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Expressio Unius (Est) Exclusio Alterius

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A. Introduction

1 *Expressio unius (est) exclusio alterius* (sometimes simply referred to as *expressio unius*) is an interpretative maxim pursuant to which the express mention of an item excludes others. In international law, *expressio unius* is mainly invoked in the context of treaty interpretation (→ *Treaties, Interpretation of*). Whether this maxim is a legal rule or a law of logic has been widely discussed especially in light of its non-inclusion in the customary rules on treaty interpretation codified in the 1969 Vienna Convention on the Law of Treaties ('VCLT') (→ *Interpretative maxims*; → *Interpretative rules*) (see sec B below). The maxim has been explicitly or implicitly referred to by → *international courts and tribunals* in a considerable number of cases for the interpretation of a variety of instruments. Interpreters frequently exclude *expressio unius* on the basis of context-specific arguments (→ *Contextual interpretation*; → *Textual interpretation*) (see sec C below). *Expressio unius* is hence best understood as an interpretative conclusion and should be resorted to only with great caution (see sec D below).

1. Origin and Use

2 *Expressio unius* finds its origin in Roman Law. Like many other interpretative maxims rooted in Roman Law, it was collected in Justinian's Digest and ultimately found its way into contemporary domestic legal systems (continental and common-law). It is regularly applied for the construction of statutes, contracts and treaties by domestic courts. The maxim is not always explicitly mentioned (see eg the non-explicit use by the United States Supreme Court in *Terrace v Thompson*, 1923, finding that the enumeration of treaty rights to own or lease land for trade-related purposes excludes the right to do so for agricultural purposes). In the international context, *expressio unius* is first and foremost referred to in the context of treaty interpretation. The maxim has exceptionally been invoked as a tool for the ascertainment of → *customary international law*. It is, however, questionable whether the express statement of a new treaty rule allows the inference of the exclusion of incompatible customary rules on the same subject-matter (Villiger, 1997, para 250).

2. Alternative Formulations

3 The most common formulation of the maxim to be encountered in an international context is *expressio unius (est) exclusio alterius*—literally, expression of the one is exclusion of the other. Insignificant variations in the Latin formulation can sometimes be found in scholarly writings or decisions of international courts and tribunals. These interchangeable formulations include *inclusio unius (est) exclusio alterius*, *affirmatio unius (est) exclusio alterius*, *designatio unius (est) exclusio alterius*, or *enumeratio unius (est) exclusio alterius*. *Expressio unius personae vel rei est exclusio alterius* limits its scope to the mention of persons or things.

3. Related Interpretative Maxims

4 *Expressio unius* is regularly presented as an expression of *argumentum e contrario* (Ehrlich, 1928, 113-14; Linderfalk, 2007, 299). In short, *argumentum e contrario* similarly allows the inference of an opposition in consequences on the basis of an opposition of hypotheses (Kolb, 2006, para 388). The → *Permanent Court of International Justice (PCIJ)* and the → *International Court of Justice (ICJ)*, for instance, exclusively refer to *argumentum e contrario*. *Expressio unius* has more often been referred to in a common-law context whereas *argumentum e contrario* seems to have prevailed in continental law (McNair, 1986, 400). *Argumentum e contrario* and *expressio unius* are sometimes distinguished: *expressio unius* then appears to be more narrowly limited to the mention of particular circumstances or conditions in a treaty (Aust, 2007, 248-49). Several interpretative maxims are related to *expressio unius* as they largely adopt a similar rationale. Pursuant to the maxim *expressum facit cessare tacitum*, the expression of a given item renders any implied item silent. *Qui de*

uno dicit, de altero negat ('he who says one thing excludes the alternative' [translation by the author]) similarly allows the exclusion of non-mentioned items to be inferred.

5 Negative formulations such as *expressio unius non est exclusio alterius* ('explicit mention does not exclude the alternative' [translation by the author]) or *exempla illustrant, non restringant, legem* ('examples illustrate but do not restrict the law' [translation by the author]) remain exceptional in the international context. Interpreters will generally discuss the relevance of *expressio unius* before deciding to uphold or reject it in a given case.

B. Unclear Status in International Law

1. Non-Inclusion in the VCLT Rules on Treaty Interpretation

6 *Expressio unius* is alternatively labelled as an interpretative maxim, principle, rule, canon or presumption in decisions of international courts and tribunals. Whether it constitutes a legal rule, or a rule of grammar or logic, has been widely discussed in scholarly writings. The validity and significance of the maxim is regularly called into question as its relevance 'depends very much on the particular circumstances and cannot be answered in a generalized way' (Schreuer, 2006, 7). This partially explains why *expressio unius* is not mentioned in the treaty interpretation rules of the VCLT ('VCLT Rules'). It is commonly accepted that the rules codified by the → *International Law Commission (ILC)* in Articles 31 to 33 VCLT reflect customary international rules on treaty interpretation. Quite ironically, non-inclusion of *expressio unius* in the VCLT Rules does not allow its incompatibility with the latter to be inferred. Neither does it allow the conclusion that recourse to the maxim is too rare in practice to justify its inclusion in the VCLT Rules. Quite the contrary, the ILC Special Rapporteur Waldock admitted that, if the question were simply one of its relevance on the international plane, it would be possible to find sufficient evidence of recourse to—*inter alia*—*expressio unius* in international practice to justify its inclusion in the VCLT Rules (Third Report on the Law of Treaties, 54).

7 It is, however, precisely the questionable obligatory character of this interpretative maxim which ultimately prompted the ILC to avoid any mention of it in the VCLT Rules. The ILC Special Rapporteur Waldock included *expressio unius* in the list of principles of logic and good sense:

Valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions which they employed in a document. Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document: the particular arrangement of the words and sentences, their relation to each other and to other parts of the document, the general nature and subject-matter of the document, the circumstances in which it was drawn up, etc. Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case. In other words, recourse to many of these principles is discretionary rather than obligatory, and the interpretation of documents is to some extent an art, not an exact science (Third Report on the Law of Treaties, 54).

8 The ILC Special Rapporteur ultimately advocated against a permissive rule allowing recourse to such maxims, finding that it would be particularly difficult and dangerous to develop a comprehensive catalogue. Instead of drawing up a comprehensive catalogue of available interpretative tools in which *expressio unius* could find its place, the ILC ultimately opted for an 'economical code of principles' (Sinclair, 1984, 153). In doing so,

maxims such as *expressio unius* are however by no means excluded from use by the ILC (Gardiner, 2012, 477).

2. Compatibility with VCLT Rules on Treaty Interpretation

9 The proper basis in the VCLT Rules to apply *expressio unius* is well discussed. Two alternative possibilities are generally put forward (Gardiner, 2010, 111). First, the maxim may be directly invoked to assess the ordinary meaning and context as required by Article 31 (1) VCLT. Alternatively, the maxim could be invoked as a supplementary means of interpretation to be deployed only to confirm what has been established by application of Article 31 VCLT, or to determine the meaning in the circumstances envisaged in Article 32 VCLT (Le Bouthillier, 2010, para 46; Villiger, 2011, para 9; Oppenheim, para 633). The question overall seems to remain largely academic as it has been substantially overlooked in practice by international courts and tribunals since the conclusion of the VCLT. This may be explained by a general tendency to disregard the strict conditions imposed by the VCLT to justify recourse to supplementary means of interpretation. Scholars themselves sometimes foster confusion when qualifying maxims such as *expressio unius* as supplementary means (under Art 32 VCLT) while at the same time stating that they mostly 'relate to discovering the ordinary meaning' (Aust, 2007, 248). To conclude, it nevertheless appears that a qualification of *expressio unius* as a supplementary means of interpretation pursuant to Article 32 VCLT finds greater support in scholarship.

C. Discretionary and Implicit Application by International Courts and Tribunals

10 This section by no means aims to present an exhaustive panorama of the recourse to *expressio unius* in international adjudication. It rather aims to confirm that recourse to the interpretative maxim is not limited to a particular type of treaty and that it has been invoked explicitly, or implicitly endorsed, by a wide variety of interpreters. *Expressio unius* has been raised *proprio motu* by interpreters, or sometimes in response to direct arguments advanced by parties.

1. PCIJ/ICJ

11 *Expressio unius* has never been explicitly invoked by the PCIJ or the ICJ. Several precedents, however, demonstrate that both courts implicitly endorse *expressio unius* whilst explicitly referring to interpretation *per argumentum e contrario*.

12 In the *SS 'Wimbledon'* case, 1923 (→ *Wimbledon, The*), a British steamship was refused passage through the Kiel Canal as it carried a cargo of munitions for Poland which was then at war with Russia. The PCIJ interpreted the relevant provisions of the 1919 Treaty of Versailles, Article 380 of which provided that the Canal shall be maintained free and open to the ships of commerce and war of all nations at peace with Germany. The Court found that said provision explicitly reserved the possibility for Germany to close the Canal to vessels belonging to nations at war with it. Hence:

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 (*SS 'Wimbledon', United Kingdom v Germany*, 23).

13 The Court notably clarified that the underlying idea of the relevant provisions in 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' (SS 'Wimbledon', *United Kingdom v Germany*, para 24).

14 In the *Railway Traffic between Lithuania and Poland* case, 1931, Advisory opinion, the PCIJ was requested to determine whether Lithuania was subject to any obligation to open for traffic a particular railway sector in spite of its then conflictual political relationship with Poland. The Court was only able to find an explicit provision in the Memel Convention pursuant to which Lithuania was under an obligation to open traffic for waterways even in cases of emergency or war. The judges evidently concluded that this provision could not apply to railways:

Seeing that the Memel Convention expressly forbids Lithuania to invoke Article 7 of the Barcelona Statute [allowing temporary derogations in cases of emergency or war], with reference to freedom of transit by waterway, it is clear, on the other hand, that [Lithuania] might avail herself of it with regard to railways of importance to the Memel territory (*Railway Traffic between Lithuania and Poland, Lithuania v Poland*, para 121)

15 The case concerning *United States Diplomatic and Consular Staff in Tehran (United States v Iran)*, 1980 (→ *United States Diplomatic and Consular Staff in Tehran Case (United States of America v Iran)*), offers an evident illustration of recourse to *argumentum e contrario* by the ICJ. The United States had decided to submit the dispute to the ICJ whilst the United Nations Security Council was still actively seized of the situation in Tehran. The question arose whether the Court was prevented from deciding the case because of the involvement of the Security Council. Pursuant to Article 12 United Nations Charter, the General Assembly is prevented from making recommendations in such circumstances. The Court concluded in the negative, highlighting that 'no such restriction is placed on the functioning of the [ICJ] by any provision of either the Charter or Statute' (*United States Diplomatic and Consular Staff in Tehran, United States v Iran*, para 40).

16 The ICJ recently took the opportunity to generally clarify its understanding of *argumentum e contrario*, clearly cautioning against any automatic use of it:

An *a contrario* reading of a treaty provision—by which the fact that the provision expressly provides for one category of situations is said to justify the inference that other comparable categories are excluded—has been employed by both the present Court [...] and the [PCIJ] [...]. Such an interpretation is only warranted, however, when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty. Moreover, even where an *a contrario* interpretation is justified, it is important to determine precisely what inference its application requires in any given case (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea, Nicaragua v Colombia*, 2016, para 37).

17 Interestingly, the Registrar of the ICJ once explicitly invoked *expressio unius* to interpret Article 66 (2) Statute of the ICJ following an inquiry about the possibility of submitting an *amicus curiae* to the Court. The Registrar replied that:

With reference to [the] suggestion that there seems to be no explicit bar in the Statute or Rules to accepting a document from an interested group or individual, the Court's view would seem to have been that the expression of its powers in Article 66, paragraph 2, is limitative, and that *expressio unius est exclusio alterius*

(*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, 6 November 1970, 638–39).

2. WTO Dispute Settlement System

18 *Expressio unius* has also been invoked in the context of the dispute settlement system of the World Trade Organization ('WTO'; see → *World Trade Organization, Dispute Settlement*). An interesting case to mention is *US—Hot-Rolled Steel*, 2001. In their pleadings, the parties extensively discussed the relevance of *expressio unius* for the interpretation of the WTO Anti-Dumping Agreement. The United States, in particular, underscored that the VCLT Rules do not refer *expressio unius*. The maxim must thus be applied with great caution as 'the purpose of treaty interpretation is to give effect to the intention of the parties to the treaty as expressed in their words read in context' (*US—Hot-Rolled Steel*, Panel Report, 2001, para 232). The United States further stated that Japan's proposed interpretation based on *expressio unius* 'could create absurd consequences in violation of Article 32(b) of the Vienna Convention' (*US—Hot-Rolled Steel*, Panel Report, 2001, para 235). The Panel ultimately failed to engage in a discussion on the relevance of *expressio unius* in its report.

19 In *US—Oil Country Tubular Goods*, 2005, the WTO Appellate Body held that '[a]lthough Article 11.3 [of the WTO Anti-Dumping Agreement] is silent as to whether investigating authorities are required to establish the existence of a "causal link" between likely dumping and likely injury, this "silence does not exclude the possibility that the requirement was intended to be included by implication"' (*US—Oil Country Tubular Goods*, Appellate Body Report, 2005, para 109). The WTO Appellate Body similarly stated that 'the task of ascertaining the meaning of a treaty provision with respect to a specific requirement does not end once it has been determined that the text is silent on that requirement' (*US—Carbon Steel*, Appellate Body Report, 2002, para 65).

3. Arbitral Tribunals

20 *Expressio unius* has repeatedly been invoked explicitly by arbitral tribunals, including inter-state arbitral tribunals. Arbitral tribunals have used *expressio unius* on the basis of clear evidence that the treaty parties intended to limit treaty rights to explicitly listed exceptions.

21 In the *David J Adams Case*, 1921, an arbitral tribunal was requested to determine whether the seizure of an American fishing schooner, on the ground that it had entered into Canadian harbours to purchase bait, amounted to a violation of the Convention between the United States and the United Kingdom Respecting Fisheries, Boundary and the Restoration of Slaves ('1818 London Convention'). The Treaty provided that 'American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever'. The Tribunal implicitly invoked *expressio unius* to exclude any violation of the 1818 London Convention:

A stipulation which says that fisherman 'shall be admitted' for certain enumerated purposes and 'for no other purpose whatever' seems to be perfectly clear and to mean that for the specified purposes the fishermen shall be admitted and for any other purposes they had no right to be admitted, and it is difficult to contend that by such plain words the right to entrance for purchasing bait is not denied. No sufficient evidence of contrary intention of the High Contracting Parties is produced

to contradict such a clear wording (United States–Great Britain Claims Arbitration, *David J Adams Case*, 1921, 90).

22 The expression ‘for no other purpose whatever’ evidently facilitated the tribunal’s task to interpret the relevant treaty provision. Absent similar wording, arbitral tribunals have sometimes been reluctant to draw any final conclusions. In the *Heirs of the Duc de Guise Claim*, Decision No 107, 1951, the Franco-Italian Conciliation Commission notably rejected *expressio unius* while interpreting the 1947 Treaty of Peace with Italy. Pursuant to Article 78 (2) of the treaty, Italy was obliged to nullify all measures, ‘including seizures, sequestration or control, taken by it against United Nations property during the war’ (Treaty of Peace between the Allied and Associated Powers and Germany, 1920). The Commission found that:

No conclusion can be drawn from the fact that the measures mentioned in Article 78(2) of the Treaty are all of a discriminatory character (‘seizures, sequestrations or control’). The Treaty does not require the Italian Government to nullify [only] measures of seizure, sequestration and control. The latter are not enumerated to indicate the kind of measures which must be annulled, but purely so as to establish quite clearly that they are included in the requirement of the paragraph (*Heirs of the Duc de Guise Claim*, Decision No 107, 425).

23 Unsurprisingly, more precise and specific wording in treaty provisions will greatly facilitate the work of arbitral tribunals. This is evidenced with the *Provident Mutual Life Insurance Company Case*, 1924, concerning the interpretation of the 1921 Treaty between the United States and Germany Restoring Friendly Relations (‘Treaty of Berlin’). Under the treaty, Germany was obliged to make compensation for damages suffered by the American surviving dependents of civilians whose deaths were caused by acts of war. The United States had put forward on behalf of certain American life-insurance companies several claims before the United States–Germany Mixed Claims Commission to recover from Germany alleged losses following the sinking of the *Lusitania*. Umpire Parker invoked *expressio unius* to conclude that the American claims were not contemplated by the treaty:

Looking, therefore, to the only provision in the Treaty of Berlin which expressly obligates Germany to make compensation in death cases, we find that such obligation is limited to damage suffered by American surviving dependents resulting from deaths to civilians caused by acts of war. Under familiar rules of construction this express mention of surviving dependents who through their respective governments are entitled to be compensated in death cases excludes all other classes, including insurers of life. The maxim *expressio unius est exclusio alterius* is a rule of both law and logic and applicable to the construction of treaties as well as municipal statutes and contracts (*Provident Mutual Life Insurance Company Case*, 111).

24 Arbitral tribunals have further rejected *expressio unius* having found that the allegedly excluded item could in any event not have been included in the treaty. In the *North Atlantic Coast Fisheries Case, Great Britain v United States*, 1961, the United States claimed that the 1818 London Convention regulated only the liberty to dry and cure on the treaty coasts and to enter bays and harbours on the non-treaty coasts so that the liberty to fish should be subjected to no restrictions, as none were provided for in the convention. The arbitral tribunal refused to uphold *expressio unius* as it found the comparison between the right to fish and the other rights to be inappropriate. In its view:

Restrictions of the right to enter bays and harbors applying solely to American fishermen must have been expressed in the treaty, whereas regulations of the fishery, applying equally to American and British, are made by right of territorial sovereignty (*North Atlantic Coast Fisheries Case, Great Britain v United States*, 185).

25 *Expressio unius* has more recently been frequently invoked in the context of → *international investment arbitration* for the interpretation of bilateral investment treaties ('BITs'; see → *Investments, Bilateral Treaties*).

26 For instance in *Tokios Tokeles v Ukraine*, 2004, Article 1 (2) (b) of the invoked BIT defined investors as 'entities established in Lithuania'. Article 1 (2) (c) further extended the benefit of the BIT to entities incorporated in third countries, using other criteria to determine the nationality of the investors. The Tribunal concluded that following the 'well-established presumption' *expressio unius*, it did not need to further verify whether the claimant satisfied the additional criteria mentioned in Article 1 (2) (c) (*Tokios Tokeles v Ukraine*, para 30). The Tribunal found that the treaty parties were certainly free to impose these additional criteria to entities established in Lithuania but that they did not do so in the present case.

27 In *RosInvestCo UK Limited v Russian Federation*, 2007, the arbitral tribunal implicitly endorsed *expressio unius*, finding that it could not uphold its jurisdiction to assess the existence of an expropriation because its jurisdiction under the BIT was limited to matters 'consequential upon an act of expropriation'. In the words of the tribunal:

If these preconditions were to be considered as also included, the qualification would be meaningless [...] because not only the issues mentioned in these qualifications, but all other aspects of expropriation would be included (*RosInvestCo UK Limited v Russian Federation*, Award on jurisdiction, para 116).

28 *Expressio unius* has further been invoked by investment arbitral tribunals asked to apply a → *most-favoured-nation clause* ('MFN clause') to dispute settlement matters (→ *Jurisdictional impact of most favoured nation clause*).

29 In *Plama Consortium Limited v Republic of Bulgaria*, 2005, the arbitral tribunal highlighted, on the one hand, that the relevant provision in the invoked BIT provided an explicit exception to Most-Favoured-Nation treatment relating to 'economic communities and unions, customs unions or free trade areas' (*Plama Consortium Limited v Republic of Bulgaria*, para 187). Referring to *expressio unius*, the arbitral tribunal found this unique exception in the BIT to support the view that all other matters, including dispute settlement, fall under the scope of the MFN clause (*Plama Consortium Limited v Republic of Bulgaria*, para 191). On the other hand, the Tribunal highlighted that the exceptions provision referred to 'privilege', which in its view could equally imply a limitation of the MFN clause to substantive protection, ie, to the exclusion of dispute settlement provisions (*Plama Consortium Limited v Republic of Bulgaria*, para 191). A similar reference to *expressio unius* can further be found in *National Grid plc v Argentina*, 2006, paragraph 82.

30 In *Austrian Airlines v Slovakia*, 2009 ('*Austrian Airlines*'), the arbitral tribunal found that despite any reference to it in the VCLT Rules, *expressio unius* 'may be relevant' as in the case, three exceptions were specifically foreseen in the MFN clause, none of which referred to dispute settlement (*Austrian Airlines*, para 128). The arbitral tribunal, however, insisted that *expressio unius* is only a supplementary means of interpretation which cannot alone determine the outcome of the interpretation when a treaty contains other relevant elements (*Austrian Airlines*, para 131). The arbitral tribunal ultimately refused to apply the

MFN clause to dispute settlement provisions in light of the 'manifest and specific' intent of the treaty parties to restrict arbitration to certain types disputes.

4. Other International Tribunals

31 *Expressio unius* has been referred to as a general canon of interpretation by the → *International Criminal Tribunal for the Former Yugoslavia (ICTY)* (*Prosecutor v Zejnir Delalić*, 1998, para 166). Interestingly, in *Prosecutor v Kupreškić*, 2000, the Trial Chamber refused to identify which rights constitute 'fundamental rights' for the purposes of 'persecution', warning that the explicit inclusion of particular fundamental rights could be interpreted as the implicit exclusion of other rights (*Prosecutor v Kupreškić*, para 623).

32 The → *Iran-United States Claims Tribunal* explicitly invoked *expressio unius* in order to determine the applicable law to a Sales and Purchase Agreement. Article 29 of the agreement provided that it had to be interpreted in accordance with Iranian Law and that the rights and obligations of the Parties to the agreement shall be governed by and according to the provisions of this agreement. Highlighting the 'unusual' character of the choice of law in Article 29, the tribunal found that:

The fact this choice only applied to the issue of interpretation, in contrast with the usual practice, does not justify an extension of this choice to other issues. *Expressio unius exclusio alterius est*. The only possible interpretation is that the parties were unable to arrive at an agreement beyond the question of interpretation and that no choice of law was made in the Agreement in relation to the law applicable to any other issue (*Mobil Oil Iran, Inc v Iran*, 1987, para 80).

33 The tribunal concluded that with the exception of interpretation issues of the agreement to which the Iranian law would apply, the 'principles of commercial and international law' should be applied to all other issues (*Mobil Oil Iran, Inc v Iran*, para 80).

34 The Administrative Tribunal of the → *International Labour Organization (ILO)* in *Re Novak (Judgment 975)*, 1989, explicitly referred to *expressio unius* to conclude that a provision referring only to 'sick leave' could not be applied to 'maternity leave' (*Re Novak (Judgment 975)*, para 7).

D. Assessment: An Interpretative Conclusion Rather than a Binding Rule

35 Interpreters of all kinds have frequently referred to *expressio unius*, either directly or indirectly. More importantly, they do not always find it appropriate to ultimately apply the interpretative maxim in a given case. Hence, rather than a rule or principle, *expressio unius* is best understood as an interpretative conclusion on its own. Indeed, it is only following a proper contextual analysis and by taking into account the object and purpose of the interpreted text (→ *Teleological interpretation*) that an interpreter can confirm the relevance of *expressio unius* in a given case. The exact opposite conclusion—ie *expressio unius non est exclusio alterius*—may well be appropriate in a different case. This will particularly be true when a given provision explicitly labels a list of items as being examples, eg using terms such as 'including', 'among others', 'inter alia', or 'for example'.

36 To conclude, *expressio unius* must be resorted to with utmost caution as any automatic or mechanical application is likely to produce distorted interpretations. The non-inclusion of *expressio unius* in the VCLT Rules is a first reminder of its non-obligatory character. In the

words of McNair, the 'valuable servant' should not be allowed to become a 'dangerous master' (McNair, 1986, 400).

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