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# THE OBLIGATION TO NEGOTIATE IN INTERNATIONAL LAW: RULES AND REALITIES

*Martin A. Rogoff\**

## INTRODUCTION

The most important<sup>1</sup> and most difficult<sup>2</sup> decision in the process of international negotiation may very well be the threshold decision of states to enter into negotiations in the first place. Once the will to resolve a dispute through negotiation is present on the part of national leaders, agreement on procedures and substance, while usually protracted and arduous, is likely to follow. At the very least, agreement becomes a real possibility since the mutual decision to negotiate already represents a public commitment to the cooperative resolution or management of the dispute. Even if negotiation does not produce agreement, it does afford the disputing parties the opportunity to lessen tensions and to learn more about each other's interests, positions, personalities, and problems.<sup>3</sup>

The critical importance of "getting to the table" has been recognized by both diplomats and scholars. A substantial body of nonlegal literature, describing and analyzing what has come to be called the "prenegotiation" phase, has developed over the past decade.<sup>4</sup> Similar

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The author would like to thank the University of Maine School of Law, the University of Southern Maine, and the University of Maine system for his appointment as Libra Professor of Law (1992-1994) which provided support for the research and writing of this article.

1. "Nor should we overlook the psychological value of the opening of negotiations . . . . The opening of . . . negotiations is often a decisive step toward the conclusion of an agreement." International Status of South-West Africa, 1950 I.C.J. 128, 188 (Advisory Opinion, July 11) [hereinafter International Status of South-West Africa] (de Visscher, J., dissenting). See also Harold H. Saunders, *Getting to Negotiation*, 95 HARV. L. REV. 1503 (1982) [hereinafter Saunders, *Getting to Negotiation*].

2. In many cases, persuading parties in a conflict to commit to a negotiated settlement is even more complicated, time-consuming, and difficult than reaching agreement once the negotiations have begun. Harold H. Saunders, *We Need a Larger Theory of Negotiation: The Importance of Pre-negotiating Phases*, 1 NEG. J. 249, 249 (1985) [hereinafter Saunders, *We Need a Larger Theory of Negotiation*].

3. See generally John G. Cross, *Negotiation as a Learning Process*, in THE NEGOTIATION PROCESS: THEORIES AND APPLICATIONS 29 (I. William Zartman ed., 1978) [hereinafter THE NEGOTIATION PROCESS].

4. See, e.g., HAROLD H. SAUNDERS, *THE OTHER WALLS: THE ARAB-ISRAELI PEACE PROCESS IN A GLOBAL PERSPECTIVE* 21-38, *passim* (rev. ed. 1991) [hereinafter SAUNDERS,

systematic scrutiny, however, has not been devoted by legal scholars to the legal context in which the commitment to negotiate international disputes occurs, although some legal writing does exist which bears on particular aspects of the prenegotiation process.<sup>5</sup> One may well ask: are there rules of international law which require negotiations in certain situations? If so, what is the content of such rules? Do these rules affect the decisions of national leaders to enter into international negotiations? What are the possible consequences when national leaders fail to enter into negotiations when obliged to do so by customary or conventional international law? It is the purpose of this article to examine these and related questions with the goal of calling to the attention of national leaders and the practitioners of international diplomacy the requirements of peaceful settlement of disputes and international cooperation through negotiation. Such obligations are increasingly present in positive international law and will likely assume greater importance in the future.<sup>6</sup>

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THE OTHER WALLS]. See generally RICHARD N. HAASS, CONFLICTS UNENDING: THE UNITED STATES AND REGIONAL DISPUTES (1990); GETTING TO THE TABLE: THE PROCESSES OF INTERNATIONAL PRENEGOTIATION (Janice Gross Stein ed., 1989) [hereinafter GETTING TO THE TABLE]; I. WILLIAM ZARTMAN, RIPE FOR RESOLUTION: CONFLICT AND INTERVENTION IN AFRICA (1989); Saunders, *Getting to Negotiation*, supra note 1; Saunders, *We Need a Larger Theory of Negotiation*, supra note 2. See also Stern, *International Agreements — Agreement to Enter into Comprehensive Negotiations, Ethiopian-Eritrean People's Liberation Front (EPLF), Final Communiqué, September 19, 1989*, 31 HARV. INT'L L.J. 339, 339 (1990).

5. See FREDERIC KIRGIS, JR., PRIOR CONSULTATION IN INTERNATIONAL LAW: A STUDY OF STATE PRACTICE 3 (1983); JUDO UMARTO KUSUMOWIDAGDO, CONSULTATION CLAUSES AS MEANS OF PROVIDING FOR TREATY OBEDIENCE: A STUDY IN THE LAW OF TREATIES 4 (1981); TEKLEWOLD GEBREHANA, DUTY TO NEGOTIATE: AN ELEMENT OF INTERNATIONAL LAW 1 (1978); Ulrich Beyerlin, *Pactum de Contrahendo und Pactum de Negotiando im Völkerrecht?*, 36 ZEITSCHRIFT FÜR AUSLÄNDISCHES OFFENTLICHES RECHT UND VÖLKERRECHT 407, 408 (1976); Paul Reuter, *De L'obligation de Négocier*, 14 COMUNICAZIONI E STUDI 711, 714 (1975); Hugo J. Hahn, *Das Pactum de Negotiando als Völkerrechtliche Entscheidungsnorm*, 18 AUSSENWIRTSCHAFTSDIENST DES BETRIEBS-BERATERS 489, 490 (1972); Adolfo Miñaja de la Muela, *Pacta de Contrahendo en Derecho Internacional Publico*, 21 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 392, 393 (1968).

There is surprisingly little legal literature on international negotiation. "La négociation est une opération matérielle dont le droit international général a peu de chose à dire . . ." JEAN COMBACAU, LE DROIT DES TRAITÉS 16 (1991). "La négociation est peu connue des juristes et elle est presque ignorée du droit." Reuter, supra, at 714. But see Kenneth J. Vandeveld, *Treaty Interpretation from a Negotiator's Perspective*, 21 VAND. J. TRANSNAT'L L. 281, 283 (1988); Tariq Hassan, *Good Faith in Treaty Formation*, 21 VA. J. INT'L L. 443, 445 (1981); Grigore Geamănu, *Théorie et Pratique des Négociations en droit international*, 166 REC. DES COURS 365, 367 (1980); Jean-Pierre Cot, *La Bonne Foi et la Conclusion des Traités*, 1 REVUE BELGE DE DROIT INT'L 140, 141 (1968); Edwin M. Smith, *Understanding Dynamic Obligations: Arms Control Agreements*, 64 S. CAL. L. REV. 1549, 1555 (1991).

6. In his discussion of this issue, Paul Reuter states:

Comme les engagements internationaux se multiplient en s'étendant à des objets de plus en plus vastes, mettant en cause des aspects techniques ardues et délicats, il devient difficile de conclure ces traités en une seule opération et les Etats signent

The usual outcome of successful international negotiations is the conclusion of a legally binding international agreement or treaty.<sup>7</sup> The process of concluding a legally binding international agreement can be divided into several successive phases. The first phase is the prenegotiation stage which transpires before a mutual commitment to negotiations has been made.<sup>8</sup> The second phase is the process of the negotiations itself, during which the negotiating states<sup>9</sup> engage in substantive discussions and bargaining.<sup>10</sup> The final phase is the period between the con-

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des accords de principe en renvoyant les mesures d'application à des accords ultérieurs qu'ils s'obligent à négocier.

Reuter, *supra* note 5, at 712; *see also id.* at 733.

7. The terms "treaty" and "international agreement" are used interchangeably in this article to refer to bilateral or multilateral international legal obligations voluntarily undertaken by states. Thus, the term "treaty" is not used in the narrower sense in which it is employed in Article 1(1)(a) of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 1, para. 1(a), 1155 U.N.T.S. 331, 333, 8 I.L.M. 679, 681 (1969) (entered into force Jan. 27, 1980) (defining a treaty as "an international agreement concluded between States in written form . . .") [hereinafter Vienna Convention on the Law of Treaties]. The term "treaty," as used in this article, should also not be confused with the way it is defined in the U.S. Constitution. U.S. CONST., art. II, § 2 & art. VI (defining a treaty as an international obligation of the United States ratified by the President upon the advice and consent of two-thirds of the Senate). *See also* PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES 23 (José Mico & Peter Haggemacher trans., 1989) (1985) ("A treaty is an expression of concurring wills attributable to two or more subjects of international law and intended to have legal effects under the rules of international law.")

Negotiations that result in nonbinding understandings, "gentlemen's agreements," or nonbinding agreements which are said to be "binding" at the political level may also be regarded as successful if in fact international disputes or problems are resolved or mitigated. Perhaps the most important recent agreement of this type is the Final Act of the Conference on Security and Cooperation in Europe, Aug. 1, 1975, U.S. DEP'T OF STATE PUB. NO. 8826, GEN. FOREIGN POL'Y SERIES 298 (1975), 14 I.L.M. 1292 (1975) [hereinafter Helsinki Accords]. *See generally* EMMANUEL DECAUX, SÉCURITÉ ET COOPÉRATION EN EUROPE (1992); VOJTECH MASTNY, THE HELSINKI PROCESS AND THE REINTEGRATION OF EUROPE: ANALYSIS AND DOCUMENTATION (1992). *See also* Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT'L & COMP. L.Q. 787 (1986); SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945-1986 90-95 (1989).

8. *See infra* note 33 and accompanying text for a definition of "prenegotiation."

9. The term "negotiating state" is used in this article in a sense similar to that employed in Article 2(1)(e) of the Vienna Convention on the Law of Treaties, *supra* note 7, to refer to a state which participates in the negotiating process. "Negotiating state" is to be distinguished from "party", which "means a State which has consented to be bound by [a] treaty and for which the treaty is in force." *Id.*, art. 2(1)(g).

10. There is a vast amount of literature on the various aspects of the theory and practice of international negotiations. *See, e.g.*, WILLIAM H. HABEED, POWER AND TACTICS IN INTERNATIONAL NEGOTIATION: HOW WEAK NATIONS BARGAIN WITH STRONG NATIONS (1988); MARTIN PATCHEN, RESOLVING DISPUTES BETWEEN NATIONS: CONCILIATION OR COERCION? (1988); NEGOTIATING WORLD ORDER: THE ARTISANSHIP AND ARCHITECTURE OF GLOBAL DIPLOMACY (Alan K. Henrikson ed., 1986); L.N. RANGARAJAN, THE LIMITATION OF CONFLICT: A THEORY OF BARGAINING AND NEGOTIATION (1985); MULTILATERAL NEGOTIATION AND MEDIATION: INSTRUMENTS AND METHODS (Arthur S. Lall ed., 1985) [hereinafter MULTILATERAL NEGOTIATION AND MEDIATION]; HOWARD RAIFFA, THE ART AND SCIENCE OF

clusion of negotiations<sup>11</sup> and the entry into force<sup>12</sup> of the recently negotiated obligations. Once the agreement enters into force, it creates binding legal obligations for its parties. In that sense, the outcome of the negotiating process is fully protected by law: the parties are legally obligated to perform in good faith the obligations they have assumed<sup>13</sup> and the

NEGOTIATION (1982); ALAIN PLANTEY, *LA NÉGOCIATION INTERNATIONALE* (1980); CHARLES LOCKHART, *BARGAINING IN INTERNATIONAL CONFLICTS* (1979); ORAN R. YOUNG, *THE POLITICS OF FORCE* (1968); ARTHUR S. LALL, *MODERN INTERNATIONAL NEGOTIATION: PRINCIPLES AND PRACTICE* (1966) [hereinafter LALL, *MODERN INTERNATIONAL NEGOTIATION*]; FRED C. IKLÉ, *HOW NATIONS NEGOTIATE* (1964). See also JIMMY CARTER, *NEGOTIATION: AN ALTERNATIVE TO HOSTILITY* (1984). On the practicalities of negotiation in general, see MAUREEN R. BERMAN & I. WILLIAM ZARTMAN, *THE PRACTICAL NEGOTIATOR* (1982); ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981).

11. The successful conclusion of negotiations is usually marked by the authentication and adoption of the text of the agreement. The Vienna Convention on the Law of Treaties notes that:

[t]he text of a treaty is established as authentic and definitive:

- (a) by such procedures as may be provided for in the text [of the treaty or] . . . .
- (b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representative of those States of the text of the treaty or of the Final Act of a conference incorporating the text.

Vienna Convention on the Law of Treaties, *supra* note 7, art. 10.

The conclusion of negotiations should not be confused with the vast and comprehensive process of concluding an international agreement. For a discussion of the entire process, see SIR IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES 29-44* (1984). See also LORD ARNOLD MCNAIR, *THE LAW OF TREATIES 1-236* (1961).

12. A treaty or international agreement creates legal rights and obligations when it enters into force. SINCLAIR, *supra* note 11, at 44-46. The Vienna Convention on the Law of Treaties states:

- (1) A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.
- (2) Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States . . . .

Vienna Convention on the Law of Treaties, *supra* note 7, art. 24. Article 11 of the Vienna Convention specifies how a State may consent to a treaty. Article 11 states that:

[t]he consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

*Id.* art. 11.

13. "Every treaty in force is binding on the parties and must be performed by them in good faith." Vienna Convention on the Law of Treaties, *supra* note 7, art. 26. See SINCLAIR, *supra* note 11, at 83-84. See also I.I. Lukashuk, *The Principle "Pacta Sunt Servanda" and the Nature of Obligation Under International Law*, 83 AM. J. INT'L L. 513, 515 (1989); Josef L. Kunz, *The Meaning and Range of the Norm "Pacta Sunt Servanda"*, 39 AM. J. INT'L L. 180, 183 (1945), reprinted in JOSEF L. KUNZ, *THE CHANGING LAW OF NATIONS: ESSAYS ON INTERNATIONAL LAW 347* (1968).

legal consequences of noncompliance are prescribed.<sup>14</sup> Modern international law also extends legal protection to the third phase of the negotiation process — the period between the conclusion of negotiations and the entry into force of the negotiated agreement. During this period, states which have signed an agreement or expressed their consent to be bound are obliged to refrain from acts which would defeat the object and purpose of the agreement.<sup>15</sup> This requirement aims to prevent prospective parties to the agreement from undermining the benefits accorded by the agreement to other prospective parties.<sup>16</sup> Negotiating states may also agree to apply the agreement, or parts of it, provisionally, prior to its actual entry into force, in order to effectuate immediately certain provisions of the agreement or to provide immediate legal protection to the successful outcome of their negotiations.<sup>17</sup> International law recognizes the regime of provisional application, although the obligations imposed on states during this period are somewhat enigmatic.<sup>18</sup>

From the point of view of international law, the two prior phases of the negotiation process, the prenegotiation and the actual negotiation, are

14. See Vienna Convention on the Law of Treaties, *supra* note 7, art. 60; SINCLAIR, *supra* note 11, at 188–92. See also SHABTAI ROSENNE, *BREACH OF TREATY* 2 (1985); ATHANASSIOS VAMVOUKOS, *TERMINATION OF TREATIES IN INTERNATIONAL LAW: THE DOCTRINES OF REBUS SIC STANTIBUS AND DESUETUDE* 7 (1985); MARK E. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* 357–80 (1985); ARIE E. DAVID, *THE STRATEGY OF TREATY TERMINATION: LAWFUL BREACHES AND RETALIATIONS* 5 (1975); D.N. Hutchinson, *Solidarity and Breaches of Multilateral Treaties*; 59 *BRIT. Y.B. INT'L L.* 151, 151 (1988). But see Frederic L. Kirgis, Jr., *Some Lingering Questions about Article 60 of the Vienna Convention on the Law of Treaties*, 22 *CORNELL INT'L L.J.* 549, 550 (1989).

15. A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
- (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Vienna Convention on the Law of Treaties, *supra* note 7, art. 18. See VILLIGER, *supra* note 14, at 315–26; TALITHA VASSALLI DI DACHENHAUSEN, *LA CULPA IN CONTRAHENDO NEL DIRITTO INTERNAZIONALE* 3 (1983); Joni S. Charme, *The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma*, 25 *GEO. WASH. J. INT'L L. & ECON.* 71, 71 (1991); Hassan, *supra* note 5, at 451–70; Martin A. Rogoff, *The International Legal Obligations of Signatories to an Unratified Treaty*, 32 *ME. L. REV.* 263, 264 (1980).

16. Rogoff, *supra* note 15, at 298–99.

17. The Vienna Convention states that “a treaty or part of a treaty is applied provisionally prior to its entry into force if: (a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed . . . .” Vienna Convention on the Law of Treaties, *supra* note 7, art. 25(1). See generally Barbara E. Gauditz & Martin A. Rogoff, *The Provisional Application of International Agreements*, 39 *ME. L. REV.* 29 (1987).

18. Gauditz & Rogoff, *supra* note 17, at 40–51.

more problematic. In its final draft codification of the law of treaties, the International Law Commission (ILC) recommended extending the obligation to refrain from acts which would defeat the object and purpose of an eventual negotiated agreement to the negotiating phase.<sup>19</sup> Thus, states participating in negotiations would incur substantive legal obligations as soon as they entered into the negotiating process. The Vienna Conference on the Law of Treaties, however, did not adopt the ILC's recommendation on this matter. The Vienna Convention on the Law of Treaties does not impose any substantive obligations on negotiating states during the negotiating phase,<sup>20</sup> but it is quite probable that such obligations may be imposed by customary international law or by general principles of law applicable to the relations between states. The doctrine of *culpa in contrahendo* is well established in many domestic legal systems,<sup>21</sup> and there is authority that supports its international

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19. The ILC's draft of Article 15 stated that:

A State is obliged to refrain from acts tending to frustrate the object of a proposed treaty when:

(a) It has entered into negotiations for the conclusion of the treaty, while these negotiations are in progress.

REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS EIGHTEENTH SESSION, Official Commentary to the Draft Articles on the Law of Treaties, art. 15, U.N. Doc. A/6309/Rev.1 (1966), reprinted in 61 AM. J. INT'L L. 253, 316 (1967) [hereinafter ILC's Draft Articles on the Law of Treaties]. For a detailed description of the negotiating history of this provision, see Hassan, *supra* note 5, at 470-76. See also Philippe Cahier, *L'obligation de ne pas Priver un Traité de son Objet et de son but Avant son Entrée en Vigueur*, 1 MÉLANGES FERNAND DEHOUSSE 31, 31-32 (1979).

20. Given the Vienna Convention's failure to adopt the ILC's recommendation, at least one scholar has concluded that there is no uniform obligation to negotiate. Reuter, *supra* note 5, at 715. The Vienna Convention on the Law of Treaties, however, does impose procedural obligations on negotiating states. Vienna Convention on the Law of Treaties, *supra* note 7, arts. 49 (concerning possible fraudulent conduct by a negotiating state), 50 (prohibiting the corruption of a representative of a state by another negotiating state), 51 (prohibiting the coercion of a representative of a state) & 52 (prohibiting the coercion of a state by the threat or use of force).

21. Article 1337 of the Italian Civil Code is probably the clearest legislative statement of the principal of *culpa in contrahendo*. "The parties, in the conduct of negotiations and the formation of a contract, shall conduct themselves according to good faith." CODICE CIVILE [Cc] art. 1337 (Italy) (Mario Beltramo et al. trans., 1993). In other civil law systems, the doctrine rests on more general provisions, for example: CODE CIVIL SUISSE [Cc] art. 2 (Switz.) (1907) ("Every person must act in good faith both in the exercise of his rights and in the fulfillment of his obligations."); CODE CIVIL [C. CIV.] art. 1382 (France) (1984) ("Any act of a person which causes damages to another makes him by whose fault the damage occurred liable to make reparation for the damage."); BÜRGERLICHES GESETZBUCH [BGB] art. 242 (F.R.G.) (1984) ("The debtor is bound to perform his obligation in good faith, having regard to usage."). See Sylviane Colombo, *The Present Differences between the Civil Law and Common Law Worlds with Regard to Culpa in Contrahendo*, 2 TILBURG FOREIGN L. REV. 341, 344 (1993); E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 222 (1987); Edith Fine & Friedrich Kessler, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of*

application.<sup>22</sup> The principle of good faith,<sup>23</sup> and most likely that of abuse of rights,<sup>24</sup> presumably also apply to all dealings between states. Any one or all of these doctrines may be applicable in those situations where the actions of a negotiating state with respect to the subject matter of the negotiations cause injury to the interests of another negotiating state during the negotiation period.

The following sections of this article describe and analyze the prenegotiation period giving particular consideration to the role of perceived legal obligation as a factor in the decision to initiate international negotiations. The legal obligation to negotiate arising from customary international law and from treaty commitments is examined along with the problems involving the implementation of the obligation to negotiate. In conclusion, the obligation to negotiate is examined in light of modern developments in the theory and practice of the international law of treaties.

At the outset, it is important to define the term "negotiation" and to distinguish between the obligation to negotiate and other closely related but significantly different legal obligations. In this article, the term "negotiation" will be used in the narrow sense suggested by Iklé as:

a process in which explicit proposals are put forward ostensibly for the purpose of reaching agreement on an exchange or on the realization of a common interest where conflicting interests are present.<sup>25</sup>

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*Contract: A Comparative Study*, 77 HARV. L. REV. 401, 408 (1964).

22. See generally VASSALLI DI DACHENHAUSEN, *supra* note 15.

23. See Hassan, *supra* note 5, at 443; Cot, *supra* note 5, at 140. See also ROSENNE, *supra* note 7, at 135-79; ELISABETH ZOLLER, LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC 2 (1977); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 106-20 (1953); Georg Schwartzberger, *The Fundamental Principles of International Law*, 87 REC. DES COURS 191, 290-326 (1955).

24. See generally ALEXANDRE-CHARLES KISS, L'ABUS DE DROIT EN DROIT INTERNATIONAL (1953); CHENG, *supra* note 23, at 121-36; SIR HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 286-306 (1933); Vladimir Paul, *The Abuse of Rights and Bona Fides in International Law*, 28 ÖSTERR. Z. ÖFFENTL. RECHT UND VÖLKERRECHT 107 (1977); NÍCOLAS POLITIS, LE PROBLÈME DES LIMITATIONS DE LA SOUVERAINETÉ ET LA THÉORIE DE L'ABUS DES DROITS DANS LES RAPPORTS INTERNATIONAUX (1926).

25. IKLÉ, *supra* note 10, at 3-4 (emphasis deleted). See also OFFICE OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, PUB. NO. 8547, 14 DIGEST OF INTERNATIONAL LAW 19 (Marjorie M. Whiteman ed., 1970) ("Negotiation is used, in general, to refer to the exchange and discussion of proposals by the representatives of the parties concerned with a view to reaching a mutually acceptable agreement.") [hereinafter WHITEMAN, DIGEST OF INTERNATIONAL LAW]; Reuter, *supra* note 5, at 717 ("un geste formel et publique indiquant le début des négociations."). This definition of negotiation requires that negotiators behave "as negotiators." They should not engage in acts which are incompatible with a good faith



This view of negotiation directs attention to the more formal process of state interaction and excludes "tacit bargaining or other behavior that regulates conflict."<sup>26</sup> It also excludes other forms of dispute settlement, such as conciliation, mediation, inquiry, arbitration, reference to international or regional organizations, or judicial settlement,<sup>27</sup> because such procedures require some sort of agreement between the disputing parties which presupposes prior arrangements or negotiations.

Behind this formal definition of negotiation, however, it is necessary to distinguish two different, and contrasting, subjective views of the negotiation process itself.<sup>28</sup> According to one conception, the process of negotiation is a part of the process of continuous contention and struggle between the sovereign states involved. Thus, until the negotiations result in a binding international agreement, the negotiating states have assumed no legal obligations. Their sovereign right to complete freedom of action remains intact. According to the opposing view, the process of negotiation is a cooperative undertaking by states to resolve a mutual problem in the common interest within the context of an interdependent community. This latter view supports extending obligations to the prenegotiation and negotiation phases, while the former view strongly believes in the legal freedom of states to act as they wish until they actually undertake binding legal obligations.<sup>29</sup>

It is also useful to distinguish the obligation to negotiate from the obligation to conclude an agreement. Although some scholars question the utility of this distinction, believing that an obligation to conclude an agreement is no more than a commitment to negotiate in good faith,<sup>30</sup> the distinction is helpful, because it allows for separate consideration of the decision to undertake negotiations. This decision to undertake negotiations is the focus of this article and provides an understanding of the

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intention to negotiate. See WHITEMAN, *DIGEST OF INTERNATIONAL LAW*, *supra*.

26. IKLÉ, *supra* note 10, at 3. *But see* LALL, *supra* note 10, at 5-21. Lall uses the term "negotiation" to include "[e]very form of conscious effort for the peaceful settlement, adjustment, amelioration, or better understanding of international situations or disputes . . ." *Id.* at 6.

27. *See generally* J.G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* (1984); *INTERNATIONAL DISPUTES: THE LEGAL ASPECTS* (David Davies Memorial Institute of International Studies Study Group ed., 1972).

28. *See* Reuter, *supra* note 5, at 714.

29. "Si l'on se place dans le cadre de la première vision, l'obligation de négocier ne peut pas avoir une grande portée juridique, puisque les Etats ont besoin d'une liberté totale; si l'on se place dans le cadre de la seconde l'obligation de négocier peut voir son contenu s'enrichir considérablement." *Id.*

30. *See* Beyerlin, *supra* note 5, at 407; Miaja de la Muela, *supra* note 5, at 394-95, 412, 414. *See also* 3 ANGELO PIERO SERENI, *DIRITTO INTERNAZIONALE* 1389-92 (1962).

manner in which negotiations are conducted.<sup>31</sup> It is also useful to distinguish between the obligation to negotiate and the obligation to consult.<sup>32</sup> An obligation to negotiate entails a commitment to some degree of interaction between states in attempting to resolve a dispute or to deal with a common problem. An obligation to consult, however, typically involves a lesser degree of responsibility, if any, to consider the views and positions of the other parties or to engage in mutual negotiations.

Finally, considered in this article is the important question of whether the obligation to negotiate imposes an affirmative obligation on a state to seek actively negotiations with the other interested state or states before it can legally engage in certain activities, or whether the obligation to negotiate simply requires the state subject to the obligation to respond favorably when asked by the other state or states to enter into negotiations.

### I. PRENEGOTIATION AND THE DECISION TO NEGOTIATE

According to Professor I. William Zartman, a leading student of the negotiation process:

[p]renegotiation begins when one or more parties consider negotiation as a policy option and communicate this intention to other parties. It ends when the parties agree to formal negotiations (an exchange of proposals to arrive at a mutually acceptable outcome in a situation of interdependent interests) or when one party abandons the consideration of negotiations as an option . . . . In essential terms, prenegotiation is the span of time and activity in which the parties move from conflicting unilateral solutions for a mutual problem to a joint search for cooperative multilateral or joint solutions.<sup>33</sup>

Since the development of a mutual commitment to the cooperative solution of an international problem occurs during the prenegotiation

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31. Claims Arising out of Decisions of the Mixed Graeco-German Arbitral Tribunal Set-up under Article 304 in Part X of the Treaty of Versailles (Greece v. F.R.G.), 19 R.I.A.A. 27, 55-56 (1972) [hereinafter *Graeco-German Arbitration*].

32. See generally KUSUMOWIDAGDO, *supra* note 5, at 55-56; KIRGIS, *supra* note 5, at 11-12 & n.27; *Affaire du Lac Lanoux* (Spain v. Fr.), 12 R.I.A.A. 281 (1957) [hereinafter *Lac Lanoux Arbitration*].

33. I. William Zartman, *Prenegotiation: Phases and Functions*, in GETTING TO THE TABLE, *supra* note 4, at 4. For a useful series of case studies on international negotiations that devotes special attention to the prenegotiation phase, see WILLIAM MARK HABEEB & I. WILLIAM ZARTMAN, THE PANAMA CANAL NEGOTIATIONS (FPI Case Studies No. 1, 1986); NILS JOHNSON & CHARLES PEARSON, THE NEW GATT TRADE ROUND (FPI Case Studies No. 2, 1986).

phase, it is evident that this phase needs to be closely studied and analyzed to learn what can be done to encourage parties to commit to negotiate.<sup>34</sup>

The decision to commit to a negotiated settlement, as Harold Saunders rightly stresses, presents both substantive and psychological problems.<sup>35</sup> Substantive problems involve such matters as conflicting strategic or economic interests. Psychological problems, on the other hand, involve attitudes, fears, preconceptions, suspicions, and distrusts of peoples and their leaders. It may be far more important to the successful negotiated settlement of an international problem to eliminate the psychological obstacles to settlement than to reach understandings on the general substantive bases of discussions.<sup>36</sup> It is important to realize that psychological and substantive factors interact constantly during the prenegotiation phase; progress or regress in one area contributes to corresponding movement in the other.<sup>37</sup> Substantive progress in resolving disputes between states also leads to improvement in the psychological climate.<sup>38</sup>

A major obstacle frequently preventing a state from engaging in international negotiations is the internal political situation of the state. The government may not be strong enough to undertake the resolution of an international dispute through negotiations or have the support needed to negotiate the particular position it favors.<sup>39</sup> In order to enter into negotiations, a government must formulate a position that will command the necessary internal political support or undertake to devel-

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34. See Saunders, *We Need a Larger Theory of Negotiation*, *supra* note 2, at 250. See also SAUNDERS, *THE OTHER WALLS*, *supra* note 4, at 22.

35. Saunders, *We Need a Larger Theory of Negotiation*, *supra* note 2, at 260.

36. Harold Saunders cites as an example President Anwar Sadat's trip to Israel in January 1977. This dramatic visit altered the psychological climate of Israeli-Egyptian relations which allowed meaningful negotiations to take place even though at the time Israel considered President Sadat's substantive proposals completely unacceptable. SAUNDERS, *THE OTHER WALLS*, *supra* note 4, at 1-3.

37. See, e.g., *id.*

38. The history of the superpower arms control agreements provides an excellent example of this phenomenon. Substantive progress in controlling or reducing armaments led to improvement in the psychological climate. The improved psychological climate helped further negotiations on arms control issues which were still outstanding. See GERARD C. SMITH, *DOUBLETALK: THE STORY OF THE FIRST STRATEGIC ARMS LIMITATIONS TALKS 1-3* (1980); THOMAS W. WOLFE, *THE SALT EXPERIENCE* 243-63 (1979).

The Conference on Security and Cooperation in Europe provides another good example of the close interaction between progress on substantive issues and improvement in psychological climate leading, in turn, to more substantive progress. See DECAUX, *supra* note 7, at 47-67, 122-25.

39. Saunders, *We Need a Larger Theory of Negotiation*, *supra* note 2, at 254. See generally Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988).

op the political support necessary for its position. There is continuous interaction between the domestic political situation with respect to support for the government's position toward negotiations and the government's actions at the international level. Robert Putnam describes the politics of international negotiations as a simultaneous "two-level game."<sup>40</sup> According to Putnam:

[e]ach national leader appears at both game boards. Across the international table sits his foreign counterparts, and at his elbows sit diplomats and other international advisors. Around the domestic table behind him sit party and parliamentary figures, spokespersons for domestic agencies, representatives of key interest groups, and the leader's own political advisors.<sup>41</sup>

In order to be successful in this multi-game environment, a national leader must "build a package"<sup>42</sup> that will be acceptable to the other side as well as to key domestic constituencies. These same considerations also apply during the prenegotiation phase.

The principal goal of the prenegotiation process is to remove both substantive and psychological obstacles to the mutual commitment of states to seek a cooperative, negotiated settlement to an international problem or dispute, while at the same time eliminate any domestic political obstacles to negotiations. Are there legal rules which are operative at this stage? If so, do they have the potential to play a significant part in the decision of national leaders to undertake negotiations?

A review of the literature on the prenegotiation phase discloses little, if any, reference to legal requirements to negotiate or to settle disputes by peaceful means as significant factors in the decisions of national leaders to enter into negotiations. Harold Saunders, for example, isolates four "judgments" involved in the decision of national leaders to commit to negotiations:

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40. Putnam, *supra* note 39, at 434. See also *DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS* (Peter B. Evans et. al eds., 1993). Cf. Abram Chayes, *An Inquiry into the Workings of Arms Control Agreements*, 85 HARV. L. REV. 905, 907 (1972) (offering insights into the relationship of the negotiation process and compliance by states with their treaty obligations). But see Jeffrey W. Knopf, *Beyond Two-Level Games: Domestic-International Interaction in the Intermediate-Range Nuclear Forces Negotiations*, 47 INT'L ORG. 599, 600 (1993) (suggesting a "three-and-three" analytical framework, which distinguishes three forms of domestic-international interaction and allows for a third level of analysis taking into account a state's alliance partners and other third-party state actors, as a preferable alternative to Putnam's "two-level game" approach).

41. Putnam, *supra* note 39, at 434.

42. Daniel Druckman, *Boundary Role Conflict: Negotiation as Dual Responsiveness*, in *THE NEGOTIATION PROCESS*, *supra* note 3, at 87, 100.

First is a judgment that the present situation no longer serves a party's interests . . . .

Second is a judgment that the substance of a fair settlement is available . . . .

Third is a judgment that leaders on the other side will be willing and politically able to negotiate such a settlement . . . .

Fourth, a commitment to a negotiated settlement will require a judgment that the balance of forces will permit a fair settlement . . . .<sup>43</sup>

Saunders is not alone in omitting legal requirements as an important factor in the decision of national leaders to enter into negotiations.<sup>44</sup>

The timing of the decision to undertake negotiations has recently received considerable attention by scholars, who have highlighted the concept of "ripeness" as a useful focus for policymakers concerned with bringing other parties to the negotiating table. Once again, legal requirements to seek a negotiated solution to problems appear to play no part in determining whether a particular dispute is "ripe" for a negotiated settlement. The focus of analysts is almost exclusively on political and other material factors.<sup>45</sup>

The seeming irrelevance of a perceived legal requirement to negotiate does not necessarily mean that such a requirement cannot have present or future importance. Legal rules, if they are responsive to the underlying political realities and moral imperatives existing in the community in which they operate, can help clarify and give operational form to the shared expectations of community members.<sup>46</sup> With respect to the decision to enter into formal negotiations for the resolution of mutual problems or conflicts, national political leaders may benefit from clear or readily ascertainable legal requirements to commence negotiations with other states. First of all, the existence of substantive legal rules, which include an obligation to negotiate with respect to the particular matter in dispute (for example, the delimitation of an internation-

43. SAUNDERS, *THE OTHER WALLS*, *supra* note 4, at 24-32 (emphasis deleted).

44. *See, e.g.*, IKLÉ, *supra* note 10, at 3; MULTILATERAL NEGOTIATION AND MEDIATION, *supra* note 10, at 354 (Iklé concludes that at present, power, rather than respect for international law, is the dominant factor in international relations; therefore, "the time has not yet come when we can formulate principles which express accurately the influences of international law on the conduct of states, particularly as a factor which predisposes them toward or influences them in negotiations.").

45. *See, e.g.*, HAASS, *supra* note 4, at 2; ZARTMAN, *supra* note 4, at 3.

46. On the relationship of rules to the fostering and facilitating of cooperative activity, see Philip B. Heymann, *The Problem of Coordination: Bargaining and Rules*, 86 HARV. L. REV. 797 (1973).

al maritime boundary or the responsibility for transboundary environmental damage) can provide a principled framework for a negotiated settlement and encourage nations to enter into negotiations. Second, the determination that a legal obligation to negotiate does exist may prove helpful to national leaders in persuading their foreign counterparts and domestic constituencies that negotiations should be undertaken. It is not unusual that the principal inhibition to undertaking the search for common solutions to international problems is domestic pressure militating against cooperation and compromise, particularly with respect to issues that are emotionally charged. In this setting it would be helpful for national leaders to be able to point to international legal requirements that negotiations be undertaken to deal with the particular matter.

Also, in seeking to bring other states to the negotiating table, appeals to a legal requirement to negotiate the particular dispute may be helpful in conditioning foreign public opinion to support the initiation of negotiations. Moreover, if commencing negotiations is politically difficult, national leaders can point to a legal requirement that they enter into negotiations as an expedient way of avoiding personal responsibility for an unpopular decision. Finally, if an obligation to negotiate does exist with respect to a particular matter, there can be detrimental legal consequences for the nation that refuses to enter into negotiations.<sup>47</sup>

## II. THE OBLIGATION TO NEGOTIATE IN CUSTOMARY AND CONVENTIONAL INTERNATIONAL LAW

Although an obligation to negotiate may be highly desirable, it appears that at present there is no general obligation imposed on states, applicable in all situations of dispute or disagreement, to enter into negotiations as a matter of customary or conventional international law.<sup>48</sup> There are, however, two decisions of the International Court of

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47. See discussion *infra* parts III.B, III.C.

48. Paul Reuter has commented:

Il est certes tentant de chercher à moraliser le droit international et de se placer le plus possible sur le plan de l'idéal. Mais il ne faut cependant pas dépasser, sans sortir du domaine du droit, ce qui peut être communément accepté par la société internationale actuelle. A cet égard il est malheureusement certain qu'il serait peu réaliste de vouloir *d'une manière générale* donner à l'obligation de négocier une portée qu'elle ne comporte pas . . . .

La conclusion qui s'impose est qu'il n'y a pas une obligation uniforme de négocier, mais que selon les circonstances il y a une obligation plus ou moins consistante, plus ou moins riche de devoirs. Il n'y a pas d'autres explications possibles à la diversité des cas d'espèces.

Reuter, *supra* note 5, at 714-15.

Justice (ICJ) which hold that states are obligated to negotiate in certain situations.<sup>49</sup> The reasoning of the ICJ in those cases supports the general proposition that states are under an obligation to negotiate in disputes involving situations where each possesses legal rights which can only be defined in relation to the legal rights of the other. Thus, once it is determined that customary or conventional international law creates rights for more than one state with respect to a particular matter, then, in case of a dispute involving that matter, the states concerned are obliged to enter into negotiations to resolve their differences. In addition, once it is determined that an obligation to negotiate exists as a matter of customary or conventional international law, the content of that obligation may be determined by closely scrutinizing the nature of the substantive rights of the states involved.

An examination of those cases where the ICJ or another international arbitral tribunal has interpreted obligation-to-negotiate clauses in international agreements provides substantial guidance in this endeavor. Part A of this section examines the question of the existence of a general obligation to negotiate in international law with a focus on the United Nations (U.N.) Charter. Part B analyzes the basis in customary international law for determining whether an obligation to negotiate exists. Part C analyzes the content of the obligation, specifically referencing a number of cases involving the interpretation of treaties imposing that obligation on the parties.

### *A. Is There a General Obligation to Negotiate?*

Does the U.N. Charter prescribe, as a matter of conventional international law, a general obligation to negotiate for the 180 member states? A number of the stated purposes and principles of the U.N., as stipulated in Articles 1 and 2 of the Charter, support the proposition that member states should settle disputes by peaceful means and resolve common problems through cooperation.<sup>50</sup> It is doubtful, however, that any of these provisions impose general obligations on member states to negotiate in the absence of more specific directives found in other

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49. Fisheries Jurisdiction Case (U.K. & N. Ireland v. Iceland), 1974 I.C.J. 3, 32 (July 25); North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 47 (Feb. 20).

50. For example, Article 1 of the U.N. Charter states that the purposes of the U.N. are:

(1) To maintain international peace and security, and to that end: . . . *bring about by peaceful means* . . . the adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

Charter provisions. For instance, Article 2(3) provides that “[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”<sup>51</sup> While there is considerable uncertainty concerning the scope and import of this very general proposition, it is probably safe to say that it does not create an obligation for member states to negotiate.<sup>52</sup> Also, the principle of good faith, which is referred to in Article 2(2),<sup>53</sup> has been held by the ICJ not to be itself a source of legal obligation.<sup>54</sup> Thus, negotiations must be carried out in good faith once an obligation to negotiate exists; but the principle of good faith alone does not impose an obligation to enter into negotiations.

A specific reference to negotiation appears in Article 33. Article 33 enumerates possible methods of peaceful dispute settlement in the context of the “Pacific Settlement” procedures of Chapter 6.<sup>55</sup> Article 33 states:

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.<sup>56</sup>

The specific wording of Article 33 and its position in the Charter raise two questions at the outset: (1) does the obligation contained in the

(3) To achieve *international co-operation* in solving international problems of an economic, social, cultural, or humanitarian character. . . .

U.N. CHARTER, art. 1 (emphasis added).

51. *Id.* art. 2(3).

52. The obligation to settle international disputes by peaceful means does not include the obligation to settle particular kinds of disputes by particular means or to follow any particular order of priority in the choice of methods. LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 43 (3rd rev. ed. 1969) [hereinafter GOODRICH, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS].

53. U.N. CHARTER, art. 2(2) (Members “shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.”).

54. Border and Transborder Armed Actions (Nicar. v. Hond.), 1988 I.C.J. 69, 105 (Judgment on Jurisdiction, Dec. 20); Yves Le Bouthillier & Michel Morin, *La bonne foi en droit international public, le règlement pacifique des différends et le recours à la force lors de la guerre du Golfe*, 37 MCGILL L.J. 1026, 1029 (1992); Hugh Thirlway, *The Law and Procedure of the International Court of Justice, 1960-1989*, 60 BRIT. Y.B. INT’L L. 1, 9-10 (1989).

55. GOODRICH, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS, *supra* note 52, at 41-43.

56. U.N. CHARTER, art. 33.



Article extend to all disputes between states; and (2) does the Article impose a general obligation on states or does it impose an obligation only within the context of the pacific settlement procedures of Chapter 6?

It is clear from the wording of Article 33 that the obligation to settle disputes by peaceful means does not apply to all disputes, but only to those disputes "the continuance of which is likely to endanger the maintenance of international peace and security."<sup>57</sup> It is instructive to note the different wording of Article 2(3) and Article 33. According to Article 2(3) the dispute must be "international." Goodrich, Hambro, and Simon point out that the word "international" was inserted in Article 2(3) to emphasize that the principle that states settle their disputes by peaceful means does not apply to domestic disputes even though such disputes could presumably endanger the maintenance of international peace and security.<sup>58</sup> Article 33, on the other hand, applies to "any dispute, the continuance of which is likely to endanger the maintenance of international peace and security."<sup>59</sup> Article 33 must of course be read together with Article 2(7), which provides that members are not required to submit matters which are essentially within the domestic jurisdiction of any state to settlement under the Charter. The current interpretation of the term domestic jurisdiction, however, would seem not to apply to any dispute which could endanger international peace and security; therefore, Article 33 should be read as imposing the obligation of peaceful settlement on states involved in any serious dispute. This reading of Article 33, in light of Article 2(7), is further supported by the words "any dispute" in Article 33.

With regard to the function of Article 33 in the overall scheme of the Charter, it appears that the requirement of peaceful settlement should be read in the context of the operation of Chapter 6. The phrase "first of all"<sup>60</sup> would seem to contemplate a series of events beginning with attempts at peaceful settlement by the parties, followed by investigation by the Security Council, recommendations by the Security Council, or referral by the parties of the matter to the Security Council. There are indications in decisions of the ICJ, however, that the scope of Article 33 may be broader, transcending the procedures for peaceful settlement

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57. *Id.*

58. GOODRICH, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS, *supra* note 52, at 41.

59. U.N. CHARTER, art. 33.

60. "The parties to any dispute . . . shall, *first of all*, seek a solution by negotiation . . ." *Id.* (emphasis added).

contained in Chapter 6 of the Charter. In the *North Sea Continental Shelf* cases, for example, the ICJ stated:

[the obligation to negotiate] merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes.<sup>61</sup>

This language was later quoted with approval by the Court in the *Fisheries Jurisdiction* case.<sup>62</sup>

## B. *The Obligation to Negotiate in Customary International Law*

### 1. *The North Sea Continental Shelf Cases*<sup>63</sup>

The ICJ, in the *North Sea Continental Shelf* cases, held that the states involved in the continental shelf boundary disputes were obligated under customary international law to delimit the disputed areas by negotiation and eventual agreement.<sup>64</sup> The Court derived this obligation to delimit continental shelf boundaries by negotiation and agreement from its detailed analysis of the legal regime of the continental shelf, starting with the Truman Proclamation of 1946<sup>65</sup> and considering subsequent developments including the Geneva Convention on the Continental Shelf of 1958.<sup>66</sup> The Court determined that the Convention on

61. *North Sea Continental Shelf Cases*, 1969 I.C.J. at 47.

62. *Fisheries Jurisdiction Case*, 1974 I.C.J. at 32.

63. *North Sea Continental Shelf Cases*, 1969 I.C.J. at 3.

64. *Id.* at 53–54.

65. The Truman Proclamation, in relevant part, provides that: "In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles." Pres. Proclamation No. 2667, 3 C.F.R. 39 (1945 Supp.), *reprinted in* 59 Stat. 884 (1945).

In the *North Sea Continental Shelf* cases, the ICJ stated that the two concepts of the Truman Proclamation, the concept of delimitation by mutual agreement and the concept of delimitation in accordance with equitable principles, "have underlain all the subsequent history of the subject." *North Sea Continental Shelf Cases*, 1969 I.C.J. at 33.

66. Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311 (entered into force June 10, 1964). The Convention provides that:

Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

*Id.* art IV, para. 2.

the Continental Shelf was not opposable by the Federal Republic of Germany because it was not a party to the agreement,<sup>67</sup> and the agreement was not necessarily expressive of customary international law with respect to the delimitation of continental shelf areas between adjacent states.<sup>68</sup> In the Court's view, however, there did exist applicable rules of customary international law governing the delimitation of continental shelf boundaries between adjacent states.

[D]elimitation must be the object of agreement between the States concerned, and . . . such agreement must be arrived at in accordance with equitable principles . . . namely:

(a) the parties are under an obligation to enter into negotiations 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; they are under an obligation to conduct themselves so that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it . . . .<sup>69</sup>

While the ICJ did find an obligation to negotiate on the part of the states involved in continental shelf boundary disputes, it found that obligation specifically in the substantive customary law regime of the continental shelf. The ICJ did not derive the obligation from more general principles of international law requiring peaceful settlement of disputes, but rather from the specific rules and principles of customary international law applicable to the delimitation of continental shelf areas between adjacent states. Furthermore, the Court gave meaning to the requirement of delimitation by agreement by mandating that the disputing states enter into negotiations aiming at such agreement.<sup>70</sup>

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67. North Sea Continental Shelf Cases, 1969 I.C.J. at 25-26.

68. *Id.* at 45.

69. *Id.* at 46-47. Note, however, the statement of Judge Ammoun in his separate opinion:

I dispute that there is such an obligation in the present case. It cannot be inferred from the Truman Proclamation, nor yet from Article 33 of the Charter, which concerns disputes the continuance of which is likely to endanger the maintenance of international peace and security, and is the less imperative inasmuch as it empowers the Security Council "when it deems necessary, [to] call upon the parties to settle their dispute by such means."

*Id.* at 146-47 (Ammoun, J., dissenting); see also *id.* at 215-16 (Morelli, J., dissenting).

70. *Id.* at 46-47.

## 2. The *Fisheries Jurisdiction* Case<sup>71</sup>

In the *Fisheries Jurisdiction* case, the ICJ took a more expansive approach to the obligation to negotiate. In that case, the ICJ determined that as a substantive matter, Iceland had certain "preferential fishing rights" in particular maritime areas while at the same time Great Britain had certain "traditional fishing rights" in the identical maritime areas.<sup>72</sup> According to the Court, "[n]either right is an absolute one:"

[T]he preferential rights of a coastal State are limited according to the extent of its special dependence on the fisheries and by its obligation to take account of the rights of other States and the needs of conservation; the established rights of the other fishing States are in turn limited by reason of the coastal State's special dependence on the fisheries and its own obligation to take account of the rights of other States, including the coastal State and the needs of conservation . . . .<sup>73</sup>

The ICJ then indicated that "[t]he most appropriate method for the solution of the dispute is clearly that of negotiation."<sup>74</sup> Unlike its reasoning in the *North Sea Continental Shelf* cases, where it derived the obligation to negotiate from a specific legal requirement of the customary regime of the continental shelf, the ICJ in the *Fisheries Jurisdiction* case found the obligation to negotiate "flow[ing] from the very nature of the respective rights of the Parties . . . ."<sup>75</sup> According to the Court, "[i]t is implicit in the concept of preferential rights that negotiations are required in order to define or delimit the extent of those rights . . . ."<sup>76</sup>

The reasoning of the *Fisheries Jurisdiction* case has far-reaching implications with regard to the obligation to negotiate. Once it is deter-

71. *Fisheries Jurisdiction* Case, 1974 I.C.J. at 3.

72. *Id.* at 30.

73. *Id.* at 31.

74. *Id.*

75. *Id.* at 32.

76. *Id.* In discussing this case, Professor Kirgis comments that:

What is important is that the Court found from the concept of a preferential right (as it found from Article 2 of the Convention on the High Seas and — in different contexts — could find from other treaty norms or from state practice) a duty to take account of other states' established interests . . . . The duty to consider other states' established interests defined the "very nature of the respective rights of the Parties," which in turn engendered the duty to negotiate.

mined as a matter of conventional or customary international law that the extent of particular rights of a state must be defined in relation to and in consideration of the rights of another state, it follows that in case of a dispute between those states regarding the precise definition of their respective rights, those states are under an obligation to negotiate. Moreover, this obligation does not stem from a specific customary norm mandating the settlement of this particular type of dispute through a negotiated agreement, as in the *North Sea Continental Shelf* cases, but rather from a principle of international law requiring negotiation of disputes in situations where the extent of the rights of states are limited by the rights of other states.<sup>77</sup>

### 3. Other Evidence of Custom

Increasingly, customary and conventional international law impose obligations on states to settle disputes by agreement involving overlapping or mutually limiting legal rights. While there does not appear to be a general rule requiring negotiation in all situations of conflicting interests of states, there are now many specific areas where the principles of the *North Sea Continental Shelf* cases and the *Fisheries Jurisdiction* case lead to the conclusion that negotiation is required. These are situations where the legal rights of states, whether derived from customary or conventional international law, overlap and are thus mutually limiting. The extent of the rights of one state, therefore, cannot be defined without a definition of the rights of one or more other states. For example, there are several provisions in the Convention on the Law of the Sea which recognize the rights of more than one state in a particular maritime area or call for the management of a common resource or the resolution of conflicts by agreement.<sup>78</sup> Also, many bilateral agreements

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77. Professor Kirgis expresses this idea as follows:

When a state is under a duty (imposed by treaty, custom, or any other source of international law) to consider the established interests of an identifiable group of states while exercising a right of its own, the state planning to exercise its right must consult those states before it acts, unless it is clear that the contemplated action would not significantly affect their interests.

*Id.* at 362.

78. See, e.g., United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, U.N. Doc. A/CONF.62/122, reprinted in 21 I.L.M. 1261 (1982) (entered into force Nov. 16, 1994) [hereinafter U.N. Convention on the Law of the Sea], art. 62 (providing for the utilization of the living resources of the exclusive economic zone, including the requirement that "[w]here the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements . . . give other States access to the surplus of the allowable catch . . ."), art. 63 (concerning the conservation and management of transboundary fish stocks which requires states "to agree upon the measures necessary to co-ordinate and ensure the conservation and development of such stocks . . ."),

contain provisions requiring a negotiated solution to common problems or specifically recognize common legal rights in a particular matter.<sup>79</sup>

### C. *The Obligation to Negotiate and Conventional International Law*

An obligation to negotiate on the part of states can arise from commitments made in international agreements to which they are parties. Sometimes these commitments are general, such as the promise to settle disputes likely to threaten international peace and security through negotiation or some other peaceful process.<sup>80</sup> Sometimes these commit-

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art. 197 (which mandates cooperation on a global or regional basis "in formulating and elaborating international rules, standards and recommended practices and procedures . . . for the protection and preservation of the marine environment . . .") & art. 199 (which requires states to "jointly develop and promote contingency plans for responding to pollution incidents in the marine environment").

79. After an exhaustive analysis of bilateral treaties in force, Professor Lagoni concludes that "the obligation to negotiate in good faith about the exploration and exploitation of the common deposit and about the apportionment of its proceeds can already be regarded as a customary rule of international law." Ranier Lagoni, *Oil and Gas Deposits Across National Frontiers*, 73 AM. J. INT'L L. 215, 243 (1979). See also William T. Burke, *Regulation of Driftnet Fishing on the High Seas and the New International Law of the Sea*, 3 GEO. INT'L ENVTL. L. REV. 265, 288-93 (1990); C.B. Bourne, *Procedure in the Development of International Drainage Basins: The Duty to Consult and to Negotiate*, 10 CAN. Y.B. INT'L L. 212, 233 (1972).

80. See, e.g., U.N. CHARTER, art. 33. See also Vienna Convention on the Law of Treaties, *supra* note 7, art. 65 (indicating procedures to be followed with respect to the invalidity, termination, withdrawal from, or suspension of the operation of a treaty). Article 65(1) provides, in part, that "a party which . . . invokes . . . a ground for impeaching the validity of a treaty, terminating it, withdrawing from it, or suspending its operation, must notify the other parties of its claim." *Id.* art. 65(1). Article 65(3), however, states that if an "objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations." *Id.* art. 65(3).

Professor Rosenne argues that Article 65 of the Vienna Convention might have an extensive reach for its signatories.

*Grosso modo* Article 65 of the Vienna Convention may go further and, for the parties to it, may impose, as regards the treaties to which it applies, an obligation which extends to all disputes relating to the application to a given treaty of the provisions of the Vienna Convention regarding the invalidity or termination of the treaty, regardless of whether the dispute would be one likely to endanger international peace and security.

ROSENNE, *supra* note 7, at 264.

It is important to note that Article 60(1) of the Vienna Convention on the Law of Treaties deals with the termination or suspension of the operation of a treaty as a consequence of its breach. Article 60(1) provides that "[a] material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operations in whole or in part." Vienna Convention on the Law of Treaties, *supra* note 7, art. 60(1) (emphasis added).

Article 60(2)(b) contains an analogous provision with respect to the termination or suspension of multilateral treaties. Thus, a party may not unilaterally terminate or suspend the operation of the treaty on account of a breach, but must resort to the procedures required by Article 65 which may include the obligation to negotiate imposed by Article 33 of the U.N. Charter. *Id.* arts. 60(2)(b) & 65; U.N. CHARTER, art. 33. See also ILC's Draft Articles on the

ments are quite specific,<sup>81</sup> such as the promise to engage in ongoing arms control<sup>82</sup> or economic<sup>83</sup> negotiations or to resolve disputed boundary, resource, or environmental questions through agreement.<sup>84</sup>

An interesting recent innovation is the creation of the Conference on Security and Cooperation in Europe (CSCE), a loose but permanent structure for conducting continuing negotiations on a variety of matters

Law of Treaties, *supra* note 19, arts. 57 & 63, at 421–26, 442–43; ROSENNE, *supra* note 7, at 259–352; Herbert W. Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice*, 68 AM. J. INT'L L. 51, 52 (1974); Jurisdiction of the ICAO Council (*India v. Pakistan*, 1972 I.C.J. 46 (Judgment, Aug. 18) (rejecting contentions that a party could unilaterally terminate a multilateral treaty with respect to another party by alleging the treaty's breach by that other party).

81. Professor Reuter calls such obligations "obligations de négocier liées," since the obligation to negotiate is specifically tied to specific substantive commitments. Reuter, *supra* note 5, at 720.

82. See, e.g., Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435 [hereinafter ABM Treaty]; Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3462 [hereinafter Interim Agreement]. The ABM Treaty and the Interim Agreement are known collectively as the first Strategic Arms Limitation Treaty (SALT I). Both agreements contain provisions for the continuation of active negotiations for the limitation of offensive strategic arms. ABM Treaty, *supra*, art. X; Interim Agreement, *supra*, arts. VII & VIII(2). See also Treaty on the Limitation of Offensive Arms and Protocol Thereto (SALT II Treaty), art. XIV, June 18, 1979, U.S.-U.S.S.R., S. EXEC. DOC. Y, 96th Cong., 1st Sess., 37 (1979) [hereinafter SALT II Treaty].

83. See, e.g., General Agreement on Tariffs and Trade, Agreement Establishing the Multilateral Trade Organization [World Trade Organization], GATT Doc. MTN/FA, pt. II, art. III(2) (Dec. 15, 1993), *reprinted in* 33 I.L.M. 13, 16 (1994) [hereinafter GATT: WTO Agreement]. The GATT: WTO Agreement provides:

The [WTO] shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the annexes to this Agreement. The [WTO] may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations . . . .

*Id.* See also General Agreement on Tariffs and Trade, General Agreement on Trade in Services, GATT Doc. MTN, pt. II, art. XIX, Annex 1B and Add. 1 (Dec. 15, 1993), *reprinted in* 33 I.L.M. 44, 61 (1994) [hereinafter GATT: Trade in Services Agreement]. The GATT: Trade in Services Agreement provides:

1. In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiation . . . with a view to achieving a progressively higher level of liberalization . . . .

. . . . .

4. The process of progressive liberalization shall be advanced in each such round through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement.

*Id.*

84. See U.N. Convention on the Law of the Sea, *supra* note 78, arts. 62, 63, 197 & 199.

affecting security, cooperation, and human rights in Europe.<sup>85</sup> The principal legal problems in assessing the obligations assumed by states party to an agreement to negotiate are: (1) determining whether the agreement imposes an obligation to negotiate in the particular factual situation which confronts the parties; (2) if it does, what is the content of that obligation; (3) whether there has been a breach of this obligation; (4) if so, what are the legal consequences of its nonfulfillment; and (5) what mechanisms exist, if any, for the authoritative resolution of these questions.<sup>86</sup> These questions raise several problems concerning treaty interpretation.

Treaty provisions obligating the parties to negotiate are quite common in both bilateral and multilateral treaties. Such provisions may be included in treaties for a number of different reasons. First, the parties to a treaty may have been able to negotiate solutions to most of their difficulties, but a few small matters might remain unresolved. Rather than postpone agreement on the more significant matters, the parties conclude an agreement that contains a provision to negotiate a solution to the outstanding problem or problems in the future. The well-known arbitration by President Calvin Coolidge of the Tacna-Arica Question involving the Treaty of Peace of 1883 (Treaty of Ancon) which ended the War of the Pacific between Chile and Peru<sup>87</sup> is an excellent example. The parties were unable to agree on the organization of a plebiscite to determine which nation would exercise sovereignty over the provinces of Tacna and Arica. In the Treaty of Peace, the parties agreed to conclude later a special protocol which would prescribe "the manner in which the plebiscite is to be carried out, and the terms and time for the payment by the nation which remains the owner of the provinces of Tacna and Arica."<sup>88</sup>

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85. See generally DECAUX, *supra* note 7. See also Conference on Peace and Co-operation in Europe: Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter, Nov. 21, 1990, 30 I.L.M. 190 (1991) [hereinafter Charter of Conference on Peace and Co-operation in Europe]. The Conference on Peace and Co-operation in Europe creates new institutional structures for ongoing negotiations and consultations within the CSCE. The most important institutions created are: the Council, which consists of the Ministers of Foreign Affairs of the CSCE states and meets at least once a year; the Committee of Senior Officials, which prepares the work of the Council; the CSCE Secretariat, which supports the work of the Council; the Conflict Prevention Center; and the Office for Free Elections.

86. See Reuter, *supra* note 5, at 729-33.

87. Tacna-Arica Question (Chile v. Peru), 2 R.I.A.A. 921, 926 (1925) [hereinafter Tacna-Arica Arbitration].

88. *Id.* "Apparently the Parties in 1883-1884 thought it better to agree that they would agree at some unspecified time in the future than to agree to disagree in the present." *Id.* at 928.



The parties to a successful negotiation may also want to continue the negotiating process in order to deal with related problems in the future. For example, the United States and the Soviet Union included provisions in both the SALT I and SALT II arms control agreements calling for the continuation of negotiations on other outstanding arms control problems.<sup>89</sup>

States may realize that their overlapping interests or legal rights with respect to a particular matter may give rise to the need for cooperation in the future. The U.N. Convention on the Law of the Sea provides many examples.<sup>90</sup> The same principle applies with respect to pollution control and the management and exploitation of the living and non-living resources of the seas.<sup>91</sup> Other multilateral and bilateral agreements contain similar provisions.<sup>92</sup>

States may want to establish a forum for the mitigation or resolution of certain differences through discussion and, if possible, agreement. The process of discussion and negotiation, with regular interaction and compromise, which it is hoped will lead to increased understanding and the lessening of tensions, may be more important than the actual negotiated solution. The CSCE provides an excellent example of this use of agreement to negotiate.<sup>93</sup> A leading student of the CSCE has described it as "a process of permanent negotiation."<sup>94</sup>

In order to determine the legal content of the obligation to negotiate assumed by agreement, it is helpful to examine the decisions of international tribunals which have had to interpret such treaty provisions. Although such reported decisions are few, a clear evolution in approach can be discerned. This evolution parallels that of international law in general which has moved from its earlier stress on the sovereignty of states to the needs of the world community for cooperation in the peaceful settlement of international disputes.

In the Tacna-Arica arbitration, as indicated above, Chile and Peru agreed to negotiate the "manner in which the plebiscite is to be carried

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89. ABM Treaty, *supra* note 82, art. X; Interim Agreement, *supra* note 82, arts. VII, VIII(2); SALT II Treaty, *supra* note 82, art. XIV. See also Smith, *supra* note 5, at 1549.

90. For instance, maritime boundary delimitation is to be undertaken on a cooperative basis. See U.N. Convention on the Law of the Sea, *supra* note 78, arts. 15 (delimitation of the territorial sea between states with opposite or adjacent coasts) & 74 (delimitation of the exclusive economic zone between states with opposite or adjacent coasts).

91. See *id.* arts. 62, 63, 197 & 199.

92. See, for example, the agreements cited and discussed in Lagoni, *supra* note 79, at 215, and Ranier Lagoni, *Interim Measures Pending Maritime Delimitation Agreements*, 78 AM. J. INT'L L. 345, 347 (1984).

93. See DECAUX, *supra* note 7, at 47-67.

94. *Id.* at 9.

out, and the terms and time for the payment [of a certain sum of money].”<sup>95</sup> According to the arbitrator, “their undertaking was in substance to negotiate in good faith . . . and it would follow that a willful refusal of either Party to do so would have justified the other Party in claiming discharge from the provision.”<sup>96</sup> Since the terms of the plebiscite were not prescribed in the treaty, but were left to future agreement, the arbitrator continued, “it is manifest that with respect to the negotiations looking to such an agreement they retained the rights of sovereign States acting in good faith.”<sup>97</sup> With regard to the content of this standard, the arbitrator stated:

Neither Party waived the right to propose conditions which it deemed to be reasonable and appropriate to the holding of the plebiscite, or to oppose conditions proposed by the other Party which it deemed inadvisable. The agreement to make a special protocol with undefined terms did not mean that either Party was bound to make an agreement unsatisfactory to itself provided it did not act in bad faith. Further, as the special protocol was to be made by sovereign States, it must also be deemed to be implied in the agreement . . . that these States should act respectively in accordance with their constitutional methods, and bad faith is not to be predicated upon the refusal of ratification of a particular proposed protocol deemed by the ratifying authority to be unsatisfactory. In order to justify either Party in claiming to be discharged from performance, something more must appear than the failure of particular negotiations or the failure to ratify particular protocols. There must be found an intent to frustrate the carrying out of the provisions . . . 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 . . . . A finding of the existence of bad faith should be supported not by disputable inferences but by clear and convincing evidence which compels such a conclusion.<sup>98</sup>

In addition, the arbitrator placed the burden of proof on Peru, the party alleging bad faith in the conduct of negotiations.<sup>99</sup>

In applying this “intent to frustrate” standard to the conduct of negotiations, the arbitrator found that “[t]he record fails to show that

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95. Tacna-Arica Arbitration, 2 R.I.A.A. at 926.

96. *Id.* at 929.

97. *Id.*

98. *Id.* at 929–30.

99. *Id.* at 930.

Chile has ever arbitrarily refused to negotiate with Peru the terms of the plebiscitary protocol."<sup>100</sup> Moreover, the arbitrator noted that:

[s]uch causes of delay as a cabinet crisis, a revolution, the illness of a minister, the death of a president — political contingencies which did not lie beyond the contemplation of the Parties — cannot be charged to either side as constituting a willful refusal to proceed with negotiations. The argument based on the failure of Chile to ratify the Billinghurst-Latorre Protocol of 1898 must proceed on the assumption either that Chile was bound to ratify that particular agreement or that Chile's conduct in relation thereto establishes absence of good faith in the prosecution of negotiations pursuant to the treaty. Neither position can be maintained. The Billinghurst-Latorre Protocol provided that two important conditions of the plebiscite, namely, the qualifications of voters and the secrecy of the vote should be submitted to the arbitration of the Queen of Spain. Chile had not promised to agree to such an arbitration and acted within her rights in seeking a direct agreement upon these points. Nor does Chile's conduct in relation to the Protocol afford ground for a finding of bad faith . . . . The legislature of Chile under the constitutional system of Chile had the same right to refuse to approve the Protocol as the Executive had to negotiate it and no unfavorable inference can be drawn from the exercise by the Legislature of its constitutional prerogative in the circumstances described.<sup>101</sup>

In its 1931 Advisory Opinion on *Railway Traffic Between Lithuania and Poland*,<sup>102</sup> the Permanent Court of International Justice found that the two states were bound by a resolution of the Council of the League of Nations which recommended that:

the two governments . . . enter into direct negotiations as soon as possible in order to establish such relations between the two neighboring States as will ensure the good understanding between nations upon which peace depends . . . .<sup>103</sup>

Poland argued that in accepting this recommendation both states undertook the obligation not only to negotiate but also to come to an agree-

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100. *Id.* at 933.

101. *Id.*

102. Advisory Opinion No. 42, *Railway Traffic Between Lithuania and Poland*, 1931 P.C.I.J. (ser. A/B) No. 42, at 108 (Oct. 15).

103. *Id.* at 115.

ment to open the Landwarów-Kaisiadorys railway sector to traffic.<sup>104</sup> In rejecting this argument, the Court stated:

[that] an obligation to negotiate does not imply an obligation to reach an agreement, nor in particular does it imply that Lithuania, by undertaking to negotiate, has assumed an engagement, and is in consequence obliged to conclude the administrative and technical agreements indispensable for the re-establishment of traffic on the Landwarów-Kaisiadorys railway sector.<sup>105</sup>

The 1950 ICJ Advisory Opinion in the *International Status of South-West Africa* is in the same vein.<sup>106</sup> One of the questions facing the Court in that case was whether the provisions of Chapter XII of the U.N. Charter ("International Trusteeship System") imposed on South Africa the obligation to enter into negotiations with the United Nations with a view to concluding a trusteeship agreement with respect to Southwest Africa.<sup>107</sup> The territory of Southwest Africa was a former German colony which had been placed under the aegis of South Africa after the First World War.<sup>108</sup> According to the mandate arrangement with the League of Nations, South Africa was to have full power of administration and legislation over the territory.<sup>109</sup> With the demise of the League of Nations and the creation of the international trusteeship system in Chapter XII of the U.N. Charter, the question arose as to whether South Africa was legally obliged to conclude a trusteeship agreement with the U.N. to place Southwest Africa under the newly-created system of administration and supervision.<sup>110</sup>

In determining that South Africa was under no such obligation, the Court engaged in a close, literal reading of the relevant provisions of the Charter, and rejected the argument that the answer to the question posed be sought in "general considerations" regarding the creation of the trusteeship system and its relation to the existing mandate system of the League of Nations. The Court regarded these considerations as "political or moral duties."<sup>111</sup> Thus the Court was reluctant to impose a duty on

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104. *Id.* at 116.

105. *Id.*

106. *International Status of South-West Africa*, 1950 I.C.J. at 128.

107. *Id.* at 139-40.

108. *Id.* at 131.

109. *Id.* at 132.

110. *Id.* at 139.

111. *Id.* at 139. The court concluded:

It is true that, while Members of the League of Nations regarded the Mandates System as the best method for discharging the sacred trust of civilization as provid-

South Africa lacking a clear and specific manifestation of intent in the governing international agreement even though the agreement involved was the U.N. Charter, where one might think clear indications of object and intent would govern.

The rationale for the contemporary evolution away from a state sovereignty starting point for the interpretation of agreements to negotiate, exemplified in the Tacna-Arica Arbitration, the decision of the Permanent Court of International Justice in the Polish-Lithuanian Railway case, and the 1950 ICJ Advisory Opinion in the *International Status of South-West Africa* case, to a more cooperative, community-based approach, demonstrated in the Graeco-German Arbitration which is discussed below, is foreshadowed in two dissenting opinions in the *International Status of South-West Africa* case. In that case, as discussed above, the Court addresses the question of whether Chapter XII of the U.N. Charter imposed an obligation on South Africa to enter into negotiations for placing Southwest Africa under the U.N. Trusteeship System. Judge de Visscher, in dissent, argues that "the individualistic concepts which are generally adequate in the interpretation of ordinary treaties" do not suffice "in the interpretation of a great international constitutional instrument, like the United Nations Charter . . . ."<sup>112</sup> Thus, rather than view the interpretative problem in the context of state sovereignty,<sup>113</sup> Judge de Visscher starts from the stated community objectives for the trusteeship system contained in Article 76 of the U.N.

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ed for in Article 22 of the Covenant, the Members of the United Nations considered the International Trusteeship System to be the best method for discharging a similar mission. It is equally true that the Charter has contemplated and regulated only a single system, the International Trusteeship System. It did not contemplate or regulate a co-existing Mandates System. It may thus be concluded that it was expected that the mandatory States would follow the normal course indicated by the Charter, namely, conclude Trusteeship Agreements. The Court is, however, unable to deduce from these general considerations any legal obligation for mandatory States to conclude or to negotiate such agreements. It is not for the Court to pronounce on the political or moral duties which these considerations may involve.

*Id.* at 140. *But see id.* at 186-90 (de Visscher, J., dissenting).

112. *Id.* at 189 (de Visscher, J., dissenting).

113. The classic statement of the state sovereignty appears in the S.S. "Lotus" case. The S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 20 (Sept. 7). The Permanent Court of Justice stated:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. *Restrictions upon the independence of States cannot therefore be presumed.*

*Id.* at 35 (emphasis added).

Charter.<sup>114</sup> Judge Alvarez, in his dissenting opinion, indicates that he would go even further. He would derive not only an obligation to negotiate, but also an obligation to reach an agreement, from the language of the Charter read in light of the "spirit of the Charter."<sup>115</sup>

The Graeco-German Arbitration of 1972,<sup>116</sup> involving Greece's claim that Germany was obligated to enter into negotiations regarding the determination and payment of certain debts, represents an approach to the interpretation of treaty-based obligations to negotiate similar to that advocated by Judge de Visscher. In the Graeco-German case, Greece argued that by undertaking an obligation to negotiate, Germany had not only agreed to negotiate concerning the existence, amount, payment schedule, and modalities of certain debts, but had also agreed that it did in fact have financial obligations to Greece.<sup>117</sup> This is a conclusion which Germany vigorously denied.<sup>118</sup>

Greece argued that under Article 19 of the Agreement on German External Debts of 1953,<sup>119</sup> the Federal Republic of Germany was under an obligation to engage in negotiations to settle certain outstanding claims.<sup>120</sup> Germany countered by contending that the Agreement im-

114. Article 76 of the U.N. Charter provides:

The basic objectives of the trusteeship system, in accord with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

- (a) to further international peace and security;
- (b) to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;
- (c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and
- (d) to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice . . . .

U.N. CHARTER, art. 76.

115. *International Status of South-West Africa*, 1950 I.C.J. at 183 (Alvarez, J., dissenting). Judge Alvarez notes that "[e]ven admitting that there is no legal obligation to conclude an agreement, there is, at least, a political obligation, a duty which derives from social interdependence and which can be sanctioned by the Assembly of the U.N." *Id.* at 184.

116. *Graeco-German Arbitration*, 19 R.I.A.A. at 27.

117. *Id.* at 44.

118. *Id.* at 46.

119. *Agreement on German External Debts*, Feb. 27, 1953, 4 U.S.T. 443, 333 U.N.T.S. 3.

120. *Graeco-German Arbitration*, 19 R.I.A.A. at 42.

posed no duty on its part to enter into a settlement.<sup>121</sup> In its decision, the Tribunal first decided that there existed no conflict between the terms "further discussions" and "negotiations."<sup>122</sup> After concluding that Article 19 was a *pactum de negotiando*, rather than a *pactum de contrahendo*,<sup>123</sup> the Tribunal stated:

[that] a *pactum de negotiando* is also not without legal consequences. It means that both sides would make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of strongly held positions earlier taken. It implies a willingness for the purpose of negotiation to abandon earlier positions and to meet the other side part way. The language of the Agreement cannot be construed to mean that either side intends to adhere to its previous stand and to insist upon the complete capitulation of the other side. Such a concept would be inconsistent with the term "negotiation." It would be the very opposite of what was intended. An undertaking to negotiate involves an understanding to deal with the other side with a view to coming to terms. Though the Tribunal does not conclude that Article 19 in connection with paragraph 11 of Annex I absolutely obligates either side to reach an agreement, it is of the opinion that the terms of these provisions require the parties to negotiate, bargain, and in good faith attempt to reach a result acceptable to both parties and thus bring an end to this long drawn out controversy . . . . The need for the peaceful solution of differences between States is so great and so essential to the well-being of the community of nations that, when disputants have reached a point of signifying their agreement to negotiate an outstanding dispute, the subsequent negotiations normally ought to lead to a satisfactory and equitable result.<sup>124</sup>

The Tribunal then noted that the obligation to negotiate entails the obligation to enter into "meaningful" negotiations.

To be meaningful, negotiations have to be entered into with a view to arriving at an agreement. Though, as we have pointed out, an agreement to negotiate does not necessarily imply an obligation to reach an agreement, it does imply that serious efforts towards that end will be made.

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121. *Id.* at 46.

122. *Id.* at 54-55, 64.

123. *Id.* at 55.

124. *Id.* at 56.

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In this case, an agreement to negotiate implies much more than mere willingness to accept the other side's complete capitulation. For such a result, negotiations are neither necessary nor desirable. We construe the pertinent provisions of the Agreement to mean that, notwithstanding earlier refusals, rejections or denials, the parties undertook to reexamine their positions and to bargain with one another for the purpose of attempting to reach a settlement.<sup>125</sup>

Significantly, the Tribunal interprets the agreed commitment to negotiate as "proof of the fact that both sides were prepared to remove the dispute between them from the realm of contentiousness. Any interpretation of these provisions must keep this objective in mind."<sup>126</sup>

The *Lac Lanoux* arbitration of 1956 involved an agreement between France and Spain whereby a state that intended to take an action which might alter the regime or volume of the flow of water also utilized by the other state agreed to notify the other state in advance of its intentions.<sup>127</sup> Spain argued that this provision required France to obtain the prior agreement of Spain for a certain hydraulic project that it wanted to undertake. Although the Tribunal employed a great deal of "state sovereignty" language in its opinion,<sup>128</sup> *Lac Lanoux* should not be understood as rejecting the more community-oriented approach to the interpretation of agreements to negotiate. The specific wording of the treaty article in question clearly contemplates prior notification, not negotiation. The Tribunal held that this prior notification provision, read in the light of the general rule of good faith in international law, imposed on France the obligations to consider Spanish interests, to attempt to satisfy these interests to the extent compatible with its own interests, and to manifest that it has a real concern for harmonizing its interests with those of its neighboring riparian.<sup>129</sup>

### III. IMPLEMENTATION OF THE OBLIGATION TO NEGOTIATE

With respect to the obligation to negotiate, the most difficult issues arise in connection with the implementation of this obligation. Whether

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125. *Id.* at 57, 59.

126. *Id.* at 60.

127. *Lac Lanoux* Arbitration, 12 R.I.A.A. at 289.

128. For example, the Tribunal stated that "[p]ushed to the extreme, the Spanish contention would imply either the general paralysis of the exercise of national jurisdiction in case of a dispute or the submission of all disputes whatsoever to a third-party decision-maker; international practice does not sanction either of these results." *Id.* at 310.

129. *Id.* at 315.



the source of the alleged obligation is conventional or customary international law, problems arise in determining: (1) whether there exists an obligation to negotiate in a given factual situation; (2) if an obligation to negotiate is found to exist, whether a breach of that obligation has occurred; and, (3) if a breach has occurred, what is an appropriate remedy for the aggrieved state.

#### A. Determination of the Existence of an Obligation and Its Breach

If the alleged obligation to negotiate arises from an international agreement which also contains a provision conferring jurisdiction on an international tribunal (an established court or an ad hoc arbitral tribunal) or if the parties to an international agreement containing a negotiation provision are also parties to a more general dispute settlement agreement, then questions involving the interpretation and application of the obligation to negotiate can be resolved in a judicial forum by a third-party decisionmaker. If the states involved are parties to a dispute settlement arrangement which encompasses the particular dispute, the same possibility of judicial determination exists if the alleged obligation to negotiate arises from customary international law. Additionally, the disputing states can always specifically agree to submit a particular dispute to a third party decisionmaker for resolution.<sup>130</sup>

In most cases, however, it is unlikely that issues involving the obligation to negotiate will be resolved by a judicial body. Therefore, the question arises whether the obligation to negotiate has any significant value as a norm of positive international law in the absence of some provision for its judicial application. Does it actually influence the behavior of state officials? Or, in the words of Professor Franck, does the obligation to negotiate exert "a pull toward compliance on those [parties] addressed normatively . . . ?"<sup>131</sup> The answer to this question is not clear or simple. Professor Franck suggests a helpful analysis focusing on the following four factors: determinacy, coherent practice, symbolic validation, and adherence.<sup>132</sup> While such an analysis may be em-

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130. For more information on the role of third-party decision in obligation-to-negotiate situations, see Reuter, *supra* note 5, at 731-33.

131. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24 (1990).

132. Professor Franck defines these terms as follows:

*Determinacy* — "Determinacy . . . denotes a rule's clarity of meaning: how effectively it communicates with the parties to a dispute."

*Symbolic validation* — "The *symbolic validation* of a rule, or of a rule-making process or institution, occurs when a signal is used as a cue to elicit compliance with a command."

ployed to determine whether or not a particular rule is legitimate, and thus exerts a pull toward compliance, Professor Franck points out that it is also prescriptive, because it suggests ways to augment the capacity of a rule to obligate.<sup>133</sup> Thus, if a rule is clearly stated, the product of an accepted process of normative development, conceptually consistent with other generally accepted norms, and applied consistently (or, at the very least, demands for compliance are consistently made), then the rule will exert a pull toward compliance.

Part III.B of this article will demonstrate that an obligation to negotiate can be derived logically and coherently from existing international legal doctrine; and that in fact, such obligations have been derived by the ICJ from existing international legal concepts and precedents for application in specific cases. Further analysis of the application of the obligation to negotiate in other particular cases is undertaken in Part III.C of this article. This analysis will demonstrate that the substantive content of the obligation to negotiate is determinate. In other words, the substantive content can be clearly stated. When this is not the case, a procedural approach to giving content to the obligation is available. Given the strong theoretical basis for the rule, and its desirability in interstate relations, diplomats and national leaders should frame their expectations and demands for the opening of meaningful international negotiations in terms of an international legal requirement to negotiate in those situations where such an obligation exists within the meaning of the *Fisheries Jurisdiction* case (that is, in those situations where the rights of states overlap and are mutually defining and limiting).

The specific content of the obligation can be determined by reference to the applicable substantive law from which the obligation to negotiate derives. Reliance on the obligation to negotiate in diplomatic practice may possibly enhance the likelihood of "getting to the table," while at the same time strengthen the compliance pull of the rule. Furthermore, by framing the call to negotiate in terms of a legal obligation, national leaders and diplomats may enhance the possibility that public opinion, domestic or foreign, would support or accede to the opening of negotiations.

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*Coherence* — *Coherence* refers to consistent practice.

*Adherence* — "[A]dherence . . . [is] the vertical nexus between a *primary rule of obligation*, . . . and a hierarchy of secondary rules identifying the sources of rules and establishing normative standards that define how rules are to be made, interpreted, and applied."

*Id.* at 84, 92, 135–49, 184.

133. *Id.* at 207.

Since the commencement or continuation of negotiations, which is essentially a cooperative and collaborative enterprise, is the goal sought by the obligation to negotiate, a coercive approach to a failure to negotiate is not the optimal solution. A mechanism is needed to direct and encourage states to enter into good faith negotiations when dealing with particular problems. Shabtai Rosenne makes the following suggestive observations that address treaties specifically, but which may also be read to apply to breaches of obligations imposed by customary international law:

The general international law reflects the point of departure that international treaties are concluded between States and are only binding upon States when in force; and that breach of a treaty is a matter for States, to be dealt with in accordance with current diplomatic practices and procedures and closely influenced by government policies at the given moment.

But alongside this standard diplomatic approach, entirely new conceptions are being evolved. In these, the distinction between a purely political approach and a purely legal approach . . . is becoming blurred . . . . The essence of this new evolution . . . consists in the creation of monitoring and reporting machinery aiming at the systematic and organized mobilization of public opinion (including governmental opinion) to give backing to what is commonly believed to be the intention of the drafters of the treaty, deviation from which, endorsed by such monitors, attracts to the government concerned charges (which no government likes to hear) of treaty-breaking. Monitoring in this sense exists both as an official activity, and as a non-official activity . . . . It has one effect at least which should be noted here: it is liable to reassert the community interest in the modern treaty as against the excessive bilateralism characteristic of the Vienna Convention, and in that sense may open the way to a new construction and a new conception of the effect of breach within the context of the law of treaties.<sup>134</sup>

It may be that the sort of international obligation monitoring and publicity function suggested by Rosenne is already operating at the international level through the efforts of the U.N. General Assembly.<sup>135</sup>

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134. ROSENNE, *supra* note 14, at 40.

135. See *infra* note 143 and accompanying text.

### B. *Legal Consequences of Breach*

Even though judicial or arbitral application of the obligation to negotiate may not be possible in a particular case, there is still more practical value to the obligation than the political, diplomatic, or public relations uses suggested above. There are situations where the failure of a state to honor a consensual or customary obligation to negotiate would allow the aggrieved state to take certain legal action that would otherwise be legally impermissible, such as the termination of a treaty relationship or acting in a manner otherwise prohibited.

With respect to treaties, Article 60 of the Vienna Convention on the Law of Treaties provides for the termination or suspension of a treaty in case of a material breach by one of the parties.<sup>136</sup> A material breach is defined as "the violation of a provision essential to the accomplishment of the object or purpose of the treaty."<sup>137</sup> Failure to enter into negotiations might very well be a material breach if: (1) the treaty contained an express provision requiring negotiation under certain circumstances; or (2) the treaty created overlapping rights which could only be defined for one party in relation to the rights of the other party or parties even without an express requirement to negotiate. While terminating a treaty relationship because of the failure of a party to negotiate when under the obligation to do so is indeed a drastic response, the existence of that possibility may provide additional leverage to the aggrieved state to convince the other party to enter into serious negotiations.

The same considerations apply with respect to obligations arising by virtue of customary international law. An aggrieved state may claim that the failure of another state to enter into good faith negotiations when required to do so by customary international law excuses the former state from certain corresponding obligations with respect to the non-negotiating state. Furthermore, violation of a customary or consensual obligation to negotiate may allow the aggrieved state to take action, short of terminating the treaty, that would otherwise be impermissible.

### C. *The Implementation of the Obligation Illustrated: The Case of Large-Scale Driftnet Fishing*

To illustrate the practical application of the obligation to negotiate, this article will examine in some detail the recent large-scale driftnet

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136. Vienna Convention on the Law of Treaties, *supra* note 7, art. 60. See also *supra* note 14 and accompanying text.

137. Vienna Convention on the Law of Treaties, *supra* note 7, art. 60(3)(b).

fishing controversy.<sup>138</sup> This examination reveals that a perceived obligation to negotiate contributed to meaningful international negotiations undertaken within the context of the relevant substantive rules of international law. Even though national differences have not yet been fully accommodated, the continuing existence of a recognized obligation to negotiate contributes to channeling the dispute in the direction of a multilateral, cooperative resolution.

During the 1980s, fishermen from several major commercial fishing states began to employ large-scale pelagic driftnets for fishing operations. Almost immediately, concern developed that the widespread use of large-scale driftnets would lead to the overfishing of certain fish stocks and to an unacceptably large incidental catch resulting in the death of marine mammals, birds, turtles, and nontarget fish (principally tuna and salmon). In 1987, the United States unilaterally enacted legislation intended to control the use of driftnets and to obtain more precise scientific information regarding the effects of driftnet fishing.<sup>139</sup> In November 1989, a number of South Pacific states concluded a regional, multilateral agreement to prohibit the use of long driftnets in their exclusive economic zones (EEZ).<sup>140</sup> In December 1989, the U.N. General Assembly adopted Resolution 44/225, which called upon "interested members of the international community . . . [to] review the best available scientific data on the impact of large-scale pelagic driftnet fishing and agree upon further co-operative regulation and monitoring measures."<sup>141</sup> Resolution 44/225 also recommended the imposition of a moratorium on all large-scale pelagic driftnet fishing operations by June

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138. See generally Leslie A. Davis, *North Pacific Pelagic Driftnetting: Untangling the High Seas Controversy*, 64 SO. CAL. L. REV. 1057 (1991); Burke, *supra* note 79, at 265; Report by the U.N. Secretary-General on Large-Scale Pelagic Driftnet Fishing and Its Impact on the Living Marine Resources of the World's Oceans and Seas, U.N. Doc. A/45/663 (1990).

139. Driftnet Impact Monitoring, Assessment, and Control Act of 1987, Pub. L. No. 100-220, Title IV, §§ 4001-4009, 101 Stat. 1477 (1987), 16 U.S.C. § 1822 (1988) [hereinafter Driftnet Act]. See Juan B. Otero, *The 1987 Driftnet Act: A Step Toward Responsible Marine Resources Management*, 2 COLO. J. INT'L ENVTL. L. & POL'Y 129, 130 (1991). A key provision of the Driftnet Act is its call for immediate "negotiations with each foreign government that conducts, or authorizes its nationals to conduct, driftnet fishing that results in the taking of marine resources of the United States in waters of the North Pacific Ocean outside of the exclusive economic zone and territorial sea of any nation." Driftnet Act, *supra*, § 4006(a).

140. Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, Nov. 24, 1989, 29 I.L.M. 1449 (1990) (entered into force May 17, 1991).

141. *Large-Scale Pelagic Driftnet Fishing and Its Impacts on the Living Marine Resources of the World's Oceans and Seas*, G.A. Res. 44/225, U.N. GAOR, 44th Sess., Supp. No. 49, at 292, U.N. Doc. A/44/746/Add.1 (1989).

30, 1992.<sup>142</sup> Professor Burke highlights the importance of these provisions (paragraphs 3 and 4 of Resolution 44/225) as representing “a significant step in the development of the Law of the Sea . . . [where] the General Assembly has been used to respond to problems surrounding the high seas by recommending binding obligations on states.”<sup>143</sup> Recommendation by the General Assembly of a particular cooperative course of action to be followed by “interested states” based on existing international law provides an alternative mechanism for encouraging states to fulfill their international legal commitments.

In spite of the measures described above, there are still serious differences of opinion concerning the benefits and dangers of large-scale driftnet fishing. While there is mutual agreement on particular problems, preferred solutions differ widely.<sup>144</sup> Although the moratorium on large-scale driftnet fishing called for in General Assembly Resolution 46/215 has been in effect since December 31, 1992, serious concerns remain between states favoring and opposing the ban.<sup>145</sup>

The driftnet fishing problem is principally limited to the high seas, since states can regulate fishing activities in their EEZ's under current international law. High seas fisheries, however, have become more important in recent years because many large areas of the ocean have been closed to foreigners under the EEZ regime and because technological developments have made driftnet fishing more practical and economically advantageous. With respect to the conservation of fish in high seas areas, states have both a particular and a general interest: (1) a particular interest in anadromous, catadromous, or highly migratory fish stocks which spend part of their lifecycle in that state's domestic waters

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142. *Id.* at 294.

143. Burke, *supra* note 79, at 277. The General Assembly has subsequently adopted two additional resolutions on large-scale driftnet fishing. *Large-Scale Pelagic Driftnet Fishing and Its Impacts on the Living Marine Resources of the World's Oceans and Seas*, G.A. Res. 46/215, U.N. GAOR, 46th Sess., U.N. Doc. A/Res/46/215 (1992), Dec. 20, 1991, reprinted in 31 I.L.M. 241 (1992) (calling on states to “ensure that a global moratorium on all large-scale pelagic driftnet fishing is fully implemented on the high seas of the world's oceans and seas . . . by 31 December 1992”); G.A. Res. 45/197, U.N. GAOR, 45th Sess., U.N. Doc. A/Res/45/197 (1990), Dec. 21, 1990 (calling for the “full implementation [of Resolution 44/225] by all members of the international community . . .”). The European Community has also adopted regulations prohibiting the use of driftnets exceeding 1.5 miles in length on the high seas. David E. Pitt, *Fishing Fleets Are Pulling in Their Giant Nets*, N.Y. TIMES, Jan. 9, 1994, at A11.

144. For a description of the problems involved in large-scale pelagic driftnet fishing, see Davis, *supra* note 138, at 1066–75.

145. For examples, see Pitt, *supra* note 143, at A11. In late December 1993, environmentalists, seeking to call attention to the continuing use of driftnets, unfurled a 1.2-mile long driftnet across the base of the Eiffel Tower in Paris. See *Activists String Giant Fish Net Under Eiffel Tower in Protest*, CHI. TRIB., Dec. 20, 1993, at 7.

or EEZ (or stocks which straddle that state's EEZ and the adjacent area of high seas); and (2) a general interest in the taking of any high seas fish as part of that state's "freedom of fishing" on the high seas. Also, all states have a general interest in the protection and conservation of all other marine life on the high seas, both as an economic matter (considering other marine life to have commercial value) and for non-commercial reasons (e.g., preservation of endangered species or humanitarian concerns).

No single state, group of states, or international organization is able to make laws for high seas areas that deal effectively with the driftnet issue. The cooperation of all interested states is required to settle this issue. Given this, one may ask if there is an obligation on the part of these "driftnetting" states to enter into negotiations with other interested states to deal with the perceived problem. And, if there is such an obligation, does it extend only to those states which can demonstrate an individualized interest in a particular fish stock (e.g., because that stock straddles its EEZ or originates in its internal waters), or does the obligation to negotiate also extend to those states which have no such individualized interests. Furthermore, if an obligation to negotiate does exist in either of these situations, is that obligation an affirmative one, such that a prospective driftnetting state must seek to negotiate before it can engage in that practice, or is the obligation only an obligation to respond to the call of other interested states for negotiations.

An analysis of the relevant international practice indicates that states recognize that states engaging in large-scale driftnet fishing do have an obligation to negotiate at least with those states with individualized interests in the affected fish stocks. The obligation, however, does not appear to be an affirmative one.<sup>146</sup> A look at the history of this controversy indicates that all states, including those that engage in high seas driftnetting, have felt legally obligated to enter into negotiations concerning the matter. This recognition of an obligation to negotiate on the part of high seas fishing states is in accord with the mandate of the

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146. See Burke, *supra* note 79, at 288-89.

In the context of high seas pelagic driftnets, there is ample evidence that the parties involved have engaged in negotiations, as well as other forms of international cooperation. Some long established international agreements are concerned with pelagic driftnets [citing, *inter alia*, the International North Pacific Fisheries Convention of 1952] and recently, special agreements have been reached to implement measures concerning use of high seas driftnets and to lay a basis for further cooperative action [citing bilateral agreements concluded by the United States in 1989 with Japan, Taiwan, and Korea].

*Id.* at 289 (citations omitted).

*Fisheries Jurisdiction* case: an obligation to negotiate flows from the simultaneous, and mutually limiting, rights of states in the high seas.<sup>147</sup> Rights of states in the high seas areas are comprehensively defined in the U.N. Convention on the Law of the Sea.<sup>148</sup> For those states that are not parties to the Convention, like the United States, the U.N. Convention on the Law of the Sea is still regarded as stating applicable customary law with respect to the rights of states concerning fishing and conservation in high seas areas.<sup>149</sup> With respect to the general obligations of states in high seas areas, Article 117 of the Convention on the Law of the Sea states the customary law principle that "[a]ll States have the duty to take, or to co-operate with other states in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources on the high seas."<sup>150</sup> In addition, Article 118 provides:

States shall co-operate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned.<sup>151</sup>

The Convention also specifically recognizes particularized high seas rights of coastal states for anadromous,<sup>152</sup> catadromous,<sup>153</sup> highly migratory,<sup>154</sup> and straddling stocks<sup>155</sup> that spend part of their lifecycle in the

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147. See generally *id.* at 286-88.

148. U.N. Convention on the Law of the Sea, *supra* note 78, arts. 62-64, 66-67, 117-18, 197 & 199.

149. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. V, introductory note, at 5 (1986) ("By express or tacit agreement accompanied by consistent state practice, the United States, and states generally, have accepted the substantive provisions of the [U.N.] Convention [on the Law of the Sea]; other than those addressing deep sea-bed mining, as statements of customary law binding upon them apart from the Convention.").

150. U.N. Convention on the Law of the Sea, *supra* note 78, art. 117.

151. *Id.* art. 118.

152. *Id.* art. 66.

153. *Id.* art. 67.

154. *Id.* art. 64.

155. *Id.* art. 63(2). The efforts of the international community to deal with the problems involved in the conservation and management of highly migratory and straddling fish stocks provides another illuminating context in which to explore the existence, operations, and effect of the obligation to negotiate. For background, see Alison Rieser, *ASIL Observer Comments on UN Conference on Straddling and Migratory Fish Stocks*, ASIL NEWSL. (American Society of International Law, Washington, D.C.) Nov.-Dec. 1993, at 12; Moritaka Hayashi, *The Management of Transboundary Fish Stocks under the LOS Convention*, 8 INT'L J.



internal waters or EEZs of those states. Given this rather clear state of the law, it is not surprising that all states involved in the controversy regard themselves under an obligation to negotiate.

The legal consequences that would flow from a driftnetting state's failure to enter into negotiations with states that have particularized interests in specific fish stocks adversely affected by driftnet fishing activity, or with states that are lacking a particularized interest but who still have general legal rights with respect to the high seas areas, is unclear. In this context, it is instructive to consider the current controversy concerning the use of unilateral trade measures by nations seeking to protect marine mammals or conserve fishery resources in high seas areas.<sup>156</sup>

Can a nation that is a party to the General Agreement on Tariffs and Trade (GATT)<sup>157</sup> ban the import of marine products if those products are obtained by fishing techniques which are harmful to marine mammals or endanger particular fish stocks? A recent report by a GATT Dispute Settlement Panel refused to allow the United States to take unilateral trade sanctions against Mexico because of the high incidental by-catch of dolphins by Mexican vessels.<sup>158</sup> According to the Tuna-Dolphin Panel Report, the unilateral restrictive measures taken by the United States violated its obligations under the GATT.<sup>159</sup>

Analyzing this question in the driftnet fishing context, if the United States attempted to engage an offending user of large-scale pelagic driftnets in negotiations pursuant to the principles of customary interna-

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MARINE & COASTAL L. 245, 250 (1993); Bruce N. Shibles, *Implications of an International Legal Standard for Transboundary Fishery Management of Gulf of Maine-Georges Bank Fishery Resources*, TERR. SEA J., Sept. 1985, at 1.

156. See generally Belina Anderson, *Unilateral Trade Measures and Environmental Policy Protection*, 66 TEMPLE L. REV. 751 (1993); Christopher A. Cherry, *Environmental Regulation Within the GATT Regime: A New Definition of "Product"*, 40 UCLA L. REV. 1061 (1993); Janet McDonald, *Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order*, 23 ENV'T L. 397 (1993); Matthew H. Hurlock, Note, *The GATT, U.S., Law and the Environment: A Proposal to Amend the GATT in Light of the Tuna/Dolphin Decision*, 92 COLUM. L. REV. 2098 (1992); Thomas J. Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L L. 700 (1992); Edith B. Weiss, *Environment and Trade as Partners in Sustainable Development: A Commentary*, 86 AM. J. INT'L L. 728 (1992).

157. General Agreement of Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, 55 U.N.T.S. 194 (entered into force Jan. 12, 1948) [hereinafter GATT].

158. General Agreement of Tariffs and Trade, United States — Restrictions on the Imports of Tuna (Aug. 16, 1991), 30 I.L.M. 1594 (1991) [hereinafter Tuna-Dolphin Panel Report]. See also General Agreement of Tariffs and Trade, United States — Restrictions on the Imports of Tuna (June 1994), GATT Doc. DS29/R, Limited Distribution [hereinafter Tuna-Dolphin Panel Report II].

159. Tuna-Dolphin Panel Report, *supra* note 158, at 1623; Tuna-Dolphin Panel Report II, *supra* note 158, at paras. 5.20, 5.33.

tional law and that state had refused to enter into meaningful discussions, would this breach of the international legal obligation to negotiate permit the United States, without violating its obligations under the GATT, to prohibit the importation of fish products taken with large-scale driftnets? The obligation to negotiate would have real international significance, because its breach would cause important legal consequences for the offending state if the United States is permitted to prohibit the importation of the driftnet fish products without violating the GATT. While it appears doubtful, in light of the Tuna-Dolphin Panel Report, that a breach of an obligation to negotiate would have enabled the United States to take such action, there is language in the decision that indicates that a breach of an obligation to negotiate may, in certain situations, entail important legal consequences.<sup>160</sup>

In the Tuna-Dolphin Panel Report, the United States argued that it was justified in banning the importation of tuna from Mexico under Article XX of the GATT.<sup>161</sup> Article XX provides that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . (b) necessary to protect human, animal or plant life or health . . . ."<sup>162</sup> The Panel, however, disagreed with the U.S. position and refused to interpret Article XX(b) as applying extraterritorially.<sup>163</sup>

According to the Panel, Article XX(b) applied only to the protection of human, animal, or plant life *within* the territory of the state seeking to ban importation of a product.<sup>164</sup> The Panel also noted that even if Article XX(b) "were interpreted to permit extraterritorial protection of life and health, [the U.S. measures] would not meet the requirement of necessity set out in that provision."<sup>165</sup>

Furthermore, according to the Tuna-Dolphin Panel Report,

The United States has not demonstrated to the Panel — as required of the party invoking an Article XX exception — that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular *through the negotiation of international cooperative arrangements . . . .*<sup>166</sup>

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160. Tuna-Dolphin Panel Report, *supra* note 158, at 1620.

161. *Id.*

162. GATT, *supra* note 157, art. XX.

163. Tuna-Dolphin Panel Report, *supra* note 158, at 1619–20.

164. *Id.* at 1620.

165. *Id.*

166. *Id.* (emphasis added).

Article XX itself imposes no obligation to negotiate on a state seeking to make use of the exceptions it provides;<sup>167</sup> however, as has been demonstrated, an obligation to negotiate deriving from the conventional and customary law of the high seas certainly exists. Thus, in the driftnet fishing case, if the question of "necessity" under Article XX were dispositive with respect to the U.S. ability to invoke the exception contained in Article XX(b) of the GATT, the breach of the obligation to negotiate might very well be decisive.

### CONCLUSION

The international negotiation process, viewed as a whole, is the principal vehicle for cooperation between states. Whether negotiation occurs within the context of established international structures, such as the U.N., the CSCE, or the GATT, or is organized on an ad hoc basis to deal with particular problems, the interaction of states through negotiations concluding in binding international agreements represents the international community of states' regular way of conducting its business.<sup>168</sup> The law of treaties as it has developed over the past few centuries, however, has not evolved in a manner that is fully responsive to the continuity, intensity, or multiplicity of contemporary international negotiation.<sup>169</sup> This is because that body of law developed primarily

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167. See Schoenbaum, *supra* note 156, at 711.

168. "Treaties are the bones and sinew of the global body politic, making it possible for states to move from talk through compromise to solemn commitment. They are also its moral fiber, the evidence that governments and people have pledged their 'full faith and credit' to one another." Thomas M. Franck, *Taking Treaties Seriously*, 82 AM. J. INT'L L. 67, 67 (1988). The ILC has observed that "the conclusion of multilateral agreements has become the main device in the legal regulation of the relations between States." Report of the Secretary-General Reviewing the Multilateral Treaty-Making Process: Observations of the International Law Commission, U.N. Doc. A/35/312/Add.2, at 16 (1980).

169. As Shabtai Rosenne has noted:

one cannot fail to be struck by the fact that the codification of the law of treaties . . . is still cast in a nineteenth-century mould. . . . What has been accomplished certainly constitutes a very sound and well-drafted basis and even core for the law for governing the major written instrument through which international transactions of all kinds are commonly (though not invariably) recorded — the treaty, the agreement between subjects of international law governed by international law. But the codification as a whole still reflects the law as it was developed in the relatively compact and relatively homogeneous international community before the effects of self-determination of 1919 and of the massive decolonization of the 1960s could be felt.

ROSENNE, *supra* note 7, at 83–84. See also Philip Allott, *Mare Nostrum: A New International Law of the Sea*, 86 AM. J. INT'L L. 764, 781 (1992) (The reliance by the international community on treaties and other forms of agreements is "a clear sign of the impoverishment of the international system as a political system, and of its rudimentary nature as a democracy."); Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J.

during a period when international negotiation and international agreement played a far different role in the life of the world community. Until the latter part of the nineteenth century, international negotiations and agreements dealt principally with political matters: war, peace, and neutrality; alliance and friendship; and the settlement of territorial claims.<sup>170</sup> Today, international negotiations and agreements are not limited to political matters, but also incorporate legal, social, cultural, economic, environmental, technical, and administrative matters.<sup>171</sup>

Not only has the subject matter of international negotiations and agreements expanded exponentially, but the way in which negotiations are structured and conducted has also changed greatly. The hallmarks of present day negotiations are continuity and interrelatedness. Conference diplomacy and standing preparatory bodies, like the International Law Commission, are becoming increasingly important. Rather than each negotiation being a unique event to deal with a particular, discrete problem, modern day negotiations are characterized by their length, complexity, continuity, and inclusiveness. It is essential that the law of treaties evolve to reflect these changing realities.<sup>172</sup>

The thick web of multilateral, plurilateral, and bilateral treaty relationships and the numerous institutional arrangements for continuous international negotiations which have developed over the past few decades empirically demonstrate the need for appropriate changes in the international law of treaties and in the reconceptualization of certain fundamental premises upon which that law is based.<sup>173</sup> As one student of

INT'L L. 259, 259 (1992) (The treaty process caused international environmental law to be "slow, cumbersome, expensive, uncoordinated and uncertain.").

170. Gauditz & Rogoff, *supra* note 17, at 30. See also JOSÉ M. RUDA, *THE FINAL ACCEPTANCE OF INTERNATIONAL CONVENTIONS* 6 (1976).

171. Gauditz & Rogoff, *supra* note 17, at 302. The Preamble to the Vienna Convention on the Law of Treaties, *supra* note 7, pmbl., recognizes "the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations . . ." *Id.*

172. See generally KAYE HOLLOWAY, *MODERN TRENDS IN TREATY LAW* 1-13 (1967). See also ROSENNE, *supra* note 7, at 83. Rosenne makes the following interesting observation:

If the codification of the law of the sea in the 1958 Conventions was widely regarded as the apogee of the Grotian heritage of the freedom of the seas — only to collapse irrevocably within less than ten years — it is beginning to look as though the codification of the law of treaties is in its intellectual approach somewhat similar.

*Id.* Thus, consistent with Rosenne's observation, the time may be ripe for a fundamental rethinking of the theoretical foundations and particular legal doctrines of the law of treaties.

173. See *id.* at 80-84. See also ROSENNE, *supra* note 14, at 40 (commenting on the "excessive bilateralism characteristic of the Vienna Convention [on the Law of Treaties]"); Shabtai Rosenne, *Bilateralism and Community Interest in the Codified Law of Treaties*, in *TRANSNATIONAL LAW IN A CHANGING SOCIETY; ESSAYS IN HONOR OF PHILLIP C. JESSUP* 201 (Wolfgang Friedmann et al. eds., 1972).

the international treaty process has written, "these manifestations in treaties of common interest and common concern of states are positive evidence of the interdependence of states as recognized . . . within the legal system of international law."<sup>174</sup> The increasing use of and significant changes in the legal regime applicable to the multilateral treaty represent perhaps the most compelling evidence of this phenomenon.<sup>175</sup> Other positive evidence of the factual interdependence of states may be found in the provisions of many postwar national constitutions which accord legal primacy to norms of international treaty law over conflicting domestic law<sup>176</sup> or declare that international law is part of the law of the land<sup>177</sup> and in certain doctrinal changes in international treaty law which have already been accepted.<sup>178</sup> At the theoretical level, scholars

174. KUSUMOWIDAGDO, *supra* note 5, at 287. See also REUTER, *supra* note 7, at 1. Reuter states that:

collectively the corpus of concluded treaties forms the reality and substance of an international society from which treaties in turn will increasingly derive their legal traits. In that process, nations starting out as entities closed to one another gradually open up and create the very environment to which they themselves submit.

*Id.* See also HOLLOWAY, *supra* note 172, at 1. Kaye Holloway notes that:

The measures taken, whether individually or collectively, to ensure the cohabitation of States, separated from each other by a host of factors, constitute the content and explain the nature of the international legal order. As the component parts evolve so does the legal order which governs the external manifestation of their evolution and in turn affects the action of the independent — but only in appearance — units.

*Id.*

175. REUTER, *supra* note 7, at 2–3. See also ROSENNE, *supra* note 7, at 80–84.

176. See, e.g., GREECE CONST. art. 28(1) ("The generally acknowledged rules of international law shall be an integral part of domestic Greek law . . . and shall prevail over any contrary provision of the law."); STATUUT NED. [Constitution] (Neth.) art. 63 ("If the development of the international legal order requires this, the contents of an agreement may deviate from certain provisions of the Constitution."), art. 66 ("Legal regulations in force within the Kingdom shall not apply if this application should be incompatible with provisions . . . of agreements entered into either before or after the enactment of the regulations."); FR. CONST. (France) art. 55 ("Treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party").

177. See, e.g., GRUNDGESETZ [Constitution] [GG] art. 25 (F.R.G.) ("The general rules of public international law shall be an integral part of federal law."); AUSTL. CONST. art. 9 ("The generally recognized principles of International Law are valid parts of the Federal Law."); FR. CONST. (France) pmb. (1946) (which is incorporated by reference into the French Constitution of 1958 states that the "French Republic, faithful to its traditions, abides by the rules of international law."); COST. [Constitution] art. 10 (Italy) ("Italy's legal system conforms with the generally recognized principles of international law.").

178. See, e.g., Vienna Convention on the Law of Treaties, *supra* note 7, art. 19(c) (allowing a state to make a unilateral reservation to a treaty provided that the reservation is not incompatible with the object and purpose of the treaty). See also HOLLOWAY, *supra* note 172, at 11 ("[T]he new trends in the law of reservations are in fact an expression of the

increasingly question the bundle of ideas contained in the notion of "state sovereignty," which traditionally has stressed the factual and legal independence of states at the expense of the interrelational and community elements of international life.<sup>179</sup>

The idea that states are under an obligation to negotiate, at least in those situations where the extent of their rights can only be defined by reference to the rights of other states, is both the pragmatic and logical consequence of the interdependence of states in the modern world and of the general recognition, by states, practitioners, and students of international relations of that interdependence.

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awareness of States that the will of *individual* States is no longer the only source of general international law."); Vienna Convention on the Law of Treaties, *supra* note 7, art. 9(2) (requiring that "[t]he adoption of the text of a treaty at an international conference take place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule"); Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (May 28).

This same movement away from the unanimity principle is also occurring in other areas of international law. For example, contrast the change from the principle of unanimity under the Covenant of the League of Nations with that of majority voting under the U.N. Charter. See HOLLOWAY, *supra* note 172, at 6.

179. See, e.g., Louis Henkin, *The Mythology of Sovereignty*, ASIL NEWSL. (American Society of International Law, Washington, D.C.) Feb.-Mar. 1993.

The old theory of absolute sovereignty may have fitted in with the actual conditions of prior centuries, but it is totally incompatible with the present-day interdependence and solidarity of states, peoples and individuals. Sovereignty must be mitigated by the exigencies of interdependence. It can no longer mean unlimited discretion or freedom from international law.

Luzius Wildhaber, *Sovereignty and International Law*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE, AND THEORY* 425, 440 (R. Macdonald & D.M. Johnston eds., 1983).

See also Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT'L L.J. 1, 25 (1988) ("International law is trapped in the prerevolutionary world of the eighteenth century, the world made by Vattel, the world before the American and French Revolutions, before Rousseau and Marx. The international law of the old regime is preventing the emergence of the new international society.").

