The Duty to Negotiate International Environmental Disputes in Good Faith

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Within the context of international watercourse law and high seas fisheries law, this article explores the essence of good faith and the ensuing obligations of States in their quest of a formalised agreement on environmental protection in situations where that environment's integrity competes with the right of use of its resources. It is in this view that this work discusses in three steps the duty to negotiate in good faith. First, the author reviews this principle in situations of dispute settlement. Second, a distinction is made between the particular nature of the obligation and similar doctrines of international law, including the duty to consult in good faith. Third, the author details the specific requirements of the duty to negotiate in good faith. Finally, the author advocates for the expansion of the doctrine of good faith by drawing a parallel between the content of this principle and the ultimate purpose of the obligation.

C'est au travers du droit des voies navigables internationales et du droit de la pêche en haute mer que l'auteur explore les composantes de la bonne foi et des obligations des États dans leur recherche d'un accord formalisé sur la protection de l'environnement, dans des situations où l'intégrité de celui-ci se heurte au droit d'utilisation des ressources. L'article cerne trois étapes du devoir de négocier de bonne foi. L'auteur examine d'abord ce devoir dans le contexte du règlement des différends. Il présente ensuite une distinction entre la nature particulière de cette obligation et d'autres doctrines semblables en droit international, y compris le devoir de consulter de bonne foi. L'auteur discute également des conditions spécifiques du devoir de négocier de bonne foi. L'auteur conclut en préconisant l'élargissement de la doctrine de la bonne foi en traçant un parallèle entre le contenu de ce principe et l'objet directeur de l'obligation.

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1. Introduction

2. When Does the Duty to Negotiate in Good Faith Arise?
   2.1 Icelandic Fisheries
   2.2 Gabcikovo-Nagymaros
   2.3 Shrimp Turtle
   2.4 Summation

3. How is the Duty to Negotiate in Good Faith Distinct?
   3.1 Non-Justiciability
   3.2 Peaceful Settlement of International Disputes
   3.3 The Duty to Consult in Good Faith
      3.3.1 Dispute Avoidance/Dispute Settlement
      3.3.2 As Interacting Right/Interest: Lake Lanoux
      3.3.3 Critique
   3.4 Summation

4. Content of the Duty to Negotiate in Good Faith
   4.1 Efforts to Seek Agreement
   4.2 Nature of the Agreement
   4.3 Procedural Mechanisms
   4.4 Relevant Parties to the Process
   4.5 The Relevance of Law
   4.6 Substantive Proposals
   4.7 The Principle of Good Faith: Expanding the Doctrine
   4.8 Summation

5. Conclusion
International tribunals and multilateral treaties increasingly rely on the duty of states to negotiate in good faith to reach cooperative goals of shared and common property resource use and protection. The essence of the obligation is for states to make strong efforts to strive toward agreement on environmental protection goals in situations where rights of resource use compete with rights or obligations of environmental protection. In an age of increasing natural resource depletion and the persistence of the obligation in international law, it is timely to re-examine the nature and specific requirements of the duty to negotiate in good faith. The purpose of this paper is to explore the doctrine of good faith negotiation drawing primarily from the international watercourse law and high seas fisheries law. Particular reliance will be placed on the three major international law cases that have obliged disputing parties to negotiate in good faith — Icelandic Fisheries, Gabčíkovo-Nagymaros and Shrimp Turtle¹ — as well as the probative work of the International Law Commission Final Draft Articles on the Non-Navigable Uses of International Watercourses (ILC Draft Articles), subsequently adopted without substantial change as the Convention on the Non-Navigable Uses of International Watercourses (Watercourses Convention).²


The major conclusions flowing from the analysis herein are as follows:

1. The duty to negotiate in good faith is an obligation of cooperation that is activated at the earliest possible stage when a dispute arises in connection with the right or obligation to protect or conserve a shared or common property natural resource.

2. While the duty to negotiate in good faith and the duty to consult in good faith are similar obligations of cooperation, the former demands stronger efforts of the parties to reach agreement on use and protection of the resource and, consequently, unilateral measures to advance a state’s interest in the resource are to be eschewed until or unless good faith efforts are manifestly not reciprocated.

3. The essence of the obligation is for states to engage in behaviours that help facilitate agreement on environmental protection. The doctrine can and should be expanded upon by connecting the content of the principle of good faith with the underlying purpose of the obligation.

The format of the paper is as follows: Part 2 will explore when the duty to negotiate in good faith arises between states in the context of dispute settlement; Part 3 discusses the distinct nature of the obligation vis-à-vis similar doctrine of international law, i.e. non-justiciability, peaceful settlement of international disputes and the duty to consult in good faith; and Part 4 provides a discussion of the requirements that comprise the duty to negotiate in good faith, and includes an argument for expanding the doctrine in respect of substantive bargaining behaviour.

### 2. WHEN DOES THE DUTY TO NEGOTIATE IN GOOD FAITH ArISE?

The obligation to negotiate environmental disputes in good faith in connection with shared or common property natural resources – watercourses, high seas fisheries, and migratory species – has gained prominence in recent years in both international case law, and treaty law. While the legal context and basis of the obligation may differ, e.g. treaty

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obligation as distinct from judicial imposition of the obligation by a tribunal, the requirements of good faith negotiation of environmental disputes are uniform. Since treaty obligations speak for themselves, the focus in this section is on the origins of good faith negotiation as a mechanism of dispute settlement. It is intriguing that tribunals have imposed good faith negotiation on states in situations where disputes have become protracted and acrimonious, i.e. where the parties had clearly not negotiated in good faith. The challenge undertaken here is to identify a legal basis that triggers the obligation at some prior time when dispute resolution can more easily be facilitated.

In the dispute settlement context, the legal basis of the duty to negotiate in good faith is rooted in competing rights and obligations that disputing states may have in relation to a shared or common property resource. Fundamentally, the obligation entails the reconciliation between rights of shared resource use, on the one hand, and rights or obligations of protection, on the other. Generally, the right to utilize the resource will be advanced by a state (source state) while rights or obligations of protection will be argued in relation to that use by another state (affected state), though it need not neatly break down along these lines. A second feature of the obligation is that the source of these rights and obligations is generally pre-existing; however, they are expressed in broad terms, making their exact definition and relationship to each other indeterminate.

2.1 Icelandic Fisheries

The Icelandic Fisheries case involved a protracted dispute spanning a quarter century between Iceland and Britain over imperiled fisheries off the high seas coast of Iceland. In the absence of international agreement and fearing overexploitation of the fisheries off its coast by distant water fisher states like Britain, Iceland implemented a series of unilateral declarations extending its exclusive jurisdiction over coastal fisheries. At its lowest points, the dispute saw the British navy and Icelandic coast guard confront each other as British boats attempted to fish in the disputed waters. When the dispute was ultimately referred to the International Court of Justice (ICJ) in the early 1970s, there was no customary law obligation to conserve high seas fish stocks. Instead, the freedom of states to fish on the high seas was restrained only by a principle of reasonable use that, together

resources, the former has been described as “a limited form of community interest, usually involving a small group of states in geographic continuity, who exercise shared rights over the resources in question,” e.g. shared watercourses (PW. Burnie & A.E. Boyle, International Law & the Environment, 2nd ed., (Oxford: Oxford University Press, 2002) at 139), while common property resources, such as fisheries or mammals on the high seas, occur in areas beyond national jurisdiction where the resource is open to the use of all states and cannot be appropriated to the exclusive sovereignty of any state (Burnie & Boyle at 141). The distinction is one without a difference for the purpose of this paper.

4 Consider for example, the extensive reliance of the ILC Draft Articles (supra note 2) on the Lake Lansaux (supra note 1) and Icelandic Fisheries (supra note 1) cases.

5 Thus for example, in Icelandic Fisheries (supra note 1), Iceland asserted rights of use and conservation.

6 But in some cases, the obligation of conservation was imposed by the court to progressively develop law rather than as recognition of an established right. For example, in Icelandic Fisheries, (supra note 1) at para.79(4) the ICJ prescribed an obligation of conservation in connection with the resource rights of the disputing parties and in relation to other interested states.

with emerging notions of international co-operation, proved ineffective in conserving rapidly plummeting fish stocks occasioned by more fishers and better technologies.8

The Court pronounced a ‘new’ rule of customary law that gave preferential rights of coastal states to fishery resources in certain circumstances. Interestingly, the Court found support for the rule in a resolution at the Second Law of the Sea Conference, i.e. ‘soft law’ that had an authoritative quality but was not binding on the parties.9 The preferential right of Iceland was not absolute and the historical right of Britain to these fisheries was to be accommodated as part of the duty to negotiate in good faith. These rights then were determined to be correlative, albeit not equal in status, and additionally an obligation of conservation arose:

Neither right is an absolute one: the preferential rights of a coastal State are limited according to the extent of its special dependence on the fisheries and by its obligation to take into account the rights of other States and the needs of conservation; the established rights of other fishing States are in turn limited by reason of the coastal State’s special dependence on the fisheries and its own obligation to take account the rights of other States, including the coastal State, and of the needs of conservation.10

The parties were to achieve an equitable solution “on the basis that each must in good faith pay reasonable regard to the legal rights of the other” as well as to the interests of other states in the conservation and equitable exploitation of these resources.11

The Court responded to the environmental imperative of dwindling fish stocks by suggesting that the objective of conservation is inherent in the respective rights of the parties, in which “the same interest in conservation exists.”12 Further:

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8 The conceptual development of ‘reasonable use’ represents the first period of restraint on high sea fisheries freedoms (Francisco Orrego Vicuna, The Changing International Law of High Seas Fisheries (Cambridge: Cambridge University Press, 1999) at 8). Reasonable use was codified in art. 2 of the 1958 Convention on the High Seas (29 April 1958, 450 U.N.T.S. 11 (entered into force 30 September 1962)). Art. 4 of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas (29 April 1958, 559 U.N.T.S. 285 (entered into force 20 March 1960)) provided that, where states were fishing for the same stock(s), they shall enter into negotiations for measures to ensure conservation, at the request of any of them. Iceland was not a signatory to either of these treaties though the former treaty was “generally declaratory of established principles of international law” (Ian Brownlie, Basic Documents in International Law, 2nd ed. (Oxford: Clarendon Press, 1972) at 89). R.R. Churchill & A.V. Lowe, The Law of the Sea, 3rd ed (Manchester: Manchester University Press, 1999) at 279 note the steady increase in fishery exploitation since the Second World War: “[T]his increase is mainly due to two factors: technical improvements, such as the development of sophisticated electronic fish-finding equipment, larger vessels (including factory freezers) and larger and stronger nets, and secondly greater investment in the fisheries of developing countries.”

9 The principle was not adopted at either conference but the Court indicated that the non-binding resolution on preferential rights at the second law of the sea conference suggested a “general consensus” (Icelandic Fisheries, supra note 1, at para.52). According to the Court, preferential rights are only activated “at the moment when an intensification in the exploitation of fishery resources makes it imperative to introduce some system of catch-limitation and sharing of those resources, to preserve the fish stocks in the interests of their rational and economic exploitation” (supra note 1 at para. 60).

10 Supra note 1 at para. 71.

11 Supra note 1 at para. 78-79.

12 Ibid. at para. 66.
It is one of the advances in maritime international law, resulting from the intensification of fishing, that the former laissez-faire treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all.\(^{13}\)

The Court clearly distinguished between conservation for the purpose of preserving other state rights or entitlements, and conservation for the long-term viability of the resource.\(^{14}\) The development of the law in this case rested on the imperatives of conservation that resulted from intensification of exploitation that threatened the long-term viability of the resource.

### 2.2 Gabčíkovo-Nagymaros

The Gabčíkovo-Nagymaros case revisited a 1977 treaty\(^{15}\) established between Hungary and Czechoslovakia (regarding an area now being Slovakia) under which they agreed to the construction of dams on the Danube for the production of hydroelectric power. The Treaty also contained broadly worded environmental protection obligations. By 1989, Hungary became concerned about serious but scientifically uncertain environmental effects of the project, particularly in relation to the drinking water supply of its capital city, Budapest. Hungary proceeded to suspend and abandon key works, without the agreement of Slovakia, thereby making the operation of the project in its original conception impossible. After two years of failed negotiations, Slovakia took matters into its own hands to operationalize the project. This would have had the effect of massive diversion of water into Slovak territory and thus violating Hungary's right to equitable utilization of the Danube’s watercourse. In response to this course of action by Slovakia, Hungary proceeded to terminate the treaty (without legal basis as the Court later held).\(^{16}\)

The 1997 ICJ judgment found that, despite serious breaches by both sides to the dispute (i.e. unilateral diversion and treaty termination), the 1977 Treaty survived. The duty to negotiate in good faith was premised on the 1977 Treaty regime that set multiple objectives of economic development and environmental protection, none of which, in the Court's opinion, had priority over the others.\(^{17}\) The treaty regime bound the parties in a way that neither could independently realize its objectives (abandonment or full operation of the Project) without compromising the legitimate interests of the other. More concretely, this meant that Hungary’s environmental concerns arising from the project could not be separated from the realization of Slovakia’s goal of operationalizing its heavy investment in the economic objective of treaty. Therefore, where rights of development are coupled with obligations of environmental protection within a treaty in

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\(^{13}\) Ibid. at para. 72 [emphasis added].

\(^{14}\) Ibid. at para. 47: The Court viewed the case as a dispute between the parties that “includes disagreements as to the extent and scope of their respective rights in the fishery resources and the adequacy of measures to conserve them.” Singh J. at 42 agreed, suggesting that the conservation question cannot be considered an extraneous element to the core of the conflict. But see Petren J. at 152-55, and Gros J. at 128, suggesting that a ruling on fisheries conservation exceeded the jurisdiction of the Court since the matter was not formally before the Court.


\(^{16}\) Gabčíkovo, supra note 1 at para. 108.

\(^{17}\) Ibid. at para. 135.
which neither is assigned priority and the relationship between the two is not clear, a duty to negotiate in good faith may arise.\textsuperscript{18}

The duty to negotiate in good faith may persist for a considerable period of time (perhaps indefinitely) depending on the terms of the treaty. In \textit{Gabčíkovo-Nagymaros}, the Treaty was not defeated by the emergence of new environmental knowledge and norms that developed subsequent to the date of conclusion; instead, the terms of the Treaty gave rise to an ongoing duty to negotiate in good faith.\textsuperscript{19} The Court adopted an evolutionary approach to the 1977 Treaty provisions on environmental protection. Looking at the intention of the parties, the Court did not distinguish the new environmental dangers, or new international environmental norms, as so qualitatively different than those envisioned at the time of negotiation as to nullify the Treaty.\textsuperscript{20} The Court maintained that

\textit{[\ldots]} new developments in the state of environmental knowledge and of environmental law can [not] be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20, [the environmental protection provisions] designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.\textsuperscript{21}

The Court read modern legal content into the general provisions in the Treaty relating to environmental protection. The provisions were not static, in the Court's opinion, but could accommodate through negotiation new norms of international environmental

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\item The Court did not explicitly base the source of good faith negotiation on general principles of international watercourse law. See however Charles B. Bourne, "The Case Concerning the Gabčíkovo-Nagymaros Project: An Important Milestone in International Water Law" (1997) 8 Y.B. Int'l Env. L. 6 at 11-12: A duty to negotiate in good faith, though based on treaty law in \textit{Gabčíkovo} (ibid.), echoed the identical customary international law obligation.
\item The judicial authority for this proposition is the ICJ's Advisory Opinion in the \textit{Namibia} case \textbf{(Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, [1971] I.C. Rep. 16 [Namibia])} where the Court held that wording in a treaty referring to 'strenuous conditions of the modern world' and 'well being and development' of the peoples concerned "were not static, but were by definition evolutionary" \textit{(Namibia} at 31). An international instrument, according to the Court in \textit{Namibia} "has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" \textit{(Namibia} at 31). Thus this wording was to be interpreted in light of subsequent developments in international law (Ian Sinclair, \textit{The Vienna Convention on the Law of Treaties}, 2nd ed. (Manchester: Manchester University Press, 1984) at 140).
\item \textit{Gabčíkovo}, supra note 1 at para. 56-57: The Hungarian Academy of Science had raised allegedly new and unforeseen ecological impacts. The Academy in its June 1989 report noted that "the environmental, ecological and water quality impacts were not taken into account properly during the design and construction period until today" \textit{(Gabčíkovo} at para. 56). But the Court responded that many scientific and technical studies were conducted in the 1970s and thus that Hungary was "presumably aware of the situation as then known, when it assumed its obligations under the Treaty" \textit{(Gabčíkovo} at para. 57).
\item \textit{Ibid.} at para. 104. The Court further emphasized that the stability of treaty relations demanded that the plea of fundamental change of circumstances, relied on by Hungary, is only to be recognized in exceptional circumstances. But does this duty to 're-negotiate' depend on an explicitly stated provision in a treaty relating to environmental protection, or can it arise where a treaty is silent on the manner? Bourne, supra note 18 at 11 suggests that if the harmful effects were reasonably foreseeable at the time of the agreement, there would be no obligation to renegotiate. However, if they were not reasonably foreseeable, "the parties would be obliged to consult and negotiate to adapt the terms of the agreement in light of unforeseen circumstances."
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law that had developed since the Treaty’s conclusion. The Court instructed the parties to find an agreed solution that “takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses.”

The intention of the parties at the time of treaty conclusion remains paramount in the interpretation process. This intention may be revealed from general wording of a provision that suggests an evolutionary approach. An evolutionary approach will often apply, therefore, to generally expressed provisions in treaties relating to protection of the environment, in absence of a discernable will to the contrary. Treaties, in such cases, may be open to negotiation in good faith to take into account new norms of international environmental law as well as new or emerging environmental risks.

2.3 Shrimp Turtle

The Shrimp Turtle case provides the most recent articulation of a duty of good faith negotiation in the narrow context of international trade law. The General Agreement on Tariffs and Trade establishes substantive rights of free and non-discriminatory trade in possible tension with exceptions to these rules under Article XX.

22 Gabiúsky, ibid. at para. 112: The “Treaty is not static, and is open to adapt to emerging norms of international law.” The “newly developed norms of environmental law are relevant for the implementation of the Treaty and... the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20.” It was their “joint responsibility” to implement such new norms through consultation and negotiation. Implementation “requires a mutual willingness to discuss in good faith actual and potential environmental risks... The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty’s conclusion. These new concerns have enhanced the relevance of Articles 15, 19 and 20.”

23 Ibid. at para. 141.

24 Bedjaoui J, in his separate opinion, identified three precautions to evolutionary interpretation of treaty provisions (ibid. at para. 6-15). First, he noted that the evolutionary approach still placed primary emphasis on interpretation of the treaty in accordance with the intention of the parties at the time of its conclusion (ibid. at para. 6-8). Intentions are presumed to be influenced by current law (not future law), and only in exceptional cases is the treaty to be interpreted by a ‘mobile reference’ (i.e. in accordance with contemporary law). Second, the definition of a concept in a treaty is not to be confused with law applicable to that concept, and in this case, neither the definition of ‘environment’ nor the object of the 1977 Treaty had in fact changed though applicable norms had (ibid. at para. 9-11). Third, the interpretation of the treaty is not to be confused with its revision, or, to put it another way, interpretation should not substitute the negotiated text with a completely different substance which was not agreed to (ibid. at para. 12-15). Sinclair, supra note 19 at 140 observes that this rule of interpretation should not be applied across the board to treaty provisions, but only those terms in a treaty which are by their very nature expressed in such general terms as to lend themselves to an evolutionary interpretation. But this must always be on the condition that such an evolutionary interpretation does not conflict with the intentions and expectations of the parties as they may have been expressed during the negotiations preceding the conclusion of the treaty.

25 It is essential to highlight the relatively isolated nature of the WTO regime in connection with international norms more generally. The WTO Appellate Body has not considered general public international law in its reasoning beyond customary rules of treaty interpretation and as a guide in interpreting specific wording in the WTO Agreements.

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption...27

The dispute in this case concerned the right of the United States of America (US), in the absence of negotiation, to take unilateral and discriminatory trade measures relating to shrimp harvesting methods in exporting states for the protection of highly endangered sea turtles.

The measure, which essentially required exporting states to use turtle excluder devices (TEDs) during shrimp harvesting as a condition of market access, was found to conform to the basic right of the US to protect migratory sea turtles that occur in its waters under an expansive interpretation of paragraph (g) concerning the “conservation of exhaustible natural resources.” In the Appellate Body’s view, the reference to “sustainable development” in the preamble to the World Trade Organization (WTO) Agreement demonstrates awareness of “the importance and legitimacy of environmental protection as a goal of national and international policy” and suggests that the term “exhaustible natural resources” is “evolutionary” in content.28 On this basis, the Appellate Body looked to modern international environmental treaties and instruments to support an interpretation of “exhaustible natural resources” as including living natural resources such as sea turtles.29 Noting that the targeted sea turtle species covered under the measure (though not necessarily all populations of these species) occur at one time or another in waters subject to US jurisdiction, the Appellate Body held that “there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).”30

Based on this prima facie right, a duty to negotiate in good faith arose by operation of the chapeau (or introductory wording) of Article XX, which instructs states to apply the exceptions in a way that is not unjustifiably discriminatory. The Appellate Body ruled

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27 Ibid., art. 20.

28 Shrimp-Turtle, supra note 1 at para. 129-30. The Appellate Body noted that “exhaustible natural resources” under art. XX(g) was drafted over 50 years ago, and “must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment” (Shrimp-Turtle at para. 129). It also refers to the Namibia case (supra note 19) for the proposition that “evolutionary” concepts must take into account subsequent developments in the law and further, that an international instrument “has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation” (Shrimp-Turtle at para. 130).


30 Shrimp-Turtle, ibid. at para 133.
The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of abus de droit, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right [quoting Bin Cheng] "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably." An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting.31

The reasonable exercise of rights is a balancing act between the right to invoke an Article XX exception against the duty to respect the treaty rights of other Members.32 More particularly, "the location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."33

The standards of the chapeau were said to include both substantive and procedural requirements.34 Substantively, the Appellate Body viewed the chapeau as embodying the reasonable exercise of rights that includes an obligation to respect the correlative rights of other states under the treaty. The line of equilibrium is not static but responsive to the facts of the case, which in this case found expression in Inter-American Convention for the Protection and Conservation of Sea Turtles.35 This regional treaty between the US and Caribbean nations required that the parties act in accordance with WTO agreements in implementing their sea turtle protection commitments.36 Procedurally, the Appellate Body refers to soft law environmental agreements to define "unjustifiable discrimination" in the chapeau to mean cooperation and good faith negotiation. In particular, attempts at multilateral agreement are called for in both US law and international environmental soft law, and are supported by an established regional precedent between the US and Caribbean countries. Aside from the US failure to negotiate with the complaining exporting countries, the measure was also found to be unjustifiably discriminatory on the basis that the US essentially required exporting nations to adopt the same regulatory policy (the use of TEDs) without taking into account different conditions that may occur in those countries.37

The implications of the Shrimp Turtle ruling may not be immediately obvious. Robert Howse takes the view that negotiation was only needed here to remedy the adverse effects of unjustifiable discrimination that arose from striking a deal with some countries but not others. He maintains that

31 Ibid. at para. 158.
32 Ibid. at para. 156.
33 Ibid. at para. 159.
34 Ibid. at para. 160.
36 Shrimp-Turtle, supra note 1 at para. 170.
37 Ibid. at para. 164.
Although with good Declaration provided disputes potentially interpreting other categorizing the United States has others, Summation the 2.4 however, when the issue of whether the US complied with the initial ruling was raised, the Appellate Body elaborated that the revised unilateral measure, while sufficiently flexible, still remained contingent on ongoing efforts at good faith negotiations. In other words, non-discriminatory application of the unilateral measure among exporting states was not enough to justify its continued existence, rather the duty to negotiate in good faith remained a requirement to alleviate unjustifiable discrimination through continued efforts to find a non-trade restrictive approach to protection of sea turtles. In interpreting paragraph (g) and the chapeau, the approach of the Appellate Body casts a potentially wide ambit for a requirement of good faith negotiation in the context of trade disputes relevant to global commons protection (e.g. living resources on the high seas, provided a state can establish a jurisdictional nexus to the natural resource). It is difficult to imagine a global commons issue where a multilateral solution would not be mandated with reference to either international environmental law (such as Principle 12 of the Rio Declaration on Environment and Development), or the presence of an existing agreement, or both.

2.4 Summation

Although it remains unclear whether the obligation to negotiate shared or common property resource disputes in good faith has attained the status of customary law, it appears that in the dispute settlement context, it may be prescribed by tribunals in the following situations:

1. States have entered into treaty commitments that convey an intention to address emerging environmental protection knowledge and law as they arise. The implications of 'evolutionary' interpretation of general environmental protection

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38 Robert Howse, "The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate" (2002) 27 Colum. J. Envrld. L. 491 at 508. According to Howse, the finding of unjustifiable discrimination was based on the failure to take into account different conditions of different countries as well as de facto engagement with some countries and not with others, with preferential benefits accruing to the former group as a result. However, "...if a member has adequately accounted for different conditions in different countries, then whether that country has engaged in negotiation may be irrelevant for the purposes of the chapeau" (Howse at 509).


41 Principle 12, invoked by the Appellate Body to justify the obligation to negotiate in the circumstances of this case at Shrimp-Turtle (supra note 1 at para. 168), provides, in part: "Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus" (Rio Declaration, ibid.). Moreover, the Appellate Body readily refers to such authoritative international environmental legal instruments that were either 'soft' in form, or not binding on the parties, e.g. the Migratory Species Convention (supra note 29) and the Convention on Biological Diversity (supra note 29), in establishing the legitimacy of cooperative action.
terms in treaties are potentially widespread. New life is breathed into anachronistic language such as ‘exhaustible natural resources’ and new norms can be ‘read in’ to obligations of environmental protection.

2. In international trade law, the scope of the duty to negotiate in good faith may be quite broad in connection with the regulation of trade related process and production methods that impact on global commons resources.

3. Where the long-term viability of the resource is threatened, the objective of conservation for its own sake has been recognized as both inherent to, and independent of, individual state rights to the resource, even in the absence of a pre-existing obligation of conservation.

International law neither prescribes equal entitlement to resources nor does the process of good faith negotiation assign priority to either economic or environmental aspects of the dispute. Quite to the contrary, the duty to negotiate in good faith consistently demands that states employ strong efforts to attempt reconciliation of their rights and/or obligations of use and protection in good faith. Tribunals appear anxious to give expression to urgent and legitimate environmental concerns and appear ready to do so with reference to non-binding but authoritative soft law instruments as informing an obligation to negotiate environmental protection. Resolutions and declarations of global multilateral conferences, provisions from authoritative but non-binding treaties, and oblique references to norms of international environmental law are instrumental to the creation of the obligation and are intended to have relevance in the process of good faith negotiation.

The duty to negotiate in good faith has been prescribed in situations when states, not being able to reach agreement, have resorted to unilateral measures to protect or advance their interest in the resource. In the cases discussed above, these acts included the unilateral extension of the fisheries zone by Iceland, the abandonment of the key works by Hungary, and the simple failure of the US to attempt negotiation prior to regulating process and production standards on shrimp imports. The aggrieved parties responded with provocative measures of their own, e.g. massive unilateral diversion of the Danube by Slovakia. Such unilateral actions are provocative, antagonistic, and often put the possibility of agreement out of reach. Tribunals appear to admonish states to negotiate in good faith in situations where they should have but clearly did not. States then should look to accommodate their own and each other’s rights and obligations in connection with a shared or common property resource when concerns affecting these rights are raised. Good faith negotiation should logically occur when rights and obligations are engaged by a proposed use of a resource and not at some point later when relations have deteriorated and agreement is more difficult to reach. In other words, the duty to negotiate in good faith is intended to function in a crucial middle ground between unilateral

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measures, which are generally undesirable and all too frequently resorted to, and formal adjudication, which is under-utilized for international disputes.

3. HOW IS THE DUTY TO NEGOTIATE IN GOOD FAITH DISTINCT?

In this section, the duty to negotiate in good faith is distinguished from apparently similar concepts and principles of international law. The obligation is neither a means of conveniently downloading dispute resolution onto the parties by the court, nor is it a form of peaceful settlement of international disputes. Good faith negotiation has closest affinity with the duty to consult in good faith, a comparison that elicits much confusion in international environmental law doctrine.

3.1 Non-Justiciability

The cynic may view the duty to negotiate in good faith as a means of downloading dispute resolution to the parties in difficult cases; however, this view does not withstand scrutiny. The explicit role of the ICJ is to decide disputes in accordance with international law." In a small number of cases, the ICJ has refused to render judgment based on either non liquet, i.e. the Court can not determine what the law is, or by reason of the fact that resolution of the dispute is political, and not legal, in nature, i.e. a matter outside the domain of law. The result of either political question or non liquet is the inability of law to guide dispute settlement and the necessary recourse to political negotiation for resolution. Political question and non liquet have only sparingly been resorted to by international tribunals, and never in relation to an environmental dispute. The fact that courts direct the parties to apply law to resolve impasse as part of the duty to negotiate in good faith implies not that the law is unclear or silent but merely that specific resolution of the dispute is being transferred to the parties within the parameters of legal principles established by a court or tribunal.

There are in fact no objective criteria separating a legal question from a political question. Commentators have attempted to uncover a general categorization of political question disputes: lack of objective judicial determination; the characterization of the issue as political by one of the parties; the political motivations of one of the parties; the matter relates to a state's vital interests; and concern about post-adjudicative compliance. The problem is that it is impossible to discern a pattern that reliably accounts for

43 Statute of the International Court of Justice, 26 June 1945, 59 Stat. 1031; T.S. No. 993, art. 38(1).
45 Malcolm Shaw, International Law, 2nd ed. (Cambridge: Grotius Publications, 1986) at 497: Any dispute will involve political considerations, it is difficult to find objective criteria separating legal from political issues, and in fact many political disputes are judicially resolved.
46 Rosalyn Higgins, “Policy Considerations and the International Judicial Process” (1968) 17 I.C.L.Q. 58 at 65 [Higgins, “Policy Considerations”]: ‘Political’ dispute has four meanings: disputes relating to state’s vital interests; disputes incapable of objective judicial determination; disputes where the initiating state’s motives are in question; and disputes where post-adjudicative compliance is in doubt. See also H. Lauterpacht, ed., International Law: A Treatise by L. Oppenheim, Volume II: Disputes, War and Neutrality, 7th ed. (London: Longman, Green and Co., 1952) at 4 n. 1 [Lauterpacht, International Law 7th ed.]: Political questions arise in situations where the dispute cannot be resolved due to defective or undeveloped international law; the dispute is vital to the independence and sovereignty of States so as to make resolution by recourse to law unsuitable; or, the attitude of the party putting forward the claim or defense regards it as such. See also Shaw, ibid. at 497: Many disputes can
a finding of political question based on these criteria. Courts have not explicitly yielded to political question on the basis of political motivation or characterization by a party. The difficulty of rendering a palatable decision affecting the vital interests of states seems influential in political question cases, but the same could also be said in the Icelandic Fisheries and Gabčíkovo cases. There is no clear concept of what constitutes a vital state interest, and there appears no objective basis for distinguishing between the relative importance of a massive hydroelectric dam project, the interests of a fish-dependent coastal state or, as in the Haya de la Torre cases which invoked political question, the diplomatic immunity of a foreign coup leader. Also, it would be just as legitimate to the parties concerned, who are left to negotiate a solution, for the court to pronounce political question rather than prescribe a duty to negotiate in good faith.

Importantly, the Court has never declined jurisdiction on the basis of political question and thus we may infer from this that the law has the ability to at least define the issues for negotiation, if not always resolve them. Furthermore, the Court has only very infrequently declined to decide the merits of a case on the basis of political question. Some thirty-five years ago, Higgins argued that the Court has taken a 'robust' view as to what constitutes a legal dispute. Since that time, the law has become even more pervasive in the international community. As Judge Lachs stated: "the dividing line between political and legal disputes is blurred, as law becomes ever more frequently an integral element of international controversies. The Court... is thus called upon to play an ever

only be understood in their political context and whether a dispute is characterized as legal or political may reflect the circumstances of the case, the views adopted by the relevant parties and the way in which their differences are expressed. See also Hermann Mosler, "The Area of Justiciability: Some Cases of Agreed Delimitation in the Submission of Disputes to the International Court of Justice" in Jerzy Makarczky, ed., Essays in International Law in Honour of Judge Manfred Lachs (The Hague: Martinus Nijhoff, 1984) 409 at 415: Whether a question is political or legal may be more of a pragmatic than a legal distinction.


48 In the Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, [1996] I.C.J. Rep. 226 [Nuclear Weapons], the Court's jurisdiction to give an advisory opinion on the legality on the threat or use of nuclear weapons to the UN General Assembly was challenged on the grounds that it was "too vague and abstract, too fraught with political baggage, and too obstructive of other, more appropriate diplomatic efforts to control the dangers posed by the existence of nuclear weapons" (Richard A. Falk, "Nuclear Weapons, International Law and the World Court: A Historic Encounter", 91 A.J.I.L. 64 at 66). The Court responded that the question put before it was in fact a legal one, and the political aspects of, or motivations behind, the question did not deprive it of jurisdiction or its 'judicial task' of assessing the legality of threat or use of nuclear weapons (Nuclear Weapons at para. 13).

49 Haya de la Torre Case, supra note 47; South West Africa Cases: Second Phase (Ethiopia and Liberia v. South Africa), [1966] I.C.J. Rep. 6 [South West Africa Case]. But see Rosalyn Higgins, Problems and Process: International Law and How We Use It (Oxford: Clarendon Press, 1994) at 195 [Higgins, Problems and Process]: 'The views expressed by the Court in 1966, in the South West Africa affair, that the issues brought to it were 'really' political, and better left for determination by the Security Council, were out of line with the otherwise consistent attitude of the Court that neither motive nor context matters: all that matters is that it is required to interpret a treaty, or determine a question of international law, or pronounce upon a breach of obligation, or deal with the nature and extent of reparation.'

Furthermore, Higgins argues that the Court has not wavered from deciding cases notwithstanding the politically charged nature of the dispute (Higgins, Problems and Process, ibid. at 195-96).
greater role."51 Collier and Lowe convincingly counter the assertion of political question as undeveloped law in suggesting that "international law is constantly developing, and matters formerly outside its scope may come in time to be regulated by rules of international law."52 Whatever relevance political question may once have had appears considerably diminished in the modern day.

An even greater rarity is a finding of non liquet by the Court. In fact, the sole instance of the ICJ's invocation of non liquet was in the Nuclear Weapons Advisory Opinion case.53 After reviewing relevant principles of law, the Court in that case was unable to "conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."54 The breadth and abstract nature of the question before the Court and its implications for national security policies of major military powers must have played a role in an uncharacteristic finding of non liquet, and in that sense the case should be considered enigmatic.55

The debate on non liquet is split along the lines of the proper role of courts when faced with unclear law. Legal positivists might find a non liquet where there is an absence of a rule; to them, extra legal considerations such as morality have little, if any, relevance.56 On the other hand, those who deny the possibility of non liquet do not suggest that the law is always clearly set out. Higgins, for example, maintains that even in the absence of a precise rule to be applied, there are 'tools for authoritative decision-making on the problem' being the use of analogy, reference to context or by analysis of specific consequences.57 Fitzmaurice noted that courts address legal gaps by adapting "existing principles to meet new facts," or by creating new rules with reference to fundamental concepts or doctrines of law.58 For Lauterpacht, "every international situation is capable

52 Collier & Lowe, supra note 44 at 14-15.
54 Nuclear Weapons, ibid. at para. 105(2)(e).
55 Koskenniemi, "Faith, Identity and the Killing of the Innocent", supra note 53 at 142, comments on the futility of the question in light of the fact that high stakes politics of national security would undoubtedly take precedence over law were the result of the case otherwise.
56 South West Africa Cases, supra note 49 at para. 49: A court of law "can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise it is not a legal service that will be rendered."
57 Higgins, Problems and Process, supra note 49 at 10. See also Nuclear Weapons, supra note 48 at para. 7 and Higgins "Policy Considerations", supra note 46 at 74: The distinction between legal and political dispute is not substantive but only has relevance to the decision-making process employed.
58 Gerald Fitzmaurice, "Judicial Innovation - Its Uses and its Penils" in Cambridge Essays in International Law: Essays in Honour of Lord McNair (London: Stevens, 1965) 24 at 24-25, cited in Higgins, "Policy Considerations", ibid. at 68: "In practice, courts hardly ever admit a non liquet. As is well known, they adapt existing principles to meet new facts or situations. If none serves, they in effect propound new ones by appealing to some antecedent or more fundamental concept, or by invoking doctrines in light of which an essentially innovatory process can be carried out against a background of received legal precept."
of being determined as a matter of law.\textsuperscript{59} In his view, courts close legal gaps by reference to analogy, general principles of law, the balancing of conflicting claims or having regard to the needs of the international community.\textsuperscript{60} International tribunals, furthermore, have implicitly acknowledged the non-exclusivity of Article 38 sources of law – e.g. treaty or customary law – by finding rules, or exceptions to rules, based on morality, equity, or legitimate interests.\textsuperscript{61}

Discerning a doctrine of political question or \textit{non liquet} is problematic, even idiosyncratic. One may even say that the courts’ inclination to remind parties of their duty to negotiate in good faith, rather than explicitly decide a given case, is but a guise of non-justiciability.\textsuperscript{62} The courts in the cases discussed have laid down certain requirements, namely good faith efforts to strive toward agreement on environmental protection in accordance with law, that clearly distinguish it from political question or \textit{non liquet}. This suggests that the law can help resolve the dispute, provided negotiations are entered into in good faith. Courts have never applied political question or \textit{non liquet} to environmental disputes, where arguably many of the same conditions existed, given the enigmatic nature of the \textit{Nuclear Weapons Advisory Opinion}, and the growth of modern international law, they do not seem poised to ever do so.

3.2 Peaceful Settlement of International Disputes

The principle of peaceful settlement of disputes is a rule of customary international law that applies across the board to all disputes whether political or legal.\textsuperscript{63} Two provisions of the \textit{Charter of the United Nations (UN Charter)}\textsuperscript{64} provide for the peaceful settlement of international disputes. Article 2(3) states:

\begin{quote}
All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.\textsuperscript{65}
\end{quote}

Article 33 of the \textit{UN Charter} provides:

\begin{quote}
The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.\textsuperscript{66}
\end{quote}

\begin{footnotesize}

\textsuperscript{60} Koskenniemi, \textit{The Gentle Civilizer}, supra note 47 at 367.


\textsuperscript{62} “Non-justiciability may hide behind a variety of categories and judicial tactics” (Ian Brownlie, “The Justiciability of Disputes and Issues in International Relations” (1976) 42 Brit. Y.B. Int'l L. 123 at 136).

\textsuperscript{63} Antonio Cassese, \textit{International Law}, 2\textsuperscript{nd} ed. (Oxford: Oxford University Press, 2005) at 283.

\textsuperscript{64} 26 June 1945, Can. TS. 1945 No. 7.

\textsuperscript{65} \textit{Ibid.}, art. 2(3).

\textsuperscript{66} \textit{Ibid.}, art. 33.
\end{footnotesize}
These provisions have been elaborated in two UN General Assembly declarations: *The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations* (the Friendly Relations Declaration) and *The Manila Declaration on the Peaceful Settlement of International Disputes* (the Manila Declaration). 67

While different in other respects, the obligation to settle disputes peacefully and the duty to negotiate in good faith are both dispute driven. The threshold as to what qualifies as a dispute in international law is quite low: "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons." 68 Disagreements over 'a point of fact or law' or 'of legal views' between states are common in international negotiations, whether of an environmental nature or otherwise. However, peaceful settlement and good faith negotiation entail different objectives that arise from the dispute. 69 Peaceful settlement is concerned only that the dispute is peacefully diffused, perhaps even on a temporary basis. The concept is, in other words, generally agnostic about the result of the settlement vis-à-vis the problem it attempts to resolve. As we will see, the duty to negotiate in good faith is very much concerned that agreement achieves, or helps ensure, a certain result — i.e., environmental protection — in appropriate circumstances. In other words, there is the expectation that the negotiated outcome reflect the environmental protection objective.

The obligations differ as well in the manner in which law is relevant. While Article 2(3) refers to the endangerment of peace, security, and justice, Article 33 omits the latter word. Whatever number of interpretations that may be given to 'justice', the concept differs from the application of law to facilitate dispute resolution. 70 Parties remain free, under the obligation to settle disputes peacefully, to contract as they please provided they don't violate jus cogens norms, 71 or fundamental principles of international law, such as the prohibition on use of force, non-endangerment of international peace, security or just-


68 *Case of The Mavrommatis Palestine Concessions (Greece v. United Kingdom*) (1924), P.C.I.J. (Ser. A) No. 2 at 11. This definition relates to justiciability before international law which has two prerequisites: a specific disagreement must exist; and the disagreement can be resolved by application of law by judicial process (Collier & Lowe, supra note 44 at 10).

69 Some suggest that good faith negotiation is one means of peaceful settlement of disputes rather than a distinct obligation, a view that is contested here. See *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and The Netherlands)*, [1969] I.C.J. Rep. 3 at para. 86 [North Sea Continental Shelf Case].


71 Collier & Lowe, supra note 44 at 7-8. A jus cogens or peremptory norm is one in which no derogation is permitted: see art. 53 of the *Vienna Convention on the Law of Treaties* (23 May 1969, 1155 U.N.T.S. 331 (came into force 27 January 1980) [Vienna Convention].
tice, and the sovereign equality of states. However, just as treaties may legitimately modify customary rules of international law, there is also no duty to rigidly apply pre-existing rules of law. There is, in other words, a fundamental difference between violating peremptory norms of law (prohibited) and changing non-peremptory rules of international law (permitted). The peaceful settlement of disputes, therefore, leaves open an array of means of persuasion – political, moral, economic – that may be employed to settle the dispute. While a settlement must not violate peremptory norms, it need not necessarily be in accordance with law. As we will see in Part 4, the duty to negotiate in good faith envisions law as facilitative to reaching agreement on the goals of environmental protection.

3.3 The Duty to Consult in Good Faith

Duties of negotiation and consultation in good faith are each integral to a web of cooperative duties in international environmental law needed to overcome the significant barriers to environmental negotiation. However, the relationship between consultation and negotiation is not clear. One view is that consultation is a mechanism of inter-state communication that helps to avoid disputes from occurring while negotiation connotes the first step of a formal legal process culminating in adjudication. A second view is that consultation is a source state's accommodation of an affected state's interests, while negotiation involves the parties seeking agreement in respect of mutually limiting rights in the resource.

3.3.1 Dispute Avoidance/Dispute Settlement

The law of international environmental cooperation entails specific duties including the requirement to notify, share information and consult with states that may be potentially affected by another state's activities. These duties, generally viewed as dispute avoidance mechanisms i.e. to avoid disputes from arising, are reflected in Principle 19 of the Rio Declaration:

States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.

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73 Cooperation has been defined as follows: “[Cooperation] marks the effort of States to accomplish an object by joint action, where the activity of a single State cannot achieve the same result. Thus, the duty to cooperate means the obligation to enter into such coordinated action so as to achieve a specific goal. The significance and value of cooperation depends upon its goal” (Rudiger Wolfrum, “International Law of Cooperation” in Encyclopedia of Public International Law, vol. 2 (Amsterdam: Elsier, 1995) 1242 at 1242). The barriers to environmental negotiation include scientific uncertainty, high social costs, and the need for preventative and collaborative solutions.


The duty to consult in good faith demands that the acting state allow affected states the opportunity to review and discuss the planned activity. While this conception of consultation is characterized as dispute avoidance, negotiation may be viewed as a step in a formal, and by connotation adversarial, process of dispute settlement.

In places, the Watercourses Convention implies this distinction between consultation and negotiation. As dispute avoidance, the term ‘consultation’ is employed in Article 6(2) of the Convention (concerning the need of states to assess equitable utilization) to lower the threshold of inter-state cooperation. It was believed that the term ‘negotiation’ necessitated the existence of a ‘dispute’ possibly requiring dispute settlement procedures, when instead dispute avoidance was the aim of the provision. Furthermore, the ILC commentary to Article 7(2), which requires consultation when an affected state is caused significant harm despite the exercise of due diligence, indicates that when consultations fail to lead to a solution, the Article 33 dispute settlement procedures (including negotiation) will apply. The reasoning behind the language of these provisions suggests that ‘dispute’ connotes an adversarial legal process that begins with negotiation but may move to formal dispute settlement, whereas ‘consultation’ is a means of dispute avoidance.

3.3.2 As Interacting Right/Interest: Lake Lanoux

A second conception of the duty to consult in good faith is based on the 1958 Lake Lanoux arbitration ruling, in which Spain disputed the legality of the France’s plans to construct a hydroelectric dam in its territory that affected a shared watercourse. The plan ultimately decided upon by France, prior to the litigation, involved full restitution of diverted waters for downstream use by Spain thus minimally impairing Spain’s interests. One of the questions that the tribunal addressed was whether the proposed works required prior agreement of Spain under the applicable treaty between the parties.

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76 Hunter, Salzman & Zaelke, supra note 74 at 430: The duty to consult requires that consultations be undertaken in good faith and over a reasonable period of time and involves the imparting and exchange of information or views between parties. While the duty to consult may flow from a duty to notify, it is to be emphasized that the obligation of consultation is one of more general applicability insofar as it is a process invoked in a variety of circumstances not just prior to planned measures. See also Stephen C. McCaffrey, The Law of International Watercourses: Non Navigable Uses (Oxford: Oxford University Press, 2001) at 409-11.

77 Tanzi & Arcari, supra note 2 at 123.

78 ILC Draft Articles, supra note 2 at 105. But see also at 104 which approvingly cites the Icelandic Fisheries (supra note 2) duty to negotiate in support of an obligation to consult.

79 McCaffrey, supra note 76 at 409 notes that the process of consultation is not found in the dispute settlement provisions of the ILC Draft Articles.

80 Lake Lanoux, supra note 3.

81 Spain nevertheless disputed this altering of natural conditions of the shared watercourse that made restitution of the waters “physically dependent on human will” (McCaffrey, supra note 76 at 199).

82 The other question before the court was whether the proposed works constituted an infringement of Spain’s rights under the treaty. The Tribunal answered the first question in the negative, finding among other things that the proposed work did not present “abnormal risk” to Spain’s enjoyment of the waters, nor did Spain allege pollution of those waters (Lake Lanoux, supra note 3 at para. 4-9). The Tribunal implicitly followed the principle of equitable utilization in this case, and found that Spain’s rights in this regard were not violated (Burnie & Boyle, supra note 3 at 302). The Tribunal interpreted the compromis to confine applicable law to the terms of the treaty between the two parties, with the proviso that unclear provisions within the treaty may be aided by rules of ‘international common law’ (Lake Lanoux at para. 2). The 1866 Treaty in dispute (Treaty of Bayonne, France and Spain, 26 May 1866, 1288 U.N.T.S. 305 (came into force 7 March 1869)) established full sovereignty of each state
this question, the tribunal ruled that a treaty is not viewed as restricting the sovereignty of a state in the absence of “clear and convincing evidence.” 83 A requirement of prior agreement would amount in effect to a right to veto, according to the Tribunal, and that is why state practice supports an obligation to negotiate and seek agreement without actually subordinating state rights until an agreement is reached. 84 In considering the requirement under the applicable treaty to safeguard interests, the Tribunal elaborates the duty to notify and consult. The content of the obligation to consult, in the Tribunal’s view, is to take account of all interests that may be affected by the project, “even if they do not correspond to a right.” 85 Thus,

accord to the rules of good faith, the upstream State is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own. 86

France was entitled to exercise her sovereign rights in accordance with a good faith obligation to take into consideration Spain’s interests. 87 Unmistakable priority is given to France’s rights over Spain’s interests. 88 Still, good faith ensures that France should give a reasonable place to safeguarding adverse interests in its sovereign right to proceed with the project. 89

If, in the course of discussions, the downstream State submits schemes to it, the upstream State must examine them, but it has the right to give preference to the solution contained in its own scheme provided that it takes into consideration in a reasonable manner the interests of the downstream State. 90

As such, a requirement was found for France to comply with the obligation to notify, consult and take into regard Spain’s interest in adopting the scheme of its own choosing.

While the Tribunal in Lake Lanoux used the terms ‘consultation’ and ‘negotiation’ interchangeably, the case is cited as authority for the duty to consult in good faith in international environmental law. This conception of the duty to consult is firmly founded on the principle of state sovereignty. There is only one operative right – that of the acting state’s sovereignty – albeit it is modified by a reasonable regard for the interests (as op-

83 Lake Lanoux, ibid. at para. 11.
84 In their view, neither customary international law nor the treaty under consideration supported a requirement of prior agreement (ibid. at para. 12-20).
85 Ibid. at para22.
86 Ibid.
87 Ibid. at para. 23.
88 The tribunal declares this priority suggesting that Spain cannot put rights and interests “on the same plane” (ibid.).
89 Ibid.
90 Ibid.
posed to rights) of other states. Consultation is not merely a procedural hurdle to clear in a perfunctory manner, but involves active consultation (process) and consideration of other schemes and alternatives (substantive) to safeguard affected state interests. If this standard is met, the acting state is not prevented from exercising its rights. By contrast, we may presume that the duty to negotiate in good faith may be conceived as involving mutually limiting (correlative) rights between states and not just one operative right as modified by another state’s interest (i.e., less than right). According to this approach, a distinction can be made between consultation and negotiation in terms of how these processes accommodate conflicting interests or rights. Negotiation involves the parties striving toward a mutually acceptable agreement, whereas consultation makes accommodation of the affected states’ interests (not rights) the considered choice of the acting state.

3.3.3 Critique

The two models of consultation discussed are not necessarily mutually exclusive. A source State may consult with and accommodate an affected state’s interests without a dispute arising. However, there are problems with both of these characterizations of consultation. The problem with the dispute avoidance/dispute settlement dichotomy is that it implies that if a dispute arises, as we may expect factual and legal disagreement would happen during interstate discussions, this signals a shift from a cooperative process of consultation to an adversarial process of negotiation. Since both good faith consultation and negotiation are cooperative processes, this distinction cannot be right. In other words, it is necessary to acknowledge that disputes will in fact arise in both the processes of consultation and negotiation; however, that this does not qualitatively alter the interaction from cooperation, where these duties are located, to adversarial dispute settlement.

A second source of practical confusion lies in the distinction between characterizing an act of the source state as impacting upon either a right or an interest of the affected state. The Watercourses Convention deals with this characterization problem (at least initially) by emphasizing not whether an impact concerns a right (namely, the right to be free from significant harm) or interest (something less than significant harm) but that states interact early on in reconciling their interests in the watercourse through a process of cooperative interaction.91 The low threshold of interaction eliciting consultation and negotiation is evident in Articles 3 and 4 of the Convention, which oblige parties to watercourse agreements to ensure that use does not adversely affect “to a significant extent” use by other watercourse state(s).92 Where this is a possibility, an affected state is entitled to participate in consultations and negotiations in good faith “with a view to becoming a party thereto” under Article 4(2). The ILC establishes a range of “significant adverse effect” as something more than the relatively minor concerns of Spain in Lake Lanoux, e.g., “real

91 Art. 17(2) of the Watercourses Convention, supra note 2, for example, suggests that “consultations and negotiations” are to be executed in good faith with each party paying “reasonable regard to the rights and legitimate interests of the other State.” See ILC Draft Articles, supra note 2 at 116 citing both the Icelandic Fisheries case (negotiation; supra note 1) and Lake Lanoux (consultation; supra note 3) in support of this provision. The adjective ‘legitimate’ is an attempt to put a limitation on ‘interests’ but otherwise the term is not defined in that Convention.

92 Watercourses Convention, ibid., arts. 3(4) and 4(2): Participation is limited “to the extent that its use is thereby affected.”
improvement of use,” though less than “substantial.” The standard of real impairment of use is less than a right to be free from significant harm.

Lowering the threshold for consultations and negotiations reflects two realities. First, it is difficult to demarcate an interest from a right in some cases; nevertheless, the important point is that a possible significant adverse effect amounting to at least a real impairment of an interest in the resource is to be procedurally managed through a process of cooperative accommodation. Second, a violation of rights cannot be unilaterally assessed. The commentary on Article 4 elaborates the practical difficulty of determining the extent of a significant adverse effect in the absence of consultation and negotiation with an affected party:

A requirement that a State’s use must be substantially affected before it would be entitled to participate in consultations and negotiations would impose too heavy a burden upon the third State. The exact extent to which the use of water may be affected by a proposed action is likely to be far from clear at the outset of negotiations. The decision in the Lake Lanoux case illustrates the extent to which plans may be modified as a result of negotiations and the extent to which such modification may favour or harm a third State. The State should be required to establish only that its use may be affected to a significant extent.

This passage reveals that the nature of the significant adverse effect (if any ultimately) cannot be determined until consultations and negotiations are undertaken to more exactly discern the impacts of the proposed use. Consultation and negotiation, therefore, are needed as a diagnostic tool to determine the interests or rights in play. Once this determination is made, then a process of cooperative accommodation is to be entered into between states.

Another issue that arises from the consultation/negotiation distinction is whether this is intended to have any substantive impact on the process of interaction, particularly the permissibility of unilateral measures. Article 17(3) of the Watercourses Convention requires the notifying state, upon request, to refrain from implementation of the planned measure to allow for a period of consultations and negotiations. The commentary elaborates that the parties are in the best position to set a reasonable period of time appropriate under the circumstances of the case, but that if the parties cannot agree, the notifying state may proceed with the measures after six months and subject to its obligations under Articles 5 and 7. Neither consultation nor negotiation ultimately prevent a state from

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93 ILC Draft Articles, supra note 2 at 94.
94 Ibid. at 111: Art. 12 places a duty of notification on states seeking to implement planned measures “which may have a significant adverse effect upon other watercourse States.” The commentary clarifies that this threshold is lower than the obligation not to cause significant harm under art. 7, and its reason for doing this is to encourage states to notify without admitting that the planned measure constitutes significant harm.
95 Ibid. at 96. See also Ibid. at 111: Art. 11 requires states to exchange information and consult with each other concerning “the possible effects of planned measures.” The term “possible effects” “includes all potential effects of planned measures, whether adverse or beneficial” and the requirement “avoids problems inherent in unilateral assessments of the actual nature of such effects.”
96 Ibid. at 116. The ultimate right to take unilateral measures is supported in both Lake Lanoux (supra note 3) and, with respect to good faith negotiation, Shrimp-Turtle (supra note 1). Burnie & Boyle, supra note 3 at 128: The duty to notify and consult in mitigating transboundary risk establishes procedural rules that usually lead to an obligation to negotiate in good faith. Still, an acting state need
unilaterally exercising sovereign rights, though the time frame for negotiation should presumably be longer to accommodate an affected state's right.

The distinction between negotiation and consultation turns on whether the affected state's right or interest may be impacted by the proposed use, i.e. the Lake Lannono distinction appears sound. But when it is unclear whether a particular adverse effect amounts to a right or merely an interest, consultation and negotiation in good faith may be indistinguishable. Once a state can establish that a planned measure will have a real impairment of its interest in the resource, a cooperative process is to be engaged between the parties to explore ways that may accommodate that concern. If accommodation or reconciliation is not possible, the source state is not prevented from acting after a reasonable period of time provided it has acted in good faith. But where the impact is serious enough such that a right is engaged, good faith negotiation mandates stronger efforts, and longer time periods, in which to achieve mutual agreement. Further, a state should not proceed with a planned or unilateral measure unless there is a manifest refusal of the other party to engage in good faith negotiations. As a final thought, one wonders if it would be better to conceptualize efforts at good faith accommodation of an affected state's concern as positively correlated to the seriousness of the harm, rather than its characterization as a right or interest.

3.4 Summation

There is similarity and overlap between consultation and negotiation in good faith in some circumstances, though the obligations are conceptually distinct.

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not achieve agreement nor is it restrained in unilaterally proceeding with the activity should negotiations ultimately fail.

This may account for the confusion, and conflation, of the two duties. In the ILC commentary to draft art. 17 dealing with planned measures, for example, it is stated that only "some members" made a distinction between consultations and negotiations (ILC Draft Articles, ibid. at 116). But see ILC Draft Articles, ibid. at 104 (commentary to art. 7) which approvingly cites the Icelandic Fisheries (supra note 1) duty to negotiate in support of obligation to consult. Similarly, a number of scholars have commented on the similarity — even indistinguishability — of the two processes. R. Jennings & A. Watts, eds., Oppenheim's International Law: Volume 1: Peace, Parts 2 to 4, 9th ed. (London: Longman Group, 1993) at 1181 advanced that the act of consultation is likely to influence the action of States in a manner acceptable to all parties, making consultation and negotiation legally indistinguishable when a dispute arises. But otherwise, the authors continue, consultation involves discussions between States that elaborate the positions and justifications of each side, whereas negotiations require a good faith effort to reach agreement based on a compromise between the positions elaborated during consultations. See also Lauterpacht, International Law, supra note 46 at 8: Consultation does not necessarily involve a dispute between the parties, though when it does, the two concepts (consultation and negotiation) may in a legal sense be indistinguishable.
1. Both processes are obligations of cooperation and should accommodate the possibility of a dispute – a disagreement of law or fact – without changing the qualitative discourse between, and behaviour of, the relevant parties. Both obligations, as well, require parties to engage in a process of cooperation early on to reconcile their interests in the resource. In so doing, duties of consultation and negotiation help ensure that disputes are cooperatively resolved when they first arise. Both duties allow for the possibility of unilateral exercise of a right of use after appropriate efforts.

2. The duty to negotiate in good faith is activated at the point when an affected state’s right, as opposed to interest, is engaged by the proposed use. Efforts at negotiated agreement to accommodate the engaged right are to be stronger and for a longer period than the duty to consult in good faith.

4. CONTENT OF THE DUTY TO NEGOTIATE IN GOOD FAITH

This section analyzes the specific requirements of good faith negotiation, as revealed in international law doctrine. The last sub-heading addresses the unexplored potential of the principle of good faith as enhancing the ability of states to reach agreement on environmental protection measures, specifically addressing the substantive bargaining dimension.

4.1 Efforts to Seek Agreement

While the duty to negotiate in good faith sets the parties striving to reach agreement on the correct path to reach their goals, it does not equal a duty to \textit{conclude} an agreement. Thus, while the Appellate Body in the \textit{Shrimp Turtle} case set out a duty to enter into “serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles,” it specifically rejected a duty to conclude an agreement since this would give other states a veto power over negotiations and preclude recourse to legitimate unilateral action. A similar line of reasoning was used in Lake Lanoux, i.e. to oblige agreement would amount to an unjustifiable veto over the rights of states to act in the face of the parties not being able to reach agreement.

Still, strong efforts must be made in attempting to achieve agreement. One member of the ICJ in \textit{Icelandic Fisheries} stated that negotiations should be pursued “as far as possi-

\textit{North Sea Continental Shelf Cases}, supra note 69 at para. 85(a): The Court in that case directed that the parties were “under an obligation to enter negotiations with a view to arriving at an agreement... they are under an obligation to so conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.”

\textit{Shrimp-Turtle}, supra note 1 at para. 166.


\textit{Lake Lanoux}, supra note 3 at para. 11. The ILC Draft Articles, supra note 3 at 94 (commentary to art. 3) follows \textit{Lake Lanoux} on this point. See also \textit{Case Concerning Claims Arising Out of Decisions of the Mixed Greco-German Arbitral Tribunal Set Up under Article 304 in Part X of the Treaty of Versailles} (1972), 19 R.I.A.A. 27 at para. 60: The Tribunal interpreted the word ‘negotiate’ “to mean to confer with another with a view to reaching an agreement.” Further at para. 62: This is an obligation \textit{pactum de negotiando} and not \textit{pactum de contrahendo} which would be an obligation to conclude an agreement.
ble with a view to concluding agreements.” Some examples of violating this duty, according to the arbitration panel in Lake Lanoux, would include “an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally, in cases of violation of the rules of good faith.” Stated more positively, international agreement is best achieved when parties heed the “obligation to accept in good faith all communications and contracts which could, by a broad comparison of interests and by reciprocal good will, provide States with the best conditions for concluding agreements.”

4.2 Nature of the Agreement

The duty to negotiate in good faith is concerned with the outcome of agreement between the parties. The goal of good faith negotiation is to achieve a substantive outcome that reflects a balance between use and protection of the resource, in accordance with each state’s respective rights and/or obligations. Tribunals have been quite explicit in stating that the outcome should accommodate environmental protection interests. In Icelandic Fisheries, the parties were to work toward the objective of fisheries conservation while in Gabčíkovo, the court directed that all the objectives of the Treaty, including environmental protection, should be realized through negotiations. However, there may be conflicts of use of international watercourse that may permit significant environmental harm in circumstances where, notwithstanding due diligence and best efforts to accommodate environmental protection interests, use of the resource will take priority over environmental protection.

The ILC Draft Articles on International Watercourses as well as the UN Agreement Relating to the Conservation and Management of Straddling and Migratory Fish Stocks [Fish Stocks Agreement] are good examples of the broad meaning accorded to ‘agreement’. The term ‘agreement’ in the ILC Draft Articles is “used in its broad sense and would include, for example, an arrangement or modus vivendi that had been arrived at by watercourse States.” In the Fish Stocks Agreement, parties are in certain circumstances, to enter into an “arrangement” for the conservation of fish stocks, meaning a “cooperative mecha-

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102 Icelandic Fisheries, supra note 1 at p. 105 per Separate Opinion of Judge De Castro referring to dicta of the Permanent Court of International Justice.
103 Lake Lanoux, supra note 3 at para. 11.
104 Ibid. at para. 13.
105 The no significant harm principle in art. 7 of the Watercourses Convention (supra note 2) is an obligation of due diligence meaning that harm may be permitted in some circumstances. See McCaffrey, supra note 76 at 365; Burnie & Boyle, supra note 3 at 309-10.
106 ILC Draft Articles, supra note 2 at 110 (commentary to art. 10). Art. 17, which relates specifically to consultation and negotiation in connection with planned measures, refers to “equitable resolution” (Watercourses Convention, ibid). The ILC Draft Articles at 116 again interpret this broadly suggesting it could include modification of plans, adjustment of other uses, or the provision of compensation. See also the International Law Commission’s Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries (Report of the International Law Commission, UN GAOR, 56th Sess, Supp. No. 10, UN Doc. A/56/10 (2001) at 377) adopted by the International Law Commission at its 53rd session in 2001, which elaborates that consultative or negotiated “acceptable solutions” in art. 9 “will [generally] be expressed by means of some form of agreement” (at 411).
Coastal and distant fisher states are to ensure that individual measures of conservation are “compatible” as part of their obligation to negotiate in good faith.

The term ‘agreement’ or its synonyms take on more specific meaning based on the factual circumstances of the negotiation scenario. The form of the negotiated outcome necessarily reflects the nature and complexity of the environmental threat and related issues under negotiation. For example, if a state modifies its planned use of a shared watercourse in a manner acceptable to other riparian states, a unilateral declaration or exchange of letters might suffice. In many environmental disputes, there will be elements of complexity – e.g., scientific uncertainty, lack of cost-effective solutions, unequal sharing of benefits and burdens – that tend toward detailed commitments of a procedural and substantive nature that should be documented in specific agreements “for greater effectiveness.” In the Icelandic Fisheries, for example, the ICJ directed the parties to reach a “solution” in connection with complex issues of catch allocations and a host of other matters that appropriately implied the negotiation of a treaty.

Ultimately, form is not as important as process and it is the fact that the parties agree to a resolution on environmental protection, rather than the type of the agreement, that is central to good faith negotiation. Where there is doubt about the form of agreement, however, parties can be aided by relevant norms of the international community based on the legal and factual circumstances of the negotiation scenario. The sea turtle protection negotiations in the South Asian region, in the aftermath of the Shrimp Turtle litigation, are a good example of this. The parties negotiated a Memorandum of Understanding (MOU) and Conservation Plan to address the manifold threats to sea turtles that envisaged ongoing negotiation and legally binding commitments. The MOU as an outcome of early negotiations on the protection of migratory species reflects the international community norm established in the Convention on Migratory Species. Furthermore, as Shrimp Turtle and Gabotekovo make clear, environmental negotiations tend to be ongoing process to generate knowledge and consensus and thus good faith negotiation will often

107 Fish Stocks Agreement, supra note 3, art. 1(d).
108 Ibid., art. 7(2).
109 The ILC Draft Articles, supra note 2 at 97 (commentary to art. 5) indicate that the cooperative efforts inherent in the rule of equitable utilization should for “greatest effectiveness” be detailed in specific watercourse agreements. At 98, the commentary continues that equitable resolutions of conflict of uses “can best be achieved on the basis of specific watercourse agreements.” As Shelton has observed, law is necessary for ordering behaviour, and the written “language of law” in particular “most precisely communicates expectations and produces reliance, despite inevitable ambiguities and gaps” (Dinah Shelton, “Law, Non Law and the Problem of ‘Soft Law’” in Dinah Shelton, ed., Commitment and Compliance: The Role of Non-binding Norms in the International Legal System (Oxford: Oxford University Press, 2000) at 8).
110 Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia, June 23 2001 (came into effect 1 September 2001), online: Indian Ocean – South-East Asian Marine Turtle Memorandum of Understanding <http://www.ioseaturtles.org/official_texts.php> [MOU]. See in particular Basic Principle 4 of the MOU that provides that the MOU may, where appropriate, be amended to be legally binding.
111 Migratory Species Convention, supra note 29. See list of Agreements and Memorandums of Understanding at the Secretariat website (online: Convention on Migratory Species <http://www.cms.int/species/index.htm>).
involve continuous efforts and negotiations to reach environmental protection objectives.112

4.3 Procedural Mechanisms

Negotiation may be assisted through a variety of methods and third party interventions. Dispute resolution can be aided by clarification of factual uncertainties, as may be provided through inquiry and fact-finding procedures.113 When animosity and distrust taint negotiations, the parties may benefit from the intervention and assistance of third parties to facilitate resolution on a voluntary and non-legally binding basis, i.e. mediation or good offices.114 Another method of dispute resolution is conciliation, which combines elements of inquiry and mediation.115 Beyond these options lay recourse to third party adjudication either through arbitration or judicial tribunals, which may be of greatest assistance where points of law or legal interpretation are present in the dispute.

Negotiation and adjudication are neither mutually exclusive forms of dispute resolution nor do they represent opposite points on a hierarchy of dispute settlement procedures. Negotiation in the international context may occur prior to, after, and concurrent with adjudication. Even the ‘final’ judgment of a tribunal depends on the outcome of the parties’ negotiation on its implementation. One may even say that the various means of dispute settlement represent a “continuation and a variation of negotiations between parties.”116 The complexity of some disputes means that parties should not be constrained in their methods since dispute settlement is “enhanced by allowing different procedures to be employed simultaneously.”117 The ICJ has held that the procedures enumerated in Article 33 may be simultaneously pursued.118 In the absence of special arrangements, the

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112 Reflecting the scientific uncertainty and costliness of environmental problem-solving, good faith negotiation will usually imply a continuity of efforts. Redgwell refers to this phenomenon as “permanent” environmental diplomacy insofar as treaty-making is not an isolated event but instead a process (Catherine Redgwell, “Multilateral Environmental Treaty-Making” in Vera Gowlion-Debbas, ed., Multilateral Treaty-Making: the current status of challenges to and reforms needed in the international legislative process (The Hague: Martinus Nijhoff, 2000) 89 at 90-91). In the international trade context, negotiating in good faith means a continuity of efforts to successfully reach the goal of conservation, and that negotiation efforts be comparable vis-à-vis different states and regions (Shrimp-Turtle 2001, supra note 100 at para. 122). Ongoing negotiation was also suggested in Gabala (supra note 1) to deal with the advent of new environmental knowledge in connection with the treaty objectives.

113 This involves the elucidation of facts through investigation, usually third party impartial investigation, though it may also be accomplished inter se (Collier & Lowe, supra note 44 at 24).

114 Ibid. at 27: Mediation is the participation of a disinterested third-party “in an attempt to reconcile the claims of the contending parties and to advance proposals aimed at a compromise solution.” Good offices, on the other hand, consists of action taken by a third party to “bring about, or initiate, or cause to be continued, negotiations” but otherwise may not involve active participation of a third party.

115 Ibid. at 29: “A dispute may be referred to a person or commission whose task is to make an impartial elucidation of the facts and to put forward proposals for a settlement, which do not have the binding character of an award or a judgment.”


118 Ibid. at 178. See also Collier & Lowe, supra note 44 at 20-22: The ICJ has held that the existence of active negotiations does not preclude referral to other dispute settlement procedures; nor is there a requirement that negotiations be exhausted before the tribunal will accept jurisdiction of a case. Also
The Court made mediation a tenet of good faith negotiation to help resolve the dispute:

When, after the present Judgment is given, bilateral negotiations without preconditions are held, both Parties can profit from the assistance and expertise of a third party. The readiness of the Parties to accept such assistance would be evidence of the good faith with which they conduct bilateral negotiations in order to give effect to the Judgment of the Court.\(^{120}\)

Thus, the same view prevails for good faith negotiation as for the peaceful settlement of disputes, i.e. alternative and concurrent means can assist in dispute settlement and thus should be encouraged.

A duty to attempt different means of dispute settlement is problematic in that parties may, even in good faith, disagree on appropriate means of dispute resolution.\(^{121}\) Even where procedures are set out by treaty, for example the obligation to consult or negotiate before seeking adjudication, it is not always apparent when preliminary procedures have been exhausted.\(^{122}\) However, the spirit and wording of the Friendly Relations and Manilla declarations elaborate on the core duties of Articles 2(3) and 33 in that the parties are under an obligation “to continue to seek a settlement by other peaceful means agreed by them, in the event of failure by one particular method.”\(^ {123}\) This imposes a duty

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at 15-16: In Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran, [1980] I.C.J. Rep. 3 [Tehran]), the UN Security Council and Court were concurrently seized with the matter and in Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States, [1984] I.C.J. Rep. 392), the Court did not refuse jurisdiction where the Contradora peace negotiations were ongoing.

\(^{119}\) Merrill, supra note 117 at 180.

\(^{120}\) Gabiskuro, supra note 1 at para. 143. Earlier, at para. 113, the Court identified the point of impasse between the parties and suggested a procedural solution: “The Court recognizes that both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, but they fundamentally disagree on the consequences this has for the joint Project. In such a case third-party involvement may be helpful and instrumental in finding a solution, provided each of the Parties is flexible in its position.”

\(^{121}\) There is no customary obligation to follow a stepladder of procedures (Anne Peters, “International Dispute Resolution: A Network of Cooperativeal Duties” (2003) 14 E.J.L. 1 at 14).

\(^{122}\) There is, however, judicial authority for the proposition that a requirement of negotiation cannot be used to delay legal proceedings if one party refuses to engage in meaningful discussions (Collier & Lowe, supra note 44 at 23, referring to Tehran, supra note 118). Peters, ibid at 13-14 states that in Southern Bluefin Tuna Case (supra note 3), the Law of the Sea Tribunal indicated that mandated negotiations, where frustrated, should not act as bar to judicial proceedings.

\(^{123}\) The Friendly Relations Declaration, supra note 67 at s. 1: “The parties to a dispute have a duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.” Art. 7 of the Manila Declaration, supra note 67 is a similar provision. Antonio Cassese, International Law (Oxford: Oxford University Press, 2001) at 103 suggests that there must be a “bona fide effort” to resolve disputes peacefully using consensual procedures available and that, in the event of failure of one means, there is a legal obligation to seek other methods of settlement. Conversely, the principle of peaceful settlement will be violated where states “willfully and male fide” refuse to resort to negotiations
on parties to continue to seek settlement of a dispute in accordance with agreed means and in good faith.

The duty to negotiate in good faith and the obligation to seek a peaceful settlement of disputes share a fluidity of means at their disposal with negotiation serving as a basic minimum requirement. Parties are required to employ mechanisms, either individually or concurrently, to help resolve the dispute. When states reach an impasse in negotiations, they should seek out another dispute settlement mechanism to move the process forward. To the extent that a proposed concurrent means of dispute resolution undermines the promise of an ongoing procedure, then parties should reject that course of action.

4.4 Relevant Parties to the Process

There is strong indication in the case law that the needs of conservation should extend beyond the dispute between the parties inter partes. In the Icelandic Fisheries case, the interests of third party States in the conservation of fish-stock were recognized as part of the obligation to negotiate in good faith. Moreover, Judge Weeramantry in the Gabčíkovo case emphasized the limits of adjudication inter partes in respect of environmental protection.\(^{124}\) As we already saw, the Watercourses Convention extends actual participation of third parties to negotiations when their interests may be significantly affected. Thus, efforts at conservation should include the participation of all relevant and significantly affected states.\(^{125}\)

4.5 The Relevance of Law

International case law instructs that negotiated outcomes are to be guided by applicable law. The Court in the Icelandic Fisheries case directs not just an equitable solution “but an equitable solution derived from the applicable law.”\(^{126}\) In the Gabčíkovo case, the Court directed that the negotiated outcome be in accordance with international environmental law norms and principles of international watercourse law. The invocation of law alters the quality of discourse between parties in that it “imposes limitations upon the kind of arguments which can be made by each party in defence of its actions.”\(^{127}\) Limitations on the kinds of arguments allowed, however, can be facilitative or constraining vis-à-vis a negotiated agreement depending on the conception of law employed. Elsewhere, I have

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\(^{124}\) Gabčíkovo, supra note 1, per Weeramantry J. at 117-18. See also A.E. Boyle, “The Gabčíkovo-Nagymaros Case: New Law in Old Bottles” (1997) 8 Y.B. Int’l Env. L. 13 at 19: In the aftermath of Gabčíkovo, the balance between development and protection of watercourses is no longer only of concern to the states in dispute but also the international community’s interest in sustainable development must be taken into account.

\(^{125}\) Note however the Fish Stocks Agreement, supra note 3, art. 8(3), where it speaks of limits on the participation in regional fishery organizations of states that “have a real interest in the fisheries concerned.”

\(^{126}\) Icelandic Fisheries, supra note 1 at para. 78. This follows the North Sea Continental Shelf Cases, supra note 69 at para. 83, 85, where the court ruled that the absence of substantive treaty or customary rules applicable to continental shelf delimitation did not, in the Court’s opinion, create a legal vacuum where delimitation could be rendered at the “unfettered appreciation of the Parties.” Rather, the Court turned to equity, not “as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles.”

\(^{127}\) Collier & Lowe, supra note 44 at 4-5.
argued that law is facilitative when states expand the relevance, sources, and use of law in the negotiation process. First, law should be relevant not as self-serving justification but as a means of persuasion through a cooperative process of interaction. Second, parties should draw from a wider conception of law, one that acknowledges the persuasive attributes authoritative soft law to the negotiation scenario. Third, states should use this wider conception of law to advance and reconcile their specific legitimate interests that are derivative of their rights in the resource.

Article 3(5) of the Watercourses Convention is a good example of the manner in which law can facilitate dispute resolution undertaken in good faith. That section provides for the adjustment of the Convention to the characteristics and uses of particular watercourses:

Where a watercourse State considers that adjustment and application of the provisions of the present Convention is required because of the characteristics and uses of a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements.

This provision is aimed at accommodating the broad diversity of international watercourses at the global level. As the Commission notes:

This [framework agreement] approach recognizes that optimal utilization, protection and development of a specific international watercourse are best achieved through an agreement tailored to the characteristics of that watercourse and to the needs of the States concerned. It also takes into account the difficulty, as revealed by the historical record, of reaching such agreements relating to individual watercourses without the benefit of general legal principles concerning the uses of such watercourses [emphasis added].

The ILC suggests that the “adjustment and application” terminology means that the Watercourses Convention is “essentially residual in nature” even though states should take “due account” of them while negotiating watercourse agreements. This commentary communicates two apparently contradictory notions. On the one hand, the Commission is asserting the reasonable proposition that modifications to exact provisions of the Watercourses Convention is permitted, though the basic principles are non-negotiable. On the other hand, the Commission appears to leave the door wide open by suggesting that the Watercourses Convention is residual in nature. This may be an attempt to articulate a compromise position as revealed in the negotiating history of this article. The wording ‘application and adjustment’ appears to fall somewhere in the middle between positions advocating, on the one hand, a prohibition from contracting out of the basic principles, and on the other, permitting agreements “to apply or depart from” the Watercourses Convention.

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129 [framework agreement] approach recognizes that optimal utilization, protection and development of a specific international watercourse are best achieved through an agreement tailored to the characteristics of that watercourse and to the needs of the States concerned. It also takes into account the difficulty, as revealed by the historical record, of reaching such agreements relating to individual watercourses without the benefit of general legal principles concerning the uses of such watercourses [emphasis added].
130 ILC Draft Articles, supra note 2 at 92.
131 Ibid. at 92.
132 Ibid. at 93.
133 Tanzi & Arzani, supra note 2 at 85.
Some observations can be drawn from the discussion of Article 3. The permissibility of adjustment makes sense insofar as it is reasonable that the provisions of a global instrument should be tailored to specific circumstances. Negotiation is – or at least can be – an innovative and flexible process for problem solving and therefore, the law should not serve to unduly constrain. However, the use of the word ‘adjust’ and not ‘depart from’ may imply a restrictive deviation from the Watercourses Convention. One can hardly imagine that the Watercourses Convention, which is designed to facilitate the negotiation of specific agreements, would so easily dismiss its relevance. In this sense, the addition of the phrase to “consult with a view to negotiating in good faith” the adjustment of the articles may suggest that significant deviation can be justified only in exceptional circumstances according to the principle of good faith. It seems then that the Watercourses Convention is an instrument designed to facilitate dispute resolution in connection with shared watercourses and thus states must heed such authoritative statements of the law when they negotiate in good faith.

4.6 Substantive Proposals

In terms of substantive proposals, the case law highlights the making of concessions, or acting reasonably, so that agreement can be reached. The Court in Gabčíkovo instructed the parties “to so conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.” In Lake Lanoux, the tribunal commented that conflicting interests in a shared watercourse leads to the “necessity to reconcile them by mutual concessions.” More exactly, “it is normal that when considering adverse interests, a Party does not show intransigence with respect to all of its rights. Only thus can it have some of its own interests taken into consideration.”

The principle of good faith informs the bargaining process in respect of treaty obligations undertaken by the parties. The multiple objectives of the 1977 Treaty in Gabčíkovo, which included development of the watercourse but also its protection, were to be realized in accordance with the good faith obligation in Article 26 of the Vienna Convention. Good faith, according to the Court, “implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the parties to apply it in a reasonable way and in such a manner that its purpose can be realized.” Similarly, a reasonableness standard for competing rights was imposed by the Appellate Body in Shrimp Turtle. The Appellate Body ruled that an environmental right should be exercised so as not to unreasonably infringe on market access rights. This suggests that good faith interpretation is not a self-serving process but that states must consider the meaning of gen-

134 Citing North Sea Continental Shelf Cases, supra note 69 at para. 85(a).
136 Ibid. at para. 18.
137 Vienna Convention, supra note 71.
138 Gabčíkovo, supra note 1 at para. 142.
eral rights and obligations from all reasonable perspectives in accordance with the intention and purpose behind the language of the treaty.  

4.7 The Principle of Good Faith: Expanding the Doctrine

The potential of the principle of good faith, as it might be applied to the duty to negotiate in good faith, has not been fully explored. While the principle of good faith is pervasive in the negotiation process, the emphasis in this section is on substantive bargaining behaviour, i.e. as regulating substantive proposals put forth by states to reach agreement. In this regard, the duty to negotiate in good faith can be informed by an examination of the principle in other legal contexts concerning negotiation.

The principle of good faith in domestic legal systems, and within international law, has been the source of much academic discussion. Specific manifestations of the principle of good faith appear capable of varied gradations of meaning depending on the context. For example, if a source state is considering whether to share important new scientific insights about an environmental concern with an affected state, good faith may, depending on its attributed meaning in the circumstances, dictate a variety of responses: a duty not to deceive or misrepresent facts (i.e. bad faith) but without acknowledging the existence or content of the report’s findings; an intermediate response of candour in which the existence or content of those findings are disclosed though the report is withheld; or full disclosure by sending a copy of the report to the other party for its review. These gradations of meaning will, depending on which is applicable to negotiation, have profound impacts on the negotiation process in terms of building trust, confidence and ultimately consensus on a solution.

The more precise meaning of the principle across the broad spectrum of domestic and international law can be distilled to two variables: the values imbedded within a legal system (at least in domestic law), and the underlying goals that the principle seeks to achieve, i.e. the legal context in which the principle of good faith is located. These variables may be inter-related so, for example, the low standard of good faith in English con-

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139 Given the source of the principle, i.e. *pacta sunt servanda*, Sinclair (supra note 19 at 119-20) makes the point that “where a third party is called upon to interpret the treaty, his obligation is to draw inspiration from the good faith which should animate the parties if they were themselves called upon to seek the meaning of the text which they have drawn up.”

140 Existing literature on the principle of good faith within the duty to negotiate in good faith, while varied in outlook, has not been probative. See Hugh Thirlway, “The Law and Procedure of the International Court of Justice 1960-1989” (1989) 60 Brit. Y.B. Int’l L. 1 at 25 on whether ‘good faith’ adds anything to the obligation to negotiate: “...to negotiate otherwise than in good faith is surely not to negotiate at all.” See also A.J.F. Tammes, “Soft Law” in *Essays in International and Comparative Law in Honour of Judge Erades* (The Hague: Martinus Nijhoff, 1983) 187 at 189: The requirement of good faith is “used to reinforce the prescriptive weakness of the *pactum de contrabendo*.” See also David A. Koplow, “Parsing Good Faith: Has the United States Violated Article VI of the Nuclear Non-Proliferation Treaty?” (1993) Wis. L. Rev. 301 at 378: At international law, the content of good faith in the negotiation process is ambiguous in that it is impossible to precisely determine “what the parties are required to do, when they must do it, or how much flexibility they must demonstrate...”. Koplow continues “international law...has not progressed to the point where aspirational terms are defined with much specific operational content.” Nevertheless, he suggests that at minimum, good faith requires the parties to negotiate, to try to reach agreement, and to make “proposals that could solve the problems and be acceptable to the other side.” Poegel & Oeser, supra note 72 at 514: Good faith should manifest as a willingness to compromise in order to reach a peaceful settlement of the dispute, otherwise negotiations would amount to a mere formality.
tract law, i.e. requiring only the absence of bad faith, reflects a legal system that values freedom of contract on the underlying premise that the pursuit of self-interest will result in the best bargains, voluntarily arrived at.\textsuperscript{141} This kind of freedom of contract rationale is neither purposive of the parties reaching agreement nor is it concerned, within certain broad parameters, of the result. By contrast, German civil law imposes a high standard of good faith conduct such that the parties take due regard of the legitimate interests of the other.\textsuperscript{142} Implicit in this latter kind of approach to contract formation is the impetus to build trust and confidence between parties to facilitate not just an agreement but a fair agreement. On this basis, some commentators on English contract law have argued for a more purposive approach to good faith negotiation to instill trust in the belief that parties may actually achieve better agreements once they no longer need to adopt defensive positions during negotiations.\textsuperscript{143}

A useful analogy for the discussion here is Canadian labour law. The principle of good faith in that context straddles a freedom of contract rationale, i.e. the parties seeking to advance their own interests, with policy objectives of encouraging collective agreements in the interests of peaceful labour relations and avoiding economic disruption. The requirements of good faith negotiation in this context respond to the fact that a failure to bargain in good faith is a “disease that is usually contagious” preventing the

\textsuperscript{141} J.W. Carter & M.P. Furmston, “Good Faith and Fairness in the Negotiation of Contracts” (1994) 8 Journal of Contract Law 1 at 3, noting that common law imposes “no more than a duty not to engage in fraudulent conduct” during negotiations. The rationale for this position is rooted in freedom of contract in which each party is viewed as entitled to pursue individual interests, so long as misrepresentations are avoided. See Simon Whitaker & Reinhard Zimmermann, “Good Faith in European Contract Law: Surveying the Legal Landscape” in Reinhard Zimmermann & Simon Whitaker, eds., \textit{Good Faith in European Contract Law} (Cambridge: Cambridge University Press, 2000) 7 at 40. See also Carter & Furmston at 4, citing Lord Ackner and Kirby J: A duty to negotiate in good faith would be “inherently repugnant to the adversarial position of the parties when engaged in negotiations” \textit{(Walford v. Miles, [1992] 2 A.C. 128 at 138 per Lord Ackner), and would disrupt the commercial bargaining process by substituting “lawyerly conscience for the hard-headed decisions of business people” \textit{(Aristotle v. Franklin's Sense} (1989) 16 N.S.W.L.R. 582 at 585 per Kirby J). Even within certain international law contexts, good faith simply means the absence of bad faith, i.e. not to mislead or act fraudulently during negotiations. See arts. 48, 49 and 52 of \textit{Vienna Convention, supra note 71: State consent to treaty commitments is invalidated on the basis of error, fraudulent conduct or procurement by threat or use of force.

German civil law has developed the concept of \textit{culpa in contrahendo} (fault in negotiating) which establishes “a relationship of trust and confidence” at the pre-negotiation stage (Friedrich Kessler & Edith Fine, “Culpa in Contrahendo, Bargaining in Good Faith and Freedom of Contract: A Comparative Study” (1964) 77 Harvard Law Review 401 at 404). Included here are duties to take necessary precautionary measures for the protection of the other's person or property, and to disclose information that is important to the other party’s decision-making (provided the latter is unable to procure it herself) (Kessler & Fine at 404-405).

Carter & Furmston, \textit{supra} note 141 at 5 see a positive role for good faith in that both parties usually have a common interest in successfully completing negotiations with an agreement. Another view sees a general principle of good faith in contract law as facilitating reciprocal exchanges conducive to trust-building and cooperation between the parties. According to this view, good faith provides security against risks of opportunism and exploitation thus moving parties away from offensive positions and toward flexible approaches in the way they do business (Roger Brownsword, “Positive, Negative, Neutral: The Reception of Good Faith in English Contract Law” in Roger Brownsword, Norma J. Hird & Geraint Howells, eds., \textit{Good Faith in Contract: concept and context} (Aldershot: Ashgate/Dartmouth, 1999) 13 at 31-32).
parties from making “meaningful accommodations.” The standards of good faith negotiation here are both subjectively and objectively determined. Parties must “honestly strive to find a middle ground between their opposing interests [and] approach the bargaining table with good intentions.” Furthermore, parties are to put forward proposals that reflect “comparable standards and practices within the particular industry.” There is also a requirement of rational discussion that includes the disclosure of material information and that the parties justify the negotiating positions that they take. The intent of these requirements is to facilitate agreement by requiring behaviours and substantive proposals that are honest, sincere and reasonable in the circumstances while preserving the advancement of legitimate interests of the parties.

What is the appropriate standard of good faith conduct within the duty to negotiate in good faith? As an obligation of cooperation whose goal is to encourage state behaviours that facilitate agreement on environmental protection objectives, the duty to negotiate in good faith is intended to have purposive content. Rosenne captures this point perfectly in suggesting that good faith, in all its manifestations, plays a functional role in the decision-making process (whether second or third party) in that it is a “pointer to the close link that exists between the obligation itself and its performance.”

The specific attributes usually associated with good faith are honesty, sincerity, reasonableness, fairness and respect for the legitimate interests of the other party. The duty to negotiate in good faith values dispute resolution that balances the pursuit of individual interests with the legitimate interests of the other side. The specific interests of states correspond to broad rights of resource use and environmental protection, each being advanced by the opposing states. The competing rights that give rise to duty to negotiate in good faith are also to find expression in the desired outcome. This is why tribunals have emphasized that any negotiated agreement reflect goals of use and protection of the resource and that states understand their own, and each other's, rights as modifying and informing each other.

It follows that states are to make proposals that reflect each other’s legitimate interests in the resource that are derivative of those rights. Tribunals have indicated that the purpose or intention behind those rights informs this process; where intention is not clear, rights are to be governed by a standard of reasonableness. In the context of good faith, reasonableness is often associated with standards that are reflecting of the relevant

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146 Ibid. at para. 42.
147 Adam Canadian Labour Law, supra note 144 at 10-100.
149 The concept of fairness in a substantive sense is an elusive concept in international environmental law and will not be addressed here. For a discussion of different conceptions of fairness in the environmental context, see Cecilia Albin, Justice and Fairness in International Negotiation (Cambridge: Cambridge University Press, 2001) at 9-11. See also Thomas M. Franke, Fairness in International Law and Institutions (Oxford: Clarendon Press, 1995) at 352-53 and 370-71: There are generally no objectively fair solutions to environmental problems.
community. In the international context, states may reference state practice and authoritative legal instruments to decipher the standards of the international community of states.

In terms of honesty, states should share, and where reasonable generate, information on environmental impacts upon which meaningful negotiations may be undertaken. States should also be sincere in conveying their intentions and positions, and in putting forth proposals. In other words, appearances should reflect the reality that proposals are to accommodate parties’ legitimate rights and interests in the resource. States then should refrain from competitive negotiation tactics such as bluffing or bullying; rather it would be consistent with good faith that states seek solutions for mutual gains thus narrowing the gap of disagreement and inching ever closer to agreement. It being based on these cooperative attributes of honesty, sincerity, reasonableness, and respect for each other’s legitimate rights that we might expect that states will build the trust, confidence and consensus needed to maximize the prospects for agreement.

4.8 Summation

The requirements of the doctrine of good faith negotiation lex lata are summarized in points one and two below; point three expands the doctrine by connecting the principle of good faith with its purpose with respect to substantive bargaining proposals and represents, to some degree, a modification of point number two:

150 See e.g. Royal Oaks, supra note 145. See also J.F. O’Connor, Good Faith in International Law (Hants, England: Dartmouth, 1991) at 124: “The principle of good faith in international law is a fundamental principle from which the rule pacta sunt servanda and other legal rules distinctively and directly related to honesty, fairness and reasonableness are derived, and the application of these rules is determined at any particular time by the compelling standards of honesty, fairness and reasonableness prevailing in the international community at that time.”

151 I argue elsewhere that this process may be aided by a probative inquiry that utilizes law to interpret the rights between the parties according to legitimacy criteria (Hutchison, supra note 128).

152 Michel Virally, “Review Essay: Good Faith in Public International Law” (1983) 77 A.J.I.L. 130 at 131: Good faith “excludes any separation between reality and appearances” such that “the expressed will [is] consistent with the real will” of the parties. Anthony D’Amato, “Good Faith” in Encyclopedia of Public International Law, vol. 2 (Amsterdam: Elsvier, 1995) 599 at 599: “The principle of good faith requires parties to a transaction to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage that might result from a literal and unintended interpretation of the agreement between them.”

153 A problem-solving form of negotiation is integrative bargaining, which seeks absolute gains for both parties with the goal of reaching an effective agreement (a win-win approach). This requires the parties to understand each other’s needs, to facilitate an open disclosure of information, and to stress the commonalities between the parties and their interdependencies (Shlomi Dinar, “Negotiations and International Relations: A Framework for Hydropolitics” (2000) 5 International Negotiation 375 at 392-93). It also requires the building of trusting relationships (Brigid Starkey, Mark A. Boyer & Jonathan Wilkenfeld, eds., Negotiating a Complex World: An Introduction to International Negotiation (Lanham, MD: Rowman & Littlefield, 1999) at 114).
1. Parties are required to actively engage in the process of negotiation and make strong efforts to reach an agreement about environmental protection. These efforts are to be inclusive of parties, whose interests may be significantly affected, and negotiations are generally to be ongoing. Parties should look to alternative methods of dispute resolution, either individually or concurrently, to help resolve impasse.

2. States are not only required to actively consider proposals, but should seek to arrive at an agreement by compromising their bargaining positions through reciprocal concessions and the taking into account of the other parties interests. Good faith adds that the parties are to understand rights and obligations based on the intention behind them or on the basis of reasonableness. The parties are to apply relevant norms of international law to help facilitate agreement and, for this purpose, could be aided by authoritative sources of law on the subject.

3. States should conduct themselves according to high standards of honesty and sincerity to build trust, confidence and consensus on a solution. Substantive proposals should reflect that fact that inherent in good faith negotiation is the reconciliation of rights in a resource and, when the purpose behind those rights are not clear, parties may be guided by standards found in the international community of states.

5. CONCLUSION

The duty to negotiate in good faith is fundamentally concerned with the cooperative management of rights and obligations regarding the use and protection of natural resources at the earliest stage of a dispute.

In the cases examined herein, the failure to reach an agreement within a reasonable period of time after the emergence of the dispute proved fatal to second party dispute resolution. The requirements of the duty to negotiate in good faith aim to enhance the ability of states to reach an agreement that accommodates rights of use and protection during this critical early phase of the dispute. This obligation is intended to temper the pursuit of individual state interests by engaging actions and behaviours that generate trust, confidence and consensus building in the process. Finally, this method reflects the purposive nature of the parties’ mutual obligation: to facilitate agreement through strong and constructive efforts that accommodate all member states’ rights in the management of the given resources.