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Treaty Interpretation from a Negotiator's Perspective

*Kenneth J. Vandevelde**

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I. INTRODUCTION

The international law of treaty interpretation is based on the perspective of an objective third party, such as a court,[1] seeking to interpret an agreement after it has been negotiated. The result is a legal regime that attempts unnecessarily to apply a uniform approach to all treaty provisions and which places primary emphasis on resolving disputes rather than on enforcing the parties' intent. This approach takes insufficient account of the actual process of treaty negotiation, undercuts the legitimacy of the court's interpretation and potentially diminishes the effectiveness of treaties as a means of governing international relations. International law needs a theory of treaty interpretation based not on the perspective of a court but rather on that of a negotiator. This essay offers such a theory.

The essay is divided into four parts. Part I, the Introduction, will discuss the purposes of the international law of treaty interpretation and define some terms to be used in the subsequent analysis. Part II will then summarize and analyze the current international law of treaty interpretation. Part III will provide a case study of a treaty negotiation which offers a basis for a different approach to treaty interpretation. Finally, Part IV will outline a theory of treaty interpretation from a negotiator's perspective.

A. *The Tasks of Treaty Interpretation*

This Article concerns primarily the contrasting perspectives of negotiators and courts in interpreting international agreements. A useful first step in comparing the two points of view is to identify the purposes of treaty interpretation in order to formulate a standard against which one can evaluate the two perspectives.

Parties generally negotiate a treaty hoping to narrow the range of potential future disputes and thereby assure themselves a relatively stable position in their future international relations.[2] Thus, as a general rule, treaty negotiators seek provisions that are as determinant[3] as possible.

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1. This Article will use the term "court" as a generic reference to all third-party entities that may be requested to interpret a treaty or other international agreement.

2. For a discussion of the general problem of achieving stable expectations in a treaty relationship, see R. BILDER, MANAGING THE RISKS OF INTERNATIONAL AGREEMENT (1981).

3. Probably no one asserts that treaty language is always determinant of all disputes concerning its application. David Kennedy argues for the opposite view, that treaty language is never determinant of any dispute. Kennedy, *Theses About International Legal Discourse*, 23 GERMAN Y.B. INT'L L. 353 (1980). Kennedy contends that those who are

To the extent relevant treaty provisions are not determinant of a particular dispute, parties must negotiate an agreed interpretation of a treaty, which, in effect, adds new meaning to the agreement. Thus, parties continue to negotiate agreements even after the agreements have entered into force.[4]

Negotiations subsequent to a treaty's entry into force differ, however, in at least two material respects from prior negotiations. First, a treaty's entry into force freezes the conceptual content and vocabulary of the negotiations. Parties negotiate on the assumption that they can and should resolve their dispute through application of treaty terms already in force rather than through the insertion of new terms. This is consistent with the premise that the purpose of a treaty is to achieve stability in international relations. Thus, after a treaty enters into force, a party cannot make any demand that it could not defend as an explicit or implicit treaty requirement.

The second difference is that in many cases parties will designate a third party to resolve their dispute through adjudication.[5] In theory, whether parties resolve a dispute through negotiations or adjudication, the issue is the same:[6] what result does the treaty mandate? In neither case do parties claim they are making a new treaty; in both cases they

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sufficiently skilled at the reasoning process can argue with equal logical force that any text has either of two mutually incompatible meanings and that anyone convinced of a particular interpretation by treaty language merely deludes himself. *Id.* at 357.

Even assuming for the sake of argument that Kennedy is right, experience does suggest nevertheless that there are cases in which virtually all observers will reach the same interpretation. Call it mass delusion, but countless number of times each day, treaties are applied without disputes arising because all participants find themselves in accord on the treaty's meaning; indeed, most participants do not imagine that the treaty could have any other meaning. An unconditional most-favored-nation provision in a trade agreement, for example, permits the goods of a treaty partner to be imported subject to a particular tariff schedule. Thousands of import transactions may occur without the importer or a treaty party ever considering that a different tariff rate applies. The author regards as highly determinant a provision which induces this broad agreement that only one interpretation is correct. A particular provision, of course, may be more determinant of some disputes than of others.

4. One commentator refers, for example, to the "prolonged and hard bargaining characterized by mutual concessions" that follows entry into force of the treaty. *See* Schreuer, *The Interpretation of Treaties By Domestic Courts*, 1971 BRIT. Y.B. INT'L L. 255, 283.

5. This Article will use the term "adjudication" to refer generically to all procedures by which a third party resolves a treaty dispute.

6. The concept of a court as a facilitator in the negotiations between parties is discussed in Gross, *Treaty Interpretation: The Proper Role of an International Tribunal*, 1969 AM. SOC'Y INT'L L. PROC. 108, 109 (1969).

say they are defining a treaty already made.[7] In negotiations, each attempts to persuade the other of its interpretation. In adjudication, the parties abandon their attempts to persuade each other and seek to persuade a third party.[8]

Thus, regardless of whether parties resolve a dispute through negotiation or adjudication, the international law of treaty interpretation faces the same two tasks. The first is to find techniques to ensure, to the greatest extent possible, that genuinely determinant provisions are given effect. The second is to find a theory of treaty interpretation that can define indeterminant treaty provisions without abandoning the treaty as the basis for dispute resolution.

B. *Definitions*

Before assessing whether the international law of treaties is well suited to these tasks, it is useful to define some terms necessary to that assessment. One may regard a treaty as consisting of either rules or standards.[9] The legal community frequently expresses this distinction as the difference between the letter and the spirit of an agreement or the text and its intention.[10]

Those who consider a treaty as setting forth a collection of rules focus

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7. At times, of course, it is clear that an existing treaty is inadequate and the parties may decide to negotiate a new one. In such a case, however, the rules of treaty interpretation are not regarded as theoretically controlling the outcome. Accordingly, such cases do not concern us here. There may also be instances in which it is unclear whether the parties regard themselves as negotiating the meaning of an existing agreement or negotiating a new one. Suffice it to say that parties never ask a court to negotiate a new agreement.

8. For a suggestion that there is a great difference between negotiating and adjudicating a dispute, see *Summary Records of the 870th Meeting*, [1966] I Y.B. INT'L L. COMM'N 186, U.N. Doc. A/CN.4/SER.A/1966 (Comments of Shabtai Rosenne) [hereinafter *870th Meeting*].

9. A rule is a statement of the conduct required of a party. A standard is a statement of a goal toward which a party should direct its conduct. Thus, for example, a prohibition on driving in excess of 25 m.p.h. is a rule. A requirement that one drive safely is a standard. One may think of a rule as a particular case or application of a corresponding standard. The choice between rules and standards, then, is reducible to the question, at what level of generality should one define a party's obligations? Thus, as noted in the text below, because a rule is merely a particularized application of a standard, rules and standards are not mutually exclusive.

10. *See, e.g.*, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion), 1950 I.C.J. 221; *870th Meeting*, *supra* note 8, at 190 (Comments of Eduardo Jiménez de Aréchaga); *Summary Records of 871st Meeting*, [1966] I Y.B. INT'L L. COMM'N 193, U.N. Doc. A/CN.4/186 (Comments of Antonio de Luna) [hereinafter *871st Meeting*].

on the words of the agreement.[11] In their view the parties have fulfilled the agreement if they have obeyed its rules—that is, if they have followed the words literally.

Those who view a treaty as a collection of standards focus on the spirit of the agreement, of which the words are but an expression. In their view the parties have fulfilled the agreement if they have satisfied its underlying purpose—that is, if the parties have obeyed the spirit of the agreement, even if such an interpretation requires one to strain the meaning of the treaty's language.

While rules and standards are conceptually distinct, no treaty provision can be a pure rule or a pure standard.[12] We apply even the clearest of rules only because we sense a more general purpose or standard behind such rules without thinking.[13] That is, we understand that every rule embodies a standard. At the same time, a pure standard provides a set of obligations too ill-defined for application or use as the basis for an international agreement.[14]

Thus, the two views of treaty content are not mutually exclusive. Even the strongest adherent of one view will recognize at least some validity in the other. The difference is whether one regards a treaty provision as being predominantly a rule or a standard. The rule-theorist generally will not insist on a reading of the text so literal as to render the agreement completely ineffective or to produce an absurd result.[15] In other words, rule-theorists generally follow the rules only as long as the rules do not completely vitiate the underlying standard or an implied standard

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11. *See, e.g., 870th Meeting, supra* note 8, at 188 (Comments of Paul Reuter).

12. *See supra* note 9 and accompanying text.

13. Gottlieb, *The Interpretation of Treaties by Tribunals*, 1969 AM. SOC'Y INT'L L. PROC. 122, 125.

14. *Id.* at 129; *870th Meeting, supra* note 8, at 197 (Comments of Mustafa Kamil Yasseen).

Parties to an international agreement seek to reduce uncertainty in their international relations. A treaty provision that is not, to some extent, specific and determinant will be inadequate to accomplish that purpose. *See supra* note 2 and accompanying text.

15. *Cf.* Vienna Convention on the Law of Treaties May 23, 1969, Rule 32, U.N. Doc. A/CONF.39/27 (1969), *reprinted in* 8 I.L.M. 679 (1969) [hereinafter Vienna Convention]; *see infra* text accompanying note 41. *See* Waldock, *Third Report on the Law of Treaties*, [1964] II Y.B. INT'L L. COMM'N 5, 57 U.N. Doc. A/CN.4/167 and Add.1-3 [hereinafter Waldock, *Third Report*]; Polish Postal Service in Danzig (Poland, Free City of Danzig), 1925 PCIJ (ser. B) No. 11, at 39 (May 16); Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4, 8; Jacobs, *Varieties of Approach to Treaty Interpretation: with Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference*, 18 INT'L & COMP. L.Q. 318, 319 (1969).

of reasonableness. Similarly, standards-theorists generally do not insist on a result that is simply irreconcilable with any possible reading of the text. Standards-theorists believe they are entitled to read words creatively, but without disregarding them entirely, in order to give effect to the standard.[16]

Whether one regards a treaty as consisting primarily of rules or of standards, one may still adhere to one of two theories of interpretation: objectivist or subjectivist. An objectivist interprets an agreement as he believes an objective third party would. This theory of interpretation may or may not reflect the intent of the parties who negotiated the treaty.[17] Thus, for example, a court interprets words according to what the court regards as their plain and ordinary meaning. A subjectivist interprets an agreement as he believes the parties who negotiated the treaty would. He interprets words not according to their plain and ordinary meaning but according to the meaning the parties actually intended them to have.

As in the case of rules and standards, the objectivist and subjectivist theories of interpretation are not mutually exclusive.[18] Few objectivists would argue that a word should never be given a special meaning, while most subjectivists presumably would need to see considerable evidence before they would believe that a word really meant its opposite.[19] Again, in the practical world the difference is one of emphasis—that is, whether one inclines toward objectivism or subjectivism.

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16. *Cf.* I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 70-71 (1973).

17. *See, e.g., Summary Records of the 872nd Meeting*, [1966] I Y.B. INT'L L. COMM'N 201, U.N. Doc. A/CN.4/186 (Comments of Eduardo Jiménez de Aréchaga) [hereinafter *872nd Meeting*]. In the parlance of United States law, this objective third party is often described as the "reasonable person." *See generally* W. PROSSER, LAW OF TORTS 149-66 (4th ed. 1971)

18. Because every transaction is unique at some level of specificity, a word that describes similar transactions means something slightly unique in each context. A word thus has infinite shades of meaning. Yet the community perceives a generalized core meaning that is largely present in each context. The choice between an objectivist and a subjectivist theory of interpretation, then, is reducible to the question, at what level of generality shall a word be defined? The subjectivist seeks the particular shade; the objectivist the general core. Thus, because the general and the particular meanings may overlap, objectivism and subjectivism are not mutually exclusive in a given case.

19. *Cf.* Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels (Advisory Opinion), 1931 PCIJ, (ser. A/B) No. 43, at 144 (Dec. 11). "The court is not prepared to adopt the view that the text of the Treaty of Versailles can be enlarged by reading into it stipulations which are said to result from the proclaimed intentions of the authors of the Treaty, but for which no provision is made in the text itself." *Id.*

II. TREATY INTERPRETATION: CURRENT LAW

A. *The Principal Schools of Treaty Interpretation*

Commentators generally recognize three principal schools of treaty interpretation.[20] These three approaches ostensibly share a common premise: that the validity of an international agreement rests solely on the will or consent of the parties to be bound and, therefore, treaty interpretation is the process of attempting to establish the content of that consent.[21] The difference in the approaches, then, at least in theory, is one of means.[22]

The first method, the textual approach, regards actual treaty text as the essence of an agreement between parties.[23] In this view, the negotiating history is likely to be inconclusive or even misleading.[24] The textual approach limits itself to the only expression of intent that both parties unambiguously adopted—the treaty itself[25]—and seeks to interpret the language according to its plain and ordinary meaning.[26] The principal objection to the textual approach is that, because terms often have no ordinary meaning,[27] the text is virtually always subject to more than one

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20. *See* I. SINCLAIR, *supra* note 16, at 70-73; T. ELIAS, THE MODERN LAW OF TREATIES 72 (1974); Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 1951 BRIT. Y.B. INT'L L. 1-6 (1951) [hereinafter Fitzmaurice, 1951]; Waldock, *Third Report, supra* note 15, at 53. *Report of the International Law Commission on the work of its Eighteenth Session*, [1966] II Y.B. INT'L L. COMM'N 172, 218; Jacobs, *supra* note 15, at 318; Schreuer, *supra* note 4, at 272.

21. Harvard Law School, *Research in International Law, Part III, Law of Treaties*, art. 19, 29 AM. J. INT'L L. 939, (Supp. 1935) [hereinafter Harvard Research].

22. Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 1957 BRIT. Y.B. INT'L L. 203, 204 [hereinafter Fitzmaurice, 1957]; Fitzmaurice, 1951, *supra* note 20, at 2. The exception may be the extreme teleological approach, discussed *infra* at note 34.

23. Fitzmaurice, 1957, *supra* note 22, at 204-07; I. SINCLAIR, *supra* note 16, at 71; Jacobs, *supra* note 15, at 319.

24. *Reports of the International Law Commission on the work of its Eighteenth Session*, *supra* note 20, at 220.

25. M. Huber, 44-I ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 199 (1952); *871st Meeting, supra* note 10, at 193 (Comments of Antonio de Luna); Fitzmaurice, 1951, *supra* note 20, at 7.

26. Jacobs, *supra* note 15, at 322-23; Fitzmaurice, 1951, *supra* note 20, at 7-8; Fitzmaurice, 1957, *supra* note 22, at 205; Gottlieb, *supra* note 13, at 123; *Report of the International Law Commission on the work of its Eighteenth Session, supra* note 20, at 221; Waldock, *Third Report, supra* note 15, at 56 (The "natural and ordinary meaning of the terms is the very essence of the textual approach.").

27. *See, e.g.*, Schwarzenberger, *Myths and Realities of Treaty Interpretation: Articles 27-29 of the Vienna Draft Convention on the Law of Treaties*, 9 VA. J. INT'L L. 1,

reading. Thus, the court seeking to interpret an agreement may be imposing its own meaning—in effect, enforcing an agreement the parties never made.[28]

The second method, the subjective approach,[29] regards the parties' actual intentions underlying an agreement as being the essence of the agreement[30] and looks to the negotiating history to determine these intentions. The objection to this approach is that parties may not have had any views on the disputed issue—that is, the intention of the parties may be as fictitious as the plain meaning of the term. In addition, the negotiating history may be no more illuminating than the text. It may be silent on crucial points as well as misleading, confusing, one-sided or inconclusive.[31] Adherents to this approach are open to the criticism that they are enforcing an agreement that one or both parties wanted to make or might have made, rather than the one the parties actually did make.

The third method, the teleological approach, interprets the treaty text in light of its apparent overall object and purpose as gleaned from the text.[32] The teleological approach suffers from the same criticism as the

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13 (1968) and sources cited therein; *870th Meeting, supra* note 8, at 188 (Comments of Herbert W. Briggs); *id.* at 191-92 (Comments of Milan Bartos); Jacobs, *supra* note 15, at 340; McDougal, *The International Law Commission's Draft Articles Upon Interpretation: Textuality Redivivus*, 61 AM. J. INT'L L. 992 (1967); Lauterpacht, *Some Observations on Preparatory Works in the Interpretation of Treaties*, 48 HARV. L. REV. 549, 571 (1935) ("[I]n no circumstances ought preparatory work to be excluded on the ground that the treaty is clear in itself. Nothing is absolutely clear in itself.")

28. Hyde, *Judge Anzilotti on the Interpretation of Treaties*, 27 AM. J. INT'L L. 502 (1933); A. MCNAIR, LAW OF TREATIES 366 (1945); Fitzmaurice, 1951, *supra* note 20, at 2 n.1; Gottlieb, *supra* note 13, at 126; Falk, *On Treaty Interpretation and the New Haven Approach: Achievements and Prospects*, 8 VA. J. INT'L L. 323, 332-334 (1968).

29. One must distinguish the subjective approach from the more general theory of subjectivism. This essay will describe the second traditional approach to treaty interpretation exclusively through the term "subjective approach." The terms "subjectivism," or "subjectivist" will refer to the more general theory *See supra* text accompanying notes 17-19.

30. *See, e.g.*, Jacobs, *supra* note 15, at 319; Lauterpacht, 43(1) ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 366-434 (1950); *Summary Records of the 765th Meeting*, [1964] I Y.B. INT'L L. COMM'N 279-280, U.N. Doc. A/CN.4/167/Add.3 (Comments of Milan Bartos).

31. *See* Fitzmaurice, 1951, *supra* note 20, at 2 n.1, 4-5; Fitzmaurice, 1957, *supra* note 22, at 205-06; Jacobs, *supra* note 15, at 318.

32. Jacobs, *supra* note 15, at 318-20; I. SINCLAIR, *supra* note 16, at 75; Harvard Research, *supra* note 21, at 939; Fitzmaurice, 1951, *supra* note 20, at 2 n.1. *See, e.g.*, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion), 1951 I.C.J. 15, 53 (May 28) (dissenting opinion of Judge Alvarez).

textual approach: the court may in fact be reading a different purpose into the agreement than the parties did. In addition, the teleological approach suffers a further deficiency intrinsic to its nature: it threatens to push all the provisions of a treaty toward a particular goal, whereas the parties may have intended a treaty to represent a compromise among conflicting goals.[33] Thus, for example, a treaty that protects investments provides certain specific protections, not carte blanche protection for investors. The teleological approach offers no formula for choosing which of several conflicting goals to further in any given case.[34]

Although the literature does not generally discuss other methods of treaty interpretation, one can identify a fourth approach, the quasi-textual approach. This approach, similar to the textual approach, regards text as the essence of an agreement. Rather than interpreting words according to their plain and ordinary meaning, however, the quasi-textual approach seeks to interpret them in the manner the parties intended.[35]

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33. Indeed, one commentator has suggested that the teleological approach should refer in the plural to "objects and purposes." Gottlieb, *supra* note 13, at 126. Another noted that the singular reference to "object and purpose" in the Vienna Convention on the Law of Treaties, *see infra* text accompanying note 36, may have been an attempt to focus interpretation on the "principal object and purpose," thereby reducing the potential for controversy concerning "which of several possibly conflicting objects and purposes should determine the meaning of a disputed term." Jacobs, *supra* note 15, at 337.

34. The teleological approach originated largely as an approach to interpreting multilateral conventions, although it can obviously apply to bilateral agreements as well. *See* Waldock, *Third Report, supra* note 15, at 53-4; Fitzmaurice, 1951, *supra* note 20, at 2. One may, in fact, subdivide the teleological approach into a moderate school and an extreme school. For the moderate teleological approach see *supra* text accompanying note 32. The extreme teleological approach, which is associated primarily with the interpretation of multilateral agreements, draws the purpose not merely from the text but from a broader inquiry into the circumstances of the agreement's drafting, its subsequent operation or its role in international life. Practitioners of the extreme teleological approach may make no pretense of following the intentions of the framers of a treaty; the treaty takes on a justification of its own independent of the intent of the drafters. Fitzmaurice, 1951, *supra* note 20, at 2-4; Fitzmaurice, 1957, *supra* note 22, at 207-09. *See, e.g.*, 1951 I.C.J. at 53 (dissenting opinion of Judge Alvarez). As discussed herein, the teleological approach will refer to the moderate school.

35. As in the case of the teleological approach, one may identify two schools within the quasi-textual approach. The restrictive school requires that any special meaning be apparent from the text. This appears to be the approach the International Law Commission (ILC) took in drafting what became the Vienna Convention on the Law of Treaties. *See* Waldock, *Sixth Report on the Law of Treaties*, [1966] II Y.B. INT'L L. COMM'N 51, 100, U.N. Doc. A/CN.4/186 and Add.1-7. Indeed, one member of the ILC went so far as to say that a special meaning should be acceptable only if explicitly set forth in the text. *See Summary Records of the 770th Meeting*, [1964] I Y.B. INT'L L. COMM'N 318, U.N. Doc. A/CN.4/171 (Comments of Angel M. Paredes) [hereinafter *770th Meeting*].

B. *The Vienna Convention on the Law of Treaties*

Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention) codify the current international law of treaty interpretation.[36]

The starting point for treaty interpretation under the Vienna Convention is the text itself and the context other texts provide. One must read the text, however, in light of its apparent object and purpose. In other words, the Vienna Convention adopts the textual approach,[37] with the

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The more liberal school consults the negotiating history to determine any such special meanings. *See, e.g.*, C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED BY THE UNITED STATES Vol. II, at 1470 (1945) [hereinafter C. HYDE, CHIEFLY INTERPRETED]; Hyde, *Concerning the Interpretation of Treaties*, 3 AM. J. INT'L L. 46 (1909) [hereinafter Hyde, *Concerning Interpretation*]. *See also* Y. CHANG, THE INTERPRETATION OF TREATIES BY JUDICIAL TRIBUNALS 182 (1933) ("[T]he function of the interpreter is simply to discover and ascertain, with the aid of various sources of evidence, the sense in which the contracting parties actually employed particular terms in a treaty."); T. YU, THE INTERPRETATION OF TREATIES 43 (1927) ("[T]he initial task of interpretation is the seeking out of the sense . . . in which the contracting parties employed particular terms.")

36. Vienna Convention, *supra* note 15, arts. 31, 32. Article 31 of the Vienna Convention provides:

General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connexion [*sic*] with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connexion [*sic*] with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

The United States is not a party to the Vienna Convention, but regards it as declarative of customary international law in many respects. *See* Briggs, *United States Ratification of the Vienna Treaty Convention*, 73 AM. J. INT'L L. 470 (1979).

37. Jacobs, *supra* note 15, at 326. *Report of the International Law Commission on the work of its Eighteenth Session*, *supra* note 20, at 220-21 ("[T]he starting point of

teleological approach used on an ancillary basis to assist with textual analysis.[38] It also includes the quasi-textual approach as an acceptable, albeit less-preferred, approach.[39]

The Vienna Convention clearly has relegated the subjective approach to subsidiary importance.[40] Only if the article 31 textual analysis leaves an unclear or absurd result can the interpreter turn to the negotiating history.[41]

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interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties."); Waldock, *Third Report, supra* note 15, at 56. In its primary orientation toward the textual approach, the Vienna Convention codified customary international law and, in particular, the practice of the International Court of Justice. *See* T. ELIAS, *supra* note 20, at 77; Fitzmaurice, 1951, *supra* note 20, at 6-8; Fitzmaurice, 1957, *supra* note 22, at 209-10. As the Court has noted,

> the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.

Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion), 1950 I.C.J. at 8. *See also* Conditions of Admission of a State to Membership in the United Nations (Advisory Opinion), 1948 I.C.J. 57, 63 (May 28) ("The Court considers that the text is sufficiently clear; consequently, it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of the Convention is sufficiently clear in itself.").

38. I. SINCLAIR, *supra* note 16, at 75.

39. Special Rapporteur Waldock, who drafted the language that became article 31(4), even expressed doubts concerning whether to include the provision. *See Summary Records of the 769th Meeting*, [1964] I Y.B. INT'L L. COMM'N 309, U.N. Doc. A/CN.4/171 [hereinafter *769th Meeting*].

40. As Schreuer points out, "Neither Article 31 nor 32 contains any reference to intention and the dominant Article 31 is drafted in a very objectivist manner." Schreuer, *supra* note 4, at 274. *See also* Jacobs, *supra* note 15, at 325; Sinclair, *Vienna Convention on the Law of Treaties*, 19 INT'L & COMP. L.Q. 47, 60 (1970) [hereinafter Sinclair, *Vienna Convention*]. This too is consistent with customary international law and the practice of the ICJ. *See* Fitzmaurice, 1951, *supra* note 20, at 7-8.

41. Article 32 provides specifically:

> *Supplementary means of interpretation*
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

"[I]t is permissible to fix the meaning of the terms by reference to evidence or indications of the intentions of the parties outside the ordinary sense of their words" only in the case

C. *An Analysis of Current Law*

The following chart diagrams the relationship among the four approaches to treaty interpretation. The chart categorizes each approach according to whether the approach regards the content of a treaty primarily as rules or as standards, and whether it is objectivist or subjectivist in its theory of interpretation. The provision of the Vienna Convention that authorizes each approach appears in parentheses.[42]

	Rules	Standards
Objectivist	Textual Approach (Article 31(1))	Teleological Approach (Article 31(1))
Subjectivist	Quasi-Textual Approach (Article 31(4))	Subjective Approach (Article 32)

The textual approach, then, regards an agreement as consisting of rules that one should interpret as a third party would—that is, according to their objective meaning. The teleological approach differs from the textual approach in that it regards the underlying standards of an agreement as controlling, but shares with the textual approach an objectivist theory of interpretation under which the standard is not necessarily that of the parties themselves but of an objective third party. The quasi-textual approach shares with the textual approach an emphasis on interpreting the actual text of an agreement but differs in that it interprets the text subjectively, as the parties would, rather than as an objective third party would. Finally, the subjective approach is the opposite of the textual approach. It shares with the teleological approach a view of the treaty as consisting primarily of standards and, like the quasi-textual approach, adopts a subjective theory of interpretation: the standards are those agreed to by the parties, not those apparent to an objective third party.

The Vienna Convention codifies a primarily objectivist theory of

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where "either the natural and ordinary meaning of the terms in their context does not give a viable result or for one reason or another the meaning is not clear." Waldock, *Third Report, supra* note 15, at 57. Note that the negotiating history is also available to confirm, but not vary, the meaning of a clear text. *See infra* notes 54-55 and accompanying text.

42. Rule 32 authorizes reliance on the negotiating history and thus makes possible a subjectivist theory of interpretation. It does not, however, explicitly authorize the subjectivist approach.

treaty interpretation. Both the textual approach and the teleological approach, the preferred approaches under rule 31(1), are objectivist. Words have the meaning that the court, as a third party, gives them. To the extent that some sense of an underlying standard is necessary to illuminate the text, it is the court's version of the parties' purpose which serves that function.

Subjectivism is acceptable as a primary method of treaty interpretation if it is in the form of a subjective reading of the text. That is, a court may give a word a special meaning rather than its ordinary meaning, but only if a party can specifically prove such special meaning. A court is under no independent obligation to look for a special meaning and the presumption is against one.[43] A subjectivist interpretation of the underlying standard is acceptable only as a secondary approach, if all else fails.

The Vienna Convention also prefers a rule orientation over a standards orientation. It prefers the textual approach somewhat more than the teleological approach: both are objectivist, but only the former is rule-oriented. Likewise, it prefers the quasi-textual approach to the subjective approach. Both are subjectivist, but again the former is rule-oriented.

The exception to the Vienna Convention's preference for rules over standards lies in the relationship between the teleological approach and the quasi-textual approach. Clearly, the Vienna Convention prefers the standards-oriented teleological approach to the rule-oriented quasi-textual approach. The inference is that the distinction between the objectivist and subjectivist approaches is more important than the distinction between rule orientation and standards orientation. That is, objectivism is always preferable to subjectivism, even when the latter is applied to treaty text. The teleological approach is objectivist and thus, despite its standards orientation, is preferable to the subjectivist quasi-textual approach. The rule orientation of the quasi-textual approach, even the restrictive version that the Vienna Convention embodies, cannot rescue the approach from the sin of subjectivism.

That objectivism is more important than rule orientation is perhaps

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43. T. ELIAS, *supra* note 20, at 78. As the Permanent Court of International Justice observed, "if it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to [the word 'Greenland'], it lies on that Party to establish its content." Legal Status of Eastern Greenland, 1933 P.C.I.J. (ser. A/B) No. 53, at 49. Special meanings must be "established conclusively" by "decisive proof." Waldock, *Third Report, supra* note 15, at 57. *See also* Conditions of Admission of a State to Membership in the United Nations, 1948 I.C.J. at 57, 63 ("To warrant an interpretation other than that which ensues from the natural meaning of the words, a decisive reason would be required.").

surprising because the rhetoric of international legal debates suggests just the opposite. The very name "textual approach" implies that adherence to text rather than objectivism is the essence of the approach. In explaining its preference for the textual approach in what would become the Vienna Convention on the Law of Treaties, the International Law Commission emphasized that the starting point of treaty interpretation is the text rather than the intent of the parties.[44] Thus, what was advertised as the triumph of rule theory over standards theory was, to a much greater extent, a triumph of objectivism over subjectivism.

To understand why international law would prefer objectivism over subjectivism while portraying the preference as one of rules over standards, it is useful to consider treaty interpretation from the perspective that underlies the Vienna Convention, that of a court. A court examining a treaty for the first time immediately can distinguish between two types of treaty provisions: those that appear clear on their face and those that do not. If a court regards the provision as clear, the Vienna Convention requires it to apply an objective interpretation in the form of the textual and teleological approaches. As noted above,[45] objectivists interpret rules and standards as a third party would rather than as the treaty parties themselves would. Thus, in applying the textual and teleological approaches, the court seeks not to enforce the actual intent of the parties, but merely to settle the dispute in accordance with a third-party interpretation. Only in the case of the second type of treaty provision, those that the court cannot explain through recourse to a third-party interpretation, will the court seek to determine the actual intent of the parties.

One of the goals of treaty interpretation is to enforce the will of the parties.[46] The textual approach claims to meet this goal by defining the will of the parties as that which they embodied in the text. What this approach largely ignores, however, is that the meaning given to the text is not necessarily that of the parties, but of an objective third party. As this suggests, the Vienna Convention, contrary to theory, does not seek primarily to enforce the will of the parties, but to settle disputes.

Of course, courts do not participate in treaty negotiations and have no institutional stake in effecting the arrangement worked out in them. Rather, courts need first and foremost to resolve disputes in a manner that is authoritative and convincing.[47] Objectivism meets that need. By

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44. *See, e.g., Report of the International Law Commission on the work of its Eighteenth Session, supra* note 20, at 220.

45. *See supra* text accompanying note 17.

46. *See supra* text accompanying note 21.

47. *Cf.* Statute of the International Court of Justice, 1947 I.C.J. Acts & Docs. (ser.

elevating third-party interpretation to primary importance, objectivism provides courts with a theory that renders the court's interpretation, by definition, as authoritative as any party could offer. If the role of treaty interpretation is to ascribe to terms their plain and ordinary meaning, a court can do that as well as anyone.

Objectivism, then, elevates a court's institutional need to resolve disputes authoritatively over the goal of enforcing an agreement in accordance with the will of the parties. In short, the injection of a new institution—the courts—into treaty interpretation changes the goal of that endeavor—from enforcing the will of the parties to settling the dispute. With the submission of a dispute to a court, treaty provisions will be regarded not from the negotiator's perspective, but from a court's perspective.

Courts offer no principled justification, however, for placing a third-party interpretation above the parties' intentions. Indeed, as already noted,[48] the textual approach asserts that it is seeking to enforce the parties' intent, but only as revealed in the text. In fact, by relegating the parties' intent to secondary importance, traditional treaty interpretation abandons the principle on which it bases its legitimacy as law.

The foregoing analysis suggests why international law's embrace of objectivism occurs behind a facade of rule orientation. Objectivism seems to provide a basis for a court's authority, while in fact it undercuts its legitimacy. The result is that the advocates of a textual approach prefer to frame the debate as one between hard rules or text and soft standards or intentions.[49] These hard rules, commentators have said, circumscribe the discretion of the court and ensure fidelity to the parties' intentions. One can depict those who advocate the subjective approach as being judicial legislators seeking to impose their will on the parties through unfettered interpretation of nebulous standards.

Whatever rigor adherence to the text imposes,[50] however, is diminished by the embrace of objectivism.[51] It matters little that a court is

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D) 37, art. 38(1), at 76 (The purpose of that body "is to decide in accordance with international law such disputes as are submitted to it.").

48. *See supra* text accompanying note 25.

49. *Cf.* Falk, *supra* note 28, at 344.

50. I have argued that language is sometimes determinant, and I believe that adherence to the text imposes some restriction on a court's discretion. *See supra* note 3. In some cases, a court knows that the international legal community would not regard a particular interpretation of a treaty as credible, however logically defensible.

51. I do not mean to suggest that objectivism permits unbridled discretion. There are some interpretations of a word that one cannot plausibly defend as the plain and ordinary meaning. An objectivist court will find certain interpretations foreclosed. Neverthe-

bound to text if the court can supply its own meaning to the text.

The elevation of the goal of dispute settlement over that of enforcing the will of the parties raises both a principled and a practical objection. The principled objection already has been stated: the international law of treaty interpretation rests its legitimacy on a claim that it is, in fact, enforcing the will of the parties.

The practical objection is that states may become disillusioned with a law of treaty interpretation that interprets treaties differently than they were written and thus may place less reliance on treaties as a means of ordering international relations.[52] That such an outcome is not demonstrably occurring may be attributable to two factors. First, the court's objectivist interpretation may often coincide with at least one party's subjectivist interpretation.[53] In such cases, resort to objectivism rather than subjectivism may not have any practical consequences.

Second, it is unclear that courts in practice really adhere to international law as codified in articles 31 and 32 of the Vienna Convention. The cornerstone of the Vienna Convention is its requirement that courts refrain from inquiring into the parties' actual intentions if the provision to be interpreted is clear on its face. The Vienna Convention does allow a court to refer to the negotiating history, however, even when the treaty text is clear, in order to confirm its interpretation—a rule that borders on the absurd. If the meaning is clear, a court need not confirm it, and examining the negotiating history serves no point.[54] If a court examines the negotiating history anyway but in fact disconfirms the plain meaning, the court has no basis for following the interpretation that the history reveals.[55]

This absurdity is not manifest in practice because courts probably scrutinize the negotiating history whether the text seems clear or not. If the negotiating history supports a court's first impression, then the court

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less, provided a court is within the realm of plausibility, objectivism permits it to legislate in an unrestricted manner, unfettered by even a theoretical need to ascertain the true intent of the parties.

52. Compare Lauterpacht's warning that "[a]n international court which yields conspicuously to the urge to modify existing law . . . may bring about a drastic curtailment of its activity," Gross, *supra* note 6, at 113.

53. Indeed, as one commentator notes, "[a]ll three approaches are capable, in a given case, of producing the same result in practice." Fitzmaurice, 1951, *supra* note 20, at 2.

54. *See, e.g., Summary Records of the 766th Meeting*, [1964] I Y.B. INT'L L. COMM'N 283, U.N. Doc. A/CN.4/167/Add.3; *769th Meeting, supra* note 39, at 314; *770th Meeting, supra* note 35, at 317 (Comments of Jose M. Ruda).

55. For a similar view, see *769th Meeting, supra* note 39, at 314 (Comments of Mustafa Kamil Yasseen); Jacobs, *supra* note 15, at 327.

labels the text as clear and can cite the negotiating history as confirming that meaning in accordance with article 32.[56] If the negotiating history disconfirms the court's first impression, it can disregard it and cite its first impression as the clear meaning of the text or, alternatively, declare the text ambiguous and refer to the negotiating history in accordance with article 32.[57] Of course, this procedure is contrary to the law as codified in articles 31 and 32, under which the negotiating history cannot vary the meaning of a clear textual provision.

It is thus possible that we need not fear dire consequences from application of the traditional law of treaty interpretation because courts do not really follow the traditional law. Such an explanation undercuts the necessity for changing the traditional law as a matter of practicality, while proving the necessity as a matter of principle.

III. TREATY NEGOTIATIONS: A CASE STUDY

The thesis of this Article is that international law needs a theory of treaty interpretation grounded on the perspective of a negotiator rather than on that of a court. In order to develop such a theory, it is helpful to describe the process of negotiation.

Set forth below is a case study of a typical bilateral treaty negotiation. The procedure does not necessarily describe all bilateral treaty negotiations. Believing that one flaw in the current international law of treaty interpretation is the effort to be too general and cover too many different types of agreements, the author has eschewed any attempt to provide a universally applicable account of treaty negotiations. Rather, this case study addresses a particular type of treaty: a bilateral treaty that one state negotiates with two or more other states and which is based on a model negotiating text.[58] This Article will refer to such agreements as

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56. McNair comments, for example, on the "numerous cases" in which a court asserts that since the text is clear, there is no need to examine the negotiating history even though the court already has examined such history prior to making the assertion. *See* A. MCNAIR, *supra* note 28, at 413.

57. *See, e.g., 766th Meeting, supra* note 54, at 283 (Comments of Shabtai Rosenne) ("[T]o state that the *travaux prêparatoires* had been used only to confirm an opinion already arrived at on the basis of the text of the treaty was coming close to a legal fiction . . . . [I]t was particularly difficult to accept the proposition that the *travaux prêparatoires* had not actually contributed to form their opinion as to the meaning of a treaty which, nevertheless, they stated to be clear from its text."). *See also 769th Meeting, supra* note 39, at 314(65) (Comments of Special Rapporteur Waldock), *id.* at 314 (Comments of Shabtai Rosenne); *766th Meeting, supra* note 54, at 285 (Comments of Antonio de Luna).

58. While certain observations made in this case study may have some application to

bilateral series agreements. These agreements may cover diverse areas such as trade, investment, navigation, aviation, consular relations or legal assistance.[59]

Because this Article will describe treaty interpretation from a negotiator's perspective, it is essential that the description correctly depict how parties actually negotiate a treaty series. The following model is based on the manner in which the United States negotiated its bilateral investment treaties (BITs).

The United States has signed BITs with ten other countries.[60] The

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multilateral or other bilateral agreements, no claim is made that they do. There is a much greater difference between the negotiation of multilateral agreements and the negotiation of bilateral agreements than among the negotiation of various types of bilateral agreements. Thus, the case study is least likely to offer meaningful insights into multilateral treaty negotiations.

59. For a listing of United States treaties, see DEP'T OF STATE, TREATIES IN FORCE, an annual listing of treaties and other international agreements of the United States in force on January 1 of the year in which the listing is published. Bilateral treaties are listed by country and categorized within the country listing by topic.

60. INVESTMENT TREATY WITH EGYPT, S. TREATY DOC. NO. 99-24, 99th Cong., 2d Sess. (1986) (Treaty Between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 29, 1982, with a related exchange of letters signed March 11, 1985 and a Supplementary Protocol, signed Mar. 11, 1986) [hereinafter Egypt BIT];

INVESTMENT TREATY WITH PANAMA, S. TREATY DOC. NO. 99-14, 99th Cong., 2d Sess. (1986), (Treaty Between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investments, with Agreed Minutes, Oct. 27, 1982) [hereinafter Panama BIT];

INVESTMENT TREATY WITH CAMEROON, S. TREATY DOC. NO. 99-22, 99th Cong., 2d Sess. (1986) (Treaty Between the United States of America and the Republic of Cameroon Concerning the Reciprocal Encouragement and Protection of Investment, Feb. 26, 1985) [hereinafter Cameroon BIT];

INVESTMENT TREATY WITH MOROCCO, S. TREATY DOC. NO. 99-18, 99th Cong., 2d Sess. (1986) (Treaty Between the United States of America and the Kingdom of Morocco Concerning the Encouragement and Reciprocal Protection of Investments, July 22, 1985) [hereinafter Morocco BIT];

INVESTMENT TREATY WITH ZAIRE, S. TREATY DOC. NO. 99-17, 99th Cong., 2d Sess. (1986) (Treaty Between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, Aug. 3, 1984) [hereinafter Zaire BIT];

INVESTMENT TREATY WITH BANGLADESH, S. TREATY DOC. NO. 99-23, 99th Cong., 2d Sess. (1986) (Treaty Between the United States of America and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol and Exchange of Letters, Mar. 12, 1986) [hereinafter Bangladesh BIT];

INVESTMENT TREATY WITH HAITI, S. TREATY DOC. NO. 99-16, 99th Cong., 2d Sess. (1986) (Treaty Between the United States of America and the Republic of Haiti Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol,

purpose of these agreements is to provide protection for the investments of nationals and companies of one country located in the other country.[61] The United States began preparing a model text in 1977 but did not complete one for negotiation until 1980. It has revised the model text several times since first completing it. The most recent model, dated February 27, 1984, is itself in a review process that may lead to still another model negotiating text.

Successful negotiations with a number of countries based on various model texts commenced in early 1982 and continued through May 1986, when the United States and Grenada signed the United States-Grenada BIT. The United States has suspended negotiations of BITs with most other countries pending Senate advice and consent on the ten signed BITs.

In an effort to identify the different processes by which parties reach agreement on individual treaty provisions, this case study will proceed chronologically through the process of treaty negotiation. Provisions are categorized in accordance with the process by which they were negotiated, although the categories described below are not exhaustive. The intent is only to identify a sufficient number in order to illustrate a particular approach to treaty interpretation.

Dec. 13, 1983) [hereinafter Haiti BIT];

INVESTMENT TREATY WITH SENEGAL, S. TREATY DOC. NO. 99-15, 99th Cong., 2d Sess. (1986) (Treaty Between the United States of America and the Republic of Senegal Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, Dec. 6, 1983) [hereinafter Senegal BIT];

INVESTMENT TREATY WITH TURKEY, S. TREATY DOC. NO. 99-19, 99th Cong., 2d Sess. (1986) (Treaty Between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments, with Protocol, Dec. 3, 1985) [hereinafter Turkey BIT];

INVESTMENT TREATY WITH GRENADA, S. TREATY DOC. NO. 99-25, 99th Cong., 2d Sess. (1986) (Treaty Between the United States of America and Grenada Concerning the Reciprocal Encouragement and Protection of Investment, May 2, 1986) [hereinafter Grenada BIT].

61. Four major articles comprise the BIT. The first requires parties to provide covered investment with certain absolute standards of treatment as well as most-favored-nation and national treatment. The second prohibits expropriation of covered investment unless in accordance with certain conditions, including payment of prompt, adequate and effective compensation. The third guarantees the right to free transferability of payments related to an investment. The fourth provides the investor with the right to binding third-party arbitration of investment disputes with the host country. For a lengthy description of the BIT program, see Vandevelde, *The Bilateral Investment Treaty Program of the United States*, forthcoming in 21 CORNELL INT'L L.J. (1988).

A. *Stage One: Text Presentation*

Generally speaking, the first stage of the negotiating process in a bilateral agreement is the text presentation, in which the drafting party provides the receiving party with a copy of the model text that the drafting party wishes to use as a basis for negotiations.[62] The receiving party may: (1) decide the proposed draft is too onerous and elect not to pursue negotiations further; (2) decide to commence negotiations based on the proposed draft; or (3) respond with a counterdraft.

A counterdraft may be a rewritten version of the proposed draft or it may represent the receiving party's own concept of a model text. A counterdraft itself may lead to any of several possibilities: (1) the drafting party may decide to end the negotiations when it realizes how far apart the parties' views are; (2) the drafting party may persuade the receiving party to abandon the counterdraft; (3) the drafting party may decide to abandon its own model text and negotiate from the counterdraft; or (4) the parties may attempt to integrate the draft and counterdraft into a consolidated negotiating text, which will juxtapose, in some manner, those articles of the draft and counterdraft that address similar subjects.

B. *Stage Two: Issue Identification*

Assuming the presentation of the draft, and possible presentation of a counterdraft, do not result in the abandonment of negotiations, the parties will move to the second stage: identification of issues. Where the parties are negotiating from one party's model text, the receiving party will identify those portions of the model text concerning which it has questions or to which it objects. In the case of a consolidated negotiating text, the parties will assume that all language not common to the draft and counterdraft is objectionable to the respective receiving parties. In either case the general form of the problem is the same: the parties have before them a text consisting of two types of provisions: those that are acceptable to the receiving party and those that are not.

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62. This Article will use the term "drafting party" to refer to the party that has drafted a particular provision and is proposing it for inclusion in the treaty.

This Article will use the term "receiving party" to refer to the party to which the text is proposed. In a particular negotiation, one party may be the drafting party with respect to some provisions and the receiving party with respect to others.

C. *Stage Three: Issue Resolution*

1. Noncontroverted Provisions

In the third stage, issue resolution, the negotiations narrow to concern only those provisions that are not initially acceptable to the receiving party. Acceptable provisions—that is, the noncontroverted provisions—which may in fact constitute the majority of the text, become part of the final treaty without the parties' ever having discussed them. With respect to these provisions, those who seek to interpret the treaty at some later date will have before them all that the treaty negotiators themselves had—the unadorned language of the text.

Each party may have had its own subjective intention with respect to the noncontroverted provisions, perhaps embodied in working documents internal to that party's government, but neither party conveyed any such intention to the other. In the case of the drafting party, it may have crafted the language of the provisions carefully to accomplish some well-defined goal, or it may have borrowed the language from other similar agreements without a clear appreciation of its implications. Where the drafting party borrowed the language, its action is comparable to that of a private attorney copying a legal document from a form book: the goal is to obtain whatever rights or concessions someone else obtained with this same language without necessarily having determined precisely what those rights and concessions are.

In the case of the receiving party, the provisions may have passed almost unnoticed, overshadowed by more controversial provisions. Where this occurs, the receiving party will have had perhaps only the most general notion of what it was accepting. Alternatively, the receiving party may have considered the provisions very carefully, developing a well-formed intent with respect to the provision but an intent unfortunately at variance with that of the drafting party.[63] It is also possible, of course, that the receiving party interpreted the provisions as the drafting party did and was in full accord.

As the foregoing discussion makes clear, in the case of noncontroverted provisions, one cannot know, perhaps until a dispute arises, whether the parties had or shared any intention at all, beyond a desire or willingness that the provision appear in the final treaty text. Of course, a dispute does not mean that the parties were not originally in full accord. The parties may have forgotten the meaning of a provision over time or circumstances may have caused a party to change its position.

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63. *See 765th Meeting, supra* note 30, at 280 (Comments of Robert Ago); *870th Meeting, supra* note 8, at 186 (Comments of Shabtai Rosenne).

2. Controverted Provisions

Controverted provisions are those with respect to which the receiving party raises a question or objection. In stage three negotiations the parties attempt to reach mutual agreement to: (1) incorporate the controverted provision as originally drafted into the treaty; (2) incorporate the controverted provision in a changed form; or (3) omit the controverted provision from the treaty. One can divide controverted provisions into several categories according to the manner in which the parties reached their agreement concerning such provisions.

a. Defined Provisions

Defined provisions are those in which the meaning of some word or phrase is unclear to the receiving party. The receiving party's confusion may be attributable, for example, to poor draftsmanship, the inherent difficulties in reducing what may be a complex matter to a few simple provisions,[64] language difficulties or unfamiliarity with a term of art. The receiving party will request the drafting party to define the unclear language. Once the receiving party has been given and is satisfied with a definition, it will accept the provision as part of the treaty. What the parties have agreed to, of course, is not the plain and ordinary meaning of the terms in question, but the language as the drafting party defined it.

A court charged with interpreting a defined provision at some later date cannot find that the agreement is clear and unambiguous, no matter how clearly the words may appear to the court. This is because the receiving party found the same provision unclear and in need of further definition. It seems fundamental that a treaty provision that is unclear to one of the parties is an unclear provision, whatever a court may say.[65] While the text is obviously a starting point for interpretation, the bare

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64. A treaty that attempts to spell everything out may be too complex to understand. In any event, every additional sentence creates new potential difficulties and thus, all things considered, longer provisions are harder to negotiate than shorter provisions. A treaty that attempts to be concise, on the other hand, may leave too many gaps in the description of the parties' obligations. *See* R. BILDER, *supra* note 2, at 119.

65. *See, e.g., 766th Meeting, supra* note 54, at 286, and 313 (Comments of Mustafa Kamil Yasseen); *769th Meeting, supra* note 39, at 313 (Comments of Milan Bartos); T. YU, *supra* note 35, at 55. This is the sort of statement that separates objectivists from subjectivists. Subjectivists would agree that a provision which is unclear to one or both parties is an unclear provision. Objectivists would disagree, asserting that if the provision is clear to an impartial third party, then it is clear, notwithstanding the fact that one of the parties found it otherwise.

text was insufficient for the receiving party and, likewise, should be insufficient for a court as well. Rather, the receiving party accepted the text only as the drafting party embellished it, and it was to this defined text that the parties agreed.[66] A court that does not go beyond the text has not found the parties' agreement.

b. Explained Provisions

As in the case of a defined provision, the negotiation of an explained provision begins with a question from the receiving party concerning the meaning of the provision. The difference is that the ensuing explanation, whether because of the scope of the receiving party's question or for some other reason, extends beyond the mere definition of some terms to include an explanation of the intent behind the provision as a whole. This explanation becomes the basis on which the receiving party decides to accept the provision. The text alone was insufficient. The explanation is, thus in fact, the subject of the agreement, with the text serving merely as a mutually-agreed means of encapsulating the underlying agreement.

c. Clarified Provisions

Clarified provisions comprise a third category. Like defined and explained provisions, these are unclear to the receiving party. On hearing the drafting party's explanation, however, the receiving party does not accept the text but suggests that the drafting party could better express its intent by changing the language. In essence, the receiving party's reaction is that the provision is acceptable in substance, but poorly drafted.

The parties will then propose a series of alternative formulations until they find one that is mutually acceptable. In the case of the receiving party, the test will be whether the new wording more clearly expresses the meaning of the provision as the drafting party explained it. In the case of the drafting party, which probably regards its original formulation as the most desirable, the test will be twofold: (1) is the alternative formulation sufficiently clear; and (2) does the alternative formulation amount to, or appear to amount to, a substantive concession?

The latter question is particularly serious in negotiations of multiple treaties from a single model text. In such a case the drafting party is on public record as preferring a particular formulation. Observers poten-

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66. For an example of a defined provision and a concurring view that a defined provision must be interpreted in light of the explanation of the drafting party as gleaned from the negotiating history, see *769th Meeting*, *supra* note 39, at 288 (Comments of Robert Ago).

tially may construe every deviation from the model text, however superficial, as a derogation rather than as a clarification. The drafting party will look, in the first instance, for existing formulations in other treaties that have an established meaning equivalent to that in the draft.

An example of a clarified provision in the BITs appears in article II(4) of the BIT between the United States and Senegal.[67] This article requires, in pertinent part, that each party observe any "engagement" it may have entered into with respect to investment.[68] The model text had used the word "commitment," which the Senegalese negotiators believed was less clear in French.[69] The negotiators did not intend to affect the meaning of the provision by making the change; they intended only to find a written formulation which, in the view of both parties, clearly expressed the parties' agreement.

A clarified provision, like an explained provision, is one in which the drafting party's explanation of its intention forms the core of the agreement. The text the parties finally adopt is acceptable because both parties agree that it adequately reflects that explanation. A court that confines its interpretation to a reading of the bare text interprets the reflection of the parties' agreement and not the agreement itself.

d. Reworded Provisions

Reworded provisions are those in which the form of the provision is objectionable to the receiving party for reasons other than the provision's failure to convey adequately the underlying meaning. An excellent example, in the case of the BITs, was the reference to the interest that an expropriating government must pay to an expropriated investor for any period of delay in providing compensation for the expropriation, a reference the Moroccan negotiators found offensive on religious grounds. The parties replaced all references to interest with general language creating a right to compensation for delays in receipt of payment. They retained the substance of the right to interest, but with rewording to accommodate a particular sensitivity.[70]

The negotiation of a reworded provision, like that of a clarified provision, proceeds in three steps. First, the receiving party will articulate the basis of its objection. Second, the drafting party will reply that the objection appears to be one of form only and it will articulate the underlying principle that it believes both parties are prepared to accept. Third, the

67. Senegal BIT, *supra* note 60, art. II(4).
68. *Id.*
69. *See* Vandevelde, *supra* note 61.
70. *Id.*

parties will begin their search for a new formulation that preserves the principle while avoiding the receiving party's objection. In the case of the reworded provision, as in that of the clarified provision, the parties will mutually agree on the drafting party's intention with respect to the principle, changing only the form of the treaty text. The receiving party will seek a new formulation that avoids a particular word or phrase, even though in substance it has no objection. The drafting party will seek to avoid formulations that the other party may later interpret as substantive concessions or which may obscure the principle.

The language the parties finally adopt will be acceptable to them because it will appear to express adequately the underlying principle on which both parties concur. While the language may be an acceptable formulation of the principle, the parties' minds met in fact on the principle itself. A court that interprets the provision as anything other than an embodiment of the principle will have misinterpreted the parties' agreement.

e. Modified Provisions

Modified provisions are provisions that the receiving party finds unacceptable in substance. The parties will reach agreement on the provision only after the drafting party agrees to modifications that represent substantive concessions.

It is useful to distinguish among three types of modified provisions: explained, defined and unexplained. An explained modified provision is one where a party offers new language, discusses the provision with the other party, and they reach an agreement acceptable to both. As in the case of explained, clarified and reworded provisions, the parties reach an agreement which they embody in words. Unlike the explained, clarified or reworded provisions, however, the intent that ultimately becomes their mutual agreement originates not with the drafting party but with both parties. The parties adopt the wording used because they believe it reflects their shared intention. Again, the negotiations and the meeting of minds that resulted therefrom are the heart of the agreement; the text is only an effort to reduce the agreement to words. A court that examines only the text has missed the agreement.

One can find an illustration of an explained modified provision in paragraph 1 of the Protocol to the BIT between the United States and Zaire (Zaire BIT).[71] Article V(1) of that BIT, following the United States proposal, guarantees to investors of either party the right to make cur-

71. Zaire BIT, *supra* note 60.

rency transfers related to an investment freely in and out of the territory of the other party.[72] The Protocol to the Zaire BIT modified the general rule, however, in that it permits Zaire, under certain exigent circumstances, to allow the transfer of sale or liquidation proceeds "over a period [of] three years."[73] The parties agreed to the modification only after they had reached an understanding in principle that Zaire would make a good faith effort to permit meaningful transfers throughout the three years, although they agreed not to quantify Zaire's obligation.[74] The parties believed the "over a three year period" formulation adequately reflected the understanding in principle. A court that considers only the bare text could interpret it defensibly to permit Zaire to make no effort to allow transfer until the last day of the period, but such a reading would not reflect the parties' agreement, notwithstanding its facial consistency with the text.

A defined modified provision is one where one of the parties proffers the new language without explanation. Subsequent discussions define certain terms but, unlike the case of the explained modified provision, these discussions do not go to the heart of the entire provision. The text forms the core of the agreement, but it is the text as defined, not the bare text.

An example of a defined modified provision is article II(3)(a) of the BIT between the United States and Senegal.[75] The 1983 draft language that the United States proposed authorized the parties to require that the right of the other party's investors to engage in mining on the public domain be based on reciprocity, a derogation from the general rule of national and most-favored-nation treatment set forth in the BIT. Senegal proposed that the parties broaden the provision to refer to mining activities and not just mining.[76] During negotiations, the parties agreed that "mining activities" would include mining and any initial transformation of a mined product.[77] A court that reads the term more narrowly or more broadly than the definition to which the parties agreed would misinterpret the agreement.

An unexplained modified provision is one where one party offers and the other party accepts new language without discussion of its meaning. In one sense the unexplained modified provision is similar to a noncon-

72. *Id.* art. V(1).
73. Zaire BIT, *supra* note 60, Protocol, para. 1(b).
74. Vandevelde, *supra* note 61.
75. Senegal BIT, *supra* note 60, art. II(3)(a).
76. Vandevelde, *supra* note 61.
77. *Id.*

troverted provision. Certainly, several statements of intent may have preceded the provision. At the critical moment, however, the record falls silent and we are left with only the final text and perhaps some inconclusive discussions preceding agreement on the text. One can distinguish these discussions from the internal expressions of intent referred to in the case of noncontroverted provisions because here they have been communicated to the other party. Inasmuch as the parties compromised, however, one cannot presume that either side has accepted the other side's intent. In that sense, the discussions are comparable to the internal expressions of intent. The discussions may set the limits of the interpretive process, but within those limits the court will have to impose its own objective view of the provision.

Article II(1) and (2) of the Zaire BIT provides an illustration of an unexplained modified provision.[78] The 1983 draft that the United States proposed for adoption required the parties to provide national and most-favored-nation treatment to new and existing investment of nationals and companies of the other party "in like situations."[79] The Zaire BIT, inexplicably insofar as the author has been able to ascertain, omits reference to "in like situations" from the paragraph relating to the treatment of *existing* investments.[80] It is unclear which party proposed the change or what effect it intended the change to have. The interpreter is left with only the bare text to interpret as an objective third party would.

In the case of the unexplained modified provisions, as with noncontroverted provisions, a meeting of minds may never have occurred other than the agreement that specific words should appear in the treaty text. Each party is content to see the provision in the light most favorable to its own position. Indeed, the parties may avoid clarification out of fear that it would only expose conflict and result in an explanation that would force one party to back away from the language.[81]

IV. Treaty Interpretation: A Negotiator's Perspective

The purpose of the foregoing case study was to illustrate the diverse ways in which parties to a treaty reach agreement on individual provisions. In each case the manner in which the parties negotiated a provision suggests the proper approach to its interpretation.

In some cases, for example, the plain language of the text is all that passed between the parties. The parties did not agree on any underlying

78. Zaire BIT, *supra* note 60, arts. II(1), (2).
79. Vandevelde, *supra* note 61.
80. Zaire BIT, *supra* note 60.
81. *See 766th Meeting, supra* note 54, at 289-90 (Comments of Shabtai Rosenne).

principle or imbue the text with any special meaning. A court that examines that plain language has as much information about the meaning of the agreement as the parties did. Such cases include noncontroverted provisions and unexplained modified provisions. Under those circumstances, it is wholly appropriate for the court to regard the agreement as consisting of the text itself and to interpret that text objectively—that is, to adopt the textual approach.

In other cases, however, the parties agreed to include a particular text only after they discussed what they intended that provision to mean. That is, the parties accepted a particular formulation as an adequate expression of the underlying principle that they found mutually acceptable in the course of the negotiations. The underlying principle, not the text, was the essence of the agreement. These cases include explained, clarified, reworded and explained modified provisions. In such cases a court should regard the agreement as consisting of a standard, not a rule, and interpret it subjectively. The court should adopt the subjective approach.

In still other cases, prior to accepting a provision, the receiving party sought assurances that the parties would interpret a word or phrase in a particular manner. The discussions did not focus on the provision as a whole, but concerned only the meaning of a word or phrase. Such cases include defined and defined modified provisions. In these cases courts should regard the provision as a rule, not a standard, and interpret it subjectively—that is, in accordance with the parties' actual meaning. Thus, the quasi-textual approach is appropriate.

These examples illustrate the interpretation of certain types of treaty provisions from a negotiator's perspective. The provisions considered were those the case study identified. As previously noted, the case study did not purport to be an exhaustive list of the types of provisions found in bilateral series agreements, to say nothing of international agreements generally.[82] The limited number of provisions considered above, however, provides a sufficient basis for identifying the premises that underlie the negotiator's perspective.

The negotiator's perspective requires a theory of interpretation based on three premises. The first premise is that the primary purpose of

82. Treaty negotiators may reach agreement through numerous routes, of which this essay has discussed only a few. One can imagine countless other categories of provisions. An obvious addition to the list is the explained noncontroverted provision—a provision with respect to which the drafting party provides the receiving party with voluminous explanatory materials, following which the receiving party accepts the provision without discussion.

treaty interpretation is to give effect to the intention of the parties rather than simply to settle a dispute by recourse to a third-party interpretation. That is, the negotiator's perspective, in contrast to the court's perspective, prefers subjectivism to objectivism.

The corollary, however, is a recognition that at times the parties will not have had any intention on a particular issue or that their intention will be impossible to identify from the negotiating history. In such cases the negotiator's perspective recognizes the legitimacy of a third-party, objectivist interpretation as a means of settling the dispute.[83]

The current international law of treaty interpretation is profoundly objectivist, allowing subjectivism only where a party sustains a heavy burden of proof, as in the quasi-textual approach, or where objectivism has failed. The negotiator's perspective calls for a reversal of this presumption: courts would seek to interpret treaty provisions subjectively, reserving objectivism for cases where it is clear the parties had no subjective intent on the issue in dispute or where, because of gaps in the record, the court could not discern that intent.

The second premise is that most treaties are a mixture of rules and standards. At times the parties will have reached clear agreement on a standard which they then seek to embody in language. A negotiator's perspective recognizes that the underlying standard was the essence of their agreement and, if the record reveals it, the underlying standard should form the basis of interpretation. At other times, however, the parties will have incorporated a rule into the agreement with little or no discussion, or will have been unable to agree in principle and will have agreed to unexplained language to bridge the gap. In these cases a negotiator's perspective recognizes that the rule is the agreement and it is the proper subject of interpretation.

The third premise is that courts should examine disputed treaty provisions in every case in light of the treaty's negotiating history.[84] Only

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83. Jacobs, *supra* note 15, at 339. Once it has abandoned the search for the parties' actual meaning in favor of a third-party interpretation, a court has the choice of acting either arbitrarily or on the basis of some guiding principles. A principled interpretation may be hardly different from an arbitrary one if the principles are arbitrarily selected. Thus, a court that seeks to make a principled interpretation first must find a legitimate basis on which to choose the principles to be applied. Unfortunately, the negotiator's perspective, as formulated herein, offers no guidance in this regard. Treaty negotiators generally operate on a "black box" theory of international law: they assume the existence of some set of principles that will enable a court to fill in interpretive gaps, but will rarely allow speculation as to the nature of those principles to intrude into the treaty-making process.

84. For a concurring view, see, e.g., Lauterpacht, *supra* note 30, at 433.

through such an examination can a court determine whether a rule or a standard was the essence of the agreement and whether a subjectivist or an objectivist theory of interpretation is more appropriate under the circumstances of the negotiation.

One can state the difference between a court's perspective and a negotiator's perspective rather simply: a court's perspective regards all treaty provisions as ideally the same—as rules that courts should interpret objectively. One determines whether to depart from this ideal and treat a provision as a standard or to apply a subjectivist theory of interpretation by examining the bare text alone.

A negotiator's perspective, on the other hand, recognizes that agreements have rules and standards, and that both subjectivism and objectivism are legitimate under certain circumstances. One determines whether to treat a provision as a rule or a standard and whether to apply an objectivist or subjectivist theory of interpretation by examining the negotiating history.[85]

V. CONCLUSION

The traditional international law of treaty interpretation, as embodied in the Vienna Convention, is almost purposely inadequate to the two tasks of treaty interpretation previously identified: enforcing the parties' agreement where there is one and supplying a legitimate interpretation where there is not. First, the traditional law of treaty interpretation in many cases does not even attempt to identify the parties' actual intent

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85. Commentators are showing increasing recognition that the attempt to formulate a single approach for interpreting treaty provisions is misguided. The most obvious distinction to be made is that between bilateral and multilateral agreements. A negotiator's perspective is that the manner in which these two types of agreements are negotiated is very different and thus they necessitate different approaches to interpretation. For a reference to the particular problem of multilateral treaty negotiations, see Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion), 1951 I.C.J. 15, 49-53 (May 28) (dissenting opinion of Judge Alvarez); *Summary Records of the 873rd Meeting*, 1966 I Y.B. INT'L L. COMM'N 207, U.N. Doc. A/CN.4/186 (Comments of Gilberto Amado); *766th Meeting, supra* note 54, at 287 (Comments of Milan Bartos); A. MCNAIR, *supra* note 28, at 412 (1945); Fitzmaurice, 1951, *supra* note 20, at 3-4. At least one commentator, without going quite that far, has suggested that a general reservation for constituent instruments of international organizations be included in the Vienna Convention. *See 765th Meeting, supra* note 30, at 278 (Comments of Shabtai Rosenne). Falk has commented on the need for "more functionally specific conceptions of interpretation that give adequate weight to [the relative roles of text and context in the interpretative process]." Falk, *supra* note 28, at 345. Falk suggests that an important distinction is whether a treaty relates to war and peace or some more prosaic subject.

but remains content with the court's objective interpretation. Second, traditional law simply does not acknowledge the situation in which the parties' agreement is not determinant of the dispute and, thus, it has not developed a theory of interpretation that can legitimate treaty interpretation in such cases.

The negotiator's perspective, by contrast, seeks to uncover the parties' actual agreement in every case in which it can be found. Where there was no agreement on the point at issue or the agreement can no longer be found, the negotiator's perspective accepts the legitimacy of law-making under an objectivist theory of interpretation as a means of resolving the dispute in accordance with the parties' agreed procedures.

This leaves open the question of what principles should guide that process of law-making. We cannot find a solution, however, until we admit that there is a problem.