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On the Interpretation of Treaties

The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties

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The examples provided in the preamble, observes the Court, are particular aspects in which an improvement of "conditions of labour" are seen to be "urgently required". In its second opinion, the Court makes the following statement with regard to the meaning of the expression "measures":

> "other measures" ... must mean measures to improve the conditions of labour and to do away with injustice, hardship and privation.[123]

Together, these two observations assume the form of an interpretation argument.

The argument can be analysed as being comprised of five propositions, of which one is the conclusion: no referents of the expression " measures" belong to any other class than *measures to improve the conditions of labour and to do away with injustice*, *hardship and privation*. The remaining four propositions form the premises of the argument. Proposition no. 1 addresses the relationship between the expression "measures" and the preamble's long list of examples – the expression "the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, ...". It is the suggestion of the Court that, according to conventional language, the expression "measures" should be considered related to the expression "the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, ...". According to conventional language, the expression "other" acquires part of its meaning through the presence of another expression in the text or discourse, to which the expression "other" can be said to (deictically) refer. In the Statute of the International Labour Organization this can be only one expression: "the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, ...". Proposition no. 2 addresses the reference of the expression "the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, ...". It is the suggestion of the Court that the referents of the expression are members of a certain, generically defined class, namely *measures to improve the conditions of labour and to do away with injustice*, *hardship and privation*. Note that proposition no. 2 cannot be evaluated in terms of being true or false. The reference of an expression in a treaty is determined by the intentions of the utterers; these intentions can only be assumed.[124] Therefore, proposition no. 2 can only be evaluated in terms of it being well-founded.[125] Proposition no. 3 addresses the extension of the expression "measures", when interpreted in accordance with conventional

language. It is the suggestion of the Court that, according to conventional language, "measures" has an extension, which includes members of the class *measures to improve the conditions of labour and to do away with injustice, hardship and privation*. Lastly, proposition no. 4 addresses the contents of the principle of *ejusdem generis*. The suggestion of the Court can be expressed as follows: given that propositions no. 1 and no. 3 can be regarded as true, and that proposition no. 2 can be considered well-founded, then the preamble to the Statute of the International Labour Organization shall be understood under the assumption that no referents of the expression "measures" belong to any other class than *measures to improve the conditions of labour and to do away with injustice, hardship and privation*.

This analysis of the PCIJ opinion delivered in *Competence of the ILO for Agriculture* makes it possible already at this juncture to say something about the meaning of the principle of *ejusdem generis*. As a first, tentative hypothesis I would like to propose a rule of interpretation along the following lines:

Rule no. 39
If it can be shown (i) that in a treaty provision two expressions are included, of which the one (expression A), according to conventional language, can be considered related to the other (expression B), (ii) that all the referents of the former expression (A) can be considered to be members of a certain, generically defined class, and (iii) that, according to conventional language, all the members of this class are referents of the latter expression (B), then the provision shall be understood under the assumption that no referents to this second expression (B) belong to any other class.

Now, let us take a closer look at *Grimm v. Iran* and *Alberta Provincial Employees*.

The principle of *ejusdem generis*, observes *the Iran-United States Claims Tribunal* in *Grimm v. Iran*, can be applied for the interpretation of the expression "measures affecting property rights", used in article II, paragraph 1 of the Claims Settlement Declaration:

> [U]nder the well-known principle of *ejusdem generis* the words "other measures" in Article II, paragraph 1, ought to be, especially in the context of "debts and contracts", construed as generically similar to "expropriations" [...].[126]

Three conditions must be met in order for us to consider this application to be fully in accordance with interpretation rule no. 39. First, we must be able to show that according to conventional language, the expression "measures affecting property rights" bears a relation to the expression "expropriation". Second, we must be able to show that for good reasons, all the referents

of the expression "expropriation" can be considered to be members of a certain, generically defined class. Third, we must be able to show that according to conventional language, the expression "measures affecting property rights" has an extension that comprises said members of this class. All these conditions seem to be fulfilled. The first condition is met, since the expression "measures" in article II, paragraph 1 of the Claims Settlement Declaration is preceded by the expression "other", whose meaning – as already observed – is partially acquired through the presence of another expression in the text, to which "other" can be said to (deictically) refer. In paragraph 1, this expression can only be "expropriations". The second condition is met, since the verb EXPROPRIATE is defined in dictionaries *inter alia* as *to deprive of ownership*. The extension of the term DEPRIVATION OF OWNERSHIP is obviously broader than that of EXPROPRIATION. The third condition is met, since according to the lexicon and grammar of the English language, the expression "measures affecting property rights" clearly has an extension that includes (among others) the members of the class *deprivation of ownership*. All in all, it seems the case of *Grimm v. Iran* could be considered a confirmation of interpretation rule no. 39.

The principle of *ejusdem generis*, observes Chief Justice Sinclair in the case of *Alberta Provincial Employees*, is not applicable for the interpretation of the expression "administration of the State", used in article 8 § 2 of the International Covenant on Economic, Social and Cultural Rights. Three conditions must be met in order for us to be able to interpret the expression "administration of the State" in accordance with interpretation rule no. 39. First, we must be able to show that the expression "administration of the State", according to conventional language, bears a relation to the expression "members of the armed forces or ... the police". Second, we must be able to show that, for good reasons, all the referents to the expression "members of the armed forces or ... the police" can be considered members of a certain, generically defined class. Third, we must be able to show that according to conventional language, the expression "administration of the State" has an extension that includes (among others) the members of this specific class. It is the suggestion of Chief Justice Sinclair that this last condition has not been met. Possibly, there is a certain, generically defined class that includes all the referents of the expression "members of the armed forces or ... the police"; but according to conventional language, this class cannot be included in the extension of the expression "administration of the State":

> I cannot accept this suggestion [that the words "administration of the State" ought to be equated to the armed forces or to the police] because I believe the three functions to be essentially distinct.[127]

Again, it seems as if *Alberta Provincial Employees* could be considered a confirmation of interpretation rule no. 39. Hence, I will take this to be a correct description of the *ejusdem generis* principle.[128]

Not all authors seem prepared to support the conclusion that the principle of *ejusdem generis* should be described as a rule of interpretation in and of itself, separate from those other rules of interpretation that can be applied according to international law. Some authors seem to think that an application of the principle of *ejusdem generis* could be considered a use of conventional language, justified already under the provisions of Vienna Convention article 31.[129] The assumption is that a use of conventional language, under conditions identical to those that exist when the principle of *ejusdem generis* is applied, always leads to the exact same interpretation result. This assumption is not tenable. Take for example the text of the aforementioned Claims Settlement Declaration, article II, paragraph 1. Through an application of the *ejusdem generis* principle, we can obtain the result that none of referents of the expression "measures affecting property rights" belong to any other class than *deprivation of ownership*. This same result cannot be achieved by a mere use of conventional language. By using conventional language, we may possibly be able to show that the expression "measures affecting property rights" bears a relation to the expression "expropriations", and that the expression "measures affecting property rights" has an extension that includes members of the class *deprivation of ownership*. But this is not enough. To draw the conclusion that no referents to the expression "measures affecting property rights" belong to any other class than *deprivation of ownership*, we must also be able to show that all referents of the expression " expropriations" are members of the class *deprivation of ownership*. This requires a value judgment; and this value judgment cannot be produced on the basis of conventional language alone. Obviously, if the principle of *ejusdem generis* shall be taken into consideration for the interpretation of treaties, it must be described as a rule of interpretation in and of itself.

9 OTHER CLAIMED INTERPRETATION RULES

According to some authors, treaties shall be interpreted *in favorem debitoris*.[130] The principle *in favorem debitoris* can be expressed in the following way:

> If it can be shown (i) that the interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to conflicting results, (ii) that the interpreted provision expresses an obligation placed upon the parties to the treaty in different ways, and (iii) that the extension of

> the obligation in one of the two possible ordinary meanings is greater than in the other, then the latter meaning shall be adopted.[131]

Looking at the way some authors argue the point, it seems they take for granted that the principle *in favorem debitoris* could be considered a rule of interpretation in and of itself, independent of those otherwise applicable according to international law.[132] In my judgment, this is an assumption we should view with some scepticism.

One rule of interpretation laid down in international law is the one earlier termed as the rule of restrictive interpretation (rule no. 27):

> If it can be shown that the interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to conflicting results, and that the provision contains an obligation, whose extension in one of the two possible ordinary meanings is comparably greater than it is in the other, then the latter meaning shall be adopted.[133]

Clearly, a similarity exists between the principle *in favorem debitoris* and the rule of restrictive interpretation, and their respective scopes of application. Each and very case that comes within the scope of the principle *in favorem debitoris* comes within the scope of the rule of restrictive interpretation as well. Given interpretation rule no. 6 – according to which a treaty provision shall be understood so that in the text of that treaty there will be no instance of a logical tautology – I find it difficult to arrive at any other conclusion than this: the principle *in favorem debitoris* should not be considered a rule of interpretation in and of itself.

Another form of argumentation that some authors suggest we should include among the rules of interpretation laid down in international law is the maxim *lex specialis*,[134] sometimes denoted by authors using the more comprehensive expression *lex specialis derogat generali*,[135] or the corresponding negative expression *generalia specialibus non derogat*.[136] The meaning of this maxim remains rather unclear. According to some authors, it appears as if *lex specialis* would stand (at least in part) for a rule identical to the one that we have earlier termed as the principle of *ejusdem generis* (rule no. 39).[137] According to other authors, it seem as if *lex specialis* would stand (at least in part) for a rule identical to the one that we have earlier termed as interpretation rule no. 6.[138] Still others seem to consider *lex specialis* a rule to be applied for the resolution of norm conflicts:

> If it can be shown that two legal rules are in conflict with one another, and that the one (norm A) bears a relation to the other (norm B), that for good reasons can be described as that between *lex specialis* and *lex generalis*, respectively, then only the former norm (A) shall be applied.[139]

I cannot feel convinced by any of these arguments.

In the first and second of the three senses above, the maxim *lex specialis* would be found to be at variance with interpretation rule no. 6, according to which a treaty provision shall be understood so that in the text of that treaty there will be no instance of a logical tautology. If the maxim *lex specialis* were to be considered a rule of interpretation in and of itself, then in the former sense of the maxim, the principle of *ejusdem generis* (rule no. 39) would appear to be superfluous. In the second sense of the maxim, interpretation rule no. 6 would appear to be superfluous. In the third sense, the maxim *lex specialis* would appear to be at odds with interpretation rule no. 2, according to which the words and phrases used for a treaty shall be given a consistent meaning. The purpose of *lex specialis*, in the third sense of the maxim, is to resolve conflicts between legal norms. No conflict can be said to exist between two norms laid down in a treaty until the provisions where those two norms are expressed have been clarified. However, VCLT article 32 talks of "supplementary means of interpretation"; and INTERPRETATION, in the terminology used for other parts of the Vienna Convention, means the *clarification of an unclear text of a treaty*.[140] If the maxim *lex specialis* were to be considered a rule of interpretation, then upon the application of this rule the word INTERPRETATION would stand for something which it does not stand for upon the application of the other rules of interpretation. All things considered, the conclusion I draw is that *lex specialis* should not be considered a rule of interpretation in and of itself.

NOTES

1. For further explanations, see the introduction to Chapter 8 of this work.
2. See *Oppenheim's International Law*, pp. 1278–1279; Seidl-Hohenveldern, 1992, p. 93; Verdross and Simma, p. 493; Bernhardt, 1963, p. 143; and implicitly, Orakhelashvili, p. 534. See also *R (Marchiori) v. Environment Agency*, *ILR*, Vol. 127, p. 601; *EC-Beef Hormones*, § 165. Note, however, that the maxim *in dubio mitius* is at times also used as a synonym of what I – like many others and for the sake of clarity – have referred to as comprised by the principle of *in favorum debitoris*. (See e.g. McNair, 1961, p. 462; Lauterpacht, 1950, pp. 402–403.) About the principle *in favorem debitoris*, see Section 9 of this chapter.
3. See *Oppenheim's International Law*, pp. 1278–1279; Seidl-Hohenveldern, 1992, p. 93; *Starke's International Law*, pp. 436–437; Brownlie, p. 631; Akehurst, 1987, p. 205; Vitányi, p. 65; Verdross and Simma, pp. 493–494; Bos, 1984, pp. 156–157, 145–146; Haraszti, pp. 154–163; Rest, pp. 70–71; O'Connell, p. 256; Degan, 1963, pp. 106–111; Berlia, pp. 312–320; Hogg (II), pp. 19–28; De Visscher, 1957, p. 249; Grossen, pp. 119–120. See also, more or less implicitly, Verzijl, pp. 316–317; Bernhardt, 1967, p. 502. In contrast, Lauterpacht, 1950, pp. 406–407.
4. The Kronprins Gustaf Adolf; The Pacific (United States and Sweden), Award of 18 July 1932, *ILR*, Vol. 6, p. 375. Among the authorities who cite this decision, see

e.g. Verdross and Simma, p. 493, n. 11; Verzijl, pp. 316–317; O'Connell, p. 256, n. 69; Degan, 1963, p. 109; Lauterpacht, 1950, p. 406.

5. Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder, Judgment of 10 September 1929, *PCIJ*, Ser. A, No. 23, p. 26. Among the authorities who cite this decision, see e.g. Brownlie, p. 631, n. 48; Vitányi, p. 65, n. 131; Haraszti, p. 160; O'Connell, p. 256, n. 69; Bernhardt, 1963, p. 148; Grossen, p. 120; Lauterpacht, 1950, p. 405.
6. *Article 3*, *Paragraph 2*, *of the Treaty of Lausanne (Frontier Between Turkey and Iraq)*, Advisory Opinion of 21 November 1925, *PCIJ*, Ser. B, No. 12, p. 25. Among the authorities who cite this decision, see e.g. *Oppenheim's International Law*, pp. 1278–1279, n. 16; Verdross and Simma, p. 493, n. 11; Vitányi, p. 65, n. 131; Bos, 1984, pp. 156–157, 145–146; O'Connell, p. 256, n. 69; Berlia, p. 316; Grossen, p. 120.
7. The adjective RESTRICTIVE requires an object: according to conventional language, one cannot speak of *restrictive interpretation*, if it cannot be specified *which interpretation is meant to be restrictive*.
8. See the introduction to Chapter 8 of this work.
9. Hence, when Grossen observes "Les etats sont présumés avoir limité au minimum leur souverainité", it must be considered a bit misleading. (Grossen, p. 119.)
10. See Rest, pp. 71–72; Seidl-Hohenveldern, 1992, p. 93.
11. Rest, p. 70. (Footnotes omitted.)
12. See Alexy, 1994, pp. 75–77.
13. See e.g. Schwarzenberger, 1955, pp. 214–227, especially pp. 214–216.
14. See Ch. 8, Section 2, and Ch. 5, Sections 1 and 3, respectively, in this work.
15. See Ch. 4 of this work.
16. See Morrisson, pp. 361–375. See also, more or less explicitly, Brownlie, p. 631.
17. Cf. Schwarzenberger, 1955: "[S]ubjects of international law are bound by rules of an international legal order *if this can be shown to exist*" (p. 216). (My italics.)
18. Similarly, Vitányi, p. 65; Haraszti, p. 155; Hogg (II), pp. 27–28. Cf. also *Kronprins Gustaf Adolf*, see the quotation on p. 311 of this work.
19. Note, however, that at times the principle of *contra proferentem* has also been used to denote an interpretation *in favorem debitoris*. (See e.g. Rousseau, pp. 297–298; Degan, 1963, p. 114.) Such a usage of language cannot be considered correct. An interpretation of a treaty *in favorem debitoris*, in this context, amounts to much the same as (or rather amounts to a special case of) an application of *the rule of restrictive interpretation*. See more on this in Section 9 of this chapter.
20. See e.g. Aust, p. 201; Seidl-Hohenveldern, 1992, pp. 92–93; *Oppenheim's International Law*, p. 1279; Verdross and Simma, p. 493; Haraszti, pp. 188–191; Rest, p. 80; O'Connell, p. 257; Rousseau, p. 298; Berlia, pp. 321–327; Bernhardt, 1963, pp. 184–185; De Visscher, 1963, pp. 110–111; Degan, 1963, pp. 114–116; McNair, 1961, p. 464; Lauterpacht, 1949, pp. 63–64.
21. See Seidl-Hohenveldern, 1992, pp. 92–93; Verdross and Simma, p. 493; Rest, p. 80. See also McNair: "[I]n case of ambiguity a provision must be construed against the party which drafted *or* proposed that provision" (McNair, 1961, p. 464). (My italics.)
22. See *Oppenheim's International Law*, p. 1279; Haraszti, p. 188; Rousseau, p. 298; O'Connell, p. 257; Berlia, pp. 324–327; Degan, 1963, p. 115; Bernhardt, 1963, pp. 184–185; De Visscher, 1963, p. 111; Lauterpacht, 1949, pp. 63–64.

23. Definition B can be read as a more precise version of definition A. A party may have suggested that an expression be used for a treaty provision, without having unilaterally proffered the treaty for acceptance; but a party who has unilaterally proffered a treaty for acceptance is always *ipso facto* also the party who suggested the expression to be used for the provision interpreted.
24. Cf. Haraszti, p. 188; Köck, p. 53; Rest, p. 80; O'Connell, p. 257; Rousseau, p. 298; Bernhardt, 1963, p. 185; Lauterpacht, 1949, p. 64.
25. See, explicitly, Lauterpacht, 1949, p. 64. See also, more or less explicitly, Seidl-Hohenveldern, 1992, pp. 92–93; Verdross and Simma, p. 493; Haraszti, pp. 188–189; Köck, pp. 53–54.
26. Cf. for example Treaty of Peace with Italy, Signed at Paris, on 10 February 1947.
27. In general, it is rather unusual that a state unilaterally proffers a treaty for acceptance.
28. Several other authors seem to have arrived at this same conclusion. (See, implicitly, *Oppenheim's International Law*, pp. 1276, 1279; O'Connell, p. 257; Bernhardt, 1963, p. 185; McNair, 1961, p. 464.) There are also authors who claim that the principle of *contra proferentem* is applicable only for the interpretation of *traités-contrats*. (See e.g. Rest, p. 80; Rousseau, p. 298; Berlia, pp. 321–327; De Visscher, 1963, p. 110.)
29. See *Oppenheim's International Law*, p. 1279; Nowak, p. xxiv; Merrills, pp. 77, 114, 116; Ganshof van der Meersch, pp. 116–117; Bleckmann, p. 179; Verzijl, p. 317; O'Connell, p. 257; Bernhardt, 1963, pp. 182–184; Dahm, p. 56; Soubeyrol, p. 693. The opinion seems not shared by Pauwelyn. (Pauwelyn, p. 250.)
30. When a treaty is interpreted using "supplementary means of interpretation" – as we observed in Chapter 8 of this work – the process can be performed in two fundamentally different ways. "Supplementary means of interpretation can be used alone, and they can be used cumulatively, in combination with the means of interpretation known as conventional language". It is clear that the rule regarding restrictive interpretation of exceptions – just like *the rule of restrictive interpretation* – must always be based on a use of the means of interpretation conventional language.
31. Cf. e.g. Dahm, p. 56.
32. Bernhardt, 1963, p. 182. (Footnotes omitted.)
33. See, implicitly, *Oppenheim's International Law*, p. 1279; Nowak, p. xxiv; Merrills, pp. 77, 114, 116; Ganshof van der Meersch, pp. 116–117; Bleckmann, p. 179; O'Connell, p. 257; Soubeyrol, p. 693.
34. See e.g. Amerasinghe, pp. 196–198; Skubiszewski, 1989, pp. 855–868; Akehurst, 1987, p. 205; Verdross and Simma, pp. 494–495; E. Lauterpacht, pp. 423–432; Tunkin, pp. 185–188; Rest, p. 52; Chaumont, pp. 472–479; Gordon, pp. 816–821; Bernhardt, 1963, pp. 97–107; Schwarzenberger, 1957, pp. 522–525; Fitzmaurice, 1952, pp. 5–6.
35. See e.g. Rest, p. 52; Bernhardt, 1963, pp. 97–107; Schwarzenberger, 1957, pp. 525–526.
36. See e.g. Skubiszewski, 1989, pp. 855–856; Bernhardt, 1963, p. 98.
37. Cf. Hogg (I), pp. 428–429.
38. Similarly, Rest, p. 52; Bernhardt, 1963, p. 98.
39. Similarly, Hogg (I), pp. 409–441.
40. See e.g. Amerasinghe, pp. 196–198; Skubiszewski, 1989, pp. 855–868; Akehurst, 1987, p. 205; Verdross and Simma, pp. 494–495; E. Lauterpacht, pp. 423–432; Tunkin, pp. 185–188; Haraszti, pp. 171–173; Rest, p. 52; Chaumont, pp. 472–479; O'Connell, p. 257; Gordon, pp. 816–821; Bernhardt, 1963, pp. 97–107; Hogg (I), pp. 409–441; Schwarzenberger, 1957, pp. 522–525; Fitzmaurice, 1952, pp. 5–6.

41. See e.g. Blakemore, pp. 57–63.
42. See e.g. *Reparation for Injuries*: "Under international law, the Organization [i.e. United Nations] must be deemed to have those powers which, *though not expressly provided in the Charter*, are conferred upon it by necessary implication as being essential to the performance of its duties." (*ICJ Reports*, 1949, p. 182. My italics.) The case is cited by Amerasinghe, p. 196; Akehurst, 1987, p. 205; Verdross and Simma, p. 495; E. Lauterpacht, p. 424; Tunkin, pp. 185–186; Haraszti, p. 172; Rest, p. 52, n. 5; Chaumont, p. 473; Gordon, p. 817; Hogg (I), pp. 409–410; Schwarzenberger, 1957, p. 522; Fitzmaurice, 1952, p. 5.
43. See pp. 290–291 of this work.
44. See the introduction to Ch. 8 of this work.
45. In addition to the authorities cited in the text, see e.g. Skubiszewski, 1989, pp. 857–859; Akehurst, 1987, p. 205; Verdross and Simma, pp. 494–495; Tunkin, pp. 185–188, especially p. 188; Haraszti, pp. 171–172; Rest, p. 51; Chaumont, pp. 470–483; Hogg (I), pp. 427–441, especially p. 441; Fitzmaurice, 1952, p. 6.
46. See Gordon, p. 816.
47. See Schwarzenberger, 1957, pp. 521–526.
48. Ibid., p. 517.
49. See Amerasinghe, pp. 196–198.
50. Merrills, p. 87.
51. See the introduction to Ch. 8 of this work.
52. Skubiszewski, 1989, pp. 860–861.
53. See Skubiszewski, 1989, p. 860; Amerasinghe, pp. 196–198; Akehurst, 1987, p. 205; E. Lauterpacht, p. 423; Tunkin, p. 185; Haraszti, p. 171; Rest, pp. 51–52; Chaumont, p. 472; O'Connell, p. 257; Gordon, p. 820; Schwarzenberger, 1957, p. 523.
54. See E. Lauterpacht, p. 423 and pp. 423–432 cf. p. 420; Amerasinghe, pp. 196–198; Haraszti, p. 171; Rest, pp. 51–52, cf. p. 47; Chaumont, p. 472; Waldock, Third Report on the Law of Treaties, *ILC Yrbk*, 1964, Vol. 2, p. 61, § 29. See also Draft Articles With Commentaries (1966): "Properly limited and applied, the maxim [*ut res magis valeat quam pereat*] does not call for an 'extensive' or 'liberal' interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty." (*ILC Yrbk*, 1966, Vol. 2, p. 219, § 6.)
55. See Section 4 of Ch. 7 in this work.
56. Third Report on the Law of Treaties, *ILC Yrbk*, 1964, Vol. 2, p. 61, § 29.
57. See p. 220 of this work.
58. See the introduction to Ch. 7 of this work.
59. See Skubiszewski, 1989, pp. 861–862; E. Lauterpacht, pp. 430–432.
60. For the sake of simplicity, I concentrate on the application of interpretation rule no. 30 concerning the use of the *teloi* of a treaty. The same line of reasoning can be brought to bear on the application of interpretation rule no. 31 concerning the use of a treaty's norm content.
61. See E. Lauterpacht, 423; Haraszti, p. 171. A commonly cited opinion containing similar views is Judge Hackworth's dissenting opinion in *Reparations for Injuries* (*ICJ Reports*, 1949, p. 198).
62. See Ch. 2 of this work.
63. Loc. cit.
64. Loc. cit.
65. See Ch. 7, Section 1 of this work.

66. See interpretation rules nos. 18, 20, 22, 24 and 26.
67. Bleckmann distinguishes between two types of analogies: *Gesetzesanalgie* and *Rechtsanalogie*. "Gesetzesanalogie soll vorliegen, wenn von einem besonderen Rechtssatz auf einen anderen besonderen Rechtssatz geschlossen wird, Rechtsanalogie, wenn aus mehreren besonderen Rechtssätzen auf einer höheren gemeinsammen Rechtssatz, der als Ausdruck eines allgemeineren Prinzips angesehen wird." (Bleckmann, p. 176.) Obviously, when we deal exclusively with interpretation, only the former type of analogy may be in question.
68. See Bos, 1984, pp. 143–144; Rest, p. 78; Rousseau, p. 275; Bernhardt, 1963, p. 181; De Visscher, 1963, p. 38; Jokl, p. 106.
69. See Vitányi, pp. 54–55; Rousseau, p. 275; Degan, 1963, pp. 100–102; Spencer, pp. 71ff.
70. Similarly, Rousseau, p. 275.
71. See Bos, 1984, pp. 143–144; Karl, 1979, pp. 19–20; Bleckmann, pp. 177–178; Verzijl, p. 316; Rest, pp. 78–79; Rousseau, pp. 275–278; Voïcu, p. 48; De Visscher, 1963, pp. 38–44; Dahm, p. 53; Guggenheim, pp. 128–129; Sørensen, 1946, pp. 225–226. For a different opinion, see: Bernhardt, 1963, pp. 181–182; cf. however Bernhardt, 1967, p. 502; Jokl, pp. 104–109.
72. See e.g. Bernhardt, 1963, pp. 181–182; Jokl, pp. 104–109.
73. See e.g. Bernhardt, 1963, pp. 181–182.
74. See Vitányi, pp. 54–55; Degan, 1963, pp. 100–102; Spencer, pp. 71ff. Cf. also Rousseau, p. 275.
75. See the introduction to Ch. 8 of this work.
76. See Section 4 in this chapter.
77. See Section 1 in this chapter.
78. See Section 2 in Chapter 8 of this work.
79. See, expressly, Rousseau, pp. 275–278; De Visscher, 1963, pp. 40–41.
80. See Rest, p. 78; Guggenheim, p. 128. *Interpretation per analogiam* appears to be defined in this same manner in certain national legal systems. See e.g. Peczenik, 1995, with regard to Swedish law: "*Gesetzsanalogie* means that (1) the case in question lies outside the natural area of linguistic application for the particular law being applied; in other words, outside both its essence and its periphery, but (2) the case is nevertheless judged using this law, since (3) this law regulates other cases bearing considerable similarity to the case at hand." (p. 341; authors translation).
81. See the introduction to Ch. 8 of this work.
82. Loc. cit.
83. See Section 6 of this chapter (interpretation rule no. 34).
84. See Simon, pp. 105–106; Bleckmann, p. 162; Verzijl, p. 316; Haraszti, p. 110; Rest, p. 79; Voïcu, p. 47; De Visscher, 1963, p. 113; Schwarzenberger, 1957, pp. 513–514; Sørensen, 1946, p. 225.
85. See Simon, p. 106, n. 374.
86. Cf. Peczenik, 1987: "*Regulative norms* qualify (1) actions or (2) conditions as directed, permitted or prohibited." (p. 15; authors translation.)
87. See Simon, p. 106, n. 374.
88. See n. 85 in this chapter.
89. I assume this is why some authors classify interpretation *per argumentum a fortiori* as a type of interpretation *per analogiam*. (See e.g. Bleckmann, p. 162. See also Peczenik, 1995, p. 361.) I am reluctant to make this classification. The authors seem

to assume that we can equate the requirement of generic kinship – that must be met when we interpret a treaty *per argumentum a fortiori* – and the requirement of significant similarity – that must be met when we interpret a treaty *per analogiam*. If this assumption were correct, then an argument that comes within the scope of an interpretation *per argumentum a fortiori* will also always come within the scope of an interpretation *per analogiam*. Would this not make interpretation *per argumentum a fortiori* semantically superfluous?

90. This is not to say that it is impossible. With regard to interpretation *per argumentum a fortiori* under Swedish law, professor Peczenik observes: "In a few isolated cases, the relationship more-less can be established without value judgment through logical deduction or empirical observations. To cause that no tax be levied on the taxpayer is clearly more than to cause that an insufficient tax be levied. The latter act is a crime according to 2 § 2 of the Swedish Law on the Crime of Tax Evasion; hence, the former act is as well." (Peczenik, 1995, p. 361; authors translation.)
91. Cf. *Legal Status of Eastern Greenland*, *PCIJ*, Ser. A/B, No. 53, p. 73.
92. In actuality, two value judgments are necessary. In order to justify the claim that a Norwegian occupation of eastern Greenland is a less tolerable act than that of Norway contesting the territorial sovereignty possessed by Denmark with regard to all of Greenland, an applier must be able to defend the proposition that a Norwegian occupation of eastern Greenland is an act generically identical to that of Norway contesting the territorial sovereignty possessed by Denmark with regard to all of Greenland. She must also be able to defend the proposition that a Norwegian occupation of eastern Greenland is a less tolerable act than that of Norway contesting the territorial sovereignty possessed by Denmark with regard to all of Greenland. Neither of these propositions can be justified by an applier in a value-free way. Justification of the latter proposition naturally requires that the former can be justified. Therefore, I have chosen to simplify the issue somewhat and say that only *one* value judgment is required.
93. See, explicitly, Bleckmann, p. 162; Ehrlich, pp. 112–113; in addition, implicitly, Verzijl, p. 316; Sørensen, 1946, pp. 225–226. See also Peczenik, 1995, p. 361.
94. See e.g. Aust, p. 201; *Oppenheim's International Law*, pp. 1279–1280; Brownlie, p. 629; Bos, 1984, p. 141; Haraszti, pp. 110–111; Verzijl, p. 316; Rest, pp. 79–80; Bernhardt, 1963, pp. 180–181; De Visscher, 1963, p. 113; Degan, 1963, pp. 113–114; McNair, 1961, pp. 399–410; Schwarzenberger, 1957, pp. 511–512; Fitzmaurice, 1951, p. 25. See also *Plama*, § 191.
95. Cf. *The Law Dictionary: A Dictionary of Legal Words and Phrases with Latin and French Maxims of the Law Translated and Explained*, Gilmer's Revision, sixth edition.
96. The S.S. "Wimbledon", Judgment of 17 August 1923, *PCIJ*, Ser. A, No. 1. Among the authorities who cite this decision, see e.g. Haraszti, pp. 110–111; Degan, 1963, pp. 113–114; De Visscher, 1963, p. 113; McNair, 1961, pp. 400–401; Schwarzenberger, 1957, p. 513.
97. McNair, 1961, pp. 400–401. (Footnotes omitted.)
98. Railway Traffic between Lithuania and Poland (Railway Sector Landwarów-Kaisiadorys), Advisory Opinion of 15 October 1931, *PCIJ*, Ser. A/B, No. 42. Among the authorities who cite this decision, see e.g. Verzijl, p. 316; Rest, pp. 79–80; Bernhardt, 1963, p. 180; Schwarzenberger, 1957, p. 512.
99. *PCIJ*, Ser. A/B, No. 42, p. 5.
100. The text cited is that provided by the court. (See *PCIJ*, Ser. A/B, No. 42, p. 16.)

101. The text cited is that provided by the court. (See loc. cit.)
102. Ibid., p. 17–18.
103. See p. 300 of this work.
104. See pp. 301–302 of this work.
105. Additional support for this conclusion can be found in the national law literature. In interpretation rule no. 38, the maxim *expressio unius est exclusio alterius* is expressed in the same way as it appears to be used in common-law countries. (See e.g. Bennion, pp. 823, 844–850.)
106. See primarily Brownlie, pp. 628–629. See also *Oppenheim's International Law*, pp. 1279–1280, cf. however p. 1275 and the title of § 633.
107. See e.g. Aust, p. 201; *Oppenheim's International Law*, pp. 1279–1280; Brownlie, p. 629; Köck, p. 49; Haraszti, p. 192; Bernhardt, 1963, p. 176, n. 809; McNair, 1961, pp. 393–399; Schwarzenberger, 1957, p. 510. Note that certain authors denote the principle using other terms than *ejusdem generis*. (See e.g. Köck, p. 49; Haraszti, p. 192; Schwarzenberger, 1957, p. 510.)
108. *Oppenheim's International Law*, p. 1280, n. 20. For an almost identical definition, see Brownlie, p. 629; and McNair, 1961, p. 393.
109. International case law does not offer an abundance of examples that can be used to establish the application (and applicability) of the principle of *ejusdem generis*. However, in addition to the cases cited in the main text, the following may be mentioned: *Buchanan and Co. Ltd v. Babco Ltd.*, Opinion of Lord Edmund-Davies, *ILR*, Vol. 74, p. 610; *Quazi v. Quazi*, Opinion of Lord Scarman, *ILR*, Vol. 74, p. 552; *Social Insurance (Alsace-Lorraine)*, *American Journal of International Law*, Vol. 20 (1926), p. 570; *Administrative Decision No. II*, *American Journal of International Law*, Vol. 18 (1924), p. 184.
110. Competence of the ILO for Agriculture, Advisory Opinion of 12 August 1922, *PCIJ*, Ser. B, No. 2–3.
111. My italics.
112. *PCIJ*, Ser. B, No. 2–3, p. 25.
113. Ibid., p. 55, continued on p. 57.
114. Grimm v. The Government of the Islamic Republic of Iran (Case No. 71), Award of 18 February 1983, *ILR*, Vol. 71, pp. 650ff.
115. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 January 1981.
116. My italics.
117. *ILR*, Vol. 71, p. 652.
118. Loc. cit.
119. Re Alberta Union of Provincial Employees et al and the Crown in Right of Alberta, Judgment of 25 July 1980, *ILR*, Vol. 90, pp. 181ff.
120. My italics.
121. *ILR*, Vol. 90, p. 188.
122. See p. 304 of this work.
123. See p. 305 of this work.
124. See Ch. 3, Section 3 of this work.
125. Of course, proposition no. 2 must be considered well-founded. From a grammatical point of view, the expression "the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour

supply, the prevention of unemployment, ..." bears a clear relation to the second sentence of the second paragraph: "an improvement of those conditions is urgently required". The expression "conditions" in the second sentence of the second paragraph refers anaphorically to the first sentence of the second paragraph, and the expression "conditions of labour ... involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that peace and harmony of the world are imperilled". This conclusion can be made, since the expression "conditions" is preceded by the expression "those", which according to the rules established for the English language, acquires part of its meaning through the presence, earlier in the same text, of another expression, to which "those" can be said to refer. In the preamble to the Statute of the International Labour Organization, this expression can only be one, namely, "conditions of labour ... involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that peace and harmony of the world are imperilled".

126. See p. 306 of this work.
127. See p. 306 of this work.
128. Additional support for this conclusion can be found in the national law literature. In interpretation rule no. 39, the principle of *ejusdem* is expressed in the same way as it appears to be used in common-law countries. (See e.g. Bennion, pp. 823, 828–840; Williams, 1943, pp. 119–128.)
129. See Brownlie, pp. 628–629; Bernhardt, 1963, p. 176, n. 809, as well as *Oppenheim's International Law*, pp. 1279–1280; however, cf. p. 1275 and the title of § 633.
130. See e.g. Seidl-Hohenveldern, 1992, p. 93; *Oppenheim's International Law*, p. 1279; O'Connell, pp. 256–257; Rousseau, pp. 297–298; Degan, 1963, p. 114; McNair, 1961, pp. 462, 765–766; Fitzmaurice, 1957, p. 238; Lauterpacht, 1950, pp. 402–403. It should be noted that sometimes an act of interpretation *in favorem debitoris* is denoted using different terms. For example, Lauterpacht and McNair refer to the act of interpretation *in favorem debitoris*, denoting it by the maxim *in dubio mitius*. Degan and Rousseau refer to the act, denoting it by the principle of *contra proferentem*.
131. Cf. Seidl-Hohenveldern, 1992, p. 93; *Oppenheim's International Law*, p. 1279; O'Connell, pp. 256–257; Rousseau, pp. 297–298; Degan, 1963, p. 114; McNair, 1961, pp. 462, 765–766; Fitzmaurice, 1957, p. 238; Lauterpacht, 1950, pp. 402–403.
132. See e.g. Seidl-Hohenveldern, 1992, p. 93; McNair, 1961, pp. 462, 765–766; Fitzmaurice, 1957, p. 238; Lauterpacht, 1950, pp. 402–403.
133. See p. 281 of this work.
134. See e.g. McLachlan, p. 291; Aust, p. 201; Mus, p. 218; De Visscher, 1963, pp. 104–105; Schwarzenberger, 1957, pp. 510–511.
135. See e.g. *Starke's International Law*, p. 437; Schwarzenberger, 1957, pp. 510–511.
136. See e.g. *Oppenheim's International Law*, p. 1280; Haraszti, pp. 191–192; Voïcu, p. 47; Fitzmaurice, 1957, pp. 236–238.
137. See e.g. Haraszti, pp. 191–192; Schwarzenberger, 1957, pp. 510–511.
138. See e.g. Haraszti, pp. 191–192; Fitzmaurice, 1957, pp. 236–238; Schwarzenberger, 1957, pp. 510–511. With regard to interpretation rule no. 6, see Ch. 4 of this work.
139. See e.g. Mus, p. 218; *Starke's International Law*, p. 437; *Oppenheim's International Law*, p. 1280; De Visscher, 1963, pp. 104–105.
140. See Ch. 1, Section 3, of this work.

CHAPTER 10

THE RELATIONSHIPS BETWEEN DIFFERENT MEANS OF INTERPRETATION

The purpose of this work to clarify and put to words those rules of interpretation that can be invoked by appliers on the basis of international law. According to general jurisprudence, rules of interpretation classify as of two different types, often termed as first-order and second-order rules of interpretation, respectively.[1] A first-order rule of interpretation tells appliers how a treaty provision shall be understood in cases where it has been shown to be unclear. A first-order rule of interpretation informs appliers of the relationship that shall be assumed to hold between an interpreted treaty provision and a given means of interpretation.[2] A second-order rule of interpretation tells appliers how a treaty provision shall be understood in cases where two first-order rules of interpretation have been shown to be in conflict with one another. A second-order rule of interpretation informs appliers of the relationship that shall be assumed to hold between two given first-order rules of interpretation.[3] As a result of the investigations conducted in Chapters 3–9 of this work, we have obtained quite an extensive set of rules, which – for the sake of simplicity – we have termed using the numbers 1 through 39. These are all first-order rules of interpretation. In this chapter, I shall proceed to investigate the various second-order rules of interpretation laid down in international law.

Of all the provisions comprised by VCLT articles 31–33, two are of principal interest. The first is the one included in article 32: "Recourse may be had to supplementary means of interpretation ... in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable."

Il peut être fait appel à des moyens complémentaires d'interprétation ... en vue, soit de confirmer le sens résultant de l'application de l'article 31, soit de déterminer le sens lorsque l'interprétation donnée conformément à l'article 31: (a) laisse le sens ambigu ou obscur; ou (b) conduit à un résultat qui est manifestement absurde ou déraisonnable.

Se podrá acudir a medios de interpretación complementarios ... para confirmar el sentido resultante de la aplicación del artículo 31, o para determinar el sentido cuando la interpretación

dada de conformidad con el artículo 31: (a) Deje ambiguo o oscuro el sentido; o (b) Conduzca a un resultado manifiestamente absurdo o irrazonable.

The second provision referred to is the one set forth in article 31 § 1: "A treaty shall be interpreted in 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."

Un traité doit être interprété de bonne foi suivant le sens ordinaire à attribuer aux termes du traité dans leur contexte et à la lumière de son objet et de son but.

Un tratado deberá interpretarse de buena fe conforme al sentido corriente que haya de atribuirse a los términos del tratado en el contexto de éstos y teniendo en cuenta su objeto y fin.

What do these two provisions imply? This is what we shall now try to establish.

The organisation of this chapter is similar to that of previous chapters in this work. As in Chapters 3–9, I will divide Chapter 10 according to the different means of interpretation that can be used by appliers for the interpretation of treaties. A first task will be to determine the relationship that shall be assumed to hold among primary and supplementary means of interpretation. This is the subject of Sections 1–6. A second task will be to determine the relationship that shall be assumed to hold among the primary and supplementary means of interpretation, respectively. This is the subject of Section 7.

1 THE RELATIONSHIP BETWEEN PRIMARY AND SUPPLEMENTARY MEANS OF INTERPRETATION: AN INTRODUCTION

According to VCLT article 32, appliers may have recourse "to supplementary means of interpretation ... in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable". A key feature in this passage is the expression "determine" (Fr. "*déterminer";* Sp. "*determinar")*. Determining the meaning of a treaty using some certain means of interpretation is tantamount to understanding the text in accordance with the rule or rules of interpretation, through which the usage has to be effectuated.[4] If a treaty can be interpreted using both supplementary and primary means of interpretation, and the use of different means of interpretation leads to conflicting results, then the supplementary and primary means of interpretation cannot possibly *both* be used to "determine" the meaning of the treaty. Earlier, we described the use of supplementary

means of interpretation as the application of interpretation rules nos. 17–39.[5] The use of primary means of interpretation has been described as the application of interpretation rules nos. 1–16.[6] Consequently, as a preliminary rendering of VCLT article 32, we may establish the following sentence:

> If it can be shown that the interpretation of a treaty provision in accordance with any one of the interpretation rules nos. 1–16 leads to a result, which is different from that obtained by interpreting the provision in accordance with any one of the interpretation rules nos. 17–39, and that the application of the former rule either leaves the meaning of the provision "ambiguous or obscure", or "leads to a result which is manifestly absurd or unreasonable", then the provision shall be understood in accordance with the latter of the two rules.

This sentence will henceforth be termed as norm sentence NS_1.

Of course, in and of itself, norm sentence NS_1 amounts to a very cautious reading – too cautious, according to many. In purely grammatical terms – this much is clear – article 32 expresses permission. According to its wording, supplementary means of interpretation is something, to which recourse "*may* be had" (auxquelles "[i]l *peut* être fait appel", a cuales "[s]e *podrá* acudir").[7] The majority of authors, however, seem to agree that the provision shall also be applied *e contrario*.[8] Not only does article 32 give permission; it shall also be understood to express a prohibition. The prohibition goes as follows: appliers may *not* have recourse to the supplementary means of interpretation to determine the meaning of a treaty provision, when interpreting the provision according to article 31 *neither* leaves the meaning of the text "ambiguous or obscure", *nor* "leads to a result which is manifestly absurd or unreasonable". More neatly put, it can also be expressed in the following manner:

> If it can be shown that the interpretation of a treaty provision in accordance with any one of the interpretation rules nos. 1–16 leads to a result, which is different from that obtained by interpreting the provision in accordance with any one of the interpretation rules nos. 17–39, then the provision shall be understood in accordance with the former of the two rules, except for those cases where it can be shown that the application of this former rule leaves the meaning of the provision "ambiguous or obscure", or "leads to a result which is manifestly absurd or unreasonable".

This sentence will henceforth be termed as norm sentence NS_2.

Now we have made some headway in our inquiry. As a preliminary rendering of article 32, we have established two norm sentences, and to

facilitate reference we have denoted them as NS_1 and NS_2. However, there is still some work to be done before the contents of article 32 can be put to words in the form of a true rule of interpretation. First, we must define more precisely the relationship between our two classes of rules: rules nos. 1–16 and rules nos. 17–39. As observed earlier, there are several possible avenues that may be taken by states if they wish to establish a rule of law to govern the relationship between two first-order rules of interpretation. [9] Assume that states have established two rules of interpretation (A and B) that, in practice, they suspect will often lead to different results. Assume also that states decide to establish a rule of interpretation D, according to which all future conflicts between rules A and B will be resolved so that, whatever treaty provision is interpreted, it shall be read only in application of interpretation rule A. In principle, this can be done in two ways. Either states decide that treaty provisions shall *not* be read in accordance with interpretation rule B; or states decide that *rather than* with rule B, treaty provisions shall be read in accordance with interpretation rule A – which is not really the same thing. In both cases, interpretation rule D is a reason not to understand treaty provisions in accordance with interpretation rule B; thus far, the contents of the two rules are identical. The difference is that in the former case, interpretation rule D is a *conclusive reason* to not understand a treaty provision in accordance with interpretation rule B, while in the second case, interpretation rule D is only a *reason pro tanto*. In practice, this difference can be of greatest significance.

Imagine the following scenario. We interpret a treaty provision (T) and discover that there are three first-order rules of interpretation (A, B and C), which all can be applied *prima facie* . The problem is that they do not all lead to identical results. While the result obtained by applying rule A compares to that obtained by applying rule C, the result that ensues from an application of B differs. In other words, rules A and B are in conflict with one another, as are rules B and C; but no conflict exists in the relationship between rules C and A. Now, assume the following second-order rule of interpretation (D) can be established:

> If it can be shown that the interpretation of a treaty provision in accordance with interpretation rule A leads to a result, which is different from that obtained by interpreting the provision in accordance with interpretation rule B, then the provision shall not be understood in accordance with interpretation rule B.

Interpretation rule D resolves the conflict that exists between rules A and B. But it also resolves the conflict that exists between rules B and C; for

interpretation rule D is a conclusive reason to not understand treaty provision T in accordance with interpretation rule B. Hence, when rule D is applied, the effect is that rule B loses its normative power, not only with respect to rule A, but quite generally, with respect to each and every other first-order rule of interpretation, with which it might possibly collide. The situation would be different if, instead, the imaginary rule D had been described in the following manner:

> If it can be shown that the interpretation of a treaty provision in accordance with interpretation rule A leads to a result, which is different from that obtained by interpreting the provision in accordance with interpretation rule B, then rather than being understood in accordance with rule B, the provision shall be understood in accordance with interpretation rule A.

Interpretation rule D resolves the conflict that exists between rules A and B. However, the conflict that exists between interpretation rules B and C remains; for interpretation rule D is merely a reason *pro tanto* to not understand treaty provision T in accordance with rule B. When rule D is applied, the effect is that interpretation rule B loses its normative power, but only with respect to interpretation rule A. The conflict that holds between interpretation rules B and C still remains.

The problem with the norm sentences NS_1 and NS_2 would then be that they allow for different readings. Naturally, the question is how the passage concluding the two sentences should be understood: "then the provision shall be understood in accordance with the latter [in NS_2: 'the former'] of the two rules". Should we take this as an instruction to the effect that appliers shall not understand the interpreted treaty provision in accordance with the "losing" rules of interpretation nos. 1–16 and 17–39, respectively? If that is the case, the norm expressed will form a conclusive reason to not understand the interpreted treaty provision in accordance with the "losing" rules of interpretation nos. 1–16 and 17–39, respectively. Or should we understand the passage as an instruction to the effect that prior to the "losing" rules of interpretation nos. 1–16 and 17–39, respectively, we shall understand the provision in accordance with the "winning" rules? Then instead, the norm expressed will form only a reason *pro tanto* to not understand the interpreted treaty provision in accordance with the "losing" interpretation rules nos. 1–16 and 17–39, respectively. Choosing between these two alternatives, my conclusion is that norm sentences NS_1 and NS_2 must be given different interpretations. This is a proposition that I will now try to establish.

2 THE RELATIONSHIP BETWEEN PRIMARY AND SUPPLEMENTARY MEANS OF INTERPRETATION: THE SECOND-ORDER RULE AS A CONCLUSIVE REASON OR AS A REASON *PRO TANTO*

To repeat: the question to be answered is whether the norms expressed by norm sentences NS_1 and NS_2 should be considered as conclusive reasons to not understand an interpreted treaty provision in accordance with the "losing" rules nos. 1–16 and 17–39, respectively, or whether they should be considered merely as reasons *pro tanto*. Let us begin with addressing norm sentence NS_1. It is my opinion that norm sentence NS_1 should be regarded in the former manner – the norm that the sentence expresses is a conclusive reason to not understand an interpreted treaty provision in accordance with the "losing" interpretation rules nos. 1–16 and 17–39, respectively. The main argument, which I believe supports my conclusion, is the concept of interpretation assumed in the Vienna Convention. As observed earlier, interpreting a treaty, according to the terminology of the Vienna Convention, is tantamount to clarifying the text of a treaty that has been shown to be unclear.[10] From this definition two norms of interpretation can be derived – in the aggregate often referred to as THE DOCTRINE OF PLAIN MEANING (LA RÈGLE DU SENS CLAIR),[11] OR THE PRINCIPLE OF NATURAL AND ORDINARY MEANING.[12] According to the first of the two norms, a process of interpretation shall be concluded when one arrives at a point where the interpreted treaty provision can be regarded as clear.[13] According to the second norm, a process of interpretation shall *not* be concluded, as long as the interpreted treaty provision *cannot* be regarded as clear.[14] Of course, neither of these norms are something that governs the result of the interpretation process,[15] which after all is the subject to be dealt with in this work.[16] They are both norms that govern the interpretation process as such. However, at least the second of the two norms is of major relevance, when – given that the use of primary and supplementary means of interpretation lead to conflicting results – we need to determine which of the results shall be considered legally correct. Perhaps this will come out more clearly if instead the norm is expressed in the following manner:

> Whatever first-order rule of interpretation is applied for the understanding of a treaty provision, if the ensuing meaning cannot be considered clear, it shall not be regarded as normative.

Right away, the crucial point of the problem turns out to be this: what do we mean when we say that the meaning of a treaty cannot be considered clear? What is the criterion, by which appliers are to judge the clarity of a treaty provision? The general view held among authors is that the relevant

criterion is the one that can be discerned from VCLT article 32. In order for a treaty provision to be considered clear – this is how the text is to be read – the meaning given to the provision must not be "ambiguous or obscure"; nor must the meaning be "manifestly absurd or unreasonable".[17] The essence of this analysis would then seem to be the following:

> Whatever first-order rule of interpretation is applied for the understanding of a treaty provision, if the ensuing meaning is either "ambiguous or obscure", or amounts to a result which is "manifestly absurd or unreasonable", that meaning shall not be regarded as normative.[18]

If we accept this conclusion, then the norm expressed by norm sentence NS_1 can be understood in only one way, namely as a conclusive reason to not understand a treaty provision in accordance with any of the interpretation rules nos. 1–16. Norm sentence NS_1 could accordingly be given a more precise wording:

> If it can be shown that the interpretation of a treaty provision in accordance with any one of the interpretation rules nos. 1–16 leads to a result, which is different from that obtained by interpreting the provision in accordance with any one of the interpretation rules nos. 17–39, and that the application of the former rule either leaves the meaning of the provision "ambiguous or obscure", or "leads to a result which is manifestly absurd or unreasonable", then the provision shall not be understood in accordance with this former rule.

Now, let us see if this same approach can be used to more precisely define the meaning of norm sentence NS_2. Earlier, norm sentence NS_2 was articulated as follows:

> If it can be shown that the interpretation of a treaty provision in accordance with any one of the interpretation rules nos. 1–16 leads to a result, which is different from that obtained by interpreting the provision in accordance with any one of the interpretation rules nos. 17–39, then the provision shall be understood in accordance with the former of the two rules, except for those cases where it can be shown that the application of this former rule leaves the meaning of the provision "ambiguous or obscure", or "leads to a result which is manifestly absurd or unreasonable".

In my judgment, the passage "then the treaty provision shall be understood in accordance with the former of the two rules" shall be understood as an instruction to the effect that rather than being understood in accordance

with rules nos. 17–39, the interpreted treaty provision shall be understood in accordance with rules nos. 1–16. This conclusion does not immediately follow from the wording of the Vienna Convention.[19] As a heading for article 32, the drafters have chosen the expression "Supplementary means of interpretation" *("Moyens complémentaire d'interprétation", "Medios de interpretación complementarios").* However, in and of itself, the word SUPPLEMENTARY (Fr. COMPLÉMENTAIRE; Sp. COMPLEMENTARIOS) only informs us that the means of interpretation set forth in article 32 are something to be used (should the need arise) as an addition or as a supplement to those set forth in article 31.[20] If a treaty provision has been shown to be unclear, the initial step for the applier shall not be to interpret the provision using the means of interpretation set forth in article 32. Instead, according to the wording of article 32, the initial step shall be to interpret the provision using the means of interpretation set forth in article 31. Only in those cases where the initial step of the interpretation process proves insufficient – when applying the rules of article 31 either leaves the meaning of the interpreted treaty provision "ambiguous or obscure", or "leads to a result that is manifestly absurd or unreasonable" – only then shall the provision be interpreted using the means recognised as acceptable in article 32.

Thus, on the face of it, article 32 would seem designed mainly to govern the process of interpretation as such. In this work, article 32 is of interest only because it can be considered as governing the results of the interpretation process.[21] The task before us is not to determine how appliers shall proceed, from the purely methodological perspective, when they interpret a treaty using the primary and supplementary means of interpretation. The situation that poses the problem in this work can be described as follows: a treaty provision has be shown to be unclear, and we have to choose between two different interpretation alternatives; the one alternative can be described as the result of an act using a primary means of interpretation, the other as the result of an act using a supplementary means of interpretation; in neither case do we face a result "which is manifestly absurd or unreasonable", or one that leaves the meaning of the interpreted provision "ambiguous or obscure"; we are now keen on determining which of the two interpretation alternatives we shall consider correct. This problem is not one that can be solved by simply referring to the wording of VCLT article 32, and the wording of article 32 only. A solution must be sought elsewhere.

Some assistance can indeed be found in the literature. Among the several authors that may readily be cited is Professor Villiger:

> A result arrived at by the use of primary means of Art. 31 prevails over solutions suggested by the *travaux*.[22]

With regard to the draft finally adopted by the ILC in 1966, Jennings makes the following remarks:

> Article 28 on the other hand is said to be wholly subordinate to Article 27, for it relates to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion ...".[23]

Schröder comments on the very same draft:

> Der Vergleich der Art 27 und 28 ergibt, daß die Interpretation an Hand des Vetragstextes den Vorrang vor den travaux préparatoires und den Umständen bei Vetragsschluß haben soll.[24]

The three authors all have different ways of expressing themselves, yet the substance is the same: when appliers have to choose between using a primary and a supplementary means of interpretation to determine the meaning of a treaty provision, greater attention should be paid to the former.

In addition to this, several authors have commented upon the relationship assumed to be held between primary and supplementary means of interpretation, noting that the former are *hierarchically superior* to the latter.[25] Jacobs, to name one, reports with reference to the ILC draft of 1966:

> In its distinction between Article 27, "General rule of interpretation" and Article 28, "Supplementary means of interpretation", the draft appears to establish a clear hierarchy in favour of the ordinary meaning of the words which suggests a textual approach.[26]

I cannot perceive this to be anything but synonymous with what we have already observed, along with authorities such as Villiger, Jennings and Schröder: in a situation where we are forced to choose between a primary and a supplementary means of interpretation, greater attention should be paid to the former. HIERARCHY involves rank and precedence. The word HIERARCHY stands for a system, in which different persons or objects bear a relation to each other based on their different importance or authority, *not implying*, however, that one or several of these people or objects should be considered as lacking in importance or authority completely. A relationship held between two people is hierarchical, if (and only if) the will of the one can be generally considered more important, but the will of the other, at least in some situations, can be considered more important than the will of a third person. If we have a discussion about the relationship held between primary and supplementary means of interpretation, and I make the remark that the former are hierarchically superior to the latter, but by saying so I mean that a supplementary means of interpretation – just because it happens to be in conflict with a primary means of interpretation, and just because of its lower hierarchical rank – loses the normative power normally conferred upon it, then, indeed, this would not be the ordinary way of using the word HIERARCHY.

This same discussion of hierarchies can be found in the preparatory work of the Vienna Convention. As a starting point for the Vienna Conference of 1968 and 1969, the International Law Commission had prepared a draft. In this draft – as in the Convention that was finally adopted – different means of interpretation had been separated and arranged as two separate articles (articles 27 and 28), the latter of which bore the heading "Supplementary means of interpretation".[27] This draft was heavily criticised by the USA,[28] who later during the conference pressed for changes.[29] The American proposal was that articles 27 and 28 of the ILC draft should be combined and replaced by a single article, in which largely the same elements (or means) of interpretation were listed, but with no details regarding the conditions under which each element should be used.[30] The reaction of the other participating states was unusually harsh. A few delegations declared a willingness to support the proposal,[31] but the great majority expressed strong dissent.[32] The argument made – for as well as against – was that, by accepting the American proposal, all means of interpretation would be given the exact same level of authority; the hierarchy that the ILC had tried to establish between primary and supplementary means of interpretation would be undermined completely. All things considered, it seems that strong reasons support the proposition that in norm sentence NS_2, the norm expressed should be regarded as a reason *pro tanto*. Hence, norm sentence NS_2 can be revised to read:

> If it can be shown that the interpretation of a treaty provision in accordance with any one of the interpretation rules nos. 1–16 leads to a result, which is different from that obtained by interpreting the provision in accordance with any one of the interpretation rules nos. 17–39, then, rather than being understood in accordance with the latter of the two rules, the provision shall be understood in accordance with the former, except for those cases where it can be shown that the application of this rule leaves the meaning of the provision "ambiguous or obscure", or "leads to a result which is manifestly absurd or unreasonable".

One task remains before the content of VCLT article 32 can be set forth conclusively: we must define more precisely the conditions, on which the relationship between the two classes of means is dependent. If the need arises to interpret a treaty provision, and the use of primary and supplementary means of interpretation leads to conflicting results, there are two possible solutions to the problem. According to the first of the solutions, appliers shall *not understand* the provision using the primary means of interpretation. This solution is practised in cases where it can be shown that the use of primary

means of interpretation either leaves the meaning of the interpreted provision "ambiguous or obscure", or "leads to a result which is manifestly absurd or unreasonable". According to the second solution, *rather than* understanding the provision using the supplementary means of interpretation, appliers shall understand the provision using the primary means of interpretation. This solution is practised in cases where it *cannot* be shown that the use of primary means of interpretation leaves the meaning of the interpreted provision "ambiguous or obscure", or that it "leads to a result which is manifestly absurd or unreasonable". Two questions arise:

(1) What do we mean when we say that the use of primary means of interpretation leaves the meaning of an interpreted treaty provision "ambiguous or obscure"?
(2) What do we mean when we say that the use of primary means of interpretation "leads to a result which is manifestly absurd or unreasonable"?

In Sections 3 through 6 of this chapter, I will make an attempt to answer these questions. The first question will be addressed in Section 3; the second question will be addressed in Sections 4–6.

3 THE EXPRESSION "AMBIGUOUS OR OBSCURE"

What do we mean when we say that the use of primary means of interpretation leaves the meaning of an interpreted treaty provision "ambiguous or obscure"? I can see four different types of situations that might create problems for the applier who interprets a treaty provision using primary means of interpretation:

(1) Drawing up the provision, the parties used an expression whose form corresponds to an expression of conventional language; the expression has already been interpreted in accordance with interpretation rule no. 1; but the conventional meaning of the expression is ambiguous; and none of the interpretation rules nos. 2–16 can be applied to the effect that only one of the two possible meanings can be considered correct.
(2) Drawing up the provision, the parties used an expression whose form corresponds to an expression of conventional language; the expression has already been interpreted in accordance with interpretation rule no. 1; but the conventional meaning of the expression is vague; and none of the interpretation rules nos. 2–16 can be applied to the effect that the conventional meaning can be sufficiently defined.
(3) Drawing up the provision, the parties used an expression whose form corresponds to an expression of conventional language; the expression has already been interpreted in accordance with interpretation rule no. 1; but the conventional meaning of the expression is either vague or

ambiguous; and though several of the interpretation rules nos. 2–16 can be applied, the application of different rules leads to different results.

(4) Drawing up the provision, the parties used an expression whose form *does not* correspond to an expression of conventional language; hence, none of the interpretation rules nos. 1–16 can be applied.[33]

For me, it is clear that all four scenarios were in mind for those who drafted the text of article 32. In situations (1) and (2), as well as in situations (3) and (4), the use of the primary means of interpretation leads to a result that leaves the meaning of the interpreted provision "ambiguous or obscure". However, considering the way article 32 has been worded, we should be aware that this is a reading that meets with certain problems.

The root of these problems is the expression "the meaning" (Fr. "*le sens";* Sp. "*el sentido")*. In VCLT article 32, the word MEANING (Fr. SENS; Sp. SENTIDO) appears three times. This is how the article reads: "Recourse may be had to supplementary means of interpretation ... in order to confirm *the meaning* resulting from the application of article 31, or to determine *the meaning* when an interpretation according to article 31: (a) Leaves *the meaning* ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable".[34] In each instance, "the meaning" refers to *the meaning of the interpreted treaty* – I have taken this for granted.[35] However, it is clear that the meaning of the expression "the meaning" cannot be the same throughout the text of article 32. The first occurring expression refers to *the meaning of a treaty that ensues from the application of VCLT article 31*. The second occurring expression stands for something else; clearly, in this case "the meaning" shall be understood to refer to *the correct meaning of the treaty*. Less clear is the purport of the third occurring expression.

On a first immediate reading – especially considering the expression "leaves" (cf. the text of article 32: "*leaves the meaning ambiguous or obscure"*, "*laisse le sens ambigu ou obcure"*, "*[d]eje ambiguo o oscuro el sentido")* – one might easily draw the conclusion that "the meaning" refers to *the correct meaning of the treaty*. However, interpretation rule no. 15 argues against such an interpretation:

> If it can be shown that the interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to conflicting results, and that the treaty has a certain *telos*, which in one of the two possible ordinary meanings, by applying the provision, will be realised to a greater extent than in the other, then the former meaning shall be adopted.[36]

It is a *telos* conferred on the regime of interpretation laid down in VCLT articles 31 through 33 – and indeed a very important one – that it shall govern the operative interpretation of treaties.[37] However, in an operative situation of interpretation, it is pure anomaly to speak of the correct meaning of a treaty as something ambiguous. For an operative interpretation, it must