

Fordham International Law Journal

Volume 36, Issue 3

2013

Article 1

The International Law as a Means of Negotiation Settlement

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ARTICLES

THE INTERNATIONAL LAW OF NEGOTIATION AS A MEANS OF DISPUTE SETTLEMENT

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INTRODUCTION

In the 1924 case *Mavrommatis Palestine Concessions* (“*Mavrommatis*”), the Permanent Court of International Justice (“PCIJ”) famously defined a “dispute” as a “disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.”¹ That case hinged upon whether there was a dispute between the United Kingdom and Greece and, if so, whether the United Kingdom, as the then Mandatory Power of Palestine, had violated certain of its international legal obligations related to concessions that had been granted to Greek national Mavrommatis in Mandatory Palestine. In his dissenting opinion, Judge Moore built upon the PCIJ’s understanding of the nature of a dispute in describing it as a “pre-existent difference, certainly in the sense and to the extent

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1. *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 11 (Aug. 30).

that the government which professes to have been aggrieved should have stated its claims and the grounds on which they rest, and that the other government should have had an opportunity to reply, and if it rejects the demands, to give its reasons for so doing.”² The *Mavrommatis* test for determining whether a disagreement simpliciter can be regarded as a legally-cognizable dispute is usually seen as reflecting general international law.³ The existence of a dispute, of course, is an absolute prerequisite for the application of the international law of dispute settlement.

Once a disagreement rises to the level of a dispute, then the international law of dispute settlement will apply. The cornerstone of this law is that disputes must be settled peacefully, “in such a manner that international peace and security, and justice, are not endangered,”⁴ and in the absence of the threat or use of force.⁵ Like its corresponding articles in the Covenant of the League of Nations before it,⁶ Article 33 of the Charter of the United Nations (“Charter”) recognizes various means of dispute settlement.⁷ In addition to such diplomatic means of dispute settlement as negotiation, enquiry, mediation, and conciliation, Article 33(1) lists arbitration and judicial settlement, both of which channel the parties, upon agreement, to resolve their dispute through, ultimately, the

2. *Id.* at 61 (Moore, J., dissenting).

3. See J. G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 1 (5th ed. 2011) (“A dispute may be defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another.”); see also *Questions Relating to Obligation to Prosecute or Extradite* (Belg. v. Sen.), Judgment, ¶ 46 (July 20, 2012), available at <http://www.icj-cij.org/docket/files/144/15054.pdf>; *Application of International Convention on Elimination of All Forms of Racial Discrimination* (Geor. v. Russ.), Preliminary Objections, ¶ 30 (Apr. 1, 2011), available at <http://www.icj-cij.org/docket/files/140/16398.pdf>.

4. U.N. Charter art. 2, para. 3.

5. See *id.* art. 2, para. 4.

6. See League of Nations Covenant arts. 12–17.

7. On Chapter VI of the UN Charter, with particular reference to Article 33, see Rosalyn Higgins, *International Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law*, in 230 *COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 9, 225–28 (1991). See also 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1, at 21 (Sept. 16, 2005); Anne Peters, *International Dispute Settlement: A Network of Cooperational Duties*, 14 *EUR. J. INT’L L.* 1, 4–9 (2003); see generally Manfred Lachs, *The Law and the Settlement of International Disputes*, in *DISPUTE SETTLEMENT THROUGH THE UNITED NATIONS* 283 (K. Venkata Raman ed., 1977).

reaching of a legally-binding agreement.⁸ Sir Hersch Lauterpacht captured the essential difference between diplomatic and legal means of dispute settlement well when, writing in 1930, he noted that parties that choose a diplomatic means of dispute settlement over a legal means of dispute settlement are effectively “substitut[ing] a series of attempts at settlement for a settlement proper.”⁹ Although, as this paper shows, it would not be correct to say that the law plays no role in diplomatic means of dispute settlement or that political considerations do not inform legal means of dispute settlement, it is true that these dichotomies have classically been put forward as the key distinguishing factors between diplomatic and legal means of dispute settlement.¹⁰

Drawing upon a number of important recent decisions of the International Court of Justice (“ICJ”) and other dispute settlement bodies, this paper sets forth what can best be described as the international law of negotiation. It shows that although the forms of this diplomatic means of dispute settlement are varied and diverse, the essential embeddedness of negotiation within a framework of legal evaluation means that a party’s failure to comply with its obligations can result in an internationally wrongful act and, in response, countermeasures and other responses by the victim party. This paper proceeds in three parts. Firstly, it looks at the relationship between negotiation and other means of dispute settlement, both diplomatic and legal. Secondly, it explores the modalities that govern when it can be said as a matter of law that negotiation has been tried and has been exhausted. Finally, it looks at the not uncommon situation of a negotiation that has broken down due to the commission of an internationally wrongful act by one of the parties under the law of negotiation and the potential for

8. U.N. Charter art. 33, para. 1. Article 33 also states that the parties to a dispute can have recourse to “regional agencies or arrangements” and “other peaceful means of their own choice,” though it does so without specifying whether these must be diplomatic or legal in nature. *Id.* Presumably, they could be either, appropriately tailored by the parties to the particular facts and circumstances of the dispute at issue.

9. Hersch Lauterpacht, *The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals*, 11 BRIT. Y.B. INT’L L. 134, 138 (1930).

10. See D. W. BOWELL, *Contemporary Developments in Legal Techniques in the Settlement of Disputes*, in 180 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 169, 177–78 (1983).

the victim party to adopt countermeasures and other responses to facilitate compliance with law and vindication of rights.

I. THE RELATIONSHIP BETWEEN NEGOTIATION AND OTHER MEANS OF DISPUTE SETTLEMENT

Negotiation is undoubtedly the oldest means of dispute settlement. In their dissenting opinions in *Mavrommatis*, Judges Moore and Pessôa referred to it as, respectively, the “legal and orderly administrative process by which governments, in the exercise of their unquestionable powers, conduct their relations one with another and discuss, adjust and settle, their differences”¹¹ and as “debate or discussion between the representatives of rival interests, discussion during which each puts forward his arguments and contests those of his opponent.”¹²

Like consultation within the context of the World Trade Organization’s dispute settlement system, negotiation allows the parties to a dispute to exchange information, assess their respective cases, and attempt to reach a mutually agreed upon understanding.¹³ Negotiation serves to focus disagreements and make disputes more “concrete,” with a view to settlement.¹⁴ It can involve tactics that are tough and challenging, and it often does. As such, ICJ Judge Lachs’ view that negotiation can “no longer be viewed as a chess game in which one party steers the other into a checkmate position”¹⁵ seems to overshoot the mark. Negotiation is most assuredly a “chess game in which one party steers the other into a checkmate position.”¹⁶ Although there are (legal) rules as to how the “chess game” can be played, it would be a rare party to a dispute that would not seek to maximize its advantage through negotiation.

11. *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 62–63 (Aug. 30) (Moore, J., dissenting).

12. *Id.* at 91 (Pessôa, J., dissenting).

13. See Appellate Body Report, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, ¶ 54, WT/DS132/AB/RW (Oct. 22, 2001).

14. See J. G. Merrills, *The Mosaic of International Dispute Settlement Procedures: Complementary or Contradictory?*, 54 NETH. INT’L L. REV. 361, 366 (2007).

15. Lachs, *supra* note 7, at 289.

16. *Id.*

In its purest form, negotiation does not involve third party intervention,¹⁷ and it can be relatively informal in nature.¹⁸ As a diplomatic means of settling disputes, it has the advantage of, inter alia, giving notice to the parties as to the existence and scope of a dispute and providing an opportunity to settle their dispute by mutual consent.¹⁹ It tends to favor parties that can leverage their greater attributes of power—be these military, political, economic, or otherwise—to influence the discussions, though it is also important to point out that the law does not require the weaker party to come to a legally-binding agreement with the stronger party. The PCIJ made this clear in 1931, when, in rejecting Poland’s argument that Lithuania was bound to negotiate with it until a legally-binding agreement had been reached, it stated that although the law of negotiation requires that the parties to a negotiation “pursue them [negotiations] as far as possible, with a view to concluding agreements[,] . . . an obligation to negotiate does not imply an obligation to reach an agreement.”²⁰ To be sure, there is ultimately a procedural and substantive “floor” to negotiation, but this will vary in each case and depend upon the particular facts and circumstances of the dispute at issue.²¹

17. See Michael Waibel, *The Diplomatic Channel*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 1085, 1090 (James Crawford et al., eds., 2010). *But see* Bowett, *supra* note 10, at 177 (articulating a rather broader understanding of negotiation that can admit third party involvement).

18. Waibel notes that this informality means that negotiation can take place at, inter alia, informal meals and in casual conversation. *See* Waibel, *supra* note 17, at 1087.

19. *See* Application of International Convention on Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, ¶ 131 (Apr. 1, 2011), available at <http://www.icj-cij.org/docket/files/140/16398.pdf>.

20. *Railway Traffic Between Lithuania and Poland*, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 42, at 12 (Oct. 15).

21. On negotiation generally as a means of dispute settlement, see JOHN COLLIER & VAUGHAN LOWE, *THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES* 20–24 (2000); MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT*, *supra* note 3, at 1–25; Antonio Cassese, *The Israel–PLO Agreement and Self-Determination*, 4 *EUR. J. INT’L L.* 564, 567 n.7 (1993); Waibel, *supra* note 17, at 1090; *see* Manila Declaration on the Peaceful Settlement of International Disputes, G.A. Res. 37/10, Annex, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/RES/37/10 (Nov. 15, 1982); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 26/25, Annex, 25 U.N. GAOR, 25th Sess., Supp. (No. 28), U.N. Doc. A/5217, at 121 (Oct. 24, 1970). On the Manila Declaration on the Peaceful Settlement of International Disputes, *see* Vladimir-Djuro Degan, *The Value of the Manila*

The text of Article 33 of the Charter does not as such indicate whether the parties to a dispute must choose diplomatic or legal means of dispute settlement, much less does it suggest that there is a hierarchy of means, that is, whether international law privileges particular means of dispute settlement over others. This is because, generally speaking, it does not. Rather, the general aim of Article 33 is to facilitate the peaceful settlement of disputes, and the means that the parties can choose to achieve this can be used either singly or in combination with each other. The Charter leaves the choice of means largely to the parties themselves,²² and they can arrive at the choice of means *ad hoc*, that is, as particular disputes arise, or this can be determined in advance, through a compromissory clause in a treaty that dictates particular means and modalities of dispute settlement.²³

While it is clear that the Charter does not as such indicate whether the parties to a dispute must choose diplomatic or legal means of dispute settlement or suggest a hierarchy of means, international law can direct that particular disputes be settled through particular means of dispute settlement, to the exclusion of others.²⁴ A typical example of this would be when the United Nations Security Council “recommends” that the parties settle their dispute through particular means but does so without adopting a legally-binding enforcement measure under Chapter VII of the Charter.²⁵ Of course, should the situation require it, the Security Council can also “decide” to require the parties to settle their dispute through particular means and can do so through the adoption of a legally-binding enforcement measure. This, of course, would then require the parties to settle their dispute through the mandated means of dispute settlement to the exclusion of others, pursuant to States’ Charter obligation to

Declaration on International Dispute Settlement in a Case in Which the Philippines is a Party, 11 CHIN. J. INT’L L. 5 (2012).

22. See *Aerial Incident of 10 August 1999 (Pak. v. India)*, Preliminary Objections, 2000 I.C.J. 12, 33 (June 21).

23. See, e.g., United Nations Convention on the Law of the Sea, arts. 279–99, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 3.

24. See Merrills, *supra* note 14, at 366–69, 389–92.

25. See U.N. Charter art. 33, para. 2; *id.* art. 36, para. 1.

“accept and carry out the decisions of the Security Council in accordance with the present Charter.”²⁶

Reference to the ICJ’s handling of a dispute in the mid-1970s between Greece and Turkey that involved the delimitation of the continental shelf in the Aegean Sea is helpful to illustrate this interplay. In exercise of its “primary responsibility for the maintenance of international peace and security,”²⁷ the Security Council adopted Resolution 395, which, *inter alia*, “[c]all[ed] upon the Governments of Greece and Turkey to resume direct negotiations over their differences and appeal[ed] to them to do everything within their power to ensure that these negotiations will result in mutually acceptable solutions.”²⁸ Through this Resolution, the Security Council sought to channel the settlement of this dispute through a particular means of dispute settlement, negotiation, and when the dispute reached the ICJ, the ICJ expressed some reluctance to indicate provisional measures on the basis of this.²⁹ Two years later, in 1978, the ICJ rejected Greece’s application on the basis that it lacked jurisdiction.³⁰ It did so on technical grounds, however, grounds that were unrelated to the fact that Resolution 395 had expressed a preference for a negotiated settlement between Greece and Turkey.³¹ As the ICJ put it, “the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function.”³² The basic idea here seems to be that international law’s overriding concern with facilitating the

26. *Id.* art. 25.

27. *Id.* art. 24, para. 1.

28. S.C. Res. 395, ¶ 3, U.N. Doc. S/RES/395 (Aug. 25, 1976). For another of the Security Council’s “callings upon” to negotiation involving another dispute in the eastern Mediterranean with obvious implications for Greece and Turkey, see S.C. Res. 1250, ¶ 7, U.N. Doc. S/RES/1250 (June 29, 1999).

29. See *Aegean Sea Continental Shelf (Greece v. Turk.)*, Interim Measures, 1976 I.C.J. 3, 13 (Sept. 11).

30. *Aegean Sea Continental Shelf (Greece v. Turk.)*, 1978 I.C.J. 3 (Dec. 19).

31. See *id.* In Paragraph 4, Resolution 395 also “[i]nvit[ed] the Governments of Greece and Turkey . . . to continue to take into account the contribution that appropriate judicial means, in particular the International Court of Justice, are qualified to make to the settlement of any remaining legal differences which they may identify in connexion with their present dispute.” S.C. Res. 395, ¶ 4, U.N. Doc. S/RES/395 (Aug. 25, 1976).

32. *Aegean Sea*, 1978 I.C.J. at 12; see *id.* at 52–53 (separate opinion of Lachs, J.).

peaceful settlement of disputes militates in favor of a multi-pronged strategy.³³

Conceivably, of course, a court with jurisdiction *could* delay rendering a judgment or even use its discretion to refuse to render a judgment *tout court* when a dispute is being settled, with whatever measure of success, through a diplomatic means of dispute settlement such as negotiation. The PCIJ suggested just such a possibility in its 1929 order in *Free Zones of Upper Savoy and the District of Gex*,³⁴ and more recently, Judge Xue and Judge ad hoc Roucouas showed considerable sensitivity to the wisdom and prejudicial potential of rendering a judicial decision alongside an ongoing negotiating process in their respective dissenting opinions appended to the ICJ's 2011 judgment in *Application of the Interim Accord of 13 September 1995* ("*Interim Accord*").³⁵ Nonetheless, a court with jurisdiction would be under no such obligation as a matter of law, a point that the ICJ most recently reiterated in *Interim Accord*.³⁶ From the ICJ's perspective, the question is whether there are "compelling reasons"³⁷ for it to use its discretion so as to stay proceedings and to refuse to proceed to the merits despite the presence of *prima facie* jurisdiction over a dispute.³⁸

33. See Waibel, *supra* note 17, at 1094–95.

34. See *Free Zones of Upper Savoy and District of Gex* (Fr. v. Switz.), Order, 1929 P.C.I.J. (ser. A) No. 22, at 13 (Aug. 19) (stating that the Permanent Court of International Justice ("PCIJ") had a "facilitat[ive]" role with regards to "direct and friendly settlement," though only "so far as is compatible with its Statute").

35. See *Application of Interim Accord of 13 September 1995* (Maced. v. Greece), Dissenting Opinion, 5 (Dec. 5, 2011), available at <http://www.icj-cij.org/docket/files/142/16833.pdf> (Xue, J., dissenting); *id.* ¶ 16 (Roucouas, J., dissenting), available at <http://www.icj-cij.org/docket/files/142/16835.pdf>. *But cf.* Peters, *supra* note 7, at 15 (suggesting that a court in such circumstances might be inclined to view this as an abuse of process).

36. See *Maced v. Greece*, 2011 I.C.J. ¶¶ 57–60; see also *Legal Consequences of Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 159–60 (July 9).

37. *Judgments of Administrative Tribunal of International Labour Organization Upon Complaints Made Against United Nations Educational, Scientific and Cultural Organization*, Advisory Opinion, 1956 I.C.J. 77, 86 (Oct. 23).

38. See *Judgment No. 2867 of Administrative Tribunal of International Labour Organization Upon a Complaint Filed Against International Fund for Agricultural Development*, Advisory Opinion, ¶¶ 33–34 (Feb. 1, 2012), available at <http://www.icj-cij.org/docket/files/146/16871.pdf>.

II. THE LAW OF NEGOTIATION

Prior to its 2011 rejection of Georgia's application against Russia during the preliminary objections phase of *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia)*,³⁹ the ICJ had spoken only generally about what international law requires for a negotiation to qualify as such as a means of dispute settlement.⁴⁰ A notable exception to this occurred in 1969, when the ICJ rendered judgment in conjoined cases that involved a dispute about the delimitation of the continental shelf in the North Sea, the *North Sea Continental Shelf* cases.⁴¹ In these cases, the ICJ found that both the 1958 Geneva Convention on the Continental Shelf did not apply against the Federal Republic of Germany because the State was not a party to the treaty and also that the equidistance principle did not apply as a matter of customary international law.⁴² Instead, the ICJ held that the States at issue, the Federal Republic of Germany and Denmark and the Federal Republic of Germany and the Netherlands, were required to enter into negotiations to settle their disputes and that these negotiations had to be purposeful, "with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement,"⁴³ as well as "meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it."⁴⁴ Although the ICJ articulated these legal parameters for negotiation as a means of dispute settlement within the particular context of the delimitation of the

39. Application of International Convention on Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, ¶ 30 (Apr. 1, 2011), available at <http://www.icj-cij.org/docket/files/140/16398.pdf>; see Phoebe Okowa, *The International Court of Justice and the Georgia/Russia Dispute*, 11 HUM. RTS. L. REV. 739 (2011).

40. For a fairly thorough articulation of the law of negotiation outside the context of the ICJ prior to *Geor. v. Russ.*, see German External Debts Arbitration (Kingdom of Greece v. F. R. G.), 47 I.L.R. 418, 451–62 (1972).

41. See generally North Sea Continental Shelf (F. R. G. v. Den.; F. R. G. v. Neth.), 1969 I.C.J. 3 (Feb. 20).

42. See *id.* at 46.

43. *Id.* at 47.

44. *Id.*

continental shelf, it seemed to have also been articulating the *lex generalis* of negotiation.⁴⁵

The ICJ handed down its judgment rejecting Georgia's application against Russia during the preliminary objections phase in April 2011. It had previously, in October 2008, ordered provisional measures against both States, though it did acknowledge in its provisional measures order that it "need not finally satisfy itself, before deciding whether or not to indicate such [provisional] measures, that it has jurisdiction on the merits of the case, yet it may not indicate them unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded."⁴⁶ In its 2011 judgment, the ICJ ultimately held that it did not have jurisdiction to proceed to the merits because, upholding the second of Russia's four preliminary objections, the terms of article 22 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") had not been satisfied.⁴⁷ Thus, the case was dismissed.

Georgia is a key development in the law of negotiation because the ICJ articulated a three-part understanding for this means of dispute settlement and, in so doing, spoke not simply about negotiation within the framework of the CERD, which would be a *lex specialis*, but also expanded its discussion to pronounce upon negotiation under international law

45. See *id.* at 47–48; see also Application of Interim Accord of 13 September 1995 (Maced. v. Greece), Judgment, ¶¶ 131–32 (Dec. 5, 2011), available at <http://www.icj-cij.org/docket/files/142/16827.pdf>; Pulp Mills on River Uruguay (Arg. v. Uru.), 2010 I.C.J. 14, 67 (Apr. 20); Fisheries Jurisdiction (F. R. G. v. Ice.), 1974 I.C.J. 175, 201–02 (July 25); Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, 31–33 (July 25).

46. Application of International Convention on Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Provisional Measures, 2008 I.C.J. 353, 377 (Oct. 15). On the October 2008 order, see Sandy Ghandhi, *The International Court of Justice and the Provisional Measures Order in the Georgia v. Russian Federation Case*, in CONFLICT IN THE CAUCASUS: IMPLICATIONS FOR INTERNATIONAL LEGAL ORDER 80 (James A. Green & Christopher P. M. Waters eds., 2010).

47. See *Geor. v. Russ.*, 2008 I.C.J. ¶¶ 115–84; International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, Annex, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014, at 47, art. 22 (Dec. 21, 1965) ("Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.").

generally.⁴⁸ It set forth the modalities that govern when it can be said as a matter of law that negotiation has been tried and has been exhausted. Specifically, the ICJ approached the condition predicate of negotiations by examining “what constitutes negotiations; . . . their adequate form and substance; and . . . to what extent they should be pursued before it can be said that the precondition has been met.”⁴⁹ It is worth examining the ICJ’s analysis here in some detail.

As to “what constitutes negotiations,” the ICJ contrasted them with “mere protests or disputations.”⁵⁰ “[M]ore than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims,”⁵¹ a negotiation requires a “genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute.”⁵² A negotiation can be said as a matter of law to have been tried and to have been exhausted once the negotiating process experiences “failure . . . or become[s] futile or deadlocked.”⁵³ Although it may seem obvious, the ICJ also felt compelled to state that a negotiation must also relate to the subject matter of the dispute.⁵⁴ What is absolutely clear from this is that, according to the ICJ, when the parties to a dispute are required to channel the settlement of their dispute through negotiation, neither can credibly claim that it need not even attempt to negotiate or that the mere

48. Application of International Convention on Elimination of All Forms of Racial Discrimination (*Geor. v. Russ.*), Preliminary Objections, ¶ 30 (Apr. 1, 2011), *available at* <http://www.icj-cij.org/docket/files/140/16398.pdf>. *But cf.* *Mavrommatis Palestine Concessions* (*Greece v. U.K.*), 1924 P.C.I.J. (ser. A) No. 2, at 13 (Aug. 30).

49. *Geor. v. Russ.*, 2011 I.C.J. ¶ 156.

50. *Id.* ¶ 157.

51. *Id.*

52. *Id.*

53. *Id.* ¶ 159 (citations omitted). In its July 2012 judgment in *Questions Relating to the Obligation to Prosecute or Extradite*, the International Court of Justice (“ICJ”) clarified that it could be said that negotiation had been tried and had been exhausted when the “basic positions . . . [of the parties to a dispute had] not subsequently evolved.” *Questions Relating to the Obligation to Prosecute or Extradite* (*Belg. v. Sen.*), Judgment, ¶ 59 (July 20, 2012), *available at* <http://www.icj-cij.org/docket/files/144/17064.pdf>.

54. *See Geor. v. Russ.* 2011 I.C.J. ¶ 161.

factual existence of a dispute suffices as a matter of law to show that negotiation has been tried and has been exhausted.⁵⁵

As stated above, the ICJ in *Georgia* upheld Russia's preliminary objection that the terms of article 22 of the CERD had not been satisfied and, thus, that there was no jurisdiction to proceed to the merits. There was not unanimity on this point, however. A joint dissenting opinion by President Owada, Judges Simma, Abraham, and Donoghue, and Judge ad hoc Gaja, for example, contended that the majority had set the "bar" for negotiation "too high."⁵⁶ According to this view, negotiation can be said as a matter of law to have been tried and to have been exhausted when there is no longer, if there ever was, a "reasonable possibility of settling the dispute by negotiation."⁵⁷ Furthermore, this dissent stated that the crux of the majority's analysis in this regard should have been more firmly rooted in matters of substance and a realistic assessment of the particular facts and circumstances of the dispute at issue rather than what it stated to be a formalistic or procedural perspective.⁵⁸ More radically, Judge Cançado Trindade's dissenting opinion dismissed the very relevance of Article 22 of the CERD as a condition predicate to the ICJ's exercise of jurisdiction in *Georgia*, criticizing it for being a "groundless and most regrettable obstacle to justice."⁵⁹

55. Hence, the International Court of Justice ("ICJ") rejected Georgia's argument in its memorial that, "under Article 22 of the 1965 Convention, there is no affirmative obligation for the Parties to have attempted to resolve the dispute through negotiations (or through the procedures established by the Convention). All that is required is that, as a matter of fact, the dispute has not been so resolved." Memorial of Georgia, Application of International Convention on Elimination of All Forms of Racial Discrimination (*Geor. v. Russ.*), vol. 1, I.C.J., at 304 (Sept. 2, 2009).

56. Application of International Convention on Elimination of All Forms of Racial Discrimination (*Geor. v. Russ.*), Dissenting Opinion, (Apr. 1, 2011), *available at* <http://www.icj-cij.org/docket/files/140/16422.pdf> (Owada, J., dissenting).

57. *Id.* ¶ 12

58. *See id.* ¶¶ 48–63. *But cf.* South West Africa Cases (*Eth. v. S. Afr.*; *Liber. v. S. Afr.*), Preliminary Objections, 1962 I.C.J. 319, 346 (Dec. 21) (de-emphasizing form and focusing on the "attitude and views of the Parties on the substantive issues of the question involved").

59. *Geor. v. Russ.*, 2011 I.C.J. ¶ 208 (Cançado Trindade, J., dissenting). "The Court cannot keep on embarking on a literal or grammatical and static interpretation of the terms of compromissory clauses enshrined in those treaties, drawing 'preconditions' therefrom for the exercise of its jurisdiction, in an attitude remindful of traditional international arbitral practice. When human rights treaties are at stake, there is need, in my perception, to overcome the force of inertia, and to assert and develop the

Implicit in all of this, of course, is the idea that negotiation must be conducted in good faith.⁶⁰ Although this legal principle is admittedly one that can seem irredeemably vacuous and question-begging *in abstracto*, it is, as the ICJ has noted, “[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source,”⁶¹ and international law has consistently reaffirmed the centrality of good faith under the law of negotiation.⁶² It is a primary law obligation that focuses mainly, though not exclusively, on process considerations, and when a treaty requires that the parties to a dispute settle their dispute by negotiation, good faith “kicks in” by virtue of Article 26 of the 1969 Vienna Convention on the Law of Treaties (“VCLT”).⁶³ This is, to quote Judge Greenwood in his separate opinion appended to the ICJ’s 2010 judgment in *Pulp Mills on the River Uruguay*, “implicit,”⁶⁴ and the fact that some treaties qualify a duty to negotiate with the phrase “good faith” is reaffirmative rather than imposing a “new” obligation as such.⁶⁵

compulsory jurisdiction of the ICJ on the basis of the compromissory clauses contained in those treaties.” *Id.* at ¶ 206.

60. *Cf.* Reference re Secession of Québec, [1998] 2 S.C.R. 217, para. 104 (Can.) (articulating an analogous notion of “principled negotiations”).

61. Nuclear Tests (Ausl. v. Fr.), 1974 I.C.J. 253, 268 (Dec. 20); Nuclear Tests (N. Z. v. Fr.), 1974 I.C.J. 457, 473 (Dec. 20).

62. *See, e.g., Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries*, [2001] 2 Y.B. Int’l L. Comm’n 148, 160–61, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2). On six consequences of the good faith principle within the context of international dispute settlement’s duty to cooperate, see Peters, *supra* note 7, at 15–16.

63. *See Pulp Mills on River Uruguay (Arg. v. Uru.)*, 2010 I.C.J. 14, 67 (Apr. 20); *see also* Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT] (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”); ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 352–54 (2d ed. 2009).

64. *Pulp Mills*, 2010 I.C.J. at 223 (separate opinion of Greenwood, J.); *see also* Application of Interim Accord of 13 September 1995 (Maced. v. Greece), Judgment, ¶ 131 (Dec. 5, 2011), *available at* <http://www.icj-cij.org/docket/files/142/16827.pdf>.

65. *See, e.g., Treaty on the Non-Proliferation of Nuclear Weapons*, art. 6, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT] (stating that “[e]ach of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control”). On Article 6 of the Treaty on the Non-Proliferation of Nuclear Weapons (“NPT”), *see* Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 263–65 (July 8). For some perspective on this

The 1925 arbitral award in the *Tacna-Arica Question (Tacna-Arica)*⁶⁶ gives some texture to this legal principle of good faith within the context of negotiation.⁶⁷ *Tacna-Arica*, which US President Calvin Coolidge decided as arbitrator, involved a dispute between Chile and Peru over the provinces of Tacna and Arica.⁶⁸ After the War of the Pacific in the late-nineteenth century, Chile and Peru agreed that the former State would possess Tacna and Arica for ten years, after which time, according to article 3 of the Treaty of Ancon, a plebiscite would “decide by popular vote whether the territory of the above-mentioned provinces is to remain definitely under the dominion and sovereignty of Chile or is to continue to constitute a part of Peru.”⁶⁹ What is relevant for present purposes is the award’s view as to how good faith should operate when a legal framework, in this case, the Treaty of Ancon, indicates an end result, the holding of a plebiscite, without stipulating the modalities and timeframe that should govern the manner in which this end result should be reached.⁷⁰

Given that the Treaty of Ancon on this point was merely an “agreement to agree with no time specified and no forfeiture provided,”⁷¹ President Coolidge framed the question as a matter of good faith. Clearly, Chile and Peru had to negotiate in good faith, and this was an obligation for both States equally unless one of the States demonstrated a “wilful refusal [. . .] so to do.”⁷² In their negotiation, both States were free to propose and

obligation in light of the NPT’s negotiating history, see Edwin Brown Firmage, *The Treaty on the Non-Proliferation of Nuclear Weapons*, 63 AM. J. INT’L L. 711, 732–37 (1969). See also DANIEL H. JOYNER, INTERPRETING THE NUCLEAR NON-PROLIFERATION TREATY 95–108 (2011).

66. *Tacna-Arica Question (Chile/Peru)*, 2 R.I.A.A. 921 (1925).

67. *Interim Accord* cited *Tacna-Arica* as reflecting customary international law on this point. See *Maced v. Greece*, 2011 I.C.J. ¶ 132 (Dec. 5).

68. For background to the dispute, see Ronald Bruce St. John, *Chile, Peru and the Treaty of 1929: The Final Settlement*, 8 IBRU BOUNDARY & SEC. BULL. 91 (2000).

69. *Tacna-Arica*, 2 R.I.A.A. at 926. Article 3 of the Treaty of Ancon also stipulated that the State that would ultimately annex Tacna and Arica after the plebiscite would have to pay a sum of money to the other State and that the two States would have to agree to a special protocol before the plebiscite could be held. See *id.*

70. See *id.* at 927–44. President Coolidge also decided on the conditions of the plebiscite and some questions related to the northern and southern boundaries of Tacna and Arica. See *id.* at 944–57.

71. *Id.* at 928.

72. *Id.* at 929.

counter-propose conditions that each hoped would ultimately govern the holding of the plebiscite, and it could not be said that either State had violated the obligation to negotiate in good faith provided that it had at all times maintained the required, so to speak, *mens rea*. Put differently, neither State could show an “intent to frustrate the carrying out of the provisions of Article 3 with respect to the plebiscite; that is, not simply the refusal of a particular agreement proposed thereunder, because of its terms, but the purpose to prevent any reasonable agreement for a plebiscite.”⁷³ A violation of the good faith obligation “should not be lightly imputed.”⁷⁴ A sustainable case *could*, however, be made on the basis of circumstantial evidence, though not on the basis of “disputable inferences but[, rather,] by clear and convincing evidence which compels such a conclusion.”⁷⁵

An important point to note in relation to the law of negotiation is that the *duration* of the process is not dispositive when it comes to determining whether it can be said as a matter of law that negotiation has been tried and has been exhausted. As the ICJ put it in its 1971 advisory opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, “[i]n practice[,] the actual length of negotiations is no test of whether the possibilities of agreement have been exhausted.”⁷⁶ Similarly, the arbitral tribunal in *Government of Kuwait v. American Independent Oil Company* framed

73. *Id.* at 930.

74. *Id.*

75. *Id.*; *cf.* *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 18 (Apr. 9) (permitting a “more liberal recourse to inferences of fact and circumstantial evidence” and “indirect evidence” in another context).

76. *Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, 44 (June 21) (continuing by stating that “it may be sufficient to show that an early deadlock was reached and that one side adamantly refused to compromise”); *see Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. A) No. 2, at 13 (Aug. 30) (stating that “[n]egotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a dead lock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that *the dispute cannot be settled by diplomatic negotiation*”).

negotiation's temporal dimension as follows: "good faith as properly to be understood; sustained upkeep of the negotiations over a *period appropriate to the circumstances*; awareness of the interests of the other party; and a persevering quest for an acceptable compromise."⁷⁷ These are questions that must be decided by the parties in good faith, on a case-by-case basis, and with due regard to considerations of reasonableness and equity.⁷⁸ The law of negotiation does not focus on temporal concerns as such; these are secondary. Rather, it looks at good faith and related considerations. In a word, the focus is on whether, considering all of the facts and circumstances at issue, the negotiation is, or can be said to have been, "meaningful."⁷⁹ The concern is with conduct, not result, on process, not conclusive resolution.⁸⁰ It is a question of due diligence, as well.⁸¹

Of course, while the general international law position is that duration is not dispositive, special rules of law can change this analysis.⁸² A *lex specialis* within the context of a particular negotiation can "elevate" the relevance of duration and make it, if not the sole criterion, certainly a more consequential criterion than would otherwise be the case under general international law. The most obvious example of this would be when the underlying law requires the parties to reach a negotiated settlement within a fixed period of time.⁸³ Articles 74(2) and

77. *Gov't of Kuwait v. Am. Indep. Oil Co. (Aminoil)*, 66 I.L.R. 518, 578 (Int'l Arb. Trib. 1982) (emphasis added).

78. *See* Interpretation of Agreement of 25 March 1951 Between World Health Organization and Egypt, Advisory Opinion, 1980 I.C.J. 73, 96 (Dec. 20).

79. Application of Interim Accord of 13 September 1995 (Maced. v. Greece), Judgment, ¶ 134 (Dec. 5, 2011), available at <http://www.icj-cij.org/docket/files/142/16827.pdf>.

80. *See id.*

81. *See generally* Robert P. Barnidge, *The Due Diligence Principle Under International Law*, 8 INT'L CMTY. L. REV. 81 (2006) (discussing the due diligence principle generally under international law).

82. *See generally* *Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/SER.A/2001/Add.1 [hereinafter *Articles on State Responsibility*].

83. *See, e.g.*, Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), 2010 I.C.J. 639, 691–92 (Nov. 30). For a view supporting the ICJ's ordering of a negotiated settlement as to reparation within a fixed period of time in its November 2010 judgment in *Diallo*, see Sandy Ghandhi, *Human Rights and the International Court of Justice: The Ahmadou Sadio Diallo Case*, 11 HUM. RTS. L. REV. 527, 551–53 (2011). In the wake of *Diallo*, Guinea and the Democratic Republic of the Congo failed to reach agreement on

83(2) of the 1982 United Nations Convention on the Law of the Sea, for instance, would be a less straightforward example. These articles call for States with opposite or adjacent coasts to reach agreement with each other as regards the delimitation of, respectively, the exclusive economic zone and the continental shelf within a “reasonable period of time.”⁸⁴ While there are no “hard and fast” rules regarding the meaning of a “reasonable period of time,” each case having to be assessed on the basis of particular facts and circumstances, it is worth noting that the tribunal in the 2006 arbitral award in *Barbados v. Trinidad and Tobago* found that negotiations related to the delimitation of the exclusive economic zone and the continental shelf over the course of roughly twenty-five years that failed to result in an agreement between the States satisfied the criterion of a “reasonable period of time.”⁸⁵

III. WHEN NEGOTIATION BREAKS DOWN: COUNTERMEASURES AND OTHER RESPONSES

Negotiation as a means through which the parties to a dispute can peacefully settle their differences does not usually have all of the trappings and formalities of, for example, arbitration or judicial settlement. As has been shown above, however, there is nonetheless a framework of legal norms against which the acts and omissions of the negotiating parties can be assessed, and a party to a dispute is theoretically no more (or less) likely to commit (or not) an internationally wrongful act within the context of a negotiation than it is within the context of a different means of dispute settlement, be it diplomatic or legal. With the possibility of an internationally wrongful act comes the entire panoply of the law of international responsibility, and within this legal universe are countermeasures and other responses that a victim party can

compensation within the six-month period of time that the ICJ had stipulated for them for a negotiated settlement. The ICJ ended up awarding US\$85,000 for Diallo's non-material injury and US\$10,000 for the material injury to his personal property. See Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Compensation Judgment, ¶ 61 (June 19, 2012), available at <http://www.icj-cij.org/docket/files/103/17044.pdf>.

84. United Nations Convention on the Law of the Sea, *supra* note 23, art. 74, para. 2; *id.* art. 83, para. 2.

85. See *Delimitation of Exclusive Economic Zone and Continental Shelf (Barb. v. Trin. & Tobago)*, 27 R.I.A.A. 147, 204 (Perm. Ct. Arb. 2006).

potentially take to facilitate compliance with law and vindication of rights.

It might be thought that the absence of third party intervention in negotiation (in its purest form) and its relatively informal nature mean that a party to a dispute is left without recourse if the other party violates its obligations under the law of negotiation. This, however, is not the case. One of the responses that a victim party can take is countermeasures, and these, it must be said, “hover disconsolately on the Stygian waters which divide the imperfectly held terrain of international law from the uncontrolled terrain of extralegal anarchy.”⁸⁶ Within the context of negotiation, countermeasures are meant to facilitate, and not to obstruct, a negotiated settlement, to restore equality and symmetry between the parties.⁸⁷ As the arbitral tribunal in the 1978 *Air Service Agreement of 27 March 1946 Between the United States of America and France* (“*Air Service Agreement*”) defined them, countermeasures are “contrary to international law but justified by a violation of international law allegedly committed by the State against which they are directed.”⁸⁸

The *Air Service Agreement* arbitral award involved a dispute between the United States and France concerning American-designated planes undertaking changes of gauge in the United Kingdom on flights between the West Coast of the United States and France. The French grounded a Pan American World Airways (Pan American) flight to Paris Orly Airport and

86. Julius Stone, *International Conflict Resolution*, in *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* (1968); see ELENA KATSELLI PROUKAKI, *THE PROBLEM OF ENFORCEMENT IN INTERNATIONAL LAW: COUNTERMEASURES, THE NON-INJURED STATE AND THE IDEA OF INTERNATIONAL COMMUNITY* 68–76 (2010); Hubert Lesaffre, *Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Countermeasures*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY*, *supra* note 17, at 469; Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law*, in 178 *COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 9, 167–87 (1982); see generally David J. Bederman, *Counterintuiting Countermeasures*, 96 *AM. J. INT’L L.* 817 (2002).

87. See *Air Service Agreement of 27 March 1946 Between the United States of America and France*, 18 *R.I.A.A.* 417, 444–45 (Perm. Ct. Arb. 1978).

88. *Id.* at 444. The contemporary law related to countermeasures finds its roots in the notion of reprisals. See Oscar Schachter, *Dispute Settlement and Countermeasures in the International Law Commission*, 88 *AM. J. INT’L L.* 471, 471–72 (1994). For the classic definition of reprisals, see *Responsibility of Germany for Damage Caused in Portuguese Colonies in South of Africa (Port. v. Ger.)*, 2 *R.I.A.A.* 1011, 1025–26 (1928).

suspended future Pan American flights to France. In response, the US Civil Aeronautics Board required French companies Union de Transports Aériens and Air France to file with it existing and future flight schedules related to flights to and from the United States.⁸⁹ The second of two questions that the arbitral tribunal had to address was the issue of the lawfulness of the United States' response to France's actions against Pan American.⁹⁰

While the arbitral tribunal in *Air Service Agreement* ultimately found in favor of the United States on the countermeasures issue, what is more broadly interesting than the specific dispute in that case is the reasoning that was used in assessing the contours of permissible countermeasures. The arbitral tribunal noted that, in taking countermeasures, a victim party essentially "affirm[s] its rights"⁹¹ and can only do so as a matter of proportionate response.⁹² Obviously, proportionality is not an exact science, here as elsewhere in the law. According to the arbitral tribunal, what is involved is "some degree of equivalence"⁹³ and "very approximative appreciation."⁹⁴ In addition to the question of proportionality, the victim party's "hand" is potentially "strengthened" in that it can also account for issues of principle arising from the alleged violation of international law by the other party, not simply the material injury that may have been caused.⁹⁵ To this, it might be pointed out, arbitrator Reuter's dissenting opinion added consideration of "probable effects."⁹⁶ It is also crucial to point out that the arbitral tribunal in *Air Service Agreement* acknowledged the permissibility of countermeasures by a victim party within the context of an ongoing negotiation as long as the dispute at issue is *sub judice*.⁹⁷

89. *Air Service Agreement*, 18 R.I.A.A. at 419–23.

90. *See id.* at 441–46.

91. *Id.* at 443.

92. *Id.* On proportionality of countermeasures generally under international law, see PROUKAKI, *supra* note 86, at 260–76, and Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715 (2008).

93. *Air Service Agreement*, 18 R.I.A.A. at 443.

94. *Id.* at 444.

95. *See id.* at 443.

96. *Id.* at 448 (Reuter, Arb., dissenting).

97. *See id.* at 445–46; *see also* Yuji Iwasawa & Naoki Iwatsuki, *Procedural Conditions*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY*, *supra* note 17, at 1149, 1152–54. *But cf.*

Gabčíkovo-Nagymaros Project (*Gabčíkovo-Nagymaros*) is the seminal ICJ case dealing with countermeasures.⁹⁸ As its name suggests, this case involved the Gabčíkovo-Nagymaros Project, a complex project of locks along the River Danube between Hungary and Slovakia. Slovakia's purported countermeasure was a plan that became known as "Variant C," and this involved the unilateral diversion of the Danube, the construction of an overflow dam and levee, and some ancillary works.⁹⁹ In rejecting Slovakia's argument that Variant C was a permissible countermeasure, the ICJ spelled out four criteria that must be satisfied for any countermeasure to be considered permissible under international law: (1) it must be responsive and directed at the wrongdoer; (2) it must have followed an attempt to have the wrongdoer cease its internationally wrongful act or make reparation for it; (3) there must be commensurability between the internationally wrongful act and the injury suffered, all rights considered; and (4) the countermeasure must be reversible so as to facilitate what might be regarded as the *sine qua non* of any countermeasure, that is, to induce the wrongdoer to comply with its (violated) international legal obligation.¹⁰⁰

Two of the opinions appended to the majority's judgment in *Gabčíkovo-Nagymaros* are worth examining to fully appreciate the texture of countermeasures under international law. In his separate opinion, Judge Bedjaoui agreed with the majority that Variant C did not qualify as a permissible countermeasure because it was, *inter alia*, disproportionate and irreversible.¹⁰¹ He argued, however, that the majority should have made more of the (illicit) possibility of premeditation and calculated response by Slovakia as regards to Variant C.¹⁰² Judge Vereshchetin, in his

Articles on State Responsibility, *supra* note 82, at 131, art. 50(2)(a) (noting that a State taking countermeasures remains under an obligation to fulfill its obligations "under any dispute settlement procedure applicable between it and the responsible State").

98. *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25).

99. *See id.* at 25.

100. *See id.* at 55–57. For affirmation of the *Gabčíkovo-Nagymaros* criteria as reflective of the customary international law of countermeasures, see Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. Mex., ICSID Case No. ARB(AF)/04/05, ¶¶ 124–33 (Nov. 21, 2007).

101. *See Gabčíkovo-Nagymaros*, 1997 I.C.J. at 134 (separate opinion of Bedjaoui, J.).

102. *See id.*

dissenting opinion, accepted much of what the majority had held as to the black letter law of countermeasures, but he disagreed with the application of these criteria to Variant C. According to him, the majority should have been more searching and critical in looking at the gravity and effect of Variant C on the particular facts and circumstances of the dispute at issue.¹⁰³ Within the context of Variant C, according to Judge Vereshchetin, these included economic, financial, and environmental considerations.¹⁰⁴ The respective opinions of Judges Bedjaoui and Vereshchetin, then, reinforce rather than undermine the majority's articulation of the *lex generalis* of countermeasures.

On August 9, 2001, almost four years after the ICJ had handed down its judgment in *Gabčíkovo-Nagymaros*, the International Law Commission ("ILC") adopted the Articles on Responsibility of States for Internationally Wrongful Acts ("Articles on State Responsibility").¹⁰⁵ The Articles on State Responsibility reflect the inevitability, if not the desirability, of countermeasures in contemporary international law, and they build upon the contours of permissible countermeasures as set forth in *Air Service Agreement* and *Gabčíkovo-Nagymaros*. Given previous State practice, it is unsurprising that the Articles on State Responsibility preclude the wrongfulness of a victim party's conduct when it amounts to a permissible countermeasure in response to a previous or ongoing internationally wrongful act by the responsible party, though this is without prejudice to the possibility of compensation for material loss caused by the countermeasure.¹⁰⁶ Articles 49 and 51 mirror the criteria in the *Gabčíkovo-Nagymaros* test for permissible countermeasures, and the proportionality calculus, in a nod to *Air Service Agreement*, allows the victim party to consider the "purely 'quantitative' element of the injury suffered . . . [and] also 'qualitative' factors such as the importance of the interest protected by the

103. See *id.* at 224 (Vereshchetin, J., dissenting).

104. See *id.*

105. *Articles on State Responsibility*, *supra* note 82. For a historical overview of the International Law Commission's decades' long State responsibility project, see James Crawford, *Introduction*, in *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES I* (James Crawford ed., 2003).

106. See *Articles on State Responsibility*, *supra* note 82, at 75, art. 22; *id.* at 85, art. 27.

rule infringed and the seriousness of the breach.”¹⁰⁷ Of course, countermeasures must end when the responsible party’s underlying internationally wrongful act, which triggered the privilege of countermeasures in the first place, ends.¹⁰⁸

The Articles on State Responsibility largely reaffirm the *Gabčíkovo-Nagymaros* criteria for permissible countermeasures, but they also go a step further in that they expressly forbid countermeasures that “affect” Article 2(4) of the Charter, obligations that protect “fundamental human rights,” obligations of a humanitarian nature related to reprisals, and *jus cogens* norms.¹⁰⁹ The majority in *Gabčíkovo-Nagymaros* completely avoided referring to these or any other such considerations in its judgment, though it might be argued that some such considerations were implied, at least to an extent.¹¹⁰ Dictated largely by policy considerations, these are the permissible limits beyond which countermeasures must not transgress, and the ILC’s final incarnation of them in its 2001 draft is clearer than the corresponding provisions in its 1996 Draft Articles on State Responsibility Provisionally Adopted on First Reading.¹¹¹ Article 50(b) of that draft, for example, sought to prohibit, in exceedingly vague language, “[e]xtreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act.”¹¹²

Although the four limits beyond which permissible countermeasures must not transgress as articulated in the Articles on State Responsibility arguably improve upon the 1996

107. *Id.* at 135.

108. *See id.* at 85, art. 27(a); *id.* at 135, art. 52(3)(a); *id.* at 137, art. 53.

109. *See id.* at 131, art. 50(1). In its second paragraph, Article 50 goes on to note that a “State taking countermeasures is not relieved from fulfilling its obligations: (a) under any dispute settlement procedure applicable between it and the responsible State; (b) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.” *Id.* at 131, art. 50(2).

110. Only Judge Vereshchetin, in his dissenting opinion, expressly recognized permissible limits to countermeasures. In his view, they were not at issue with Variant C, but they were, and are, “the threat or use of force, extreme economic or political coercion, infringement of the inviolability of diplomatic agents, derogations from basic human rights or norms of *jus cogens*.” *Gabčíkovo-Nagymaros* Project (Hung. v. Slov.), 1997 I.C.J. 7, 222 (Sept. 25) (Vereshchetin, J., dissenting).

111. *See Draft Articles Provisionally Adopted by the Commission on First Reading*, [1996] 2 Y.B. Int’l L. Comm’n 58, 64, art. 50.

112. *Id.* at 64, art. 50(b).

draft of the State responsibility project, they are still far from unproblematic. Indeed, they leave much to be desired and arguably beg more questions than they answer. For example, countermeasures must not affect, according to article 50(1)(b) of the Articles on State Responsibility, “fundamental human rights,” but what is it precisely that makes a human right “fundamental” as opposed to, one might suppose, a “garden variety” human right? Do “*fundamental* human rights” impose greater obligations upon victim parties with respect to countermeasures than do, to use the corresponding language in the 1996 draft of the State responsibility project, “*basic* human rights”?¹¹³ If so, how, precisely, and in what way?

That countermeasures must not affect *jus cogens* norms seems unsurprising as a general principle, but the definition of a *jus cogens* norm contained in article 53 of the VCLT surely does not “interpret itself.”¹¹⁴ Even if one were to assume agreement on a definitive list of *jus cogens* norms, when could it be said that a countermeasure “affect[s]” such a norm?¹¹⁵ Does “affect” mean the same as “breach”? One reading might be that the former would seem to potentially implicate more conduct than the latter. Are these questions of substance or process? And who, or what, is to answer them? Most importantly, how is a victim party reasonably to be expected to answer these questions in a measured manner without increasing the risk that it will inadvertently engage in an impermissible countermeasure, perhaps entailing a violation of a *jus cogens* norm?

In addition to countermeasures *stricto sensu*, a party to a dispute that has suffered an injury under the law of negotiation can potentially respond on the basis of the classic legal principle

113. *Id.* at 64, art. 50(d) (emphasis added).

114. VCLT, *supra* note 63, art. 53 (defining such a norm as one that is “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”).

115. *Cf.* Legal Consequences of Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 214 (July 9) (separate opinion of Higgins, J.) (critiquing the majority judgment for concluding that the separation barrier, rather than the reaching of a negotiated settlement between Israelis and Palestinians, is what has complicated, or, one might say in the context of countermeasures, “affect[ed],” the exercise of the right to self-determination).

exceptio non adimpleti contractus.¹¹⁶ *Exceptio non adimpleti contractus* can best be understood within the context of reciprocal legal obligation. In his separate opinion appended to *Interim Accord*, Judge Simma, though presuming to have presided over the funeral of the principle and to have “declared [it] dead,”¹¹⁷ nicely captured this notion of reciprocity. “Reciprocity,” according to him, “constitutes a basic phenomenon of social interaction and consequently a decisive factor also behind the growth and application of law.”¹¹⁸ It is Janus headed, both constructive and destructive, reinforcing stability and licensing instability, both, according to Judge Simma, “a propelling force in the making and keeping of the law and . . . a trigger in the breakdown of legal order.”¹¹⁹ One can scarcely think of a means of dispute settlement in which reciprocity plays a more pronounced role than negotiation. Under the law of negotiation, the obligations of the parties to the dispute are often innately (inter)dependent. Indeed, without the “give and

116. As the UK Supreme Court put it in 2010, “[w]here a plaintiff sues to enforce performance of an obligation which is conditional upon performance by himself of a reciprocal obligation owed to the defendant, then the performance by him of this latter obligation (or, in cases where they are not consecutive, the tender of such performance) is a necessary prerequisite of his right to sue and should be pleaded by him. Conversely in such a case the defendant may raise as a defence, known as the *exceptio non adimpleti contractus*, the fact that the plaintiff has failed to perform, or in the appropriate case, tender performance of, his own reciprocal obligation.” *Inveresk PLC v. Tullis Russell Papermakers Ltd.* [2010] UKSC 106, 122 (quoting *ESE Fin. Servs. Ltd. v. Cramer*, 1973(2) SA 805, 809). See James Crawford & Simon Olleson, *The Exception of Non-Performance: Links Between the Law of Treaties and the Law of State Responsibility*, 21 AUSTL. Y.B. INT’L L. 55, 56 (2000) (casting a definition of *exceptio non adimpleti contractus* in general terms as the “principle that performance of an obligation may be withheld if the other party has itself failed to perform the same or a related obligation”).

117. See Application of Interim Accord of 13 September 1995 (*Maced. v. Greece*), Separate Opinion, ¶ 26 (Dec. 5, 2011), available at <http://www.icj-cij.org/docket/files/142/16829.pdf> (separate opinion of Simma, J.); cf. Joe Verhoeven, *The Law of Responsibility and the Law of Treaties*, in THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 17, at 105, 108 (stating that the “material breach” regime of Article 60 of the Vienna Convention on the Law of Treaties (“VCLT”) incorporates *exceptio non adimpleti contractus*); Comm’n on Human Rights Subcomm’n on the Promotion and Prot. of Human Rights, Summary Record of the 14th Meeting, 56th Sess., at 4, U.N. Doc. E/CN.4/Sub.2/2004/SR.14 (2004) (statement by Mr. Bossuyt) (conflating *exceptio non adimpleti contractus* with the “material breach” regime of article 60 of the VCLT).

118. *Maced. v. Greece*, 2011 I.C.J. ¶ 10 (Dec. 5) (separate opinion of Simma, J.).

119. *Id.*

take” that negotiation requires, few negotiated settlements could be reached.

The ICJ most recently had a chance to clarify the contours of *exceptio non adimpleti contractus* in December 2011, in *Interim Accord*, but it only dealt with it *arguendo* and expressly refused to even acknowledge the existence of the principle in contemporary international law.¹²⁰ Of course, this is far from fatal for the existence of this subsidiary means of redress, and this is so for a number of reasons. Firstly, the ICJ only refused to comment upon the status of *exceptio non adimpleti contractus* within the context of treaty law, specifically, in that case, the Interim Accord of 13 September 1995. Thus, it left wholly untouched the principle’s status in contexts *other than or only in* treaty law, that is, in contexts in which the legal obligation said to have been violated roots itself other than or only in straight application of a treaty norm.¹²¹ Secondly, it could be said that the fact that the ICJ even dealt with the principle *arguendo* lends credence to it, and not simply within the context of treaty law. To exaggerate the argument within the context of *Interim Accord*, if Greece had sought to justify its conduct on a clearly prohibited normative basis, such as a “need” to engage in genocide, the ICJ would clearly have condemned this justification as having no place in contemporary international law. That it refused to do so vis-à-vis *exceptio non adimpleti contractus* in *Interim Accord* reflects, at the very least, a colorable claim within the context of treaty law, and again, this is to say nothing of the principle’s operation in contexts in which the legal obligation said to have been violated roots itself other than or only in straight application of a treaty norm. Finally, to grapple with the question of *exceptio non adimpleti contractus*’ existence in contemporary international law as if this were a “yes” or “no” proposition, that is, that the principle must either “exist” or “not exist,” may itself be an unduly simplistic approach. Indeed, it may be more appropriate to inquire as to

120. See *id.* ¶¶ 114–65.

121. Cf. Crawford & Ollerson, *supra* note 116, at 62–63 (articulating an understanding of *exceptio non adimpleti contractus* that could conceivably exist outside of international treaty law).

the “scope” of the principle rather than whether or not it is “recognized” as such.¹²²

Some of the opinions appended to *Interim Accord* provide further support for the existence of *exceptio non adimpleti contractus* in contemporary international law, in particular the declaration and dissenting opinion of, respectively, Judge Bennouna and Judge ad hoc Roucounas. Judge Bennouna cast the principle within the broader context of reciprocity and went on to positively affirm its existence “under a strict construction of reciprocity in the implementation of certain international obligations, where the implementation of one is inconceivable without the other. These are obligations of a strictly interdependent nature.”¹²³ One senses here an acknowledgement by Judge Bennouna that *exceptio non adimpleti contractus* exists in international law generally, irrespective of the particular source of law at issue. In his dissenting opinion, Judge ad hoc Roucounas rejected Judge Simma’s view that article 60 of the VCLT had somehow “displaced” *exceptio non adimpleti contractus*.¹²⁴ Indeed, for Judge ad hoc Roucounas, the nature of the principle and the constant overlap that exists between general international law and international treaty law mean that, “[a]s a defence to the non-performance of an obligation, it is a general principle of law, as enshrined in Article 38, paragraph 1(c), of the Statute of the Court.”¹²⁵

This view supporting the existence of *exceptio non adimpleti contractus* in contemporary international law was also affirmed in *Klöckner Industrie-Anlagen GmbH & Others v. Republic of*

122. See Application of Interim Accord of 13 September 1995 (Maced. v. Greece), Declaration, at 1 (Dec. 5, 2011), available at <http://www.icj-cij.org/docket/files/142/16833.pdf> (Bennouna, J., dissenting) (stating that “the issue is not about determining whether or not a given theory is recognized by general international law, but rather of ascertaining the scope, in general international law, of the principle of reciprocity, presented as *exceptio non adimpleti contractus*, with regard to the obligations of the parties under the Interim Accord and, specifically, Article 11 thereof”); see also Serena Forlati, *Reactions to Non-Performance of Treaties in International Law*, 25 LEIDEN J. INT’L L. 759 (2012).

123. *Maced v. Greece*, 2011 I.C.J. at 1 (Bennouna, J., declaration).

124. See *id.* ¶ 66 (Roucounas, J. dissenting).

125. *Id.*; see *Diversion of Water from Meuse (Neth. v. Belg.)*, 1937 P.C.I.J. (ser. A/B) No. 70, at 77 (June 28) (separate opinion of Hudson, J.); see also *Articles on State Responsibility*, *supra* note 82, at 72. But see Crawford & Olleson, *supra* note 116, at 73.

Cameroon¹²⁶ and has scholarly support.¹²⁷ Indeed, as ILC Special Rapporteur Professor James Crawford noted in his Third Report on State Responsibility in 2000, it is recognized in law by a “respectable body of international authority and opinion.”¹²⁸ It is also worth noting that in acknowledging the existence of *exceptio non adimpleti contractus* in contemporary international law in its 2002 award in *La Aplicación del “Imesi” (Impuesto Específico Interno) a la Comercialización de Cigarrillos*, an ad hoc Mercado Común del Sur tribunal effectively recognized that the circumstances that can justify the use of this legal principle are different than those under the “material breach” regime of article 60 of the VCLT: a “violación sustancial; [sic] del tratado y teniendo ella características esenciales”¹²⁹ for the former rather than, as regards the latter, a “violación grave.”¹³⁰ In *Eureko BV v. Poland*, furthermore, a 2005 arbitral award decided under United Nations Commission on International Trade Law arbitration rules in response to a dispute between the Netherlands and Poland, the tribunal defined *exceptio non adimpleti contractus* as the “exception of non performance”¹³¹ and noted that this legal principle relates to “simultaneous performance of particular obligations, i.e. mutuality,”¹³² and could only in theory apply to cases of “simultaneous or

126. See *Klößner Industrie-Anlagen GmbH & Others v. Rep. of Cameroon* (1983), 114 I.L.R. 152, 210–12 (1999) (recognizing the existence of *exceptio non adimpleti contractus* in international law, French law, and English law).

127. See, e.g., Alain Pellet & Alina Miron, *Sanctions*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 4 (July 2011), http://www.mpepil.com/subscriber_article?id=/cpil/entries/law-9780199231690-e984; Jan Peter Schmidt, *MERCOSUR*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 32 (Oct. 2008), available at http://www.mpepil.com/subscriber_article?id=/cpil/entries/law-9780199231690-c655.

128. Int'l Law Comm'n, Third Report on State Responsibility, at 35, U.N. Doc. A/CN.4/507/Add.3 (2000) (citing supporting authority).

129. *Laudo del Tribunal Arbitral “ad hoc” de MERCOSUR Constituido Para Decidir en la Controversia Entre la República del Paraguay a la República Oriental del Uruguay Sobre la Aplicación del “Imesi” (Impuesto Específico Interno) a la Comercialización de Cigarrillos* [Award of the Tribunal “ad hoc” MERCOSUR Constituted to Decide the Dispute Between the Republic of Paraguay to the Republic of Uruguay on the Implementation of “Imesi” (Excise Tax) by the Marketing of Cigarettes], in LAUDOS, ACLARACIONES, Y OPINIONES CONSULTIVAS DEL LOS TRIBUNALES DEL MERCOSUR 208, 213 (2002).

130. On the “material breach” regime of Article 60 of the VCLT, see *infra* notes 134–40 and accompanying text.

131. *Eureko BV v. Pol.*, Ad hoc–UNCITRAL Arbitration Rules, IIC 98, ¶ 176 (2005).

132. *Id.* ¶ 179.

conditional performance.”¹³³ This careful language suggests that *exceptio non adimpleti contractus* requires two elements, reciprocity and non-performance, and that the latter of these two elements need not necessarily rise to the level of a “material breach” as understood by article 60 of the VCLT.¹³⁴

A final response that a party to a dispute can potentially take if it has suffered an injury under the law of negotiation lies in the “material breach” regime of article 60 of the VCLT. This is a truly radical option in that it allows the victim party to sever treaty relations with the responsible party, though a party that has suffered a “material breach” and wishes to invoke this regime must be careful to observe such related modalities as not expressly condoning or by its conduct acquiescing in the continued validity of the treaty.¹³⁵ Analogous to the limits beyond which permissible countermeasures must not transgress as articulated in the Articles on State Responsibility, the “material breach” regime does not apply to “provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.”¹³⁶ This reflects a naturalist impulse in the law of treaties, but as with countermeasures, what precisely is meant by these exclusions is not altogether clear.¹³⁷

In cases in which a treaty sets forth detailed provisions that seek to regulate the negotiation process, the violation by one of the parties of its obligations under the law of negotiation as set forth in the particular treaty at issue will take on added significance as compared with a more generalized treaty that only deals with the modalities of negotiation in cases of dispute as but one aspect of the overall treaty. Given the subject matter,

133. *Id.* ¶ 177. It should be noted that, as the ICJ had done in *Interim Accord*, the arbitral tribunal here refused to even acknowledge the existence of *exceptio non adimpleti contractus* in contemporary international law. *See id.*

134. It is worth noting that in a commentary to Article 60 of the VCLT that he co-authored in 2011 with Christian Tams, Judge Simma conceded that the “material breach” regime deviated from the concept of reciprocity that is inherent to *exceptio non adimpleti contractus*. *See* Bruno Simma & Christian J. Tams, *Article 60, in 2 THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY* 1351, 1377–78 (Olivier Corten & Pierre Klein eds., 2011).

135. *See* VCLT, *supra* note 63, art. 45.

136. *Id.* art. 60(5).

137. *See* Simma & Tams, *supra* note 134, at 1366–70.

it is more likely that a party's violation of its negotiation obligation under the former type of treaty could be considered a "material breach" in the sense of Article 60 of the VCLT, that is, in the context of a bilateral treaty, a "repudiation of the treaty not sanctioned by the present Convention; or . . . the violation of a provision essential to the accomplishment of the object or purpose of the treaty,"¹³⁸ thus allowing the victim party to terminate or suspend the treaty. Of course, this is not to say that a party's violation of its negotiation obligation under the latter type of treaty could not rise to the level of a "material breach." Indeed, it very well could, as long as it meets the "material breach" test.¹³⁹ This raises the obvious point that it is difficult to make general conclusions as to "material breach," and the significant consequences that can potentially flow from this, *in abstracto*.¹⁴⁰

CONCLUSION

When the parties to a dispute exercise their freedom to choose by deciding to negotiate, they are making a tangible contribution to the peaceful settlement of disputes. This is to be encouraged. To facilitate this, international law has developed such that certain modalities govern when it can be said as a matter of law that negotiation has been tried and has been exhausted. Unsurprisingly, the law of negotiation in this regard is extraordinarily fact-specific, and it involves considerations of both procedural and substantive law. What is clear is that the non-arbitral and non-judicial nature of negotiation in no way detracts from the seriousness of legal obligation for the

138. VCLT, *supra* note 63, art. 60.

139. It should also be pointed out that the "material breach" regime is itself not without what seem to be its own internal inconsistencies in logic. See Simma & Tams, *supra* note 134, at 1359 (pointing out, quite accurately, that a textual analysis of the article supports the view that "Article 60 does not legitimize responses to grave breaches of treaty provisions which are not essential, but . . . that trivial breaches of essential provisions can constitute material breaches in the sense of Article 60, paragraph 3(b)").

140. On Article 60 of the VCLT in the jurisprudence of the ICJ, see Application of Interim Accord of 13 September 1995 (Maced. v. Greece), Judgment, ¶ 23–25 (Dec. 5, 2011), available at <http://www.icj-cij.org/docket/files/142/16829.pdf>, (separate opinion Simma, J.).

negotiating parties as they attempt to peacefully settle their dispute.

That international law empowers a party to a dispute that has suffered an injury under the law of negotiation to potentially resort to countermeasures and other responses when a negotiation breaks down need not be a particularly alarming proposition. Indeed, in the words of Jessup, a year before he was to become Judge Jessup of the ICJ, these may be “necessary as a safety-valve lest national feelings be strained to a point at which the state yields to the temptation blatantly to violate international law.”¹⁴¹ Just as it is true that a response by the victim party of any description to violations of the law of negotiation by the other party could inflame a dispute in certain contexts, so a victim party’s failure to respond at all could doom the prospects of a settlement in other contexts. As long as the victim party acts reasonably on the particular facts and circumstances, however, then neither need it fear the law nor need the law in this area risk being hopelessly compromised. As the arbitral tribunal in *Air Service Agreement* put it, such responses are a “wager on the wisdom, not on the weakness of the other Party.”¹⁴²

141. Philip C. Jessup, *A Half-Century of Efforts to Substitute Law for War*, in 99 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1, 17 (1960).

142. *Air Service Agreement of 27 March 1946 Between United States of America and France* (1978), 18 R.I.A.A. 417, 445 (making this point within the specific context of countermeasures).