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The Effect of the Passage of Time on the Interpretation of Treaties: Some Reflections on *Costa Rica* v. *Nicaragua*

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Abstract

This article examines the reasoning and findings of the International Court of Justice in its judgment in *Costa Rica* v. *Nicaragua* on issues relating to the effect of the passage of time on the interpretation of treaties. In arriving at the proper interpretation of the disputed phrase 'for purposes of commerce' in a Treaty of Limits between the parties, which entered into force in 1858, the ICJ followed a number of interpretative steps based on Article 31 of the Vienna Convention on the Law of Treaties (VCLT), which led the Court to conclude that the meaning of this phrase must be presumed to have evolved over time. The means and methods of interpretation employed by the ICJ to determine the effect of the passage of time on treaties are examined. More specifically, the question is raised whether the ICJ's approach to determining the evolutionary character of a treaty provision, based on an interpretative presumption, may not be considered unsatisfactory insofar as it does not appear to take full account of the actual common intention of the parties – the main task of interpretation.

Key words

contemporaneous interpretation (*renvoi fixe*); *Costa Rica* v. *Nicaragua* case; evolutionary interpretation (*renvoi mobile*); intention of the parties; International Court of Justice; interpretative presumptions; inter-temporal law; treaty interpretation

1. Introductory remarks and relevant facts of the case

It is a truism that the inexorable passage of time inevitably affects all social and natural phenomena. Likewise, international law 'cannot be excessively rigid without failing to allow for the movement of life',[1] hence the International Law Commission's (ILC) recent observation that 'no legal relationship can remain unaffected by time'.[2] A more difficult question is how and to what extent the passage of time actually affects legal relationships, notably through the process of treaty interpretation. As Judge Jessup put it in the second phase of *South West Africa*:

> The law can never be oblivious to the changes in life, circumstance and community standards in which it functions. Treaties – especially multipartite treaties

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1 *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, [1997] ICJ Rep. 7, at 124, para. 16 (Judge Bedjaoui, Separate Opinion).

2 See M. Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682 (2006), at 241.

> of an institutional or legislative character – cannot have an absolutely immutable character.[3]

The enduring relevance of Judge Jessup's observation was recently underscored by the inclusion of the topic 'Treaties over Time' in the ILC's programme of work in 2008.[4] The question has also recently received renewed attention from the International Court of Justice (ICJ, Court). In the *Case Concerning the Dispute Regarding Navigational and Related Rights*[5] between Costa Rica and Nicaragua, the critical issue before the Court was the effect of the passage of time on the interpretation of a mid-nineteenth-century treaty between the two countries. The relevant facts of this dispute may briefly be summarized as follows.

In the late 1850s, following the end of a war between Costa Rica and Nicaragua, the two countries resolved to settle outstanding bilateral matters between them, relating, inter alia, to their common boundary, to the navigational regime on the San Juan River, and to the possibility of building an inter-oceanic canal across the Central American isthmus. On 6 July 1857, a Treaty of Limits was signed between the two countries that addressed the dual questions of territorial limits and the status of the San Juan River.[6] This treaty, which, inter alia, afforded Nicaragua sovereignty over the San Juan River and granted Costa Rica navigational rights on the said river 'con articulos de comercio' ('with articles of trade'), was not ratified by Costa Rica. On 8 December 1857, a Convention of Peace was signed – which, again, made reference to Nicaraguan sovereignty over the San Juan River with attendant Costa Rican navigational rights on the river 'con articulos de comercio' – but was not ratified by either party.[7] However, on 15 April 1858, through the mediation of the Salvadoran foreign minister, a Treaty of Limits was signed, this time approved and ratified by both countries a few weeks later.[8]

In a key provision, the 1858 Treaty of Limits (Treaty of Limits) established Nicaraguan dominion and sovereign jurisdiction over the waters of the San Juan River, but at the same time affirming Costa Rica's perpetual navigational rights 'con objetos de comercio' on that 141-kilometre-long lower section of the river, where the border lies on the Costa Rican bank. It was the interpretation of this term that was the main source of dispute between the parties before the ICJ. Leaving aside the Spanish words, whose interpretation, and even translation, constituted the main source of dispute between the parties before the Court, Article VI of the Treaty of Limits reads:

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3 *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment of 18 July 1966, [1966] ICJ Rep. 6, at 439 (Judge Jessup, Dissenting Opinion).

4 See Report of the International Law Commission, UN Doc. A/63/10 (2008), at 355. For the establishment and orientation of the ILC Study Group on Treaties over Time, see Report of the International Law Commission, UN Doc. A/64/10 (2009), at 353–5.

5 *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009 (hereinafter Judgment), available at www.icj-cij.org.

6 Costa Rica–Nicaragua Treaty of Limits (Cañas-Juárez), signed at Managua, 6 July 1857, available at http://manfut.org/cronologia/t-canasjuarez.html.

7 Costa Rica–Nicaragua, Convention of Peace (Cañas-Martínez), 49 BFSP 1222 (1857) (Arts. 8 and 9 subject to ratification; remainder in force on signature).

8 For a brief history of the dispute, see Judgment, *supra* note 5, paras. 15–29.

> The Republic of Nicaragua shall have exclusively the dominion and sovereign jurisdiction over the waters of the San Juan River from its origin in the Lake to its mouth in the Atlantic; but the Republic of Costa Rica shall have the perpetual right of free navigation on the said waters, between the said mouth and the point, three English miles distant from Castillo Viejo, said navigation being [*con objetos de comercio*] either with Nicaragua or with the interior of Costa Rica, through the San Carlos River, the Sarapiqui, or any other way proceeding from the portion of the bank of the San Juan River, which is hereby declared to belong to Costa Rica. The vessels of both countries shall have the power to land indiscriminately on either side of the river at the portion thereof where the navigation is common; and no charges of any kind, or duties, shall be collected unless when levied by mutual consent of both Governments.[9]

Already, in the late nineteenth and early twentieth centuries, the scope of their respective rights and obligations inter alia under Article VI of the Treaty of Limits gave rise to differences that were settled by adjudication in two important decisions: in 1888 in an arbitral award by US President Grover Cleveland and in 1916 by a judgment from the Central American Court of Justice.[10] Although neither of these decisions was immediately relevant to the settlement of the dispute that was submitted by Costa Rica to the ICJ on 29 September 2005, they nevertheless contained some elements that the Court found useful to take into account in interpreting the Treaty of Limits.[11]

Whatever the source of their past legal differences, Costa Rica explained to the Court that prior to 1980, apart from 'sporadic and occasional incidents',[12] it did not encounter difficulties in exercising its 'perpetual right of free navigation ... *con objetos de comercio*' as defined by Article VI of the Treaty of Limits. In the 1980s, Nicaragua started imposing some restrictions on Costa Rican navigation on the San Juan River that it justified as temporary and exceptional measures required to protect its national security during the civil war that was raging in that country. In particular, several incidents occurred against Costa Rican vessels transporting passengers and tourists on the river, the latter of which was an increasingly lucrative business that Costa Rican boat operators had operated since the 1970s.[13] During the mid 1990s, at a time when the Nicaraguan civil war had ended, further measures were introduced by Nicaragua to regulate this traffic, including the charging of fees for passengers and tourists travelling on Costa Rican vessels navigating the river.[14] These measures

9 Judgment, *supra* note 5, para. 44 (ICJ translation).

10 For a brief discussion, see Judgment, *supra* note 5, paras. 20, 22, and 49. In the *Cleveland Award*, having determined that the Treaty of Limits was valid, President Cleveland found that its Art. VI did not allow Costa Rica to navigate the San Juan River with vessels of war; by contrast, Costa Rica was allowed to navigate the river with vessels of the Revenue Service in so far as they were connected with navigation 'for purposes of commerce'. But nothing was said about the putative navigation rights of *other* Costa Rican public vessels. On the application of Costa Rica, the Central American Court of Justice found that Nicaragua had violated Art. VIII of the Treaty of Limits and the *Cleveland Award* by entering into the 1914 Chamorro-Bryan Treaty with the United States (relating to an inter-oceanic canalization project through the San Juan River) without consulting Costa Rica prior to the conclusion of that agreement (see ibid.).

11 Judgment, *supra* note 5, para. 41.

12 Costa Rica Memorial (hereinafter CRM), para. 3.01; Verbatim Record, 2 March 2009, CR 2009/2 (uncorrected), 23, para. 2 (Mr Ugalde on behalf of Costa Rica), available at www.icj-cij.org.

13 CRM, ibid., para. 4.64; Verbatim Record, 34, para. 53 (Mr Kohen on behalf of Costa Rica).

14 Judgment, *supra* note 5, para. 24.

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were still in effect when Costa Rica submitted its Application to the Court on 29 September 2005.

Leaving aside examples of instances of other alleged violations of its navigational and related rights,[15] the Costa Rican claim that will be examined here is that Nicaragua was in breach of its 'obligation to allow Costa Rican boats and their passengers to navigate freely and without impediment on the San Juan River *for purposes of commerce* ("con objetos de comercio"), including the transportation of passengers and tourism'.[16] In a nutshell, Costa Rica claimed that the Spanish phrase 'con objetos de comercio' in Article VI of the Treaty of Limits should be interpreted as meaning 'for purposes of commerce'; as a minimum, its navigational rights on the river were therefore not only limited to the transport of goods, but also encompassed passengers, including tourists. For its part, Nicaragua submitted that the phrase should be interpreted as meaning simply 'with articles of trade'; that is, Costa Rica's navigational rights were limited to the commercial transport of goods.[17] In sum, the dispute before the Court in 2009 turned on the proper interpretation of the words in Article VI of the Treaty of Limits adopted in 1858 and which made reference to a perpetual right of free navigation 'con objetos de comercio'. In arriving at the proper interpretation of this phrase, the Court followed a number of interpretative steps based on the general rule of interpretation in Article 31 of the Vienna Convention on the Law of Treaties (VCLT) and which ultimately led the Court to conclude that the meaning of the relevant phrase must be presumed to have evolved over time.

The Court's judgment merits at least two comments – one of a specific and one of a general character. An examination of the main steps in this interpretative process will demonstrate that it may not have been necessary to resort to the technique of evolutionary interpretation in this case in order to arrive at the Court's conclusion. But there is a broader point of concern. The Court's approach, consistent with its earlier jurisprudence, is compounded by a rather mechanical test to determine the evolutionary character of a treaty provision and may be considered perfunctory insofar as it does not appear to take full account of the actual common intention of the parties – the main task of interpretation.

In its judgment, the Court recognized the well-established basic principle that 'determining intent is the main task in the work of interpretation'.[18] Articles 31–2 VCLT provide the analytical framework designed to give effect to this main task and emphasize a textual approach to interpretation: a leitmotif in the Court's

15 For Costa Rica's submissions, see Judgment, *supra* note 5, paras. 12–14.

16 Judgment, *supra* note 5, paras. 12(b) and 13 (emphasis added).

17 Judgment, *supra* note 5, para. 45.

18 Judgment, *supra* note 5, para. 58. The element of the intention of the parties is not explicitly stated in Arts. 31–2 VCLT but the ILC commentary is full of references thereto; see, e.g., para. 11 of the commentary to what became Arts. 31–2 VCLT, 1966 YILC, Vol. II, at 220. For affirmation of this basic principle, see further, e.g., *Award in the Arbitration Regarding the Iron Rhine Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Award of 24 May 2005, RIAA, Vol. XXVII, 35, at 65, para. 53; *Interpretation of the Convention of 1919 Concerning Employment of Women during the Night*, Advisory Opinion of 15 November 1932, PCIJ Rep., Series A/B, No. 50, 365, at 383 (Judge Anzilotti, Dissenting Opinion); R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (1992), 1267; I. Brownlie, *Principles of Public International Law* (2008), 631; A. D. McNair, *The Law of Treaties* (1961), 365; I. Sinclair, *The Vienna Convention on the Law of Treaties* (1984), 134–5; P. Reuter, *Introduction au droit des traités* (1995), 88, para. 141.

jurisprudence.[19] Moreover, it is widely accepted – as the Court indeed reaffirmed in its judgment – that Articles 31–2 VCLT reflect customary international law on the matter.[20] These provisions make allowance for several principles of interpretation, even if some of them are not explicitly stated therein. They include the so-called principles of (i) 'contemporaneous' and (ii) 'evolutionary' interpretation, both of which were potentially relevant to the determination of the meaning of the phrase 'objetos de comercio' in the present case. Let us consider them in turn.

2. Determining intent through contemporaneous interpretation

It was noted above that the major disagreement in this case concerned the meaning of the term *comercio* in the Treaty of Limits concluded in 1858. More specifically, the dispute before the Court turned on whether the common intention of the parties in 1858 had been to fix the meaning of the term *comercio* or whether they had accepted that this meaning could evolve and expand over time. Nicaragua summarized the problem thus: 'Should the terms used in the treaty be interpreted according to their meaning at the time it was concluded (principle of *contemporaneousness*), or is it appropriate to assume meanings that emerge later?'[21]

It is well established that the terms of a treaty should, in principle, be interpreted in the standard sense they had at the time of the conclusion of the treaty. This is what Fitzmaurice in the 1950s termed the 'principle of contemporaneity', according to which:

> the terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded.[22]

As the ILC has observed, the 'principle of contemporaneity'[23] is the counterpart in the law of treaties of the general principle of inter-temporal law – famously affirmed by Judge Huber in his celebrated award in *Island of Palmas* in the context of territorial

19 For a recent affirmation of the textual approach, see *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment of 15 December 2004, [2004] ICJ Rep. 279, at 318, para. 100 ('Interpretation must be based above all upon the text of the treaty').

20 Judgment, *supra* note 5, para. 47 (since Nicaragua is not a party to the VCLT, it was necessary for the Court to make this point). For the most recent reaffirmation by the Court, see *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, para. 64.

21 Nicaragua Countermemorial (hereinafter NCM), para. 4.3.11 (emphasis in original).

22 G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points', (1957) 33 BYIL 203, at 212 and 225–7.

23 For references to the 'principle of contemporaneity', see, e.g., H. Waldock, 'Third Report on the Law of Treaties', 1964 YILC, Vol. II, at 55, para. 12; Report of the International Law Commission, UN Doc. A/60/10 (2005), 220, para. 479; I. Sinclair, *The Vienna Convention on the Law of Treaties* (1984), 124; R. Gardiner, *Treaty Interpretation* (2008), 64; M. Shaw, *International Law* (2008), 934; Brownlie, *supra* note 18, at 633. For references to the same principle in international jurisprudence, see notably *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 16, at 182 (Judge de Castro, Dissenting Opinion); *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment of 19 December 1978, [1978] ICJ Rep. 3, at 67 (Judge de Castro, Dissenting Opinion); Eritrea–Ethiopia Boundary Commission, *Decision Regarding Delimitation of the Border between Eritrea and Ethiopia*, Decision of 13 April 2002, RIAA, Vol. XXV, 83, at 110, para. 3.5.

claims – the 'primary principle'[24] of which dictates that 'a juridical fact must be appreciated in the light of the law contemporary with it, and not the law in force at the time such a dispute in regard to it arises or falls to be settled'.[25] Similarly, the terms of a treaty will normally be interpreted on the basis of their meaning at the time the treaty was concluded and in light of the circumstances then prevailing.[26]

Indeed, as Brownlie notes, the principle of contemporaneity is a corollary of the first principle in Article 31 VCLT, which states that 'a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty'.[27] The emphasis placed by Judge Bedjaoui in *Gabcikovo-Nagymaros Project* on the primacy of this approach that is said to form the 'essential basis'[28] for treaty interpretation finds support in the jurisprudence of the ICJ and other international tribunals on the matter.[29] But the contemporaneous meaning of a term will not always be decisive; account must sometimes be taken of those instances in which the meaning of a term has evolved over time. This issue was at the heart of the dispute in the present case. The enquiry is thus into the effect of the passage of time on the interpretation of treaties and the means and methods of interpretation employed to determine that effect.

Although the principle of contemporaneity was provisionally adopted by the ILC as an aspect of the general rule of interpretation, it was ultimately not explicitly stated in Article 31 VCLT.[30] However, Special Rapporteur Waldock's observation that the principle is based on 'common sense and good faith, and is also implicit in the rule that the meaning of terms is to be determined by reference to the context of the treaty and to its objects and purposes' was broadly accepted by the ILC and states.[31] In essence, the ILC concluded that the principle is inherent in the textual approach adopted in what became Article 31 VCLT and its application accordingly depends on the intention of the parties as elucidated by ordinary means of interpretation. Waldock neatly encapsulated the position thus: 'The question whether the terms

24 Waldock, *supra* note 23.

25 *Island of Palmas (Netherlands v. United States)*, Award of 4 April 1928, RIAA, Vol. II, 829, at 845; para. 16 of the commentary to what became Art. 31 VCLT, YILC, *supra* note 18, at 222; Report of the International Law Commission, UN Doc. A/61/10 (2006), 415 (note 1025). See also para. 1 of the commentary to Art. 13 ARSIWA, Report of the International Law Commission, UN Doc. A/56/10, 57 (2001).

26 Jennings and Watts, *supra* note 18, at 1282; H. Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989', (2006) 77 BYIL 1, at 68.

27 Brownlie, *supra* note 18, at 633.

28 *Gabcikovo-Nagymaros Project* case, *supra* note 1, at 122, para. 8 (Judge Bedjaoui, Separate Opinion).

29 For basic support of the principle of contemporaneity in international jurisprudence, see generally *Right of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment of 27 August 1952, [1952] ICJ Rep. 176, at 189; *Minquiers and Ecrehos (France/United Kingdom)*, Judgment of 17 November 1953, [1953] ICJ Rep. 47, at 91 (Judge Levi Carneiro, Individual Opinion); *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, *supra* note 3, at 23, paras. 16–17; *Aegean Sea Continental Shelf* case, *supra* note 23, at 63 (Judge de Castro, Dissenting Opinion); *Gabcikovo-Nagymaros Project* case, *supra* note 1; *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment of 13 December 1999, [1999] ICJ Rep. 1045, at 1062, para. 25; ibid., at 1114, para. 4 (Judge Higgins, Declaration); *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Equatorial Guinea intervening)*, Judgment of 10 October 2002, [2002] ICJ Rep. 303, at 346, para. 59; Eritrea–Ethiopia Boundary Commission Decision, *supra* note 23.

30 See Draft Art. 69(1)(b) and commentary thereto, YILC, *supra* note 23, at 199; Waldock, *supra* note 23, at 52 and 56, para. 15. See also Israel's proposal to include a separate rule on 'inter-temporal linguistics', YILC, *supra* note 18, at 95–6.

31 H. Waldock, 'Sixth Report on the Law of Treaties', YILC, *supra* note 18, at 96; para. 16 of the commentary to what became Art. 31 VCLT, ibid., 222.

used [in a treaty] were intended to have a fixed content or to change in meaning with the evolution of the law could be decided only by interpreting the intention of the parties.'[32]

More recently, the ILC and the Eritrea–Ethiopia Boundary Commission have reaffirmed the same point.[33]

The ICJ and other international bodies have consistently supported this approach. An example in point is *Namibia*, in which the Court recognized 'the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion'.[34] In a similar vein, the Eritrea–Ethiopia Boundary Commission has held that 'a treaty should be interpreted by reference to the circumstances prevailing when the treaty was concluded'.[35] Already, in 1897, in the context of the dispute between Costa Rica and Nicaragua, Arbitrator Alexander – appointed by US President McKinley in accordance with a treaty between the parties to effect the demarcation process on the San Juan River following the *Cleveland Award* – observed that 'the principal and the controlling [consideration] is that we are to interpret and give effect to the [1858] Treaty [of Limits] . . . in a way in which it was mutually understood at the time by its makers'.[36] While the soundness of this approach is irreproachable, Judge ad hoc Guillaume was correct in the case under examination to point out that it nonetheless raises a real difficulty.[37]

In effect, in most cases, the parties do not specify in the text of a treaty whether their common intention at the time of its conclusion was to fix the meaning of a particular term or whether they accepted that this meaning could evolve and expand over time. Likewise, the 1858 Treaty of Limits does not provide much guidance on this question. It may therefore be necessary to rely on interpretative presumptions and this is indeed what the ICJ did to determine the meaning of *comercio* in the Treaty of Limits. But these presumptions should not apply automatically and thereby give the appearance of being irrebuttable. As the ILC has recently observed:

> [A] safe guide to a decision on the matter [i.e. on inter-temporality] may not be found in the imputed intention of the parties alone. Rather, the interpreter must find concrete evidence of the parties' intentions in this regard in the material sources referred to in articles 31 and 32 of the Vienna Convention, namely: in the terms themselves; the context; the object and purpose of the treaty; and, where necessary, the *travaux*.[38]

Put differently, in so far as possible, the interpreter must take account of concrete evidence of the parties' intentions before confirming or rebutting an interpretative presumption. At least in analytical terms, and consistent with the overall approach

32 1966 YILC, Vol. I (Part Two), at 199, para. 9.

33 See para. 16 of the commentary to what became Art. 31 VCLT, YILC, *supra* note 18, at 222; Report of the International Law Commission, UN Doc. A/61/10 (2006), 415; Eritrea–Ethiopia Boundary Commission Decision, *supra* note 23. See also *Award in the Arbitration Regarding the Iron Rhine Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, *supra* note 18, at 72, para. 79; M. Fitzmaurice, 'The Practical Working of the Law of Treaties', in M. Evans (ed.), *International Law* (2006), 198–9.

34 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* case, *supra* note 23, at 31, para. 53.

35 Eritrea–Ethiopia Boundary Commission Decision, *supra* note 23.

36 Verbatim Record, 5 March 2009, CR 2009/4 (uncorrected), at 50, para. 4 (Mr Pellet on behalf of Nicaragua).

37 Judgment, *supra* note 5, paras. 14–15 (Judge ad hoc Guillaume, Declaration).

38 *Report of the International Law Commission*, UN Doc. A/60/10 (2005), 219, para. 474.

adopted by the Vienna Convention thus described, it seems clear that the determination of whether or not the meaning of a treaty term has evolved can only be made by reference to its meaning at the time of the conclusion of the treaty.

Judge de Castro's observations in *Aegean Sea* provide a useful starting point:

> The meaning of words may change with time. In order to interpret any statement, to ascertain its real meaning, we must first of all concentrate on the meaning which it could have had at the time when it was made. Words have no intrinsic value in themselves .... Their semantic value depends on the time and the circumstances in which they were uttered.[39]

Likewise, Judge Bedjaoui in *Gabcikovo-Nagymaros Project* referred to the 'very classical approach' that the ordinary meaning of a treaty term 'must *in the first place*' be interpreted according to the contemporaneous meaning of that term.[40] In a similar vein, Judge Higgins in *Kasikili/Sedudu Island* emphasized that 'we must never lose sight of the fact that . . . we must trace a thread back to this point of departure'.[41] In short, the contemporaneous meaning of a term must 'provide at least the starting point for arriving at the proper interpretation of the treaty'.[42] In the present case, this basic approach was supported by Judge Skotnikov and Judge ad hoc Guillaume.[43] The evidence submitted by the parties demonstrates the soundness of this approach; it was possible to determine the meaning of the term *comercio* at the time of the conclusion of the Treaty of Limits.

2.1. The Court's treatment of the principle of contemporaneous interpretation in *Costa Rica* v. *Nicaragua*

Relying on much of the jurisprudence discussed in the previous section, Nicaragua maintained that it was 'important to give the words in the Treaty the meaning they had at the time the Treaty was concluded, not their current meaning because this is the only way to remain true to the intent of the drafters of the Treaty'.[44] At the time of the conclusion of the Treaty of Limits in 1858, the standard sense of the term *comercio* necessarily referred to trade in goods and did not extend to services, the inclusion of services being a very recent development. Having regard to the circumstances prevailing when the treaty was concluded, Nicaragua submitted that Costa Rica's navigational rights under Article VI of the Treaty of Limits were the culmination of her continuous efforts to gain access to the San Juan River as a trade route to the Atlantic for her exports of coffee and other products to Europe, not to transport passengers or tourists.[45] At the same time, Nicaragua admitted that 'the most lucrative business at the time of the signing of the Treaty of 1858 was by far the transport of passengers [including tourists]'; that is, it was not an 'unknown

39 *Aegean Sea Continental Shelf* case, *supra* note 23, at 63 (Judge de Castro, Dissenting Opinion).
40 *Gabcikovo-Nagymaros Project* case, *supra* note 1, at 122, para. 7(iii) (Judge Bedjaoui, Separate Opinion) (emphasis in original).
41 *Kasikili/Sedudu Island (Botswana/Namibia)*, *supra* note 29, at 1114, para. 4 (Judge Higgins, Declaration).
42 Jennings and Watts, *supra* note 18, at 1282.
43 Judgment, *supra* note 5, paras. 4–7 (Judge Skotnikov, Separate Opinion); ibid., paras. 15–16 (Judge ad hoc Guillaume, Declaration).
44 Judgment, *supra* note 5, para. 58.
45 Nicaragua Rejoinder, paras. 1.10 and 3.99 (hereinafter NCR).

commercial activity' in the area at the time in question.[46] But this 'booming business' – which Nicaragua stressed was 'one of the most heatedly disputed questions between the Parties' – was not contemplated in the Treaty of Limits because, historically, it had always been its exclusive right to transport passengers on the San Juan River.[47]

In support of its position, Nicaragua pointed to a series of contemporaneous contracts with private foreign companies, as well as treaties with other states in relation to concessions for the transit of passengers and for cutting an inter-oceanic canal through Nicaragua that would make use of the San Juan River. These contracts, signed with private parties, and the treaties then concluded by Nicaragua regarding these same matters, confirmed its exclusive right to transport passengers and the consequential right to grant concessions and concede the right to navigation with passengers on the river. Although Nicaragua accepted that this was an especially profitable activity, it did not coincide with the common understanding of the term 'commerce' in the mid-nineteenth century. In light of these prevailing circumstances, Nicaragua deemed it significant that there was no explicit reference in the Treaty of Limits to any purported right of Costa Rica to navigate the river with passengers and which would have changed this fact.[48] In short, the transport of passengers existed as a commercial activity in 1858 but the Treaty of Limits contemplated only the transport of goods; it did not envisage the transport of passengers.

For its part, Costa Rica argued that the term *comercio* as used contemporaneously in the Treaty of Limits was broad enough to 'cover any activity in pursuit of commercial purposes, including the transport of passengers, tourists among them, as well as of goods'.[49] In particular, Costa Rica argued that 'throughout the 19th century there was substantial commercial transportation of passengers on the San Juan River, both leaving from and coming to Costa Rica'.[50] Indeed, both parties accepted that the river was a well-known transit route in the 1850s, used by tens of thousands of passengers travelling from the east coast of the United States to California during the gold rush, as well as by European emigrants settling in Costa Rica.[51] The transport of passengers was evidently included in the meaning of 'commerce' in 1858 in this area. A further observation was said to reinforce this conclusion.

Costa Rica argued that the 'obvious object and purpose of the Treaty was the interoceanic canal'[52] contemplated in Article VIII of the Treaty of Limits. The reference in the treaty to the joint defence of the common bays at each end of the proposed route of the canal and the demilitarization along that route buttressed this conclusion. These elements formed the basis of the essential quid pro quo in Article VI, which granted Nicaragua sovereignty over the river in exchange for Costa Rica's navigational rights for commercial purposes. In Nicaragua's subsequent treaty

46 NCM, *supra* note 21, para. 4.3.9; Judgment, *supra* note 5, para. 58.
47 NCM, *supra* note 21, para. 4.3.9; NCR, *supra* note 45, para. 3.90.
48 NCM, *supra* note 21, para. 4.3.9.
49 Judgment, *supra* note 5, para. 59.
50 CRM, *supra* note 12, para. 4.60.
51 See, e.g., CRM, *supra* note 12, para. 4.59; NCM, *supra* note 21, para. 1.3.15.
52 Verbatim Record, *supra* note 12, at 15, para. 28 (Mr Crawford on behalf of Costa Rica).

practice with third states, it was clear that the use of the inter-oceanic canal (which never materialized because of the construction of the Panama Canal) was intended for the transport of both goods and passengers – as witnessed by two FCN treaties entered into in 1859 and 1860 between Nicaragua and France and Nicaragua and the United Kingdom, respectively.[53] It must thus have been clear to the authors of the Treaty of Limits that the term *comercio* included the transport of passengers.

In the light of the evidence submitted by the parties, it is somewhat surprising that the ICJ did not find it useful to first establish the meaning of the term 'commerce' at the time of the conclusion of the Treaty of Limits. As it happened, the Court rightly rejected Nicaragua's argument that the meaning of the term *comercio* should be given the narrow meaning (i.e. limited to trade in goods) it had when the Treaty of Limits was entered into. But the Court arrived at this conclusion without any enquiry into the contemporaneous meaning of the term. Instead, the Court relied rather mechanically on an interpretative presumption. After reaffirming the cardinal principle that 'the terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention, which is, by definition, contemporaneous with the treaty's conclusion', it stated:

> That may lead a court seised of a dispute, or the parties themselves, when they seek to determine the meaning of a treaty for purposes of good-faith compliance with it, to ascertain the meaning a term had when the treaty was drafted, since doing so can shed light on the parties' common intention. The Court has so proceeded in certain cases requiring it to interpret a term whose meaning has evolved since the conclusion of the treaty at issue, and in those cases the Court adhered to the original meaning . . . .
>
> This does not however signify that, where a term's meaning is no longer the same as it was the date of conclusion, no account should ever be taken of its meaning at the time when the treaty is to be interpreted for purposes of applying it.
>
> [T]here 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.[54]

We shall return in the next section to an assessment of some of the more notable 'situations' that are deemed to give rise to this interpretative presumption. At this stage, it is sufficient to note that the Court in the above passage concluded that the meaning of the term *comercio* was no longer the same as it was on the date of conclusion. On that basis, the Court went on to find essentially that *comercio* was a generic term whose meaning was presumed to require an evolutionary interpretation; its present-day meaning included transport of both passengers and tourists. Without much elaboration or justification, the Court thus concluded that the meaning of the term *comercio* had evolved from its original meaning in the mid-nineteenth

53 Costa Rica Reply, para. 2.52.
54 Judgment, *supra* note 5, paras. 63–64.

century. But this conclusion can presumably only be reached with confidence once the contemporaneous meaning of the term has been established. It is thus difficult to disagree with Judge Skotnikov's separate opinion that 'the Court should have [more meticulously] examined the intentions of the Parties at the time of the conclusion of the Treaty'.[55]

In a similar vein, relying on the evidence submitted by the parties, Judge ad hoc Guillaume maintained that it was doubtful at the time of the conclusion of the Treaty of Limits whether navigation for commercial purposes on the San Juan River was limited to trade in goods, since, in the mid-nineteenth century, Lake Nicaragua and the San Juan River were used to transport emigrants from the coast and from the east coast of the United States to California so as to avoid the trip around South America. Moreover, the inter-oceanic canal, whose construction was contemplated in the Treaty of Limits, was intended to facilitate commercial transport of both passengers and goods – as evidenced by the FCN treaties entered into in 1859 and 1860 by Nicaragua with France and the United Kingdom, respectively. Judge ad hoc Guillaume's conclusion was clear: 'when the authors of the 1858 Treaty referred to navigation for commercial purposes, they intended to cover commercial transportation of both persons and goods.'[56]

Subject to the fulfillment of the same condition of commercial activity, he added that the transport of passengers must today also include tourists.[57] Judge ad hoc Guillaume appears to suggest that, strictly speaking, there was no need for an evolutionary interpretation in this case; the contemporaneous meaning of the term *comercio* had not evolved over time, at least not in a manner relevant to the settlement of the dispute. The Court evidently disagreed and preferred instead to rely on what appears to be a rather perfunctory test to determine the evolutionary character of a treaty provision. Let us now turn to the elements of this interpretative presumption and the real difficulties that may arise from its application by the Court.

3. Determining intent through evolutionary interpretation

Before continuing our assessment of the present case, a few general observations about the treatment of the principle of evolutionary interpretation in practice are warranted. The ILC's provisional adoption on first reading of the principle of contemporaneity in what became Article 31 VCLT provoked considerable debate among its members.[58] On second reading, the ILC concluded that a strict principle of contemporaneity 'covered only partially the question of the so-called inter-temporal law'.[59] In essence, the relevant provision had 'failed to deal with the problem of the effect of an evolution of the law on the interpretation of legal terms in a treaty and

55 Judgment, *supra* note 5, para. 4 (Judge Skotnikov, Separate Opinion).
56 Ibid., para. 16 (Judge ad hoc Guillaume, Declaration).
57 Ibid. See also ibid., para. 10 (Judge Skotnikov, Separate Opinion).
58 For the debate on first reading, see 1964 YILC, Vol. I, at 33–9.
59 YILC, *supra* note 18, at 222, para. 16.

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was therefore inadequate'.[60] In other words, the ILC had not adequately addressed the counterpart in the law of treaties of Judge Huber's equally famous second limb of inter-temporal law, enunciated in *Island of Palmas*, which holds:

> 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 law.[61]

Although limited to 'exceptional cases',[62] account should thus also be taken of the 'so-called principle of evolutionary interpretation'.[63] But the ILC widely agreed that it was difficult to transpose any comprehensive principle of inter-temporal law to the law of treaties.

One ILC member in particular, Mr Jimenez de Aréchaga (later ICJ president), took the view that any application of inter-temporal law to the law of treaties would be misplaced. Rather, the question of the effect of the passage of time on the interpretation of treaties should be resolved by mere reference to the intention of the parties.[64] In adopting what became Article 31 VCLT, the ILC agreed and decided to omit any reference to the temporal element because 'in any event, [the matter was] dependent on the intentions of the parties'.[65] It added that 'correct application of the temporal element would normally be indicated by interpretation of the term in good faith'.[66] But this rather innocuous observation does not add much. There does not seem to be any independent role for good faith in treaty interpretation with any obvious applicable criteria.[67] Rather, the main function of the principle of good faith, as the sequence of the wording of Article 31(1) VCLT suggests, is to inform the whole process of interpretation. In the words of Judge Schwebel in *Qatar* v. *Bahrein*, the principle of good faith is the 'cardinal injunction'[68] of the rule of interpretation adopted in the 1969 Vienna Convention to which all elements therein must conform. Accordingly, as observed in the previous section, the basic method of ascertaining the effect of the passage of time on the interpretation of treaties is no different from any other task of interpretation under the 1969 Vienna Convention: it depends on the intention of the parties as elucidated by ordinary means of interpretation.[69]

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60 Ibid.
61 *Island of Palmas (Netherlands v. United States), supra* note 25.
62 YILC, *supra* note 58, at 33, para. 6 (Mr Verdross); *Gabcikovo-Nagymaros Project* case, *supra* note 1, at 122 (Judge Bedjaoui, Separate Opinion).
63 *Gabcikovo-Nagymaros Project* case, *supra* note 1, at 124, para. 18; NCM, *supra* note 21, para. 4.3.18.
64 YILC, *supra* note 58, at 34, para. 10.
65 See para. 16 of the commentary to what became Art. 31 VCLT, YILC, *supra* note 18, at 222.
66 Ibid.
67 It is generally agreed that the term 'good faith' in Art. 31(1) VCLT is largely an indirect reference to the principle of effective interpretation (*ut res magis valeat quam pereat*). See para. 6 of the commentary to what became Art. 31 VCLT, YILC, *supra* note 18, at 219. For a more recent discussion, see R. Gardiner, *Treaty Interpretation* (2008), 147–61; M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), 425–6; J.-M. Sorel, 'Article 31: Convention de 1969', in O. Corten and P. Klein (eds.), *Les conventions de Vienne sur le droit des traités: Commentaire article par article*, Vol. II (2006), 1309.
68 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Qatar v. Bahrain*), Jurisdiction and Admissibility, Judgment of 15 February 1995, [1995] ICJ Rep. 6, at 39 (Judge Schwebel, Dissenting Opinion).
69 For a similar conclusion, see A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008), 291.

Counsel for Nicaragua in the case under examination emphasized the same point.[70]

A few years after the adoption of the Vienna Convention, the Institut de droit international adopted the same position. In its 1975 Wiesbaden resolution, entitled 'The Intertemporal Problem in Public International Law', the Institut said:

> Wherever a provision of a treaty refers to a legal or other concept without defining it, it is appropriate to have recourse to the usual methods of interpretation in order to determine whether the concept concerned is to be interpreted as understood at the time when the provision was drawn up or as understood at the time of its application.[71]

In the commentary to what became Article 31 VCLT, the ILC set out the broad parameters by which this determination would normally be made. In short, it explained that although there is a certain logical sequence to the various elements contained in the Vienna rule of interpretation, there is no strict hierarchical order for their application: 'All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation.'[72]

Evidently, much like the old wizard stirring his cauldron, this process is not entirely formulaic – as witnessed by the ILC's recognition that the act of interpretation is 'to some extent an art, not an exact science'.[73] This is all the more true when it comes to the interpretation of treaties over time.[74] Therefore, as McNair acknowledged, it is understandable that the task of interpretation may be approached with some 'trepidation'.[75] More recently, it has even been suggested that there is 'no matter more daunting and complicated than dynamic interpretation'.[76] The absence of a specific formula is underscored by the fact that the Vienna rule of interpretation allows the interpreter a considerable degree of discretion in the performance of his task.

International courts and tribunals have adopted this basic methodology and have developed specific techniques to apply it in concrete cases. An example in point is evolutionary interpretation, namely a technique used to determine the effect of the passage of time on treaties. As we observed in the previous section, the guiding principle, articulated by the ICJ in *Namibia*, is here to ascertain the common intention of the parties at the time of the conclusion of the treaty. It may also be

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70 Verbatim Record, *supra* note 36, at 49, para. 3 (Mr Pellet on behalf of Nicaragua) ('le principe de base qui constitue la toile de fond de cette opération n'a rien de mystérieux et me paraît vraiment indiscutable; il est celui-là même qui inspire le droit des traités dans son ensemble: tout se rapporte à *l'intention des Parties*') (emphasis in original).

71 See para. 4 of the *Wiesbaden* resolution entitled 'The Intertemporal Problem in Public International Law', adopted by the Institut de droit international on 11 August 1975, available at www.idi-iil.org.

72 See paras. 8–9 of the commentary to what became Art. 31 VCLT, YILC, *supra* note 18, at 219–20. More recently, an ICSID tribunal has aptly described this as a 'process of progressive encirclement'; see *Aguas del Tunari v. Bolivia* (ICSID ARB/02/03), Award of 21 October 2005, para. 91.

73 See para. 4 of the commentary to what became Art. 31 VCLT, YILC, *supra* note 18, at 218; Waldock, *supra* note 23, at 54, para. 6.

74 Compare J. Crawford, 'Second Report on State Responsibility', 1999 YILC, Vol. II (Part One), at 18, para. 43.

75 McNair, *supra* note 18, at 364.

76 M. Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties: Part I', (2008) 21 *Hague Yearbook of International Law* 101, at 102.

recalled, however, that this exercise is often complicated by the fact that a treaty will not normally clearly establish whether the parties intended the meaning of a term therein to be fixed or capable of evolving over time.

Accordingly, international jurisprudence has developed a technique, based on a presumption, which, under certain conditions, favours an evolutionary interpretation.[77] It is nowadays an established mode of interpretation, most notably in the case of human rights treaties. Nonetheless, as Judge ad hoc Guillaume observed in the case under examination, it is not always easy to decipher the reason why international jurisprudence sometimes relies on an evolutionary interpretation and at other times relies on a contemporaneous interpretation.[78] Perhaps the most glaring example is the Court's reliance in the second phase of *South West Africa* on contemporaneous interpretation to determine the meaning of 'sacred trust' and its reliance on evolutionary interpretation in *Namibia* to determine the meaning of the same term – a process that marked the culmination of the most tumultuous decade in the life of the Court to date.[79]

At least in part, it may be that the uncertainty identified by Judge ad hoc Guillaume can be explained by a perfunctory application in the ICJ's jurisprudence of an otherwise sound – and indeed sometimes necessary – test to determine the evolutionary character of a treaty. The Court's application of this test in the present case can only be properly understood in the context of its earlier jurisprudence on the matter. Before returning to the present case, let us therefore briefly turn to the elaboration and application of the doctrine of evolutionary interpretation in the *Namibia* advisory opinion and the *Aegean Sea Continental Shelf* case.[80]

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77 For the various situations in which international jurisprudence has relied on the principle of evolutionary interpretation, see notably *Legal Consequences for States of the Continued Presence of South Africa in Namibia* case, *supra* note 23, at 31, para. 53 (relying on the contemporary law of self-determination to give effect to Art. 22 of the League Covenant in accordance with Art. 31(3)(c) VCLT); *Tyrer v. United Kingdom*, European Court of Human Rights, Application No. 5856/72, Judgment of 25 April 1978, para. 31 (relying on an evolutionary interpretation in order to ensure an application of the European Convention on Human Rights and Fundamental Freedoms that would be effective in terms of its object and purpose, holding in a classic statement that the Convention is 'a living instrument . . . which must be interpreted in the light of present-day conditions'); *Aegean Sea Continental Shelf* case, *supra* note 23, at 32, para. 77; *Interpretation of the American Declaration on the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Inter-American Court of Human Rights, Advisory Opinion OC-10/89 of 14 July 1989, para. 37 (citing the ICJ in *Namibia* to the effect that 'an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation'); *Gabcikovo-Nagymaros Project* case, *supra* note 1, at 67–8, para. 112 (newly developed norms of environmental law relevant to the implementation of a 1977 Treaty in accordance with Art. 31(3)(c) VCLT); *Roger Judge v. Canada*, UN Human Rights Committee, Communication No. 829/1998, paras. 10.3–10.4 (referring to the International Covenant on Civil and Political Rights as a 'living instrument' on the basis of Art. 31(1) VCLT); *Award in the Arbitration Regarding the Iron Rhine Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, *supra* note 18, at 72–4, paras. 79–81 (relying on an evolutionary interpretation in order to ensure an application of a 1839 Treaty of Separation that would be effective in terms of its object and purpose).

78 Judgment, *supra* note 5, para. 10 (Judge ad hoc Guillaume, Declaration) (and see ibid., paras. 11–12 for references to the case law).

79 See *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, *supra* note 3, at 23, paras. 16–17; *Legal Consequences for States of the Continued Presence of South Africa in Namibia* case, *supra* note 23, at 31, para. 53.

80 For the purposes of this article, it will not be necessary to consider the Court's reliance on the doctrine of evolutionary interpretation in the *Gabcikovo-Nagymaros Project* case, *supra* note 1, at 67 and 77–8, paras. 112 and 140.

3.1. The Court's previous treatment of the principle of evolutionary interpretation: an irrebuttable presumption?

The Court in its advisory opinion in *Namibia* first identified the technique of evolutionary interpretation.[81] One of the most contested issues in that case related to the intention of the parties to the League Covenant at the time of its conclusion in 1919. More specifically, the Court had to consider the fiercely controversial argument that on the basis of the different categories of mandate conferred by the League of Nations, the 'C' Mandate for South West Africa was qualitatively different from 'A' or 'B' mandates because, at the time of the establishment of the League of Nations, it was the intention of its members that 'C' mandates should effectively be assimilated to annexation.[82] In a well-known passage, the Court did not accept this argument:

> Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant – 'the strenuous conditions of the modern world' and 'the well-being and development' of the peoples concerned – were not static, but were by definition evolutionary, as also, therefore was the concept of the 'sacred trust'. The parties to the Covenant must consequently be deemed to have accepted them as such.[83]

On the basis of the presumed intentions of the parties to the Covenant, the Court found that there was no qualitative difference between the different types of mandate.[84] The basic finding of the Court that Article 22 of the Covenant itself contemplated an evolutionary interpretation was important because, consonant with *lex specialis* (as enunciated in the classic formula in the *Georges Pinson* case),[85] it enabled the Court to take into account an extraneous element in the process of interpretation as envisaged in Article 31(3)(c) VCLT, namely the principle of self-determination under general international law.[86]

In arriving at this conclusion, Thirlway has criticized that in an apparent act of 'benevolent hindsight', the Court did not find it necessary to support its interpretative presumption by reference to any concrete evidence that the parties to the League Covenant at the time had in fact so intended, notwithstanding the existence in the *travaux* of some evidence pointing in the opposite direction.[87] In his dissenting opinion in *Namibia*, Judge Fitzmaurice – while not objecting to evolutionary interpretation as a matter of principle – levelled the same criticism against the majority ruling and did so in rather vigorous terms based on a contemporaneous interpretation of the intention of the parties to the League Covenant.[88]

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81 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* case, *supra* note 23.
82 Ibid., para. 45.
83 Ibid., para. 53.
84 Ibid., para. 54.
85 In this case, the French–Mexican Claims Commission stressed that a treaty must tacitly be seen as referring to general international law 'for all questions which it does not itself resolve expressly and in a different way'. See *Georges Pinson (France v. United Mexican States)*, Award of 13 April 1928, RIAA, Vol. V, 422.
86 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* case, *supra* note 23, at 31, para. 53.
87 See Thirlway, *supra* note 26, at 136–7.
88 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* case, *supra* note 23, at 277, para. 85 (Judge Fitzmaurice, Dissenting Opinion).

But even if Judge Fitzmaurice's view were accepted, namely that the available evidence showed that 'C' mandates were 'in their practical effect not far removed from annexation',[89] it must be stressed that the Court still reached a wholly suitable conclusion. This is so because even if it is accepted that the relevant terms of Article 22 of the League Covenant itself did not allow for an evolutionary interpretation, the new peremptory law on self-determination would have retrospectively voided the 'C' Mandate for South West Africa in accordance with Article 64 VCLT.[90] It may be that for the Court, any reference to the peremptory status of self-determination and Article 64 VCLT was simply a bridge too far and that the principle of evolutionary interpretation provided a more suitable basis upon which to settle a 'very special situation'.[91] In any event, the Court's approach in *Namibia* remains problematic in so far as it gives the appearance of an irrebuttable presumption in favour of evolutionary interpretation. Within a few years, the Court refined the doctrine, but its basic problem remained unaddressed.

In the *Aegean Sea Continental Shelf* case,[92] the Court was asked to delimit the continental shelf appertaining to Greece and Turkey in the Aegean Sea. As a basis for the Court's jurisdiction, Greece relied mainly on Article 17 of the 1928 General Act for the Pacific Settlement of International Disputes under which the parties agreed to submit to the Permanent Court of International Justice (and its successor, the ICJ) – all disputes with regard to which they 'are in conflict as to their respective rights'.[93] The Court convincingly found that 'rights' was a generic term that followed the evolution of law to include rights over the continental shelf, even though those rights did not exist at the time of Greece's accession to the General Act in 1931.[94] A more difficult question was raised by a Greek reservation to Article 17 of the General Act that inter alia excluded 'disputes relating to the territorial status of Greece'.[95] At the jurisdictional stage, the Court accordingly had to determine whether or not the reference in the reservation to 'territorial status' should be interpreted as excluding disputes over the continental shelf, namely a concept unknown at the time of Greece's accession to the General Act in 1931. Greece advanced two closely interrelated arguments based on the principle of contemporaneity in support of jurisdiction.

First, Greece maintained that the *travaux* of the reservation clearly showed that it had a specific purpose intended to 'restrict its scope to matters of territorial status connected with attempts to revise the territorial arrangements established by the peace treaties of the First World War'.[96] This conclusion was reinforced by the general historical context in which reservations of questions relating to territorial

89 Ibid., at 28, para. 45.
90 For a contemporaneous reference to the peremptory status of the principle of self-determination, see para. 3 of the commentary to what became Art. 53 VCLT, YILC, *supra* note 18, at 248. For a similar argument, see Orakhelashvili, *supra* note 69, at 377 (note 300). For recognition by the Court of the potential role of Art. 64 VCLT see, e.g., *Gabcikovo-Nagymaros Project* case, *supra* note 1, at 67, para. 112.
91 *Gabcikovo-Nagymaros Project* case, *supra* note 1, at 122, paras. 9–10.
92 *Aegean Sea Continental Shelf* case, *supra* note 23.
93 Ibid., at 33, para. 78.
94 Ibid., at 33, para. 78.
95 Ibid., at 21, para. 48.
96 Ibid., at 29, para. 70.

status had come into use in the 1920s.[97] The Court rejected this argument. While the Court accepted that attempts to undermine the peace settlements might have been:

> the *motive* which led States to include in treaties provisions regarding 'territorial status' [it did] not follow that they intended those provisions to be confined to questions connected with the revision of such settlements. Any modification of a territorial 'status' . . . is unpalatable to a State; and 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.[98]

The Court concluded that:

> the historical evidence adduced by Greece does not suffice to establish that the expression 'territorial status' was used in the League of Nations period, and in particular in the General Act of 1928, in the special, restricted, sense contended for by Greece. The evidence seems rather to confirm that the expression 'territorial status' was used in its ordinary, generic sense of any matters properly to be considered as relating to the integrity and legal régime of a State's territory.[99]

The conclusion that 'territorial status' should be understood in a generic sense was critical in addressing Greece's second argument.

In a further historical argument, Greece maintained that the reservation was in any event inapplicable because 'the very idea of the continental shelf was wholly unknown in 1928 when the General Act was concluded, and in 1931 when Greece acceded to the Act'.[100] In effect, Greece could not have intended the reservation to cover a legal concept that did not exist at the time. The Court also rejected this argument. In so doing, it explicitly identified the main criterion that favoured an evolutionary interpretation:

> 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 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.[101]

Evidently, the main criterion for an evolutionary interpretation was that 'territorial status' was found to be a 'generic term'. On this basis, the Court proceeded to consider whether the dispute over the continental shelf related to the territorial status of Greece; it found that the dispute was covered by the reservation and

97 Ibid., at 30, para. 72.
98 Ibid., at 30, para. 73 (emphasis in original).
99 Ibid., at 31, para. 74.
100 Ibid., at 32, para. 77.
101 Ibid., at 32, para. 77.

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declined jurisdiction on that basis.[102] The Court's approach prompts a number of observations.

In his dissenting opinion, Judge de Castro criticized the Court for failing to uphold 'a rigorous application of the appropriate rules for interpretation', the point of which was to comply with 'the well-established principle that the purpose of interpretation is to ascertain the true will of the parties'.[103] In a similar vein, it has been objected by Thirlway, one of the most arduous students of the Court, that the 'basic weakness' in the Court's approach (and indeed in *Namibia*) is its apparent mechanical assumption that a term that *can* evolve over time actually *does* so.[104] Indeed, there is nothing in the Court's assessment of the historical evidence presented by Greece that suggests, with confidence, that it was the actual intention of Greece at the time that the expression 'territorial status' should be understood in a generic sense. In fact, there was concrete evidence based on the *travaux* of the Greek reservation that pointed in the opposite direction.[105] In these circumstances, the onus of proof placed by the Court on Greece to have 'made plain ... at the time'[106] that it did *not* intend the expression to be understood in a generic sense seems misplaced.[107] This is especially so because the fact that a term is generic does not automatically lead to the conclusion that it should be interpreted in an evolving manner.

As Judge de Castro stressed, even if it was correct to say that the expression 'territorial status' was a generic one, 'the meaning of most words is in fact subject to a certain degree of flexibility, with the exception of those which refer to individual concrete objects'.[108] This observation underlines the need for the interpreter to look at concrete evidence of the intention of the parties, notwithstanding the possible generic character of a term, namely 'a known legal term, whose content the parties expected would change over time'.[109] There is no automatic link between a generic term and its evolutionary interpretation; there may well be a presumption of such a link, but it should not be irrebuttable or give the appearance of so being. A further reason reinforces this impression.

One of Judge de Castro's more fundamental criticisms of the majority ruling was that the interpreter should take care not to assume, based purely on a textual approach, that the parties intended to include concepts or contemplate meanings of terms that, even if generic, did not exist at the time of the conclusion of a particular treaty.[110] The essential basis for interpreting the ordinary meaning of a term – whether generic or not – must remain the contemporaneous meaning of that term. In the context of 'the duty of the Court to interpret the Treaties, not to revise

102 Ibid., at 34–7, paras. 81–90.
103 Ibid., at 62–3 (Judge de Castro, Dissenting Opinion).
104 See Thirlway, *supra* note 26, at 142.
105 For a similar conclusion, see *Aegean Sea Continental Shelf* case, *supra* note 23, at 64–5; and implicitly Thirlway, *supra* note 26, at 142.
106 *Aegean Sea Continental Shelf* case, *supra* note 23, at 33, para. 79.
107 For a similar conclusion, see Thirlway, *supra* note 26, at 143 (noting that the Court's requirement was 'hardly appropriate').
108 *Aegean Sea Continental Shelf* case, *supra* note 23, at 65 (Judge de Castro, Dissenting Opinion).
109 *Kasikili/Sedudu Island (Botswana/Namibia)*, *supra* note 29, at 1113–14, para. 2 (Judge Higgins, Declaration).
110 *Aegean Sea Continental Shelf* case, *supra* note 23, at 63–4.

them'[111] and the cardinal principle *pacta sunt servanda*, Judge Bedjaoui made a similar point in *Gabcikovo-Nagymaros Project*. While he did not object to the evolutionary interpretation adopted by the Court in that case,[112] he nonetheless emphasized the need for a cautious approach because:

> The intentions of the parties are presumed to have been influenced by *the law in force at the time the Treaty was concluded*, the law which they were supposed to know, and not by future law, as yet unknown . . . only international law existing when the Treaty was concluded 'could influence the intention of the Contracting States . . . as the law which did not yet exist at that time could not logically have any influence on this intention' . . . . Hence, the essential basis for the interpretation of a treaty remains the *'fixed reference'* to contemporary international law at the time of its conclusion. The *'mobile reference'* to the law which will subsequently have developed can be recommended only in exceptional cases . . . .[113]

In most cases, the imputed intentions of the parties alone are therefore not sufficient to establish with any degree of confidence a presumption in favour of evolutionary interpretation. The interpreter must either confirm or negate this presumption based on the available concrete evidence of the common intention of the parties at the time of the conclusion of a treaty. Yet again, it is suggested that the Court failed to do so in the case under examination in order to either confirm or negate the presumption in favour of an evolutionary interpretation of the term *comercio* in the 1858 Treaty of Limits.

3.2. The Court's treatment of the principle of evolutionary interpretation in *Costa Rica* v. *Nicaragua*

Nicaragua emphasized that in accordance with *Namibia*, the 'governing principle' in determining whether a contemporaneous or an evolutionary interpretation of the 1858 Treaty of Limits should obtain was the common intention of the parties at the time of its conclusion.[114] In short, Nicaragua maintained that the Treaty of Limits was a boundary treaty whose object and purpose was to reach a definitive settlement of boundary issues: 'Treaties of limits, like the 1858 Treaty, enjoy special stability, for obvious reasons: opening them to an "evolutionary" interpretation undermines the permanence of established boundaries and encourages conflicts that may result from unstable borders.'[115]

The intention of the parties must have been that the Treaty of Limits should have a stabilizing effect. Moreover, it could not be assumed that Nicaragua had granted Costa Rica any rights of navigation – as an exception to its exclusive sovereign rights over the San Juan River – which were unknown at the time of the conclusion of the Treaty of Limits. Accordingly, the Treaty of Limits excluded an evolutionary

111 See *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Second Phase, Advisory Opinion of 18 July 1950, [1950] ICJ Rep. 229.
112 *Gabcikovo-Nagymaros Project* case, *supra* note 1, at 77–8.
113 Ibid., at 121–2 (Judge Bedjaoui, Separate Opinion) (emphasis in original). In the passage quoted above, Judge Bedjaoui relied in part on M. K. Yasseen, 'L'interprétation des traités d'après la Convention de Vienne sur le droit des traités', 151 RdC (1976) 1, at 64.
114 NCR, *supra* note 45, para. 2.56; Verbatim Record, *supra* note 36, at 50, para. 4 (Mr Pellet on behalf of Nicaragua).
115 NCR, *supra* note 45, para. 3.98; Verbatim Record, *supra* note 36, at 50, para. 5 (Mr Pellet on behalf of Nicaragua).

interpretation of the term *comercio* that went beyond trade in goods to also include transportation of passengers, including tourists.[116]

For its part, Costa Rica insisted that the contemporaneous meaning of the term *comercio* included the transport of passengers and tourists alike. Alternatively, it relied on *Aegean Sea* to suggest that *comercio* was a generic term whose meaning was presumed to evolve over time to include transport of passengers, including tourists. This presumption was even more compelling because the intention of the parties had been to grant Costa Rica a perpetual right of navigation on the San Juan River and it was hardly conceivable that such a right was intended to have a fixed content regardless of subsequent developments.[117] The Court broadly agreed with Costa Rica.

Relying on *Aegean Sea*, the Court said that its reasoning in that case was:

> founded on the idea that, where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.
>
> This is so in the present case in respect of the term 'comercio' as used in Article VI of the 1858 Treaty. First, this is a generic term, referring to a class of activity. Second, the 1858 Treaty was entered into for an unlimited duration; from the outset it was intended to create a legal régime characterized by its perpetuity.[118]

This last observation was buttressed by the object and purpose itself of the treaty, which was to 'achieve a permanent settlement between the parties of their territorial disputes'.[119] The Court concluded from the foregoing that:

> [T]he terms by which the extent of Costa Rica's right of free navigation has been defined, including in particular the term 'comercio', 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.
>
> Thus even assuming that the notion of 'commerce' does not have the same meaning today as it did in the mid-nineteenth century, it is the present meaning which must be accepted for purposes of applying the Treaty.
>
> Accordingly, the Court finds that the right of free navigation in question applies to the transport of persons as well as the transport of goods, as the activity of transporting persons can be commercial in nature nowadays .... The Court sees no persuasive reason to exclude the transport of tourists from this category, subject to fulfillment of the same condition.[120]

In a separate opinion, Judge Skotnikov criticized the Court's presumption in favour of evolutionary interpretation because '[n]o evidence submitted by the Parties showed that Nicaragua and Costa Rica intended at the time the Treaty was concluded to give

116 Verbatim Record, *supra* note 36, at 50, para. 5 (Mr Pellet on behalf of Nicaragua).
117 Ibid., at 35, paras. 57–59 (Mr Kohen on behalf of Costa Rica).
118 Judgment, *supra* note 5, paras. 66–67.
119 Ibid., para. 68.
120 Ibid., paras. 70–71.

an evolving meaning to the word "commerce"'.[121] More specifically, he criticized the Court's method of interpretation:

> The Court's finding that the term 'commerce' should be interpreted in accordance with its present-day meaning is extraneous to interpretation of the Treaty per se. Neither the generic nature of the term 'commerce' nor the unlimited duration of the Treaty and the perpetuity of the legal régime established by it . . . excludes the possibility that the Parties' intention was to grant Costa Rica navigational rights determined by the content of the notion 'commerce' as it existed when the Treaty was concluded. The Court's solution is based solely on the mechanical application of the jurisprudence which in a particular case favours the evolutive approach.[122]

This criticism is not without merit. Indeed, as observed in the previous section, the evidence submitted by the parties does not exclude the possibility that they intended to adopt a contemporaneous meaning of the term *comercio*, whatever that meaning might be. But the Court does not appear to take this evidence into account in order to confirm or rebut its presumption of evolutionary interpretation. In the vein of its earlier jurisprudence, the Court's approach to determining the effect of the passage of time on the interpretation of treaties appears to be flawed in so far as it is based on a mechanical test that does not fully take into account concrete evidence of the common intention of the parties.

In the present case, it seems that a fuller assessment of the evidence by the Court may well have demonstrated that the contemporaneous meaning of the term *comercio* – as understood in Article VI of the 1858 Treaty of Limits – coincided with its modern-day meaning. This conclusion is reinforced by the subsequent practice of the parties.[123] While the Court thus reached a wholly suitable conclusion and is certainly 'free to base its decision on the ground which in its judgment is more direct and conclusive',[124] it may nevertheless have been preferable for it to reach this conclusion by reference to the concrete evidence of the parties rather than rely mechanically on an interpretative presumption. The Court's mechanical test underlines the broader problems of this approach.

4. Concluding observations

The question of how and to what extent the passage of time affects the process of treaty interpretation is a difficult one. It is well established that the starting point is to ascertain the intention of the parties at the time of the conclusion of a treaty. However, in most cases, a treaty will be silent on the question of whether the parties at the time of its conclusion had intended to fix the meaning of a particular term or whether they had accepted that this meaning could evolve and expand over time. As Judge ad hoc Guillaume was careful to point out in the present case, this raises a real difficulty. The ICJ has accordingly developed an interpretative technique based on a presumption that under certain conditions favours an evolutive approach.

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121 Ibid., para. 5 (Judge Skotnikov, Separate Opinion).
122 Ibid., para. 6.
123 Ibid., paras. 8–10.
124 *Case of Certain Norwegian Loans (France v. Norway)*, Judgment of 6 July 1957, [1957] ICJ Rep. 9, at 25.

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But, at least in part, this test appears to be perfunctory, prompting the observation from Judge ad hoc Guillaume that it is not always easy to understand the reason why international jurisprudence sometimes relies on an evolutionary interpretation and at other times relies on a contemporaneous interpretation. It is suggested that some of this uncertainty can be explained by an apparent failure of the Court to openly confirm or rebut the presumption of evolutionary interpretation, notwithstanding the availability of concrete evidence of the intention of the parties to that effect, thereby giving the unfortunate appearance of an irrebuttable presumption. Determining intent remains the main task in the work of interpretation, especially where temporal elements are involved. The uncertainty surrounding the Court's application of the presumption of evolutionary interpretation is not resolved by its judgment in *Costa Rica* v. *Nicaragua*.