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# In Dubio Mitius: *Advancing Clarity and Modesty in Treaty Interpretation*

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## Abstract

*The principle of in dubio mitius stipulates that if treaty interpreters have doubts about the correct meaning of a provision, they should adopt the interpretation that imposes the less demanding obligation. Although the principle is commonly rejected by scholars, it keeps surfacing in international legal practice. This article describes the history of the principle and provides an overview of its treatment by international courts and tribunals. It then argues that in dubio mitius can be of renewed relevance, now that the legitimacy of international courts and tribunals has become increasingly controversial. The principle recognizes that some questions of treaty interpretation may not have a single permissible answer, even after an application of the customary rules of treaty interpretation, and instead allow for legitimate disagreement or ‘doubt’. In such circumstances, in dubio mitius provides treaty interpreters with a solution, advising them to limit the scope of vague provisions to a normative core that can be deduced with sufficient certainty. In doing so, the principle acknowledges that international courts and tribunals lack the authority to expand international law in the face of legitimate disagreement within and among states.*

## 1 Introduction

The notion of *in dubio mitius* stipulates that if treaty interpreters have doubts about the correct meaning of a provision, they should adopt the interpretation that entails the less demanding obligation. Although declared defunct time and time again, *in dubio mitius* keeps surfacing in international legal practice, as states continue to invoke the principle before international courts and tribunals.<sup>1</sup> Moreover, even if international

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<sup>1</sup> See, e.g., ICJ, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Verbatim Record of the Public Sitting of 2 March 1998, at 19; WTO, *United States – Definitive Safeguard Measures on*

adjudicators have generally ignored invocations of *in dubio mitius*, the principle is not universally rejected. For instance, in his separate opinion in *Teinver v. Argentina*, Kamal Hossain referred to the ‘interpretative principle of *in dubio mitius*’ as a relevant consideration when interpreting a bilateral investment treaty (BIT).<sup>2</sup>

In this article, I discuss the history of *in dubio mitius* and the main arguments advanced against and in favour of the principle. In the first part of the article (Section 2), I provide an overview of decisions of various international courts and tribunals that have explicitly adopted or rejected *in dubio mitius*.<sup>3</sup> In Section 3, I investigate the meaning of the condition ‘*in dubio*’. I argue that the rules of interpretation codified in the Vienna Convention on the Law of Treaties (VCLT) are not intended to solve every question of treaty interpretation.<sup>4</sup> The principle of *in dubio mitius* acknowledges that an application of the VCLT rules can sometimes result in multiple permissible interpretations, and provides a solution to such a dilemma. In the final part of the article (Section 4), I discuss the merits of this solution. I argue that *in dubio mitius* advances clarity in international law, by limiting the scope of international obligations to a normative core that is sufficiently clear. Moreover, *in dubio mitius* encourages international adjudicators to adopt a modest role, especially in times when the legitimacy of their review has become increasingly controversial.

## 2 Roots and Recent Practice

*In dubio mitius* is short for *in dubio, pars mitior est sequenda*, which literally translates as ‘in case of doubt, the milder course should be pursued’.<sup>5</sup> The origins of the principle

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*Imports of Circular Welded Carbon Quality Line Pipe from Korea – Report of the Appellate Body*, 15 February 2002, WT/DS202/AB/R, para. 20; ICJ, *Jurisdictional Immunities of the State (Germany v. Italy)*, Verbatim Record of the Public Sitting of 16 September 2011, 2.30 p.m., at 22; ICSID, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Paraguay – Further Decision on Objections to Jurisdiction*, 9 October 2012, ICSID Case no. ARB/07/9, para. 183; PCA, *Guaracachi America Inc. and Rurelec PLC v. Bolivia – Respondent’s Letter to the Tribunal*, 14 January 2013, PCA Case no. 2011–17, at 4; ICSID, *Muhammet Çap and Sehil İnşaat Endüstri ve Ticaret Ltd. Sti v. Turkmenistan – Decision on Respondent’s Objection to Jurisdiction*, 13 February 2015, ICSID Case no. ARB/12/6, para. 142; PCA, *Mason Capital L.P. and Mason Management LLC v. Korea – Statement of Defence*, 30 October 2020, PCA Case no. 2018–55, para. 208.

<sup>2</sup> ICSID, *Teinver S.A., Transportes de Cecañas S.A. and Autobuses Urbanos des Sur S.A. v. Argentina – Award, Separate Opinion of Dr Kamal Hossain*, 21 July 2017, ICSID Case no. ARB/09/01, para. 25.

<sup>3</sup> In this article, I focus on international courts and tribunals, even though they have no monopoly on treaty interpretation. See d’Aspremont, ‘Formalism versus Flexibility in the Law of Treaties’, in C. Tams, A. Tzanakopoulos and A. Zimmermann (eds), *Research Handbook on the Law of Treaties* (2014) 257, at 274 (‘legal scholars and addressees of treaties themselves are similarly engaged in the application and interpretation of treaties’); Regan, ‘International Adjudication: A Response to Paulus – Courts, Custom, Treaties, Regimes, and the WTO’, in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010) 225, at 233 (arguing that Article 31 VCLT is primarily addressed to states for the purpose of self-application).

<sup>4</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331; 8 ILM 679 (1969) (hereinafter VCLT) Articles 31 and 32.

<sup>5</sup> J. Ballentine, *A Law Dictionary* (1916), at 224. *Mitius* is the neuter form of the comparative adjective *mitior* (‘milder’), which can also function as a comparative adverb (‘more mildly’). Consequently, *in dubio*

are commonly related to certain maxims found in domestic legal systems, such as the criminal law principle of *in dubio pro reo* ('when in doubt, in favour of the accused'), and the contract law principle of *contra proferentem* ('against the drafter').<sup>6</sup> In the context of international law, *in dubio mitius* was listed by Lassa Oppenheim among certain 'rules of interpretation which recommend themselves, because everybody agrees upon their suitability'.<sup>7</sup> According to the influential definition provided by Oppenheim, *in dubio mitius* stipulates that if a treaty provision is ambiguous, 'the meaning is to be preferred which is less onerous for the obliged party, or which interferes less with the parties' territorial and personal supremacy, or which contains less general restrictions upon the parties'.<sup>8</sup>

Nevertheless, it is often observed that international courts and tribunals have rarely applied *in dubio mitius*.<sup>9</sup> The Permanent Court of International Justice (PCIJ) occasionally referred to the principle, but without applying it in the case at hand. In the *Wimbledon* case, the Court was faced with a treaty provision that imposed 'an important limitation of the exercise of the sovereign rights' of the respondent.<sup>10</sup> This provided, according to the Court, 'a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such a limitation'.<sup>11</sup> At the same time, the Court felt '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'.<sup>12</sup> In the *Wimbledon* case, the Court did not resort to *in dubio mitius*, since the terms of the relevant provision were 'categorical' and gave 'rise to no doubt'.<sup>13</sup>

On several occasions, the Court emphasized that *in dubio mitius* should only be applied when all other methods of interpretation have failed. The principle, 'though sound in itself', should be employed 'only with the greatest caution':

*mitius* has also been translated as '[m]ore leniently in case of doubt'. A. Fellmeth and M. Horwitz, *Guide to Latin in International Law* (2009), at 126.

<sup>6</sup> Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties', 26 *British Yearbook of International Law* (*Brit. YB Int'l L.*) (1949) 48, at 56–57; Larouer, 'In the Name of Sovereignty? The Battle over *In Dubio Mitius* Inside and Outside the Courts', Cornell Law School Inter-University Graduate Student Conference Paper no. 22 (2009), at 3–5; Merkouris, 'In Dubio Mitius', in J. Klingler, Y. Parkhomenko and C. Salonidis (eds), *Between the Lines of the Vienna Convention: Canons of Construction and Other Interpretive Principles in Public International Law* (2019) 259, at 262–265. Merkouris notes that the domestic maxims favour the individual, whereas the international maxim of *in dubio mitius* favours the state: *ibid.*, at 274.

<sup>7</sup> L. Oppenheim, *International Law: A Treatise*, vol. 1: *Peace* (1905), at 560–561. Cf. M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2018), at 445.

<sup>8</sup> Oppenheim, *supra* note 7, at 561. Cf. A. McNair, *The Law of Treaties* (1986), at 462.

<sup>9</sup> See, e.g., Bernhardt, 'Evolutive Interpretation, Especially of the European Convention on Human Rights', 42 *German Yearbook of International Law* (1999) 11, at 14; S. Schill, *The Multilateralization of International Investment Law* (2009), at 316–317; Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)', 21 *European Journal of International Law* (*EJIL*) (2010) 681, at 682; Bjorge, 'The Convergence of the Methods of Treaty Interpretation: Different Regimes, Different Methods of Interpretation', in E. Bjorge and M. Andenas (eds), *A Farewell to Fragmentation* (2015) 498, at 520–525; D'Argent, 'Contra Proferentem', in Klingler, Parkhomenko and Salonidis, *supra* note 6, 241, at 257–258.

<sup>10</sup> PCIJ, *SS 'Wimbledon'* (*United Kingdom, France, Italy and Japan v. Germany*), Judgment of 17 August 1923, 1923 PCIJ Series A, No.1, para. 34.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, para. 28.

[I]t is not sufficient that the purely grammatical analysis of a text should not lead to definite results; there are many other methods of interpretation . . . ; 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.<sup>14</sup>

As the Court never came to this point, it has been concluded that its remarks on *in dubio mitius* combined a ‘recognition of the principle . . . with the refusal to apply it in individual cases’.<sup>15</sup>

The International Court of Justice (ICJ) addressed the more general notion of restrictive interpretation in *Navigational Rights*. In that case, the Court was not convinced ‘that Costa Rica’s right of free navigation should be interpreted narrowly because it represented a limitation of the sovereignty over the river conferred by the Treaty on Nicaragua’.<sup>16</sup> The Court considered:

While it is certainly true that limitations of the sovereignty of a State over its territory are not to be presumed, this does not mean that treaty provisions establishing such limitations . . . should for this reason be interpreted *a priori* in a restrictive way. A treaty provision which has the purpose of limiting the sovereign powers of a State must be interpreted like any other provision of a treaty, i.e. in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation.<sup>17</sup>

In this paragraph, the ICJ rejected the idea that a treaty provision that limits sovereign rights should be interpreted *a priori* in a restrictive way. At the same time, the Court’s phrasing suggests that in cases where the customary rules of treaty interpretation do not produce a conclusive outcome, a restrictive interpretation may be called for.<sup>18</sup>

Several international courts and tribunals have rejected *in dubio mitius* more explicitly. In the *Iron Rhine* arbitration, the tribunal noted that ‘the principle of restrictive interpretation, whereby treaties are to be interpreted in favour of state sovereignty in case of doubt’, did not appear in the VCLT, and that the ‘object and purpose of a treaty, taken together with the intentions of the parties, are the prevailing elements for interpretation’.<sup>19</sup> The tribunal considered that ‘a too rigorous’ application of the

<sup>14</sup> PCIJ, *Territorial Jurisdiction of the International Commission of the River Oder (United Kingdom et al. v. Poland)*, Judgment of 10 September 1929, 1929 PCIJ Series A, No. 23, para. 71. Cf. PCIJ, *Polish Postal Service in Danzig*, Advisory Opinion of 16 May 1925, 1925 Series B, No. 11, para. 113.

<sup>15</sup> Lauterpacht, *supra* note 6, at 61. Cf. PCIJ, *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, Advisory Opinion of 12 August 1922, 1922 PCIJ Series B, No. 2, para. 25; PCIJ, *Article 3, Paragraph 2, of the Treaty of Lausanne*, Advisory Opinion of 21 November 1925, PCIJ 1925 Series B, No. 12, para. 66; PCIJ, *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, Order of 6 December 1930, para. 7; PCIJ, *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, Judgment of 7 June 1932, PCIJ Series A/B, No. 46, para. 223.

<sup>16</sup> ICJ, *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, para. 48 (hereinafter ‘*Navigational Rights*’).

<sup>17</sup> *Ibid.*

<sup>18</sup> R. Gardiner, *Treaty Interpretation* (2nd ed., 2015), at 407; Mbengue, ‘Rules of Interpretation (Article 32 of the Vienna Convention on the Law of Treaties)’, 31 *ICSID Review* (2016) 388, at 395. For older pronouncements reminiscent of *in dubio mitius*, see ICJ, *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, para. 44; ICJ, *Case Concerning the Continental Shelf (Libya v. Malta)*, Judgment of 21 March 1984, para. 35; Crema, *supra* note 9, at 685.

<sup>19</sup> PCA, *Arbitration regarding the Iron Rhine (‘IJzeren Rijn’) Railway (Belgium v. Netherlands) – Award*, 24 May 2005, PCA Case no. 2003-02, para. 53 (hereinafter ‘*Iron Rhine – Award*’).

principle of restrictive interpretation might be inconsistent with the purpose of a treaty, for example in the case of human rights treaties.<sup>20</sup> The tribunal concluded: ‘some authors note that the principle has not been relied upon in any recent jurisprudence of international courts and tribunals and that its contemporary relevance is to be doubted’.<sup>21</sup>

The Appeals Chamber of the Special Tribunal for Lebanon considered, while interpreting its own Statute, that *in dubio mitius* has been replaced by ‘the principle of teleological interpretation’.<sup>22</sup> According to the Appeals Chamber, *in dubio mitius* was ‘emblematic of the old international community, which consisted only of sovereign states, where individuals did not play any role’.<sup>23</sup> It noted that the principle ‘is no longer or only scantily invoked by modern international courts’, and for good reasons:

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.<sup>24</sup>

In contrast to these categorical rejections of *in dubio mitius*, some international adjudicators have expressed support for the principle. The best-known example is the ruling of the Appellate Body (AB) of the World Trade Organization (WTO) in its *Hormones* decision. In that case, the AB interpreted Article 3.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter ‘SPS Agreement’), which provides that ‘Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations’.<sup>25</sup> According to the Panel, this provision required that such measures ‘conformed to’ these standards, but the AB rejected this interpretation.<sup>26</sup>

<sup>20</sup> *Ibid.* Cf. ECtHR (GC), *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, Appl. no. 47848/08, Judgment of 17 July 2014, at 65 n.4 (Pinto de Albuquerque, J., concurring). See also ECtHR, *Wemhoff v. Germany*, Appl. no. 2122/64, Judgment of 27 June 1968, ‘Law’, para. 8.

<sup>21</sup> *Iron Rhine – Award*, 24 May 2005, PCA 2003-02, para. 53. Cf. *Interpretation of the Air Transport Services Agreement between the United States of America and Italy – Advisory Opinion of the Arbitral Tribunal*, 16 RIAA 75, 17 July 1965, para. 3.

<sup>22</sup> Special Tribunal for Lebanon, *Prosecutor v. Ayyash et al. – Interlocutory Decision on the Applicable Law*, 16 February 2011, para. 29 (hereinafter ‘*Prosecutor v. Ayyash – Decision on the Applicable Law*’). Cf. Special Tribunal for Lebanon, *Akhtar Beirut S.A.L. and Ibrahim Mohamed Ali Al Amin – Decision on Motion Challenging Jurisdiction*, 6 November 2014, para. 57.

<sup>23</sup> *Prosecutor v. Ayyash – Decision on the Applicable Law*, 16 February 2011, para. 29.

<sup>24</sup> *Ibid.* For some critical remarks, see Ambos, ‘Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?’, 24 *Leiden Journal of International Law* (LJIL) (2011) 655, at 658–659.

<sup>25</sup> Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, 1867 UNTS 493 (1995) (hereinafter ‘SPS Agreement’).

<sup>26</sup> WTO, *European Communities – Measures Concerning Meat and Meat Products – Report of the Appellate Body*, 16 January 1998, WT/DS26/AB/R, para. 166. It should be noted that this conclusion was not exclusively based on *in dubio mitius*, but rather on the ordinary meaning of the phrase, its context and its object and purpose; *ibid.*, paras 163–165. Consequently, the reference to *in dubio mitius* served to confirm rather than establish the AB’s interpretation, which is not the purpose of *in dubio mitius*.

The Panel's interpretation of Article 3.1 would . . . transform those standards, guidelines and recommendations into binding *norms*. But, as already noted, the *SPS Agreement* itself sets out no indication of any intent on the part of the Members to do so. We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating *conformity* or *compliance with* such standards, guidelines and recommendations. To sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling . . . would be necessary.<sup>27</sup>

In a footnote, the AB referred to '[t]he interpretative principle of *in dubio mitius*, widely recognized in international law as a "supplementary means of interpretation"'.<sup>28</sup> In support of this statement, the AB listed a number of academic sources and four judicial and arbitral decisions, including the ICJ's *Nuclear Tests* judgments,<sup>29</sup> although the persuasiveness of this evidence has been widely rejected by scholars.<sup>30</sup> Moreover, the AB has not explicitly applied *in dubio mitius* on other occasions,<sup>31</sup> even if disputing parties have continued to invoke it.<sup>32</sup> In *China – Publications*, the AB held that 'even if the principle of *in dubio mitius* were relevant in WTO dispute settlement', there was no reason to apply it in the case at hand because the relevant provision could be conclusively interpreted on the basis of Article 31 VCLT.<sup>33</sup>

A second example of the application of *in dubio mitius* in international adjudication is the *SGS v. Pakistan* decision on jurisdiction.<sup>34</sup> In that case, the tribunal rejected the investor's claim that an umbrella clause could create jurisdiction over claims arising out of a contract between the investor and the host state government:

<sup>27</sup> *Ibid.*, para. 165.

<sup>28</sup> *Ibid.*, para. 165 n.154.

<sup>29</sup> The AB further referred to an interstate arbitral award of 1963, a decision of the Italian-US Conciliation Commission of 1961 and the PCIJ's judgment in *Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels*, Advisory Opinion of 11 December 1931, PCIJ 1931 Series A/B, No. 43.

<sup>30</sup> Lennard, 'Navigating by the Stars: Interpreting the WTO Agreements', 5 *Journal of International Economic Law* (JIEL) (2002) 17, at 63; I. van Damme, *Treaty Interpretation by the WTO Appellate Body* (2009), at 63; De Brabandere and Van Damme, 'Good Faith in Treaty Interpretation', in A. Mitchell *et al.* (eds), *Good Faith and International Economic Law* (2015) 37, at 45–48. For support of the AB's position, see Cameron and Gray, 'Principles of International Law in the WTO Dispute Settlement Body', 50 *International and Comparative Law Quarterly* (ICLQ) (2001) 248, at 258–259.

<sup>31</sup> Cf. Davey, 'The Limits of Judicial Processes', in D. Bethlehem *et al.* (eds), *The Oxford Handbook of International Trade Law* (2009) 460, at 468 ('the Appellate Body has arguably given effect to the *in dubio mitius* maxim in cases involving environmental and health measures').

<sup>32</sup> For references, see Larouer, *supra* note 6, at 26–29; Van Damme, *supra* note 30, at 64.

<sup>33</sup> WTO, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products – Report of the Appellate Body*, 21 December 2009, WT/DS363/AB/R, para. 411 (hereinafter '*China – Publications*').

<sup>34</sup> ICSID, *SGS Société Générale de Surveillance SA v. Pakistan – Decision of the Tribunal on Objections to Jurisdiction*, 6 August 2003, ICSID Case no. ARB/01/13 (hereinafter '*SGS v. Pakistan – Jurisdiction*'). For the broader notion of restrictive interpretation, see, e.g., ICSID, *Noble Ventures v. Romania – Award*, 12 October 2005, ICSID Case no. ARB/01/11, para. 55. See for a 'neutral' approach, ICSID, *Mondev v. United States – Award*, 11 October 2002, ICSID Case no. ARB(AF)/99/2, para. 43. For criticism of restrictive interpretation, see ICSID, *Loewen Group Inc and Raymond Loewen v. United States – Decision on Hearing of Respondent's Objection to Competence and Jurisdiction*, 5 January 2001, ICSID Case no. ARB(AF)/98/3, para. 51; F. Fontanelli, *Jurisdiction and Admissibility in Investment Arbitration: The Practice and the Theory* (2018), at 5, 101–102.

Article 11 of the BIT would have to be considerably more specifically worded before it can reasonably be read in the extraordinarily expansive manner submitted by the Claimant. 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*.<sup>35</sup>

On a similar issue, the majority of the tribunal in *Eureko v. Poland* reached a different conclusion. It considered that:

[R]eliance 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.<sup>36</sup>

The tribunal's reasoning in this paragraph is not entirely clear. It is difficult to see how the conclusion of thousands of BITs, even if this would have an impact on customary international law, would change the status of *in dubio mitius* as a principle of treaty interpretation. Nevertheless, as concerns the jurisdictional effect of umbrella clauses, most tribunals have followed the approach in favour of jurisdiction.<sup>37</sup>

In sum, it appears that *in dubio mitius* has not played an important role in the jurisprudence of international courts and tribunals, at least not explicitly.<sup>38</sup> While some adjudicators, including the WTO AB, have expressed some support for the principle, others, such as the *Iron Rhine* tribunal and the Special Tribunal for Lebanon, have firmly rejected it.<sup>39</sup> Accordingly, it has been concluded that even if '[t]he history of the application of *in dubio mitius* principle in international adjudication is quite a checked one', '[r]ejections of the principle are on the rise'.<sup>40</sup>

Scholars also commonly dismiss the normative validity of *in dubio mitius*,<sup>41</sup> although some take a more positive view.<sup>42</sup> As a preliminary point, critics of the principle often

<sup>35</sup> *SGS v. Pakistan – Jurisdiction*, 6 August 2003, ICSID Case no. ARB/01/13, para. 171.

<sup>36</sup> UNCITRAL, *Eureko BV v. Poland – Award*, 19 August 2005, para. 258.

<sup>37</sup> See generally, Antony, 'Umbrella Clauses since *SGS v. Pakistan* and *SGS v. Philippines* – A Developing Consensus', 29 *Arbitration International* (2013) 607. For a defence of the approach taken in *SGS v. Pakistan*, see G. van Harten, *Investment Treaty Arbitration and Public Law* (2008), at 135–136.

<sup>38</sup> A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008), at 413 ('restrictive interpretation can take place not only as a matter of declared policy, but also as a disguised and unprofessed interpretative exercise').

<sup>39</sup> See also UNCITRAL, *Ethyl Corp v. Canada – Award on Jurisdiction*, 24 June 1998, para. 55; ICSID, *PNG Sustainable Development Program Ltd v. Papua New Guinea – Award*, 5 May 2015, ICSID Case no. ARB/13/33, para. 257.

<sup>40</sup> Merkouris, *supra* note 6, at 289, 291. Cf. Pirker and Smolka, 'Making Interpretation More Explicit: International Law and Pragmatics', 86 *Nordic Journal of International Law* (2017) 1, at 29. However, Petsche, 'Restrictive Interpretation of Investment Treaties: A Critical Analysis of Arbitral Case Law', 37 *Journal of International Arbitration* (2020) 1, at 2, mentions a 'noticeable renaissance'.

<sup>41</sup> Cf. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 281 *Recueil des cours* (2001) 9, at 171; Alvarez, 'Is Investor–State Arbitration "Public?"', 7 *Journal of International Dispute Settlement* (2016) 534, at 552; Dörr, 'Article 31', in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A Commentary* (2nd ed., 2018) 559, at 578.

<sup>42</sup> M. Krajewski, *National Regulation and Trade Liberalization in Services. The Legal Impact of the General Agreement on Trade in Services [GATS] on National Regulatory Autonomy* (2003), at 50; Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints', 98 *American Journal of International Law (AJIL)* (2004) 247, at 258; U. Linderfalk, *On the Interpretation of Treaties. The Modern*

note that it is not mentioned in the VCLT.<sup>43</sup> This observation cannot, however, provide a conclusive argument against *in dubio mitius* since it is widely accepted that the VCLT rules are not exhaustive.<sup>44</sup> The International Law Commission (ILC) acknowledged that there exists a variety of principles of treaty interpretation beyond those codified in the VCLT.<sup>45</sup> According to the ILC, the suitability of these principles depends on the circumstances of the concrete case at hand.<sup>46</sup>

More fundamentally, scholars have raised two main objections against *in dubio mitius*. The first objection holds that the customary rules of treaty interpretation are intended to produce a conclusive answer to questions of treaty interpretation, which renders *in dubio mitius* superfluous. The second objection holds that the principle jeopardizes an effective interpretation and application of international law. This means that *in dubio mitius* is being criticized as either redundant or harmful. In the following sections of this article, I conclude that neither of these somewhat contradictory concerns is fully justified: *in dubio mitius* is likely applicable in a limited number of exceptional cases; when applied, it is conducive rather than detrimental to the effectiveness of international law.

### 3 *In Dubio*: Accepting Doubt in Treaty Interpretation

The difference between *in dubio mitius* and the broader notion of ‘restrictive interpretation’ is that the former applies only ‘in case of doubt’. Consequently, *in dubio mitius* does not entail a general presumption in favour of restrictive interpretation, suggesting that any treaty provision should be read narrowly because it intrudes upon state sovereignty.<sup>47</sup> Instead, *in dubio mitius* applies only when the interpreter is ‘in doubt’ as to

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*International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007), at 280; T. Yen, *The Interpretation of Investment Treaties* (2014), at 150.

<sup>43</sup> Bernhardt, *supra* note 9, at 11.

<sup>44</sup> Sbolci, ‘Supplementary Means of Interpretation’, in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (2011) 145, at 158; Gardiner, ‘The Vienna Convention Rules on Treaty Interpretation’, in D. Hollis (ed.), *The Oxford Guide to Treaties* (2012) 475, at 504; Pauwelyn and Elsig, ‘The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals’, in J. Dunoff and M. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (2012) 445, at 448.

<sup>45</sup> International Law Commission, Draft Articles on the Law of Treaties with Commentaries, ILC Report 18th Session, *Yearbook of the International Law Commission* (1966-II) 177, at 218, commentary to arts. 27–28, para. 4 (hereinafter ‘ILC Draft Articles’).

<sup>46</sup> *Ibid.* See also Tzanakopoulos and Ventouratou, ‘Nicaragua in the International Court of Justice and the Law of Treaties’, in E. Sobenes Obregon and B. Samson (eds), *Nicaragua Before the International Court of Justice: Impacts on International Law* (2018) 215, at 225 (arguing that *in dubio mitius* ‘has been subsumed into the VCLT rules of interpretation’).

<sup>47</sup> Such a general rule of restrictive interpretation was rejected by the ICJ in *Navigational Rights*, Judgment of 13 July 2009, para. 48; see also ICJ, *Whaling in the Antarctic (Australia v. Japan)*, Judgment of 31 March 2014, para. 58 (‘neither a restrictive nor an expansive interpretation of Article VIII is justified’). See, however, J. Crawford, *Brownlie’s Principles of Public International Law* (9th ed., 2019), at 365 (‘the principle may operate in cases concerning regulation of core territorial privileges’).



the proper interpretation of a provision; in that case, the interpretation that entails the relatively less demanding obligation should prevail.

Scholars have questioned the relevance of the condition '*in dubio*'. In his influential article on restrictive interpretation, Hersch Lauterpacht considered that: 'all rules of interpretation apply only in case of doubt; where there is no doubt, there is no necessity for interpretation'.<sup>48</sup> Although there may be some truth in this observation, it does not differentiate between different degrees of uncertainty and controversy: whereas most questions of treaty interpretation might allow for some variety of answers, in some cases there will be more room for legitimate disagreement than in others.<sup>49</sup>

The difficulty of establishing the correct interpretation of a treaty provision depends on a range of different factors. On a semantic level, there are various forms of indeterminacy that can leave room for legitimate disagreement.<sup>50</sup> Linguists distinguish between different forms of vagueness and ambiguity,<sup>51</sup> which can also be found in treaty provisions. Vagueness concerns terms whose scope of application is unclear, in a qualitative sense (e.g. 'democracy' or 'sustainable development'), in a quantitative sense (e.g. 'endangered species' or 'adequate compensation') or in both senses ('island', 'denial of justice' or 'like product'). Treaty provisions can also contain ambiguous terms; it is debatable, for instance, whether the word 'person' in a human rights treaty includes legal persons, and whether the phrase 'exhaustible natural resources' includes animals. In each of these categories, it will be difficult for an interpreter to demarcate the scope and content of the relevant provision.<sup>52</sup>

Fortunately, the customary rules of treaty interpretation assist treaty interpreters with their task and offer tools to resolve questions of vagueness and ambiguity. As noted by the WTO Appellate Body:

<sup>48</sup> Lauterpacht, *supra* note 6, at 49. Cf. the maxim '*in claris non fit interpretatio*' or, in Vattel's formulation, 'il n'est pas permis d'interpréter ce qui n'a pas besoin d'interprétation'. The maxim was criticized by McNair, *supra* note 8, at 372 ('[words] may be clear to one man and not clear to another, and frequently to one or more judges and not to their colleagues'); Waldock, 'Sixth Report on the Law of Treaties', ILC Report 17th Session, *Yearbook of the International Law Commission* (1966-II) 51, at 100; McDougal, 'Vienna Conference on the Law of Treaties. Statement of Professor Myres S. McDougal, United States Delegation, to Committee of the Whole, April 19, 1968', 62 *AJIL* (1968) 1021, at 1023 ('the determination of what text does or does not require interpretation is in itself an interpretation'); Popa, 'The Holistic Interpretation of Treaties at the International Court of Justice', 87 *Nordic Journal of International Law* (2018) 249, at 284.

<sup>49</sup> Cf. Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?', 16 *EJIL* (2006) 907, at 914 ('some uncertain norms are more uncertain than others'). See also Vandeveld, 'Treaty Interpretation from a Negotiator's Perspective', 21 *Vanderbilt Journal of Transnational Law* (1998) 281, at 283 n.3 ('Call it mass delusion, but countless number of times each day, treaties are applied without disputes arising because all participants find themselves in accord on the treaty's meaning').

<sup>50</sup> Yuval Shany has identified three categories of international legal norms that 'meet the test of inherent uncertainty in their application': standard-type norms, discretionary norms and result-oriented norms. Shany, *supra* note 49, at 914.

<sup>51</sup> See, e.g., Poscher, 'Ambiguity and Vagueness in Legal Interpretation', in L. Solan and P. Tiersma (eds), *The Oxford Handbook of Language and Law* (2012) 128.

<sup>52</sup> 'Hard cases' are not exclusively caused by semantic indeterminacy, but also by contextual factors such as moral and political controversy. Arguably, the difficulties caused by the latter are not primarily questions of interpretation, but of 'decision'. See Dascal and Wróblewski, 'Transparency and Doubt: Understanding and Interpretation in Pragmatics and Law', 7 *Law and Philosophy* (1988) 203, at 219.

A word or term may have more than one meaning or shade of meaning, but the identification of such meanings in isolation only commences the process of interpretation, it does not conclude it . . . [A] treaty interpreter is required to have recourse to context and object and purpose to elucidate the relevant meaning of the word or term.<sup>53</sup>

This leads to the second reason why Lauterpacht questioned the usefulness of the notion of ‘*dubio*’: not only is there always reason for doubt, but the customary rules of treaty interpretation are designed to resolve such doubt.<sup>54</sup> If *in dubio mitius* applies only when all other methods of interpretation have failed, its relevance would be ‘reduced to the minimum’.<sup>55</sup> According to Lauterpacht, it is ‘hardly likely’ that after an application of all means of treaty interpretation, the interpreter would still not have a conclusive interpretation.<sup>56</sup>

It should be noted, however, that Article 32 explicitly addresses the possibility that an interpretative exercise in accordance with Article 31 ‘leaves the meaning ambiguous or obscure’; in that case, the interpreter may resort to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.<sup>57</sup> In this way, the VCLT acknowledges that the method prescribed by Article 31 cannot solve every question of interpretation. Moreover, it is unlikely that the two supplementary means mentioned in Article 32 are capable of solving all ambiguities and obscurities that remain after an application of Article 31.<sup>58</sup> This is confirmed by the open-ended phrasing of Article 32, which mentions some supplementary means but leaves room for additional ones.<sup>59</sup>

<sup>53</sup> *United States – Continued Existence and Application of Zeroing Methodology – Report of the Appellate Body*, 4 February 2009, WT/DS350/AB/R, para. 268 (hereinafter ‘*United States – Continued Zeroing*’).

<sup>54</sup> Keith, ‘John Dugard Lecture – 2015. The International Rule of Law’, 28 *LJIL* (2015) 403, at 409 (stating that there is ‘much more certainty in the methods of interpretation and their application than the cynics, national and international, would suggest. . . . Even in difficult cases, the method, the approach provides in many situations broadly accepted conclusions’).

<sup>55</sup> Lauterpacht, *supra* note 6, at 62.

<sup>56</sup> *Ibid.* Cf. Yen, *supra* note 42, at 151 (recourse to the principle ‘should be rare, if not mainly theoretical, when . . . available interpretive rules, have been fully complied with and exhausted’); Merkouris, *supra* note 6, at 302 (*in dubio mitius* ‘would be of extremely limited scope verging to nothingness’).

<sup>57</sup> For a critical analysis of the relationship between Articles 31 and 32, see Schwebel, ‘May Preparatory Work be Used to Correct Rather than Confirm the “Clear” Meaning of a Treaty Provision?’, 10 *Svensk Juristtidning* (1997) 797; Linderfalk, ‘Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting the Rules of Interpretation’, 54 *Netherlands International Law Review* (2007) 133. See also Treves, ‘The Expansion of International Law’, 398 *Recueil des cours* (2019) 9, at 236–237, arguing that the ICJ uses preparatory work in the context of an integrated operation of interpretation, rather than as a supplementary means.

<sup>58</sup> Sbolci, *supra* note 44, at 151: ‘an ambiguous text frequently stems from preparatory works that are equally ambiguous and hence of little utility’.

<sup>59</sup> *In dubio mitius* can be categorized as the ‘last’ of the supplementary means of Article 32 VCLT. See, e.g., Sbolci, *supra* note 44, at 158; C. Lo, *Treaty Interpretation Under the Vienna Convention on the Law of Treaties: A New Round of Codification* (2017) 247. Alternatively, it can be conceptualized as a last resort beyond the scope of Article 32. See Yen, *supra* note 42, at 148. Cf. Dörr, ‘Article 32. Supplementary Means of Interpretation’, in Dörr and Schmalenbach, *supra* note 41, 571, at 580 (suggesting that the term ‘means of interpretation’ refers to material or substantive matters, rather than to interpretative principles). However, in its Commentary, the ILC used the term ‘means of interpretation’ both for current Articles 31 and 32; see ILC Draft Articles, *supra* note 45, e.g. at 220.

The possibility that the VCLT rules do not always produce an unequivocal outcome is further evidenced by the variety of ‘hard cases’ that treaty interpreters have faced in different fields of international law. Fundamental conflicts over the interpretation of a certain provision, not only between parties or scholars, but also within international courts and tribunals, demonstrate that questions of treaty interpretation can evoke legitimate disagreement. In these circumstances, it is difficult to see how an application of the VCLT rules would produce a conclusive solution.<sup>60</sup> The VCLT provides tools that can help prioritize one interpretation over another, but in reality these tools can often be applied in different ways, resulting in different outcomes.<sup>61</sup>

An explicit recognition of this possibility is provided in Article 17(6)(ii) of the WTO Antidumping Agreement (ADA).<sup>62</sup> This Article stipulates that, when making a legal assessment of a contested measure:

the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

From the time of its adoption, the text of Article 17(6)(ii) has caused controversy, with broader relevance for questions of treaty interpretation. Scholars have wondered ‘how a panel could ever reach the conclusion that provisions of an agreement admit of more than one interpretation’.<sup>63</sup> They have argued that Article 31 VCLT intends to produce a conclusive interpretation of a treaty provision, and that, if necessary, the ‘supplementary means’ of Article 32 can ‘resolve any lingering ambiguities’.<sup>64</sup>

<sup>60</sup> Ascensio, ‘Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law’, 31 *ICSID Review* (2016) 366, at 372 (‘It would be an extraordinary result that, thanks to some mechanical implementation of Article 31, any qualified interpreter would be led necessarily to a single, and thus correct, result’). Cf. Gardiner, *supra* note 18, at 5; Sykes, ‘The Economic Structure of International Investment Agreements with Implications for Treaty Interpretation and Design’, 113 *AJIL* (2019) 482, at 534.

<sup>61</sup> Sorel and Boré Eveno, ‘Article 31, Convention of 1969’, in O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties* (2011) 804, at 808 (noting that Article 31 is a compromise between the defenders of textual interpretation, subjective interpretation based on the parties’ intention, and ends-focused or teleological interpretation’); Linderfalk, ‘Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making’, 26 *EJIL* (2015) 169, at 189; Waibel, ‘Uniformity versus Specialisation (2): A Uniform Regime of Treaty Interpretation?’, in Tams, Tzanakopoulos and Zimmermann, *supra* note 3, 375, at 377; Weiler, ‘The Interpretation of Treaties – A Re-examination. Preface’, 21 *EJIL* (2010) 507, at 507. See also Slocum and Wong, ‘The Vienna Convention and the Ordinary Meaning of International Law’, *Yale International Law Journal* (forthcoming 2021), arguing that the VCLT’s ‘failure to meaningfully restrict the allowable sources of meaning leaves judicial interpretive discretion unconstrained’.

<sup>62</sup> Article 17(6) ADA is a compromise from the final stage of the Uruguay Round, where it was agreed that a deferential standard of review would be adopted in the context of the ADA, which governs a particularly contentious branch of trade law.

<sup>63</sup> Croley and Jackson, ‘WTO Dispute Procedures, Standard of Review, and Deference to National Governments’, 90 *AJIL* (1996) 193, at 200.

<sup>64</sup> *Ibid.*, at 201. Cf. McRae, ‘Treaty Interpretation by the WTO Appellate Body: The Conundrum of Article 17(6) of the WTO Antidumping Agreement’, in Cannizzaro, *supra* note 44, 164, at 178; Von Staden, ‘The Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial

On its turn, the Appellate Body has considered that Article 17(6)(ii) ‘presupposes that application of the rules of treaty interpretation . . . could give rise to, at least, two interpretations of some provisions’.<sup>65</sup> The AB has also noted that ‘a permissible interpretation is one which is found to be appropriate *after* application of the pertinent rules of the *Vienna Convention*’.<sup>66</sup> In *United States – Continued Zeroing*, the AB further explained:

[T]he second sentence [of Article 17(6)(ii)] allows for the possibility that the application of the rules of the *Vienna Convention* may give rise to an interpretative range and, if it does, an interpretation falling within that range is permissible and must be given effect by holding the measure to be in conformity with the covered agreement. The function of the second sentence is thus to give effect to the interpretative range rather than to require the interpreter to pursue further the interpretative exercise to the point where only one interpretation within that range may prevail.<sup>67</sup>

At the same time, the AB considered that the VCLT rules ‘cannot contemplate interpretations with mutually contradictory results’, since the purpose of these rules is ‘to narrow the range of interpretations, not to generate conflicting, competing interpretations’.<sup>68</sup> Accordingly, the ‘holistic exercise’ of interpretation prescribed by the AB oscillates between two considerations:<sup>69</sup> on the one hand, a panel should seek a conclusive interpretation, but on the other, it should acknowledge the possibility of multiple permissible interpretations, which the interpreter should not necessarily seek to eliminate.<sup>70</sup>

Like Article 17(6)(ii) of the ADA, *in dubio mitius* addresses the situation where a treaty interpreter is faced with two or more interpretations that are all legitimate in light of the provision’s ordinary meaning and context as well as the treaty’s object

Standard of Review’, 10 *International Journal of Constitutional Law (ICON)* (2012) 1023, at 1043–1044 (‘for article 17.6(ii) ADA to become relevant at all, the interpretive process would have to be incapable of reducing an existing set of diverging meanings to a single one, a highly unlikely outcome’); Kuijper, ‘John Jackson and the Standard of Review’, 15 *World Trade Review* (2016) 398, at 399 (‘[a]ny serious (international) lawyer applying [Articles 31 and 32 VCLT] would normally end up with one interpretation, not with two permissible ones’).

<sup>65</sup> WTO, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan – Report of the Appellate Body*, 24 July 2001, WT/DS184/AB/R, para. 59 (hereinafter ‘*United States – Hot-Rolled Steel*’).

<sup>66</sup> *Ibid.* See also *United States – Continued Zeroing*, 4 February 2009, WT/DS350/AB/R, para. 271. The AB’s claim that the two sentences of the provision are sequential is not uncontested. McRae, *supra* note 64, at 178.

<sup>67</sup> *United States – Continued Zeroing*, 4 February 2009, WT/DS350/AB/R, para. 272.

<sup>68</sup> *Ibid.*, para. 273. See, however, McRae, *supra* note 64, at 175 (‘[a]ll competing interpretations are in some way contrary or contradictory’).

<sup>69</sup> *United States – Continued Zeroing*, 4 February 2009, WT/DS350/AB/R, para. 268.

<sup>70</sup> The AB has emphasized that Article 17.6 ADA does not derogate from the panel’s obligation to provide an ‘objective assessment’ of the matter under Article 11 of the Dispute Settlement Understanding (DSU). See, e.g., *United States – Hot-Rolled Steel*, 24 July 2001, WT/DS184/AB/R, para. 62. Mavroidis, ‘The Gang That Couldn’t Shoot Straight: The Not So Magnificent Seven of the WTO Appellate Body’, 27 *EJIL* (2017) 1107, at 1109 (‘this meant the end of deference in anti-dumping disputes’). In practice, the AB has not found multiple permissible interpretations, even if panels have done so. Van Damme, *supra* note 30, at 70 (‘[t]he Appellate Body seeks the “proper” or “correct” interpretation, not any “permissible” interpretation’).

and purpose. *In dubio mitius* acknowledges that the interpreter cannot always credibly pursue the interpretative exercise until a single interpretation remains, and present the outcome that is preferred among other permissible alternatives as the inevitable result of an application of the VCLT rules.<sup>71</sup>

The question as to when an interpreter should accept the existence of an interpretative range and admit doubt is difficult to answer in the abstract. One could think of formal criteria, stipulating, for instance, that a court is *in dubio* if a specified minimum number of judges does not support one out of several competing interpretations.<sup>72</sup> It may not be desirable, however, to specify categorical conditions determining when an interpreter should resort to *in dubio mitius*. Article 32 VCLT addresses the situation where an application of Article 31 leaves the meaning of a provision ‘ambiguous or obscure’,<sup>73</sup> without providing specific conditions that would control the transition to the ‘second’ phase of interpretation. Instead, the VCLT leaves it to the discretion of the interpreter to determine when a situation of ambiguity or obscurity occurs and when the supplementary means of interpretation should be applied.<sup>74</sup> A similar approach could be taken in respect of *in dubio mitius*.<sup>75</sup> Rather than imposing a mechanical rule, *in dubio mitius* encourages interpreters to acknowledge situations where they are *in dubio*, instead of pretending that an application of the rules of interpretation provides a decisive answer.<sup>76</sup>

<sup>71</sup> Cf. Paulus, ‘International Law after Postmodernism: Towards Renewal or Decline of International Law?’, 14 *LJIL* (2001) 727, at 754 (‘If the lawyer stops to pretend that the outcome of her analysis is the result of a purely objective analysis, if she admits and demonstrates the element of (conscious) choice and individual commitment, the legal enterprise wins much credibility and loses little of its normativity’); D’Aspremont, *supra* note 3, at 278–281.

<sup>72</sup> Statutes of international courts commonly determine that in case of a split, the President has a casting vote. As noted by Tullio Treves, the adoption of judgments ‘with the casting vote of the President may by itself raise questions of legitimacy’. Treves, ‘Aspects of Legitimacy of Decisions of International Courts and Tribunals’, in R. Wolfrum and V. Röben (eds), *Legitimacy in International Law* (2008) 169, at 174 n.7. For a general critique of majority voting in domestic courts, see Waldron, ‘Five to Four: Why Do Bare Majorities Rule on Courts?’, 123 *Yale Law Journal* (2014) 1692. For an empirical analysis of the ECtHR and the IACtHR demonstrating that split judicial decisions are perceived as less authoritative, see Naurin and Stiansen, ‘The Dilemma of Dissent: Split Judicial Decisions and Compliance with Judgments from the International Human Rights Judiciary’, 53 *Comparative Political Studies* (2020) 959.

<sup>73</sup> For some examples of cases where this finding was made, see Le Bouthillier, ‘Article 32. Supplementary Means of Interpretation’, in Corten and Klein, *supra* note 61, 841, at 850 n.51. For an analysis of the phrase ‘ambiguous or obscure’, see Linderfalk, *supra* note 42, at 331–334.

<sup>74</sup> The word ‘may’ in Article 32 indicates that a recourse to supplementary means is discretionary, although ‘it seems that if an interpreter has not been able to find an acceptable meaning through the use of Art. 31, he or she has no other choice but to “have recourse” to Art. 32’. Le Bouthillier, *supra* note 73, at 849 n.48.

<sup>75</sup> Arguably, the stakes in establishing ‘doubt’ are higher when the consequence is an application of *in dubio mitius* rather than a resort to *travaux préparatoires*. See Davey, ‘The Limits of Judicial Processes’, in D. Bethlehem *et al.* (eds), *The Oxford Handbook of International Trade Law* (2009) 460, at 468 (‘It will always be in the interest of the party accused of violating a WTO provision to argue that the provision is ambiguous and that consequently it is innocent’). However, a defendant is unlikely to invoke *in dubio mitius* at the outset, because the adjudicators first need to be convinced that the normal rules of interpretation allow for multiple permissible interpretations.

<sup>76</sup> Lauterpacht, *supra* note 6, at 53 (rules of treaty interpretation ‘are not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means’); Schwarzenberger,

In the judicial context, however, expressing doubt might seem to conflict with the adjudicator's duty to settle disputes. Judicial decisions 'need to offer judicial finality and this requires that the law cannot be left indeterminate'.<sup>77</sup> Hersch Lauterpacht voiced this concern in a debate with Julius Stone about the permissibility of finding a '*non liquet*' ('it is not clear') in international adjudication.<sup>78</sup> Lauterpacht considered that 'a court . . . must not refuse to give a decision on the ground that the law is non-existent, or controversial, or uncertain and lacking in clarity'.<sup>79</sup> In response, Stone argued that a prohibition of *non liquet* implies that courts have the power to 'engage in the creation of law by a judicial act of choice between more or less equally available legal alternatives'.<sup>80</sup> According to Stone, it is not always desirable that a case is settled by judges in this manner. Instead, Stone proposed that a court should have the freedom 'to decide that the authoritative legal materials and other resources available for judgment do not in the particular case enable it to make a binding judgment'.<sup>81</sup>

The principle of *in dubio mitius* provides a different solution to uncertainty than a *non liquet*. According to *in dubio mitius*, the interpreter's doubt is not the final outcome of the interpretative exercise but only an intermediate step in the process. Once an interpreter has concluded that the customary rules of interpretation do not result in a single permissible reading of the treaty provision at stake, *in dubio mitius* advises the interpreter to adopt the interpretation that involves the less demanding obligation. Consequently, an interpreter applying *in dubio mitius* provides a decisive answer

'Myths and Realities of Treaty Interpretation. Articles 27–29 of the Vienna Draft Convention on the Law of Treaties', 9 *Virginia Journal of International Law* (1968) 1, at 12–13 ('Growing awareness that disclosure of the operative reasons is the last thing to be expected from international courts and tribunals is one of the least discussed grounds for the spreading disenchantment with international adjudication').

<sup>77</sup> Van Damme, *supra* note 30, at 69, writing about the AB. Cf. Keil and Poscher, 'Vagueness and Law. Philosophical and Legal Perspectives', in G. Keil and R. Poscher (eds), *Vagueness and Law: Philosophical and Legal Perspectives* (2016) 1, at 7 ('Judges have to deliver a decision even in cases in which the law is vague').

<sup>78</sup> G. Hernández, *The International Court of Justice and the Judicial Function* (2014), at 241–244. See also Weil, "'The Court Cannot Conclude Definitively. . ." *Non Liquet* Revisited', 36 *Columbia Journal of Transnational Law* (1998) 109, at 115 ('*non liquet* frustrates the will of the parties to have their disputes settled judicially rather than by some other means available in the system').

<sup>79</sup> Lauterpacht, 'Some Observations on the Prohibition of "Non Liquet" and the Completeness of the Law', in E. Lauterpacht (ed.), *Hersch Lauterpacht. International Law: Collected Papers. Vol. 2.1: The Law of Peace: International Law in General* (1975) 213, at 216. The debate concerned not only the legitimate role of courts, but also the 'completeness' of international law. See Hernández, *supra* note 78, at 254. It had been argued that international law is a 'complete' system, because sovereignty gives complete freedom to states unless they voluntarily restrict that freedom, or because international law contains sufficient tools enabling adjudicators to fill any gaps, such as the general principles of law. See Aznar-Gómez, 'The 1996 Nuclear Weapons Advisory Opinion and *Non Liquet* in International Law', 48 *International & Comparative Law Quarterly (ICLQ)* (1999) 3. See also Article 42(2) ICSID Convention, prohibiting a *non liquet*.

<sup>80</sup> Stone, '*Non Liquet* and the Function of Law in the International Community', 35 *Brit. YB Int'l L.* (1959) 124, at 132.

<sup>81</sup> *Ibid.*, at 152. For a defence of '*non liquet*' in the context of the WTO, see Oesterle, 'Just Say "I Don't Know": A Recommendation for WTO Panels Dealing with Environmental Regulations', 3 *Environmental Law Review* (2001) 113. See also Pauwelyn, 'The Transformation of World Trade', 104 *Michigan Law Review* (2005) 1, at 49 (listing *non liquet* among 'common judicial techniques [that] can accommodate and respond to political sensitivities').

to the relevant legal question, while acknowledging the difficulties involved in the interpretation of the applicable provision. Instead of affirming one out of several permissible interpretations as the logical outcome of an exercise of treaty interpretation, the interpreter accepts that there is room for legitimate disagreement and that a conscious choice needs to be made. In these circumstances, *in dubio mitius* advocates a relatively narrow interpretation of the vague or ambiguous provision, imposing the less demanding obligation. The remaining section of this article discusses the merits of this solution.

#### 4 *Mitius*: When Less Is More in Treaty Interpretation

Historically, the normative roots of *in dubio mitius* lie in a voluntaristic understanding of international law.<sup>82</sup> The principle resonates with the PCIJ's reasoning in the *Lotus* case, where the Court held that '[t]he rules of law binding upon States . . . emanate from their own free will' and '[r]estrictions upon the independence of States cannot therefore be presumed'.<sup>83</sup> According to this classical paradigm, international law limits sovereignty only to the extent that states have voluntarily and explicitly assumed obligations. Consequently, vague or ambiguous treaty provisions need to be interpreted narrowly, in order not to impose obligations that were never accepted by the contracting states.<sup>84</sup>

The voluntaristic view of international law expressed in *Lotus* has become increasingly challenged. It has been argued that entities other than states play important roles in international lawmaking<sup>85</sup> and that states can be bound by international law against their will.<sup>86</sup> At the same time, it is widely acknowledged that state consent remains a crucial feature of the theory and practice of international law making.<sup>87</sup> Even if non-state actors and international organizations contribute more and more often to treaty drafting, the entry into force and implementation of

<sup>82</sup> Pulkowski, 'Structural Paradigms of International Law', in T. Broude and Y. Shany (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (2008) 51, at 66 (noting that *in dubio mitius* is a residue of 'the rhetoric of the Westphalian model').

<sup>83</sup> PCIJ, *Case of the S.S. 'Lotus' (France v. Turkey)*, Judgment of 7 September 1927, para. 44.

<sup>84</sup> M. Matsushita et al., *The World Trade Organization: Law, Practice, and Policy* (3rd ed., 2015), at 58 ('*in dubio mitius* amounts to a presumption that no sovereignty has been transferred when the letter of the law is unclear'). Cf S. Dothan, *International Judicial Review: When Should International Courts Intervene?* (2020), at 17.

<sup>85</sup> A. Boyle and C. Chinkin, *The Making of International Law* (2007), at 97 ('It would be myopic to insist on the classical view of states as the sole makers of international law; rather we must recognise the multi-layered, multi-partite nature of the international law-making enterprise'); P. Allott, *Eunomia: New Order for a New World* (2001), at 296–304.

<sup>86</sup> Cf. Tomuschat, 'Obligations Arising for States Without or Against Their Will', 241 *Recueil des cours* (1994) 195, at 210–211; Simma, 'From Bilateralism to Community Interest', 250 *Recueil des cours* (1997) 217, at 234 ('International law is finally overcoming the legal as well as moral deficiencies of bilateralism and maturing into a much more socially conscious legal order', serving 'the common interests of the international community, a community that comprises not only States, but in the last instance all human beings'). See also Peters, 'Humanity as the  $\Lambda$  and  $\Omega$  of Sovereignty', 20 *EJIL* (2009) 513.

<sup>87</sup> Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', 107 *AJIL* (2013) 295, at 296; Steinbach, 'The Trend towards Non-Consensualism in Public International Law: A (Behavioural) Law and Economics Perspective', 27 *EJIL* (2016) 643, at 666; Werner, 'State

treaties is still largely dependent on states.<sup>88</sup> Moreover, in the absence of democratic processes of international law-making, it is unclear which principle would replace state consent as a normative condition for treaty-making.<sup>89</sup> Although voluntaristic approaches to international law are often associated with *Realpolitik* and considered un conducive to the realization of global public goods, there are arguments in favour of voluntarism even from a cosmopolitan point of view. The requirement of state consent formally acknowledges the sovereign equality of states and carries a corresponding degree of democratic legitimacy.<sup>90</sup> Alternative forms of law-making are not necessarily more inclusive, and can easily become dominated by powerful actors, possibly even more so than traditional forms of international law-making.<sup>91</sup>

Leaving aside the ideological roots of *in dubio mitius*, the validity of the principle is not necessarily dependent on a voluntaristic understanding of international law. *In dubio mitius* offers several advantages, irrespective of one's view on the proper role of state consent in international law-making. In the remainder of this article, I submit that *in dubio mitius* promotes clarity in international law and encourages modesty among international adjudicators in accordance with their limited mandate and powers.

## A Clarity

The principle of *in dubio mitius* proposes a straightforward solution to situations of doubt in treaty interpretation: the interpreter should adopt the interpretation that imposes the less demanding obligation. By prescribing how interpreters should respond to doubt, *in dubio mitius* brings transparency and predictability to the interpretive exercise. Moreover, by restricting the scope of unclear obligations, the principle advances also substantive clarity in international law. If a treaty provision is unclear and the

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Consent as Foundational Myth', in C. Brölmann and Y. Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (2016) 13, at 31.

<sup>88</sup> Hollis, 'Why State Consent Still Matters: Non-State Actors, Treaties, and the Changing Sources of International Law', 23 *Berkeley Journal of International Law* (2005) 137.

<sup>89</sup> Cf. Klabbers, 'The Cheshire Cat That Is International Law', 31 *EJIL* (2020) 269, at 276 ('international law . . . has no response – to those who complain about its absence of democratic pedigree'). For a proposal advancing 'thick stakeholder consensus' as an alternative for 'thin state consent', see Pauwelyn, Wessel and Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking', 25 *EJIL* (2014) 733.

<sup>90</sup> Cf. Besson, 'State Consent and Disagreement in International Law-Making. Dissolving the Paradox', 29 *LJIL* (2016) 289; Kingsbury, 'Sovereignty and Inequality', 9 *EJIL* (1998) 599; B. Roth, *Sovereign Equality and Moral Disagreement* (2011), at 93–131; Koskeniemi, 'What Use for Sovereignty Today?', 1 *Asian Journal of International Law* (2011) 61. See also Dothan, *supra* note 84, at 19 (states 'are usually the best possible representatives of all individuals affected by their actions. These individuals are the ultimate stakeholders – the true purpose of defending state sovereignty. They are the ones that the court protects by restrictively interpreting the treaty').

<sup>91</sup> Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods', 108 *AJIL* (2014) 1, at 39–40. See also Benvenisti, *supra* note 87, at 302; Weil, 'Towards Relative Normativity in International Law?', 77 *AJIL* 413 (1983), at 441.



meaning of the obligation is doubtful, *in dubio mitius* condenses its content into a normative core that has sufficient clarity.

The importance of clarity in law, both national and international, is evident: the law needs to be intelligible and predictable, in order to be able to guide and restrain conduct and to attribute responsibility.<sup>92</sup> Clarity of the law is a prerequisite for legal certainty and widely considered a fundamental pillar of the rule of law.<sup>93</sup> At the same time, vagueness and ambiguity permeate legal language as much as ordinary language. Treaties, in particular, abound with vague and ambiguous provisions, because they result from international negotiation and compromise.<sup>94</sup> Clear commitments are only possible where there exists substantial agreement between the contracting states; if such agreement is lacking, the treaty becomes vaguer and more ambiguous.<sup>95</sup>

The premise of *in dubio mitius* is that obligations need to have a sufficient degree of clarity. In cases of doubt, this leads to a minimalist approach: the obligation will be retained insofar as it can be deduced with sufficient certainty. Consequently, *in dubio mitius* results in a sifting of treaty language, filtering out provisions that are equivocal or aspirational.<sup>96</sup> Provisions of this kind can have legitimate functions, such as expressing a developing consensus or inducing incremental change, but they cannot serve to impose binding obligations in the face of evident disagreement between and within contracting states. Accordingly, *in dubio mitius* results in a focus on obligations that are sufficiently clear as to guide and restrict behaviour in an intelligible and predictable way.

<sup>92</sup> ICSID, *Kim et al. v. Uzbekistan – Decision on Jurisdiction*, 8 March 2017, ICSID Case No. ARB/13/6, para. 399; Karl, 'International Investment Arbitration: A Threat to State Sovereignty?', in W. Shan, P. Simons and D. Singh (eds), *Redefining Sovereignty in International Economic Law* (2008) 225, at 231; Hanotiau, 'Are Bilateral Investment Treaties and Free Trade Agreements Drafted with Sufficient Clarity to Give Guidance to Tribunals?', 5 *American University Business Law Review* (2015) 313.

<sup>93</sup> See, e.g., Chesterman, 'An International Rule of Law?', 56 *EJIL* (2008) 331, at 342. But see Waldron, 'Clarity, Thoughtfulness, and the Rule of Law', in Keil and Poscher, *supra* note 77, 317, at 327 (vagueness can 'help to sponsor thoughtfulness and reflection in the law, on the part of those who are called on to apply it'); Endicott, 'The Value of Vagueness', in V. Bhatia *et al.* (eds), *Vagueness in Normative Texts* (2005) 27, at 45; Farber, 'The Case Against Clarity', in D. Kennedy and J. Southwick (eds), *The Political Economy of International Trade Law. Essays in Honor of Robert E. Hudec* (2002) 575.

<sup>94</sup> Allott, 'The Concept of International Law', 10 *EJIL* (1999) 31, at 43 ('[a] treaty is a disagreement reduced to writing'); Pauwelyn and Elsig, *supra* note 44, at 447 (treaties 'tend to be more incomplete contracts than national texts because of high transaction costs and future uncertainties'; see at 448, for the 'paradox of interpretation': the ambiguity of treaties, combined with the difficulty of changing them, creates a high demand for treaty interpretation, whereas such interpretation is often controversial).

<sup>95</sup> Stone, 'Fictional Elements in Treaty Interpretation: A Study in the International Judicial Process', 1 *Sydney Law Review* (1954) 344, at 347 ('the treaty terms may often be intended, not to express the consensus reached, but rather to conceal the failure to reach it'). See also Dothan, *supra* note 84, at 18 ('states often understand that they cannot foresee all the future circumstances surrounding their agreement and nonetheless want to cement their commitment to cooperate by forming a treaty that will be subjected to evolutionary interpretation').

<sup>96</sup> Burda notes that *in dubio mitius* also helps avoiding conflicts between treaty provisions. Burda, 'Les fonctions de la démarche interprétative dans le cadre de l'Organisation mondiale du commerce', 21 *Revue Québécoise de droit international* (2008) 1, at 15 n.78.

The choice for the narrower interpretation in case of doubt has often been criticized as a threat to the effectiveness of international law.<sup>97</sup> Lauterpacht considered that '[t]he greater effectiveness of a provision can be secured, by dint of liberal interpretation, only at the expense of the freedom of action of the state bound by it'.<sup>98</sup> Along similar lines, scholars commonly argue that *in dubio mitius* is overly protective of sovereignty, whereas the purpose of international law is to restrict sovereignty.<sup>99</sup> In the words of Thomas Wälde, *in dubio mitius* 'tends to reduce obligations and thus undermines the – intended – legally binding character of a treaty'.<sup>100</sup> For these reasons, Robert Jennings and Arthur Watts added to the discussion of *in dubio mitius* in *Oppenheim's International Law* that '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 effective'.<sup>101</sup>

The previous section of this article has argued that *in dubio mitius* only applies when treaty interpreters are faced with multiple permissible interpretations that are all legitimate in light of Article 31 VCLT. Consequently, an interpretation that is adopted on grounds of *in dubio mitius* necessarily corresponds to the object and purpose of the treaty. Rather than jeopardizing the effectiveness of international law, *in dubio mitius* recognizes that there can be different ways to understand and achieve a treaty's object and purpose, and that an effective interpretation is not necessarily a maximalist interpretation.<sup>102</sup>

When assessing the effectiveness critique of *in dubio mitius* in more detail, it is helpful to distinguish between treaties that govern horizontal relationships among states (*traités-contrats*) and those that restrain state powers vis-à-vis other entities,

<sup>97</sup> See Reinisch and Braumann, 'Effet Utile', in Klingler, Parkhomenko and Salonidis, *supra* note 6, 47, at 49 ('The principle of restrictive interpretation, or *in dubio mitius*, is often depicted as the opposite rule to the principle of effectiveness'); Orakhelashvili, *supra* note 38, at 415; Laird, 'Interpretation in International Investment Arbitration: Through the Looking Glass', in J. Werner and A. Hyder Ali (eds), *A Liber Amicorum: Thomas Wälde. Law Beyond Conventional Thought* (2009) 151, at 156.

<sup>98</sup> Lauterpacht, *supra* note 6, at 67.

<sup>99</sup> *Ibid.*, at 60. J. Hathaway, *The Rights of Refugees under International Law* (2005), at 72–73; T. Gammeltoft-Hansen, *Access to Asylum. International Refugee Law and the Globalisation of Migration Control* (2011), at 66.

<sup>100</sup> Wälde, 'Interpreting Investment Treaties: Experiences and Examples', in C. Binder *et al.* (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 724, at 733. See also *ibid.*, at 735–736 ('It would be difficult to find real obligations in international law, . . . if one required absolute and specific clarity devoid of any ambiguity before accepting that treaty language creates obligations').

<sup>101</sup> R. Jennings and A. Watts, *Oppenheim's International Law: Vol. 1 Peace* (9th ed., 2008), at 1278–1279.

<sup>102</sup> In its classic formulation *ut res magis valiat quam pereat*, the principle of effectiveness is cautious rather than ambitious, not unlike *in dubio mitius*. As noted by Fitzmaurice:

[T]he maxim *ut magis* is 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. This affords a very good pointer to the limits of a doctrine which, if allowed free play, would result in parties finding themselves saddled with obligations they never intended to enter into, in relation to situations they never contemplated, and which often they could not even have anticipated. Fitzmaurice, 'Vae Victis or Woe to the Negotiators! Your Treaty or Our "Interpretation" of It?', 65 *AJIL* (1971) 358, at 373.

such as individuals, foreign investors or the environment (*traités-lois*).<sup>103</sup> In the first context, scholars commonly argue that *in dubio mitius* protects the sovereignty of the respondent state at the expense of another state's sovereignty.<sup>104</sup> This argument assumes that the relevant treaty addresses a zero-sum game, where a gain by one state automatically involves a loss for another state, which might be the case, for instance, in the context of disputes over territory, natural resources or consular assistance. In such circumstances, it would be problematic to apply *in dubio mitius* to only one side of the bargain. However, if both states assumed an identical obligation towards each other, *in dubio mitius* would not jeopardize the balance of the treaty, since a narrow interpretation would apply to both sides.<sup>105</sup> In this context, a restrictive interpretation of obligations would limit the scope of cooperation, rather than favouring one of the parties at the expense of another party.

Treaties of the category *traités-lois* codify a shared commitment to common interests even though non-fulfilment by one party does not directly affect the position of other contracting states.<sup>106</sup> In this context, it is commonly held that *in dubio mitius* impedes the pursuit of a common good or jeopardizes the protection of third party interests.<sup>107</sup> Rudolf Bernhardt, for instance, has argued that *in dubio mitius* jeopardizes an effective interpretation of human rights treaties:

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.<sup>108</sup>

<sup>103</sup> Brölmann, 'Specialized Rules of Treaty Interpretation: International Organizations', in Hollis, *supra* note 44, 513, distinguishing between contractual and constitutive treaties when evaluating *in dubio mitius*. For distinctions between substantive fields of international law, see, e.g., Merkouris, *supra* note 6, at 278–285; Yen, *supra* note 42, at 150. I believe that a differentiation along substantive lines is not helpful when discussing general principles of treaty interpretation, since these principles derive their usefulness from their generality, while their application in a concrete case is context-dependent anyway. Cf. Kolb, 'Is There a Subject-Matter Ontology in Interpretation of International Legal Norms?', in Borge and Andenas, *supra* note 9, at 473; Arato, 'Accounting for Difference in Treaty Interpretation over Time', in A. Bianchi, D. Peat and M. Windsor (eds), *Interpretation in International Law* (2015) 205.

<sup>104</sup> Stone, *supra* note 95, at 354; McNair, *supra* note 8, at 765; Borge, *supra* note 9, at 524; Merkouris, *supra* note 6, at 276; Petsche, *supra* note 40, at 21.

<sup>105</sup> Petsche, *supra* note 40, at 24–25.

<sup>106</sup> Cf. the ICJ's description of the Genocide Convention in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, at 10, noting that 'the contracting States do not have any interests of their own' and that one cannot speak of 'individual advantages or disadvantages to States'.

A different question is whether adjudicators hearing a dispute over a treaty provision between a state party and a third party (e.g. an investor or individual) should take into account that one disputing party is not a treaty party, which might affect debates over the parties' original intentions and also raise arguments based on the principle of *contra proferentem*.

<sup>107</sup> Nowrot, 'Termination and Renegotiation of International Investment Agreements', in S. Hindelang and M. Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (2016) 227, at 258.

<sup>108</sup> Bernhardt, *supra* note 9, at 14. Cf. IACmHR, *Azocar et al. v. Chile*, Report 137/99 of 27 December 1999, para. 146; S. van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme: Prendre l'idée simple au sérieux* (2001), at 50 (describing 'une interprétation fondatrice tout

However, even if *in dubio mitius* might prevent an expansive interpretation of treaties,<sup>109</sup> it is less clear whether the principle conflicts with an ‘effective’ interpretation. The notion of effectiveness suggests that a treaty pursues a singular aim whose realization is a matter of linear progress, whereas in reality, different states as well as other stakeholders often hold divergent views in respect of the aim of a treaty or of a particular provision.<sup>110</sup> Consequently, an interpretation that favours one of these competing views in the name of effectiveness may be contrary to what others perceive as an effective interpretation.<sup>111</sup>

Moreover, even if states and other stakeholders agree on the importance of a specific common goal, they will often envisage different levels of realization of that aim. The conclusion of a treaty expresses a shared interest in a certain limitation of state sovereignty, but states are unlikely to agree on how far that limitation should go.<sup>112</sup> General exceptions and limitation clauses explicitly acknowledge that a treaty’s aims may need to be balanced against competing objectives.<sup>113</sup> Consequently, when *in dubio*

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entière dédiée à la promotion du but de La Convention (*in dubio, pro libertate*). See also, critically of recent ECtHR jurisprudence, Orakhelashvili, ‘Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights’, 14 *EJIL* (2003) 529. But see Itzcovich, ‘One, None and One Hundred Thousand Margins of Appreciations: The *Lautsi* Case’, 13 *Human Rights Law Review* (2013) 287, at 301 (arguing that a restrictive interpretation of the ECHR is justified by the principles of subsidiarity and democracy, and by the need to avoid conflicts with the contracting states and to gradually build consensus and trust).

<sup>109</sup> This is not necessarily true for evolutionary interpretation, as long as such an interpretation results from an application of Article 31 VCLT. The ECtHR’s reliance on a ‘European consensus’ when adopting an evolutionary interpretation of the Convention acknowledges that such an interpretation requires wide support among the states party. See K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (2015) at 152, 155.

<sup>110</sup> I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed., 1984), at 130; Kritsiotis, ‘The Object and Purpose of a Treaty’s Object and Purpose’, in M. Bowman and D. Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (2018) 237, at 248. See, e.g., ICSID, *SGS v. Philippines – Decision on Objections to Jurisdiction*, 29 January 2004, ICSID Case no. ARB/02/6, para. 116 (‘The object and purpose of the BIT supports an effective interpretation. . . . It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments’); UNCITRAL, *Saluka Investments BV v. Czech Republic – Partial Award*, 17 March 2006, para. 300 (arguing for ‘a balanced approach’). Cf. Van Aaken, ‘Interpretational Methods as an Instrument of Control in International Investment Law’, 108 *ACIL Proceedings* (2014) 196, at 197–198.

<sup>111</sup> Cf. Waibel, ‘Demystifying the Art of Interpretation’, 22 *EJIL* (2011) 571, at 582; Stone, *supra* note 95, at 353 (‘The principle of maximum effectiveness in itself gives no decisive guidance’).

<sup>112</sup> For that reason, the notion of sovereignty does not become redundant merely because the assumption of international obligations is an exercise of sovereignty. Orakhelashvili, *supra* note 38, at 414 (‘The crucial question is whether sovereignty is residual to treaty obligations, or whether it continues impacting their content once these obligations are assumed’); Liedenberg, ‘Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol’, 42 *Human Rights Quarterly* (2020) 48, at 50.

<sup>113</sup> In this context, the AB considers that ‘WTO Members have the right to determine the level of protection’ of non-trade interests. See Du, ‘Autonomy in Setting Appropriate Level of Protection under the WTO Law: Rhetoric or Reality?’, 13 *JIEL* (2010) 1077; Paine, ‘Autonomy to Set the Level of Regulatory Protection in International Investment Law’, 70 *ICLQ* (2021) 697. The proposition that exception clauses should be interpreted narrowly seems to have lost support, see S. Zleptnig, *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements* (2010), at 107–109. For a moderate defence, see Solomou, ‘Exceptions To a Rule Must Be Narrowly Construed’, in Klingler, *supra* note 6, 359.

*mitius* gives priority to sovereignty in case of doubt, this is not automatically contrary to the principle of effectiveness. Rather, this approach acknowledges that the treaty seeks to strike a proper balance between sovereignty and other interests, and not necessarily a maximum reduction of sovereignty.<sup>114</sup>

Moving from a doctrinal to a more realist perspective on international adjudication, the notion of 'effectiveness' should arguably pay attention to the effects of a certain interpretation in the outside world, beyond the courtroom. Understood this way, effectiveness is an *ex post* variable, which can only be measured after an international court or tribunal has issued its judgment. The extent to which states comply with the judgment is of crucial relevance to such effectiveness: only an interpretation that is actually implemented can claim to be effective in a meaningful sense.<sup>115</sup> Consequently, a modest interpretation that is complied with might be more effective than an ambitious interpretation that is contested or ignored.<sup>116</sup> For these reasons, the principles of *in dubio mitius* and effectiveness are not necessarily 'mutually incompatible'.<sup>117</sup> On the contrary, *in dubio mitius* might provide a relatively effective method of treaty interpretation, when state compliance is taken into account as a relevant variable.<sup>118</sup>

## B Modesty

The principle of *in dubio mitius* acknowledges that hard questions of treaty interpretation require a conscious choice from the interpreter.<sup>119</sup> The more a treaty provision is vague or ambiguous, the greater the risk that this choice will be subjective and reflect personal preferences.<sup>120</sup> This does not mean that an exercise of interpretation is always

<sup>114</sup> Cf. Petsche, *supra* note 40, at 24 ('In many cases, *in dubio mitius* interpretation will not actually lead to results that are incompatible with the principle of effectiveness . . . [but] merely have the effect of limiting the scope or reach of a particular rule'). See also Villalpando, 'The Legal Dimension of the International Community: How Community Interests are Protected in International Law', 21 *EJIL* (2010) 387, at 414 ('the proclamation and protection of collective interests have not implied a renunciation to the protection of other, competing, interests in international law, including the very fundamental individual interest which underlies the concept of "sovereignty"').

<sup>115</sup> But see Howse and Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters', 1 *Global Policy* (2010) 127; Huneus, 'Compliance with Judgments and Decisions', in C. Romano *et al.* (eds), *The Oxford Handbook of International Adjudication* (2013) 437, at 440 (noting that judgments can 'give social civil society groups discursive tools with which to pursue their goals', 'influence how other judges and political actors frame an issue' and 'influence bargaining among actors').

<sup>116</sup> Van Aaken, 'International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis', 12 *JIEL* (2009) 507, at 528.

<sup>117</sup> Lauterpacht, *supra* note 6, at 67.

<sup>118</sup> Cf. the concerns expressed by the ILC in its Commentary to (then) Articles 27 and 28 VCLT, denouncing 'attempts to extend the meaning of treaties illegitimately on the basis of the so-called principle of "effective interpretation"': see ILC Draft Articles, *supra* note 45, at 219, para. 6.

<sup>119</sup> Stone, *supra* note 95, at 365 ('even under the accepted canons the Court may have to make ethico-political choices before reaching a legal decision'); T. Gazzini, *Interpretation of International Investment Treaties* (2016), at 347 ('the interpreter may have to make choices, balance the weight of the various elements, and even take a creative stand, especially when the relevant provisions are vague, incomplete or ambiguous').

<sup>120</sup> See Venzke, 'Sources in Interpretation Theories: The International Law-Making Process', in J. d'Aspremont and S. Besson (eds), *The Oxford Handbook of the Sources of International Law* (2017) 401, at 414.

self-serving, as interpreters can ‘be driven by sincere convictions or the genuine ambition to find the morally best answer’.<sup>121</sup> The point is rather that the ensuing interpretation is partial and influenced by the interpreter’s personal convictions.<sup>122</sup>

International law lacks meta-principles that might guide interpretative choices,<sup>123</sup> since conceptions of the common good and universal justice are contested within and among states.<sup>124</sup> Consequently, even if treaty interpretation is pictured as a technical, legal assessment, favouring one interpretation over another may actually imply a controversial policy choice. This becomes more problematic if the element of deliberate choice is obscured and the preferred interpretation is presented ‘in the universalizing language of the law, in a cloak of universal rightness’.<sup>125</sup>

*In dubio mitius* acknowledges that hard questions of treaty interpretation require a discretionary choice, while there is no international consensus on meta-principles that could govern such a choice. Accordingly, the principle advocates a modest approach:

<sup>121</sup> *Ibid.*, at 415. But see V. Pergantis, *The Paradigm of State Consent in the Law of Treaties. Challenges and Perspectives* (2017), at 7 (‘these mechanisms have inevitably internalized a sense of self-preservation, which is not necessarily in line with the furtherance of the values and purposes of the treaties that they are mandated to uphold’). See also Alvarez, ‘The New Dispute Settlers: (Half) Truths and Consequences’, 38 *Texas International Law Journal* (2003) 405, at 418 (‘Politics infects the rule of law and the judges themselves’).

<sup>122</sup> Venzke, *supra* note 120, at 415. It has been noted that in more specialized regimes there is a greater ‘likelihood that these judges identify in a particularly strong manner with the social values purportedly realized by the implementation of the regime’: Von Bernstorff, ‘Specialized Courts and Tribunals as the Guardians of International Law? The Nature and Function of Judicial Interpretation in Kelsen and Schmitt’, in A. Føllesdal and G. Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (2018) 9, at 23.

<sup>123</sup> See Gross, ‘Treaty Interpretation: The Proper Rôle of an International Tribunal’, 63 *ASIL Proceedings* (1969) 108, at 114 (noting that concepts like ‘overriding objectives of human dignity’ are ‘pregnant with ambiguity far greater than ever confronted an international tribunal in interpreting the words and concepts in a treaty’). See also Zemanek, ‘International Law Needs Development. But Where To?’, in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011) 793, at 798 (‘Being divided over basic principles which should guide entails being divided over the direction in which the community should advance in the future’); Pergantis, *supra* note 121, at 6–7 (noting ‘the dubious premise that there are indeed some communitarian values and ideas that are commonly shared by the international legal community’).

<sup>124</sup> Stone, *supra* note 95, at 366 (‘The deep and far-reaching ideological conflicts which divide modern States are reflected in conflicting socio-ethical convictions which can produce only mutual incompatibility of criteria of justice as between great segments of mankind’). The ECtHR commonly notes that the disputes before it involve a ‘consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely’. E.g. ECtHR (Plenary), *James and Others v. United Kingdom*, Appl. no. 8793/79, Judgment of 21 February 1986, para. 46.

<sup>125</sup> Venzke, *supra* note 120, at 414. Cf. *ibid.* at 420: ‘power dynamics . . . tend to be concealed in the practice of interpretation that pushes everyone to articulate interests and convictions, however idiosyncratic, in a universalizing and objectifying claim to the law’. See also Hernández, ‘Interpretative Authority and the International Judiciary’, in Bianchi, Peat and Windsor, *supra* note 103, 166, at 184; Couveinhes Matsumoto, ‘Les politiques des États à l’égard des juridictions internationales: Ni pour, ni contre, bien au contraire’, in F. Couveinhes Matsumoto and R. Nollez-Goldbach (eds), *Les États face aux juridictions internationales: Une analyse des politiques étatiques relatives aux juges internationaux* (2019) 5, at 86 (arguing that international courts demonstrate ‘déséquilibres évidents (européo-centrisme, libéralo-centralisme, capitalo-centrisme)’).

in case of doubt, the narrower interpretation of the relevant obligation should prevail. The justification for this modesty is that international courts and tribunals are not well placed to develop international law in ways they see fit, beyond clear commitments by treaty parties.<sup>126</sup> International adjudicators may consider themselves as ‘agents of the “international community” bent on the pursuit of “justice” broadly understood’,<sup>127</sup> and therefore seek to interpret treaty provisions as widely as possible, especially when the treaty aims to protect global community interests or public goods against state interference.<sup>128</sup> It is difficult to see, however, why international courts should have the authority to advance their own views on the right development of international law if political avenues of international law-making fail due to disagreement within and among states.<sup>129</sup>

Some domestic constitutional systems assign a significant law-making role to the judiciary, which has fostered debates about the countermajoritarian difficulty and the (il)legitimacy of judicial activism. Irrespective of one’s view on these matters, it is clear that the potential justifications for domestic judicial law-making cannot easily be extrapolated to the international level. Domestic courts are embedded in societal and constitutional networks and linked to the enforcement machinery of the state. International adjudicators lack such connections, and their authority and ability to develop the law is therefore more limited.<sup>130</sup> Moreover, unlike the domestic judiciary,

<sup>126</sup> Yen, *supra* note 42, at 150 (the principle of restrictive interpretation ‘functions as a safeguard of state sovereignty against the adjudicators’ adventure after failure to find a meaning of treaty terms by applying international rules on treaty interpretation’).

<sup>127</sup> Alvarez, ‘What Are International Judges for? The Main Functions of International Adjudication’, in Romano *et al.*, *supra* note 115, 158, at 173.

<sup>128</sup> Cf. Howse, ‘Moving the WTO Forward: One Case at a Time’, 42 *Cornell International Law Journal* (2009) 223, at 228 (‘In the presence of political and diplomatic impasse, the judiciary has an enhanced role in the preservation of the legitimacy of the system through evolving its practices to reflect shifting conceptions of legitimate international order’); Petersmann, ‘Between “Member-Driven” WTO Governance and “Constitutional Justice”: Judicial Dilemmas in GATT/WTO Dispute Settlement’, 21 *JIEL* (2018) 103, at 118; Kulick, ‘From Problem to Opportunity? An Analytical Framework for Vagueness and Ambiguity in International Law’, 59 *German Yearbook of International Law* (2016) 257; A. Stone Sweet and F. Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (2017), at 33. Cf. Waibel, *supra* note 111, at 573 (‘[t]he prevalent view among international lawyers is that international law is a force for good. . . . In this frame of mind, the more international law, the better’).

<sup>129</sup> Crawford, *supra* note 47, at 365 (‘[t]he teleological approach has many pitfalls, not least its overt “legislative” character’); Fitzmaurice, *supra* note 102, at 370 (the process would confer ‘a discretion of a kind altogether exceeding the normal limits of the judicial function’); Regan, *supra* note 3, at 241 (‘Many writers move too easily from the premise that we need a lot more effective international law than we currently have . . . to the problematic conclusion that since no other institution is currently able to give it to us, judges should step in to supply our need’). It should also be noted that courts are limited by the *ad hoc* nature of litigation and largely depend on the arguments raised by disputants.

<sup>130</sup> Cf. Stone, *supra* note 95, at 364 (‘we still lack international tribunals which can reflect the socio-ethical convictions of the aggregate of States . . . it is this relation between judges and community, which, in the final resort, renders judicial law-creation tolerable and consistent with liberty’). Cf. V. Jeutner, *Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma* (2017), at 107 (‘sovereigns can engage in a comparatively more ground-breaking and distinctly forward-looking analysis of non-legal and legal factors’). See also Lindseth, ‘Theorizing Backlash: Supranational Governance and International Investment Law and Arbitration in Comparative Perspective’, 21 *Journal of World Investment & Trade* (2020) 34, at 60 (‘Institutions of regulatory governance beyond the State still ultimately depend on State-level bodies to back up the regulatory regime’).

international courts and tribunals form usually part of sectoral regimes of international law, which restricts their potential to engage in comprehensive assessments of the common good.<sup>131</sup> International judges are mandated to solve disputes in these specialized contexts, and they are commonly recruited on the basis of their specific expertise in these fields of law. Accordingly, international adjudicators are not necessarily authorized to decide broader questions of justice and to determine the right balance between different competing interests, even if they consider that they act in the pursuit of the common good or on behalf of marginalized actors.<sup>132</sup> Recent challenges to the legitimacy of international courts and tribunals have demonstrated that their authority to exercise this form of review is increasingly being questioned.<sup>133</sup>

Several international courts and tribunals have explicitly acknowledged the limits to their powers and authority, and commonly express judicial restraint in the form of judicial deference. The European Court of Human Rights grants a ‘margin of appreciation’ to states,<sup>134</sup> when it considers that domestic authorities are ‘better placed than an international court’ to make certain decisions, for instance on grounds of democratic legitimacy, technical expertise and proximity to local circumstances.<sup>135</sup> A number of other international adjudicators have adopted similar approaches.<sup>136</sup>

Judicial deference remits a question of international law to domestic institutions and gives them a say in the resolution of the matter. Adjudicators often do so by adopting a specific standard of review that limits the scope or intrusiveness of their scrutiny.<sup>137</sup> In this way, adjudicators leave it to the relevant state to decide whether the applicable treaty provision requires more than the minimal compliance assessed under the chosen standard of review.<sup>138</sup> This points to an important difference between deference

<sup>131</sup> Carozza, ‘The Problematic Applicability of Subsidiarity to International Law and Institutions’, 61 *American Journal of Jurisprudence* (2016) 51, at 59; Von Staden, ‘No Institution Is an Island: Checks and Balances in Global Governance’, in J. Mendes and I. Venzke (eds), *Allocating Authority. Who Should Do What in European and International Law?* (2018) 115, at 138.

<sup>132</sup> Koskeniemi, *supra* note 90, at 67 (noting that even a uncontroversial goal such as the eradication of poverty allows for diverse policies). See also Rachovitsa, ‘The Principle of Systemic Integration in Human Rights Law’, 66 *ICLQ* 557 (advising caution in the use of systemic integration in human rights law).

<sup>133</sup> Steinberg, ‘The Impending Dejudicialization of the WTO Dispute Settlement System?’, 112 *Proceedings of the ASIL Annual Meeting* (2018) 316, at 321 (referring to the use of *in dubio mitius* as a way of rendering the AB ‘more sensitized to the political climate’).

<sup>134</sup> Hilf and Salomon, ‘Margin of Appreciation Revisited: The Balancing Pole of Multilevel Governance’, in M. Cremona *et al.* (eds), *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann* (2013) 37, at 40 (‘In international law respect for the sovereignty of nations is a cause for granting those states a margin of appreciation’). But see Crema, *supra* note 9, at 699: (‘It is not a new edition of the old restrictive interpretation in favour of sovereignty’).

<sup>135</sup> Gerards, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’, 17 *European Law Journal* (2011) 80.

<sup>136</sup> For references, see J. Fahner, *Judicial Deference in International Adjudication: A Comparative Analysis* (2020), at 131.

<sup>137</sup> See further on the distinction between treaty standard and standard of review, *ibid.*, 128–131.

<sup>138</sup> Besson, ‘Subsidiarity in International Human Rights Law: What Is Subsidiary about Human Rights?’, 61 *American Journal of Jurisprudence* (2016) 69, at 84. In practice, it can be difficult to distinguish between treaty interpretation and the identification of a standard of review. J. Christoffersen, *Fair Balance: A Study of Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (2009), at 274.



and a principle of treaty interpretation such as *in dubio mitius*: deference concerns the distribution of interpretative powers among different institutions,<sup>139</sup> whereas principles of treaty interpretation determine how these powers should be applied.

Unlike *in dubio mitius*, international judicial deference receives considerable academic support. Scholars commonly note that deference respects the policy space and regulatory freedom of domestic decision-makers.<sup>140</sup> Arguably, *in dubio mitius* has a similar effect, while at the same time providing clarity on the scope and content of the relevant treaty provision. Deference authorizes domestic authorities to determine and implement their own understanding of treaty provisions, which perpetuates uncertainty over the scope of the relevant obligation as a matter of international law.<sup>141</sup> *In dubio mitius* also respects the policy space of contracting states to the extent permissible under the applicable provision, but in doing so it provides a clear pronouncement on the content of the international legal obligation. For this reason, *in dubio mitius* leads to a more defined outcome than judicial deference,<sup>142</sup> even if the practical implications of either approach are likely to be the same in a concrete dispute.

In some cases, an application of *in dubio mitius* might receive disapproval from contracting states who would prefer more extensive international obligations.<sup>143</sup> This dissatisfaction, in turn, could translate into new treaty-making initiatives. Once international adjudicators refuse to take the lead in developing international law, states may see a need to negotiate more ambitious treaties. In this way, modesty among international courts and tribunals might actually encourage the development of international law by incentivizing states to conclude more demanding agreements.<sup>144</sup> Recently, the opposite

<sup>139</sup> Roberts, 'The Next Battleground: Standards of Review in Investment Treaty Arbitration', 16 *International Council for Commercial Arbitration Congress Series* (2011) 170, at 172 ('the degree of deference adopted is relevant to determining how strictly tribunals will scrutinize governmental conduct and how readily they will substitute their own views for those of respondent States').

<sup>140</sup> See, e.g., Shany, *supra* note 49; A. Legg, *The Margin of Appreciation in International Human Rights Law* (2012); Burke-White and Von Staden, 'Private Litigation in a Public Law Sphere: the Standards of Review in Investor-State Arbitrations', 35 *Yale Journal of International Law* (2010) 283; Schill, 'Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review', 3 *Journal of International Dispute Settlement* (2012) 577; G. van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (2013).

<sup>141</sup> Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards', 31 *New York University Journal of International Law and Politics* (1999) 843; Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law', 11 *Columbia Journal of European Law* (2005) 113.

<sup>142</sup> The concept of the margin of appreciation has been criticized for not clarifying the appropriate level of deference. Lavender, 'The Problem of the Margin of Appreciation', 4 *European Human Rights Law Review* (1997) 380; Arato, 'The Margin of Appreciation in International Investment Law', 54 *Virginia Journal of International Law* (2014) 545.

<sup>143</sup> Mercurio and Tyagi, 'Treaty Interpretation in WTO Dispute Settlement: The Outstanding Question of the Legality of Local Working Requirements', 19 *Minnesota Journal of International Law* (2010) 275, at 322 n.156 ('parties, especially respondents, are likely to treat this principle with caution given that narrowing obligations for the benefit of a particular situation may work against their interests in the future when they seek to enforce a different obligation').

<sup>144</sup> Pergantis, *supra* note 121, at 8 (noting the need to encourage states 'to participate more actively in the evolution of the treaty regime, thus enhancing the democratic element within it').

has occurred in international investment law, where arbitral tribunals, at least in the view of some state parties, have issued overly extensive interpretations of vague treaty standards.<sup>145</sup> In response, multiple states have reformulated their treaties,<sup>146</sup> adopting more curtailed standards of investment protection.<sup>147</sup> Such a rollback could be avoided if international adjudicators would take a modest stance and leave the expansion of international obligations to political actors.<sup>148</sup> Even when treaties have the aim of protecting public goods or individual interests from state sovereignty, the beneficiaries of such protection are better served by clear treaty rules than by controversial rulings adopted by international courts and tribunals on the basis of vague or ambiguous provisions, if such interpretations jeopardize both the legitimacy of these institutions and the effectiveness of their decisions.

## 5 Concluding Remarks

In his *Philosophische Untersuchungen*, Ludwig Wittgenstein reflected on the meaning of the word ‘game’. Noting the variety of phenomena known as ‘games’, Wittgenstein wondered how to define the boundaries of the concept: ‘Wie ist denn der Begriff des Spiels abgeschlossen? Was ist noch ein Spiel und was ist keines mehr?’<sup>149</sup> Fifty years later, the Appellate Body of the WTO faced a similar question, namely with regard to the word ‘sporting’.<sup>150</sup> The question surfaced in a dispute about the United States’ commitment to give unrestricted market access to the cross-border supply of recreational services ‘except sporting’. The United States argued that gambling and betting

<sup>145</sup> Sornarajah, ‘The Neo-Liberal Agenda in Investment Arbitration: Its Rise, Retreat and Impact on State Sovereignty’, in Shan, Simons and Singh, *supra* note 92, 199, at 215–221. See ICSID, *Lemire v. Ukraine – Decision on Jurisdiction and Liability*, 14 January 2010, ICSID Case No. ARB/06/18, para. 246 (referring to the fair and equitable treatment standard as a rule of ‘Delphic economy of language’).

<sup>146</sup> Ortino, ‘Refining the Content and Role of Investment “Rules” and “Standards”: A New Approach to International Investment Treaty Making’, 28 *ICSID Review* (2013) 152; De Brabandere, ‘States’ Reassertion of Control over International Investment Law: (Re)Defining “Fair and Equitable Treatment” and “Indirect Expropriation”’ in A. Kulick (ed.), *Reassertion of Control over the Investment Treaty Regime* (2016) 285; De Nanteuil, ‘Fuir ou rester? Ambiguïtés et mérites de la politique des États à l’égard de l’arbitrage d’investissement’, in Couveinhes Matsumoto and Nollez-Goldbach, *supra* note 125, 199, at 224.

<sup>147</sup> De Nanteuil, *supra* note 146, at 221 (‘un certain nombre d’États ont récemment pris l’initiative de modifier leurs TBI ou modèles de traités bilatéraux afin de préciser la teneur des normes de protection qu’ils comportent et singulièrement celles qui sont le plus susceptibles, au moins en apparence, de porter atteinte à la liberté normative des gouvernements’). See also Karl, *supra* note 92, at 238–240.

<sup>148</sup> Besson, ‘Getting Over the *Amour Impossible* between International Law and Adjudication’, in Romano *et al.*, *supra* note 115, 414, at 433. Steinberg, *supra* note 133, at 321 (‘An AB that is less judicialized and more sensitized to the political climate could catalyze WTO members to negotiate new substantive rules that fill the legal chasms that have emerged over the past two decades’).

<sup>149</sup> L. Wittgenstein, *Philosophische Untersuchungen* (2010), at 96, para. 68: ‘how is the concept of a game bounded? What still counts as a game and what no longer does?’

<sup>150</sup> WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Appellate Body*, 7 April 2005, WT/DS285/AB/R. The AB considered that a schedule is an integral part of the treaty and therefore should be interpreted in accordance with the VCLT rules. See paras 159–160 of the Report.

services were covered by the ‘sporting’ exception, whereas Antigua and Barbuda argued the contrary. The Appellate Body noted that ‘the range of possible meanings of the word “sporting” includes both the meaning claimed by Antigua and the meaning claimed by the United States’.<sup>151</sup> The AB then considered the other elements prescribed by Article 31 VCLT – context, object and purpose, and subsequent practice – but they were to no avail, leading the AB to conclude that the meaning of the exception was ambiguous.<sup>152</sup> Ultimately, the question could be solved by a resort to supplementary means in the form of two documents of the Secretariat, which suggested that gambling and betting services were not covered by the term ‘sporting’, and thus entitled to unrestricted market access.<sup>153</sup>

The example shows that vague and ambiguous language puzzles philosophers and lawyers alike.<sup>154</sup> However, unlike philosophers, international courts and tribunals need to adopt decisive interpretations in order to settle a dispute, even if treaty provisions are vague or ambiguous. In the words of Hersch Lauterpacht, an international judge ‘is neither compelled nor permitted to resign himself to the *ignorantibus* which besets the perennial quest of the philosopher’.<sup>155</sup> The principle of *in dubio mitius* assists international judges in fulfilling this challenging task. It acknowledges that some questions of treaty interpretation do not have an evident answer that can be discovered through an application of the Vienna Convention rules. In cases of doubt, where a question of treaty interpretation has no single persuasive answer but instead requires a conscious choice between different permissible outcomes, *in dubio mitius* provides a solution, stipulating that this choice should be made in favour of the narrower interpretation. In this way, *in dubio mitius* reconciles an acknowledgment of the provision’s indeterminacy with the interpreter’s duty to speak the law.

*In dubio mitius* is likely to be criticized for its conservative, statist approach to international law, or welcomed as a prudent expression of judicial restraint. In concrete disputes, its evaluation will depend on one’s appreciation of the outcome of the case or one’s general view on the applicable treaty regime. On a more abstract level, the merit of *in dubio mitius* lies in its contribution to clarity, as it provides a transparent and predictable response to interpretative doubt and restricts the scope of legally binding obligations to a clear and intelligible core. Moreover, the principle acknowledges that international courts and tribunals with a specific expertise and limited mandate lack the authority to develop the law in the face of legitimate disagreement among and within contracting states. It accepts that these institutions are not well placed to make controversial policy choices, and that the interests supposedly defended by extensive interpretations are better served by calls for more ambitious treaty drafting.

<sup>151</sup> *Ibid.*, para. 167.

<sup>152</sup> *Ibid.*, para. 195.

<sup>153</sup> *Ibid.*, paras 196–213. The Panel had used the same documents under the heading of ‘context’.

<sup>154</sup> Although, ‘Wittgenstein, unfortunately, was never an AB member’, Mavroidis, ‘No Outsourcing of Law? WTO Law as Practiced by WTO Courts’, 102 *AJIL* 421 (2008), at 446 n.122.

<sup>155</sup> H. Lauterpacht, *The Function of Law in the International Community* (2011), at 72.

