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Article

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Evolutive Interpretation by the WTO Adjudicator

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ABSTRACT

Several types of changes can take place between the conclusion of a treaty and when its provisions call for interpretation, e.g. changes in the political, social, historical or legal context; technological changes; linguistic changes; or changes in the law. Traditionally, interpreters refused to consider changes that may have occurred since the treaty's conclusion. Today, many argue that it is more legitimate for a treaty interpreter to take account of these changes and use an 'evolutionary' or 'dynamic' interpretation. The issue of changes is particularly relevant in the context of the World Trade Organization (WTO) Treaty, because it combines long-standing provisions with more recent ones, and because international trade has evolved greatly, notably with electronic trade (e-commerce) and new means of distribution that did not exist when the WTO was concluded. The different types of changes discussed in this article may be grouped into four non-mutually exclusive types of situations, which will be examined through the prism of the interpretation process set out in Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT). While different types of evolutionary interpretations can be considered under standard rules of interpretation in public international law, the use of the term 'evolutionary interpretation' allows for a more global understanding of the phenomenon, and might have, at the very least, a symbolic value.

INTRODUCTION

Several types of changes can take place between the date of the conclusion of a treaty and the date when its provisions call for interpretation. They may include changes in the political, social, or historical context; technological changes that render certain things feasible that were not so (and could not have been) upon the treaty's conclusion; linguistic changes in the ordinary or special meaning of terms; or changes in the law that is either applicable or should be considered—to name but a few.[1]

Under the principle of intertemporality, however, when determining the reference period to interpret the terms of treaties between States, traditional doctrine has always

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1 On this subject, see the inaugural conference given by Alain Pellet to The Hague Academy in 2007: Alain Pellet, 'L'adaptation du droit international aux besoins changeants de la société internationale' in *Collected Courses of The Hague Academy of International Law* 329 (2007), Martinus Nijhoff, Leiden, 2008, p. 17 onward [Pellet].

viewed the date of the treaty's conclusion as the relevant date.[2] Sir Gerald Fitzmaurice wrote in 1957:

> The terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded.[3]

A treaty interpreter following this approach would refuse to consider the changes that may have occurred since the treaty's conclusion. Others argue that it would be more legitimate for a treaty interpreter to take account of these changes.

In that context, certain international tribunals have referred to 'evolutive' or 'evolutionary' interpretation. For instance, World Trade Organization (WTO) Appellate Body (AB) used the concept of 'evolutive interpretation' as opposed to 'static' interpretation in the *US – Shrimp* AB Report.[4] International adjudicatory bodies also speak of 'dynamic'[5] interpretation, allowing integration of contemporary elements when examining international treaties, some of which had been drafted decades previously. Using this 'dynamic', 'evolutive', or 'evolutionary' interpretive method avoids locking the scope of the convention into the past, offering a more contemporary reading that uses new concepts, facts, or rights.

The issue of 'changes' is particularly relevant in the context of the WTO Treaty, because it combines long-standing provisions with other, more recent ones, adopted simultaneously. The whole forms a 'single undertaking', a single agreement, despite several apparent temporal and circumstantial incongruities. International trade has also evolved greatly, notably to include electronic trade (e-commerce) that did not exist when the WTO Agreement was concluded. Methods of access and restrictions to trade have, in part, taken forms that were inconceivable upon the WTO Treaty's conclusion. Non-commercial values that States defend in their international relations have also changed greatly. Moreover, WTO Members have adopted a series of decisions implementing treaty provisions, and international law itself (external to the law of the WTO, but pertinent in interpreting its place and role in public international law) has evolved since the WTO Treaty's conclusion.

This article will question how international law in general, and WTO law specifically, have dealt with these changes. More particularly, with a view to understanding the meaning and scope of the expression 'evolutive interpretation' and whether it adds to

2 The principle of intertemporality prescribes interpreting treaties based on conceptions that are prevalent at the moment of the conclusion of such treaties. The principle of intertemporality as Huber formulated it is as follows: 'a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time which a dispute in regard to it arises or falls to be settled.' *Isla de Palmas Case (Netherlands* v *United States)*, 2 *Reports of International Arbitration Awards* 831 at p. 845.

3 Sir Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points' (1957) 33 *BYBIL* 203 at p. 212.

4 WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para 130 ['*US – Shrimp*'].

5 For a list of judgements referring to one or the other of these terms, see Panos Merkouris '(Inter)Temporal Considerations in the Interpretive Process of the VCLT: Do Treaties Endure, Perdure or Exdure?' (2014) 45 *NYIL* 121 at p. 131 [Merkouris, *(Inter)temporal*].

standard rules of interpretation, the present study attempts to determine how the traditionally accepted rules of interpretation—including, notably, the Vienna Convention on the Law of Treaties (VCLT) rules—consider and deal with different types of changes taking place between the conclusion of the treaty and its interpretation. Through the identification of these different types or categories of changes, it is hoped to bring a more structured understanding of evolutive interpretation, in particular, in the context of the WTO.

The different types of changes discussed in this article may be grouped into four types of situations, or categories of changes, which can be examined through the prism of the steps or sequential items of the interpretation process in VCLT Articles 31–33. For each of these situations, the relevant rules of interpretation will be discussed to determine whether and how they can take account of changes that occurred between the conclusion of the treaty and the day of its interpretation. The first type or category of changes concerns *linguistic* changes for the ordinary or special meaning of terms. The second type of change looks at the changes that occur in the *broad context*. The third type of situation concerns *physical or technical transformations* and evolutions that warrant an evolutive reading due to the object and purpose of the treaty. Finally, the fourth type of change comes from changes to other relevant and related treaties or aspects of international law.

However, these four types of changes or four categories are not mutually exclusive. On the contrary, as can be seen throughout this article, a situation may include changes that can be considered or qualified differently, and which may call for the simultaneous application of several rules of interpretation in international law. Indeed, interpretation of treaties and the sequential stages of VCLT Articles 31–33 are known to compose a holistic process.[6]

This article first offers a brief overview of the literature on this topic. This will demonstrate how divided the writings on the topic are, and provide evidence that some sort of classification would be a useful tool. It will then turn to the VCLT (a decisive component in the rules and principles of treaty interpretation) and its history to shed light on the subject, before looking at the relevant practice of certain international tribunals. Following this, the article will discuss the WTO jurisprudence on some of these changes, before offering more general concluding comments on the subject.

I. EVOLUTIVE INTERPRETATION AND ITS DOCTRINAL APPROACHES

Authors have attempted to define the concept of evolutive, evolutionary, or dynamic interpretation. The approaches set out in this article are given varying levels of importance. It is nevertheless necessary to note that disagreements exist on several aspects of evolutive interpretation. Inevitably, there are different perspectives in the value ascribed to the negotiators' intentions, given the very text of the treaty. Some commentators consider that the basis of evolutive interpretation can be derived only from the intention of the treaty's negotiators, others add the reference to the object and purpose of the

6 On this subject, see WTO Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, para 81, nn 44.

treaty as justification for an evolutionary interpretation. It seems that still other types of changes (evolution of the social context and changes to applicable law) are derived from an application of the VCLT rules. All accept that domestic and international law may evolve, but one might wonder if the difference between the evolution of a single norm and that of the whole legal system would help provide an answer.

Christian Djeffal views evolutive interpretation as a means to revise an already existing interpretation. He uncovers several approaches, notably based on the object and purpose of the treaty or on the generic terms it uses, emphasizing the absence of consensus on the topic.[7] He suggests a method by which the different arguments for a static interpretation (or applying the principle of intertemporality) and for an evolutive interpretation are balanced against each other to determine the result. He nonetheless finds all these possibilities within the VCLT.[8] Luigi Crema also follows this approach, identifying different factors of evolution—whether changes in the meaning of a term, systemic changes, or new considerations linked to the object and purpose of the treaty—without any link to the intention of the parties.[9]

Pierre-Marie Dupuy sums up the object of evolutive interpretation generally: 'a judge is often requested to redefine the meaning of a treaty without altering its nature. Such a manner of interpreting treaties, sometimes called an evolutionary interpretation, is no mean feat. In many cases the very survival of the agreement and its applicability to present-day concerns are at stake'.[10] This idea of the survival of the treaty is also at the heart of Panos Merkouris' vision, which speaks of treaties as '"living instruments" that need to evolve in order to survive'.[11]

Other authors propose a definition of the term, but are more conservative in the changes that they consider the term encompasses. Eirik Bjorge, for example, inspired by the jurisprudence of the International Court of Justice (ICJ), emphasizes the intention of the parties.[12] He concludes that evolutive interpretation is not so much a rule of interpretation as 'the result of a proper application of the usual means of interpretation, as a means by which to establish the intention of the parties'.[13] For him, the parties would therefore have wanted the changes that this evolutive interpretation covers, during the conclusion of the treaty.[14]

7 'There was no agreement at the outset and no agreement has been reached ever since.' Christian Djeffal, *Static and Evolutive Treaty Interpretation* (Cambridge: Cambridge University Press, 2016) at pp. 348–349 [Djeffal].

8 Djeffal, supra note 7, at p. 353.

9 Luigi Crema, 'Subsequent Agreement and Subsequent Practice within and outside the Vienna Convention' in Georg Nolte (ed.), *Treaties and Subsequent Practice* (Oxford: Oxford University Press, 2013) 13 at p. 22.

10 Pierre-Marie Dupuy, 'Evolutionary Interpretation of Treaties: Between Memory and Prophecy' in Enzo Canizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford: Oxford University Press, 2011) 123 at p. 125.

11 Merkouris, *(Inter)temporal*, supra note 5, at p. 131.

12 Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford: Oxford University Press, 2014) [Bjorge].

13 Bjorge, supra note 12, at p. 2.

14 International Law Commission, *Report of the International Law Commission: Sixty-eighth Session (2 May–10 June and 4 July–12 August 2016)*, Doc UN A/71/10 (2016) at pp. 182–83 [International Law Commission, *Report of the 68th Session*].

Alan Boyle also examines the idea of intention, and briefly looks at the role of VCLT Article 31(3)(c), as does Paolo Palchetti.[15] Similarly, Theodore Georgopoulos also emphasizes the parties' intention at the treaty's conclusion and suggests that any subsequent evolutive interpretation would have to draw on this. Even the broad definition he proposes depends on the evolution of law, in the first instance, and not on social evolution in general.[16] The same is true for Brigitte Stern, who criticizes the dissenting opinion of a judge, as it does not follow the parties' intention. She makes a distinction between the generic terms (which will evolve), and specific terms (to be interpreted according to the meaning in force at the treaty's conclusion).[17] Julian Wyatt also defends the idea of primacy of the intention. However, he argues that the VCLT is unhelpful in determining whether a dynamic or static interpretation should be adopted.[18] Alain Pellet generally believes that treaties should be interpreted by taking into account changes that take place in society. [19]

Referring to evolutive interpretation, Bruno Simma criticizes the ICJ, by suggesting that it should not simply content itself with Article 31(3)(c), but should also rely on the ordinary meaning of the terms.[20]

Finally, James Crawford, who may be the most sceptical expert, underlines:

> We seem to have a Court that is evolutionary when it is not really necessary but not evolutionary when the text invites such an interpretation.[21]

The above survey of doctrinal sources demonstrates that the concept of evolutive interpretation is *a priori* not clear and there is no consensus on whether and how to take into account various types of changes that occur between the conclusion of the treaty and the date of its interpretation.

II. EVOLUTIVE INTERPRETATION IN THE VCLT NEGOTIATIONS

The issue of temporality in treaty interpretation emerged in a sporadic manner during the two decades preceding the conclusion of the VCLT—without, however, being addressed directly. First, the Institute of International Law attempted to propose rules for interpreting treaties over the course of three sessions. Notably, the importance to be

15 Alan Boyle, 'Further Development of the 1982 Law of the Sea Convention: Mechanisms for Change' (2005) 53 ICLQ 563 at pp. 567–68; Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007) p. 244; Paulo Palchetti, 'Interpreting "Generic Terms": Between Respect for the Parties' Original Intention and the Identification of the Ordinary Meaning' in Nerina Boschiero, Tullio Scovazzj, Cesare Pitea, and Chiara Ragni (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (The Hague: Springer, 2013) 91 at pp. 91–2.

16 Theodore Georgopoulos, 'Le droit intertemporel et les dispositions conventionnelles évolutives' (2004) 108 *RGDIP* 123 at p. 130.

17 Brigitte Stern, *20 ans de jurisprudence de la Cour international de Justice: 1975–1995*, (Martinus Nijhoff: The Hague, 1998) at pp. 80–1.

18 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*, Thesis, University of Geneva, 2017 at 846–7.

19 Pellet, supra note 1.

20 Bruno Simma, 'Miscellaneous Thoughts on Subsequent Agreements and Practice' in Georg Nolte (ed.), *Treaties and Subsequent Practice* (Oxford: Oxford University Press, 2013) 46 at p. 48 [Simma].

21 Bjorge, supra note 12, at p. v.

accorded to the parties' intention in the process of interpretation was debated at length. However, this was mainly understood and discussed with respect to intention at the time of the treaty's conclusion.[22]

Taking up the torch, the International Law Commission (ILC) decided to codify the law of treaties.[23] Within this framework, a draft international convention was progressively drawn up. Over the course of preliminary discussions, successive rapporteurs raised the question of the relevant moment for interpretation—the question of intertemporality.

Initially, in 1964 the reference to the 'rules of general international law *in force at the time of its conclusion'*, was situated within the first paragraph of what now became Article 31, and so qualified the entirety of the interpretation in good faith principle and the 'ordinary meaning' of the terms.

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to each term:

(a) In the context of the treaty and in the light of its objects and purposes; and
(b) In the light of the rules of general international **law in force at the time of its conclusion**[24]

However, in the 1966 draft articles, the reference to 'in force at the time of its conclusion' was removed by Rapporteur Waldock, 'leaving the application of the intertemporal law to be implied'[25].

In the end, Article 31 was adopted without any reference to intertemporality. The Commission therefore avoided this issue and the general rule of interpretation of Article 31(1) became the following:

> A treaty shall be interpreted in good faith 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.

22 See Institute of International Law, 1950 at pp. 366–460; Institute of International Law *Yearbook of the Institute of International Law, Sienna Session*, Vol. 44, Book I, Institute of International Law, 1952 at pp. 297–223; Institute of International Law, *Yearbook of the Institute of International Law, Sienna Session* Vol. 44 Book II, Institute of International Law, 1952 at pp. 359–406; Institute of International Law, *Yearbook of the Institute of International Law, Aix-en-Provence Session*, Vol. 45, Book I, Institute of International Law, 1954 at pp. 225–27; Institute of International Law, *Yearbook of the Institute of International Law, Grenada Session*, Vol. 46, Institute of International Law, 1956 at pp. 317–59.

23 See the decision in International Law Commission, 'Report of the International Law Commission on the work of its first Session' in *Yearbook of the International Law Commission 1949*, Vol. 1 at p. 281 (Doc UN A/CN.4/13).

24 Article 69, 'Report of the International Law Commission on the Work of its Sixteenth Session' (Doc UN A/5809) in the *Yearbook of the International Law Commission 1964*, Vol. 2, New York, UN, 1964 at p. 199 (Doc UN A/CN.4/SER.A/1964/Add.1) [emphasis ours]. This reference to the 'relevant rules of international law applicable' is now included in the third paragraph of Article 31(3).

25 International Law Commission, *Yearbook of the International Law Commission*, Vol. 2, New York, UN, 1966 at p. 97 (Doc UN A/CN.4/Ser.A/1966/Add.1).

The search for the 'ordinary meaning to be given to the terms of the treaty in their context' often begins with consulting current language dictionaries, without particularly relying on the history of the language.[26] From that point onward, the adjudicators necessarily focus on the contemporary semantics of the words[27], leading inevitably to an evolution in the interpretation of the term.[28] In this way, an emphasis placed on the treaty's terms is not opposed to a dynamic interpretation, but on the contrary, participates in it. It is important to note that the term 'context' in the first sentence of Article 31, is linked to the 'ordinary meaning' of the terms. Therefore, it is useful to note the conceptual proximity between the text and the context. The evolution of language may have an impact on the interpretation of the terms of the treaty. On this topic, Judge Spender offered the following thoughts:

> Words communicate their meaning from the circumstances in which they are used. In a written instrument their meaning primarily is to be ascertained from the context, the setting, in which they are found.[29]

It is generally argued that the 'context' primarily refers to the legal context.[30] This would explain how some authors consider that only the 'context' of the term at the time of the conclusion of the treaty, and not that contemporary to its interpretation[31] , is valid.

26 David Pavot, 'The Use of Dictionary by the WTO Appellate Body at the WTO: Beyond the Search of Ordinary Meaning' (2013) 4:1 *Journal of International Dispute Settlement* 29. See also *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, Advisory opinion, PCIJ (Ser. B) No. 2 at pp. 33–4.

27 Umberto Eco evokes the contemporaneity of the semantics of dictionaries as follows: '*je persiste à penser que, à l'intérieur des limites d'une certaine langue, il existe un sens littéral des items lexicaux, celui que les dictionnaires enregistrent en premier, celui que l'homme de la rue citerait en premier si on lui demandait le sens d'un mot donné*', Umberto ECO, *Les limites de l'interprétation*, Paris, Grasset, 1992, introduction. See also Andrea Binachi, 'Textual Interpretation and (International) Law Reading: The Myth of (In)determinacy and the Genealogy of Meaning' in Pieter Bekker (ed.), *Making Transnational Law Work in the Global Economy—Essays in Honour of Detlev Vagts* (Cambridge: Cambridge University Press, 2010) 34 at pp. 39–40.

28 This perspective is also advanced in Manfred Elsig and Joost Pauwelyn, 'The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals' in Jeffrey Dunoff and Marka Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge: Cambridge University Press, 2013) 445 at p. 451.

29 *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advisory opinion, Separate Opinion of Judge Sir Percy Spender, ICJ Reports 1962, p. 182 at para 184.

30 Oliver Dörr, 'Article 31: General Rule of Interpretation' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer, 2012) 521 at p. 550; Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff, 2009) p. 427. For him, only Article 32 would exceptionally permit overlooking the legal context to embrace the non-legal context of the negotiation of the treaty (*travaux préparatoires*). Other authors, including this one, defend the opinion that the context must be understood in a broader sense. The proposed interpretation would not make reference to the legal context, but to the more sociological one linked to the evolution of language. It is thus a broader context than the legal context of VCLT Article 31(2), linked to the internal system of the treaty under examination, permitting to take into account the external context linked to the 'ordinary meaning of the words'.

31 See Peter Mavroidis, 'Looking for Mr. and Mrs. Right: Ten Years of Appellate Body at the WTO' in Giorgio Sacerdoti, Alan Yanovich, and Jan Bohanes (eds), *The WTO at Ten: The Contribution of the WTO Dispute Settlement System* (Cambridge: Cambridge University Press, 2006) 348 at pp. 357–58; Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, (Oxford: Oxford University Press, 2009) at p. 216 [Van Damme].

However, a reading of the 'ordinary meaning of the terms in their context' would not exclude consideration of a more extended, non-legal context; integrating the sematic evolution of the relevant terms into the context. In addition, the scope of the 'context' in Article 31(2) CVLT, when it states: 'The context shall comprise, in addition to the text, including its preamble and annexes. . .', is clearly not limitative: 'the context *shall comprise'* but is not 'limited to'.

Although the VCLT does not directly regulate the temporal elements in which interpretation should take place, certain legal events following the treaty's conclusion are explicitly mentioned and are to be taken into account together with the original treaty's context:

There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) Any relevant rules of international law applicable in the relations between the parties.

Such subsequent agreements or practices confirm the relevance of the possible additions to the original treaty. Article 31, while including three distinct sub-paragraphs, contains two major categories.

First, sub-paragraphs (3)(a) and (b) of Article 31 envisage the situation in which a subsequent agreement or practice modifies the interpretation of the initial treaty. This approach effectively permits the taking into account of changes to the initial treaty desired by the parties; but their application is restrained. On the one hand, a subsequent agreement or practice requires renewed State consent. The parties must, in one way or another, demonstrate their wish for evolution to take place after the first treaty's conclusion. On the other hand, these two paragraphs refer to acts within the boundaries of the original treaty. Consequently, an explicit proximity must exist between the first treaty and the subsequent acts, whether arising from practice or from an agreement.[32] It should be noted that these subsequent agreements and practices also concern secondary law originating from committees and advisory boards.[33]

The particularity of sub-paragraph 3(c) of Article 31, in comparison with sub-paragraphs (3)(a) and (3)(b) of Article 31 is highlighted by Georg Nolte in the ILC's

32 International Law Commission, *First report on subsequent agreements and subsequent practice in relation to treaty interpretation,* Doc UN A/CN.4/660 (2013) at para 76–8, 111–15 [International Law Commission, *First Report on Agreements*]; International Law Commission, *Second report on subsequent agreements and subsequent practice in relation to treaty interpretation,* Doc UN A/CN.4/671 (2014) at para 3–19 [International Law Commission, *Second Report on Agreements*].

33 See International Law Commission, *Report of the International Law Commission: Sixty-seventh Session (4 May–5 June and 6 July–7 August 2015)*, Doc UN A/CN.4/683 (2015) at p. 16 [International Law Commission, *Report of the 67th Session*], see also infra Section IV.C.

extensive study on subsequent agreements and practice.[34] He emphasizes that sub-paragraphs (a) and (b) very specifically concern agreements or practice 'regarding the interpretation of the treaty', while sub-paragraph (c) touches on the systemic integration of international law.[35] This was also the vision adopted by the ICJ in *Denmark* v *Norway*[36] , which excluded the application of Articles 31(3)(a) and 31(3)(b), for lack of a sufficiently explicit reference to the original treaty in the subsequent acts.[37] Therefore, the new agreement or the new practice must 'relate . . . sufficiently'[38] to the previous treaty. Article 31(3)(c) appears to envisage a systemic integration of international law, broader than the rigid fraternity of the practice and agreements envisaged under sub-paragraphs (a) and (b). Furthermore, the term 'rules' in Article 31(3)(c) seems broader in scope than the terms 'agreement' (Article 31(3)(a)) and 'practice' (Article 31(3)(b)).[39]

The dynamic dimension of international law seems to have been recognized in the terms of sub-paragraph (3)(c) of VCLT Article 31, which prescribes that, in addition to the context, interpretation must also consider 'Any relevant rules of international law applicable in the relations between the parties'. On this topic, Sinclair argues:

> There is some evidence that the evolution and development of international law may exercise a decisive influence on the meaning to be given to expressions incorporated in a treaty.[40]

Indeed, it seems that the birth of a 'relevant rule of international law' subsequent to the first treaty's conclusion would permit modification of the scope of obligations that it initially contained.[41]

34 For the most recent version of the draft conclusions, see International Law Commission, *Report of the International Law Commission: Seventieth Session (30 April–1 June and 2 July–10 August 2018)*, Doc UN A/73/10 (2018) at p. 13 [International Law Commission, *Report of the 70th Session*].

35 'It is also not always easy to distinguish subsequent agreements and subsequent practice from subsequent "other relevant rules of international law applicable in the relations between the parties" (Article 31 (3)(c)). It appears that the most important distinguishing factor is whether an agreement is made "regarding the interpretation" of a treaty.' International Law Commission, *First Report on Agreements*, supra note 32, at para 115.

36 *Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v *Norway)*, Judgement, ICJ Reports 1993, p. 38.

37 'No reference whatever was made in the 1979 Agreement to the existence or contents of the 1965 Agreement. The Court considers that if the intention of the 1965 Agreement had been to commit the Parties to the median line in all ensuing shelf delimitations, it would have been referred to in the 1979 Agreement.' Ibid, at para 28.

38 International Law Commission, *First Report on Agreements*, supra note 32, at para 77.

39 Howse goes so far here as to admit the use of soft law instruments in the context of 31(3)(c), Robert Howse, 'The Use and Abuse of Other "Relevant Rules of International Law" in Treaty Interpretation: Insights from WTO Trade/Environment Litigation' (2007) *Institute of International Law and Justice Working Paper* 1 at p. 40, see also note 111.

40 Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester: Manchester University Press) 1984 at p. 139.

41 See *Island of Palmas (United States v Netherlands)* (1928), 2 RSA 845 (Permanent Court of Arbitration); Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave*, Leiden, Brill-Nijhoff, 2015 at p. 102 onward [Merkouris, *Systemic Integration*]; Simma, supra 20 note, p. 48; International Law Commission, *Fragmentation of International Law: Difficulties Arising from*

In sum, the idea of interpreting a treaty while taking account of subsequent facts and (legal) acts only dates back over 50 years. Before this, as the discussions of the Institute of International Law and the earlier quote by Sir Gerald Fitzmaurice highlight,[42] the opinion of the authors tended towards giving deference to the legal situation in force at the treaty's conclusion. The disappearance of the reference to intertemporality during the VCLT negotiations opened the way to a more contemporary reading of treaties. As international tribunals have made use of this opening, it is crucial to rely on their practice to understand the developments in evolutive interpretation and the situations it could cover.

III. CHANGES AND EVOLUTIVE INTERPRETATION IN THE PRACTICE OF SOME INTERNATIONAL ADJUDICATORY BODIES

Soon after the VCLT was concluded, the ICJ ruled on a question linked to the evolution of law in its advisory opinion in the *Namibia* case.[43] On that occasion, a reading based on the original intention of the parties resulted in the court considering relevant law subsequent to the treaty's conclusion.

> Mindful as it is of the primary necessity of interpreting an instrument **in accordance with the intentions of the parties at the time of its conclusion**, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant—'the strenuous conditions of the modern world' and 'the well-being and development' of the peoples concerned—were not static, but were by definition evolutionary, as also, therefore, was the concept of the 'sacred trust'. [. . .] **Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation**.[44]

In 1970, the ICJ took 'into consideration the changes which have occurred in the supervening half-century' and 'the subsequent development of law' in the terms of VCLT Article 31(3)(c)—the fourth category of situations discussed above. The ICJ freed itself from the 'relevance'[45] of subsequent rules to refer to 'the entire legal system'. The ICJ also resorted to the fiction of intention through the text, by presuming the intention of evolution on the negotiators' part through use of notions that were 'not static, but were by definition evolutionary'.[46]

In 1979, the *Aegean Sea* case expanded this approach, when the ICJ resorted to a fiction of intention of the parties whose use of a 'generic term' reflected that they 'intended to follow the evolution of the law' [47]. Nevertheless, it anchored its interpretation on the

Diversification and Expansion of International Law, Doc UN A/CN.4/L.682 (2006) at para 475 [International Law Commission, *Fragmentation of International Law*].

42 See supra, p. 1.

43 *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 [Advisory opinion *Namibia*].

44 Ibid, at para 53 [emphasis ours].

45 VCLT Article 31(3)(c).

46 Advisory opinion *Namibia*, supra note 43, at para 53.

47 *Aegean Sea Continental Shelf Case*, Judgement, ICJ Reports 1979, p. 3 at para 77 [*Aegean Sea* case].

intention of the parties to the treaty at the moment of the treaty's conclusion, insisting that at the conclusion of the treaty, the parties wished that the meaning of the terms should continue to evolve—corresponding to our first category.

One year earlier in 1978, the European Court of Human Rights also admitted the necessity of considering changes. However, in contrast to the ICJ, it seemed to recognize a reference to the evolution of the social context, recognized in VCLT Article 31(1), our second category:

> The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions.[48]

More than 20 years later, in the *Matthews* v *United Kingdom* case, the European Court of Human Rights took the opposite route from that taken by the ICJ, explicitly excluding the intention of the negotiators of the *European Convention of Human Rights*[49] (ECHR), but referring instead to the evolution of law and to structural changes:

> That the Convention is a living instrument which must be interpreted in the light of present-day conditions is firmly rooted in the Court's case-law [. . .]. **The mere fact that a body was not envisaged by the drafters of the Convention cannot prevent that body from falling within the scope of the Convention.** To the extent that Contracting States organise common constitutional or parliamentary structures by international treaties, the Court must take these mutually agreed structural changes into account in interpreting the Convention and its Protocols.[50]

The foundation of this reasoning may be attributed to a broad reading of Article 31(3)(c), because new international treaties influenced the interpretation of the Convention; and, also as some authors argue, to a teleological reading of the Convention[51], i.e. based on its object and purpose of the treaty. Interpretation of the purpose and object (VCLT Article 31(1)), to maintain the effectiveness of the treaty, was also adopted in the *Iron Rhine* arbitration:

> In the present case it is not a conceptual or generic term that is in issue, but rather new technical developments relating to the operation and capacity of the railway. But here, too, it seems that an evolutive interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred to a strict application of the intertemporal rule.[52]

In 2009, the ICJ reaffirmed, the importance of the 'ordinary meaning of the terms' in their *semantic context* at the date of the interpretation, but by making reference to the parties' intention, at the date of the treaty's conclusion. The *Costa Rica* v *Nicaragua* case

48 *Tyrer* v *United Kingdom* (1978) ECHR 2 No. 5856/72, para 31.

49 *European Convention on Human Rights*, 4 November 1950, 213 UNTS 221.

50 *Matthew* v *United Kingdom [GC]* (1999) ECHR 1 No. 24833/94, para 39 [emphasis ours].

51 See Dinah Shelton, *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013) at p. 752.

52 *Award in the Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Decision of 24 May 2005, 27 UNRIAA 35 at para 80.

led the ICJ to provide the following explanation concerning its interpretation of the word '*comercio*':

> 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. [. . .] This does not however signify that, where a term's meaning is no longer the same as it was at the date of conclusion, no account should ever be taken of its meaning at the time when the treaty is to be interpreted for purposes of applying it.[53]

Interestingly, another interpretation of the term 'trade' had already taken place in the earlier *Oil Platforms* case. On this occasion, the ICJ had however adopted another approach but with the same result. Based on the intention of the parties, who would have wished to apply the meaning of the term as it existed at treaty's conclusion, and according to the court, the term 'commerce' at that time already included the transport of passengers. The ICJ also had recourse to a dictionary in assessing the meaning of the word.[54]

The North American Free Trade Agreement (NAFTA) Panel in *Tariffs applied by Canada to certain US-origin agricultural products* also had recourse to the terms 'an evolving system of law'.[55] The Panel interpreted and applied NAFTA in a way that maintained the General Agreement on Tariffs and Trade (GATT) flexibilities, despite the entry into force of the WTO and the disappearance of the GATT.[56] The Panel referred to the 'language of the agreement and of the context of the negotiations' of the GATT:[57]

> By accepting the application of GATT rights and obligations, including those under agreements negotiated under the GATT, the Parties were also accepting any *modifications that might be made* to the regimes under the GATT that permitted agricultural protection.[58]

The Panel concludes, therefore, that FTA Article 710 brings into the NAFTA, as between Canada and the United States, the rights and obligations under the Uruguay

53 *Dispute regarding Navigational and Related Rights (Costa Rica* v *Nicaragua)*, Judgement, ICJ Reports 2009, p. 213 at para 63–4 [*Costa Rica* v *Nicaragua* case]. In the recent *Pulp Mils* case, the ICJ reiterated that same statement: 'there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used—or some of them—a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law', *Case concerning Pulp Mills on the River Uruguay (Argentina* v *Uruguay)*, Judgement, ICJ Reports 2010, p. 14 at para 204.

54 *Case concerning Oil Platforms (Islamic Republic of Iran* v *United States of America)*, Preliminary Objection, Judgement, ICJ Reports 1996, p. 803 at para 45.

55 *Tariffs applied by Canada to certain US-origin agricultural products (1996)*, NAFTA Doc CDA-95-2008-01, (Final Report of the Panel) at para 139 [*'Canada – Agricultural Products'*].

56 The question was whether Article 710 of the FTA negotiated between the USA and Canada (integrated by reference into NAFTA, and itself referring to the GATT) would also cover the situation from the entry into force of the WTO (and the disappearance of the GATT) onward. Consequently, the exceptional agricultural protections maintained under the aegis of the GATT were from then on maintained, even under the WTO.

57 *Canada – Agricultural Products*, supra note 55, at para 73.

58 *Canada – Agricultural Products*, supra note 55, at para 197.

Round agreements that replaced those rights and obligations under which agricultural quotas were maintained.[59]

The Panel referred to both the intention of the negotiators by their choice of certain words considered to be generic (referring to the multilateral system of trade law) and on the object and purpose of NAFTA[60], which allowed for an evolutionary scope of the term GATT, to become WTO.

This brief overview of the practice of certain international tribunals underlines the fact that several types of changes can arise after the treaty's conclusion, and tribunals have dealt with them by using traditional rules of treaty interpretation, within which they seem to comfortably fit. Whether by respecting of the intention of the parties, the ordinary meaning of the terms in their context, the object and purpose of the treaty or the systemic integration of international law, all VCLT rules appear to have been able to integrate and take into account the types of changes discussed earlier. With this framework in mind, we now turn to consider WTO jurisprudence to determine whether it confirms this position.

IV. CONSIDERATION OF CHANGES AND EVOLUTIVE INTERPRETATION IN WTO DISPUTE SETTLEMENT

As mentioned above, the WTO AB referred to the 'evolutive interpretation' in its early case law in late 1990s. One might wonder what the AB meant when it wrote that 'the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary"'.[61] Did it wish to expand the principles of treaty interpretation or did it seek to recall the principles of interpretation for public international law by *presenting* them differently? Did the AB need to refer to evolutive interpretation? As we asked earlier, does the principle of evolutive interpretation add to the principles of interpretation in public international law?

The four types of changes that may take place between the conclusion of the treaty and the date of the interpretation of its provisions can also be used as an analytical framework to understand the situation of 'evolutive interpretation' in the WTO jurisprudence.

A. The use of generic terms in connection with the intention of the parties

In the *US – Shrimp* case[62] the AB referred for the first time to an evolutive interpretation whose theoretical underpinnings are close to the ICJ's perspective.[63] This proximity was assumed by the AB members, who cited ICJ jurisprudence in the footnotes:[64]

59 *Canada – Agricultural Products*, supra note 55, at para 199.

60 *Canada – Agricultural Products*, supra note 55, at para 145.

61 *US – Shrimp*, supra note 4, para 130.

62 WTO Appellate Body Report, *US – Shrimp*, supra note 4, para 130.

63 For a brief explanation of the importance of this case, see Callum Musto and Catherine Redgwell, 'US – Import Prohibition of Certain Shrimp and Shrimp Products (1998)' in Eirik Bjorge and Cameron Miles (eds), *Landmark Cases in Public International Law* (Cumnor Hill: Hart Publishing, 2017) at 489.

64 Ibid, at para 130, nn 109. Reference is made to the *Namibia* Advisory Opinion, supra note 43 and the *Aegean Sea* case, supra note 47.

> From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary'.[65]

Generic terms, *inter alia*, seems to justify the AB's decision here. To consolidate its approach, a second rationale is also presented in the same paragraph, as the AB cites four international instruments supporting its position—confirming that relevant international law has also evolved since the conclusion of the old GATT Article XX. We will return to this argument below.[66]

In 2010, the *China – Publications and Audiovisual Products* case emphasizes the evolutive potential of the treaty text:

> More generally, we consider 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.[67]

The AB even goes so far as to explicitly reject the doctrine of intertemporality, which would advocate interpreting the terms according to their meaning at the time of a treaty's ratification:

> We further note that 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.[68]

The AB then reconciles its decision with the *US – Shrimp* jurisprudence and the *Costa Rica* v *Nicaragua* case (before the ICJ) by referring to them in a footnote.[69] In this *Audiovisual Products* dispute, the application of evolutive interpretation, based on generic terms chosen by the negotiators contains a peculiarity. The AB applies an evolutive interpretation in the domain of technology and thus recognizes technical evolution.

It can be noted that the Panel in *EC – IT Products* adopted the same approach a few years earlier:

> In the case of this concession, the Panel notes that generic terms were used to cover a wide range of products and technologies.[70]

65 Ibid, at para 130.

66 See infra Section IV.C, for a discussion of the *United States – Shrimp* case.

67 WTO Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, para 396 ['*China – Publications and Audiovisual Products*'].

68 *China – Publications and Audiovisual Products*, supra note 67, at para 397.

69 *China – Publications and Audiovisual Products*, supra note 67, at para 396, nn 705.

70 Panel Reports, *European Communities and its member States—Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, para 7.599 ['*EC –IT Products*'].

These two interpretations based on generic terms could also result from an interpretation of the ordinary meaning of the terms used in their 'context', because the technological context has changed, as discussed hereafter.[71] This demonstrates that the different types of changes are not mutually exclusive. On the contrary, they regularly overlap.

Finally, in the *US – Gambling* case, the evolution is implicitly based on a concept often best expressed in generic terms. In this case, the Panel had to interpret the term 'public morals' in GATS Article XIV. In doing so, it indicated:

> We are well aware that there may be sensitivities associated with the interpretation of the terms 'public morals' and 'public order' in the context of Article XIV. In the Panel's view, the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.[72]

B. The ordinary meaning of the terms in their 'context'

Similarly, to the ICJ in the *Oil Platforms* case, the search for the ordinary meaning of the terms in their 'context', as the first paragraph of VCLT Article 31 prescribes, seems to have allowed WTO adjudicators to account for the evolution that permeates the meaning of certain terms in the WTO treaty. Even more so than the ICJ, the AB has long been considered as a defender of interpretation based near exclusively on the text,[73] to the point of being considered 'textually obsessed'.[74] The AB recognized this importance of the meaning that the dictionary accords to words:

> In order to identify the ordinary meaning, a Panel may start with the dictionary definitions of the terms to be interpreted.[75]

Recourse to the contemporary meaning that the dictionary gives words forces consideration of the most recent meaning given to a word. The societal and semantic context will then naturally be considered by the treaty interpreter. Continuing its reasoning in *US – Gambling*, the AB emphasized the significance of the dictionary meaning (and thus the role of the social context) in seeking to determine whether 'gambling' is included in the ordinary meaning of the word 'sporting':

71 This point is also discussed in Section IV.B. below.

72 Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, para 6.461 ['*US – Gambling (Panel)*'].

73 See Donald Mcrae, 'Treaty Interpretation and the Development of International Trade Law by the WTO Appellate Body' in Giorgio Sacerdoti, Alan Yanovich, and Jan Bohanes (eds), *The WTO at Ten: The Contribution of the WTO Dispute Settlement System* (Cambridge: Cambridge University Press, 2006) 360 at p. 363.

74 'Un obsédé textuel', Georges Abi-Saab, 'The Appellate Body and Treaty Interpretation' in Olufemi Elias, Malgosia Fitzmaurice, and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Leiden: Martinus Nijhoff, 2010) 97 at p. 106 [Abi-Saab]. This perspective was nonetheless questioned by Van Damme in Van Damme, supra note 31, at p. 227.

75 WTO Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, para 164 ['*US – Gambling*'].

> First, to the extent that the Panel's reasoning simply equates the 'ordinary meaning' with the meaning of words as defined in dictionaries, this is, in our view, too mechanical an approach. Secondly, the Panel failed to have due regard to the fact that its recourse to dictionaries revealed that gambling and betting can, at least in some contexts, be one of the meanings of the word 'sporting'.[76]

The use of a dictionary, even when it only provides a partial solution, emphasizes the fact that the AB is ready to take semantic evolution into consideration (necessarily originating in the meaning that society in general attributes to it) in its interpretation. Therefore, the underlying rationale of the Panels in *US – Gambling* or in *EC – IT Products*, mentioned above, could also flow from a reading of the ordinary meaning of the terms of a treaty, read in their current semantic and commercial 'contexts' or even in light of the object and purpose of the WTO treaty.

However, WTO jurisprudence is not necessarily unanimous. It is interesting to note that shortly after the Panel Report in *US – Gambling*, but before that of the AB, another Panel took a thoroughly different approach concerning the ordinary meaning of words over time.

> In our view, the 'ordinary meaning' is to be assessed at the time of conclusion of the treaty in question, being the time which is at the focus of both Articles 31 and 32 of the Vienna Convention.[77]

Applying the principle of intertemporality, the Panel in *EC – Chicken Cuts* explicitly refused any evolutive approach, by notably affirming that none of the parties had suggested it.[78] While the Panel's reasoning was upheld with regards to 'ordinary meaning', the AB did not directly address the question of intertemporality.[79]

C. Preserving the effectiveness of the treaty's object and purpose

The third type or category of changes envisages consideration of situations that would not have been conceivable at the time of the conclusion of the treaty, in order to maintain the object and purpose of the treaty. In this context, VCLT Article 31(1) and (2) seem to offer options for analysis. This category is essential when a change has taken place, in a direction that could not have been foreseen by the parties. This is the case for technological progress, which sees the appearance of goods or services whose existence could barely have been imagined a few years previously. This scenario is explicitly contemplated by the Panel in the *Mexico – Telecoms* when called upon to interpret the GATS. Indeed, the 'rapid technological evolution' of telecommunication

76 *US – Gambling*, supra note 75, at para 166.

77 Panel Reports, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/R (Brazil) / WT/DS286/R (Thailand), adopted 27 September 2005 at para 7.99 ['*EC – Chicken Cuts (Panel)*'].

78 *EC – Chicken Cuts (Panel)*, supra note 77, para 7.99, nn 144. One may nevertheless question the status of this jurisprudence in view of the response brought by the AB in the *US – Gambling* case that followed, while recognizing that it did not return to the question in its *EC – Chicken Cuts* Report.

79 WTO Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, para 174–6 ['*EC – Chicken Cuts*']

services is directly linked to the fact that 'interpretation and clarification of GATS provisions is likely to evolve over time'.[80]

On this theme, the *US – Gambling* Panel was called to determine whether internet games (gambling) were covered by the 'cross-border' commitments in Mode 1, negotiated at a time when the internet did not exist. Because the object and purpose was 'technological neutrality', the Panel could affirm that they would still fit under Mode 1, which encompasses all possible means of supplying services from the territory of one WTO Member into the territory of another WTO Member—even though the GATS had been agreed upon before the internet boom.[81]

The presumption of intention found via generic terms (the first category identified above) would not be obvious here, since it would lead to the conclusion that the negotiators would have wanted something whose very existence was not envisaged at the moment that they had concluded the treaty. It was therefore necessary to turn toward a teleological interpretation to justify an evolutive approach. In this case, given the object and purpose of the GATS,[82] interpreting it dynamically with respect to technological evolution is necessary to its effectiveness.[83]

In *EC – IT Products* case, mentioned above[84], the Panel referred to the use of 'generic terms' to justify taking into account the evolution of technology in its interpretation. The same issue was present in *US – Gambling*[85] or *China – Publications and Audiovisual Products*[86]. Multifunction machines sold at the moment of the interpretation of the term differ drastically from those existing during the negotiations of the WTO. A teleological interpretation of the terms in their (technological context), in light of the object and purpose of the treaty (liberalization of trade), would also lead to the conclusion the Panel should look at the ordinary meaning of the technological terms today. Note that the adjudicator did not use the intention of the negotiators mentioned previously, but rather the object and purpose of the treaty.[87]

80 Panel Report, *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, adopted 1 June 2004, para 7.2 ['*Mexico – Telecoms*'].

81 *US—Gambling (Panel)*, supra note 72, at para 6.285.

82 The object and purpose were determined to 'establishing "a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization"', *China—Publications and Audiovisual Products*, supra note 67, at para 7.1219.

83 It could be argued that the principle of 'technological neutrality' that the Panel advanced may have implicitly been recognized by the WTO Agreement's negotiators. In effect, the application of the GATS to the telephone and fax machine might suggest a broad acceptance of this principle. In admitting this, the *US—Gambling* case would fall into an evolution based on the intention of the parties. That said, from the qualitative point of view rather than quantitative, changes linked to the advent of the internet seem more coherently attributed to this reading of the GATS' object and purpose.

84 Supra, p. 15.

85 See *US – Gambling (Panel)*, supra note 72.

86 See *China – Publications and Audiovisual Products*, supra note 67.

87 This is, in any case, the argumentation retained by Japan in this case: 'Japan considers that, it would be inconsistent with the object and purpose of the WTO Agreement and the GATT 1994 to reduce tariffs on a particular product, only to permit the re-imposition of those tariffs simply because of some evolution in that product.', *EC – IT Products*, supra note 70, at para 7.538.

D. The evolution of related and relevant international law

The last type of change concerns those affecting the relevant law. As mentioned earlier, sub-paragraphs (3)(a) and (b) of Article 31 envisage the situation in which a subsequent agreement or practice modifies the interpretation of the initial treaty. This approach effectively permits the taking into account of changes to the initial treaty desired by the parties.

The AB has repeatedly dealt with such situations. In the *US – Tuna II (Mexico)* case, a TBT Committee decision was considered a subsequent agreement in the sense of Article 31(3)(a).[88] Similarly, a ministerial decision was deemed to be a subsequent agreement, following an extensive analysis of the constitutive criteria in the *US – Clove Cigarettes* case.[89]

The AB has analyzed how criteria relating to subsequent practice are expressed in WTO law, and has considered events that took place after the creation of the organization. Additionally, with regard to the requirement that there be a relationship between the practice and the treaty, the AB has held that the practice 'must be a common, consistent, discernible pattern of acts or pronouncements'.[90] It is, however, not necessary that every single party engage in that practice.[91] Indeed, under certain circumstances, silence or lack of reaction can be understood as a tacit acceptance.[92] The AB then confirmed this approach, which was first followed in *EC–Chicken Cuts*, by re-using it in the *EC – Large Civil Aircraft* case, while adding that it recognized that the parties' agreement regarding a treaty's interpretation may be deduced, not only from the actions of those actually engaged in the relevant practice, but also from the acceptance of other parties to the treaty through their affirmative reactions, or depending on the attendant circumstances, their silence.[93]

Article 31(3)(c) VCLT envisages something else—what some have referred to as the international systemic integration and coherence. Article 31(3)(c) seems to express the possibility of considering rules that emerged after the treaty, even if these rules do not expressly relate to its interpretation.

The *US – Shrimp* case suggests that the AB relies on the rules of Article 31(3)(c), through the invocation of various relevant international instruments. Thus, the interpretation of 'natural resources' is deemed to be evolutive by reference to the *United Nations Convention on the Law of the Sea*, the *Convention on Biological Diversity*, the *Convention on the Conservation of Migratory Species of Wild Animals*, and *Agenda 21*.[94]

88 WTO Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, para 372 ['*US – Tuna II (Mexico)*'].

89 WTO Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, para 256–68 ['*US – Clove Cigarettes*'].

90 *US – Gambling*, supra note 75, at para 192.

91 *EC – Chicken Cuts,* supra note 79, at para 259.

92 *EC – Chicken Cuts,* supra note 79, at para 272.

93 WTO Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, para 845, nn 1916 ['*EC and certain Member States – Large Civil Aircraft*'].

94 In the *US – Shrimp* case, it may equally be argued that evolutive interpretation was unnecessary. The negotiators of the GATT 1947 seem to have foreseen the application of the terms 'natural resources' to animals, thus rendering superfluous the AB's argumentation regarding the evolution of the treaty. However,

It is clear that sub-paragraphs (3)(a) and (3)(b) of VCLT Article 31 could not have served as the basis for the AB's interpretive analysis, insofar as these instruments do not focus *on the interpretation* of the WTO Agreement—a precondition of the application of sub-paragraphs (3)(a) and (b) of Article 31.[95] The AB seems, rather, to have adopted a broad reading of Article 31(3)(c), encompassing much more than simply the formal treaties.[96] Indeed, on the one hand, none of the above-mentioned treaties have been ratified by all parties to the litigation in question;[97] on the other hand, Agenda 21 is not, by nature, an international treaty, but an instrument of soft law.[98] It seems that, for the AB, these legal instruments are nevertheless 'relevant rules' in the sense of VCLT Article 31(3)(c). In its eyes, international environmental law has evolved and produced a rule that includes living creatures within the terms 'natural resources', relevant to the term of VCLT Article 31(3)(c).[99]

The question remains regarding to whom 'parties' refers, in the expression 'relevant rules applicable to the parties'. For a rule to be relevant in the interpretation of a treaty, must it be applicable to all the parties to the treaty under interpretation, or merely those to the dispute? The AB seems to have indicated certain principles when it wrote:

> An interpretation of 'the parties' in Article 31(3)(c) should be guided by the Appellate Body's statement that 'the purpose of treaty interpretation is to establish the common intention of the parties to the treaty.' This suggests that one must exercise caution in drawing from an international agreement to which not all WTO Members are party. At the same time, we recognize that a proper interpretation of the term 'the parties' must also take account of the fact that Article 31(3)(c) of the Vienna Convention is considered an

the inclusion of a paragraph on 'sustainable development' in the preamble of the Marrakesh Agreement, which thus makes up part of the legal context, seems to be determinant for the AB when it wrote that this reference to sustainable development 'must add colour, texture and shading' the interpretation of the old terms of the WTO. *US – Shrimp*, supra note 4, para 153.

95 See International Law Commission, *Report of the 70th Session*, supra note 34, at p. 13.

96 The AB also includes the general principles of law in its interpretation of Article 31(3)(c), *US – Shrimp*, supra note 4, at para 158, nn 157.

97 *United Nations Convention on the Law of the Sea*: 142 ratifications at the time; the United States had not signed it, but admitted the customary character of most of the rules contained in the treaty. *Convention on Biological Diversity*: 180 ratifications at the time; the United States and Thailand had signed but not ratified it. *Convention on the Conservation of Migratory Species*: 60 ratifications at the time. The AB was aware of this partial ratification by the parties to the litigation, mentioning it in a footnote; *US – Shrimp*, supra note 4, para 130, nn 110–3. See also Ulf Linderfalk, 'Who are "the Parties"? Article 31, Paragraph 3(c) of the 1969 Vienna Convention and the "Principle of Systemic Integration" Revisited' (2008) 55:3 *Netherlands International Law Review* 343 at p. 344 onward.

98 The majority of authors defend the position that the term 'rule' applies only to those elements having obligatory force. A minority position nonetheless admits the possibility of including some 'soft' elements in the rule of Article 31(3)(c), see Merkouris, *Systemic Integration*, supra note 41, p. 22, nn 73.

99 It is useful to also mention the existence of the Panel Report *EC – Approval and Marketing of Biotech Products*. On this occasion, it argued that Article 31(3)(c) could not be used while all Members of the WTO were parties to another treaty used in interpreting WTO rules, Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R / WT/DS292/R / WT/DS293/R, adopted 21 November 2006, para 7.68 and 7.71 ['*EC – Approval and Marketing of Biotech Products*']. This decision was criticized, notably with respect to the issue of the fragmentation of international law, and was not taken up again in subsequent jurisprudence. See International Law Commission, *Fragmentation of International Law*, supra note 41 at p. 227; *EC and certain Member States – Large Civil Aircraft*, supra note 93, para 844–46.

> expression of the 'principle of systemic integration' which, in the words of the ILC, seeks to ensure that 'international obligations are interpreted by reference to their normative environment' in a manner that gives 'coherence and meaningfulness' to the process of legal interpretation. In a multilateral context such as the WTO, when recourse is had to a non-WTO rule for the purposes of interpreting provisions of the WTO agreements, a delicate balance must be struck between, on the one hand, taking due account of an individual WTO Member's international obligations and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members.[100]

Arguably Article 31(3)(c) requires consideration of the broader legal context, to ensure a systemic integration or coherence of international law. States must at all times and in good faith respect general international law and all their international obligations. International law evolves and States must continue to respect it in the implementation and application of their treaty obligations. It was on this basis that the AB considered the state of international law in force during the interpretation of certain terms of the WTO Treaty.

V. CONCLUSION—THE DIFFERENT CATEGORIES OF EVOLUTIVE INTERPRETATION

Several types of changes can take place between the date of the conclusion of a treaty and the date when its provisions call for interpretation and they can have an important impact on the application of the concerned treaty provisions. In this article, four types or categories of changes were identified. The first type of changes to the ordinary meaning of terms exists when 'generic' terms are used. This choice of generic terms could confirm the (original) intention of the parties to cover situations that are new, or different from those existing at the time of the treaty's conclusion.[101] These terms can therefore be understood as having been voluntarily chosen to permit a future semantic evolution.[102] The terms concerning social concepts may equally be considered 'generic'. Everyone agrees that social and human values evolve over time. In the case of the WTO, this issue is found in the interaction between trade and non-trade values, with the question being whether certain market access restrictions may be justified. In this context, it has been argued that it is simple to presume that the parties would have wished to have recourse

100 *EC and certain Member States – Large Civil Aircraft*, supra note 93, para 845.

101 This seems to be the majority opinion; see Julian Arato, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences' (2010) 9:3 *Law and Practice of International Courts and Tribunal 443*; Bjorge, supra note 12; Sondre Torp Helmersen, 'Evolutive Treaty Interpretation: Legality, Semantics and Distinctions' (2013) 6:1 *European Journal of Legal Studies* 127 [Helmersen]. This principle of 'contemporaneity' has moreover been confirmed in international jurisprudence. See *CS Inspection and Control Services* v *Argentina*, Award on Jurisdiction (2012), CPA Case no. 2010-9 (Argentina–Germany BIT) at para 266, nn 449. This approach could also be related to the intention of the negotiators deriving from 'circumstances', and be covered by VCLT Article 32.

102 Venzke summarizes in these terms: 'In short, it is rather common to understand developments in law and language as evolution. Linguistic theory seems to readily support the conception of legal changes in terms of evolution.' Ingo Venzke, *How Interpretation makes International Law: On Semantic Changes and Normative Twists* (Oxford: Oxford University Press, 2012) p. 39 [Venzke].

to a 'value driven' notion, such as 'public morals', clearly based on social values that evolve.[103]

The second type of changes covers situations where the ordinary or even specific or technical meaning of the treaty's terms may itself have evolved, and this could not have been envisaged at the time of the conclusion of the treaty. For instance, the French term '*viande*', or 'meat', referred to all forms of food in the 17th century (cereals and vegetables included). It has since come to mean nothing more than the edible flesh of an animal.[104] Similarly, we may see that certain words, despite a clear and unequivocal meaning at the treaty's conclusion, evolve with time—transportation in the 19th century did not include airplanes, telecommunication in the early 1990s did not include the internet, family in the 1950s did not include gay couples, as they do today.

The third type of changes concerns physical or technical transformations and evolutions. Notably, this category would include internet accessibility in trade, which was inconceivable when the WTO treaty was concluded. If a WTO Member opens its market to all modes of so-called 'cross-border supplies', including telecoms, telephones and faxes, the technological neutrality that qualifies the object and purpose of the WTO provisions on trade in services would also today include cross–border internet transmission.

In the fourth category, changes may concern related and relevant rules of international law, which could have evolved since the treaty's conclusion. The ILC specifies that such subsequent acts can help determine whether a treaty's interpretation should evolve.[105] International law more generally, outside the treaty being interpreted, can also change and evolve and affect importantly, in addition to the context, the meaning of terms of the treaty under interpretation

Paradoxically, among the four categories of changes that we have identified (and for which a certain evolutive interpretation has already been possible), the one that is based on the intention of the parties via the use of generic terms seems the most anchored in the past.[106] Formally, the interpretation in question is done at the date of the treaty's conclusion, when the parties chose the generic term. The meaning of the term is essentially based on an understanding that is contemporary to the treaty's conclusion, and subsequent evolution does not constitute a real change in the interpretation of the terms. The rule remains the same, but from the beginning the meaning ascribed to the

103 As Helmersen emphasizes: 'When value driven terms evolve, tribunals seem to accept that the evolution was intended by the parties, without demanding further justification. That is presumably because values inevitably change over time, as new generations will have their own views on what is (for example) "inhuman" or "fair". The evolution of a non-value driven term is, on the other hand, not inevitable, and is thus less easily anticipated'. Helmersen, supra note 101, at p. 139.

104 Ferdinand Brunot, *Histoire de la langue française des origines à 1900*, Tome IV, Première Partie, (Paris: Armand Colin, 1913) at p. 277.

105 International Law Commission, *Report of the 68th Session*, supra note 14, at p. 122.

106 We are here reflecting the categorization made by Malgosia Fitzmaurice, which opposes evolution based on intention at the moment of the conclusion, and that drawn from the subsequent intention. Malgosia Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties: Part I' (2008) 21 *Hague Year Book of International Law* 101.

term is sufficiently vague[107] to include varied situations. Only the contents change, but the container remains the same—the word does not change, but its meaning does.

The case of evolution based on the ordinary meaning of the terms in their social or semantic context seems subtler than those mentioned previously, because of its quasi-total extraneity to the legal field. The legitimacy of this category of evolution remains an open question. On the one hand, change is taking place outside of the tribunals and the usual *fora* of negotiation. On the other hand, a grassroots dynamic emerging from society itself emphasizes a more democratic element within it, which cannot be overlooked. Seen another way, this modification of the meaning of words, the semantic context, may be seen as particularly democratic and legitimate, as it is society itself, as a whole, which imposes this change on States.

When dealing with technological changes, the scope and meaning of the treaty provisions themselves may evolve to take into account the technological changes with a view to maintaining the original object and purpose of the treaty. The teleological interpretation and the object and purpose of the treaty can be particularly useful in permitting an evolutive interpretation of the treaty. This interpretive method would be somehow hybrid, shared between the immutability of the object and the purpose of the treaty and the ordinary meaning of the terms confronted by technological evolution—a very frequent situation in the field of electronic trade, for example.

The changes to relevant international law are already mentioned in VCLT Article 31 in two principal forms. First, regarding the sub-paragraphs (3)(a) and 3(b) of Article 31, the consent of States remains pivotal. These States must, by their actions after the ratification of a treaty, and *related to it*, show that they added to the original treaty and therefore interpretation of the original treaty provisions has evolved. The fact remains that the existence of these paragraphs confirms that States clearly wish, in certain circumstances, to consider actions later than the date of the treaty's conclusion.

The sub-paragraph 3(c) of VCLT Article 31 implies a change in the rule of international law, external to the treaty under interpretation, which takes place later than the treaty's conclusion—without, however, requiring an explicit link with it. It is clear that the meaning of the treaty provision may be affected and even modified by the birth of subsequent relevant rules of international law.

What remains particularly interesting is that it seems that the provisions of the VCLT can integrate and take into account all the changes envisaged at the beginning of this study. If it is fundamental that the interpretation and application of treaties should be adapted to the values of society, it seems that the VCLT comprises and incorporates these changes. Indeed, the ILC appears to also be of this view:

> In the final analysis, most international courts and tribunals have not recognized evolutive interpretation as a separate form of interpretation, but instead have arrived at such an evolutive interpretation in application of the various means of interpretation that are mentioned in Articles 31 and 32 of the 1969 Vienna Convention, by considering certain criteria (in particular those mentioned in paragraph (6) above) on a case-by-case basis.

107 On the vague character of the terms, see Helmersen, supra note 101, at pp. 143–44.

> Any evolutive interpretation of the meaning of a term over time must therefore result from the ordinary process of treaty interpretation.[108]

Evolutive interpretation, appears to be integrated in and an integral part of the VCLT's rules of interpretation, whether discussed individually or collectively. Nevertheless, the categories and types of changes identified above should help with the understanding of the various types of evolutive interpretation, each calling for different considerations. Moreover, we hope that linking it back to the VCLT contributes to demystifying the notion.

WTO adjudicating bodies have very frequently had recourse to VCLT Articles 31, 32, and 33 and were able to develop a specific jurisprudence related to evolutive interpretation, even without using such terms. Social considerations and technological evolution, notably, play an important role in the context of an organization in which certain rules have been drafted more than 70 years ago. Thus, through the customary rules codified in the VCLT, the WTO adjudicating bodies may maintain the relevance of the rules that they interpret.

The question of the temporality of the elements considered remains, in any case, a source of questions. Evolutive interpretation seems to stay, for the moment, a protean notion—sometimes used inaccurately[109], or used loosely, but which perhaps does not add much to the principles of treaty interpretation (of which the VCLT codifies several). A reasonable interpretation and application of the VCLT rules and principles would permit integration of all these approaches. In particular, the reading of 'context' in Article 31 to include the contemporary ordinary meaning of the terms in their social or semantic context leads to a clear dynamism in the process of interpretation—such as the integration of soft law into the 'rules' of Article 31(3)(c). As Georges Abi-Saab emphasizes, these rules are not limited to the exact text of the VCLT, but encompass the whole of the 'customary rules of interpretation'.[110] It is thus legitimate to ask whether evolutive interpretation may, in the long term, become a customary principle of interpretation with different expressions.

However, the added value that the use of evolutive interpretation brings is not necessarily purely legal since it would cover linguistic and technological but also political and sociological changes. In the WTO, evolutive interpretation has allowed the AB to remind WTO Members that the principles of treaty interpretation authorize it, and even oblige it, to consider several provisions under more current perspectives, in order to maintain the effectiveness of the WTO Treaty. This allows integration of social, human, and environmental concerns, and a certain international coherence,[111] while at the same time recognizing that the nature of international trade means that it continues to evolve technically.

108 International Law Commission, *Report of the 70th Session*, supra note 34, at p. 66.

109 James Crawford has also argued that recourse to evolutive interpretation was superfluous on the part of the ICJ in the *Costa Rica* v *Nicaragua* case, supra note 53; Bjorge, supra note 12, at p. v.

110 Abi-Saab, supra note 74, p. 104.

111 International Law Commission, *Fragmentation of International Law*, supra note 41, at p. 89.