The many lives of *effet utile* in treaty interpretation

Las muchas vidas del principio del effet utile *en la interpretación de tratados*

Les nombreuses vies de l'effet utile *dans l'interprétation des traités*

José Rogelio **Gutiérrez Álvarez**

https://orcid.org/0009-0004-8657-1687

University of Cambridge. United Kingdom
Correo electrónico: jrg75@cam.ac.uk

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Abstract: This article studies the many ways in which the principle of effectiveness in treaty interpretation has been applied in international dispute settlement. It argues that the different versions of *effet utile* may be categorised according to: a) the object and purpose that the interpreter attempts to fulfil (i.e., that of a treaty as a whole or that of specific components within it); b) the yardstick for assessing the effectiveness (i.e., a 'narrow' approach that would solely prevent that a treaty or its provisions are completely deprived of meaning, or a 'broader' one that aims towards the maximisation of its effects) and c) the relevance of the specific facts assessed by the court or tribunal to ascertain the general meaning of treaty provisions.
Keywords: treaty interpretation; effectiveness; *effet utile*; object and purpose.

Resumen: Este artículo estudia las múltiples formas en las que el principio de efectividad en la interpretación de los tratados ha sido aplicado en la jurisprudencia internacional. Se propone una categorización de las diferentes versiones de este principio, en atención a a) el objeto y fin que el intérprete intenta realizar (i.e., el objeto y fin del tratado en su totalidad o aquel de sus

componentes particulares; b) la medida para evaluar la efectividad (i.e., una versión 'restringida' que únicamente previene que el tratado o sus componentes sean absolutamente privados de sentido o una versión 'amplia' que procura la maximización de sus efectos) y c) la relevancia de los hechos específicos del caso bajo estudio por la corte o tribunal internacional para determinar el sentid general de los términos del tratado.
Palabras clave: interpretación de tratados; efectividad; *effet utile*; objeto y fin.

Résumé: Cette article analyse les nombreuses versions du principe de l'effet utile dans le règlement des différends internationaux. L'article suggère qui ces versions peuvent être classifies conformément à: a) l'objet et le but qui l'interpréteur souhaite rendre efficace (i.e. l'objet et le but de tout le traite ou celle d'une de son parts); b) l'indicateur de l'efficacité (i.e. une version 'limitée' qui seulement souhaite éviter qui le traité soit privé de tout conséquence, ou une version 'libéral', qui peut augmenter ses effets) et c) la pertinence des faits spécifiques évalués par la cour ou le tribunal pour déterminer le sens général des dispositions du traité.

I. Introduction

Within the toolkit that international lawyers use to decipher treaties, there is an intriguing hermeneutical principle, one which is riddled in academic and judicial controversy notwithstanding its somewhat elegant French name, impressive historical credentials, and recurrent appearances in contemporary case law. This is the so-called 'effectiveness' or *effet utile* principle, which might aptly be described as an umbrella term for a varied range of interpretative approaches that prevent redundant, futile, unreasonable, and perhaps restrictive readings of international agreements.

The relevance of this maxim in international adjudication can hardly be overstated, as the decisions of international courts and tribunals are often determined by their understandings of what *effet utile* means and implies. Ironically, however, adjudicative bodies have endorsed divergent views of what effectiveness stands for. A snapshot provided by three consequential decisions might suffice to convey the significance of this principle in contemporary international law and, more importantly, the confusion that surrounds it.

Take, for example, the International Court of Justice's (ICJ) preliminary objections judgment in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, where the Court determined that it had no jurisdiction. This decision was essentially based on considerations of effectiveness in treaty interpretation that were heavily criticised in a joint dissenting opinion of four ICJ judges. In a nutshell, the minority disagreed with the majority's assertion that Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination[1] —which grants States Parties a right to refer to the ICJ a dispute concerning this treaty— should be understood as imposing a strict requirement of prior negotiations before the filing of the claims. The majority decided that Article 22 established such requirement, because otherwise 'a key phrase of this provision would be devoid of meaning',[2] in a straightforward application of *effet utile*. By contrast, the minority acknowledged the relevance of the principle of effectiveness in the law of treaties, but it nonetheless argued that 'this technique of interpretation is never as all-determinative as the Court would appear to treat it in the present case; it does not suffice by itself'.[3]

Controversies over the role of effectiveness in treaty interpretation have also lied at the centre of impactful international human rights decisions, as exemplified by the judgment of the Inter-American Court of Human Rights (IACtHR) in *Case of Artavia Murillo v. Costa Rica*.[4] In this case, the Court interpreted Article 4(1) of the American Convention on Human Rights (ACHR),[5] which establishes that the right to life 'shall be protected by law and, *in general*, from the moment of conception'.[6] The majority of the Court opined that 'the object and purpose of the expression "in general" is to permit, should a conflict between rights arise, the possibility of invoking exceptions to the

[1] New York, 7 march 1966, 660 UNTS 195, *entered into force* 4 january, 1969.

[2] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Georgia vs. Russian Federation,* Preliminary objections, judgment, I. C. J. Reports 2011, p. 70, at paras. 133 and 134 *Georgia vs. Russia*.

[3] *Ibidem, Joint diss*, *cit*. Owada, Simma, Abraham, Donoghue and Gaja, paras. 21 and 22.

[4] I/A Court H. R., *Case of Artavia Murillo et al*., *In vitro fertilization vs. Costa Rica*, Preliminary objections, merits, reparations and costs, judgment of november 28, 2012, series C, num. 257.

[5] San José, 22 november, 1969, 1144 UNTS 123, *entered into force* 18 july, 1978.

[6] *Idem* (emphasis added).

protection of the right to life from the moment of conception'.[7] By contrast, in a dissenting opinion Judge Vio Grossi argued that,

> the rule of the "object and purpose" of a treaty must be used for interpreting the expression "and, in general". The object and purpose of the Convention is to require States to respect human rights and to ensure their free and full exercise. In turn, the object and purpose of Article 4(1) is the respect of life. Hence, the expression "and, in general" must have an *effet utile* to this end, so that it contributes effectively to this object and purpose, not providing an exception to it or, *a fortiori*, a negation of the right to life.[8]

Judge Vio Grossi went on to argue that the expression 'and, in general' in Article 4(1) had been included in the ACHR so as to clarify that human life before and after birth deserved common protection under law. In his view, then, this expression 'makes no reference to an exception, to an exclusion. Quite the opposite, this expression is inclusive'.[9] In Vio Grossi's view, then, effectiveness should be used to 'maximise' the effects of a treaty norm.

More recently, the centre-stage relevance and controversy surrounding effectiveness in treaty interpretation became apparent in the recent decision of a Pre-Trial Chamber of the International Criminal Court (ICC) in *Situation in the State of Palestine*,[10] where the Chamber elucidated article 12(2)(a) of the Rome Statute.[11] This provision empowers the Court to exercise its jurisdiction in relation to '[t]he State on the territory on which [an alleged criminal conduct] occurred'. The Chamber had to assess whether Palestine could be considered a State for the purposes of this provision.[12] Thus, invoking the principle of effectiveness,[13] it declared that.

[7] *Artavia Murillo,* num. 4, para. 258.

[8] *Ibidem, Diss*, *cit.,* Vio Grossi, p. 7.

[9] *Ibidem,* p. 8.

[10] Pre-Trial Chamber I, *Decision on the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine"*, 5 february, 2021, ICC-01/18, *Situation in the State of Palestine*.

[11] *Rome Statute of the International Criminal Court,* Rome, 17 july, 1998, 2187 UNTS 3, *entered into force* 1 july, 2002.

[12] *Situation in the State of Palestine,* num. 10, para. 91.

[13] *Ibidem,* para. 105.

> [T]he reference to '[t]he State on the territory of which the conduct in question occurred' in article 12(2)(a) of the Statute cannot be taken to mean a State fulfilling the criteria for statehood under general international law. Such a construction would exceed the object and purpose of the Convention and, more specifically, the judicial functions of the Chamber to rule on the individual criminal responsibility of the persons brought before it. Moreover, *this interpretation would also have the effect of rendering most of the provisions of the Statute, including article 12(1), inoperative for Palestine*.[14]

This was a noteworthy move by the Chamber since, as observed by Judge Kovács in his dissent, until that point *effet utile* had only figured in the case law of the ICC as 'a *general* test of relevance' of the Statute, rather than as an instrument to make its provisions fit 'a single (but certainly very complicated) case'.[15]

The three decisions outlined above illustrate some of the main debates surrounding the principle of effectiveness in treaty interpretation. *Georgia v. Russian Federation* attests to the uneasy relationship between *effet utile* and other rules of treaty interpretation. *Artavia Murillo* shows that effectiveness can require more than the avoidance of futile or redundant interpretations —indeed, multiple readings of a treaty provision may enable it to produce certain but unequal effects. In such scenarios, this tool may be employed to advanced teleological interpretations that circumscribe or maximise the scope of a treaty provision. Finally, the *Situation of Palestine* decision exemplifies how this tool has not only been used to ensure that a treaty is effectively applied to a set of situations abstractly determined, but also to establish that a specific situation fits within the terms of the agreement at hand.

It is herein submitted that the lack of consensus over the boundaries of this interpretative canon is at least partially explained by a general lack of awareness of the different 'hats' worn by *effet utile* worn across international legal case law and scholarship. This article attempts a categorisation and explanation of these 'hats', hoping that this portrayal of the varying uses for which this principle has been employed may assist international lawyers in discerning the merits and limitations of each of these variations.

The article is structured in four sections. In opening the discussion, section II outlines the different versions of effectiveness used in treaty interpretation. It argues that there are at least three parameters according to which multiple

[14] *Ibidem,* para. 106.

[15] *Ibidem,* september, *cit.,* Kovács, para. 69.

versions of this maxim may be categorised. These are (a) the breath of the object and purpose whose effectiveness is pursued (i.e., that of the agreement as a whole or that of merely one of its components); (b) the yardstick for assessing effectiveness (i.e., a 'narrow' approach that would solely prevent the futility of a treaty or a 'broad' approach aiming for the maximisation of its effects); and (c) the moment, metaphorically speaking, at which this principle comes into play in treaty interpretation (i.e., from the outset, as an aid to establish the applicability of the treaty to a set of situations or only once the scope of the agreement has been *prima facie* ascertained through the general rule of treaty interpretation). Afterwards, section III reviews the history of effectiveness in treaty interpretation in international dispute settlement. This account, which comprises the bulk of the article, is segmented in two periods: pre- and post-Vienna Convention on the Law of Treaties (VCLT).[16] It intends to show how most of these categories have been well represented throughout history, further identifying the contexts in which each variety of *effet utile* has been most popular. Section IV then ponders upon the factors in favour and against the different versions of effectiveness, before the conclusion in section V wraps of the discussion.

II. The many lives of *effet utile*-a categorisation

Without aiming to describe every possible use given to this interpretative maxim in international case law, this section suggests that there are three main parameters according to which the most predominant versions of *effet utile* may be categorised.

The first parameter is defined by the type of object and purpose that an interpreter intends to make effective. Concretely, *effet utile* may be relied upon either to ensure the effectiveness of a treaty as a whole or to specific components within it,[17] all the way down from chapters to articles[18] and specific

[16] Vienna Convention on the Law of Treaties, Vienna, 23 may, 1969, 1135 UNTS 331, *entered into force* 27 january, 1980.

[17] Fitzmaurice, Malgosia and Merkouris, Panos, 'Canons of treaty interpretation: selected case studies from the world trade organization and the North American Free Trade Agreement' in Fitzmaurice, Malgosia, Olufemi Elias and Merkouris, Panos (eds.), *Treaty interpretation and the Vienna Convention on the Law of Treaties: 30 years on,* Brill, 2010.

[18] Weeramantry, J. Romesh, *Treaty Interpretation in Investment Arbitration,* OUP, 2012.

words.[19] For the sake of clarity, I will refer to these approaches, respectively, as the whole-convention-approach and the specific-provision-approach.

Admittedly, the idea that specific components of a treaty may have their own object and purpose remains controversial. A recent monograph on the rules of interpretation as set forth in the VCLT, for example, claims that 'nowadays, the 'common wisdom' seems to have settled around the idea that the 'object and purpose' refers to the treaty as a whole, rather than its individual provisions'.[20] Yet, the weight of the evidence suggests otherwise. International and regional courts often refer to the object and purpose of specific provisions,[21] and the International Law Commission (ILC) has done the same.[22] Moreover, adjudicative bodies have also grappled with the complex relationship between the object and purpose of the treaty as a whole and that of its particular terms.[23]

A further complication may result from the methodology that should be employed to ascertain the relevant object and purpose. As shown by the case law from the ICJ, a treaty's object and purpose is often derived from its title and preamble.[24] By contrast, other courts and tribunals have embraced more controversial views, affirming that the *travaux préparatoires* may be consulted in order to identify the treaty's object and purpose.[25] This last position is, of course, difficult to reconcile with approaches to treaty hermeneutics that

[19] *Artavia Murillo* (n 4) para. 258.

[20] Bianchi, Andrea and Zarbiyev, Fuad, *Demystifying treaty interpretation,* CUP, 2024.

[21] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination,* Ukraine vs. Russian Federation, judgment, 31 january, 2024, para. 138, *Ukraine vs. Russian Federation*; *Phillip Harkins vs. The United Kingdom* [GC], 71537/14, decision of 15 june, 2017, para. 51.

[22] ILC, "Draft articles on responsibility of States for internationally wrongful acts, with commentaries", *Yearbook of the International Law Commission*, vol. II, part two, 2001, p. 34.

[23] Appellate Body Report, *European Communities-Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, adopted 12 september, 2005, para. 238.

[24] *Ukraine vs. Russian Federation,* num. 21, para. 50; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Qatar vs. United Arab Emirates,* preliminary objections, judgment, I. C. J. reports 2021, p. 71, para. 84.

[25] High Court of Australia, *vs. Minister for Immigration & Ethnic Affairs,* 1997, HCA 4, per Brennan C J; *Case of the government of the Kingdom of Greece (on behalf of Apostolidis) vs. the Federal Republic of Germany, decision of the Second Chamber of 11 may 1960,* XXIX RIAA 445, pp. 466 and 467.

preclude the use of supplementary means of interpretation in situations other than those established in Article 32 of the VCLT.[26]

A second parameter for distinguishing among different uses of *effet utile* is concerned with the extent to which the relevant object and purpose (be that of the treaty as a whole or of one of its components) is aimed to be fulfilled. It is common to find references throughout international legal scholarship to two such variants of the principle.[27] On the one hand, there is a 'narrow' version of *effet utile*, which often goes by the name of *ut as res magis valeat quam pereat*, requiring that no treaty (or provision within it) is interpreted in a way that renders it idle or redundant. On the other hand, there is a 'broader' (and controversial)[28] version of the principle – with no Latin name to claim for its own – which would not only prevent the futility of the treaty (or provision within it), but also require the 'maximisation' of its effects of so that its object and purpose is realised to the fullest extent. It might be more precise to say, however, that these two versions of *effet utile* actually stand at the poles of a continuum of possibilities. In other words, 'the choice is rarely between full effectiveness and no effectiveness of a treaty provision, but between various degrees of effectiveness'.[29] One author has conveniently suggested a tripartite classification of *effet utile* approaches, as minimal, enhanced ('augmenté') and maximal.[30]

For illustration, consider the judicial and academic debates surrounding the geographical scope of the *non-refoulement*, the refugee and human rights principle demanding that refugees are not expelled to places where their lives would be endangered. Without diving into the specifics of a complex debate in treaty interpretation, it may suffice to note that some suggest that *non-refoulement* only protects individuals that have physically entered the territory of the State which is bound by this norm.[31] If so, a State could physically fortify its borders, without allowing any points of entry for asylum seekers, and still

[26] Gutiérrez Álvarez, José Rogelio, "The weight of a State's past stances on treaty interpretation-may good faith play a role?", *Cambridge International Law Journal*, 2024, vol. 13, issue 1, pp. 41, 47-49.

[27] Berlia, Georges, "Contribution a l'interpretation des traites", *Collected Courses of the Hague Academy of International Law,* 1965, vol. 114, pp. 306-308.

[28] Kolb, Robert, *The law of treaties: an introduction,* 2016, pp. 154 and 155.

[29] Bianchi and Zarbiyev, num. 20, p. 197.

[30] Kolb, Robert, *Interprétation et création du droit international,* Bruylant, 2006, pp. 583-600.

[31] Grahl-Madsen, Atle, "Commentary on the Refugee Convention, Articles 2-11, 13-37",

be in compliance with this principle. Others, however, argue that *non-refoulement* also applies at the boundary line, outlawing rejections at the frontier.[32] Finally, others contend that this principle applies extraterritorially-banning State efforts to prevent asylum seekers from reaching the border.[33]

In each of these three scenarios, *non-refoulement* would have certain effects. Indeed, in none of these interpretations would this norm be rendered idle or redundant. Even in the narrowest one, some individuals —those who manage to surpass land border controls, or who arrive by air transportation— would benefit from this protection. By contrast, the two alternative interpretations progressively extend the scope of *non-refoulement* over larger numbers of persons, arguably enabling the presumptive aim of the norm to have a greater reach. A maximising version of *effet utile* could arguably give preference to one of the two broader readings of *non-refoulement*.

Finally, a third ground pursuant to which the uses of *effet utile* may be categorised is that of the stage of the interpretative endeavour in which it comes into play. This idea might be better explained by recalling the ICC's Chamber decision in *Situation in the State of Palestine*. As narrated above, the Chamber invoked the principle of effectiveness to affirm that the term 'State' under Article 12(2)(a) of the Rome Statute should be understood as including Palestine, because any other interpretation 'would have the effect of rendering most of the provisions of the Statute […] inoperative for Palestine'. Irrespective of the apparent circularity in the Court's reasoning, this decision illustrates how effectiveness has been employed to establish that one particular scenario is covered by a treaty term, which is then construed in a way that supports this premise. This is the reason for which Judge Kovács noted in his dissent that the ICC's Chamber was not relying on effectiveness to ascertain the general meaning of the treaty, against which its applicability to specific situations may be assessed – a feature which, according to Judge Kovács, dis-

UNHCR 1997. https://www.unhcr.org/publications/legal/3d4ab5fb9/commentary-refugee-convention-articles-2-11-13-37bremwritten-professor.html (accessed 26 march, 2024).

[32] *N. D. and N.T. vs. Spain* [GC], 8675/15 and 8697/15, para. 178, ECHR 2020; I/A Court H. R., *Rights and guarantees of children in the context of migration and/or in need of international protection*, Advisory Opinion OC-21/14 of august 19, 2014, series A, num. 21, para. 210. This is arguably the predominant position.

[33] Maarten den Heijer, *Extraterritorial Asylum under International Law,* Hart Publishing, 2012, p. 131.

tinguished the ICC's decision in this case from prior instances where *effet utile* had played a role in its jurisprudence.[34]

Of course, the ICC's decision should be contextualised within the framework of the complex legal and political questions that surround the status of Palestine under international law. This is not the place to dive into the soundness of the opposing claims on this very sensitive matter, and this article is not intended to endorse any among them. This case is only discussed here to the extent that it illustrates one of the many uses of the principle of effectiveness in treaty interpretation. For present purposes, the focus should be placed over the fact that a specific-situation approach to *effet utile* is likely to be invoked in order to maximise the effects of the treaty at hand, as the following cases similarly suggest.

In *Prosecutor v Tadić*, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) relied there on the principle of effectiveness principle to construe the definition of 'protected persons' in Article 4 of Geneva Convention IV.[35] According to this provision, '[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power *of which they are not nationals*'.[36] Interestingly, the Court considered that 'even if in the circumstances of a case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable', so long as perpetrators and victims belonged to different ethnicities.[37] In short, the ICTY deviated from the definition of nationality under general international law, equating it — for the purposes of the Geneva Convention IV— to the notion of ethnicity. The Court did so in order to better fulfil the aims of this international agreement. Indeed, the judicial rationale was premised on the view that 'Article 4 of Geneva Convention IV, if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible'.[38]

[34] *Situation in the State of Palestine,* num. 10, september, *cit.,* Kovács, para. 69.

[35] Geneva Convention relative to the Protection of Civilian Persons in Time of Sar, Geneva, 12 august, 1949, 75 UNTS 287, *entered into force* 21 october, 1950.

[36] *Idem.*(emphasis added).

[37] Appeals Chamber of the ICTY, *Prosecutor vs. Tadić*, IT-94-1, judgment of 19 july, 1999, para. 169.

[38] *Ibidem,* para. 167 and 168. See also *Prosecutor vs. Delalic et al.*, IT-96-21-A, Appeals Chamber, judgment of 20 february, 2001, para. 73.

A less clearcut example is provided by *Abaclat v. Argentina*, an international investment arbitration in which the tribunal had to decide whether the dispute arose directly out of an 'investment' for the jurisdictional requirement set forth in Article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[39] to be satisfied (the ICSID Convention). To answer that question, the tribunal pondered upon the appropriateness of the *Salini* test, a set of objective criteria used in other investment cases to set the boundaries of the notion of 'investments' under the ICSID Convention. The tribunal's majority decided not to follow the *Salini* criteria to determine whether the dispute at hand was related to an investment, because,

> [i]f Claimants' contributions were to fail the *Salini* test, those contributions – according to the followers of this test-would not qualify as investments under Article 25 ICSID Convention, which would in turn mean that Claimants' contributions would not be given the procedural protection afforded by the ICSID Convention. The Tribunal finds that such a result would be contradictory to the ICSID Convention's aim, which is to encourage private investment while giving the Parties the tools to further define what kind of investment they want to promote.[40]

On these terms, the majority of the arbitral tribunal decided to deviate from the definition of investment established by the *Salini* test because these criteria would leave the specific claim at hand outside the scope of the ICSID Convention. Thus, teleological considerations were advanced to ensure that the term 'investment' in Article 25 to this treaty was broad enough so as to encompass the particular set of facts before the tribunal. In this regard, while some scholars have contested the reliability of the *Salini* test as an appropriate benchmark to assess the nature of possible investments under the ICSID Convention,[41] the decision of this tribunal to reject its applicability was not explained by a contradictory, 'general' definition of investment but, instead,

[39] (Washington, 18 march, 1965), 575 UNTS 159, *entered into force* 14 october, 1966.

[40] *Abaclat and Others vs. The Argentine Republic*, ICSID case Num. ARB/07/5, decision on jurisdiction and admissibility, 4 august, 2011, para. 364.

[41] Figueiredo, Roberto Castro de, "The ICSID Convention and the VCLT: Interpreting the Term 'Investment'" in Shirlow, Esmé and Nasir Gore, Kiran (eds.), *The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution and Future,* 2022, Kluwer Law International, pp. 76-82.

by an assumption that the specific contribution of the claimants was, in fact, an investment.

From what has been explained thus far, it may be concluded that the principle of effectiveness in treaty interpretation can be employed in many different ways. It can be used either to further the object and purpose of an agreement as a whole or that of its separate components. It can be applied either to ensure that the treaty and its components are not deprived of meaning and consequence or to maximise their impact, to the extent that the text and context of the agreement may permit. More controversially, it has also been employed to establish that a treaty term is broad enough to cover the specific situation at hand.

Now that the different versions of *effet utile* have been distinguished, the following section will review the case law from international courts, arbitral tribunals, treaty bodies that rely on this principle. It will become apparent that the prevalence of the different approaches to effectiveness in treaty interpretation varies among adjudicative contexts.

III. The history of effectiveness in treaty interpretation

This section reviews the history of effectiveness in treaty hermeneutics. In addressing such a broad topic, the discussion is structured in two parts. Firstly, subsection 1. narrates how this principle was first understood by classical international legal publicists, then endorsed by the earliest arbitral decisions of the modern era, and finally consolidated as an interpretative canon by the Permanent Court of International Justice (PCIJ) and the ICJ up to the adoption of the VCLT. As it is well known, the VCLT was a watershed in the history of the law of treaties – and particularly so with respect to the rules on their interpretation, insofar as it codified most of the customary law on the matter in its Articles 31 to 33.[42] Significantly, however, *effet utile* was not included in the VCLT's text. This has not prevented international courts and tribunals from continuing to rely on this interpretative maxim until present days, as subsection 2. will demonstrate.

[42] The customary status of these rules was recently acknowledged by the ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, The Gambia vs. Myanmar,* Preliminary objections, judgment, I.C.J., reports, 2022, p. 477, para. 87.

1. *The road from the classics to Vienna*

There will always be some arbitrariness in fixing the starting point of a historical review of how ancient components of the international legal system developed. When it comes to the principle of *effet utile*, however, it would be hard to find a better candidate to head the list than the works of Grotius who, in recounting an episode from the Peloponnesian War, made the following observation:

> [a]s regards the effect, especially important is the case when a word taken in its more common meaning produces an effect contrary to reason. For in the case of an ambiguous word, that meaning ought preferably to be accepted which is free from fault. In consequence, we ought not to admit the quibble of Brasidas, who, having promised that he would withdraw from Boeotian country, denied that the land which he occupied with his army was Boeotian, as if that word ought to be understood of warlike possession and not of ancient boundaries; for in the former sense the compact would have been meaningless.[43]

Other heavyweights in the history of international law followed Grotius' steps. When Pufendorf made reference to this maxim, he observed that 'when words, if taken in their plain and simple meaning, will produce an absurd or even no effect, [then] some explanation must be made from their more generally accepted sense, that they may not lead to nothingness or absurdity'.[44] Later on, Vattel picked up the principle in his *Law of Nations*.[45] This work dedicated whole chapter to the topic of treaty interpretation, which relied heavily on Roman law.[46] There, Vattel made the following statement about the principle of effectiveness:

> [i]t is not to be presumed that sensible persons, in treating together, or transacting any other serious business, meant that the result of their proceedings should prove a

[43] Grotius, Hugo, *On the law of war and peace, Student Edition,* C. Neff, Stephen (ed.), CUP 2012) 240-241.

[44] Cited in Bederman, David, *Classical Canons: Rhetoric, classicism and treaty interpretation,* Ashgate, 2001, 129.

[45] Vattel, Emer de, *The law of nations* in Kapossy, Béla and Whatmore, Richard (eds.), Liberty Fund, 2008.

[46] Fairman, Charles, "The interpretation of treaties", *Transactions of the grotius society,* 1934, pp. 123, 129-130.

> mere nullity. *The interpretation*, therefore, *which would render a treaty null and inefficient, cannot be admitted*[…] *It ought to be interpreted in such a manner, as that it may have its effect, and not prove vain and nugatory* […][47]

As articulated by Vattel, the rule of effectiveness has been recurrently applied in international dispute settlement since the earliest modern arbitrations. It was cited in 1794 by two commissioners under the Jay Treaty arbitrations,[48] and thereafter by the Costa Rican Claims Commission in 1862.[49] Reportedly, an arbitral tribunal also relied upon *effet utile* in resolving a dispute between Chile and Peru in 1875.[50] At the turn of the XX century, the Permanent Court of Arbitration reiterated that 'it is a principle of interpretation that words in a document ought not to be considered as being without any meaning if there is not specific evidence to that purpose'.[51]

Effet utile soon became part of the PCIJ's jurisprudence, where the differences between its 'narrow' and 'broader' approaches became apparent. Indeed, until this point international legal case law and scholarship mostly relied on this principle to prevent that treaty provisions were rendered idle or redundant, in line with the *ut as res magis valeat quam pereat* variation. By contrast, in *Free Zones of Upper Savoy and the District of Gex* the PCIJ invoked this canon to enable treaty texts to have 'appropriate effects'[52] – arguably a higher threshold than mere avoidance of irrelevance. Moreover, in *Acquisition of Polish Nationality*, the PCIJ seemed to endorse a broad version of *effet utile* when it construed a provision within a minorities' treaty, because '[i]f this was not the case, the value and sphere of application of the Treaty would be greatly *diminished*'.[53]

[47] Vattel, *cit.*, p. 419.

[48] Bassett Moore, John, *History and digest of international arbitrations to which the United States has been a party* (4th ed.), Government Printing Office, 1898, pp. 2284, 2286.

[49] *Ibidem,* p. 1565.

[50] Berlia, Georges, p. 306.

[51] *North Atlantic Coast Fisheries Case* (1910) 4 American Journal of International Law, 949, 982.

[52] *Free Zones of Upper Savoy and the District of Gex,* Order of 19 August 1929, P. C. I. J., series A, num. 22, p. 13.

[53] *Acquisition of Polish Nationality*, *Advisory opinion* (1923), P. C. I. J. series B, num. 7, p. 16 (emphasis added). It could also be argued that the Court's reading is not so much the result of the application of the principle of effectiveness but of an exercise of systemic interpretation (i. e., reading the minorities treaty in light of the Covenant of the League of Nations).

Once the PCIJ was replaced by the ICJ, the new Court was quick to rely on the effectiveness principle. In *Corfu Channel* —its first contentious case— it recalled that '[i]t would be incompatible with the generally accepted rules of interpretation to admit that a provision[…] occurring in a special agreement should be devoid of purport or effect.'[54] Thus, the ICJ reasserted the standing of the narrow version of effectiveness (*ut as res magis valeat quam pereat*) as a rule of treaty interpretation. By contrast, this Court voiced very critical views about the maximising version of *effet utile* throughout its earlier case law.

For instance, in its *Interpretation of Peace Treaties* advisory opinion, the Court had to determine the scope of the attributions granted to Secretary-General of the United Nations in certain peace treaties. [55] These agreements established a dispute settlement mechanism, according to which each party to the dispute was empowered to appoint one representative to a Commission that would be completed through the joint appointment of a third representative. Moreover, the treaties specified that if the parties failed to agree on the appointment of the third member of the Commission, the Secretary-General could be requested by either party to make such appointment. Against this background, the General Assembly of the United Nations (UNGA) asked the Court if the Secretary-General would be authorised to appoint a member to this Commission if one of the disputing parties had failed to appoint its own representative. In dismissing such possibility, the Court clarified that *effet utile* could not be employed to grant the Secretary-General a power that was not bestowed upon him by the treaty, noting that,

> [t]he principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which[…] would be contrary to their letter and spirit.[56]

The maximising version of *effet utile* would fare even worse in *South West Africa, Second Phase*. In that judgment, after recalling that its duty is 'to interpret Treaties, not to revise them',[57] the Court expressed itself in the following terms:

[54] *Corfu Channel case*, judgment of april 9th, 1949, I. C. J. Reports 1949, pp. 4-24.

[55] *Interpretation of peace treaties (second phase), Advisory opinion: I. C. J. Reports 1950*, p. 221.

[56] *Ibidem*, p. 229.

[57] *Idem*.

> [i]t may be urged that the Court is entitled to engage in a process of "filling in the gaps", in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes. The Court need not here enquire into the scope of a principle the exact bearing of which is highly controversial, for it is clear that it can have no application in circumstances in which the Court would have to go beyond what can reasonably be regarded as being a process of interpretation, and would have to engage in a process of rectification or revision. Rights cannot be presumed to exist merely because it might seem desirable that they should.[58]

Importantly, in this case the Court was dealing with a claim submitted by Ethiopia and Liberia against South Africa for the latter's refusal to comply with its obligation to report to UNGA on the administration of the Mandate of South West Africa. Thus, the ICJ had to interpret the Covenant of the League of Nations —as the normative framework in which the Mandate was constituted— to determine whether the applicants had the right they intended to exercise against South Africa. Pursuant to the text of the Covenant, such right was vested on the League's Council, to which the 'mandatory was entitled to attend as a member for the purposes of any mandate entrusted to it'. Since decisions of the Council on these matters had to be adopted by unanimity, the mandatory (South Africa) appeared to have a right to veto any such decision. Thus, the Court reasoned,

> The gist of [the applicants'] argument is that since the Council had no means of imposing its views on the mandatory[…] the mandatory could have been flouted at will. Hence, so the contention goes, it was essential, as an ultimate safeguard or security of the performance of the sacred trust, that each member of the League should be deemed to have a legal right or interest in that matter and, in the last resort, be able to take direct action relative to it.[59]

On these terms, there is a strong reason to differentiate between the irrelevance of the maximising approach to treaty interpretation in the *South West Africa, Second Phase* and its potential applicability to elucidate rights which are expressly provided for in other agreements. In *South West Africa*, *effet utile* was invoked by the applicants to affirm the existence of a right that had no textual base in the Covenant of the League of Nations. In other words, the Court

[58] *South West Africa,* Second phase, judgment, I. C. J. reports 1966, p. 6, para. 91.

[59] *Ibidem,* para. 86.

concluded that there was no right to be interpreted —let alone made effective. Consequently, this ICJ decision does not preclude the use of *effet utile* to maximise rights that are actually included in an international treaty, assuming that such an approach is merited in the case at hand.

Either way, the story that has been told so far shows that the principle of effectiveness has occupied an important place in the history of the rules on treaty interpretation, dating as far back as the works of Grotius. Indeed, this maxim has been employed by international adjudicators since the earliest arrangements for inter-State dispute settlement were established, although they showed no consistency on the meaning and implications of this principle. Whereas the classic publicists endorsed a minimal version of *effet utile* in order to discard futile, redundant, or meaningless readings of international agreements, the PCIJ was more willing to entertain maximising versions of effectiveness. The ICJ, by contrast, was much more sceptical about these broad approaches, which it portrayed as attempts to revise international treaties without the agreement of their parties.

2. *The road from Vienna to present days*

Adopted in 1969, the VCLT aimed to dispose 'of the most controversial and difficult subject in the whole field of the law of treaties, the question of treaty interpretation'.[60] Judged by the place now occupied by these rules in international legal case law and scholarship, the codification efforts behind the VCLT resulted in great success. Indeed, the rules established in Articles 31 to 33 of the VCLT are generally considered to reflect of customary international law,[61] drawing the boundaries of the pitch upon which arguments on treaty hermeneutics are played out.

Considering the extensive history of *effet utile* in treaty interpretation that was narrated above, it is notable that this canon is absent from the plain text of the general rule of treaty interpretation set forth in Article 31 of the VCLT. In this regard, it has been suggested that the ILC, which produced the draft that later turned into the VCLT, 'seem to have believed that the principle of

[60] Cited by Davis Mortenson, Julian, "The *Travaux* of *Travaux*: Is the Vienna Convention Hostile to Drafting History?", *American Journal of International Law*, 2013, vol. 107, issue 4, pp. 780, 820.

[61] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, The Gambia vs. Myanmar,* Preliminary objections, judgment, I. C. J. reports 2022, p. 477, para. 87.

effectiveness expressed in the maxim *ut res magis valeat quam pereat* was subsumed in the reference to 'good faith' and 'the object and purpose of a treaty' contained in Article 31'.[62] Importantly, the ILC also observed that '[p]roperly limited and applied, the maxim 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'.[63]

The lack of express reference within the general rule of interpretation in the VCLT could imply, as some have suggested, that the status of this maxim was 'downgraded' to that of supplementary means of interpretation.[64] Nevertheless, this view is contradicted by the recurrent reliance of international courts and tribunals on this principle, which they employ even when recourse to supplementary means of interpretation would not seem necessary (or perhaps even permissible)[65] under Article 32 of the VCLT. Indeed, despite its absence from the text of the VCLT, international case law is full of examples in which the principle of effectiveness has played an important role in treaty interpretation.

The resilience of this canon is evidenced by its multiple appearances throughout the ICJ's case law since the VCLT was concluded, particularly so with regards to its *ut res magis valeat quam pereat* version. For instance, in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court asserted that '[i]f Article 25 [of the UN Charter] had reference solely to decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter'.[66]

[62] Sinclair, Ian, *The Vienna Convention on the Law of Treaties* (2nd. ed.), Manchester University Press, 1984, p. 118.

[63] Commentary on Draft Articles on the Law of Treaties, YILC, 1966, vol. II, p. 219, para. 6.

[64] Jennings, Robert and Watts, Arthur, *Oppenheim's international law,* vol. 1: Peace (9th ed.), OUP, 2008, pp. 1280-1281.

[65] *Competence of the General Assembly for the Admission of a State to the United Nations,* Advisory opinion, I. C. J. reports, 1950, p. 8.

[66] *Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory opinion, I. C. J. reports 1971, p. 16, para. 113.

More recently, the ICJ has increasingly endorsed positions that apparently lend support to broader versions of *effet utile*.[67] For illustration, in the *Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*[68] the Court interpreted Article VI of the Genocide Convention, which establishes that,

> [p]ersons charged with genocide or any other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.[69]

There were doubts on whether the ICTY could constitute an 'international penal tribunal' within the meaning of Article VI, since this tribunal was not created through an international agreement through which States parties may have accepted its jurisdiction, but rather through a Security Council resolution. In response, the Court observed that 'it would be contrary to the object of the provision to interpret the notion of 'international penal tribunal' restrictively in order to exclude from it a court which, as in the case of the ICTY, was created pursuant to a United Nations Security Council resolution adopted under Chapter VII of the Charter'.[70] Obviously, an opposite conclusion would not have deprived Article VI of the Genocide Convention of all meaning.

More recently, the Court recently affirmed that among two plausible readings of article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),[71] the one that would *facilitate* the achievement of the treaty's aims should be preferred.[72] None of the 'contend-

[67] Of course, the Court has continued to endorse minimal versions as well. See *Fisheries purisdiction (Spain* vs. *Canada) Jurisdiction of the Court, Judgment,* I. C. J. reports 1998, p. 432, para. 52; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation),* Preliminary objections, judgment, I. C. J. reports 2011 (I), pp. 125 and 126, para. 133.

[68] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Serbia and Montenegro),* Judgment, I. C. J. reports 2007, p. 43.

[69] Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 december, 1948) 78 UNTS 277, entered into force 12 january, 1951.

[70] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Serbia and Montenegro),* Judgment, I. C. J. reports 2007, p. 43, para. 445.

[71] (New York, 7 march, 1966) 660 UNTS 195, *entered into force* 4 january, 1969.

[72] *Application of the International Convention for the Suppression of the Financing of Terrorism and of*

ing' readings of article 22 of CERD —which is concerned with the procedure to refer a dispute to the ICJ— would render this provision meaningless or redundant.

One can also find many post-VCLT decisions from other international courts, tribunals, and treaty bodies relying upon the effectiveness principle. The case law of the ICC is full of examples. In this context, *effet utile* has been described as the requirement 'that a treaty as a whole, as well as its individual provisions, must be read in such a way so as not to devoid either the treaty as such or one or more of its provisions of any meaningful content'.[73] Moreover, while minimal versions to effectiveness are prevalent in the ICC's case law, there are also examples of enhanced/maximising approaches that define it as 'a principle which gives preference to that interpretation of a treaty which best promotes its major purposes'.[74]

Regional human rights jurisprudence has no shortage of cases where this interpretative maxim has been applied. For illustration, the European Court of Human Rights (ECtHR) has reasoned that the law-making nature of the European Convention[75] made it 'necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties'.[76] This same Court has recurrently stated that the European Convention must be interpreted in a manner which ren-

the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine vs. Russian Federation), Preliminary Objections, Judgment, I. C. J. reports 2019, p. 558, para.111.

[73] Pre-Trial Chamber II, *The Prosecutor vs. Joseph Kony,Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Decision on the prosecutor's Application that the Pre-Trial Chamber disregard as irrelevant the Submission filed by the Registry on 5 december 2005, 9 march, 2006, ICC-02/04-01/05-147, para. 25.

[74] *Prosecuror vs. Omar Hassan Ahmad Al Bahir*, Joint concurring opinion of judges Eboe-Osuji, Morrison, Hofmanski and Bossa, 6 may 2019, ICC-02/05-01/09-397-Anx1 at para. 419, citing Myers McDougal and Richard Gardner, 'The Veto and the Charter: An Interpretation for Survival' (1951) 60 Yale L J 258, at p 261. See also Pre-Trial Chamber III, *The Prosecutor vs. Jean-Pierre Bemba Gombo*, Decision adjourning the hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, 3 march 2009, ICC-01/05-01/08-388 paras. 30-37. Other international criminal tribunals have also applied the principle of effectiveness. See *Prosecutor vs. Blaškić* (Subpoenae), International law reports, vol. 110, p. 696.

[75] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 april, 1950), 213 UNTS 221, *entered into force* 3 september, 1953.

[76] *Case of Wemhoff vs. Germany*, 2122/64, para. 8, ECHR, 1968.

ders its rights 'practical and effective, not theoretical and illusory'.[77] It could also be argued that the maximising-effects approach arguably lurks behind the ECtHR's persistent recourse to evolutive interpretation.[78] Indeed, both hermeneutic approaches usually point in similar directions, by enlarging the scope *ratione materiae* of international obligations in favour of the individual. On this point, the ECtHR has affirmed that the European Convention 'is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect *the increasingly high standard* being required in the area of the protection of human rights'.[79]

The IACtHR has not shied away from advancing interpretations that maximise the effects of the ACHR. In fact, it has asserted that 'when interpreting the [American] Convention it is always necessary to choose the alternative that is most favourable to protection of the rights enshrined in said treaty'.[80] Similarly, this Court has affirmed that, when faced with various viable readings of a treaty provision, 'the hermeneutic alternative that is most favourable to the protection of the rights of the individual and compatible to the application of the *pro persona* principle must be chosen'.[81] Moreover, the Court has asserted that 'norms should also be interpreted based on a values-based

[77] *Mamatkulov and Askarov vs. Turkey* [GC], 46827/99 and 46951/99, paras. 121-123, ECHR, 2005-I; *Case of Svinarenko and Slyadnev vs. Russia* [GC], 32541/08 and 43441/08, para. 118, ECHR, 2014.

[78] See Wyatt, Julian, *Intertemporal Linguistics in International Law* (Hart Publishing, 2020) 4, 150-151, 154; Oliver Dörr, *The Strasbourg Approach to Evolutionary Interpretation* (Hart Publishing, 2019), 115-116.

[79] *Case of Demir and Baykara* vs. *Turkey* [GC], 34503/97, para. 146 ECHR, 2008 (emphasis added). See also *Case of Austin and Others* vs. *The United Kingdom* [GC], 39692/09, 40713/09 and 41008/09, para. 53, ECHR, 2012.

[80] I/A Court H. R., *Case of the Mapiripán Massacre vs. Colombia*, Merits, Reparations and Costs, judgement of september 15, 2005, series C, num. 134, para. 106. See also I/A Court H. R., *Case of the 19 Merchants vs. Colombia*, Merits, Reparations and Costs, Judgment of july 5, 1004, series C, num. 109, para. 173.

[81] I/A Court H. R., *Gender identity and equality and non-discrimination of same-sex couples*, Advisory opinion OC-24/17 of november 24, 2017, series A, num. 24, para. 67 (Advisory opinion OC-24/17). The Mexican Supreme Court has followed a similar approach. See Mexican Supreme Court (First Chamber), *Amparo en Revisión 1077/2019* (2009) para. 119.

model[…] from the perspective of the "best approach" for the protection of the individual'.[82] More generally, On the IACtHR has affirmed that

> [t]he object and purpose of the American Convention is [the] effective protection of human rights. Hence, when interpreting that Convention, the Court must do it in such a way that the system for the protection of human rights has all its appropriate effects (*effet utile*).[83]

It must be acknowledged, however, that the *pro persona* principle of interpretation under Inter-American human rights case law is distinct from *effet utile*, even though the IACtHR seems to conflate them. Indeed, in *Hacienda Brasil Verde Workers v Brazil*, this Court considered that

> in light of the evolution of international law in recent decades, the phrase "slave trade and traffic in women" of Article 6(1) of the American Convention should be interpreted broadly to refer to "trafficking in persons". In the same way that the purpose of the slave trade and traffic in women is the exploitation of the human person, based on the interpretation that is most favourable to the individual and the *pro persona* principle, the Court cannot limit the protection granted by this article only to women or to the said "slaves". *This is important to give practical effects to the prohibition established in the American Convention* pursuant to the evolution of the phenomenon of human trafficking in our societies.[84]

On this regard, it must be emphasised that the *pro persona* principle of interpretation flows from Article 29 of the American Convention on Human Rights[85] instead of general international norms on treaty interpretation, as happens with *effet utile*. Moreover, the *pro persona* principle requires more than favouring an interpretation that prevents a treaty norm from being deprived of meaning or fulfilling its fullest effects, since it also requires the interpreter to ensure that their readings of the American Convention do not

[82] IACtHR, *Case of Gonzales et al. ("Cotton Field") vs. Mexico,* Preliminary Objection, Merits, Reparations and Costs, judgment of november 16, 2009, series C, num. 205, para. 33.

[83] I/A Court H. R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law*, Advisory opinion OC-19/99 of october 1, 1999, series A, num. 16, para. 58.

[84] I/A Court H. R., *Case of the Hacienda Brasil Verde Workers vs. Brazil*, Preliminary objections, merits, reparations and costs, judgment of october 20, 2016, series C, num. 318, para. 289 (emphasis added).

[85] Advisory opinion OC-24/17, num. 81, para. 218.

restrict the enjoyment of freedoms recognised in other international instruments and domestic legislation of the States parties.[86]

Relative to its Inter-American and European counterparts, the African Commission and Court on Human and Peoples' Rights have had little to say about methodology in treaty interpretation. Nevertheless, both of them have been willing to engage in expansive, *pro-persona* interpretations of human rights treaties. For instance, in *African Commission vs. Republic of Kenya*, this Court ascertained the meaning of 'cultural life' for the purposes of Article 17 of the African Charter,[87] declaring that '*culture* should be construed *in its widest sense* encompassing the total way of life of a particular group'.[88] More recently, the African Commission has affirmed that the right to participate freely in the government of one's country, as established in Article 13(1) of the Banjul Charter, 'must[…] be interpreted *in the widest possible sense* to include all forms of elections'.[89]

Arguably, the practice of UN human rights treaty bodies has similarly endorsed an expansive version of the *effet utile* principle. For instance, in *Hopu and Bessert v. France* (1997), the Human Rights Committee (HRC) asserted that 'the objectives of the [International Covenant on Civil and Political Rights][90] require that the term 'family' be given a broad interpretation as to include all those comprising the family as understood in the society in question'.[91] The HRC has also interpreted the same treaty progressively, resulting in expansive readings of this Covenant.[92] The Committee on Economic, Social and

[86] *Ibidem,* para. 57.

[87] African Charter on Human and Peoples' Rights (Nairobi, 27 june, 1981), 1520 UNTS 217, *entered into force* 21 october, 1986.

[88] Application num. 006/2012 (judgment on merits) 26 may, 2017, para. 179 (emphasis added).

[89] *Communication 430/12*, *Gabriel Shumba and Others vs. Zimbabwe,* 2020, para. 70 (emphasis added). Similarly, see *Communication 344/07, George Iyanyori Kajikabi vs. Egypt* (2020), para. 201.

[90] (New York, 16 December 1966), 999 UNTS 171, *entered into force* 23 march, 1976.

[91] *Hopu and Other vs. France,* 1997, UN Doc CCPR/C/60/D/549/1993/Rev.1, para. 10.3. Similarly, in HRC, 'General Comment num. 16: article 17' (1988) UN Doc HRI/GEN/1/Rev.1, at p. 22, para. 5.

[92] The HRC has affirmed the applicability of Article 21 ICCPR, protecting the right of peaceful assembly, to 'online' assemblies, implying that States may not unjustifiably block or hinder Internet connectivity against them. See HRC, 'General Comment num. 37 on the right of peaceful assembly (article 21)' (2020), UN Doc CCPT/C/GC/37.

Cultural Rights,[93] the Committee against Torture, and the Committee on the Elimination of Racial Discrimination[94] have similarly embraced an evolutive approach to treaty interpretation which, in practice, tends to broaden the scope of the relevant human rights agreements.

When it comes to international trade law, the principle of effectiveness also enjoys great popularity. The Appellate Body of the World Trade Organization (WTO) relied on effectiveness in numerous occasions,[95] and the principle has already made its appearance in an award rendered by an arbitral tribunal established under the Multi-Party Interim Appeal Arbitration Arrangement.[96] *Effet utile* has also featured in the jurisprudence of regional international trade regimes, such as the United States-Mexico-Canada Agreement[97] and MERCOSUR.[98] In international trade contexts, effectiveness is generally applied with respect to specific treaty provisions to dismiss interpretations that would turn them redundant or meaningless, along the lines of *ut as res magis valeat quam pereat*. Nevertheless, one can also find examples of enhanced or maximal uses of *effet utile* here. For instance, in *Canada – Dairy TRQ Allocation Measures*, the Panel asserted that '[e]ffectiveness must be achieved through an interpretation that gives full meaning to all provisions of a treaty, beyond purely nominal effectiveness'.[99]

International investment tribunals often have recourse to the different variants of *effet utile* in their awards and decisions, sometimes to ensure the

[93] Daniel Moeckli, 'Interpretation of the ICESCR: Between Morality and State Consent' in Daniel Moeckli and others (eds.), *The Human Rights Covenants at 50: Their Past, Present, and Future* (OUP 2018) 54 and 55.

[94] Birgit Schlütter, 'Aspects of human rights interpretation by UN treaty bodies' in Helen Keller and Geir Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012) 287.

[95] Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP 2009) 282; August Reinisch and Céline Braumann, 'Effet Utile' in Joseph Klingler and others (eds.), *Between the Lines of the Vienna Convention? Cannons and other principles of interpretation in public international law* (Kluwer 2018) 55 (Reinisch and Braumann).

[96] *Colombia-Anti-Dumping Duties on Frozen Fries from Belgium, Germany and The Netherlands*, Arbitration under article 25 of the DSU, Award, 21 december, 2022, paras. 4.22, 4.89.

[97] Final Report of USMCA Panel, *Canada-Dairy TRQ Allocation Measures, CDA-USA-2021-31-010*, december 20, 2021, para. 58.

[98] *Laudo Arbitral del Primer Tribunal Ad-Hoc* (Comunicados DECEX No 37 y SECEX No 7), Award, 28, april 1999, paras. 61, 78.

[99] Final Report of USMCA Panel, *Canada-Dairy TRQ Allocation Measures, CDA-USA-2021-31-010*, december 20, 2021, para. 58.

effectiveness of an investment treaty as a whole. For instance, in the annulment decision in *Capital Financial Holdings S.A. v. Cameroon*, it was affirmed that *effet utile* 'est utilisé pour rejeter une interprétation qui aurait pour conséquence de priver un traité de sa valeur, en le rendant incertain et hypothétique'. It is also common to see this principle being applied with respect to specific treaty norms, as in *Alverley Investments Limited v. Romania*, where it was described as 'the general maxim that each provision in a treaty should be given an effect'.[100] Arguably, this may imply, for example, that different terms included in a single provision (such as fair and equitable treatment on the one hand, and full protection and security, on the other) give expression to two distinct legal standards.[101]

As other authors have already pointed out, throughout the international investment case law there are examples of minimal and maximising versions of *effet utile*, although the former are much more prevalent (and less controversial) than the latter.[102] Effectiveness has been at the centre of the debates between those advocating in favour of a subjectivist approach to the definition of 'investment' in Article 25 of the ICSID Convention and those defending an objectivist approach. In the words of the arbitral tribunal in *Joy Mining Machinery Limited v. Egypt*,

> [t]he parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the [ICSID] Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, *would be turned into a meaningless provision*.[103]

In a handful of cases, arbitral tribunals have also asserted that *effet utile* required them to interpret treaty provisions 'so as to give them *their fullest weight and effect* consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and meaning can be attrib-

[100] *Alverley Investments Limited v. Romania*, ICSID Case num. ARB/18/30, excerpts of Award dated 16 march 2022, para. 221.

[101] *Addiko Bank AG vs. Montenegro*, ICSID Case num. ARB/17/35, excerpts of Award dated 24 november, 2021, para. 779.

[102] Reinisch and Braumann num. 95, 56-60 (on the use of minimal approach) 65-68 (on maximising approach).

[103] *Joy Mining Machinery Limited vs. The Arab Republic of Egypt*, ICSID Case num. ARB/03/11, Award on jurisdiction, 6 August 2004, para. 50 (emphasis added).

uted to every part of the text'.[104] Statements as these may be contrasted with the position of the tribunal in *CEMEX v.Venezuela*, who affirmed that *effet utile* 'does not require that a maximum effect be given to a text. It only excludes interpretations which would render the text meaningless, when a meaningful interpretation is possible'.[105]

In the law of the sea context, the good standing of *effet utile* seemed to be acknowledged by the International Tribunal for the Law of the Sea[106] and by a tribunal established under Annex VII of the United Nations Convention on the Law of the Sea.[107] Inter-State arbitral tribunals have also made use of the principle of *effet utile*,[108] as have done many high courts from Singapore,[109] India,[110] Mexico,[111] Colombia,[112] and Argentina.[113]

As this long list of judgments, awards, and decisions show, the principle of effectiveness in treaty hermeneutics is alive and well. It is routinely applied both to prevent the nullification of international agreements as a whole or their specific provisions. Moreover, this maxim is not only employed to reject interpretations that would deprive the treaty at hand or its components of

[104] *Murphy Exploration & Production Company International vs. Republic of Ecuador*, PCA Case num. 2012-16 (formerly AA 434), Partial Award on Jurisdiction, 13 november, 2013, para. 171.

[105] *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. vs. Bolivarian Republic of Venezuela*, ICSID Case num. ARB/08/15, Decision on jurisdiction, 30 december, 2010, para. 114.

[106] *M/V "Norstar", Panama vs. Italy, judgment, ITLOS Reports 2018-2019*, p. 10, para. 244; *Request for Advisory opinion submitted by the sub-regional Fisheries Commission,* Advisory opinion, 2 april 2015, ITLOS Reports 2015, p. 4, para. 56.

[107] *South China Sea Arbitration (Philippines vs. People's Republic of China)*, PCA Case num. 2013-19, Award, 2016, para. 575.

[108] *Affaire de l'île de Timor, Pays-Bas, Portugal* (1961) XI RIAA 481, 508; *Laguna del Desierto Arbitration, Argentina/Chile,* decision, 1994, XXII RIAA 3, para. 137. See also George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal: An Analysis of the Decisions by the Tribunal* (OUP 1996) 374.

[109] Singapore Court of Appeal, *Sanum Investments Ltd vs. Government of the Lao People's Democratic Republic*, International Law Reports, vol. 183, p. 432, para. 128.

[110] Supreme Court of India, *Ram Jethmalani vs. Union of India*, Writ Petition Civil num. 176 of 2009, order of 4 july 2011, paras. 60-64.

[111] Mexican Supreme Court, First Chamber, *Amparo en revisión 1077/2019,* 2021, para. 119.

[112] Constitutional Court of Colombia, *judgment SU649/17 'Quimbaya',* 2017, section 5.4.1.

[113] Supreme Court of Argentina, *Copana Cornejo, Fanny s/extradición art. 52*, judgment of 10 december, 2020.

any meaning, but also to enhance or maximise its effects-although the latter version of *effet utile* continues to be controversial. By comparison, there are significantly less examples in which this principle has been used to determine or enlarge the scope of a treaty so as to fit a specific situation, as arguably occurred in the examples used in the section II above.

Before the discussion moves on to a critical assessment of the soundness of the multiple versions of *effet utile, it may be worth noting that the record of the many uses of this interpretative principle by international courts and tribunals might reveal small traces of fragmentation within the norms of treaty interpretation, as applied to agreements of different nature or material scope.*[114] *On this regard, while it has been argued that concerns about the fragmentation of international law are unwarranted —particularly so in relation to the law on treaty interpretation—*[115] *the post-VCLT case law cited in this section suggests that enhanced/maximising approaches to effectiveness are more prevalent in human rights jurisprudence than in more generalist settings.*

IV. The best and worse places to wear each *effet utile* "hat"

As the previous sections made apparent, international courts and tribunals often rely on the principle of effectiveness when elucidating treaties. The reviewed case law offers examples of the various modalities of this maxim, although it also revealed that the popularity of the many 'hats' of effectiveness varies considerably. Indeed, while both the whole-convention and specific-provision approaches of *effet utile* are well represented, narrow varieties (in the sense of *ut as res magis valeat quam pereat*) appear to be more prevalent than maximising ones. Most often, effectiveness is used during the interpretative process to determine the general scope of an agreement, against which it is possible to determine if a specific situation at hand falls within. There are, however, a handful of examples in which the applicability of the treaty to the factual scenario under analysis is taken for granted by virtue of *effet utile*.

[114] Some international legal scholars have dismissed as a 'myth' the view that there is a single, unifying methodology for the interpretation of treaties. See Benedict Kingsbury, 'International courts: uneven judicialization in global order' in James Crawford and Martti Koskenniemi (eds.), *The Cambridge Companion to International Law* (CUP 2012) 204; Bianchi and Zarbiyev, num. 20, 8 and 9.

[115] Bjorge, Eirik, *The evolutionary interpretation of treaties* (OUP 2014) 23-55.

In the abstract, each of these varieties of effectiveness may seem more or less plausible, although their reliability becomes particularly contested in some contexts. For starters, an attempt to read the specific components of an agreement (i.e., like a chapter, section, or article) in a way that is conducive to the attainment of the overall object and purpose of the treaty might run counter to a deliberate decision of the contracting parties to leave regulatory gaps in their agreement, perhaps desiring to submit the matter to future negotiations or to retain a margin of discretion in how they comply with the treaty's obligations. Indeed, as one scholar has persuasively argued,

> [t]he danger with [teleological] arguments is that they can easily trespass over the intention of the parties and allow the militant judge to arrogate himself legislative functions. In other words, an interpretation may here easily shade into a revision of the treaty. Thus, for example, if an interpreter is confronted with a treaty on the protection of the environment, he could use the object and purpose (which is 'environmental protection') in order to interpret all the provisions of the treaty so as to maximize the effectiveness of protection. However, the States adopting the treaty will in most cases have accepted such a protection only subject to many compromises, reservations, less-than-full-effect, trade-offs with economic constraints, and so on. In other words, they will not have wanted a full realization of the sole object and purpose of protection, but only a limited realization, balanced with other values and constraints. The interpreter is not allowed to upset this complex equilibrium and to re-write the treaty as he sees it.[116]

Moreover, it can be difficult to determine what an effective interpretation of an agreement would require when the treaty in question pursues more than one goal. In this regard, as observed by the WTO Appellate Body in *US – Shrimp*, 'most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes'.[117] Ascertaining the relevant object(s) and purpose(s) can be particularly challenging when the treaty it hand is multilateral and concerned with multiple domains of international relations.[118] That an international agreement may

[116] Kolb, Robert, num. 28, 146.

[117] Appellate body report, *United States-Import prohibition of certain shrimp and shrimp products*, WT/DS58/AB/R, adopted 12 october 1998, para. 17.

[118] Dino Kritsiotis, "The Object and purpose of a treaty's object and purpose" in Bowman, Michael J. and Kritsiotis, Dino (eds.), *Conceptual and contextual perspectives on the modern law of treaties* (CUP 2018) 278-280.

pursue multiple aims, however, does not necessarily mean that each of them is equally important. A treaty may well have a main object and purpose,[119] which should arguably receive primary attention during the interpretative process.

Things can get even more complicated when the merits of maximising versions of *effet utile* are assessed. The words of Sir Gerald Fitzmaurice, who was one of the ILC's special rapporteurs on the law of treaties, are particularly instructive in this context:

> the maxim *ut magis* is all too frequently misunderstood as denoting that agreements should always be given their *maximum possible* effect, whereas its real object is merely ("*quam pereat*") to prevent them failing altogether. This affords a very good pointer to the limits of a doctrine which, if allowed free play, would result in parties finding themselves saddled with obligations they never intended to enter into, in relation to situations they never contemplated, and which often they could not have anticipated.[120]

As elaborated in subsection III.a above, this rationale was upheld by the ICJ when it rejected a maximising interpretation of the Covenant of the League of Nations in *South West Africa, Second Phase*. There are other examples in the ICJ's case law supporting the view that when there is a mismatch between the aims pursued by a treaty (as stated in its preamble) and the text of specific provisions which seem to fall short of fulfilling this goal, the latter prevails. For illustration, this rationale was endorsed by the Court in *Arbitral Award of 31 July 1989*, where it observed that 'although the two States had expressed in general terms in the Preamble of the Arbitration Agreement their desire to reach a settlement of their dispute, their consent thereto had only been given in the terms laid down by Article 2'.[121]

So, how could anyone decide if it is appropriate to adopt on a maximising version of *effet utile* in any given situation? While it might be difficult to establish a definitive standard on the matter, it is submitted that the case law

[119] Vriese, Kit de, 'How to?: a methodological guide to identify a treaty's object and purpose", 2022, 21 *The Law and Practice of International Courts and Tribunals* 35, 41-44. See also *Abaclat and Others vs. Argentina*, *Dissenting opinion to decision on jurisdiction and admissibility by Georges Abi-Saab*, 21 october, 2011, para. 53.

[120] Fitzmaurice, "*Vae victis* or Woe to the negotiators! Your treaty or our "Interpretation" of It?", *American Journal of International Law,* 1971, vol. 65, issue 2, 358, 373.

[121] *Arbitral award of 31 july 1989,* judgment, I. C. J. reports 1991, p. 53.

of the ECtHR might provide some guidance. In this Court's jurisprudence, effectiveness usually comes into play only when the ECtHR ascertains the scope of the human rights safeguarded by the European Convention —and not, contrastingly, when it interprets the grounds and conditions established therein for the limitation of these rights.[122] In this regard, it has been persuasively argued that the

> examples of the Court's treatment of limitations[…] are not so much instances of the effectiveness principle being ignored, as a demonstration of the obvious, but crucial point, that, as between rules and their exceptions, the application of the effectiveness principle depends on the overall context and relative priority accorded to each by the interpreted. The principle[…] requires a provision to be interpreted so as to give it the fullest effect consistent with the ordinary meaning *and with other parts of the text*[…] [L]ooking at the Convention as a whole, the articles concerned with protecting rights should be treated as central and those authorising their restriction as marginal. This does not make limitations meaningless, but does remove any tendency to give such provisions their maximum effect.[123]

It might thus be argued that other interpretative principles may assist in the determination of the appropriate measure of effectiveness that should be pursued when elucidating different components of an international agreement. One such assisting principle would be that, in general, exceptions must be interpreted restrictively.[124]

On a related point, it is important to remember that every treaty provision may aim to fulfil a purpose within the whole text of the agreement which, on its turn, might have been crafted to balance competing interests and attain multiple objectives.[125] In theory, then, an attempt to maximise the effects of one treaty provision could minimise those of others. Therefore, when interpreters rely upon the principle of effectiveness to ascertain the scope of one treaty provision, they must be careful not to deprive other components of the agreement of their appropriate effects. This much is acknowledged by international case law. For instance, in *United States – Standards for Reformulated*

122 Merrills, J. G., *The development of international law by the European Court of Human Rights* (2nd. ed.), Manchester University Press, 1993, 113-115.

123 *Ibidem,* 115 and 116.

124 *Flegenheimer Case-decision number 182 of 20 september 1958,* Italian-United States Conciliation Commission, RIAA, vol. XIV, p. 383.

125 Kolb, Robert, 146.

and Conventional Gasoline, the WTO Appellate Body had to interpret Articles III and XX of the General Agreement on Tariffs and Trade; in so doing, it asserted that none of them may be read so expansively as to subvert the object and purpose of the other.[126] Such idea resonates with a recent observation of the ICJ, which considered that 'in seeking to determine the meaning of the second paragraph of [a treaty's Article], it should not adopt an interpretation which renders the first paragraph of that Article devoid of purport or effect'.[127]

Finally, perhaps the most pressing concern related to the principle of effectiveness was expressed by the dissenting opinion of several ICJ judges in *Georgia v. Russia*, which was mentioned in the introduction to this article. Indeed, the many roles played by *effet utile* throughout international case law may convey the impression that this maxim affords the interpreter a very wide discretion, to the detriment of legal certainty and the stability of treaties. It is thus vital to recall that effectiveness 'is merely one argument which may point towards a particular interpretation, but it does not obviate the need to take into consideration other elements relevant to elucidating the meaning of a text'.[128]

In other words, this maxim should not be used to displace the customary rules set forth in Articles 31 to 33 of the VCLT. *Effet utile* may be of assistance during the interpretative process, but an argument built upon it as its central premise will likely be weak. The narrow version of this principle (*ut as res magis valeat quam pereat*) can certainly help to discard an implausible reading of a treaty, but by itself is unable to direct the interpreter to the right understanding. Moreover, recourse to maximising approaches to effectiveness should only be justified after the object and purpose that serves as guiding star in the process has been properly ascertained, and then only applied when doing so does not run against the clear meaning conveyed by the text.

In addition, the employment of *effet utile* to determine or enlarge the scope of a treaty so as to fit a specific situation can also be problematic, because it may privilege teleological considerations over the ordinary meaning of the

[126] Report of the appellate body, *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 april 1996, p. 18. See also *Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products*, AB-1999–8, WT/DS98/AB/R, p. 24, para. 81.

[127] *Alleged violations of sovereign rights and maritime spaces in the caribbean sea, Nicaragua vs. Colombia, Preliminary objections, judgment, I. C. J. reports 2016*, p. 3, para. 44.

[128] *Georgia vs. Russia,* num. 2*,* Joint diss *cit.,* Owada, Simma, Abraham, Donoghue and Gaja, para. 22.

treaty terms and —some may add— it could potentially blur the boundaries of terms of art in international law (such as 'Statehood' and 'nationality'). An interpreter that relies on the principle of effectiveness to elucidate an international agreement without the rigorous support of the rules set forth in Articles 31 to 33 of the VCLR runs the risk of having his or her views portrayed as statement of *de lege ferenda* instead of *lata*.

V. Concluding thoughts

Ascertaining the meaning of an international agreement can be a tricky business. To the fortune of international lawyers, there is a well-established set of rules on how to run this process; to their despair, the precise scope of such rules remains elusive. There is something about the principle of effectiveness that further complicates the matter.

This is a hermeneutic principle that is not expressly included in the text of the VCLT and which, confusingly, can stand for different propositions. Throughout this article, the many lives of *effet utile* in treaty interpretation have been narrated. The article's main contention is that there are three main parameters according to which the most predominant versions of this principle can be categorised. The first parameter is defined by the type of object and purpose that an interpreter intends to make effective; in other words, a distinction is made between the object and purpose of the treaty as a whole or one of its parts. The second parameter is concerned with the extent to which the relevant object and purpose is aimed to be fulfilled: is the interpreter's goal to prevent the treaty (or its provisions) from turning redundant or to maximise its effects? The third parameter is related to the stage of the interpretative process in which *effet utile* is relied upon, depending on whether the principle is used to affirm the applicability of the norm to the case at hand before the general (or abstract) scope of the norm is ascertained, or otherwise.

It has been argued that, even if some of its many uses are better represented in international case law than others, they all have their limitations. In short, effectiveness is merely one among many instruments within the toolkit that international lawyers use to elucidate treaties. It should remain as such. *Effet utile* can be aid in interpretation, but, by itself, it can hardly dictate how an international agreement should be properly understood.

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