Interpreting "Generic Terms": Between Respect for the Parties' Original Intention and the Identification of the Ordinary Meaning

Paolo Palchetti

1 The Evolutive Interpretation of Generic Terms in the Case Law of International Courts

It is a truism that international treaties, as any sets of rules, are subject to erosion with the passing of time. Since treaties are based on the will of the parties, it is primarily for the parties to assess the effects on treaties of the passing of time and to decide whether to revise or terminate aging treaties. While only the parties may undertake the revision of a treaty, international courts may play a role in ensuring the adaptation of the normative regime established by a treaty to changing conditions. They can contribute to this, in particular, by interpreting a treaty in an evolutive manner in order to ensure, as the Arbitral Tribunal in the *Iron Rhine* case put it, "an application of the treaty that would be effective in terms of its object and purpose".[1]

As is well known, evolutive interpretation is a method which is not frequently used by international courts. The general rules on treaty interpretation set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; hereinafter Vienna Convention)[2] do not provide a clear indication as to when a judge is allowed to redefine the meaning of a treaty provision in the light of changing circumstances. By requiring that account can be taken of "any relevant rules of international law applicable in the relations between the parties", Article 31.3.c is often referred to as a rule which opens up the possibility of an evolutive

[1] PCA: Iron Rhine ("IJzeren Rijn") Railway (Belgium/Netherlands), Award (24 May 2005), para 80.
[2] Entered into force on 27 January 1980.

P. Palchetti (✉)
Professor of International Law, University of Macerata, Macerata, Italy
e-mail: palchetti@unimc.it

N. Boschiero et al. (eds.), *International Courts and the Development of International Law*, DOI: 10.1007/978-90-6704-894-1_8,
© T.M.C. Asser Press, The Hague, The Netherlands, and the authors 2013

interpretation of a treaty. It may be objected, however, that even this provision does not clarify whether the rules of international law to be taken into account for the purposes of interpretation are only the rules in force at the time of the conclusion of the treaty or also subsequent rules in force at the time of the interpretation of the treaty.[3] With some exceptions,[4] international judges appear to be attached to the idea that, in principle, a treaty must be interpreted by taking fully into account what was the intention of parties at the time of its conclusion. The International Court of Justice (ICJ) recently restated this idea in the following terms: "It is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention, which is, *by definition*, contemporaneous with the treaty's conclusion".[5] The emphasis generally placed on the need to give effect to the intention of the parties is evidently a deterrent to the use of an evolutive interpretation. Resort to this method may potentially be perceived as leading to an interpretation which is not in accordance with the parties' intentions.

Confronted with these two different demands—to preserve the effectiveness of a treaty in the face of evolving circumstances, on the one hand, and to respect the intention of the parties as manifested at the time of the conclusion of the treaty, on the other—international courts have devised a solution which aims at reconciling this tension between change and stability. This solution consists of identifying, in the will of the parties, the possibility of reasons as to why under certain circumstances an evolutive interpretation may be justified. Thus, it has been held that there are situations in which it must be presumed that it was the parties' intention that a term or a provision be interpreted according to the meaning *acquired* by that term or provision at the time in which the treaty is to be applied. To determine when such a presumption arises, international courts have identified certain elements which serve the purpose of establishing whether the parties' intention allows for a dynamic interpretation of the treaty. Prominent among these indicators is the fact that the parties have used "generic terms" in a treaty. In the words of the ICJ,

> 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.[6]

[3] For this observation see Thirlway 1991, p. 58.

[4] See, for instance, the frequent use of the method of evolutive interpretation in the case law of the European Court of Human Rights. On this issue, see Bernhardt 1999, pp. 17–24, and Gaja 1999, pp. 219–222. When considering the attitude of international courts, account must be taken of the fact that, as observed by Dupuy 2011, p. 125, they "are not always in the same legal and political position to undertake a dynamic reading of the agreement before them".

[5] ICJ: Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment (13 July 2009), para 63 (italics added).

[6] Ibidem, para 66.

The role which generic terms play in treaty interpretation has long been recognized in the case law of the ICJ. In its advisory opinion in the *Namibia* case, while taking care to stress that it was mindful of "the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion",[7] the Court recognized that certain concepts embodied in Article 22 of the Covenant of the League of Nations, such as that of a sacred trust of civilization, "were not static, but were by definition evolutionary".[8] In the Court's view, "[t]he parties to the Covenant must consequently be deemed to have accepted them as such".[9] A similar approach was later taken by the Court in its judgments in the *Aegean Sea Continental Shelf* case[10] and, more recently, in the case concerning the *Dispute Regarding Navigational and Related Rights*. In the former case, the question concerned the interpretation of the term "territorial status" in Greece's reservation to the General Act of 1929. Once it was established that this expression was used as a generic term, the Court found that "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".[11] In the *Dispute Regarding Navigational and Related Rights* case, the Court applied the same reasoning with regard to the interpretation of the term "*comercio*" as used in the 1858 Treaty of Limits between Costa Rica and Nicaragua.[12]

The role assigned to generic terms in treaty interpretation is by no means a feature which characterizes only the case law of the ICJ. In its well-known decision in the *US—Shrimp* case, the WTO Appellate Body established that the term "exhaustible natural resources" in Article XX.g of GATT also covered living species on the ground that "the generic term 'natural resources' in Article XX (g) is not 'static' in its content or reference but is rather 'by definition evolutionary'".[13] In its more recent report in the *China—Measures Affecting Trading Rights and Distribution Services* case, the Appellate Body found that "the terms used in China's GATS Schedule ('sound recording' and 'distribution') are sufficiently generic that what they apply to may change over time".[14] As to the case law of

[7] ICJ: Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Op. (21 June 1971), para 53.

[8] Ibidem.

[9] Ibidem.

[10] ICJ: Aegean Sea Continental Shelf (Greece v. Turkey), Judgment (19 December 1978).

[11] Ibidem, para 77.

[12] Navigational and Related Rights, supra n. 5, para 67. On this judgment see Bjorge 2011, p. 271.

[13] WTO: United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, Appellate Body Report (12 October 1998), para 129.

[14] WTO: China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/AB/R, Appellate Body Report (21 December 2009), para 396.

arbitral tribunals, reference may be made to the arbitral award in the *Iron Rhine* case, where the Tribunal expressly admitted that, when a term can be classified as generic, the presumption arises that the term must be interpreted according to its meaning at the time in which the treaty is to be applied.[15]

Since the use of generic terms creates a presumption in favor of a dynamic interpretation of their meaning, the classification of a term as 'generic' is an element which may impact considerably on the outcome of the interpretative process. Then the following question arises: can it be held that, whenever the parties to a treaty have used terms susceptible of evolutive interpretation, the presumption *necessarily* arises that they intended to give to such terms a meaning that would change over time? And, if this is not the case, when can the use of a certain term give rise to a presumption that the term must be interpreted in an evolutive manner? Behind these questions lies a more general problem: what role, if any, do the general rules set forth in Articles 31 and 32 of the Vienna Convention play with regard to the interpretation of generic terms?

2 What Terms Can Be Classified as Generic for the Purposes of Treaty Interpretation?

In her declaration attached to the ICJ's judgment in the *Kasikili/Sedudu Islands* case, Judge Higgins provided the following definition of what is a generic term: "a known legal term, whose content the parties expected would change through time".[16] The view that the notion of generic terms (as elaborated in the case law of the ICJ) only applies to legal terms whose meaning changes with the development of the law finds significant support in the legal literature.[17] That view appears to have been buttressed by the fact that, in its judgment in the *Aegean Sea Continental Shelf* case, where the idea of the evolutive interpretation of generic terms was first articulated in clear terms, the Court had in fact approached the problem as one of determining the impact of the evolution of the law on the interpretation of a generic term that referred to a legal concept. As the Court put it, since the expression "territorial status of Greece" was to be regarded "as a generic term denoting any matters comprised within the concept of territorial status under general international law", there was the presumption that the term "was intended to follow the evolution of the law".[18]

If one accepts that the interpretative problem raised in connection with the use of generic terms only concerns the interpretation of legal terms whose meaning

[15] Iron Rhine, supra n. 1, para 79.

[16] ICJ: Kasikili/Sedudu Island (Botswana v. Namibia), Judgement (13 December 1999), Declaration of Judge Higgins.

[17] See for instance Jiménez de Aréchaga 1978, p. 49; Jennings and Watts 1992, p. 1282.

[18] Aegean Sea Continental Shelf, supra n. 10, p. 32, para 77.

may change with the evolution of the rules of international law, then it is quite logical to consider that this problem must be assessed in the light of the rule set forth in Article 31.3.c of the Vienna Convention. In particular, it may be held that the presumption in favor of an evolutive interpretation of generic terms reflects the fact that Article 31.3.c permits a treaty to be interpreted in the light of the rules of international law in force at the time when the treaty is to be applied. Significantly, the view that the interpretation of generic terms involves an application of the rule set forth in Article 31.3.c appears to find support in the work on the International Law Commission on the fragmentation of international law. When assessing the scope of application of this provision, the Study Group on Fragmentation established by the International Law Commission also addressed the question of inter-temporality, i.e. the question of whether the “rules of international law applicable in the relations between the parties” are the rules in force at the time of the conclusion of the treaty in question or the rules in force at the time of its application. In this context, the Study Group referred also to the question concerning the interpretation of “open or evolving concepts”. The conclusion of the Study Group specifically dedicated to the interpretation of open concepts provides that “[r]ules of international law subsequent to the treaty to be interpreted may be taken into account where the concepts used in the treaty are open or evolving”.[19]

However, this distinction between legal terms—or, more broadly, between terms whose meaning change with the development of international law—and other “open” terms whose content is capable of evolving appears to be unwarranted. If the presumption of evolutive interpretation relies on the idea that when the parties have used a generic term in a treaty, they must necessarily be aware that the meaning of that term may evolve over time, then there is no reason why such a presumption should only arise when legal terms are used. What is relevant is not so much the fact that the term used by the parties refers to a legal concept as the fact that the term was sufficiently generic to warrant the conclusion that its meaning was presumably intended by the parties to evolve over time. In the same vein, and contrary to the restrictive view apparently taken by the Study Group of the International Law Commission with respect to the interpretation of “open concepts”, the development of international law is not the only element which must be taken into account in order to address problems of inter-temporality in treaty interpretation. Changes in conventional language are also relevant and may give rise to the presumption of an evolutive interpretation.[20]

Recent decisions dealing with the question of the interpretation of generic terms lends support to this view. Terms such as “*comercio*” and “sound recording” can hardly be qualified as legal terms. When determining the meaning of the word “*comercio*” the Court did not find it necessary to refer to a development in international law in order to demonstrate that the meaning of the term nowadays is

[19] Conclusions of the Work of the Study Group, in Report of the International Law Commission on the work of its sixty-first session (2006), UN doc. A/61/10, p. 415.

[20] In the same vein, Simma and Kill 2008, p. 684, note 25, and Linderfalk 2008, p. 121.

different from the meaning it had at the time of the conclusion of the 1858 Treaty of Limits; it simply observed that "this is a generic term, referring to a class of activity".[21] At the same time, however, the Court observed that the terms used in a treaty can have a meaning capable of evolving "so as to make allowance for, among other things, developments in international law".[22] Thus, the Court expressly acknowledged that developments in international law constitute only one element, among others, which the interpreter may take into account to adapt the meaning of a term to changed circumstances.[23]

If the presumption of evolutive interpretation does not only concern legal terms whose meaning has changed with the development of international law but also applies to generic terms whose meaning has changed as a consequence of an evolution in language, it would hardly be conceivable to rely on Article 31.3.c to justify the operation of this presumption. Since the interpretation of generic terms has to do with the determination of the ordinary meaning of a term in cases in which the meaning of this term has evolved over time, the rule of interpretation which comes into play is the general rule set forth in Article 31.1, according to which a treaty must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[24] Here, eventually, the question which may be raised concerns the application of this rule to the problem of determining when a term must be interpreted according to the meaning acquired at the time in which the treaty is intended to be applied. The question is essentially the following: for a presumption in favor of evolutive interpretation to arise, is it sufficient to refer to the fact that the term used by the parties has a meaning capable of evolving, or should one instead consider that such a presumption is necessarily the result of an interpretative process in which all three components of Article 31.1—the ordinary meaning of the term, its context and the treaty's object and purpose—are to be used?[25]

---

[21] Navigational and Related Rights, supra n. 5, para 67.

[22] Ibidem, para 64.

[23] Ibidem. According to Arato 2010, p. 472, in order to interpret the term "*comercio*" the Court "took into account evolving *factual* circumstances in interpreting an evolutive term, in other words what it deemed to be a development in the ordinary meaning of the expression '*comercio*'". In the *Namibia* case, the Court also took into account "the political history of mandated territories in general" in order to justify its evolutive interpretation of the term "sacred trust of civilization". Namibia, supra note 7, p. 31, para 52. See Linderfalk 2008, p. 125.

[24] It may be held that, for purposes of determining the meaning of a legal term, it makes substantially no difference if one applies the general criterion stated in Article 31.1, or that in Article 31.3.c. One can share this view, the only possible difference lying in the fact that, according to a certain reading of Article 31.3.c, this criterion requires the interpreter to take into account only the rules of international law which are applicable in the relations between the parties to the treaty to be interpreted. It would be unreasonable to apply a similar restriction with regard to the problem of determining whether an evolution in the meaning of a legal term has taken place.

[25] On this point see Van Damme 2006, p. 31.

3 Determining the Meaning of Generic Terms in the Light of Their Context and the Treaty's Object and Purpose

At first glance, when considering the approach of international courts to the interpretation of generic terms, one might have the impression that the focus is essentially, if not exclusively, on the generic character of the terms used by the parties. This may lead one to believe that what matters for the purposes of establishing a presumption of evolutive interpretation is that the terms used in the treaty were "not static but were, by definition, evolutionary". Thus, the real interpretative problem would be that of determining when a term can be classified as generic. Once it is established that a certain term may be so classified, this would automatically give rise to a presumption of evolutive interpretation.[26] From this perspective, the establishment of such a presumption appears to be the result of an interpretative process which centers exclusively around the determination of the natural and ordinary meaning of the terms employed at the time of the treaty's application.

However, on a more careful analysis it emerges that, together with the particular nature of the terms used, international courts take into account other elements which they consider to be relevant when deciding whether a presumption of evolutive interpretation arises. In its Advisory Opinion in the *Namibia* case the Court, while placing particular emphasis on the fact that a concept such as that of the "sacred trust of civilization" was "by definition evolutionary", also referred to the specific object and purpose of the mandate institution provided by Article 22 of the Covenant of the League of Nations. As the Court observed, "[i]t cannot tenably be argued that the clear meaning of the mandate institution could be ignored by placing upon the explicit provisions embodying its principles a construction at variance with its object and purpose".[27] As one can deduce from the Court's reasoning, the consideration of the object and purpose of this institution was regarded as being an element which, in conjunction with the particular content of the terms employed, justified an evolutive interpretation of the relevant provision. The importance assigned to elements other than the "generic" character of the terms used emerges even more clearly from the Court's judgment in the *Aegean Sea Continental Shelf* case. In this case, the Court took care to stress that the presumption of evolutive interpretation was "even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes

[26] See in this respect the criticism by Thirlway 1989, p. 137, according to whom the thrust of the Court's reasoning in *Namibia* was that, "because the concepts were, in the Court's view, 'by definition evolutionary', they [the parties] 'must consequently be deemed to have accepted them as such'".

[27] Namibia, supra n. 6, para 50. The Court concludes its reasoning over the meaning to be given to the generic terms at issue by observing that "the Court is unable to accept any construction which would attach to 'C' mandates an object and purpose different from those of 'A' or 'B'". Ibidem, para 54.

designed to be of the most general kind and of continuing duration, for it hardly seems conceivable that in such a convention terms like 'domestic jurisdiction' and 'territorial status' were intended to have a fixed content regardless of the subsequent evolution of international law".[28] What is here implied is that the consideration of a treaty's object and purpose has a role to play when it comes to determining whether a term must be interpreted according to its meaning at the time when the treaty is applied. The same position was subsequently taken by the Court in its judgment in the *Dispute Regarding Navigational and Related Rights* case, where, for the purposes of justifying an evolutive interpretation of the term "*comercio*", relevance was given to the fact that the 1858 Treaty of Limits "was intended to create a legal regime characterized by its perpetuity".[29]

Thus, the Court's approach to the interpretation of generic terms is based on a combination of different elements. While in the Court's reasoning it is the kind of terminology employed by the parties that is generally considered as the key element which gives rise to the presumption of evolutive interpretation, the Court is also careful to buttress the existence of such a presumption by referring to other elements which relate to the context in which a generic term is used and to the treaty's object and purpose. In this respect, the method employed by the Court appears to reflect the integrated operation envisaged by the general rule of interpretation set forth in Article 31.1. The Court may perhaps be criticized for its tendency to rely on certain objective characteristics of a treaty—such as, for instance, its unlimited duration and the perpetuity of the regime established by it—instead of conducting a fuller assessment of the context in which a term is used and of the treaty's object and purpose. It remains, however, that the operation put in place by the Court, to the extent that it involves an inquiry into whether a certain term, read in its context and in the light of the treaty's object and purpose, may be interpreted according to its current meaning, appears to conform to the criterion set forth in Article 31.1.

Other international courts have adopted the same approach that was followed by the Court. In its report in the *US—Shrimp* case, the WTO Appellate Body, when addressing the question of the meaning to be attached to the generic term "natural resources" in Article XX.g of the GATT, placed particular emphasis on the fact that "[t]he preamble of the WTO Agreement—which informs not only the GATT 1994, but also the other covered agreements—explicitly acknowledges 'the objective of sustainable development'".[30] The finding that term included living species was justified by reference to both the recent attitude taken by the international community with regard to the protection of living natural resources and

[28] Aegean Sea Continental Shelf, supra n. 10, para 37.

[29] Navigational and Related Rights, supra n. 5, para 67. See also ibidem, paras 68–69.

[30] US—Shrimp, supra n. 13, para 129.

"the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the WTO Agreement".[31] In its report in the case concerning *China—Publications and Audiovisual Products*, the Appellate Body took into account the object and purpose of GATS for the purposes of determining whether the entry "Sound recording distribution services" had to be interpreted according to meaning of this entry at the time of interpretation.[32]

Since, for a presumption of evolutive interpretation to arise, account should be taken of the context in which generic terms are used and of the object and purpose of the treaty, the same generic term may be given different meanings depending on the treaty in which it is used. While in the context of a treaty a generic term can be interpreted according to the meaning it had at the time of the conclusion of that treaty, when used in a different treaty it can be interpreted according to the meaning it has at the time of the interpretation. This point was made by the ICJ in the *Aegean Sea* case. The Court rejected a parallel which Greece had sought to establish between the interpretation to be given to the terms used in its reservation to the 1928 General Act and the interpretation of similar terms which had been given by an arbitral award concerning the grant of a mineral oil concession.[33] In the Court's view,

> [w]hile there may well be a presumption that a person transferring valuable property rights to another intends only to transfer the rights which he possesses at that time, the case appears to the Court to be quite otherwise when a State, in agreeing to subject itself to compulsory procedures of pacific settlement, excepts from that agreement a category of disputes which, though covering clearly specified subject-matters, is of a generic kind.[34]

According to this line of reasoning, the fact that a term has been classified as generic by a tribunal in the context of the interpretation of a certain treaty is an element which, *per se*, can hardly be considered as decisive for the interpretation to be given to the same or a similar term when it is used in a different treaty. Whether this term is to be interpreted according to its contemporary meaning or not is a question which must be assessed in the light of the specific circumstances of each treaty.[35]

---

[31] Ibidem, para 131.

[32] China—Publications and Audiovisual Products, supra n. 14, para 395.

[33] Greece referred to the arbitral award in the *Petroleum Development Ltd.* versus *Sheikh of Abu Dhabi* case, where the arbitrator held that the grant of an oil concession in 1939 was to be interpreted as not including the continental shelf.

[34] Aegean Sea Continental Shelf, supra n. 10, para 77.

[35] But see Arato 2010, pp. 491–492, who held the view that it "is not unrealistic to imagine tribunals relying on one another's judgments about the evolutive nature of terms, even when interpreting different treaties—the statement that a treaty is evolutive by virtue of its terminology is an imputation on the basis of language, not necessarily in consideration of subject-matter, context, or object and purpose".

4 A Rebuttable Presumption? The Role of the Subsequent Practice of the Parties and of Preparatory Works

As we have seen, the effect of the use of generic terms in a treaty is to give rise to a presumption that these terms are to be interpreted according to their meaning at the time of the application of the treaty. While international courts have never addressed this issue explicitly, it may be held that this is a rebuttable presumption. The question which then arises is what elements must be taken into account for purposes of confirming or rebutting the interpretative presumption stemming from the use of generic terms. Put differently, what other means of interpretation come into play for the determination of whether or not the meaning of a treaty term has to be interpreted in an evolutive manner, and what is the relation between these different means of interpretation?

In its judgment in the *Dispute Regarding Navigational and Related Rights* case, the ICJ referred to the subsequent practice of the parties within the meaning of Article 31.3.b as a means of interpretation by which the meaning of a treaty term or treaty provision may change over time.[36] In that case, the interpretation based on the subsequent practice of the parties and the evolutive interpretation based on the use of generic terms were presented as two alternative means of interpretation by which one may justify the taking into account of an evolution in the meaning of a term. No reference was made to the possibility of applying both techniques at the same time for the purpose of determining the solution to be given to the interpretative problem at issue. However, such a possibility can hardly be denied. The contemporaneous application of both techniques is a solution which conforms best with the rule of interpretation set forth in Article 31 of the Vienna Convention. In certain cases, the subsequent practice of the parties may provide a confirmation of the interpretative presumption which arises in connection with the use of generic terms. Indeed, in the *Dispute Regarding Navigational and Related Rights* case, the interpretation based on the evolutive character of the term "*comercio*" and the interpretation based on the subsequent practice of Costa Rica and Nicaragua pointed to the same result.[37] It may happen, however, that the application of these two techniques leads to different results as to the meaning to be given to a treaty term. This raises the problem of which of these two elements must be regarded as the most relevant for purposes of determining whether or not a term is to be interpreted according to the meaning it has at the time of the interpretation. An answer to this question cannot be found in Article 31 of the Vienna Convention. However, since the subsequent practice reflects the actual agreement of the parties,

---

[36] Navigational and Related Rights, supra n. 5, para 64.

[37] In his declaration attached to the Court's judgment, Judge Skotnikov, while contesting the correctness of the methods of interpretation applied by the Court, agreed with the Court's conclusion that the term "*comercio*" had to be interpreted according to its meaning at the present time. In his view such an interpretation found support in the subsequent practice of the parties.

it seems that in principle this element provides a more solid ground for justifying the interpretation of treaty terms than the reference to their evolutive character.[38]

A more complex issue concerns the role to be given to preparatory works. As we have seen, the approach followed by the Court to justify an evolutive interpretation of generic terms is based on the assessment of the parties' common intention at the time the treaty was concluded. The emphasis thus placed on the parties' original intent seems to imply that the preparatory works of a treaty and the other circumstances of its conclusion should be given relevant weight for the purposes of confirming or rejecting the interpretative presumption which arises in connection with the use of generic terms. It might be held that the preparatory works are an indispensable means for assessing the parties' original intention. Indeed, the main criticism levelled against the Court's approach is that the Court failed to provide historical evidence to buttress the presumption that it was the parties' intention at the time of the conclusion of the treaty to give the terms used a meaning capable of evolving.[39]

As is well known, under the general rules of treaty interpretation codified in the Vienna Convention, preparatory works and the other circumstances surrounding the conclusion of a treaty have been given the role of supplementary means of interpretation to which recourse must be had in order to confirm the interpretation resulting from the application of the criteria stated in Article 31 or when the application of these criteria leads to an unsatisfactory result. Even assuming that preparatory works should have a greater role in situations in which one is confronted with a question of inter-temporal nature, such a role must not be exaggerated. Thus, it would be excessive to suggest that a term cannot be given an evolutive meaning unless one is able to find evidence to that effect in the preparatory works.[40] This would substantially mean that preparatory works are to be regarded as the main, if not the only, element to be taken into account for the purpose of determining whether a term can be given an evolutive meaning. As provided by Article 32 of the Vienna Convention, reference to preparatory works is most useful in order to confirm the interpretative presumption arising as a consequence of the use of generic terms in a treaty.[41] When the preparatory works provide clear evidence that the parties did not intend to give to a term a meaning which changed over time, this evidence should generally lead to a rejection of the presumption in favor of an evolutive interpretation. While in this case the

[38] For the view that "the agreement of the parties, as evidenced by their subsequent practice, can sometimes provide a higher legitimacy than the invocation of an inherently evolutionary meaning", see Nolte 2011, p. 143.

[39] See Thirlway 1989, p. 137; Dawidowicz 2011, p. 221.

[40] This seems to be the view of Judge Skotnikov. See his declaration attached to the Court's judgment in Navigational and Related Rights, supra n. 5.

[41] In its US—Shrimps report, the Appellate Body referred incidentally to the preparatory works of the GATT by observing that "the drafting history does not demonstrate an intent on the part of the framers of the GATT 1947 to exclude 'living' natural resources from the scope of application of Article XX(g)". Supra n. 13, note 114.

preparatory works appear to have a greater role than the determination of the ordinary meaning of a term in its context and in the light of the treaty's object and purpose, the Vienna Convention seems to contemplate this possibility, as it provides that "[a] special meaning shall be given to a term if it is established that the parties so intended".[42] Moreover, it may be suggested that under certain circumstances it could be justified to resort to an evolutive interpretation of generic terms despite the indication to the contrary flowing from the preparatory works. Thus, for instance, in the context of multilateral treaties, particularly when several parties did not participate in the works leading to the adoption of the text of the treaty but only acceded to that treaty at a later stage, it may be doubted that indications drawn from the preparatory works can be regarded as reflecting the parties' common intention at the time of the conclusion of the treaty.[43] In this scenario, in so far as preparatory works may not be indicative of the parties' common intention, the weight to be given to this element may correspondingly be reduced.

The supplementary means of interpretation referred to in Article 32 appear to play a greater role when the problem of interpreting generic terms arises with regard to the interpretation of international acts other than treaties. The ICJ has recognized that the rules of interpretation set forth in the Vienna Convention apply by analogy to the interpretation of unilateral acts of States, such as the unilateral declaration of acceptance of the jurisdiction of the Court,[44] and of acts of international organizations, such as UN Security Council resolutions.[45] Most recently, the Seabed Disputes Chamber of the International Tribunal of the Law of the Sea, under the presidency of Tullio Treves, has taken the same view with respect to the interpretation of certain regulations adopted by the International Seabed Authority.[46] While international courts accept that the criteria of interpretation stated in the Vienna Convention provide guidance as to the interpretation of these other acts, they also appear to suggest that certain elements, which in the context of treaty interpretation rank among the supplementary means of interpretation, have a greater weight in the context of the interpretation of unilateral acts of States or of acts of international organizations. Thus, for instance, in its judgment in the *Fisheries Jurisdiction* case, the ICJ took care to stress that, when interpreting a State's declaration of acceptance of the Court's jurisdiction, "due regard" must be had "to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court", adding that

---

42 See Article 31.4 of the Vienna Convention.

43 On this point see Fitzmaurice 1957, p. 205, who found that in cases such as this "the very expression 'the intentions of the parties' is unsatisfactory".

44 ICJ: Fisheries Jurisdiction (Spain v. Canada), Judgment (4 December 1998), para 46.

45 ICJ: Accordance with International Law of the Unilateral Declaration of Independence with Respect to Kosovo, Advisory Op. (22 July 2010), para 94.

46 ITLOS: Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Seabed Disputes Chamber, Advisory Op. (1 February 2011), para 60.

> [t]he intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served.[47]

Given the importance attached, as a rule, to evidence pertaining to the circumstances of the preparation of the unilateral act, it may be expected that evidence of this kind must be given an even greater role, particularly if compared to what happens in the context of treaty interpretation, when it comes to determining whether a generic term used in such an act must be interpreted in an evolutive manner. It must be noted, however, that in the only case where such a question arose, the Court paid little attention to the differences between the interpretation of treaties and the interpretation of unilateral acts. In the *Aegean Sea Continental Shelf* case, while accepting in principle that "in interpreting reservation (b) regard must be paid to the intention of the Greek Government at the time when it deposited its instrument of accession to the General Act", the Court relied on the evolutionary character of the term "territorial statute" without attaching particular significance to the specific features of the act to be interpreted.[48]

5 Conclusions

It can hardly be said that the general rule of interpretation stated in Article 31.1 of the Vienna Convention gives a clear indication in favor of an evolutive interpretation of generic terms. However, Article 31.1 clearly indicates that, when interpreting a treaty term or a treaty provision, emphasis must be placed primarily on certain objective factors such as the ordinary meaning of a term, the context in which it is used and the treaty's object and purpose. When interpreting generic terms, international courts appear to stick to this indication in so far as they seek to link the evolutive interpretation of these terms to objective factors, in particular the fact that the meaning of the term used has changed over time and the consideration of the context and of the treaty's object and purpose. Admittedly, they do not refer to the general rule of interpretation stated in the Vienna Convention in order to

[47] Fisheries Jurisdiction (Spain v. Canada), supra n. 44, para 49. In the advisory opinion on *Kosovo*, the Court noted that "[t]he interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions". Kosovo, supra n. 45, para 94.

[48] Aegean Sea Continental Shelf, supra n. 10, p. 29, para 69. In its judgment in the *Dispute Regarding Navigational and Related Rights* case, the Court took care to note that the Court's reasoning in the *Aegean Sea* case with regard the interpretation of generic terms, "[t]hough adopted in connection with the interpretation of a reservation to a treaty", was "fully transposable for purposes of interpreting the terms themselves of a treaty". Navigational and Related Rights, supra n. 5, para 66.

justify their solution, preferring, instead, to rely on an argument which is based on the identification of the presumed intention of the parties at the time of the conclusion of the treaty. Yet this reference to the presumed intention of the parties appears to amount to no more than a *fictio juris*. Historical evidence showing what the intention of the parties was upon the conclusion of a treaty is rarely taken into consideration. The presumed intention is deduced from objective factors which are substantially the same factors on which one should rely when interpreting a treaty according to the general criterion stated in the Vienna Convention.

The solution adopted by international courts with regard to the interpretation of generic terms may be regarded as providing a further indication of the tendency to interpret treaties in an objective manner.[49] It might be objected that this solution may lead to an interpretation of a treaty beyond the actual consent of the parties and, in turn, may undermine the predictability of the legal commitments which the parties intended to assume with the conclusion of the treaty. But this risk should not be overstated. Moreover, the opposite presumption—according to which a term would have to be interpreted according to its meaning at the time of the conclusion of the treaty—might also risk undermining the predictability of treaty commitments. This point was convincingly made by the WTO Appellate Body with regard to the interpretation of GATS and GATS Schedules. In a passage which deserves to be reported in its entirety, the Appellate Body observed:

> (…) interpreting the terms of GATS specific commitments based on the notion that the ordinary meaning to be attributed to those terms can only be the meaning that they had at the time the Schedule was concluded would mean that very similar or identically worded commitments could be given different meanings, content, and coverage depending on the date of their adoption or the date of a Member's accession to the treaty. Such interpretation would undermine the predictability, security, and clarity of GATS specific commitments, which are undertaken through successive rounds of negotiations, and which must be interpreted in accordance with customary rules of interpretation of public international law.[50]

Once it is realized that the problem of interpreting generic terms cannot be addressed simply on the basis of one presumption or another but, like any interpretative problem, must be assessed in the light of the means of interpretation set forth in the Vienna Convention, it becomes important to ensure that these means of interpretation are effectively and adequately used. International courts should make clear in the reasoning presented in their judgments that when they interpret a generic term in an evolutive manner, this is the result of an operation which involves a full assessment of the elements indicated in the general rules of interpretation. It is submitted that the reference to these rules provides greater legitimacy than the invocation of the presumed intention of the parties.

---

[49] On this tendency see, among others, the report prepared by Mr. Nolte on "Treaties over time, in particular: Subsequent Agreement and Practice", in Report of the International Law Commission on the work of its sixty-third session, UN doc. A/63/10, p. 370, para 15.

[50] US—Shrimp, supra n. 13, p. 161, para 397.

References

Arato J (2010) Subsequent practice and evolutive interpretation: techniques of treaty interpretation over time and their diverse consequences. Law Pract Int Law Tribunals 9:443–494

Bernhardt R (1999) Evolutive treaty interpretation, especially of the European Convention on Human Rights. Ger Yearb Int Law 42:11–25

Bjorge E (2011) International Court of Justice, *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* Judgment of 13 July 2009. Int Comp Law Q 60:271–279

Dawidowicz (2011) The effect of the passage of time on the interpretation of treaties: some reflections on *Costa Rica* v Nicaragua. Leiden J Int Law 24:201–222

Dupuy P-M (2011) Evolutionary interpretation of treaties: between memory and prophecy. In: Cannizzaro E (ed) The law of treaties beyond the Vienna Convention. Oxford University Press, Oxford, pp 123–137

Fitzmaurice G (1957) The law and procedure of the International Court of Justice 1951–4: treaty interpretation and other treaty points. Br Yearb Int Law 33:203–247

Gaja G (1999) Does the European Court of human rights use its stated methods of interpretation? In: Divenire sociale e adeguamento del diritto. Studi in onore di Francesco Capotorti. Giuffrè, Milan, pp 213–227

Jennings R, Watts A (1992) Oppenheim’s international law, vol I. Longman, London

Jiménez de Aréchaga E (1978) International law in the past third century. Recueil des Cours 159:1–343

Linderfalk U (2008) Doing the right thing for the right reason—why dynamic or static approaches should be taken in the interpretation of treaties. Int Community Law Rev 10:109–141

Nolte G (2011) Subsequent practice as a means of interpretation in the jurisprudence of the WTO appellate body. In: Cannizzaro E (ed) The Law of treaties beyond the Vienna Convention. Oxford University Press, Oxford, pp 138–144

Simma B, Kill T (2008) Harmonizing investment protection and international human rights: first steps towards a methodology. In: Binder C, Kriebaum U, Reinisch A, Wittich S (eds) International investment law for the 21st century. Essays in honour of Christoph Schreur. Oxford University Press, Oxford, pp 678–707

Thirlway H (1989) The law and procedure of the International Court of Justice 1960–1989 part one. Br Yearb Int Law 60:1–157

Thirlway H (1991) The law and procedure of the International Court of Justice 1960–1989 part three. Br Yearb Int Law 62:1–75

Van Damme I (2006) Some observations about the ILC Study group report on the fragmentation of International Law: WTO treaty interpretation against the background of other international law. Finn Yearb Int Law 17:21–38