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PACTUM DE NEGOTIANDO AND *PACTUM DE CONTRAHENDO* AS INTERNATIONAL OBLIGATIONS IN THE PRESENT INTERNATIONAL LAW

Abstract: *The article concerns the obligations to negotiate and conclude agreements in good faith (pactum de negotiando and pactum de contrahendo), which are used in international legal practice to more efficiently settle disputes or negotiate new agreements in various areas of international law. These obligations, however, are sometimes mixed together and misunderstood. They also give rise to various interpretation disputes related to their existence as obligations and their content. The aim of the study is to show that these are not simple obligations, but bundles of obligations. Such perception of them makes it possible to distinguish both pacta and penetrate into their rich content, as well as to unequivocally apply to their performance the principle of performing international obligations in good faith (Art. 2(2) of the UN Charter), especially in the form of pacta sunt servanda (Art. 26 of the Vienna Convention on the Law of Treaties).*

Keywords: good faith, *pactum de contrahendo*, *pactum de negotiando*, obligation to negotiate, *pacta sunt servanda*

INTRODUCTION

One of the basic rules of international law is the freedom of action of its subjects, namely states. International law both protects and regulates this freedom. It is therefore not absolute. The freedom is subject to certain formal and substantive limitations. They arise for various reasons, and their nature and practical value also vary. Nevertheless, they contribute to increasing the predictability and security of legal relations, facilitating international coexistence, strengthening cooperation, and protecting important individual and common values in a decentralized international community.

The concretization of the freedom of action in international relations includes, *inter alia*, the freedom to incur international obligations, including in particular freedom to

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negotiate and conclude international agreements, and the freedom to use all available means for the peaceful settlement of international disputes. These freedoms are also not absolute, but are subject to various limitations. *Pactum de negotiando* and *pactum de contrahendo* are among such limitations. Both *pacta* relate to negotiations and the international agreements resulting therefrom. With respect to *pactum de negotiando*, the International Court of Justice (ICJ) ruled in its judgment in *Obligation to Negotiate Access to the Pacific Ocean Case (Bolivia v. Chile)* that: "While States are free to resort to negotiations or put an end to them, they may agree to be bound by an obligation to negotiate. In that case, States are required under international law to enter into negotiations and to pursue them in good faith."[1]

Pacta are relatively often used in international, mainly state, practice. They also appear in judicial and arbitral practice. Despite their usefulness, *pacta* were not regulated in the Vienna Convention on the Law of Treaties of 1969 (VCLT), nor in the legal regulations in the field of international dispute settlement. Meanwhile, not all their aspects are obvious. The aim of this study is to establish the legal basis and the essence of *pactum de negotiando* and *pactum de contrahendo* as a bundle of international obligations, and to indicate the differences and similarities between them as well as their functions and usefulness in international legal practice.

When considering *pacta* in this study, the context in which they are applied are first analysed, and thereafter the reasons for their use and the general extent of their occurrence are briefly described. Then the legal bases and forms, nature, and characteristics of *pacta* as international obligations and the principles of performing them are examined.

1. CONTEXTUAL ASPECTS OF *PACTA*

Pacta are most often seen as instruments restricting the freedom to choose the means of dispute settlement, requiring bargaining before resorting to other means, and in some cases even excluding other means of dispute resolution. Negotiations are a preferred or exclusive means, especially in the case of sensitive matters (e.g. boundaries). They can serve as a means of determining the existence and subject-matter of the dispute.[2] Negotiations are also considered to be the most effective and flexible method of dispute settlement. Therefore, the parties should at least negotiate with the aim of resolving a dispute, and ideally reach an agreement.[3] The *Manila Declaration on the peaceful settlement of international disputes* of 15 November 1982 speaks in this spirit, stating that:

[1] ICJ, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment (Preliminary Objections), 24 September 2015, ICJ Rep 2018, p. 507, at p. 538, para. 86.

[2] *See* P. Daillier, M. Forteau, A. Pellet, *Droit international public*, L.G.D.J., Paris: 2009, p. 925.

[3] The ICJ has distinguished negotiations from a dispute, stating that "negotiations are distinct from mere protests or disputations. Negotiations 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 counterclaims." *See* ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* Case (*Georgia v. Russian Federation*), Judgment (Preliminary Objections), 1 April 2011, ICJ Rep 2011, p. 70, at 132, para. 157.

> 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 choose to resort to direct negotiations, States should negotiate meaningfully, in order to arrive at an early settlement acceptable to the parties.[4]

However, *pacta* often prove no less important in situations where there is is no direct dispute, but states simply wish to negotiate an international agreement. They can then impose a limitation on treaty freedom in the form of an obligation to negotiate a future treaty, or even conclude one. The reasons for invoking *pacta* can be multifold. They can be accepted when a general or specific problem is not yet suitable for regulation (e.g. a peace treaty) or requires the conclusion of an additional agreement (an implementing agreement). *Pacta* may also appear in the context of framework agreements which require further development, clarification, and implementation for their operation, for example in the form of protocols.[5] However, the mere existence of framework agreements does not automatically imply *pacta*.[6] In addition, *pacta* can be envisaged in the context of re-negotiating agreements after gaining some experience (re-negotiation clauses).[7]

The dual role of negotiations (as a means of dispute settlement and a method of law-making) is recognized in the UN General Assembly resolution of 8 December 1998 on "Principles and guidelines for international negotiations" (Principles and guidelines), which states in its preamble that: "[i]nternational negotiations constitute a flexible and effective means for, among other things, the peaceful settlement of disputes among States and for the creation of new international norms of conduct."[8] However, it should be noted that it is sometimes very difficult to distinguish between the two functions. In both situations there is an obligation to negotiate an agreement. At the same time, especially with regard to dispute settlement,[9] the agreement may be legally non-binding.

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[4] A/RES/37/10, pt. 10.

[5] N. Matz-Lück, *Framework Conventions as a Regulatory Tool*, 1(3) Göttingen Journal of International Law 439 (2009).

[6] Y.-K. Kim, *Maritime Boundary and Island Disputes in Northeast Asia*, 25 Korean Journal of International and Comparative Law 1997, pp. 76-77, lists three functions of the *pactum de negotiando*, while noting that they are also performed by the *pactum de contrahendo*: 1) "to ease political tension between states belonging to antagonistic blocks, but willing to relieve tension by entering into some interim contractual relations"(states tend to avoid premature agreements); 2) "to reserve the elaboration of details for the implementation of a given treaty"(negotiations are concerned with more technical and less important issues; the goal is to accelerate the process of conclusion of a treaty); and 3) "to ensure for the concerned parties to resort to a treaty already in existence between them by articulating the legal obligations to proceed expeditiously to an exchange of views to settle the disputes arising between them" (i.e., the parties have the duty "to renew their previously unsuccessful negotiations with the aim of reaching an agreement on seeking a solution by peaceful means").

[7] Z.A.Al. Quarshi, *Renegotiation of International Petroleum Agreements*, 22(4) Journal of International Arbitration 291 (2005).

[8] A/RES/53/101.

[9] S. O'Connor, C.M. Bailliet, *The Good Faith Obligation to Maintain International Peace and Security and the Pacific Settlement of Disputes*, in: C.M. Bailliet, K.M. Larsen (eds.), *Promoting Peace Through International Law*, Oxford University Press, Oxford: 2015, p. 70.

Pacta can exist in all areas of international law. In practice, they most often appear in the international law of peace and security (disarmament, arms control, peace treaties and their implementation); the law of the sea (issues of maritime boundaries, but also maritime cooperation in various areas);[10] natural resources and environmental protection;[11] or international economic law (especially the law of international trade).[12]

2. FREEDOM TO ESTABLISH *PACTA*

Pacta require a decision as to their establishment. There is no general obligation to negotiate/conclude agreements. Paradoxically, they are therefore a reflection of the freedom to incur international obligations. *Pacta* express a limitation on that freedom in relation to the decision to initiate and pursue negotiations or to conclude an agreement. In this context, the freedom to establish *pacta* includes the choice of the type of *pactum*, setting the date, conditions and formulas for starting negotiations, the content of the negotiations, and the possible date of their completion/conclusion of an agreement.

However, the freedom to establish *pacta* may be subject to limitations. Such limitations can be a consequence of the decisions of interested parties, but they can also result from the inclusion of the *pactum* in a broader package of obligations under multilateral agreements (e.g. *pacta* included in the 1982 UN Convention on the Law of the Sea, UNCLOS). *Pacta* may be applicable only to certain parties to a multilateral treaty. The shape of negotiations can be imposed by the third party (e.g. Arts. 98 and 104 of the Versailles Treaty of 28 June 1918[13]). Moreover, the freedom to establish *pacta* can be restricted/abolished by recommendations or decisions taken by an international organisation (e.g. Security Council recommendations under Arts. 36 or 37 of the UN Charter[14]) or by an international court.

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[10] J. Symonides, *Nowe prawo morza* [The new law of the sea], PWN, Warszawa: 1986, pp. 228-230.

[11] *See* C. Hutchinson, *The Duty to Negotiate International Environmental Disputes in Good Faith*, 2(2) McGill International Journal of Sustainable Development and Policy 117 (2006).

[12] M. Panizzon, *Good Faith in the Jurisprudence of the WTO. The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement*, Hart Publishing, Oxford and Portland: 2006, pp. 75-84. Critically: B.J. Condon, *Does International Economic Law Impose a Duty to Negotiate*, 17(1) Chinese Journal of International Law 73 (2018).

[13] According to Art. 98, "Germany and Poland undertake, within one year of the coming into force of this Treaty, to enter into conventions of which the terms, in case of difference, shall be settled by the Council of the League of Nations (…)." Art. 104 provided that "The Principal Allied and Associated Powers undertake to negotiate a Treaty between the Polish Government and the Free City of Danzig, which shall come into force at the same time as the establishment of the said Free City."

[14] T. Giegerich, commentary on Art. 36, underlines that Security Council recommendations are neither legally, nor politically binding. Nevertheless, they are "highly authoritative and exercise a considerable political 'compliance pull'." B. Simma et al. (eds.), *The United Nations Charter. A Commentary*, vol. I, Oxford University Press, Oxford: 2012, pp. 1143-1444, 1156-1157, 1160. O'Connor and Bailliet, *supra* note 9, p. 77, consider that the impact of the Security Council recommendations is modest.

Exceptionally, the *pacta* may also be imposed, as in the case where such an obligation results for the weaker parties to an agreement, or even third parties, under the *pactum in odium tertii* formula (Arts. 34-37 VCLT). This is, for instance, the case of Art. 1(2) of the Treaty on the Final Settlement with Respect to Germany (signed on 12 September 1990[15]) which provided that the united Germany and Poland (Poland was not a party to the treaty) shall confirm the existing border between them in a treaty that is binding under international law.

3. LEGAL BASES AND FORM OF *PACTA*

Both *pactum de negotiando* and *pactum de contrahendo* can be formulated as either soft or hard law. In the first case, they can be based on joint political statements or declarations, also included in the final acts of international conferences,[16] or non-binding resolutions of organs of international organizations. Such *pacta* are not legal obligations, but merely political ones. While this does not mean that they are not useful or effective, this type of *pacta* will however remain beyond the scope of our consideration.

The legal bases for *pacta* may differ.[17] They derive primarily from bilateral or multilateral treaties. *Pacta* are most often included in dispute resolution clauses (e.g. the Biodiversity Convention, Art. 27(1)) or are normalized as agreement clauses (e.g. Arts. 74 and 83 UNCLOS). They usually constitute a provision being *pars pro toto* of a broader treaty regulation, such as the Non-Proliferation Treaty, or a treaty negotiated specifically for that purpose, e.g. preliminary peace treaties). A binding resolution of an international organization may also be the basis for a *pactum* in special circumstances (e.g. a UN Security Council resolution imposing an obligation on parties to a conflict to negotiate a ceasefire agreement or even to conclude it or sign a peace treaty). Hypothetically, unilateral declarations can also play such a role. States may, without concluding an agreement, promise each other to negotiate and/or conclude an agreement or a state may promise to join in the future an ongoing conference convened in order to develop a treaty. However, the legal bases of *pacta* cannot be a customary rule[18] or a general principle of law. *Pacta*, as exceptions to the freedom to incur obligations, cannot be presumed.

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[15] 1696 UNTS 29226.

[16] *See* Declaration No. 23 on the future of the Union, incorporated into the Final Act of the 2001 EU Nice Intergovernmental Conference (IGC), which indicated that the conference would take place in 2004 (pt 7).

[17] M.A. Rogoff, *The Obligation to Negotiate in International Law: Rules and Realities*, 16(1) Michigan Journal of International Law 141 (1994), pp. 153ff.

[18] Daillier, Forteau, Pellet, *supra* note 2, pp. 924-925, maintain that the obligation to initiate and conduct negotiations is based on customary law, although its existence and content may be confirmed and clarified by a treaty. The obligation exists in particular when the parties have not specified other methods of dispute resolution or do not use those which they have agreed on themselves. For a contrary view *see* Y. Tanaka, *The Peaceful Settlement of International Disputes*, Cambridge University Press, Cambridge: 2018, p. 37.

Recognizing a *pactum* in the form of a formal provision does not always mean that it actually exists. Much depends on the intention of the parties and wording used. The legal existence of *pacta* should be assessed in good faith. Nevertheless, the issue can raise disputes. As regards intention as a precondition of a *pacta* giving rise to legal obligations, the ICJ in the *Obligation to Negotiate Access to the Pacific Ocean Case* of 2018 ruled, in the context of a *pactum de negotiando*, that

> the fact that a given issue is negotiated at a given time is not sufficient to give rise to an obligation to negotiate. In particular, for there to be an obligation to negotiate on the basis of an agreement, the terms used by the parties, the subject-matter and the conditions of the negotiations must demonstrate an intention of the parties to be legally bound. This intention, in the absence of express terms indicating the existence of a legal commitment, may be established on the basis of an objective examination of all the evidence.[19]

The evidence of intention can be taken from different instruments, such as written (notwithstanding the form) and oral (tacit) agreements, declarations and other unilateral acts, but also from other legal bases, namely acquiescence, estoppel, and legitimate expectations. The intention must include the object of the *pacta*, and therefore must not involve anything else, not even conduct of a similar nature. The intention should be the source of the consent of the party to the existence and content of a particular *pactum*.

The significance of the wording of the legal provisions for the existence of *pacta* can be illustrated by the ICSID arbitral award of 7 November 2011 in the *Spyridion Roussalis v. Romania* case.[20] The applicant applied for a finding under Art. 9 of the applicable bilateral investement treaty that Romania had not entered into negotiations with a view to reaching an amicable settlement, which, in its view, led to "an unfair and inequitable treatment." Art. 9(1) stated:

> Disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former, shall, if possible, be settled by the disputing parties in an amicable way.

However, in interpreting this provision, the tribunal shared the view of the responding state. It held that

> in accordance with the interpretation rules of Article 31 of the Vienna Convention, the Treaty neither imposes a legal duty nor creates a legal right for the Parties to negotiate a settlement. Article 9 does not refer to "negotiations." It only refers to an amicable settlement "if possible."

The arbitration tribunal also added that

> in view of the numerous procedures which had taken place or were still ongoing before the courts of Romania, Respondent may have believed reasonably and in good faith that an amicable settlement was not "possible" and that it should not engage in negotiations.

[19] ICJ Rep 2018, p. 507 (at 539), para. 91ff.
[20] ICSID Case No. ARB/06/1, paras. 333-337.

> The Tribunal therefore decides that Romania's conduct was reasonable and adequate and did not breach the Fair and Equitable Treatment requirement.

This award shows that not every provision of a treaty that *prima facie* expresses the *pactum de negotiando* (in the field of settlement of disputes) may give rise to an obligation to enter into and conduct negotiations. The provision may include not an obligation, but only a possibility ("if possible'). Therefore, if the parties, or one of them, considers that it is not possible to negotiate an amicable agreement, they do not have to engage in negotiations.

Sometimes the *pacta* are not formulated unambiguously and clearly, but constitute a necessary assumption of such a provision ("hidden pacta"). UNCLOS provides various examples of such situations. For example, Art. 15 UNCLOS states that:

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. (…)

This solution can be seen as a conditional *pactum de contrahendo*, i.e. if the parties want to depart from the Convention's rule, they must negotiate and conclude an appropriate agreement.[21]

Other examples are Arts. 66(3)(d) and 67(3) UNCLOS, which provide for an obligation to conclude agreements between states in some circumstances in relation to anadromous stocks (enforcement of regulations regarding anadromous stocks beyond the exclusive economic zone) and catadromous species (where catadromous fish migrate through the exclusive economic zone of another State). Similar conclusions can be drawn from Arts. 69(3) and 70(3) insofar as the participation of land-locked states and geographically disadvantaged states in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same subregion or region are concerned. Additionally, Art. 125 can also be mentioned (freedom of transit).

4. LEGAL NATURE OF *PACTA*

4.1. General remarks

Pacta should not be seen merely as duties. Rather, they are international obligations, a part of the pre-contractual good faith obligations.[22] They constitute correlated rights

[21] *See also* Art. 119(2) of the Rome Statute of the International Criminal Court: "Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties."

[22] Panizzon, *supra* note 12, p. 73.

and obligations defined by international law. The parties have at the same time correlated rights and duties to enter into and pursue negotiations and – in the case of the *pactum de contrahendo* – to conclude an agreement. In the case of violation (non-performance, incomplete or improper performance) of *pacta,* international responsibility can be established.[23] Thus, despite the rather flexible formula (especially in the case of *pactum de negotiando*),[24] it is not about soft law obligations. Their existence and performance should be ascertained in the same way as those arising from any other legal obligation.[25] *Pacta* have to be performed in good faith and are enforceable. They can also be the subject of a legal dispute. This does not mean that the two *pacta* are identical and that they should not be distinguished from other obligations of a similar nature.

4.2. Distinguishing *pactum de negotiando* from *pactum de contrahendo*

4.2.1. Introductory remarks

The considered *pacta* have a lot in common, and this similarity sometimes blurs differences between them.[26] As indicated by, among others, Urlich Bayerlin, "there is neither a legal necessity for nor any practical utility in distinguishing the two *pacta*."[27] After a brief analysis of international practice, he adds: "[T]here is no relevant distinction between the two *pacta* in the legal quality of the obligations resulting from these instruments. There is no case where an absolute "agreement to agree" has been recognized by an international tribunal." He also noted that both obligations will differ slightly according to the circumstances in the particular case: the margin of negotiation on matters of substance left open to the parties for shaping the ultimate agreement will be larger or smaller according to the degree to which the substantive contents

[23] As the arbitral tribunal in *The Government of Kuwait v. Aminoil* of 24 March 1982 noted "the obligation to negotiate is not devoid of content, and when it exists within a well-defined juridical framework it can well involve fairly precise requirements." 21 ILM 1982, p. 976 (at 1014), para. 24.

[24] Due to the flexibility inherent in the nature of such obligations, they are sometimes referred to as soft (legal) obligations. *See* H. Neuhold, *Variations on the Theme of 'Soft International Law'*, in I. Buffard et al. (eds.), *International Law Between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner*, Martinus Nijhoff Publishers, Leiden-Boston: 2008, pp. 343ff, esp. pp. 349-351.

[25] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment (Merits), 1 October 2018, ICJ Rep 2018, p. 507, at 539, para. 91.

[26] For more on the international practice undermining the relevance and even the existence of a *pactum de contrahendo*, *see* J. Gilas, *Pactum de contrahendo w prawie międzynarodowym publicznym* [Pactum de contrahendo in public international law], 23 Zeszyty Naukowe UMK Prawo 135 (1967).

[27] *See i.a.* U. Bayerlin, *Pactum de contrahendo, pactum de negotiando*, in R. Bernhardt (ed.), *Max Planck Encyclopedia of Public International Law*, vol. 7, North Holland, Amsterdam-New York-London: 1984, pp. 371ff, esp. pp. 372, 376. The author admits, however, that the doctrine did not agree on the issue of distinguishing between the two categories of the *pacta* (pp. 375-376). Similarly, *see* L. Marion, *La notion de "pactum de contrahendo" dans la jurisprudence internationale*, 78(2) Revue générale de droit international public 351 (1974), esp. pp. 382-397; R.R.Q. Baxter, *International Law in "Her Inifinite Variety"*, 29(4) International and Comparative Law Quarterly 549 (1980), p. 552. For an opposite opinion *see* H. Owada, *Pactum de contrahendo, pactum de negotiando*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. 8, Oxford University Press, Oxford: 2012, pp. 18-19.

of the final agreement can be determined by means of the *pactum* itself. Upon this also depends the success of a party in refuting the assertion of the other side of not having done its best to come to an agreement and in proving that it has negotiated in good faith.[28]

Sometimes it is also argued that while *pactum de negotiando* can be considered, *pactum de contrahendo* is a misleading concept that should be eliminated from the scientific discourse.[29]

The difference between the two types of obligations is indeed difficult to grasp. Problems with determining the content of an obligation are sometimes exacerbated by ambiguous treaty provisions. Given treaty practice and, to a lesser extent, international case law, there is also a tendency to interpret the provisions underpinning obligations to negotiate and conclude international agreements under the guise of *pactum de negotiando*.[30] It seems that the states negotiating treaties for their conclusion are not always interested in strengthening their obligation by defining the need to achieve the outcome of concluding a treaty. However, this does not mean that the possibility of a *pactum de contrahendo*, its practical relevance,[31] or the theoretical need to distinguish it from the *pactum de negotiando* should be rejected.[32] At the same time, distinguishing between the *pacta* requires insight into their legal nature and scope as well as an in-depth analysis of the obligations they give rise to.

4.2.2. Distinguishing *pactum de negotiando* from *pactum de contrahendo*

The *pactum de negotiando* is based on the need to initiate and conduct negotiations in good faith. It is not about having to definitively negotiate an international agreement, let alone to conclude it, or even to ensure that it enters into force. The Permanent Court of International Justice in its Advisory Opinion in *Railway Traffic between Lithuania and Poland* of 15 October 1931 stated, rejecting the Polish argument relating

[28] Bayerlin, *supra* note 27, p. 376.

[29] A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, Cambridge: 2000, p. 25, following Lord McNair.

[30] Gilas, *supra* note 26, p. 154.

[31] *See i.a. Case concerning claims arising out of decisions of the Mixed Greco-German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles (between Greece and the Federal Republic of Germany)* of 26 January 1972, RIAA vol. XIX, p. 27 (at 55-56), para. 62. The tribunal stated: "Article 19 must be considered as a pactum de negotiando. The arrangement arrived at between the parties in the present case is not a pactum de contrahendo as we understand it. This term should be reserved to those cases in which the parties have already undertaken a legal obligation to conclude an agreement (…)." *See also* on the distinction in the arrangement of Israel and the Palestine Liberation Organization (Declaration of Principles on Interim Self-Government Arrangements) of 1993: A. Cassese, *The Israel-PLO Agreement and Self-Determination*, 4(4) European Journal of International Law 564 (1993), pp. 565-568.

[32] Rogoff, *supra* note 17, pp. 148-149, observes: "Although some scholars question the utility of this distinction [between pacta – CM], believing that an obligation to conclude an agreement is no more than an obligation to negotiate in good faith, the distinction is helpful, because it allows for separate consideration of the decision to undertake negotiations."

to the interpretation of the resolution of the Council of the League of Nations, that "an obligation to negotiate does not imply an obligation to reach an agreement."[33] Similarly, the arbitral tribunal in the *Government of Kuwait v. Aminoil* Case of 24 March 1982 made it clear that: "An obligation to negotiate is not an obligation to agree."[34]

As the arbitration tribunal in the *Lake Lannoux* Case of 16 November 1957 explained, the *pactum de negotiando* avoided the rigidity of the *pactum de contrahendo* by not obliging the parties to conclude an agreement. The tribunal confirmed that the *pactum de negotiando* is much more frequent than the *pactum de contrahendo*. This is due to the fact that international practice prefers to resort to less extreme solutions, limiting the obligations of states to seek, in previous negotiations, the terms of an agreement without making the exercise of their competence conditional on its conclusion.[35]

However, contrary to first impressions, the *pactum de negotiando* is not a fully homogenous legal institution. In the *Lake Lannoux* Case the arbitration tribunal found that the *pacta de negotiando* were, often inappropriately, referred to as obligations to negotiate an agreement. In reality, however, obligations of different forms and scope are at stake. In the case of *Air Service Agreement of 27 March 1946 between the United States of America and France* of 9 December 1978, the arbitral tribunal took a similar position, stating that "the duty to negotiate may, in present times, take several forms and thus have a greater or lesser significance."[36] *Pactum de negotiando* can be formulated similarly to *pactum de contrahendo*. This may cause additional distortions in distinguishing this *pactum* from *pactum de contrahendo*.

An important example of such interpretation problems concerns Art. VI of the Non-Proliferation Treaty of 1968. According to it,

> Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

Regarding this provision, the ICJ, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* of 8 July 1996,[37] concluded that:

> The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result – nuclear disarmament in all its aspects – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.

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[33] PCIJ Series A/B, No. 42, p. 107, at 116. Similarly the ICJ in *Obligation to Negotiate Access to the Pacific Ocean (Merits)*, at 538, para. 87.

[34] 21 ILM 1982, p. 976, at 1014, para. 24.

[35] RIAA vol. XII, p. 281 (at 306-307), para. 11.

[36] RIAA vol. XVIII, p. 417 (at 444), para. 87.

[37] ICJ, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, ICJ Rep 1996, p. 226, at 263-264, para. 99.

In the literature this pronouncement is sometimes interpreted as a recognition of the *pactum de contrahendo*.[38] However, this is not the correct reasoning. It results from the unfortunate appeal to the obligation to achieve a result. The Court does not deny that Art. VI expresses an obligation to enter into and conduct negotiations with a view to agreeing on a nuclear disarmament treaty. However, in order to emphasize its target content, it stated that it was not simply any disarmament that was at stake, but nuclear disarmament in all its aspects.

4.2.3. Distinguishing pacta from similar obligations

Pacta should also be distinguished from obligations of similar nature. Such similar obligations include obligations to exchange views and, as is often the case in international agreements, the obligation to consult.[39] The boundary between them, especially in the context of the drafting of specific treaty provisions, cannot always be drawn from a simple reading of the text and remains to a significant extent a matter of interpretation.[40] It is necessary to refer to the intention and the object and purpose of the provision, or even the treaty.

Both the obligation to exchange views and the obligation to consult, although of varying intensity, come into play with legal obligations, usually those related to the obligation of conduct. However, they consist only in the exchange of information, knowledge, experiences, sharing, learning positions and opinions, discussing specific issues or giving advice. They do not include negotiating and concluding agreements. They do not cover the intention to conclude an agreement.[41] These obligations may either precede or occur after the failure of *pacta*.[42]

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[38] *See e.g.* D. Simon, *Article VI of the Nuclear Non-Proliferation Treaty is a pactum de contrahendo and has Serious Legal Obligation by Implication*, 2 Journal of International Law and Policy 1 (2004-2005), pp. 7-17, text: https://www.law.upenn.edu/journals/jil/jilp/articles/2-1_Simon_David.pdf (accessed 30 May 2021).

[39] Rogoff, *supra* note 17, p. 149; Hutchinson, *supra* note 11, pp. 135-141.

[40] Thus, for example, the arbitration tribunal in the *Air Service Agreement of 27 March 1946 between the United States of America and France Case* of 9 December 1978 derived from the general obligation of permanent (regular) consultations aiming at the compliance with the principles and provisions of the Agreement, "a clear mandate to the Parties to make good faith efforts to negotiate on issues of potential controversy" (RIAA vol. XVIII, p. 417 (at 444), para. 88). *See also* Rogoff, *supra* note 17, pp. 171ff.

[41] *See Case concerning claims arising out of decisions of the Mixed Greco-German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles (Greece v. Germany)* of 26 January 1972, RIAA vol. XIX, p. 27, at 61-62, para. 78. The tribunal stated: "We have examined the communications that were exchanged between the Governments subsequent to the signature of the Agreement and have concluded that these did not constitute "negotiations" (…). The exchange of views in the main took place in writing. Some oral discussions were held but only during the course of unrelated negotiations. On all these occasions the German side simply rejected the Greek claims ab initio and gave reasons for this rejection. On the other hand, the Greek Government also refused to reconsider its position."

[42] In the *M/V "Norstar" Case (Panama v. Italy)*, Judgement (Preliminary Objections), 4 November 2016, Case No. 25, para. 204ff, the ITLOS considered the importance of the obligation to exchange views regarding its settlement by negotiation under Art. 283(1) UNCLOS. According to the ITLOS, this obligation cannot be equated with an obligation to negotiate the subject-matter of a dispute (para. 208). It does not have to be executed if a party determines that "the possibilities of reaching agreement have been

Pacta should also not be identified with the obligation to cooperate, which often appears in treaties. The obligation to cooperate is broader in scope and relativized to the subject matter of the treaty and linked to its institutional infrastructure, if established. While cooperation requires being open to one another, making contacts and responding to them, and acting in good faith for a common purpose, it does not *per se* involve an obligation to negotiate or conclude a treaty. *Pacta* thus cannot be inferred from a general obligation to cooperate, as due to their restrictive nature they require an indication of a specific legal basis.

5. *PACTA* AS A BUNDLE OF INTERNATIONAL OBLIGATIONS

5.1. General remarks

Pacta are not simple duties. They should not be viewed as single legal obligations. They constitute a bundle of obligations. One can find out about them by analyzing the legal nature and scope of each *pactum*. Considerations in this matter additionally highlight the differences between the two *pacta*. *Pactum de negotiando* includes the obligation to enter into negotiations and to pursue them in good faith,[43] while the *pactum de contrahendo* focuses on the obligation to negotiate and conclude an agreement in good faith. Let us now focus on the content of the *pacta* themselves, leaving good faith to be considered in the next section.

5.2. *Pactum de negotiando* as a bundle of obligations

5.2.1. The obligation to enter into negotiations

Generally speaking, the obligation to enter into negotiations assumes not so much the articulation of a readiness to negotiate as the undertaking of actual activities related to the determination of the date and place of their commencement, scope, conditions, and manner of their conduct. Future negotiators have a great deal of freedom in this regard.

exhausted" (para. 216). *Cf.* diversely: *the case of Chagos Marine Protected Area (Mauritius v. United Kingdom)* in the award of 18 March 2015, RIAA vol. XXXI, p. 359, at 520-521, para. 381. The arbitral tribunal stated that "an overly formalistic application of Article 283 does not accord with how diplomatic negotiations are actually carried out" and added that "substantive negotiations concerning the parties' dispute are not neatly separated from exchanges of views on the preferred means of settling a dispute, and the idealized form exhibited in Southern Bluefin Tuna will rarely occur." As a consequence, "in the jurisprudence on Article 283 it is frequently not clear as to whether the communications that were considered sufficient for the purposes of Article 283 were substantive or procedural in nature" (para. 381). Thus, the tribunal applied criteria similar to those applied to the *pactum de negotiando* with respect to the performance of the obligation to exchange views (para. 385).

[43] R. Kolb, *La bonne foi en droit international public. Contribution à l'étude des principes généraux de droit*, Presses Universitaires de France, Paris: 2000, pp. 587-595. The author derives three principles from *pactum de negotiando*: 1) prohibition of depriving the negotiations of the object and purpose; 2) prohibition of the abuse of rights; 3) protection of trust and confidence.

Nevertheless, the freedom should be perceived as limited insofar as concerns the date of their commencement, the formula, and the substantive scope of the negotiations initiated.

Formally, the obligation to negotiate may or may not indicate the date by which negotiations should begin. If a deadline is not set, the parties concerned should enter into negotiations within a reasonable time. In both cases, the obligation to negotiate an agreement is an obligation of result, although it is required at a different point in time. A breach of this obligation would be either an unjustified delay in the opening of negotiations, an open refusal to start negotiations, and/or the ineffective expiry of the date, if any. The obligation to enter into negotiations on a specific date may also depend on a condition.[44]

The parties may decide to negotiate directly or in a more or less institutionalized formula (e.g. in multilateral international conferences or in international organizations, such as the GATT47[45] and now the WTO[46]). They may also define their *modus procedendi* before the start of the negotiations. When they do, however, they must respect and adhere to the mutually agreed framework for conducting negotiations.[47]

The parties are also free to determine the content of the negotiations. Usually, however, their subject matter is laid down at least as to the final result. The result can be described in terms of its overall content or its legal nature (e.g. Arts. 74, 83 UNCLOS: equitable solution). Finally, the freedom to determine the content of the negotiations may be limited by the parties themselves, which may prejudge the issues to be negotiated and possibly included in a future agreement (e.g. preliminary agreements for future peace treaties).[48]

5.2.2. The obligation to pursue negotiations

Pactum de negotiando assumes that once the decision to enter into negotiations is made, such negotiations will be pursued. However, the question arises as to how the parties should behave in order for the obligation to pursue negotiations to be considered as fulfilled. The answer to this question should be sought in international jurisprudence. In particular, the ICJ indicated more generally that the parties are to behave in such a way that the negotiations are meaningful.[49] In its judgments of 20 February 1969 in the *North Sea Continental Shelf Cases* (Germany/Denmark; Germany/Netherlands) it ruled that:

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[44] *See* Art. N(2) EU Treaty (on the IGC 1996), or the 1997 Protocol No 11 on the institutions in view of the enlargement of the European Union (the beginning of the IGC was defined as future and uncertain, and was subject to the condition that it be announced that the number of members of the European Union would soon exceed 20).

[45] *See i.a.* S.L. Klass, *Obligatory Negotiations in International Organizations*, 3 Canadian Yearbook of International Law 36 (1965).

[46] D. Carreau, P. Juillard, *Droit international économique*, Dalloz, Paris: 2010, p. 110ff.

[47] *See* Principles and guidelines, point 2(d).

[48] *See also* 1997 EU Protocol on the institutions with the prospect of enlargement of the European Union.

[49] In the Advisory Opinion in *Railway Traffic between Lithuania and Poland*, PCIJ, Series A/B, No. 42, p. 108 (at 116), it was stated that the obligation to negotiate requires "not only to enter into negotiations, but also to pursue them *as far as possible*, with a view to concluding agreements" [own emphasis].

> [T]he parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.[50]

Thus, the concept of meaningfulness determines the behavior of the parties during the negotiations. However, as is clear from international case law, this concept should be related to specific, detailed obligations falling within the scope of the obligation to pursue negotiations. These obligations include: 1) the obligation to make mutual and genuine concessions; 2) the obligation to make serious efforts to ensure that the negotiations are meaningful/successful; 3) the obligation not to jeopardize or hamper the reaching of a final agreement.

The first obligation is analysed in the arbitration award in the case of *Claims arising out of decisions of the Mixed Greco-German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles (Greece v. Germany)* of 26 January 1972,[51] interpreting Art. 19 of the London Agreement on Public and Private Debt of Germany before and after the First and Second World Wars. The tribunal found that

> both sides would make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of strongly held positions earlier taken. It implies a willingness for the purpose of negotiation to abandon earlier positions and to meet the other side part way. The language of the Agreement cannot be construed to mean that either side intends to adhere to its previous stand and to insist upon the complete capitulation of the other side. Such a concept would be inconsistent with the term "negotiation." (…) An undertaking to negotiate involves an understanding to deal with the other side with a view to coming to terms.

It also added that

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

According to the arbitrators, the obligation to make mutual and genuine concessions is something more than just showing a willingness to make concessions, but also something less than capitulation, submission to the arguments to the other party in negotiations.

[50] ICJ, *North Sea Continental Shelf*, Judgment, 20 February 1969, ICJ Rep 1969, p. 3, at 47, para. 85. Similarly ICJ, *Pulp Mills on the River Uruguay (Uruguay v. Argentina)*, Judgment, 20 April 2010, ICJ Rep 2010, p. 14, at 48, para. 146; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment, 5 December 2011, ICJ Rep 2011, p. 644, at 685, para. 132.

[51] RIAA vol. XIX, p. 27, at 55, 57-58, 59, paras. 62, 65, 71.

Mutual concessions should be an expression of the negotiating parties' striving for a certain balance, a test of their actual involvement in the meaningful negotiations in order to conclude an agreement. The concession obligation is of particular importance when one of the negotiating parties is clearly weaker than the other.

In the same case, the tribunal also emphasized the parties' obligation to make serious efforts to conclude the treaty, stating that:

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

In order to demonstrate the fulfillment of the obligation, the participants of the negotiations must therefore demonstrate that they adopted an active attitude during the negotiations, and submitted appropriate proposals that could effectively contribute to the achievement of the negotiation goal, i.e. to the conclusion of an agreement. In the event of an impasse in negotiations, "States should use their best endeavours to continue to work towards a mutually acceptable and just solution" (*Principles and guidelines*, point 2(g)). If there are substantive or procedural rules for the conduct of the negotiations, the parties must also take them into account.

According to international jurisprudence, the obligation to pursue negotiations is also connected with the negative obligation to not jeopardize or hamper the reaching of a final agreement.[52] Sometimes this obligation is explicitly included in the *pactum* (e.g. the case of delimitation of the exclusive economic zone and the continental shelf, Arts. 74(3) and 83(3) UNCLOS). However, it is not necessary that it be so included. Such an obligation may be implied from the obligation to pursue meaningful negotiations. In general, the parties to the negotiations cannot obstruct them by, for example, interrupting communications or causing delays in an unjustified manner, or disregarding the procedures agreed upon.[53] As emphasized by the General Assembly, "States should endeavour to maintain a constructive atmosphere during negotiations and to refrain from any conduct which might undermine the negotiations and their progress" (*Principles and guidelines,* point 2(e)).

The need for concessions and making serious efforts in negotiations on the one hand, and the requirement to not jeopardize or hamper the conclusion of an agreement on the other, were explicitly mentioned by the arbitration tribunal in its award on the *Delimitation of the sea border* between French Guyana and Suriname of 17 September 2007.[54] With regard to the obligation to negotiate interim agreements, it stressed that although the term "every effort" leaves some room for interpretation, it is

[52] *Delimitation of the exclusive economic zone and the continental shelf between Barbados-Trinidad and Tobago*, Award of 11 April 2006, RIAA vol. XXVII, p. 147.

[53] *Lake Lanoux Arbitration (Spain v. France)*, RIAA vol. XII, p. 281, at 307, para. 11.

[54] RIAA vol. XXX, p. 1, at 130, 131-133, paras. 461, 465-470. *See also* A. Aizenstadt, *Guyana v Suriname Maritime Boundary Arbitration*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. 8, Oxford University Press, Oxford: 2012, vol. IV, pp. 654-657.

a component of the obligation to negotiate in good faith. Furthermore, by using the words "in a spirit of understanding and cooperation" in the UNCLOS provision, the intention of its authors was to require the parties to adopt a conciliatory approach to the negotiations, whereby they should be prepared to make mutual concessions with a view to reaching a provisional agreement. This is expected particularly in the case of interim agreements, which by definition are temporary and should be negotiated without prejudice to the final delimitation. With regard to the obligation to make every effort not to jeopardize the conclusion of the final agreement, the tribunal pointed out that this did not necessarily prohibit any action, but only any action which would make it more difficult or impossible to conclude the final agreement (in the context of the shelf in particular, such action may be of such a nature as to bring about a permanent physical change in the marine environment, such as the exploitation of gas or oil deposits).

The *pactum de negotiando* does not, in principle, specify the desired date for the conclusion of negotiations (although this is not formally unacceptable). Theoretically therefore, it would be possible to demand that negotiations be conducted indefinitely. However, international law takes the view that negotiations should be concluded within a reasonable period of time and that the obligation to conduct negotiations outside of that period expires when it is demonstrated that they would be counterproductive or meaningless. This was confirmed by the arbitration tribunal in its award in the *Delimitation of the exclusive economic zone and the continental shelf (Barbados v. Republic of Trinidad and Tobago)* case of 11 April 2006.[55] It determined that:

> The existence of a dispute is similarly not precluded by the fact that negotiations could theoretically continue. Where there is an obligation to negotiate it is well established as a matter of general international law that that obligation does not require the Parties to continue with negotiations which in advance show every sign of being unproductive.

The ICJ formulated a similar view in the judgment on preliminary objections in the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation*) case of 1 April 2011. The Court stated:

> Manifestly, in the absence of evidence of a genuine attempt to negotiate, the precondition of negotiation is not met. However, where negotiations are attempted or have commenced, the jurisprudence of this Court and of the Permanent Court of International Justice clearly reveals that the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked.[56]

Moreover, following the *Mavrommatis* Case of 1924, it pointed out that "ascertainment of whether negotiations, (…), have taken place, and whether they have failed

[55] RIAA vol. XXVII, s. 147, at 205, para. 199. *See* B. Kwiatkowska, *The 2006 Barbados/Trinidad Tobago Maritime Delimitation (Jurisdiction and Merits) Award*, in: T. Malik Ndiaye, R. Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, Martinus Nijhoff Publishers, Leiden-Boston: 2007, pp. 917ff, esp. 937-939.

[56] ICJ Rep 2011 (I), p. 70, at 133, para. 159.

or become futile or deadlocked, are essentially questions of fact "for consideration in each case."[57]

In its judgment on the *Questions relating to the Obligation to Prosecute or Extradite* of 20 July 2012, the ICJ in turn stressed that:

> The requirement that the dispute "cannot be settled through negotiation" could not be understood as referring to a theoretical impossibility of reaching a settlement. It rather implies that, as the Court noted with regard to a similarly worded provision, "no reasonable probability exists that further negotiations would lead to a settlement" (…).[58]

Thus, entering into and pursuing negotiations in good faith does not have to be successful. The ICJ in its judgment of 10 October 2002 in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, focusing on Arts. 74 and 83 UNCLOS, noted that these provisions "do not require that delimitation negotiations should be successful; like all similar obligations to negotiate in international law, the negotiations have to be conducted in good faith."[59]

5.3. Pactum de contrahendo as a bundle of obligations

A distinctive feature of the *pactum de contrahendo* is that, in addition to the obligation to enter into and pursue negotiations, it includes the obligation to end them by concluding an agreement. Nevertheless, the content of that *pactum* is not entirely clear. Let's first note that there are two forms of the *pactum*: 1) the obligation to conclude a new agreement; 2) an obligation to accede to an existing agreement.

Insofar as the first version of the *pactum* is concerned, some doubts deal with the final and key phase for the performance of the obligation, i.e. the conclusion of the agreement.[60] At least two interpretations are possible. According to the first of them, the *pactum* will be fulfilled when the negotiating parties adopt/sign an agreement. Pursuant to the second possibility, the agreement's entry into force is to be ensured. In the first case, the mere adoption/signing of an agreement does not necessarily ensure that the agreement will actually enter into force. This means that the *pactum* would in fact be ineffective. The second interpretation thus requires the entry into force of the negotiated agreement. However, the moment of performance may then be postponed, and failure to ensure the entry into force of the agreement may be the result of various factors. Responsibility for breach of the obligation would be developed differently in both cases.

Nevertheless, it seems correct to recognize that the *pactum de contrahendo* means that the parties will bring the agreement into effect and therefore ensure that it enters into force. Indeed, the mere adoption/signing of an agreement, especially if it were not to be applied provisionally, would differ from the *pactum de negotiando* only in appearance, and the obligation to conclude the agreement would be solely formally fulfilled.

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[57] *Ibidem*, para. 160.

[58] ICJ Rep 2012, p. 422, at 446, paras. 114 and 115.

[59] ICJ Rep 2002, p. 303, at 424, para. 244.

[60] On the ambiguity of the concept of concluding an agreement, *see* Gilas, *supra* note 26, pp. 139-141.

The second form of the *pactum de contrahendo* can be considered as simpler. It may consist of an obligation to accede to certain treaties already in force. This situation can be encountered, for example, in the accession practice of the European Union. The Acts of accession contain provisions obliging new member states to accede to international agreements with third parties to which the Union and Member States are parties (so-called "mixed agreements"), as well as agreements concluded by member states in the framework of the integration process, also in a simplified form.[61]

The obligation to conclude an agreement may also be twofold from the point of view of the time of its conclusion. The first refers to a situation when the obligation includes a date when a treaty should not so much be initiated and negotiated as it should be signed (entry into force). Such an obligation is an obligation of result. As a consequence, failure to conclude the agreement on time results in a breach of the obligation. The second form of the *pactum de contrahendo* includes the obligation to conclude an agreement without indicating a deadline. It could be assumed that this is a duty of conduct. This however is not the case. In the absence of a clear time limit, the agreement must be concluded without undue delay, within a reasonable period of time. However, in this case it is more difficult to distinguish between this obligation and the *pactum de negotiando*.

From a substantive point of view, the *pactum de contrahendo* may be either unlimited or limited. In the first case, the subject matter of the future agreement is defined only in general terms. In the second situation, the *pactum* indicates what matters should be included in the future treaty. They are indicated in such a way as to maintain the necessary flexibility. Such matters may also be included in the form of a duty of conduct, which means that failure to include them (completely) in the negotiated treaty will not be tantamount to a breach of the *pactum*.

Pactum de contrahendo is an obligation that goes beyond *pactum de negotiando*. It is connected with the acceptance, or even the final binding nature, of a negotiated treaty. For this reason, the obligation not to defeat the object and purpose of the treaty remains valid in this regard (Art. 18 VCLT) during the period from its adoption to being bound by the treaty. *Ex naturae,* this obligation does not apply to *pactum de negotiando*.

6. PRINCIPLES FOR THE PERFORMANCE OF *PACTA* OBLIGATIONS

6.1. General remarks

Establishing the nature and scope of the specific obligations that make up *pacta* raises another question about the most basic standards for their performance. These standards not only determine the appropriate behaviour of the parties, but also con-

[61] Such obligations have emerged since the first accession to the European Communities (1972). A. Wyrozumska, *Legal Nature of the 2003 Treaty of Accession to the European Union*, XXVI Polish Yearbook of International Law 5 (2002-2003), p. 10.

tribute "to enhancing the predictability of negotiating parties, reducing uncertainty and promoting an atmosphere of trust at negotiations."[62]

Recognizing that *pacta* constitute international obligations, they are subject to the principle of fulfilling obligations in good faith (Art. 2(2) UN Charter).[63] Due to the fact that they appear most often in treaties, the principle of *pacta sunt servanda* applies to them (Arts. 26 and 27 VCLT). As valid international obligations, *pacta* require performance to the full extent and appropriately insofar as persons, time, place, and manner are concerned, consistently with the content of the relevant *pacta*. They cannot be unilaterally and arbitrarily rejected. No reference may be made to the national law of the parties, nor to any internal obstacle or reason to justify the refusal to perform them or to justify their improper performance.

The *pacta* obligations are governed by and must be carried out in accordance with international law (*Principles and guidelines*, point 1). "The purpose and object of all negotiations must be fully compatible with the principles and norms of international law, including the provisions of the Charter" (point 2(c)), especially with *jus cogens* and the primacy of the UN Charter (Art. 103). Moreover, the performance of *pacta* obligations should be consistent with the specific rules of a particular branch of international law (e.g. equitable principles, methods, criteria, and equitable considerations cannot be ignored in negotiations concerning maritime delimitations).[64]

Pacta are essentially bilateral obligations. If they arise within the framework of conferences or international organizations, they may remain bilateral or can be multilateralised. In addition, as the General Assembly underlined in the *Principles and guidelines* resolution (point 2(b)),

> States should take due account of the importance of engaging, in an appropriate manner, in international negotiations the States whose vital interests are directly affected by the matters in question.
>
> Since negotiations take place *inter partes*, they should also pay reasonable regard to the interests and rights or obligations of third parties not participating in them.

6.2. The good faith principle

Good faith is the most basic and, at the same time, a framework standard affecting both the creation of *pacta* and their performance. Good faith is inherently linked to *pacta*. It determines the exercise of each of the specific obligations falling within the scope of both types of *pacta*.[65] As the ICJ explained in *Application of the Interim Accord*

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[62] Principles and guidelines, preamble.

[63] Principles and guidelines, point 2(a).

[64] D.R. Rothwell, T. Stephens, *The International Law of the Sea*, Hart Publishing, Oxford-Portland: 2010, p. 383ff; R. Lagoni, D. Vignes (eds.), *Maritime Delimitation*, Martinus Nijhoff Publishers, Leiden-Boston: 2006.

[65] *See* J.-P. Cot, *La bonne foi et la conclusion des traités*, 4 Revue belge de droit international 140 (1968), pp. 146-149; T. Hassan, *Good Faith in Treaty Formation*, 21(3) Virginia Journal of International Law 470 (1981).

of 13 September 1995,[66] even if the requirement of good faith is not expressly stated in the provision on which it is based, it remains an implicit element. This means that parties which undertake to enter into and to pursue negotiations or to conclude an agreement must do so in good faith. Any conduct of the negotiating parties must therefore be assessed in the light of good faith.[67]

Thus, as the arbitration tribunal in the *Lake Lannoux* Case of 1957 stressed,[68]

> the reality of the obligations thus defined cannot be called into question and can be sanctioned, for example, in the event of unjustified breakdowns in negotiations, abnormal deadlines, contempt for the procedures provided for, systematic refusal to take account of the various proposals or interests and, more generally, in the event of breaches of the rules of good faith.[69]

In the case of *pacta* the assessment of the parties' conduct will not involve examining their merits, but whether the parties have put forward their arguments in good faith with a view to negotiating/concluding an international agreement.[70]

Good faith, however, is difficult to define. There is no consensus as to its understanding.[71] While the analysis of this problem would go beyond the scope of this study, in can nevertheless be assumed that good faith expresses trust and confidence.[72] It assumes the existence of two elements: an ideal one, therefore a subjective but positive attitude to the performance of the obligation (this is a rational ethical attitude resulting from loyalty, honesty, reliability, a serious approach to complex declarations of will, common sense); and also a real one, not related to declarations about a party's behaviour,[73] but aimed at fulfilling the obligation in all respects by practical activities.

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[66] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, p. 684, para. 131.

[67] ICJ, *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Judgment (Merits), 25 July 1974, ICJ Reports 1974, at 33, para. 78.

[68] RIAA vol. XII, p. 281, at 306-307, para. 11.

[69] As regards the proof required for finding the existence of bad faith, "something more must appear than the failure of particular negotiations." It could be provided by circumstantial evidence, but should be supported "not by disputable inferences but by clear and convincing evidence which compels such a conclusion." The arbitration award in the case of *Tacna-Arica (Chile, Peru)*, 4 March 1925, RIAA vol. II, p. 921 (at 930).

[70] In the arbitration award in the case of *Tacna-Arica*, the tribunal stated: "The question now presented is not whether the particular views, proposals, arguments and objections of either Party during the course of the negotiations should be approved, but as to the good faith with which these views, proposals, arguments and objections were advanced. (…) The Parties, by Article 3 of the Treaty of Ancon, having left to a future agreement the conditions of the plebiscite must be deemed to have thereby agreed that each Party should have the right to make proposals, and to object to the other's proposals, so long as they acted in good faith" (p. 933).

[71] *See* Kolb, *supra* note 43; J.F. O'Connor, *Good Faith in International Law*, Dartmouth Publishing Company, Aldershot: 1991; E. Zoller, *La bonne foi en droit international public*, Éditions A. Pédone, Paris: 1977.

[72] ICJ, *Nuclear Tests Cases (Australia v. France/New Zealand v. France)*, Judgments, 20 December 1974, ICJ Rep 1974, respectively p. 253, at 267 and p. 457, at 473.

[73] ICJ, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, 10 October 2002, ICJ Rep 2002, p. 303, at 424, para. 244, with regard

Good faith applies to both the course of action and the result, if assumed by the parties to the obligation. The consequence of good faith is a reasonable expectation that the other party is actually aiming for a positive outcome.[74] Although it is not a precise standard, it is certain that the obligation cannot be performed in bad faith, or in a merely apparent, formal way.

As regards *pacta*, it is understood that the duty to negotiate to conclude an agreement in good faith does not impose a new obligation, but rather reaffirms an existing one.[75] The principle of good faith alone does not generate autonomous obligations.[76] Nevertheless, good faith has a major influence on the performance of *pacta*. To a significant extent it also enables a more precise determination of whether the manner of performing the obligation corresponded to its content.

CONCLUSIONS

Pacta are a useful and frequently-used instrument in the field of dispute resolution and the creation of new international regulations. They are useful in bilateral and multilateral treaty practice in many areas of international law. *Pacta* are legal obligations, although they retain a flexible nature. Their violation results in international responsibility. While they themselves are essentially a product of treaty freedom, they set limits on future negotiations and contracting. Despite their similarities, *pactum de negotiando* and *pactum de contrahendo* should not be equated. They are bundles of partially different obligations. *Pactum de negotiando* includes the obligation to enter into and pursue negotiations. However, the latter is broken down into a number of specific obligations in connection with the requirement of meaningfulness. In turn, the *pactum de contrahendo* requires the conclusion of an agreement, although this obligation is far from attaining clarity. *Pacta* are a mix of obligations of conduct and of result, of action and of omission. Their fulfilment is based on reciprocity and good faith, and should be consistent with international law and respect of the interests of non-negotiating parties.

to the meaning of the obligation to conduct negotiations in good faith. In *Gabčikovo-Nagymaros Project*, the Court has ruled that: "The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized" (ICJ, *Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25 September 1997, ICJ Rep 1997, p. 7. at 78-79, para. 142).

[74] *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, 20 January 1984, ICJ Rep 1984, p. 246, at 292, para. 87. In the judgment, the ICJ stated that the obligation to negotiate the agreement requires "a genuine intention to achieve a positive result." *See also* O'Connor and Bailliet, *supra* note 9, p. 72.

[75] R. Barnidge, *The International Law as a Means of Negotiation Settlement*, 36(3) Fordham International Law Journal 545 (2013), p. 557.

[76] Kolb, *supra* note 43, p. 597.