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### Hidden Meanings: Evolutionary Interpretation between Norm Application and Progressive Development

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## Book Review

### Hidden Meanings: Evolutionary Interpretation Between Norm Application and Progressive Development

#### ABSTRACT

Debates about the meaning of ‘evolutionary interpretation’ reveal the existence of two conflicting views. Some see evolutionary interpretation as an inevitable step in the ordinary process of applying fixed written language to changing reality. Others see it as a means for interpreters—and, crucially, adjudicators—to update the agreement being applied, infusing into the text the interpreter’s view of what would be a desirable development of the relevant provisions. Benefitting from the views expounded and decisions collected by the authors of *Evolutionary Interpretation and International Law*, edited by Georges Abi-Saab, Kenneth Keith, Gabrielle Marceau, and Clément Marquet (Hart 2020), this piece investigates two core questions that run through debates regarding evolutionary interpretation. First is the question of what is meant by evolutionary interpretation, whether an unavoidable step in the norm application process or a decision to develop obligations beyond their original scope. Second is the question of the distinctive role of adjudicators, i.e. of whether evolutionary interpretation is a tool used by adjudicators to exercise authority over the legal framework being applied, bypassing the constraints of the consent-based international rule-making system.

**Evolutionary Interpretation and International Law.** Edited by Georges Abi-Saab, Kenneth Keith, Gabrielle Marceau and Clément Marquet, Oxford: Hart 2020. ISBN 9781509929900, 392 pp.

#### I. INTRODUCTION

The international lawyer and legal scholar faced with a question concerning the evolutionary interpretation of treaties in 2020 will find no better friend than *Evolutionary Interpretation and International Law* (Oxford, Hart 2020, xxi+368 p.). Edited by three figures of undisputed status within the invisible college of our times (Georges Abi-Saab, Kenneth Keith, and Gabrielle Marceau) and an up-and-coming scholar (Clément Marquet), the book features 27 independent chapters by academics and

\* Assistant professor in Public International Law and International Trade Law, University of Amsterdam. I thank Fiona Smith, Ingo Venzke and Graham Cook for the careful reading and helpful comments on an earlier draft. The usual caveat applies.

practitioners. Following a section containing transversal conceptual chapters, the book is organized around different sections on evolutionary interpretation as practiced by a range of actors in international law, including World Trade Organization (WTO) adjudicators, investment tribunals, human rights and criminal courts, the courts of the European Union, and relevant actors other than international adjudicators (national courts, treaty bodies, states, and international organizations). This collection, at once informative and insightful, is accurately described in the general summary as an ‘authoritative compendium’ on the topic of evolutionary interpretation,<sup>1</sup> straddling the various subfields that have come to constitute international law. Discussion of the key decisions of the International Court of Justice (ICJ) on the issue, rather than being contained in a specific chapter, pervades the analyses and considerations made by the various authors—an editorial decision that quietly affirms the unity of international law.

The scholar or practitioner pondering how to deal with arguments on this issue will find in *Evolutionary Interpretation and International Law* a treasure trove of both scholarly reflections and statements by adjudicators, past and present, on the topic. Following the significant scholarship on the topic over the past few years,<sup>2</sup> the book is valuable both in collecting the conclusions of scholars in the field and in providing the reader with the most up-to-date source for decisions of adjudicators and other actors in the different subfields of international law.

Taking advantage of this work, this piece focuses on the tension between two different ideas of what is meant by ‘evolutionary interpretation’. One view is that so-called ‘evolutionary’ interpretation is a routine and unavoidable step in the process of applying a normative framework to changing factual circumstances; the other, that it is a means for an adjudicator to update, and perhaps revise, the normative framework itself in order to meet what the adjudicator deems to be the demands of the contemporary world. Following this Introduction, Section II presents the two views. Section III examines the argument that ‘evolution’ is an illusion, arising from the application of fixed treaty language to specific factual patterns, which necessarily change over time. Section IV discusses the cases in which adjudicators employ the concept merely to give effect, in their interpretation, to specific interpretative guidance provided by states, i.e. where normative evolution, while acknowledged, is not (at least in discourse) guided by the adjudicator’s interpretative choices but by the decisions and practice of states. Section V analyzes what can be called evolutionary interpretation in its strictest sense:

- 1 Georges Abi-Saab, Kenneth Keith, Gabrielle Marceau and Clément Marquet, ‘Evolutionary Interpretation and International Law’, in Georges Abi-Saab, Kenneth Keith, Gabrielle Marceau and Clément Marquet (eds), *Evolutionary Interpretation and International Law* (Hart 2020), i. Throughout this piece, references to names of authors and numbers in square brackets refer to page numbers of this book and the authors of its chapters.
- 2 Julian Arato, ‘Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences’ (2010) 9 *The Law & Practice of International Courts and Tribunals* 443; Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014); Ingo Venzke, *How Interpretation Makes International Law On Semantic Change and Normative Twists* (OUP 2012); C Djeflal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (CUP 2016); Julian Wyatt, *An Original or Modern-Day Meaning for Treaty Terms? The Problem of Intertemporal Linguistics in the Case Law of International Courts and Tribunals* (University of Geneva 2017); Gabrielle Marceau, ‘L’interprétation évolutive par le juge OMC: sophisme ou nécessité?’ (2018) 122 *Revue Générale de Droit International Public* 23.

an adjudicator's resort to the notion of evolutionary interpretation to justify modifying the previously established legal framework, either to give effect to its object and purpose or to adapt it to emerging concerns and realities that, in the adjudicator's view, could not have been anticipated by the original drafters. Section VI concludes.

## II. TWO VIEWS OF EVOLUTIONARY INTERPRETATION

Christian Djeflal reminds us that the basic dilemma posed by the notion of evolutionary interpretation in international law—whether the interpreter should aim to ascertain the meaning of a treaty or document to its drafters or to construct a meaning that is attuned to contemporary realities—ranges back to Grotius and Vattel, with authors often adopting seemingly inconsistent positions depending on the particulars of the case they examine [21–22]. And, while some authors claim that there is a correct choice between interpreting a treaty's terms as would have been willed at the time of its conclusion and interpreting it at the time of interpretation (Donald McRae [62]), this is by no means a given. The ICJ itself has equivocated on the matter, having stated successively (i) that in interpreting treaties, 'it is necessary to take into account the meaning of the word ... at the times when the ... treaties were concluded';<sup>3</sup> (ii) that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation';<sup>4</sup> and, perhaps as synthesis, (iii) that drafters usually employ 'generic term[s] denoting any matters comprised within the concept' so that, as the factual elements to which a term refers evolve, 'the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time.'<sup>5</sup>

The tension between two different views of what is meant by 'evolutionary interpretation' runs through the book. One view is that 'evolutionary' interpretation is a mere (and possibly necessary) logical step in the process of interpreting and applying normative texts, i.e. of inferring meaning from and applying to specific facts the terms employed in a legal instrument. Few would argue, for example, that a tariff commitment covering 'bicycle parts', negotiated in 1980, should apply solely to products that already existed or were in production on the date of signature of the instrument. Interpreters of the agreement would consider as no less than its sole reasonable interpretation that this tariff commitment should apply to objects produced long after the treaty entered into force, including new models of bicycle parts that are incremental developments of those then in production, and very likely to any newly invented products whose purpose is to become 'parts' of other products that fit the understanding of 'bicycles'.

At the same time, the issue could arise whether a newly invented or newly popular product (say, electric motorized bicycles) remains within the definition of 'bicycles'. Here, the interpreter will be required to make a decision, inferring from the text of the treaty and its context whether the term 'bicycles' can be interpreted to include

3 *Rights of Nationals of the United States of America in Morocco (France v United States of America)*, ICJ Reports 1952, p. 176, 189.

4 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)*, ICJ Reports 1971, p. 16, 31.

5 *Aegean Sea Continental Shelf (Greece v Turkey) (Judgment)*, ICJ Reports 1978, p. 32.

motorized bicycles or whether a different heading (say, ‘vehicle parts’) applies.<sup>6</sup> The second perspective on evolutionary interpretation emphasizes its choice aspect, viewing ‘evolutionary interpretation’ as a means for adjudicators to update the terms of past agreements, possibly seeking to infer from the original agreement what the parties would have agreed upon were they entering into an agreement with a similar scope and aim at the time of interpretation. Here, rather than merely a step in the cognitive process of interpretation, the ‘evolutionary’ element appears clearly as an exercise of the adjudicator’s authority that modifies the content of the rights and obligations originally agreed upon. This evolution of the original legal framework is often presented as, if not a matter of logical necessity, a desirable development, necessary to give effect to the original instrument’s object and purpose, to adjust its terms to contemporary concerns, or both.

The juxtaposition between these two perspectives, which are reflected not only in the divergent views of authors in the book but also in the different evocations of the concept of evolutionary interpretation by adjudicators, reveals a deeper truth about interpretation: its dual character. Interpretation is both a process of cognition and an act of will (or ‘volition’, as Georges Abi-Saab puts it [7]). The very triadic model of dispute settlement that is integral to our understanding of adjudication requires the parties to submit to the adjudicator (at least) two different alternatives, each of which is, if not necessarily persuasive to a particular reader, at least a conceivable perspective on how a certain text relates to the facts before the adjudicator. Adjudication then consists in the exercise by the adjudicator of its authority to *decide* which, among the array of conceivable interpretations, will prevail.<sup>7</sup> The various elements in the interpretative process, including evolutionary interpretation, serve the purpose of justifying, to the parties and the broader audience of adjudication, a decision that necessarily favors a given interpretation over its conceivable alternatives. References to evolutionary interpretation are accordingly defined, both in scholarly analysis and in the practice of adjudicators, by this duality between its role as an element of textual analysis and its role as a justification for a decision.

### III. EVOLUTION AS MERE APPLICATION: SEEKING COMMON INTENTION

One view of evolutionary interpretation, emphasized in roughly half the chapters of the volume, appears to assume the existence of an *original meaning and intention* of legal texts that can be discovered, and sees as the function of interpretation to preserve to the highest possible degree the meaning, and perhaps the intent, of the original drafters in the face of changing factual circumstances. If interpretation is merely a means of ‘establishing the common intention of the parties’, as Eirik Bjorge states [35], evolutionary

6 One may recall in this respect Hart’s example of a rule prohibiting the use of ‘vehicles’ in the park and a less-than-typical situation. In Hart’s view, an interpreter faced with a situation other than a ‘plain case’ where the rule would apply has no option but to consider ‘whether the present case resembles the plain case “sufficiently” in “relevant” respects. The discretion thus left to him [sic] by language may be very wide; so that if he applies the rule, the conclusion, even though it may not be arbitrary or irrational, is in effect a choice’ (H.L.A. Hart, *The Concept of Law* (OUP 1961/2012), 127).

7 See Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, 1981).

interpretation is both possible and required to the extent that the purported evolution derives from this original intention. It would be, as Peter Van den Bossche puts it, ‘the result of a proper application of the VCLT rules of interpretation [to] non-static terms and concepts’ [228]. One may ascribe to this view Robert Kolb’s conclusion that evolutionary interpretation is ‘inevitable’ [18] as well as Graham Cook’s argument that what we call evolutionary interpretation is ultimately an ‘illusion’ [181], produced by the ordinary application of treaty terms to changing factual elements in the real world.

In their chapters, Clément Marquet and Julian Wyatt seek to refine this operation, borrowing examples, terminology, and techniques from linguistics to assist interpreters in operating this type of evolutionary interpretation—which one might simply call ‘interpretation.’ Marquet collects examples of semantic evolution of words that would lead to absurd results if treaty terms were applied using their subsequently acquired meaning [187], while Wyatt brings from linguistics an insightful distinction between *ambiguity* and *vagueness* [53]. Ambiguity demands disambiguation, i.e. a determination of which of the meanings of a polysemous term a document refers to. This might be something as simple as ‘ball’, which designates both an event featuring dance and an object used in sport practice. Vagueness, by contrast, refers to the variable but inevitable imprecision of words in a language, even within a single nucleus of meaning. Thus, even after one has decided that ‘ball’ in a document means an object used in sport practice, the question may still arise whether the term applies to nonspherical objects, such as a rugby ball or a hockey puck. Although the distinction between these two steps is itself not always easy to draw—as will know all those who have had to consider competing interpretations of terms such as ‘sporting’<sup>8</sup> or ‘salted’<sup>9</sup>—it is nonetheless useful in the process of connecting written words to specific factual circumstances.

This ‘inevitable’ or ‘illusory’ aspect of evolutionary interpretation takes place when factual developments mean that, over time, a nucleus of meaning comes to cover elements of reality that are different from those that it covered when the term was initially employed (assuming, for the sake of argument, that there is such a thing as a commonly understood meaning that can be discovered through reason). The evolutionary effort required from an interpreter is lessened whenever and to the extent that drafters employ abstract rather than concrete language. Thus, the term ‘exhaustible natural resources’ in GATT Article XX(g) can credibly be claimed to have always applied to any and all resources that qualify as both as ‘natural’ and as ‘exhaustible’, evolving in its coverage as discoveries and perceptions of what is ‘natural’ and ‘exhaustible’ evolve. Despite the Appellate Body having affirmed the ‘evolutionary’ character of the interpretation that allowed this exception to justify measures to protect turtles,<sup>10</sup> resort to this concept was ultimately unnecessary in light of the words of the provision. As both Isabelle van Damme [175] and Sondre Torp Helmersen [216] note, living resources were thought to be covered by GATT Article XX(g) before the 1994 Agreement Establishing the

8 Appellate Body Report, *US—Gambling*, WT/DS285/AB/R, para 162–208.

9 Appellate Body Report, *EC—Chicken Cuts*, WT/DS286/AB/R, para 170–346.

10 Appellate Body Report, *US—Shrimp*, para 131.

WTO referred to ‘sustainable development’ in its preamble.<sup>11</sup> One can even speculate that, if pressed, one of the actual drafters of the 1947 GATT, upon reading the text the day after its adoption, would have conceded that, objectively speaking, animals such as turtles are indeed resources, natural, and exhaustible, thus being covered by the text of the exception—even if none of the treaty’s drafters would have had turtles in mind when employing this expression.

Importantly, this type of ‘mere application’ evolution can take place even against the supposed literal sense of words, especially once one considers that the ‘ordinary meaning’ of a word does not exist independently of its context and object and purpose. Thus, if a building was left as legacy to a university in 1880, to be used ‘exclusively as a ballroom,’ an interpreter could, credibly and without seeking to ‘evolve’ the relevant will, find that the term ‘ball’ means an event involving dance, eating, and drinking, therefore permitting the use of the room for modern events involving dance, eating, and drinking that English language users would no longer call ‘balls.’ (At most, a mock-originalist interpreter of the will might require all events taking place in the University Ballroom to be labelled ‘balls,’ all while acknowledging that those who first opened the will in 1880 would hardly recognize the events taking place there in 2020 as ‘balls.’) The same interpreter would probably hesitate before a request for the same room to be used primarily as a deposit for sports balls, even if dance balls went so out of fashion that English language users started using the term ‘ballroom,’ in everyday language, almost exclusively to refer to deposits containing balls. Even though the term ‘ballroom’ would, under this hypothetical linguistic evolution, apply to rooms where balls are kept, a good faith interpreter would be aware that to apply the 1880 will in this manner would be to distort the wish of the testator to meet a present-day demand.

Sometimes, documents themselves refer to abstract standards of conduct, leaving it to adjudicators to take into account the prevailing practice to conclude whether this standard was violated. As Sévane Garibian notes, the statutes of *ad hoc* criminal tribunals were ‘far from precise’ [154]. Article 3 of the Statute of the International Tribunal for the Former Yugoslavia (ICTY), for example, entrusted the ICTY with the ‘power to prosecute persons violating the laws or customs of war.’ In order to determine that rape was included in this standard, the trial chamber in *Furundžija* relied on an array of sources from different legal frameworks, including international humanitarian law, international human rights law, and domestic legal orders, to conclude that ‘rape and serious sexual assault in armed conflict has ... evolved in customary international law’ and was a violation of ‘the laws or customs of war.’<sup>12</sup> In the same vein, the Arbitral Tribunal under the United Nations Convention on the Law of the Sea found, in *Arctic Sunrise*, that the requirement that hot pursuit of foreign ships be preceded by a

11 As Graham Cook notes [186], the GATT panel in *US—Tuna (EEC)* made precisely this finding under the GATT 1947. Without referring to evolutionary interpretation, the panel ‘accepted that a policy to conserve dolphins was a policy to conserve an exhaustible natural resource’ (GATT Panel Report, *United States—Restrictions on Imports of Tuna (US—Tuna (EEC))* 16 June 1994, unadopted, DS29/R, para 5.13). At the same time, it is relevant that this panel issued its report in 1994, when many of the instruments used by the Appellate Body to justify evolutionary interpretation in *US—Shrimp* had already been issued.

12 *Prosecutor v Anto Furundžija*, Case No. IT-95-17/1-A, Judgment, 21 July 2000, para 168.

‘visual or auditory signal’ could, considering ‘modern use of technology’ and the object and purpose of the requirement, be met by a radio message.<sup>13</sup>

Mere application, which one might call ‘inevitable’ or ‘illusory’ evolutionary interpretation, takes place as a regular part of the cognitive process of determining what the meaning of a provision would have been to its drafters and applying this meaning in the face of changing circumstances. The more abstract the wording of a provision, the less effort is required to adapt it to changing circumstances. The WTO panel in *EC—IT Products* concluded that products that were the result of technological advancements while still fitting within the definition found in the relevant tariff concession (for ‘flat panel display devices’) could benefit from the concession even if the concession had been drafted chiefly with the product’s predecessors in mind, on grounds that ‘generic terms were used to cover a wide range of products and technologies’.<sup>14</sup> The Appellate Body in *China—Publications and Audiovisual Products* found that the terms used in China’s schedule of concessions for services, ‘sound recording distribution services’, were ‘sufficiently generic that what they apply to may change over time’.<sup>15</sup>

There may be degrees to the evolution that is produced under this form of evolutionary interpretation. In these disputes, WTO adjudicators were careful to point out that the relevant technologies already existed at the time the concessions were agreed. Thus, the Appellate Body in *China—Publications and Audiovisual Products* emphasized that China’s schedule of commitments was agreed to in 2001, when electronic distribution was already available, all while implying that similarly worded concessions made by other WTO members in 1994, when this was not the case, would have subsequently evolved to encompass distribution by electronic means as well.<sup>16</sup> Like in *US—Shrimp*, the principle of evolutionary interpretation appears to have been affirmed unnecessarily, since the relevant treaty text was deemed to have already been applicable to the factual elements object of the dispute at the time of its drafting.

A more consequential evolutionary approach to textual interpretation was adopted by the ICJ in *Navigational and Related Rights*. The Court found that Costa Rica’s right to navigate in Nicaraguan waters ‘for purposes of commerce’ (‘con objeto de comercio’), agreed to in an 1858 treaty, had evolved to encompass not only the transport of goods but also the transport of persons, to the extent that it is ‘commercial in nature’ (i.e. for purposes of tourism).<sup>17</sup> The ICJ reasoned that

where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is ‘of continuing duration’, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.<sup>18</sup>

13 *Arctic Sunrise (Netherlands v Russian Federation)*, PCA Case N° 2014-02, para 259–260. Among the subfields of international law in which adjudicators regularly operate, the law of the sea is the one that could have deserved a more thorough treatment in the book. I thank Marco Benatar for this point.

14 Panel Report, *EC—IT Products*, WT/DS375/R/WT/DS376/R/WT/DS377/R, para 7.599.

15 Appellate Body Report, *China—Publications and Audiovisual Products*, WT/DS363/AB/R, para 396.

16 Appellate Body Report, *China—Publications and Audiovisual Products*, above n 16, para 395. See also Panel Report, *EC—IT Products*, above n 14, fn 807.

17 *Navigational and Related Rights (Costa Rica v Nicaragua) (Judgment)*, ICJ Reports 2009, p. 213, 244.

18 *Ibid.*, p. 242.

Despite the similarities in form, in its effects the ICJ decision goes further than those in *EC—IT Products* and *China—Publications and Audiovisual Products*. While the WTO adjudicators made an effort to argue that the specific elements to which they were applying the legal text were already envisaged by the parties when entering into the original agreement, the ICJ in *Navigational Rights* avowedly expanded the scope of activities covered by the provision, compared to what the parties could credibly have envisaged when entering into the agreement in 1858. Still, both the vagueness of the term employed and its inherently teleological character ('for purposes of' commerce) permitted the ICJ to ground its findings on the original text. This puts the ICJ's decision at the outer edge of what one could term evolution as mere application, being sufficiently grounded on the text to fall short of a manifestly adjudicator-driven normative development.

#### IV. STATE-DRIVEN EVOLUTION: GIVING EFFECT TO LAW-MAKING INSTRUMENTS AND PRACTICES

A second meaning of the notion of 'evolution' implies not mere application but subsequent normative development. Prior to discussing the cases in which normative developments are overtly interpreted into a treaty by adjudicators (Section V), it is useful to consider the cases in which these developments are grounded on purposive interpretative actions of states. The parties to a treaty may define and clarify the legal rights and obligations established by the treaty, either by employing law-making or interpretative powers granted by the instrument itself or, formally or informally, through their subsequent actions. Codifying practice and jurisprudence, Articles 31.3(a) and 31.3(b) of the Vienna Convention on the Law of Treaties (VCLT) require interpreters to incorporate into their interpretation the common understandings of the parties to a treaty of their rights and obligations in the form of subsequent practice and subsequent agreements. While overtly permitting the evolution of legal instruments, comprising not merely the application of given rules to new circumstances but a transformation of the applicable rules themselves, these mechanisms (which Jennifer Radford, Gregory Tereposky, and Kun Hui term 'State-led evolutionary treaty interpretation' [294]) ascribe this normative evolution not to the choice of third-party interpreters but to the actions of states, as international law's rightful legislators and primary interpreters.

An example of state-led normative development took place, within investor-state adjudication under the North American Free Trade Agreement (NAFTA), when the NAFTA Free Trade Commission (FTC) issued an interpretative note interpreting (restrictively) the rights of investors under NAFTA. The Arbitral Tribunal in *Mondev* responded by declaring the 'evolutionary potential' of NAFTA and, more broadly, the 'evolutionary character of international law'.<sup>19</sup> The Tribunal also noted that the FTC was entrusted, under NAFTA Article 2001.2(c), with 'resolv[ing] disputes that may arise regarding [the] interpretation or application' of NAFTA, and that pursuant

19 *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002, para 119.

to NAFTA Article 1131.2 interpretations issued by the Commission are ‘binding on’ NAFTA investment tribunals.<sup>20</sup>

The ‘evolutionary interpretation’ in this case was thus simply the means for the adjudicator to give effect to state-driven normative development, carried out through an organ authorized by the applicable treaty to issue such an interpretation. This is the same sense in which the ICJ used the term ‘evolving instrument’ in *Whaling in the Antarctic*, when it noted that the International Convention for the Regulation of Whaling establishes the International Whaling Commission and gives it ‘a significant role in the regulation of whaling ... ma[king] the Convention an evolving instrument.’<sup>21</sup> In the latter case, however, the ‘evolution’ goes beyond an interpretation of the treaty itself and involves obligations that, although formally derived from the treaty, are established in a different instrument. For example, the ‘decisions’ that the United Nations (UN) Security Council is competent to make and are binding on all UN members under Article 25 of the Charter are not mere interpretations of existing provisions of the Charter but political decisions that create new obligations for UN members, and may establish whole ‘legal order[s]’ within the Council’s area of competence.<sup>22</sup>

Even without a specific provision permitting state-driven interpretation, the same effect can be attained through the concepts of subsequent practice and subsequent agreement. The International Law Commission concluded that these concepts can ‘assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.’<sup>23</sup> Adjudicators have gone far further than this. In the *Wall* Advisory Opinion, the ICJ interpreted the partition of competences between the General Assembly and the Security Council with regard to the preservation of international peace and security in line with ‘the accepted practice of the General Assembly.’<sup>24</sup> The WTO Appellate Body found in *US—Clove Cigarettes* that agreements regarding interpretation, when reached by consensus within WTO political bodies, must be ‘read into the treaty for purposes of its interpretation’, despite the WTO Agreements entrusting certain WTO organs, following specific procedures and subject to specific requirements, with the ‘exclusive authority’ to interpret the WTO Agreements.<sup>25</sup> The Appellate Body found subsequent practice to have substantively the same effect, with the result that ‘the

20 Ibid, para 100.

21 *Whaling in the Antarctic (Judgment)*, ICJ Reports 2014, p. 226, 247.

22 *Accordance with International Law of the Unilateral Declaration of Independence with Respect to Kosovo* (Advisory Opinion), ICJ Reports 2010, p. 403, 440. In the book, Paolo Palchetti considers the possible evolutionary interpretation of Security Council Resolutions [98] contemplated in this Opinion (Ibid, p. 442).

23 International Law Commission, ‘Draft Conclusion 8 on subsequent agreements and subsequent practice’, ILC Report 2018, A/73/10, 67.

24 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, ICJ Reports 2004, p. 136 150.

25 Appellate Body Report, *US—Clove Cigarettes*, para 269. Article IX:2 of the Agreement Establishing the World Trade Organization provides that the WTO Ministerial Conference and General Council ‘have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements’.

interpretation of a treaty provision on the basis of subsequent practice is binding on all parties to the treaty, including those that have not actually engaged in such practice.<sup>26</sup>

Perhaps the court that makes the most far-reaching use of the concept of subsequent practice is the European Court of Human Rights (ECtHR). As Eirik Bjorge [39] and Olivier Dörr [115] point out, the ECtHR has become known for considering the European Convention on Human Rights (ECHR) a ‘living instrument’, whose provisions evolve and become more constraining following evolutions in the domestic systems of ECHR parties with respect to the existence and extent of human rights.<sup>27</sup> In *Bayatyan*, the ECtHR found that ‘nearly a consensus’ regarding the existence of a right, inferred from the practice of ‘an overwhelming majority’ of the ECHR parties, sufficed for an interpretation to be applied to the holdout states.<sup>28</sup> In *Hassan*, the ECtHR went as far as stating that ‘consistent practice on the part of the High Contracting Parties, subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention.’<sup>29</sup>

In the latter case, however, the Court interpreted state practice to permit, against the text of the ECHR, preventive deprivation of liberty in armed conflict. Gloria Gaggioli finds this development ‘worrying’, cautioning against evolutionary interpretation that enshrines limitations on human rights. In this field at least, she contends, evolutionary interpretation must not reflect *any* developments subsequent to the treaty but should follow a substantive criterion, integrating into the legal framework ‘progress in ensuring respect for human rights’ while resisting evolution on the basis of violations of these rights [112]. There is therefore resistance to a purely procedural view of evolution, in which adjudicators (at least in discourse) do not themselves develop the normative content of the interpreted provisions but incorporate, through VCLT-warranted and consent-based techniques, clarifications and modifications originating in the decisions of states.

State-driven normative developments may be referred to as ‘evolutionary interpretation’ in a strong sense, which embodies the acknowledgement that it is not simply circumstances that change but the legal framework itself that is not static but subject to change by the states that establish and operate it. However, in adopting this approach adjudicators remain (or at least seek to remain) within the bounds of the role of value-neutral norm appliers, giving effect to whatever determinations are jointly agreed upon by states, as the masters of treaties. This form of procedural incorporation of state-driven normative developments is labelled by Luigi Crema ‘pragmatic’, lumped together with evolution-as-application as being both ‘neutral operation[s] of fine-tuning’ [79]. This is contrasted with evolution ‘used, in idealistic terms to mean “progress”’ in a ‘political reading’, [79] in which ‘evolutionary interpretation’ appears as a purpose-driven action by an adjudicator that chooses to develop the applicable legal framework to further certain normative goals.

26 Appellate Body Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft* (EC—Aircraft), WT/DS316/AB/R, at 273.

27 *Magyar Helsinki Bizottság v Hungary* [GC] App no 18,030/11 (ECtHR, 8 November 2016), para 143–150.

28 *Bayatyan v Armenia* [GC] (2012) 54 EHRR 15, para 103.

29 *Hassan v United Kingdom* [GC] App no 29,750/09 (ECtHR, 16 September 2014).

## V. ADJUDICATOR-DRIVEN UPDATES: EVOLUTIONARY INTERPRETATION AS (PROGRESSIVE) NORM DEVELOPMENT

In its strictest sense, ‘evolutionary interpretation’ could be opposed to the two phenomena mentioned earlier and reserved to those cases in which adjudicators reach a conclusion without providing for it a basis in either the specific legal text being applied or other state-sanctioned documents and elements specifically related to its interpretation. Some authors in the book highlight the cases in which resort to evolutionary interpretation appears clearly as a *choice* made by adjudicators, an ‘act of volition’ as opposed to a ‘process of cognition’ as Georges Abi-Saab puts it [7–8]. This act of volition is performed in some cases to further certain objectives, in what Makane Moïse Mbengue and Aikaterini Florou label ‘value promotion’ [262]. Luigi Crema describes this as interpretation ‘towards the achievement of a certain end’ [79], and Julian Wyatt terms it (somewhat derogatorily) ‘a doctrine supporting progressive adjudication ... to achieve justice or positive outcomes for society’ [56].

At the origin of this perspective on evolutionary interpretation is often a suspicious view of claims to the value-neutrality of the VCLT-guided interpretative process. The very description of this process by Christian Djéffal, as a “single combined operation” [where] all the techniques laid out in [VCLT] Article 31 [and] all arguments are to be put in a crucible [and] weighed and balanced against each other’ [26],<sup>30</sup> hints at its indeterminacy, with the result that ‘the interpreter will have to decide’ [26]. Given what Malgosia Fitzmaurice calls the ‘somewhat esoteric’ character of the whole operation, and the assessment that it ‘is not applied uniformly’ [147], some might decide to set aside the whole enterprise in favor of interpretation that overtly promotes certain values. In some cases, adjudicators will still ground their findings on Article 31.3(c) of the VCLT, which directs interpreters to take into account ‘relevant rules of international law applicable in the relations between the parties.’<sup>31</sup> In other cases, Article 31.3(c) is either left aside<sup>32</sup> or used loosely as a hook for the incorporation into the legal reasoning of broader normative and societal developments,<sup>33</sup> in what Gabrielle Marceau and Clément Marquet call ‘a mechanism allowing [the law] to change and adapt to the emerging needs and habits of new generations’ [1].

30 This approach, together with the expression ‘single combined operation’, comes from ILC Special Rapporteur on the Law of Treaties Sir Humphrey Waldock. See ILC, ‘Report of the International Law Commission on the Work of its 18th Session’, ILC Ybk 1966/II, 172, 219–220.

31 See, e.g. the decision of the European Committee of Social Rights in *Defence for Children International (DCI) v the Netherlands* (Merits), Complaint No 47/2008, adopted 20 October 2009, para 34–36.

32 See, e.g. Human Rights Committee, *Roger Judge v Canada*, Communication no 829/1998, 5 August 2003 (UN Doc CCPR/C/78/D/829/1998, 13 August 2003) para 10.3 (‘there has been a broadening international consensus in favour of abolition of the death penalty, and in states which have retained the death penalty, a broadening consensus not to carry it out’).

33 Inter-American Court of Human Rights (IACtHR), *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, IACHR Series A No 16 (1 October 1999), para 114 (‘international human rights law ... has made great headway thanks to an evolutive interpretation of international instruments of protection. That evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention’).

The most remarkable cases of this form of ‘evolutionary interpretation’ take place in contexts in which the adjudicator finds that fundamental legal developments subsequent to the conclusion of a treaty have the power to ‘clarify’ the relevant obligations in a manner that no purely intellectual exercise of textual interpretation would have warranted. The ICJ in the *Namibia* Advisory Opinion famously imported into the mandate exercised by South Africa over Namibia the full legal framework applicable to trusteeship agreements under the UN, including the obligation to decolonize. While the ICJ recognized ‘the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion’, it immediately countered this with the view that ‘an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.’<sup>34</sup> The Court’s interpretation, informed by the ‘subsequent development of international law in regard to non-self-governing territories’, modified the very object and purpose of the original provision, making its ‘ultimate objective’ not the annexation of territories under mandate but ‘the self-determination and independence of the peoples concerned.’<sup>35</sup>

The area in which evolution beyond the scope of the original obligations is most common may be that of environmental norms. In many cases, the corresponding findings of normative development have been somewhat modest. The ICJ in *Gabčíkovo-Nagymaros* and the Arbitral Tribunal in *Iron Rhine*, while highlighting the emergence of environmental conservation requirements, found that the parties should themselves enter into new arrangements taking into account emerging environmental norms.<sup>36</sup> By contrast, the Inter-American Court of Human Rights (IACtHR) in its Advisory Opinion in *The Environment and Human Rights* amalgamated various instruments urging states to protect the environment and developed, through 50 pages, the set of environment-related obligations that in its view are part of the *corpus* of human rights obligations to be respected by all states parties to the American Convention on Human Rights (and maybe by all states in the Americas).<sup>37</sup> This follows a practice by the IACtHR to engage in what Gloria Gaggioli terms ‘quasi norm-setting exercises ... by gathering norms flowing from various human rights and [other] instruments and then develop[ing] on that basis a brand new framework document’ in a particular issue-area [106].<sup>38</sup> In this as in other fields, the extent to which the IACtHR is ready to engage in adjudicator-driven progressive development of the legal framework subject to its jurisdiction is noteworthy.

34 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)*, ICJ Reports 1971, p. 16, 31.

35 *Ibid.*

36 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, p. 7; *Iron Rhine Arbitration*, 27 UNRIAA 35 (2005), para 221.

37 IACtHR, *The Environment and Human Rights*, Advisory Opinion OC-23/17, IACHR Series A No 23 (15 November 2017), para 105–243.

38 This refers to the rights of migrant children. See IACtHR, *Rights of Migrant Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14, IACHR Series A No 21 (19 August 2014).

On the other hand, adjudicators have also explicitly refused to adopt an evolutionary interpretation that would impose specific environmental obligations on parties. In *Pulp Mills*, while the ICJ read into a provision requiring the ‘protect[ion] and preserv[ation of] the aquatic environment ... in accordance with applicable international agreements’ a requirement that parties undertake environmental impact assessments,<sup>39</sup> it also rejected the argument that this amounted to a full-blown incorporation by reference of the corpus of environmental conservation norms—an otherwise credible interpretation of the relevant provision.<sup>40</sup> In *Canada—Wheat Exports and Grain Imports*, the Appellate Body refused to interpret a provision requiring state-trading enterprises of WTO members to afford companies of other members ‘adequate opportunity ... to compete for participation in ... purchase or sales’<sup>41</sup> as ‘imposing comprehensive competition-law-type obligations on STEs’.<sup>42</sup> In the ECtHR Judgment in *Hatton*, the majority refused to interpret into the ECHR a specific right to a clean and quiet environment, reasoning that no such right existed in the Convention, while the minority pointed to the Court’s history of ‘evolutive’ and ‘progressive’ interpretation in the field of ‘environmental human rights’ to argue that, if applied, they would have led to the conclusion that the ECHR ‘guarantees the right to a healthy environment’.<sup>43</sup>

The choice for evolutionary interpretation is highly contentious in international investment law. Given that the obligations in this field take the form of vague standards, including ‘fair and equitable treatment’, ‘full protection and security’ and ‘international minimum standard of treatment’, the question whether to view these terms as they would have been understood at the time of conclusion of the treaty or in light of subsequent developments—in particular, the jurisprudence of other arbitral tribunals—is contentious. In *RosInvestCo UK Ltd v The Russian Federation*,<sup>44</sup> *Daimler v Argentina*<sup>45</sup> and *ICS v Argentina*,<sup>46</sup> the Arbitral Tribunals found that the appropriate course of action was to seek the meaning of the standards at the time of conclusion of the agreement. By contrast, the Arbitral Tribunals in *ADF v United States*,<sup>47</sup> *Merrill & Ring Forestry LP v Canada*<sup>48</sup> and *Bilcon v Canada* found that the relevant standards refer the interpreter to customary international law, and ‘customary international law has not been frozen

39 *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, ICJ Reports 2010, p. 14, 83.

40 *Ibid.*, p. 45.

41 General Agreement on Tariffs and Trade, Article XVII:1(b). See the United States’ argument in para 25.

42 Appellate Body Report, *Canada—Wheat Exports and Grain*, para 145.

43 *Hatton and Others v UK* [GC] (2003) 37 EHRR 28, para 96, 98–99; Joint Dissenting Opinion of Judge Costa, Judge Ress, Judge Türmen, Judge Zupančič and Judge Steiner, paras 2, 4–5.

44 *RosInvestCo UK Ltd v The Russian Federation*, SCC Case No 079/2005, Award on Jurisdiction, October 2007, para 37.

45 *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Award, 22 August 2012, para 224. *Ibid.*, Dissenting Opinion of Judge Charles Brower, para 19–20.

46 *ICS Inspection and Control Services Limited (United Kingdom) v The Republic of Argentina*, PCA Case No 2010/09, Award on Jurisdiction, 10 February 2012, para 220.

47 *ADF Group Inc v United States of America*, ICSID Case No ARB(AF)/00/1, Award, 9 January 2003, para 179.

48 *Merrill & Ring Forestry LP v The Government of Canada*, ICSID Case No UNCT/07/1, Award, 31 March 2010, para 190–93.

in time and ... continues to evolve in accordance with the realities of the international community'.<sup>49</sup> As Mbengue and Florou note [258], the latter awards were issued after the intervention by the NAFTA Free Trade Commission discussed in Section III above, which most saw as aimed at restricting the scope for findings of violation. In other words, these arbitral tribunals affirmed their ability to 'evolve' the minimum standard of treatment beyond its original scope against the presumable intention of the treaty parties when adopting, by common agreement, a normative instrument explicitly provided for under the relevant treaty.

One striking element of decisions that ostensibly invoke the concept of 'evolutionary interpretation' is that this invocation often appears immaterial to the outcome of the dispute. As Charalampos Giannakopoulos and Malvika Monga conclude [309], determining whether to adopt a 'historical' or an 'evolutionary' approach to investment obligations does little to help establishing the actual scope of the obligation in a particular case. As discussed earlier, the Appellate Body's original invocation of evolutionary interpretation in *US—Shrimp*, to include in the coverage of Article XX(g) trade-restrictive measures to protect living natural resources, was unnecessary. Resort to the ordinary toolbox of treaty interpretation would have been sufficient to conclude that endangered turtles are 'exhaustible natural resources' deserving of protection. Yet, the Appellate Body went through the trouble of examining various multilateral instruments and conventions developing international environmental law, highlighting the incorporation of these developments into WTO law through the addition of the objective of sustainable development to the preamble of the Agreement Establishing the WTO, and conjecturing upon the evolving views of the international community, to conclude that it was 'too late in the day' not to permit the invocation of an exception covering all exhaustible natural resources to protect living natural resources.<sup>50</sup>

This is not a singular occurrence. Human rights bodies, and not only the IACtHR, have often assumed what Olivier Dörr labels a 'quasi-constitutional role' [121], asserting new interpretations on the basis of their view of what *should be* a human rights violation. In *Rantsev*, the ECtHR was asked to apply to a case of human trafficking the ECHR prohibition on slavery, servitude, and forced or compulsory labor. Rather than interpreting the terms of the Convention to inquire upon their applicability to human trafficking, the ECtHR declared it 'unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery", "servitude" or "forced and compulsory labour"'. Instead, the Court grounded its finding of breach on the assertion that 'trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the [ECHR]'.<sup>51</sup> The Human Rights Committee (HRC) in *Judge v Canada* found that 'factual and legal developments and changes in international opinion' called for 'a review of the scope of application of the rights protected'.<sup>52</sup> Reversing

49 *Bilcon of Delaware et al v Government of Canada*, PCA Case No 2009–04, Award on Jurisdiction and Liability, 17 March 2015, para 435.

50 Appellate Body Report, *US—Shrimp*, para 131.

51 *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, para 282.

52 *Judge v Canada*, above n 34, para 10.3.

a previous finding, the HRC concluded that a state that prohibited the death penalty could no longer deport persons to another state where they could be expected to receive the death penalty. Not only did the Committee reason that ‘the protection of human rights evolves’, it also found that this evolution would apply retroactively, because when the facts under examination occurred ‘the Committee’s position was evolving’ (emphasis added).<sup>53</sup> This reasoning puts the (quasi-)adjudicator, and not states, on the driving seat of the evolution of the normative framework being applied.

The ICSID Arbitral Tribunal in *UP & CD v Hungary* adopted similar reasoning in the sense of finding that subsequent evolution, this time in the position of a state, should have retroactive effect. The question before it was whether the most-favored-nation (MFN) clause in a Bilateral Investment Treaty (BIT) permitted resort to arbitration, for a purpose not permitted by the arbitration clause in the applicable BIT, because a subsequent BIT featured a more expansive arbitration clause. The tribunal reasoned that arbitration should be permissible not only due to its interpretation of how the MFN clause should operate but also because ‘Hungary’s BIT practice since 1992 shows that an open arbitration clause ... is by now its normal standard. Achieving the same result in the present case via the MFN clause in the Hungary–France BIT thus would in no way lead to a situation unusual for Hungary today.’<sup>54</sup> In other words, rather than merely engaging in interpretation, the tribunal examined the subsequent policies of Hungary and, as Mbengue and Florou put it, ‘took the liberty to ... assum[e] that the respondent would have wished to deploy a similar liberalism in its previous treaties’ [262].

These decisions have in common that the adjudicator reached a conclusion that, despite being inferable from the text of the instrument being interpreted, was highly contentious within the relevant regime. The Appellate Body in *US—Shrimp* was de facto reversing the previous understanding, confirmed in GATT panels, that trade rules would prohibit the use of trade-restrictive measures to promote values beyond a member’s territory.<sup>55</sup> The ECtHR in *Rantsev* explicitly acknowledged that some of its earlier case-law adopted narrow interpretations of the prohibitions on slavery, servitude and forced or compulsory labor.<sup>56</sup> The HRC in *Judge v Canada* was avowedly reversing a previous understanding it had adopted less than a decade before.<sup>57</sup> And the use of the most-favored-nation clause to expand the scope of the arbitration clause in BITs has been contentious since it was first accepted in *Maffezini*.<sup>58</sup> It would seem that resort to the notion of evolutionary interpretation in these cases was not necessary because the

53 Ibid, para 10.7.

54 *UP (formerly Le Chèque Déjeuner) and CD Holding Internationale v Hungary*, ICSID Case No ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016, para 174.

55 GATT Panel Report, *United States—Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, unadopted, BISD 39S/155; Panel Report, *US—Shrimp*, para 7.45.

56 *Rantsev*, above n 53, para 276.

57 *Judge v Canada*, above n 34. See HRC, *Kindler v Canada*, Communication No. 470/1991, views adopted on 30 July 1993, para 14.6.

58 *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, para 56.

wording of the relevant provision would not have permitted the adjudicator's conclusion through a regular application to the text of the ordinary rules of interpretation of public international law. Instead, the concept was referenced because the adjudicator was consciously employing its authority to assert an interpretation contradicting a previous understanding—confirmed in previous adjudication—regarding the rights and obligations of the parties under the relevant legal framework.

## VI. CONCLUSION

*Evolutionary Interpretation in International Law* provides academics and practitioners in international law with two key assets. On the one hand, it includes highly condensed versions of the conclusions reached by scholars who have reflected at length elsewhere on the challenges of interpretation and evolutionary interpretation in international law. On the other hand, it provides readers with a highly useful compendium of the state of the art on the issue, as authors refer to the key decisions on the matter in the various subsystems of international law in which adjudication has become a regular feature (with the notable exception of the law of the sea). While the format of an edited collection is itself inimical to general conclusions, the most interesting insights on the issue emerge from the juxtaposition of the positions adopted by the different authors.

Evolutionary interpretation will certainly remain a contentious issue within international law. Besides the intellectual question that it raises—what is the appropriate time-period of reference for assessing the appropriate interpretation of a provision?—the concept provides a key for adjudicators to exercise their normative authority to update the rights and obligations of parties compared to what could have been inferred from the text alone. Adjudicators may do so with a view to affirming the object and purpose of treaty provisions in the face of factual developments; with the aim of strengthening the ability of the treaty to fulfil its object and purpose; or in order to take into account, and translate into rights and obligations, major developments in the reality and shared concerns of the international community. Seemingly unnecessary resort to the concept of evolutionary interpretation may indicate an adjudicator's conscious decision to contradict a previously dominant understanding regarding the rights and obligations of the parties under the applicable legal framework.

Given the potential for the use of 'evolutionary interpretation' to justify adjudicatory intervention into a legal framework ostensibly grounded on state consent, many of the book's authors conclude that there should be a limit to how far its use should allow adjudicators to interpret into treaties rights and obligations that cannot be inferred from their text. The boundaries considered by the authors include discursive limitations, in the sense of what can be justified under the interpreted document's actual wording (Nina Mileva and Marina Fortuna [140], Sévane Garibian [166], Kenneth Keith [344]) and, perhaps ultimately, the extent to which the new arrangement is able to 'find support from [a decision's] addressees' (MC Andrade [240]), is 'acceptable to states' (Gloria Gaggioli [114]) or can avoid 'the risk of backlash from States' (Nina Mileva and Marina Fortuna [135]). In the general conclusion, Kenneth Keith speculates that the resistance to explicit evolutionary interpretation in recent times, when compared to the ICJ's bold statement in *Namibia* (a reasoning which might also apply to the Appellate

Body's statement in *US—Shrimp*), may be a way for adjudicators of 'deflecting criticism against judicial overreach' [344].

Evolutionary interpretation is a concept that allows adjudicators not only to organize their intellectual assessment of the elements of interpretation listed in the VCLT but also to go beyond this intellectual assessment and infuse into the cognitive process discernible decisions, first with respect to whether to adopt an evolutionary interpretation and then with respect to what elements will be privileged in the determination of the direction of the discovered evolution. Since, in this strong sense, evolutionary interpretation operates as an instrument that unlocks the ability of adjudicators to go beyond structuring and upholding state-sanctioned commitments and to exercise their own authority to establish the content of the legal framework they are in principle merely applying, it is perhaps unsurprising that the debates surrounding this concept and its uses often appear to be reproductions, in concentrated form, of the central debates regarding the role and limits of adjudication in the international legal system.

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