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Evolutive Interpretation of Treaties and Risk of Judicial Legislation

The risk of judicial legislation is inherent to any method of interpretation of international treaties, but due to particular characteristics of evolutive interpretation, this method of interpretation is especially at risk to slip into judicial legislation. Both key elements of evolutive interpretation: a) the capacity of a treaty to evolve its meaning and b) change that occurred after the conclusion of a treaty that modifies the meaning of the treaty have slippery spots. Branching of evolutive interpretation through the jurisprudence of various international courts and tribunals increased the risk. Despite branching, certain commonalities may be derived from incoherent practices and if they acquire the status of standards, they can reduce the danger of arbitrariness. Besides, a holistic approach to interpretation, as envisaged in Article 31 of the Vienna Convention on the Law of Treaties, can diminish the risk.

Key words: international treaties, evolution, interpretation

Introduction

The evolutive interpretation is a relatively new method of interpretation that addresses the temporal aspect in the interpretation of long-living legal instruments, such as constitutions or international treaties. Regarding international treaties, it answers the question of whether and how certain change, such as a change in rules on international law applicable between the parties to a treaty or changes of the meaning of terms used in a treaty, modifies the meaning of the treaty.

Whether a change can affect the meaning of a treaty depends on certain qualities of a treaty provision, on the disputed issue that should be answered by interpretation, and on the qualities of the change. A treaty provision should have qualities that enable it to evolve its meaning. A change should be such to offer the answer to the issue that is disputed between the parties.

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The issue of judicial legislation was raised in the *Magyar Helsinki Bizottság* case of 2016.[1] The issue before the European Court of Human Rights (hereinafter ECtHR or European Court) was whether the term "to receive" information, in the context of the freedom of expression, as guaranteed by Article 10 of the European Convention on Human Rights, evolved thus to included meanings of the terms "to seek" information or "to access" to the information? The Government of the United Kingdom intervened in the proceedings on the side of the Respondent State Hungary. Having in view the *travaux préparatoires* and case law, the Government asserted that Article 10 did not recognize a right of access to information.[2] The recognition of the right "would far exceed the legitimate interpretation of the Convention and would amount to judicial legislation."[3] The Government invoked Article 31 (1) of the 1969 Vienna Convention on the Law of Treaties (hereinafter VCLT) and argued that the ordinary meaning of the words should be the principle means of interpretation.[4] In spite of that, the majority of judges of the Grand Chamber of the European Court gave a positive answer. Dissenting judges Spano and Kjølbro began their opinion with a general and key remark concerning the role of the European Court. The two judges warned that the European Court should not be a body that transformed every positive development in the field of human rights in the Convention law, but a body restraint to the interpretation of the Convention.[5] Obviously, they shared the concern of the United Kingdom that the European Court might encroach on judicial legislation. The positive answer was based on several developing processes which were running in parallel, and which resulted in the new meaning of Article 10. The developing process will be addressed later in the article.

The risk of judicial legislation is not specific only to the method of evolutive interpretation. However, certain characteristics of this method make the risk greater. Branching of evolutive interpretation in practices of various international courts and tribunals results in incoherency and relative indeterminacy of the concept and opens the door for arbitrariness. The concepts differ regarding a key element of the evolutive interpretation — establishing the capacity of a treaty to evolve its meaning over time. The International Court of Justice (hereinafter: ICJ or World Court) uses subjective element — intention or presumed intention of the parties to endow a treaty with a capacity to evolve an objective element-characteristics of terms, provisions, and the treaty which enable its meaning to evolve.

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1 *Magyar Helsinki Bizottság v. Hungary* (app. no. 18030/11), Judgment of 8 November 2016.

2 *Ibid.,* para 69.

3 *Ibid*.

4 *Ibid*., para 99.

5 *Ibid*., Dissenting Opinion of Judge Spano Joined by Judge Kjølbro, para 2.

Other international courts and tribunals use only objective elements. An arbitration tribunal rejected both elements and employs the object and purpose of a treaty to realize the evolutive potential of its provision. This incoherence can instigate other innovative approaches which can increase uncertainty regarding evolutive interpretation and interpretation in general.

The article aims to refer to slippery places of evolutive interpretation as well as to safeguard against judicial legislation. It begins with a short presentation of birth and branching of evolutive interpretation and continues with a short reference to informal modification of a treaty which can mitigate the risk. The focus will be then shifted to two key elements of evolutive interpretation: a) the capability of a treaty to evolve its meaning over time and b) change, which occurred after the conclusion of a treaty, and its capacity to alter the meaning of the treaty. A holistic approach to interpretation will be presented as the best guarantee against judicial legislation and the article will end with a more general consideration of the propriety of evolutive interpretation.

1. The birth and branching of evolutive interpretation of treaties

Huber's formulation of the intertemporal law in the *Island of Palmas* case in 1928[6] and a remark of the Permanent Court of International Justice of 1923 that answer the question of whether a certain matter is or is not solely within the jurisdiction of a State depends on the development of international relations announced the development of evolutive interpretation in international law.[7] Codifying treaty law 1964–1966, the UN International Law Commission (hereinafter: ILC or Commission) touched on the intertemporal issue.[8] Having spread over various international jurisdictions after the seventies of the last century, the evolutive interpretation has lost coherence and bifurcated into more branches.

The substance of intertemporal issues, addressed by the International Court of Justice (hereinafter: the ICJ or the World Court), was the question of whether and how changes in international law

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6 *Island of Palmas case*, Award of April 1928, Report of International Arbitral Awards, vol. II, 845. Available at https://legal.un.org/riaa/ See more on intertemporal law at T. O. Eilas, The Doctrine of Intertemporal Law, *American Journal of International Law*, vol. 74, no. 2, 1980, 285–307.

7 *Nationality Decrees Issued in Tunis and Morocco*, P. C. I. J. Series B, No. 4, 1923. Available at https://www.icj-cij.org/en/pcij-series-b.

8 Report of the International Law Commission on the work of its eighteenth session, Geneva, 4 May — 19 July 1966, *The Yearbook of the International Law Commission* 2/1966, 222, para 16. Available at https://legal.un.org/ilc/documentation/english/reports/a_cn4_191.pdf.

and language affect the meaning of treaties. In the *Namibia* case[9] of 1971, the issue was whether and how the international legal system, which has been established after World War Two and which has recognized the right to self-determination, affects the meaning of a general provision on mandates in paragraph 1 of Article 22 of the Covenant of the League of Nations of 1919. In the *Aegean Sea Continental Shelf* of 1978, the question was whether rules on the continental shelf, which emerged in the law of the sea after World War Two, modified the meaning of the terms "territorial status," as used in the 1931 Greek instrument of accession to the 1928 General Act for Peaceful Settlement of International Disputes.[10] The difference between the parties in the *Gabčikovo-Nagymaros* case was whether a new development of international environmental law undermined the validity of the 1977 Treaty between Czechoslovakia and Hungary concerning the construction and operation of the Gabčikovo-Nagymaros System of Locks.[11] In the *Navigational Rights and Related Rights* case,[12] the question was whether the term "commerce" has changed its meaning from the time of the conclusion of the Treaty of Limits of 1858, so to cover tourist services or remained at its original meaning of trade in goods. In *Pulp Mills* the ICJ found that environmental impact assessment obligation has emerged from the widespread acceptance of States and thus became infiltrated in the Statute of the River Uruguay.[13] In the case of *US Nationals in Morocco*[14] in 1952, the World Court considered whether the term "dispute" in a provision regarding consular jurisdiction had meaning from the time of the conclusion of the treaty in 1836 or a new meaning. Here, the World Court opted for the meaning from 1836 i. e. for static interpretation. In the *Construction of a Wall* advisory opinion, however, the Court departed from the model established in previous mentioned cases and referred to the evolved practice of the General Assembly as to a source of a new meaning of the Charter.[15] The focus of the ICJ in mentioned cases, except in the last case, was on ascertaining ability of a treaty to absorb a new meaning. The

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9 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, I. C. J. Reports 1971, p. 31, para 53, All cases of the ICJ are available at https://www.icj-cij.org/en/list-of-all-cases.

10 *Aegean Sea Continental Shelf* (Greece v. Turkey) Judgment of 19 December 1978.

11 *Gabčikovo-Nagymaros Project* (HungarylSlovakia), Judgment, I. C. J. Reports 1997, p. 65, para 104.

12 *Dispute regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), Judgment, I. C. J. Reports 2009.

13 *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, I. C. J. Reports 2010, 14.

14 *Case concerning rights of nationals of the United States of America in Morocco*, Judgment of August 27th, 1952, I. C. J. Reports 1952.

15 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p. 149, para 27.

World Court developed concept according to which the ability was intended or presumably intended by the parties and the intention or presumed intention is expressed in using generic terms in treaties and in the long duration of treaties.

The ECtHR accepted the method of evolutive interpretation in the *Tyrer* case[16] in 1978 and became famous for that method. The attention of the European Court has not been concentrated on ascertaining the ability of the European Convention on Human Rights to evolve its meaning, but on ascertaining changes in social and legal developments that affect the meaning of the Convention. The *Magyar Helsinki Bizottság* is distinguished by the way of ascertaining the change of legal developments and its impact on the meaning of the Convention. Although evolutive interpretation has become a label of the ECtHR, it has not been used as an absolute canon.

The new type of evolutive interpretation was born in the *Iron Rhine* case.[17] The Arbitral Tribunal was asked, *inter alia*, whether Article XII of the 1839 Treaty of Separation, which governed building traffic communication between Belgium and Germany over the Dutch territory, was applicable also to the modernization of the railway communication. Information on the ability of the Treaty to evolve was found not in the characteristics of provisions of the Treaty, but in the object and purpose of the Treaty. New facts — modern speedy railways — provoked the object and purpose of the treaty to disclose a new meaning of Article XII.

The model of evolutive interpretation, as developed by the ICJ, has been transplanted into practice of the Appellate Body of the WTO and in investment arbitrations. Two investment arbitration tribunals, the Al-Warraq tribunal and the Itisaluna tribunal interpreted Article 17 of the 1981 Agreement on Promotion and Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (hereinafter OIC Agreement). The Al-Warraq tribunal applied evolutive interpretation and the Itisaluna tribunal refused this interpretative method. Two tribunals arrived thus to contrary results.

The evolutive interpretation has not been established thus as a coherent and uniform method in various judicial practices. Rather, it seems that the courts and tribunals have adapted the method to their different needs. That may explain different concepts of the ICJ and the ECtHR. The ICJ interprets various treaties, and the World Court has to establish in each case capability of a particular treaty to evolve

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[16] *Tyrer v. the United Kingdom*, Application No. 5856/72, Judgment, 25 April 1978. All cases of the ECtHR are available at https://hudoc.echr.coe.int/eng#{%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}.

[17] *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, Reports of International Arbitral Awards, vol XXVII, 2008, 35. Available at https://legal.un.org/riaa/.

its meaning. The European Court interprets exclusively the European Convention on Human Rights. Having found once that the Convention has been a living instrument, it is in a position just to repeat its first finding in later cases. Due to different subject matters of disputes, the ICJ is usually in a more convenient position than the ECtHR to ascertain the change and its bearing on the meaning of a treaty. The Appellate Body of the WTO transplanted the model of the ICJ, but without subjective element — intention or presumed intention of parties. The Iron Rhine arbitral tribunal established a new type of evolutive interpretation which might be seen as closer to teleological interpretation. Such diversification of the practice of evolutive interpretation brings a risk of vagueness and arbitrariness in its application. The Al-Warraq tribunal found thus evidence of the capability of Article 17 of the OIC Agreement to evolve not in characteristics of terms used in the Article, but in the subject-matter of the Article.

2. Informal modification of a treaty by practice in its application

According to the general rule regarding the amendment of treaties, as laid down in Article 39 of the VCLT, "a treaty may be amended by agreement between the parties". Whether a treaty may be amended by an informal agreement between the parties, reached by their practice in the application of a treaty? In its Draft on the law of treaties of 1964, the ILC proposed Article 38 as follows: "A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions." The Vienna Conference rejected the proposal.[18] Having in view that the Conference rejected the proposal in 1968 and that later literature and practices of international courts have recognized the possibility of informal modification, the ILC was very cautious about the idea of an informal modification of a treaty, but it did not reject the idea in 2008.[19]

The ICJ signaled such a possibility in more cases. In *Navigational and Related Rights*, the ICJ indicated two ways by which the meaning of a treaty may be changed:

> On the one hand, the subsequent practice of the parties, within the meaning of Article 31(3)(*b*) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other

[18] Report of the Committee of the Whole on its work at the first session of the Conference, Doc. A/Conf. 39/14, Documents of the UN Conference on the Law of the Treaties, United Nations, New York, 1971, 158.

[19] Report of International Law Commission on the Work of Its Seventieth Session, Supp. No. 10, 2018, UN Doc. A/73/10 (2018), 51.

> hand, there are situations in which the parties intent upon the conclusion of the treaty was, or may be presumed to have been, to give the terms ...a meaning or content capable of evolving...[20]

The ILC observed that it was not quite clear whether the ICJ accepted that subsequent practice under Article 31(3)(b), might also amend or modify a treaty, or whether the ICJ explained that the original intent of the parties was not necessarily decisive for the interpretation of a treaty.[21] In *Namibia*, however, the ICJ rejected the objection of South Africa that a resolution of the Security Council was invalid since the abstention of a Permanent Member in voting on the resolution was contrary to Article 27(3) of the UN Charter. The World Court explained that such a mode of voting "has been generally accepted by the Members of the United Nations and evidence a general practice of that Organization."[22] The relevant part of Article 27(3) of the Charter states: "Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members..." Whether the ICJ applied here evolutive interpretation or accepted the informal modification of Article 27? The question might have certain doctrinal significance, but its practical importance is small. After certain sporadic critiques of such a mode of voting by some Member States, that mode of voting has become generally accepted. That's the end. All other is of small importance.

The ECtHR was quite clear and explicit. In the *Öcalan* case, the ECtHR stated:

> It is recalled that the Court accepted in its *Soering v. the United Kingdom* judgment that an established practice within the Member States could give rise to an amendment of the Convention. In that case, the Court accepted that subsequent practice in national penal policy, in the form of a generalized abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 and hence remove a textual limit on the scope for evolutive interpretation of Article 3 (...).[23]

Informal modification of a treaty by practice in its application is thus the first neighbor of evolutive interpretations. Their domains are

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[20] *Navigational and Related Rights*, *supra* n. 12, p. 242.

[21] International Law Commission Report on the Work of Its Seventieth Session, Supp. No. 10, at 60, UN Doc. A/73/10 (2018).

[22] *Namibia*, *supra* n. 9, p. 22, para. 22.

[23] *Öcalan v. Turkey*, (Application No. 46221/99)., Judgment of 12 May 2005, para 163.

not clearly divided. By interpreting a treaty, an international court can in fact recognize informal modification of the treaty. In that case, it would not be reasonable to accuse the court of judicial legislation.

3. Capability of a Treaty to Evolve Its Meaning over Time

The concept of intention or presumed intention of the parties to endow a treaty with the capacity its meaning to evolve has been established by the ICJ to preserve the concept of a treaty as the agreement among the parties. In *Aegean Sea Continental Shelf*, the Court used the phrase "the presumption necessarily arises that its meaning was intended to follow the evolution of the law". It was in a line with the opinion of the UN International Law Commission from 1966 that the applicability of intertemporal law should depend on the intention of the parties.[24] The author of the opinion was Sir Humphrey Waldock, then Special Rapporteur on the law of treaties in the ILC[25] and later Judge of the ICJ in *Aegean Sea Continental Shelf*. His idea on the relevance of the intention of the parties for the intertemporal issue was accepted in the ILC and now appeared in the judgment of the ICJ. In the preceding *Namibia* case, the ICJ used the presumption that the parties accepted the evolutionary capacity of the expression — "the parties ... must ... be deemed to have accepted ..."[26] In *Navigational Rights and Related Rights*, the ICJ remarked that the parties had been aware that the meaning of the terms would probably evolve over time and states "there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been ..."[27] The Al-Warraq Tribunal stated that "the intention of the Contracting Parties... was to create a dispute resolution mechanism that might develop with international law."[28] Thus, the parties intended or presumably intended, when they drafted a treaty, to open the treaty for a new meaning.

The intention or presumed intention may be disclosed in certain objective characteristics of a treaty. The courts and tribunals used different phrases to indicate the objective capacity of a treaty to evolve. Some of them found these objective signs as an expression of the

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[24] *Report of the International Law Commission on the work of its eighteenth session*, *supra* n. 8, p. 222, para 16.

[25] Humphrey Waldock, The Effectiveness of the System Set up by the European Convention on Human Rights, *Human Rights Law Journal*, 1, 1980, 3,4. Quoted by Eirik Bjorge, The Vienna Rules, Evolutionary Interpretation, and the Intentions of the Parties, in A. Bianchi, D. Peat and M. Windsor, (eds), *Interpretation in International Law*, Oxford University Press, New York, 2015, p. 201.

[26] *Namibia, supra* n. 9, p. 31, para 53.

[27] *Navigational Rights and Related Rights*, *supra* n. 12, p. 242, para 64.

[28] *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, Award of 21 June 2012, para 82. Available at https://www.italaw.com/cases/1527.

intention or presumed intention, but others did not refer to the subjective element. The expressions "by definition evolutionary,"[29] "generic term"[30] and "sufficiently generic"[31] are used. Indeed, the meaning of a term should be enough broad to allow its new specification. Thus, in *Namibia*, the expression "' the well-being and development of the peoples concerned" was enough broad to include the new right to self-determination.[32] Or, in Aegean Sea Continental Shelf the expression "territorial status" was enough wide to absorb the newborn concept of the continental shelf. In one case, the openness of articles was described by a remark that "articles do not contain specific obligations of performance."[33] The treaties of "the most general kind and of continuing duration"[34] or only of "continuing duration"[35] were considered capable of evolving. The characteristic of treaties has been always combined with the characteristic of terms. The Al-Warraq tribunal departed from the stated practice. It described the term "dispute" as "the generic and undefined term".[36] Really, the term is of generic nature. The Tribunal used the term, however, to denote the subject matter of Article 17 of the OIC Agreement. It was used as the subject matter of the Article since the new meaning did not specify or alter the meaning of the term, but it modified the meaning of the Article as a whole. It was an innovative and problematic approach.

The ECtHR has not used the concept of intention or presumed intention to justify its evolutive interpretation. Neither it explores the generic nature of terms used in the European Convention on Human Rights. Instead of that, the European Court repeats that "the Convention is a living instrument".[37] That means that the Convention is capable to evolve its meaning. That means, also, that the agreement of the Contracting States, as explicated in the provisions of the Convention, is not static, but dynamic, changeable over time. The ICJ confirmed, also, as it was stated above, that the original intention of the parties can be replaced by their tacit agreement achieved by subsequent practice in the application of a treaty. Judge of the ICJ James Crawford saw evolutive interpretation as a departure from the

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[29] *Namibia*, *supra* n. 9, p. 31, para 53.

[30] *Aegean Sea Continental Shelf*, *supra* n. 10, p. 20, para 48. *Navigational Rights and Related Rights*, *supra* n. 12, 243, para 66. Appellate Body Report, United States — Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 12 October 1998, 48, para 130. Available at https://www.wto.org/english/tratop_e/dispu_e/58abr.pdf.

[31] Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publication and Audiovisual Entertainment Product*, WT/DS363/AB/R 21 December 2009, p. 161, para 396, in n. 705. Available at https://www.wto.org/english/tratop_e/dispu_e/363abr_e.pdf.

[32] *Namibia, supra* n. 9, p. 31, para 53.

[33] *Gabčikovo-Nagymaros Project supra* n. 11, p. 67, para 112.

[34] *Aegean Sea Continental Shelf*, *supra* n. p. 20, para 48.

[35] *Navigational Rights and Related Rights*, *supra* n. 12, p. 243, para 66.

[36] *Al-Warraq*, supra n. 28, para 82.

[37] *Tyrer, supra* n. 16, para 31.

intention of the parties, as it was at the time of a conclusion of a treaty.[38] The Appellate Body of the WTO transplanted the model of the ICJ but dropped out the subjective component-intention or presumed intention. The "Iron Rhine Railway" Tribunal did not, also, refer to the intention or presumed intention of the parties. It remarked that "a conceptual or generic term" model, as used by the ICJ or the Appellate Body of the WTO was not an issue in the case, but rather new technical developments.[39] The Tribunal found evidence of capacity for evolution rather than in the object and purpose of the treaty.[40]

The concept of a presumed intention of the ICJ opens the issue of the relationship between real intention, as it may be identified in *travaux préparatoires* and presumed intention, as it may be reflected in generic terms in a treaty. The cases explored in this article inform that in the case of conflict between real intention and presumed intention, the last will prevail.[41] However, the practice of interpretation, including the practice of the ECtHR confirms that the generic nature of terms was not considered enough to produce evolutive effects in certain cases.

4. The change and its capacity to modify the meaning of a treaty

The change, which occurred after the conclusion of a treaty, may awaken the evolutive potential of a treaty to inbreathe a new meaning. The changes include changes in rules of international law applicable between the parties of a treaty; changes of meanings of words used in a treaty; changes in practices of the parties in the application of a treaty; changes in generally accepted practice by States; changes in relevant case law regarding interpretation of a treaty; changes in circumstances relevant for application of a treaty, etc. The list of possible changes is long, but not exhaustive. It should be, however, a change of something what is enough relevant for a treaty or what reflects the views of the parties to a treaty. Taking practice of a few States, beyond the circle of the Contracting States to the European Convention on Human Rights, by the ECtHR in *Christine Goodwin* as relevant for interpretation of the European Convention was criticized as "arbitrary and hardly predictable".[42]

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38 J. Crawford, State Responsibility: The General Part, Cambridge University Press, 2013, 246. Quoted by Eirick Bjorge, *The Evolutionary Interpretation of Treaties*, Oxford 2014, 122.

39 *Iron Rhine Railway, supra* n. 17, p. 73, para 80.

40 *Ibid*., p. 74, para 83.

41 *Namibia*, *supra* n. 9, p. 28, para 45, *Aegean Sea Continental Shelf*, *supra* n. 10, p. 30, para 73, *Al-Warraq*, *supra* n. 28, para 81. *Magyar Helsinki Bizottság*, *supra* n. 1, para 135.

42 Kanstantsin Dzehtsiarou and Conor O'Mahony. "Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights

Commenting on evolutive interpretation of the ECtHR, its former Judge Bernhard remarked that "real problems" occurred when the ECtHR has relied on some general tendences in which some Contracting States had not participated or had not reacted in the same manner.[43] Indeed, the European Court has taken, usually, practice of majority of the Contracting Parties as relevant. If minority did not participate in new emerging practice or if it did not oppose to the practice, taking of the practice of majority is not a serious problem. The problem may arise when a States has been continuously and consistently opposing developing of new practice. One can make parallel with formation of new rule of international customary law. A continuously and consistently opposition of a State can exempt the State from effects of a new customary rule. The question is, however, whether the parallel is justified in the context of practice in the application of a treaty. The opposition might be relevant if it is not contrary to the object and purpose of a treaty or its particular provision. And then, effect of opposition might depend on subject-matter of a treaty and circumstance of the case.

The ascertaining of a change may be another sensitive issue. The ICJ had no any problem to ascertain the changes in *Namibia*, *Aegean See Continental Shelf, Gabčikovo-Nagymaros* or *Navigational Rights and Related Rights*. When they appear as provisions of international treaties, decisions of international organizations or judicial finding in decisions of courts and tribunals, they are well evidenced and easily accessible. The ICJ did not have problem to ascertain the right to self-determination, as established in the UN Charter and in general practice after the Second World War in *Namibia*, or a new legal concept of continental shelf in *Aegean See Continental Shelf*, or new meaning of the term "commerce" in *Navigational Rights and Related Rights*. In these cases, the change established was enough to articulate the new meaning of a treaty. The matter was more complicated in *Pulp Mills*. The general acceptance of the new standard of international environmental law regarding environmental impact assessment was easily ascertained. The parties did not differ, however, regarding the existence of the standard, but they were in dispute regarding specific issues of application of the standard. Since the ICJ did not find enough communalities in the practice of States in respect of these specific issues, the World Court left the issues to the discretion of the parties. The ECtHR has often faced the same problem. In *Christine Goodwin* judges observed converging tendencies in the internal law of the Contracting States but noted that the

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and the U. S. Supreme Court," *Columbia Human Rights Law Review*, vol. 44, no. 2, 2013, 352.

[43] Rudolf Bernhard, "Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights", *German Yearbook of International Law*, vol. 42, 1991, p. 22.

convergence did not reach a sufficient level to give unified answers to specific questions of the case.[44]

The matter is becoming even more complex when a change emerges in a diffuse form, when it appears in many sources and when its elements are not quite identical. It is a prevailing standard that the courts refer to all different sources to evidence the change and its content. Contrary practice, as in *Al-Warraq*, is risky. The Tribunal referred only to "the modern practice" without any specific evidence of the practice. A few years later the Itisaluna tribunal saw "the modern practice" differently. It would not be so easily possible if the first tribunal presented enough evidence to corroborate a change. It might be noted that a standard has emerged according to which elements of the change in all its appearances in various sources have to be identical in measure necessary to provide clear and precise information on the specific issue. This is important when a court must reply to specific, precise questions, like in *Pulp Mills* or *Magyar Helsinki Bizottság*. In other cases, like *Gabčikovo-Nagymaros*, and partly in *Iron Rhine* nature of the dispute is such that a general view on legal developments satisfies. The resolution of the dispute in these cases did not require ascertaining a change and its content in detail. A combination of identical elements from various sources to identify a change can be illustrated by *Magyar Helsinki Bizottság*. The question raised before the European Court was whether the freedom of expression included the right to seek information i. e., the right of access to information. The first two sentences of Article 10 of the ECHR, which were the subject-matter of interpretation, read:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

Interpreting the Article, the European Court distinguished more parallel and interrelated developing processes. The first was detected in its case law. For a longer period, the European Court had denied that the right to access information, as a general right, was inherent to the freedom of information, as guaranteed by Article 10. In the framework of the freedom of the press, as an important element of the freedom of information, the European Court began, however, to recognize a specific right to access to information of public interest, first to journalists and then to other "public watchdogs" including NGOs and "bloggers and popular users of the social media".[45] The second developing process was running at the level of international, universal, and regional human rights treaties and in the practice

[44] *Christine Goodwin v. The United Kingdom* (app. no. 28957/95), Judgment of 11 July 2002. para 85.

[45] *Ibid*., paras 130, 132, 159, 168.

of international, universal, and regional human rights bodies. The substance of this developing process was establishing a connection between watchdogs' right to access information, the right to impart information, and the right of the general public to receive information.[46] The third development "of paramount importance" was discovered in comparative legislation of the Contracting States and in instruments adopted by the Council of Europe.[47] The ECtHR noted that nearly all of the thirty-one member States of the Council of Europe had adopted the legislation on freedom of information which recognized the right to access to information under certain limits and conditions. The "further indicator of common ground" was found by the European Court in the adoption of the Council of Europe Convention on Access to Official Documents.[48] The ECtHR did not mechanically transplant the right to seek information as it is envisaged in Article 19 (2) of the 1966 International Covenant on Civil and Political Rights. Paragraph 2 of the Article states: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information..." Article 19 is the applicable law between the Contracting Parties to the ECHR in sense of Article 31 (3) (c) of the VCLT. The European Court has not however extended the right to seek information to its maximal limits, as foreseen by Article 19 (2) of the International Covenant, but having in view all practices, it combined their identical elements and established limits to the right to access information in respect to the subjects, nature of information required and purpose of informing. Having in view that all Contracting States to the European Convention on Human Rights are the parties to the International Covenant on Civil and Political Rights and that Article 19 (2) of the Covenant defines freedom to expression as including freedom to seek information, it might be difficult to argue that they did not consent to such meaning. In such circumstances despite the difference between the terms "to receive," "to seek" and "to access", the allegation that the ECtHR entered judicial legislation, in that case, does not look as justified.

5. Holistic approach to interpretation

The evolutive interpretation is part and parcel of Articles 31 and 32 of the Vienna Convention on the Law of Treaties[49] and it runs in

[46] *Ibid*., para 152.
[47] *Ibid*., para 153.
[48] *Ibid*.
[49] Under the title "General rule on interpretation" Article 31 reads:
"1. 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. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble

parallel with other means of interpretation set out in the articles.[50] In fact, it operates through the means laid down in Articles 31 and 32 of the VCLT: ordinary meaning of terms, object and purpose of a treaty, subsequent agreements and subsequent practice in the application of a treaty, relevant rules of international law applicable between the parties and the circumstance of the conclusion of a treaty. The ordinary meaning of terms may be changed over time and a new meaning may be used, as was the case in *Navigational Rights and Related Rights*. The new circumstances regarding the modernization of railways provoked the object and purpose of the treaty in *Iron Rhine* to disclose a new meaning of the treaty. The subsequent practice in the application of a treaty is the main avenue for introducing new meaning in the European Convention on Human Rights. Seldom it is practice envisaged by Article 31(3, b) of the VCLT in the sense that it reflects an informal agreement of all Contracting States regarding a new meaning of the European Convention. More often it is a practice that reflects an informal agreement of the majority of the Contracting States, which is also relevant in accordance with Article 32 of the VCLT. Newborn general rules of international law can bring new content to a treaty as it was the case in *Gabčikovo-Nagymaros*. Besides, the outcome of evolutive interpretation is controlled by stated means. Thus, a new meaning resulting from evolutive interpretation has to fit to context, to be in conformity with the object and purpose and subsequent practice in the application of a treaty, etc. Indeed, the ICJ, the ECtHR, and other courts and tribunals have usually employed other means of interpretation to confirm the evolution of the meaning of a treaty.

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and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. 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. 4. A special meaning shall be given to a term if it is established that the parties so intended." Under the title "Supplementary means of interpretation", Article 32 states: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

[50] Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, adopted by the International Law Commission at its seventieth session, in 2018, A/73/10, 66, para 8. Avaiable at https://legal.un.org/ilc/texts/instruments/english/commentaries/1_11_2018.pdf.

Two awards of two investment arbitration — *Al-Warraq* UNCITRAL arbitration[51] and *Itisaluna* ICSID arbitration[52] may serve as a good illustration of the relevance of a holistic approach. Both tribunals interpreted the same Article 17 of the 1981 Agreement on Promotion and Protection and Guarantee of Investments among the Member States of the Organization of the Islamic Conference. Relevant parts of Article 17 of the OIC Agreement read:

> "1. ...disputes that may arise shall be entitled through conciliation or arbitration in accordance with the following rules and procedures:
>
> 1. Conciliation
>
> a) In case the parties to the dispute agree on conciliation, the agreement shall include a description of the dispute, the claims of the parties to the dispute and the name of the conciliator whom they have chosen...
>
> 2. Arbitration
>
> a) If the two parties to the dispute do not reach an agreement as a result of their resort to conciliation, or if the conciliator is unable to issue his report within the prescribed period, or if the two parties do not accept the solutions proposed therein, then each party has the right to resort to the Arbitration Tribunal for a final decision on the dispute..."[53]

The Al-Warraq tribunal applied evolutive interpretation. Having observed that the subject matter of the clause was the generic and undefined term "dispute," the Tribunal states that "the intention of the Contracting Parties to the OlC Agreement was to create a dispute resolution mechanism that might develop with international law."[54] The Tribunal began evolutive interpretation by the following observation:

> "From a contemporary perspective, the Tribunal finds that Article 17 constitutes an investor-state arbitration provision, and there is nothing in this Article inconsistent with the modern practice to interpret these clauses as constituting an open offer by the state parties to investors, that can be accepted and the arbitration initiated, without any separate agreement by the state party."[55]

Invoking "modern practice", the Tribunal interpreted the quoted provisions of Article 17 as an unconditional offer for arbitration,

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[51] *Al-Warraq, supra* n. 28.

[52] *Itisaluna Iraq LLC and others v. Republic of Iraq*, Award of 3 April 2020, case No. ARB/17/10. Available at https://www.italaw.com/cases/5591.

[53] *Al-Warraq*, *supra* n. 28, para 11, *Itisaluna*, *supra*. n. 52, para 51.

[54] *Al-Warraq*, *supra* n. 28, para 11., para 82.

[55] *Al-Warraq*, *supra* n. 28, para 81.

made by the parties to investors. Modern practice has changed the meaning of the Article, according to the Tribunal, by eliminating conciliation as a precondition of arbitration. Eight years later the Itisaluna tribunal disagreed. The Tribunal observed that the award of the Al-Warraq tribunal did not take into account the conditional mode "if...then" stated in Article 17 of the OIC Agreement.[56] It found that the conclusion that resorting to arbitration is preconditioned by conciliation is in harmony with the rest of the Article and with comparative elements of dispute settlement provisions in other investment treaties.[57] Thus, the two tribunals differ regarding the existence of a new meaning-an open offer to arbitration. The Itisaluna tribunal did not find that the new meaning could be derived from "modern practice". More importantly, the two tribunals differ regarding the possibility to integrate the new meaning in the text of Article 17. The Itisaluna tribunal concluded that the outcome of the evolutive interpretation as applied by the Al-Warraq tribunal did not fit to the ordinary meaning of the text of Article 17.[58]

6. Propriety of evolutive interpretation

Exploring the propriety of evolutive interpretation as well as other interpretative methods one should have in view that judicial interpretation is part and parcel of the resolution of international disputes and that the UN Charter requires that the said disputes must be resolved in accordance with law and the principle of justice. Justice may be understood here as a synthesis of the United Nations' values. Having that in mind, it can be said that even if evolutive interpretation may be technically correct, that is if it is realized by introducing a new meaning in generic terms of a treaty in full harmony with other means of interpretation, set out in Article 31 and 32 of the VCLT, propriety of evolutive interpretation may be still doubtful having in view particular characteristics of a case. The question may be illustrated by *Aegean Sea Continental Shelf*. Having in view its previous jurisprudence, the ICJ confirmed in *Aegean Sea Continental Shelf* that the intention of the Greek Government at the time when it deposited its instrument of accession to the General Act, that is in 1931, was relevant for the interpretation of the reservation regarding territorial status.[59] The Court found that the motive of the reservation was to protect against claims for revision

[56] *Ibid*., para 178.
[57] *Ibid*., para 183.
[58] See more at Rodoljub Etinski, "Different Interpretation of the dispute settlement provisions in the OIC Investment Agreement: propriety of the evolutive interpretation," *Yearbook on International Arbitration and ADR*, vol. VII, 2021, 27–47.
[59] *Aegean Sea Continental Shelf*, *supra* n. 10, p. 29, para 69.

of territorial arrangements established after the First World War.[60] The motive was thus quite specific. Greece lodged the reservation to protect itself against reversionistic territorial claims. Having confirmed the motive, the World Court left the terrain of facts and entered the uncertain terrain of probability: "the strong probability is that a State which had recourse to a reservation of disputes relating to territorial status, or the like, intended it to be quite general."[61] The probability was based on the opinion of the ICJ that States did not like territorial disputes of any kind and resulted in the decision of the ICJ that it was without jurisdiction to resolve the dispute between Greece and Turkey concerning the delimitation of the Aegean Sea continental shelf. There is an opinion that the motive of the Court for declining its jurisdiction in the case was to avoid determining whether the 1928 General Act for Peaceful Resolution of International Disputes was in force at that time.[62] States and judges were divided about the question, which was certainly very important. The judgment was adopted by 12: 2. One of two dissenting judges, Judge De Castro said:

> "In seeking to ascertain what it was that had become the common will of Greece and Turkey with regard to the meaning of Greece's reservation (b), we are faced with the fact that at the time when these two States acceded to the Act, on 14 September 1931 and 26 June 1934, States in general, and Greece and Turkey in particular, were totally unaware that there could be problems relating to the continental shelf... It is therefore obvious that at the time of the meeting of wills between Greece and Turkey, there was not-and could not be-any agreement between their respective declarations to exclude from the jurisdiction of the Court questions relating to the continental shelf."[63]

The question might be whether it was proper to allow that later development of law narrows the jurisdictional agreement between Greece and Turkey in the circumstance of the case. The dispute has remained unresolved until the present day. And in general, whether all provisions of international treaties, consisting of generic terms, are equally suitable to evolve over time? Interestingly enough, the European Court, a champion in evolutive interpretation gave a negative answer. The ECtHR excluded Article 1 of the European

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60 *Ibid*., p. 30, para 73.

61 *Ibid*.

62 D. H. N Johnson, "The International Court of Justice Declines Jurisdiction again (the Aegean Sea Continental Shelf Case)," *Australian Year Book of International Law*, 7, 1976–1977, 316.

63 *Aegean Sea Continental Shelf*, *supra* n. 10. Dissenting Opinion of Judge De Castro, 63.

Convention from evolutive interpretation. In *Bankovic* the European Court stated:

> "It is true that the notion of the Convention being a living instrument to be interpreted in light of present-day conditions is firmly rooted in the Court's case-law. The Court has applied that approach not only to the Convention's substantive provisions... but more relevantly to its interpretation of former Articles 25 and 46 concerning the recognition by a Contracting State of the competence of the Convention organs...
>
> However, the scope of Article 1, at issue in the present case, is determinative of the very scope of the Contracting Parties' positive obligations and, as such, of the scope and reach of the entire Convention system of human rights protection as opposed to the question, under discussion in the Loizidou case (*preliminary objections*), of the competence of the Convention organs to examine a case. In any event, the extracts from the *travaux préparatoires* detailed above constitute a clear indication of the intended meaning of Article 1 of the Convention which cannot be ignored..."[64]

Again, it might be asked whether the such interpretation was proper in the light of the subject matter of the dispute-human rights which are by definition inherent to each human being.[65] In some other cases, the European Court considered evolutive interpretation inappropriate not due incapacity of the provision of the European Convention to evolve its meaning, but due to specific characteristics of particular cases. In *A, B, and C v. Ireland* the ECtHR considered that "the profound moral views of Irish people as to the nature of life" was an obstacle to applying widespread consensus among the Contracting States on abortion.[66] The European Court stated: "A finding that a failure to provide abortion for social reasons breached Article 8 would bring a significant detriment to the Irish public which had sought to

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[64] *Bankovic and others v. Belgium and others* (app. no. 52207/99) Decision, 12 December 2001, para 64 I 65.

[65] Erik Roxstrom, Mark Gibney and Terje Einarsen, "The NATO Bombing Case (Bankovic et al. v. Belgium et al.) and the Limits of Western Human Rights Protection," *Boston University International Law Journal*, vol. 23, no. 1, 2005, 62. See also arguments that the interpretation was contrary to the object and purpose of the European Convention: Alexander Orakhelashvili, "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights," *European Journal of International Law*, vol. 14, no. 3, 2003, 547. Kerem Altiparmak, "Bankovic: An Obstacle to the Application of the European Convention on Human Rights in Iraq," *Journal of Conflict and Security Law*, vol. 9, no. 2, 2004, 226. Matthew Happold, "Bankovic v. Belgium and the Territorial Scope of the European Convention on Human Rights," *Human Rights Law Review*, vol. 3, no. 1, 2003, 88.

[66] *A, B and C v. Ireland* (App. No. 25579/05) Judgment of 16 December 2010, para 241.

protect pre-natal life."[67] The ECtHR recognized thus that there may be certain particular interests that European consensus, the main vehicle of evolutive interpretation, makes irrelevant.

The ICJ considers, also, that a generic term by itself does not necessarily require evolutive interpretation. In *US Nationals in Morocco*[68] in 1952, the World Court rejected the claim of France to interpret the term "dispute" in the treaty of 1836 in an evolutive way. In *Navigational and Related Rights*, the ICJ referred to *US Nationals in Morocco* but did not explain why did not apply evolutive interpretation there. In *Aegean Sea Continental Shelf* the ICJ made a distinction between subject-matter of the case and subject-matter of the *Petroleum Development Ltd. v. Sheikh of Abu Dhabi* case from 1951.[69] The disputed issue in the arbitration was whether the grant of concession for exploring mineral oil in 1939 included the continental shelf in 1951. The arbitrator replied the grant did not include the continental shelf in 1951. The arbitrator applied static interpretation. The ICJ explained different interpretative approaches by the different intention of the parties. The World Court stated:

> "While there may well be a presumption that a person transferring valuable property rights to another intends only to transfer the rights which he possesses at that time, the case appears to the Court to be quite otherwise when a State, in agreeing to subject itself to compulsory procedures of pacific settlement, excepts from that agreement a category of disputes which, though covering clearly specified subject-matters, is of a generic kind."[70]

The field of presumptions is inescapable in law but requires special caution. The ICJ based the difference in interpretative approaches in the two cases on presumed intentions. In the Greece case, the presumed intention was contrary to the established specific motive. Staying at the specific motive would be, perhaps, closer to the jurisdictional agreement between the parties in a broader context of international law as established by the UN Charter.

The analyzed cases in this paper show that evolutive interpretation did not result in an unforeseeable radical change of obligations of the parties under a treaty, except maybe in *Al-Warraq*. If evolutive interpretation would result in a new meaning that unexpectedly and radically change the obligations of the parties under a treaty, the question might be whether it would be a proper interpretation. The fundamental change of circumstances that was not foreseen by the parties can terminate a treaty in accordance with Article 62 of

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[67] *Ibid*., para 188.

[68] *Case concerning rights of nationals of the United States of America in Morocco*, *supra* n. 14.

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

[70] *Ibid*.

the VCLT when it radically changed the obligations under a treaty. Spirit of Article 62 might be relevant in the evaluation of the propriety of evolutive interpretation.

Conclusions

One of the fundamental canons of the judicial function is that the court is expected to interpret the law, not to create law. Judicial legislation is not allowed. One of the purposes of rules on the interpretation of international treaties is to secure stability and predictability in treaty relations. In spite of that, the risk of judicial legislation has been always present in process of interpretation of international treaties. Due to specific characteristics of evolutive interpretation, the risk is greater in the application of this interpretative method.

Having been branched in the jurisprudence of various international courts and tribunals, evolutive interpretation is less coherent and vaguer than other interpretative tools, such as the principle of effectiveness or even the concept of object and purpose of a treaty. Shortage of coherence and uniformity exposed the method to the risk of arbitrary application. Despite that, some commonalities might be derived as general standards of the method. Derivation and respect for the general standards would reduce the danger of arbitrariness.

The evolutive interpretation is part and parcel of the rules on interpretation, as laid down in Articles 31 and 32 of the VCLT. It produces its effect via means of interpretation, such as the ordinary meaning of terms in a treaty, the object and purpose of a treaty, subsequent agreements and subsequent practice in the application of a treaty, and rules of international law applicable between the parties to a treaty. At the same time, the effect of evolutive interpretation-a new specified or modified meaning of a term or new legal content inserted in a treaty should be controlled by the same means of interpretation. Application of evolutive interpretation in isolation regardless of other means would expose judges to the risk to enter judicial legislation.

It should have in view that a modification of a treaty by an informal agreement among the parties, established by their practice in the application of a treaty is the first neighbor to evolutive interpretation and that the domains of the two neighbors are not precisely delimited. If by interpreting a treaty, judges discover in fact an informal agreement regarding modification, they are in a convenient position without fear to slip into judicial legislation.

Regarding the capacity of a treaty provision to evolve its meaning, there are enough elements in practice for establishing standards that the generic nature of terms by itself is not enough for the conclusion that the provision is capable to evolve its meaning. Also, the presumption that the presumed intention of the parties regarding the evolutive

capacity of a treaty prevails over real intention regarding the specific matter in dispute can be disavowed by particular circumstances.

Determination of the range of changes and quality of changes that can alter the meaning or legal content of a treaty is, also, important. The issue is particularly important if a change occurred beyond the matters whose relevance has been recognized by Articles 31 and 32 of the VCLT, such as meanings of words, practice in the application of a treaty, or rules of international law. Equally important is the issue of whether the change brings enough precise answers to the question in dispute between the parties. Changes that were not been foreseeable at the time of the conclusion of a treaty and which changed radically rights and obligations under the treaty could be considered as excluded by analogous application of Article 62 of the VCLT, except when they were done by informal agreement of all parties.

Evolutive interpretation of international treaties and interpretation, in general, is part in parcel of dispute settlements. The UN Charter demands that international disputes must be resolved in conformity with international law and the principles of justice. Justice may be understood here as the synthesis of all values of the United Nations. The propriety of choice between evolutive and static interpretation should be evaluated also in that context.

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Dr Rodoljub Etinski

Evolutivno tumačenje međunarodnih ugovora i rizik sudske legislacije

Jedan od temeljnih kanona sudske delatnosti jeste da sud ne stvara već primenjuje pravo. Uprkos tome, rizik sudske legislacije je inherentan sudskom tumačenju međunarodnih ugovora. Taj rizik nije karakterističan samo za evolutivno tumačenje, ali je naročito izražen kod tog metoda tumačenja. Evolutivno tumačenje međunarodnih ugovora je relativno nov metod tumačenja koji se pojavio početkom sedamdesetih godina u praksi Međunarodnog suda pravde, a krajem te decenije u praksi Evropskog suda za ljudska prava. Metod je preuzet, zatim, od drugih međunarodnih sudova i tribunala. Ovo granjanje metoda kroz jurisidkcije raznih međunarodnih sudova učinilo ga je manje koherentnim i nejasnije određenim u odnosu na druge metode i sredstva tumačenja, kao što je načelo efikasnosti ili čak i koncept predmeta i cilja ugovora, koji nije, takođe, sasvim jasan. To čini metod evolutivnog tumačenja lakše podložnim arbitrernosti u tumačenju.

Evolutivno tumačenje se bavi vremenskom dimenzijom u tumačenju međunarodnih ugovora koji se nalaze u dugoj primeni. Ono je sastavni deo članova 31 i 32 Bečke konvencije o pravu međunarodnih ugovora i obezbeđuje odgovore na pitanja kao što je: koje se obično značenje pripisuje izrazima u tekstu ugovora, ono iz vremena zaključenja ugovora ili ono iz vremena primene ugovora. Pored promena u značenju izraza, na specificiranje značenja ugovora mogu da utiču i promene pravila međunarodnog prava, koja se primenjuje među ugovornicama ugovora, promena prakse primene ugovora od strane ugovornica, promena case law-a i druge promene. Da bi te promene mogle da utiču na specifikaciju značenja izraza u ugovoru ili da bi mogle da dopune ugovor novim pravni sadržajem, izrazi korišćeni u ugovoru treba da budu dovoljno opšti da omoguće novo posebno značanje, odnosno ugovor treba da bude otvoren za nove sadržaje. Tako, prvi korak u evolutivnom tumačenju jeste nalaz da je ugovor podoban za evolutivno tumačenje, a drugi korak jeste da se dogodila promena koja može da utiče na značenje ugovora. Praveći oba ova koraka sudije nailaze na dosta klizavih mesta na kojima mogu da skliznu u sudsku legislaciju.

Ključne reči: međunarodni ugovori, evolucija, tumačenje