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Some Reflections on Good Faith during Negotiations in Recent ICJ Cases

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Abstract: Whatever their legal basis or their objectives negotiations between states essentially consist of a process parties to which may hold divergent views on the qualification of the exchanges between them. The normative principle of good faith during negotiations is multifaceted and arguably also governs the pre-conditions for the start of the process: (un)conditional willingness to enter it, creation of a favourable climate and no use of intimidation. The well-established *acquis jurisprudentiel* has confirmed that parties must comply with procedural and substantive duties. In recent cases before the International Court of Justice Parties have abandoned their traditional reluctance to formulate allegations of lack of good faith rendering it more difficult for the Court to turn to its judicial presumption of good faith. This article looks at Parties' general approach towards good faith requirements during negotiations in order to identify areas were refinement and expansion —both *ratione temporis* and *ratione materiae*— of the *acquis jurisprudentiel* by the Court would be welcome.

Keywords: *good faith during negotiations – recent ICJ cases – room for refinement of the acquis jurisprudentiel*

(A) INTRODUCTION

Peaceful settlement of disputes is not only one of the main tasks of the international legal order, but it also entails a Charter-based and customary legal obligation for states. Although negotiations are still the method of preference for states, they "are free to resort to negotiations or put an end to them"[1] or not to negotiate at all although in the *North Sea Continental Shelf* and *Fisheries Jurisdiction* cases the International Court of Justice (ICJ) "came close to enunciating a general obligation to negotiate in good faith."[2]

States are the *domini negotii*, but within the limits imposed by international law; hence the process is governed by principles, rules and duties. The principle of good faith "does not oblige states to negotiate in the first place" [3] but it is the controlling principle for any diplomatic process of negotiations.

Analysis by negotiation scholars in the field of international relations has provided states with an "ethical" code of "dispute management"[4] minimum requirements for state

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[1] *Obligation to negotiate access to the Pacific Ocean (Bolivia v. Chile), Judgment of 1October 2018, para. 86.* The author has been consulted by the Government of Chile during the proceedings.

[2] M. Waibel, 'The Diplomatic Channel', in J. Crawford (Ed.), *The Law of International Responsibility* (OUP, Oxford, 2010), 1085 at 1093.

[3] R. Kolb, *Good Faith in International Law* (Hart Publishing, Oxford and Portland, Oregon, 2017), at 203.

[4] K. Oellers-Frahm, 'Nowhere to Go? The Obligation to Settle Disputes Peacefully in the Absence of Compulsory Jurisdiction ', in T. Giederich (Ed.), *A Wiser Century? Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years after the Second Hague Peace Conference* (Berlin, 2009), 435 at 451.

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behaviour during negotiations. The functional interaction between negotiations and adjudication has given the ICJ and other courts and tribunals the opportunity to bring important parts of that basic code of conduct into the realm of law, giving rise to an *acquis jurisprudentiel* providing "a limited conduct guidance" while preserving "a significant 'zone of legality' within which States are free to operate"[5] and containing the benchmarks for any judicial good faith review.

This *acquis* jurisprudentiel has been built through the exercise of *jurisprudential authority* —as reflected in judicial reasoning— and to a far lesser extent of their *decisional authority* —i. e. the authority of the operative part of judgments[6]. Parties 'submissions only rarely do include allegations of lack of good faith and relevant cases do not always reach the metis stage.

Parties' narrative of the factual matrix underlying the dispute and their arguments will cover a wide range of conduct, behaviour and actions part of which may, in due course, be "replaced by flexibly and spontaneously emerging norms, a process which carries with it a certain degree of legal uncertainty"[7] while others are (still) based "on a spirit of understanding and cooperation."[8]

Litigation "is about the art of persuasion, understood as the effective advocating for a particular outcome under the applicable law."[9] The *acquis jurisprudential* "gives States guideposts that help [them] to assess the merits of their case and [to] shape their litigation strategy" and it is "argumentatively being used by the parties to persuade" the Court.[10]

(1) The Purpose of this Article

The purpose of this article is to have a closer look at the various heads of bad faith allegations and to find out whether and to what extent there is room or a need even for judicial expansion and refinement of this *acquis jurisprudentiel* (judicial law), in light of Parties' opinions and views in recent cases as to what it means to negotiate in good faith (justiciable law).

Aspects and facets of good faith during negotiations as perceived and put forward by Parties in their narrative of the historical trajectory of a process of negotiations and legal

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5 C. Ragni, 'Standard of Review and the Margin of Interpretation before the I.C.J.', in L. Gruszczynski and W. Werner (Eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (OUP, Oxford, 2014), 319 at 322.

6 A distinction made by O. Amman, 'The European Court of Human Rights and Swiss Politics: How does the Swiss Judge Fit in?', in M. Wind (Ed.), *International Courts and Domestic Politics* (CUP, Cambridge, 2018), 262 at 276 and 280.

7 R. Kolb, *supra* n. 3, at 81.

8 H. Thirlway, 'The Law and Procedure of the International Court of Justice 1969-1989 Part One', 60 *B.Y.I.L.* (1989), 4-157, at 24, note 60 [doi/org/10.1093/bybil/60.1.1].

9 S. Ugalda and J. Quintana, 'Managing Litigation before the International Court of Justice ', 9 *JIDS* (2018), 691-724, at 691 [doi:10.1093/jnlids/idy001].

10 WW. Alschner and D. Charlotin, 'The Growing Complexity of the International Court of Justice 's Self- Citation Network' 29 *EJIL* (2018) 83-112, at 100 and at 85 [doi/10.1093/ejil/chy002]

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arguments will be interwoven with corresponding parts of the *acquis jurisprudentiel*. Recent cases which did not reach the merits stage and even pending cases can show us the way forward in this continuous process of elaboration and refinement.

(2) The scope of this Article

In order to stay within editorial limits our reflections only deal with recent ICJ cases without however going into the merits of these cases; the focus will be on good faith during negotiations whatever their instrumental role in the proceedings.

Parties may disagree whether they are under an obligation to negotiate, what topics had (allegedly) (not) been discussed, whether the process had failed or whether there was still a chance to resume the process; these topics are outside the scope of this article as well as *procedural good faith sensu stricto* operating during adjudicatory proceedings.

(3) The Methodology used

We will approach the question on the basis of the Court's "judicial findings" and it "recording the positions" of the Parties[11] in the last five years and making extensive use of the oral pleadings by the Parties which "are of monumental importance" because it is "where the parties make their last stand, and, where, to a significant degree, a case may be lost or won."[12] Torres Bernárdez has rightly pointed to the role of the pleadings in the Court's assessment of negotiations.[13] This way we will look for those aspects and elements in Parties' arguments which could deserve a "jural imprimatur."[14]

(B) GOOD FAITH HAS MULTIPLE FUNCTIONS IN THE INTERNATIONAL LEGAL ORDER

The principle of good faith "touches every aspect of international law" and "every power in international law, and every right and privilege provided for a State in a treaty is to be executed in good faith"[15] hence the eagerness of Parties in their opening statements before the Court to stress their good faith in conducting their international relations in the shadow of international law.

Robert Kolb has masterfully identified three different "shades of good faith"[16] each of

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[11] H. Thirlway, ' The Law and Procedure of the International Court of Justice 1969-1989 Part Twelve ' 82 *BYIL* (2011) 37-181, at 75, note 139 [doi/org/10.1093/bybil/brs004].

[12] S. Ugalda and J. Quintana, *supra* n. 9, at 716 and 717.

[13] S. Torres Bernardez, 'Are Prior Negotiations a General Condition for Judicial Settlement by the International Court of Justice?', in C. Barea et al. (Eds), *Liber Amicorum 'In Memoriam' of Judge José Maria Ruda* (The Hague, 2000), 507, at 507, para. 2.

[14] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, ICJ Reports (1986) 14, Dissenting Opinion of Judge Schwebel,259 at 286.

[15] R. Jennings and A. Watts (Eds.), *Oppenheim's International Law*, Vol. 1, (9th Ed. Longman, London, 1992), at 38 and *Application of the CERD (Qatar v; UAE), Request UAE provisional measures*, CR. 2019/5 (UAE), at 30, para. 8.

[16] R. Kolb, *supra* n. 3, at 15-29.

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them potentially or actually giving rise to reviewable rules and good practices in a process of negotiations.

– *As a subjective legal fact,* good faith "designates a state of mind consisting in an erroneous representation of legally relevant facts."[17] The rebuttable character of the judicial presumption of good faith entails indeed that "there is nothing non-justiciable in the notion of bad faith."[18] "Good faith is treated as a question of fact" and international courts and tribunals "apply *de novo* review and once a court decides to examine evidence of bad faith, the State is afforded no deference."[19]

One should keep in mind that "les entorses à la bonne foi sont rarement si grossières. Le combat se déroule à fleurets mouchetés et les diplomaties répugnent à y dégainer un sabre."[20] Moreover, "will the International Court, the expert in law, now also be required to become adept in psychology, so that it can probe the heart and mind not of an individual, but of a State, the respondent ?"[21]

Given the unwillingness of international jurisprudence in general "[de] pénétrer dans les intentions des Etats"[22] the question arises whether the Court is equipped to fully evaluate parties' conduct beyond a touch and feel approach. A summary of negotiations referring to the numerous political difficulties that had caused a delay in the process of negotiations would seem to have been for long the most far-reaching judicial approach while staying well within the limit just referred to.[23]

As "a *vague standard for evaluating the reasonableness or the normality of behaviour*"[24] good faith operates an objectivising legal standard.[25] Reasonableness of behaviour appears to be the dominant notion in this regard[26] as reflected in both procedural and substantive duties of good faith.

The "main normative content" of good faith *as a general principle of the law*" is the protection of legitimate expectations freely created in another subject by some deliberate course of conduct[27] and nourishing e. g. "some pre-contractual obligations" on "which another subject could and should have relied."[28]

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[17] *Ibid*, at 15.

[18] *Ibid*, at 21.

[19] A. Marmolea, 'Good Faith Review' in *Deference in International Courts and Tribunals, supra* n. 5, 74, at 75.

[20] J.P. Cot, ' La bonne foi et la conclusion des traités ' 4 *RBDI* (1968) 140-159, at 143.

[21] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment,* I.C.J. Reports (2016) 833, Dissenting Opinion of Judge *Ad Hoc* Bedjaoui, 1108 at 1117, para. 31.

[22] L.Marion, 'La notion de "Pactum de Contrahendo" dans la jurisprudence internationale' (1974) 78 *RGDIP*, 351-398, at 398 and 392.

[23] L. Marion, *supra* n. 22, at 390, note 100.

[24] R. Kolb, *supra* n. 3, at 15 (emphasis added).

[25] *Ibid*, at 22.

[26] *Ibid.*

[27] *Ibid*, at 15.

[28] *Ibid*, at 23.

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(C) THE DEFINITION OF NEGOTIATIONS

Before entering further into the heart of the *acquis jurisprudentiel* it is appropriate to briefly attempt to delineate its potential reach *ratione materiae.* A process of diplomatic interaction may consist of "a protean amalgam of elements of negotiations, good offices, mediation and possibly conciliation, the appropriate weight of each element varying from phase to phase"[29] and a dispute settlement clause may carefully y climb "from *dialogue* in which each State's concerns are voiced to each other, to the various means by which settlement may be *negotiated*" and that it is the dialogue which defines what is in dispute.[30] Negotiation "is an institution of international law" situating itself "at the crossroads of international law and diplomacy."[31]

Negotiations basically "is the process of consideration of an international dispute or situation by peaceful means, other than judicial or arbitral processes, with a view to promoting or reaching among the parties concerned or interested some understanding, amelioration, adjustment, or settlement of the dispute or situation."[32] Parties "to a potential dispute adjust their policies and accommodate other party's interests" through *consultations* "before any harm has even occurred"[33] but the distinction with negotiations should not be stretched too far as they may gradually merge without clearly moving from one stage to another.[34]

Pourparlers are "*informal* discussions, generally preliminary to substantive negotiations and having the objective of promoting peaceful settlement".[35]

Informal negotiations "do imply that statements made by one or the other party are non-committal and should not be taken as final".[36]

Exchanges between the parties do not necessarily have to take the form of proper negotiations but they may take place *within the context* of proper negotiations or pre-negotiations.

"*Inter-parties correspondence* must be treated with great caution when a dispute is on the horizon", also because it "is likely to be disclosed" later to a Court or Tribunal.[37]

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[29] *Border and Transborder Armed Actions (Nicaragua v. Honduras) Jurisdiction and Admissibility, Judgment,* I.C.J. Reports (1988), 69, Separate Opinion of Judge Shahabuddeen, 133, at 154.

[30] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment,* I.C.J. Reports (2016) 3, Dissenting Opinion of Judge *Ad Hoc* Caron, 74 at 75, para. 3 referring to the Pact of Bogota (emphasis added).

[31] A. Watts, 'Negotiation and International Law' in P. Borba Casella (Ed.), *Dimensio Internacional do direito Estudos em homage a G.E do Nascimento e Silva* (Sao Paulo, 2000), 519-536, at 519.

[32] A. Lall, *Modern International Negotiation Principles and Practice* (Columbia University Press, N.Y. and London, 1966), at 5.

[33] M. Waibel, *supra* n. 2, at 1087.

[34] C. Fombad, 'Consultation and Negotiation in the Pacific Settlement of International Disputes '1 *AJICL* (1989), 707-724, at 711-7112.

[35] A. Lall, *supra* n.32, at 18.

[36] A. Davérède, 'Negotiations Secret 'in *Max Planck Encyclopaedia of Public International Law* (OUP, Oxford, 2012), para. 2

[37] J. Gladstone, 'The Legal Adviser and International Disputes: Preparing to Commence or Defend

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States have pointed out that the "essence of negotiation is communication and discussion"[38] but they do not always refer to the *talks* they had in a way consistent with the notions just listed which is not surprising as in reality the borderline is not always well-defined although "one generally recognizes that negotiations involve the bringing of discussions into a sharper focus and more adversarial posture than was the case previously."[39] It is not surprising that Parties disagree about the nature, the content and significance of the *talks* they had. An Applicant may consider a full exchange of views as "diplomatic negotiations"[40] whereas the Respondent may be of the view that the maritime delimitation has been discussed only "in the *most preliminary way* without any structure."[41]

Part of a duty to negotiate is participation in official meetings to discuss communications and proposals.[42] Raising relevant issues at the UN in the presence of representatives of the other Party are not negotiations[43] neither are "idle chatters over dinners, or at a diplomatic reception."[44]

In the view of states negotiations seems thus to require a series of meetings in person around the table and this appears to correspond to the Court's approach *in general.*[45] The Court has referred to pre-negotiations as "exploratory discussions".[46] Looking at the record before it the Court may agree with the Applicant that detailed and substantive discussions did take place[47] and which were more than discussions " in the *most preliminary way* without any structure or detail as argued by the Respondent"[48] and that the record established that "those negotiations […] discussed in detail the methodology to be used in the delimitation exercise."[49]

The Court has distinguished negotiations from "mere protests or disputations". Negotiations "entail more than the plain opposition of legal views or interests between two

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Litigation or Arbitration 'in A. Zidar and J-P Gauci (Eds), *The Role of Legal Advisers in International Law* (Brill Nijhoff, London, Boston, 2017) 34 at 44 (emphasis added).

[38] *Obligations concerning Negotiations, Marshall Islands v. United Kingdom*, Memorial of the Marshall Islands, para. 176.

[39] A. Watts, *supra* n. 31, at 520.

[40] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Application Somalia, para. 7

[41] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Verbatim Records, CR 2016/10 (Kenya), at 48, para. 2

[42] *Obligation to Negotiate Access*, Verbatim Records, CR 2018/16 (Bolivia) at 60, para. 9 (c).

[43] *Application of the International Convention on the Elimination of all forms of Racial Discrimination (Qatar v. United Arab Emirates), Request for the Indication of Provisional Measures, Order of 23 July 2018, para. 36.*

[44] *Obligation to Negotiate Access*, Verbatim Records, CR.2018/6 (Bolivia), at 70, para. 56.

[45] *Application of the International Convention for the e Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all forms of Racial Discrimination (Ukraine v. Russian Federation), Request for the Indication of Provisional Measures, Order of 19 April 2017*, I.C.J. Reports (2017) 104 at 125,*para. 59.*

[46] *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), Merits, Judgment*, I.C.J. Reports (1974), 3 at 14, para. 28.

[47] *Maritime Delimitation in the Indian Ocean*, Verbatim Records, CR. 2016/11 (Somalia) and at 16, para. 22, and at 45, para. 31.

[48] *Maritime Delimitation in the Indian Ocean*, Verbatim Records, CR 2016/10 (Kenya) at 48, para. 2.

[49] *Maritime Delimitation in the Indian Ocean, Preliminary Objections, Judgment of 2 February 2017*, I.C.J. Reports (2017) 3 para. 92.

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parties". Not even "a series of accusations and rebuttals" or "the exchange of claims and directly opposed counter-claims" would qualify as negotiations.[50] Discussions "limited to two parallel presentations without any attempt to compromise" would not qualify.[51] The minimum requirement is "a genuine attempt by one of the parties to engage in discussions with the other party, with a view to resolving the dispute"[52] but not *all* statements by an Applicant may be considered as genuine attempts to negotiate *relevant matters*.[53]

Subsequent to the Court's decision in the *Belgium Senegal case* that an exchange of correspondence over a period of eight months was considered to have been a genuine attempt to negotiate without any in-depth in-person negotiation[54] states continue to disagree whether the mere exchange of two Notes Verbales would suffice to fulfil a prior negotiations clause[55] or even a mere letter inviting the other party to negotiate would "by itself [be] sufficient to show a genuine attempt".[56] On the other hand, the Court considered that an exchange of Notes Verbales *and* one meeting held, followed by a negative response i.e. to be unable to accept an offer for arbitration did suffice to satisfy a prior negotiation clause.[57]

The particular circumstances of such exchanges —their frequency, their content and the (lack of) responses— are important factors for the Court to consider them as genuine attempts to negotiate without any subsequent meetings in person.

(D) THE LEGAL BASIS FOR NEGOTIATIONS

The freedom of any State to choose and conduct its foreign policy in "co-ordination with

[50] *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment of 1 April 2011,* I.C.J. Reports (2011), 70 at 132, para. 157. However, Parties still consider "the mere enumeration of claims during three brief meetings "as negotiations: *Application of the ICSFT and CERD case, Preliminary Objections,* CR. 2019/9 (RF) at 47, para. 4 referring to UKR position.

[51] *Maritime Delimitation in the Indian Ocean, Preliminary Objections, Judgment of 2 February 2017,* I.C.J. Reports (2017) 3, Dissenting Opinion of Judge *Ad Hoc* Guillaume, 79 at 86 para. 29.

[52] *Application of the ICSFT and CERD case, Request for the Indication of Provisional Measures, Order of 19 April 2017,* I.C.J. Reports (2017) 104, at 120 para. 43.

[53] CERD *case, Judgment of 1 April 2011,* I.C.J. Reports (2011), 70 at 139, para. 181

[54] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment,* I.C.J. Reports (2012), 422 at 433-435, paras. 24-26 and at 446, para. 58.

[55] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Verbatim Records CR 2018/16 (Iran) at 28-29, para. 3 and CR 2018/17 (United Sates) at 23, para. 4.*

[56] *Application of the CERD case (Qatar v. UAE), Verbatim Records CR 2018/14 (Qatar) at 12-13, para. 13.*

[57] *Application of the ICSFT and CERD, Request for the Indication of Provisional Measures, Order of 19 April 2017,* para. 53. The Court did confirm its position in its Judgment of 8 November 2019 on the preliminary objections in the same case: para. 76. Individual judges have previously opined that the legal significance to be attached to a bilateral exchange of letters could very well consist in considering them as attempts at a negotiated settlement: *CERD case Judgment of 1 April 2011,* I.C.J. Reports (2011) 70, Separate Opinion of Judge Simma, 188 at 190, para. 5, at 198-199, para. 22 and at 199, para. 25.

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that of another State" constitutes the very basis of any process of negotiations.[58]

A "general, customary law-based duty of co-operation with a view to a settlement"[59] is inherent in states' obligation to settle their disputes peacefully but no rule in international law "imposes a general obligation to States to settle their disputes *through negotiation*, instead of resorting to another peaceful means of their choice".[60] Negotiations may thus, at first glance, still "widely be regarded as essentially voluntary process"[61] and an obligation to negotiate "can only result from an undertaking voluntary entered into by States concerned through a treaty provision or *through any other legally valid or relevant form of expression of State consent.*"[62]

In the *Bolivia Chile case* the Court had to examine the wide variety of sources allegedly having created an obligation to negotiate.[63] There arguably is merely a *need to negotiate* when the subject-matter is the exercise of preferential rights or the implementation of a Judgment.

In case the legal framework for the negotiations has not been put in place "by an agreement between the parties or by the Court" the parties "are free to decide on the *format and content* of the process, the *object and purpose* of which must be compatible with the principles and norms of international law."[64] *The duty to negotiate* has gradually evolved in becoming one of the general principles of international law and it is a special application of a "principle which underlies all international relations."[65]

A prime example of a *pactum de contrahendo* is Article VI of the Non-Proliferation Treaty (NPT) —"the single most important provision of the Treaty" and its "cornerstone"[66]— it is linked to the provisional nature of the treaty itself[67], and consisting of both an obligation of conduct and an obligation of result.[68]

A judicial order to negotiate imposed *motu proprio* —by way of a provisional measure[69] or

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[58] *Nicaragua case, Merits, Judgment,* I.C.J. Reports (1986), 14 at 133, para. 265.

[59] A. Peters, 'International Dispute Settlement : A Network of Cooperational Duties', 14 *EJIL* (2003) 1-34, at 9 [doi/10.1093/ejil/chy002].

[60] *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003,* ITLOS Reports (2003), 10 Separate Opinion of Judge Jesus, at 53.

[61] A. Watts, *supra* n.31, at 525.

[62] *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003,* ITLOS Reports (2003), 10 Separate Opinion of Judge Jesus, at 53 (emphasis added)

[63] *Obligation to Negotiate Access,* Judgment of 1 October 2018, paras. 91-175.

[64] GA Res. 53/101, 8 February 1998, Principles and Guidelines for International Negotiations, para. 2 (c).

[65] *North Sea Continental Shelf cases (Federal Republic of Germany /Denmark; Federal Republic of Germany / the Netherlands) Judgment,* I.C.J. Reports (1969) 3 at 47, para. 86.

[66] *Obligations concerning negotiations (Marshall Islands v. United Kingdom)* Memorial of Marshall Islands, para. 139 and Verbatim Records CR 2016/7 (UK), at 14, para. 20.

[67] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment,* I.C.J. Reports (2016) 833, Dissenting Opinion of Judge *Ad Hoc* Bedjaoui, 1108 at 1124-1125, paras. 60-64.

[68] *Obligations concerning negotiations (Marshall Islands v. United Kingdom)* Memorial of Marshall Islands, para. 97

[69] *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 Match 2011,* I.C.J. Reports (2011) 6, at 27, para. 86(2).

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in the operative clauses of a judgment on the merits[70]— would normally determine the objective of the process Parties are obliged to undertake and may establish the legal parameters and factors to be taken into account but not the very content of the agreement to be decided by the Parties, except as requested to do so.[71]

Whatever the legal basis of a process of negotiations, the duty to perform it in good faith is inherent and there is no need to explicitly provide it. In case of a pre-existing obligation to negotiate, the duties under the good faith principle may be *strengthened* [72] but they are not different in nature and scope although their breaches —such as a refusal to enter into the process or actions to defeat the object and propose of the process— may then be considered more serious in terms of state responsibility.

(E) THE TIME FACTOR

Time is an essential feature of negotiations as a dynamic process and "surrounding factors largely determine the speed of negotiation"[73] which in turn "must inevitably contend with factors that have their roots in the past."[74]

Negotiations are transformative by nature as circumstances, priorities and perspectives usually do change in the course of the process. In order to be able to negotiate in good faith, the irreducible minimum objectives of the parties must "not be totally incompatible" but as they "tend to fluctuate with time"[75] what "had been absolutely and emphatically non-negociable"[76] may later become negotiable.

Parties may be under a self-imposed or judicially prescribed deadline to start, resume or to bring a process of negotiations to an end. It has been *jurisprudence constante* that the duration of a process and thus time as such is not an important let alone decisive factor in a judicial assessment of the conduct of the parties[77] but causing abnormal delays as part of a negotiating strategy to maintain the status quo or causing them in an unjustified manner is not in accordance with good faith[78] . In case of a *pactum de contrahendo* such as Article VI of the NPT the notion of "undue or abnormal delays" arguably also applies "in

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[70] *Gabicikovo-Nagymaros Project (Hungary/ Slovakia), Judgment,* I.C.J. Reports (1997) 7, at 83, para. 155(2) B.

[71] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment,* I.C.J. Reports (2007) 659 at 668, para. 18 and at 669, para 19(2) and at 763, para. 321 (4).

[72] R. Kolb, *supra* n. 3, at 197.

[73] A. Lall supra n.32, at 3.

[74] *Ibid*, at 52.

[75] *Ibid*, at 54.

[76] *Ibid*, at 129.

[77] *Applicability of the Obligation to Arbitrate under Section 21 of the United Headquarters Agreement of 26 June 1947, Advisory Opinion,* I.C.J. Reports (1988) 12, at 33-34, para. 55.

[78] *Affaire du Lac Lanoux (Espagne, France), 1957, XII RIAA,* 281-317, at 307. At the preliminary objections stage the Court may merely "note" that a Respondent has twice sent a Reply Note after the proposed date for a meeting had passed: *Application of the ICSFT and CERD case, Preliminary Objections, Judgment of 8 November 2019,* para. 118.

 DOI: 10.17103/sybil.23.3

commencing" *such* negotiations and "sustaining" them.[79]

Good faith does not allow "unreasonable delay"[80] in both making and responding to proposals. A process of negotiations should not exceed a reasonable period of time which will depend on the subject matter at hand and the particular circumstances.[81] A conventionally prescribed period of 6 months for negotiations on the organisation of an arbitration has been strictly upheld by the Court, while a period of almost 2 years of negotiations on the subject-matter of the dispute "has to be regarded as a reasonable time."[82] "Even in the case of a short contact, when it appears that the other party opposes a clear *non possumus,* or *non volumus,* the party attempting to break the ice has fulfilled its duties under good faith."[83]

(F) GOOD FAITH DURING NEGOTIATIONS HAS MANY FACES

(1) Good faith does apply

In their narrative and reasoning about a process of negotiations Parties are making use of bad faith as a political and moral argument rather than as legal one, in order to discredit the other Party, but this "does not detract from its parallel operation in the legal order as a legal concept" [84] acting "as an agent of creation of obligations and rules."[85]

Good faith is "consubstantial with the idea of negotiation"[86] and "to negotiate otherwise than in good faith is surely not to negotiate at all."[87] Good faith is "paramount in all legal areas permeated by reciprocity and bilateralism",[88] reciprocity being the bedrock of the good faith requirement giving rise to mutual, equivalent, and corresponding and duties.

It is well-known that —based on the principle of good faith— the original ILC Draft Articles did impose the application *ratione temporis* of the obligation contained in Article 18 of the Vienna Convention on the Law of Treaties —not to defeat the object and purpose of a treaty prior to its entry into force— from the moment when a State "has agreed to

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[79] *Obligations concerning Negotiations (Marshall Islands v. UK)* Memorial Marshall Islands, para. 185.

[80] *Obligation to Negotiate Access (Bolivia v. Chile)*, Memorial Bolivia, Vol. I, paras. 275-279.

[81] *Maritime Delimitation in the Indian Ocean,* Verbatim Records CR 2016/10 (Kenya), at 24, para. 24 and at 24-25, para. 25. *Application of ICSFT and CERD case,* Verbatim Records, CR 2017/2 (RF) at 62, para. 42 and CR 2017/3 (UKR), at 31, para. 17.

[82] *Application of the ICSFT and CERD case, Preliminary Objections, Judgment of 8 November 2019,* paras. 76 and 70.

[83] R. Kolb, *supra* n. 3, at 197. Systematic cutting short of meetings for allegedly futile reasons would not conform to good faith: *Application of ICSFT and CERD case,* CR. 2019/9 (RF) at 63, para. 33.

[84] *Ibid*, at 23, note 107.

[85] *Ibid*, at 31.

[86] R. Kolb, ' Aperçus sur la bonne foi en droit international public', 54 *Revue hellénique de droit International (2001) 383-428, at 408.*

[87] H. Thirlway, *supra* n. 8, at 25.

[88] R. Kolb, *supra* n. 3, at 41.

 DOI: 10.17103/sybil.23.3

enter into negotiations for the conclusion of a treaty" as long as "the negotiations are in progress."[89]

Although the general opinion was that the principle of good faith did apply during negotiations, and in fact the Conference "did not deny the substance of good faith during negotiations but only the form in which it which it has been presented",[90] the Draft Article did not make it at the Vienna Conference on the Law of Treaties out of an (unjustified) fear that states would be subject to strict obligations, hardly compatible with the flexibility inherent to negotiations.[91] What in 1969 has been considered by some states as too much of a progressive development of international law has, half a century later, slowly but gradually become judicial law through the *acquis jurisprudentiel* confirming and establishing objective standards, while the obligation under Article 18 "is now part of customary international law."[92]

In light of the *travaux préparatoires* of the Vienna Convention and *the acquis jurisprudential* good faith as a normative principle carries with it both *negative duties* to abstain from certain actions and conduct that would defeat the object and purpose of the process and *positive duties* to actively promote and preserve them. "Good faith [sometimes] prompt(s) the states to act positively to uphold the object and purpose of the treaty concerned" already during the proceeding negotiations.[93]

Circumstances of every process of negotiations vary, and a number of factors tend to increase the scope and intensity of "these good faith duties"[94] but the following core procedural and substantive duties will unreservedly and consistently impose themselves upon the parties throughout.

(2) Procedural and substantive good faith

A thin but fine line of distinction between *substantive and procedural good faith* seems to impose itself quite naturally, giving rise to *more substantive or rather procedural duties* as useful tools for any good faith assessment by both states and the ICJ. The processual and fluid nature of negotiations will cause both categories of duties to be partly overlapping throughout.

According to international scholars flexibility in bilateral negotiations produces as one of its disadvantages that there are "no definite rules of procedures that facilitate the

[89] Article 15 (a) ILC YB 1966-II, A/CN.4/Ser.A/1965/Add.1, at 161. On the initial draft proposals see *inter alia* E. Zôller, *La bonne foie n droit international public* (Pedone, Paris, 1977), at 55-57 and T. Hassan, 'Good Faith in Treaty Formation '21 VJIL (1980-1981) 443-481, at 467-476.

[90] T. Hassan, *supra* n.89, at 476.

[91] United Nations Vienna conference on the Law of Treaties, t. I, A/CONF.39/C.1/SR.19, 97-105.

[92] R. Kolb, *supra* n.3, at 45.

[93] L. Boisson-de-Chazournes, La Rosa and Mbengue, 'Article 18. Obligation not to defeat the object and purpose of a treaty prior to its entry onto force', in O. Corten and P. Klein (Eds.) *The Vienna Convention on the Law of Treaties. A Commentary* (OUP, Oxford, 2011) 369 at 398, para. 62.

[94] For a list of such factors see R. Kolb, *supra* n. 3, at 202.

 DOI: 10.17103/sybil.23.3

exchange of positions" hence "procedural rules need to be fixed"[95] . That is precisely what *procedural good faith sensu lato* is destined to achieve while at the same time partly remedying the fact that the Vienna Convention "does nothing to regulate the fairness of the conduct of treaty negotiation."[96]

Procedural good faith requires *inter alia* the willingness to compromise and in case of deadlock to conduct further negotiations.[97] *Substantive good faith* requires states to conduct themselves in a loyal and reasonable way which implies *inter alia* giving serious consideration to proposals tabled by the other party[98] and "fairly to take into account the needs and interests of other parties"[99] and thus to consider carefully proposals that involve a modification of one's own position.[100]

When analysing a process of negotiations through the prism of good faith the legal and factual matrix of the background should be taken into account but one should not forget that "negotiations often serve goals other than arriving at a settlement"[101] and that "the political reality of what compliance with the law requires shapes the bargaining process"[102], that is where the *substantive and procedural good faith* converge.

Trust is "likely to play a central role in resolving" disputes "only if the two sides are willing to negotiate in good faith"[103] whereas distrust "is considerably influenced by the nation's past experiences which are deposited in the collective memory."[104] As a salient structural factor trust thus provides thus the policy foundation for compliance with the good faith requirements.

Some acts, attitudes and approaches have been considered rather as recommended practices not yet coming within the realm of the *acquis,* as necessary pre-conditions for the start of the process in good faith.

(G) PRE-CONDITIONS FOR THE START OF THE PROCESS IN GOOD FAITH

Negotiation scholars in the field of international relations have rightly drawn our attention

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[95] A. Mondré, *Forum Shopping in International Disputes* (Palgrave Macmillan, Basingstoke, 2015, at 32.

[96] T. Hassan, *supra* n.89, at 470.

[97] T. Hassan, *supra* n. 89, at 478, 479 and 480.

[98] *Ibid*, at 476.

[99] *Ibid.*

[100] *Obligation to Negotiate Access,* Memorial Bolivia, paras. 255-268.

[101] A. Mondré, *supra* n. 95, at 154.

[102] Ph. Webb, 'Escalation and Interaction: International Courts and Domestic Politics in the Law of State Immunity 'in M. Wind (Ed.) *International Courts and Domestic Politics* (CUP, Cambridge, 2018) 206 at 217, table 9.1.

[103] E. Yuchtman Yaar, Yasmin Alkalay, 'The Role of Trust in the Resolution of the Israeli-Palestinian Conflict' in I. Alon and D. Bar-Tal (Eds.) T*he Role of Trust in Conflict Resolution: the Israeli-Palestinian Conflict and Beyond* (Cham, Springer Nature, Switzerland, 2016) 149-167, at 150.

[104] D. Bar-Tal and I. Alon, 'Sociopsychological Approach to trust (or Distrust) Concluding remarks' in in I. Alon and D. Bar-Tal (Eds.) T*he Role of Trust in Conflict Resolution: the Israeli-Palestinian Conflict and Beyond* (Cham, Springer Nature, Switzerland, 2016) 311-334, at 325.

 DOI: 10.17103/sybil.23.3

to the importance of pre-negotiations[105] because of their intrinsic link with the negotiations proper. Parties may for instance establish Joint Technical Commissions to discuss *preparatory* issues *leading to* bilateral maritime boundary *negotiations*[106] and meetings may be held to discuss "a *framework of modalities* for embarking on maritime demarcation" the purpose being *merely procedural* in order "to *structure* negotiations."[107] It has been rightly argued that some of the good faith requirements "ordinarily applied to the conduct of negotiations" are "equally appropriate in the context of *pre-negotiations*".[108]

(Un)conditional willingness to enter into a process of negotiations contribute to a favourable climate for the process and not resorting to any forms of intimidation during the pre-negotiation stage are *preconditions for the fulfilment of the good faith requirements* at a later stage. When during the actual process of negotiations parties conduct themselves in such a way as to seriously affect or undermine these conditions, such actions or omissions will then squarely come within the realm of good faith.

(1) Willingness to enter into the process

We should not "overlook the psychological value of the opening of negotiations" because the opening "is often a decisive step toward the conclusion of an agreement."[109] If the "will to move from the status quo" is lacking "there cannot be a negotiation"[110] while "difference in the power levels" of the parties "is one of the factors of prime importance which affect *movement toward negotiation.*"[111]

The "obligation *to be ready to negotiate* with a view to concluding an agreement" today still represents "the minimum of international co-operation".[112] Parties may not only disagree about their respective readiness to negotiate in good faith an agreement to implement a judgment of the Court but also on the subject-matter of the negotiations they were willing to enter.[113]

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[105] T. Hopman, *The Negotiation Process and the Resolution of International Conflict* (University of South Carolina Press, Columbia, 1996) at 180.

[106] Request for the Interpretation of the Judgment of 23 May 2008 in the case concerning *Sovereignty over Pedra Branca /Pulau Batu Puteh, middle Rocks and South Lodge (Malaysia* v. Singapore), Application Malaysia, para. 8.

[107] *Maritime Delimitation in the Indian Ocean,* Verbatim Records CR 2016/10 (Kenya) at 48, para. 5 and at 49-50, para. 8 (emphases added).

[108] *Obligations concerning Negotiations, (Marshall Islands v. UK) Memorial* Marshall Islands, para. 225 (emphasis added).

[109] *International Status of South-West Africa, Advisory Opinion:* I.C.J. Reports (1950), 128, Dissenting Opinion of Judge Ch. De Visscher at 188.

[110] A. Lall, *supra* n. 3, at 31 and 34.

[111] *Ibid.*, at 132 (emphasis added).

[112] *International Status of South-West Africa, Advisory Opinion:* I.C.J. Reports (1950), 128, Dissenting Opinion of Judge Ch. De Visscher at 189 (emphasis added).

[113] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment,* I.C.J. Reports (2016) 3, at 31, para. 69.

 DOI: 10.17103/sybil.23.3

(a) An Offer to Negotiate

"No rule of international law forbids governments to perform acts and make declarations which are incapable of producing legal effects."[114] Whether the "political willingness" to enter into or to resume negotiations is legally binding or not could be at the centre of debate between Parties like in the *Bolivia v. Chile case*.

An offer to negotiate —which may be preceded by a request to address grievances[115]— is a unilateral legal act aimed to create legal effects to the will expressed by the State.[116] Such an offer "does not necessarily demonstrate a State's willingness to resolve the dispute"[117] and it can neither be interpreted as "consent to participate" or "actual participation" in the process unless "this has been clearly expressed or follows indisputably from the attitude adopted by that party."[118]

In addition to good faith, also caution and reasonableness require states to be unambiguous and straightforward when making an offer to start negotiations. Indeed, within the context of the interaction between good faith and acquiescence, it has been noted "that there is no duty to react if and when the attitude of the other subject of law remains ambiguous, unclear and uncertain."[119] Whether effect should be given to tweets by a Head of State declaring openness to negotiations may be doubtful in light of the conditions attached to that openness.[120] Negotiators of a treaty "ne peuvent se contenter de situations ambigües",[121] good faith seems to require this from the very first steps towards the negotiation process.

An offer to start negotiations calls for some reaction within a reasonable period of time if the other party wishes to accept it.[122] Expecting a response within 2 weeks[123] would perhaps be too strict while a proposal to actually conduct the process within 2 weeks[124] does not seem unreasonable.[125]

Parties may differ on whether an offer to negotiate was "totally artificial" and thus not a real attempt.[126] A Note Verbale with an offer to negotiate should at least contain a

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[114] *Interhandel Case, Judgment of March 21rst, 1959:* I.C.J. Reports (1959) 6, Dissenting Opinion of Judge H. Lauterpacht, at 118.

[115] *Application of CERD (Qatar v. UAE),* Verbatim Records CR 2018/12 (Qatar) at 29, para.39.

[116] E. Suy, *Les actes juridiques unilatérales en droit international* (LGDJ, Paris, 1962) at 22.

[117] A. Mondré, *supra* n. 95, at 33.

[118] *Nottebohm Case (second phase), Judgment of April 6th, 1955:* I.C.J. Reports (1955) 4 at 20.

[119] R. Kolb, *supra* n. 3, at 97.

[120] *Alleged Violation of the 1955 Treaty on case,* Verbatim Records CR 2018/16 (Iran), at 76, para. 38.

[121] J.P. Cot, *supra* n. 20, at 146.

[122] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15June 1962:* I.C.J.Reports (1962) 6 at 23.

[123] *Application of CERD,* Application of Qatar, para. 18.

[124] *Application of CERD,* Verbatim Records CR. 2018/12 (Qatar) at 29-30, para. 39.

[125] In its Order of 23 July 2018, the Court did not go into this deadline at that stage.

[126] *Application of CERD,* Verbatim Records CR. 2018/13 (UAE) at 22, para. 10 and at 23, para. 11 and CR.2018/12 (Qatar) at 30, para. 42.

 DOI: 10.17103/sybil.23.3

suggestion of a meeting, a proposal how to meet and ask for a reply[127] in order to be considered as a genuine, first attempt to negotiate. A reply to an offer to negotiate should express the views of the addressee, it could propose an alternative schedule for the process, but at least that the receiving State was taking the matter into consideration.[128]

(b) A refusal to negotiate

The principle of good faith does not seem to exclude the discretionary power of states to refuse to enter into the (pre-) negotiation phase when they are under no any legal obligation to do so. However, a negative response to an offer to negotiate *without reasons being given* is considered contrary to good faith.[129]

States *may invoke a variety of reasons* to refuse to enter into or to resume negotiations. They may for instance hold the view that there is no dispute[130] in that situation "there cannot be any fruitful negotiation"[131] but it does not *ipso facto* prove bad faith.[132] They may argue that a mere request for information is not a real negotiation. They may hold different views on the subject-matter to be discussed or the overall objectives of the process or they may consider that there is no genuine prospect that the process could be useful. When the matter is *sub judice* a State may argue that under constitutional principle of the separation of powers it is "incapable" to accept an offer to negotiate while stressing that its inability to stop ongoing judicial proceedings "does not constitute an unwillingness to *dialogue.*"[133] However, one should add that in some cases, "what appears to be a refusal to negotiate is the rejection rather of a particular form or method of negotiation."[134]

Domestic policies may limit the leeway to start a process of negotiations, but whether the risk of serious domestic civil and or political unrest could be invoked as a valid reason for a refusal is another matter altogether.[135]

Absence of diplomatic relations may be an obstacle, but it does not necessarily have a negative impact on the willingness of the parties concerned to negotiate[136] and to have regular and frequent meetings, be it as part of a regional peace process[137] but in light of the

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[127] *Alleged Violations of the 1955 Treaty*, Verbatim Records CR.2018/17(US) at 31, para.26.

[128] *Application of CERD*, Verbatim Records CR.2018/14 (Qatar) at 12-13, para. 13.

[129] *Obligation to negotiate Access*, Verbatim Records CR.2018/10 (Bolivia) at 62, para. 17.

[130] *Application of the ICSFT and CERD*, Verbatim Records CR.2017/1 (UKR) at 23-24, para. 14 referring to the Russian Federation.

[131] A. Lall, supra n. 31, at 31.

[132] E. Zôller, *supra* n. 89, at 131.

[133] *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016*, I.C. J Reports (2016) 1148, at 1162, para. 56 and Verbatim Records CR.2018/4 (France) at 36, para. 3 (emphasis added).

[134] A. Lall, *supra* n. 32, at 130. See for instance CR Application Certain Activities at 21, para. 9

[135] See for instance A. Mondré, *supra* n. 95.

[136] P. Behrens, Diplomatic *Interference and the Law* (Hart Publishing, Oxford and Portland, Oregon, 2016), at 124, note 156. *Application of the CERD case*, Verbatim records CR. 2018/12 (Qatar) at 25, para. 27.

[137] *Armed Activities on the Territory of the Congo (New application 2002) (Democratic Republic of the Congo v; Rwanda), Provisional Measures, Order of 10 July 2002*, I.C.J. Reports (2002) 219 at 236, para. 44 (Rwanda's reply to an argument of the DRC).

 DOI: 10.17103/sybil.23.3

Court's jurisprudence[138] is not a sufficient reason to justify a refusal to enter into a process.[139] Furthermore, it does not prevent parties "from seeking the peaceful settlement of their disputes through judicial means."[140]

Of course, once a State "has made a commitment to enter into negotiations this step is not a gratuitous one" as "it is not the Court's function to contemplate that it will not comply with it."[141]

Explaining the lack of response to a communication containing an offer as neither acceptance nor refusal i.e. taking a neutral position[142] does not seem acceptable under the good faith requirement. Unwillingness to negotiate in reply to an offer may bring the Court to conclude that the offer was not a genuine attempt to negotiate but this does not necessarily amount to an implicit finding of bad faith on the part of the offering State.

Readiness "to accept the assistance" of a third party "would be evidence of the good faith of the parties".[143] . In case the UN Security Council "calls for bilateral negotiations, it would be hard for either side to reject that call".[144] In case of a pre-existing obligation to negotiate, refusing to enter the process constitutes a violation of that obligation. The duty not to defeat the object and purpose of the process may claim a more prominent role and parties may be expected to adopt a more pro-active attitude e. g. by taking more initiatives with regard to the format and venue and of course on matters of substance.

(2) (Un)conditional willingness

Does the discretionary power of states to enter or not into a process of negotiations, mean that they are free to attach conditions to their willingness as part of their political negotiation strategy, a freedom not yet touched let alone governed by the principle of good faith?

Unreasonable or excessive conditions which probably will be unacceptable to the other party do not only make a claim to offer into a process untenable[145] as they would only undermine the credibility of a party's willingness to negotiate, but they would run counter to the Court's requirement that a "attempt" to negotiate should be "genuine" and it would come close to coercive diplomacy.

Examples range from "insisting on a multilateral framework as the only acceptable

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[138] *United States Diplomatic and Consular Staff in Tehran, Judgment,* I.C.J. Reports (1980) 3 at 28, para. 54.

[139] *Armed Activities on the Territory of the Congo (New application 2002) (Democratic Republic of the Congo v; Rwanda), Jurisdiction and Admissibility, Judgment,* I.C.J. Reports (2006) 6 at 37, para. 84 (Rwanda).

[140] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* Verbatim Records CR.2018/30 (Iran) at 11, para. 8

[141] *Nuclear Test (Australia v. France), Judgment,* I.C.J. Reports (1974) 253 at 272, para. 60.

[142] *Application of CERD, Request for the indication of Provisional Measures, Order of 23 July 2018, para. 34 (UAE).*

[143] *Gabcikovo- Nagymaros Project (Hungary / Slovakia), Judgment, I.C.J.* Reports (1997) 7 at 79 , para. 143.

[144] A. Mondré, *supra* n. 95.

[145] *Border and Transborder Armed Actions (Nicaragua v. Honduras) Jurisdiction and Admissibility, Judgment,* I.C.J. Reports (1988), 69, Separate Opinion of Judge Shahabuddeen, 133, at 151.

 DOI: 10.17103/sybil.23.3

basis for negotiating",[146] over the process cannot start unless unacceptable concessions are made and must be limited to the implementation of one party's demands[147] and full capitulation to a series of non-negotiable political demands are a *conditio sine qua* non for readiness to start negotiations[148] to demanding a pre-commitment to the outcome of the process.[149]

A Respondent may consider the possibility of an unconditional dialogue being ruled out[150] because the Applicant has called for the withdrawal of armed forces from occupied territory "to permit the issue [of certain activities] to be discussed bilaterally."[151]

Acceptance of full implementation of a Judgment —"[which] is final and not subject to negotiations"[152]— may be put forward as a *conditio sine qua non* for a Party "to accept negotiations" on a different subject-matter;[153] such an approach "may simply be a part of a negotiating stance and for this reason need to be appraised carefully."[154]

Although the decision on the *negotiability* of a dispute or issues of concern belongs to the Parties, they have to demonstrate by "*substantive* evidence" their respective or joint opinion *in good faith* in that regard while openness to dialogue "is not a decisive factor".[155]

The Court has not yet expressed itself in general terms on the conditionality of willingness to negotiate. The pending case between Qatar and the United Arab Emirates provides the Court with an opportunity to do so. The Court's judicial decision in *Gabcikovo* that the Parties should negotiate "without pre-conditions"[156] must be read within the particular circumstances of that case and it "must be seen as a strict obligation exactly like the good faith conduct it implies"[157] and Parties should embark upon such a process with an open mind.[158]

(3) Creating a Favourable Climate

The importance of creating a favourable climate prior to the start of negotiations is beyond

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[146] *Ibid.*

[147] *Application of CERD*, Verbatim records CR. 2018/12 (Qatar), at 27, para. 32.

[148] *Application of CERD*, Application Qatar, para. 17 and Verbatim Records CR. 2018/12 (Qatar), at 26-27, para. 29-32.

[149] *Obligation to Negotiate Access*, Verbatim Records CR.2018/8 (Chile) at 27, para. 26.

[150] *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Application Costa Rica, para. 33.

[151] *Ibid.* at par. 30.

[152] *Alleged Violations of Sovereign Rights*, Verbatim Records CR. 2015/25 (Nicaragua) at 15, para. 19.

[153] *Ibid.* at 14-15, para. 18.

[154] *Alleged Violations of Sovereign rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment,* I.C.J. Reports (2016) 3, dissenting Opinion of Judge *Ad Hoc* Caron, 74 at 97, para. 72.

[155] *Alleged Violations of Sovereign rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment,* I.C.J. Reports (2016) 3 at 37, para. 93 and at 38, para. 99. (emphases added).

[156] *Gabcikovo- Nagymaros Project (Hungary / Slovakia), Judgment, I.C.J.* Reports (1997) 7 at 79, para. 143.

[157] *Ibid.* Separate Opinion of Judge Bedjaoui, 120 at 140, para. 69.

[158] *Pulp Mills on the River Uruguay (Argentina v. Uruguay) Judgment*, I.C.J. Reports (2010) 4, Separate Opinion of Judge *Ad Hoc* Torres Bernardez, 233 at 261, para. 92.

 DOI: 10.17103/sybil.23.3

doubt and parties may be "keen to create an atmosphere in which amicable talks might proceed" [159] and they should take unilateral and joint action in order to contribute to such a climate for instance by confidence building measures.[160] When in the *Gabcikovo case the* Court considered the suspension of a bilateral treaty as an action which has "contributed to a situation which was not conducive to the conduct of fruitful negotiations"[161] this seems to imply at least the expectation that states should create a favourable climate.

Once the process has started good faith requires parties to *maintain* that favourable climate[162] —e.g. in particular circumstances through agreeing to the "temporary non-exercise of the rights asserted" or "at least restraint in their exercise" [163] or by concluding interim arrangements to avoid further friction— and to abstain from action which could put that climate in jeopardy.

Accusations on allegedly other matters than the one in dispute, are not conducive to a good atmosphere for fruitful negotiations and demonstrate a lack of good faith[164] . But good faith does not seem to require that "in order to negotiate" over a Party's financing of terrorism, the other Party is "bound not to" make such accusations.[165]

(4) No Intimidation

"A difference in the power levels" of the parties "is one of the factors of prime importance which affect movement toward negotiation."[166] The "initial bargaining position before the start of the actual negotiations" is relevant "since it has an influence both on the bargaining process itself and on its results"[167], moreover shifts in the balance of power may occur during the process. Major Powers rightly hold the view that an imbalance between negotiating powers is unavoidable but not as such a ground for invalidity of an agreement.[168]

The "concept of intimidation" is "wider than that of threats made with the intention to change the opinion of the target"[169] but "as a bare minimum" it requires "at least the

[159] *Alleged Violations of Sovereign Rights,* Verbatim Records CR. 2015/25 (Nicaragua), at 28, para. 17.

[160] *Arbitral Award of 3 October 1899 (Guyana v. Venezuela),* Application Guyana, Annex 6, Letter UN Secretary- General of 15 December 2016.

[161] *Gabcikovo- Nagymaros Project (Hungary / Slovakia), Judgment, I.C.J.* Reports (1997) 7 at 66, para. 107.

[162] GA Res 53/101, Principles and Guidelines for International Negotiations, para. 2 (e). (emphasis added).

[163] H. Thirlway, *supra* n. 8, at 23-24.

[164] *Application of ICSFT and CERD,* Verbatim Records CR. 2017/2 (RF) at 47, para. 62 and CR.2019/9/ (RF) at 45, para. 49.

[165] *Ibid.* Verbatim Records CR. 2017/3 (UKR) at 30, para. 15 and CR. 2019/20 (UKR) at 73, para. 32.

[166] A. Lall, *supra* n. 32, at 132.

[167] D. Gathier, *Morals by Agreement* (OUP, Oxford, 1986) as cited by K. Simonen, 'The Strong Do What They Can and the Weak Suffer What They Must But Must They? Fairness as a Prerequisite for successful Negotiations (Benchmarking the Iran Nuclear Negotiations)', 22 *JCSL* (2017) 125-145 at 128 [10.1093/jcsl/kjrx003].

[168] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion of 25 February 2019,* Verbatim Records CR. 2018/21 (UK) at 44-45, para. 10.

[169] P. Behrens, *supra* n. 136, at 225.

 DOI: 10.17103/sybil.23.3

indication, expressly or implied, of negative consequences."[170] "Historically, threats and ultimata played a significant role in diplomatic relations."[171]

Threatening to institute proceedings before the ICJ prior to the start of negotiations is putting pressure on the other party but it does not necessarily amount to an act of procedural bad faith *sensu lato*.

Coercion of a State during negotiations by the use or threat with the use of force leads to the invalidity of the treaty pursuant to Article 52 of the Vienna Convention. As part of a compromise a Declaration on the Prohibition of the Threat or Use of Economic Coercion or Political Coercion in Concluding a Treaty was adopted as a resolution accompanying the text of the Vienna Convention without forming part of it, after the amendment to expand Article 52 to include political and economic coercion had been withdrawn. Given the fact that "a substantial majority would have backed"[172] that amendment, the use of economic coercion during negotiations would be incompatible with the Declaration[173] although half a century later, the question still is "whether or not most States agree that the use of economic and military coercion is illegal [in negotiations]".[174]

"The *restriction* on the use of economic and military coercion in treaty negotiations has taken the form of a gradual process of introducing fairness into inter-State relations."[175] Economic sanctions imposed as "a peremptory demand for positive conduct"[176] in order to bring a party to the negotiating table[177], without an inquiry into "their effect on the principles governing the negotiation" [178] leaves "much to be desired in terms of fairness",[179] certainly when coupled with a series of "unreasonable" demands and additional principles which must be complied with prior to the lifting of measures imposed and which are said to be non-negotiable.[180]

Making the openness to make new steps dependent on the other party willing to make major changes in its conduct may raise doubts whether the offer was made in good faith.[181] On balance the "determination to use force unless the other side shows some signs of submission does not preclude negotiation" but "if there are to be negotiations there cannot be a total or exclusive adherence to the determination to use force".[182]

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[170] *Ibid.* at 226

[171] *Ibid.* at 225.

[172] K. Simonen, *supra* n. 167, at 131

[173] *Ibid.* at 139.

[174] *Ibid.* at 143. The CERD case between Qatar and the UAE will provide the ICJ an opportunity to confirm and clarify the 1969 Declaration.

[175] K. Simonen, *supra* n. 167, at 130 (emphasis added).

[176] P. Behrens, *supra* n.136, at 225.

[177] K. Simonen, *supra* n. 167, at 126.

[178] *Ibid.* at 125.

[179] *Ibid.*

[180] *Application of CERD,* Application of Qatar, paras 22 and 26 and Qatar's Request for the indication of provisional measures, para. 11.

[181] *Alleged Violations of the 1955 Treaty*, Verbatim Records CR. 2018/18 (Iran), at 14, para. 9

[182] A. Lall, *supra* n. 32, at 41.

 DOI: 10.17103/sybil.23.3

Referring to its lack of experience compared with that of the other Party's former colonial Power is clearly based on the inequality of power during negotiations but the argument should have been taken "so far as to suggest it as a ground for invalidity of the Treaty itself" to bring the Court to deal with it.[183]

In assessing the conduct of Parties prior and during negotiations individual judges seem more inclined than the Court to consider the respective power positions of the Parties. The Court should not have overlooked the well-known fact that "certain 'Notes' delivered by a government of a strong power to the government of a small nation, may have the same purpose and the same effect as the use or threat of force".[184] Individual judges may limit themselves to merely referring to the difference in power between the Parties;[185] in other circumstances they may express their opinion in a straightforward and unambiguous way finding that "the intent to bully, frighten and coerce [...] was all too obvious and the " general atmosphere was one of *intimidation and coercion*".[186]

(H) THE ACQUIS JURISPRUDENTIEL

Although issues arising from the legal discourse on good faith during negotiations "are fact- and circumstance-intensive" and the duties flowing from the principle good faith "cannot be applied in isolation of such factors"[187], the core of the *acquis jurisprudentiel* has been well-established and acknowledged as such by doctrine and states.

(1) Procedural Duties

Although when considering "whether negotiations have taken place, and whether they have failed or become futile or deadlocked" the Court "has come to accept less formalism in what can be considered negotiations",[188] it is clear that non-compliance with procedural duties risks to jeopardize the whole process in the first place. The main objective of these procedural duties of good faith is to create and preserve the necessary and best possible diplomatic architecture and circumstances for the parties to carry out their substantive duties and this in order to bring the process to a successful conclusion.

According the *acquis jurisprudentiel* the following acts and actions —in ascending order of importance— are not in conformity with these procedural duties.

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[183] *Territorial Dispute (Libyan Arab Jamahirya /Chad),* I.C.J. Reports (1994) 6, at 22, para. 41 and at 20, para.36.

[184] *Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), Jurisdiction of the Court, Judgment,* I.C.J. Reports (1973) 49, Dissenting Opinion of Judge Padillo Nervo, 81 at 91.

[185] *Corfu Channel Case, Judgment of April 9th, 1949:* I.C.J. Reports (1949) 4, Dissenting Opinion of Judge Badawi Pasha,58, at 64 and Dissenting Opinion of Judge Krylov, 68 at 69.

[186] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 Advisory Opinion of 25 February 2019,* Separate Opinion of Judge Robinson, paras. 93 and 95 (emphasis added).

[187] R. Kolb, *supra* n. 3, at 196.

[188] CERD *case, Judgment of 1 April 2011,* I.C.J. Reports (2011), 70, at 133, para. 160.

 DOI: 10.17103/sybil.23.3

(a) No contempt for agreed procedures[189]

Contempt for agreed procedures may take different forms but unilaterally "*disregarding* procedures agreed upon" does not satisfy the requirement that "States must conduct themselves so that the negotiations are meaningful."[190]

Not responding to communications that require reading, merit consideration and call for a response has been considered contrary to good faith.[191] Failing to send a delegation to a final session —which a State itself has proposed and the other party was ready to attend— without providing either advance notification or significant explanation seems not acceptable, even if security reasons have been invoked afterwards.[192] The attendance by one Party's Head of State at a Summit of Heads of State of a Regional Organisation providing "a golden opportunity" to "start a dialogue" would, arguably, "by itself constitute a genuine attempt to negotiate" while the failure of the other Party to attend was not.[193]

(b) No Unjustified Suspension, Interruption or Withdrawal from the Process [194]

Readiness to start a process, acceptance or rejection of a proposal, a decision to break off or resume leaves a large margin of interpretation for states and "places the principal emphasis on the intention of the parties." [195] Negotiation scholars in the field of international relations are telling us that the "breaking-off of a negotiation is a fait accompli", whereas "deadlock is an event one stage before break-off", a situation in which each "side issues a tacit message "to the other side "concerning the possible interruption of the process or, if it is already viewed a s a stalemate, the restarting of the discussions".[196]

Good faith may even require withdrawal from the process when it appears to that party that it is impossible to reach an agreement and when it wishes to recover tis freedom of action with regard to the object of the envisaged treaty.[197] It has been emphasized that during negotiations there is a mutual expectation of a minimum of good faith. A State is free to interrupt the process, and only acts of bad faith are forbidden.[198] Unilateral

[189] R. Kolb, *supra* n. 3, at 200.

[190] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011,* I.C.J. Reports (2011) 644 at 685, para. 132 and Lake Lannoux arbitration (Spain/ France), Reports of International Arbitral awards (RIAA) (1957), Vol. XII, 281-317, at 307

[191] *Obligation to Negotiate Access,* Verbatim Records, CR. 2018/11 (Chile) at 62, para. 10.

[192] *Maritime Delimitation in the Indian Ocean,* Application Somalia, para. 31 and Verbatim Records CR. 2016/10 (Kenya), at 51, para. 13.

[193] *Application of CERD, Application Qatar, para. 17 and* Verbatim Records CR. 2018/14 (Qatar), at 12, para. 9.

[194] R. Kolb, *supra* n. 3, at 200. Parties sometimes interchangeably use termination and suspension of the process: *Maritime delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua),* Application Costa Rica, paras. 7, 9 and 10 and Verbatim Records CR. 2017/ 7 (CR)), at 20-21, para. 5.

[195] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) Preliminary Objections, Judgment of 26 May 1961:* I.C.J. Reports (1961), 17, at 31.

[196] G. Faure, 'Deadlocks in Negotiation Dynamics' in W. Zartmann G. Faure (Eds.) *Escalation and Negotiation in International Conflicts* (CUP, Cambridge, 2005) 23-52 at 26.

[197] United Nations Vienna conference on the Law of Treaties, t. I, A/CONF.39/C.1/SR.20, 99, para. 34.

[198] *Ibid.* at 104, para. 24.

 DOI: 10.17103/sybil.23.3

suspension of the process may of course take place without a reason being given[199] but the party concerned may also explain its decision.[200]

A distinction has been drawn between negotiations which are *permanently interrupted* and a process which after interruption has been *resumed* on many occasions to demonstrate "that the possibility of a settlement through negotiations never disappeared."[201] The other party may *appear formally* to accept an invitation to resolve disputes through negotiations and may not respond at all to an invitation to re-commence negotiations.[202]

(c) No Deliberate Acts to Aggravate the Dispute[203]

Measures taking during a process of negotiations and causing disproportionate harm to the other party, with little advantage to one own would almost by nature have *the effect* of aggravating the dispute.[204] Resorting "to propaganda and high-tuned accusations against the other party during the negotiations phase so as to try to manoeuvre the other party into a less favourable position"[205] would be an example of such an act. The same goes for the continuation of practices which are part of the subject-matter of a dispute in addition to a refusal to discuss the central issues of the dispute.[206]

For negotiations taking place in parallel with judicial proceedings, this procedural duty imposes itself alongside the related, but distinct cooperational duty for each of the Parties towards each other and towards the Court under the law of dispute settlement.[207] Actions which are unrelated to the controversy at hand and which is (going to be) the subject-matter of the negotiations may not amount to failing this particular procedural duty, but they may still be no contribution at all to the creation or maintaining of a favourable climate.[208]

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[199] *Application of ICSFT and CERD*, Verbatim Records CR. 2017/2 (RF), at 62, para. 43 and *Obligation to Negotiate Access*, Verbatim Records CR. 2018/6 (Bolivia) at 40, para. 33.

[200] By invoking the filing of an Application to the ICJ (*Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* Judgment of 2 February 2018, Verbatim Records CR.2017/7 (Costa Rica) at 20-21, para. 5 referring to Nicaragua or the fact that there are no pending issues: *Obligation to Negotiate Access*, Application Bolivia, paras.27-28.

[201] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment*, I.C.J. Reports (2012) 422, Separate Opinion of Judge Yusuf, 559 at 561, para. 5.

[202] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean*, Application Costa Rica, para. 10.

[203] R. Kolb, *supra* n. 3, at 200(vi).

[204] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Application Nicaragua, at 6, para. 11 (e); one should note that Nicaragua did refer to conduct causing harm to the interests of each other.

[205] R. Kolb, *supra* n. 3, at 200.

[206] *Application of the ICSFT and CERD* Verbatim Records CR 2017/1 (UKR) at 36, para.7 and CR. 2019/10 (UKR) at 14, para. 13. and *Application of the CERD case, Request Qatar for the indication of provisional measures, para. 18.*

[207] A. Peters, *supra* n. 59.

[208] *Pulp Mills on the River Uruguay (Argentina v. Uruguay) Judgment*, I.C.J. Reports (2010) 4 , Separate opinion of Judge Greenwood, 221 at 228, para. 21.

 DOI: 10.17103/sybil.23.3

Parties should also "abstain from creating *faits accomplis* "prejudicing the outcome of the process."[209] When during bilateral negotiations accusations and counter-accusations over incursions are being exchanged[210] it is the mere occurrence of such incidents which is incompatible with the procedural duty not to aggravate the dispute.

(2) Substantive duties

(a) Preserving the Equality of the Parties

The "obligation to refrain from any action which might *interfere* with the subject-matter of a dispute while judicial proceedings are pending"[211] flows "from the very nature of the judicial process".[212] Good faith requires this obligation also to apply during negotiations. The political-legal context in which all negotiations should take place —"within the framework of mutual respect and preservation of the sovereignty of States"[213]— is all-encompassing over and beyond the good faith requirement.

Exception made for cases involving fraud and coercion, direct interference in both future and ongoing *arbitral proceedings and negotiations* through seizure and detention of documents protected by legal professional privilege certainly has been the most visible and far-reaching violation of the fundamental principle of good faith in recent years.

The Applicant did consider the seizure of relevant documents an unlawful impediment to the conduct "inter alia of future negotiations where its position would irreversibly be weakened."[214] In addition to the already existing balance of power[215] such conduct "manifestly distorts the character of future negotiations" as it would find itself at "a considerable negotiating" disadvantage.[216] Moreover, it "violates fundamental principles governing the conduct of negotiations" and it "totally destroys the equality and good faith that must prevail between the Parties"[217] as a result "trust was lost" and "relations [were] poisoned".[218]

The Court, in enjoining the Respondent from "interfering" in any way in communications with the Applicant's legal advisers emphasized that "*equality of the parties*

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[209] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* I.C.J. Reports (2004) 136, Separate Opinion of Judge Al-Khasawneh, 235, at 239, para. 13.

[210] *Territorial Land Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras Judgment) I.C.J.* Reports (2007) 659, at 681, para. 58.

[211] *LaGrand (Germany v. United States of America), Judgment,* I.C.J. Reports (2001) 466, at 498, para. 93 (Germany) (emphasis added).

[212] R. Jennings, 'The LaGrand case' 1 *LPCIT* (2002), 13-54, at 30 [doi:10.1163/15718034-12341393].

[213] See for instance Qatar's Application in the *Application of CERD case,* para. 13

[214] *Questions relating to the Seizure and Detention of Certain documents and Data (Timor-Leste v. Australia),* Request Timor-Leste for the Indication of Provisional Measures, paras 5 and 6.

[215] *Questions relating to the Seizure and Detention,* Verbatim Records, CR. 2014/1 (Timor-Leste) at 17, para. 4

[216] *Ibid.* at para.3

[217] *Ibid.* at 25, para. 17.

[218] *Ibid.* Verbatim Records CR. 2014/3 (Timor Leste), at 12, para. 3 replying to a question put by Judge Cancado Trindade.

 DOI: 10.17103/sybil.23.3

must be preserved when they are involved" in a process of negotiations.[219] Judge *Ad Hoc* Callinan dissenting, aptly observed that there might "be a problem about the use of the word 'interfere' because of its breadth and unspecific nature."[220]

(b) Conducting a Meaningful Process

"The duty to behave in a *constructive way* during negotiations has been recognised for a long time."[221] In order to pass judicial assessment through the prism of good faith negotiations have to be conducted in a *meaningful* way: parties must demonstrate by their conduct and actions —such as for instance the suspension of exploratory activities of a transitory character and an invitation to the other Party to negotiate provisional arrangements pursuant to Articles 74 (3) and 83 (3) UNCLOS[222]— a genuine intention to make progress.

The *authenticity* of the efforts to reach an agreement is an important factor for any judicial assessment of a process of negotiations.[223] Simply formally going through the motions —for instance arguably "solely for the purpose of claiming to have exhausted the requirements" of a prior negotiation's clause[224] would not reflect such a genuine intention[225] neither would simply be listening and then to give reasons for the dismissal of a proposal.[226]

Parties may disagree about the relationship between the good faith requirements and the element of meaningfulness as "two overarching" but separate "duties"[227] the second one being to "pursue (negotiations) without moving away from the goal set"[228] or the latter being just "a manifestation of the good faith requirement",[229] this view being in accordance with the *acquis jurisprudentiel*. Indeed, once the Court has considered negotiations during a particular period to have been "meaningful" they are recognised as having been conducted in good faith. When the Court reminds the Parties that they could continue the dialogue and that "with willingness "on both sides, *meaningful* negotiations can be

[219] *Questions relating to the Seizure and Detention of Certain documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014* I.C.J. Reports (2014) 147, at 161, para. 55 (3) and at 153, para. 27 (emphasis added).

[220] *Ibid. at 223, para.32.*

[221] R. Kolb, *supra* n. 3, at 195, note 2

[222] *Maritime Delimitation in the Indian Ocean,* Verbatim Records CR. 2016/10 (Kenya), at 27-28, para. 36

[223] *CERD case (2011), Judgment,* I.C.J. Reports (2011), 70 at 130, para. 150 (Russian Federation).

[224] *Application of the ICSFT and CERD, Verbatim* Records CR. 2017/2 (RF), at 21, para. 21 and CR. 2019/9, at 4, para. 50. and *Maritime Delimitation in the Indian Ocean, Verbatim* Records CR. 2016/ 10 (Kenya), at 25, para. 27.

[225] *North Sea Continental Shelf, Judgment,* I.C.J. Reports (1974) 3, at 46-47, para. 85. The same allegation has been made with regard to efforts of mediation aimed to provide a basis for good faith discussions: *Application of the CERD,* Application of Qatar, para. 17.

[226] *Obligation to Negotiate Access,* Verbatim Records CR. 2018/6 (Bolivia), at 61, para. 17

[227] *Obligation to Negotiate Access,* Memorial Bolivia, Vol. I, at 100, para. 230 and para. 235 and para. 237.

[228] *Obligation to Negotiate Access,* Reply Bolivia, para. 116.

[229] *Obligation to Negotiate Access,* Counter Memorial Chile, 4.31.

 DOI: 10.17103/sybil.23.3

undertaken"[230] this means in good faith.

The course of the process of negotiations and the contribution *each party* has made to the process are factors to be considered by judicial actors when evaluating actions by one party which allegedly are of such a nature "as to frustrate the negotiations" and "were not *meaningful*".[231]

"Preparatory steps" taken by one party "to ensure that it is ready to proceed" with a project, "is not, *in itself* contrary to the duty to negotiate in good faith."[232] To qualify as such a breach the record has to show "that the party concerned did not *intend* to engage in meaningful negotiations."[233]

(c) Taking into Account the Interests of the Other Party

Parties are under a duty "to pay *reasonable* regard to the interests of the other party"[234] a duty imposing itself whatever the kind of negotiations parties are involved in. Proposals must be reasonable, consider the interests of the other party and address the agreed subject-matter[235] but good faith does not "require States to forego their own interest".[236] Behaviour consisting in simply ignoring the interests of the other party "is *against the essence of negotiation*".[237]

(d) Changing Positions and Exchanging Proposals

It may be fairly be taken for granted that negotiations will always start with the parties taking rather opposing positions with regard to the issues at hand. Lall has aptly observed that it "might be possible for a series of negotiations over a considerable period of time to move an issue to a significantly different position from that which obtained before the commencement of the series of negotiations" but it is equally true that "revolutionary change through negotiations is a rarity indeed."[238]

Although "reversals of positions" in an attempt "to maximize the response of the other side" and "such tactics is one of the essence of negotiations" it could "lead to accusations of bad faith" giving rise to doubts by third parties "about the sincerity of the negotiating states."[239]

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[230] *Obligation to Negotiate Access (Bolivia v. Chile), Judgment of 1 October 2018, para. 127 and para. 176 (emphasis added).*

[231] *Pulp Mills on the River Uruguay (Argentina v. Uruguay) Judgment,* I.C.J. Reports (2010) 4, Separate Opinion of Judge Keith, 121, at 127, para.17, at 128, para; 18 and at 130, para. 24 (emphasis added).

[232] *Ibid.* Separate Opinion of Judge Greenwood, 221, at 227, para. 16 (emphasis added).

[233] *Ibid.* (emphasis added).

[234] *Interim Accord, Judgment, I.C.J.* Reports (2011)644, at 685, para. 132 (emphasis added) and *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment,* I.C.J. Reports (1974) 3, at 33, para. 78.

[235] *Obligation to Negotiate Access,* Memorial Bolivia at paras 247-254.

[236] *Obligation to Negotiate Access,* Counter Memorial Chile 4.26.

[237] *Obligations concerning Negotiations, (Marshall Islands v. UK)* Memorial Marshall Islands v. UK, para. 185 (emphasis added).

[238] A. Lall, *supra* n. 32, at 288.

[239] *Ibid.* at 299.

 DOI: 10.17103/sybil.23.3

There is an "obvious tendency [by parties] to maintain original positions as firmly as possible"[240] which may be perceived as "extreme and far-fetched positions".[241] S*ystematic* refusal to take into consideration adverse proposals is contrary to good faith as the *Lake Lannoux Award* made clear back in 1957[242]. It is important to recall that it is *absolute intransigence* which in case of a pactum *de contrahendo* renders conduct contrary to good faith. [243]

During the process each party "formule des offres, des propositions que le cocontractant adverse est libre d'accepter ou de refuser"[244] but such rejection would only be considered a lack of good faith if it is out of hand.

(e) Accepting a Compromise

To negotiate "with no prospect of compromise is not" negotiate at all.[245] *The processual nature of negotiations* —which involves changing perceptions of respective and mutual attitudes and positions— is bound to have an impact on compliance by parties with their duty to accept a reasonable compromise. An initially cooperative approach may easily develop into a more adversarial posture.

It is jurisprudence *constante* that "insisting upon its own position without *contemplating* any modification of it" does not satisfy the requirement under the good faith principle that the negotiations must be meaningful.[246] When during a particular period of time Parties showed willingness to abandon their initial bargaining position the Court may note a degree of openness.[247] On the other hand, statements by political leaders could raise judicial concern when "they *suggested* an inflexible position".[248] Parties will always argue that they have shown "openness to compromise" and that the other party has been "intransigent".[249]

Willingness "to negotiate changes" in an initial draft may be taken into account by the Court when assessing the progress made, thereby noting "a more guarded attitude" of the Respondent compared to a positive approach by the Applicant.[250]

Working towards a compromise may be easier when competing interests are at stake

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[240] *Ibid.*

[241] *Alleged Violations of Sovereign Rights*, Verbatim Records CR. 2017/7 (CR), at 23, para. 14 and at 26, para. 25. See also Somalia's Application para. 30 in the *Maritime Delimitation in the Indian Ocean case.*

[242] *Lake Lannoux* at *307 a*nd E. Zôller, *supra* n. 89 at 64, para. 55

[243] *Lake Lannoux*, at 310-311 and 315.

[244] E. Zôller, *supra* n. 89, at 49, para. 43.

[245] *Application of CERD*, Verbatim Records CR. 2018/12 (Qatar), at 27, para. 33.

[246] *Interim Accord, Judgment, I.C.J.* Reports (2011)644 at 685, para. 132

[247] *Ibid.* at 686, para. 135; contra Judge *Ad Hoc* Roucounas, dissenting, 720, at 725, para. 11.

[248] *Ibid.* at 686, para. 135 (emphasis added).

[249] *Ibid.* at 684, para. 129 (Macedonia) and *Application of ICSFT and CERD*, Verbatim Records CR. 2017/2 (RF), at 46-47, para. 59 and 60 and *Maritime Delimitation in the Indian Ocean case*, Verbatim Records CR. 2016/10 (Kenya), at 25, para. 27.

[250] *Border and Transborder Armed Actions (Nicaragua v. Honduras) Jurisdiction and Admissibility, Judgment,* I.C.J. Reports (1988), 69 at 98, para. 74.

 DOI: 10.17103/sybil.23.3

than when parties negotiate about their respective legal rights.[251] Admittedly the duty to negotiate in good faith "cannot be equated with a duty to abandon one's position if that position is firmly grounded in law",[252] but parties will obviously differ in that important respect and it is only *a posteriori* that a judicial actor will authoritatively decide what the law says.

(f) Changing your Mind

It has been argued that a "legal obligation is durable; a policy choice is mutable" and "can be changed",[253] and that "States like individual may change their minds".[254] Are parties completely free —given their duty to accept a reasonable compromise— to change their minds at regular intervals following for instance a government or regime change, but without however suspending or interrupting the process or withdrawing from it?

An Applicant may consider the Respondent's change of long-held positions on two separate occasion as unacceptable[255] but only "[w]eighty circumstances are required to establish that a party intended *abruptly* to abandon a position long held by it". [256]

A "party's announcement at a press conference that its approaches toward the negotiation process will undergo substantial changes"[257] may be foreshadowing that party's subsequent unwillingness to continue negotiations on particular matters.

Flexibility of the Parties in their respective positions is a condition for third-party involvement in finding a solution to be helpful and instrumental.[258] Although one may safely argue that by the nature of things the trust which a party has accorded to the conduct of the other part may have induced it to change its position to its disadvantage[259] —thus potentially bringing into operation the doctrine of estoppel— it does not "necessarily follow" from the relation with good faith "to prohibit a state to change its policies".[260] Moreover, "in most cases where a simple legal position has been taken, estoppel will not

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[251] R. Kolb, *supra* n. 3, at 196.

[252] C. Tomuschat, 'Article 33 UN Charter 'in A. Zimmermann et al. (Eds), *The Statute of the International Court of Justice: A Commentary* (OUP, Oxford, 2012) 119-133, at 124, MN.17 and R. Kolb, *supra* n. 3, at 196, note 4.

[253] *Obligations concerning Negotiations (Marshall Islands v. Pakistan) and (Marshall Islands v. India) Verbatim* Records CR. 2016/ 2, at 50, para. 3 and CR.2016/1, at 59-60, para. 7 Marshall Islands referring to Pakistan' sand India's arguments respectively.

[254] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Verbatim Records CR. 2017/10 (Nicaragua), at 52, para. 13.

[255] *Dispute concerning the Status and Use of the Waters of the Silala River System (Chile v. Bolivia)*, Application Chile, para. 32.

[256] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J.* Reports (1995) 6, Dissenting Opinion of Judge Shahabuddeen, 51, at 57 (emphasis added).

[257] *CERD case (2011), Judgment,* I.C.J. Reports (2011), 70 at 138, para. 177.

[258] *Gabcikovo- Nagymaros Project (Hungary / Slovakia), Judgment, I.C.J.* Reports (1997) 7 at 68, para. 113.

[259] R. Kolb, *supra* n. 3, at 102, note 268

[260] *Ibid.* at 102.

 DOI: 10.17103/sybil.23.3

apply at all, since no detrimental reliance can be proven."[261]

A "general doctrine of non-contradiction would vastly overestimate the potential and the role" of international law, although it is counterbalanced by the doctrine of estoppel[262] which is "shaped as a relational concept"[263] . The "*relative positions* of the parties" must have changed.[264]

A large degree of consistency may be valuable but, as the Court opined, "too much importance need not to be attached to a few uncertainties or contradictions, real or apparent"[265] the invocation of which[266] "always produce some result in the mind of lawyers". This may be described as "a sort of *estoppel minus quam imperfecum*".[267]

(g) Using Unambiguous Language

To negotiate in good faith requires parties to genuinely engage in a meaningful process with the intention to make it successful. Language, choice of words and avoidance of ambiguity are relevant indicators this respect.[268] Although a certain degree of ambiguity, lack of clarity and uncertainty are bound to surface particularly during the early phases of the process —they may even concern a Party's commitment to respect its commitment to negotiate[269]—, the good faith principle requires states to dispel them when they reach a more or less potentially decisive stage in the process.

Parties may indeed "expect that the other party's choice of words corresponds to their actual will"[270] and it would be contrary to good faith for a party to hide behind equivocal formulations in order later to benefit from the text's ambiguity.[271] Furthermore, when "one party to a bilateral negotiation [becomes] aware of a mistake of the counterparty on the proper meaning of a word, it [has] a duty under good faith either to signal or to notify the provision so as to accommodate the meaning attached to the word by the counterparty."[272]

Although a *joint* choice for indeterminate wording disguises the incompatibility

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[261] *Ibid.* at 104.

[262] *Ibid.* at 106.

[263] *Ibid.* at 108.

[264] As explained by Judge Gerald Fitzmaurice in the *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962:* I.C.J. Reports (1962) 6, Separate Opinion, 52, at 63.

[265] *Fisheries case, Judgment of December 18th, 1951:* I.C.J. Reports (1951) 116, at 138.

[266] See for instance *Obligation to Negotiate Access,* Verbatim Records CR. 2015/ 21 (Bolivia) at 13, para. 13.

[267] R. Kolb, *supra* n. 3, at 112.

[268] For instance, in order not to exacerbate a situation a state may decide —during the pre-negotiations stage— to convey a grievance using the language of a 'complaint' rather than a "protest ': P. Behrens, supra n. 136, at 271, note 22. On the various aspects of the importance of language during negotiations see for instance *Obligation to Negotiate Access,* Verbatim Records CR. 2018/6 (Bolivia) at 45-55.

[269] *Obligation to Negotiate Access,* Verbatim Records CR. 2018/7 (Bolivia) at 70-71, para. 41.

[270] M.L. Gächter Alge, 'The Principle of Good Faith in Treaty Negotiations: Obligation to Choose Words in a Trustworthy Manner 'in S. Besson and P.Pichonnaz (Eds.), *Principles in European Law* (Genève, 2011) 139-160, at 147.

[271] J.P. Cot, *supra* n. 20, at 146.

[272] R. Kolb, *supra* n. 3, at 197, referring to the 1951*Pertulosa case.*

 DOI: 10.17103/sybil.23.3

between the parties' positions[273] the principle of good faith "and its innate concept of trust prevent treaty negotiators from resorting to this technique postponing the search for a mutual consent to the application or interpretation process",[274] ruling out what could be called 'constructive ambiguity'. The principle of good faith constitutes the "essential link between the negotiating process and treaty interpretation", hence an holistic approach to the law of treaties demands that Articles 26 and 31 of the Vienna Convention "need to be applied *from the very first step in treaty negotiations* and especially with regard to the choice of words expressing the common intentions of the negotiating States."[275]

The duty to create a favourable climate mentioned earlier may be undermined by the choice of particular words or terminology such as "requiring, calling, strongly urging and condemning".[276]

Providing no "straight and specific responses on the issues" and instead making "general and non-committal statements [...raising] semantic questions"[277] may be part of evasive and dilatory tactics raising doubts about that party's authenticity during the process.

(I) GENERAL APPROACH TOWARDS GOOD FAITH BY BOTH THE COURT AND THE PARTIES BEFORE IT.

The duties and practices coming within the good faith requirements as they can be found in the *acquis jurisprudentiel* are neither monolithic nor static: they cover a wide spectrum of conduct and omissions ranging from defaulting on procedural matters over consistent refusal to consider proposals to the exercise of coercion and the threat with the use of force. Responses by Parties and the Court will vary accordingly, also in light all other relevant-mitigating or aggravating factors and circumstances.

(1) Parties' General Approach

Back in 1958 there may have been, "a natural reluctance to ascribe bad faith to states, in the sense of a deliberate intention knowingly to circumvent an international obligation"[278] a decade later State practice was characterized by Cot as follows: "Le combat se déroule à fleurets mouchetés et les diplomates répugnent à y dégainer un sabre."[279]

Exchanges of accusations of bad faith during hearings before the Court used to be a rather unusual phenomenon but in recent times they certainly are on the increase.

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[273] M.L. Gächter Alge, *supra* n. 270, at 153.
[274] *Ibid.* at 160.
[275] *Ibid.* at 159 and 160 (emphasis added).
[276] *Application of the ICSFT and CERD,* Verbatim Records CR. 2017/2 (RF), at 47, para. 63.
[277] *Ibid. Verbatim* Records CR 2017/1 (UKR), at 55, para. 5 and para. 6.
[278] G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1954-1959: General Principles and Sources of international Law' 35 *BYIL* (1958) 183 at 209.
[279] J.P. Cot, *supra* n. 20, at 143.

 DOI: 10.17103/sybil.23.3

Whether the judicial presumption of good faith may partly explain the recent tendency of Parties to abandon the rather euphemistic allegation of "a lack of good faith" in favour of more straightforward and robust allegations of bad faith is difficult to say.

Still, states are trying to choose a formulation which may be perceived as less aggressive —such as lack of good faith, disregarding good faith, not-complying with it— rather than using more direct terminology such as infringing or violating good faith, breaching it and finally bad faith full stop .An Applicant, accusing the Respondent for not having negotiated at all, may take care to point out that it never argued that the Respondent had been "acting in bad faith" but that "it was not discharging its obligation in good faith".[280]

A Respondent may argue "that it cannot be said" that the Applicant "negotiated in good faith"[281] while the Applicant interprets this position as the Respondent merely *suggesting* "that it did not engage in negotiations in good faith".[282]

In advisory proceedings states have expressed themselves in a more or less subtle way such as "a series of events that have plenty to wish for in terms of good faith".[283]

Accusations could be made that not only the obligation not to defeat the object and purpose of the envisaged treaty in case of a *pactum de contrahendo* has not been pursued in good faith but in addition that the general, customary law obligation for states to perform all their obligations in good faith has been breached;[284] the prohibition of conduct that prevents the fulfilment of a treaty's object and purpose equally applies to the fulfilment of this customary international law obligation.[285]

For instance, during their pleadings Parties may formulate allegations of lack of good faith or bad faith[286] but stopping short of including them in their submissions. In other cases, such explicit accusations already present in the Application[287] may find their way into a submission asking the Court to declare that the Respondent should negotiate in good faith[288] implying that it has not been doing so in the past.

Such allegations of bad faith may not be based on "some general failure to negotiate in good faith"[289] but through specific allegations of breach namely degradation of the

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[280] *Obligations concerning negotiations* Verbatim Records CR. 2016/5 (Marshall Islands) at 16-17, para. 8.

[281] *Maritime Delimitation in the Indian Ocean case,* Written Reply of Kenya to the questions put by Judge Crawford: page 7, (2).

[282] *Ibid, Comments* in writing of Somalia on the written reply of Kenya; page 3, para. 9

[283] *Legal Consequences of the separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion of 25 February 2019,* Verbatim Records CR. 2018/24 (Guatemala), at 33, para. 14.

[284] *Obligations concerning Negotiations,* Application Marshall Islands, paras. 15 -17 and para. 18.

[285] *Ibid.* para. 55. The Applicant is in favor of extending the scope of the first obligation by also including activities that "render remote […] the achievement of the objectives": Memorial, para. 226.

[286] *Application of the ICSFT and CERD,* Verbatim Records CR. 2017/2(RF), at 36, para. 1 and CR.2019/9 (RF) at54, para. 7, at 54-55, para. 9 and at 63, para. 33.

[287] *Obligation to Negotiate Access,* Application Bolivia, para. 32 (B) and Verbatim Records CR. 2015/19 (Bolivia), at 34, para. 25.

[288] *Obligation to Negotiate Access,* Verbatim Records, CR. 2018/ 10, at 70, para. 9 (c).

[289] *Ibid.*, Counter-Memorial Chile, 4.47

 DOI: 10.17103/sybil.23.3

negotiation terms[290] and refusal to negotiate a particular issue[291] . It is the accumulation of conduct considered as improper which may lead to such an allegation.

An accusation that the Respondent was acting in bad faith by allegedly "systematically reducing the object and scope within which [it] was prepared to negotiate" has been considered a serious allegation.[292] The argument —explicitly referring to *Mavrommatis*— that the dispute cannot be settled as a result of the other Party's conduct[293] does imply that the other Party was unable or refuses to give way contrary to the good faith requirement, without the need to explicitly invoke it, although a further accusation was that a deadlock has been "manufactured" and has to be attributed to the other party.[294]

When demonstrating that an attempt to negotiate has been made, a Party may argue that the lack of progress was due to the other party's bad faith.[295] Allegations concerning *substantive duties of good faith* include describing the other Party as "unwilling to budge from its long-standing position"[296] , declining "to engage on the substance of the dispute" and "consistently" failing "to negotiate in a constructive manner" and "refusing to engage in an meaningful discussion";[297] or declaring itself "*unable to support … any outcome it may produce*."[298] In case of negotiations on nuclear disarmament this lack of good faith was even "*reinforced*" by modernising nuclear arsenal.[299]

Allegations also cover *procedural duties of good faith* such as "largely failing to respond to correspondence"[300], voting against a resolution establishing a Working Group tasked with only "to develop *proposals* to take forward negotiations"[301] and not proposing "an alternative initiative to pursue and conclude negotiations"[302] but opposing the efforts to even a more serious breach.[303]

Given the intrinsic link between procedural and substantive duties of good faith —which most clearly manifests itself in case of a *pactum de contrahendo*[304]— it is obvious that agreeing to "*discussions short of negotiations*" and to "*support he commencement of*

[290] *Ibid.*, 4.48.
[291] *Ibid.* 4.49.
[292] *Ibid.* Verbatim Records CR. 2018/9 (Chile) at 32, para. 37.
[293] *Alleged Violations of Sovereign Rights, Verbatim* Records CR. 2015/23 (Nicaragua) at 44, para. 58.
[294] *Ibid.* Verbatim Records CR. 2015/24 (Colombia), at 31, para. 15 and see also *Application of the ICSFT and CERD*, CR. 2019/10 (UKR, at 14, para. 14.
[295] *Armed Activities on the Territory of the Congo (New application 2002) (Democratic Republic of the Congo v; Rwanda), Jurisdiction and Admissibility, Judgment,* I.C.J. Reports (2006) 6 at 38, para. 86 and at 43, para. 98 (DRC).
[296] *Maritime Delimitation in the Indian Ocean case,* Verbatim Records CR. 2016/13 (Somalia) at 41, para. 11
[297] *Application of the ICSFT and CERD*, Application Ukraine, para. 23
[298] *Obligations concerning Negotiations,* Application Marshall Islands, para. 70 (first emphasis added).
[299] *Ibid.* Memorial Marshall Islands v. UK, para. 226 (emphasis added).
[300] *Application of the ICSFT and CERD*, Application Ukraine, para. 19
[301] *Obligations concerning Negotiations,* Application Marshall Islands v. UK, para. 69 (emphasis added).
[302] *Ibid.* Memorial Marshall Islands v .UK, para. 25.
[303] *Obligations concerning Negotiations, (Marshall Islands v. Pakistan),* Application Marshall Islands, para. 25.
[304] See for instance Memorial Marshall Islands (UK case), paras. 15-18.

 DOI: 10.17103/sybil.23.3

negotiations in the Conference on Disarmament"[305] and to participate in a Working Group does not protect a Respondent 's conduct —such as to improve its nuclear weapons— from being contrary to the objective of Article VI of the NPT and directly conflicting with it.[306]

In case of a *pactum de contrahendo* such as provided for in Article VI of the Non-Proliferation Treaty the breaches considered may consist both of actions contrary to substantive duties such as to improve nuclear weapons and breaches of procedural duties by opposing efforts of the majority of States to initiate the negotiations.[307] Also in the absence of an obligation to negotiate a combination of both duties may be the he subject of allegations.[308]

Is there room for the *minis rule because* for instance "manifestly unjustified interruption of negotiations "will be "sanctionable only in *extreme cases*"?[309] The burden of proof for an accusation of manifest bad faith is high as we will find out next but should the normative role of the principle of good faith in the international legal order not require that every lack of good faith in carrying out substantive duties be sanctioned?

(2) The Court's General Approach

As for instance demonstrated by the *Pulp Mills* case judicial review of good faith is bound to be a difficult and delicate task as judicial actors have to carefully navigate between a "strict legal straitjacket" which "would be of no utility" and "a complete absence of rules protecting the legitimate expectations" of the parties[310] thereby preserving the necessary flexibility parties are entitled to retain and demonstrate.

It is not within the Court's inherent jurisdiction to make *motu proprio* a judicial assessment of the Parties' performance of the obligation to negotiate in good faith. The jurisdictional clause must have endowed the Court with jurisdiction to examine whether the Parties were engaged in good faith negotiations.

A reminder to Parties in the reasoning of a Judgment of their duty to negotiate in good faith does not "entail a determination that a party had acted contrary to international law when no such determination on that point of law had been sought by the other party in its final submission".[311]

Judge H. Lauterpacht's warning that the Court, when examining its jurisdiction, "must

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[305] *Obligations concerning Negotiations, (Marshall Islands v. India)*, Application Marshall Islands, paras. 27 and 36 (emphases added).

[306] *Ibid.* paras. 58 and 64.

[307] Memorial Marshall Islands (UK case), paras. 15-18.

[308] Intransigence and breaking-off negotiations: *Obligation to Negotiate Access:* Verbatim Records CR. 2018/6 (Bolivia) at 30, para. 30 and at 44, para. 47 and CR. 2018/8 (Chile) at 17, para. 12 (b) and at 27, para. 25.

[309] R. Kolb, *supra* n. 3, at 200 (emphases added).

[310] *Ibid.* at 201.

[311] *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J.* Reports (2003) 161, Separate Opinion of Judge Higgins, 225, at 228-229, para. 14 (mutatis mutandis).

 DOI: 10.17103/sybil.23.3

exercise the greatest caution in attributing to a sovereign State bad faith"[312] a fortiori applies when a case later reaches the merits.

The Court presumes that Parties have been negotiating in good faith unless and until the opposite is claimed and proven and in general the Court is not going beyond a "touch and feel" type of test.

The Court may consider the readiness to accept third parties' assistance as an indication of their good faith.[313]

(a)Material at the Court's disposal

The material at the Court's disposal consists of the facts and circumstances of the particular case, Parties' narrative of their negotiation process and their legal arguments. When embarking upon a process of negotiations states are aware of the good faith requirements as consolidated in the *acquis jurisprudentiel* and which later on will shape their litigation strategy.

"The one-sided presentations are 'counterbalanced' by equal opportunities for presentation" and "by the knowledge that the judges will evaluate the claim"[314] . However, since Parties are making an instrumental and selective use of the history of the dispute at hand and of the negotiations conducted to resolve it, the Court should be cautious in its assessment of the facts

The exact chronology of *unilateral* decisions taken by a party during a process of negotiations is relevant "in the event it has to be decided whether the parties negotiated in good faith"[315]. The Court may *merely report* that a process of negotiations has taken place but it may also feel obliged to describe in some detail the *nature* of the prior negotiations, and this also in order to bring to light what was the *main* reason they had broken down and "fully to ascertain the *scope and purpose*" of exchanges.[316]

The material presented by the Parties should be conclusive to allow the Court "to evaluate the significance of the meetings held"[317] and it expects to be informed " in particular [about] the way, duration, scope [and] stage of progress" of a process to be able to carry out its assessment[318] . When the process stretches over a period of several decades

[312] *Interhandel Case, Judgment of March 21st, 1959:* I.C.J. Reports (1959) 6, Dissenting Opinion of Judge H. Lauterpacht, 95 at 111.

[313] *Gabcikovo- Nagymaros Project (Hungary / Slovakia), Judgment, I.C.J.* Reports (1997) 7 at 79, para. 143.

[314] A. Mondré, *supra* n. 95, at 41.

[315] *Gabcikovo- Nagymaros Project (Hungary / Slovakia), Judgment, I.C.J.* Reports (1997) 7, Dissenting Opinion of Judge Herczegh, 176 at 192.

[316] *North Sea Continental Shelf, Judgment,* I.C.J. Reports (1969) 3, at 16, para. 5 and at 17, para. 7 and *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Judgment,* I.C.J. Reports (1973) 49 at 56, para. 18 (emphasis added).

[317] *Territorial Land Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment,* I.C.J. Reports (2007), 832 at 868-869, para. 119.

[318] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Provisional Measures Order of 8 December 2000,* I.C.J. Reports (2000) 182 at 200, para. 6

 DOI: 10.17103/sybil.23.3

Parties may feel no need to go over the history between them in any great detail.[319]

A detailed examination of the records of negotiations has been considered premature at the provisional measures stage[320] . It was pointed out that there is not "a single decision at *any* stage of the proceedings scrutinizing a lengthy record of negotiations for alleged bad faith of the party claiming the Court's jurisdiction" and that it would be "burdensome and unworkable for the Court, presumably requiring it to weigh competing accounts of what actually happened in many negotiating sessions".[321]

At the provisional measures stage the Court has to assess where it appears that a genuine attempt has been made[322]. The Court may conclude from the facts on the record that "it *appears* that [the] issues [concerning the ICSFT] could not be resolved by negotiations"[323] and it may express the view that the issues relating to the CERD "had not been resolved "by negotiations[324]. At that stage the Court does indeed not have to go into mutual accusations of bad faith.[325] At the preliminary objections stage the Court may express the view that the negotiations including diplomatic correspondence and face-to-face meetings "*indicate(s)* that a genuine attempt at negotiation" had been made.[326]

(b) The Evidence Required

Circumstantial evidence may be submitted but it has to "supported" not by disputable inference but by clear and convincing evidence showing "that the party concerned did not *intend to engage in meaningful negotiations*"[327] and compelling the Court to a "finding of the existence of bad faith".[328]

When the procedural and substantive duties of good faith require states to take positive action, and a Party formulates an allegation of omission, the Court will require "a lower standard of proof for State responsibility to be incurred".[329] The Court may of course

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[319] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Verbatim Records CR. 2017/5 CR) at 20-21, para. 5.

[320] *Application of the ICSFT and CERD, Verbatim* Records CR. 2017/3 (UKR) at 29, para. 10

[321] *Application of the ICSFT, Verbatim* Records CR. 2017/3 (UKR) at 27-28, para. 6 and at 28, para. 6.

[322] *Ibid. Provisional Measures, Order of 19April 2017,* I.C.J. Reports (2017) 104, at 121, para. 44 'emphasis added). See also *Application of the CERD case, Request for the Indication of Provisional Measures, Order of 23 July 2018*, para. 36.

[323] *Application of the ICSFT and CERD, Provisional Measures, Order of 19April 2017,* I.C.J. Reports (2017) 104 at 123, para. 52.

[324] *Ibid.* at 125, para. 59.

[325] Judge Bhandari was the only Judge to touch upon these accusations but only to state that they "cannot be assessed by the Court at this stage of the proceedings without prejudging the decision to be made in the subsequent phase of this case' Ibid. *Separate Opinion of Judge Bhandari,* 187, at 194, para. 13.

[326] *Application of the ICSFT and CERD case, Preliminary objections, Judgment of 8 November 2019, para. 120 (emphasis added).*

[327] *Interim Accord case, Judgment*, I.C.J. Reports (2011)644 at 685, para. 132 and *Pulp Mills on the River Uruguay (Argentina v. Uruguay) Judgment,* I.C.J. Reports (2010) 4 , Separate opinion of Judge Greenwood,221 at 227, para. 16 (emphasis added).

[328] *Interim Accord case, Judgment*, I.C.J. Reports (2011)644 at 685, para. 132

[329] K. del Mar, 'The International Court of Justice and Standards of Proof 'in K. Bannelier, T. Christakis

 DOI: 10.17103/sybil.23.3

come to the conclusion that the Respondent had "not met its burden of demonstrating that the applicant breached its obligation to negotiate in good faith".[330] The Court may draw "provisional" inferences from conduct or omissions which have been perceived or found as hampering or frustrating the pre-conditions listed earlier.

(c) The Court's Standard

Importance of progress or lack of it is no benchmark for assessing compliance with the good faith requirement. Lack of result is not *the standard* to measure whether the obligation to negotiate has been undertaken in good faith as the Court has to consider "whether the Parties conducted themselves in such a way that negotiations may be meaningful"[331] and this in turn depends on the course of the negotiations, the abstention from action which frustrated the process[332] and on the contribution made by either of the Parties to the process.

Although the Court will attach "corroborative weight" to "the conduct of the Parties in negotiations",[333] "it is not the same to negotiate in a bilateral relation on the apportionment of a common resource than to negotiate multilaterally about nuclear disarmament."[334]

In such a context the argument has been made that a judicial evaluation whether a state's efforts to negotiate are "in good faith *and/*or genuine" cannot be done in a vacuum but has to be made "in the context of the attitude and actions" of other states and that it cannot be carried out "irrespective" of the fact that other states may have breached the obligation to negotiate.[335]

But it was rightly pointed out that the "Court cannot order third States to enter into negotiations, and that one cannot negotiate alone. But a third State could breach an obligation to negotiate by its own conduct and the Court could determine as such".[336]

Finally, "the Court cannot address the merits of a bad faith case" by "parsing up the entrails of that case".[337]

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and S. Heathcote (Eds.) *The ICJ and the Evolution of International Law: the Enduring Impact of the Corfu Channel Case (Routledge*, London, 2012) 98 at 108.

[330] *Interim Accord case, Judgment*, I.C.J. Reports (2011) 644, at 686, para. 138

[331] *Ibid.* at 685, para. 134.

[332] *Pulp Mills on the River Uruguay (Argentina v. Uruguay) Judgment,* I.C.J. Reports (2010) 4 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)Judgment,* I.C.J. Reports (2010) 4 , *Separate opinion of Judge Keith, 121 at 130, para. 24.*

[333] *Land, Island and Maritime Frontier Dispute (El Salvador / Honduras: Nicaragua intervening), Judgment, I.C.J.* Reports (1992) 351, at 550, para. 317.

[334] R. Kolb, *supra* n. 3, at 196.

[335] *Obligations concerning Negotiations,* Verbatim Records CR. 2016/3 (UK) at 46, para. 9 (emphasis added). Judge Tomka supported this approach: *Separate Opinion of Judge Tomka,* 885 at 898, para. 38.

[336] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment,* I.C.J. Reports (2016) 833 Dissenting Opinion of Judge Crawford, 1093 at 1107 para. 33.

[337] *Obligations concerning Negotiations,* Verbatim Records CR. 2016/3(UK) at 15, para. 14.

 DOI: 10.17103/sybil.23.3

(d) The Failure of a Process

Depending "wholly or partly on the position of one of the States concerned" a process of negotiations may fail, although both parties have "each [been] acting in good faith, or not demonstrably in bad faith";[338] however in appropriate circumstances, it might be fully justified to raise doubts about the Parties' compliance with their respective and mutual obligation to negotiate on good faith.[339]

In case of a breakdown of a series of bilateral negotiations when a Party is said to have "finally" have abandoned its efforts to reach an agreement, the judicial presumption may entail that the determined continuance of the process should be regarded as a sign of good faith. When negotiations "stalled owing to diametrically opposed positions"[340] this does not necessarily imply a rebuttal of the presumption of good faith.

(e) Refraining from blaming

When examining the admissibility of a (counter) claim, the Court considered it irrelevant whether "the fact that diplomatic negotiations have not been pursued is to be regarded as attributable to the conduct of one Part or to the other".[341]

Having no inherent jurisdiction in that respect and unless explicitly requested to do so, the Court cannot determine with judicial authority in the operative part whether and to what extent conduct by (one of) the Parties could be considered to have significantly contributed to or perhaps even decisively caused the failure of a process of negotiations. Furthermore, there is no need for the Court to explicitly make such ascertainment in its reasoning. In almost all cases the Court has refrained from attributing the failure of a process to one of the Parties.[342]

In case of a merely descriptive prior negotiation clause there is no need for the Court "to examine whether *formal* negotiations have been engaged or whether the lack of diplomatic adjustment is due to the conduct of one party or the other"[343]. When the Court is called upon to pronounce itself on the legal consequences of a breakdown, the question of blaming (one of) the Parties does arise and with it the judicial review of good faith. The record before the Court however may make it impossible to blame solely one party.[344]

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[338] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment,* I.C.J. Reports (2017)3 Joint Declaration of Judges Gaja and Crawford, 63 at 64, paras. 4 and 5.

[339] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion,* I.C.J. Reports (2010) 403 Declaration of Vice-President Tomka 454 at 463, para. 29.

[340] *Gabcikovo- Nagymaros Project (Hungary / Slovakia), Judgment, I.C.J.* Reports (1997) 7, at 53, para. 73.

[341] *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J.* Reports (2003) 161 at 210, para. 107.

[342] But see *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment,* I.C.J. Reports (2012) 422 at 447-448, para. 61 with regard to negotiations to organise arbitration proceedings.

[343] *Alleged Violations of the 1955 Treaty, Request for the Indication of Provisional Measures, Order of 3 October 2018,* para. 50.

[344] *Gabcikovo- Nagymaros Project (Hungary / Slovakia), Judgment, I.C.J.* Reports (1997) 7, at 65-66, para. 107 and *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment,* I.C.J. Reports (2012) 422 at 44§, para. 59.

 DOI: 10.17103/sybil.23.3

In other cases, the Court did not feel the need to address the particular issue raised by one of the Parties that the lack of (further) progress in the process was caused by the bad faith displayed by the other Party.[345]

(f) Individual Judges Speak out

Individual judges seem to be less reluctant to engage with good faith aspects of the cases at hand. As far as the presumption of good faith at the provisional measures stage is concerned an individual Judge may consider the Court's conclusion on the risk of irreparable prejudice as contrary to the presumption of good faith[346] which imposes itself also on international judges when they deal with cases involving the honour of states[347] which should not lightly be *mise en cause* a fortiori at the provisional measures stage[348]. The burden of proof rests on the Party alleging a lack of good faith and this applies also at this stage of proceedings[349] . Given the Respondent's genuine commitment to its human rights obligations the presumption of good faith should have been *mise en oeuvre* to the benefit of the Respondent.[350]

The Court may attract criticism when a perception arises based on its reasoning and conclusions, that it had rewarded the part who allegedly negotiated in bad faith".[351] When the Court sees no need to address charges of bad faith that may seem to be "more a matter of formal presentation than of the reality",[352] hence the Court's review of the conduct and its conclusions may "entail a finding of bad faith which is not explicitly expressed".[353]

Apart from mentioning in passing that the negotiations during a particular period have bene conducted meaningful, the Court may not have to go into an accusation of bad faith implied in one of the submissions it had rejected as result of an earlier decision in the operative paragraph of its Judgment. This does not prevent an individual Judge to point that in his view neither of the Parties had breached the principle of good faith or had failed the good faith requirement.[354]

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[345] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J.* Reports (2002) 303 at 423 para. 243.

[346] *Application of the CERD (Qatar v. UAE), Request for the Indication of Provisional Measures, Order of 23 July 2018,* Dissenting Opinion of Judge *Ad Hoc* Cot, para. 26

[347] *Ibid.* para. 27.

[348] *Ibid.*

[349] *Ibid.* para. 28.

[350] *Ibid.* para. 29.

[351] *Pulp Mills on the River Uruguay (Argentina v. Uruguay) Judgment,* I.C.J. Reports (2010) 4 , *Judgment,* I.C.J. Reports (2010) 14 Dissenting Opinion of Judge *Ad Hoc* Vinuesa 266, at 272, para. 20.

[352] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment,* I.C.J. Reports (2014) 226 Dissenting Opinion if Judge Abraham 321 at 328, para. 28

[353] *Ibid.* Dissenting Opinion of Judge Yusuf, 383 at 402, para. 54

[354] *Obligation to Negotiate Access, Judgment of 1 October 2018,* Dissenting Opinion of Judge *Ad Hoc* Daudet, para. 44.

 DOI: 10.17103/sybil.23.3

CONCLUDING OBSERVATIONS

This article is a modest contribution to the further study and development of the good faith requirements guiding parties when they design their participation in a process of negotiations in the shadow of the *acquis jurisprudentiel*.

Negotiations between states present themselves in cases before the Court in ever decreasing circles: they may form part of the general background to the dispute, the Court merely taking notice of the process or they may constitute a necessary pre-condition for the Court's jurisdiction or admissibility of the claims put forward. Latest developments have made a process of negotiations (part of) the subject-matter of the dispute compelling the Court to address and assess accusations of lack of good faith.

In recent years Parties have become less reluctant to make allegations of lack of good faith during negotiations, thereby broadening the range of conduct, behaviour and actions which in their view would come within the scope of legitimate expectations flowing from good faith as a general principle of law.

Parties' arguments with regard to good faith are either expressions of *opinio juris* in *statu nascendi* about more detailed duties beyond the existing *acquis jurisprudentiel* or at least reflections of what states consider to be recommended good practices. As such they provide fertile ground for judicial elaboration and refinement, provided the Court is willing to relax its policy of judicial economy, particularly when it is faced with implicit allegations of lack of good faith.

Given the continuous disagreement among states about the need to have meetings in person the Court may feel the need to elaborate its judicial notion of negotiations, beyond the case-specific factors and circumstances.

State practice has confirmed the importance of pre-negotiations to which the application *ratione temporis* of the good faith requirements should appropriately be extended.

As far as the application *ratione materiae* is concerned the Court may look favourably to the preconditions for the proper fulfilment of what good faith requires as presented by Parties in their arguments.

In case of an obligation to negotiate arguably each party is under a duty to *"initiate"* the process. An offer to negotiate should be rather detailed and a reply should contain alternative schedules while some kind of response to such an offer seems compulsory. Parties have a positive duty to actively table proposals instead of merely responding to proposals.

Whether conditionality as such of the willingness to negotiate forms part and parcel of good faith still waits for a clear Court pronouncement, as are the duty to create a favourable climate for the process and the prohibition to use coercion to bring a party to the negotiating table.

The Court could also express the view that decisions taken by parties prior to and

 DOI: 10.17103/sybil.23.3

during negotiations and which might be perceived by the other party as a lack of good faith should have been taken for plausible reasons.

More judicial attention to the use of clear and unambiguous language even before the start of negotiations and well throughout the process would also be a welcome development.

Given the normative function of the principle of good faith the Court should whenever the opportunity presents itself to make its view known on the undesirable application of the *de minimis rule*.

Finally, the recent increase in allegations of lack of good faith will bring the Court to move beyond its cautious touch and feel approach. Refinement and expansion of the *acquis jurisprudentiel* would allow the Court to carry out a more comprehensive and holistic assessment of the conduct of the Parties through the prism of good faith.

 DOI: 10.17103/sybil.23.3