

4-15-2009

In the Name of Sovereignty? The Battle over In Dubio Mitius Inside and Outside the Courts

Christophe J. Larouer

S.J.D. Candidate and Fellow of the Institute of International Economic Law, Georgetown University Law Center,
cl236@law.georgetown.edu

Follow this and additional works at: http://scholarship.law.cornell.edu/lps_clacp

 Part of the [International Law Commons](#), and the [International Trade Commons](#)

Recommended Citation

Larouer, Christophe J., "In the Name of Sovereignty? The Battle over In Dubio Mitius Inside and Outside the Courts" (2009). *Cornell Law School Inter-University Graduate Student Conference Papers*. Paper 22.
http://scholarship.law.cornell.edu/lps_clacp/22

This Article is brought to you for free and open access by the Conferences, Lectures, and Workshops at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law School Inter-University Graduate Student Conference Papers by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

In the Name of Sovereignty? The Battle over *In Dubio Mitius* Inside and Outside the Courts

Christophe J. Larouer*

Contrary to some prominent legal scholars' predictions, the principle of in dubio mitius, that is, the principle of restrictive interpretation of treaty obligations in deference to the sovereignty of states, has not disappeared. Worse, the Appellate Body (AB) of the World Trade Organization (WTO) has carried it into the 21st Century, reigniting the ideological debate dividing the legal doctrine over the conception of what the relationship between domestic and international law should be. Therefore, after retracing the history of this principle during which key legal figures opposed one another, this article examines the divergent positions defended by the proponents and opponents of in dubio mitius, including domestic and international courts, to demonstrate the isolation and weakness of the AB's position towards this principle to the detriment of its legitimacy. To this end, this article contributes to the broader discussion concerning states' regulatory autonomy and the relevance of the concept of sovereignty in today's globalizing society.

I. Introduction

At the outset this article seeks to determine whether there is some evidence establishing the deliberate omission of the principle of *in dubio mitius*, that is, the principle of restrictive interpretation of treaty obligations in deference to the sovereignty of states, from the language of the Vienna Convention on the Law of Treaties (VCLT).¹ Guided by Lord McNair's suggestion to delve into the preparatory work of the 1956 Resolution upon the Interpretation of Treaties of the Institute of International Law (IIL) to find an answer to this question,² this article shows that the division of the aforesaid resolution's drafters over *in dubio mitius* transcended this principle and

* S.J.D. Candidate and Fellow of the Institute of International Economic Law, Georgetown University Law Center. Preliminary draft prepared for the Fifth Cornell Inter-University Graduate Conference, Cornell University School of Law, March 27-28, 2009.

¹ Vienna Convention on the Law of Treaties (1969), 1155 U.N.T.S. 331, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

² See LORD MC NAIR, THE LAW OF TREATIES 766 (Oxford: Clarendon Press, 1961). See also JOHN H. JACKSON, SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 185 (Cambridge University Press, 2006) (emphasizing that “during the drafting of the [1956] Resolution upon the Interpretation of Treaties . . . the members were unable to come to an agreement as to mention of this rule, with the result that it does not appear in the resolution.”)

exposed differing conceptions of the purpose of treaty interpretation.³ Partisans of the textual, objective or plain meaning approach⁴ – or what U.S. Supreme Court Justice Breyer calls the “literal text-based approach”⁵ – seem to favor the application of *in dubio mitius* to prevent judicial legislation,⁶ whereas advocates of the subjective and teleological approaches to treaty interpretation have denounced its danger.⁷ However, neither school of thought has prevailed, for this ideological legal debate is still raging both at the international⁸ and domestic levels.⁹ To this end, the affirmation of the principle of *in dubio mitius* by the AB of the WTO in *EC – Hormones* as “an interpretative principle . . . widely recognized in international law”¹⁰ perpetuates the legal controversy regarding a principle whose scope was already questioned by Roman jurists.¹¹

Although the omission of the principle of *in dubio mitius* from the VCLT originated in its drafters’ diverging conceptions of treaty interpretation, this principle did not disappear. To the contrary, sixty years after Hersch

³ See Francis Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference*, 18 INT. & COMP. L. Q. 318 (1969).

⁴ See Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT’L L. 203 (1957).

⁵ STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 85 (Knopf, 2005).

⁶ *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) at para. 2 (1975) (separate opinion of Judge Sir Gerald Fitzmaurice).

⁷ See Sir Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 Brit. Y.B. Int’l L. 56 (1949).

⁸ See e.g., Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93(3) CALIF. L. REV. 48 (2008); Federico Ortino, *Treaty Interpretation and the WTO Appellate Body Report in US – Gambling: A Critique*, 9(1) J. INT. ECON. LAW 117, 146 (2006) (warning that “ignoring the contextual and teleological dimensions of treaty interpretation may undermine the legitimacy of WTO reports as well as of the WTO dispute settlement system as a whole.”); and Henrik Horn & Joseph Weiler, *European Communities – Trade Description of Sardines: Textualism and its Discontent*, in HENRIK HORN & PETROS C. MAVROIDIS ET AL., *THE WTO CASE LAW OF 2002* 253 (Cambridge University Press, 2005).

⁹ See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Princeton University Press, 1997). But cf. BREYER, n.____.

¹⁰ Appellate Body Report, *EC Measures Concerning Meat and Meat Products (EC – Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 16 January 1998, para. 165, n. 154.

¹¹ *Annuaire de l’Institut de Droit International, Quarante-sixième volume, Session de Grenade, Avril 1956, Quatrième question : De l’interprétation des traités, Rapporteur: Sir Gerald Fitzmaurice*, at 341 (Gutzwiller approving the elimination of the mention regarding restrictive interpretation, since Roman jurists already could not agree on the scope to be given to this principle).

Lauterpacht warned against the repercussions of the recognition by the International Court of Justice (ICJ) of the “theoretical relevance of the rule of restrictive interpretation,”¹² the AB in *EC – Hormones*, in turn, has helped to keep this principle “alive in some arbitral awards, in the pleadings of the parties, and in the literature of international law.”¹³ Not only does this behavior undermine the role played by the WTO and multilateralism in international law, but it also discredits the prediction advanced by many that “[s]overeignty” has lost its central place in international law.”¹⁴

If the repackaging of the debate concerning sovereignty into a discussion relating to nation-states’ *regulatory autonomy*¹⁵ exceeds the scope of this article, the persistence of *in dubio mitius* proves that the motives underlying unilateral state action are stronger than ever. And the ability of the WTO to defeat this course remains dubious, for, unlike other international courts, the AB has carried this principle into the Twenty-First Century.¹⁶

This article will proceed as follows. Part II demonstrates how the principle of *in dubio mitius* was introduced in international law for the purpose of treaty interpretation and deliberately left out of the language of the VCLT. Part III turns to the case law of the WTO and other international and domestic tribunals to expose not only the isolation of the AB’s position towards this principle, but also the weakness of its reasoning. Part IV draws on the doctrinal reactions generated by the AB to transcend partisanship and discredit false claims, before Part V concludes.

II. Origin of the Principle of *In Dubio Mitius*

¹² Lauterpacht, *supra*, n. ____, at 63.

¹³ *Id.*

¹⁴ Martti Koskenniemi, *What Use for Sovereignty Today?*, The Second Biennial General Conference of the Asian Society of International Law, International Law in a Multi-polar and Multi-civilizational World: Asian Perspectives, Challenges and Contributions, Tokyo, 1-2 August 2009, available at <http://www.asiansil-tokyo2009.com/pdf/abstract-koskenniemi.pdf>. See also Anne-Marie Slaughter, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, 39 GOVERNMENT AND OPPOSITION 159 (2004).

¹⁵ See, e.g., Armin von Bogdandy, *Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law*, 6(3) INT’L J. CON. L. 397 (2008); Michael Ming Du, *Domestic Regulatory Autonomy under the TBT Agreement: From Non-discrimination to Harmonization*, 6(2) CHINESE J. INT’L L. 269 (2007); and Joel P. Trachtman, *Regulatory jurisdiction and the WTO*, 10(3) J. INT. ECON. LAW 501 (2007).

¹⁶ Nearly every single legal article pertaining to the question of *in dubio mitius* has been triggered by the AB’s report in *EC – Hormones*. See *infra* IV. Division of the Legal Doctrine on the Principle of *In Dubio Mitius*, at ____ and accompanying notes.

In a nutshell, the “teachings of the most highly qualified publicists of the various nations,”¹⁷ are responsible for incorporating a concept first used in domestic criminal and contract law in the area of treaty interpretation.

A. When Was the Principle of *In Dubio Mitius* introduced in International Law?

I. A Criminal Law Principle

The principle of *in dubio mitius* originated in the Roman law maxim *Semper in dubiis benigniora praeferenda sunt* (i.e., in doubtful matters preference should always be given to the more benign [benevolent, liberal] solution).¹⁸ This maxim used in criminal cases¹⁹ evolved into the principle *in dubio pro reo* (i.e., when in doubt, in favor of the accused),²⁰ which is better known as the presumption of innocence.²¹ Francis Wharton was the first

¹⁷ Article 38(1)(c)(d) of the Statute of the International Court of Justice.

¹⁸ The Corpus Iuris of Emperor Justinian (529-533 A.D.), Legal Maxims: Digest Book 50 Chapter 17, Dig.50.17.56, Gaius 3 de legatis ad ed. urb.

¹⁹ See Fabio Lopez-Lazaro, ‘No Deceit Safe in Its Hiding Place’: □*The Criminal Trial in Eighteenth-Century Spain*, 20 (3) LAW AND HISTORY REV. 33 (2002).

²⁰ The *in dubio pro reo* principle is still expressly used in the decisions of the Court of Justice of the European Communities (ECJ). See, e.g., Case C□62/06 *ZF Zefeser* [2007] ECR I□607, at para. 11; and Case T-43/02 *Jungbunzlauer v. Commission* [2006] OJC-294/41, at para. 142.

²¹ For a series of references and decisions illustrating the correlation between the principles of *in dubio pro reo* (i.e., when in doubt, in favor of the accused) and the presumption of innocence, see, e.g., JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* 122 (Yale University Press, 2008); MICHAEL BOHLANDER, *INTERNATIONAL CRIMINAL JUSTICE: A CRITICAL ANALYSIS OF INSTITUTIONS AND PROCEDURES* 106 (Cameron May, 2007); FRANCIS JACOBS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 113 (Oxford University Press, 1975) (noting that “[w]hat the principle of the presumption of innocence requires here is first that the court should not be predisposed to find the accused guilty, and second that it should at all times give the accused the benefit of the doubt, on the rule *in dubio pro reo*.”); *M. H. D. v. the International Telecommunication Union*, 97th Session, Judgment No. 2351, at 11 (Int’l Lab. Org. Admi. Trib. 2004) (finding that “[c]ontrary to what the ITU maintains, however, the burden of proof rests with the Administration, since the complainant must enjoy a presumption of innocence and the protection afforded by the principle *in dubio pro reo*.”); and *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A (Int’l Crim. Trib. for Former Yugoslavia 2007) (stating that “[t]he Appeals Chamber is satisfied that the principle of *in dubio pro reo*, as a corollary to the presumption of innocence, and the burden of proof beyond a reasonable doubt,²¹ applies to findings required for conviction, such as those which make up the elements of the crime charged.”)

scholar to use *in dubio mitius* in the context of international law.²² However, the principle was still limited to the area of international criminal law.²³

2. *First Attempts to Use In Dubio Mitius to Interpret Ambiguous Treaty Provisions*

McNair reproduced a *Report by the King's Advocate dated 3 February 1835* in which the use of *in dubio mitius* was advanced to interpret the terms “warlike stores” contained in a treaty signed in London in 1834 between Great Britain, France, Spain and Portugal. The relevant passage of this report reads as follows:

I have the Honor to report that, in the interpretation of Treaties, the terms of which are vague and indefinite, whatever tends to destroy the equality of a Contract, and to lay a burthen upon one only of the contracting parties, must be construed in a strict and limited sense, and that the obligation is not to be extended beyond what is actually expressed²⁴

Lassa Oppenheim was the first scholar to have advocated the application of *in dubio mitius* for the interpretation of treaty provisions whose meanings are ambiguous. The language used then by Oppenheim will pass the test of time, as the AB in *EC – Hormones* will use the exact same words when referring to *in dubio mitius*. To that end, compare the similarity between Oppenheim’s comments on *in dubio mitius* and footnote 154 of the AB’s report in *EC – Hormones*.

According to Oppenheim:

The principle in *dubio mitius* must be applied interpreting treaties. If, therefore, the meaning of a stipulation 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.²⁵ (emphasis

²² See FRANCIS WHARTON, COMMENTARIES ON LAW, EMBRACING CHAPTERS ON THE NATURE, THE SOURCE, AND THE HISTORY OF LAW; ON INTERNATIONAL LAW, PUBLIC AND PRIVATE; AND ON CONSTITUTIONAL AND STATUTORY LAW 764 (Kay and brother, 1884)

²³ See, e.g., JOHN BASSETT MOORE & FRANCIS WHARTON, A DIGEST OF INTERNATIONAL LAW: AS EMBODIED IN DIPLOMATIC DISCUSSIONS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS, INTERNATIONAL AWARDS, THE DECISIONS OF MUNICIPAL COURTS, AND THE WRITINGS OF JURISTS 335 (G.P.O., 1906).

²⁴ See MC NAIR, *supra*, n.____, at 462.

²⁵ LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 561 (vol. 1, Longmans, Green, 1905).

added)

As for footnote 154 of the AB's report in *EC – Hormones*, it reads in part:

The principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal *supremacy* of a party, or involves less general restrictions upon the parties.²⁶ (emphasis added)

3. *Lauterpacht's Decisive Contribution*

If Oppenheim advocated the use of *in dubio mitius* to interpret ambiguous treaty provisions in deference to the sovereign state assuming the obligation, Lauterpacht legitimized - probably against his will - its use by admitting its existence and supporting his observations by citing Francis Wharton's work.²⁷ Therefore, although Hersch Lauterpacht cautioned against the use of *in dubio mitius* in treaty interpretation and denounced the danger of "restrictive interpretation of obligations as a general principle of law" (i.e., *in dubio mitius*),²⁸ he constitutes the missing link between the legal maxim in force under Emperor Justinian and the finding of the AB in *EC – Hormones*.

B. Why Was the Principle of *In Dubio Mitius* Left Out of the VCLT?

1. *Preparatory Work of the VCLT: A Dead-End*

First, it is worthy to note that the principle of *in dubio mitius* was never once referred to in the preparatory work of the VCLT. The only implicit allusion to such a principle pertained to the use of maxims in treaty interpretation, which was made in the commentaries to Article 28 of the 1966 Draft Articles on the Law of Treaties with commentaries:

(3) Most cases submitted to international adjudication involve the interpretation of treaties, and the jurisprudence of international tribunals is rich in reference to principles and maxims of interpretation. In fact, statements can be found in the decisions of international tribunals to support the use of almost every principle or maxim of which use is made in national systems of law in the interpretation of statutes and contracts. Treaty interpretation is, of

²⁶ See *EC – Hormones*, *supra*, n.____.

²⁷ See HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW: WITH SPECIAL REFERENCE TO ARBITRATION 178 (The Lawbook Exchange, Ltd, 2002) (reprint of 1927 ed.)

²⁸ See Lauterpacht, *supra*, n.____, at 59.

course, equally part of the everyday work of Foreign Ministries.

(4) Thus, it would be possible to find sufficient evidence of recourse to principles and maxims in international practice to justify their inclusion in a codification of the law of treaties, if the question were simply one of their *relevance* on the international plane. But the question raised by jurists is rather as to the *non-obligatory character* of many of these principles and maxims. They are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document. Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document; the particular arrangement of the words and sentences, their relation to each other and to other parts of the document, the general nature and subject-matter of the document, the circumstances in which it was drawn up, etc. Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case. In other words, recourse to many of these principles is *discretionary* rather than obligatory and the interpretation of documents is to some extent an art, not an exact science.²⁹ (emphasis added)

Needless to say, the caution expressed by the VCLT's drafters was such that even the use of maxims in treaty interpretation was depleted of all meaning. In this context, as McNair underlined, the examination of the preparatory work of the 1956 Resolution upon the Interpretation of Treaties of the IIL explains why the principle of *in dubio mitius* was left out of the language of the VCLT.

2. Preparatory Work of the 1956 Resolution upon the Interpretation of Treaties of the IIL: The Answer

Between 1950 and 1956, the members of the IIL's committee in charge of the resolution regarding the interpretation of treaties were not able to come to an agreement regarding notably the rule of restrictive interpretation (i.e., *in dubio mitius*). As a result, no mention of this rule was made in the final resolution of the IIL adopted in Granada in April 1956. Analyzing the work of the IIL, Christian Tomuschat reached the conclusion that:

²⁹ International Law Commission, *Draft Articles on the Law of Treaties with commentaries*, U.N. Doc. A/CN.4/SER.A/1966/add. 1., 2 YBK. INT'L L. COMM'N 218 (1966).

This outcome of the deliberation (of the International Law Commission) may be assessed as more than just an accidental event. It demonstrates that the sovereign State today is not anymore the core value of international community. It has become clear that conditions of peace and security in international society require a collective effort on part of all States so that restrictions to sovereignty pertain to the normal picture of international relations and cannot be termed as unusual exception.³⁰

Before delving into the details of the preparatory work of this committee, one must observe that the *special rapporteurs* on the Law of Treaties of the International Law Commission (ILC) were also the *rapporteurs* to the IIL, which demonstrates the extent to which the debate that took place within the IIL affected the VCLT.

The deliberation of the IIL is foremost the confrontation of two men and two conceptions of treaty interpretation. On the hand, Lauterpacht, a strong advocate of the subjective approach,³¹ provided the IIL with the initial report upon which the resolution should have been adopted. On the other hand, Gerald Fitzmaurice, a defender of the textual approach,³² singled-handedly put an end to the debate after replacing Lauterpacht who had resigned to become a judge at the ICJ. This confrontation played out in the key four reports of the IIL that led to the adoption of the 1956 Resolution upon the Interpretation of Treaties.³³

(a) Bath – September 1950

Lauterpacht's report accompanying his first project of resolution on the interpretation of treaties to the IIL is systematic and resolute. He did not hesitate to marginalize some of the committee's members' favorable conception of the principle of restrictive interpretation (e.g., Profs. Guggenheim's, Podesta Costa's, and Rousseau's). To this end, it is interesting to note that the AB in *EC – Hormones* cited Prof. Rousseau to support the recognition of the principle of *in dubio mitius* as an interpretative principle "widely recognized in international law."³⁴

For Lauterpacht, the principle of restrictive interpretation sometimes appeared in domestic law, in the area of contract interpretation, under the form of the principle of *in dubio mitius* (i.e., "a presumption according to which the meaning of an ambiguous contract stipulation to be preferred is the least

³⁰ Christian C. Tomuschat, *International Law: Ensuring the survival of mankind on the eve of a new century*, 281 R.C.A.D.I. 171 (1999).

³¹ See Mitchell, *supra*, n.____.

³² See Fitzmaurice, *supra*, n.____.

³³ The views expressed in these reports, which are available in French only, are the result of my translation and do not represent the official view of the IIL.

³⁴ See *EC – Hormones*, *supra*, n.____.

onerous to the debtor of the obligation.”)³⁵ Please note that this explicit reference to the actual words *in dubio mitius* were used only once during the entire process of the IIL’s Resolution upon the Interpretation of Treaties. Lauterpacht emphasized (i) that the principle of *in dubio mitius* “was not an absolute rule of interpretation in private law;”³⁶ and (ii) that the “exaggerations of the maxim *in dubio mitius* were amplified by considerations inferred from the sovereignty of states.”³⁷

Notwithstanding the intrinsic value of *in dubio mitius*, Lauterpacht demonstrated that several rules of treaty interpretation were contradictory and mutually exclusive,³⁸ including the principles of *in dubio mitius* and effectiveness or *effet utile*.³⁹ He illustrated his observation by several decisions of the U.S. Supreme Court⁴⁰ and the Permanent Court of International Justice (PCIJ)⁴¹ in which these tribunals had chosen to apply the effectiveness principle over the principle of restrictive interpretation. Note that the AB seems to have followed in the steps of these tribunals.⁴²

The work of the committee on the interpretation of treaties was concluded by a series of reactions to Lauterpacht’s report, several of them diverging with his conception of the restrictive interpretation principle. Thus, Sir Eric Beckett deplored that too little value was given to various canons of interpretation, including the presumption against restrictions on sovereignty (i.e., *in dubio mitius*), which are found in the books or in judicial or arbitral decisions.⁴³

(b) Sienna – April 1952

Lauterpacht deemed it important to reproduce excerpts of some the committee’s members’ letters that he received in 1951, for instance Max Huber’s letter describing the circumstances under which the principle of

³⁵ *Annuaire de l’Institut de Droit International, Quarante-troisième volume, Tome I, Session de Bath, Septembre 1950, Rapport et projet de Résolutions présentées par M. H. Lauterpacht*, at 402.

³⁶ *Id.* at 403.

³⁷ *Id.*

³⁸ *Id.* at 372, 412.

³⁹ *Id.* at 372.

⁴⁰ *See Nielsen v. Johnson*, 279 U.S. 47 (1929).

⁴¹ *See, e.g., Acquisition of Polish Nationality*, 1923 P.C.I.J. (ser. B) No. 7, at 17 (Sept. 15); *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, 1922 P.C.I.J. (ser. B) No. 2 (Aug. 12); and *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer*, 1926 P.C.I.J. (ser. B) No. 13, (July 23).

⁴² *See infra* (c) The Flaw of Footnote 154, at ____, and (d) Unsolved Questions, at ____ and accompanying notes.

⁴³ *See Annuaire de l’Institut de Droit International, supra*, n. ____, at 437.

restrictive interpretation is “natural.”⁴⁴ For him, this principle is particularly justified to interpret treaties where only one party dominates the treaty making-process to the detriment of the parties’ common intention.⁴⁵ As a result, the definitive project of Resolutions presented by Lauterpacht undermined the principle of restrictive interpretation by emphasizing that:

As demonstrated by the international judicial and arbitral jurisprudence, the principle of restrictive interpretation plays an insignificant role in practice; its legitimacy in the doctrine is most questionable. There is no reason to use it unless in the extreme case where there are no other means to establish the parties’ common intention. To that end, there is no difference between the clauses conferring competence to the international tribunals and the other treaties’ provisions.⁴⁶

Lauterpacht conceded that “it will be impossible to prevent the parties from arguing that any clause limiting sovereignty must be interpreted restrictively.”⁴⁷ However, he affirmed that “*de lege lata*, the rule of restrictive interpretation has barely any practical importance.”⁴⁸ I believe that he underestimated the attraction represented by this principle when he concluded that this principle could be used “only when all of the other methods of interpretation turned out to be insufficient,”⁴⁹ which constitutes a situation that “will likely never happen.”⁵⁰

It did not take long for criticisms to start flooding in. Fitzmaurice led them, emphasizing that “the rule of restrictive interpretation plays a significant part in the negotiation of treaties where the parties lay down rules that more or less depart from general international law.”⁵¹ He later added that “the rule of restrictive interpretation plays a primordial part in the negotiation of treaties because treaty negotiations are always conducted with the knowledge that interpretation of the texts will be restrictive.”⁵² Guggenheim urged the IIL to select one of the two existing conceptions of the rule of restrictive interpretation without trying to reconcile them.⁵³ According to him,

⁴⁴ *Annuaire de l’Institut de Droit International, Quarante-quatrième volume, Tome I, Session de Sienne, Avril 1952, Observations complémentaires et projet définitif de résolutions présentées par M. H. Lauterpacht*, at 201.

⁴⁵ *Id.*

⁴⁶ *Id.* at 223.

⁴⁷ *Annuaire de l’Institut de Droit International, Quarante-quatrième volume, Tome II, Session de Sienne, Avril 1952, Troisième question, De l’interprétation des traités, Rapporteur : M. H. Lauterpacht*, at 364.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 370.

⁵² *Id.* at 395.

⁵³ *Id.*

the first conception of this rule “consists in admitting the least onerous obligation deriving from the text of a treaty assumed by a party,”⁵⁴ while the second conception defended by late judge Anzilotti considers restrictive interpretation as “the adoption of the narrowest meaning of the terms.” Notwithstanding the choice made by the IIL, Guggenheim recommended that “the principle of restrictive interpretation must receive different applications depending on the nature and object of the treaties in question.”⁵⁵

In this context, Paul de la Pradelle’s intervention epitomized the motives having led to the elimination of the rule of restrictive interpretation from the IIL’s Resolution upon the Interpretation of Treaties, for he preferred that this rule not be mentioned in spite of its value because of the “fundamental disagreement opposing the *rapporteur* (i.e., Lauterpacht) and Fitzmaurice.”⁵⁶ In order to dissipate any misunderstanding, he explained that Lauterpacht “was against restrictive interpretation,”⁵⁷ whereas Fitzmaurice “saw in it a fundamental principle.”⁵⁸ Another committee’s member, Bourquin, reused de la Pradelle’s comment word for word.

(c) Aix-en-Provence – April/May 1954

Lauterpacht summarized the various positions expressed by the different committee’s members towards his examination of the principle of restrictive interpretation in his report. Therefore, he found that Basdevant, Bourquin, and Fitzmaurice had found “the project too radical, inasmuch it minimizes the importance of the principle.”⁵⁹ He noted that Basdevant, Scelle, Bourquin, and Guggenheim wanted to insist more on the purpose and object of treaties.⁶⁰ Finally, he observed that Guggenheim and Fitzmaurice sought to specify the meaning of the principle.⁶¹ More generally, Lauterpacht noted that “there was a complete disagreement on (i) the need to mention the principle; and (ii) the importance of the principle,”⁶² and that “no proposal of compromise, amendments or new drafts were suggested.”⁶³

(d) Granada – April 1956

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 396.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Annuaire de l’Institut de Droit International, Quarante-cinquième volume, Tome I, Session d’Aix-en-Provence, Résumé de la question de l’interprétation des traités à l’issue du débat de Sienna, Avril/Mai 1954*, at 230.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

After Aix-en-Provence, the process seemed stalled, but an important event will affect the debate regarding the scope of the restrictive interpretation principle forever: Lauterpacht resigned from the IIL – and the ILC – to become a judge at the ICJ and was replaced in both instances by Fitzmaurice. The result of this change was going to be immediate and unequivocal, as Fitzmaurice announced that he would be “preferable to drop the articles,” which had been controversial up until then (e.g., the principle of restrictive interpretation). He justified his position by saying that the new principles of interpretation “will not be able to be contested.” Surprisingly, he noted that “it would be dangerous to mention the principle of restrictive interpretation in the Resolution of the Institute (IIL).” Yet he added that “the Institute should not give its approval to texts introducing the idea that one can confer to a text a scope broader than what the parties intended it to be.” The juxtaposition of these two ideas shows how Fitzmaurice put an end to a long controversy about the restrictive interpretation while managing to keep this principle’s spirit alive. The following examination of the case law of different international and domestic tribunals proves this point.

It is interesting to note that six members of the IIL’s committee, including Guggenheim, abstained from voting on Fitzmaurice’s resolution.

III. The Principle of *In Dubio Mitius* before the Courts

In 1958 Lauterpacht foresaw that the rule of restrictive interpretation would die out.⁶⁴ Three years later, McNair corroborated this view by stating that the “so-called rule of restrictive interpretation . . . is believed to be now of declining importance and the time may be not far distant when it will disappear from the books.”⁶⁵ Up until the report of the AB in *EC – Hormones*, these predictions seemed to have been correct. However, contrary to the widespread doctrinal view accepting the extinction of *in dubio mitius*,⁶⁶ this article shows how the AB along with other domestic and international tribunals has carried this principle into the twenty-first century; so much that the principle of restrictive interpretation resurfaced in the recent conclusions of the ILC relating to unilateral acts of states.⁶⁷

⁶⁴ See John H. Knox, *The Judicial Resolution of Conflicts Between Trade and the Environment*, 28 HARV. ENVTL. L. REV. 63 (2004).

⁶⁵ MCNAIR, *supra*, n._____, at 765.

⁶⁶ See Rudolf Bernhardt, *Evolutionary Treaty Interpretation, Especially of the European Convention on Human Rights*, 42 GERM. Y.B. INT’L L. 14 (1999) (emphasizing that *in dubio mitius* “is no longer relevant, it is neither mentioned in the Vienna Convention, nor has it ever been invoked in the recent jurisprudence of international courts and tribunals. Treaty obligations are in case of doubt and in principle not to be interpreted in favor of State sovereignty.”)

⁶⁷ See *Report of the Working Group of the International Law Commission: Conclusions of the International Law Commission relating to Unilateral Acts of States*, U.N. GAOR, 58th Sess., at 4, U.N. Doc. A/CN.4/L.703 (2006) (paragraph 7

A. The Pre-*Hormones* Legal Landscape

1. *The PCIJ and the ICJ*

From the outset, it is worthy to emphasize that all the judgments of both the PCIJ⁶⁸ and the ICJ are posterior to the introduction of *in dubio mitius* in international law by the legal doctrine. Furthermore, as the Harvard Research in International Law noted, the PCIJ “has formulated relatively few rules of interpretation, and that it has usually stated them with such qualifications as to leave itself completely free to apply them or not accordingly as the circumstances and evidence in a particular case may require.”⁶⁹

(a) The Ideology: *The Lotus Case*

The *Lotus case*⁷⁰ is often deemed to have established a presumption of state sovereignty,⁷¹ embodying the then PCIJ’s voluntarist conception of international society,⁷² that is, the doctrinal movement seeking “to assure the guarantee of the sovereignty of each state.”⁷³ The relevant passage of this judgment reads as follows:

reading: “A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner.”)

⁶⁸ For summaries of the jurisprudence of the PCIJ relative to the interpretation of treaties, see, e.g., Charles Cheney Hyde, *Interpretation of Treaties by the Permanent Court of International Justice*, 24 AM. J. INT’L L. 1-19 (1930); and Sir (William) Eric Beckett, *Decisions of the Permanent Court of International Justice*, 11 BRIT. Y.B. INT’L L. 1 (1930).

⁶⁹ Harvard Research in International Law, *Draft Convention on the Law of Treaties*, 29 AM. J. INT’L L. 943 (Supp) (1935).

⁷⁰ The Case of the S.S. “*Lotus*” (hereinafter *The Lotus case*), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) (holding that Turkey could apply its criminal laws to any foreigner who committed an offense outside of Turkey while harming Turkey or its subjects). For further references about the *Lotus case*, see, e.g., J.L. Brierly, *The Lotus Case*, 44 L.Q.R. 155 (1928); and Ole Spiermann, *Lotus and the double structure of international legal argument*, in L. BOISSON DE CHAZOURNES & PH. SANDS, INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 137 (Cambridge University Press, 1999).

⁷¹ See, e.g., KARL MATTHIAS MEESSEN, EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE 84 (Martinus Nijhoff, 1996); and MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 220 (Cambridge University Press, 2005).

⁷² Brigitte Stern, *Custom at the Heart of International Law*, from *MÉLANGES OFFERTS À PAUL REUTER* 479-99 (Paris: Pedone, 1981) (trans. Michael Byers & Anne Denise), 11 DUKE J. COMP. & INT’L L. 89, 106 (2001).

⁷³ *Id.* at 102.

International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these coexisting independent communities or with a view to the achievement of common aims. *Restrictions upon the independence of states cannot therefore be presumed.*⁷⁴ (emphasis added)

The ideology vehicled by this judgment is encapsulated in the last sentence of the aforementioned excerpt, for the Kingdom of Belgium recently argued in a reply made before the Permanent Court of Arbitration (PCA):

It is the last phrase of this quote, which has been interpreted as consecrating a ‘presumption of sovereignty’. Yet, as J.L. Briery pointed out when the judgment was rendered, if restrictions upon the independence of states cannot be presumed, “neither, it may be said, can the absence of restrictions; for we are not entitled to deduce the law applicable to a specific state of facts from the mere fact of sovereignty or independence.”⁷⁵

However, even before the *Lotus* case, which the majority of writers viewed as presenting “a lethal danger to the future of international law,”⁷⁶ the PCIJ had identified the principle of *in dubio mitius* as meaning that “if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the parties should be adopted.”⁷⁷ It is important nevertheless to mitigate this result by noting that the first decade of the 20th century was dominated by a predominance of bilateral, contractual treaties and a very limited number of multilateral law making treaties.⁷⁸

(b) The Judgments Enhancing *In Dubio Mitius*

⁷⁴ See *The Lotus case, supra*, n.____, at 18.

⁷⁵ Iron Rhine (“Ijzeren Rijn”) Railway (Belgium v. Netherlands), Reply of the Kingdom of Belgium, Perm. Ct. Arbitration, 10 March 2004, at 18, available at <http://www.pca-cpa.org/upload/files/BE Reply.pdf>

⁷⁶ Prosper Weil, *The Court cannot Conclude Definitively . . . Non Liquet Revisited*, 36 COLUM. J. TRANSNAT’L L. 109 (1998).

⁷⁷ See Interpretation of Article 3, Paragraph 2 of the Treaty of Lausanne (Frontier between Turkey and Iraq), 1925 P.C.I.J. (ser. B) No. 12, at 25 (Nov. 21).

⁷⁸ See Joseph H. H. Weiler, *The Geology of International Law - Governance, Democracy and Legitimacy*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZAÖRV) 547, 549 (2004).

There are at least two decisions in the case regarding the *Free Zones* between France and Switzerland in which the PCIJ unambiguously stated that “in case of doubt, a limitation of sovereignty must be construed restrictively.”⁷⁹

(c) The Judgments Undermining *In Dubio Mitius*

In its first judgment, the *Wimbledon* case between Germany and Poland, the PCIJ held that:

Germany has to submit to an important limitation of the exercise of the sovereign rights which no one disputes that she possesses over the Kiel Canal. But the Court feels obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted.⁸⁰

Six years later, the PCIJ still addressed the principle of restrictive interpretation cautiously in *Territorial Jurisdiction of the International Commission of the River Oder*, for it found that:

This argument, though sound in itself, must be employed only with the greatest caution. To rely upon it is not sufficient that the purely grammatical analysis of a text should not lead to definitive results; there are many other methods of interpretation, in particular reference is properly had to the principles underlying the matters to which the text refers; 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.⁸¹

Lauterpacht characterized the recourse to restrictive interpretation by the PCIJ only if all other methods of interpretation had failed as a “frequent feature of the jurisprudence of the Court.”⁸² For him, a good illustration of this jurisprudence was the Advisory Opinion concerning the *Polish Postal Service in Danzig* in which the PCIJ held that:

In the opinion of the Court, the rules as to a strict or liberal construction of treaty stipulations can be applied only in cases where

⁷⁹ Case of the Free Zones of Upper Savoy and the District of Gex (second phase), 1930 P.C.I.J. (ser. A) No. 24, at 12 (Dec. 6); Case of the Free Zones of Upper Savoy and the District of Gex, 1932 P.C.I.J. (ser. A/B.) No. 46, at 167 (June 7).

⁸⁰ The S.S. “Wimbledon”, 1923 P.C.I.J. (ser. A) No. 01, at 24-25 (Jan. 16).

⁸¹ Case relating to the Territorial Jurisdiction of the International Commission of the River Oder, 1929 P.C.I.J. (ser. A) No 23, at 26 (Sept. 10).

⁸² Lauterpacht, *supra*, n.____, at 61.

ordinary methods of interpretation have failed.⁸³

(d) The Ambiguous Judgments

The ICJ in the *Nuclear Tests Case* stated that when a State assumes legal obligations by way of unilateral declaration “a restrictive interpretation is called for.”⁸⁴ Tomuschat tempered this finding by saying that:

[T]his pronouncement does not prove, however, that still today the ICJ clings to the traditional doctrine. Only exceptionally can States be bound by unilateral declarations they have made publicly, namely when there exists a manifest intent to enter into a legal commitment. Great caution is required to sustain such conclusion, in particular because the State concerned receives no consideration. Normally States assume legal obligation on the base of reciprocity. A treaty as a bilateral instrument, embodying an undertaking of give and take, cannot be compared with a unilateral declaration⁸⁵

On this particular point regarding the application of the restrictive interpretation principle to treaties, Lauterpacht emphasized that *in dubio mitius* “in so far as it implies an interpretation unfavourable to the recipient of benefits under the contract and one which is less onerous to the party burdened with an obligation, *is not a general principle of law*”⁸⁶ and “quite independently of the fact that its merits do not seem to be as apparent as is generally assumed . . . is open to the objection that it does not take into account the benefits which the party bound by the commitment has reaped in consideration of its undertaking.”⁸⁷ (emphasis added)

2. *The ECtHR*

(a) The Rejection of *In Dubio Mitius: Golder v. United Kingdom*

In *Golder*, the European Court of Human Rights (ECtHR) read in Article 6 of the European Convention on Human Rights (ECHR), which guarantees a fair trial, the right of access to a court without any textual support for (or against) such a right.⁸⁸ It construed this provision “by emphasizing the rule-of-law object and purpose of the Convention, and rejecting the idea that a law-making treaty such as the ECHR should be interpreted *in dubio mitius* [i.e.

⁸³ Polish Postal Service in Danzig, 1925 P.C.I.J. (ser. B) No. 11, at 39 (May 16).

⁸⁴ Nuclear Tests Case (Australia v. France), 1974 I.C.J. 253, 267 (Dec. 20).

⁸⁵ See Christian C. Tomuschat, *supra*, n.____.

⁸⁶ Lauterpacht, *supra*, n.____, at 48.

⁸⁷ *Id.*

⁸⁸ See *Golder v. United Kingdom* (separate opinion of Judge Sir Gerald Fitzmaurice), *supra*, n.____, at para. 18.

restrictively].”⁸⁹

The European Commission of Human Rights had previously reached the same conclusion in this case, accepting the position of the applicant (i.e., Sydney Elmer Golder) that “the ‘extended’ meaning [of art. 6 (1) of the ECHR] should be preferred to the ‘restricted’ one put forward by the government.”⁹⁰ The Commission justified its conclusion by arguing that “[t]he decisive consideration here must be that the overriding function of this Convention is to protect the rights of the individual and not to lay down as between States mutual obligations which are to be restrictively interpreted having regard to the sovereignty of these States.”⁹¹

Nevertheless, Fitzmaurice, who was a judge of the ECtHR at the time, dissented in this case, implying the Court’s illegitimate interpretative process:

I am quite unable to agree with the Court on what has been the principal issue of law in these proceedings, - namely that of the applicability, and interpretation, of article 6, paragraph 1 (art. 6-1), of the Convention - the question of the alleged right of access to the courts - the point here being, not whether the Convention ought to provide for such a right, but whether it actually does. This is something that affects *the whole question of what is legitimate by way of the interpretation of an international treaty while keeping within the confines of a genuinely interpretative process*, and not trespassing on the area of what may border on judicial legislation.⁹² (emphasis added)

Almost twenty years after his report to the IIL on the interpretation of treaties, and ten years after his report to the ILC on the law of treaties, Fitzmaurice had not changed his hostile position towards the principle of restriction. For him:

These various factors could justify even a somewhat restrictive interpretation of the Convention but, without going as far as that, they must be said, unquestionably, not only to justify, but positively to demand, a cautious and conservative interpretation, particularly as regards any provisions the meaning of which may be uncertain, and where extensive constructions might have the effect of imposing upon the contracting States obligations they had not really meant to assume,

⁸⁹ Jonas Bering Liisberg, *Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a fountain of law or just an inkblot?* (Harvard Jean Monnet Working Paper 04/01), available at <http://www.jeanmonnetprogram.org/papers/01/010401.html>

⁹⁰ Sidney Elmer Golder against the United Kingdom, App. No. 4451/70, 16 Eur. Comm’n H.R. (ser. B) at 31 (1973) (Commission report).

⁹¹ *Id.*

⁹² Golder v. United Kingdom (separate opinion of Judge Sir Gerald Fitzmaurice), *supra*, n. ____.

or would not have understood themselves to be assuming. Any serious doubt must therefore be resolved in favour of, rather than against, the government concerned, - and if it were true, as the Judgment of the Court seeks to suggest, that there is no serious doubt in the present case, then one must wonder what it is the participants have been arguing about over approximately the last five years!⁹³

Nor had Fitzmaurice lost the verve that had allowed him to impose his view at the IIL without concealing his devotion to the principle of restrictive interpretation, when he concluded his dissenting opinion by saying:

I have to conclude that - like it or not, so to speak - a right of access is not to be implied as being comprehended by Article 6.1 (art. 6-1) of the Convention, except by a process of interpretation that I do not regard as sound or as being in the *best interests of international treaty law*.⁹⁴ (emphasis added)

(b) The Margin of Appreciation Doctrine: Resurgence of *In Dubio Mitius*

The ECtHR has developed the doctrine of margin of appreciation to “avoid damaging confrontations between the Court and Contracting States over their respective spheres of authority and enables the Court to balance the sovereignty of Contracting Parties with their obligations under the Convention.”⁹⁵

Put simply, the ECtHR has refused to interpret domestic law provisions in political and economical sensitive areas.⁹⁶ Thus, in *Handyside*, examining the consistency of an English act (i.e., the Obscene Publications Act 1959, as amended by the Obscene Publications Act 1964), it expressly stated that “[by] reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these

⁹³ *Id.* at para. 39.

⁹⁴ *Id.* at para. 48.

⁹⁵ RONALD ST. JOHN MACDONALD, *THE MARGIN OF APPRECIATION IN THE EUROPEAN SYSTEM OF HUMAN RIGHTS* 123 (Martinus Nijhoff, 1993).

⁹⁶ See *James and Others v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) at 46 (1986) (the Court finding it natural that “the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgment as to what is ‘in the public interest’ unless that judgment be manifestly without reasonable foundation.”) For comprehensive analyses of the margin of appreciation doctrine, see, e.g., HOWARD C. YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (Martinus Nijhoff, 1996); and T. A. O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 HUM. RTS. Q 474 (1982).

requirements”⁹⁷

In this context, consider the following legal arguments made by the European Communities (EC) in *EC – Hormones*: (i) “It is submitted by the European Communities that WTO panels should adopt deferential “reasonableness” standard when reviewing a Member’s decision to adopt a particular science policy or a Member’s determination that a particular inference from the available data is scientifically plausible;”⁹⁸ and (ii) “The European Communities considers that the principle of reasonable deference is applicable in all highly complex factual situations, including the assessment of the risks to human health arising from toxins and contaminants, and that therefore, the Panel applied an inappropriate standard of review in the present case.”⁹⁹

Can one still maintain that they reflect the EC’s will to see the precautionary principle approach apply to the case or are the EC members countries merely using a successful jurisprudential tool (i.e., the margin of appreciation doctrine)? In any case, the EC is far from being the only WTO Member used to applying such a doctrine. Consider the following excerpt drawn from a decision of the U.S. Supreme Court reviewing a rule adopted by the U.S. Nuclear Regulatory Commission to evaluate the environmental effects of a nuclear power plant’s fuel cycle:

Third, a reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential. *See, e.g., Industrial Union Dept. v. American Petroleum Institute*, 448 U. S. 607, 656 (1980) (plurality opinion); *id.* at 448 U. S. 705-706 (Marshall, J., dissenting).¹⁰⁰

Notwithstanding its relevance, the margin of appreciation doctrine, like the principle of *in dubio mitius*, reinforces nation states’ discretion and jeopardizes the very foundations of the international legal system. This is especially concerning since this doctrine is used by other international courts, such as the ICJ¹⁰¹ or NAFTA tribunals.¹⁰² To this end, Eyal Benvenisti’s comments regarding the danger represented by the doctrine of margin of

⁹⁷ *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 48 (1976).

⁹⁸ *EC – Hormones, supra*, n.____, at para. 14.

⁹⁹ *Id.* at para. 15.

¹⁰⁰ *Baltimore G. & E. Co. v. NRDC*, 462 U.S. 87 (1983).

¹⁰¹ *See* André Nollkaemper, *The Role of Domestic Courts in the Case Law of the International Court of Justice*, 5(2) CHINESE J. INT’L L. 301, 318 (2006) (equating the deference showed by the ICJ towards domestic courts to the margin of appreciation doctrine applied by the ECtHR).

¹⁰² *Gami Investments, Inc. v. The Government Of The United Mexican States*, NAFTA Ch. 11 Arb. Trib. (Nov. 15, 2004), 44 ILM 545 (2005), at para. 41.

appreciation, which is equally applicable to *in dubio mitius*, seems ineluctable:

[T]he rhetoric of supporting national margin of appreciation and the lack of corresponding emphasis on universal values and standards may lead national institutions to resist external review altogether, claiming that they are the better judges of their particular domestic constraints and hence the final arbiters of their appropriate margin.¹⁰³

3. *The Principle of In Dubio Mitius in Arbitral Awards*

As McNair rightly noted, the principle of *in dubio mitius* “dates from an age in which treaties were interpreted not by legal tribunals, and not even much by lawyers, but by statesmen and diplomats.”¹⁰⁴ Consequently, arbitral tribunals have constituted a place of predilection to raise such a principle. Thus, in *Claims of the Nordstjerner Company*, the arbitrator, Prof. Eugène Borel, concluded that:

Considering the natural state of liberty and independence which is inherent in sovereign states, they are not to be presumed to have abandoned any part thereof, the consequence being that the high contracting Parties to a treaty are to be considered as bound only within the limits of what can clearly and unequivocally found in the provisions agreed to and that those provisions, in case of doubt, are to be interpreted *in favor of the natural liberty and independence* of the parties concerned.¹⁰⁵ (emphasis added)

More significantly, the arbitral awards to which the AB referred in *EC – Hormones* unequivocally asserted the relevance of the principle of *in dubio mitius*. Thus, in *USA – France Air Transport Services Arbitration*, the arbitral tribunal believed that “of two possible interpretations, the choice of that involves less extensive obligations for the obligated Party seems to be

¹⁰³ Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31. N.Y.U. J. INT’L L. & POL. 844 (1999).

¹⁰⁴ MCNAIR, *supra*, n.____, at 765.

¹⁰⁵ The “Kronprins Gustaf Adolf” (Sweden, USA), 2 R. INT’L ARB. AWARDS 1239, 1254 (1932) (finding that “sovereign States . . . are to be considered as bound only within the limits of what can be clearly and unequivocally found in the provisions agreed to and that those provisions, in case of doubt, are to be interpreted in favor of the natural liberty and independence of the Party concerned.”) *See also* Naomi Russell, In Her Own Right and As Administratrix and Guardian (U.S.A.) v. United Mexican States, 4 R. INT’L ARB. AWARDS 805, 866 (1931) (considering that “in case of doubt the benefit should be accorded to the respondent Government that is, Mexico, in the present case.”) It is noteworthy that the Special Claims Commission supported its finding by an exact translation of Oppenheim’s definition of *in dubio mitius* in Spanish (OPPENHEIM, *supra*, n.____.)

especially justified.”¹⁰⁶ Similarly, in *De Pascale Claim*, the Italian-United States Conciliation Commission held:

[T]he construction preferred by the Commission . . . is controlling because of the fact that is the most literal of the three interpretations analysed and is the most restrictive upon the provision in question. The international legal system is in favor of the freedom of the subjects involved. The principle of interpretation that preserves this freedom harmonizes with prevailing the tendency of international intercourse, a fact which also flows, among other things, from the jurisprudence of the Permanent Court of International Justice (for instance Series A, No. 10, p. 18 [i.e., the *Lotus Case*]).¹⁰⁷

However, the depiction of the arbitral tribunals’ position towards the principle of *in dubio mitius* is not as homogeneous as the AB suggests, for some arbitral tribunals have been skeptical about the weight to give to *in dubio mitius*.¹⁰⁸ Consider Lauterpacht’s observation, according to which:

What value – except a negative value as an element of confusion – can be attached to a rule of interpretation which, in the language of a carefully worded arbitral award, is to be resorted to only ‘in the case of absolute impossibility of ascertaining the exact meaning’ of a

¹⁰⁶ Air Transport Services Agreement Arbitration (United States v. France) (1963), 38 INTERNATIONAL LAW REPORTS 182, 243.

¹⁰⁷ *De Pascale Claim* (Italian-United States Conciliation Commission) (1961), 40 INTERNATIONAL LAW REPORTS 250, 256. See also *The Indo-Pakistan Western Boundary (Rann of Kutch) between India and Pakistan (India, Pakistan)* 17 R. INT’L ARB. AWARDS 1, 565 (1968) (opinion of the Chairman) (emphasizing that the claim made by Kutch must “be interpreted restrictively, to the disadvantage of the claiming party and the statements issued by the British authorities must be understood in like fashion and cannot in the circumstance be extensively interpreted.”)

¹⁰⁸ See e.g., *Affaire relative à l’interprétation de l’article 11 du Protocole de Londres du 9 août 1924 (réparations allemandes) (Allemagne contre Commissaire aux revenus gagés)* [hereinafter *Allemagne contre Commissaire aux revenus gagés*], 2 R. INT’L ARB. AWARDS 755, 773 (1926) (finding that “although a provision limiting the right of sovereignty must be interpreted restrictively, the literal meaning of such a provision must always prevail.”) (translated from French); and *The Question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts* [hereinafter *German External Debts*], 19 R. INT’L ARB. AWARDS 67, 137 (1980) (reiterating that “the Court [PCIJ] observed that notwithstanding the validity of the principle, according to which conventions involving the abandonment of certain rights inherent in sovereignty must be interpreted restrictively, one must in every case resolve issues in terms of what a treaty actually meant.”)

treaty?¹⁰⁹

4. The Principle of *In Dubio Mitius* before Domestic Tribunals

Although the Report of the Study Group of the International Law Commission on Fragmentation of International Law characterized *in dubio mitius* as a legal process principle drawn from domestic laws,¹¹⁰ actual mention of this principle in domestic legal orders is extremely rare. In the period prior to the report of the AB in *EC – Hormones*, this principle was mentioned once in a hearing before the Civil Division of the Court of Appeal in the UK in 1996 regarding the application of maxims of interpretation to the construction of a postponement letter. In this case, the judge found that:

Swiss principles of construction applicable to private documents have a close similarity to English principles, both in their general tendency and (to some extent) in particular maxims. The purpose is to discover the real intention of the parties. The language in which they express their agreement is the starting-point in the search for their intention, but the search is not restricted to their language, and the letter is not to prevail over the spirit. Evidence of the surrounding circumstances, including the business context of the agreement, is admissible. Evidence of the parties' subsequent conduct is also admissible as an aid to the construction of a contract. There are various maxims of construction which may be resorted to in case of doubt, including "in dubio mitius" - that is, in case of doubt a provision should be interpreted in the sense most favourable to the party who commits himself; this is only one of many maxims that may apply in case of doubt.¹¹¹

However, some domestic canons of interpretation startlingly close to the concept of *in dubio mitius* have been used before domestic courts. Consider, for instance, the use of the "special Indian-related interpretative canon,"¹¹² according to which "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit,"¹¹³ in the

¹⁰⁹ Lauterpacht, *supra*, n. ____, at 63.

¹¹⁰ See Report of the Study Group of the International Law Commission: *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. GAOR, 58th Sess., at 254, U.N. Doc. A/CN.4/L.682 (2006).

¹¹¹ *Banque Banque Financière de la Cité v Parc (Battersea) Ltd Omnicorp Overseas Ltd* [1996] EWCA Civ 1065.

¹¹² *Chickasaw Nation v. United States*, 534 U.S. 84, 88 (2001).

¹¹³ *Id.*

jurisprudence of the U.S. Supreme Court.¹¹⁴ In *Chickasaw Nation*, the Court did not find this canon of interpretation conclusive,¹¹⁵ arguing that:

For one thing, canons are not mandatory rules. They are guides that “need not be conclusive.” *Circuit City Stores, Inc. v. Adams*, 532 U. S. 105, 115 (2001). They are designed to help judges determine the Legislature’s intent as embodied in particular statutory language. And other circumstances evidencing congressional intent can overcome their force. In this instance, to accept as conclusive the canons on which the Tribes rely would produce an interpretation that we conclude would conflict with the intent embodied in the statute Congress wrote.¹¹⁶

As it is also the case for the principle of *in dubio mitius* with respect to the principle of effectiveness,¹¹⁷ the Court noted that canons of interpretations “are often countered . . . by some maxim pointing in a different direction”¹¹⁸ and “do not determine how to read this statute.”¹¹⁹

Conversely, Justice O’Connor reached a different conclusion, emphasizing that “[f]aced with the unhappy choice of determining which part of a flawed statutory section is in error, I would thus rely upon the long-established Indian canon of construction and adopt the reading most favorable to the Nations.”¹²⁰

B. The Post-*Hormones* Legal Landscape

If several WTO Members have raised *in dubio mitius* as a defense, it is the AB alone who made this situation possible by elevating this principle to the rank of “interpretative principle . . . widely recognized in international law as a ‘supplementary means of interpretation.’”¹²¹ (emphasis added) The motives underlying this decision are likely to be found in the AB’s early attempt to answer the criticisms voiced against the WTO’s dispute settlement system’s threat to national sovereignty, as William Davey noted:

Since its inception in 1995, the World Trade Organization’s dispute settlement system has attracted a great deal of attention – from WTO

¹¹⁴ See, e.g., *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (quoting *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918); and *Shoshone Indians v. United States*, 324 U.S. 335 (1945)).

¹¹⁵ *Chickasaw Nation v. United States*, *supra*, n.____, at 95 (concluding: “[T]he canons here cannot make the difference for which the Tribes argue.”).

¹¹⁶ *Id.*

¹¹⁷ See *Annuaire de l’Institut de Droit International*, *supra*, n.____, at 372, 412.

¹¹⁸ *Chickasaw Nation v. United States*, *supra*, n.____, at 85.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 102 (Justice O’Connor, dissenting).

¹²¹ *EC – Hormones*, *supra*, n.____.

Members, who have made extensive use of it and who have frequently insisted that it rule on quite difficult and controversial disputes – to the public at large, who may know little details about its operation or decisions, but who have (or are told by various sources that they should have) serious concerns about its threat to national sovereignty or their preferred environmental policies. Among academics – both legal and economic – who have followed the evolution of the GATT into the WTO, there is sometimes concern expressed that some controversial decisions emanating from the WTO dispute settlement mechanism may undermine popular, and ultimately governmental, support for the multilateral trading system to the detriment of world at large.¹²²

Under the pressure of some or all of these criticisms – towards which Davey barely hid his frustration – the AB made the mistake in *EC – Hormones* of entitling WTO Members to invoke the principle of *in dubio mitius*, which has led to an ambiguous result regarding both the future and status of this principle in the WTO case law and beyond.

1. WTO Case Law

Implicit or explicit reference to the principle of *in dubio mitius* was made in: 4 AB reports;¹²³ 10 panel reports;¹²⁴ and 4 government submissions.¹²⁵ It

¹²² William Davey, *Has the WTO Dispute Settlement System Exceeded its Authority? A Consideration of Deference Shown by the System to Member Government Decisions and Its Use of Issue-Avoidance Techniques*, 4(1) J. INT. ECON. LAW 79 (2001).

¹²³ See Appellate Body Report, *Korea – Taxes on Alcoholic Beverages (Korea – Alcohol)*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 18 January 1999, paras 5, 12, 47, 78; *EC – Hormones*, *supra*, n.____; Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agriculture Products (Chile – Price Band)*, WT/DS207/AB/R, adopted 23 September 2002, para. 110; and Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (U.S. – Line Pipe Safeguards)*, WT/DS202/AB/R, adopted 15 February 2002, para. 20.

¹²⁴ See Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (China – IP Rights)*, WT/DS362/R, adopted 26 January 2009, paras 4.797-798; Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agriculture Products (Chile – Price Band)*, WT/DS207/R, adopted 3 May 2002, paras 4.45-4.46; Panel Report, *United States – Sections 301-310 of the Trade Act of 1974 (U.S. – Section 301)*, WT/DS152/R, adopted 22 December 1999, paras 4.388-4.389, 4.470; Panel Report, *United States – Anti-Dumping Act of 1916 (U.S. – 1916 Act) (Complaint by Japan)*, WT/DS162/R, adopted 29 May 2000, paras 3.89-3.90; Panel Report, *United States – Anti-Dumping Act of 1916 (U.S. – 1916 Act) (Complaint by the European Communities)*, WT/DS136/R, adopted 31 March 2000, para. 6.87; Panel Report, *Argentina –*

is noteworthy that WTO Members – and not WTO panels or the AB – raised most of these references (i.e., 10 out of 14 WTO panels' and AB's reports).

(a) *EC – Hormones*: The AB's Self-Limitation of Its Exercise of Judicial Interpretation

While interpreting the Panel's interpretation of Article 3.1 of the SPS Agreement, the AB in *EC – Hormones* found that “[w]e 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.”¹²⁶

The AB justified its finding by giving a doctrinal definition of *in dubio mitius*,¹²⁷ which it supported by a series of jurisprudential and doctrinal references supposedly confirming the relevance of this treaty interpretation principle in international law.¹²⁸

Safeguard Measures on Imports of Footwear (Argentina – Footwear Safeguard), adopted WT/DS121/R 25 June 1999, para. 7.8; Panel Report, *United States – Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (U.S. – Lamb Safeguard)*, WT/DS177/R, WT/DS178/R, adopted 21 December 2000, para. 7.16; Panel Reports, *European Communities – Export subsidies on Sugar (EC – Sugar Subsidies)*, WT/DS283/R (Complaint by Thailand), WT/DS266/R (Complaint by Brazil), WT/DS265/R (Complaint by Australia), adopted 15 October 2004, para. 4.208; and Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products (Canada – Milk/Dairy)*, WT/DS103/R, WT/DS113/R, adopted 17 May 1999, para. 4.491.

¹²⁵ See *China – IP Rights*, *supra*, n.____, China's rebuttal submission, at paras 51-56; Panel Report, *United States – Subsidies on Upland Cotton (U.S. – Cotton Subsidies)*, WT/DS267/R, adopted 8 September 2004, Annex A-3: Argentina's Third Party Initial Brief, WT/DS267/R/Add.1, 10 June 2003, at A-15, para. 6, Annex B-3: Third Party Submission by Argentina, WT/DS267/R/Add.1, 15 July 2003, at B-25, para. 41; Oral Statement by the European Communities at the Second Substantive meeting with the parties, *European Communities – Export subsidies on Sugar (EC – Sugar Subsidies)*, DS 265, 266, 283, 11 May 2004, at 25, para. 84; and Appellant Submission of the United States, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (U.S. – Line Pipe Safeguards)*, 20 November 2001, paras 48-49.

¹²⁶ *EC – Hormones*, *supra*, n.____, at para. 165.

¹²⁷ See *supra* 2. First Attempts to Use In Dubio Mitius to Interpret Ambiguous Treaty Provisions, at ____ and accompanying notes.

¹²⁸ See R. JENNINGS & A. WATTS ET AL., *OPPENHEIM'S INTERNATIONAL LAW* 1278 (9th ed, vol. I, Longman, 1992); BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 631 (4th ed., Clarendon Press, 1990); C. ROUSSEAU, *DROIT INTERNATIONAL PUBLIC* 273 (vol. I. 1990); D. CARREAU, *DROIT INTERNATIONAL* 142 (4th ed., Editions A. Pedone, 1994); M. DÍEZ DE VELASCO, *INSTITUCIONES DE DERECHO INTERNACIONAL PÚBLICO* 163-164 (9th ed, vol. I, Editorial Tecnos, 1991); B. CONFORTI, *DIRITTO INTERNAZIONALE* 99-100 (3rd ed., Editoriale Scientifica, 1987); *Nuclear Tests Case (Australia v. France)*, *supra*, n.____, at 267; Access to, or

(b) The Use of *In Dubio Mitius* in WTO Case Law

Never before footnote 154 of *EC – Hormones* had a GATT/WTO panel or the AB referred to the actual words *in dubio mitius*. After this report, WTO Members saw in this principle of *in dubio mitius* an opportunity to curtail the AB's exercise of judicial interpretation. Therefore, the EC invoked this principle in:

(i) *Chile – Price Band*, where it considered that the Panel “lightly assumed that WTO Members had taken on a more onerous obligation than that apparent from the text, contrary to the *in dubio mitius* principle referred to by the Appellate Body in *EC – Hormones*;¹²⁹

(ii) *EC – Sugar Subsidies*, where it “regarded the principle of *in dubio mitius* as more appropriate, since it applied to treaties, had been recognized by the Appellate Body, and required that an interpretation be preferred which impinged as little as possible on the sovereignty of Members.”¹³⁰ Prior to this report, the EC made an oral statement at the Second Substantive meeting with the parties in which it argued that “the principle of *in dubio mitius* is more appropriate. This principle applies to treaties, has been recognised by the Appellate Body and requires that an interpretation be preferred which impinges as little as possible on the sovereignty of Members;”¹³¹ and

(iii) *EC – Sardines*,¹³² where the EC, without citing expressly the AB's report in *EC – Hormones*, quoted *in extenso* the AB's finding in *EC – Hormones* that had compelled the AB to justify itself in footnote 154 and according to which: “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.”¹³³

Anchorage in, the Port of Danzig, of Polish War Vessels, 1931 P.C.I.J. (ser. A./B.) No. 43, at 142 (Dec. 11); *Air Transport Services Agreement Arbitration (United States v. France) (1963)*, *supra*, n.____, at 243; and *De Pascale Claim (Italian-United States Conciliation Commission) (1961)*, *supra*, n.____, at 250.

¹²⁹ *Chile – Price Band (AB)*, *supra*, n.____.

¹³⁰ Panel Reports, *European Communities – Export subsidies on Sugar (EC – Sugar Subsidies)*, WT/DS283/R (Complaint by Thailand), WT/DS266/R (Complaint by Brazil), WT/DS265/R (Complaint by Australia), adopted 15 October 2004, para. 4.208.

¹³¹ *EC – Sugar Subsidies (Oral Statement by the European Communities)*, *supra*, n.____.

¹³² Panel Report, *European Communities – Trade Description of Sardines (EC – Sardines)*, WT/DS231/R, adopted 29 May 2002, para. 7.82.

¹³³ *EC – Hormones*, *supra*, n.____.

The U.S. tied the EC's record by raising the principle of *in dubio mitius* in:

(i) *U.S. – Line Pipe Safeguards*, where the U.S. considered that “the Panel disregarded the principle ‘*in dubio mitius*’, an accepted principle of treaty interpretation, and infringed unnecessarily on the manner in which the United States has internally structured the decision-making process of its competent authority.”¹³⁴ In this report, the Appellant Submission of the United States stated: “The principle of *in dubio mitius* supports an interpretation of treaty language that assumes that sovereign states intend to impose upon themselves less burdensome, as opposed to more onerous, obligations absent any agreement language to the contrary. The Appellate Body has recognized the relevance of this principle of treaty interpretation”¹³⁵

(ii) *U.S. – Section 301*, where the U.S. argued that the “EC's proposed construction of Article XVI:4, even if it had so much as an ambiguous textual basis, would run afoul of the *in dubio mitius* principle,”¹³⁶ which “is applicable in WTO disputes as a supplementary means of interpretation;”¹³⁷ and

(iii) *U.S. – 1916 Act*, where the U.S. concluded that “the Panel should be guided by the interpretative principle of *in dubio mitius*.”¹³⁸

And the Chinese government does not intend to let its European and American counterparts monopolize *in dubio mitius*, as it is the latest WTO Member to have raised this principle, albeit unsuccessfully, in *China – IP Rights*; a dispute brought by the United States against China for not providing for criminal procedures and penalties to be applied in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale that fail to meet certain thresholds.¹³⁹

The other WTO Members who have invoked the principle of *in dubio mitius* are:

¹³⁴ *U.S. – Line Pipe Safeguards (AB)*, *supra*, n.____.

¹³⁵ *U.S. – Line Pipe Safeguards (Appellant Submission of the United States)*, *supra*, n.____, at para. 48.

¹³⁶ *U.S. – Section 301 (Panel Report)*, *supra*, n.____, at para. 4.389.

¹³⁷ *Id.* at para. 4.388.

¹³⁸ Panel Report, *United States – Anti-Dumping Act of 1916 (U.S. – 1916 Act)* (Complaint by Japan), WT/DS162/R, adopted 29 May 2000, para. 3.89.

¹³⁹ See *China – IP Rights*, *supra*, n.____, at para. 7.497 (China arguing “for the application of the ‘interpretative canon’ of *in dubio mitius* which, it submits, has a particular justification in the realm of criminal law;” an area where China considers “that the Panel should treat sovereign jurisdiction over police powers as a powerful default norm, departure from which can be authorized only in light of explicit and unequivocal consent of State parties.”)

(i) Korea, in *Korea – Alcohol*, emphasizing that “[g]iven that ambiguity, Article 19.2 of the DSU and the principles of predictability and *in dubio mitius* should have been respected by the Panel;”¹⁴⁰

(ii) Chile, in *Chile – Price Band*, stating:

[I]n the event that the Panel had any doubts over the correct interpretation of Article 4.2, the legal principle *in dubio mitius*, which the Appellate Body has endorsed, would suggest that vagueness and ambiguity should not be resolved against Chile, but rather against the complaining party that seeks to invalidate Chile's long standing system;¹⁴¹

(iii) Canada, in *Canada – Milk/Dairy*, noting “that the legal principle of *in dubio mitius*, may also apply with respect to the interpretation of the terms and conditions in Canada’s Schedule regarding fluid milk;”¹⁴² and

(iv) Argentina, in its Third Party Initial Brief in *U.S. – Cotton Subsidies*, arguing that:

A different interpretation would imply giving the measures allegedly covered by the Peace Clause a character of absolute immunity, independent of whether the legal requirements established in Article 13 are fulfilled or not. This would contradict the principle of *in dubio mitius*, constituting a more onerous interpretation of the treaty provisions.¹⁴³

In the three remaining instances, WTO panels made explicit references to the AB’s finding in *EC – Hormones* in:

(i) *U.S. – 1916 Act*, where the Panel found that “[s]ince the United States had so far applied its law in conformity with Article VIII of the GATT 1947 and since there was no evidence that the United States intended to apply the law in a GATT-incompatible manner, the principle *in dubio mitius* logically applied;”¹⁴⁴

(ii) *Argentina – Footwear Safeguard*, where the Panel stated:

¹⁴⁰ Appellate Body Report, *Korea – Taxes on Alcoholic Beverages (Korea – Alcohol)*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 18 January 1999, para. 5.

¹⁴¹ *Chile – Price Band (Panel Report)*, *supra*, n.____, at para. 4.45.

¹⁴² *Canada – Milk/Dairy (Panel Report)*, *supra*, n.____.

¹⁴³ *U.S. – Cotton Subsidies (Annex A-3: Argentina’s Third Party Initial Brief)*, *supra*, n.____.

¹⁴⁴ *U.S. – 1916 Act*, *supra*, n.____, at para. 6.87.

While we do recognise the general interpretative principle "in dubio mitius" raised by Argentina, we do not share Argentina's apparent opinion that under the Safeguards Agreement it is for the national authority to choose one of several possible factual or legal interpretations. Rather, regarding legal interpretations, a treaty must be interpreted, pursuant to Article 31 of the Vienna Convention, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose;¹⁴⁵ and

(iii) *U.S. – Lamb Safeguard*, where the Panel noted in the cases' context "the Appellate Body's statement that '[t]he principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states.'"¹⁴⁶

(c) The Flaw of Footnote 154

First, the references selected by the AB in *EC – Hormones* and their use is questionable. Thus, the AB's definition of the principle *in dubio mitius* in footnote 154 is incomplete, for Robert Jennings and Arthur Watts added where the AB left off:

However, in applying this principle [i.e., *in dubio mitius*] 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 (see (9) below). Further, it usual for courts to interpret strictly exceptions to a principal provision imposing obligations on a state, notwithstanding that the principle *in dubio mitius* might suggest that the exception be given a liberal interpretation.¹⁴⁷

The editing choice of the AB is significant, as Oppenheim's entire definition of *in dubio mitius* underscores the weight of the effectiveness principle (i.e., *effet utile*); an interpretation principle which has always played an important role in the jurisprudence of the WTO.¹⁴⁸ To this end, Dominique

¹⁴⁵ *Argentina – Footwear Safeguard (Panel Report)*, *supra*, n.____, at para. 7.8.

¹⁴⁶ *U.S. – Lamb Safeguard (Panel Report)*, *supra*, n.____, at para. 7.16.

¹⁴⁷ JENNINGS & WATTS, *supra*, n.____, at 1278.

¹⁴⁸ See, e.g., Panel Report, *United States – Section 211 Omnibus Appropriations Act of 1998 (U.S. – Section 211)*, WT/DS176/R, adopted 6 August 2001, para. 8.79 (footnote 122 reading: "The principle of effective interpretation or "l'effet utile" or in latin *ut res magis valeat quam pereat* reflects the general rule of interpretation which requires that a treaty be interpreted to give meaning and effect to all the terms of the treaty."); *US – Gasoline (AB)*, WT/DS2/AB/R, *supra*, n.____, at 23 (concluding that "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."); Appellate Body Report, *Japan - Taxes on Alcoholic Beverages (Japan—Alcoholic Beverages)*,

Carreau, who was also cited in footnote 154,¹⁴⁹ noted the difficulty to reconcile *in dubio mitius* with the approach to treaty interpretation based upon the object and purpose of a treaty,¹⁵⁰ which explains the hostility of state sovereignty defenders towards the teleological approach to treaty interpretation.”¹⁵¹ Furthermore, Jennings and Watts illustrated the limits of *in dubio mitius* by taking the example of the European Court of Justice (ECJ) who “in a number of judgments refrained from interpreting the treaties establishing the EC in such a way as to interfere as little possible with the rights of the member states.”¹⁵²

Similarly, the AB selected two arbitral awards demonstrating the relevance of *in dubio mitius*.¹⁵³ However, we showed earlier that the arbitral tribunals’ position towards the principle of *in dubio mitius* was not as homogeneous as the AB suggested given that some arbitral tribunals having been skeptical about the weight to give to this principle.¹⁵⁴

Second, the structure itself of footnote 154 undermines the finding of the AB in *EC – Hormones*, for Gráinne de Búrca and Joanne Scott emphasized the weakness of some AB’s reports’ footnotes containing references to cases before the ICJ and specific quotation from an academic work.¹⁵⁵ Examining footnote 156 of the AB’s report in *U.S. – Shrimp* recognizing the doctrine of

WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 4 October 1996, at 12 (emphasizing that “[a] fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 [VCLT] is the principle of effectiveness.”); and Panel Report, *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products* (“*Korea — Dairy Safeguards*”), WT/DS98/R, adopted 21 June 1999, para. 7.37 (recalling “the principle of ‘effective interpretation’ whereby all terms must be given their full meaning and must be interpreted with each other to avoid inconsistencies or ‘inutility.’”) For a discussion of the effectiveness principle see *Document A/6309/Rev.1: Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session*, 2 YB INT’L L. COMM’N 1, 219 (1966), U.N. Doc. A/CN.4/SER.A/1966/Add.1; JENNINGS & WATTS, *supra*, n.____, at 1280-1281; *Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), 1949 I.C.J. 4, 24 (Apr. 9) (stating that “[i]t would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.”); and *Case Concerning the Territorial Dispute Case* (Libyan Arab Jamahiriya v. Chad), 1994 I.C.J. 6, 23 (Feb. 3).

¹⁴⁹ See *EC – Hormones*, *supra*, n.____.

¹⁵⁰ See CARREAU, *supra*, n.____, at 143 (translated from French).

¹⁵¹ *Id.*

¹⁵² JENNINGS & WATTS, *supra*, n.____.

¹⁵³ *Air Transport Services Agreement Arbitration (United States v. France)* (1963), *supra*, n.____; and *De Pascale Claim (Italian-United States Conciliation Commission)* (1961), *supra*, n.____.

¹⁵⁴ See *Allemagne contre Commissaire aux revenus gagés*, *supra*, n.____; and *German External Debts*, *supra*, n.____.

¹⁵⁵ See GRÁINNE DE BÚRCA & JOANNE SCOTT, *THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES* 21 (Hart Publishing, 2001).

abus de droit,¹⁵⁶ whose content mirrors footnote 154 used by the AB in *EC – Hormones* a few months earlier, de Búrca and Scott drew the conclusion that the AB was articulating a range of standards “almost from nowhere.”¹⁵⁷ I do not contend that either footnotes of the WTO case law are worthless, or that de Búrca and Scott assumed that all footnotes are used by the AB to abuse its authority, as some WTO panels successfully used footnotes to acknowledge the relevance of specific treaty interpretations such the *effet utile* principle or *ut res magis valeat quam pereat*.¹⁵⁸ I contend, however, that footnotes that are manipulated by the AB, as was the case in *EC – Hormones*, to reflect a partial view of international tribunals’ jurisprudence or the doctrine, jeopardize the future of international law. At the very least, they do not and cannot entitle the AB to proclaim the principle of *in dubio mitius* as “widely recognized in international law as a ‘supplementary means of interpretation.’”¹⁵⁹ (emphasis added)

(d) Unsolved Questions

The ambivalence of WTO panels and the AB towards treaty interpretation principles, especially the principle of *in dubio mitius*, has contributed to harming the legitimacy of the WTO dispute settlement system. On the one hand, the Panel in *U.S. – Section 211* characterized the principle of effective interpretation or *effet utile* as a “general rule of interpretation which requires that a treaty be interpreted to give meaning and effect to all the terms of the treaty.”¹⁶⁰ On the other hand, the AB in *U.S. – Shrimp* defined another treaty interpretation (i.e., the doctrine of *abus de droit* or abuse of right) as a “general principle of law and a general principle of international law [that

¹⁵⁶ See Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (U.S. – Shrimp)*, WT/DS58/AB/R, adopted 12 October 1998, para. 158, n. 156. In this footnote, the AB recognized the doctrine of *abus de droit* by stating in part:

A reasonable and bona fide exercise of a right in such a case is one which is appropriate and necessary for the purpose of the right (i.e., in furtherance of the interests which the right is intended to protect). It should at the same time be fair and equitable as between the parties and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed. A reasonable exercise of the right is regarded as compatible with the obligation. But the exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty obligation, and a breach of the treaty.

¹⁵⁷ See DE BÚRCA & SCOTT, *supra*, n.____, at 22.

¹⁵⁸ See, e.g., *Korea – Dairy Safeguards*, *supra*, n.____; and Panel Report, *Canada – Term of Patent Protection (Canada – Patent)*, WT/DS170/R, adopted 5 May 2000 para 30, n. 30.

¹⁵⁹ *EC – Hormones*, *supra*, n.____.

¹⁶⁰ *U.S. – Section 211*, *supra*, n.____, at para. 8.79.

controls the exercise of rights by states.”¹⁶¹ In this context, the AB in *EC – Hormones* considered *in dubio mitius* “an interpretative principle . . . widely recognized in international law.”¹⁶² Therefore, are a general principle of law and a general principle of international law the same principle? Is a general rule of interpretation different than an interpretative principle widely recognized in international law? In other words, have WTO panels and the AB established a hierarchy of treaty interpretation principles? If so, is an interpretative principle widely recognized in international law, such as *in dubio mitius*, at the top or bottom of this hierarchy? To complicate the situation, the Report of the Study Group of the International Law Commission on Fragmentation of International Law stated:

‘General international law’ clearly refers to general customary law as well as ‘general principles of law recognized by civilized nations’ under article 38 (1) (c) of the Statute of the International Court of Justice. But it might also refer to principles of international law proper and to *analogies from domestic laws*, especially principles of the legal process (*audiatur et altera pars*, *in dubio mitius*, estoppel and so on). In the practice of international tribunals, including the Appellate Body of the WTO or the European and Inter-American Courts of Human Rights reference is constantly made to *various kinds of ‘principles’ sometimes drawn from domestic law, sometimes from international practice but often in a way that leaves their authority unspecified.*¹⁶³ (emphasis added)

Furthermore, the reticence of the AB in *EC – Hormones* to interfere with a WTO Member’s sovereignty could be interpreted as a form of judicial economy or, as in Davey’s terms, an “issue-avoidance” technique.¹⁶⁴ Indeed, how the decision of the AB to defer to the WTO Member’s interpretation of a treaty provision differ from the technique that has been developed by courts over time to dispose of cases where a decision seems inappropriate for judicial consideration (e.g., political questions; *non liquet*) or simply too controversial?¹⁶⁵ Contrary to Thomas Cottier’s view, it seems that the *Lotus* rationale and the distinction between political and legal disputes has yet to be

¹⁶¹ See *Shrimp*, *supra*, n.____. See also, Panel Report, *United States – Definitive Measures on Imports of Certain Steel Products (U.S. – Steel Safeguards)*, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, adopted 11 July 2003, para 7.1987, n. 4722.

¹⁶² *EC – Hormones*, *supra*, n.____.

¹⁶³ *Report of the Study Group of the International Law Commission: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, *supra*, n.____, at n. 93.

¹⁶⁴ See Davey, *supra*, n.____, at 96.

¹⁶⁵ *Id.*

overcome.¹⁶⁶

2. *The Application of In Dubio Mitius in the Settlement of Investment Disputes*

Today, the AB's finding in *EC – Hormones* has spread to other areas of international law. Thus, one form of the principle of *in dubio mitius*, *in dubio pars mitior est sequenda* (i.e., when in doubt, the milder course is to be followed) is often used in the area of international investment law. In *SGS Société Générale de Surveillance S.A. v. Pakistan*, the International Centre for Settlement of Investment Disputes (ICSID) concluded:

We believe, for the foregoing considerations, that 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*.¹⁶⁷

Similarly, in *El Paso v. Argentina*, the ICSID noted that “[i]n effect, although not by name, the Tribunal relied on the *in dubio mitius* canon rejected by the *Eureka and Aguas del Tunari* tribunals.”¹⁶⁸

3. *The Traditional Venues of In Dubio Mitius*

(a) *In Dubio Mitius* before Domestic Tribunals: *Marchiori*

Here, the article will take the example of a recent decision rendered by the Civil Division of the Court of Appeal in the UK to illustrate the lasting

¹⁶⁶ See THOMAS COTTIER, *THE CHALLENGE OF WTO LAW: SELECTED ESSAYS* 103 (Cameron May, 2006) (stating: “In doctrine, the *Lotus* principle and the distinction between political and legal disputes was gradually overcome, in particular under the influence of the American New haven School of Jurisprudence.”)

¹⁶⁷ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID (W. Bank) Case no. ARB/01/13 (2003). International case law cited in this regard included *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Change of Jurisdiction, 25 January 2000; and Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS/26/AB/R; WT/DS/48/AB/R, adopted 16 January 1998. [Reference Swiss Government Letter in Mealey’s].

¹⁶⁸ *El Paso Energy International Company v. The Argentine Republic*, ICSID, Case No. ARB/03/15, Decision on Jurisdiction of 27 April 2006, in John P. Gaffney & James L. Loftis, *The ‘Effective Ordinary Meaning’ of BITs and the Jurisdiction of Treaty-Based Tribunals to Hear Contract Claims*, 8(1) J. WORLD INV. & TRADE 49 (2007). See also Kathryn Ballantine, *How Far do BITs Bite? A Comparison of SGS V. Pakistan and SGS V. Phillipines: Interpreting Umbrella Clauses in Bilateral Investment Treaties*, 2 CAMBRIDGE STUDENT L. REV. 37 (2006).

relevance of *in dubio mitius* before domestic tribunals. In *Marchiori*,¹⁶⁹ while confronting the application of the Treaty establishing the European Atomic Energy Community (Euratom) and Directive 85/337 to their domestic legislation, the judge of the Court of Appeal's panel in charge of examining this question of treaty interpretation, Laws LJ, found that "the principle of Treaty interpretation summarised in the Latin phrase *in dubio mitius*: where a Treaty provision is ambiguous, the interpretation which is less onerous to the State owing the Treaty obligation is to be preferred" applied to this case.¹⁷⁰

Previously, the Queen's Bench Division of the Administrative Court had also found that "[t]here must be an inherent presumption against any sovereign State ceding to other States control of or access to military activities and in case of doubt, the decision should be resolved by application of the principle *in dubio mitius*."¹⁷¹ During the hearing, the judge on the Administrative Court's panel, Turner J, acknowledged the principle of restrictive interpretation:

[T]here is a proposition of international law which conditions the proper approach to the interpretation of any treaty. The principle in play is that which regards the maintenance of independent sovereignty as a feature which is not to be removed unless the purpose and effect of a treaty demonstrate that such was the treaty intention.¹⁷²

The Administrative Court went on to justify its position, as the AB did in *EC – Hormones*, by citing Oppenheim: "[i]f the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming the obligation, or which interferes less with the territorial and personal supremacy of the party, or involves less general restrictions upon the parties."¹⁷³

(b) *In Dubio Mitius* Before International Arbitral Tribunals: The *Iron Rhine* Case

In this case, the Permanent Court of Arbitration (PCA) had to determine whether "Article XII of the Separation Treaty [at issue] should, in so far as it

¹⁶⁹ *R (on the application of Marchiori) v The Environment Agency* [2002] EWCA Civ 03.

¹⁷⁰ *Id.* at para. 58.

¹⁷¹ See Darren Abrahams, *Significant UK Environmental Cases*, 14 J. ENV. L. 7 (2002).

¹⁷² *Queen v Environment Agency ex parte Emanuela Marchiori and N A G Ltd; Ministry of Defence and AWE plc* [2001] EWHC Admin 267, para. 36.

¹⁷³ *Id.*

contains a restriction to the territorial sovereignty of the Netherlands, in accordance with international law, be construed restrictively.”¹⁷⁴

The process that led the Court to the conclusion that the treaty at issue must be interpreted using the normal rules of interpretation identified in Articles 31 and 32 of the Vienna Convention principle to the detriment of the restrictive interpretation principle is noteworthy.¹⁷⁵ Thus, the Court first noted that:

It is true that in both the *Free Zones case* and in *Case of the S.S. Wimbledon* (P.C.I.J. Series A, No. 1 (1923) at p. 24) the Permanent Court said that in case of doubt about a limitation on sovereignty that limitation is to be interpreted restrictively. In the latter case, the Permanent Court did caution, however, that it would nonetheless ‘feel 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.’¹⁷⁶

Then, the PCA discarded the restrictive interpretation principle (i.e., *in dubio mitius*) by stating:

The doctrine of restrictive interpretation never had a hierarchical supremacy, but was a technique to ensure a proper balance of the distribution of rights within a treaty system. The principle of restrictive interpretation, whereby treaties are to be interpreted in favour of state sovereignty in case of doubt, is not in fact mentioned in the provisions of the Vienna Convention. The object and purpose of a treaty, taken together with the intentions of the parties, are the prevailing elements for interpretation. Indeed, it has also been noted in the literature that a too rigorous application of the principle of restrictive interpretation might be inconsistent with the primary purpose of the treaty (*see* Jennings and Watts, *Oppenheim’s International Law*, 9th Edition (1992), at p. 1279). Restrictive interpretation thus has particularly little role to play in certain categories of treaties – such as, for example, human rights treaties. Indeed, 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 (Bernhardt “Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights,” 42 *German Yearbook of International Law* (1999), p.

¹⁷⁴ Iron Rhine ("Ijzeren Rijn") Railway (Belgium v. Netherlands), Award of the Arbitral Tribunal, Perm. Ct. Arbitration, 24 May 2005, at 16, para. 27, *available at* http://www.pca-cpa.org/upload/files/BE-NL_Award_corrected_200905.pdf

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 26, para. 52.

11, at p. 14).¹⁷⁷

IV. Division of the Legal Doctrine on the Principle of *In Dubio Mitius*

Treaty interpretation principles, in particular *in dubio mitius*, are but a tool in the ongoing ideological debate dividing the legal doctrine over the conception of what the relationship between domestic and international law should be. More importantly, this debate betrays the divergences of views regarding the extent to which an international court – such as the AB in *EC – Hormones* – should defer to national sovereignty. As Lauterpacht rightly noted:

[T]he main reason why the rule of restrictive interpretation has acquired prominence in international law is not that it has been considered by many to represent a general principle of law. The main explanation of the prominence of the rule of restrictive interpretation in the international sphere is that it has been resorted to by reference to and *on account of the sovereignty of independent states*. It is not only that in case of doubt the contractual obligation must be interpreted in favor of the debtor; *it is because states are sovereign that a restrictive interpretation must be put upon their obligations*.¹⁷⁸ (emphasis added)

Therefore, this article demonstrates (a) how a part of the legal doctrine has denounced the inadequacy of *in dubio mitius* in international law, and (b) why the AB and other international courts have strived to use this principle to mistakenly preserve their credibility. Finally, it underlines the arguments raised by some legal scholars to persist in applying *in dubio mitius* to certain specific legal areas.

A. The Inadequacy of *In Dubio Mitius* in International Law

From Lauterpacht to John Jackson, several prominent legal scholars have challenged the use of *in dubio mitius* in international law by exposing its inherent flaws and opposing it to other canons of interpretation.

1. The Inherent Flaws of In Dubio Mitius

(a) A Diplomatic Concept

Michael Lennard argued that *in dubio mitius* is not a legal principle, but a diplomatic concept inherited from what McNair described as “an age in which treaties were interpreted not by legal tribunals, and not even much by lawyers

¹⁷⁷ *Id.*

¹⁷⁸ Lauterpacht, *supra*, n.____, at 58.

but by statesmen and diplomats.”¹⁷⁹ As a result, he drew the conclusion that “[i]t might seem surprising that as the WTO becomes a more legally orientated institution, the Appellate Body should be placing faith in a maxim that seems to have been little relied on by other modern legal tribunals.”¹⁸⁰

While Lennard’s observation is correct, note that the principle of *in dubio mitius* is not the only defective concept from the past that has been carried into the WTO. To this end, I have argued elsewhere that non-violation complaints of Article XXIII:1(b) of the General Agreement on Tariffs and Trade (GATT)¹⁸¹ have remained “for better or worse a keystone element of the WTO dispute settlement system.”¹⁸²

The similarity between *in dubio mitius* and non-violation complaints is striking. As in the case of *in dubio mitius*, I found that (i) non-violations were considered “a diplomat’s legal concept of legal order,”¹⁸³ (ii) Uruguay Round negotiators had been unable to agree on a definition of “non-violation,”¹⁸⁴ (iii) there have been only a handful of non-violation cases,¹⁸⁵ and (vi) both WTO panels and the AB had failed to define the concept of non-violation.¹⁸⁶

(b) An Absurd Concept

Elaborating on the modern application of *in dubio mitius*, Jackson warned:

There is even a doctrine that has been evoked in one case [i.e., *EC – Hormones*] and attempted as part of advocacy in several other cases in the WTO, which absurdly states that if there is any ambiguity, the acting nation state’s actions should be deemed not consistent with the

¹⁷⁹ See Michael Lennard, *Navigating By The Stars: Interpreting The WTO Agreements*, 5(1) J. INT. ECON. LAW 65 (2002).

¹⁸⁰ *Id.* at 63.

¹⁸¹ Art. XXIII:1(b) of the GATT provides in part:

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement.

¹⁸² See Christophe Larouer, *WTO Non-Violation Complaints: A Misunderstood Remedy at the Heart of the WTO Dispute Settlement System*, 53(1) NETHERLANDS INT’L L. REV. 97, 99 (2006).

¹⁸³ *Id.* at 100 (quoting ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 7 (Salem, NH, Butterworth Legal Publishers 1993)).

¹⁸⁴ *Id.* at 104.

¹⁸⁵ *Id.* at 110.

¹⁸⁶ *Id.* at 113.

agreement. The doctrine is called *in dubio mitius* and it is largely discredited.¹⁸⁷

McNair, who found that, also took this position:

It is difficult to defend the rule [i.e., the so-called rule of restrictive interpretation] on a basis of logic. Every treaty obligations limits the sovereign powers of a State. [I]f a so-called rule of interpretation is applied to restrict the obligation of one party, a sovereign State, it reduces the reciprocal benefit or ‘consideration’ due to the other party, also a sovereign State, which seems to me to be absurd.¹⁸⁸

Moreover, at the time of China’s accession to the WTO, Lennard foresaw the contradiction that *in dubio mitius* would create if it were to be applied to an agreement such as an Accession Protocol, which is inherently one-sided in that it imposes special burden on one side (China) as the ‘price of admission’ to the WTO.¹⁸⁹ For him, “[i]t can therefore be argued that too blindly following maxims such as *in dubio mitius*, and construing ambiguities in favor of the WTO aspirant, could dilute the accession requirements and inadvertently reduce the ‘price of admission’ to the WTO.”¹⁹⁰

(c) An Obsolete Concept

Numerous commentators have considered *in dubio mitius* an obsolete principle since Lauterpacht’s prediction in 1958 that the rule of restrictive interpretation would die out.¹⁹¹ As mentioned earlier, McNair corroborated this view by stating that the “so-called rule of restrictive interpretation . . . is believed to be now of declining importance and the time may be not far distant when it will disappear from the books.”¹⁹² Christian Tomuschat emphasized that “[t]o date, in legal doctrine there remain hardly any voices

¹⁸⁷ John H. Jackson, *The WTO dispute settlement system after ten years: the first decade’s promises and challenges*, in YASUHEI TANIGUCHI, ALAN YANOVICH & JAN BOHANES, *THE WTO IN THE TWENTY-FIRST CENTURY: DISPUTE SETTLEMENT, NEGOTIATIONS, AND REGIONALISM IN ASIA* 23 (Cambridge University Press, 2007). From the same author, see *The Changing Fundamentals of International Law and Ten Years of the WTO*, 8(1) J. INT. ECON. LAW 14 (2005) (noting that “[o]lder concepts [i.e., *in dubio mitius*], often resorting to nation-state sovereignty ideas, frequently run the risk of disabling the ability of some institutions to function effectively in carrying out their purposes.”)

¹⁸⁸ MCNAIR, *supra*, n.____, at 765.

¹⁸⁹ See Michael Lennard, *Interpreting China’s Accession Protocol: a case study in anti-dumping*, in DEBORAH CASS ET AL., *CHINA AND THE WORLD TRADING SYSTEM: ENTERING THE NEW MILLENNIUM* 402 (Cambridge University Press, 2003)

¹⁹⁰ *Id.* at 403.

¹⁹¹ See Knox, *supra*, n.____.

¹⁹² MCNAIR, *supra*, n.____, at 765.

claiming that *in dubio mitius* belongs to the routinely applicable canons of interpretation in international law.”¹⁹³ Rudolf Bernhardt noted that *in dubio mitius* “is no longer relevant, it is neither mentioned in the Vienna Convention nor has it been invoked in the recent jurisprudence of international courts and tribunals. Treaty obligations are in case of doubt and in principle not to be interpreted in favor of State sovereignty.”¹⁹⁴ More recently, John Knox summarized these views by concluding:

Although the Permanent Court of International Justice regularly cited the rule, it made clear that it would use it only as a last resort, and in practice almost never used it at all. Lauterpacht predicted in 1958 that the rule was dying out, and he appears to have been right. The only decision by the International Court of Justice (and the only post-1963 decision of any kind) the Appellate Body cited in *Hormones* in favor of the rule was *Nuclear Tests*, in which the ICJ said that it would apply a restrictive interpretation to unilateral statements limiting a state’s freedom of action, a situation that does not raise Lauterpacht’s concern regarding the loss of reciprocal benefits.¹⁹⁵

However, these statements must be read with caution. Lauterpacht and McNair examined the relevance of *in dubio mitius* before the AB’s report in *EC – Hormones*. Tomuschat and Bernhardt overlooked the aforesaid AB’s report. As for Knox, he undermined its significance by drawing his conclusion from the perspective of the ICJ, notwithstanding the perspicacity of his reasoning.

2. Competing Canons of Interpretation

(a) The Supremacy of the Principle of Effectiveness

Several prominent legal scholars have seen in the principle of effectiveness or *effet utile*, also called *ut res magis valeat quam pereat*, a principle of treaty interpretation superior to that of *in dubio mitius*. Thus, after noting the mutual incompatibility of these two principles,¹⁹⁶ Lauterpacht stated that “[w]hile, in the decisions of international tribunals, the doctrine of restrictive interpretation of treaties limiting the sovereignty of states has been no more than a form of words, the principle of effectiveness has played a prominent and ever-growing part in the administration of international law.”¹⁹⁷ Similarly, Antonio Cassese noted:

¹⁹³ TOMUSCHAT, *supra*, n.____, at 171.

¹⁹⁴ See Bernhardt, *supra*, n.____, at 14.

¹⁹⁵ See Knox, *supra*, n.____, at 62.

¹⁹⁶ See Lauterpacht, *supra*, n.____, at 67.

¹⁹⁷ *Id.*

[T]he authors of the Vienna Convention set great store by the principle of ‘effectiveness’ (*ut res magis valeat quam pereat*), whereby a treaty must be given an interpretation that enables its provision to be ‘effective and useful’, that is, to have the appropriate effect. This principle is plainly intended to expand the normative scope of treaties, to the detriment of the old principle whereby in case of doubt limitations of sovereignty were to be strictly interpreted.¹⁹⁸

Cottier found that *in dubio mitius* was superseded by another principle of interpretation (i.e, good faith), stating:

International agreements and obligations no longer are to be constructed in accordance with the rule of *in dubio mitius*, but in accordance with good faith, as expressed in Article 31(1) of the Vienna Convention on Treaties. Treaty provisions must be interpreted according to ‘good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’¹⁹⁹

The case law of the WTO seems to prove these commentators right, for we described earlier the major cases in which the principle of effectiveness played a significant role.²⁰⁰ Therefore, would the AB have consecrated the teleological approach to treaty interpretation? It would not be the first international court to engage in this direction, as Pierre Klein and Philippe Sands noted:

[I]t is clear that the case law of some of these international courts and tribunals, in particular the I.C.J. and the ECJ, indicates a tendency towards seeking to ensure that the approach to which is relied upon will assure the effectiveness of the organization. This requires careful consideration of the object and purposes of the organization, by reference to what has been referred to as a ‘teleological approach.’²⁰¹

Paola Gaeta drew a similar conclusion in the context of international criminal law by finding that:

[T]reaties in contemporary international law can be construed more liberally than in the past, when the dogma of state sovereignty was a

¹⁹⁸ ANTONIO CASSESE, *INTERNATIONAL LAW* 179 (Oxford University Press, 2005).

¹⁹⁹ THOMAS COTTIER, *supra*, n._____, at 104.

²⁰⁰ See *supra* (c) The Flaw of Footnote 154, at_____, and (d) Unsolved Questions, at _____ and accompanying notes.

²⁰¹ PIERRE KLEIN & PHILIPPE SANDS, *BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS* 450 (Sweet & Maxwell, 2001).

dominant feature in the international community. Nowadays the application of the principle of restrictive interpretation, whereby limitations on state sovereignty cannot be presumed or inferred by implication (*in dubio mitius*), is subject to other, more liberal principles and criteria (i.e., it may be applied only when resort to those other principles and criteria have failed).²⁰²

(b) All Canons of Interpretation Are Equal

One must not forget that the arguments made in favor of the principle of effectiveness by the advocates of the teleological approach to treaty interpretation have been questioned by other prominent legal scholars on the basis of this principle's intrinsic value and the key question of the choice between conflicting canons of interpretation. Ian Brownlie noted that "[t]he principle of effective interpretation is often invoked, and suffers from the same organic defects as the principle of restrictive interpretation."²⁰³

Having already exposed the critical work of Fitzmaurice in this area, this article will now turn to the views expressed by Julius Stone vis-à-vis what he called the "competition between the doctrines of 'effectiveness' and of 'restrictive interpretation.'"²⁰⁴ He demonstrated that the principle of effectiveness was not a panacea, stating:

[E]ven if the "effect" of a treaty were a known entity, its claim to paramountcy would still be confronted by an older and still cherished canon tending to opposite results. This is that treaty obligations must be construed restrictively, in favour of sovereignty; so that provisions which might or might not impose obligations on States, or which might impose greater or lesser obligations, shall be construed so as to impose no obligation, or the lesser obligation, as the case may be. This latter principle will obviously tend to conflict with that of maximizing the treaty's effect whenever (as is usually the case) such "effect" depends on the creation of obligations for States. The interpreter, therefore, usually has available competing canons of interpretation on the undisputed authority of which he can impose or refuse to impose obligations in a doubtful case. And since *no canon dictates the choice between the conflicting canons*, the choice may endorse rather than dictate the conclusion reached.²⁰⁵ (emphasis added)

²⁰² Paola Gaeta, *On What Conditions Can a State Be Held Responsible for Genocide?*, 18(4) EUR. J. INT'L L. 631 (2007).

²⁰³ BROWNLIE, *supra*, n.____.

²⁰⁴ Julius Stone, *Fictional Elements in Treaty Interpretation: A Study in the International Judicial Process*, 1 SYDNEY L. REV. 353 (1953-1955).

²⁰⁵ *Id.* at 354.

This freedom of the treaty interpreter embodied in Stone's last sentence regarding the lack of canon governing conflicting canons of interpretation could explain the discretion and ease with which the AB in *EC – Hormones* felt itself entitled to defer to national sovereignty by acknowledging *in dubio mitius*.

(c) The Opportunistic Use of Canons of Interpretation

The uncertainty revolving around canons of interpretation has generated speculation about the scope of *in dubio mitius*, for Jackson noted that “the concept [i.e., *in dubio mitius*] has been embraced, incidentally by certain specific special interest advocacy groups, particularly inside the beltway in Washington, D.C., and one might imagine where that is coming from if one watches what is going on in the U.S. Congress.”²⁰⁶

To this end, consider Caroline Henckels's argument according to which the precautionary approach (i.e., the application of the precautionary principle) would have allowed the panel in *EC – Biotech*²⁰⁷ to reconcile the principle of effectiveness with the principle of *in dubio mitius*. She found that:

Unlike the Panel's narrow reading of art 5.7, this approach [i.e., the precautionary approach] would give effect to the principle of effectiveness — that is, if a treaty provision is open to two different interpretations, one rendering the provision nugatory, the effective interpretation should be adopted. The approach also gives effect to the principle of *in dubio mitius*, whereby an ambiguous treaty term should be interpreted in such a way as to interfere less with a state's autonomy, or to be less onerous to the party who assumes an obligation — a principle adopted by the Appellate Body in *EC – Hormones*. It would require Panels and the Appellate Body to show greater deference to the regulatory authority of members where there is a legitimate nexus between the *SPS Agreement* measure and the Member's avowed policy objective, as long as the purpose is non-discriminatory — particularly in cases where there is low certainty and low consensus with respect to the level of risk posed by a particular product or technology. Broadly speaking, therefore, the precautionary principle in this context would enable Members to act with greater

²⁰⁶ John H. Jackson, *The Varied Policies of International Juridical Bodies - Reflections on Theory and Practice*, 25(4) MICH. J. INT'L L. 874 (2004).

²⁰⁷ Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (EC – Biotech)*, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 29 September 2006.

flexibility than would be possible under the interpretation given by the Panel in *EC — Biotech*.²⁰⁸

B. The AB's Judicial Self-Restraint

Several scholars strived to excuse the AB's judicial self-restraint in *EC — Hormones*, considering it almost a mistake of youth. Lennard observed that the AB sought to not "overly impinge on 'State sovereignty' or overstep its perceived role,"²⁰⁹ because it was "in more of a cautious jurisdiction and *confidence-building phase* than, for example, the European Union institutions and most other legal tribunals."²¹⁰ (emphasis added) Robert Howse understood the reliance of the AB on *in dubio mitius* "as the subsidiarity aspect of institutional sensitivity."²¹¹ Others have acknowledged the application of *in dubio mitius* by the AB without drawing any partisan conclusions, Matthias Oesch noting that "the case law to date reveals that panels and the Appellate Body have in general not assumed for themselves a too active role in interpreting and construing ambiguities and open-textured norms contrary to national interests."²¹² Only Robert Hudec saw in the AB's decision the deliberate and 'responsible' choice to ensure its survival.

1. The 'Responsibility' of the AB: Hudec's Legacy

Hudec considered the deference to national sovereignty expressed in the first decisions of the AB the foundation guaranteeing the existence of this court, which for him had been "taken for granted."²¹³ He observed that government had viewed these decisions "as competent, conservative, and 'responsible.'"²¹⁴ Thus, with respect to the decision of the AB in *EC — Hormones* to apply *in dubio mitius*, Hudec noted:

The principle of *in dubio mitius* is a well respected canon of treaty interpretation, but like most canons (and counter-canons) its role in treaty interpretation is a matter of how forcefully it is applied. Given the expected difficulty in securing government compliance with the new WTO disputes procedure, one might expect that the Appellate

²⁰⁸ Caroline Henckels, *GMOs in the WTO: A Critique of the Panel's Reasoning in EC — Biotech*, 7(2) MELBOURNE J. INT'L L. 303 (2006).

²⁰⁹ See Lennard, *supra*, n. ____, at 65.

²¹⁰ *Id.*

²¹¹ ROBERT HOWSE, *THE WTO SYSTEM: LAW POLITICS AND LEGITIMACY* 243 (Cameron May, 2007).

²¹² Matthias Oesch, *Standards of Review in WTO Dispute Resolutions*, 6(3) J. INT. ECON. LAW 644 (2003).

²¹³ Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8(1) MINN. J. GLOBAL TRADE 30 (1999).

²¹⁴ *Id.* at 31.

Body would give considerable emphasis to this canon, in an effort to assure governments that the WTO's new and stronger enforcement powers would be limited to obligations that governments have clearly and knowingly adopted. Until the *Hormones* case, however, the Appellate Body decisions had not gone out of their way to give this assurance. The earlier decisions did not seem to have been significantly narrowed by explicit application of *in dubio mitius* reasoning.²¹⁵

Hudec knew that his work on the early years of the AB and the AB's reports themselves during that period would be challenged, for he predicted that "[a]lthough the next few years will undoubtedly produce a substantial body of literature criticizing some of these early rulings, that criticism will almost certainly not threaten the central role that the Appellate Body has succeeded in defining for itself."²¹⁶ If his prediction was right, was his conclusion correct? In other words, has the AB reached – or will ever reach – the level of legitimacy allowing it to depart from its initial exercise of judicial self-restraint? Did the AB need to defer to national sovereignty to establish its credibility?

To a certain extent, other international courts, such as the ECJ, have succeeded in freeing themselves from national sovereignty. In *Van Gend en Loos*, the ECJ established the direct effect of the provisions of the Treaty establishing the European Economic Community (EEC) by declaring "the Community constitutes a new legal order of international law for the benefit of which the states have limited sovereignty rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals."²¹⁷ However, as Ole Spiermann noted: "[w]hen the Court [i.e., the ECJ] had a choice between the international principle of self-containedness and a less restrictive interpretation of a treaty provision or a provision contained in secondary legislation, it often opted for the former."²¹⁸ He confirmed that the ECJ has persisted in applying the principle of *in dubio mitius* by emphasizing that "when provisions are unclear and a variety of more or less practicable solutions are on offer, the treaty has often yielded to state sovereignty."²¹⁹ Similarly, we have seen that other international courts, such

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Case C-26/62 *Van Gend en Loos v. Netherlands Inland Revenue Admin.* [1963] E.C.R. I.

²¹⁸ On the principle of subsidiarity in EU law, see PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW, TEXT, CASES AND MATERIALS* 100 (Oxford University Press, 2007).

²¹⁹ Ole Spiermann, *The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order*, 10(4) *EUR. J. INT'L L.* 787 (1999).

as the ICJ, have struggled with national sovereignty since *the Lotus* case still haunts this tribunal.²²⁰

2. *The Opponents of Judicial Activism*

Following in the line of Fitzmaurice's opposition to judicial activism,²²¹ all of the following scholars agreed with Hudec's position towards *in dubio mitius*, often basing their conclusions on the AB's report in *EC – Hormones* itself.

Claus-Dieter Ehlermann and Lothar Ehring found:

[A]s regards the question of the extent to which Article 17.6(ii) provides for a departure from the general standard of legal review, one must first ask whether the application of the rules of treaty interpretation can really result in more than one permissible interpretation. If this is the case, the next question would be to what extent Article 17.6(ii) produces different outcomes than the generally applicable principle of interpretation of public international law 'in dubio mitius.'²²²

Howse emphasized that "[a]nother consideration to keep in mind is that, where a legal obligation is unclear, the international law principle of *in dubio mitius* requires a treaty interpreter to adopt the reading that least restricts the sovereignty of a signatory state."²²³

Howse and Michael Trebilcock concluded:

[T]he panel adopted the complainant's view that a narrower rather than broader meaning of 'limited' should be applied; 'limited' should be read 'small'. The tenor of this reasoning is exactly contrary to the interpretative principles established by the AB in *Hormones* – according to the AB the principle of *in dubio mitius* requires that where there are two plausible approaches to interpretation of a treaty provision, the treaty interpreter adopt the interpretation that is less

²²⁰ See *The Lotus case*, *supra*, n. ____.

²²¹ See *supra* 2. Preparatory Work of the 1956 Resolution upon the Interpretation of Treaties of the IIL: The Answer, at ____, and accompanying notes.

²²² Claus-Dieter Ehlermann & Lothar Ehring, *WTO Dispute Settlement and Competition Law: Views from the Perspective of the Appellate Body's Experience*, 26 *FORDHAM INT'L L.J.* 1539 (2003).

²²³ Robert Howse, *Back to Court After Shrimp/Turtle? Almost but not Quite Yet: India's Short Lived Challenge to Labor and Environmental Exceptions in the European Union's Generalized System of Preferences*, 8 *AM. U. INT'L L. REV.* 1350 (2003).

restrictive of the sovereignty of the state understanding the obligation in question.²²⁴

Jagdish Bhagwati considered:

I have some sympathy for [the] view that the dispute settlement panels and the appellate court must defer somewhat more to the political process instead of making law in controversial matters. I was astounded that the appellate court, in effect, reversed long-standing jurisprudence on process and production methods in the Shrimp/Turtle case. I have little doubt that the jurists were reflecting the political pressures brought by the rich-country environmental NGOs and essentially made law that affected the developing countries adversely.²²⁵

Markus Krajewski said:

Certain well-established principles of treaty interpretation, such as principles of logic and good sense, the principles of effective interpretation and of *in dubio mitius* can be applied in addition to the convention rules, if the circumstances or the treaty text call for it. The principle of *in dubio mitius* is of special relevance if WTO law is to be interpreted in deference to national regulatory choices. According to the Appellate Body in EC-Hormones *in dubio mitius* ‘applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.’²²⁶

Yoshiko Naiki acknowledged:

A policy of restraint from limiting sovereignty in the interpretation of obligations was already confirmed by the Appellate Body in its previous decision, by referring to the principle of *in dubio mitius* in general international law, which provides that ‘[i]f the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less

²²⁴ MICHAEL J. TREBILCOK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 418 (Routledge, 2005)

²²⁵ Jagdish Bhagwati, *After Seattle: Free Trade and the WTO*, in ROGER B. PORTER ET AL., *EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM* 60 (Brookings Institution Press, 2001).

²²⁶ Markus Krajewski, *Public Services And Trade Liberalisation: Mapping The Legal Framework*, 6(2) J. INT. ECON. LAW 349 (2003).

with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.’²²⁷

And Kal Raustiala found that “[t]he interpretation of a silent text would likely be construed subject to the principle of *in dubio mitius*.”²²⁸

C. *In Dubio Mitius*: A Concept Specific to Certain Legal Areas

1. *The Application of In Dubio Mitius in Human Rights*

Inasmuch as international human rights treaties guarantee effective protection of individual freedoms, it appears logical that legal scholars specialized in this area have refuted the application of *in dubio mitius* in international law in order to prevent States from jeopardizing such rights. As Shiyun Sun noted with respect to the possible ratification of the International Covenant on Civil and Political Rights (ICCPR) by China, “the main object and purpose of the human rights treaties such as the ICCPR are to protect and promote the rights of individuals instead of State sovereignty.”²²⁹ Similarly, Bernhardt said:

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.²³⁰

However, would the same commentators still challenge *in dubio mitius* if they were defending human rights that would be better protected at the domestic or regional level?

Furthermore, consider Catherine Button’s attempt to apply *in dubio mitius* in the WTO for health cases:

Given that some standard of review must be applied even though it has not been explicitly stipulated in the texts, there is no basis on which to suppose that panels could not, without authorization, accord the findings of national authorities any deference. In fact, this argument is

²²⁷ Yoshiko Naiki, *The Mandatory/Discretionary Doctrine in WTO Law: The US – Section 301 Case and Its Aftermath*, 7(1) J. INT. ECON. LAW 60 (2004).

²²⁸ Kal Raustiala, *Rethinking The Sovereignty Debate In International Economic Law*, 6(4) J. INT. ECON. LAW 846 (2003).

²²⁹ Shiyun Sun, *The Understanding and Interpretation of the ICCPR in the Context of China’s Possible Ratification*, 6(1) CHINESE J. OF INT’L L. 31 (2007).

²³⁰ See Bernhardt *supra*, n.____, at 14. See also PHILIP ALSTON, *THE EU AND HUMAN RIGHTS* 405 (Oxford University Press, 1999).

the more tenable as it is in keeping with the *in dubio mitius* principle applied by the Appellate Body in the *Hormones* case, on the basis that it is less onerous to the parties. All of which is not to say that the Anti-Dumping Agreement's standard of review should be used in health cases—the point is simply that, if a similar standard were justified, based on the applicable texts and the balance of authority between the Member and the WTO that they embody, the mere fact of Article 17.6 existence should not preclude the adoption of that level of deference.²³¹

2. *The Application of In Dubio Mitius to Exceptions Provisions*

There exists a doctrinal debate about the application of *in dubio mitius* to exceptions provisions inserted in international agreements. On the one hand, Asif Qureshi, quoting the authors of *Oppenheim's International Law*, observed that courts strictly interpret exceptions imposed on a State “notwithstanding that the principle *in dubio mitius* may suggest that the exception be given a liberal interpretation.”²³² This position is often embodied in the maxim *exceptiones sunt strictissimae interpretationis*, which is a variant of *in dubio mitius*. On the other hand, Trebilcock and Howse, drawing an example from the WTO case law, criticized the panel in *Canada – Pharmaceuticals*²³³ for not applying the principle of *in dubio mitius* while interpreting the Article 30 exception of the TRIPs Agreement.²³⁴

On this point, consider Steve Charnovitz's argument regarding the application of *in dubio mitius* with respect to Article XX of the GATT:

I would be surprised to see a holding that a WTO Member claiming a GATT Article XX(g) exception is compelled to permit imports of products made from a foreign endangered species even when such commerce gives incentives for killing the species. Perhaps, the principle of *in dubio mitius* would be helpful to the adjudicator on the grounds that the governments drafting Article XX did not impose on

²³¹ CATHERINE BUTTON, *THE POWER TO PROTECT* 187 (Hart publishing, 2004).

²³² ASIF H. QURESHI, *INTERPRETING WTO AGREEMENTS: PROBLEMS AND PERSPECTIVES* 105, 111 (Cambridge University Press, 2006).

²³³ Panel Report, *Canada – Patent Protection of Pharmaceutical Products (Canada – Pharmaceuticals)*, WT/DS114/R, adopted 17 March 2000, para. 7.37.

²³⁴ TREBILCOCK & HOWSE, *supra*, n.____, at 419. They denounced the panel's narrow interpretation of Article 30 of the TRIPs Agreement in favor of the complainant's view, alleging that:

The tenor of this reasoning is exactly contrary to the interpretation principles established by the AB in *Hormones* – according to the AB, the principle of *in dubio mitius* requires that where there are two plausible approaches to the interpretation of a treaty provision, the treaty interpreter adopt the interpretation that is less restrictive of the sovereignty of the state or states undertaking the obligation in question.

themselves more onerous requirements than those specifically mentioned in Article XX.²³⁵

V. Conclusion

When McNair made some observations to Lauterpacht's first project of resolution on the interpretation of treaties to the IIL in 1950, he compared the attitude of jurists towards legal interpretation to badminton, describing lawyers as playing with rules as if they were birdies.²³⁶ To this end, he noted that "[a] lawyer discovers a rule supporting his thesis somewhere; he submits it to the tribunal; the tribunal feels compelled to examine it and the rule thus becomes part of the doctrine."²³⁷

Although it is difficult to ascertain whether the AB felt compelled to apply *in dubio mitius*, its report in *EC – Hormones* has unequivocally made this principle part of the doctrine and carried this vestige of the past into the Twenty-First Century. As Arthur Murphy emphasized, "old maxims never die."²³⁸ Not only was the AB's justification for using *in dubio mitius* questionable, for the AB manipulated the references made in support of the use of this principle, but it reignited the ideological debate dividing the legal doctrine over the conception of what the relationship between domestic and international law should be. As a result, some international courts and legal scholars consider *in dubio mitius* a threat to the future of international law, whereas the other part of the doctrine and the AB itself still sees in it a counterbalance to judicial activism. There is no doubt that had the AB used *in dubio mitius* in the recent *zeroing cases*,²³⁹ for example, the outcome would have been quite different. That is why, in spite of the little impact that this principle has had in practice, the question of the use of *in dubio mitius* in the WTO must not be postponed any longer.

²³⁵ Steve Charnovitz, *The WTO's Environmental Progress*, 10(3) J. INT. ECON. LAW 701 (2007).

²³⁶ See *Observations de Sir Arnold McNair, La Haye, 23 mars 1950, Annuaire de l'Institut de Droit International, Quarante-troisième volume, Tome I, Session de Bath, Septembre 1950, Rapport et projet de Résolutions présentées par M. H. Lauterpacht*, at 449.

²³⁷ *Id.* (translated from French).

²³⁸ See Arthur W. Murphy, *Old Maxims Never Die: The 'Plain-Meaning Rule' and Statutory Interpretation in the 'Modern' Federal Courts*, 75 COLUM. L. REV. 1299 (1975).

²³⁹ See Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology (US – Zeroing)*, WT/DS350/AB/R, adopted 4 February 2009; Panel Report, *United States – Laws, Regulations, and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/RW, adopted 17 December 2008; and Panel Report, *United States – Continued Existence and Application of Zeroing Methodology (US – Zeroing)*, WT/DS350/R, adopted 1 October 2008.