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Law and Philosophy Library 83

On the Interpretation of Treaties

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

Springer

picture complete, there are indeed authors who express opinions which do not agree with the one generally held. Two of these opinions are especially worthy of mention.

A first dissenting opinion concerns the means of interpretation, on which the rule of restrictive interpretation is allegedly based. As observed earlier, the means of interpretation used by appliers for the interpretation of a treaty in accordance with the rule of restrictive interpretation is the principle of state sovereignty. According to some authors the means used is another, namely relative sovereignty.[10] Consider for example the following statement by Rest:

> Die neuere Völkerrechtslitteratur geht im Anschluß an die Klassiker des modernen Völkerrechts von dem Bestehen einer Auslegungsregel aus, wonach nach geltendem Völkerrecht grundsätzlich Einschränkungen der relativen Souveränität nich vermutet werden dürfen, mit der Folge, daß vertragliche Bestimmungen, die eine Einschränkung der staatlichen Freiheit enthalten, restriktiv auszulegen seien.[11]

I have to admit that I am not completely certain what Rest really has in mind when he writes "*der relativen Souveränität"*. Principles demand optimisation; there is always some certain state of affairs that should be attained to the highest possible (legal or factual) degree.[12] According to the principle of state sovereignty, a state – within the realm of competence inherent in statehood – should have an *unlimited power* to act according to its liking.[13] Hence, if *"Souveränität"* is short for the principle of state sovereignty, RELATIVE SOUVERÄNITÄT would be a complete contradiction in terms.

Given that Rest expresses himself within the bounds set by conventional language, only one interpretation remains. What Rest has in mind when speaking of "*der relativen Souveränität"* is the freedom of action that remains for a state, when all obligations incumbent upon that state according to international law have been excluded – given, once again, that with every obligation entered into by a state, its freedom of action is partly relinquished. According to the rule of restrictive interpretation, a treaty provision would then have to be interpreted in such a way that logically, it cannot be considered inconsistent with any other obligation held by the parties to said treaty under international law. This reading in turn lends itself to two different interpretations. Either we take "*die relative Souveränität"* to stand for a relative concept, dependent upon the party specifically addressed: according to the rule of restrictive interpretation, a treaty provision shall be interpreted in such a way, that for each individual party it cannot be considered logically inconsistent with any other obligation *held by that party* under international law. Or, we take "*die relative Souveränität"* to stand for a fully uniform concept: according to the rule of restrictive interpretation, a

treaty provision shall be interpreted in such a way that logically, it cannot be considered inconsistent with any other obligation *mutually held* by the parties under international law. The first interpretation alternative must be dismissed, since it is clearly unreasonable. It meets with the same problem as a relative interpretation of the two expressions "the preparatory work of the treaty" (VCLT article 32) and "the conclusion of the treaty" (article 31 § 2).[14] The second interpretation alternative is at variance with a rule of interpretation laid down in international law (earlier termed as rule no. 6), according to which a treaty provision shall be interpreted so that nowhere in the text of that treaty there will be no instance of a logical tautology.[15] For if it is the meaning conveyed by the rule of restrictive interpretation that a treaty provision shall be interpreted so that it cannot be considered logically inconsistent with any other obligation *mutually held* by the parties to said treaty under international law, then the rule only repeats what is already stated in VCLT article 31 § 3(c), together with article 32 concerning a use of the context as a supplementary means of interpretation. All things considered, it is my conclusion that the position of Rest is unfounded.

A second dissenting opinion that I consider especially worthy of mention concerns the *applicability* of the rule of restrictive interpretation. According to what I have suggested, the rule of restrictive interpretation shall apply regardless of what kind of treaty is interpreted. Some authors wish to limit the applicability of the rule, arguing that it does not apply for the interpretation of treaties covering certain kinds of subject matter.[16] This view appears difficult to reconcile with the considerations underlying the rule of restrictive interpretation. When appliers interpret a treaty in accordance with the rules laid down in the Vienna Convention – the rule of restrictive interpretation excepted – there is no absolute guarantee that this will lead to a legally acceptable interpretation result. There is always a slight possibility that by using the primary means of interpretation, appliers arrive at a result which is either ambiguous or obscure, or manifestly absurd or unreasonable, and despite a use of the supplementary means of interpretation the appliers are incapable of producing something better. To avoid situations of this kind, we need a rule that establishes who in the last instance has the burden of proof. If two states are in dispute as to the norm content of a given treaty provision, we must be able to say which of these parties shall bear the risk, should it prove impossible to establish the contents of the provision with any sufficient clarity. Shall it be the entitled or the obligated party? In view of the way international law is fundamentally structured, the answer must be a given. The idea of states as sovereign subjects is one of the most basic principles known in international law. When a state enters a treaty, thereby assuming obligations in relation to another state vis-à-vis a certain

kind of behaviour, then this shall be considered an *exception* to the freedom of action held by that state according to the principle of state sovereignty.[17] Therefore, if appliers who interpret a treaty are faced with a situation where they are forced to presume that the parties have either retained or relinquished sovereign freedom of action, the alternative of choice must naturally be the former.[18] I can see no reason why this choice should lead to different results depending upon the kind of subject matter covered by the treaty interpreted.

2 THE PRINCIPLE OF *CONTRA PROFERENTEM*

Another norm finding widespread support in the literature is the one denoted as the principle (or rule) of *contra proferentem*.[19] Clearly, therefore, the principle of *contra proferentem* must be considered a valid norm of international law.[20] Less clear is the meaning of the principle. Two definitions can be found in the literature. According to a first definition, if an expression contained in a treaty provision can be shown to be unclear, then the provision shall be interpreted to the disadvantage of the party who once suggested the expression *(der sie vorgeschlagen hat)*.[21] Let us call this definition A. According to a second definition, if a treaty provision can be interpreted in two different ways, then it shall be interpreted to the disadvantage of the party who once unilaterally proffered the treaty for acceptance.[22] We shall call this definition B. Definition A appears unreasonably broad.[23] It is the fundamental idea underlying the principle of *contra proferentem*, that the party who once had the sole responsibility of drafting a treaty is also the one that ought to be penalised, should the meaning of the provision later be shown to be unclear. A state who accepts a treaty without having taken part in its drafting typically has more difficulty predicting the consequences of its acceptance, compared to the difficulty had by the state who unilaterally proffered the treaty, in predicting the consequences of its offer. Considering this, it can be seen as a reasonable solution that it is the latter state and not the former who shall bear the risk, should it prove impossible to clearly establish the content of the treaty.[24] It *cannot* be considered a reasonable solution that the risk is borne by a state, simply because in normal, mutual negotiations this state proposed a treaty to be worded in a specific way, and this wording endures up to and into the treaty's final adoption. All in all, I can arrive at no other conclusion than this: definition B is the only correct description of the *contra proferentem* principle.

Considering the contents of the *contra proferentem* principle, it seems to be the natural conclusion that the principle is applicable only for the interpretation of a very specific kind of treaty. According to some authors, the

principle is applicable without any such limitations.[25] Hence, the principle of *contra proferentem* would be applicable for the interpretation of a treaty, regardless of whether its content is of a "two-sided" or a "many-sided" nature. (The content of a treaty has a two-sided nature, if the treaty has two parties only, or – should there be more than two parties – if the treaty has been drawn up in such a way, that one of the parties has rights and obligations toward each and every one of the others, and vice versa, but these other parties do not have corresponding rights and obligations toward each other.[26] The content of a treaty has a many-sided nature, if it does not have a two-sided nature.) First, it is probably a rare occurrence that a state unilaterally proffers a treaty for acceptance, when the content of the treaty has a many-sided nature.[27] Second, severe problems of principle would arise if the *contra proferentem* principle were considered applicable for the interpretation also of those treaties with a content of a many-sided nature. If two states are of different opinions as to the interpretation of a treaty provision, and the dispute is submitted for settlement by an international court or tribunal, then the provision might very well come to be understood in two different ways, depending upon whether the state which unilaterally proffered the treaty for acceptance is a party to the dispute or not. Such a double standard cannot be accepted. Like cases are to be judged alike – this is a fundamental principle upheld in every legal system. All things considered, I arrive at the following conclusion: the principle of *contra proferentem* is applicable only for the interpretation of treaties with a content of a two-sided nature.[28]

Hence, if the principle of *contra proferentem* shall be put to words, it may be stated along the following lines:

Rule no. 28

§ 1. 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 content of the treaty has a two-sided nature, (iii) that the treaty was concluded through one of the negotiating parties unilaterally proffering the treaty for acceptance by the other(s), and (iv) that the provision, in one of the two possible ordinary meanings, is of greater disadvantage for this active party than it is in the other, then the former meaning shall be adopted.

§ 2. For the purpose of this rule, saying that the content of a treaty has a TWO-SIDED NATURE is tantamount to saying that the treaty has two parties only, or – should there be more than two parties – that the treaty has been constructed in such a way, that one of the parties has rights and obligations toward each and every one of the others, and vice versa, but these other parties do not have corresponding rights and obligations toward each other.

§ 3. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.

3 EXCEPTIONS SHALL BE NARROWLY INTERPRETED

That exceptions shall be narrowly interpreted is a proposition emphasised by several authors in the literature.[29] Taken on its own, the suggestion is far from unambiguous. If a treaty provision can be interpreted in two different ways, and the provision contains an *exception* whose extension in one of the two possible meanings is less than it is in the other, then the former meaning shall be adopted – this much is apparent.[30] Not so apparent, however, is the meaning of "exception".

The noun EXCEPTION requires an object – it makes no sense to say that a provision contains an exception, if it cannot also be said from *what* there is an exception. In this case, it seems that we have two alternatives. "Exception" either refers to a deviation from the rights and obligations held by the parties under the interpreted treaty, or to a deviation from the rights and obligations held by the parties under international law in general.[31] Professor Bernhardt endorses the former alternative:

> Das Gebot *der restriktiven Auslegung von Ausnahmevorschriften* scheint einen verhältnismäßig festen Platz in der völkerrechtlichen Auslegungslehre einzunehmen --- In diesem Zusammenhang ist eine Präzisierung erforderlich: Das Problem, ob vom allgemeinen Völkerrecht abweichende – allgemeine oder spezielle – Vertragsbestimmungen restriktiv, d.h. under weitestmöglicher Beachtung der gewohnheitsrechtlichen Regeln zu interpretieren sind, ist schon an anderer Stelle erörtet worden, es interessiert hier nicht. Zu behandeln ist nur noch die Frage, ob vertragliche Ausnahme- und Spezialbestimmungen, die eine Durchbrechung allgemeiner Vorschriften und Prinzipien derselben vetraglichen Vereinbarung enthalten – und diesen grundsätzlich als *lex specialis* vorgehen – im Zweifel einschränkend zu interpretieren sind.[32]

It must be admitted that of all authors who comment on the issue, no one expresses an opinion in such plain words as Bernhardt. However, in the final analysis it is my judgment that the opinion held by professor Bernhardt well agrees with current doctrine.[33]

All things considered, this allows for the following rule to be stated:

Rule no. 29
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 provision contains an exception to a right or an obligation laid down in said treaty, and (iii) that the extension of the exception in one of the two possible ordinary meanings is comparably greater than it is in the other, then the latter meaning shall be adopted.

4 THE RULE OF NECESSARY IMPLICATION

Before we start to seriously examine the rule of necessary implication, a terminological issue needs to be settled. NECESSARY IMPLICATION, in the terminology I have adopted, means an act of interpretation based on the assumption that the parties to the interpreted treaty have expressed themselves through implication. In the literature, such an act of interpretation is denoted using two different terms. A first term, IMPLIED POWERS, is used when the content of the interpreted treaty provision is a norm that confers a power on an international organisation (or an organ of such an organisation).[34] (For example, state A may have made an agreement with state B to the effect that the international organisation O is permitted to act towards A in a certain manner M.) A second term, NECESSARY IMPLICATION, is used when the content of the interpreted provision is not a norm that confers a power on an international organisation, or when the subject onto whom the power is conferred is not an international organisation (nor an organ of such an organisation).[35] This language can be explained by the etymology of the two terms. IMPLIED POWERS has its origins in constitutional law,[36] while NECESSARY IMPLICATION appears to have been taken from the law of civil contract.[37] However, from a practical point of view, I see no real need for the distinction. In the final analysis it is quite clear that IMPLIED POWERS and NECESSARY IMPLICATION stand for one single idea, the only difference being that it is applied to treaties of different contents.[38] Therefore, since the rules of interpretation laid down in the Vienna Convention do not distinguish between treaties of different contents, and since the meaning of IMPLIED POWERS is less neutral than that of NECESSARY IMPLICATION, I have chosen to use only the latter term. Nevertheless, to avoid confusion I would like to expressly point out that the term NECESSARY IMPLICATION, in the sense of this work, has a meaning broader than that sometimes ascribed to it by other authors. In this work, NECESSARY IMPLICATION means an act of interpretation based on the assumption that the parties to the interpreted treaty have expressed themselves through implication, *regardless of what that treaty contains*.[39]

Authors seem to have no doubt that the rule of necessary implication is a norm that belongs to the realm of international law.[40] The doubts that do exist concern the content of the rule. According to the terminology of linguistics, when a person implies something, communication occurs without the help of conventional language.[41] This is also the meaning given to the word IMPLICATION when actors in international law refer to the rule of necessary implication.[42] Hence, the rule of necessary implication can be applied only under very specific conditions. Once the limits set by conventional language

have been exceeded, no natural restrictions exist for the very far-reaching interpretations that may very well be the consequence. If we cannot exactly define the circumstances, under which a meaning may implicitly be read into a treaty, then there is a considerable risk that in the end the significance of conventional language for the interpretation process will be very small. The dividing line between the interpretation and modification of a treaty would once and for all be erased. (The fact that the rule of necessary implication is applicable only on the condition that the primary means of interpretation can be shown to result in a meaning which is manifestly absurd or unreasonable,[43] makes very little difference.) Hence, if we make it our task to establish the content of the rule of necessary implication, the decisive question to be answered seems to be the following: from the point of view of international law, under what conditions may parties to a treaty, with good reason, be assumed to have expressed themselves through implication? If it can be shown that some certain meaning may implicitly be read into a treaty provision, and that an implication is necessary, then this implied meaning shall be adopted – this much is clear. But what exactly do we mean by "necessary"? On this point the literature is of no avail.

One way of better handling the literature is to have the rule of necessary implication examined as the usage of a supplementary means of interpretation – in the same manner as we earlier examined "the preparatory work of the treaty" and "the circumstances of its conclusion". As observed in Chapter 8, when a treaty is interpreted using a supplementary means of interpretation, the task may be approached in two fundamentally different ways. "[S]upplementary means of interpretation" can be used independently of other means of interpretation, or they can be used relative to conventional language.[44] As previously established, if a person expresses herself through implication, this occurs without the help of conventional language. Hence, the contents of the rule of necessary implication should fit the following schematic description:

> If it can be shown that between an interpreted treaty provision and some certain means of interpretation M there is a relationship governed by the communicative standard S, then the provision shall be understood as if the relationship conformed to this standard.

Two questions must be answered before a conclusion can be drawn about the content of the rule of necessary implication:

(1) What means of interpretation are used for the application of the rule of necessary implication?

(2) What communicative standard or standards shall the parties to a treaty be assumed to have followed when appliers interpret the treaty in accordance with the rule of necessary implication?

The answer to the first question may easily be given. The means of interpretation used is "the object and purpose" of the interpreted treaty – this much is evident from the literature.[45] Consider Professor Gordon, for instance, who describes implied powers as a type of teleological interpretation.[46] For his treatment of the two phenomena implied powers and necessary implication, Professor Schwarzenberger uses as a heading the term FUNCTIONAL INTERPRETATION.[47] "[S]uch a construction", it is observed, ...

> ... pays little attention to the letter of a treaty, but concentrates on the effective realisation of its objects and purposes or, in other words, its spirit.[48]

The very same two phenomena are examined by Professor Amerasinghe under the heading "The object and purpose – teleology".[49] Maybe the proposition is even more clearly expressed by Professor Merrills; in his book, *The Development of International Law by the European Court of Human Rights*, he states the following about the Court's mode of interpreting the European Convention through implication:

> The contrast between the cases in which the Court has acceded to the argument that an unstated right should be implied and those in which it has not, demonstrates the extent to which the Court is prepared to use a broad conception of the object and purpose of the Convention as a guiding principle in its interpretation.[50]

Question (2) is a more difficult one. A fair guess is that the rule of necessary implication is less a matter of determining how the parties to the interpreted treaty have expressed themselves than a matter of determining how they have *not* expressed themselves. We need to remember that when appliers use the rule of necessary implication, the result will always be a meaning that exceeds the limits set by conventional language. The supplementary means of interpretation can be used to bring about such a result only in situations where the interpretation of a treaty according to VCLT article 31 can be shown to lead to a meaning which is manifestly absurd or unreasonable.[51] Professor Skubiszewski seems to share to this line of thought (even though I think he goes too far when he asserts that in most cases, an implication will not lead to an interpretation that agrees with the intentions of the parties):

> The process of implication should not be identified with the discovery of the intention of the parties. The link of necessity unites the purpose, the function or the power already granted to the power which is now implied. Quite often, what results from necessity was not and could not have been foreseen and, therefore, cannot be regarded as intended by the parties. Hence establishing a nexus between intention and implication would in most instances amount to a useless fiction. Intention referred to in the context of implication will in most cases indicate

a purpose or a task that Member States wish to be fulfilled. The International Court of Justice appears to have used this term in that specific meaning when it said that the United Nations "could not carry out the intentions of its founders if it was devoid of international personality".

When the Court speaks of "necessity", it appears that it thinks that a contrary solution, i.e., the rejection of what is implied, cannot be imputed to the Members of the organization. They cannot be supposed to object to it. But that is something else than reading into the text the intention of the parties.[52]

Taken on their own merit, however, these considerations can hardly be considered sufficient.

One way for us to answering question (2) is to return to our earlier observation regarding the use of a treaty's "object and purpose" and the principle of effectiveness. According to what is commonly expressed in the literature, a close relationship exists between the rule of necessary implication and the principle of effectiveness.[53] More specifically, it seems as if the rule of necessary implication would be an application of the principle of effectiveness.[54] This appears particularly in the Third Report on the Law of Treaties, which Waldock submitted to the International Law Commission in 1964. As we recall from Chapter 7, Waldock suggested that the principle of effectiveness be expressly included among a series of so-called "general rules" of interpretation.[55] According to Waldock, two reasons would justify such an approach.

The first is that the principle has a special significance as the basis upon which it is justifiable to imply terms in a treaty for the purpose of giving efficacy to an intention necessarily to be inferred from the express provisions of the treaty. The second is that in this sphere – the sphere of implied terms – there is a particular need to indicate the proper limits of the application of the principle if too wide a door is not to be opened to purely teleological interpretations.[56]

As observed in Chapter 7, the following three communicative standards form the basis for an application of the principle of effectiveness:

- If a state produces an utterance taking the form of a treaty provision, then the provision should be drawn up so that in the context there will be no instance of a pleonasm.
- If a state produces an utterance taking the form of a treaty provision, then the provision should be drawn up so that by applying the provision a result is not obtained, which is not among the *teloi* conferred on the treaty.
- If a state produces an utterance taking the form of a treaty provision, then the provision should be drawn up so that by applying the provision no other part of the treaty will be normatively useless.[57]

The first standard on the list may be identified with an act of interpretation using the context; here it can be ignored. Only the second and third standard

can be said to involve a use of "the object and purpose". Given that the rule of necessary implication is an application of the principle of effectiveness, and that the means of interpretation assumed is the object and purpose of the treaty, then either of these two standards would form the basis for an application of the rule of necessary implication. It matters little that these same standards have already been said to form a basis for a use of the object and purpose, according to the provisions of Vienna Convention article 31. The effect we achieve by applying the rule of necessary implication is not identical to the one achieved by using the object and purpose according to the provisions of VCLT article 31. According to the provisions of VCLT article 31, the object and purpose shall be used relative to conventional language.[58] Such an interpretation inevitably leads to a result that can be reconciled with conventional language. This is not the case with the result that ensues from an application of the rule of necessary implication.

All things considered, if we wish to put to words the rule of necessary implication, it seems it could be stated as follows:

Rule no. 30

§ 1. If it can be shown that according to linguistics a meaning can be read into a treaty provision by implication, and that such an implication is necessary to avoid a situation where, by applying the provision a result is attained which is not among the *teloi* conferred on the treaty, then this meaning shall be adopted.

§ 2. For the purpose of this rule, TELOI means the state or states of affairs, which according to the parties should be attained by applying the interpreted provision.

§ 3. For the purpose of this rule, the TELOI of a treaty are determined based upon the intentions held by the parties at the time of the treaty's conclusion, except for those cases where § 4 applies.

§ 4. For the purpose of this rule, the TELOI of a treaty are determined based upon the intentions held by the parties at the time of interpretation, granted it can be shown that the thing interpreted is a generic referring expression with a referent assumed by the parties to be alterable.

§ 5. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.

Rule no. 31

If it can be shown that according to linguistics a meaning can be implicitly read into a treaty provision, and that such an implication is necessary to avoid a situation where, by applying the provision, another part of the treaty will be normatively useless, then this meaning shall be adopted.

It is my judgment that with these two rules, I have given an account of what I earlier termed as "the general view held in the literature". Of course – as is almost always the case – some authors are inclined to disagree; they have other opinions about the content and meaning of the rule of necessary implication. Among these opinions, two in particular are worthy of mention.

The first concerns the qualifier *necessary*. According to conventional language, NECESSARY can be used both in the stronger sense of *indispensable; absolutely imperative*, and in the weaker sense of *essential* or *vital*. According to Professors Skubiszewski and Elihu Lauterpacht, when we speak of "the rule of necessary implication" NECESSARY is used in the latter, weaker sense of the word.[59] This is a view that seems to be based on a misconception of the thing, *for which* an implication is supposed to be necessary. In the rule of necessary implication, an implication is necessary in order to avoid a result, which is not among the *teloi* of the treaty.[60] In order for the rule to be applicable, we must be able to show, first, that the interpreted treaty provision can be understood not only in a way that can be reconciled with conventional language, but also in a way that completely ignores the rules of conventional language; and secondly, that the rules of conventional language need to be set aside, lest an application of the treaty is to result in a state of affairs, which is not among the treaty's *teloi*. Given this fact, it cannot possibly be in the weaker sense of *essential* that we speak about a rule of NECESSARY implication. When we apply the rule of necessary implication, we have no more than two alternatives. We choose between understanding a treaty in a way that can be reconciled with conventional language, and understanding it with complete disregard for that language (through implication, that is). If it is established that only through the latter interpretation will an application of the treaty lead to a state of affairs, which is among the treaty's *teloi*, then naturally – given the alternative – an implication is imperative for ensuring that an application of the treaty does not result in something, which is not the treaty's *teloi*.

What professors Lauterpacht and Skubiszewski seem to believe is that when an implication is categorised as necessary, it is for the simple reason that is necessary for attaining a treaty's *teloi*. For if this is assumed, the rule of NECESSARY implicationcannot possibly be read in the stronger sense of *indispensable*. Showing that an implication is indispensable for ensuring that the application of a treaty provision does not result in a state of affairs which is not among the treaty's *teloi* is tantamount to showing that the *teloi* of the treaty cannot be attained as long as we abide by the rules of conventional language. Obviously, this can be done only on the condition that a description is given of the instrumental relationship that holds between

the *teloi* of the treaty and the specific application at hand. Such a description is not easily achieved. We have to remember that when a treaty provision is applied, this specific application does not operate in a vacuum. If the *teloi* of the treaty are attained, this is often the combined effect of many factors, including not only the possible further application of the interpreted provision, but also other parts of the treaty, public international law in general, and if nothing else the world at large. It goes without saying that the condition set forth cannot possibly be fulfilled.

A second opinion I would like to address concerns the meaning of the term IMPLICATION. In THE RULE OF NECESSARY IMPLICATION, an implication is necessary if (and only if) it can be considered indispensable either to ensure that the application of the interpreted treaty provision does not result in a state of affairs which is not among the *teloi* of the treaty, or to prevent another part of the treaty from becoming normatively useless The basis for making the implication is always an assumption about the interpreted treaty's *teloi* or norm content. Some authors, including Professors Haraszti and Elihu Lauterpacht, use a considerably more limited basis. According to them, in order for a *telos* of a treaty to be used as a basis for implication it must be *explicit*; the same is said about the treaty's norm content.[61] For two reasons this assumption does not carry great weight.

First, the assumption does not agree with what linguistics is telling us about implication in general. One of the premises that a reader uses to determine the meaning of a text – whether this is done by implication or not – is a contextual assumption, that is to say, an assumption derived from a context.[62] A context is an aggregate of assumptions about the world at large, to which a reader has access when she is confronted with a text that she wishes to understand.[63] According to linguistics, contextual assumptions – for instance, the assumptions made by a reader about a treaty's *teloi* or norm content – are in no way limited to those that can be accessed through decoding of the interpreted treaty text or by inferring messages communicated explicitly.[64]

Secondly, the assumptions expressed by Haraszti and Lauterpacht are contrary to how we are supposed to otherwise address the determination of a treaty's "object and purpose". The fact is that in international law, there are no rules to which an applier in doubt can defer to establish the *teloi* of a treaty.[65] In the Vienna Convention articles 31–33, the applier is instructed how to proceed when uncertain about the *norm content* of a treaty provision. However, there is nothing in these articles to suggest that the contents of a treaty provision can only be determined by inferences about what the parties to said treaty may have communicated *explicitly*; quite the

opposite. According to what we have already established, by applying the provisions of VCLT article 32 we are allowed to determine the norm content of a treaty through implication, if only under very specific conditions.[66] All things considered, I find it difficult to see how the views of Haraszti and Lauterpacht could be considered anything but groundless.

5 INTERPRETATION *PER ANALOGIAM*

First of all, it is necessary that we establish some sort of definition. As we know, ANALOGY means *partial resemblance*. Two phenomena are said to be ANALOGOUS to one another, if in some significant respect they can be thought of as similar or comparable, although all things considered they are still different. In general, interpretation *per analogiam* occurs where appliers draw a conclusion about the meaning of a treaty provision based on the observation that an analogy holds between two distinct phenomena.[67] The first of these phenomena is the specific case or state of affairs, in regard to which the meaning of the interpreted treaty provision is to be determined. This state-of-affairs is one, which we *cannot* clearly say whether or not it shall be considered as coming within the scope of application of the treaty provision in question. The second phenomenon is yet another case, be it hypothetical or factual. This is a state-of-affairs, which we *can* clearly say that it shall be considered as coming within the scope of application of either the interpreted treaty provision,[68] or of some other provision *in pari materia*.[69] In the former case we may say that the analogy is *internal*, in the latter that it is *external*.[70] Interpretation *per analogiam*, to the extent that it can be considered a mode of reasoning based on the assumption about the existence of external analogy, will not be examined in this section. Such an act of interpretation can be performed already on the basis of either interpretation rule no. 25 – corresponding to a use of the context – or on the basis of rule no. 23 – corresponding to a use of a treaty *in pari materia*. Consequently, in this work, interpretation *per analogiam* will refer only to the mode of reasoning based on the assumption about the existence of internal analogy.

Authors seem generally positive to the idea of interpreting treaties *per analogiam*.[71] In my judgment, this is sufficient basis to say that an interpretation *per analogiam* is one supported by international law. Admittedly, in the earlier literature, several authors express the opinion that an interpretation *per analogiam* does not have the support of international law.[72] The reasons they cite are two. First, some authors maintain that from a purely semantic standpoint, legal interpretation and legal argumentation *per analogiam* are two different things. According to conventional language – this is what

they allege – there is no place for a legal argument *per analogiam* until all avenues provided in VCLT articles 31–33 have been tried.[73] Second, interpretation *per analogiam* is said to be "constructive" – an act of interpretation *per analogiam* will more likely lead to a modification of a treaty than to a mere determination of its norm content.[74]

If we examine these two assertions from a critical stance we must surely consider the former as groundless. There are simply too many users of language talking about interpretation *per analogiam* for one to say that from a purely semantic standpoint, legal interpretation and legal argumentation *per analogiam* are two different things. The second assertion is the weightier one. Clearly, when an act of interpretation *per analogiam* is performed there is a risk that it will lead to an expansion of the interpreted treaty's norm content. Still, the assertion is too categorical. Considering the way the Vienna Convention has been designed, the risk that an act of interpretation *per analogiam* will lead to a modification of the interpreted treaty should not be greater than the risk that lies in applying any other rule of interpretation. As we must remember, supplementary means of interpretation are only used to determine the meaning of an interpreted treaty provision when the rules laid down in VCLT article 31 lead to a meaning which is either ambiguous or obscure, or manifestly absurd or unreasonable. All things considered, I see no reason to be overly concerned about the scepticism expressed in the earlier literature regarding the legal status of interpretation *per analogiam*.

As we established earlier, when a treaty is interpreted using "supplementary means of interpretation", it can be done in two fundamentally different ways. "[S]upplementary means of interpretation" can be used independently of other means of interpretation, or they can be used relative to conventional language.[75] Some means of interpretation can only be used independently of other means of interpretation; such is the case with the object and purpose of the treaty when used in connection with an application of the rule of necessary implication.[76] Others can only be used relative to conventional language; such is the case with the principle of state sovereignty when used in connection with an application of the rule of restrictive interpretation.[77] Still others can be used both independently and relative to conventional language, for instance the preparatory work of the treaty.[78] It is not entirely clear to which group interpretation *per analogiam* belongs. According to some authors, an interpretation *per analogiam* can sometimes be performed on the basis of a previous use of conventional language; sometimes it can occur *ab initio* – needing no basis at all.[79] According to other authors, it seems interpretation *per analogiam* can only occur *ab initio*.[80]

My judgment is that we should take a liberal stance, adopting the view of the former group of authors. As support for this position I would like to advance an interpretation *per argumentum a fortiori*. When a supplementary means of interpretation is used relative to conventional language, the interpretation result is always a meaning permitted by the rules of conventional language.[81] When a supplementary means of interpretation is used *ab initio*, the result *may* be a meaning permitted by conventional language; but it may also be a meaning not permitted by that language.[82] Thus, from the point of view of the parties, an interpretation *per analogiam* should be considered less tolerable when it occurs on the basis of a previous use of conventional language, than when it occurs *ab initio*. One of the rules that can be invoked to justify an act of interpretation *per argumentum a fortiori* is the following:

> If it can be shown that a treaty provision permits an act or a state-of-affairs, which – from the point of view of the parties – can be considered less tolerable than another generically identical act or state-of-affairs, then the provision shall be understood to permit this second act or state-of-affairs, too.[83]

Given that an act of interpretation *per analogiam* can be considered permitted by international law when performed independently of conventional language, an act of that kind would also seem to be permitted when performed relative to conventional language.

Consequently, all things considered, it appears that interpretation of treaties *per analogiam* can be described by the following two rules of interpretation:

Rule no. 32

§ 1. 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 two states-of-affairs are analogous to one another, (iii) that the one state-of-affairs is governed by the interpreted treaty provision, and (iv) that in one of the two possible ordinary meanings the other state-of-affairs comes within the scope of application of the provision, whereas in the other meaning it does not, then the former meaning shall be adopted.

§ 2. For the purpose of this rule, saying that two states-of-affairs are ANALOGOUS to one another is tantamount to saying that in some significant respect they can be thought of as similar or comparable.

Rule no. 33

§ 1. If it can be shown that of two states-of-affairs, which are analogous to one another, the one comes within the scope of application of an interpreted treaty provision, then the provision shall be understood in such a way that the other comes within that scope of application, too.

§ 2. For the purpose of this rule, saying that two states-of-affairs are ANALOGOUS to one another is tantamount to saying that in some significant respect they can be thought of as similar or comparable.

6 INTERPRETATION *PER ARGUMENTUM A FORTIORI*

It is a view generally held in the literature that treaties shall be interpreted *per argumentum a fortiori*.[84] In my judgment, this is sufficient basis to say that such acts of interpretation have the support of international law. Interpretation *per argumentum a fortiori* may be divided into two types of arguments. The first pertains to the interpretation of such treaty provisions where an action or a state-of-affairs is governed in negative terms,[85] the provision expressing a prohibition.[86] Arguments of this kind are often stated by the Latin phrase *a minori ad majus*: if a treaty provision prohibits an action or a state-of-affairs that is more tolerable than another, then the provision shall be understood to forbid this second action or state-of-affairs, too. The second type of argument pertains to the interpretation of such treaty provisions where an action or a state-of-affairs is governed in positive terms,[87] the provision expressing permission.[88] Arguments of this kind are often stated by the Latin phrase *a majori ad minus*: if a treaty provision allows an action or a state-of-affairs that is less tolerable than another, then the provision shall be understood to permit this second action or state-of-affairs, too.

Four remarks need to be made with regard to the interpretation of treaties *per argumentum a fortiori*. A first remark concerns the word *tolerable*. In order to say whether an action or a state-of-affairs is more or less tolerable than another, one must be able to state the viewpoint from which the tolerability of the different actions or states-of-affairs shall be judged. One must be able to say for whom the actions or states-of-affairs are more or less tolerable. To my mind, it is obvious that this viewpoint is that of the parties to the interpreted treaty.

A second remark concerns *the object of the tolerability assessment* – the different actions or states-of-affairs. In order to say whether an action or a state-of-affairs is more or less tolerable than another, we must be able to compare the different actions or states-of-affairs in some way. Some kind of class commonality – a generic kinship – must be established.[89]

A third remark concerns the *tolerability assessment as such*. In order to say whether an action or a state-of-affairs is more or less tolerable than another, we often need to make a value judgment.[90] Assume, for instance, that Norway has promised not to contest the territorial sovereignty possessed by Denmark with regard to all of Greenland. Obviously more

than a simple logical deduction is required to allow the conclusion that Norway, by this same promise, has committed itself not to occupy Eastern Greenland.[91] Any statement to the effect that Norway's occupation of Eastern Greenland is a less tolerable action than that of Norway contesting the territorial sovereignty possessed by Denmark with regard all of Greenland, requires a value judgment.[92] This judgment is not free of limitation. One must not accept as correct each and every claim that a person makes regarding the relative tolerability of two actions or states-of-affairs. Whoever claims that a certain action or state-of-affairs is less tolerable than another, this is not sufficient to consider the claim justified, if that person cannot show that the claim is supported by good reasons.

A fourth remark addresses the relationship between the interpretation of treaties *per argumentum a fortiori* and the use of conventional language. As we have observed numerous times, when appliers use the supplementary means of interpretation, the task may be approached in two fundamentally different ways. "[S]upplementary means of interpretation" can be used independently of other means of interpretation, and they can be used relative to conventional language. The literature is not entirely clear as to whether an act of interpretation *per argumentum a fortiori* can only be performed *ab initio* – independently of conventional language – or if it can also be performed based on a previous use of conventional language. Still, it is apparent that several authors consider the interpretation of treaties *per argumentum a fortiori* to be a form of argumentation closely related to the interpretation of treaties *per analogiam*.[93] Given that an act of interpretation *per analogiam* can be performed both *ab initio* and on the basis of a previous use of conventional language, I am inclined to think it unlikely that interpretation *per argumentum a fortiori* should not be approached in a similar manner.

All things considered, it appears that the interpretation of treaties *per argumentum a fortiori* can be described by the following four rules of interpretation:

Rule no. 34

§ 1. If it can be shown that a treaty provision permits an act or a state-of-affairs, which – from the point of view of the parties – can be considered less tolerable than another generically identical act or state-of-affairs, then the provision shall be understood to permit this second act or state-of-affairs, too.

§ 2. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.

Rule no. 35
§ 1. 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 provision permits an action or a state-of-affairs, which – from the point of view of the parties – can be considered less tolerable than another generically identical action or state-of-affairs, and (iii) that in one of the two possible ordinary meanings, this other action or state-of-affairs comes within the scope of application of the interpreted provision, whereas in the other meaning it does not, then the former meaning shall be adopted.
§ 2. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.

Rule no. 36
§ 1. If it can be shown that a treaty provision prohibits an act or a state-of-affairs, which – from the point of view of the parties – can be considered more tolerable than another generically identical act or state-of-affairs, then the provision shall be understood to prohibit this second act or state-of-affairs, too.
§ 2. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.

Rule no. 37
§ 1. 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 provision prohibits an action or a state-of-affairs, which – from the point of view of the parties – can be considered more tolerable than another generically identical action or state-of-affairs, and (iii) that in one of the two possible ordinary meanings, this other action or state-of-affairs comes within the scope of application of the interpreted provision, whereas in the other meaning it does not, then the former meaning shall be adopted.
§ 2. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.

7 INTERPRETATION *PER ARGUMENTUM E CONTRARIO*

Interpretation of treaties *per argumentum e contrario* – sometimes also referred to using the Latin maxim *expressio unius est exclusio alterius* – is a form of argumentation that receives extensive support in the literature.[94] Clearly, an act of interpretation *per argumentum e contrario* conforms to the standards of international law. Less clear is what such an act interpretation should be seen to imply. Some guidance is provided by the Latin expression *expressio unius est exclusio alterius*: to explicitly make mention of one is to

exclude another.[95] EXPLICITLY MAKING MENTION OF a referent is tantamount to *referring to that referent using conventional language*. But what should be understood by the two expressions "one" and "another"? The word ANOTHER requires an object. In the expression "to explicitly make mention of one is to exclude another", it seems logical that this object would be the same as that of "one". In all reason, the expression "another" should be read to mean *another of the same type as "one thing"*. Hence: if, according to conventional language, an expression is used to refer to a referent of a particular type (such as a group of people, objects, or states-of-affairs), then this expression shall not be seen to refer to any additional referent of that same type (assuming that such additional referents do exist). Considered on its own, this analysis is of course meagre support for any satisfying conclusions. Therefore, let us see if further confirmation can be found in the practice of international courts and tribunals.

As examples of the interpretation of treaties *per argumentum e contrario*, two decisions are mentioned most often in the literature. One is the judgment of the Permanent Court of International Justice in the case of *The S.S. Wimbledon*.[96] McNair neatly summarises the decision in the following manner:

> In the *Wimbledon* case Germany claimed the right to close the Kiel Canal against a British ship, chartered to a French company and carrying a cargo of munitions for Poland then at war with Russia, in spite of Article 380 of the Treaty of Versailles of 1919, which provided that
>
> "The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality."
>
> The second paragraph of Article 381 contained the following provision
>
> "No impediment shall be placed on the movement of persons or vessels other than those arising out of police, customs, sanitary, emigration or immigration regulations and those relating to the import or export of prohibited goods. ..."
>
> Germany argued for a restrictive interpretation of the Treaty. M. Basdevant, in presenting the French argument, said (translation):
>
> "In Article 381, therefore, there are no provisions which could be held to justify the measures taken in regard to the ss. 'Wimbledon'. The provisions of this Article are restrictive; they refer to 'no impediment other than'.... It is therefore impossible to add any other impediments to those therein expressly mentioned."
>
> The Permanent Court accepted and applied these arguments; it said
>
> "The right of the [German] Empire to defend herself against her enemies by refusing to allow their vessels to pass though the canal is therefore proclaimed and recognized. In making this reservation in the event of Germany not being at peace with the nation whose vessels of war or of commerce claim access to the canal, the Peace Treaty clearly contemplated the possibility of a future war in which Germany was involved. If the conditions of access to

the canal were also to be modified in the event of a conflict between two Powers remaining at peace with the German Empire, the Treaty would not have failed to say so. It has not said so and this omission was no doubt intentional."

Again, the Court said

"The idea [*la pensée*] which underlies Article 380 and the following articles of the Treaty is not to be sought by drawing an analogy from these provisions but rather by arguing *a contrario*, a method of argument which excludes them."[97]

The other decision often mentioned is the advisory opinion of the PCIJ in *Railway Traffic between Lithuania and Poland*.[98] In 1931, the League of Nations had brought a request to the PCIJ:

Do the international engagements in force oblige Lithuania in the present circumstances, and if so in what manner, to take the necessary measures to open for traffic or for certain categories of traffic the Landwarów-Kaisiadorys railway sector?[99]

In meeting the request of the League, the Court came to occupy itself with (among many other agreements) the so-called Memel Convention, concluded between the British Empire, France, Italy and Japan on the one side, and Lithuania on the other. Article 3 of the Memel Convention's third annex contains the following provision:

[T]he Lithuanian Government shall ensure the freedom of transit by sea, by water *or by rail*, of traffic coming from or destined for the Memel territory or in transit through the said territory, and shall conform in this respect with the rules laid down by the Statute and Convention on the Freedom of Transit adopted by the Barcelona Conference [...].[100]

The Barcelona Statute expresses for Lithuania the following obligation:

... [to] facilitate free transit, by rail or waterway, on routes *in use convenient for international transit*.[101]

The Court considered it clear that the railway sector Landwarów-Kaisiadorys could not be considered "in use", in the sense of the Barcelona Statute. Nevertheless, the Court obviously found this simple observation to be in need of reinforcement:

Furthermore, it must be remembered that, under the last paragraph of Article 3 of Annex III to the Memel Convention, to which reference has been made above, the Lithuanian Government undertakes "to permit and to grant all facilities for the traffic *on the river* to or from or in the port of Memel, and not to apply, in respect of such traffic, on the ground of the present political relations between Lithuania and Poland, the stipulations of Articles 7 and 8 of the Barcelona Statute on the Freedom of Transit and Article 13 of the Barcelona Recommendations relative to Ports placed under an International Régime".

These are obviously circumstances calculated to promote freedom of transit *via* the port of Memel, for the provisions which Lithuania abandons her right to apply are designed to place certain restrictions on this freedom. But it is to be observed that this clause in the Memel Convention applies solely to waterways and not to railways.

- - -

Seeing that the Memel Convention expressly forbids Lithuania to invoke Article 7 of the Barcelona Statute, with reference to freedom of transit by waterway, it is clear, on the other hand, that she might avail herself of it with regard to railways of importance to the Memel territory. And accordingly, even if the Landwarów-Kaisiadorys railway sector were in use and could serve Memel traffic, Lithuania would be entitled to invoke Article 7, as a ground for refusing to open this sector for traffic or for certain categories of traffic, in case of an emergency affecting *her safety* or *vital interests*.[102]

These two excerpts comfortably help us to a better understanding of the interpretation *per argumentum e contrario*. In summary, I would like to propose a rule saying something along the following lines:

Rule no. 38

If it can be shown that in a treaty provision there is an expression, which according to conventional language is used to refer to a smaller part of a larger, generically defined class, then the provision shall be understood in such a way that the extension of the expression comprises this smaller part only, and not any other part of the class.

"The provisions of this Article", observes the applicant in the *Wimbledon* case, regarding the interpretation of article 381 of the Treaty of Versailles, ...

... refer to 'no impediment other than'. It is therefore impossible to add any other impediments to those therein expressly mentioned.[103]

"[I]mpediment[s] placed on the movement of persons or vessels ... arising out of police, customs, sanitary, emigration or immigration regulations and those relating to the import or export of prohibited goods" is an expression which, according to conventional language, is used to refer to a smaller part of a larger, generically defined class, namely *impediments placed on the movement of persons and vessels. Impediment placed on the movement of S.S. Wimbledon* is another part of this larger class. Similar arguments are presented in the *Railway Traffic between Lithuania and Poland* case.

Seeing that the Memel Convention expressly forbids Lithuania to invoke Article 7 of the Barcelona Statute, with reference to freedom of transit by waterway, it is clear, on the other hand, that she might avail herself of it with regard to railways of importance to the Memel territory.[104]

"Traffic on the river to or from or in the port of Memel" is an expression, which according to conventional language is used to refer to a smaller part of a larger, generically defined class, namely *traffic to or from or in the port of Memel*. *Railway to the Memel territory* is another part of this larger class. Therefore, in both *Wimbledon* and *Railway Traffic between Lithuania and Poland*, the cited interpretation arguments could be described as an application of treaty interpretation rule no. 38. It seems the content of this rule has been correctly described.[105]

Not all authors seem prepared to support this conclusion: that an act of interpretation *per argumentum e contrario* should be described as the application of a rule of interpretation, independent of those other rules of interpretation laid down in international law. The implication is that an act of interpretation *per argumentum e contrario* could be considered a use of conventional language, already supported by the provisions of Vienna Convention article 31.[106] The assumption is that an act of interpretation *per argumentum e contrario* has nothing to contribute besides that which is already the result of an act of interpretation using conventional language. This assumption is clearly incorrect. It is true that an act of interpretation per *argumentum e contrario* must always lead to the exact same interpretation result as earlier achieved by appliers using conventional language. If it can be shown that in a treaty provision, there is an expression, which according to conventional language is used to refer to a smaller part of a larger, generically defined class, then – when using conventional language – the provision shall be understood in such a way that the extension of the expression comprises this smaller part only, and not any other part of the class. However, it is not true that in a process of interpretation, an act of interpretation *per argumentum e contrario* plays a role identical to that already played by conventional language. An act of interpretation *per argumentum e contrario* has a role that conventional language cannot possibly play: it can be employed to confirm the use of conventional language. Indeed, conventional language cannot be used to confirm its own use. This seems to be ignored by certain authors.

8 THE PRINCIPLE OF *EJUSDEM GENERIS*

According to many authors in the literature, a treaty shall be interpreted through application of the principle of *ejusdem generis*.[107] In my judgment, this is sufficient reason for us to conclude that the principle is a valid rule of international law. However, the question is still what the principle stands for –in the literature, authors seem to think this obvious. The only real explanation offered by the literature is the following:

> The *ejusdem generis* doctrine is to the effect that general words when following (or sometimes preceding) special words are limited to the *genus*, if any, indicated by the special words.[108]

The purposes and goals of this work demand better explanations. If we wish to reach the level of understanding where the principle of *ejusdem generis* can be described in terms of a proper rule of interpretation, we must clarify the views expressed in the literature. We can do so by drawing on the judicial opinions expressed by courts and tribunals. Three cases in particular could then be examined.[109]

A first case is the advisory opinion delivered by the PCIJ in *Competence of the ILO for Agriculture*.[110] In 1922, the League of Nations had turned to the PCIJ, requesting that the court issue an advisory opinion to clarify certain issues about the competence of the International Labour Organization (ILO). The ILO's competence had been established by the member states of the League in the preamble of the ILO Statute (*Treaty of Versailles*, Part XIII). The preamble reads as follows:

> Whereas universal and lasting peace can be established only if it is based upon social justice;
>
> And whereas conditions of labour exist 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; and an improvement of those conditions is urgently required; as, for example, by 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, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for equal value, recognition of the principle of freedom of association, the organisation of vocational and technical education and other *measures*;
>
> Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries;
>
> The High Contracting Parties, moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace on the world, and with a view to attaining the objectives set forth in this Preamble, agree to the following Constitution of the International Labour Organisation [...].[111]

The Court's response to the League of Nations request is divided into two separate decisions. Both decisions contain abundant information, with several important points. Particularly interesting in this context is the Court's observation with regard to the meaning of the expression "measures", used in the preamble cited above. In its first decision, the Court had commented upon the contents of paragraph 2 in the following manner:

> The comprehensive character of Part XIII is clearly shown in the Preamble, which declares that "conditions of labour", ("*conditions de travail")*, exist "involving such injustice, hardship and privation to large numbers of persons [sic!] as to produce unrest so great that the peace and harmony of the world are imperilled". An improvement of these conditions the Preamble declares to be urgently required in various particulars, the examples given being (1) "the regulation of the hours of work, including the establishment of a maximum working day and week"; (2) "the regulation of the labour supply"; [...].[112]

In its second decision, the Court found that there were things to be added to this commentary:

> In the opinion this day rendered on the question of competence as regards the regulation of the conditions of agricultural labour, the Court has given a full and detailed exposition of the powers of the International Labour Organisation under Part XIII of the Treaty of Versailles;

and it is unnecessary to repeat what was there so amply set forth. The object for which the International Labour Organisation was founded was the amelioration of the lot of the workers and the adoption of humane conditions in matters such as the hours of labour, the labour supply, prevention of unemployment, an adequate living wage, protection against sickness, disease and injury arising out of employment, the protection of children, young persons and women, provision for old age and injury, the protection of workmen employed in countries other than their own, freedom of association, vocational and technical education, and, as the Treaty says, "other measures", which must mean measures to improve the conditions of labour and to do away with injustice, hardship and privation.[113]

A second case to be examined in this context is the decision of the Iran-United States Claims Tribunal in *Grimm v. Iran*.[114] In 1982, the plaintiff, Mrs. Grimm – an American citizen – had turned to the *Iran-United States Claims Tribunal* claiming she had a right to compensation for damages. According to the claim, Mrs. Grimm had suffered damages because of the murder of her husband, Mr. Grimm – an American citizen active in the management of a multinational, Iran-based oil company – at the time the Islamic regime took power in 1978. Mrs. Grimm demanded both compensation for her financial loss owing to the death of her husband, and compensation for the mental anguish she had suffered. As a basis for her claim, the plaintiff argued that the Islamic government had neglected to (sufficiently) protect her husband; in so doing, the government had failed to live up to international standards of due diligence. To the plaintiff, it was not to be doubted that the tribunal had the jurisdiction needed for trying the case. Mrs. Grimm was an American citizen; her claim could be seen to relate to "measures affecting property rights", as required by article II, paragraph 1 of *the Claims Settlement Declaration*:[115]

An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims ... arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other *measures affecting property rights* [...].[116]

The tribunal itself came to the conclusion that it *did not* have the necessary jurisdiction for trying the claim of Mrs. Grimm. In the opinion of the tribunal, there were two arguments of interpretation in particular that should be seen to contradict the suggestions made by the plaintiff with regard to the meaning of the above quoted paragraph 1. The first argument can be described as a use of conventional language:

It would perhaps be possible to accept that the words "other measures" may cover both acts and failures to act and that for Mrs. Grimm "property rights" have arisen or are involved in this case. However, to hold in the context of Article II, paragraph 1, that such "property

rights" were affected by the alleged failure to protect Mr. Grimm is far from the natural understanding of the circumstances that this failure just affected the life and safety of Mr. Grimm. Furthermore, compensation for mental anguish, grief and suffering can obviously not be a property right that was affected by the alleged failure to provide adequate protection for Mr. Grimm. The right to such compensation, if any, arose out of the assassination; it did not even exist prior to the assassination and could not be affected by the failure to provide protection.[117]

The second argument is an application of the *ejusdem generis* principle:

[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" and the alleged failure to provide protection is in no way similar to expropriations.[118]

My third case derives from a Canadian court, *the Alberta Court of Queens Bench*; it is the *Alberta Provincial Employees* case.[119] In 1977, the parliament of the Canadian province of Alberta had passed a law, according to which a large majority of public sector employees were forbidden to strike. The state workers' labour organisation protested, arguing that that the law was in conflict with the obligations incumbent upon Canada according to several international agreements, one such agreement being the *1966 International Covenant on Economic*, *Social and Cultural Rights*; therefore, the law should be considered invalid. The right to strike is plainly stated in article 8 § 1(d) of the 1966 Covenant. This right is relative in the sense that according to article 8 § 2, the parties retain the right to take certain kinds of restrictive actions. Paragraph 2 reads:

This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of *the administration of the State*.[120]

Chief Justice Sinclair makes the following remark about the meaning of this treaty provision:

Counsel for the union argues that the words "administration of the State" ought to be equated to the armed forces or to the police under a rule of documentary construction known as *ejusdem generis*. With respect, I cannot accept this suggestion because I believe the three functions to be essentially distinct.[121]

These three excerpts from international case law help us to better understand the meaning of the *ejusdem generis* principle. Let us begin with the first quoted excerpt. In its first advisory opinion in the *Competence of the ILO for Agriculture* case, the PCIJ cites from the Statute of the International Labour Organization:

[T]he Preamble ... declares that "conditions of labour", ("*conditions de travail")*, exist "involving such injustice, hardship and privation to large numbers of persons [sic!] as to produce unrest so great that peace and harmony of the world are imperilled".[122]