Multilingual Treaty Interpretation and the Case of SALT II

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MULTILINGUAL TREATY INTERPRETATION
AND THE CASE OF SALT II

David A. Wirth*

Introduction

Since the Treaty of Versailles was drafted in English and French in 1919, multilingual agreements have been increasingly important in international affairs.¹ One result of this phenomenon has been the awareness that this type of treaty can present some of the most interesting and most difficult problems of interpretation. Not surprisingly, the typical difficulty with multilingual treaties is a difference in meaning between or among the texts. Faced with a possible discrepancy, an interpreter must assume the task of resolving two conflicting principles of construction, one of which asserts that the texts are of equal force and the other that each provision of a treaty has only one meaning. Although the general problem of treaty interpretation is related to the problems of statutory construction and contract interpretation, the complexities presented by authoritative texts in various languages have attracted international attention mainly in the context of the plurilingual treaty.²

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2. Similar problems do, however, arise in domestic contexts. Switzerland, for example, has long been confronted with the problem of multiple authoritative texts in the interpretation of its statutes. Doctrine asserts that all the texts must be consulted. For example, the French and Italian versions of Article 1 of the Swiss Civil Code should be examined in ascertaining the correct meaning of the German text. See O. Germann, Probleme und Methoden der Rechtsfindung 58 (2d ed. 1967); M. Gmür, Die Anwendung des Rechts nach Art. 1 des schweizerischen Zivilgesetzbuches 124 (1908). See also Reed, Problèmes de la traduction juridique au Québec, 24 Meta 95 (1970).
The Treaty on the Limitation of Strategic Offensive Arms (SALT II) between the United States and the Soviet Union is an instance of just such a difficulty. President Carter and Secretary Brezhnev signed the Treaty on June 18, 1979, but neither side has yet ratified it. In the United States, Senate approval of the Treaty has been a matter of considerable controversy. Ninety-eight agreed statements and common understandings elaborate the Treaty's provisions and appear, as does the Treaty proper, in English and Russian texts of equal authenticity. The greatest discrepancy between the two texts is probably in the Common Understanding to Para-

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3. Dep't State Bull., July, 1979, at 23; 37 Cong. Q. Weekly Rep. 1228 (1979); 18 Int'l Legal Materials 1138 (1979). The Russian text of the Treaty may be found at Izvestiia, June 19, 1979, at 1, col. 1; Pravda, June 19, 1979, at 1, col. 1. A copy of the original Russian text of the Treaty, including the agreed statements and common understandings, is on file with Yale Studies in World Public Order.

4. Article XIX of the Treaty provides that it "shall be subject to ratification in accordance with the constitutional procedures of each Party. This Treaty shall enter into force on the day of the exchange of instruments of ratification . . . ." In the United States, ratification is accomplished "by and with the Advice and Consent of the Senate . . . provided two thirds of the Senators present concur." U.S. Const. art. II, § 2, cl. 2. In the Soviet Union, "[t]he Presidium of the Supreme Soviet of the U.S.S.R. . . . ratifies and denounces international agreements." Konstitutsiia (Constitution) art. 121, para. 6 (U.S.S.R.).


6. According to one of the negotiators,

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graph 8 of Article IV,7 which reads in English as follows:

During the term of the Treaty, the Union of Soviet Socialist Republics will not produce, test, or deploy ICBMs [intercontinental ballistic missiles] of the type designated by the Union of Soviet Socialist Republics as the RS-14 and known to the United States of America as the SS-16, a light ICBM first flight-tested after 1970 and flight-tested only with a single reentry vehicle; this Common Understanding also means that the Union of Soviet Socialist Republics will not produce the third stage of that missile, the reentry vehicle of that missile, or the appropriate device for targeting the reentry vehicle of that missile.8

The Russian text is the following:

6. (Continued)

7. The limitations contained in this common understanding were of particular importance to the United States, since, according to Secretary of State Vance, "[t]he Soviet SS-16 long-range mobile missile would have presented us with particular verification problems, because its first two stages cannot be distinguished from the intermediate range missile, the SS-20." For. Rel. Comm. Hearings, Pt. 1, supra note 6, at 92 (statement of Cyrus R. Vance). Intermediate range missiles such as the SS-20 are not limited by SALT II, although they may be the subject of agreements currently being negotiated. See New U.S.-Soviet Arms Talks Open in Geneva Under Stritest Secrecy, N.Y. Times, Oct. 17, 1980, at A10, col. 2 (city ed.).

The Russian may be translated in the following manner:

During the term of the Treaty, the Union of Soviet Socialist Republics will not produce, test and deploy ICBMs of the type designated by the Union of Soviet Socialist Republics as the RS-14 and known to the United States of America as the SS-16, a light ICBM first flight-tested after 1970 and flight-tested only with a single reentry vehicle; this Common Understanding also means that the Union of Soviet Socialist Republics will not produce the third stage of that missile, the reentry vehicle of that missile and the appropriate device for targeting the reentry vehicle of that missile.9

As is clear from this literal translation of the Russian, there is a divergence between the English and the Russian texts in the use of the word "and" in the Russian for the English "or." This occurs twice in the Common Understanding, in similar syntactic constructions. Assuming the Treaty were in force,11 it is con-

9. Soglasovannye zaiaavlennia i obshchie ponimanii (original Russian text of agreed statements and common understandings to SALT II), supra note 3, at 16-17 (emphasis supplied).
10. Id. (author's translation) (emphasis supplied).
11. It appears that the U.S.S.R. has already acted contrary to the spirit and probably the letter of the Treaty. See Robinson, Soviet SALT Violations Feared, Av. Week & Space Tech., Sept. 22, 1980, at 14; Soviet Union Test Fires New Missile and Encodes In-
ceivable that the Soviet Union could claim that the
Common Understanding entitles it, for example, to test
and to deploy the SS-16 so long as the missile were
not produced in the U.S.S.R. In other words, the So-
viet Union could argue for a less extensive interpreta-
tion of the obligations in the Common Understanding
than would be justified by the English text.

This Article evaluates proposed solutions to the
difficulties of multilingual treaty interpretation as
applied to a concrete problem, the Common Understanding
to Paragraph 8 of Article IV of SALT II. First, the
precise meaning of the English and Russian texts is
examined, with reference to scholarship from the fields
of symbolic logic and linguistics. Then, after the
texts have been clarified individually, various doc­
trines prescribing resolution of discrepancies--by
choice of the text most favorable to the obligor,
choice of the text in the language of the state to which
a provision refers, choice of the least extensive text,
choice of an interpretation which all texts have in com-
mon, and choice of the clearest text--are applied to,
and evaluated in the context of, this provision.

I. The Meaning of the Texts

To resolve the discrepancy between the two texts,
it is instructive first to examine plausible alternative
interpretations of each. Since the two occasions of di-
vergence between the texts present similar syntactic

(Continued)
formation From It, N.Y. Times, Feb. 16, 1980, at 4, col. 5. Recent
evidence suggests that the U.S.S.R. may be engaging in precisely
the activity which so concerned the American negotiators--disguis­
ing the long-range SS-16 as the intermediate range SS-20. Washin-
12. This might occur if the U.S.S.R. imported the SS-16, in-
cluding all the parts mentioned in the second clause of the Common
Understanding, instead of producing it domestically. Such activity
might still be a violation of either Article XII or Article XIII, or
both, of the Treaty, which provide, respectively, that "each Party
undertakes not to circumvent the provisions of this Treaty, through
any other state or states" and that "[e]ach Party undertakes not to
assume any international obligations which would conflict with this
Treaty."
difficulties, this Article will consider the possible
differences between the meaning of the English phrase
"will not produce, test, or deploy" and that of the
Russian "не будет производить, испытывать и развивать"---
"will not produce, test and deploy."

A. The English Text

A critical examination of the English text should
consider the meaning of the word "or"---the question of
inclusive versus exclusive disjunction. Assume the
propositions below have the following symbolic repre­
sentations:

\[ p = \text{produces} \]
\[ q = \text{tests} \]
\[ r = \text{deploys}. \]

The phrase "will not produce, test, or deploy" may be
represented in the following manner:

\[ \sim(p \lor q \lor r), \quad (E1) \]

where \( \sim \) represents negation and \( \lor \) represents the inclu­
sive disjunction. Expression (E1) has the following
truth table:

<table>
<thead>
<tr>
<th>( p )</th>
<th>( q )</th>
<th>( r )</th>
<th>( p \lor q \lor r )</th>
<th>( \sim(p \lor q \lor r) )</th>
</tr>
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<tbody>
<tr>
<td>T</td>
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13. Native speakers of Russian confirm this proposition as
to the Russian text.

14. A statement consisting of inclusive disjunctions of two
or more subsidiary propositions is true if and only if at least
one of the subsidiary propositions is true. A statement consist­
ing of exclusive disjunctions of two or more subsidiary proposi­
tions is true if and only if one and only one of the subsidiary
propositions is true. I. Copi, Symbolic Logic 11-14 (3d ed. 1967);
W. Quine, Elementary Logic 15 (1941); H. Reichenbach, Elements of
Symbolic Logic 23, 45-46 (1947).
The symbols "T" and "F" represent the truth or falsity, respectively, of the proposition asserted at the top of the column in which the symbol appears. The truth values of the propositions $p$, $q$, and $r$ are taken as given; the truth table is a device for evaluating the logical consequences of every combination of truth values for these premises. A "T" on a particular line in the final column indicates that, given the interpretation of "or" as an inclusive disjunction and that particular combination of truth values for the propositions, the Soviet Union has complied with the Common Understanding. An "F" indicates a violation of the Common Understanding. The truth table shows that the U.S.S.R. is in compliance with expression (E1) if and only if it neither produces nor tests nor deploys.

An alternative rendering of the English is the exclusive disjunction, represented symbolically as

$$\neg(p \lor q \lor r),$$

(E2)

where $\lor$ indicates exclusive disjunction. Expression (E2) has the following truth table:

<table>
<thead>
<tr>
<th>$p$</th>
<th>$q$</th>
<th>$r$</th>
<th>$p \lor q \lor r$</th>
<th>$\neg(p \lor q \lor r)$</th>
</tr>
</thead>
<tbody>
<tr>
<td>T</td>
<td>T</td>
<td>T</td>
<td>F</td>
<td>T</td>
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<td>F</td>
<td>F</td>
<td>T</td>
<td>F</td>
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</tbody>
</table>

The truth table shows that interpreting the English text as an exclusive disjunction implies that the Soviet Union complies with the Common Understanding if and only if it refrains from engaging in exactly one of the activities of production, testing, and deployment.

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15. This is not entirely an accurate rendering, since disjunction is properly viewed as binary and associative. Reichenbach, supra note 14, at 45. For present purposes, however, this representation will be considered to be true if and only if exactly one of $p$, $q$, and $r$ is true. Note that expression (E2) carries the meaning $\neg((p \lor q \lor r) \land \neg[(p \land q) \lor (p \land r) \lor (q \land r) \lor (p \land q \land r)])$. 
It is important to put these two possibilities in perspective. Logical principles assure a consistent result once the meaning of the words has been determined, but the apparently simple conjunctions "and" and "or" can have multiple meanings, which can cause trouble in the process of reduction to standard logical forms. Unfortunately, there appear to be few general rules for distinguishing these meanings; the only approach is to examine the context of an ambiguous word or phrase.

Even with such an elusive criterion, expression (El) is the better, if not the only, interpretation of the English text of the Common Understanding. Most native speakers of English will interpret the word "or" in this context, a multiple disjunction of nonexclusive subsidiary propositions, in the inclusive sense. The inclusive sense seems to be favored except when the conjoined propositions are, or appear to be, mutually exclusive from the point of view of logic or experience. The propositions $p$, $q$, and $r$, however, can each be satisfied independently without encountering problems of logical exclusivity. In a multiple, as opposed to a binary, linkage the exclusive sense seems to be even more disfavored. Moreover, the pattern of outcomes

16. In addition to the problem of the exclusive and inclusive meanings of "or," "and" may also be interpreted in both disjunctive senses. Likewise, "or" may sometimes have a conjunctive rather than a disjunctive meaning. Allen & Orechkoff, Toward a More Systematic Drafting and Interpreting of the Internal Revenue Code: Expenses, Losses and Bad Debts, 25 U. Chi. L. Rev. 1, 31 n.13 (1957).


19. See Quine, supra note 14, at 14-16; Reichenbach, supra note 14, at 45. An example of a statement containing several subsidiary propositions in which "or" might be interpreted in the exclusive sense is the following: "The coins in my hand are nickels, dimes, or pennies." The element of negation, as in the Common Understanding, may convert the interpretation from an exclusive sense in the positive assertion to the inclusive sense in the corresponding negative: "The coins in my hand are not nickels, dimes, or pennies."
for the exclusive interpretation, as summarized in the truth table, has little to recommend it as a rational scheme.\textsuperscript{20} So long as the Soviet Union avoided engaging in one and only one of the proscribed activities, it would be in compliance. Undertaking any two or all three would be permitted, whereas engaging in only one would be prohibited. Surely this cannot be the sense of the English words.

Native speakers of English would probably interpret the Common Understanding as an individual negation of each action:

\[ \neg p \& \neg q \& \neg r, \]  

(E3)

where \& represents conjunction.\textsuperscript{21} Expression (E3) has the following truth table:

<table>
<thead>
<tr>
<th>p</th>
<th>q</th>
<th>r</th>
<th>\neg p &amp; \neg q &amp; \neg r</th>
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The outcome for each combination of truth values for the premises is identical to that for expression (E1), and statements (E1) and (E3) are hence said to be logically equivalent.\textsuperscript{22} In light of all these considerations, then, the inclusive interpretation (E1) is decidedly superior to the exclusive interpretation (E2).

\textsuperscript{20} This factor may of itself be significant in the interpretation of a treaty. Cf. Article 32(b) of the Vienna Convention, \textit{reprinted at} note 127 \textit{infra} (reasonableness of outcome a factor in decision to resort to supplementary means of interpretation).\textsuperscript{21} A statement consisting of two or more subsidiary propositions linked by "\&" will be true if and only if each of the subsidiary propositions is true. Quine, \textit{supra} note 14, at 9; Reichenbach, \textit{supra} note 14, at 27, 44.\textsuperscript{22} This is a consequence of De Morgan's Theorem. Copi, \textit{supra} note 14, at 30.
B. The Russian Text

The Russian text, in addition to raising the question of the proper interpretation of the word "and," also involves the problem of the logical relation of the negation signified by "not" to the rest of the predicate. The systematic approach applied to expression (E1) above suggests the interpretation

$$\neg(p\&q\&r)$$

(R1)

for the Russian. Expression (R1) has the truth table

<table>
<thead>
<tr>
<th>$p$</th>
<th>$q$</th>
<th>$r$</th>
<th>$p&amp;q&amp;r$</th>
<th>$\neg(p&amp;q&amp;r)$</th>
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which differs in outcome from the truth table for (E1), the preferred interpretation of the English, in every case except the first and last lines. If this interpretation of the Russian is correct, then the Soviet Union violates the Common Understanding only by engaging in all three activities of production, testing, and deployment. The U.S.S.R. could undertake any one or any two without violating the Common Understanding. The preferred interpretation of the English text, however, prohibits each activity individually, with the result that the two texts are at least potentially inconsistent.

Logicians and linguists agree that "and" in an appropriate context may carry a disjunctive meaning.  

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23. See note 16 supra.


25. An interpretation of the English text as an exclusive disjunction must be discarded. See text accompanying notes 18-22 supra.

26. See note 16 supra.
This proposition has found acceptance in judicial practice as well. For example, the Permanent Court of International Justice (P.C.I.J.) supplied an inclusive disjunctive meaning for the French word for "and"—"et"—on at least two occasions. Courts in this country have also shown a willingness to substitute "or" for "and" and vice versa in an appropriate context. This approach would result in the interpretation

\[ \neg(p \lor q \lor r) \]  \hspace{1cm} (R2)

It is also accepted that "not" in the present context may negate each verb individually:

\[ \neg p \land \neg q \land \neg r \]  \hspace{1cm} (R3)

27. Factory at Chorzow (Jurisdiction), [1927] P.C.I.J., ser. A, No. 9, at 21; Certain German Interests in Polish Upper Silesia (Jurisdiction), [1925] P.C.I.J., ser. A, No. 6, at 14. In both cases, a dispute arose concerning the meaning of the word "and"—"et"—in Article 23, Paragraph 1 of the Geneva Convention of 1922, the relevant portion of which might read in English as follows: "Should differences of opinion resulting from the interpretation and application of Articles 6 to 22 arise . . . they should be submitted to the decision of the Permanent Court of International Justice." The Court in the German Interests opinion concluded that "the word et . . . in both ordinary and legal language, may, according to the circumstances, equally have an alternative or a cumulative meaning." \textit{Id.}

28. See, e.g., United States v. Fisk, 70 U.S. (3 Wall.) 445, 447 (1866) ("In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe 'or' as meaning 'and,' and again 'and' as meaning 'or.'"); Homer Laughlin Eng'r Corp. v. J.W. Leavitt & Co., 116 Cal. App. 197, 201, 2 P.2d 511, 512 (1st Dist. 1931), \textit{quoted in} Universal Sales Corp. v. California Press Mfg. Co., 20 Cal. 2d 751, 775-76, 128 P.2d 665, 679 (1942) ("[T]here is almost an [sic] unanimity of holding to the effect that the terms 'and' and 'or' may be construed as interchangeable when necessary to effect the apparent meaning of the parties.") Of course, this proposition can cut both ways in reconciling the English with the Russian later on. It may also have importance for unilateral interpretation of the Common Understanding on the American side. \textit{See} note 40 \textit{infra}.

29. O. Jespersen, Negation in English and Other Languages 115 (1917). Allen suggests that the distinction here is one of conjunction, (R3), as opposed to logical product, (R1). Allen, \textit{Logic, Law and Dreams}, 52 L. Lib. J. 131, 139 (1959).
Expressions (R2) and (R3) are identical to expressions (E1) and (E3) respectively and are likewise logically equivalent.

Expression (R1) appears to be the more accurate from the perspective of general principles of logical construction. Many native speakers of Russian, however, are likely to interpret the phrase in question in the sense represented by expression (R3). In support of the interpretation (R1), however, it is important to note that a clearer and more idiomatic rendering results from the use of the particle "не:"

This is similar to the English "will neither produce, test, nor deploy," and, like its English equivalent, is somewhat more emphatic than the official English text. There are also other ways of unambiguously rendering the sense of expression (R3) in Russian.

The official Russian text, then, is left as the closest idiomatic verbal equivalent to expression (R1). Arguably, if (R3) had been intended, it could have been expressed, and less ambiguously, with "не;" the fact that the only verbal construction which may possibly

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30. Letter from Charles E. Townsend (Dec. 8, 1979) (on file with Yale Studies in World Public Order). Use of the word "or"—"или"—to link alternatives suggested by a negation, as here, is rare in idiomatic Russian. Indeed, native speakers could not understand how English could logically use "or" in this sense. Perhaps as a result, a sentence such as "I do not have a dime, a nickel, and a penny" is considerably less ambiguous when translated literally into Russian using the word "and"—"и." According to native speakers, this construction is fairly common in spoken Russian.


32. Native speakers of Russian confirm this. See I. Pulkina & E. Zakhava-Nekrasova, Russian 543 (1967?). Perhaps this is why this rendering was not adopted.

33. For example, "не будет производить, не будет испытывать и не будет развертывать" conveys the meaning of expression (R3) unambiguously. This translates as "will not produce, will not test, and will not deploy."

34. Native speakers confirmed this writer's suspicion that there is no simple way unambiguously and idiomatically to render (R1), the partial denial.
render (R1) has a second meaning should not vitiate the intent of the parties, namely (R1). Numerous instances in the Treaty in which similar problems are unambiguously resolved provide support for this proposition. For instance, Article IX, Paragraph 1 includes the phrase "[e]ach Party undertakes not to develop, test, or deploy." The Russian text here is unambiguous: "[к]аждая из Сторон обязуется не создавать, не испытывать и не развёртывать." 35

All factors in the interpretation of the English text point to only one reasonable result: the language of the English text prohibits the Soviet Union from engaging in any of the enumerated activities. The Russian, however, is less clear. An interpretation which is theoretically plausible and widely accepted among native speakers is logically equivalent to the English. A more formulaic approach, however, leads to an interpretation which has some arguments in its favor and would allow the Soviet Union to engage in any one or two of the enumerated activities, so long as it did not engage in all three.

In any event, the analysis proposed so far does not settle the question of interpretation. A logical and grammatical analysis helps clarify the potential importance of different interpretations of the individual texts. More specifically, such an approach reveals the possibility of a discrepancy between the two texts. Logical and grammatical analyses are limited, however, to the extent that they provide little basis for resolving a disparity once it has been identified.

II. Reconciling the Texts

Over time, widely discussed doctrines of interpretation relevant to resolving the meaning of the Common Understanding have developed. The writing

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35. Perhaps this construction was rejected because it is more forceful. In particular, use of the verb "to undertake"—"обязываться"—may have been avoided because of its stronger connotations, especially in Russian, in which it contains a root carrying the meaning "to bind." C. Townsend, Russian Word Formation 38, 245 (1968); C. Wolkonsky & M. Poltoratzky, Handbook of Russian Roots 52-54 (1961).
of Soviet scholars, who often speak in a quasi-official capacity, is also important in predicting the theoretical and practical approach of the Soviet Union to this question. Throughout this discussion, as concluded above, the English text will be taken to have a single meaning conveyed by the inclusive meaning of "or," as represented by expression (E1). The Russian will be taken to have two possible interpretations, one of which, represented by expression (R3), is identical in meaning to the English. The other interpretation of the Russian text, represented by expression (R1), which it is assumed the Soviet side would assert in any genuine dispute, allows the Soviets considerably more freedom of action.

As a preliminary matter, it is important to emphasize that there is little reason to think that this case would ever come before an international tribunal, such as the International Court of Justice (I.C.J.). Although the United States has submitted to the compulsory jurisdiction of the Court, the Soviet Union has not. The Soviet position is that compulsory jurisdiction may lead to violations of the sovereignty of states. SALt II, not surprisingly, contains no clause providing for the submission of disputes to the Court. In theory and in practice, the Soviet Union is no more favorably disposed toward submitting to voluntary jurisdiction after concrete disputes have arisen.

38. At international conferences when the question has arisen of the inclusion in a convention of clauses providing for the compulsory jurisdiction of the International Court, the Soviet Union has objected each time, and in necessary cases has made reservations to the compulsory jurisdiction, unacceptable to the U.S.S.R., of the International Court.

V. Shurshalov, Osnovnye voprosy teorii mezhdunarodnogo dogovora 452 (1959).
39. See, e.g., Lisovskii, supra note 1, at 110 ("The right of interpretation belongs above all to the signatory parties.");
In the event of a dispute, then, American officials are likely to be confronted with a unilateral interpretation of the Treaty relying on Soviet sources. Nonetheless, it is important to consider standard legal theories developed by international tribunals, in view of their greater respect worldwide.

Many writers recognize the existence of so-called canons of interpretation—normative principles for resolving ambiguities—while varying in acceptance of their usefulness as devices for treaty interpretation. There has been significant disagreement as to how these canons ought to be applied. It is well accepted, however, that certain rules of construction recur in the

39. (Continued)
I. Pereterskii, Tolkovanie mezhunarodnykh dogovorov 50 (1959) ("Interpretation of the agreement with the consent of the states concluding that agreement is undoubtedly the form of interpretation which possesses the greatest force and the greatest international effect."); Kozhevnikov, Mezhunarodny dogovor, in Mezhunarodnoe pravo 242, 271 (F. Kozhevnikov ed. 1957), translated as International Treaties, in International Law 247, 277 (1961)("In principle the interpretation of a treaty must lie within the competence of its signatories—that is, of those who apply it.")

40. Indeed, interpretation of international agreements by the parties rather than by international adjudication is the more common phenomenon. McDougal, et al., supra note 36, at 28.


42. E.g., T. Yu, The Interpretation of Treaties 72 (1927) ("[R]ules of construction are unfortunately so abundant in the pages of publicists that a mere application of one, or a shrewd combination of two, of them may yield almost whatever conclusion the interpreter desires.")

43. See, e.g., M. Hudson, The Permanent Court of International Justice 1920–1942, at 643 (1943) (The P.C.I.J. "has formulated no rigid rules; its formulations have been in such guarded form as to leave it open to the Court to refuse to apply them, and it would be difficult to say that all of them have been consistently applied.") But see Fitzmaurice, The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points, 33 Brit. Y.B. Int'l L. 203, 210–27 (1957) (suggesting that there is a hierarchy in the I.C.J.'s application of the canons)

jurisprudence of the International Court. 44 Those likely to influence the outcome of a dispute over the Common Understanding, whether in the I.C.J. or not, are analyzed below.

A. Fundamental Principles of Interpretation

Jurists and publicists have formulated a number of general principles for interpreting the texts of international agreements. Two of these—the Rule of Ordinary Meaning and the Rule of Restrictive Interpretation—have particular significance for the process of resolving the meaning of the Common Understanding.

1. The Rule of Ordinary Meaning

One canon, the Rule of Ordinary Meaning, has been stated by the I.C.J. in the following manner:

The Court considers it necessary to say that 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. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words. . . . When

44. See, e.g., Harvard Research in International Law, Pt. III: Law of Treaties, 29 Am. J. Int'l L. 653, 942-43 (Supp. 1935) [hereinafter cited as Harvard Research]; Hogg, The International Court: Rules of Treaty Interpretation, 43 Minn. L. Rev. 369, 371 (1959) (arguing that rules of construction increase certainty and acceptance of international law) [hereinafter cited as Hogg I]. The expression "International Court" will encompass both the Permanent Court of International Justice (P.C.I.J.) and the International Court of Justice (I.C.J.), without distinction.
the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning.45

The Rule of Ordinary Meaning seems to have found its greatest support in judicial decisions46 and in the Vienna Convention on the Law of Treaties.47 It has been criticized by publicists who consider it too rigid and claim that words cannot convey intention with perfect clarity.48 Still, some writers have found justification for this rule.49 Whatever its defects, the Rule of Ordinary Meaning is clearly of primary importance in the jurisprudence of the International Court.50

The rule obviously requires a choice of one interpretation of the Russian text as the more natural. That choice, in turn, depends upon the credibility of the Soviet argument supporting a choice of expression (R1).


46. E.g., Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, [1960] I.C.J. 150, 159-60 ("The words of Article 28(a) must be read in their natural and ordinary meaning, in the sense which they would normally have in their context."); Polish Postal Service in Danzig, [1925] P.C.I.J., ser. B, No. 11, at 39 ("It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.")


48. E.g., H. Lauterpacht, The Development of International Law by the International Court 138-39 (2d ed. 1958); Yu, supra note 42, at 55 (The rule is "based on the false premise that language can be perfectly identical with human thought.")

49. E.g., Hogg I, supra note 44, at 404-06 (suggesting that the rule is more properly viewed as a presumption and that its application is beneficial as a check on arbitrary use of the judicial power).

If there is no divergence between the natural meanings of the Russian and the English texts, the question is settled at the threshold. An argument based on the Rule of Ordinary Meaning would then plainly be advantageous to the American side. If, on the other hand, the Soviet interpretation, expression (R1), were conceded to be at least as likely as the conflicting interpretation identical to the English, application of the rule would not of itself resolve the problem; the Rule of Ordinary Meaning offers no solution to the problem of equally authentic texts whose ordinary meanings are divergent.

2. The Rule of Restrictive Interpretation

The Rule of Restrictive Interpretation asserts that "if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations to the Parties should be adopted." This rule is normally viewed as a presumption against limitations of state sovereignty. Some publicists have attacked it as inconsistent with the goal of interpreting agreements according to the intention of the parties and with another well accepted approach to interpretation, the Principle of Effectiveness, which asserts that a treaty should be interpreted to effect the ends it was intended to serve. The jurisprudence of the International Court suggests that the Rule of Restrictive Interpretation has not enjoyed the same acceptance as other canons, particularly the Rule of Ordinary Meaning. Regardless

53. E.g., Lauterpacht, supra note 48, at 306 ("Undue regard for the sovereignty of one State implies undue disregard of the sovereignty of another.") See also Hogg, The International Court: Rules of Treaty Interpretation II, 44 Minn. L. Rev. 5, 28 (1959)("Whether ... the rule [of restrictive interpretation] is of any substantial value in indicating a real intention of the parties is open to question.") [hereinafter cited as Hogg II].
of whether the Court's claims that this rule is a means of last resort are correct, it is clearly hierarchically inferior to the Rule of Ordinary Meaning. As a general proposition, the Rule of Restrictive Interpretation is probably insufficient to serve as the sole basis of decision in an actual case.

An argument based on the Rule of Restrictive Interpretation clearly favors the Soviet Union's position: it provides a doctrinal preference for the Soviets' narrower interpretation of the Common Understanding. The rule certainly favors the Soviet interpretation over the interpretation of the Russian which is identical to the English, but it is not obvious that a principle of restrictive interpretation provides a basis for preferring the Soviet interpretation of the Russian text over the unassailably clear English text. That is, the Soviets agreed to the English, the English text embodies the intentions of the parties as well as the Russian, and the English is undeniably clear. Indeed, properly viewed, neither text alone embodies the intention of the parties, but rather the two taken together embody the true agreement reached in the Common Understanding.

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55. E.g., Territorial Jurisdiction of the International Commission of the River Oder, [1929] P.C.I.J., ser. A, No. 23, at 26 ("[I]t will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that that interpretation should be adopted which is most favourable to the freedom of States."); Polish Postal Service in Danzig, [1925] P.C.I.J., ser. B, No. 11, at 39 ("[R]ules as to a strict or liberal construction of treaty stipulations can be applied only in cases where ordinary methods of interpretation have failed.")


57. To avoid confusion, the term "restrictive" as used here will imply a less extensive interpretation of the undertaking expressed in a treaty provision. Thus, the Soviet Union is assumed to be arguing for a more restrictive interpretation of the Common Understanding. The word "restrictive" might, alternatively, apply to the obligation itself rather than to the interpretation process, in which case the United States would be pressing the more restrictive view.

58. See text accompanying notes 18-22 supra.

59. Brazil, Some Reflections on the Vienna Convention on the Law of Treaties, 6 Fed. L. Rev. 223, 238 (1975) ("[I]n law there is only one treaty--one common intention of the parties--even when the texts appear to diverge.")
Although the Rule of Restrictive Interpretation may provide grounds for preferring one interpretation of the Russian, it fails, as does the Rule of Ordinary Meaning, to resolve the conflict between the equally authoritative English and Russian texts.

Apart from this theoretical defect in an argument based upon the Rule of Restrictive Interpretation, it is unlikely that a court would resolve any dispute over the meaning of the Common Understanding by relying on this doctrine. First, if the discrepancy can be resolved in some other plausible way, a court might not reach the hierarchically disfavored principle of restrictive interpretation. Second, the rule, understandably, appears to apply principally to general treaty provisions, where the intent of the parties when the agreement was concluded may be difficult to ascertain. The Common Understanding, however, is quite narrow in focus. Finally, there are suggestions that, despite the lip service paid to the principle, it is in increasing disrepute.

B. Specialized Doctrine for Multilingual Treaties

The analysis so far has produced arguments which, apart from the disadvantage that they favor alternately one and the other side to the dispute, are logically inadequate. The problem is not that the policies expressed in those arguments are necessarily unacceptable, but that they are expressed in doctrinal language which is too coarse and general to be of use in the instant case. Perhaps as a consequence of the limitations of the Rules of Ordinary Meaning and Restrictive Interpretation in dealing with multilingual treaties, particularly those in which the texts are equally authoritative, refined doctrines, which purport to simplify the interpretation process while providing greater analytical precision, have been developed.

One such refined principle asserts the supremacy of the text favorable to the obligor. This principle has

60. See, e.g., Hogg II, supra note 53, at 19, 26 n.79 (suggesting that the Rule of Restrictive Interpretation is of importance primarily in interpreting provisions purporting to confer jurisdiction on the International Court). But see Lauterpacht, supra note 54, at 65-66.

61. See Lauterpacht, supra note 48, at 305; Hogg II, supra note 53, at 19-28; Lauterpacht, supra note 54, at 62-63.
found scant respect among writers. Courts and other tribunals have been somewhat more willing to accept the doctrine, although only as a last resort. Precedent in the jurisprudence of the International Court is slight.Probably the closest the Court came to accepting the principle was in the Permanent Court's advisory opinion on Competence of the International Labour Organisation with Respect to Agricultural Labour. The question in that case was whether the competence of the International Labor Organization extended to agriculture under the terms of Part XIII of the Treaty of Versailles. In particular, the words "industry" and "industrial," which were accepted to include agriculture within their meanings, appeared in the English text. The French government argued that the terms "industrie" and "industriel," which the Court agreed would normally refer to the arts or manufactures, had been used in this restricted sense in the French text and that the Court should so construe them. The Court did not dispute the validity of the proposition asserted by the French government, but decided that the context was the final test and that, in this case, the meaning asserted by the French was inappropriate.

An argument based on this presumption in favor of lesser obligation clearly favors the Soviet position. It overcomes the theoretical disadvantage of a Soviet argument based solely on the Rule of Restrictive Interpretation by providing a basis for choosing the Soviet interpretation of the Russian text, expression (R1), over the English. As demonstrated by the outcome in the Competence of the I.L.O. opinion, however, a court will not normally turn to this doctrine except as a last resort. An American argument based on sounder precedent would, as a consequence, very likely prevail over a Soviet argument based on this principle.

From a theoretical point of view, this principle of least obligation is unpalatable. It is clearly based on

63. Hardy, supra note 62, at 114.
65. Id. at 25-27, 33-41.
the same policies as the Rule of Restrictive Interpreta-
tion and suffers the same disadvantage: its rigid ap-
plication would, in many cases, fail to give effect to
the true intention of the parties. Although the doc-
trine is not expressly condemned in the Permanent
Court's advisory opinion on the Competence of the I.L.O.,
the outcome suggests that mechanical acceptance of the
doctrine is undesirable. This refinement of the Rule of
Restrictive Interpretation undermines the notion of a
multiplicity of equally authentic texts, as must any
rule which conclusively prescribes the choice of one
text over another. A text disregarded by such a prin-
iple is just as much an expression of the intention of
the parties as the one selected.

A second refined approach is to give supremacy to
the text drawn up in the language of the state to which
the provision refers or to the text in a state's own
language. Some publicists may accept this principle,66
but the majority reject it.67 As with the doctrine of
choice of the least burdensome text, precedent in the
International Court is slight. The best support can
probably be found in the case of Mavrommatis Palestine
Concessions,68 in which the Permanent Court suggested
that the choice of the English version of the Palestine
Mandate was "indicated with especial force because the
question concerns an instrument laying down the obliga-
tions of Great Britain in her capacity as Mandatory for
Palestine."69 As will be seen presently, this authority
is weak because the decision in the case ultimately
rested on another principle.

Application of this doctrine would, again, favor
the Soviet position. Such an argument, however, would
rest on rather thin authority and could be effectively
refuted by an opposing argument with a firmer doctrinal
foundation. From the Soviet point of view, this argu-
ment would have the disadvantage that it evinces a pre-
ference for the Russian text in general, but not for
the Soviet interpretation in particular. This principle
might, however, produce such a result if combined with
other doctrines favorable to the U.S.S.R.'s position.

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66. E.g., 1 L. Oppenheim, International Law 862 (7th ed.
Lauterpacht 1948).
67. E.g., McDougal, et al., supra note 36, at 326. See also
Harvard Research, supra note 44, at 971.
69. Id. at 19.
This doctrine, that the language of the party to which a provision refers is controlling, is an even more arbitrary application of the Rule of Restrictive Interpretation than is the principle of the supremacy of the text favorable to the obligor. The reasoning here appears to rest on the erroneous assumption that a party has a greater interest in the accuracy of the text drawn in its own tongue than in a text drawn in another language. In its more extreme form, that a party is bound only by the text in its own language, this principle is a total abrogation of the doctrine that the intention of the parties is expressed in all the texts taken as a whole. This implies that, in case of a discrepancy, a treaty has different meanings for the various parties. It has even been suggested that a party may not avail itself to its benefit of a text in the language of another party. Even those who would generally espouse the Rule of Restrictive Interpretation would have to admit this principle to be an irrational extension of that rule.

A third proposed principle of interpretation for multilingual treaties is the supremacy of the more restrictive text. This principle has received much attention as a result of the opinion in the Maprommatis Palestine Concessions case. The disputed terms were "public control" in the English and "contrôle public" in the French text of Article 11 of the Palestine Mandate. The English was taken to be the more restrictive in meaning, limited to direct public administration of private enterprises rather than extending to all types of public regulation, as implied in the French. The Court said that

> where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, [the Court] is bound to adopt the more limited interpretation which can be made to harmonise with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties.

Nonetheless, the P.C.I.J. accepted the proposition that the English could have more than one interpretation and,

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70. See note 59 supra.
71. 1 Oppenheim, supra note 66, at 862.
72. See note 57 supra.
74. Id. at 19.
in contrast to the rule it had just stated, gave preference to the wider meaning of the English in order not to nullify the French. The case has been criticized by those who disapprove in general of orderly application of canons, and in particular because the statement of the principle was largely unnecessary.

Applied to the language of the Common Understanding, this argument, too, would favor the Soviet position. The restrictive Soviet interpretation (RI) is analogous to the more limited of the two interpretations of the English text in Mavrommatis and is favored by the rule so plainly laid down in that case. In addition, this is a much stronger precedent than any of those examined so far. Indeed, Mavrommatis is probably the clearest and most detailed authority in the jurisprudence of the International Court for the interpretation of the Common Understanding. Despite the Court's clear statement of the principle favoring the more limited text, the doctrine is seriously undercut by the outcome of the case, which suggests that an alternative interpretation of one text which is in harmony with the meaning of other texts will be given effect over another alternative, even if the second alternative is more limited in meaning. In fact, in a dispute over the interpretation of the Common Understanding, the American side could rely on Mavrommatis just as profitably as could the Soviets.

This third principle is a somewhat more felicitous reformulation of the Rule of Restrictive Interpretation than are the previous two. The P.C.I.J.'s formulation of the restrictive text doctrine has the virtue of presupposing that all texts are to be given effect, at least to some extent. Despite the fact that the outcome may be the same as under regimes asserting either the supremacy of the text favorable to the obligor or the primacy of the text in the language of the state to which the disputed provision applies, here there is at least an attempt to reconcile the texts, implying greater acceptance of the proposition that no single text embodies the intention of the parties. This third principle also has the advantage of being a more general and hence more broadly applicable statement than either of the other refined principles so far encountered. The

75. Id. at 18-20.
76. See, e.g., McDougal, et al., supra note 36, at 329.
77. Hardy, supra note 62, at 80-81.
principle has the drawback, however, of giving imperfect effect to the intention of the parties through a prescriptive choice of one text over another. Such a principle, although an improvement over those articulated in the other two doctrines, cannot truly reconcile the texts.

A fourth refined principle asserts that when each of the texts admits of several interpretations, an appropriate resolution is to give effect to each by adopting a single interpretation common to all. Although several arbitral decisions have given effect to this doctrine, support in the International Court appears scant. The outcome in Mavrommatis, giving effect to the one of several interpretations of the English text most nearly consonant with the French, might provide some support. Still, that opinion offers little indication of the true basis for decision and no unambiguous support for the proposition that discrepancies can best be resolved by selecting some common ground among the texts.

Applied to the Common Understanding, this doctrine of common meaning would prescribe a choice of the English text, which has only one meaning, over the Soviet interpretation of the Russian. The principle would favor the United States' position regardless of the "true" interpretation of the Russian text. So long as one plausible interpretation of the Russian were identical in meaning to the English, the sole interpretation of the English would prevail. Finding precedent of sufficient force, however, would remain a problem for the American side.

This principle of common meaning is the first of the more refined principles of interpretation for multilinguals to begin to give effect to the policies behind the Rule of Ordinary Meaning at the expense of those reflected in the Rule of Restrictive Interpretation. The principle is theoretically appealing in that it appears to evince respect for the concept of multiple authentic texts, at least to the extent that there is some interpretation common to all. Even the elements it shares with the Rule of Restrictive Interpretation appear in a more benign form than in the three refined principles previously examined. If there is no single interpreta-

78. See cases collected at id. at 82-87.
79. See text accompanying notes 18-22 supra.
tion common to all the texts, however, the doctrine offers no resolution and consequently fails as a general principle.

At least one writer has asserted that a consequence of this principle of common meaning is that "if one of the texts lends itself to several interpretations whereas the other permits only one of them, the latter must prevail." Even if there is a common interpretation, this formulation has all the disadvantages of arbitrariness and lack of respect for the concept of a multiplicity of authentic texts encountered before. Indeed, it subverts the general principle of which it is a specific statement, since the text with a single meaning may be less extensive than any of the multiple interpretations of the corresponding text. In such a case, no matter what the meaning of the text susceptible of multiple interpretations, it will not be given effect by this principle.

A fifth and last of these more refined approaches to multilingual treaty interpretation prescribes a choice of the clearest of the several texts. Although other tribunals have accepted its validity, this principle appears to have only the slightest support in the jurisprudence of the International Court. In its advisory opinion on Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, the P.C.I.J. interpreted a passage from Article 104 of the Treaty of Versailles, in which the Allied Powers undertook to negotiate a treaty specifying standards for the treatment of Poles in the Free City of Danzig, and reinforced its position with the assertion that "[t]his appears more clearly from the French text of the article." Writers, however, have not supported the principle stated in this strong form.

Needless to say, interpreting the Common Understanding according to the principle of the clearest text would favor the United States' position. Such an approach could be particularly persuasive if invoked to suggest that the English should be consulted to clarify

80. Hardy, supra note 62, at 83.
81. See cases collected at McDougal, et al., supra note 36, at 327-28; Hardy, supra note 62, at 87-90.
83. Id. at 26.
84. McDougal, et al., supra note 36, at 329 n.179.
multilingual treaties The Russian rather than to prescribe a conclusive choice of the English over the Russian. In other words, the English text might be offered as an aid for clarifying the intention of the parties as expressed in the Russian.

This fifth principle is obviously more closely related to the Rule of Ordinary Meaning than to the Rule of Restrictive Interpretation. In its strong form, the principle shares with the refined approaches encountered above the defects of arbitrariness and lack of respect for at least one of the authentic texts. There are indications, however, that the principle often appears in a more benign form, prescribing comparison of the less clear texts with the clearer for aid in interpreting the intention of the parties as expressed in the less clear. In this form, it deprives no single

85. See Hardy, supra note 62, at 88 ("[W]hen the judge opts for the clearest and most precise [text] he is, in fact, giving effect to that version alone.")

86. Hardy, supra note 62, at 88-90. A particularly interesting application of this principle in its more flexible form appeared in the case of Archdukes of the Habsburg-Lorraine House v. Polish State Treasury, 5 Ann. Díg. 365 (Polish Sup. Ct. 1930). The case involved Article 208 of the Treaty of Saint-Germain, which was drafted in French, English, and Italian, with the stipulation that the French text should prevail in case of divergence. Poland was to acquire "les biens privés de l'ancienne famille souveraine d'Autriche-Hongrie," or, in the English text, "the private property of members of the former Royal Family of Austria-Hungary." Id. at 366. Members of the former royal family claimed that the French text did not apply to properties they held in their capacity as private individuals, and that, as it diverged from the English, it was bound to prevail. The court rejected the argument, stating that all three texts were authentic unless there was a divergence, and found no discrepancy after examining the English to help clarify the French. Since the English text was an expression of the intention of the parties, a contrary result, said the court, would improperly deprive the English of force altogether, "[f]or no interpretation must lead to a change of the express and indubitable will of the contracting parties." Id. at 369. Such an approach appears to find approval in Ehrlich, L'Interprétation des traités, 24 Recueil des cours 5, 98-99 (1928). If controlling in the instant dispute, this case would, of course, resolve the interpretation of the Common Understanding, in which the clearer text is equally rather than subordinately authoritative, in favor of the American side.
text of its force either in theory or in practice and prescribes no particular, and hence no arbitrary, outcome. Moreover, the Permanent Court's vague, one-sentence remark in its *Polish Nationals in Danzig* opinion may approve such a flexible approach as plausibly as a more restrictive doctrine.

At least one Soviet publicist has embraced such general formulations of the Rule of Restrictive Interpretation as resolution of ambiguities in favor of the obligor and construction *contra proferentem*.\(^{87}\) In the context of multilingual treaties, however, the principle prescribing supremacy of the text in the language of the obligor, the rule directing choice of the most limited obligation consistent with the text, and the principle that a party is bound only by the text in its own language are explicitly rejected.\(^{88}\) By such approaches doctrines that are ordinarily appropriate are mechanically extended to the difficult problems of multilingual treaties.\(^{89}\) The proper approach is to resolve textual discrepancies "in light of the common goal the agreement was designed to achieve,"\(^{90}\) a doctrine admirable, at the very least, for avoiding a categorical and arbitrary choice of a single text as conclusively revealing the intent of the parties.

C. Summary of the Canonical Approach

From the analysis to this point, it appears that the American side, in urging the more expansive interpretation of the obligation over the Soviet side's more limited reading, would have the better case. If, in an actual dispute, the United States could show that its

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89. Shurshalov, *supra* note 38, at 435.

90. *Id.* at 434. The entire Soviet discussion is for the most part theoretical, however, since "in practice, questions connected with discrepancies between the texts of multilingual treaties concluded with the Soviet Union have not arisen." Pereterskii, *supra* note 39, at 134.
interpretation of the Russian text were the more natu­
ral, it would very likely win the case at the outset. If, however, it failed to do this, the analysis would have to fall back on a muddle of overlapping arguments
with inconsistent results and numerous theoretical de­
fects. Among these arguments, the United States seems
to have the better positions, although this is far from
certain. In particular, the United States' arguments
would be based on principles which are more closely
allied to the hierarchically preferred Rule of Ordinary
Meaning, which may mean that they would be the more con­
vincing in an actual case. The best authority in the
jurisprudence of the International Court, the Mavrommatis
case, has an outcome favorable to the American side, but
strong and famous language favorable to the Soviet
position.

This analysis has also served to point out the
theoretical, logical, and practical defects in the appli­
cation of rigid principles of interpretation to the
specific problem of the Common Understanding. Signifi­
cantly, the one approach which appears to be least sub­
ject to these defects--the benign form of interpretation
by favoring the clearest text--is also the most flexible.

III. Evidence Extrinsic to the Text

Most students of treaty interpretation agree that
its goal is to determine the intention of the parties
concluding an agreement.91 Quite clearly, the extent to
which this goal can be achieved in practice is frequent­
ly limited and may vary from case to case.92 How pro­
perly to determine intent has been a subject for dispute.
Various approaches have been proposed, and it is valu­
able to examine the consequences of these trends in in­
terpreting the Common Understanding.

91. See, e.g., 2 C. Hyde, International Law Chiefly as Interpreted and Applied by the United States 1468-71 (2d rev. ed.
1945); McDougal, et al., supra note 36, at 82-3; McNair, supra
note 41, at 373; 1 G. Schwarzenberger, International Law 193 (2d
ed. 1949); Fitzmaurice II, supra note 43, at 204 ("[N]o one serious­
ly denies that the aim of treaty interpretation is to give effect
to the intentions of the parties."); Lauterpacht, supra note 54, at
83. But see Beckett, 43 Annuaire de l'Institut de Droit Interna­
tional 438-39 (1950) ("[T]he task of the court is to interpret the
treaty and not to ascertain the intention of the parties.")

92. See generally Stone, Fictional, El,ements in Treaty In­
terpretation--A Study in the International Judicial Process, 1 Syd­
ney L. Rev. 344 (1954).
The textual approach places primary reliance on the treaty document as a means for determining intent. As a consequence, there is a marked disinclination to consider extrinsic evidence of the intention of the parties, particularly travaux préparatoires, if the text is clear enough to interpret without such material. This attitude is often justified by the Ordinary Meaning Rule. The opinions of the International Court evince considerable support for the textual point of view, and the Vienna Convention is widely considered a victory for those supporting this approach. None of the approaches to interpretation so far examined violate the principle of textuality. Adherence to this principle is not inconsistent with consideration of the text as a whole to shed light on a particular provision or to guarantee consistency with the remainder of the


94. See McDougal, et al., supra note 36, at 226. It is not always clear whether the Rule of Ordinary Meaning justifies a textual approach or vice versa. Id. at 90 n.48.

95. E.g., Second Membership opinion, [1950] I.C.J. 4, 8 ("In the present case the Court finds no difficulty in ascertaining the natural and ordinary meaning of the words in question and no difficulty in giving effect to them. . . . [T]he Court is of the opinion that it is not permissible, in this case, to resort to travaux préparatoires."); Conditions of Admission of a State to Membership in the United Nations, [1948] I.C.J. 57, 63 ("[T]he text is sufficiently clear; consequently, [the Court] 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 a convention is sufficiently clear in itself.") [hereinafter cited as First Membership opinion]; S.S. "Lotus," [1927] P.C.I.J., ser. A, No. 10, at 16 ("[T]here is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself.")

instrument, although there have been instances in which the International Court has examined a provision in isolation from the rest of the document. As discussed above, the outcome of such a textual analysis is uncertain, but the American side appears to have the better arguments.

The contextual approach urges a broader conception of a treaty for interpretational purposes. More specifically, this approach advocates regular acceptance of *travaux préparatoires* as evidence of the intention of the parties. As a consequence, contextualists generally disapprove the Rule of Ordinary Meaning. Others are opposed to hierarchies of

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97. See, e.g., Article 3, Paragraph 2, of the Treaty of Lausanne, [1925] P.C.I.J., ser. B, No. 12, at 21; Competence of the I.L.O. (Agriculture), [1922] P.C.I.J., ser. B, No. 2, at 23 ("[I]t is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.")

98. E.g., Interpretation of the Convention of 1919 Concerning Employment of Women During the Night, [1932] P.C.I.J., ser. A/B, No. 50, at 387 (Anzilotti, J., dissenting) (arguing that an examination of the entire text would have produced the opposite result from that reached by the Court); S.S. "Wimbledon," [1923] P.C.I.J., ser. A, No. 1, at 23-24 ("The provisions relating to the Kiel Canal in the Treaty of Versailles are ... self-contained; if they had to be supplemented and interpreted by the aid of [other parts of the treaty] they would lose their 'raison d'être' ... ")

99. See, e.g., McDougal, et al., supra note 36, at 21, 50. It is worthwhile to note that the International Court, especially in its earlier decisions, has often used the word "context" in a sense restricted to the entire text of a treaty. *Id.* at 221 & n.341. See also Morse, supra note 93, at 39-40. *Cf.* Article 31(2) of the Vienna Convention, reprinted at note 126 infra (context defined and limited to primary and ancillary instruments).

100. See, e.g., McDougal, et al., supra note 36, at 128 n.22; *Harvard Research*, supra note 44, at 965-66. Soviet writers approve in theory of the use of preparatory materials; in practice, however, they are suspicious of their use by capitalist states to change the meaning of a treaty. Triska & Slusser, supra note 36, at 114, 117. The American unilateral approach is largely contextual and in principle would not preclude consideration of any evidence in the discussion accompanying notes 111-16 infra. Restatement (Second) of the Foreign Relations Law of the United States §§ 146, 147 & 151 (1965).

101. See, e.g., 2 Hyde, supra note 91, at 1470.
canons" or to the notion of the usefulness of canons at all. Contextualists criticize textualists for not considering all available evidence of the intention of the parties. Contextualists are, in turn, criticized for clouding the process of interpretation with a mass of material which may not be helpful in resolving the dispute. Contextualists have often been displeased with the jurisprudence of the International Court and were disappointed in the Vienna Convention by the rejection of their approach. Practice of the International Court, however, suggests that whatever their formal or informal importance may be in the decision-making process, travaux préparatoires have rarely been excluded from consideration by the Court and have been resorted to in decisions on several occasions even by the P.C.I.J., which displayed, on the

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103. See, e.g., Harvard Research, supra note 44, at 946-47. But see Lauterpacht, supra note 54, at 56 ("Most of the current rules of interpretation, whether in relation to contracts or treaties, are unobjectionable.")
104. See, e.g., McDougal, et al., supra note 36, at xvii.
105. See, e.g., Lord Asquith's opinion as arbitrator in Petroleum Development, Ltd. v. Sheikh of Abu Dhabi, 18 I.L.R. 144, 149 (1951), 1 Int'l & Comp. L.Q. 247, 251 (1952) ("Chaos may obviously result... if, instead of asking what the words used mean, the inquiry extends at large to what each of the parties meant them to mean, and how and why each phrase came to be inserted.") See also 1 G. Schwarzenberger, International Law 514 (3d ed. 1957) ("[T]he preparatory work (travaux préparatoires) is of limited value" and "largely equivocal."); Fitzmaurice II, supra note 43, at 207 ("[T]he text is the expression of the will and intention of the parties... If the text is not clear, recourse must be had to extraneous sources of interpretation: but the object is still the same—to find out what the text means or must be taken to mean."); McNair, 43 Annuaire de l'Institut de Droit International 450 (1950).
107. See note 96 supra.
108. Ehrlich, supra note 41, at 244; Fitzmaurice I, supra 43, at 13 n.1. An exception to this practice is the case of Territorial Jurisdiction of the International Commission of the River Oder, [1929] P.C.I.J., ser. A, No. 23, in which the Permanent Court refused preparatory material offered on behalf of parties to the action which had not participated in the negotiations. McDougal, et al., supra note 36, at 131 n.33; 1 Schwarzenberger, supra note 91, at 218.
whole, a less receptive attitude on this point than has its successor.110

Official preparatory work for the SALT II Treaty remains classified; it would presumably be made available to a tribunal in an actual case. Without access to the actual documents, it is difficult to say what their impact would be, but there is reason to believe that by and large they favor the American position in this hypothetical dispute. The evidence available on how American officials interpreted the Common Understanding indicates their position to be that the SS-16 is outlawed altogether.111 The American side took the Soviets to have the same intent.112 Unfortunately, sufficiently detailed material does not seem generally available to ascertain the Soviet interpretation of the Common Understanding; Soviet writing on the subject displays a marked tendency to favor the general over the specific.113 The force of arguments based on extrinsic

109. (Continued)
not suffice to show the precise sense in which the Parties to the dispute have employed these words in their Special Agreement, the Court, in accordance with its practice, has to consult the documents preparatory to the Special Agreement, in order to satisfy itself as to the true intention of the Parties." See also cases collected at 1 Schwarzenberger, supra note 91, at 218.


111. Secretary of State Vance, for example, was of the opinion that the Common Understanding means that "the SS-16 has been banned entirely." For. Rel. Comm. Hearings, Pt. 1, supra note 6, at 92 (statement of Cyrus R. Vance). An intriguing remark from the point of view of the present analysis is that, in the opinion of one of the negotiators, "under SALT II, the production, testing, and deployment of the SS-16 ICBM will be banned." Armed Services Comm. Hearings, Pt. 2, supra note 6, at 447 (statement of Gen. George M. Seignious II) (emphasis supplied).

112. One of the negotiators of the Treaty referred to "the Soviet willingness to ban production of a brandnew [sic] missile, the development of which they had just completed—the SS-16—because we were concerned about its compatibility with the SS-20 launcher." For. Rel. Comm. Hearings, Pt. 1, supra note 6, at 249 (statement of Ralph Earle II).

evidence, however, might be undermined in a diplomatic context if Soviet officials, like Soviet writers, suspect that interpretation in light of subsequent behavior and expectations of the parties invites "a factual violation of the principle *pacta sunt servanda*."\(^{114}\)

In negotiating the Treaty, each side submitted draft provisions in its own language. Discussion and compromise then produced the final text.\(^ {115} \) It would probably be improper, then, to view either text of the Treaty as a simple translation of the other. It is quite likely, however, that the Common Understanding to Paragraph 8 of Article IV, because of its content, was first proposed by the Americans. In that case, its original version would have been in English, and the Russian text of this particular provision may very well be a simple translation of the English draft. Substantial authority asserts that the original may carry greater weight despite the fact that both are authentic.\(^ {116} \)

Soviet writers, however, insist upon the absolute equality of authentic texts as expressions of the intentions of the parties.\(^ {117} \) Pereterskii goes further in

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114. Shurshalov, *supra* note 38, at 445. Pereterskii, however, approves "объяснено" or "усунутым" interpretation. Pereterskii, *supra* note 39, at 119-21. This principle is well accepted outside the U.S.S.R., where it is often known as "practical construction." See, e.g., McNair, *supra* note 41, at 424 ("[W]e are on solid ground and are dealing with a judicial practice worthy to be called a rule, namely that, when there is a doubt as to the meaning of a provision or an expression contained in a treaty, the relevant conduct . . . has a high probative value as to the intention of the parties at the time of its conclusion. This is both good sense and good law.").


116. See, e.g., Interpretation of the Convention of 1919 Concerning Employment of Women During the Night, [1932] P.C.I.J., ser. A/B, No. 50, at 378-79; Exchange of Greek and Turkish Populations, [1925] P.C.I.J., ser. B, No. 10, at 18 ("The Convention was drawn up in French and therefore regard must be had to the meaning of the disputed term in that language."); Mavrommatis Palestine Concessions, [1924] P.C.I.J., ser. A, No. 2, at 19 (That the meaning of the English text must prevail "is indicated with especial force because . . . the original draft of this instrument was probably made in English.") See also Hardy, *supra* note 62, at 99.

asserting the principle that it is impermissible to view any one authentic text as a translation of another and that in interpreting a treaty all authentic texts must be consulted. Soviet jurists have expressed this latter principle in their I.C.J. opinions. In the First Membership opinion, for example, Judge Krylov's dissenting opinion stressed the importance of examining all five authentic texts of the United Nations Charter. Likewise, in the I.C.J's advisory opinion on Certain Expenses of the United Nations, Judge Koretsky, also in dissent, examined all the texts of the Charter save the Chinese. This is a departure from the International Court's usual practice of examining only the English and French texts of the Charter. These principles would be of obvious use to the Soviet government in responding to a United States attempt to make the Russian text of the Common Understanding appear less authoritative if it should turn out to have been originally drafted in English.

B. The Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties, as one of the most recent expressions of international opinion on the question of treaty interpretation, has obvious significance for the construction of the Common

118. Peretesskii, supra note 39, at 135.
119. Id. at 136. Shurshalov admits an exception in approving a choice of one text as a "base" for interpretation. Shurshalov, supra note 38, at 436.
120. [1948] I.C.J. 57.
121. Id. at 110, 112 (Krylov, J., dissenting).
123. Id. at 274 (Koretsky, J., dissenting).
Understanding. The provisions dealing with treaty interpretation are generally thought to represent a modified textual approach; travaux préparatoires are allowed, but only as a supplementary means of interpretation. Of the three articles dealing with interpretation:

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**Article 31**

*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 with the conclusion of the treaty;

   (b) any instrument which was made by one or more parties in connexion 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.

127. Article 32 establishes the secondary importance of preparatory material:

**Article 32**

*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
tion, one is devoted exclusively to the problems presented by multiple authentic texts:

Article 33
Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Article 33(3), establishing a presumption in favor of identical meanings for equally authentic texts in different languages, is intended to provide that "every effort should be made to find a common meaning for the texts before preferring one to another."128 A statement of preference for the clearest text was explicitly rejected.129 An interpreter relying on the Vienna Convention, whether a national official or an international tribunal, would

127. (Continued)
to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.
128. Germer, supra note 124, at 402.
129. Id. at 406.
have to reject much of the traditional textual analysis proposed above as inconsistent with this presumption.

As important as Article 33(3) is, the main provision for interpreting multilingual treaties is Article 33(4), which is noteworthy for its lack of specificity.\textsuperscript{130} It appears to contain no canonical or hierarchical elements, save its incorporation by reference of Articles 31 and 32,\textsuperscript{131} which are intended in a general way to "isolate and codify the relatively few . . . general rules for the interpretation of treaties."\textsuperscript{132} The United States, consistent with its general contextual stand, introduced an amendment which resulted in the incorporation into Article 33(4) of the phrase "having regard to the object and purpose of the treaty," which is intended to encourage a more flexible solution.\textsuperscript{133}

Despite the realization, evidenced by the very existence of Article 33, that multilingual treaties require special treatment,\textsuperscript{134} the Vienna Convention fails to provide much guidance to the treaty interpreter.\textsuperscript{135}

\begin{itemize}
  \item \textsuperscript{130} Id. at 403.
  \item \textsuperscript{131} See notes 126 \& 127 supra.
  \item \textsuperscript{132} Brazil, supra note 59, at 235. But see Germer, supra note 124, at 415 (the Convention does not specify the appropriateness of applying any given principle to a particular case). See generally Lachs, The Law of Treaties: Some General Reflections on the Report of the International Law Commission, in Recueil d'études de droit international en hommage à Paul Guggenheim 391 (1968) (suggesting that a better concept of the work of the framers of the Convention may be a thoughtful reevaluation of existing rules).
  \item \textsuperscript{133} Germer, supra note 124, at 424-25. This language is intended to indicate a rejection of the Mavrommatis form of the Rule of Restrictive Interpretation. \textit{Id.} at 423-24. See also Brazil, supra note 59, at 238. Interpretation by reliance on goals and purposes is sometimes termed a "teleological" approach. See, \textit{e.g.}, Jacobs, supra note 126, at 323-25. Some see this approach as a statement of the Principle of Effectiveness. See, \textit{e.g.}, McDougal, et al., supra note 36, at 156-58.
  \item \textsuperscript{134} The Institute of International Law's 1956 resolution on the interpretation of treaties, for example, contains no special provision for multilingual treaties. See 46 Annuaire de l'Institut de Droit International 358 (1956). See also McDougal, et al., supra note 36, at 91 n.51.
  \item \textsuperscript{135} Some may see this as a virtue. See, \textit{e.g.}, Germer, supra note 124, at 403 ("Previous consideration of specific rules for the interpretation of plurilingual treaties had demonstrated many of the difficulties inherent in an attempt to create a universal rule.")
\end{itemize}
Considering the discussion above, the Convention's preference for the textual approach even in dealing with the difficult problems of the plurilingual agreement is hardly admirable. The drafters were obviously aware that even if one concedes the appropriateness of a textual approach, such general principles as are expressed in Article 31 are often inadequate to deal with the particular problem of multilingual treaties. Moreover, Article 33(3), though meritorious in suggesting that all the texts are to be given effect if possible, disfavors many of the more refined textual approaches specifically adapted to multilingual treaties. In short, few if any textual approaches will suffice as a general principle for the interpretation of plurilinguals consistent with the directive of Article 33(3) that all the texts are to be given effect. Nonetheless, by referring to Article 31, the first part of Article 33(4) confusingly reasserts the importance of the textual approach.

Only if Article 31 fails to provide a resolution, as it presumably will in a large number of cases, may the interpreter consult the preparatory work as a supplementary means of construction. The threshold standard prescribed by Article 32 is that the meaning remain "ambiguous or obscure" or the result be "manifestly absurd or unreasonable" after the application of Article 31. Almost by assumption, any discrepancy between equally authentic texts significant enough to become a genuine dispute will meet this test. Certainly, many more cases will be resolved after consulting travaux préparatoires than from application of Article 31 alone. If a resolution still eludes the interpreter, the remainder of Article 33(4)--"the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted"--fails to provide much guidance. Perhaps this is the best approach; if resort to the preparatory work has failed to provide a clear answer, any further rules are likely to be more arbitrary than beneficial.

The Vienna Convention does not address other questions of importance to multilingual treaty interpretation.

136. The United States asserted that this would often be the case, hence the need for the amendment. Id. at 425.

137. It is clear that at this point the presumption of Article 33(3) is no longer operative. This last part of Article 33(4) is intended to encourage a flexible resolution without regard to rules. Id. at 423-27.
For instance, it is not clear how or when the presumption of Article 33(3), that both texts are to be given effect, may be rebutted.\textsuperscript{138} In difficult cases, giving effect to all the texts may be an impossible task. In particular, it is important to know whether the presumption may be rebutted after the application of Article 31 and before the application of Article 32,\textsuperscript{139} in which case the preparatory work might not be considered. In a genuinely difficult case, a conscientious interpreter would certainly turn to the \textit{travaux préparatoires}, as the International Court has in the past,\textsuperscript{140} but the Convention, in failing to describe the relationship between the presumption of Article 33(3) and the threshold of Article 32, leaves an analytical gap. As suggested above, there is an analogous gap and a potential conflict between the principle of textuality and the presumption of identical meaning. Perhaps the Vienna Convention's approach is most generously described as asserting the importance of certain interpretive devices--\textit{travaux}, the principle of textuality, the presumption of identical meaning--while being deliberately vague on the standards for their interaction. Such an indefinite approach may well enhance the Convention's potential to deal flexibly with plurilingual treaty construction.

The Convention also fails to deal with the problem of translations. It does not instruct an interpreter to consider the fact, which would probably come to light during examination of the preparatory work, that one authentic text is a translation of another.\textsuperscript{141} The practice of the International Court suggests that such an approach would be proper,\textsuperscript{142} but the text of the Convention does not codify this principle.

Whatever its defects,\textsuperscript{143} the Vienna Convention's

\textsuperscript{138} It has been suggested that this presumption is easily rebutted. \textit{Id.} at 413-14.
\textsuperscript{139} \textit{See} notes 126 & 127 \textit{supra}.
\textsuperscript{140} \textit{See} note 109 \textit{supra}.
\textsuperscript{141} One view is that it is improper to view the original text as decisive, although it may acquire greater force as a result of an examination of the preparatory material. Germer, \textit{supra} note 124, at 418.
\textsuperscript{142} \textit{See} note 116 \textit{supra}.
\textsuperscript{143} The Convention's defects in this area may not in fact be substantial; no state which has yet acceded to it has made a reservation dealing with the interpretation section. Multilateral Treaties in Respect of Which the Secretary-General Performs Depository Functions, \textit{supra} note 125, at 598-602.
approach involves basically the same considerations discussed previously. In short, the United States could well prevail at the outset with an argument based on the ordinary meaning of the Russian text. The presumption of identical meaning, which should be decisive in this case, adds force to this argument. If this argument failed, further application of a textual approach would be largely unproductive. Reference to the travaux préparatoires would, quite probably, sufficiently strengthen the United States' position to settle the case in its favor. The exhortation of Article 33(4) to solve the problem by relying on the aims of the treaty would most probably not come into play, since the two texts are not absolutely irreconcilable. If it were applied, however, this method of construction could also favor the position of the United States, in accord with the parties' declaration in the Preamble to the Treaty of their intent "to take measures for the further limitation and for the further reduction of strategic arms, having in mind the goal of achieving general and complete disarmament."144

Conclusion

Circumstances surrounding the negotiation of the Common Understanding to Paragraph 8 of Article IV of the SALT II Treaty, outlawing the Soviet SS-16 long-range missile, probably remove any question about the meaning of the provision.145 Even were this not so, standard approaches for multilingual treaty interpretation would very likely uphold the meaning of the English text at the expense of alternative interpretations of the Russian. The possibility of a textual discrepancy here is yet another example of disparities that can arise in even the most carefully drafted treaties, largely as a result of irreducible problems of translation.146 In this instance, it is also likely that the choice of wording was influenced by factors other than the desire for maximum linguistic precision in articulating the extent of the undertaking. The official text of the Common Un-

145. See Talbott, supra note 5, at 134-35 (suggesting that the statements of the Soviet negotiators indicate complete abandonment of the SS-16 in the Common Understanding, which would be in keeping with the unequivocal meaning of the English text).
146. See Hardy, supra note 62, at 82.
derstanding may reflect a compromise on how to express a subjective impression of the importance of the obligation rather than its extent.

The fact that the most careful drafting may still produce texts which imperfectly reflect the meaning of other authentic texts is likely to be small comfort to a treaty interpreter confronted with a discrepancy, for the realization is of no use in selecting one of the proffered alternatives. Moreover, such a recognition, if officially acknowledged or sanctioned, would conflict with the basic principle that each provision of a treaty has only one meaning. Because of the complexity of the task, an interpreter faced with a discrepancy between equally authentic texts should be wary of any prescriptive rule beyond the most general presumptions of equal authenticity and identical meaning.

Prior attempts to formulate a controlling general principle for resolving discrepancies in plurilingual treaties have demonstrated the difficulty in articulating a prescriptive rule which is simply general enough to cover all possible situations. Even worse, most proposed solutions are arbitrary and lacking in theoretical justification. For this reason, an interpreter of a multilingual treaty should not feel constrained by any of these formulations. This is not to say that the policies behind any individual principle are valueless, but that the applicability of each approach should be considered in context and no one doctrine should be regarded as controlling. Of course, such a flexible approach to this potentially difficult problem necessarily involves an examination of the context of a discrepancy, in particular travaux préparatoires.

There is little reason to think that the cases discussed here were resolved in other than a flexible manner, with the possible exception of consideration of the preparatory material. As in its Mavrommatis and Competence of the I.L.O. opinions, the International Court has sometimes considered several grounds of decision, accepting some and rejecting others. But often, as in both these opinions, the controlling principle in the decision is less clearly stated than are those which the Court dismissed. This suggests that the true, as well as the best, rationale for a decision reconciling equally authentic texts of a multilingual treaty is an overall impression of the intention of the parties based on all available evidence.