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The Obligation of Peaceful Settlement of International Disputes

Status, Nature, Content, and Scope

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1.1 INTRODUCTION

As sovereign entities in pursuit of their domestic and foreign policy objectives, States invariably fall into dispute. The existence of disputes is not in and by itself a weakness of the international society – in fact, disputes can be an indicator of a vibrant, energetic, and healthy society.[1] That said, disputes run the risk of disrupting international relations and creating threats to international peace and security.[2] What is critical is that the international society puts in place measures, mechanisms, and means to ensure that disputes are resolved peacefully. Indeed, where disputes are settled peacefully this can be a driver of positive change within the international society, for example, by forging a closer sense of community between its members and by developing new norms and rules that set acceptable standards of behaviour.[3]

In order to maintain international peace and security, States have developed a range of political and legal methods to facilitate the peaceful settlement of their disputes, including negotiation, conciliation, mediation,

[1] John G. Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (Oxford: Oxford University Press, 2000), pp. 1–2.

[2] As an arbitral tribunal explained, it is 'essential to the well-being of the community of nations' that the parties to a dispute resolve it peacefully; *Case Concerning Claims Arising out of Decision of the Mixed Graeco-German Arbitral Tribunal Set Up under Article 304 in Part X of the Treaty of Versailles (Greece* v. *Germany)* (1972) 19 RIAA 25, para. 62.

[3] See Manfred Lachs, 'Some reflections on the settlement of international disputes' (1974) 68 ASIL Proc 323–31 at 324.

and arbitration, among others.[4] One of the cornerstones of this system is the obligation to settle disputes peacefully.[5]

The scholarship on peaceful dispute settlement has traditionally adopted an 'institutional' approach to the subject,[6] with its focus being on the *means and methods* that can be used to settle disputes rather than on the *substance* of the peaceful settlement obligation itself. The reason for this is because the obligation to settle disputes peacefully is usually seen as the flip side of the prohibition on the threat or use of force,[7] meaning that the peaceful settlement obligation does no more than require States to refrain from the threat or use of force when seeking to resolve disputes. By effectively flattening the obligation to settle disputes peacefully into a reiteration of the duty to avoid force in international relations, this approach precludes an in-depth investigation into the content of the obligation of peaceful dispute settlement as an autonomous rule of international law.

This chapter rejects the conflation of the principles of non-use of force and peaceful dispute settlement and separates them out by examining the status, nature, content, scope, and consequences of the latter. In doing so, this chapter adheres to the following structure: Section 1.2 traces the emergence of the obligation of peaceful dispute settlement under international law and establishes its status as a binding rule of treaty and customary law. Section 1.3 examines the conditions for the engagement of the obligation to settle disputes peacefully. Section 1.4 explores what measures disputants must take in order to discharge their obligation to settle disputes peacefully. This section argues that the obligation of peaceful dispute settlement is dynamic in nature and, as such, the conduct it requires from disputing parties varies depending on the circumstances of each case. This section also shows that the obligation operates as an interstitial norm insofar as it influences the interpretation and application of other rules of international law relevant to the peaceful settlement of disputes. Section 1.5 offers some concluding remarks on the utility of

[4] As Sohn explains, 'adequate means for settling international disputes are indispensable for the maintenance of international peace and security'; Louis B. Sohn, 'Peaceful settlement of disputes and international security' (1987) 3 Negot J 155–66 at 155.

[5] Robert Barnidge, 'The international law as a means of negotiation settlement' (2013) 36 Fordham Int'l L J 545–74 at 546.

[6] See Eric De Brabandere, *Merrills' International Dispute Settlement*, 7th ed. (Cambridge: Cambridge University Press, 2022), preface; Duncan B. Hollis and Eneken Tikk, 'Peaceful settlement and international law: A *jus ad pacem*', Temple University Legal Studies Research Paper No. 2021-37, 2021, https://dx.doi.org/10.2139/ssrn.3908182 (accessed 27 September 2022), 30.

[7] E.g., Alain Pellet, 'Peaceful settlement of international disputes', in Anne Peters (ed.), *Max Planck Encyclopaedia of International Law* (Oxford: Oxford University Press, 2013), para. 5.

the obligation of peaceful dispute settlement in contemporary international relations.

1.2 THE OBLIGATION OF PEACEFUL DISPUTE SETTLEMENT: HISTORY AND STATUS

The obligation of peaceful dispute settlement has a long history in international law and can be traced back at least as far as the 1899 Hague Convention on the Peaceful Settlement of Disputes.[8] This Convention requires State parties 'to use their best efforts to insure the pacific settlement of international differences'[9] and identifies a range of methods they can use to help settle their disputes peacefully, including good offices, commissions of inquiry, mediation, and arbitration.[10]

The obligation of peaceful dispute settlement has been confirmed in numerous treaties since the adoption of the Hague Convention in 1899.[11] Given its (almost) universal membership, the United Nations (UN) is most significant in this regard. Article 1 of the Charter sets out the UN's overarching aims and objectives and, according to Article 1(1), one of its main purposes is to

> maintain international peace and security, and to that end ... to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[12]

While Article 1 identifies the UN's purposes, Article 2 enumerates its guiding principles and, with a view to maintaining international peace and security, Article 2(3) of the Charter provides that 'all Member States shall settle their

[8] Although Hollis and Tikk claim that the obligation of peaceful dispute settlement has its origins in the Treaty of Westphalia of 1648; Hollis and Tikk, 'Peaceful settlement and international law', 10.

[9] Art 1 of the Hague Convention on the Pacific Settlement of International Disputes, The Hague, 29 July 1899, in force 4 September 1900.

[10] Ibid., Arts 2, 9, and 15.

[11] See, e.g., Art 1 of the Hague Convention on the Pacific Settlement of International Disputes, The Hague, 18 October 1907, in force 26 January 1910, (1907) 205 CTS 277; Art 13 of the Covenant of the League of Nations, Versailles, 28 June 1919, in force 10 January 1920, (1919) 225 CTS 195; Art III(g)–(i) of the Charter of the Organization of American States, Bogota, 20 April 1948, in force 13 December 1951, 119 UNTS 3; Art 1 of the Warsaw Treaty of Friendship, Cooperation, and Mutual Assistance, Warsaw, 14 May 1955, in force 6 June 1955, 219 UNTS 3 (the Warsaw Pact); Art XIX of the Charter of the Organization of African Unity, Addis Ababa, 25 May 1963, in force 13 September 1963, 479 UNTS 39.

[12] See further Leland M. Goodrich, 'Pacific settlement of disputes' (1945) 39 Am Pol Sc Rev 956–70 at 956.

international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'.

Article 2(3) is framed in binding terms: by using the imperative 'shall', UN members must settle their disputes peacefully as a matter of international law.[13] Article 33(1) of the UN Charter – located in Chapter VI titled 'Pacific Settlement of Disputes' – reaffirms the obligation upon member States to settle their disputes peacefully (again, note Article 33(1)'s use of the imperative 'shall') and provides a list of political and legal methods they can use to help realise this objective.[14] Article 33(1) therefore 'complements'[15] Article 2(3) and reads:

> 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.

Depending on the extent of their obligations under international law, States may be compelled to participate in certain forms of dispute settlement – for example, States may accept the jurisdiction of the International Court of Justice (ICJ) under Article 36(2) of the Statute of the ICJ, or incorporate a compromissory clause within a treaty that grants the ICJ jurisdiction in relation to disputes emerging under that agreement. However, absent such a rule of international law, a corollary of the principle of the sovereign equality of States is the principle of free choice of means, which means that States are free to decide for themselves which peaceful means and methods to use to settle their disputes or, put differently, States cannot be compelled to participate in a dispute settlement process unless they have given their consent.[16]

[13] Pellet explains that the obligation of peaceful dispute settlement contained in Arts 2(3) and 33(1) of the Charter of the United Nations (San Francisco, 26 June 1945, in force 24 October 1945, 1 UNTS 16) is 'indisputably a legally binding obligation'; Pellet, 'Peaceful settlement of international disputes', para. 2.

[14] On the distinction between diplomatic and legal means, see Anne Peters, 'International dispute settlement: A network of cooperational duties' (2003) 14 EJIL 1–34 at 4.

[15] David D. Caron and Christian Tomuschat, 'Article 2, para. 3 UN Charter', in Andreas Zimmermann et al. (eds.), *The Statute of the International Court of Justice* (Oxford: Oxford University Press, 2019), p. 125.

[16] *Status of Eastern Carelia* (Advisory Opinion) [1923] PCIJ Rep. Series B No. 5 at 27; *Fisheries Jurisdiction (Spain* v. *Canada)* (Jurisdiction, Judgment) [1998] ICJ Rep. 432 at para. 56; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile)* (Judgment) [2018] ICJ Rep. 507 at para. 165. See also UNGA, 'Declaration on principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations' (24 October 1970) UN Doc. A/RES/2625(XXV) (the Friendly Relations

In fact, the methods listed in Article 33(1) are not exhaustive, with this provision explaining that States can settle their disputes through 'other peaceful means of their own choice'. For instance, States often use good offices to help resolve their disputes and, while this method is not mentioned in Article 33(1), it is referred to in the 1899 Hague Convention and the UN General Assembly's (UNGA) Manila Declaration. States can also combine methods and create bespoke processes aimed at settling their disputes.[17] Under Article 37 of the UN Charter, if States are unable to settle a dispute by peaceful means, they must refer it to the UN Security Council (UNSC).

The obligation of peaceful dispute settlement has undoubtedly acquired the status of customary international law.[18] This status is supported by the near-universal membership of the UN Charter,[19] together with the fact that the obligation is embedded in a number of successive treaties.[20] The customary law status of the obligation is also confirmed by its inclusion

Declaration, or FRD), para 5; UNGA, 'Manila declaration on the peaceful settlement of international disputes' (15 November 1982) UN Doc. A/RES/37/10 (the Manila Declaration), para. 3; Art 3 of the American Treaty on Pacific Settlement, Bogota, 30 April 1948, in force 6 May 1949, 30 UNTS 55 (the Pact of Bogota); and Art 280 of the Convention on the Law of the Sea referring to United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS 397 (UNCLOS).

[17] Joe Verhoeven, *Droit International Public* (Brussels: Larcier, 2000), p. 696.

[18] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (Merits, Judgment) [1986] ICJ Rep. 14 at para. 290. See also *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand)* (Judgment) [2013] ICJ Rep. 281 at paras 105–6.

[19] The ICJ has explained that the 'very widespread and representative participation' in a treaty can be evidence of its customary law character; *North Sea Continental Shelf (Federal Republic of Germany* v. *Denmark; Federal Republic of Germany* v. *Netherlands)* (Judgment) [1969] ICJ Rep. 3 at para. 73; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep. 226 at para. 82 (citing 'the extent of the accession' to the Hague and Geneva Treaties as confirming their customary international law status); ILC, 'Draft conclusions on identification of customary international law, with commentaries', in *Yearbook of the International Law Commission. 2018, Volume II, Part Two: Report of the Commission to the General Assembly on the Work of Its Seventieth Session* (New York: UN, 2018), Draft Conclusion 11, commentary, para. 3 ("The number of parties to a treaty may be an important factor in determining whether particular rules set forth therein reflect customary international law; treaties that have obtained near-universal acceptance may be seen as particularly indicative in this respect').

[20] 'In some cases it may be that frequent repetition in widely accepted treaties evinces a recognition by the international community as a whole that a rule is one of general, and not just particular, law'; ILA, *Committee on Formation of Customary (General) International Law: Final Report* (London: International Law Association, 2000), Rule 25, commentary, para. 5. See also Institut de Droit International, 'Problems arising from a succession of codification conventions on a particular subject', 1 September 1995, www.idi-iil.org/app/uploads/2017/06/1995_lis_01_en.pdf (accessed 28 September 2022), Rule 12; UNGA Res. 73/203 (20 December 2018) UN Doc. A/RES/73/203 (the ILC's 'Identification of customary international

in multiple resolutions of the UNSC[21] and declarations of the UNGA.[22] Importantly, the obligation of peaceful dispute settlement is contained in the 1970 Friendly Relations Declaration (FRD),[23] whose adoption by the UNGA without the need for a vote 'may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves'.[24] The FRD explains:

> Every State shall settle its international disputes with other States by peaceful means in such a manner that international peace and justice are not endangered.
>
> States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute.

Additionally, the UNGA adopted the Manila Declaration on the Peaceful Settlement of International Disputes in 1982, which was also adopted without the need for a vote.[25] This Declaration explains that

law'), Conclusion 11(2); Yoram Dinstein, 'The interaction between customary international law and treaties' (2006) 322 Recueil des Cours 242–428 at 299–300.

[21] See, e.g., UNSC Res. 1318 (7 September 2000) UN Doc. S/RES/1318; UNSC Res. 1366 (30 August 2001) UN Doc. S/RES/1366; UNSC Res. 1809 (6 April 2008) UN Doc. S/RES/1809.

[22] See, e.g., the FRD; Manila Declaration; UNGA Res. 40/9 (6 November 1985) UN Doc. A/RES/40/9; UNGA Res. 43/51 (5 December 1988) UN Doc. A/RES/43/51; UNGA Res. 46/59 (9 December 1991) UN Doc. A/RES/46/59; UNGA Res. 47/120 (18 December 1992) UN Doc. A/RES/47/120; UNGA Res. 57/26 (19 November 2002) UN Doc. A/RES 57/26; UNGA, '2005 World Summit Outcome' (24 October 2005) UN Doc. A/RES/60/1; and UNGA Res. 67/1 (30 November 2012) UN Doc. A/RES/67/1. In the cyber context, in separate UN processes, States have affirmed that they 'shall seek the settlement of disputes by peaceful means such as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, and resort to regional agencies or arrangements, or other peaceful means of their own choice'; UNGA, 'Open ended working group on developments in the field of information and telecommunications in the context of international security: Final substantive report' (10 March 2021) UN Doc. A/AC.290/2021.CRP.2, para. 35. In 2021, a UN Group of Governmental Experts confirmed that international law applies to cyberspace, including the principle of the 'settlement of international disputes by peaceful means in such a manner that international peace and security and justice are not endangered'; UNGA, 'Report of the Group of Governmental Experts on advancing responsible State behaviour in cyberspace in the context of international security' (14 July 2021) UN Doc. A/76/135, para. 69.

[23] UNGA, 'Declaration on principles of international law concerning friendly relations' (the FRD).

[24] *Nicaragua* v. *United States of America*, para. 188.

[25] 'The [Manila] *Declaration* has since become a normative benchmark, with repeated subsequent calls by the UNGA for Member States to observe its terms'; Hollis and Tikk, 'Peaceful settlement and international law', 14.

> States shall seek in good faith and in a spirit of cooperation an early and equitable settlement of their international disputes …. In seeking such a settlement, the parties shall agree on such peaceful means as may be appropriate to the circumstances and the nature.

The international society has developed a sophisticated system of peaceful dispute settlement that comprises a dense patchwork of principles, rules, procedures, and institutions. The obligation of peaceful dispute settlement is a critically important feature of this system and, while it represents an ontologically distinct obligation under international law, it sits alongside other international legal rules that work together to ensure the maintenance of international peace and security.[26] Take, for example, the principles of non-intervention and non-use of force. The principle of non-intervention is 'part and parcel of customary international law' and prohibits States from coercively intervening in the *domaine réservé* of other States.[27] The principle of non-use of force prohibits States from engaging in acts of violence (and threats thereof) against other States and is embedded in a number of treaties as well as customary law.[28] Most notably, this principle is enshrined in Article 2(4) of the UN Charter, which reads:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Action amounting to a breach of the non-intervention and non-use of force principles may also constitute a breach of the obligation of peaceful dispute settlement on the basis that it involves the use of a non-peaceful means to resolve a dispute.[29] Importantly, however, the obligation of peaceful dispute settlement goes beyond prohibiting the use of non-peaceful means to resolve disputes and imposes an 'affirmative duty' on States to work together to find a peaceful means to settle their disputes.[30] This was recognised by the ICJ in the

[26] How these principles interact with each other will be addressed in Section 1.4.

[27] *Nicaragua* v. *United States of America*, para. 202.

[28] Ibid., para. 34.

[29] 'Any measure taken in violation of the principle of non-use of force qualifies as non-peaceful and therefore contrary to Art. 2 para 3. Actions infringing Art. 2 para 4 UN Charter infringe at the same time Art. 2 para 3'; Caron and Tomuschat, 'Article 2, para. 3', 131. See also Pellet, 'Peaceful settlement of international disputes', para. 4.

[30] '[The obligation contained in Article 2(3) of the UN Charter] extends beyond a requirement not to settle disputes through force – the point of Article 2(4). Rather, it represents an affirmative duty (though one of conduct, not result) to settle their dispute in a certain manner';

Nicaragua judgment when it held that the obligation to settle disputes peacefully is 'complementary to the principles of a prohibitive nature' found in international law such as the principles of non-intervention and non-use of force.[31] Yet, to determine the content of the obligation of peaceful dispute settlement, it is first necessary to investigate the conditions for its engagement. The next section turns to this issue.

1.3 CONDITIONS FOR THE ENGAGEMENT OF THE OBLIGATION OF PEACEFUL DISPUTE SETTLEMENT

Establishing the conditions for the engagement of the obligation of peaceful dispute settlement entails answering three questions: (1) when does a dispute come into existence; (2) whether a dispute should present certain features to engage the obligation; and (3) what parties are subject to the obligation. Each issue is addressed in turn.

1.3.1 *Existence of a Dispute*

The existence of a dispute is the trigger of the obligation of peaceful dispute settlement.[32] Yet, there is considerable uncertainty regarding what situations qualify as a 'dispute', or even whether a unitary definition of 'dispute' exists in international law.[33] The term 'dispute' appears in several international conventions and is not used consistently.[34] Indeed, the notion of a dispute may have different implications depending on the purpose for which it is sought.

Steven Ratner, 'The aggravating duty of non-aggravation' (2020) 31 EJIL 1307–42 at 1310. See also Caron and Tomuschat, 'Article 2, para. 3', 126.

[31] *Nicaragua* v. *United States of America*, para. 290. 'The principle of the peaceful settlement of international disputes is linked to various other principles of international law [such as non-intervention and non-use of force] … [These principles] are interrelated in their interpretation and application and each principle should be construed in the context of other principles'; UN OLA, *Handbook on the Peaceful Settlement of Disputes between States* (New York: UN, 1992), p. 4.

[32] Hollis and Tikk, 'Peaceful settlement and international law', 18.

[33] Paolo Palchetti, 'Dispute', in Anne Peters (ed.), *Max Planck Encyclopaedia of International Law* (Oxford: Oxford University Press, 2018), para. 10.

[34] E.g., 'a dispute … under Article 60 of the Statute … does not need to satisfy the same criteria as would a dispute … as referred to in Article 36, paragraph 2': *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico* v. *United States of America)* (Provisional Measures) [2008] ICJ Rep. 3 at para. 53. It may also be noted that, while the English text of the ICJ Statute (Statute of the International Court of Justice, San Francisco, 26 June 1945, in force 24 October 1945, 33 UNTS 993) uses the unitary term 'disputes', the French text uses several terms, such as 'conflits' (Art 4), 'différends' (Art 36(2)), 'contestation' (Art 60).

The existence of a dispute is often the precondition for the exercise of jurisdiction by an international court or tribunal.[35] In this regard, most international courts and tribunals define disputes by reference to the *Mavrommatis* case, where the Permanent Court of International Justice (PCIJ) held that a dispute is 'a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons'.[36] It is questionable, however, whether this definition is satisfactory for the purpose of the obligation of peaceful settlement. First, international courts and tribunals are only ever concerned with 'justiciable' disputes, that is, disputes that 'can be resolved by the application of rules of law by judicial (including arbitral) processes'.[37] Second, the *Mavrommatis* definition is formulated in such general terms that, at best, it provides very little guidance when it comes to identifying specific disputes and, at worst, it may be overinclusive.[38] Indeed, the ICJ, followed by

[35] See Palchetti, 'Dispute', para. 2. For instance, the jurisdiction of a court may be limited to disputes arising only after a certain date; see, e.g., *Phosphates in Morocco (Italy* v. *France)* (Preliminary Objections, Judgment) [1938] PCIJ Rep. Series A/B No. 74; *Electricity Company of Sofia and Bulgaria (Belgium* v. *Bulgaria)* (Preliminary Objections, Judgment) [1939] PCIJ Rep. Series A/B No. 77; *Right of Passage over Indian Territory (Portugal* v. *India)* (Merits, Judgment) [1960] ICJ Rep. 6.

[36] *Mavrommatis Palestine Concessions (Greece* v. *Great Britain)* (Judgment) [1924] PCIJ Rep. Series A No. 2 at 11. For references to this case by other courts, see, e.g., *Right of Passage over Indian Territory*, 34; *South West Africa Cases (Ethiopia* v. *South Africa; Liberia* v. *South Africa)* (Preliminary Objections, Judgment) [1962] ICJ Rep. 319 at 328; *Southern Bluefin Tuna Cases (New Zealand* v. *Japan; Australia* v. *Japan)* (Provisional Measures, Order of 27 August 1999) ITLOS Reports 1999, 280 at 293; *M/V 'Norstar' Case (Panama* v. *Italy)* (Preliminary Objections, Judgment of 4 November 2016) ITLOS 2016, 44; *Republic of Ecuador* v. *United States of America* (Award of 29 September 2012) PCA Case No. 2012-5 at para. 212. See, most recently, ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation)* (Request for the Indication of Provisional Measures, Order), 16 March 2022, www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf (accessed 29 September 2022) at para. 28. See also Michael Waibel, '*Mavrommatis Palestine Concessions (Greece* v *Great Britain)* (1924–27)', in Eirik Bjorge and Cameron Miles (eds.), *Landmark Cases in Public International Law* (Oxford: Hart, 2017), p. 56.

[37] Collier and Lowe, *Settlement of Disputes*, 10. See also Christoph Schreuer, 'What is a legal dispute?', in Isabelle Buffard et al. (eds.), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Leiden: Martinus Nijhoff, 2008), p. 965.

[38] For instance, it can be questioned whether a conflict of interests with no tangible effects on the conduct of the parties qualifies as a dispute. See Gerhard Hafner, 'The physiognomy of disputes and the appropriate means to resolve them', in United Nations (ed.), *International Law as a Language for International Relations. Proceedings of the United Nations Congress on Public International Law* (The Hague: Kluwer Law, 1995), pp. 560, 567; Yoshifumi Tanaka, *The Peaceful Settlement of International Disputes* (Cambridge: Cambridge University Press, 2021), p. 8. See also Robert Y. Jennings, 'Reflections on the term "dispute"', in Ronald St. J. Macdonald (ed.), *Essays in Honour of Wang Tieya* (Leiden: Brill, 1993), p. 402; Sienho Yee,

other international courts and tribunals,[39] has added several qualifications to this definition, stating in particular that a dispute comes into existence when 'the claim of one party is positively opposed by the other',[40] and that this 'opposition' may 'be inferred from the failure of a State to respond to a claim in circumstances where a response is called for'.[41]

These qualifications are also helpful when establishing the existence of a dispute for the purpose of the obligation of peaceful settlement, in that they shift the focus from the 'conflict of views or interests' (in itself a subjective condition) to the *externalisation* of such conflict through the conduct of the parties (which is capable of objective determination[42]). This notion was best captured by Judge Morelli, who described the essence of a dispute as the 'contrast between the respective attitudes of the parties in relation to a certain conflict of interests'.[43] To be more precise, Judge Morelli found that the existence of a dispute requires 'a manifestation of the will, at least of one of the parties, consisting in the making of a claim or of a protest'.[44] The opposition to this manifestation of will may take the form of a (counter-) claim, in which one party rejects the claim(s) put forward by the other party. It may also be inferred from the conduct of one party, so long as it is incompatible with the claim(s) advanced by the other parties.[45]

'Article 40', in Andreas Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd ed. (Oxford: Oxford University Press, 2019), p. 1047.

[39] E.g., *Texaco* v. *Libya* (Preliminary Award of 27 November 1975) (1979) 53 ILR 389 at 416; *Southern Bluefin Tuna Cases*, para. 44; *Impregilo S.p.A.* v. *Islamic Republic of Pakistan* (Decision on Jurisdiction of 22 April 2005) ICSID ARB/03/3 at para. 302.

[40] *South West Africa Cases*, 328.

[41] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)* (Preliminary Objections, Judgment) [2011] ICJ Rep. 70 at para. 30. See also *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea Intervening)* (Preliminary Objections, Judgment) [1998] ICJ Rep. 315 at para. 89. Similarly, emphasis on the lack of response by a party to the claims of the other has been placed by investment tribunals; see, e.g., *Tradex Hellas S.A.* v. *Republic of Albania* (Decision on Jurisdiction of 24 December 1996) ICSID ARB/94/2 at 68–69; *Asian Agricultural Products Limited* v. *Republic of Sri Lanka* (Award of 27 June 1990) ICSID ARB/87/3 at 251.

[42] The ICJ has reiterated time and again that the existence of a dispute must be established objectively; see, e.g., *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion) (First Phase) [1950] ICJ Rep. 65 at 74.

[43] *South West Africa Cases*, 567 (Dissenting Opinion of Judge Morelli).

[44] Ibid.

[45] See Gaetano Morelli, 'Nozione ed elementi constitutivi della controversia internazionale' (1960) 43 Rivista di diritto internazionale 405–26 at 406–9; *South West Africa Cases*, 567 (Dissenting Opinion of Judge Morelli); *Case Concerning the Northern Cameroons (Cameroon* v. *United Kingdom)* (Judgment) [1963] ICJ Rep. 15 at 133 (Separate Opinion of Judge Morelli).

The claims of (at least one of) the parties are thus an essential element for the establishment of a dispute. Through their claims, the parties control not only the moment at which the conflict of views or interests materialises but also, depending on the type of arguments used to support them, the content and nature of the dispute.[46] For instance, the use of 'moral' or 'historical' arguments will maintain the dispute in the 'political' sphere, but the move towards 'legal' arguments by one of the parties will give rise to a 'legal' dispute. Whether this has an impact on the engagement of the obligation of peaceful settlement will be explored in Section 1.3.2. For now, it is worth noting that, if the claims of the parties determine the existence and content of a dispute, some communications between the parties seem to be a necessary precondition for the emergence of a dispute (and thus for the engagement of the obligation of peaceful settlement). As Schreuer puts it, 'the matter must have been taken up with the other party, which must have opposed the claimant's position if only indirectly'.[47] At the same time, this should not imply that a particular 'threshold' of communications must be reached before it can be said that a dispute has arisen. In this regard, the ICJ has sparked debate – and criticism[48] – with its decision in the *Nuclear Arms and Disarmament* cases, where it held that 'a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were "positively opposed" by the applicant' and that this must have occurred 'at the time of their submission' to the Court.[49] Yet, the emphasis the ICJ placed on the time of the submission suggests that the Court was preoccupied not so much with disputes *tout court* but with specific disputes subject to the jurisdiction of the Court.[50]

[46] Schreuer, 'What is a legal dispute?', 978.

[47] Ibid., 962.

[48] *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom)* (Preliminary Objections, Judgment) [2016] ICJ Rep. 833 at 866, paras 21–22 (Dissenting Opinion of Judge Yusuf); and 1093, para. 1 (Dissenting Opinion of Judge Crawford); Beatrice I. Bonafé, 'Establishing the existence of a dispute before the International Court of Justice: Drawbacks and implications' (2017) 45 Quest Int'l L 3–32 at 19; Tullio Treves, 'Litigating global crises: What role for international courts and tribunals in the management of climate change, mass migration and pandemics?' (2021) 85 Quest Int'l L 5–15 at 12. See also contributions to the 'Symposium on the *Marshall Islands* case' (2017) 111 AJIL Unbound 62–102. For a defence of the court's position, see Hugh Thirlway, 'Establishing the existence of a dispute: A response to Professor Bonafé's criticisms of the ICJ' (2017) 45 Quest Int'l L 53–63 at 55.

[49] *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race*, paras 41–43.

[50] See Bonafé, 'Establishing the existence of a dispute', 16 ('the awareness requirement is not so much about the existence of the dispute but rather about the intention of the applicant to seize the Court').

The existence of a dispute as the trigger of the obligation of peaceful dispute settlement is a different issue compared to its suitability for adjudication by international courts and tribunals. The externalisation of a conflict of views or interests through the claims of one of the parties is sufficient to give rise to a dispute so long as these claims are incompatible with the claims or conduct of the other party.[51] Such claims can be made in several ways and require no formalities;[52] they can be raised through diplomatic exchanges but also through more informal means of communication between the parties.[53] A parallel can be drawn between the dynamics by which a dispute arises and the means by which a State can invoke the responsibility of another State for internationally wrongful acts. As the International Law Commission (ILC) has highlighted, the invocation of responsibility may occur through 'diplomatic contacts ... [which] involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent international tribunal, or even the taking of countermeasures'.[54] Indeed, with the exception of the *Nuclear Arms and Disarmament* cases, international courts and tribunals have rarely, if ever, declined jurisdiction on the basis of the non-existence of a dispute, particularly if, 'at the latest by the date when the Court decides on its jurisdiction', the applicant would be entitled 'to bring fresh proceedings'.[55]

[51] According to the PCIJ, 'a difference of opinion does exist as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views': *Certain German Interests in Polish Upper Silesia (Germany* v. *Poland)* (Preliminary Objections, Judgment of 25 August 1925) PCIJ Rep. Series A No. 6 at 14.

[52] See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, para. 30: 'the matter is one of substance, not of form'; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)* (Preliminary Objections, Judgment) [2016] ICJ Rep. 32 at para. 72: 'a formal diplomatic protest' is not required. See also *Channel Tunnel Group Limited and France-Manche SA.* v. *United Kingdom and France* (Partial Award of 30 January 2007) (2008) 132 ILR 1 at para. 142: 'international tribunals have been willing to discern a dispute from general exchanges of correspondence manifesting a difference of view without requiring the claim to have been made out with any particularity'.

[53] See e.g., *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)* (Preliminary Objections, Judgment) [1992] ICJ Rep. 240 at para. 36.

[54] The ILC's *Articles on State Responsibility for Internationally Wrongful Acts, with Commentaries*, contained in 'Draft articles on responsibility of states for internationally wrongful acts', in *Yearbook of the International Law Commission. 2001, Volume II, Part Two: Report of the Commission to the General Assembly on the Work of Its Fifty-Third Session* (New York: UN, 2008), p. 117, commentary to Art 42, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

[55] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* (Preliminary Objections, Judgment) [2008] ICJ Rep. 412 at para. 85. See also Thirlway, 'Establishing the existence of a dispute', 62 ('the existing proceedings would

This is not to say that communications between the parties are not necessary for the settlement of a dispute. However, the extent to which the parties should engage in exchanges to fulfil the obligation of peaceful settlement is a separate issue, which pertains to the content of the obligation.[56] As far as the engagement of the obligation is concerned, once a dispute has come into existence, what remains to be asked is whether such a dispute should possess certain features to give rise to the obligation of peaceful settlement. The next subsection turns to this.

1.3.2 *Character of the Dispute*

As Merrills stated, 'international disputes can be about almost anything'.[57] It may thus be asked whether all disputes trigger the obligation of peaceful settlement or whether the latter should be reserved only for certain classes of disputes. In this regard, it is important to recall the function the obligation of peaceful dispute settlement serves under the UN Charter and general international law. The premise is that disputes, if left unchecked, may cause friction in international relations and have the potential to escalate, thereby threatening international peace and security. As will be further explored below, the obligation of peaceful dispute settlement aims at reducing this risk by compelling the States to 'manage' their disputes and ensure these do not spiral out of control. Although the potential for escalation may be very different in practice, in principle all disputes present such a risk. Thus, Article 33 of the UN Charter mandates member States to seek a solution to a dispute 'the continuance of which is likely to endanger the maintenance of international peace and security'. To be sure, other provisions in the UN Charter appear to add qualifications to the obligation. In particular, Article 2 (3) restricts the obligation of peaceful settlement to 'international disputes'. This provision must be read in conjunction with Article 2(7), which provides that member States are not required to submit to settlement 'matters which are essentially within the[ir] domestic jurisdiction'. The obligation of peaceful dispute settlement is thereby limited to disputes that are

have created the necessary "awareness" in the respondent'). See also *Certain Polish Interests in Polish Upper Silesia*, 14: 'Even if, under Article 23, the existence of a definite dispute were necessary, this condition could at any time be fulfilled by means of unilateral action on the part of the applicant Party'. For similar statements in arbitral practice, see Schreuer, 'What is a legal dispute?', 978.

[56] See further Section 1.4.

[57] John G. Merrills, 'The means of dispute settlement', in Malcolm D. Evans (ed.), *International Law*, 5th ed. (Oxford: Oxford University Press, 2018), p. 549.

'international' in the sense of not being 'purely internal'.[58] Yet, the scope of this limitation is not static; the very notion of essential domestic jurisdiction excluding the international character of a dispute has shrunk over time.[59] Domestic jurisdiction can only be defined in the negative as the area in which a State has not taken up international obligations.[60] This, coupled with the growing number of inward-looking norms (i.e. 'norms that aim to regulate State conduct within the domestic jurisdiction'[61]), means that several disputes once regarded as purely internal are now unquestionably international in character – with human rights disputes being the most visible example.

The existence of a dispute concerning matters that are regulated by international law is therefore necessary for the engagement of the obligation of peaceful dispute settlement. At the same time, this does not imply that the arguments of the parties must be based on international law, as suggested by Peters.[62] As discussed above, the claims of the parties are key to the characterisation of the dispute. If the parties use international law in support of their claims, the dispute will be unquestionably 'international' in character, thereby giving rise to the obligation of peaceful settlement. Similarly, the choice of using legal arguments – and even more so the choice of some legal arguments to the exclusion of others[63] – will have implications for the means available for its settlement. However, the risk of placing too much emphasis on the arguments used by the parties is to limit the obligation to legal disputes, ignoring those in which the parties rely on extra-legal (e.g. political, moral, historical) arguments.[64] Disputes of the latter kind, if left unchecked, may very well spiral out of control and threaten international peace and security as much as any legal dispute.[65] Thus, limiting the ambit of the obligation of

[58] Caron and Tomuschat, 'Article 2, para. 3', 130.

[59] Ibid., 130–1.

[60] *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion) [1923] PCIJ Rep. Series B No. 4 at 24: 'The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations.'

[61] Antonios Tzanakopoulos, 'Domestic courts in international law: The international judicial function of national courts' (2011) 34 Loy LA Int'l & Comp L Rev 133–68 at 138.

[62] Peters, 'International dispute settlement', 3.

[63] This is particularly relevant when the jurisdictional basis is narrow and covers only part of a broader dispute; see Callista Harris, 'Claims with an ulterior purpose: Characterising disputes concerning the "interpretation or application" of a treaty' (2019) 18 LPICT 279–99.

[64] The obligation of peaceful settlement is not limited to legal disputes: UNGA, '2005 World Summit Outcome', para. 73. See also Caron and Tomuschat, 'Article 2, para. 3', 131.

[65] Moreover, as Lauterpacht argued, 'all international disputes are, irrespective of their gravity, disputes of a legal character in the sense that, so long as the rule of law is recognized, they are capable of an answer by the application of legal rules'; see Hersch Lauterpacht, *The Function*

peaceful dispute settlement to specific classes of disputes seems unwarranted. If a dispute pertains to matters that are regulated by international law, the obligation of peaceful dispute settlement is triggered for the simple fact that the issue is one of international concern. Further qualifications may contribute to shaping the content of the obligation of peaceful dispute settlement by determining the steps that should be taken to fulfil it. For instance, Article 36 of the UN Charter provides that 'legal disputes' should as a general rule be referred to the ICJ, while Article 52 suggests that 'local disputes' may involve settlement through regional agencies or agreements. However, the content of the obligation should not be conflated with the conditions for its engagement. If the 'international' character of a dispute is not only a necessary but also a sufficient condition for the engagement of the obligation, the question is whether international dispute settlement exclusively concerns disputes among States,[66] or whether the ever-growing phenomenon of 'mixed' disputes involving State and non-State actors is also affecting the scope of the obligation. The next subsection turns to this.

1.3.3 *Subjects of the Obligation*

The PCIJ's definition of a dispute in the *Mavrommatis* case referred to 'a disagreement ... *between two persons*'.[67] This choice of words was almost certainly intended as a reference to 'international legal persons', which at the time equalled States.[68] This is reinforced by the fact that, under the system created by the 1899 Hague Convention, dispute settlement was essentially a matter of inter-State relations. Even disputes involving non-State actors acquired international relevance only to the extent that a State raised the issue against another State. Notably, the PCIJ held that 'by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own

of Law in the International Community, rev. ed. (Oxford: Oxford University Press, 1933/2011), p. 172. See also Hans Kelsen, *Peace through Law* (Chapel Hill: University of North Carolina, 1944), pp. 23–24.

[66] In this sense, see Christian Tomuschat, 'Article 2(3)', in Bruno Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed. (Oxford: Oxford University Press, 2012), p. 193.

[67] *Mavrommatis Palestine Concessions*, 11 (emphasis added).

[68] But see James Crawford, 'Continuity and discontinuity in international dispute settlement: An inaugural lecture' (2010) 1 JISD 3–24 at 9: 'Even in reliance on decisions from the period of classical dualism, the boundaries between the international and the national, the public and the private, turn out to be more permeable than it might have been thought'.

rights'.[69] In the following decades, States, acting as 'gatekeepers' of the international legal system,[70] have recognised limited forms of international legal personality over non-State actors, such as international organisations, individuals, and corporations.[71] In several instances, these actors have been granted direct access to international judicial bodies for the settlement of disputes that affect them, particularly in human rights and investment matters.[72] The 'proliferation'[73] of international courts and tribunals competent to settle disputes involving both States and non-State actors has led some to question whether 'international dispute settlement properly so-called' should be confined to cases involving States.[74] This question has an obvious impact on the extent to which the obligation of peaceful dispute settlement applies to State and non-State actors alike.

The starting point is that the obligation of peaceful dispute settlement is first and foremost an obligation binding on States. While instruments such as the 1970 FRD compel States to settle 'international disputes with other States', other instruments do not contain such limitations. Notably, Article 2(3) of the UN Charter sets out an obligation of the member States to settle 'their international disputes', and Article 33 of the UN Charter refers to 'any dispute, the continuance of which is likely to endanger the maintenance of international peace and security'. It is reasonable to assume that, if a dispute may endanger international peace and security, the States remain under an obligation to seek a solution regardless of whether the other party is a State or non-State entity.[75] Whether non-State entities, in turn, bear an obligation in this sense is a more difficult question.

It is well known that the UN and other international organisations may have a significant role to play as settlers of international

[69] *Mavrommatis Palestine Concessions*, 12.

[70] Thomas D. Grant, 'The "open system" and its gatekeepers: From *Complexity in International Law*, a seminar in honour of James Crawford' (2002) 13 JISD 41–53.

[71] William Thomas Worster, 'Relative international legal personality of non-State actors' (2016) 42 Brook J Int'l L 207–73 at 212.

[72] Cesar P. Romano, 'The proliferation of international judicial bodies: The pieces of the puzzle' (1999) 31 NYU J Int'l L & Pol 709–51 at 710. As an implicit acknowledgement of these changing dynamics, reference to the *Mavrommatis* definition in more recent cases has been interpolated to read 'a disagreement … between *parties*'; see, e.g., *East Timor (Portugal* v. *Australia)* (Judgment) [1995] ICJ Rep. 90 at 100; *Certain Property (Liechtenstein* v. *Germany)* (Judgment) [2005] ICJ Rep. 6 at para. 24.

[73] John G. Merrills, 'The mosaic of international dispute settlement procedures: Complementary or contradictory?' (2007) 54 NILR 361–93 at 362.

[74] E.g., Crawford, 'Continuity and discontinuity', 4.

[75] Caron and Tomuschat, 'Article 2, para. 3', 126.

disputes.[76] Increasingly, however, international organisations may themselves be parties to international disputes concerning, for instance, the responsibility arising from their activities vis-à-vis member States, third States, and non-State parties (individuals, other organisations, etc.).[77] Considering that the obligation of peaceful dispute settlement exists as a matter of customary international law, international organisations are in principle bound by the same obligation with respect to the settlement of their disputes.[78] To be sure, access to the means of dispute settlement may be significantly more limited in cases involving international organisations.[79] Thus, what international organisations must do in order to fulfil their obligation may be different from what is required of States. At the same time, some of the steps explored further in Section 1.4 can be expected also from international organisations. This is a fast-evolving area of international law which has been recently added to the long-term programme of work for the ILC and therefore requires further scrutiny in the future.[80]

[76] For instance, the UN Security Council can make recommendations as to how a dispute is to be settled under Art 36 of the UN Charter. See Matthew Saul and Nigel D. White, 'Legal means of dispute settlement in the field of collective security: The quasi-judicial powers of the Security Council', in Duncan French, Matthew Saul, and Nigel D. White (eds.), *International Law and Dispute Settlement: New Problems and Techniques* (Oxford: Hart, 2011), pp. 191–224. International organisations, such as the EU, may also play an important role as mediators; see Jacob Bercovitch and Judith Fretter, 'Studying international mediation: Developing data sets on mediation, looking for patterns, and searching for answers' (2007) 12 Int Negot 145–73.

[77] See the ILC's *Articles on the Responsibility of International Organisations and Their Commentaries*, contained in 'Draft articles on the responsibility of international organizations, with commentaries', in *Yearbook of the International Law Commission, 2011, Volume II, Part Two: Report of the Commission to the General Assembly on the Work of Its Sixty-Third Session* (New York: UN, 2011), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf. See also Jan Klabbers, *An Introduction to International Organizations Law*, 3rd ed. (Cambridge: Cambridge University Press, 2015), p. 306; Nigel D. White, *The Law of International Organisations*, 2nd ed. (Manchester: Manchester University Press, 2017), p. 230.

[78] 'International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law': *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73 at para. 37. These are deemed to encompass at least 'those rules of customary international law that are relevant to the activities of the international organisation': Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (Cambridge: Cambridge University Press, 2011), p. 72.

[79] 'There is no general dispute settlement mechanism to handle disputes involving international organizations'; Pierre Schmitt, *Access to Justice and International Organizations: The Case of Individual Victims of Human Rights Violations* (Cheltenham: Edward Elgar, 2017), p. 135. See generally Karel Wellens, *Remedies against International Organisations* (Cambridge: Cambridge University Press, 2009).

[80] See August Reinisch, 'International organizations and dispute settlement: A new topic for the International Law Commission' (2018) 15 IOLR 1–7.

Under customary international law, other non-State actors may be right-holders or duty-bearers in relation to the settlement of disputes.[81] Whether these obligations include the general obligation of peaceful dispute settlement depends on the circumstances of the specific entity. Some non-State actors, such as national liberation movements (particularly when exercising territorial control), may be bound by the general rules of international law that are not exclusively directed to the States.[82] Obligations pertaining to international dispute settlement would certainly fall within this category given the prominent role these actors play in the settlement of international disputes. The UNSC has frequently called on them to enter negotiations with their government opponents to achieve a settlement of their disputes.[83] These actors may have access not only to diplomatic means of dispute settlement but also to judicial means as demonstrated by the *Abyei* arbitration.[84] As to individuals in general, their international legal standing in the settlement of disputes is more limited compared to that of other international legal subjects. And yet, once individuals are granted direct access to international courts and tribunals (particularly if they are acting for the protection of a right of their own that is distinct from that of the State[85]), there are, in principle, no reasons to exclude them from the general rules of international law governing the settlement of international disputes to the extent applicable to them.[86] Once again, the key question is one not of engagement but of the content of the obligation of peaceful settlement.

1.4 CONTENT AND EFFECTS OF THE OBLIGATION OF INTERNATIONAL DISPUTE SETTLEMENT

Having identified the conditions that trigger the application of the obligation of peaceful dispute settlement, the immediate question is what this obligation

[81] The Manila Declaration states that 'peoples' as holders of the right to self-determination should benefit from the mechanisms available for the peaceful settlement of disputes: Annex, ch. I, para. 12.

[82] See Antal Berkes, *International Human Rights Law beyond State Territorial Control* (Cambridge: Cambridge University Press, 2021), s. 4.2.1.1.

[83] For a recent example, see UNSC, 'Security Council press statement on Yemen truce announcement, SC/14853', United Nations, 4 April 2022, www.un.org/press/en/2022/sc14853.doc.htm (accessed 2 October 2022).

[84] *The Government of Sudan* v. *The Sudan People's Liberation Movement/Army* (2009) 30 RIAA 145. For a critical appraisal, see Gary B. Born and Adam Raviv, 'The Abeyi Arbitration and the rule of law' (2017) 58 Harv Int'l L J 177–224.

[85] See Zachary Douglas, 'The hybrid foundations of investment treaty arbitration' (2004) 74 BYBIL 151–289 at 182.

[86] See Caron and Tomuschat, 'Article 2, para. 3', 130–31; Pellet, 'Peaceful settlement of international disputes', para. 25.

entails. To fully grasp the content of the obligation of peaceful dispute settlement, it is first necessary to identify the setting in which it operates, that is, to flesh out the character of the process of a peaceful dispute settlement (Subsection 1.4.1). This analysis will reveal that, given that the obligation operates in a dynamic context, its content is itself dynamic and varies depending on the circumstances of each case (Subsection 1.4.2). While the obligation has a normative content of its own and imposes specific conduct on the parties to a dispute, it will be shown that the obligation can also operate as an interstitial norm and influence the content of other obligations (Subsection 1.4.3).

1.4.1 *Situating the Obligation in the Dynamic Process of International Dispute Settlement*

As 'historical facts', disputes arise at a given moment, persist for a certain duration, and, if settled, come to an end.[87] It is therefore commonplace to think of the obligation of peaceful dispute settlement as operating in a linear fashion. However, this linear understanding of dispute settlement makes it extremely difficult to give any meaningful content to the obligation of peaceful dispute settlement.

The first obstacle is that the obligation of peaceful dispute settlement is one of conduct, not of result.[88] This is the case also when the obligation is formulated in seemingly strict terms such as those of Article 33 of the UN Charter ('shall … seek a solution'). Because one party alone cannot settle a dispute without the agreement of the other party – lest the obligation mandates one of the parties to give up its claims – the obligation can only impose a duty to 'undertake efforts towards that purpose'.[89] That the obligation cannot be one of result is also evidenced by the fact that the submission of a dispute to a means of dispute settlement is no guarantee that 'settlement' – in itself a vague concept[90] – will be reached. This is evident in the case of diplomatic

[87] See Morelli, 'Nozione ed elementi constitutivi della controversia internazionale', 413.

[88] See Pellet, 'Peaceful settlement of international disputes', para. 2; Robert Kolb, *The International Court of Justice* (Oxford: Hart, 2013), p. 23.

[89] David D. Caron and Christian Tomuschat, 'Article 33', in Andreas Zimmermann et al. (eds.), *The Statute of the International Court of Justice* (Oxford: Oxford University Press, 2019), p. 167.

[90] Morelli distinguished between the 'termination' of a dispute – which occurs when one of its constitutive elements ceases to exist – and its 'settlement' – which results from a judicial determination of the conflict of interests; see Gaetano Morelli, 'Estinzione e soluzione di controversie internazionali', in *Scritti Giuridici in Onore di Francesco Carnelutti, Vol. IV – Diritto Pubblico e Storia del Diritto* (Padova: CEDAM, 1950), p. 99.

methods (negotiation, good offices, mediation, inquiry, and conciliation), where, in the absence of binding outcomes (unless the parties have made stipulations to this end),[91] settlement is completely reliant on extra-legal factors which may be outside the control of any individual party. Yet, even the submission to a judicial means of dispute settlement does not necessarily ensure that the disagreement at the heart of a dispute will be resolved.[92] In other words, regardless of the means chosen, the settlement of a dispute requires concerted and concordant action on behalf of all disputing parties – a 'result' that is beyond the exclusive control of a single party at any given moment.

Even when the obligation of peaceful dispute settlement is seen as one of conduct, it is not immediately evident what conduct it requires. As we saw above, it is a well-established principle that the parties to a dispute, unless they have agreed otherwise, are under no obligation to submit it to a *specific* means of dispute settlement. The absence of a specific course of action the parties must undertake to fulfil the obligation gives them a 'wide margin of discretion' and can even lead to an impasse.[93] Because States are not bound to submit to any specific means of dispute settlement, it may seem that they cannot be compelled to do anything concrete to settle their disputes despite being subject to an obligation to this end.

If States cannot be compelled to settle their disputes, it may be argued that, at the very least, they should be bound to refrain from engaging in acts that would aggravate the dispute.[94] However, the parties to a dispute may deem it necessary to resort to limited forms of escalation in order to persuade a recalcitrant counterparty to submit to a means of dispute settlement. It is generally accepted that unfriendly but lawful acts do not run into conflict with the obligation of peaceful dispute settlement.[95] These include measures of retorsion (such as the expulsion of diplomats) and countermeasures (which are breaches of international obligations whose wrongfulness is precluded by virtue of their function as a means to implement the international responsibility of wrongdoing States). The risk is that these exceptions may swallow the

[91] Tanaka, *Peaceful Settlement of International Disputes*, 20–21.

[92] 'A judicial decision in and of itself does not always remove the causes underlying the controversy. In general, adjudication that peacefully resolves disputes is supported by political efforts'; Caron and Tomuschat, 'Article 2, para. 3', 123.

[93] Peters, 'International dispute settlement', 11.

[94] See Ratner, 'Aggravating duty of non-aggravation', 1310.

[95] See Tomuschat, 'Article 2(3)', 196; Caron and Tomuschat, 'Article 2, para. 3', 132; Ratner, 'Aggravating duty of non-aggravation', 1330.

rule, given that States taking aggravating measures will almost always claim that they have valid reasons to do so.[96]

A more meaningful effort to conceptualise the obligation of peaceful dispute settlement should therefore begin by acknowledging that disputes are not static phenomena; they arise, evolve, and mutate in response to the conduct of the parties. As seen above, the existence of a dispute can only be ascertained by contrasting the claims of a party with the action and/or claims of another party. The context continues to inform the required conduct of the parties as the dispute develops. Further claims or actions by either party may contribute to the evolution of the dispute by specifying its terms, or may create new disputes concerning the legality of the reaction or connected incidents. These steps cannot be seen in isolation; the legality of the conduct of the parties to a dispute is necessarily influenced by the context and must take into account their past and (possible) future interactions.

This is of particular significance when seeking to ascertain whether the continuance of a dispute is likely to endanger international peace and security under Article 33 of the UN Charter. A disagreement of a relatively minor character between two States with a history of friendly relations is unlikely to threaten international peace and security. In such a context, the parties to the dispute have significant leeway in deciding how to deal with it: they can set it aside temporarily to preserve their friendly relations in other fields; they can attempt to settle it via peaceful means; or they can take unfriendly measures in the form of retorsion or countermeasures that will be unlikely to endanger international peace and security. The same cannot be said when disputes arise between two States that are already experiencing hostile relations – in this environment, acts of escalation may spiral out of control. In fact, it may be argued that all unsettled disputes have the potential of escalating over time and threatening international peace and security. For this reason, Cassese reasoned that 'the obligation of peaceful settlement might concern all disputes'.[97] The consequence is that the obligation of peaceful dispute settlement must be seen as a dynamic one, whose content varies according to the circumstances of the dispute.[98] In particular, as the next subsection shows, the

[96] See James Crawford, 'Counter-measures as interim measures' (1994) 5 EJIL 65–76 (explaining that '[countermeasures] can tend to exacerbate disputes'). See also Monica Hakimi, 'Unfriendly unilateralism' (2014) 55 Harv Int'l L J 105–50 at 117.

[97] Paola Gaeta, Jorge E. Viñuales, and Salvatore Zappalá, *Cassese's International Law*, 3rd ed. (Oxford: Oxford University Press, 2020), p. 277.

[98] Ratner, 'Aggravating duty of non-aggravation', 1320 ('Not all unlawful acts are aggravations of a dispute, as suggested by the Security Council's selectivity in identifying acts as aggravating. And not all aggravations of a dispute are otherwise unlawful').

greater the threat to international peace and security posed by a dispute, the more demanding the obligation becomes.

1.4.2 *Dynamic Content of the Obligation*

As seen above, the obligation of peaceful dispute settlement does not just proscribe the use of non-peaceful means to resolve disputes, but also imposes a positive duty upon the States to engage with each other and work together with a view to settling their disputes. That the obligation of peaceful dispute settlement requires 'active efforts'[99] from the States is indicated by the language of Article 33(1) of the UN Charter, which explains that the UN members must 'seek a solution' to their disputes. In a similar vein, the FRD explains that 'States shall accordingly seek early and just settlement of their international disputes', and the Manila Declaration provides that 'States shall seek in good faith and in a spirit of cooperation and early and just settlement of the international disputes'. All these authorities point to the fact that States cannot remain inert or inactive in the face of a dispute.[100] However, when it comes to identifying the concrete steps that States must take when faced with a dispute, the picture is more nuanced.

A number of commentators have interpreted the obligation of peaceful dispute settlement broadly. For them, this obligation does not just require the States to work together to identify a peaceful means that can be used to settle their disputes, but it imposes a more arduous duty to enter into negotiations and attempt to resolve the *substance* of the dispute itself.[101] In this context, the duty to negotiate requires, as a baseline minimum, the disputants to listen to the arguments of the opposing parties, reflect on their own positions in light of these arguments, and engage in meaningful dialogue in an attempt to resolve the dispute.[102]

[99] Tomuschat, 'Article 2(3)', 190.

[100] '[States are under an] obligation to settle their disputes by peaceful means. The choice of those means admittedly rests with the parties under Article 33 of the United Nations Charter. They are nonetheless under an obligation to seek such settlement'; *Aerial Incident of 10 August 1999 (Pakistan* v. *India)* (Jurisdiction, Judgment) [2000] ICJ Rep. 12 at para. 53.

[101] 'A general (but context-bound) duty to cooperate with a view to settlement is inherent in the customary law obligation to settle disputes peacefully, because resolution of a dispute would otherwise be impossible. This general obligation comprises the duty at least to negotiate, as it would otherwise be meaningless': Peters, 'International dispute settlement', 29. 'The choice of a particular means of settlement necessarily involves some kind of negotiation at a time or another': Pellet, 'Peaceful settlement of international disputes', para. 69. See also Caron and Tomuschat, 'Article 2, para. 3', 126.

[102] The ICJ has held that negotiation requires that parties 'should pay reasonable regard to the interests of the other'; *Application of the Interim Accord of 13 September 1995 (Former Yugoslav Republic of Macedonia* v. *Greece)* (Judgment) [2011] ICJ Rep. 644 at para. 132.

This interpretation of the obligation of peaceful dispute settlement is problematic. In the *Bolivia* v. *Chile* case, Bolivia maintained that Chile had failed to comply with its duty to negotiate an agreement that granted Bolivia access rights through Chile's territory to the Pacific Ocean.[103] Reaffirming its previous jurisprudence,[104] the Court held that an obligation to negotiate can only arise where the parties have expressed an intention to be legally bound.[105] Bolivia argued that Chile's intention to be bound by a duty to negotiate could be derived from the obligations to settle disputes peacefully as contained in Articles 2(3) and 33(1) of the UN Charter, but the Court rejected this interpretation when it held that 'there is no indication . . . that the parties to a dispute are required to resort to a specific method of settlement, such as negotiation'.[106] Correctly in our view, the Court justified this conclusion on the basis that a duty to negotiate is at odds with the principle of free choice of a means of dispute settlement.[107]

Despite this, there is a grain of truth in the argument that, without a minimum conduct baseline, the obligation to settle disputes peacefully would be devoid of any meaning.[108] While the States cannot be compelled to submit their disputes to a specific means of dispute settlement, the fact that they are required, in principle, to seek to settle their disputes by peaceful means and to do so in good faith[109] entails that they must, at the very least, engage in a meaningful exchange of views.[110] This is not the same as an obligation to negotiate the substance of the dispute; it concerns 'the ways in which the dispute will be settled rather than . . . the merits of the dispute'.[111] The difference is most evident in the UN Convention on the Law of the Sea,

[103] *Obligation to Negotiate Access to the Pacific Ocean* case.
[104] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)* (Jurisdiction and Admissibility, Judgment) [1994] ICJ Rep. 112.
[105] *Obligation to Negotiate Access to the Pacific Ocean*, para. 91.
[106] Ibid., para. 165.
[107] The language of the Manila Declaration also rules out the duty to negotiate: 'States should, without prejudice to the right of free choice of means, bear in mind that direct negotiations are a flexible and effective means of peaceful settlement of their disputes. When they chose to resort to direct negotiations, States should negotiate meaningfully': para. 10.
[108] Peters, 'International dispute settlement', 11.
[109] 'States shall seek in good faith and in a spirit of cooperation an early and just settlement of their international disputes': Manila Declaration, para 5. '[States are under an] obligation to settle their disputes by peaceful means . . . and to do so in good faith': *Aerial Incident of 10 August 1999*, para. 53.
[110] Although this may give rise to 'meta-disputes', that is, disputes as to which means of dispute settlement, if any, should be resorted to, such phenomenon is a necessary consequence of the dynamic nature of the obligation and may be indicative of the fact that the dispute is coming to maturity.
[111] De Brabandere, *Merrills' International Dispute Settlement*, 264.

where the obligation to exchange views is a precondition for access to the dispute settlement mechanism of the Convention.[112] As mentioned above, the very existence of a dispute requires a minimum baseline of communication that allows the parties to be aware of the nature and scope of their disagreement. An exchange of views is also necessary to give meaningful content to the obligation of peaceful dispute settlement, because in order to settle a dispute, the parties must at least assess whether dispute settlement mechanisms would be practically available.

As an obligation of conduct rather than result, where the States have co-operated in good faith and that, after all reasonable efforts have been exhausted, they are still unable to agree on a means for resolving their disputes, they do not have to consult ad infinitum.[113] The reason for this is because some disputes may be so entrenched and adversarial that it is practically impossible for the parties to agree on which means to use to resolve their disputes. In these circumstances, forcing the States to continue to discuss their disputes when it is clear that no agreement can be reached may be counter-productive and may actually exacerbate the dispute. Instead, the parties may be under an obligation to freeze the dispute and pause discussions until an environment emerges that is more conducive to a peaceful settlement of the dispute.[114] But given the dynamic nature of the obligation of dispute settlement, where there is a material change in circumstances surrounding the dispute – for example, the political climate improves because there is a change in government in one or all of the disputing States – the duty to seek a peaceful settlement is reactivated, and the disputants must resume their consultations and again work together in an attempt to find a means to settle their dispute.

[112] Art 283 of UNCLOS. As the tribunal in the *Chagos Marine Protected Area* arbitration stated, the obligation 'requires the Parties to exchange views regarding the means for resolving their dispute; it does not require the Parties to in fact engage in negotiations or other forms of peaceful dispute resolution': *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)* (Final Award of 18 March 2015) PCA Case No. 2011-03 at para. 378. See also Mariano J. Aznar Gómez, 'The obligation to exchange views before the International Tribunal for the Law of the Sea: A critical appraisal' (2014) 47 RBDI 237–54.

[113] See *ARA Libertad Case (Argentina* v. *Ghana)* (Provisional Measures, Order of 15 December 2012) ITLOS Reports 2012, 332 at para. 71 ('A State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching an agreement have been exhausted'). See also *MOX Plant Case (Ireland* v. *United Kingdom)* (Provisional Measures, Order of 3 December 2001) ITLOS Reports 2001, 95 at para. 60.

[114] The most notorious example of a frozen dispute is perhaps that concerning the territorial claims over Antarctica; see Martin Lishexian Lee, 'The 1959 Antarctic Treaty: The "freezing and bifocalism" formula' (2000) Aust ILJ 200–14.

On top of this, the obligation of peaceful dispute settlement has a role to play in preventing disputes from escalating and spiralling out of control. As seen above, limited forms of escalation are, in principle, permissible in the context of a dispute so long as they involve lawful measures (retorsion or countermeasures). At the same time, this freedom must be reconciled with the duty of the parties to a dispute to 'refrain from any action which may aggravate the Situation so as to endanger the maintenance of international peace and security'.[115] The obligation of peaceful dispute settlement therefore includes a principle of non-aggravation that proscribes acts of escalation under certain circumstances.[116]

The principle of non-aggravation inherent in the obligation of peaceful dispute settlement has an element of vagueness and indeterminacy.[117] However, it is in the interaction with other norms that the obligation most visibly exercises its normative pull. From this perspective, the obligation may colour the legality of the conduct of the parties by informing the content of other rules of international law, which in turn proscribe acts antagonistic to the settlement of disputes. In other words, the obligation of peaceful dispute settlement, alongside its status as a self-standing rule of international law, may also share some features with what Lowe describes as 'interstitial norms'.[118]

1.4.3 *Interstitial Character of the Obligation*

According to Lowe, interstitial norms are 'normative concepts operating in the interstices between ... primary norms'[119] and 'direct the manner in which competing or conflicting norms that do have their own normativity should interact in practice'.[120] For the reasons mentioned above, the obligation of

[115] The Manila Declaration repeats this provision of the FRD, para. 8. See also Ratner, 'Aggravating duty of non-aggravation', 1319 ('[The duty of non-aggravation] is legally grounded in the UN Charter and authoritative interpretations thereof (including the FRD, Manila Declaration and Security Council resolutions)').

[116] See Merrills, 'Means of dispute settlement', 549 ('The obligation is not just to give peaceful methods a try but to persevere as long as necessary, while at the same time avoiding action which could make things worse. In other words, if a dispute cannot be settled, States must at least manage it and keep things under control').

[117] Ratner, 'Aggravating duty of non-aggravation', 1321.

[118] Vaughan Lowe, 'The politics of law-making: Are the method and character of norm creation changing?' in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2001), pp. 207–26.

[119] Ibid., 213.

[120] Ibid., 216.

peaceful dispute settlement does have a normative charge of its own. However, this does not exhaust the normative pull of the obligation, which can also be appreciated by looking at its effects on other rules of international law. International law provides several norms which are inextricably linked to the process of dispute settlement and whose content is dependent on the circumstances of each case. Two examples are particularly emblematic in this regard.

The first concerns the regulation of countermeasures under the law of State responsibility. There is a clear connection between countermeasures and dispute settlement; as Simma noted, 'recourse to counter-measures not involving the threat or use of force is in itself a peaceful means of settling a dispute arising from an internationally wrongful act'.[121] Yet, as Arangio-Ruiz pointed out, countermeasures are evidently 'non-amicable' when compared to other means of dispute settlement and thus have the potential of aggravating the dispute.[122] In his capacity as the ILC Special Rapporteur on State Responsibility, Arangio-Ruiz proposed to subject resorting to countermeasures to the 'prior . . . exhaustion of all the amicable settlement procedures available under general international law, the Charter of the United Nations or any other dispute settlement instrument to which it [the reactor State] is a party'.[123] This proposal was deemed unrealistic by other ILC members and was ultimately rejected.[124] After several iterations, the ILC finally settled on the text of Article 52(1) of the Articles on State Responsibility, 2001 (ASR), which requires an injured State to 'call on the responsible State . . . to fulfil its obligations' and to 'notify the responsible State of any decision to take countermeasures and offer to negotiate with that State'. Even the mere 'offer' to negotiate as a precondition to the taking of countermeasures gave rise to 'lively

[121] Bruno Simma, 'Counter-measures and dispute settlement: A plea for a different balance' (1994) 5 EJIL 102–5 at 103.

[122] Gaetano Arangio-Ruiz, 'Counter-measures and amicable dispute settlement means in the implementation of State responsibility: A crucial issue before the International Law Commission' (1994) 5 EJIL 20–53 at 21.

[123] ILC, 'Fourth report on State responsibility by Mr. Gaetano Arangio-Ruiz, Special Rapporteur', in *Yearbook of the International Law Commission. 1992, Volume II, Part One: Report of the Commission to the General Assembly on the Work of Its Forty-Fourth Session* (New York: UN, 1992), p. 22, para. 52 (Draft Art 12(1)(a)).

[124] See Yuji Iwasawa and Naoki Itwatsuki, 'Procedural conditions', in James Crawford, Alain Pellet, and Simon Ollerson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), p. 1151. Concerns were also voiced about the unfair advantage this would give to the wrongdoing State, which would be able to avoid the application of countermeasures by maintaining the appearance of engagement with a means of dispute settlement; see David J. Bederman, 'Counterintuiting countermeasures' (2002) 96 AJIL 817–32 at 824.

debates' within the ILC, evidencing a 'central disagreement' on the point.[125] Still, the fact remains that, in the normative conflict between the rules allowing the taking of countermeasures and those protecting the sovereignty of the target State, the obligation of peaceful dispute settlement exercises its normative pull. The injured State wishing to resort to countermeasures must first ensure that reasonable attempts to settle the dispute have been made. What is reasonable depends on the circumstances of the case and is tempered by the exception for 'urgent' countermeasures pursuant to Article 52(2) of the ASR.[126] Still, measures taken without any consideration for the settlement of the dispute will likely run counter to customary international law.

The continuing normative pull of the obligation of peaceful dispute settlement on the law of countermeasures is further demonstrated by Article 50(2)(a) of the ASR, according to which 'a State taking countermeasures is not relieved from fulfilling its obligations ... under any dispute settlement procedure applicable between it and the responsible State' and, most importantly, by Article 52(3)(b) of the ASR, which provides that 'countermeasures may not be taken, and if already taken must be suspended without undue delay if ... the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties'. This is an important aspect of the connection between the legality of countermeasures and the dynamic nature of the obligation of peaceful dispute settlement. Where a means of dispute settlement has been selected, 'for so long as the dispute settlement procedure is being implemented in good faith, unilateral action by way of countermeasures is not justified';[127] any countermeasure would constitute in and of itself an aggravation of the dispute running counter to the obligation of dispute settlement. As the ILC commentary explains, this is because 'once the parties submit their dispute to such a court or tribunal for resolution, the injured State may request it to order provisional measures to protect its rights'.[128] At the same time, the obligation of peaceful dispute settlement continues to expand or contract according to the evolving circumstances. Thus, the ASR go on to specify that this limitation on the taking of countermeasures 'does not apply if the responsible State fails to implement the dispute settlement

[125] Maurice Kamto, 'The time factor in the application of countermeasures', in James Crawford, Alain Pellet, and Simon Ollerson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), p. 1171.

[126] Ibid.

[127] ILC, *Articles on State Responsibility*, 136, commentary to Art 52.

[128] Ibid. But see Bederman, 'Counterintuiting countermeasures', 825 ('The fact that a tribunal might ostensibly have the power to indicate provisional measures, even while lacking actual jurisdiction over the dispute, raises concerns about the reading of Article 52 (3)').

procedures in good faith'.[129] Once again, the obligation is flexible enough to allow a party to resort to unilateral measures when the conduct of the other party is thwarting the peaceful settlement of a dispute.[130]

An even more striking example of the normative pull exercised by the obligation of peaceful dispute settlement is the notion that, under certain circumstances, resorting to a judicial means of dispute settlement may be antagonistic to the settlement of a dispute and should therefore be deemed unlawful. This idea is captured in the principles of 'abuse of right' and 'abuse of process', which, according to Kolb, consist of 'the use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights are established, especially for a fraudulent, procrastinatory or frivolous purpose, for the purpose of causing harm or obtaining an illegitimate advantage, for the purpose of reducing or removing the effectiveness of some other available process or for purposes of pure propaganda'.[131]

Dispute settlement bodies have been reluctant to find that an abuse of process has occurred for multiple reasons.[132] Chief among them is the fact that the threshold for an abuse of process is high and a party often has several reasons to institute judicial proceedings; this makes it difficult for the other party to prove that proceedings have been improperly used.[133] The ICJ has never recognised as well-founded a claim of this kind and, on several occasions, has stated that 'it cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement'.[134] Despite this, there is little doubt that abuse of

[129] ILC, *Articles on State Responsibility*, Art 52(4).

[130] The ILC's commentary lists 'various possibilities, ranging from an initial refusal to cooperate in the procedure, for example by non-appearance, through non-compliance with a provisional measures order . . . through to refusal to accept the final decision of the court or tribunal'; ILC, *Articles on State Responsibility*, 137, commentary to Art 52.

[131] Robert Kolb, 'General principles of procedural law', in Andreas Zimmermann et al. (eds.), *The Statute of the International Court of Justice* (Oxford: Oxford University Press, 2019), p. 998. See also Alexandre Kiss, 'Abuse of rights', in Anne Peters (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2006).

[132] Andrew D. Mitchell and Trina Malone, 'Abuse of process in inter-State dispute resolution', in Anne Peters (ed.), *Max Planck Encyclopedia of International Procedural Law* (Oxford: Oxford University Press, 2018), para. 5.

[133] See Marie Lemey, 'Incidental proceedings before the International Court of Justice: The fine line between "litigation strategy" and "abuse of process"' (2021) 20 LPICT 5–29 at 24.

[134] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* (Jurisdiction and Admissibility, Judgment) [1988] ICJ Rep. 69 at para. 52. See also *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America)* (Preliminary Objections, Judgment) [2021] ICJ Rep. 9 at para. 95.

process is firmly rooted in the general principle of good faith and, as such, is part of international law.[135] States have continued to plead abuse of process before international courts and tribunals in recent years,[136] and the claim has encountered some success before investment tribunals.[137]

The notion of abuse of process is another way in which the obligation of international dispute settlement acquires a concrete normative dimension. It is imbued with the idea that the context in which the actions of a party to a dispute take place ultimately determines their legality. As seen above, the dynamic nature of the obligation means that certain steps that would be permissible (or even desirable) under different circumstances become impermissible when a party to a dispute is no longer seeking in good faith to achieve the peaceful settlement of that dispute.

1.5 CONCLUSION

The obligation to settle disputes peacefully is a critical element of the international society's dispute settlement system and is embedded in multiple treaties as well as customary law. To date, the academic literature has largely focused on the means and methods to settle disputes without inquiring into the content of the peaceful dispute settlement obligation itself other than to the extent to which it prohibits resorting to force. To fill this gap in the literature, this chapter has elaborated on the conditions that activate this obligation and on the substance of the obligation. In doing so, this chapter has demonstrated that the obligation of peaceful dispute settlement is a complex and multifaceted rule that exercises 'an immense gravitational pull' both on its own terms and on the rules that surround it.[138] At a minimum, it requires a degree of communication that allows the disputing parties to be

[135] Mitchell and Malone, 'Abuse of process', para. 7.

[136] In fact, claims of abuse of process have been on the rise; see Freya Baetens, 'Abuse of process and abuse of rights before the ICJ: Ever more popular, ever less successful?', *EJIL: Talk!*, 15 October 2019, www.ejiltalk.org/abuse-of-process-and-abuse-of-rights-before-the-icj-ever-more-popular-ever-less-successful (accessed 2 October 2022).

[137] Arbitration claims have been dismissed on the grounds that the investor underwent corporate restructuring solely for the purpose of accessing arbitration; see, e.g., *Phoenix Action, Ltd* v. *The Czech Republic* (Award of 15 April 2009) ICSID ARB/06/5 at para. 144; *Venezuela Holdings BV (Formerly Mobil Corporation)* v. *Bolivarian Republic of Venezuela* (Decision on Jurisdiction of 10 June 2010) ICSID ARB/07/27 at para. 190; *Philip Morris Asia Limited* v. *The Commonwealth of Australia* (Award on Jurisdiction and Admissibility of 17 December 2015) PCA Case No. 2012-12 at para. 588. See also Jorun Baumgartner, *Treaty Shopping in International Investment Law* (Oxford: Oxford University Press, 2016), p. 12.

[138] Lowe, 'Politics of law-making', 217.

aware of the nature and scope of their disagreement and to assess the viability of a potential means to settle it. Even when no agreement concerning the settlement of a dispute can be reached, the obligation of peaceful dispute settlement continues to guide the behaviour of the disputing parties, and as a dynamic norm, its content changes in line with the mutating circumstances.

This chapter has also demonstrated that the obligation of peaceful dispute settlement operates as an interstitial norm insofar as it informs the interpretation and application of other rules of international law linked with the process of dispute settlement. Understood in this way, the obligation of peaceful dispute settlement ensures that the conduct of the disputing parties, even when not bound by obligations concerning specific means of dispute settlement, remains within tolerable boundaries and does not stray too far from the goal of peaceful dispute settlement. Far from being a mere duplicate of the prohibition on the threat or use of force, the obligation of peaceful dispute settlement is rich in normative content and plays an essential role in preventing disputes from spiralling out of control and maintaining international peace and security more generally.