

Critical Evaluation of the ICJ Approach in Evolutionary Interpretation

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Abstract

This article aims to evaluate the underlying foundation of the reasoning of the International Court of Justice (ICJ) on evolutionary interpretation of treaties. The paper questions the common narrative on the evolutionary interpretation based on the generic nature of terms and the presumed intention. It argues that the decision about genericity of terms cannot be decided on the basis of the textual interpretation of the terms of a treaty. Nor, the intention of the parties or the presumed intention can provide the proper ground for making such a decision, as the intention of a writer is always constructed by the reader. Based on the idea that interpretation of law is an act within the legal sphere that follows the rationality of that legal system, the paper argues that what determines the content of a norm to evolve in time is its legal nature considered together with the purpose it aims to serve within the ambit of a legal system.

Keywords: International Court of Justice, Treaties, Evolution, Legal System, Interpretation

I. Introduction

The focus of the present article is to evaluate the reasoning of the International Court of Justice (ICJ) for the evolutionary interpretation of the terms of treaties in different judgments. Before setting out the framework of this study, it has to be noted that within the literature of international law, it is conceived that time may affect interpretation in two different ways: first, by changing the surrounding legal

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environment of a text; and second, by changing the traditions and practice that determine the meaning. The first problem leads to what is considered as the issue of inter-temporal law and the second raises the question of the evolutionary interpretation in strict sense. The well-known example of the inter-temporal law is the decision of Judge Huber in the *Island of Palmas* arbitration, in which he stated that “a judicial fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.”¹

While it seems that the changes in the normative environment surrounding a text is different from the semantic change of the terms within a text, as explained by the International Law Commission,² no clear line can be drawn between the two because inter-temporality may also include changes in the meaning of terms “especially where there are subsequent development in customary law and general principle of law.”³ In light of this, the paper does not address what makes the meaning of terms to evolve over time.

The ICJ has made recourse to the evolutionary concept of terms to depart from the meaning that was considered to exist at the time of conclusion of treaties. The Court, in its first case discussing the evolutionary interpretation of terms of treaties, argued that since concepts such as “the well-being and development”, and the “sacred

1 *Island of Palmas (or Miangas) (The Netherlands/The United States of America)*, Award [1928] P.C.A at 845. Furthermore, Judge Huber emphasized that “the same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of the law.” *Ibid.*

2 *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission (ILC), finalized by Martti KOSKENNIEMI, UN Doc. A/CN.4/L/682 (2006) at 478.

3 *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, Report of the Study Group of the International Law Commission (ILC) UN Doc. A/CN.4/L.702, 18 July 2006, at 22-23.

trust” in Article 22 of the Covenant of the League of Nations were not static, “but were by definition evolutionary”, therefore, the parties to the Covenant must consequently be deemed to have accepted them as having the evolutionary meaning, that the Court

... must take into consideration the changes which have occurred... and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law.⁴

This reasoning, which has echoed in other judgements of the Court for evolutionary interpretation, is based on an initial textual analysis for identification of generic terms followed by the assumption that by using generic terms the parties to a treaty should have intended its meaning to evolve in time. The present article will evaluate this process to demonstrate that, although the interpretive results can be defended on several grounds, the reasoning of the Court is based on contradictory premises. For this purpose, the first part evaluates the textual approach of the Court in the identification of generic terms, and the second part will question the theoretical foundation of relying on presumed intention of the parties for the evolutionary interpretation. Finally, the paper argues that analysing the legal nature of the rule and its purpose, anchored in legal principles, can provide the proper ground for determining the evolutionary nature of a norm because it assures that “the authority of a judgment derives from its intrinsic rationality rather than from an ‘argument’ of authority.”⁵

Of course, the effect of time on meaning cannot be wholly captured within the limited scope of this paper; nevertheless, one general caveat needs to be said to prepare the ground for our discussion. In talking about the effect of time on meaning, the most important effect of time

4 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (*Namibia*) Advisory Opinion [1971] I.C.J. Rep. 16 at 53.

5 Ost, FRANÇOIS, “The Original Canons of Interpretation of the European Court of Human Rights” in Mireille DELAMS-MARTY, *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions*. (Martinus Nijhoff Publishers, 1992). 238-318 at 284.

is on us as the readers of the text. With the passage of time, our experiences, knowledge and understanding will change. These changes give us a perspective different from the one we had before and the one we will have in future. Our existence in presence always gives a temporal dimension to our understanding and interpretation of the texts, as German philosopher, Hans-George Gadamer, explains:

If we are trying to understand a historical phenomenon from the historical distance that is characteristic of our hermeneutical situation, we are always already affected by history. It determines in advance both what seems to us worth inquiring about and what will appear as an object of investigation, and we more or less forget half of what is really there—in fact, we miss the whole truth of the phenomenon—when we take its immediate appearance as the whole truth.⁶

ii. Identification of Generic Terms

A generic term is defined by Judge Higgins, in her declaration attached to the judgment in the *Kasikili/Sedudu Island* (Botswana/Namibia) case, as “a known legal term, whose content the parties expected would change through time.”⁷ The question that will naturally arise is how the generic terms can be identified?

In *Pulp Mills* case, the ICJ advanced two very different approaches for interpreting two linguistically generic terms. The first concerned the meaning of “ecological balance”. The parties differed as to whether air pollution, noise, visual and general nuisance allegedly caused by one of the mills would fall within the ambit of the compromissory clause included in the 1975 Treaty on the Statute of the River Uruguay,⁸ and

6 Hans-Georg GADAMER, Joel WEINSHEIMER, and Donald G. MARSHALL, *Truth and Method* (London; New York: Continuum, 2004) at 300.

7 *Kasikili/Sedudu Island* (Botswana/ Namibia,) Judgment [1999] I.C.J. Rep. p. 1045, Declaration of Judge Higgins, at 2.

8 Article 60, paragraph 1, of the 1975 Statute provides: “Any dispute concerning the interpretation or application of the Treaty [The Montevideo Treaty of 7 April 1961, concerning the boundary constituted by the River Uruguay] and the Statute which cannot be settled by

thus within the ICJ jurisdiction *ratione materiae*. Argentina contended that the 1975 Statute was entered into force “with a view to protect not only the quality of the waters of the river but more generally its ‘regime’”. Relying on Article 36 of the 1975 Statute which laid out the obligation of the parties to coordinate “measures to avoid any change in the ecological balance and to control pests and other harmful factors in the river and the areas affected by it”, Argentina asserted that the Court had jurisdiction also with respect to claims concerning air pollution and even noise and visual pollution.⁹ The Court, however, saw no basis for the Argentina’s claims because the “plain language” of Article 36 and its silence on noise pollution, “[left] no doubt that it [did] not address the alleged noise and visual pollution as claimed by Argentina”.¹⁰

The second interpretation of the same judgment was to determine the obligations of the parties for protecting and preserving the aquatic environment under Article 41(a) of the 1975 Statute. In the Court’s opinion, the meaning of the terms “protection and preservation” were “capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law”. Relying on the generic nature of these terms, the Court could conclude that even without a clear reference, the parties with respect to activities liable to cause trans-boundary harm should carry out an environmental impact assessment.¹¹

From a linguistic point of view, however, the “ecological balance” is as generic as the term “protecting and preserving” and therefore, one would expect the meaning of the former would evolve, like the latter, encompassing new developments in ecological studies, such as the impact of noise pollution in disturbing the ecological balance. Nevertheless, there is no explanation in the judgment why “ecological

direct negotiations may be submitted by either party to the International Court of Justice.” United Nations, Treaty Series (UNTS), Vol. 1295, No. I-21425, at 340.

⁹ Pulp Mills on the River Uruguay (Pulp Mills) (Argentina v. Uruguay) Judgment [2010] I.C.J. Rep. 14 at 50.

¹⁰ Ibid., at 52.

¹¹ Ibid., at 204.

balance” was treated as a specific term and therefore incapable of having any semantic change while this was not the case for the terms “protect and preserve”.

It is revealing if this approach is compared with the one by the Court in the case concerning *Rights of US Nationals in Morocco*. In this case, the parties disagreed whether the term “dispute” used in the 1863 Treaty referred only to civil disputes or a,s US contended, covered all kind of disputes. For this purpose, the Court looked at the way in which the word “dispute” was used in the different treaties concluded by Morocco dating back to 1631 onward. Examining their content made it clear for the Court that “in these instances the word was used to cover both civil and criminal disputes”. The Court further noted that at the times of the conclusion of treaties, the clear-cut distinction between civil and criminal matters had not yet been developed in Morocco. Accordingly, the Court concluded that it should interpret the word “dispute” as referring both to civil and criminal disputes, although at the time of interpretation of the rule, the meaning of the term had evolved to be limited only to civil disputes.¹²

But why the term “dispute” is not considered as a generic term capable of evolving through time, while the term “protecting and preserving” could be considered as generic covering a concept that was not obligatory at the time of the conclusion of the treaty; environmental impact assessment? The meaning of words is constantly changing over time. The *Oxford English Dictionary*, as an example, is updated four times a year and its October 2018 updates contained 1,400 new words, including “the revision of a number of words in the English language that have begun to establish multiple uses far from their original meanings over time.”¹³ So what makes the Court to decide that one term has a specific meaning and the other more general and thus evolving?

12 Case concerning rights of nationals of the United States of America in Morocco (*Rights of US Nationals in Morocco*) Judgment [1952] I.C.J. Rep. 176 at 189.

13 <http://public.oed.com/the-oed-today/recent-updates-to-the-oed/>

From a linguistic perspective, there have been two distinct phenomena that have been referred to or classified as “genericity”. While the first is a *reference to a kind*, a genus,¹⁴ the second phenomenon are propositions which do not express specific episodes or isolated facts, but instead report a kind of *general property*, that is, report a regularity which summarizes groups of particular episodes or facts.¹⁵ This second notion of genericity is clearly a feature of the whole sentence (or clause), rather than of any one term in it; it is the whole generic sentence that expresses regularities, which transcend particular facts.¹⁶ With this distinction in mind, one can conclude that the Court’s referral to “generic terms” is about the first kind of genericity; a noun or, more generally, an entire noun phrase, which purports to designate (or refer to) a type,¹⁷ or a genus and not an “ordinary” individual or object. But then the question is what sorts of noun phrases can designate genera (i.e., kinds)?

Linguists in general agree that “genericity cannot depend on the syntactical or morphological form” of the term. Every “generic” term could occur as a non-generic term in other contexts. And it seems “no language marks exactly those [terms] which are to be interpreted as generic”.¹⁸ In order to identify generic terms, it is suggested that the term basically “must be semantically connected with a “well-established kind” to which the noun phrase then can refer”.¹⁹ Krifka et al. suggest that almost anything can become a well-established kind, given an appropriate body of background knowledge. For example, if

14 Like the word “potato” in the following sentence: “The potato was first cultivated in South America”.

15 For example: “John smokes a cigar after dinner”.

16 Manfred KRIFKA et al., “Genericity: An Introduction,” in *The Generic Book* (University of Chicago Press) 1–124 at 2-3.

17 Francis JEFFRY PELLETIER, *Kinds, Things, and Stuff* (Oxford University Press, 2009), at xi.

18 Manfred KRIFKA, “An Outline of Generics”. *Forschungsberichte des Seminars für natürlich-sprachliche Systeme*, Universität Tübingen, October 1987, at 2.

19 KRIFKA, *supra* note 16 at 11.

we compare the sentence, “the Coke bottle has a narrow neck”, with the sentence “the green bottle has a narrow neck”, it can be argued that the “green bottle” in the second phrase is not a generic term, while the Coke bottle is.²⁰ However, suppose it is well-known that green bottles preserve the effectiveness of certain life-saving antibiotics. With this background knowledge, the term “green bottle” in the sentence “the green bottle saves lives” can be considered as referring to a kind.²¹ In other words, in identifying generic terms, reference should be made to a source beyond the text under interpretation, as linguistic structures fall short of their identification.

These considerations suggest that what is treated as a straightforward analysis by the ICJ for the identification of a generic term is itself an act of interpretation disguised under the name of a textual analysis. In other words, to determine the generic nature of a legal term, and more importantly to determine whether a legal concept has a generic nature evolving with time, a legal treatment beyond linguistics is required.

II. The Problems of Presumed Intention

The Court’s silence on the process of identification of generic terms, however, seems to be compensated by reliance on what is known as the “hypothetical” or “presumed” intention of the parties. While the intentional or subjective approach is the doctrine that perceives the meaning to be determined on the basis of the author’s intended meaning, when the real intention is unknown or provides no answer, the proponents of this approach believe that recourse should be made to the presumed intention of the parties.

According to the hypothetical intentionalist, the meaning of a text is “what an ideal reader, fully informed about the cultural background of

20 Ibid., at 69.

21The examples are taken from Sarah-Jane LESLIE and Adam LERNER, “Generic Generalizations,” in Edward N. ZALTA, eds., *The Stanford Encyclopedia of Philosophy*, 2016, <http://plato.stanford.edu/archives/win2016/entries/generics/>.

text” would hypothesize its intended meaning. That is, the hypothetical intentionalist claims that “the meaning of the text correlates with the hypothesized intention, not the real intention of the author, and that interpreters are concerned with postulated authors not real authors.”²²

Andrei Marmor defends the hypothetical intention thesis, by relying on Paul Grice’s theory and pragmatism. Grice, who provides the most comprehensive view on the intention-based approach, explains the meaning in terms of communicative intentions of language users. The basic idea of his sophisticated theory can be summarized as explaining the timeless conventional meaning of a sentence type in terms of what those sentences meant when they were produced. In turn, the sentence token meaning was to be understood in terms of what speakers intended when producing those sentence tokens. Thus, ultimately the abstract notion of sentence meaning was to be understood in terms of specific intentions of speakers on specific occasions.²³ By distinguishing conventional implications of a sentence and its conversational implications, Grice produced an account of how it is possible that what a speaker means by an utterance to be divided into what the speaker “says” and what the speaker thereby “implicates” or means.²⁴ For example, if someone asks “Could you close the door?” the hearer does not usually answer “Yes”, instead they perform the non-linguistic act of closing the door. In this case, although the speaker uses a form of words that is conventionally a question; the hearer can infer that the speaker is making a request.²⁵ This analysis obviously goes beyond syntax and semantics and that is why Grice’s work lies at the centre of

22 Noel CARROLL, “Interpretation and Intention: The Debate between Hypothetical and Actual Intentionalism” (2000) *Metaphilosophy*, Vol. 31, No. 1/2: 75–95, at 78.

23 Richard E. GRANDY, Richard WARNER, “Paul Grice,” in Edward N. ZALTA, ed., *The Stanford Encyclopedia of Philosophy*, 2014, [http:// plato. stanford.edu/archives/ spr2014/ entries/grice/](http://plato.stanford.edu/archives/spr2014/entries/grice/).

24 Paul GRICE, *Studies in the Way of Words* (Harvard University Press, 1991), at 41.

25 The example is given by GRANDY, WARNER, *supra* note 23.

research on the semantics-pragmatics distinction and shapes much discussion about the importance of the context.²⁶

Based on this philosophy, Marmor argues that the communication intention, which determines the meaning, should not necessarily be attributed to a real speaker, rather one can attribute intentions counterfactually to a fictitious speaker “whose supposed identity and characterization determine the criteria of success presumed by the kind of interpretation offered”.²⁷

In international law, Lauterpacht follows the same approach by maintaining that the intention-based approach is more compatible with “the voluntary nature of international jurisdiction [which] requires that the purely personal and subjective aspect of judicial activity be counterbalanced and strengthened by broadening the basis of judicial reasoning” by considering objective facts in the form of recorded statements and declarations.²⁸ He believes that the use of presumed intention will be more frequent for interpretation of international treaties because a treaty “far from giving expression to any common intention of the parties - actually registers the absence of any common intention”.²⁹ By making an analogy between interpretation of treaties and contracts, Lauterpacht maintains:

There is no difficulty in interpreting a provision relating to a situation which the parties had in mind when making the contract. The difficulty—the solution of which is within the true province of the judge—arises in relation to matters falling within the general terms of the agreement but not at all present to the minds of the parties when they negotiated it or

26 For further discussion on this, see, for example, Stephen NEALE, “Paul Grice and the Philosophy of Language” (1992) *Linguistics and Philosophy*, Vol. 15, No. 5, at 509–559.

27 Andrei MARMOR, *Interpretation and Legal Theory*, Clarendon Law Series (Oxford: Clarendon Press, 1994), at 25.

28 H. LAUTERPACHT, “Some Observations on Preparatory Work in the Interpretation of Treaties,” *Harvard Law Review* 48, no. 4 (February 1, 1935) at 575.

29 H. LAUTERPACHT, “Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties,” *British Year Book of International Law* 26 (1949): 48 at 52.

put their signatures to it. It is in such cases for the judge to act on the *implied intention* of the parties, i.e. on his understanding, having regard to the contract as a whole and to surrounding circumstances, as to what would have been the attitude of the parties if confronted with the issue.³⁰[Emphasis added]

As mentioned earlier, recourse to the hypothetical intention of the parties is a justification for the ICJ to engage in the evolutionary interpretation of generic terms. The Court in its advisory opinion on *Namibia* noted that concepts such as “the strenuous conditions of the modern world”, were not static, “but were by definition evolutionary”.³¹ Due to this character, in the opinion of the Court, the parties to the Covenant must consequently be deemed to have accepted them as having evolutionary meaning, and therefore, the Court

... must take into consideration the changes which have occurred... and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law.³²

The Court followed the same argument in the *Navigational Rights* case in regard to the term “commerce” and held that

... 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. In such instances it is indeed in order to respect the parties’ common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.³³

30 Ibid.,at 80.

31 *Namibia*, supra note 4 at 53.

32 Ibid.

33 Dispute regarding Navigational and Related Rights (*Navigational Rights*) (Costa Rica v. Nicaragua) Judgment [2009] I.C.J. Rep. at 64.

This argument is founded on the idea, as explained by the Court, that where the parties have used generic terms in a treaty, the parties necessarily have 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.³⁴

Here, the point of consideration is not that the Court was right or wrong in its conclusions; the point rather is on its reliance on the hypothetical intention of the parties. Of course, what makes hypothetical intentionalism seem appealing is its desire for respecting the intention of the authors. However, it begins with different premises than those followed by actual intentionalism. If intentionalism would suggest that the correct interpretation among different possible interpretations of a text is the one that corresponds to the meaning intended by the author, the hypothetical intentionalism would suggest that the correct interpretation is the one that corresponds to the meaning *an ideal reader would rationally believe* to be intended by the author.³⁵

This was exactly the reasoning of the Court, in the case concerning the *Aegean Sea*, for interpretation of the term “territorial status” in the Greek declaration of accession. In response to the argument advanced by the Greek government that at the time the reservation was made, the very idea of the continental shelf was wholly unknown and therefore there could be no question of its applicability in present dispute, the Court relied on the generic nature of the term and held:

Once it is established that the expression ‘the territorial status of Greece’ was used in Greece’s instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to

³⁴ Ibid., at 66.

³⁵ Gary ISENINGER, “Actual Intentionalism vs. Hypothetical Intentionalism” (1996) *The Journal of Aesthetics and Art Criticism* Vol. 54, No. 4: 319–26, at 320.

correspond with the meaning attached to the expression by the law in force at any given time. This presumption, in the view of the Court, is even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes 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.³⁶

Logically, it is impossible to imagine that a speaker intends something that does not exist at the time of the utterance. In other words, the Greek government could not have actually intended to exclude disputes relating to the continental shelf from the jurisdiction of the Court. Therefore, as can be seen in this case, there exists an obvious contradiction between the actual intention of the author of the reservation and the hypothetical intention identified by the reader. This contradiction, however, was resolved in favour of the reasonable intention that an ideal reader, in this case the ICJ, believed to be intended instead of the actual intention of the author of the reservation.

One of the main arguments of the European Court of Human Rights in the *Soering v. UK* to hold that death penalty could not be considered as inhuman in the meaning of Article 3, was that since Article 2 provides for conditions of deprivation of life,

On this basis Article 3 evidently cannot have been intended by the drafters of the Convention to include a general prohibition of the death penalty since that would nullify the clear wording of Article 2....³⁷

Ronald Dworkin offers the following example as an analogy to contend that there is no real contradiction between abolishing of death penalty and laying procedures for deprivation of life. In other words, what is presumed to be the intention of drafters is only the construction of the intention by the reader through some inferences:

36 Aegean Sea Continental Shelf (Aegean Sea) Judgment [1978] I.C.J. Rep. p. 3 at 77.

37 *Soering v. the United Kingdom (Soering v. UK)* [7 July 1989] E.C.H.R. Series A no. 161 at 103.

Suppose some legislature enacts a law forbidding the hunting of animals that are members of an ‘endangered species’ and then, later in its term, imposes especial license requirements for hunting, among other animals, minks. We would assume that the members who voted for both provisions did not think that minks were endangered. But we would not be justified in concluding that fact that, as a matter of law, minks were excluded from the ban even if they plainly *were* endangered.³⁸

This variation implies that the interpreter has to construct the presumed intention on the basis of some elements that are not indicating the “real” intention of the parties. In light of these problems, many proponents of intentionalism in philosophy and literature contend that the hypothetical intention should be avoided because it would induce doubts about the “facticity of intention”.³⁹ Stoljar argues that since the hypothetical intention depends on the context, it will be vague or indeterminate.⁴⁰ Waluchow believes that such a process would eliminate the main appeal of intentionalism because “we are now to consider, not what they *did* decide, believe or understand, but what they *should* decide were they to exist today and know what we now know”.⁴¹ And so the question naturally arises: “Why not just forget this theoretically suspect, counterfactual exercise and make the decisions ourselves?”⁴²

38 Ronald D. WORKIN, “Comment,” in Antonin SCALIA, *A Matter of Interpretation: Federal Courts and the Law*, (Princeton University Press, 1998) 115–29, at 121.

39 Larry ALEXANDER and Emily SHERWIN, *Demystifying Legal Reasoning* (Cambridge University Press, 2008), at 162.

40 Natalie STOLJAR, “Counterfactuals in Interpretation: The Case against Intentionalism. [Paper Presented to Critical Perspectives on Australian Constitutional Law (Australian National University, 1997)]” (1998) *The Adelaide Law Review*, Vol. 20, No. 1, at 20.

41 Wil WALUCHOW, “Constitutionalism,” in Edward N. ZALTA, ed., *The Stanford Encyclopedia of Philosophy*, 2014, <http://plato.stanford.edu/archives/spr2014/entries/constitutionalism/>.

42 *Ibid.*

III. The Way Out: Object and Purpose

Rosalyn Higgins suggests that the root criterion for assessing whether and how a treaty may be susceptible to change over time lies in its object and purpose, both in regard to changes in its semantic and its normative environment. By reviewing the ICJ evolutionary interpretation on the basis of presumed intention, Higgins argues that such an intention is deduced from the object and purpose of the agreement, which explains why it should be the one controlling the answer of time.⁴³ Her insightful examination of several aspects of time in the life of a treaty, however, does not provide any guidance as to what is the “object and purpose” and how to identify it. To defer one concept to another concept that its content and function is debated cannot advance our understanding much further.

This problem has led Arato to maintain that the inquiry into object and purpose entails “troubling doctrinal and conceptual ambiguities and seems, moreover, fundamentally incomplete.”⁴⁴ This incompleteness, according to him, lies in the fact that “the inquiry into the object and purpose fails to take the parties’ level of commitment into account, [and thus] it cannot adequately explain how much weight such object and purpose is due vis-à-vis the other factors in the Vienna rules.”⁴⁵ Due to this shortcoming, Arato suggests that the crucial consideration in dealing with the question of changes over time lies in the “nature of obligations”, and in whether “a treaty provision incorporates a merely reciprocal exchange of rights and duties between states, or rather establishes a more durable kind of obligations, resilient against shifts in party intention.”⁴⁶ For drawing distinctions between types of treaty norms for the purpose of interpretation over time in certain

43 Rosalyn HIGGINS, “Time and the Law: International Perspectives on an Old Problem,” (1997) *International and Comparative Law Quarterly*, Vol. 46, No. 3, at 519.

44 Julian ARATO, “Accounting for Difference in Treaty Interpretation Over Time,” in Andrea BIANCHI, Daniel PEAT, and Matthew WINDSOR, eds., *Interpretation in International Law*, (Oxford University Press, 2015), 205–28, at 213.

45 *Ibid.*, at 215.

46 *Ibid.*, at 218

circumstances, Arato suggests that distinguishing reciprocal, integral, and interdependent norm is the key.⁴⁷

Although the determination of the nature of obligations is an important element in reaching the correct interpretation, such an inquiry should not and cannot be limited only to the determination of reciprocity or dependency of norms. As an example, the ICJ in the *Frontier Dispute* between El Salvador and Honduras has to decide whether the existence of a valid link of jurisdiction between the would-be intervener, Nicaragua, and the parties to a case is a requirement for the success of the application. To answer this question, the Court analyses the legal nature and the purpose of intervention. As an incidental proceeding to an on-going case, the Court holds that intervention cannot transform that case into a different case with different parties.⁴⁸ This incidental proceeding is for the purpose of protecting a state's "interest of a legal nature" that may be affected by a decision in an existing case already established between other states, and "not to enable a third State to take on a new case, to become a new party, and so have its own claims adjudicated by the Court."⁴⁹ In light of these analyses the Court concludes:

It thus follows also from the juridical nature and from the purposes of intervention that the existence of a valid link of jurisdiction between the would-be intervener and the parties is not a requirement for the success of the application. On the contrary, the procedure of intervention is to ensure that a State with possibly affected interests may be permitted to intervene even though there is no jurisdictional link and it therefore cannot become a party.⁵⁰

47 Ibid., at 222.

48 Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) (Frontier Dispute) Application to Intervene, Judgment [1990] I.C.J. Rep. 92 at 98.

49 Ibid., at 97.

50 Ibid., at 100.

A detailed analysis of the nature of rules, their classification, their composition, and their function is beyond the scope of this paper.⁵¹ What is important for our discussion is to demonstrate the important role such analysis plays in determining the evolutionary character of the term of treaties.

Before starting this analysis, it is important to note that, the inclusion of elements in Paragraphs 2 and 3 of Article 31 of the Vienna Convention on the Law of Treaties (VCLT) referring to events after the conclusion of the treaty, the dependency of meaning to “tradition”,⁵² and more importantly, the fact that legal norms are enacted to remain alive so that societies can live by them, may all indicate that changes in meaning of terms are to be considered natural. This conclusion, nevertheless, has to be read in conjunction with the “special meaning” envisaged in the VCLT system of interpretation. In this sense, one could argue that one of the issues that can fall within the scope of the special meaning in Paragraph 4 of Article 31 is a term that its meaning is frozen in time and thus, static.⁵³

The most well-known case examining the issue of special meaning was the *Greenland* case, in which Norway contended that the word “Greenland” invoked by Denmark in different legislation, as the proof of the exercise of its sovereignty did not refer to a specific geographical

51 For example, norms can be studied by consideration of their “form” using the Hohfeldian analytical system determining whether rights are a privilege, a claim, power, or immunity; or they can be studied by their “normative force” to determine whether the norms are first-order reasons, exclusionary reasons or serve as conclusive reasons. See Leif WENAR, “Rights,” in Edward ZALTA, ed., *The Stanford Encyclopedia of Philosophy*, (Metaphysics Research Lab, Stanford University, 2015), <https://plato.stanford.edu/archives/fall2015/entries/rights/>.

52 Katayoun HOSSEINNEJAD, “On the Nature of Interpretation In International Law” (2015) *UCL Journal of Law and Jurisprudence*, Vol. 4, at 225–49.

53 There is no agreement among scholars in regard to what the “special meaning” refers to. Gardiner believes that the notion of a special meaning includes two distinct categories: meaning which a term has in a particular area of human endeavor; and a particular meaning given by someone using a term that differs from the more common meaning or meanings. He contends that Article 31 covers both situations. Richard K. GARDINER, *Treaty Interpretation*, *The Oxford International Law Library* (Oxford ; New York: Oxford University Press, 2008), at 334.

place rather to the colonies or the colonized area on the West coast. The Court, by reliance on the usage of the term, held that:

The geographical meaning of the word ‘Greenland’, ie the name which is habitually used in the maps to denominate the whole island, must be regarded as the ordinary meaning of the word. If it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to it, it lies on that Party to establish its contention.⁵⁴

It is clear from this passage that the special meaning is a deviation from the ordinary one that exists in the “tradition” of a specific community and that is why the PCIJ considered the burden of the proof to lie on the party claiming such a deviation. This, however, does not mean that the special meaning is not part of the discourse. Rather, the point, as Gadamer explains, is that “[i]n contrast to the living meaning of the words in spoken language—to which ... a certain range of variation is essential—a technical term is a word that has become ossified.”⁵⁵ To put it another way, the special meaning is a meaning that is frozen both in time and scope because it’s “meaning is univocally defined, inasmuch as it signifies a defined concept.” Gadamer further explains:

A technical term is always somewhat artificial insofar as either the word itself is artificially formed or—as is more frequent—a word already in use has the variety and breadth of its meanings excised and is assigned only one particular conceptual meaning.⁵⁶

To transfer this concept to the VCLT system of interpretation means that in contrast to the ordinary meaning of a term that is interpreted by considering the events after conclusion of the treaties, the concept of special meaning can function to immune the meaning against these changes.

However, the determination of special meaning cannot be done without due regard to the nature and the aim of the rule. For example,

54 Legal Status of Eastern Greenland case (Greenland) Judgment [1932] P.C.I.J. Series A/B53 at 49.

55 GADAMER, WEINSHEIMER, MARSHALL, *supra* note 6 at 415.

56 *Ibid.*

in the *Navigational Right* case, Nicaragua was claiming that the term “commerce” has a special restricted meaning of purchase and sale of merchandise as existed at the time of the conclusion of the treaty while Costa Rica argued that “commerce” as used in the treaty took in any activity in pursuit of commercial purposes and includes, *inter alia*, the transport of passengers, tourists among them, as well as of goods.⁵⁷ Many scholars believe that the Court’s answer to this question was based on the intention of the parties since the Court relied on the notion of the presumed intention of the parties. The correct explanation of the Court’s decision, however, is that what determined the answer was the nature of the rule and the purpose that the treaty is aimed to achieve. Instead, the reliance of the Court on presumed intention of the parties was a strategic move for succeeding in what described by Bianchi as the “object of the game of interpretation”: to convince the audience by appealing to values that traditionally upheld in the state-centred view of international law as practiced by the ICJ.⁵⁸

For deciding about the evolutionary nature of the term “commerce”, the Court, first, by considering the duration of the treaty, reached this conclusion that the legal regime which was created by the treaty could be characterized by its perpetuity.⁵⁹ Such a permanent legal regime in order to achieve its objective, to a permanent settlement between the parties of their territorial disputes, required the rules lay in treaties of this type to be “by nature” permanent.⁶⁰ The right of free navigation as provided in the treaty retained the same character as the Court explained:

This is true as well of the right of free navigation guaranteed to Costa Rica by Article VI. This right, described as ‘perpetual’, is so closely

57 Navigational Rights, *supra* note 33 at 58-59.

58 Julian ARATO, “Accounting for Difference in Treaty Interpretation Over Time,” in Andrea BIANCHI, Daniel PEAT, and Matthew WINDSOR, eds., *Interpretation in International Law*, (Oxford University Press, 2015), at 36-39, in particular at 38.

59 Navigational Rights, *supra* note 33 at 67.

60 *Ibid.*, at 68.

linked with the territorial settlement defined by the Treaty — to such an extent that it can be considered an integral part of it — that it is characterized by the same permanence as the territorial régime *stricto sensu* itself.⁶¹

It was due to these considerations that the Court could conclude that the terms by which the extent of Costa Rica's right of free navigation has been defined, including in particular the term "commerce", must be understood to have the meaning they bear on each occasion on which the Treaty is to be applied, and not necessarily their original meaning.⁶²

The same approach was followed by the arbitration court established by Argentina and Chile for the interpretation of the term "water-parting". But this time, the Court held that such a term had acquired a special meaning and thus its meaning was frozen in time. The Court for determining the frontier line had to interpret and apply an award issued in 1902.⁶³ For this purpose, the Court held that for interpretation of arbitral awards rules of interpretation in international law, such as the rule of the natural and ordinary meaning of the terms would be also applicable.⁶⁴ The singular feature of interpreting awards, in the opinion of the Court, was that "[t]he interpretation of a decision involves not only determination of the meaning of the text of the operative points of the decision but also determination of its scope, meaning and purpose in accordance with its reasoning."⁶⁵ The Court by examining how the term "water-parting" was used by Argentina and Chile during the 1902 proceedings concluded that there was no indication that the then arbitrator deviated from the concept of "water-parting" as had been submitted by the parties.⁶⁶ However, what made the Court to hold that

61 Ibid., at 69.

62 Ibid., at 70.

63 Boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy, Award [1994] at 61.

64 Ibid., at 72.

65 Ibid., at 74.

66 Ibid., at 126-127.

the meaning of “water-parting” was frozen in time was the application of *res judicata* to meaning of terms,⁶⁷ which led the Court to announce:

The concept of ‘water-parting’ fulfills an essential function in the 1902 Award, and any alteration of its meaning would also alter the importance of the rulings. The Court considers that the concept of ‘water-parting’ in the 1902 Award is protected by the *res judicata* and is not susceptible of any subsequent change through usage, evolution of the language, or acts or decisions of one of the Parties to the dispute.⁶⁸

IV. Conclusion

This paper aimed to demonstrate that the common narrative about the reasoning of the ICJ in evolutionary interpretation, identification of generic terms and reliance on hypothetical intention of the parties, fails because it obscures the whole process of choosing among meaning possibilities, and therefore cannot avoid arbitrariness. As can be seen in the *Pulp Mills* case, the Court interpreted “ecological balance” statically,⁶⁹ but held that the meaning of the terms “protection and preservation” were capable of evolving,⁷⁰ without much elaboration. The argument advanced in this paper, however, can provide a better ground for determining the evolutionary nature of the terms of treaties, because it considers the interpretation of law as an act within the legal sphere that follows the rationality of that legal system. The fact that the text is the starting point in interpretation, neither makes the interpretation of law a linguistic analysis nor makes judges literary critics. The rationality and coherency of a legal system, on the one hand, and the necessity to avoid arbitrariness in judicial decisions, on the other, command the interpretation to be treated as a legal analysis. Thus, the paper argues that instead of making assumptions about the intention of the parties or the generic nature of words, the juridical nature of the norm and its purpose has to guide the courts to determine the relevant time for the purpose of interpretation.

67 *Ibid.*, at 122.

68 *Ibid.*, at 130.

69 *Pulp MILLS*, *supra* note 9 at 52.

70 *Ibid.*, at 204.

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