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EVOLUTIONARY INTERPRETATION AND INTERNATIONAL LAW

This unique book brings together leading experts from diverse areas of public international law to offer a comprehensive overview of the approaches to evolutionary interpretation in different international legal regimes. It begins by asking what interpretation is, offering the views of expert authors on the question, its components and definitions. It then comments on situations that have called for evolutionary interpretation in different international legal regimes, including general international law, environmental law, human rights law, EU law, investment law, international trade law, and how domestic courts have, on occasions, interpreted treaties and other international legal instruments in an evolutionary manner. This timely, authoritative compendium offers an in-depth understanding of the processes at work in evolutionary interpretation as well as a prime selection of the current trends and future challenges.

Evolutionary Interpretation and International Law

Edited by
Georges Abi-Saab
Kenneth Keith
Gabrielle Marceau
and
Clément Marquet

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PREFACE

GABRIELLE MARCEAU

For several years I have been encouraged to set up a study group or organise a conference at the University of Geneva on a substantive topic that I could explore in depth. I decided the time was ripe for this when, in 2014, Laval University in Québec City, my home town, invited me to preside over a conference on the WTO's 20th anniversary and present a paper on a WTO theme reflecting this milestone. I chose the topic of evolutive or evolutionary interpretation, because when the WTO Appellate Body first referred to this issue in the *US – Shrimp* case, many believed this was unique and even revolutionary. I was soon to understand that it was not. The tension between security and predictability of the law, on the one hand, and the reality of changes that can take place between the conclusion of a treaty and its eventual interpretation and application, on the other hand, exists in all legal systems and regimes. The WTO context is nonetheless quite unique, because the WTO Agreement contains provisions dating back to 1947, as well as more recent understandings and agreements – all of which were adopted together in December 1993 to enter into force on 1 January 1995, in parallel with the already existing provisions of the GATT 1947.

When I gave a first overall presentation of the concept of 'evolutionary interpretation' in September 2015 at Laval University, my seemingly simple starting questions were 'what exactly is evolutionary or evolutive interpretation? What does the concept of evolutionary interpretation cover? What does it add to the existing rules of the Vienna Convention on the Law of Treaties (VCLT)?'. Because WTO case law on evolutionary interpretation was quite limited, I decided to explore the answers to these questions in general international law and in other legal regimes to see what I could learn from them. My pursuit of answers to seemingly simple questions led me to the realization that it is far from clear what evolutionary interpretation is all about, when evolutionary interpretation should be used, and why it was used in some cases but not others. With the help of my assistant, my research continued, and my understanding started to evolve.

I gave a second presentation on the topic in April 2016 at a Harvard Law School conference marking the WTO's 20th anniversary. By then, I was making progress towards mapping out the different types of changes that could occur between the time of the conclusion of a treaty and the time of its interpretation and application: sometimes the 'applicable law' had changed, other times it was the social, political,

or technical contexts that had changed: what was reasonable in 1900 or even 1950 may no longer be reasonable in 2000. When generic terms are used in treaties, there may seem to be more interpretive 'space' for taking changes into account – but is it all only about the terms used in the original treaty?

In January 2018, I published an article in French in the *Revue générale de droit international public*, in which I transformed that initial map into a typology of the different categories of evolutionary interpretation. Beyond the catch-all name of evolutionary interpretation, what implications could this typology have on a practical level? The categories suggested in my article could also guide one's reading of this book: thus, evolutionary interpretation can be understood not just as an abstract concept, but as a meaningful practice embodied in the terms used in a treaty, its social and legal context, the continuation of its object and purpose through time, or the evolution of the law surrounding the instrument under interpretation.

A substantially amended English version of my French article was published in December 2018 in the *Journal of International Economic Law*, where I tried to develop how each of those categories of changes – could be taken into account along the VCLT's stepping stones. From this, I concluded that even if evolutionary interpretation did not add a positive rule of interpretation to those already existing in the VCLT, it bore at the very least a symbolic weight. Evolutionary interpretation embodies not only an interpretative process, but also a message that law can, and sometimes must, adapt to multiple social, legal, technological and political changes. It can serve as an intellectual compass to face upcoming challenges. As Ruth Bader Ginsburg, quoting Paul Freund, has said: 'Judges do read the newspapers and are affected, not by the weather of the day, ... but by the climate of the era'.¹

In spite of having published these articles, I had a growing sense that there were other ways of answering the seemingly simple questions about the nature and use of evolutionary interpretation. I became more than ever convinced that we needed to have a broader work, gathering together experts from different fields of international law to discuss what evolutionary interpretation is, when is it used, and how is it applied in different legal systems and international regimes.

The result was a decision to organize conference at UNIGE in October 2018; and I was most honoured when Professor Georges Abi-Saab accepted my request to lead the discussions. I cannot think of any other international expert on treaty interpretation better qualified to bring understanding of fundamental and global considerations of which interpretation is one of the most important and cross-cutting. I am very grateful to the Rectorate of the University of Geneva, its Law Faculty and my Department of Public International Law, as well as the Global Studies Institute, for their financial support for this conference and for the

¹ R Bader Ginsburg, M Hartnett and WW Williams, *My Own Words* (New York, Simon & Schuster, 2016) 161.

publication of this book. This allowed us to gather academics, practitioners and other experts from all around the world for two days of intense discussion on the topic. The rich exchanges further developed our understandings of evolutionary interpretation, allowing us to develop a deeper insight into the way evolutionary interpretation reflects all forms of internal and external changes that take place during the life of a treaty. When the decision was taken to publish papers from interested participants, additional experts were invited to join our project, and their contributions, included in this volume, have enhanced our collective appreciation of the potential and limits of the concept of evolutionary interpretation. While it is true that every regime seems to have some concept of evolutionary interpretation, they each have their own peculiarities, which are brought to the fore throughout this book. The chapters reflect the diversity of approaches that can be found in the practice of international courts and tribunals and in other international institutions; but we also looked at how domestic courts deal with the evolutionary interpretation of treaties they use in their determinations. I believe all these perspectives have contributed to the richness of this publication and to furthering debate on this fundamental topic.

This book could not have reached such an international standard without the professionalism and commitment of our legal editor Siobhan Ackroyd, who was sponsored by the Global Studies Institute. The entire evolving research project that delivered this book would not have been possible without the multifaceted and invaluable contributions from my assistant, Clément Marquet. I am grateful to Laurence Boisson de Chazourne who encouraged me very early on to plunge into the substantive labyrinths of international law. Thank you also to Roberta Bassi, who supported this project from its inception, and to Hart Publishing, who published our book in an exceptionally short time. This publication was further enhanced when Kenneth Keith agreed to make use of his exceptional international law expertise to link together all the different threads offered by the authors, with a view to developing a rich and coherent conclusive assessment of the various manifestations of evolutionary interpretation and identifying where more questions lie.

My understanding of evolutionary interpretation continues to evolve. Sometimes I think that there is evolutionary interpretation everywhere; other times I believe evolutionary interpretation is a useless sophism, as the rules of the VCLT already offer all the tools necessary to deal with changes, if they themselves are interpreted and applied properly. It remains the case that the message of the term “evolutionary interpretation” carries is that of a search for the appropriate balance between security, predictability and effectiveness in the interpretation and application of international law.

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