

THE USE OF CONSTRUCTIVE AMBIGUITY IN ISRAELI-ARAB PEACE NEGOTIATIONS

*By Joel Singer**

I. INTRODUCTION

A. General

In Middle East peace negotiations, there are almost always three phases. First, the parties resolve all the issues where their proposed texts include different language that essentially says the same thing. Then, the parties resolve many issues where they originally held different positions on substantive matters, but they can compromise by agreeing on one text that means the same thing to both of them. Finally, in order to overcome a few remaining issues that cannot be resolved, the parties sometimes agree to adopt one text that is so ambiguous that they can both accept it, even though, and, in fact *because* it may mean two different things, thus allowing the parties to reach an agreement while, in fact, continuing to hold their original, contradictory positions. That third phase employs the negotiating tool of *constructive ambiguity*, which is the subject of this article.

Before beginning to discuss the concept of *constructive ambiguity*, one must first fully comprehend the phenomenon of *ambiguity*. Most people often talk and write in an ambiguous manner because the common discourse among people frequently is in the nature of “small talk”, which normally does not require a high level of precision. Consider, for instance, the following sentence: “Mary says she loves her dog more than her husband.” It is unclear whether this sentence intends to say that Mary loves her dog more than her husband loves the dog or whether the intention is that Mary loves her dog more than she loves her husband (or perhaps both). Of course, there are ways of clarifying this sentence so that it may be understood in only one way, at least by people who interpret what they hear or read reasonably and in good faith. As discussed above, however, most people often do not care to be

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precise. Only when there is a need to undertake a binding commitment, especially when the failure to be precise may result in a significant price to be paid, will people begin to pay more attention to formulating their words in a manner that can be interpreted in only one way.

Being precise is particularly important with regard to international agreements negotiated by governments, because the potential adverse implications of imprecise drafting often are significantly more far-reaching than those of routine, domestic, limited-scope agreements.

But sometimes, the circumstances of the case may require that in order to get a deal those skilled and experienced professional negotiators who, when representing their government in drafting international agreements normally insist on cleaning every sentence in the agreement of any potential ambiguity, deviate from this practice and, instead, deliberately leave an ambiguity – or even introduce one – in the text of an agreement. Because the purpose of this ‘fudging’ is desired by all parties – to save a deal from falling apart – the use of ambiguity in these circumstances is considered to be constructive.

B. Constructive Ambiguity and Henry Kissinger

The expression constructive ambiguity is often attributed to former U.S. Secretary of State Henry Kissinger, normally coupled with an assertion that he used it first to describe his *modus operandi* in connection with his mediation efforts associated with Middle East peacemaking. Kissinger may have made this expression famous when engaging in post-Yom Kippur War (October 1973) Middle East-related shuttle diplomacy,¹ but he did not first use the constructive ambiguity technique in connection with Middle East diplomacy. Rather, he employed this tactic earlier and elsewhere; for instance, in his 1972 efforts to renew the U.S. – People’s Republic of China diplomatic relations,² as well as in his efforts to bring to an end the Vietnam War, which culminated in the Paris Peace Accords signed on January 27, 1973.

¹ “Shuttle diplomacy” is another term made famous by Kissinger. The U.S. State Department’s Office of the Historian notes: “In January and May 1974, Secretary of State Henry Kissinger engaged in ‘shuttle diplomacy’, a term coined by the members of the media who followed Kissinger on his various short flights among Middle East capitals as he sought to deal with the fallout of the October 1973 war.” See US Department of State, Office of the Historian, “Shuttle Diplomacy and the Arab Israeli Dispute, 1974-1975”, available at <https://history.state.gov/milestones/1969-1976/shuttle-diplomacy>.

² Thus, the 1972 Shanghai Joint Communiqué, which Kissinger drafted ahead of the historic visit of President Richard Nixon to the People’s Republic of China, included an ambiguous United States “acknowledgement,” but not “endorsement,” of the “One China” concept. The United States thus implicitly acknowledged the existence of a single China, but left the language vague enough to maintain its support of Taiwan even as it normalized relations

Kissinger's use of constructive ambiguity has been described, as follows-

Related to Kissinger's tendency to shade his emphasis for each audience was his use of what he called 'constructive ambiguity'. In the Vietnam negotiations, he had devised murky wording regarding the [demilitarized zone] and South Vietnamese sovereignty so that both sides could claim what they wanted; in the [Strategic Arms Limitation Treaty] talks, he left vague the limits on silo size changes and later dropped the word ballistic from limits on air missiles so that the Americans and Soviets ended up interpreting the meaning differently. Likewise, on the Middle East, Kissinger tried to fudge many of the theological disputes that stood in the way of practical disengagement accords."³

Similarly, while Kissinger may have made this expression popular in connection with his Middle East diplomacy, the use of the constructing ambiguity tool is prevalent and it has been employed by many other mediators or negotiating parties in numerous non-Middle East international agreement contexts.⁴

C. Constructive Ambiguity and International Organizations

The constructive ambiguity tool is not unique to bilateral negotiations. It is also commonly used in negotiations conducted in global organizations, such as the United Nations Security Council, where there is a constant need to reach compromises in drafting resolutions to obtain the support of a majority of the Security Council members and avoid a veto by its permanent members. Not surprisingly, the one Security Council resolution that is considered to be fraught with ambiguities even more than other such resolutions is the now-famous U.N. Security Council Resolution 242 (hereinafter "Resolution 242"), which sought to bring peace to the Middle East following the 1967 Six-Day War.⁵

with Beijing. See, generally, S. A. Kan, *China/Taiwan: Evolution of the "One China" Policy - Key Statements from Washington, Beijing and Taipei* (2011).

³ See W. Issacson, *Kissinger: A Biography* 556 (1992).

⁴ See, e.g., discussion of the role of constructive ambiguity in negotiating the U.S.-brokered 1998 Belfast Declaration, also known as the Good Friday Agreement, that helped end 30 years of violence in Northern Ireland, in C. Bell & K. Cavanaugh, "Constructive Ambiguity or Internal Self-Determination? Self-Determination, Group Accommodation, and the Belfast Agreement", 22 *Fordham Int'l L. J.* 1345 (1999).

⁵ S.C. Res. 242, U.N. SCOR, 22d Year, U.N. Doc. S/INF/22/Rev.2, at 8-9 (Nov. 22, 1967). Resolution 242 is discussed in Section II.A(3) *infra*.

Similarly, international conferences that draft international agreements, where decisions are to be adopted by consensus, are even more prone to resort to constructive ambiguity to avoid the risk of numerous deadlocks. The following description, related to the use of constructive ambiguity to maintain the consensus during the drafting of the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation⁶ is illustrative:

A different question did, however, arise in the Legal Committee, *i.e.* whether *off-airport facilities* (facilities serving the airport but located outside its perimeter) should be included within the geographical scope of the Protocol. Speaking on the basis of their national experience, several delegations stated that attacks against facilities such as power lines, fuel depots and air traffic control installations that were outside the narrow perimeter of the airport should be covered by the Protocol. Other delegations felt that such an extension was unwarranted and could lead to excesses such as covering downtown ticket offices and shuttle buses. They consequently wanted to restrict the application of the Protocol to the airport proper and let offences against off-airport facilities be dealt with by national law.

At the Legal Committee this problem was resolved by a solution of "constructive ambiguity": the Protocol would apply to "the facilities *of* an airport serving international civil aviation". Hence those countries that had unsuccessfully sought an explicit reference to off-airport facilities could argue that, if such facilities were essential to the operation of the airport, they were facilities "of the airport and consequently covered by the Protocol. *While this issue was raised again at the Diplomatic Conference, it was clear that the ambiguous formulation of the Legal Committee was the only one that could maintain the consensus that had been reached. Accordingly, the text remained unchanged.* [Emphasis added].⁷

⁶ United Nations Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 24 Feb. 1988, 14118 *U.N.T.S.* 1589.

⁷ P. Kirsch, "The 1988 ICAO and IMO Conferences: An International Consensus against Terrorism", 12 *Dalhousie L. J.* 5, 12 (1989).

It follows that constructive ambiguity is used much more broadly than only as part of peacemaking, such as in Israeli-Arab peace negotiations.

D. Constructive Ambiguity and Unilateral Declarations

Further, for constructive ambiguity to be used, there is no need for an agreement to be negotiated, whether bilaterally or multilaterally; rather, it may be, and has been, employed similarly in connection with unilateral policy declarations. In fact, it is commonly recognized that when such a declaration that is made by one nation includes a commitment undertaken towards another nation, which is then accepted by the latter, that unilateral commitment becomes as binding as any other international agreement.⁸ In these circumstances, it should be understood why the same considerations that sometimes lead two negotiating parties to include constructive ambiguity in their agreement could also cause a country undertaking public commitments towards others to ‘fudge’ those undertakings so as to keep its options open.⁹

And here too, no wonder that the unilateral declaration that has been replete with the most ambiguities, deliberately, was made in the context of Israeli-Arab relations: The Balfour Declaration. Included in a letter dated November 2, 1917 from British Foreign Secretary Arthur Balfour addressed to Lord Rothschild, in order for the latter to transmit it to the Zionist Federation of Great Britain and Ireland, the declaration stated in its operative part, as follows:

His Majesty's government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.¹⁰

Among the declaration's many ambiguities: (1) “view with favour” and “will use their best endeavours to facilitate” - do these expressions constitute a commitment to see the object of the declaration being consummated or only an abstract desire coupled with a commitment to only give it a try? (2)

⁸ See, generally, M. Tabory, “Registration of the Egypt-Israel Peace Treaty: Some Legal Aspects”, 32 *Int'l & Comp. L. Q.* 981, 989 (1983).

⁹ See discussion in Section IV.B *infra* regarding the use of constructive ambiguity in Israeli-Arab agreements in order to keep more than one option open.

¹⁰ See, generally, N. Rostow, “100 Years Later: The Continuing Relevance of the Balfour Declaration”, 47 *Isr. YB Hum. Rts.* 317 (2017).

“establishment in Palestine” - is it in the entire Palestine or only in part of it and, if the latter, what part of Palestine and what size that part will have? (3) “a national home” - does this mean an independent State or something else that is less than a State?

These ambiguities become even more problematic when read against seemingly contradictory commitments made earlier by the United Kingdom, as contained in correspondence exchanged between the British High Commissioner to Egypt, Sir Henry McMahon, and the Sharif of Mecca, Hussein bin Ali, which, among other things, confirmed the British “*desire* for the independence of Arabia and its inhabitants” in areas that arguably may have also included Palestine [emphasis added].¹¹

E. Constructive Ambiguity and Domestic Legislation and Commercial Contracts

Constructive ambiguity as a tool used to resolve disputes is not unique to international diplomacy. It has also been used in resolving differences of opinion in entirely domestic situations, such as in drafting legislation where different parliamentary parties have contradictory positions that are irreconcilable with regard to certain principles. For instance, when the Israeli Knesset passed the 1992 Basic Law: Human Dignity and Liberty, it was torn between two seemingly conflicting positions held by segments of the Israeli public: one was that Israel is a democratic State and the other was that Israel is a Jewish State. The Knesset, however, was unable to resolve this perceived contradiction. Instead, it decided to use these two characterizations of the State of Israel side by side. Thus, Section 1 of the Basic Law defines its purpose as one intended “to establish...the values of the State of Israel as *a Jewish and democratic state*” [emphasis added], disregarding entirely the question of how to reconcile these two principles if they conflict with each other.¹² See also Section 2 of the 1992 Basic Law: Freedom of Occupation, as amended in 1994,¹³ which uses identical wording.

Some commentators believe that these two concepts (Jewish and democratic) are not necessarily inherently contradictory and that they can be reconciled by finding “a balance between [Israel’s] democratic and Jewish character.”¹⁴ Others think differently. For instance, Professor Izhak Englard

¹¹ See generally K. Loevy, “Reinventing a Region (1915-22): Visions of the Middle East in Legal and Diplomatic Texts Leading to the Palestine Mandate”, 49 *Isr. L. Rev.* 309 (2016).

¹² S.H. 1391 (1992).

¹³ S.H. 90 (1994).

¹⁴ See A. Benjamin Archibald, “We Live to Survive Our Paradoxes: In Defense of Israel as a Jewish & Democratic State”, 10 *New Eng. J. Int’l & Comp. L.* 31 (2004).

commented on the ambiguity deliberately adopted by the Knesset in drafting this section, as follows:

The compound of Jewish and democratic state expresses *the inherent ambiguity of the political compromise reached in the Knesset*, in a very similar way as did the wording of Israel's Declaration of Independence in 1948. It is important to note that the opposition of religious circles to the adoption of a comprehensive Bill of Rights, instead of the actual piecemeal procedure by means of Basic Laws, is motivated by the persistent fear that the unqualified recognition of fundamental rights to all citizens will seriously effect the Jewish character of the state. Hence, it is not so much the secular foundation of dignity that deters the religious circles from bestowing upon it a broad meaning; it is, rather, its possible impact on the Jewish character of the state.¹⁵ [Emphasis added].

Professor Ruth Gavison more directly characterized the compromise adopted by the Knesset in the basic laws as an act of constructive ambiguity:

Today we would say that this vision was of Israel as the democratic nation-state of Jews, or Israel as a Jewish and democratic state in the terms of the 1992 Basic Laws. *The constructive ambiguity of this shared vision was what permitted most of the Jews, in the world and mainly in Israel to unite behind it.* In fact, even many of the leaders of the Arab minority in Israel lived well with that vision.¹⁶ [Emphasis added].

Constructive ambiguity is also used in drafting commercial contracts subject to domestic laws, which likely occurs much more frequently than when developing international agreements.¹⁷

F. Structure of the Article

Notwithstanding all of the above-mentioned examples of employing constructive ambiguity in domestic or in international, non-Middle East

¹⁵ I. Englard, "Human Dignity: From Antiquity to Modern Israel's Constitutional Framework", 21 *Cardozo L. Rev.* 1903, 1927 (2000).

¹⁶ R. Gavison, "Culture, Society, Law and Adjudication", 11 *Int'l J. Const. L.* 1114, 1116 (2013).

¹⁷ See, e.g., M. Shur-Ofry & O. Tur-Sinai, "Constructive Ambiguity: IP Licenses as a Case Study", 48 *U. Mich. J. L. Reform* 391 (2015).

situations, this expression has now become associated with Middle East peacemaking. This article, therefore, focuses on the use of constructive ambiguity in Israeli-Arab peace negotiations.

This article first explains the concept of ambiguity and defines the expression “constructive ambiguity.” The article then distinguishes between constructive ambiguity and another phenomenon often present in Middle East negotiations: an agreement to agree. It then explores the main reasons why constructive ambiguity is used so often in Middle East negotiations, identifying three such reasons: the need to keep more than one option open, face-saving, and deferring fundamental, irreconcilable differences to a later time. The article finally concludes with examining the question of when the introduction of ambiguity to Israeli-Arab agreements might be considered constructive and when it is destructive.

Before proceeding to discuss all of those issues, two caveats must be added. First, the various examples of constructive ambiguity used in this article are not intended to represent a comprehensive list of all such instances used in Israeli-Arab agreements. Nor is there any intention in this article to cover the majority of these cases or even to discuss all of the main occasions in which Israeli and Arabs used this technique. This phenomenon is simply too prevalent to fit within the confine of a short article such as this. Rather, the purpose is simply to identify and use a few typical examples of constructive ambiguity of various types and from different eras so as to illustrate the analysis included herein.

Second, there are internationally-recognized principles applicable to the interpretation of international agreements, now codified in the Vienna Convention on the Law of Treaties.¹⁸ Under this Convention, for instance, international agreements must 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.”¹⁹ Further, under the Convention, there are supplementary, extraneous means of interpretation that can be taken into account, such as the preparatory work and the circumstances of the conclusion of the agreement, if the application of the standard rules of interpretation “(a) leaves the meaning *ambiguous* or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”²⁰ [Emphasis added]. These principles, therefore, may hypothetically help resolve any ambiguity in an international agreement, whether or not deliberately included. In fact, however, for a variety of reasons, ambiguities in Israeli-Arab agreements cannot practically be

¹⁸ Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, 1155 *U.N.T.S.* 331.

¹⁹ *Id.* at art. 31 (1).

²⁰ *Id.* at art. 32.

resolved through common international dispute resolution mechanisms. First, submitting such disputes to the International Court of Justice or to a binding arbitration requires the agreement of both parties, which is not normally expected to occur, especially with regard to ambiguities deliberately included in the agreement. Second, as elaborated in this article, many of the constructive ambiguities that have been employed in Israeli-Arab peacemaking are included in documents, such as declarations, letters of invitation, frameworks and other types of agreements to make agreement, which likely do not rise to the level of enforceable agreements. Third, the agreements entered between Israel and the PLO, a non-State entity, raise additional questions regarding the applicability of the Vienna Convention. Finally, even if, notwithstanding all of these difficulties, the parties agreed to submit a dispute relating to their agreement to, for instance, binding arbitration, the proceeding may be extremely costly and lengthy, causing more friction while it is slowly moving forward.²¹ For all of the foregoing reasons, this article examines the constructive ambiguity phenomenon based on the premise that, practically, disputes relating to the interpretation of Israeli-Arab agreements may not be resolved through a binding dispute resolution process, but rather only through some subsequent agreement.

II. DEFINITION

“Constructive ambiguity” may be defined as a negotiations tool by which the parties deliberately adopt ambiguous language, that is, one that is capable of being interpreted in more than one way, to resolve an issue in dispute while pretending that full agreement has been reached yet continuing to hold their original, contradictory positions regarding that issue.

As discussed above, for a certain agreement²² provision to fall within the definition of “constructive ambiguity,” that provision must meet three cumulative conditions: (1) it must be *ambiguous*; (2) the ambiguity must be

²¹ Thus, for instance, the only dispute between Israel and one of its Arab neighbors that has become the subject of arbitration, the Israel-Egypt Taba border dispute, took approximately eight years to be resolved finally through an arbitral award. *See* Case concerning the location of boundary markers in Taba between Egypt and Israel, Decision of 29 Sept. 1988, XX Rpts. *Int'l Arbitral Awards* 1-118. On how the process of resolving the Taba border dispute got protracted, *see* A. D. Sofaer, “The Role of Arbitration in Political Settlement: Taba and the Egypt/Israel Treaty of Peace”, 39 *Hous. J. Int'l L.* 263 (2017)(warning against any attempts to resolve disputes through arbitration when the States involved have not genuinely agreed to arbitrate).

²² The reference to “agreement” here and elsewhere in this article should be understood broadly as the principles relating to constructive ambiguity discussed herein apply equally to unilateral declarations, U.N. resolutions, *etc.* *See, e.g.*, discussion in Section II.A(3) *infra* regarding United States Security Council Resolution 242 and in Section I.D *supra* regarding unilateral declarations.

intentional; and (3) the parties must *pretend that there is full agreement*. If one of these conditions is missing, there is no constructive ambiguity.

A. Ambiguity

Ambiguity may occur when the drafters of an agreement address a certain contingency in the agreement, but the solution provided in the agreement to that contingency is ambiguous. Ambiguity may also arise when the agreement drafters fail to address a contingency so that when it arises there is a need to rely on more general provisions of the agreement in order to come up with a solution, but the parties disagree as to what general provision of the agreement should apply, or how to infer a solution to the specific contingency from the applicable general provision, or which of several general provisions contained in the agreement should be used when such general provisions point in different directions on how to solve the specific contingency.

Black's Law Dictionary distinguishes between two types of ambiguities: *latent ambiguity* ("where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings"), which is not relevant to this article, and *patent ambiguity* – the subject of this article – which it defines as follows: "[P]atent ambiguity is that which appears on the face of the instrument, and arises from the defective, obscure, or insensible language used."²³

As to patent ambiguity, linguists differentiate among three main forms in which it may come: *lexical ambiguity*, *syntactic ambiguity*, and *cross-textual ambiguity*.

1) Lexical Ambiguity

Lexical ambiguity (also called *semantic ambiguity* or *referential ambiguity*) is the presence of two or more possible meanings for a single word or a single expression.²⁴ By way of example, in 1995 when I was negotiating on behalf of Israel the text of the Israel-PLO Interim Agreement on the West Bank and the Gaza Strip, also known as Oslo II²⁵ (hereinafter the "Interim Agreement")

²³ The Law Dictionary, "What is AMBIGUITY?", *thelawdictionary.org*, available at <https://thelawdictionary.org/ambiguity/>.

²⁴ See, generally, A. Sennet, "Ambiguity", *Stanford Encyclopedia of Philosophy Archive*, *plato.stanford.edu*, (Spring 2016), available at <https://plato.stanford.edu/archives/spr2016/entries/ambiguity/>.

²⁵ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 Sept. 1995, 36 *I.L.M.* 557. On the Interim Agreement, see, generally, J. Singer, "The West Bank and Gaza Strip: Phase Two", 7 *Justice* 1 (1995).

with Saeb Erekat, the PLO representative, we encountered a major stumbling block regarding the method of voting by the Palestinian inhabitants of East Jerusalem. Earlier, Israel and the PLO agreed in the 1993 Declaration of Principles on Interim Self- Government Arrangements²⁶ (hereinafter the “Oslo Declaration of Principles” or the “DOP”) that these inhabitants would be allowed to vote in the elections for the Palestinian Council.²⁷ The argument that arose in 1995 related to whether such East Jerusalemites would vote in Palestinian polling stations to be established outside Jerusalem, as I proposed, or whether they would vote in polling stations to be established inside Jerusalem, as Erekat suggested. In opposing establishing polling stations in Jerusalem I relied on various provisions of the Oslo Declaration of Principles that excluded Jerusalem from the Palestinian jurisdiction and precluded establishment of Palestinian offices outside the Palestinian area of jurisdiction in the West Bank.²⁸ Erekat, while acknowledging these DOP provisions, proposed that the Palestinian polling stations would be established inside “quasi extra-territorial” locations within East Jerusalem, such as United Nations offices, International Red Cross offices or Muslim holy places, implying that the choice of such locations could allow Israel to accept this arrangement, as it would not necessarily conflict with its position regarding sovereignty in Jerusalem. I rejected all of these proposals and this disagreement remained unresolved for a long time. To be clear, the argument was not about the technical question of where to place polling stations for one day only – the day of the Palestinian elections. Rather, the Palestinians wanted to use the elections as an opportunity to establish a precedent for the larger “fight” over Jerusalem that was expected to occur a few years later in the context of the permanent status negotiations. For exactly the same reasons, Israel wanted to avoid deploying Palestinian polling stations in East Jerusalem even for only one day.

One day, after visiting Egypt, Israeli Foreign Minister Shimon Peres called me to his office and informed that he had met with PLO Chairman Yasser Arafat and resolved the East Jerusalem voting dispute. As he recounted the agreed solution to me: “We agreed that they would vote by [and here I am bringing the Hebrew word he used] do’ar.” “Go ahead,” he instructed me, “put this agreed sentence in the draft agreement and move on.” The word “do’ar,” however, has two meanings in Hebrew. It means both the envelopes with a stamp on them that people send one another, as well as the office that is

²⁶ Israel-PLO Declaration of Principles on Interim Self- Government Arrangements, 13 Sept. 1993, 32 *I.L.M.* 1525, 1527 (1993). On the Oslo Declaration of Principles, *see, generally*, J. Singer, “The Declaration of Principles on Interim Self-Government Arrangements, Some Legal Aspects”, 1 *Justice* 4 (1994).

²⁷ *Id.*, at Annex I to the Oslo Declaration of Principles, Art. 1.

²⁸ *See id.* at Art. IV, Annex II, Art. 5 and Agreed Minutes regarding Art. IV to the Oslo Declaration of Principles.

responsible for collecting and delivering these envelopes. To complicate things even further, while in English, there are two different words for the Hebrew word “*do'ar*,” in American English, you use the word “mail” to refer to the envelopes and the word “post” to refer to the office that delivers them. For instance, in the United States you will say: The *mailman* of the U.S. *Post Office* delivered the *mail*. Conversely, in British English you refer to the stamped envelopes as “post” and to the office that is responsible for delivering the post as the “mail.” Therefore, in the United Kingdom you will say: The *postman* of the *Royal Mail Service* delivered the *post*.

Not knowing what exact words Peres and Arafat agreed on and, further, not knowing whether they were thinking in American English or British English about the mail/post issue, I asked Peres for clarifications regarding their agreement, that is, whether they agreed that Palestinian inhabitants of East Jerusalem would vote in polling stations to be established in post offices in East Jerusalem or whether such inhabitants would send their ballots in envelopes to be delivered to Palestinian polling stations outside Jerusalem. Peres explained that what he had in mind was the latter, that is, using a procedure equal to the American absentee voting in elections and that Arafat agreed. Given the prior heated arguments on that issue, I felt that the news about the Peres-Arafat agreement were too good to be true. Indeed, when I called Erekat to confirm how he understood the Peres-Arafat agreement, he responded that Arafat had told him that the agreement with Peres was that Palestinians of East Jerusalem would vote in post offices in Jerusalem. We were thus back to square one.

Subsequently, this issue was resolved through negotiating very detailed arrangements for voting of Palestinians of East Jerusalem that were included in the Interim Agreement, which involved compromises by both sides.²⁹ Under these arrangements, while most Palestinians of Jerusalem voted at approximately 170 polling stations situated in the West Bank, approximately 5,000 of Jerusalem's Palestinians were allowed to vote through services provided in five specified post offices in Jerusalem. The services, which were provided by Israel Post Authority employees, not Palestinian elections officials, involved providing the voters with ballot papers and envelopes for the voters to mark at the post office counters (not in private booths) and to insert in the envelopes, which were addressed to the relevant Palestinian elections officials (like a letter) but bore no stamps. Those envelopes then were handed over to the Israeli post office officials who inserted them in post boxes marked with the logo of the Israeli Postal Authority. Finally, under the agreed arrangements, those boxes were delivered to the relevant Palestinian elections office in the West Bank where they were counted and totaled along the other

²⁹ See Interim Agreement, Annex II (Protocol Concerning Elections), Art. VI (Election Arrangements Concerning Jerusalem).

ballot papers cast in the West Bank. The argument between Israeli and Palestinian negotiators over the shape of the boxes was the most heated. For a moment both sides truly believed that the future fate of East Jerusalem would be decided exclusively based on whether the box's slot would be at its top, like in a normal ballot box, or on its side, like in normal post boxes. Ultimately, the parties agreed to design those boxes so that they were different in size and shape from both the Palestinian ballot boxes and from the Israeli post boxes.³⁰

Had the sentence perceived by Peres to have resolved the argument regarding voting by Palestinians of East Jerusalem been inserted in the agreement, it could have been considered to be a prominent example of *lexical ambiguity*, because the Hebrew word *do'ar*, as well as its English translation (mail/post) could clearly mean different things to different people. The detailed arrangements that ultimately were included in the Interim Agreement, while representing a compromise between absentee voting and normal voting (possibly disliked by both sides), were precise and, therefore, did not represent an example of ambiguity, let alone constructive ambiguity, in resolving negotiations issues.

2) *Syntactic Ambiguity*

Syntactic ambiguity is the presence of two or more possible meanings within a full sentence, rather than in a single word or expression (as in *lexical ambiguity*).³¹

By way of example, when Israel, Egypt and the United States negotiated the Camp David Accords, which consisted of the Framework for the Conclusion of Peace Treaty between Egypt and Israel (hereinafter “Camp David Framework (Israel-Egypt)”) and the Framework for a Peace Agreement in the Middle East, which, among other things, provided the principles for establishing an autonomy regime for the Palestinians of the West Bank and Gaza (hereinafter the “Camp David Framework (Palestinian Autonomy)”),³² one of the many arguments that arose related to the nature and authority of the Palestinian Council to be elected in the West Bank and Gaza Strip.³³ Israel's

³⁰ For a fuller description of the Palestinian elections, see J. Singer, “The Emerging Palestinian Democracy Under the West Bank and Gaza Strip Self-Government Arrangements”, 26 *Isr. YB Hum. Rts.* 313 (1997).

³¹ See Sennet, *supra* note 24.

³² Framework for the Conclusion of a Peace Treaty between Egypt and Israel and A Framework for a Peace Agreement in the Middle East Agreed at Camp David, September 17, 1978, both reprinted in 17 *I.L.M.* 1466 (1978). When referring to both frameworks, this article uses the expression “Camp David Frameworks” or “Camp David Accords.”

³³ For a comprehensive list of the differences that arose in Camp David and in subsequent negotiations, see J. Singer, “Developing the Concept of Palestinian Autonomy”, *The Cairo Review of Global Affairs* (Winter 2019).

position was that the Palestinian Council would comprise one, small, eleven-member body that would have authority only over administrative matters without legislative authority. For that reason, Israel insisted on calling that Palestinian body an “Administrative Council.” Egypt’s position was that that body should consist of three branches of government: a large legislative body to be elected by the Palestinians (comprised of at least thirty members), from which a smaller, executive body would be selected, as well as a judicial branch. Egypt, therefore, insisted on calling that Palestinian body a “Self-Governing Authority.”

Since the parties were not able to agree on these matters, they ended up not addressing the nature and authority of the Palestinian elected body in the Camp David Framework (Palestinian Autonomy) and, as to the name of that body, they simply used both the Egyptian and the Israeli versions, side by side, as follows:

When the self-governing authority (administrative council) in the West Bank and Gaza is established and inaugurated, the transitional period of five years will begin.³⁴

This formulation leaves the sentence open to two conflicting interpretations and thus fits the definition of Syntactic ambiguity.³⁵ The Camp David Framework (Palestinian Autonomy) in many other respects resembled a “misty penumbra of formulational ambiguity.”³⁶

3) *Cross-textual Ambiguity*

Cross-textual ambiguity is the presence of two or more possible meanings within a body of text consisting of many sentences (rather than within the same sentence, as in *syntactic ambiguity*, or within one word or expression, as in *lexical ambiguity*).³⁷

³⁴ Camp David Framework, *supra* note 32, at Section A(c). In other sections, the Camp David Framework referred to “self-governing authority” without adding “administrative council” next to it, but that did not resolve the inherent ambiguity in the Camp David Framework regarding this Palestinian body.

³⁵ See also the discussion in Section I.E *supra* regarding how the Israeli Knesset resolved the democratic State v. Jewish State argument using the same constructive ambiguity technique.

³⁶ See A. Shapira, “Reflections on the Autonomy: The Camp David Accords and the Obligation to Negotiate in Good Faith”, in *Models of Autonomy*, 285 (Y. Dinstein ed. 1981). For a list of Camp David Framework ambiguities, see M. Gabay, *Legal Aspects of the Camp David Framework for Peace in Relation to the Autonomy Proposal*, *id.*, at 256.

³⁷ M. Awwad, “The Ambiguous Nature of Language”, 7(4) *Int’l J. Soc. Sci. & Edu.*, 195, 201 (2017).

For instance, Resolution 242³⁸ is known for being replete with ambiguities.³⁹ One ambiguity intentionally embedded in Resolution 242 relates to the scope of the required Israeli withdrawal. Based on some statements included in the resolution, Arab countries have been able to argue that Resolution 242 requires Israel to withdraw fully from all the territories occupied in the 1967 Six-Day War, whereas Israel, relying on other, contradictory statements included in other places in Resolution 242, was able to argue that the resolution permits Israel to demand adjustments to the pre-1967 borders. Arab countries based their assertion on the preambular provision of Resolution 242 in which the Security Council emphasized “the inadmissibility of the acquisition of territory by war” and its affirmation of the principle of “[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict” (para. 1, sub-para. i), which they interpreted, on the basis of the French version of the resolution, to mean withdrawal from *all* these territories (“*retrait des forces armees Israeliennes des territoires occupes lors du recent conflit*”).

Israel, conversely, points to the clear language of the English version of the withdrawal clause quoted above, noting that the word “the” was deliberately omitted before the word “territories” and also relying on the affirmation by the Security Council of the right of every State, including Israel, to live in peace “within *secure* and recognized boundaries [emphasis added],” which is included in paragraph 1, sub-para. (ii) of Resolution 242.

As noted by Professor Ruth Lapidoth-

The provision on the establishment of “secure and recognized boundaries” included in para. 1, sub-para. (ii) of the Resolution would have been meaningless if there had been an obligation to a withdrawal of Israel’s armed forces from all the territories occupied in 1967.⁴⁰

In sum, Resolution 242 represents a prominent example of a text that includes several *cross-textual ambiguities*.⁴¹

³⁸ S.C. Res. 242, U.N. SCOR, 22nd Year, U.N. Doc. S/INF/22/Rev.2, at 8-9 (22 Nov. 1967).

³⁹ See, e.g., Lord Caradon, A. J. Goldberg, M. H. El-Zayyat, A. Eban, *U.N. Security Council Resolution 242: A Case Study in Diplomatic Ambiguity*, Washington D.C., Institute for the Study of Democracy, Georgetown University, (1981).

⁴⁰ R. Lapidoth, “Security Council Resolution 242 at Twenty Five”, 26 *Isr. L. Rev.* 295, 310 (1992).

⁴¹ The withdrawal clause of Resolution 242 also represents an examples of *syntactical ambiguity* because the differences between the English and French versions of this clause allows that one clause to be interpreted in two different manners.

While cross-textual ambiguity often occurs within the body of a single text, such as a peace treaty, *cross-textual ambiguity* may also occur among two or more conflicting provisions contained in several associated documents, such as a peace treaty and an accompanying side letter,⁴² or between two separate, non-associated documents that nonetheless were created by the same party, cover the same subject-matter and include conflicting commitments provided to two other parties.⁴³

B. Intention

Clearly, if there is no ambiguity in a text, there is also no constructive ambiguity. But not all ambiguities may be considered constructive. For constructive ambiguity to exist, this tool must be employed deliberately. *Unintentional* ambiguities, which likely constitute the majority of ambiguities in domestic contracts and international agreements alike, are not *constructive* ambiguities. They are either the result of sloppy drafting by one or both parties or simply caused by the inherent inability of any drafters of any text, as careful and expert drafters as they may be, to predict all possible future outcomes and provide a precise, agreed-upon solution in the agreement to each such contingency.

Stated otherwise, there must first be an argument between the parties to the agreement that they were unable to resolve in a clear, unambiguous manner, which necessitated a resolution based on constructive ambiguity.⁴⁴ Conversely, if the parties agreed to an ambiguous provision, without argument, and only at some later time a dispute arose over contradictory interpretations by the parties regarding that provision, this situation does not qualify as constructive ambiguity; rather, this is a simple, non-deliberate ambiguity.

As discussed above, unintentional ambiguity may also result from a failure to include an agreed solution to a certain contingency in an agreement. For example, when Israel and Egypt negotiated the 1949 Armistice Agreement in the Greek island Rhodes⁴⁵ they did not include any provision regarding the right of Israeli vessels to pass through the Strait of Tiran and the Suez Canal in the agreement. In fact, this issue was not even discussed, let alone the

⁴² See discussion in Section IV.D *infra* regarding the conflict between provisions included in the Israel-Egypt peace treaty and provisions included in its side letter regarding the relations between the peace treaty and other agreements.

⁴³ See discussion in Section I.D *supra* regarding the contradictions between the United Kingdom's commitments that were included in the Balfour Declaration and in the McMahon-Hussein correspondence.

⁴⁴ As to constructive ambiguity in unilateral declarations, see discussion *infra* note 49.

⁴⁵ For the text of the Israel-Egypt Armistice Agreement, see Egyptian-Israeli General Armistice Agreement, 24 Feb. 1949, Egypt-Isr., 42 *U.N.T.S.* 251.

subject of arguments between Egypt and Israel during their armistice negotiations. As Professor Shabtai Rosenne, who was then Legal Adviser of the Israel Ministry of Foreign Affairs and a member of the Israeli delegation to these negotiations, described it:

[T]here is a continuum from really the beginning right through to Camp David about freedom of navigation through both the Suez Canal and the Strait of Tiran. The two were linked. We had thought at Rhodes during the armistice [negotiations] in one of our later conversation with Bunche that the problem of Suez was resolved by the Armistice Agreement. The problem of Tiran had not yet arisen. We knew of the existence of the strait, of course, but, it was used very little at that time.⁴⁶

As it turned out, the Armistice Agreement did not resolve the issue of Israeli vessel passage through the Strait of Tiran and the Suez Canal. On the contrary, several years after the Armistice Agreement was executed, a dispute arose between the parties on this issue, which demonstrated that Israel and Egypt had fundamentally different positions regarding whether the armistice regime established relations between the two countries that were subject to the laws of war, as Egypt argued, or to the laws of peace, as Israel argued. Egypt invoked various legal arguments to support the position that, in times of war, it may prevent the passage of enemy vessels through the Strait of Tiran and the Suez Canal, thus essentially blocking them for passage of Israeli vessels or cargo destined to Israel.⁴⁷ Only four wars later (the 1956 Suez War, the 1967 Six-Day War, the 1967-70 War of Attrition, and the 1973 Yom Kippur War) was the issue finally resolved in the 1979 Peace Treaty between Israel and Egypt (hereinafter the “Israel-Egypt Peace Treaty”), which guaranteed freedom of passage to Israeli ships and cargo through the Suez Canal and recognized the Strait of Tiran and the Gulf of Aqaba as international waterways open to unimpeded and non-suspendable freedom of navigation and overflight.⁴⁸

⁴⁶ Transcript of an interview with Rosenne by Jean Krasno (12 Jun. 1990), Yale University Oral History Project on the United Nations, at 73, available at <https://digitallibrary.un.org/record/474306?ln=en>.

⁴⁷ See, generally, L. Gross, “Passage Through the Suez Canal of Israel-Bound Cargo and Israel Ships”, 51 *Am. J. Int’l L.* 530 (1957).

⁴⁸ Peace Treaty Between Israel and Egypt, 26 Mar. 1979, at Art. V. For the text of the treaty, see XVIII *I.L.M.* 374 (1979). On how the Israel-Egypt Peace Treaty addressed these issues, see, generally, R. Lapidot, “The Strait of Tiran, the Gulf of Aqaba, and the 1979 Treaty of Peace between Egypt and Israel”, 77 *Am. J. Int’l L.* 84 (1983).

C. Pretense that full agreement has been reached

Similarly, even when the parties deliberately decide to include an ambiguous provision in an agreement, that is, both the ambiguity and intention elements are present, the formulated provision cannot be considered to have been conceived through the constructive ambiguity technique, if the parties do not pretend that they reached an agreement.⁴⁹ In other words, in situations where the parties cannot reach an agreement on one or more of the issues that they intended to resolve but decide to sign the agreement without resolving them, while noting their differences or otherwise specifying the need to continue to negotiate over some unresolved issues, that is not constructive ambiguity. The parties are not pretending that all the elements of the agreement are agreed and, therefore, a very important prerequisite is missing for this type of situation to qualify as constructive ambiguity.

By way of example, even though the text of the Interim Agreement held 314 pages when concluded after Israel and the PLO negotiated it for more than a year, the parties still needed more time to continue to negotiate several important issues related to the interim period arrangements. Accordingly, the Interim Agreement includes many provisions recording the parties' disagreements or decision to continue the negotiations over discreet issues after the agreement entered into force.

For instance, with regard to the City of Hebron, the Interim Agreement notes:

9. a. Since the two sides are unable to reach agreement regarding the Tomb of the Patriarchs / Al Haram Al Ibrahimi, they have agreed to keep the present situation as is.

⁴⁹ As discussed in Section I.C *supra*, constructive ambiguity may also be employed in the context of unilateral declarations. Even though commitments included in such declarations may become binding, there are nonetheless no two formal parties to an agreement here. Yet, the nation towards which the declaration has been made serves as the other party in such situations and often the party making the unilateral declaration negotiates with the party that is the recipient of the obligations included in the unilateral declaration the wording of the unilateral declaration. For instance, the Madrid Letters of Invitation, discussed in Section III *infra*, included, among other things, U.S. Letters of Assurances sent to various parties invited to participate in the 1991 Madrid Peace Conference. Those Letters of Assurances, even though they were negotiated closely with the intended recipients, constituted unilateral U.S. declarations that included various U.S. commitments to the various parties. These letters were replete with constructive ambiguities, both internal to each letter and resulting from conflicting commitments given to other parties. For the text of the Madrid Letters of Invitation, see 21(2) *J. Palestine Stud.* 117-149 (Winter, 1992).

b. Three months after the redeployment the high level Joint Liaison Committee will review the situation.⁵⁰

Similarly, because the parties were not able to reach agreement on the conditions for opening a Gaza Strip seaport, the Interim Agreement stated instead, as follows:

Plans for the establishment of a port in the Gaza Strip..., its location, and related matters of mutual interest and concern,...will be discussed and agreed upon between Israel and the Council taking into consideration the provisions of Article XXX (Passages) of this Agreement. To this end a special committee will be established by the two sides.⁵¹

As discussed above, because the parties noted the need to continue to discuss disputed issues, none of the above-referenced Interim Agreement provisions contains constructive ambiguity.

III. CONSTRUCTIVE AMBIGUITY DISTINGUISHED FROM AN AGREEMENT TO AGREE

To fully understand what constructive ambiguity is, one must also understand what situations, which are sometimes incorrectly considered to constitute constructive ambiguity, in fact, *do not* fall within the definition's purview.

Specifically, people sometimes confuse constructive ambiguity with an international agreement to agree⁵². Both phenomena are used quite often in Middle East negotiations, but they are distinct from one another. While an agreement to agree is not enforceable, it does require the parties to negotiate an agreement in good faith, but each party is free to walk away if the agreement to agree has not matured into a full-fledged agreement because the parties simply were not able to overcome all of their differences.⁵³ An

⁵⁰ Interim Agreement, Annex I, Art. VII (titled "Guidelines for Hebron"), Section 9.

⁵¹ Interim Agreement, Annex I, Art. XIV (titled "Security along the Coastline to the Sea of Gaza"), Section 4.

⁵² The concept of an agreement to agree is also very common in domestic, commercial transaction situations, where such a document is normally called "Letter of Intent" or "Term Sheet."

⁵³ *But see* R. Lapidot, "The Relation between the Camp David Frameworks and the Treaty of Peace - Another Dimension", 15 *Isr. L. Rev.* 191,192 (1980) (arguing that, in the case of the two Camp David Frameworks, "[t]hrough the title 'Framework' does not necessarily convey the idea of a binding international agreement, the text of the two documents

agreement to agree normally includes a few general principles that the parties agree should serve as the terms of reference for negotiating a detailed, binding agreement. Per definition, such agreements to agree cannot be precise and detailed. Had the parties been able to reach a full, detailed agreement right away, they would have skipped the preliminary phase of determining the terms of reference for their negotiations over the ultimate agreement. Examples of Israeli-Arab agreements to agree are the Camp David Frameworks, the U.S.-Soviet Union Letters of Invitation to Peace Talks in Madrid, 18 October 1991 and associated U.S. Letters of Assurances to some of the invitees (collectively, the “Madrid Letters of Invitation”),⁵⁴ which when accepted by the invitees became the agreed framework for negotiations, and the Oslo Declaration of Principles.

Yet, some authors have referred to the mere phenomenon of entering into an agreement to agree, such as the Camp David Frameworks, the Madrid Letters of Invitation and the Oslo Declaration of Principles, as resting on or being imbued with constructive ambiguity. For instance, in an Op-Ed published on the Brookings website in 2014 about U.S. Secretary of State John Kerry’s attempt to assist Israelis and Palestinians negotiate a “framework agreement,” Khaled Elgindy commented:

[T]he focus of the talks has shifted from achieving a comprehensive, conflict-ending peace deal...to a far more modest “framework agreement,” which would lay out the broad outlines of a final agreement while leaving the details of the actual treaty to be worked out later. Despite protests by U.S. officials that they are not pursuing another interim agreement like the Oslo Accords, the current plan rests on the same type of “constructive ambiguity” that prolonged — and ultimately doomed — the Oslo process for more than twenty years.⁵⁵

The same error was made by Einat Wilf in an article published in *The Atlantic*, where she wrote:

This constructive ambiguity, imbued in each element of the [Oslo] Accords, proved to be utterly destructive. Instead of building trust and allowing the parties to adjust to the reality of the inevitable compromises which were

clearly shows that it was the intention of the parties to conclude such an agreement.[Footnotes omitted]”).

⁵⁴ Madrid Letters of Invitation, *supra* note 49.

⁵⁵ K. Elgindy, “When Ambiguity is Destructive”, 22 Jan. 2014, available at <https://www.brookings.edu/opinions/when-ambiguity-is-destructive/>.

necessary for peace, it merely allowed each side to persist in its own self-serving interpretation of what the Accords implied and to continue the very behavior which destroyed trust on the other side. And so, when the time came, a few short years later, to settle the core issues, the ensuing failure was all but inevitable.⁵⁶

Like Elgindy, Wilf errs in conflating an agreement to agree, such as the Oslo Declaration of Principles, with constructive ambiguity. But Wilf also mistakenly groups together the short framework for negotiating an interim agreement on self-government arrangements, which was included in the Oslo Declaration of Principles – an agreement to agree – with the very detailed Interim Agreement that was negotiated pursuant to the DOP, and refers to them both as the Oslo Accords. Her assertion that constructive ambiguity is imbued in each element of the Interim Agreement, which holds 314 pages, seven annexes, 10 appendices, and has nine detailed maps attached to it, covering numerous areas of life related to the Palestinian autonomy in excruciating detail, is not only baseless but absurd.

Perhaps Elgindy and Wilf were thinking not about the provisions included in the Oslo Declaration of Principles that address the arrangements applicable during the autonomy period (98% of the DOP), but rather about the following two provisions that are also included in the DOP, which address the second set of Israeli-Palestinian negotiations regarding the permanent status agreement:

2. Permanent status negotiations will commence as soon as possible, but not later than the beginning of the third year of the interim period, between the Government of Israel and the Palestinian people representatives.

3. It is understood that these negotiations shall cover remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest.⁵⁷

Clearly, the six issues listed in these provisions for the permanent status agreement negotiations are nothing more than an agenda for the negotiations. The failure of Israelis and Palestinians to reach a permanent status agreement

⁵⁶ E. Wilf, “The Fatal Flaw That Doomed the Oslo Accords”, 14 Sept. 2018, *The Atlantic*, available at <https://www.theatlantic.com/ideas/archive/2018/09/the-oslo-accords-were-doomed-by-their-ambiguity/570226/>.

⁵⁷ Oslo Declaration of Principles, Art. V, paras. 2 & 3.

based on this agenda is not rooted in their inability to understand what these words mean due to some purported ambiguity; rather, they simply could not have reached an agreement on the substance of these issues. There is no ambiguity in this agenda, certainly not constructive ambiguity. To be clear, the Israelis and Palestinians who negotiated the Oslo Declaration of Principles did not have any arguments regarding the drafting of these two sections defining the agenda for the permanent status negotiations. Therefore, there was no need for them to resort to constructive ambiguity to hide any disagreements regarding the scope of the agenda for permanent status negotiations. Moreover, the Israeli and Palestinian negotiators in Oslo did not begin to discuss any permanent status issues in Oslo and then decide to delay those discussions to a later time because they could not reach agreement over them in Oslo. Instead, from the first day of discussions in Oslo, the agreed premise was that the discussions would focus exclusively on the interim period issues. That premise derived from the Madrid Letters of Invitation, which stated:

With respect to negotiations between Israel and [the] Palestinians..., negotiations will be conducted in phases, beginning with talks on interim self-government arrangements. These talks will be conducted with the objective of reaching agreement within one year. Once agreed the interim self-government arrangements will last for a period of five years. Beginning the third year of the period of interim self-government arrangements, negotiations will take place on permanent status. These permanent status negotiations...will take place on the basis of resolutions 242 and 338.⁵⁸

The two-phase formula included in the Madrid Letters of Invitation, in turn, was copied from the Camp David Framework (Palestinian Autonomy).⁵⁹ When the Oslo negotiators copied this format from Madrid and Camp David, therefore, they were not ‘fudging’ any disagreement that they could not resolve; rather, they followed a long-standing and agreed approach to resolving the Palestinian problem in two phases, first a five-year transitional period of Palestinian autonomy, and then permanent status discussions. This is not constructive ambiguity by any means.

Nonetheless, sometimes even drafters of an agreement to agree may fail to agree on some of the terms of reference for the subsequent discussions and

⁵⁸ See U.S.-Soviet Union Letter of Invitation to Peace Talks in Madrid, 18 Oct. 1991, at para. 7th.

⁵⁹ A Framework for a Peace Agreement in the Middle East Agreed at Camp David, 17 Sept. 1978, paras. 1 a-c, reprinted in 17 *I.L.M.* 1466 (1978).

they may then need to resort to constructive ambiguity. As discussed above,⁶⁰ the parties to the Camp David Framework (Palestinian Autonomy) were not able to reach agreement over many of the most fundamental general principles that were included in the framework and, therefore, the framework was replete with constructive ambiguities. Because of these ambiguities (and the fundamental disagreements underlying these ambiguities), the parties were unable subsequently to conclude the detailed autonomy agreement, even though they negotiated over such an agreement for more than three years.⁶¹

Conversely, Israeli and Palestinian negotiators were able to reach full agreement regarding all the principles included in the Oslo Declaration of Principles as they regard the interim self-government arrangements through practical compromises so that there was no need to hide any disagreements by employing constructive ambiguity. During the negotiations over the Interim Agreement, the parties had different positions regarding how to implement some of the general principles that were included in the Oslo Declaration of Principles, such as regarding the size of the Jericho area,⁶² or the scope and timing of the Israeli military redeployment from the West Bank,⁶³ but those differences were not over fundamental or existential issues and thus the parties were able to reach agreements on very detailed implementing agreements relatively quickly: The Agreement on the Gaza and the Jericho Area (hereinafter the “Gaza–Jericho Agreement”)⁶⁴ was signed within nine months from the signing of the Oslo Declaration of Principles, resolving all issues relating to Gaza and Jericho, including the size of the Jericho area;⁶⁵ and the full-fledged Interim Agreement, which resolved all issues relating to the West

⁶⁰ See Section II.A (2), *supra*.

⁶¹ For a comprehensive list of the constructive ambiguities included in the Camp David Framework and how they made it extremely difficult to reach an agreement on detailed autonomy arrangements in subsequent negotiations, see Singer, *supra* note 33.

⁶² See Oslo Declaration of Principles, Arts. V.1, VI.1, VI.2, XIV and Annex II (titled “Protocol on Withdrawal of Israeli Forces from the Gaza Strip and Jericho Area”), which did not define the size of the Jericho area.

⁶³ See Oslo Declaration of Principles, Art. XIII (titled “Redeployment of Israeli Forces”), which stated generally that “[a]fter the entry into force of [the DOP]...a redeployment of Israeli military forces in the West Bank...will take place,” that “[i]n redeploying its military forces, Israel will be guided by the principle that its military forces should be redeployed outside populated areas,” and that “[f]urther redeployments to specified locations will be gradually implemented commensurate with the assumption of responsibility for public order and internal security by the Palestinian police force...”. This article, however, did not specify when Israel would implement the further redeployments, how many such redeployments would occur and where in the West Bank would Israel redeploy its forces.

⁶⁴ Agreement on the Gaza Strip and the Jericho Area, signed at Cairo on 4 May 1994, reprinted in 33 *I.L.M.* 622 (1994).

⁶⁵ See Gaza-Jericho Agreement, Map No. 2, which delineates the Jericho Area in great precision.

Bank including the modalities of the redeployment of Israeli forces,⁶⁶ was signed 15 months later.

IV. WHY CONSTRUCTIVE AMBIGUITY IS USED?

A. General

There are several different motives for using constructive ambiguity. The first one, which is less often discussed by scholars even though it may be employed more often than the two other types of constructive ambiguity discussed below is intended by both parties to simply *leave more than one option open* with regard to various issues on which the parties do not have strong positions one way or another.

Kenneth W. Stein and Samuel W. Lewis summarized the two other more commonly discussed motives for employing Constructive Ambiguity, as follows:

When nations want badly enough to reach agreement but encounter an insurmountable difference, they may accept compromise language that is ambiguous, each side intending to interpret it differently in order to overcome significant domestic and international hurdles. For example, one party may have to interpret the language with creative flexibility in order to sell it to its own domestic constituency.⁶⁷

The explanation provided by Stein and Lewis groups together two types of constructive ambiguity that may look the same at first blush but are actually very distinct. One is intended to allow one or both parties to address personal or national sensitivities by masking the fact that they have agreed to a substantive compromise that they are reluctant to admit, thus allowing them to deny that they have deviated from positions they had previously stated they would not betray or that they are not expected by their constituencies to renege on. I refer to this type of motive to use constructive ambiguity below as *face-saving*, even though it covers a larger gamut of sensitivities.

⁶⁶ See Interim Agreement, Art. X (titled “Redeployment of Israeli Forces”), Art. XI (titled “Land,” which discusses, among other things, the further redeployments), Art. XIII (titled “Security,” which also discusses, among other things, the timing of the further redeployments), as well as Annex I (titled “Protocol Concerning Redeployment and Security Arrangements”) and its Appendix 1 (titled “Redeployment of Israeli Military Forces”) that contain numerous very detailed provisions regarding the redeployment.

⁶⁷ See K. W. Stein & S. W. Lewis, *Making Peace among Arabs and Israelis: Lessons from Fifty Years of Negotiating Experience* 25 (1991).

The other, completely different type of reason to use constructive ambiguity occurs when the negotiating parties are unable to resolve a substantive issue that has been hotly debated, and conclude that, since they have resolved many other issues, the time has come to sign a full-fledged agreement, so as to preserve their many agreements on all the other issues while papering over the one issue where no substantive agreement has been reached with the understanding that it is better to have an incomplete agreement than to have no agreement at all. I refer to the reason for using this type of constructive ambiguity below as *deferral of the resolution of a difficult substantive issue to a later time*.

These three types of constructive ambiguity are discussed below in turn.

*B. First type of Constructive Ambiguity:
Keep More Than One Option Open*

Any agreement, whether a domestic, commercial contract or an international agreement, can practically cover only a limited number of issues out of all possible future contingencies, which normally are considered by the two parties to be the most important issues. The determination of what is important and what is not important is normally done by the parties based on the circumstances prevailing at the time of forming the agreement and they draw primarily upon their past experience, as well as the experience of other parties that were placed in similar circumstances. There is no feasible way, however, to predict all possible eventualities, especially when negotiating peace treaties that are intended to be in force forever.

By way of example, when in 1978 I negotiated with Egyptian representatives the military aspects of the Israel-Egypt Peace Treaty, it was only five years after the 1973 Yom Kippur War that left strong impressions on both sides. The Israeli objective at that time clearly was to create an arrangement that would demilitarize the majority of the Sinai so as to make it more difficult for Egypt to launch another surprise attack against Israel as it did in 1973. The Israeli side could not have then predicted that the day would soon come when terrorists operating in the Sinai would pose a threat to both Egypt and Israel, that the cooperation between the parties on security matters would be close and that it would be in Israel's interest to have more, rather than less, Egyptian security presence in the Sinai. That one can better predict and address the very near future than the long-term future is also demonstrated by the fact that the Military Annex to the Israel-Egypt Peace Treaty, which was intended to cover the military aspects of the parties' relations forever, was only four and a half page long and included general principles, whereas the appendix attached to the Military Annex, titled Appendix relating to Organization of Movements in

the Sinai, which was intended to apply for only three years, from the period beginning immediately after the treaty entered into force through the completion of Israeli withdrawal from the Sinai, was much longer, it held seven pages, and included significantly greater detail.

Because of these considerations, the natural inclination of both sides is normally to address only the important issues and deal with everything else that does not seem to be important in a more general manner or simply not address it at all. Indeed, any attempt to address too many issues in a peace treaty or address such issues in too much detail may be counterproductive. The main reason is that the more detail the treaty includes, the more there will be requirements to make changes in the treaty over time, as circumstances change. However, peace treaties are not expected to be modified, certainly not frequently, and in any event are very difficult to modify, procedurally and politically. As a result, if peace treaties contain too much detail, sooner or later there will be a need to amend them, but whether they are amended or not there will be a price to pay. If the treaty is not amended, a situation might arise in which it becomes common for one of the parties or both to not comply with the treaty and for the other side to acquiesce, which may create a bad precedent by which the treaty is more honored in the breach than in the observance. Conversely, if one party insists on amending the treaty each time that one of its many details becomes obsolete, that may provide the other side with an opportunity to insist on re-opening for negotiations other parts of the treaty that it had originally agreed to only very grudgingly.

In sum, because of these considerations, peace treaties normally cover only a few, most important issues, while all the many other issues remain unregulated by the treaty. There is, therefore, an inherent ambiguity in peace treaties with regard to all of those issues that are either not addressed or addressed only in a general manner. Normally, however, those ambiguities do not constitute constructive ambiguities; even if the parties left these issues unaddressed deliberately, these situations lack an important element of the definition of "constructive ambiguity." As discussed above, for constructive ambiguity to exist, there must first be an argument between the parties that they were unable to resolve in a clear, unambiguous manner. In the majority of cases discussed above, however, the parties do not even discuss the contingencies left out of the treaty, let alone argue over how to resolve them. They simply both do not care enough to deal with them or do not even recognize that they exist at the time of negotiating the agreement.

There are, however, exceptions in which an issue is debated and the parties cannot reach an agreement on how to resolve it. Instead of including ambiguous language in the agreement, as a compromise between the two contradictory, respective texts that they propose, the parties may decide to

resolve their disagreement by simply discarding both of their competing texts and leaving the issue unresolved. This is a true situation of employing constructive ambiguity.

C. Second Type of Constructive Ambiguity: Face-Saving

In order to reach an agreement, certainly a stable agreement, there is a need to allow both parties to win (also known as a win-win deal) or, if that is not possible, at least to allow one party to win and the other to save face. Some of the methods to get there employ constructive ambiguity. In fact, this is a softer version of constructive ambiguity and some might say, including the present author, that this type of conduct does not really constitute constructive ambiguity, because it involves a situation where only one interpretation of the text is truly possible and the assertion of the party whose face has been saved that it had not given up on its original position is disingenuous. This article nonetheless also covers this phenomenon in order to present a fuller picture and also because this type of softer constructive ambiguity is often considered to belong in this discussion.

By way of introduction, there are always many different ways to describe the same thing by either using synonyms or by constructing sentences that include different shades or varying nuances of the same idea, but ultimately all boil down, more or less, to the same thing. Yet, people tend to like what they have drafted and resist attempts by others to make changes in their creations or offer alternatives. This is a common human phenomenon that is not related, certainly not exclusively, to international negotiations.

There is no better way to illustrate this phenomenon than by quoting the song written by George and Ira Gershwin, *Let's Call the Whole Thing Off*, as sung by Fred Astaire to Ginger Rogers in the 1937 movie *Shall We Dance*:

You like potato and I like potahto,
You like tomato and I like tomahto;
Potato, potahto, tomato, tomahto!
Let's call the whole thing off!

Recall that the characters played by Astaire and Rogers in that movie were two lovers. So, to understand the level of suspicion and objection by which each of the two parties in Middle East negotiations approaches a text proposed by the other, with each coming from a different culture and both still considering themselves enemies, one must multiply Astaire's and Rogers' rejection of each other's alternative language by manifold.

For instance, in 1983, during the Israel-Lebanese peace treaty negotiations, in which a U.S. delegation also participated, one day, the Lebanese delegation objected strongly to an Israeli-proposed expression that appeared to be quite benign and which the U.S. delegation supported. The next day, the head of the U.S. delegation read out quickly a series of some six synonyms to substitute for the verboten expression, likely simply picked up from a dictionary, for the Lebanese delegation to consider. The Lebanese delegation quickly accepted one of these alternatives and the negotiations proceeded to the next item. Later that day, the head of the U.S. delegation informed the head of the Israeli delegation that the head of the Lebanese delegation had confided in him that the reason they had objected to the Israeli-proposed expression was not rooted in the English words Israel proposed; rather, those words, when translated into Arabic - the language in which the agreement would be published in Lebanon - did not sound good. The Lebanese delegation, therefore, was looking for another expression that would sound better when translated to Arabic.

A similar situation occurred when in 1994 Israel and the PLO negotiated the Gaza-Jericho Agreement.⁶⁸ The operations of the Israeli army and the Palestinian Police, side-by-side, throughout the Gaza Strip, required a high level of collaboration between the two parties. However, as the Israeli side soon discovered the word “collaboration” was a taboo in the eyes of the Palestinians. Apparently, when translated to Arabic, that word has a very negative meaning, which is equal to treason.⁶⁹ Accordingly, the two parties used instead the word “cooperation” which is equal in meaning but is not loaded with the same negative connotation as “collaboration.”⁷⁰

But the examples provided above, as well as numerous other situations in which Middle East negotiating parties agreed on one word or one expression out of several alternatives that were essentially equivalent, do not truly represent constructive ambiguity. This is because there was no real substantive difference between the words or expressions ultimately selected and those that were rejected. For a genuine constructive ambiguity of the type discussed here to exist, one of the parties must have a strong distaste, often publicly expressed, to the solution ultimately included in the agreement and it must first object strongly to its inclusion in the agreement before finally accepting it. The use of constructive ambiguity in this situation is intended to offer a

⁶⁸ Agreement on the Gaza Strip and the Jericho Area, *supra* note 64.

⁶⁹ In fact, even in English, the word “collaboration” has two distinct meanings. For instance, The Merriam-Webster dictionary provides these two definitions to the word: (1) “to cooperate with an agency or instrumentality with which one is not immediately connected,” and (2) “to cooperate with or willingly assist an enemy of one’s country and especially an occupying force.”

⁷⁰ The word “cooperation” is used 43 times in the Gaza-Jericho Agreement, whereas the word “collaboration” does not appear even once.

ladder to that party to climb down from the top of the tree that party has ascended to. Stated otherwise, it is intended to sugar-coat the bitter pill. The following examples illustrate that type of constructive ambiguity.

Before Israeli Prime Minister Menachem Begin negotiated the Camp David Frameworks, he had pledged publicly that Israel would not withdraw the Israeli settlers in the Sinai in the context of the peace treaty with Egypt. Moreover, in a public statement made in September 1977 in the Israeli settlement *Neot Sinai*, located in northern Sinai, between Rafah and El Arish, Begin announced that, when he retired from his position as Prime Minister and from public life, he would move to *Neot Sinai* to live there.⁷¹ Notwithstanding that pledge, Begin agreed to full Israeli withdrawal of all Israeli settlers from the Sinai during the Camp David negotiations. Begin, therefore, was not able to sign the Camp David Framework (Israel-Egypt), because it included a provision that contradicted his pledge. To overcome that problem, the Israeli delegation devised a ‘work-around’ that included a side letter that was signed on the same day the framework was signed and in which Begin informed President Carter, as follows:

I have the honor to inform you that during two weeks after my return home I will submit a motion before Israel's Parliament (the Knesset) to decide on the following question:

If during the negotiations to conclude a peace treaty between Israel and Egypt all outstanding issues are agreed upon, “are you in favor of the removal of the Israeli settlers from the northern and southern Sinai areas or are you in favor of keeping the aforementioned settlers in those areas?”

The vote, Mr. President, on this issue will be completely free from the usual Parliamentary Party discipline to the effect that although the coalition is being now supported by 70 members out of 120, every member of the Knesset, as I believe, both of the Government and the Opposition benches will be enabled to vote in accordance with his own conscience.⁷²

⁷¹ See A. Ben, *In the Corrals*, *Haaretz English edition*, recounting an article by Amos Hadar published in *Haaretz* on 30 Sept. 1977, covering Begin's speech at Neot Sinai.

⁷² For the text of the letter, see 17 *I.L.M.* 1471 (1978). Egyptian President Anwar El Sadat, in turn, also sent President Carter a side letter dated as of the date of the framework in which he stated, among other things: “If Israel fails to meet this commitment, the “framework” shall be void and invalid.” *Id.*

Ultimately, the Israeli Knesset approved the removal of the Israeli settlements as part of approving the entire Camp David Accords⁷³ and Begin was able to both bring peace between Israel and Egypt and save face: It was not him who decided to remove the Israeli settlers from the Sinai; rather, it was the Israeli Knesset.

Similarly, the Camp David Framework (Palestinian Autonomy) included several references to “Palestinians” and the “Palestinian people” (such as in a sentence that read: “The solution from the negotiations must also recognize the legitimate right of the Palestinian peoples and their just requirements”),⁷⁴ which the Israeli delegation, and particularly Begin, found to contradict deeply rooted convictions that considered the West Bank to be part of Israel and, therefore, could not accept that the Arab inhabitants of these areas are a people entitled to national rights. For the same reason, Begin and the Israeli delegation could not accept a reference to this area as the “West Bank,” a name that was coined after the Hashemite Kingdom of Transjordan, in 1950, annexed those areas of the Mandated Palestine that it had captured in the 1948-49 war and then changed its name to the Hashemite Kingdom of Jordan, since, following the annexation, it included an East Bank and a West Bank. For Begin and the Israeli delegation, therefore, referring to this area as the West Bank suggested implicit recognition of Jordanian sovereignty. Instead, they preferred to use the Biblical name “Judea and Samaria,” which suggested Israeli sovereignty. Given these deep ideological convictions, Begin’s acceptance of the Camp David Framework (Palestinian Autonomy) hinged upon another side letter that he wrote to Carter, dated as of the date of the framework, which was not contradicted by any side letters from Sadat or Carter, and which read:

I hereby acknowledge that you have informed me as follows:

1. In each paragraph of the Agreed Framework Document the expressions “Palestinians” or “Palestinian People” are being and will be construed and understood by you as “Palestinian Arabs”.

⁷³ The vote occurred on 28 Sept. 1978 and the accords were approved by a vote of 85 out of 120 Knesset members supporting the accords, 19 voting against and 16 abstaining. See W. Claiborne, “Knesset Votes 85-19 to Approve Accords”, *Wash. Post* (28 Sept. 1978).

⁷⁴ Camp David Framework (Palestinian Autonomy), Section A.3. Reprinted in 17 *I.L.M.* 1466 (1978).

2. In each paragraph in which the expression "West Bank" appears it is being, and will be, understood by the Government of Israel as Judea and Samaria.⁷⁵

The argument over the use of words in the Camp David Framework (Palestinian Autonomy) reflected in these side letters, far from resembling the Gershwian "potato-potahto" squabble, is no small potatoes. It epitomizes the very essence of the fundamental dichotomy between the parties' underlying positions regarding the ultimate resolution of the Palestinian problem. More specifically, there was no need to resolve the ultimate fate of the West Bank and Gaza in the context of the Camp David Framework (Palestinian Autonomy). On the contrary, the resolution of the future status of these areas was deliberately deferred to after the conclusion of the five-year transitional period envisioned in the framework. Yet, Israel was concerned that its acceptance of several specific words or expressions included in the framework might be used against it, as precedents, during the next round of negotiations to be held five years later. Not less important, Begin was concerned that members of his Likud Party and other coalition parties would criticize him, vote against the Camp David Frameworks or even leave the party or the coalition, as appropriate. He, therefore, needed a way to demonstrate that, by compromising in Camp David on semantic issues, he had not betrayed his underlying ideology. The side letters, therefore, were intended to serve in the dual role of preserving Begin's positions both externally (towards Egypt and other third parties) and internally.

These sensitivities were, by no means, limited to Begin and Israel. Sadat and Egypt too struggled with how to explain, domestically, to other Arab countries, and particularly to the Palestinians, the fact that they agreed to sign the Camp David Framework (Palestinian Autonomy) so that, while it was clearly made applicable to the Palestinians of the West Bank, an area commonly considered to include East Jerusalem, there was also an implicit American-Israeli-Egyptian understanding - another constructive ambiguity - that the framework did not apply to East Jerusalem or even to Palestinians of East Jerusalem. The resultant Egyptian sensitivity was resolved by yet another side letter that Sadat sent to Carter, also dated as of the date of the framework, in which Sadat explained Egypt's position about East Jerusalem, stating, among other things, as follows:

1. Arab Jerusalem is an integral part of the West Bank. Legal and historical Arab rights in the city must be respected and restored.
2. Arab Jerusalem should be under Arab sovereignty.

⁷⁵ 17 *I.L.M.* 1471 (1978).

3. The Palestinian inhabitants of Arab Jerusalem are entitled to exercise their legitimate national rights, being part of the Palestinian People in the West Bank.⁷⁶

This type of constructive ambiguity is intended to serve the same purpose that the inclusion of a “no admission of liability” clause serves in the context of settling domestic court disputes. Such settlement agreements invariably include a provision that reads, more or less, as follows:

This Agreement constitutes a compromise, settlement, and release of disputed claims and is being entered into solely to avoid the burden, inconvenience, and expense of litigating those claims. No Party to this Agreement admits any liability to the other Party with respect to any such claim or any other matter. Each Party expressly denies liability as to every claim, which may be asserted by the other Party. Therefore, this Agreement is not to be and shall never be construed or deemed an admission or concession by any of the Parties hereto of liability or culpability at any time for any purpose concerning any claim being compromised, settled, and released, or any other matter.

Fifteen years later, when Israel and the PLO negotiated the Oslo Declaration of Principles, in order to relieve the two parties from the need to qualify their practical resolutions regarding transitional, autonomy arrangements by sending side letters repeating their fundamental disagreements as to permanent status issues, the parties included the following statement in the DOP:

The two parties agree that the outcome of the permanent status negotiations should not be prejudiced or preempted by agreements reached for the interim period.⁷⁷

The inclusion of the above-quoted provision in the Oslo Declaration of Principles, allowed the Palestinian negotiators in Oslo to exclude East Jerusalem from the jurisdiction of the Palestinian Council more explicitly than how that issue was addressed in Camp David.⁷⁸

⁷⁶ *Id.* at 1473. Begin countered by sending another letter to Carter in which Begin recounted Israel’s position regarding Jerusalem, according to which, under Israeli law “Jerusalem is one city indivisible, the capital of the State of Israel.” *Ibid.*

⁷⁷ Oslo Declaration of Principles, Art. V, Section 4.

⁷⁸ *Id.* at Art. IV, Art. V, Section 3, and Agreed Minutes to Art. IV.

In sum, this type of constructive ambiguity allows the parties to reach agreement in which they resolve an issue on a practical basis, while preserving their positions on the larger, more fundamental issues that do not need to be resolved at that time and, at the same time, equipping them with ammunition to “sell” the agreement to their domestic constituencies and international partners to gain the necessary political support for their concessions.

D. Third type of Constructive Ambiguity: Deferral of the Resolution of a Difficult Substantive Issue to a Later Time

Unlike the second type of constructive ambiguity, which focuses on facilitating the making of concessions by the parties by allowing them to save face or preserve positions on other, more general issues, the third type of constructive ambiguity occurs when the parties simply cannot reach an agreement on one or more of the issues the resolution of which appears to be essential. At some point, after confirming that they had exhausted all of their attempts to resolve the issues and that any further efforts may simply be a waste of time, the parties might conclude that it would be better to have an incomplete agreement in place rather than to forgo the agreement altogether.

For this situation to exist, normally all of the following conditions must occur:

- (a) The parties have already resolved almost all of the issues that were the subject of negotiations, but one issue remains unresolved.
- (b) They each understand that the other party also will not give up on the issue. The only alternative for them, if they are not prepared to give up, is to walk away without an agreement.
- (c) They cannot give up on the remaining issue. The unresolved issue is too important to give it up, even subject to some face-saving cosmetics. No substantive compromise is possible.
- (d) They conclude that they cannot politically enter into the agreement while only including a clause in the agreement stating that no agreement was reached on one issue and the parties would continue to negotiate the issue at a later time. Likely, it is clear that the issue cannot be resolved in the foreseeable future and their respective

constituency expects them to score right away or, at a minimum, not to leave such an issue open.

(e) They conclude that they would still each be better off with an agreement than without an agreement, even if they each cannot get what they want or need regarding that issue.

(f) In these circumstances, the parties may be open to a resolution that is based on constructive ambiguity regarding that remaining issue.

By “resolving” the issue in an ambiguous way, each side can interpret the clause differently so as to be able to assert that it has prevailed. There is no face-saving to the losing side here and no ladder is being offered to any party to facilitate the climbing down from the tree because there is no losing side. Rather, both sides can truthfully declare a victory.

Of course, this type of constructive ambiguity cannot be used to resolve a dispute regarding an issue that relates to any physical step that must be taken shortly after the agreement is signed. It is most appropriate for either declaratory, non-physical issues or physical issues that are, in fact, contingencies that may or may not happen in the long run. The thought is that either the contingency will never happen, in which case there is no reason to walk away from an agreement that is, but for that issue, fully agreed. Or, if the contingency does happen sometimes in the future, the circumstances may change by then so that what is not possible now may be possible then. Meanwhile, the two sides may benefit from the conclusion of the agreement that they both desire to accomplish.

In this connection, the following Jewish joke, often told during Arab - Israeli negotiating sessions, has already gained a permanent place in the negotiators' folklore:

An Eastern European King heard that a Jew was bragging that he could teach horses to talk. The King called the Jew and they made a deal that within one year the Jew would teach the King's horse to talk. According to the terms of the deal, during that year all the expenses of the Jew would be borne by the King, but if, at the end of the year, the horse could not talk, the King would cut off the Jew's head. When the Jew's wife heard about this agreement, she asked her husband bewilderedly, "Are you crazy? You know you can't teach horses to talk!" The husband replied

calmly: "Relax, one year is a long time. During that year, we'll live in the palace and wine and dine for free. By the end of this year maybe the King will die, or the horse will die, or the King will repent and release me, or he may be overthrown by his enemies and a new King will take over. Or maybe the horse will learn to talk."⁷⁹

In the Middle East peace process, the incremental approach to resolving problems was often useful. On many occasions, issues that were argued endlessly were successfully settled by adopting ambiguous language. Often the parties were content with this language and, after the agreement was executed, did not want to pursue the matter any further or did not need to do so, as the issue has become obsolete.

An important example of this type of constructive ambiguity occurred in the context of negotiating the Israel-Egypt Peace Treaty. At that time, there were two arguments between Israel and Egypt that were hotly debated until the very last moment. The first one related to the relationship between Egypt's obligations under the treaty and its obligations under prior agreements. Israel was aware that Egypt was a party to various agreements with other Arab countries, such as Syria and Jordan, that were of the nature of mutual security agreements, which required each party to come to the help of the other in case of a war with Israel, as well as the Joint Defense Treaty of the League of Arab States, which included similar provisions. While the parties agreed that, once the Israel-Egypt Peace Treaty entered into force, Egypt would be precluded from entering into new conflicting agreements,⁸⁰ they could not reach agreement regarding the impact of a conflict between their obligations under the treaty and their existing obligations under previously entered agreements. Israel demanded that the treaty would include a provision that would clearly state that in case of a conflict between each party's obligations under the Israel-Egypt Peace Treaty and their obligations under any prior agreement, the treaty's obligations would prevail. Egypt objected vehemently to the inclusion of such a provision in the treaty.⁸¹

⁷⁹ There is another version of this joke in which the protagonist is the Arab joker-philosopher Nasreddin who claimed to the Sultan that he could teach the Sultan's horse to *sing*, rather than to *talk*. The similarity between those two stories clearly demonstrates that, when it comes to Middle East negotiations, great minds on both sides of the aisle think alike.

⁸⁰ Thus. Art. VI, para. 4 stated unambiguously: "The Parties undertake not to enter into any obligation in conflict with this Treaty."

⁸¹ At that time, Egypt became the target of strong criticism from other Arab countries for being prepared to make separate peace with Israel. These attacks likely strengthened Egypt's reluctance to accept this Israel-proposed provision. Israel, on its part, was not prepared to give up the entire Sinai in return for Egyptian commitments to not go to war with Israel that were subordinate to other Egyptian commitments to fight against Israel

The second significant bone of contention was the linkage, if any, between the continued validity of the Israel-Egypt Peace Treaty and Israel's obligation under the Camp David Framework (Palestinian Autonomy) to negotiate an autonomy agreement for the West Bank and Gaza Palestinians. Israel wanted to avoid including any such linkage so as to preclude any possible future Egyptian argument that it was entitled to abrogate its Israel-Egypt Peace Treaty due to any lack of progress on the autonomy negotiations pursuant to the Camp David Framework (Palestinian Autonomy). Egypt, conversely, insisted on establishing such a linkage.⁸²

After the negotiations over those two issues, which took place in Washington, DC in 1978, reached a stalemate, the discussions broke down and the two delegations returned to Israel and Egypt, respectively. For a time, it appeared that Israel and Egypt would not be able to bridge their differences over the two issues (as well as a few other, less important issues). Several months later, however, during a trip made by President Carter to Israel and Egypt in early March 1979, Carter managed to bring the two parties to resolving these differences, which facilitated the signing of the Israel-Egypt Peace Treaty a few weeks later.⁸³

Importantly, however, while the parties agreed on the text of the treaty regarding those two issues, the text was, in fact, completely circular, reflecting the positions of the two parties, side by side, without definitively resolving the inherent contradiction between those two positions.

Thus, Article VI, Paragraph (2) of the treaty, which addressed primarily the issue of the linkage between the treaty and Israel's obligation to negotiate an autonomy agreement under the Camp David Framework (Palestinian Autonomy), stated:

The Parties undertake to fulfill in good faith their obligations under this Treaty, without regard to action or

alongside other Arab countries in case of a war between Israel and those other Arab countries.

⁸² For the Egyptian position regarding those two issues, see C. Bassiouni, "An Analysis of Egyptian Peace Policy Toward Israel: From Resolution 242 (1967) to the 1979 Peace Treaty", 12 *Case W. Res. J. Int'l L.* 3 (1980).

⁸³ For a Memorandum of Conversation that was developed by Zbigniew Brzezinski, Assistant to the President for National Security Affairs, of the discussion that took place in Israel between Carter and his team and Begin and his team regarding this and a few other issues, see "Center for Israel Education, Memorandum of Conversation between US President Jimmy Carter and Israeli Prime Minister Menachem Begin", *israeled.org*, 2 Mar. 1979, available at <https://israeled.org/memorandum-of-conversation-between-us-president-jimmy-carter-and-israeli-prime-minister-menachem-begin/>.

inaction of any other party and independently of any instrument external to this Treaty.

This language appears to have picked the Israeli position, according to which there would be no linkage between the Israel-Egypt Peace Treaty and the Camp David Framework (Palestinian Autonomy). However, the parties also executed Agreed Minutes that accompanied the treaty, in which they agreed, in connection with Article VI (2) quoted above, as follows:

The provisions of Article VI shall not be construed in contradiction to the provisions of the framework for peace in the Middle East agreed at Camp David. The foregoing is not to be construed as contravening the provisions of Article VI (2) of the Treaty, which reads as follows: "The Parties undertake to fulfill in good faith their obligations under this Treaty, without regard to action of any other Party and independently of any instrument external to this Treaty."

The first sentence of the Agreed Minutes relating to Article VI(2) appears to have adopted the Egyptian position and thus negates the content of Article VI(2), but then the second sentence of these Agreed Minutes contradicts their first sentence, again supporting the Israeli position.

On the issue of the conflict between the parties' obligations under the Israel-Egypt Peace Treaty and prior obligations of the parties, President Carter's compromise again adopted a "catch 22" solution. Thus, Article VI, Paragraph (5) of the treaty stated that

...in the event of a conflict between the obligations of the Parties under the present Treaty and any of their other obligations, the obligations under this Treaty will be binding and implemented.

This treaty provision too selected the Israeli position. But the Agreed Minutes again introduced confusion as to what was actually agreed by stating:

It is agreed by the Parties that there is no assertion that this Treaty prevails over other Treaties or agreements or that other Treaties or agreements prevail over this Treaty. The foregoing is not to be construed as contravening the provisions of Article VI (5) of the Treaty, which reads as follows: "Subject to Article 103 of the United Nations Charter, in the event of a conflict between the obligations of the Parties under the present Treaty and any of their

other obligations, the obligation under this Treaty will be binding and implemented.”

Again, the first sentence of the Agreed Minutes picked the Egyptian position, thus contradicting Article VI(5) of the treaty. But the second sentence of these Agreed Minutes once again repeated the Israeli position, thus contradicting the first sentence of these Agreed Minutes.

The way Carter resolved the dispute between Israel and Egypt over the two fundamental issues discussed above is probably the most prominent example of constructive ambiguity used in Israeli-Arab negotiations. It allowed both parties to declare a victory without actually resolving the argument but rather ‘fudging’ it. More importantly, it paved the way for signing the Israel-Egypt Peace Treaty by delaying the substantive resolution until a later time, depending on when, and, in fact, whether any of the contingencies of which Israel was concerned would arise.

As the subsequent events demonstrate, none of these contingencies materialized. Shortly after Israel and Egypt signed their peace treaty, the majority of Arab countries severed their diplomatic relations with Egypt and Egypt also was expelled from the Arab League. The issue of the conflict of Egypt’s obligations under its agreements with these countries and its obligations under the Israel-Egypt Peace Treaty became moot. As to the relations between the treaty and the Camp David Framework (Palestinian autonomy), for three years following the execution of the Israel-Egypt Peace Treaty, the two countries engaged in negotiations over a Palestinian autonomy agreement. Subsequently, these negotiations gradually frittered away while the Israel-Egypt Peace Treaty remained unaffected.

V. WHEN IS AMBIGUITY CONSTRUCTIVE AND WHEN IS IT DESTRUCTIVE?

The use of constructive ambiguity has been the target of criticism, but also the subject of praise. The main argument against using constructive ambiguity is that it may provide some short-term benefits but that it only defers problems without solving them, so that it is “dysfunctional in the long run for peace” and “simply misplaced and wrong for true peacemaking.”⁸⁴ Conversely, proponents of the use of this technique point out its usefulness as a “necessary evil” in situations where a deal that both parties are equally interested in making cannot be otherwise done.⁸⁵ In fact, however, constructive ambiguity

⁸⁴ A. Kleiman, *Constructive Ambiguity in Middle East Peace-Making*, 18-19 (1999).

⁸⁵ For a strong support of the use of constructive ambiguity, drawing on the lessons learned from the successful U.S. efforts to help bring peace in Northern Ireland and suggesting

is neither bad *per se* nor good *per se*. Rather, it is a type of negotiating tool that, if used correctly, may be indispensable in particular situations and, if used incorrectly, may result in failure of the agreement in which it was used.

As a starting point, no one contests that international agreements, such as peace treaties, should be drafted in a clear and unambiguous manner, to avoid, or at least minimize as far as possible, subsequent misunderstandings regarding what was agreed and potential disputes. Sloppy drafting must not be tolerated. Accordingly, the parties must strive to avoid leaving any inadvertent vagueness in the agreement. This is particularly important when drafting language that is based on a compromise between the positions of the two parties. Any type of compromise that results in language that one party or the other does not like or, more often, neither party likes, but at least it reflects precisely the compromise reached, is preferable to vague language. For instance, the parties may split the difference between them when arguing over quantitative issues, such as the number of tanks that Egypt may have in the Sinai under the Israel-Egypt Peace Treaty,⁸⁶ or the number of Palestinian police officers permitted in the Gaza Strip under the Gaza–Jericho Agreement.⁸⁷ Once a compromise has been reached on the quantitative issue, the agreed text should be precise. The parties also may compromise by Party A accepting the text proposed by Party B on one disputed issue in return for Party B accepting the text proposed by Party A on another issue. Here too the compromise would likely result in clear and unambiguous language on both of the originally disputed issues. Or the parties may resolve an argument over competing texts intended to resolve an issue by deciding to adopt a third formulation that is different entirely from both of their proposed texts and yet clear and precise.

Deliberate ambiguity is a type of compromise that should be employed to resolve arguments only as a last resort, that is, only if disputed issues cannot be resolved in a manner that provides a clear and commonly understood solution. As demonstrated by the discussion in previous sections of this article, constructive ambiguity has a better chance of being successful, and thus is much less objectionable, when it allows the parties to maintain their respective

same techniques should be used in the U.S. sponsored peace talks in the Middle East, *see* F. Ní Aoláin, “10 Things the United States has done right in Supporting a Peace Process: Lesson for the Middle East”, *justsecurity.org*, 14 Feb. 2014, available at <https://www.justsecurity.org/6764/10-united-states-supporting-peace-process-lesson-middle-east/>.

⁸⁶ *See* Peace Treaty Between Israel and Egypt, March 26, 1979, at Annex I [titled “Protocol Concerning Israeli Withdrawal and Security Agreements”] Article II, which specifies the number of Egyptian tanks permitted in Zone A. For the text of the treaty *see* XVIII *I.L.M.* 374 (1979).

⁸⁷ *See* Agreement on the Gaza Strip and the Jericho Area, *supra* note 64, at Annex I, Art. III, Section 3, which specified the number of Palestinian Police officers permitted in the Gaza Strip and the Jericho area.

national or cultural narratives and aspirations when those are divorced from the tangible issues that are the subject of the agreement, especially when full agreement has been reached regarding those tangibles.

Another situation where constructive ambiguity may not only be successful but also desirable is when it is intended to serve as face-saving for the party that has agreed, perhaps reluctantly, to make a concession, but needs support from the other party to allow it to do so in a dignified manner. As discussed above, this softer version of constructive ambiguity provides the party that is making a concession with some verbal cosmetics that the party can use to explain to its domestic constituency why it has made the concession or to show that the concession is not as bad as the political opposition and media argue. Of course, when drafting that type of constructive ambiguity, care must be taken to avoid any potential subsequent abuse by the party making the concession of the cosmetics applied to the text, which was intended only for face-saving purposes to attempt to evade the underlying obligations.

Constructive ambiguity is more suitable, if needed, to the very initial steps of the long road from the end of war to peace. At that time, the distance between the positions of the parties naturally is significantly wider than what is expected to be the case at the end of that road when full peace is accomplished. Documents signed by the parties at the beginning of that road tend to take the form of an agreement to agree, rather than a full-fledged, binding agreement. That type of document, such as the Camp David Frameworks, the Madrid Letters of Invitation and the Oslo Declaration of Principles, therefore, are more susceptible to constructive ambiguity. Because these documents are not enforceable, the risks associated with constructive ambiguity is lower and, moreover, the advantages of including constructive ambiguity in such documents are more significant. In fact, the role of constructive ambiguity in bringing the parties to sit together in the same room in those initial steps may be indispensable. But as the parties move forward to negotiate comprehensive, binding agreements, especially in connection with the tangible aspects of such agreements, the risks associated with constructive ambiguity get much higher and it should be avoided except for very rare situations. Evidence of the potential destructive impact of using constructive ambiguity in such situations is amply present in the events leading to the collapse of the initiative launched in 1970 by U.S. Secretary of State William Rogers (the "Rogers Plan").

Thus, in June 1970, Rogers published a new initiative to resolve the Middle-East Problem, which included, among other things, a comprehensive plan for resolving the entire Israeli-Arab conflict, as well as a 90-day "in-place" ceasefire component intended to end the then three-year long Israel-Egypt War of Attrition. That provision of the Rogers Plan stated:

H. Ceasefire to be effective would have to include understanding that (1) both sides would stop all incursions and all firing, on the ground and in the air, across the ceasefire lines, (2) UAR and USSR would refrain from changing military status quo (by emplacing SAMs or other new installations in an agreed zone west of Suez Canal cease-fire line), and (3) Israel would observe similar standstill on new installations in similar zone east of Canal.⁸⁸

After the United States notified Israel that both Egypt and the Soviet Union had accepted the Rogers Plan, Israel also accepted it and the ceasefire became effective on August 7, 1970. Yet, immediately after expressing its acceptance of the Rogers Plan, Egypt moved surface-to-air (SAM) missile batteries into the zone west of the Suez Canal in violation of the agreement. In response, shortly thereafter, Israel announced the withdrawal of its acceptance of the Rogers Plan, which led to the plan's collapse. Subsequently, it was revealed that Egypt likely never had fully accepted the ceasefire agreement and the United States and Soviet Union, being too eager to quickly proceed to resolve the entire Middle-East conflict may have 'fudged' the question of whether Egypt fully committed to the Rogers Plan. As recently reported,⁸⁹

On 23 July [Egyptian President] Nasser announced his acceptance of the US ceasefire proposal. ... But Nasser served notice that the SAMs would be advanced regardless of the ceasefire, even though the same day [Ambassador of the Soviet Union to the United States Anatoly] Dobrynin confirmed to Rogers that both the Soviets and the Egyptians accepted a contrary provision of the US proposal: "[Rogers said:] we assume that a military standstill as part of the cease-fire is also acceptable to the Soviet Union. Dobrynin responded affirmatively, adding, 'Yes, of course.' It was his understanding that [Egyptian] Foreign Minister [Mahmoud] Riad's statement to the Secretary covered this point." Dobrynin may not have been personally aware of it, but this "understanding" proved to be disingenuous, and its violation would doom the Rogers Plan. Kissinger

⁸⁸ See text of the Rogers Plan included in US Department of State Office of the Historian, "129. Telegram From the Department of State to Certain Diplomatic Posts", 19 Jun. 1970, available at <https://history.state.gov/historicaldocuments/frus1969-76v23/d129>.

⁸⁹ I. Ginor & Gideon Remez, *The Soviet-Israeli War, 1967-1973, The USSR's Military Intervention in the Egyptian-Israeli Conflict* (2017).

would then reportedly deny, in a promptly leaked off-the-record briefing, that there had been a full Egyptian “commitment” to the standstill and confirmed only an “understanding.” Other sources attributed it merely to tacit Egyptian acquiescence in an unsigned paper that Donald Bergus, head of the US interests section in Egypt, had left on Foreign Minister Riad’s desk. [Footnotes omitted.]

Id., at 190. Moreover, Kissinger himself later conceded that the ceasefire had been “born in fateful ambiguity” adding that “unfortunately, the agreed text was vague so as to what actions were prohibited by the standstill commitment.”⁹⁰

On the other hand, the constructive ambiguity used in the Israel-Egypt Peace Treaty regarding the relationship between the treaty and other agreements, as described above,⁹¹ demonstrates that sometimes, even when the text being negotiated is included in a binding agreement and the issue is very tangible, the risks that are inherent in the use of constructive ambiguity are still worth taking because the underlying contingency may or may not happen only in the long run, as opposed to the Rogers Plan’s ceasefire that was to be implemented the next day.

The fact that the circumstances that would have allowed Egypt to take actions contrary to the Israel-Egypt Peace Treaty, under Egypt’s interpretation of the treaty provision discussed above, did not actually occur, in and of itself, does not provide full justification to use constructive ambiguity in other similar situations. In fact, the events could have developed in a completely different direction.

At the same time, refusing to accept any constructive ambiguity in any circumstances may also have a price tag: Demanding that the other side accept your positions on all the issues that are important to you in a clear and precise manner may result in a situation where the deal simply falls apart. A window of opportunity may close. War or other types of hostilities that could have ended, may continue with more bloodshed that could have been avoided by taking a risk. As Shimon Peres once observed: “Be careful in seeking all or nothing, since nothing may come of it.”

There is a Hebrew saying commonly used in the Israeli military that goes like this: “*O tzalash - O tarash.*” While not rhyming as in Hebrew, the English translation is: “Either you are punished by being demoted to a very low rank

⁹⁰ H. Kissinger, *White House Years* (2011).

⁹¹ See Section IV.D *supra*.

or you get a medal of honor.” This saying means that sometimes officers that lead units in battle must make decisions that are based on intuition and experience without any ability to predict the outcome of their decision with any precision. The same decision may, therefore, sometimes lead to great success and sometimes to miserable failure. In these situations, the officer’s decision is always evaluated retroactively, and unfairly, based on whether it succeeded or failed, rather than based on whether, when taken, the decision was based on good judgment.

The decision whether or not to use constructive ambiguity appears to be characterized by the same considerations. Decision-makers and negotiators, therefore, confront hard choices. Thus, except when it is limited to agreements to agree or face-saving, in which constructive ambiguity may be tolerated or even encouraged, decision-makers and negotiators involved in Israeli-Arab peacemaking should use constructive ambiguity sparingly, considering carefully the prevailing circumstances, using their best judgment, and hoping for the best.

