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## NEGOTIATIONS AS A NON-JUDICIAL MEANS OF SETTLING INTERNATIONAL DISPUTES: THEORETICAL AND PRACTICAL ISSUES

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**Abstract.** This article examines the theory and practice of direct negotiations as a non-judicial means of settling disputes concerning the interpretation and application of treaties. It considers the place and function of negotiations in the contemporary system of international dispute settlement, particularly given the growing practice of treating negotiations as a preliminary step before recourse to international judicial bodies. The author analyses in detail the case law of the International Court of Justice and other international courts and tribunals on whether the parties have engaged in good-faith negotiations before seizing an international judicial body. Drawing on international jurisprudence and doctrinal writing, the article highlights the advantages of negotiations, the legal criteria for assessing their quality, and their principal standards and stages. It concludes that direct negotiations remain an important means of settling disputes between states, as well as disputes involving states and foreign natural or legal persons. At the same time, it emphasises the need to avoid a merely formal approach to negotiations when addressing disputes concerning the interpretation and application of treaties before referring to international adjudication.

**Keywords:** international dispute settlement; diplomatic means; direct negotiations; international courts and tribunals.

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## ПЕРЕГОВОРЫ КАК ВНЕСУДЕБНОЕ СРЕДСТВО РАЗРЕШЕНИЯ МЕЖДУНАРОДНЫХ СПОРОВ: ТЕОРЕТИЧЕСКИЕ И ПРАКТИЧЕСКИЕ ВОПРОСЫ

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**Аннотация.** Рассматриваются теоретические и практические аспекты использования прямых переговоров как внесудебного средства разрешения споров, возникающих в связи с применением и толкованием международных договоров. Определяются место и роль переговоров в современной системе разрешения международных споров с учетом расширения практики использования переговоров в качестве предварительного механизма урегулирования разногласий до передачи споров в международные судебные учреждения. Исследуется практика Международного суда ООН и других международных судебных органов, которая касается оценки добросовестности проведения спорящими сторонами переговоров до обращения в международные судебные учреждения. С помощью анализа международной судебной практики и доктринальных подходов отмечаются преимущества переговорного процесса, выделяются его основные стадии и правовые критерии оценки его качества. Делается общий вывод о том, что на современном этапе прямые переговоры сохраняют свою значимость как инструмент разрешения споров между государствами, а также споров с участием государств и иностранных физических и юридических лиц. Подчеркивается важность исключения формального отношения со стороны государств к переговорам при разрешении споров о применении и толковании международных договоров до обращения в международные суды.

**Ключевые слова:** разрешение международных споров; дипломатическое средство; прямые переговоры; международные судебные органы.

In contemporary dispute-settlement practices involving states, negotiations and other non-judicial means are given less importance, particularly in disputes over the interpretation and application of treaties. Some disputing parties tend to resort quickly to international courts or arbitral tribunals rather than committing in good faith to the other means stipulated in Art. 33 of the UN Charter and in other international legal instruments<sup>1</sup>. As a consequence, non-judicial means of settlement are increasingly seen as a formality. States sometimes use them not to resolve differences, but to demonstrate a general commitment to diplomatic procedures of dispute settlement or to meet a formal precondition for bringing proceedings before international judicial bodies<sup>2</sup>.

Direct negotiations have been traditionally regarded as the most universally applicable non-judicial means

of settling international disputes. During negotiations, states or other parties to an alleged dispute engage directly through their representatives to discuss the matters of mutual concern, clarify the relevant facts, and reconcile their divergent positions in order to reach a settlement. The parties to an alleged dispute retain full control over a negotiation process at every stage, which most fully reflects their free will and creates conditions for a fair and durable settlement<sup>3</sup>.

The obligation to settle disputes peacefully through negotiations is enshrined in numerous treaties<sup>4</sup>. Article 33(1) of the UN Charter also mentions negotiation among the diplomatic means that states are to employ first of all. The significance of negotiation as an indispensable, flexible, and effective means of dispute settlement is emphasised in a variety of resolutions and declarations of the UN General Assembly, including the

<sup>1</sup>Declaration on principles of international law concerning friendly relations and cooperation among states in accordance with the Charter of the United Nations // United Nations digital library. URL: <https://digitallibrary.un.org/record/202170> (date of access: 01.06.2026) ; Final act of the Conference on security and cooperation in Europe // Organisation for Security Co-operation in Europe : website. URL: [https://cdn.osce.org/sites/default/files/f/documents/5/c/39501\\_1.pdf](https://cdn.osce.org/sites/default/files/f/documents/5/c/39501_1.pdf) (date of access: 01.06.2026) ; Manila declaration on the peaceful settlement of international disputes (further – Manila declaration) // Audiovisual library of international law. URL: <https://legal.un.org/avl/ha/mdpsid/mdpsid.html> (date of access: 01.06.2026).

<sup>2</sup>In this article, «international judicial bodies» refers to permanent international courts, international arbitral tribunals, and any international organs or institutions exercising judicial or quasi-judicial functions.

<sup>3</sup>Popkov A. N. Dispute resolution mechanism in international law // Public international law. General part : textbook / A. F. Douhan (ed.). Minsk : BSU, 2023. P. 354–355 (in Russ.) ; Tolstykh V. L. International law course : textbook. M. : Prospect, 2021. P. 465 (in Russ.).

<sup>4</sup>Convention for the suppression of unlawful acts against the safety of civil aviation of 23 September 1971 // United Nations : website. URL: <https://treaties.un.org/doc/Publication/UNTS/Volume%20974/volume-974-I-14118-English.pdf> (date of access: 01.06.2026) ; Convention for the pacific settlement of international disputes of 18 October 1907 // Permanent Court of Arbitration : website. URL: <https://docs.pca-cpa.org/2016/01/bd7626f1-1907-convention-for-the-pacific-settlement-of-international-disputes.pdf> (date of access: 01.06.2026) ; United Nations Convention against corruption of 31 October 2003 // United Nations : website. URL: [https://treaties.un.org/doc/Treaties/2003/12/20031209%2002-50%20PM/Ch\\_XVIII\\_14p.pdf](https://treaties.un.org/doc/Treaties/2003/12/20031209%2002-50%20PM/Ch_XVIII_14p.pdf) (date of access: 01.06.2026) ; Convention on transit trade of land-locked states of 8 July 1965 // Ibid. URL: [https://treaties.un.org/doc/Treaties/1967/06/19670609%2002-19%20AM/Ch\\_X\\_03p.pdf](https://treaties.un.org/doc/Treaties/1967/06/19670609%2002-19%20AM/Ch_X_03p.pdf) (date of access: 01.06.2026) ; United Nations Convention against transnational organized crime of 15 November 2000 // Ibid. URL: <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> (date of access: 01.06.2026).

Declaration on principles of international law concerning friendly relations and cooperation among states in accordance with the Charter of the United Nations of 24 October 1970, and the Manila declaration.

Paragraph 10 of section I of the 1982 Manila declaration stresses that, without prejudice to the right freely to choose means of settlement, states should bear in mind that direct negotiations are a flexible and effective means of peaceful settlement of their disputes. The declaration also calls on states to negotiate meaningfully in order to arrive at an early settlement acceptable to the parties, while showing an equal preparedness to seek the settlement of their disputes by the other means.

The reluctance of some states to use properly negotiations as a non-judicial means of dispute settlement underscores the relevance of examining their true place and role in international dispute settlement and of their relationship with adjudication and arbitration. These matters are also of practical importance for the Republic of Belarus and many other CIS States, since many of their bilateral and multilateral treaties provide for the sequential use of negotiations and judicial means to resolve disputes over the interpretation and application of those treaties. The international legal nature of negotiations, and the general theoretical aspects of their organisation and conduct have been examined by such scholars as A. Kh. Abashidze, A. M. Solntsev<sup>5</sup>, M. E. Achurra-Zavala [1], R. Bilder [2], Yu. V. Dubinin<sup>6</sup>, B. D. Krivokapich [3], W. Lane [4], J. Merrills [5; 6], M. Rudolf [7], and M. Shaw [8; 9]. However, the problem remains understudied in both domestic and foreign international legal doctrines, which requires further comprehensive analysis. The purpose of this article is to identify, on the basis of an analysis of international jurisprudence and doctrinal approaches, the main current trends in using negotiations as a preliminary means of dispute resolution or ensuring the application of other non-judicial methods before bringing disputes to adjudication as well as to highlight the key stages of the negotiation process, its legal characteristics, problems, advantages and disadvantages.

Any analysis of negotiations must firstly consider the nature of international disputes and the extent to which courts and arbitral tribunals can resolve them effectively and conclusively by applying rules of international law.

In this respect, R. Jennings, the distinguished international lawyer and former judge of the International

Court of Justice, tried to draw attention to the cases when some categories of disputes can be better addressed in non-judicial format and on the basis of different factors which may include not only legal aspects but some political considerations in order to build a compromise between disputing parties. He observed: «It is important to appreciate that there are large and important areas of international relations where what is wanted is not a decision based upon the law, but a decision based upon political wisdom, or even expediency, and the lessons of political or administrative experience» [10, p. 78].

So based on the above words, it can be noted that negotiations seem to be a right method allowing some flexibility in addressing disputes not only within a strict legal framework and legal procedures for the sake of a quick and mutually acceptable solution between parties.

The need for closer attention to a non-judicial means was also underlined by M. N. Shaw: «disputes may be resolved or alleviated using a variety of mechanisms, so that recourse to law cannot therefore be regarded as the sole or exclusive factor, but merely one of a number of relevant facilities» [9, p. 70].

Many other scholars have similarly argued that not every category of dispute is best resolved by judicial means<sup>7</sup> [3, p. 55–58; 8, p. 18–19; 11; 12, p. 693–694; 13, p. 302–304]. They point out that virtually every dispute has political dimensions, and that in some disputes those dimensions prevail. This does not, certainly, mean that international courts and tribunals are incapable of isolating the legal elements of a dispute and assessing them under international law.

The International Court of Justice (here and further the Court) has repeatedly made clear that it will not decline to adjudicate a legal question merely because that question forms part of a broader set of political issues in inter-state relations. It has heard cases and given advisory opinions on legal matters within a significant political context, *inter alia*, in such cases as Military and paramilitary activities in and against Nicaragua<sup>8</sup>, United States diplomatic and consular staff in Tehran<sup>9</sup>, and the advisory opinion on the accordance with international law of the Unilateral declaration of independence in respect of Kosovo<sup>10</sup>. In this regard, the United States diplomatic and consular staff in Tehran case is especially noteworthy. In its judgment in the case, the Court noted that «yet never has the view been put forward

<sup>5</sup>Abashidze A. Kh., Solntsev A. M. International law. Peaceful resolution of disputes. M.: Yurait, 2019. 221 p. (in Russ.).

<sup>6</sup>Dubinin Yu. V. Negotiation skills: textbook. M.: Mezhdunarodnye otnosheniya, 2023. 320 p. (in Russ.).

<sup>7</sup>Boczek B. A. International law: dictionary. Lanham: Scarecrow Press, 2005. P. 362; Boczek B. A. Historical dictionary of international tribunals. London: Scarecrow Press, 1994. P. 137–139.

<sup>8</sup>Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America): Judgement of 27 June 1986// International Court of Justice: website. URL: <https://www.icj-cij.org/sites/default/files/case-related/70/070-19860627-JUD-01-00-EN.pdf> (date of access: 30.05.2026).

<sup>9</sup>United States diplomatic and consular staff in Tehran (United States of America v. Iran): Judgement of 24 May 1980// Ibid. URL: <https://www.icj-cij.org/sites/default/files/case-related/64/064-19800524-JUD-01-00-EN.pdf> (date of access: 30.05.2026).

<sup>10</sup>Accordance with international law of the Unilateral declaration of independence in respect of Kosovo: Advisory opinion of 22 July 2010// Ibid. URL: <https://www.icj-cij.org/sites/default/files/case-related/141/141-20100722-ADV-01-00-EN.pdf> (date of access: 25.05.2026).

before that, because a legal dispute... is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them»<sup>11</sup>.

However, the automatic adoption of the above-mentioned approach in all cases may have an impact on the confidence in the Court and the credibility of its decisions. This concern is strongest where the applicable general rules of international law are difficult to identify and political considerations dominate both the dispute itself and the interpretation or application of the relevant legal rules. In such circumstances, states may wish to limit the jurisdiction of international judicial institutions to the extent possible in order to remove sensitive issues, public and wide discussion of which could lead to external interference and pressure by third parties, thereby preventing the disputing parties from determining the acceptable ways of their solution on their own. Such situations can be avoided if both courts and states encourage more active use of negotiation and other diplomatic means in the pre-adjudicative phase, so that parties can explore avenues for mutual understanding. The disputes brought before international courts and tribunals would then more likely be those that are most urgent and predominantly legal in character.

A view shared by some international legal scholars in the doctrine is that the role of permanent international courts and tribunals in dispute settlement should be strengthened, which simultaneously implies decline in the importance of non-judicial means, including direct negotiations<sup>12</sup> [1; 13, p. 300–305; 14]. Proponents argue that, given the globalisation of contemporary international relations, international law should transcend the negotiation technique, developing institutionalised mechanisms of settlement with the involvement of impartial third parties, and in particular international judicial bodies, in order to reduce subjectivity in the application of international law and secure its supremacy.

In this respect, it seems appropriate to take a more balanced view of the proposed direction for the development of dispute-settlement mechanisms. This view should take into account the actual state of affairs in international relations, existing level of international legal consciousness, distinctive features of different states' international legal policies, as well as the degree of their confidence in the system of international justice and in the effectiveness of third-party dispute settlement methods. Furthermore, within the framework of an international legal order based on the principles and rules of the UN Charter, including the principles of sovereign equality of states and peaceful settlement

of international disputes, direct negotiation continue to be the most valuable method in efforts to resolve differences in a flexible and non-confrontational manner through mutual concessions. It should also be borne in mind that international judicial proceedings may, on the one hand, provide for the resolution of disputes through a qualified application of international legal rules if all standards of international justice are respected; and, on the other hand, may cause further deterioration of inter-state relations if political considerations prevail and diplomatic means have not been properly exhausted by the parties.

A former president of the International Court of Justice E. Jiménez de Aréchaga, gave particular prominence to the role of direct negotiations. He emphasised that «...parties almost always turn first to direct negotiations, since these are the best means of establishing the existence of disagreements, clarifying the points at issue, and reaching agreement on possible methods of settlement» [15, p. 219]. J. Merrills, one of the leading Western scholars of international dispute settlement, expressed a similar view [5, p. 27; 6, p. 54–65].

The advantages of negotiations over other means of settlement were also outlined by I. I. Lukashuk. He indicated their effectiveness, the relative ease of organising them, the absence of substantial costs, and, above all, their lack of adverse effects on relations between the parties<sup>13</sup>. His opinion has been supported by many contemporary scholars, in particular, by A. Kh. Abashidze, A. M. Solntsev<sup>14</sup>, and B. D. Krivokapich [3, p. 204–205]. The absence of serious negative consequences for relations between disputing parties was likewise noted by A. Cassese, who observed that «...the goal of negotiation is to achieve agreement over the conflicting claims, a further and more important element is that there will be no loser and no winner, for both parties should derive some benefit from the diplomatic exchange» [16, p. 279].

The examples given above show that the value of negotiation and its use in the early stages of a dispute is recognised in various legal systems and schools of international law. Nevertheless, it cannot be concluded that general international law imposes obligations to negotiate in every case, although some scholars have expressed positive views on the matter in legal doctrine<sup>15</sup> [1, p. 460–464; 13, p. 275; 17, p. 1168–1169].

During the period of functioning of the League of Nations, the need to enter into direct negotiations as soon as possible in order to reach an agreement between the disputing parties was indicated in its decisions by the Permanent Court of International Justice, notably in the 1931 advisory opinion on railway traffic between

<sup>11</sup> Accordance with international law of the Unilateral declaration of independence in respect of Kosovo : Advisory opinion of 22 July 2010 // International Court of Justice : website. URL: <https://www.icj-cij.org/sites/default/files/case-related/141/141-20100722-ADV-01-00-EN.pdf> (date of access: 25.05.2026).

<sup>12</sup> Boczek B. A. International law... P. 379.

<sup>13</sup> Lukashuk I. I. International law. Special part : textbook for students. M. : Walters Kluwer, 2008. P. 264 (in Russ.).

<sup>14</sup> Abashidze A. Kh., Solntsev A. M. International law... P. 32–33 (in Russ.).

<sup>15</sup> Ibid.

Lithuania and Poland<sup>16</sup>. The case law of the International Court of Justice, however, is equivocal on this point. In some earlier judgments – for example, North Sea continental shelf<sup>17</sup> and Fisheries jurisdiction<sup>18</sup> – the Court has recognised the customary obligation to negotiate in specific contexts, taking into account the particular nature of the legal relations at issue, such as the delimitation of the continental shelf or a situation where the rights of states overlap and are mutually defined and limited [7, p. 153–157]. The Court currently follows a general approach, which is taken literally within the meaning of Art. 33 of the UN Charter and encompasses the principle of peaceful settlement of disputes, which by its nature includes the free choice of means. Under this approach the parties usually decide by mutual consent whether to commence negotiations. The Court emphasised in the case concerning the Obligation to negotiate access to the Pacific Ocean, where it held that neither Art. 33 of the UN Charter nor other universal treaties and instruments establish a general legal duty to negotiate<sup>19</sup>. Nevertheless, recourse to negotiations may be mandatory under dispute settlement clauses in treaties, in particular, when negotiations operate as a first step of a settlement procedure before differences are referred to international judicial bodies [5, p. 18; 13, p. 275].

States enter into negotiations at a certain stage in virtually every international dispute, and they may choose other means of settlement during the course of those negotiations or must use them after the capacity for negotiation has been exhausted. In this respect, especially important is the correlation of negotiation as a preliminary stage and adjudication or arbitration. Prior negotiations not only facilitate settlement but also help the parties understand the substance of their disagreements and balance the use of diplomatic and judicial means. The legitimacy and admissibility of submitting the dispute to an international court or arbitral tribunal may therefore depend on whether the parties negotiated in good faith, and whether recourse to adjudication was

indeed justified. When negotiating under the dispute settlement clauses in a treaty, the parties should seek first and foremost to resolve their disagreements on the basis of the treaty's substantive provisions.

Since negotiations are usually the first method used by the parties to resolve an international dispute, they cannot be regarded as a purely formal preliminary process. The parties to any alleged dispute should make genuine attempts to address their differences and reach a compromise on the matters of concern, using all available options. In practice, however, this does not always take place. States frequently engage in negotiations *pro forma* and wait for a convenient moment to shift responsibility for their failure to the other side, with a view to expediting recourse to judicial remedies.

At the jurisdictional stage, or when assessing preliminary objections, international courts and arbitral tribunals do not always scrutinise with sufficient rigor whether the proceedings are admissible, and whether prior negotiations were faithful – either under specific treaty provisions or against the broader background of Art. 33 of the UN Charter. In adopting a more permissive line of conduct, they expand their own jurisdiction in fact. In a number of recent cases, the Court rejected the preliminary objections of the defendant state that the requirements governing negotiations as a precondition for bringing an application to the Court had not been fully met. For example, in the case concerning Application of the International convention for the suppression of the financing of terrorism and the International convention on the elimination of all forms of racial discrimination<sup>20</sup>, the Court did not support the arguments of insufficient compliance with the requirements for negotiations as a precondition for filing the case and affirmed its jurisdiction<sup>21</sup>.

Among the recent cases, in which the Court found that a prior negotiation requirement had not been met is the case concerning Application of the International convention on the elimination of all forms of racial discrimination<sup>22</sup>.

<sup>16</sup>Railway traffic between Lithuania and Poland : Advisory opinion of Permanent Court of International Justice, 1931, No. 42 // Permanent Court of International Justice : website. URL: [https://www.worldcourts.com/pcij/eng/decisions/1931.10.15\\_railway\\_traffic.htm](https://www.worldcourts.com/pcij/eng/decisions/1931.10.15_railway_traffic.htm) (date of access: 30.05.2026).

<sup>17</sup>The North Sea continental shelf case : Judgment of 20 Feb. 1969 // International Court of Justice : website. URL: <https://icj-cij.org/sites/default/files/case-related/52/052-19690220-JUD-01-00-EN.pdf> (date of access: 30.05.2026).

<sup>18</sup>Fisheries jurisdiction (the UK v. Iceland) : Judgment of 25 July 1974 // Ibid. URL: <https://www.icj-cij.org/sites/default/files/case-related/55/055-19740725-JUD-01-00-EN.pdf> (date of access: 28.05.2026).

<sup>19</sup>Obligation to negotiate access to the Pacific Ocean (Bolivia v. Chile) : Judgment of 24 Sept. 2015 // Ibid. URL: <https://www.icj-cij.org/sites/default/files/case-related/153/153-20150924-JUD-01-00-EN.pdf> (date of access: 25.05.2026).

<sup>20</sup>Allegations of genocide under the Convention on the prevention and punishment of the crime of genocide (Ukraine v. Russian Federation) : Provisional measures, Order of 16 March 2022 // Ibid. URL: <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ord-01-00-en.pdf> (date of access: 25.05.2026) ; Allegations of genocide under the Convention on the prevention and punishment of the crime of genocide (Ukraine v. Russian Federation) : Preliminary objections, Judgement of 2 Feb. 2024 // Ibid. URL: <https://www.icj-cij.org/sites/default/files/case-related/182/182-20240202-jud-01-00-en.pdf> (date of access: 26.05.2026) ; Application of the International convention for the suppression of the financing of terrorism and of the International convention on the elimination of all forms of racial discrimination (Ukraine v. Russian Federation) : Judgement of 31 Jan. 2024 // Ibid. URL: <https://www.icj-cij.org/sites/default/files/case-related/166/166-20240131-jud-01-00-en.pdf> (date of access: 25.05.2026).

<sup>21</sup>Application of the International convention for the suppression of the financing of terrorism and of the International convention on the elimination of all forms of racial discrimination (Ukraine v. Russian Federation) : Judgement of 31 Jan. 2024 // Ibid. URL: <https://www.icj-cij.org/sites/default/files/case-related/166/166-20240131-jud-01-00-en.pdf> (date of access: 25.05.2026).

<sup>22</sup>Application of the International convention on the elimination of all forms of racial discrimination (Georgia v. Russian Federation) : Preliminary objections, judgement of 1 Apr. 2011 // Ibid. URL: <https://www.icj-cij.org/sites/default/files/case-related/140/140-20110401-JUD-01-00-EN.pdf> (date of access: 25.05.2026).

In particular, the applicant state suggested that international law imposed no requirement to follow a specific procedure or format of negotiations. It further stated that even very brief informal discussions in either bilateral or multilateral settings involving, for example, a simple communication of protest to a silent or intractable party, would suffice to constitute negotiations. It also contended that the parties' exchanges did not need to refer expressly to the convention or its substantive provisions, a general reference to the subject matter of the dispute (racial discrimination, the treaty's central theme) was noted to be enough<sup>23</sup>.

Within the scope of Art. 22 of the International convention on the Elimination of all forms of racial discrimination of 7 March 1966, the Court could not find that the parties had properly conducted the negotiations on the substance of implementation of the Convention's obligations. It therefore declined to proceed to the merits<sup>24</sup>.

The Court's decision in that case sparked the comments from some researchers who criticised the Court for its conservative approach to negotiations and compliance with the preconditions set out in multilateral treaties for bringing cases before the Court [1; 4]. They argued for lowering the «threshold» for finding such preconditions satisfied and for moving away from a literal interpretation of the relevant treaty provisions, including compromissory clauses. In their view, the strict applying of the standard on negotiation may result in a denial of justice or in perpetuation of an international conflict requiring a prompt solution [1, p. 479–481; 4, p. 46–47].

However, the proposed vision is difficult to reconcile with dispute settlement clauses in treaties and with the legitimate expectations held by states parties, when they express their consent to be bound by appropriate treaties, that these clauses will be applied in good faith. If international judicial bodies do not properly assess how the parties sought to comply with the preconditions for preliminary non-judicial settlement and negotiations, and do not require them to comply faithfully, the system of international justice will become more susceptible to bias and unilateralism. In all circumstances, interna-

tional courts and arbitral tribunals should remain guided by the importance of easing tensions in inter-State relations in accordance with the purposes and principles of the UN Charter and, where appropriate, emphasise the advantages and potential of direct negotiations.

To exhaust the negotiating resource, it would not be enough to negotiate to show that a compromise is impossible and thus the parties are unwilling to abandon their positions regarding the legal and factual circumstances of a disagreement. Negotiations cannot be regarded as having genuinely taken place where there has been no more than an exchange of written claims and objections between parties. As mentioned above, states may from the outset seek to gradually derail negotiations with a view to bringing an application before an international court or arbitral tribunal as soon as possible.

A merely formal attitude to negotiations is not in conformity with prevailing international judicial and arbitral practices [2, p. 22–23; 4; 5, p. 18–23; 8]. In a number of decisions, the Court has called upon states to make more active, purposeful and good-faith efforts to settle disputes through negotiations before initiating judicial proceedings, *inter alia*, in the North Sea continental shelf case<sup>25</sup> and in its advisory opinion on the legality of the threat or use of nuclear weapons<sup>26</sup>.

In the North Sea continental shelf case, the Court stressed that the parties to an alleged dispute «are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition», and that negotiations must be «meaningful which will not be the case when either of them insist upon its own position without contemplating any modification of it»<sup>27</sup>. In the Lac Lanoux arbitration, the arbitral tribunal interpreted the duty to negotiate in similar terms, observing that negotiations must be «genuine, must comply with the rules of good faith and must not be mere formalities»<sup>28</sup>.

In other decisions, the Court noted that «the obligation to negotiate» does not imply an obligation to reach an agreement on a settlement<sup>29</sup>. At a minimum,

<sup>23</sup>Application of the International convention on the elimination of all forms of racial discrimination (Georgia v. Russian Federation) : Preliminary objections, Judgement of 1 Apr. 2011 // International Court of Justice : website. URL: <https://www.icj-cij.org/sites/default/files/case-related/140/140-20110401-JUD-01-00-EN.pdf> (date of access: 25.05.2026).

<sup>24</sup>Ibid.

<sup>25</sup>The North Sea continental shelf case : Judgment of 20 Feb. 1969 // International Court of Justice : website. URL: <https://www.icj-cij.org/sites/default/files/case-related/153/153-20150924-JUD-01-00-EN.pdf> (date of access: 25.05.2026).

<sup>26</sup>Legality of the threat or use of nuclear weapons : Advisory opinion of 8 July 1996 // Ibid. URL: <https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf> (date of access: 30.05.2026).

<sup>27</sup>The North Sea continental shelf case : Judgment of 20 Feb. 1969 // Ibid. URL: <https://www.icj-cij.org/sites/default/files/case-related/153/153-20150924-JUD-01-00-EN.pdf> (date of access: 25.05.2026).

<sup>28</sup>Lake Lanoux arbitration (France v. Spain) : Decision of 16 Nov. 1957 // Internat. Law Reports. 1961. Vol. 24. P. 101, 119.

<sup>29</sup>Application of the International convention on the elimination of all forms of racial discrimination (Georgia v. Russian Federation) : Preliminary objections, Judgement of 1 Apr. 2011 // International Court of Justice : website. URL: <https://www.icj-cij.org/sites/default/files/case-related/140/140-20110401-JUD-01-00-EN.pdf> (date of access: 25.05.2026) ; Application of the International convention for the suppression of the financing of terrorism and of the International convention on the elimination of all forms of racial discrimination (Ukraine v. Russian Federation) : Judgement of 31 Jan. 2024 // Ibid. URL: <https://www.icj-cij.org/sites/default/files/case-related/166/166-20240131-jud-01-00-en.pdf> (date of access: 25.05.2026) ; Obligation to negotiate access to the Pacific Ocean (Bolivia v. Chile) : Judgment of 24 Sept. 2015 // Ibid. URL: <https://www.icj-cij.org/sites/default/files/case-related/153/153-20150924-JUD-01-00-EN.pdf> (date of access: 25.05.2026) ; Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal) : Judgment of 20 July 2012 // Ibid. URL: <https://www.icj-cij.org/sites/default/files/case-related/144/144-20120720-JUD-01-00-EN.pdf> (date of access: 28.05.2026).

negotiations require a genuine attempt by one party to engage the other in discussions aimed at settling a dispute [3, p. 207–208]. In Application of the International Convention on the elimination of all forms of racial discrimination, the Court pointed out that «negotiations are distinct from mere protests or disputations... entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims»<sup>30</sup>.

Negotiations will be considered as genuine ones, provided that states make all necessary good-faith efforts to find solutions to the problems at issue, rather than repeatedly breaking off of discussions, delaying or regularly refusing to give consideration to proposals on possible solutions without any explanation<sup>31</sup> [5, p. 19; 8, p. 920].

To meet a treaty-based precondition in a dispute-settlement clause, negotiations must concern the subject matter of that treaty. A prior negotiation requirement is fulfilled only when negotiations have failed, or when they have objectively become futile or reached an impasse<sup>32</sup> [14, p. 756].

Even where it is clear that the controversies cannot be eliminated without recourse to an international court or arbitral tribunal, states should continue negotiating in order to define their disagreement more precisely. In some judgments, for example, in the judgment on the classic case of *Mavrommatis Palestine concessions*, it was observed that «before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by diplomatic negotiations»<sup>33</sup>. Meeting this requirement may subsequently simplify arbitral or judicial proceedings and expedite their course.

In each case, the Court determines whether the prior negotiation requirement has been met. In making that assessment, it takes into account of the parties' arguments and of generally accepted international standards governing negotiations [5, p. 18–20].

Based on this analysis of international judicial and arbitral practices, and in light of the relevant doctrinal approaches<sup>34</sup> [5, p. 18–23; 8, p. 918–921; 14], direct

negotiations under treaties should be viewed in three dimensions:

1) in the functional aspect as a means of peaceful settlement (negotiations serve as a flexible diplomatic method of resolving disagreements between states);

2) in the procedural aspect as a process for defining the content of the dispute (direct negotiations help to demonstrate the existence of a dispute and identify its subject matter by specifying the points of disagreement between the parties);

3) in the organisational aspect as a means of determining the order in which other methods of settlement are to be used (through negotiation, the parties may agree to resort to the third-party dispute settlement methods, *inter alia*, good offices, mediation, or conciliation; they may likewise arrange for the establishment of an arbitral tribunal under a treaty's compromissory clause, or settle the procedural details of possible judicial proceedings, such as forming an ad hoc chamber of the International Court of Justice or consenting jointly to submit the case for adjudication).

Negotiations do not require the parties to come to the understanding about the existence of a dispute or to concur on its content. On the contrary, they are intended both to help address the underlying problems and to provide material evidence of the existence of a legal dispute and clarify its constituent elements [12, p. 458]. A disagreement may be regarded as a dispute once it has reached a point of a sufficient definition and specificity – that is, once it has a clearly defined subject matter reflecting the substance of the conflicting positions of the parties [2, p. 4; 18, p. 494–495]. Where there is political will, direct negotiations may also help identify common ground for settlement.

Recourse to international judicial bodies depends, first and foremost, on the existence of an international dispute between the parties. Such bodies shall not consider disagreements unless they determine that the disagreement amounts to a «dispute» satisfying specific international legal criteria. This requirement is reflected throughout the case law of the International Court of Justice, including the advisory opinions in interpretation of peace treaties with Bulgaria, Hungary and Romania<sup>35</sup> and on the applicability of the

<sup>30</sup>Application of the International convention on the elimination of all forms of racial discrimination (Georgia v. Russian Federation) : Preliminary objections, Judgement of 1 Apr. 2011 // International Court of Justice : website. URL: <https://www.icj-cij.org/sites/default/files/case-related/140/140-20110401-JUD-01-00-EN.pdf> (date of access: 25.05.2026).

<sup>31</sup>*Tolstykh V. L.* International law course... P. 466–467 (in Russ.).

<sup>32</sup>Application of the International convention on the elimination of all forms of racial discrimination (Georgia v. Russian Federation) : Preliminary objections, Judgement of 1 Apr. 2011 // International Court of Justice : website. URL: <https://www.icj-cij.org/sites/default/files/case-related/140/140-20110401-JUD-01-00-EN.pdf> (date of access: 25.05.2026).

<sup>33</sup>*Mavrommatis Palestine concessions case* // Permanent Court of International Justice : website. URL: [https://www.icj-cij.org/sites/default/files/permanent-court-of-international-justice/serie\\_A/A\\_02/06\\_Mavrommatis\\_en\\_Palestine\\_Arret.pdf](https://www.icj-cij.org/sites/default/files/permanent-court-of-international-justice/serie_A/A_02/06_Mavrommatis_en_Palestine_Arret.pdf) (date of access: 30.05.2026).

<sup>34</sup>*Abashidze A. Kh., Solntsev A. M.* International law... P. 32–43 (in Russ.).

<sup>35</sup>Interpretation of peace treaties with Bulgaria, Hungary and Romania : Advisory opinion of 18 July 1950 // International Court of Justice : website. URL: <https://www.icj-cij.org/sites/default/files/case-related/8/008-19500330-ADV-01-00-EN.pdf> (date of access: 30.05.2026).

Obligation to arbitrate under section 21 of the United Nations Headquarters Agreement of 26 June 1947<sup>36</sup>, and the judgment in East Timor case<sup>37</sup>.

International jurisprudence has developed several basic criteria for establishing the existence of a dispute, although these are neither exhaustive nor always understood by the parties and the Court in the same way. The most authoritative point of reference remains the definition of an «international dispute» given by the Permanent Court of International Justice in *Mavrommatis Palestine concessions case*<sup>38</sup>. According to this definition, an international dispute exists where there is a genuine disagreement, at a minimum between two subjects of international law, concerning factual or legal issues relating to the application of legal rules, or a conflict of interests that may arise in a wide variety of international contexts<sup>39</sup>.

International law does not regulate the conduct of negotiations in detail. Nevertheless, some fundamental principles and standards of negotiation have emerged from international jurisprudence and other practices as well as in the doctrine of international law, a number of which are customary in origin, most notably the principle of good faith (*bona fide*) [4; 19, p. 54–55]. The fundamental principles of international law apply fully to negotiations, in particular the sovereign equality of states [3, p. 206–207]. The negotiations conducted in violation of these principles and during which the parties are subjected to threats, coercion or other forms of pressure cannot effectively resolve disputes because they do not create conditions conducive to agreement and are contrary to international law.

The principal standards applicable to negotiations are summarised in the UN General Assembly resolution 53/101 of 8 December 1998 «Principles and guidelines for international negotiations»<sup>40</sup>. Under para 2 of the resolution, negotiations are to be conducted in accordance with international law in a manner conducive

to achieving their stated purpose. They must also comply with a number of guidelines, including good faith, due regard for the substantial (vital) interests of third states and, where necessary, their involvement in the process, compliance with the principles and rules of international law, including the UN Charter, adherence to any mutually agreed framework for conducting negotiations, maintenance of a constructive atmosphere and refraining from any conduct which might undermine the negotiations and their progress, remaining focused throughout on the main objectives of the negotiations, and using the best endeavours to continue to work towards a mutually acceptable and just solution in the event of an impasse in negotiations.

Treaties rarely prescribe specific time-limits for negotiations, except for negotiations to constitute an arbitral tribunal or a conciliation commission. In the treaties that set time-limits, they usually do not exceed six to nine months, as in Art. 16 of the Convention on transit trade of land-locked states<sup>41</sup>. Some treaties provide only that the dispute is to be «settled through negotiation within a reasonable time» as, for instance, in Art. 20 of the International convention for the suppression of terrorist bombings<sup>42</sup>, Art. 24 of the International convention for the suppression of the financing of terrorism<sup>43</sup>, and Art. 35 of the United Nations Convention against transnational organised crime<sup>44</sup>.

International judicial decisions likewise contain no precise time-frames for what constitutes a «reasonable period» for negotiations. International judicial bodies tend instead to focus on the quality of the process, in particular, on its meaningfulness and content. They decide whether the time-frames of negotiations was reasonable and appropriate in each case, in light of the circumstances of a negotiation process. In the case concerning questions relating to the Obligation to prosecute or extradite, the Court considered a three-year history of negotiations sufficient for the purposes

<sup>36</sup>Applicability of the Obligation to arbitrate under section 21 of the United Nations Headquarters Agreement of 26 June 1947 : Advisory opinion of 26 Apr. 1988 // International Court of Justice : website. URL: <https://www.icj-cij.org/sites/default/files/case-related/77/077-19880426-ADV-01-00-EN.pdf> (date of access: 25.05.2026).

<sup>37</sup>East Timor (Portugal v. Australia) : Judgment of 30 June 1995 // Ibid. URL: <https://www.icj-cij.org/sites/default/files/case-related/84/084-19950630-JUD-01-00-EN.pdf> (date of access: 28.05.2026).

<sup>38</sup>*Mavrommatis Palestine concessions case* // Permanent Court of International Justice : website. URL: [https://www.icj-cij.org/sites/default/files/permanent-court-of-international-justice/serie\\_A/A\\_02/06\\_Mavrommatis\\_en\\_Palestine\\_Arret.pdf](https://www.icj-cij.org/sites/default/files/permanent-court-of-international-justice/serie_A/A_02/06_Mavrommatis_en_Palestine_Arret.pdf) (date of access: 30.05.2026).

<sup>39</sup>Popkov A. N. Dispute resolution mechanisms in international law... P. 346–347.

<sup>40</sup>Principles and guidelines for international negotiations // United Nations digital library. URL: <https://digitallibrary.un.org/record/265687> (date of access: 29.05.2026).

<sup>41</sup>Convention on transit trade of land-locked states of 8 July 1965 // United Nations : website. URL: [https://treaties.un.org/doc/Treaties/1967/06/19670609%2002-19%20AM/Ch\\_X\\_03p.pdf](https://treaties.un.org/doc/Treaties/1967/06/19670609%2002-19%20AM/Ch_X_03p.pdf) (date of access: 01.06.2026).

<sup>42</sup>International convention for the suppression of terrorist bombings of 16 December 1997 // Ibid. URL: [https://www.unodc.org/cld/uploads/res/treaties/definitions/treaty/international\\_convention\\_for\\_the\\_suppression\\_of\\_terrorist\\_bombings\\_1997\\_html/Terrorist\\_Bombing\\_Convention\\_English.pdf](https://www.unodc.org/cld/uploads/res/treaties/definitions/treaty/international_convention_for_the_suppression_of_terrorist_bombings_1997_html/Terrorist_Bombing_Convention_English.pdf) (date of access: 29.05.2026).

<sup>43</sup>International convention for the suppression of the financing of terrorism of 9 December 1999 // Ibid. URL: <https://www.un.org/law/cod/finterr.htm> (date of access: 29.05.2026).

<sup>44</sup>United Nations convention against transnational organized crime of 15 November 2000 // Ibid. URL: <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> (date of access: 01.06.2026).

of establishing jurisdiction over the merits<sup>45</sup>. The negotiations in the case involved an exchange of notes and several meetings, and were concerned primarily with the interpretation of various provisions of the applicable treaty<sup>46</sup>.

Negotiations are most often held on an *ad hoc* basis, but where their likely duration so requires, the parties may institutionalise the process by establishing special negotiating groups, delegations, or mixed commissions. International law does not regulate the conduct of negotiations, the sequence of their stages, or other organisational and procedural matters. General surveys of the rules and practical techniques for organising and conducting negotiations, including with reference to particular subject areas, can be found in a range of scholarly writings. The practical research of the problem was made by A. Kh. Abashidze, A. M. Solntsev<sup>47</sup>, R. B. Bilder [2, p. 22–23], B. D. Krivokapich [3, p. 211–219], J. Merri-lls [5, p. 8–17], and M. N. Shaw [8, p. 918–921; 9], Y. Nazarkin, J. Woodworth [20], Yu. V. Dubinin<sup>48</sup>, V. Kotlyar [21; 22]. Useful guidance is also provided in reference materials prepared by the UN Secretariat<sup>49</sup>.

Due to an analysis of the above-mentioned works and international practices, at least seven successive stages of negotiation can be identified to resolve disagreements over the implementation of treaties as follows:

- proposal to negotiate with specific and reasonable claims of one party to a treaty against another for breach of its obligations under the treaty;
- response to the initiative expressing willingness to enter into negotiations with a possible preliminary reaction to the claim or the filing of counterclaims;
- reaching a mutual understanding on the format, place, timing and level of negotiations, as well as forming their negotiating delegations by each party. This preparatory stage is particularly important because it lays part of the groundwork for successful negotiations. A key element is the composition of each delegation, which should include not only diplomats and specialists in international law, but also highly qualified experts from state bodies and other institutions working in the fields covered by the negotiations;
- holding preliminary consultations (pre-negotiations or «negotiation talks») to agree on the organisational aspects of the negotiation process. At this stage, parties agree on and adopt rules of procedure. The rules should address the preparation of the negotiations, the manner in which they are to be conducted, the working languages, the sequence and timing for drafting final records or minutes, measures to protect confidential information and the personal data of affected individuals,

the degree of transparency to be observed, the possible use of audio or video recording, and other technical and procedural matters;

- presentation of positions by the parties. This stage of direct negotiations includes the agreeing on agendas for each round and the determination of the sequence and timing of claims presentation, introduction of the positions of the parties in the form of exchange of information and evidence in written or oral form on the circumstances of disagreements, search for a common basis for resolving disagreements. At this stage, each round of negotiations is summed up in minutes which are signed by the heads of negotiating delegations;

- reaching an agreement by the parties on the way to resolve an alleged dispute or acknowledging that their differences cannot be overcome;

- discussing of the next stage of resolving disagreements if negotiations have not produced a settlement. This stage may cover the agreeing on the establishment of an arbitral tribunal or conciliation commission, or preparing to submit the case to an international court. At this stage, the parties also identify the principal points of disagreement that constitute the subject matter of the dispute and confirm its existence.

The essential elements of the negotiating process are the exchange of detailed information on the substance of the disagreement and the presentation of materials supporting the alleged breaches of international obligations. At different stages, these matters are often a principal source of divergence between the parties, particularly as regards the manner in which information is presented, its quality, and its assessment. Even so, the success of negotiations depends to a considerable extent on these matters and on the parties' willingness to examine them objectively.

Despite all the obvious advantages of direct communication between disputing parties during negotiations, negotiations do not always provide a full clarification of the facts underlying a disagreement or a well-founded legal characterisation of those facts. The parties may encounter difficulties in establishing certain facts or obtaining independent technical expertise relevant to an underlying problem. This may be partially due to the disputing parties' caution regarding a possible judicial process, as well as their subjective approach to gathering information and presenting it during negotiations.

Given the nature of negotiations, which more easily resolve disagreements through mutual concessions grounded in equity and according to what, under the circumstances, is just and fair (*ex aequo et bono*),

<sup>45</sup>Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal) : Judgment of 20 July 2012 // International Court of Justice : website. URL: <https://www.icj-cij.org/sites/default/files/case-related/144/144-20120720-JUD-01-00-EN.pdf> (date of access: 28.05.2026).

<sup>46</sup>Ibid.

<sup>47</sup>Abashidze A. Kh., Solntsev A. M. International law... P. 32–38 (in Russ.).

<sup>48</sup>Dubinin Yu. V. Negotiation skills : textbook. M. : Mezhdunarodnye otnosheniya, 2023. 320 p. (in Russ.).

<sup>49</sup>Handbook on the peaceful settlement of disputes between states. New York : United Nations, 1992. P. 27–50.

the evidentiary demands applicable in negotiations are not as strict, as those governing international arbitral or judicial proceedings (evidences *prima facie*) [23]. The application of *ex aequo et bono* enables the parties, by mutual consent, to move to some extent beyond the existing law in order to achieve a settlement, while remaining fully bound by the generally recognised principles of international law and other peremptory norms<sup>50</sup> [24].

At the same time, the parties should exchange evidentiary materials relevant to an alleged dispute in conformity with the standards applied by international courts and derived from general principles of law common to national legal systems. The burden of proof initially lies with the party alleging breaches of international obligations and advancing the claim (*onus probandi actori incumbit*), it may then shift to the other party when rebutting those claims (*reus in exceptione fit actor*), or simply be allocated between the parties in light of the facts each asserts [25, p. 280–285; 26, p. 156; 27, p. 646–647]. The observing of the above standards helps the parties verify one another's assertions, establish facts jointly, draw reasoned conclusions and identify possible solutions. In the course of negotiations, the parties may also decide to undertake joint fact-finding, including inquiries involving experts appointed by each party or independent experts<sup>51</sup>.

The legal literature also notes disadvantages of negotiations as a means of settling international disputes<sup>52</sup> [2, p. 23; 3, p. 219–222; 5, p. 23–27; 13, p. 275]. A frequently cited concern is that negotiations allow a powerful State, or cohesive external actors pursuing their own interests – non-governmental organisations, transnational corporations, or major foreign business interests – to pressure the more vulnerable party into outcomes that are advantageous but neither fair nor legally grounded. More generally, because effective negotiation requires concessions – and even reasonable concessions by a national government can provoke sharp criticism and undermine confidence in it – negotiations are especially susceptible to domestic political and public pressures [2, p. 23]. In some cases, these shortcomings cannot be overcome without recourse to the third-party

dispute-settlement mechanisms, particularly international arbitration.

Direct negotiations, as a non-judicial means of settling international disputes, are in principle not subject to fixed time-limits and may continue even after the parties have initiated international arbitral or judicial proceedings<sup>53</sup>.

Many contemporary multilateral treaties restrict the parties' freedom to choose among peaceful means of settlement by privileging compulsory third-party procedures, such as arbitration and proceedings before the International Court of Justice<sup>54</sup> [13, p. 275]. Such treaties may prescribe specific periods within which the parties must attempt to settle the dispute through negotiations or other diplomatic means before resorting to compulsory legal procedures.

Under many UN multilateral treaties, recourse to arbitration after unsuccessful negotiations typically precedes an application to the International Court of Justice. Such provisions appear, for example, in Art. 14 of the Convention for the suppression of unlawful acts against the safety of civil aviation (the Montreal Convention)<sup>55</sup>, Art. 16 of the International convention against the taking of hostages<sup>56</sup>, Art. 66 of the United Nations Convention against corruption<sup>57</sup>, and Art. 23 of the International convention for the suppression of acts of nuclear terrorism<sup>58</sup>.

These treaties limit the parties' freedom to choose peaceful means of settlement by prescribing the following sequence: first, negotiations, then, if they fail within a reasonable time, arbitration, and, if the states cannot agree on the organisation of the arbitration within six months or another prescribed period, either party may bring the dispute before the International Court of Justice. A notable weakness of these clauses is that they often contain no clear provisions on the constitution of the arbitral tribunal or on the applicable arbitral rules. If arbitral clauses are to operate effectively, treaties should include not only the general conditions for recourse to arbitration but also at least certain elements of the arbitral procedure, including rules on the constitution of the tribunal, or should incorporate generally recognised arbitral rules by reference.

<sup>50</sup>Boczek B. A. International law... P. 7–8 ; Boczek B. A. Historical dictionary... P. 361.

<sup>51</sup>Abashidze A. Kh., Solntsev A. M. International law... P. 43–49 (in Russ.).

<sup>52</sup>Popkov A. N. Dispute resolution mechanism in international law... P. 357 (in Russ.).

<sup>53</sup>Aegean Sea continental shelf (Greece v. Turkey) : Judgment of 19 Dec. 1978 // International Court of Justice : website. URL: <https://www.icj-cij.org/sites/default/files/case-related/62/062-19781219-JUD-01-00-EN.pdf> (date of access: 25.05.2026) ; Tolstykh V. L. International law course... P. 467 (in Russ.).

<sup>54</sup>Popkov A. N. Dispute resolution mechanism in international law... P. 353 (in Russ.).

<sup>55</sup>Convention for the suppression of unlawful acts against the safety of civil aviation of 23 September 1971 // United Nations : website. URL: <https://treaties.un.org/doc/Publication/UNTS/Volume%20974/volume-974-I-14118-English.pdf> (date of access: 01.06.2026).

<sup>56</sup>International convention against the taking of hostages of 17 December 1979 // Ibid. URL: <https://treaties.un.org/doc/db/terrorism/english-18-5.pdf> (date of access: 25.05.2026).

<sup>57</sup>United Nations Convention against corruption of 31 October 2003 // Ibid. URL: [https://treaties.un.org/doc/Treaties/2003/12/20031209%2002-50%20PM/Ch\\_XVIII\\_14p.pdf](https://treaties.un.org/doc/Treaties/2003/12/20031209%2002-50%20PM/Ch_XVIII_14p.pdf) (date of access: 01.06.2026)

<sup>58</sup>International convention for the suppression of acts of nuclear terrorism of 13 April 2005 // Ibid. URL: [https://treaties.un.org/doc/source/RecentTexts/English\\_18\\_15.pdf](https://treaties.un.org/doc/source/RecentTexts/English_18_15.pdf) (date of access: 25.05.2026).

These well-known shortcomings of arbitration clauses have discouraged recourse to arbitration in disputes over the interpretation and application of substantive treaty provisions. Even where a treaty already embodies consent to compulsory arbitration, the parties must negotiate the organisation of the proceedings in good faith – an obligation they often fail to discharge, treating the stage as a mere formality before referring a case to the Court. In its more recent cases, the Court has applied a relatively low threshold when assessing whether attempts to constitute an arbitral tribunal were sufficiently thorough and made in good faith. One or more exchanges of proposals concerning the tribunal's establishment, made before the expiry of the six-month or other defined period, may be treated as sufficient<sup>59</sup>.

A clear example is Questions relating to the Obligation to prosecute or extradite. Belgium requested the respondent to organise an arbitration under Art. 30 of the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment<sup>60</sup>, but put forward no detailed proposals concerning the issues to be submitted or the organisation of the proceedings. Nevertheless, the Court held that the precondition (that «the parties are unable to agree on the organisation of the arbitration») had been met<sup>61</sup>. Senegal's failure to signal any readiness to proceed was, in the Court's view, sufficient to satisfy it<sup>62</sup>.

This interpretation of the obligation to negotiate the organisation of the arbitration has indirectly opened the way to various forms of manipulation by applicants in later cases seeking to avoid substantive discussion of the practical arrangements for constituting an arbitral tribunal. There is no need, and no legal basis, to wait for an official reply on whether arbitration is acceptable before submitting concrete proposals on the consti-

tution of the tribunal and other procedural aspects of the arbitration. To do so may mislead the other party as to the nature of the arbitral obligations already assumed. Article 30 of the Convention against torture is clear in providing for compulsory arbitration: the dispute is to be referred to arbitration «at the request of one of the states parties», not by mutual consent<sup>63</sup> [28; 29, p. 573]. At the same time, however, the Convention provides no institutional framework for the arbitration, whether as regards the constitution of the tribunal or the applicable procedure. A request to organise arbitration should therefore, above all, contain concrete procedural proposals, if the applicant is acting in good faith, the request cannot be reduced to a mere inquiry into the other party's willingness to arbitrate. Similar provisions appear in many other treaties.

Various model arbitral rules, optional arbitral rules, and treaty provisions on international arbitral procedure provide guidance for negotiations on the organisation of arbitration. Particularly important are chapters I–IV of Part IV of the Convention for the pacific settlement of international disputes (the 1907 Hague convention)<sup>64</sup>, chapter III of the Revised general act for the pacific settlement of international disputes<sup>65</sup>, the Model rules on arbitral procedure prepared by the international law commission and recommended for use by UN General Assembly resolution 1262 (XIII)<sup>66</sup>, the 2012 Permanent Court of Arbitration arbitration rules<sup>67</sup>, and the 1992 Permanent Court of Arbitration optional rules for arbitrating disputes between two states<sup>68</sup>.

In light of these instruments, a fair and legally sound approach to the constitution of an arbitral tribunal should include: a formal request for arbitration by diplomatic note, referring to the specific treaty provision that makes arbitration a procedural precondition to seising

<sup>59</sup>Allegations of genocide under the Convention on the prevention and punishment of the crime of genocide (Ukraine v. Russian Federation) : Provisional measures, Order of 16 March 2022 // International Court of Justice : website. URL: <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ord-01-00-en.pdf> (date of access: 25.05.2026) ; Application of the International convention for the suppression of the financing of terrorism and of the International convention on the elimination of all forms of racial discrimination (Ukraine v. Russian Federation) : Judgement of 31 Jan. 2024 // Ibid. URL: <https://www.icj-cij.org/sites/default/files/case-related/166/166-20240131-jud-01-00-en.pdf> (date of access: 25.05.2026).

<sup>60</sup>Convention against torture and other cruel, inhuman or degrading treatment or punishment of 10 December 1984 // United Nations : website. URL: <https://treaties.un.org/doc/publication/unts/volume%201465/volume-1465-i-24841-english.pdf> (date of access: 30.05.2026).

<sup>61</sup>Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal) : Judgment of 20 July 2012 // International Court of Justice : website. URL: <https://www.icj-cij.org/sites/default/files/case-related/144/144-20120720-JUD-01-00-EN.pdf> (date of access: 28.05.2026).

<sup>62</sup>Ibid.

<sup>63</sup>Schlochauer H. J. Arbitration // Encyclopedia of public international law / R. Bernhardt (ed.). Amsterdam : North Holland, 1981. P. 13.

<sup>64</sup>Convention for the pacific settlement of international disputes of 18 October 1907 // Permanent Court of Arbitration : website. URL: <https://docs.pca-cpa.org/2016/01/bd7626f1-1907-convention-for-the-pacific-settlement-of-international-disputes.pdf> (date of access: 01.06.2026).

<sup>65</sup>Revised General act for the pacific settlement of international disputes of 28 April 1949 // United Nations : website. URL: <https://treaties.un.org/doc/Publication/UNTS/Volume%2071/volume-71-I-912-English.pdf> (date of access: 30.05.2026).

<sup>66</sup>Model rules on arbitral procedure recommended for use by UN General Assembly resolution 1262 (XIII) of 14 November 1958 // Ibid. URL: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/10\\_1\\_1958.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/10_1_1958.pdf) (date of access: 30.05.2026).

<sup>67</sup>Permanent Court of Arbitration arbitration rules // Permanent Court of Arbitration : website. URL: <https://docs.pca-cpa.org/2015/11/PCA-Arbitration-Rules-2012.pdf> (date of access: 30.05.2026).

<sup>68</sup>Permanent Court of Arbitration Optional rules for arbitrating disputes between two states // Ibid. URL: [https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitrating-Disputes-between-Two-States\\_1992.pdf](https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitrating-Disputes-between-Two-States_1992.pdf) (date of access: 30.05.2026).

the Court, a proposal for a workable arbitral framework, a reasonable period for the other party to reply and constructive negotiations on these matters.

A formal request for arbitration should, at a minimum, address the following: a statement of intention to submit the dispute to arbitration, the legal basis for arbitration, the subject matter of the dispute to be referred to arbitration, and an indication of the specific arbitral rules that the tribunal should follow (Art. 2(1) of the 1958 Model rules).

The compromis (arbitration agreement) may also specify the rules and principles of law to be applied by the tribunal, authority to make recommendations to the parties, authority for the tribunal to determine its own procedure, the time-limit for rendering the award, and other elements important to the effective conduct of arbitration (Art. 2(2) of the 1958 Model rules). This list is illustrative rather than exhaustive. The degree to which procedural issues are addressed in compromis will necessarily vary from case to case and depends on the parties' decision.

If the states cannot agree on the organisation of the arbitration, either party may bring a dispute before the Court or another competent international court or tribunal. The Court will ordinarily satisfy itself that attempts were made to negotiate the organisation of the arbitration and that the six-month period, or such other period as the treaty may prescribe, has elapsed, and will then treat the relevant precondition to its jurisdiction as fulfilled<sup>69</sup>. Even so, insufficient attention is often paid to whether the parties negotiated in good faith and properly discharged their obligations under the dispute-settlement clauses of the treaties by which they are bound.

In particular, where the parties to a treaty have accepted arbitration as a compulsory means of settling disputes over its application or interpretation – thereby incorporating an element of a compromise – but cannot agree on how to organise that arbitration, they should turn to the relevant provisions of the 1907 Hague convention, provided they are bound by this treaty. Under Art. 51 of the 1907 Hague Convention, the provisions of chapter III governing arbitral procedure then apply as between the states parties.

The difficulties discussed above are not confined to proceedings before the Court. They may also arise before other judicial and arbitral mechanisms, including those operating within the CIS and the EAEU.

For example, a dispute will not be entertained by the Court of the Eurasian Economic Union unless the applicant has first approached the member state or the Eurasian Economic Commission to settle the matter out of court through consultations, negotiations, or other permissible means. If the member state or the commission takes no steps to settle the matter within three months of receiving the applicant's request, the applicant may submit an application instituting proceedings to the Court (paras 43–44 of the Statute of the Court of the Eurasian Economic Union, annex No. 2 to the Treaty on the Eurasian Economic Union of 29 May 2014)<sup>70</sup>.

Likewise, most treaties and other international legal instruments recognising the jurisdiction of the CIS Economic Court require the parties, before seising that Court, to hold mutual consultations or negotiations concerning disputes over their interpretation or application – approximately 40 instruments in all<sup>71</sup>. These include important treaties for the development of economic cooperation, such as the Treaty on a free trade area of 18 October 2011 (Art. 19)<sup>72</sup> and the Agreement on free trade in services, establishment, operation and investment of 8 June 2023 (Art. 40)<sup>73</sup>.

Given these features of recourse to the CIS Economic Court and the Court of the EAEU, those courts, in determining their jurisdiction, should not only verify compliance with the treaty provisions on prior negotiations (or consultations), but also apply the international standards governing that requirement set out above.

The settlement of disputes between states, and of disputes involving states and foreign natural or legal persons – particularly those arising under international investment protection agreements and free trade agreements – also commonly entails a pre-adjudicatory phase of negotiations. Such treaties typically require negotiations or consultations as a preliminary step before the interested parties may proceed to arbitration or to international judicial or quasi-judicial bodies.

<sup>69</sup>Allegations of genocide under the Convention on the prevention and punishment of the crime of genocide (Ukraine v. Russian Federation) : Provisional measures, Order of 16 March 2022 // International Court of Justice : website. URL: <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ord-01-00-en.pdf> (date of access: 25.05.2026) ; Application of the International convention for the suppression of the financing of terrorism and of the International convention on the elimination of all forms of racial discrimination (Ukraine v. Russian Federation) : Judgement of 31 Jan. 2024 // Ibid. URL: <https://www.icj-cij.org/sites/default/files/case-related/166/166-20240131-jud-01-00-en.pdf> (date of access: 25.05.2026).

<sup>70</sup>Treaty on the Eurasian Economic Union of 29 May 2014 // United Nations : website. URL: [https://www.un.org/en/ga/sixth/70/docs/treaty\\_on\\_eeu.pdf](https://www.un.org/en/ga/sixth/70/docs/treaty_on_eeu.pdf) (date of access: 30.05.2026).

<sup>71</sup>List of treaties and other international legal acts containing the compromissory clauses on the jurisdiction of the Economic Court of the Commonwealth of Independent States // Economic Court of the Commonwealth of Independent States : website. URL: <https://sudsg.org/about/legal-activities/> (date of access: 29.05.2026) (in Russ.).

<sup>72</sup>Treaty on a free trade area of 18 October 2011 // Executive Committee of the Commonwealth of Independent States : website. URL: [https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Frtais.wto.org%2Frtadocs%2F762%2FTOA%2FEnglish%2FFTA%2520CIS\\_Text%2520with%2520protocols.docx&wdOrigin=BROWSELINK](https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Frtais.wto.org%2Frtadocs%2F762%2FTOA%2FEnglish%2FFTA%2520CIS_Text%2520with%2520protocols.docx&wdOrigin=BROWSELINK) (date of access: 30.05.2026).

<sup>73</sup>CIS Agreement on free trade in services, establishment, operation and investment of 8 June 2023 // World Trade Institute : website. URL: <https://edit.wti.org/document/show/71b83283-db70-4889-bf63-10613d5eee4e?text=BlockId=bff02b12-d355-4bde-8368-da52201ec012&page=1> (date of access: 29.05.2026).

Investment treaties usually establish a period of six or three months for attempts to settle the dispute before arbitration or recourse to domestic courts – the so-called cooling-off period. Thus, where an investment dispute is not resolved by negotiation or by other alternative means, the investor may submit it either to the competent court of the host state or to international investment arbitration [30, p. 387–388; 31, p. 50–52]. Investment arbitral tribunals constituted under the ICSID Convention (the Convention on the settlement of investment disputes between states and nationals of other states) have repeatedly addressed compliance with the precondition that the parties negotiate, or pursue some other means of settlement, for a prescribed period before an investor may submit a dispute to arbitration<sup>74</sup>.

In most cases, investment tribunals have treated observance of the six-month period for seeking settlement as a jurisdictional requirement rather than a merely procedural one. As the awards in *Goetz v. Burundi*<sup>75</sup> and *Enron and Ponderosa assets v. Argentine Republic*<sup>76</sup> show, the foreign investor must act in good faith during this period of engagement with the host state, including by giving proper notice of its intention to initiate investment arbitration.

Several general conclusions may be drawn from the foregoing analysis of negotiations, particularly in the context of disputes concerning the interpretation and application of treaties.

Among the various means of settling international disputes, negotiations remain an important instrument for resolving disagreements between states, as well as those between states and foreign natural and legal persons. They offer clear advantages to disputing parties: a prompt and flexible search for practical solutions, while minimising financial costs, reputational damage, and strain on bilateral relations. At the same time, negotiations are affected by broader international instability, the restructuring of international relations, and crises

within international law itself. These developments influence the good-faith attitude of disputing parties, and of international courts, tribunals, and other institutions, toward the negotiating process.

As international relations evolve and the international legal order develops, the role of negotiations among dispute-settlement mechanisms is also changing. Increasingly, negotiations serve as a preliminary mechanism for managing disagreements before they are submitted to international arbitral tribunals or courts. Yet this function is sometimes undermined by the formalistic attitude of some states toward negotiations.

International judicial and arbitral practices have developed criteria for the conduct of negotiations, intended to demonstrate a good-faith commitment to resolving disagreements, clarifying their content, and completing a preliminary step before recourse to international judicial bodies. Whether these criteria are observed depends largely on the firmness of the position those courts adopt – a question that bears both on the good-faith discharge of obligations to negotiate and to pursue other diplomatic means, and on the prior use of arbitration before resort to permanent courts. The situation would be balanced if international courts always insist on the strict observance of all preliminary conditions, including the conducting of prior negotiations, by parties to a dispute before initiating judicial proceedings. Disputing parties would then have additional incentives to settle disputes at an early stage through negotiations and other diplomatic means.

Any state that wishes to build fair and constructive relations with its partners (dealing with them as equals and within the bounds of international law) should aim above all to settle disagreements quickly, effectively, and without raising tensions. Direct negotiations serve this aim well, whether they accompany international judicial proceedings or stand on their own.

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<sup>74</sup>Convention on the settlement of investment disputes between states and nationals of other states of 18 March 1965 // United Nations : website. URL: <https://treaties.un.org/doc/Publication/UNTS/Volume%20575/volume-575-I-8359-English.pdf> (date of access: 25.05.2026).

<sup>75</sup>*Antoine Goetz and others v. Republic of Burundi* (ICSID Case No. ARB/95/3) : Award of 12 June 2012 // ICSID reports : website. URL: <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/01/2> (date of access: 25.05.2026).

<sup>76</sup>*Enron and Ponderosa assets v. Argentine Republic* (ICSID Case No. ARB/01/3, 2004) : Decision on jurisdiction of 14 Jan. 2004 // Ibid. URL: [https://icsid.worldbank.org/sites/default/files/parties\\_publications/C8394/Claimants%27%20documents/CL%20-%20Exhibits/CL-0117.pdf](https://icsid.worldbank.org/sites/default/files/parties_publications/C8394/Claimants%27%20documents/CL%20-%20Exhibits/CL-0117.pdf) (date of access: 26.05.2026).

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