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PDF issue: 2026-11-17

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(Citation)
国際協力論集,22(2/3):127-149

(Issue Date)
2015-01

(Resource Type)
departmental bulletin paper

(Version)
Version of Record

(JaLCDOI)
https://doi.org/10.24546/81009069

(URL)
https://hdl.handle.net/20.500.14094/81009069

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Evolutionary Interpretation of Treaties Re-examined: The Two-Stage Reasoning

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Abstract

Although evolutionary interpretation of treaties has recently attracted academic interests, its entire reasoning process and the difference of its approaches among adjudicatory bodies are still not fully understood. This paper therefore aims to re-examine evolutionary interpretation and to elucidate above points. This paper concludes that the reasoning of evolutionary interpretation is composed of two distinct stages and that the two-staged analysis of the jurisprudence among several adjudicatory bodies reveals, among other things, the sharp contrast between the ICJ and the ECtHR.

I. INTRODUCTION

One of the salient characteristics of international society compared to domestic society is the absence of a legislature. This poses a challenge to international law: how can treaties adapt to new situations that arise after their conclusion? One possible solution to this challenge is amendment of the treaties. Although amendment a common solution, it has a disadvantage: it is time-consuming. This is especially the case regarding multilateral treaties with a large number of states parties.[1] Thus, amendment cannot provide sufficient flexibility as legislatures in domestic society can.

Against this background, treaty interpretation has recently attracted increasing interest as a means to adapt treaties to the passage of time. The recent work of the International Law Commission (ILC) demonstrates this tendency. For example, the study group on fragmentation of international law addressed the inter-temporal issue

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I am very grateful to Professor Akiho Shibata, anonymous referees and my colleagues for valuable comments to the draft version of this article. All errors are my responsibility.

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in the context of the interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT)[2]. In 2009, the ILC launched the new study group on 'Treaties over Time' chaired by Georg Nolte, which studied the functions of subsequent agreements and practice in international law based on three reports submitted by Nolte.[3] Furthermore, in 2012 the ILC decided to change the format of the work and appointed Nolte as Special Rapporteur for the topic 'subsequent agreements and subsequent practice in relation to interpretation of treaties.'[4]

Indeed, even if the text of treaties is not formally amended, the meaning of the treaties can develop through interpretation. One of the interpretative techniques especially with such an effect is 'evolutionary interpretation',[5] which is the subject of this study. Although numerous admirable studies on evolutionary interpretation have been published,[6] it seems to me that its entire reasoning process which brings about the development of the meaning of treaties is still not fully understood. Furthermore, despite the fact that the various adjudicatory bodies have invoked evolutionary interpretation[7], the difference of approaches among them is still not so clear. This paper therefore aims to re-examine evolutionary interpretation and to elucidate these two points.

The composition of this paper is as follows: In section II, I clarify the concept of evolutionary interpretation and argue that evolutionary interpretation is composed of two distinct stages of reasoning. Then in section III, I analyze the practice of evolutionary interpretation by several adjudicatory bodies, distinguishing these two stages. In this analysis, I focus on the evidence and justifications that are employed in each stage of reasoning.

II. CONCEPT OF EVOLUTIONARY INTERPRETATION

1. Principle of Contemporaneity

At the outset, it is necessary to address the basic principle that regulates the inter-temporal aspect of treaty interpretation: the principle of the contemporaneity. The principle of contemporaneity denotes that a treaty must be interpreted in accordance with the intention of the parties at the time of its conclusion. Interpretation based on this principle is sometimes called 'contemporaneous interpretation.'[8]

The principle of contemporaneity has been recognized by both academia and

international practice. For example, Sir Gerald Fitzmaurice defined the principle as follows: '[t]he 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.'[9] According to him, this principle is a 'particular application of the doctrine of inter-temporal law'[10] which in the case *Island of Palmas* the Arbitrator Max Huber formulated as follows: 'a judicial fact must be appreciated in the light of the law contemporary with it.'[11]

However, this principle is not explicitly stipulated in the rules on treaty interpretation under Articles 31 and 32 of the VCLT. This is because the ILC found it difficult to formulate a rule comprehensively covering temporal elements during drafting of the VCLT.[12]

Despite the absence of an explicit stipulation, the International Court of Justice (ICJ) has consistently recognized the principle as a starting point of interpretation. Before the adoption of the VCLT, the ICJ had already applied the principle in the *Rights of Nationals of the United States of America in Morocco* case, in which it addressed the interpretation of the term 'dispute' in treaties concluded in 1787 and 1836. On this problem, the Court held that 'it is necessary to take into account the meaning of the word "dispute" *at the times when the two treaties were concluded*.'[13] The ICJ has not changed this stance even after the entry into force of the VCLT. For instance, the Court clearly recognized the principle in the recent case concerning *Navigational and Related Rights* in which it stated as follows:

> It is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention, which is, by definition, contemporaneous with the treaty's conclusion.[14]

In view of these situations, although the VCLT does not explicitly include the principle of contemporaneity, it is still recognized as a starting point of treaty interpretation.

2. Interpreting Treaties in the Light of Circumstances at the Time of its Application

Given the principle of contemporaneity, it might seem that treaties must not be interpreted in the light of the present day conditions. However, this is not the case. There are certain situations in which treaties may be interpreted in the light of the circumstances at the time of application (Some scholars call such interpretation 'evolutionary interpretation' in contrast to 'contemporaneous interpretation.'[15] However, as explained below, this paper uses a more limited meaning of 'evolutionary interpretation'). One such situation is when subsequent agreements and practice can be invoked under Article 31(3)(a) and (b) of the VCLT. These are the only provisions in the rules of interpretation in the VCLT that explicitly allow taking the circumstances after the conclusion of the treaty into consideration. However, it is important to note that taking subsequent agreements/practice into account is not the only way to interpret a treaty in the light of the circumstances at the time of its application. The other method is what this paper calls 'evolutionary interpretation.'

The ICJ acknowledged the distinction between subsequent practice and what this paper calls evolutionary interpretation in the case concerning *Navigational and Related Rights* quoted above. One of the issues in the case was the interpretation of the term 'commerce'[16] in the 1858 Treaty between Nicaragua and Costa Rica. Nicaragua asserted that 'commerce' should be interpreted in accordance with the meaning at the conclusion of the treaty.[17] However, the Court held as follows:

> 64. This does not however signify that, where a term's meaning is no longer the same as it was at the date of conclusion, no account should ever be taken of its meaning at the time when the treaty is to be interpreted for purposes of applying it. 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 hand, there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international

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> 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.[18]

Thus, the Court identified two situations where the meaning of treaty's terms can change. The first situation is when the subsequent practice within the meaning of Article 31(3)(b) of the Vienna Convention brings about a change of the meaning. The second is when the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used a meaning or content capable of evolving. The latter can be regarded as the ICJ's understanding of the concept of evolutionary interpretation. Indeed, this understanding should be considered specific to the ICJ, as the evolutionary interpretation has a wide variety of approaches depending on the adjudicatory bodies, as will be demonstrated below (see Section III). In any event, this example clearly shows that the ICJ accepts the distinction between subsequent practice within the meaning of Article 31(3)(b) and the evolutionary interpretation.

The distinction between interpretation with reference to subsequent agreements/practice and evolutionary interpretation is also acknowledged by scholars. For example, Richard Gardiner points out that, apart from subsequent practice, 'some treaties in their nature are designed to allow for a more progressive development or elaboration of the treaty' and this 'has given rise to the idea of "evolutive" interpretation.'[19] By referring to the case law of the European Court of Human Rights (ECtHR), he further suggests that evolutive interpretation 'has more limited potential for extending meanings than does concordant practice of the parties.'[20] Julian Arato also acknowledges the distinction. He argues that while subsequent practice is based on later intention of the parties of treaties, evolutionary interpretation is based on original intention of the parties.[21]

From the forgoing, the present paper defines 'evolutionary interpretation' as an interpretative technique by which treaties can be interpreted in the light of circumstances at the time of their application other than those stipulated in Article 31(3)(a) and (b) of the VCLT.

3. Legal Structure of Evolutionary Interpretation: Two-Stage Reasoning

Then how does evolutionary interpretation provide development of the meaning of treaties? What legal characteristics does it have? This section aims to elucidate the basic legal structure of evolutionary interpretation. To do this, I examine the reasoning of evolutionary interpretation made by ICJ in the *Namibia* advisory opinion, a classic case in which the ICJ resorted to an evolutionary interpretation.[22]

In the *Namibia* advisory opinion, the ICJ invoked evolutionary interpretation with regard to the term 'sacred trust' in Article 22(1) of the Covenant of the League of Nations.[23] In this case, the Security Council requested the ICJ's opinion on 'the legal consequence for States of the continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276(1970).'[24] In Resolution 276, the Security Council '[d]eclares that the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid.'[25] In the proceedings, in order to justify its continued presence, the Government of South Africa claimed that 'C' mandates were in their practical effect not far removed from annexation.[26] Against this argument, the Court tried to demonstrate that the object and purpose of the 'C' mandates were the same as that of 'A' or 'B' mandates and therefore the assertion of South Africa was untenable. This led the Court to interpret the phrase 'a sacred trust of civilization' in the Article 22(1) of the Covenant.

There seemed to be two special reasons why the Court needed to employ evolutionary interpretation in this case. First is the way South Africa asserted its annexation of Namibia. It did so by invoking the *travaux préparatoires* of the Covenant.[27] Faced with this argument, the Court needed to rebut it by newly interpreting the Covenant in light of the conditions at the time of its application. The second reason was the existence of the Court's own judgment of the *South West Africa* case in its second phase in 1966.[28] In that judgment, the ICJ interpreted the term 'sacred trust' in accordance with the principle of contemporaneity[29] and held that 'sacred trust' constituted only a moral ideal and did not give rise to legal rights and obligations.[30] Therefore, in the *Namibia* advisory opinion the Court needed to resort to an evolutionary interpretation in order to reverse the *South West Africa* decision and

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attribute more substantive content to the term 'sacred trust.'

The Court's reasoning of evolutionary interpretation is found in the paragraph 53 of its advisory opinion. It reads as follows:

> 53. ... 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. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. ...[31]

In light of this interpretation, the Court finally reached the conclusion that the objective of the 'C' mandates was the self-determination and independence of the peoples concerned and, therefore, rejected the South Africa's argument on the annexation of Namibia.[32]

A careful reading of paragraph 53 of the advisory opinion reveals that the Court's reasoning of evolutionary interpretation is composed of four parts. In the first part ('Mindful as...its conclusion,'), the ICJ reaffirms the principle of contemporaneity as a starting point of interpretation. However, in the second part of the passage ('the Court ... as such'), the Court considers whether the concept 'sacred trust' has an evolutionary character. In other words, it examines whether the term 'sacred trust'

should be interpreted in the light of present day conditions. To this question, the Court found that the term was evolutionary and should be interpreted in the light of present day conditions. Then in the third part of the passage (‘That is … important developments.’), the Court addressed the issue of *how* ‘sacred trust’ should be interpreted in the light of present day conditions. In this respect, the Court held that an interpretation of ‘sacred trust’ must take into account the subsequent development of law. More specifically, in interpreting ‘sacred trust’, the Court took into consideration the development of the principle of self-determination through the United Nations Charter and the Declaration on the Granting of Independence to Colonial Countries (General Assembly Resolution 1514 (XV)).[33] In the last part of the passage (‘These developments … peoples concerned’), the ICJ concluded that ‘the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned.’ In terms of the development of the meaning of the Covenant, the second and third parts of the reasoning are especially important.

The previous examination on the *Namibia* advisory opinion can be generalized to argue that the evolutionary interpretation comprises the following two distinct stages.[34] The first stage is a determination on whether the term or provision can be interpreted in the light of circumstances at the time of its application rather than at the time of its conclusion.[35] If the result of this examination of the first stage is positive, then, the evolutionary interpretation proceeds to the second stage of the reasoning. It should be noted that the positive determination itself does not explain *how* the meaning of the term or provision has developed.[36] Therefore, in the second stage of the reasoning, the term is further interpreted in the light of present day conditions, taking account of various circumstances that arose after the conclusion of the treaty. In this stage, what kind of circumstances is employed is crucially important, since the outcome of the interpretation largely depends on them. Based on this basic legal structure, in section III, the practice of evolutionary interpretation is analyzed.

III. ANALYSIS OF EVOLUTIONARY INTERPRETATION

The next question is what justifications or evidences are employed in each stage of reasoning. This paper analyzes the practice of evolutionary interpretation by several adjudicatory bodies[37] in each of the two stages of reasoning. In analyzing the

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first stage, it is essential to examine the basis upon which the adjudicatory bodies determined that the terms or provisions can be interpreted in the light of conditions at the time of its application. In this respect, the justificatory approaches taken by the adjudicatory bodies can be divided into three categories: the original intention of the parties as reflected in the treaty terms (III 1(1)); the object and purpose of the treaty (III 1(2)); and the 'living instrument' approach (III 1(3)).[38]

The second stage of reasoning, on the other hand, involves an interpretation of the terms or provisions in the light of present day conditions, with reference to legal or factual circumstances that arose after the treaty conclusion. This stage is analyzed from two angles. The first is what legal or factual circumstances are relied on in the process of interpretation. In this regard, the adjudicatory bodies employed the following three categories of circumstances: subsequent development of international law (III 2(1)); subsequent practice *outside* Article 31(3)(b) of the VCLT (III 2(2)); and a change of the meaning of the terms (III 2(3)). The second angle is whether or not the employment of such circumstances can be justified under the rules of treaty interpretation in Articles 31 and 32 of the VCLT.

1. First Stage of Reasoning

(1) Original Intention of the Parties Reflected in the Terms of Treaties

The first approach to evolutionary interpretation finds the basis of justification in the original intention of the parties as reflected in the text of the treaty. In other words, this approach explains that the treaty can be interpreted in the light of conditions at the time of its application because the parties intended so at the time of the conclusion of the treaty. The ICJ has taken this approach.[39] In the *Namibia* advisory opinion, the ICJ found that the concepts in the Article 22 of the Covenant including 'sacred trust' were 'by definition evolutionary' and justified this decision by observing '[t]he parties to the Covenant must consequently be deemed to have accepted them as such.'[40] This finding suggests that the ICJ found the basis of justification in the original intention of the parties reflected in the treaty term. The Court adhered to this approach in the *Gabčíkovo-Nagymaros Project* case between Hungary and Slovakia.[41] The Court found that the parties could implement the 1977 Treaty taking into consideration new developments in environmental law on the basis

of the formulation of that Treaty. The ICJ stated that 'the formulation of Articles 15, 19 and 20 [of the 1977 Treaty], designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.'[42] This statement also shows that the Court's justification is based on the original intentions of the parties as reflected in the treaty provisions.[43]

The ICJ developed this approach in *Navigational and Related Rights* as quoted above. It is worth noting that, in this case, the Court specified the situations where such intentions of the parties can be presumed. On this point, the Court held as follows:

> It is 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.[44]

Then the Court found such presumptions can be made regarding the 1858 treaty[45] and concluded that 'the 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.'[46]

A similar approach is taken by the WTO Appellate Body. The Appellate Body employed an evolutionary interpretation in the *US-Shrimp* case.[47] One of the issues in that case was whether 'exhaustible natural resources' in Article XX (g) of GATT[48] means only non-living resources, or could also include living resources. The complainant states[49] asserted that 'exhaustible natural resources' meant only non-living resources by invoking the drafting history of Article XX (g).[50] On the other hand, the United States argued that the term also included living resources. On this issue, the Appellate Body stated that 'the generic term "natural resources" in Article XX (g) is not "static" in its content or reference but is rather "by definition, evolutionary"' by referring to the *Namibia* advisory opinion and the *Aegean Sea Continental Shelf* case in its footnote.[51] The use of the phrase 'generic term' and the

reference to these ICJ judgments imply that the Appellate Body followed the same approach as the ICJ.

The advantage of this approach is its persuasiveness and logical consistency with the principle of contemporaneity. It can provide a plausible reason why a treaty needs to be interpreted in the light of present day conditions, without contradicting the principle of contemporaneity. In this sense, as the ICJ rightly mentioned in the case concerning *Navigational and Related Rights*, this approach of evolutionary interpretation is not a real departure from the principle of contemporaneity, but rather a rigorous application of the principle.[52]

(2) Object and Purpose Approach

The evolutionary interpretation is sometimes characterized as one of the forms of teleological interpretation.[53] This view is correct in the sense that some adjudicatory bodies have referred to the effective realization of the object and purpose of treaties as a reason why the treaties should be interpreted in the light of present day conditions. Such an approach was adopted by the Arbitral Tribunal in the *Iron Rhine* case, which concerned the interpretation of Article XII of 1839 Treaty between Belgium and the Netherlands. The Tribunal held that:

> In the present case it is not a conceptual or generic term that is in issue, but rather new technical developments relating to the operation and capacity of the railway. But here, too, it seems that an evolutive interpretation, which would *ensure an application of the treaty that would be effective in terms of its object and purpose*, will be preferred to a strict application of the intertemporal law.[54]

Here, the Tribunal acknowledged that even if the term in question does not reflect the original intention of the parties, the evolutionary interpretation is available on the basis of the effective realization of the object and purpose of the treaty. More specifically, having observed that the object and purpose of the 1839 Treaty 'was not for a fixed duration',[55] the Tribunal found that the evolutionary interpretation could be invoked with regard to the Article XII.

It is generally said that evolutionary interpretation is based on the original intention of the parties. However, it should be pointed out that the connection between

this object and purpose approach and the original intention of the parties is necessarily weaker, as compared with the approach adopted by the ICJ examined above.[56]

(3) 'Living Instrument' Approach

A somewhat ambiguous approach has been adopted by human rights bodies, particularly the ECtHR. This paper calls the approach adopted by human rights bodies the 'living instrument' approach. In the landmark case *Tyrer v. United Kingdom*,[57] the ECtHR employed an evolutionary interpretation for the first time. In this case, the Court dealt with the issue of whether or not judicial corporal punishment in the Isle of Man fell within the 'degrading punishment' in Article 3 of the European Convention on Human Rights. In this context, the Court held as follows:

> The Court must also recall that *the Convention is a living instrument which*, as the Commission rightly stressed, *must be interpreted in the light of present-day conditions*.[58]

In this passage, the ECtHR unquestionably acknowledged that the Convention must be interpreted in the light of the circumstance at the time of its application. A characteristic feature of this finding is that the Court did not provide any reason why the Convention might be so interpreted. Since the *Tyrer* case, the ECtHR has adopted this kind of reasoning in numerous cases.[59] On the other hand, there are some cases in which the ECtHR appears to find a basis of evolutionary interpretation in effective realization of the object and purpose of the Convention. For example, in *Christine Goodwin v. the United Kingdom*, the Court, while recognizing the importance of the consistency of case law, held as follows:

> However, since the Convention is first and *foremost a system for the protection of human rights*, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved... It is of crucial importance that the Convention is interpreted and applied *in a manner which renders its rights practical and effective, not theoretical and illusory*. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement....[60]

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Together with the phrase 'further realisation of human rights and fundamental freedoms' in the preamble of the Convention, the ECtHR seemed to affirm evolutionary interpretation on the basis of the effective realization of the object and purpose of the Convention. In this sense, it may be said that the 'living instrument' approach taken by the ECtHR is close to the 'object and purpose' approach described above.

The 'living instrument' approach is also adopted by the Human Rights Committee (HRC) in the *Judge v. Canada* case. In considering the legality of the extradition of a person to the states that maintain capital punishment, the HRC stated that 'the Covenant should be interpreted as a living instrument and the rights protected under it should be applied context and in the light of present-day condition.'[61] However, as with most cases in the ECtHR, the Committee did not indicate the reason for this observation.

As these examples demonstrate, human rights bodies, as opposed to the ICJ, do not place much emphasis on the first stage of reasoning. This characteristic suggests that the 'living instrument' approach has only a tenuous link with the original intention of the parties, which was also the case in the object and purpose approach. In addition, human rights bodies assert that the human rights conventions *as a whole*, and not a certain provision or term in them, can be interpreted in the light of present day conditions. This is another major difference with the approach taken by the ICJ.

2. Second Stage of Reasoning

The second stage of reasoning in the evolutionary interpretation interprets treaty terms with a reference to various circumstances that have arisen since the conclusion of the treaty. These circumstances can be divided into the following three categories.

(1) Subsequent Development of International Law

The first category is those circumstances related to the development of international law since the conclusion of the treaty. As examined above, in the 1971 *Namibia* advisory opinion, in interpreting the Covenant of the League of Nations, the ICJ took the development of the principle of the self-determination into account.[62] Since then the ICJ has taken notice of the subsequent development of international law in interpreting the terms of treaties. For example, in the *Gabčíkovo-Nagymaros* case, the

ICJ held that 1977 Treaty had to be interpreted according to the new environmental norms and standards.[63]

Other adjudicatory bodies have also relied on the subsequent development of international law. In *US-Shrimp*, the WTO Appellate Body took account of 'the objective of sustainable development' reflected in the preamble of the WTO Agreement, the UN Convention on the Law of the Sea, the Convention on Biological Diversity and even Agenda 21, in interpreting Article XX (g) of the GATT.[64] In the *Iron Rhine* arbitration, the Tribunal interpreted the 1839 treaty considering the European law and international environmental law.[65]

The ECtHR has invoked the subsequent development of international law quite dynamically. For instance, in the *Marckx v. Belgium* case, the ECtHR addressed whether a Belgian law which made a distinction between 'legitimate' and 'illegitimate' children breached Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the Convention. In its examination of the issue, the Court referred to two relevant conventions, namely the Brussels Convention of 12 September 1962 on the Establishment of Maternal Affiliation of Natural Children and the European Convention of 15 October 1975 on the Legal Status of Children Born out of Wedlock, despite the fact that Belgium was not a party to these conventions at that time.[66] On these two conventions, the Court stated as follows:

> Both the relevant Conventions are in force and there is no reason to attribute the currently small number of Contracting States to a refusal to admit equality between "illegitimate" and "legitimate" children on the point under consideration. In fact, the existence of these two treaties denotes that there is a clear measure of common ground in this area amongst modern societies.[67]

Then the Court concluded that the Belgian law in question violated Articles 8 and 14 of the Convention.[68] The *Demir and Baykara v. Turkey* case is also a good example. In *Demir*, the ECtHR referred extensively to subsequent development of international law.[69] The issues in the case were the interpretation of Article 11 of the Convention (freedom of assembly and association) and the right of municipal civil servants to form trade unions and bargain collectively. With regard to the method of

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interpretation of the Convention, the Court declared that it must 'take into any relevant rules and principles of international law applicable in relations between the Contracting Parties' with explicit reference to Article 31(3)(c) of the VCLT.[70] Then the Court interpreted Article 11 of the Convention taking account of several international treaties concerning labor rights, including the European Social Charter, which was not ratified by Turkey.[71] These examples clearly demonstrate that various adjudicatory bodies have invoked subsequent development of international law in the second stage of reasoning.

It is necessary then to examine how these invocations can be justified under the VCLT. As the ECtHR's explicit reference to Article 31(3)(c) in *Demir* case suggests, an invocation of subsequent development of international law can be justified under Article 31(3)(c) of the VCLT. This view is supported by the ILC study group on the Fragmentation of International Law. The study group addressed the question 'whether in applying Article 31(3)(c) the interpreter should refer only to rules of international law in force at the time of the conclusion of the treaty or may also take into account subsequent changes in the law.'[72] The ILC affirmed that '[r]ules of international law subsequent to the treaty may also be taken into account' on certain conditions.[73] However, it is also necessary to bear in mind that Article 31(3)(c) cannot justify any invocation of subsequent development of international law in every case, since the Article only recognizes 'rules of international law *applicable in the relations between the parties*.'[74] Thus Article 31(3)(c) cannot justify reference to treaties to which the state in question is not a party, as the ECtHR did in *Marckx* and *Demir*.

Finally, some scholars seem to equate evolutionary interpretation with the application of Article 31(3)(c) of the VCLT. Certainly, reference to the subsequent development of international law as justified under Article 31(3)(c) performs an important function in development of the meaning of the treaties. However, as demonstrated below, adjudicatory bodies have taken into account categories of circumstances in which evolutionary interpretation cannot be justified under Article 31(3)(c). Thus, a simple equation of the evolutionary interpretation as an application of Article 31(3)(c) of the VCLT is incorrect.

(2) Subsequent Practice outside Article 31(3)(b) of the VCLT

The second category of circumstances which are taken into consideration in the

second stage reasoning of evolutionary interpretation are those that relate to the subsequent practice that can be considered *outside* Article 31(3)(b) of the VCLT. This can be defined as practice of the parties which does not fall within the definition of 'subsequent practice' under Article 31(3)(b). Generally speaking, 'subsequent practice' *within* the meaning of Article 31(3)(b) has been interpreted strictly and is considered to have a high threshold.[75] Nevertheless, as Special Rapporteur Georg Nolte rightly pointed out, some adjudicatory bodies have taken notice of subsequent practice of the parties, even if it does not satisfy the strict conditions of Article 31(3)(b), especially the condition of 'establish(ing) the agreement of the parties.'[76] While such subsequent practice that does not establish the agreement of the parties falls outside Article 31(3)(b), as shown below, it has been taken into account in the second stage of reasoning in evolutionary interpretation.

Subsequent practice outside Article 31(3)(b) of the VCLT has played an important role in evolutionary interpretations by the ECtHR. Although the ECtHR has invoked the subsequent practice *within* the sense of Article 31(3)(b) in some cases,[77] in many other cases, the ECtHR has taken subsequent practice into account without explicitly referring to Article 31(3)(b) of the VCLT.[78] For example, in the above-mentioned *Tyrer* case, the Court stated that it 'cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe.'[79] In *Marckx* case, the Court referred not only to the subsequent development of international law, but also to the subsequent development of domestic law in member states of the Council of Europe. The ECtHR stated as follows:

> In the instant case, the Court cannot but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve … towards full juridical recognition of the maxim "mater semper certa est".[80]

Similarly, in *Demir*, the ECtHR took into consideration the development of domestic law in member states.[81]

In addition, the ECtHR sometimes takes account of subsequent practice in a much

broader sense which Georg Nolte calls 'subsequent social practice.'[82] In the case *Christine Goodwin v. the United Kingdom*, the Court dealt with the rights of transsexuals. In considering the situation of transsexuals in the twenty-first century, the Court held that 'the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable'[83] and found a violation of Article 8 of the Convention.

Can these invocations of such subsequent practice outside Article 31(3)(b) be justified under Articles 31 and 32 of the VCLT? To answer this question, the discussion of 'subsequent agreements and subsequent practice in relation to the interpretation of treaties' in the ILC should be recalled. Georg Nolte, in his first report of 2013, divides subsequent practice into two categories on the basis of whether or not subsequent practice reflects the agreement of all parties. Then he argues that subsequent practice which does not reflect the agreement of all the parties (subsequent practice in a broader sense) should not be excluded from the interpretative process, 'since it may in some situations serve as a supplementary means of interpretation in the sense of Article 32 of the Vienna Convention.'[84] This culminated in paragraph 3 of draft Conclusion 4, provisionally adopted by the Commission, providing that '[o]ther "subsequent practice" as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.'[85] From this discussion in the ILC, it can be surmised that a reference to subsequent practice outside the Article 31(3)(b) can possibly be justified under Article 32 of the VCLT. However, it is necessary to bear in mind that supplementary means of interpretation are available only if certain conditions are met.[86] It is therefore necessary to determines whether each specific invocation of subsequent practice as indicated above can be justified under Article 32.

(3) Change of the Meanings of the Terms

The meanings of words, by their nature, can change over time. Thus, the meaning of a term at the time of its application can differ from the meaning at the time of the conclusion of a treaty. The third category of circumstances that are taken into account in the second stage reasoning of evolutionary interpretation is such changes in the meanings of the terms in treaties. The ICJ took this type of circumstances into consideration in the case concerning *Navigational and Related Rights*. After the first stage

of reasoning, in which the Court found the term 'commerce' was evolutionary, the Court continued as follows:

> 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.[87]

Then the Court interpreted the term 'commerce' using 'the present meaning' of the term and concluded that the meaning of 'commerce' included not only transport of goods but also transport of persons.[88] It is noteworthy that the Court reached this conclusion without any consideration of the actual practice of states or subsequent development of international law. It depended only on 'the present meaning' of the term 'commerce.' Reference to the change of the meaning of the term can be justified by the 'ordinary meaning to be given to the terms' under Article 31(1) of the VCLT.[89]

IV. CONCLUSION

This paper has attempted to elucidate the entire reasoning process of the evolutionary interpretation and to clarify the difference of approaches among several adjudicatory bodies. As a result, I have reached the following two conclusions. Firstly, the evolutionary interpretation of treaties is composed of two distinct stage of reasoning. Both stages of reasoning play a distinct but equally important role in providing the development of the meaning of treaties. Secondly, the two-staged analysis of the evolutionary interpretation among several adjudicatory bodies has revealed, among other things, the sharp contrast between the ICJ and the ECtHR. As to the first stage of reasoning, while the ICJ has relied on the original intention of the parties, the ECtHR has not provided any clear reason why 'the Convention is a living instrument.' As to the second stage of reasoning, on the other hand, while the ICJ has primarily relied on the subsequent development of international law, the ECtHR has taken account not only of subsequent developments of international law but also of the subsequent practice *outside* Article 31(3)(b) of the VCLT.

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Notes

1 Campbell McLachlan, 'The Evolution of Treaty Obligations in International Law', Georg Nolte(ed.) *Treaties and Subsequent Practice* (Oxford University Press, 2013) p.71.

2 *See* Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, *International Law Commission Report on the Work of Its Fifty-Eighth Session*, U.N. Doc. A/61/10 (2006), p.407 et seq, paras.22-23. *See also Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi*, U.N. Doc. A/CN.4/L.682 (13 April 2006), pp.240-243, paras.475-478.

3 These three reports are reproduced in Georg Nolte (ed.), *supra* note 1, p.167 et seq.

4 *See First Report on Subsequent Agreements and Practice in Relation to Treaty Interpretation by Georg Nolte, Special Rapporteur*, U.N. Doc. A/CN.4/ 660 (19 March 2013).

5 Though some scholars use the term 'evolutive interpretation' or 'dynamic interpretation' to signify the same interpretative technique, this paper adopts the term 'evolutionary interpretation.'

6 For example, Rosalyn Higgins, 'Some Observations on the Inter-temporal Rule in International Law,' in Jerzy Makarczyk(ed.) *Theory of International Law at the Threshold of the 21st Century : Essays in Honour of Krzysztof Skubiszewski* (Kluwer Law International, 1996); Rudolf Bernhardt, 'Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights,' *German Yearbook of International Law*, Vol.42 (1999); Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention,' *International and Comparative Law Quarterly*, Vol.54 (2005); Duncan French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules,' *International and Comparative Law Quarterly*, Vol.55 (2006); Malgosia Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties Part I and Part II,' *Hague Yearbook of International Law*, Vol.21-22 (2008-09); Ulf Linderfalk, 'Doing the Right Things for the Right Reason -Why Dynamic or Static Approaches Should be Taken in the Interpretation of Treaties,' *International Community Law Review*, Vol.10 (2008); Julian Arato, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences,' *The Law and Practice of International Courts and Tribunals*, Vol.9 (2010); Pierre-Marie Dupuy, 'Evolutionary Interpretation of Treaties: Between Memory and Prophecy,' in Enzo Cannizzaro(ed.), *The Law of Treaties beyond the Vienna Convention* (Oxford University Press, 2011); Giovanni Distefano, 'L'interpretation évolutive de la norme internationale,' *Revue Générale de Droit International Public*, Vol.115 (2011); Martin Dawidowicz, 'The Effect of the Passage of Time on the Interpretation of Treaties: Some Reflections on Costa Rica v. Nicaragua,' *Leiden Journal of International Law*, Vol.24 (2011).

7 *See*, generally, Malgosia Fitzmaurice, *supra* note 6.

8 *See supra* note 4, p.23, para.54.

9 Sir Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points,' *British Yearbook of International Law*, Vol.33 (1957), p.212.

10 *Ibid*., 225.

11 *Island of Palmas case (Netherland, USA)*, Award of 4 April 1928, *Reports of International Arbitral Awards*, Vol.2, p.845.

12 *See Yearbook of the International Law Commission*, 1966, Vol.II, p.222, para.16.

13 *Case Concerning Rights of Nationals of the United States of America in Morocco*, Judgment of August 27th, 1952, *I.C.J. Reports 1952*, p. 189 (emphasis added).

14 *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p.243, para.63.

15 For example, Georg Nolte uses the word in this way, though he uses the term 'evolutive interpretation.' *See supra* note 4, p.23, para.54.

16 The original term was 'comercio' (in Spanish).

17 *Supra* note 14, pp. 240-241, para.58.
18 *Ibid*., p.242, paras.63-64.
19 Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) p.242.
20 *Ibid*., p.243.
21 Julian Arato, *supra* note 6, p.445.
22 *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. 16.
23 Article 22 paragraph 1 of the Covenant of the League of Nations: 'To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.'
24 U.N. Doc. S/RES/284 (29 July 1970), para.1.
25 U.N. Doc. S/RES/276 (30 January 1970), para.2.
26 *Supra* note 22, p. 28, para.45.
27 *Ibid*.
28 *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6.
29 *Ibid*., p.23, para16 and pp.47-48, para.89.
30 *Ibid*., p.35, paras.52-54.
31 *Supra* note 22, p.31, para.53.
32 *Ibid*., p.32, para.54.
33 Those developments are described in paragraph 52 of the Advisory Opinion.
34 In this regard, Professor Oliver Dörr has already illuminated this two-staged structure of evolutionary interpretation. He describes as follows:

> … dynamic or evolutionary interpretation appears in fact to be a **two-tier process**: first, it is to be established whether a term is meant by the parties to be interpreted in a dynamic manner. If no particular intention to this effect has been expressed, this must be taken to be the case if a concept is embodied in the treaty that is, from the outset, evolutionary. Second, the term in question must be given the meaning which it possesses at the time of interpretation, considering the development of linguistic usage, international law and other relevant circumstances up to that moment.

See, Oliver Dörr, 'Article 31,' in Oliver Dörr and Kristen Schmalenbach(eds.), *Vienna Convention on the Law of Treaties* (Springer, 2012) p.535, para. 26 (emphasis original).

In addition, Julian Arato has made a similar observation on the structure of evolutionary interpretation. According to him, evolutionary interpretation is an interpretative technique based on the original intention of the parties. In order to verify the intention of the parties, he argues that evolutionary interpretation requires meeting certain 'evidential standard.' This is what this paper calls first stage reasoning. Furthermore, he pointed out that 'the evidential standard for supporting an evolutive interpretation does not itself indicate what *content* the new interpretation should have. Substantiating the new interpretation depends on an additional set of evidence *external* to the treaty – the content is to be derived from, or at least in relation to, changing legal or factual circumstances'. This can be seen as the second stage reasoning. *See* Julian Arato, *supra* note 6, pp.466-467.

35 With regard to the first stage reasoning, it is necessary to recall the resolution on 'The Intertemporal problem in Public International Law' adopted by the Institut de Droit International in 1975. Paragraph 4 of the resolution provided as follows:

> 4. 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.…

This paragraph not only acknowledges what this paper calls the first stage of the reasoning but also instructs how the determination should be made.

36 Julian Arato, *supra* note 6, pp.466-467.

37 This paper deals with the jurisprudence of the ICJ, international arbitral tribunals, the WTO dispute settlement body, the European Court of Human Rights (ECtHR) and the Human Rights Committee (HRC).

38 *Cf.* Giovanni Distefano categorized the limitations or reasons of evolutive interpretation into three: evolutive terms contained in treaties; intention of the parties; object and purpose of treaties (Giovanni Distefano, *supra* note 6, pp.389-396). Julian Arato, on the other hand, divides the 'evolutive interpretation' into two categories: 'evolutive interpretation based on terminology'; 'evolutive interpretation in light of object and purpose' (Julian Arato, *supra* note 6, pp.468-476).

39 For more detailed analysis of the ICJ's approach, *see* Martin Dawidowicz, *supra* note 6.

40 *Supra* note 22, p.31, para.53

41 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J Reports 1997*, p.7.

42 *Ibid.*, pp.64-65, para.104. In other part of the judgment, the Court also noted that '[b]y inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law' (*ibid.*, pp.67-68, para.112.).

43 Pierre-Marie Dupuy, *supra* note 6, p.130.

44 *Supra* note 14, p.243, para.66. Indeed, this approach was originally adopted by the ICJ with regard to the interpretation of a reservation to a treaty in *Aegean Sea Continental Shelf* case in 1978. In this case, the Court held that when states employ a 'generic term', '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 time' (*see Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 33, para.77).

45 *Ibid.*, pp.243-244, paras.67-69.

46 *Ibid.*, p.244. para.70.

47 *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/R (12 October 1998).

48 Article XX (g) of the GATT: 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; .'

49 The complainants were Malaysia, Pakistan and Thailand.

50 *Supra* note 47, para.127.

51 *Ibid.*, para.130.

52 The ICJ stated '…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' (*supra* note 14, p.242, para.64 (emphasis added)).

53 *See* Malgosia Fitzmaurice, supra note 6 part I, p.117; James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 8th edition, 2012) p.379.

54 *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, Report of International Arbitral Awards*, Vol.27, p.73, para.80 (emphasis added).

55 *Ibid.*, para.83.

56 See Section II 1. (1).

57 ECtHR, *Case of Tyrer v. the United Kingdom*, Application no. 5856/72, Judgment of 25 April 1978.
58 *Ibid*., para.31 (emphasis added).
59 *See* for example, M. Fitzmaurice, *supra* note 6 part I, pp.121-153; Pierre-Marie Dupuy, *supra* note 6, pp.134-135.
60 ECtHR, *Case of Christine Goodwin v. the United Kingdom*, Application no. 28957/95, Judgment of 11July 2002, para.74 (emphasis added).
61 Human Rights Committee, *Judge v. Canada*, Communication No. 829/1998, Views Adopted on 5 August 2003, para.10.3.
62 *See* Section II 3.
63 *Supra* note 41, p.67, para.112 and p.78, para.140
64 *Supra* note 47, pp.48-50, paras.129-130.
65 *Supra* note 54, p.66, para.58.
66 ECtHR, *Case of Marckx v. Belgium*, Application no. 6833/74, Judgment of 13 June 1979, para.20.
67 *Ibid*., para.41.
68 *Ibid*., para.43.
69 On this case, *see generally* Julian Arato, 'Constitutional Transformation in the ECtHR: Strasbourg's Expansive Recourse to External Rules of International Law,' *Brooklyn Journal of International Law*, Vol.37 (2011), pp.349-387.
70 ECtHR, *Case of Demir and Baykara v. Turkey*, Application no. 34503/97, Judgment of 12 November 2008, para.67.
71 *Ibid*., paras.45,49,103 and 149.
72 *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, supra* note 2, para.22.
73 *Ibid*., para.23. It should be noted that the conditions are matters in first stage reasoning described above.
74 With regard to the interpretation of Article 31(3)(c) of the VCLT, *see* Campbell McLachlan, *supra* note 6, pp.309-318; Duncan French, *supra* note 6, pp.300-307; Richard Gardiner, *supra* note 19, pp.266-275.
75 A typical example is *Japan - Taxes on Alcoholic Beverages* case, in which the WTO Appellate Body interpreted the subsequent practice within the sense of Article 31(3)(b) as '"concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation' (*Japan-Taxes on Alcoholic Beverages, Report of the Appellate Body,* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 October 1996) pp.12-13). *See also* Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties, Second edition* (Manchester University Press 2nd edition, 1984) pp.135-138; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, 2008) p.362.
76 *See supra* note 4, paras.92-110. He made a distinction between subsequent practice in a narrow sense and subsequent practice in a broad sense especially on the basis of whether it 'establishes the agreement of the parties' or not.
77 For example, the ECtHR invoked subsequent practice *within* meaning of Article 31 (3) (b) in case Loizidou v. Turkey (Preliminary Objections), Application no.15318/89, Judgment of 23 March 1995, paras.73-82. *See also*, Georg Nolte, 'Jurisprudence under Special Regimes Relating to Subsequent Agreements and Subsequent Practice: Second Report for ILC Study Group on Treaties over Time' in Georg Nolte(ed.), *supra* note 1, pp.246-247.
78 *Supra* note 4, para.37.
79 *Supra* note 57, para.31.
80 *Supra* note 66, para.41.
81 *Supra* note 70, paras.48, 52, 106 and 151.

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82 Georg Nolte, 'Jurisprudence under Special Regimes Relating to Subsequent Agreements and Subsequent Practice: Second Report for ILC Study Group on Treaties over Time' in Georg Nolte(ed.), *supra* note 1, pp.247-249 and 261-262.
83 *Supra* note 60, para.90.
84 *Supra* note 4, p.42, paras107 and 118.
85 *International Law Commission Report on the Work of Its Sixty-fifth Session*, U.N. Doc. A/68/10 (2013), p.12.
86 Supplementary means of interpretation may be invoked only '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.' *See* Article 32 of the VCLT.
87 *Supra* note 14, p.244, para.70.
88 *Ibid.*, p.244, para.71.
89 *See* Sir Ian Sinclair, *supra* note 75, pp.124-126; Julian Arato, *supra* note 6, p.472.

投稿受付：2014 年 6 月 23 日
最終稿受理：2014 年 9 月 16 日