Keeping Good Faith in Diplomacy: Negotiations and Jurisdiction in the ICJ's Application of the CERD

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Abstract: The International Court of Justice (ICJ) refused jurisdiction in Georgia’s suit against Russia under the Convention on Elimination of All Forms of Racial Discrimination, finding that the treaty’s jurisdictional clause, which limits jurisdiction to unsettled disputes, did not apply in the absence of good-faith negotiation. The court reversed its provisional measures order, which entertained jurisdiction, and continued a line of cases holding that clauses like the treaty’s jurisdictional clause serve mainly to give the parties notice of the dispute. The ICJ’s ruling noted that these clauses also reflect limits on parties’ consent to jurisdiction and a general preference for negotiated solutions. This suggests that the court will scrutinize attempted diplomacy more in the future to ensure good-faith conduct. Yet the court refused to overturn precedents permitting use of open forums such as the UN and finding negotiations where the specific treaty obligations are not identified, making good faith harder to ensure. The ICJ’s adherence to a more flexible standard thus still provides a way for complainants to satisfy jurisdictional thresholds without fully engaging respondents beforehand.

INTRODUCTION

On April 1, 2011, the International Court of Justice (ICJ) dismissed Georgia’s claims of ethnic cleansing, citing a lack of jurisdiction. Georgia’s application alleged that Russian forces had turned a blind eye to, and even participated in, the expulsion of ethnic Georgians from the breakaway regions of South Ossetia and Abkhazia, thereby violating Russia’s obligations under the International Convention on the Prevention of All Forms of Racial Discrimination (CERD). The decision hinged on Georgia’s failure to attempt to resolve the issue through negotiation.
with the Russian Federation prior to filing its application, which was held to preclude exercise of jurisdiction under Article 22 of the CERD.\(^3\)

The ICJ, in its ruling, reversed its provisional measures order, where it found that contacts mentioning the parties’ dispute could be sufficient to give rise to the ICJ’s jurisdiction.\(^4\)

The ICJ’s judgment runs counter to a trend in the court toward reading “compromissory clauses” liberally to find jurisdiction more frequently.\(^5\) The court’s early jurisprudence suggested that the court should only adjudicate disputes that could not be resolved diplomatically.\(^6\) Nevertheless, more recent decisions addressing the question of negotiation preconditions have permitted access to the ICJ upon raising the dispute in a public forum without recourse to direct diplomacy.\(^7\) Thus, the court’s decision on Georgia’s application may signal a return to the view that the ICJ exists as a last resort for cases arising under such treaties.\(^8\)

Part I of this Comment briefly summarizes the history of tensions between Georgia and Russia surrounding the regions of South Ossetia and Abkhazia. In addition, this Part recounts the procedural history of Georgia’s application to the ICJ under the CERD, and the court’s ruling thereon. Part II outlines the role of compromissory clause jurisdiction, and the limiting function performed by negotiations as a precondition. In particular, this Part explores the degree to which states must exhaust diplomatic remedies before the court may be properly engaged. Part III analyzes the potential impact of the decision on states’ use of negotiations prior to adjudication. This Part also analyzes whether some of the court’s stated aims would have been better served by a more dramatic break from current jurisprudence.

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\(^3\) Id. ¶ 182.


\(^5\) David J. Scheffer, Non-Judicial State Remedies and the Jurisdiction of the International Court of Justice, 27 Stan. J. Int’l L. 83, 140–42 (1990). “A compromissory clause obligates the parties to a treaty to adjudicate disputes under the treaty before the Court, usually after all other attempts to resolve the dispute have failed.” Id. at 85–86 n.14.


\(^8\) See Scheffer, supra note 5, at 139–40.
I. Background

A. Overview of the Russia-Georgia Conflict

When the U.S.S.R. began to dissolve in 1991, the regions of Georgia known as South Ossetia and Abkhazia declared independence from Georgia, eventually leading to armed conflict. During the conflict, much of the regions’ ethnic Georgian populations were either killed or forced from their homes by the fighting. In 1992, Georgia and South Ossetia signed a series of agreements providing for peaceful settlement of the dispute, and establishing a peacekeeping force that included Georgians, Ossetians, and Russians. In May 1994, Abkhazia and Georgia, with the Russian Federation acting as mediator, signed a peace agreement mandating the return of displaced persons. The agreement was to be monitored by a peacekeeping force headed by the Commonwealth of Independent States (CIS), a regional organization made up of several former Soviet republics. Although the independence of either South Ossetia or Abkhazia has not been widely recognized, Russia keeps ties with both regions by circumventing economic restrictions, and thus tacitly supporting independence, which has in turn caused friction with Georgia.

The unstable relationship between Georgia and South Ossetia broke in August 2008, when Georgia used artillery fire in an attempt to strike at separatist forces in South Ossetia. Russia responded by launching a large-scale intervention into Georgia which included several airstrikes. The international community responded quickly; France

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10 Id.
13 Id.
16 Id.
and Russia immediately crafted a six-point ceasefire that was signed by Georgia, South Ossetia, Abkhazia, and Russia by August 16th.\footnote{Racial Discrimination Judgment, 50 I.L.M. 607, ¶ 107.}

**B. Procedural History of the Georgia-Russia Dispute**

The Georgian government submitted an application against Russia to the ICJ on August 12, 2008, based on violations of the CERD, to which Georgia acceded in 1999.\footnote{Id. ¶ 107.} In its application, the Georgian government alleged that Russian peacekeepers had failed to take the measures required by the CERD to help refugees return to their homes.\footnote{Id. ¶ 34.} Furthermore, Georgia accused the Russian Federation of both encouraging and directly participating in ethnic cleansing through various methods including forced migration.\footnote{Id. ¶ 17.}

Georgia requested provisional measures from the ICJ as a means to forestall irreparable harm from Abkhaz and Ossetian separatists.\footnote{Id.} Among other demands, Georgia requested that the court order the Russian Federation to take affirmative measures to promote the return of displaced Georgians and to prevent further discriminatory acts by Abkhaz and Ossetian rebels.\footnote{Application of Int’l Convention on Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Provisional Measures Order, 2008 I.C.J. 353, ¶¶ 23–25 (Oct. 15) [hereinafter Racial Discrimination Order].} Russia disputed ICJ jurisdiction, claiming that Georgia was essentially protesting Russia’s use of military force under the guise of a CERD claim, and that Georgia had not attempted to negotiate the issue with Russia sufficiently to allow the court to find jurisdiction.\footnote{Id. ¶ 83.}

The court addressed Russia’s questions of jurisdiction by holding that CERD Article 22,\footnote{International Convention on the Elimination of All Forms of Racial Discrimination art. 22, Mar. 7, 1966, 660 U.N.T.S. 195.} the clause conferring ICJ jurisdiction over disputes “not settled by negotiation,” does not require formal diplomacy

\footnote{Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation [sic] or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement. Id.}
between the parties.\textsuperscript{25} Although the court did not fully discern the facts at the provisional measures stage, it found that the allegations demonstrated a threat of ongoing racial discrimination.\textsuperscript{26} On October 15, 2008, the court voted 8–7 to order the provisional measures requested by Georgia.\textsuperscript{27}

Russia raised four preliminary objections: first, that there was no dispute relating to the CERD; second, that the ICJ lacked jurisdiction because Georgia failed to negotiate; third, that the CERD did not apply to extraterritorial acts; and fourth, that the ICJ could not hear claims alleging CERD violations before 1999, when Georgia became a party to the CERD.\textsuperscript{28}

In its decision of April 1, 2011, the court found that a dispute regarding the CERD had arisen between the parties as of August 2008, when the Georgian government accused Russia of ethnic cleansing.\textsuperscript{29} Nevertheless, the court refused to consider communication between the parties prior to 2008 as evidence of a dispute, as all accusations of ethnic cleansing referred to Russia solely in its role as a CIS peacekeeper, and not as a participant.\textsuperscript{30} In considering Russia’s second objection, the ICJ reversed its holding in the provisional order, finding that the reference to negotiations in Article 22 required a genuine attempt by Georgia to resolve the dispute.\textsuperscript{31} Because Georgia made no effort to negotiate before filing its application, the ICJ declined to exercise jurisdiction by a 10–6 vote.\textsuperscript{32}

II. Discussion

A. Negotiation and Jurisdiction: The Court’s Jurisprudence

The ICJ does not automatically have jurisdiction over any dispute arising between nations.\textsuperscript{33} The ICJ statute states that jurisdiction over a dispute may only exist by an ad hoc agreement between the parties to the dispute, by the parties’ consent to compulsory jurisdiction, or by a

\textsuperscript{25} Id.; see Racial Discrimination Order, 2008 I.C.J. 353, ¶ 115.
\textsuperscript{26} Racial Discrimination Order, 2008 I.C.J. 353, ¶¶ 141–143.
\textsuperscript{27} Id. ¶ 149.
\textsuperscript{28} Racial Discrimination Judgment, 50 I.L.M. 607, ¶ 22.
\textsuperscript{29} Id. ¶ 113.
\textsuperscript{30} See id. ¶ 104.
\textsuperscript{31} See id. ¶ 157.
\textsuperscript{32} See id. ¶¶ 182–184, 187.
treaty provision giving the court jurisdiction over disputes under that treaty. Although this regime leaves many areas in which the ICJ lacks jurisdiction, it reflects an international commitment to the basic principle that a state’s sovereignty may only be diminished by its consent. Truly compulsory jurisdiction over the acts of individual states would infringe on the sovereignty of those states, depriving them of the right to settle their affairs as they please.

Recently, states have become less willing to submit to compulsory jurisdiction under the ICJ, instead favoring the use of “compromissory” treaty clauses. The typical compromissory clause gives the court jurisdiction to hear disputes regarding the interpretation of the relevant agreement. The clause restricts the bounds of the court’s jurisdiction to those aspects of an issue related to the treaty, in theory preventing the court from passing unsought judgment on a dispute’s broader political context. A narrow scope of treaty rights restricts the focus of the court to a discrete set of issues, encouraging nations to submit to jurisdiction without fear of the court extending its reach beyond the prescribed limits.

Nations will frequently attach further limits to jurisdiction under compromissory clauses in the form of preconditions such as negotiation or other diplomatic resolution. Because states generally prefer to settle disputes through amicable compromise rather than adjudica-

35 See Hammer, supra note 33, at 497–98.
36 See id. at 498.

Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months . . . the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request . . . .

Id.
40 See Charney, supra note 37, at 857.
41 See Scheffer, supra note 5, at 90.
tion,\textsuperscript{42} many bilateral treaties—such as agreements of friendship, commerce, and navigation (FCN treaties), as well as multilateral agreements regarding trade or human rights—will only permit resolution by a third party after the parties have attempted discussion.\textsuperscript{43}

The court has advanced several theories underlying the requirement of negotiation as a precondition to jurisdiction.\textsuperscript{44} The role of negotiation was first discussed in \textit{Mavrommatis Palestine Concessions}, a case before the ICJ’s predecessor, the Permanent Court of International Justice (PCIJ).\textsuperscript{45} The PCIJ justified the negotiation requirement of the Mandate for Palestine by noting that “before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations.”\textsuperscript{46} The court has interpreted the justification in the \textit{Mavrommatis} opinion as guaranteeing notice to the respondent state, holding that negotiation requirements ensure that parties develop a clear picture of the scope of the dispute prior to adjudicatory proceedings.\textsuperscript{47}

\textit{Mavrommatis} offered other reasons to require attempts at diplomacy before allowing recourse to the PCIJ.\textsuperscript{48} The court recognized that agreement to jurisdiction is based on the express consent of the states involved, and that states thus have the right to impose limits on that consent.\textsuperscript{49} Nevertheless, the court noted that parties should have the ability to resort to adjudication, and that the precondition of negotiations need not force the parties to exhaust all diplomatic remedies as long as they have notice of the issues involved.\textsuperscript{50}

Similarly, the court found in the \textit{South West Africa Cases} that even in the absence of direct diplomacy, nations may still satisfy the negotiation requirements of a compromissory clause.\textsuperscript{51} Jurisdiction in those cases was based on a compromissory clause in the Mandate for German South West Africa, which required that a dispute be one that “cannot

\begin{itemize}
\item \textsuperscript{43} See, e.g., Elimination of Discrimination Against Women, \textit{supra} note 38, art. 29, ¶ 1; Treaty of Friendship, Commerce, and Navigation, U.S.-Japan, art. XXIV, ¶ 2, Apr. 2, 1953, 4 U.S.T. 2063.
\item \textsuperscript{44} See \textit{Racial Discrimination Judgment}, 50 I.L.M. 607, ¶ 131.
\item \textsuperscript{46} \textit{Id.} at 15.
\item \textsuperscript{47} \textit{See Racial Discrimination Judgment}, 50 I.L.M. 607, ¶ 131.
\item \textsuperscript{48} See \textit{Mavrommatis}, 1924 P.C.I.J. (ser. A) No. 2, at 13–16.
\item \textsuperscript{49} \textit{Id.} at 16.
\item \textsuperscript{50} \textit{Id.} at 13, 15.
\end{itemize}
be settled by negotiation." Although Ethiopia and Liberia had not formally negotiated with South Africa in accordance with their duties under the mandate, the court held that diplomacy conducted multilaterally through the United Nations was sufficient to sustain jurisdiction. Because the multilateral discussions had demonstrated the nature of the dispute and the low likelihood that future negotiation would resolve the issue, the court found that the compromissory clause had been satisfied.

The court further lowered the threshold of what constituted adequate diplomacy in *Military and Paramilitary Activities in and Against Nicaragua*, finding jurisdiction according to a similar clause in the FCN treaty between the United States and Nicaragua. The majority held that Nicaragua’s complaints to the Security Council and the U.S. government, despite failing to allege any specific violations of the FCN, had given the United States notice that Nicaragua considered its funding of the Contras a violation of international law. The court found such notice sufficient to sustain jurisdiction, rejecting the United States’ arguments that Nicaragua had made inadequate diplomatic efforts to resolve the specific treaty violations.

There has been a consistent group of dissenters, however, advocating for the reading of compromissory clauses as requiring direct bilateral negotiations. These dissenters have eschewed the emphasis on notice that underlies the majority view, instead favoring the interpretation of compromissory clauses as encouraging states to achieve a mutually agreeable settlement before involving the ICJ.

Spearheading this view, Judges Spender and Fitzmaurice wrote in *South West Africa*, “[General Assembly] discussions are, and necessarily must be, of too general and diffused a character to constitute a negotiation between the specific

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52 Id. at 335 (quoting Mandate for German South-West Africa art. 7, Dec. 17, 1920, League of Nations O.J. 89).
53 Id. at 346.
54 See id.
56 Id.
57 See id.
parties . . . in relation to a specific dispute between them as States.\textsuperscript{60} Underlying these dissenters’ rejection of a looser standard was the understanding that negotiation preconditions were intended to promote settlement of the dispute through non-judicial means.\textsuperscript{61} Although the court has not yet embraced these dissents and prescribed a particular form of negotiations, it has begun to reaffirm the idea that negotiation requirements are intended not only to give notice, but also as efforts to reach a solution.\textsuperscript{62}

B. Negotiation and Jurisdiction in the CERD Case

The ICJ, finding jurisdiction to issue its provisional measures order, extended the permissive reading espoused in its \textit{Nicaragua} judgment.\textsuperscript{63} Rejecting the Russian Federation’s contention that complaining states must genuinely attempt to settle the issue by negotiation, the court held that Georgia satisfied Article 22 by disclosing the nature of the dispute to Russia, both directly, and through the United Nations (U.N.) in the days prior to its application.\textsuperscript{64} The ICJ explained that the critical function of negotiations in this context was to give Russia notice and an opportunity to respond to the allegations.\textsuperscript{65} The dissent, led by Vice-President Al-Khasawneh, objected to the court’s finding of jurisdiction, claiming that the order constituted a departure from established ICJ practice requiring that negotiations be carried out in good faith until the parties reach an impasse.\textsuperscript{66}

In its subsequent judgment, the ICJ backed down from the liberal application of the compromissory clause requirements in its provisional measures order, which equated bilateral contacts with negotiation.\textsuperscript{67} The court reversed its finding of jurisdiction, holding that compromissory clauses had permitted a finding of jurisdiction only where states engaged in some effort at diplomatic resolution and had reached a deadlock.\textsuperscript{68} The court did not contradict the holding of \textit{South West Af...
rica permitting multilateral negotiations, but reiterated the need for a good-faith effort to reach a diplomatic solution.\textsuperscript{69} In explaining the role of negotiation preconditions, the court acknowledged that such clauses serve to notify the other party regarding the nature of the dispute, as it found in the order.\textsuperscript{70} Notably, the ICJ articulated alternative purposes for requiring pre-trial negotiations—chiefly that they encourage amicable settlement of disputes—and marked an important limit on the consent of states to jurisdiction.\textsuperscript{71} The court found that Georgia’s statements to Russia—both direct statements and those made through the Security Council—were not made as good-faith attempts to initiate diplomatic talks, and thus did not satisfy the requirements of Article 22 of the CERD.\textsuperscript{72}

III. Analysis

The ICJ, in its application of the CERD to the Georgia-Russia dispute (CERD case), renewed the view that negotiations required by compromissory treaty clauses must be genuinely aimed at finding diplomatic solutions to disputes brought before the court.\textsuperscript{73} Although not bound by precedent, the court affirmed the holdings of the \textit{South West Africa Cases} and \textit{Military and Paramilitary Activities in and Against Nicaragua}, which permit informal multilateral negotiations.\textsuperscript{74} The court emphasized that diplomacy as a precondition for jurisdiction serves more than a basic notice function.\textsuperscript{75} The ICJ’s refusal to find a mere exchange of parties’ viewpoints sufficient to support jurisdiction should help to promote its goal of dispute settlement by negotiation.\textsuperscript{76} Reinforcement of a good-faith standard may ensure that a party will undertake some measure calculated to open diplomacy.\textsuperscript{77} Yet by affirming contradictory precedent, the court weakened its commitment to the justifications of consent and

\begin{itemize}
\item \textsuperscript{69} Id. ¶¶ 158–160.
\item \textsuperscript{70} Id. ¶ 131.
\item \textsuperscript{71} Id.
\item \textsuperscript{72} Id. ¶¶ 181–182.
\item \textsuperscript{73} Application of Int’l Convention on Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Judgment, 50 I.L.M. 607, ¶ 157–90 (Apr. 1, 2011) [hereinafter Racial Discrimination Judgment].
\item \textsuperscript{74} See id. ¶¶ 160–161.
\item \textsuperscript{75} Id. ¶ 131.
\item \textsuperscript{76} See id. ¶ 157.
\item \textsuperscript{77} See Scheffer, \textit{supra} note 5, at 143.
\end{itemize}
non-judicial resolution, instead of requiring direct negotiations.\textsuperscript{78} Re-
jecting the standards of Nicaragua and South West Africa would—despite
imposing a higher barrier for ICJ jurisdiction—better guarantee that
complaining states at least attempt to reach bona fide agreements be-
fore invoking the court.\textsuperscript{79}

\textbf{A. The Possible Impact of the CERD Judgment}

As the structural and substantive requirements for diplomacy have
loosened, the view of such preconditions as mandating good-faith at-
ttempts to resolve disputes has been applied inconsistently.\textsuperscript{80} The court
has not articulated a bright-line test for what constitutes good faith, be-
cause pre-trial negotiations are often dependent on the circumstances
of the dispute.\textsuperscript{81}

The decision in the CERD case provided no new formal guid-
ance.\textsuperscript{82} It did, however, reinforce that one ultimate purpose of negotia-
tion is to resolve the dispute before recourse to the court.\textsuperscript{83} Thus, the
court may in the future look more critically at the nature of and moti-
vation behind a nation’s statements and offers to negotiate.\textsuperscript{84} A height-
eened threshold for jurisdiction gives greater emphasis to good faith in
achieving diplomatic resolution, which will in turn encourage states to
make more than \textit{pro forma} efforts at initiating consultation before turn-
ing to the court.\textsuperscript{85}

An increase in good-faith offers of diplomacy by complainants may
not necessarily result in more frequent negotiation.\textsuperscript{86} The current for-
mulation only requires a genuine offer by the complainant; it places no
direct obligation on the responding state to accept, in part because of
fears that forcing negotiation when neither party wishes to would be
counterproductive.\textsuperscript{87} Therefore, as Georgia contended, when relations

21) (joint dissenting opinion of Judges Spencer and Fitzmaurice).
\textsuperscript{79} See Scheffer, supra note 5, at 140–41, 153.
\textsuperscript{80} See id. at 140–41.
\textsuperscript{81} See Mavrommatis Palestine Concessions (Greece v. U.K.), Preliminary Objections,
\textsuperscript{82} See Racial Discrimination Judgment, 50 I.L.M. 607, ¶ 160.
\textsuperscript{83} Id. ¶ 161.
\textsuperscript{84} See Scheffer, supra note 5, at 152–53.
\textsuperscript{85} Id. at 154.
\textsuperscript{86} See Loretta Malintoppi, Methods of Dispute Resolution in Inter-State Litigation: When
States Go to Arbitration Rather than Adjudication, 5 L. & Prac. Int’l Courts & Tribunals
133, 133 (2006).
\textsuperscript{87} See Charles Manga Fombad, Consultation and Negotiation in the Pacific Settlement of In-
between the parties are extremely strained, a strict requirement for attempted diplomacy may seem futile.\textsuperscript{88}

Nevertheless, the burden of litigation adds significant pressure for the respondents to engage prospective complainants.\textsuperscript{89} Because adjudication can be time-consuming, states may wish to avoid submitting themselves to the court’s jurisdiction when another option is available.\textsuperscript{90} An application to the court for relief can take several years to proceed to trial.\textsuperscript{91} In the CERD case, the court did not render judgment on the question of jurisdiction for over thirty months after Georgia’s application.\textsuperscript{92} Furthermore, a dispute may implicate sensitive domestic or political matters that states intend to keep secret or within sovereign control.\textsuperscript{93} In that instance, a state may wish to avoid exposing those issues publicly through the open proceedings of the ICJ.\textsuperscript{94} The ICJ has indicated, however, that it will not hesitate to hear a legal question merely because it affects broader political issues, threatening not only states’ secrecy, but also, in some cases, their freedom to settle other aspects of disputes.\textsuperscript{95} In certain contexts, this pressure may cause states to negotiate outside of court to avoid prejudicing their ability to resolve matters on their own terms.\textsuperscript{96} Therefore, the majority’s appeal for a greater reliance on negotiation is consistent with many states’ preference to resolve disputes without the need for adjudication.\textsuperscript{97}

B. Should Compromissory Clauses Require Direct Negotiation?

The ICJ’s decision, while promoting negotiated settlements, does not optimize conditions for negotiations by requiring direct diplomacy.\textsuperscript{98} Permitting multilateral diplomacy allows complainants to satisfy a negotiation requirement without attempting negotiation in an individual capacity, thereby removing the benefits of confidentiality and

\textsuperscript{88} See Racial Discrimination Judgment, 50 I.L.M. 607, ¶¶ 171, 177; see also Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Preliminary Objections, 1984 I.C.J. 392, 515–16 (Nov. 26) (separate opinion of Judge Ago) (favoring excusing a party from attempting negotiations when relations between the parties were strained).

\textsuperscript{89} See Noyes, supra note 42, at 854.

\textsuperscript{90} See Malintoppi, supra note 86, at 136.

\textsuperscript{91} Id.


\textsuperscript{93} See Malintoppi, supra note 86, at 140.

\textsuperscript{94} See id.


\textsuperscript{96} Noyes, supra note 42, at 854–55.

\textsuperscript{97} See id.

\textsuperscript{98} See Scheffer, supra note 5, at 152–53.
freedom to frame negotiations that a party would receive.\textsuperscript{99} If the court had imposed a duty to attempt direct discussions, compromissory clauses would restrict the diplomatic avenues available to states.\textsuperscript{100} Under such an obligation, however, disputing parties may be more likely to attempt alternative forms of resolution before resorting to the unfavorable procedures of the court.\textsuperscript{101}

Considering diplomacy in multilateral settings sufficient to satisfy compromissory clause requirements may pose problems that decrease the likelihood of negotiated settlements.\textsuperscript{102} The structure of the U.N. and similar bodies lends itself to disputation, debate, and joint action, but is not conducive to meaningful negotiation.\textsuperscript{103} The multiplicity of parties often leads to discussions that extend beyond the scope of the immediate disagreement, undermining the parties' ability to define the dispute bilaterally.\textsuperscript{104} In the context of a bilateral dispute, such as that in the CERD case, the presence of additional parties detracts from discussion of the immediate issues and incentivizes political posturing.\textsuperscript{105} Furthermore, an open debate before the General Assembly does not afford the confidentiality of bilateral negotiations.\textsuperscript{106} A responding state seeking to avoid interference in political matters receives no advantage through open debate, as its issues are subject to public scrutiny if it chooses to negotiate a solution by multilateral channels.\textsuperscript{107}

Proponents of multilateral diplomacy point to its virtues, one of which is the benefit of bringing international pressure to bear upon a party.\textsuperscript{108} An obstinate state inclined to disregard a complainant's offers of diplomacy may be convinced to accept them through the intercession of third states.\textsuperscript{109} For instance, one can point to French intervention as instrumental in negotiating peace between Georgia and Russia.

\textsuperscript{100} See Fombad, \textit{supra} note 87, at 720.
\textsuperscript{101} See Scheffer, \textit{supra} note 5, at 153.
\textsuperscript{102} See \textit{South West Africa}, 1962 I.C.J. at 562 (joint dissenting opinion of Judges Spender and Fitzmaurice).
\textsuperscript{103} See id.
\textsuperscript{105} See id.
\textsuperscript{106} See Murty, \textit{supra} note 99, at 156–58.
\textsuperscript{107} See id. at 157–58.
\textsuperscript{108} See Lateef, \textit{supra} note 104, at 9.
in August 2008.\textsuperscript{110} The benefits derived from multilateralism are not incompatible with an obligation to engage directly.\textsuperscript{111} Parties may generate debate in the United Nations to help bring a party to the table, or may seek the assistance of a third party to help organize settlement.\textsuperscript{112} Nevertheless, many such uses of third parties, including recourse to the Security Council, require direct negotiation in the background to fully achieve their aims.\textsuperscript{113} In the absence of direct diplomacy, denunciations by third states serve to highlight the existence of a dispute without promoting a mutually agreeable resolution.\textsuperscript{114}

The court’s view of compromissory clauses as promoting negotiation\textsuperscript{115} would therefore be better served by mandating direct diplomacy, which would provide states with conditions more conducive to diplomatic settlement.\textsuperscript{116} This does not guarantee, however, that respondents would elect negotiated agreement over the procedures of the court.\textsuperscript{117} Nevertheless, giving states the opportunity to negotiate directly ensures that jurisdiction is not invoked without the consent of the disputants.\textsuperscript{118} In its CERD judgment, the ICJ noted that negotiation preconditions in compromissory clauses, in addition to simply promoting settlement, serve as limits on a party’s consent to jurisdiction.\textsuperscript{119} Requiring bona fide attempts at negotiation would avoid the risk of unwanted adjudication, making any ultimate judicial settlement seem legitimate and reasonable to the states involved.\textsuperscript{120}

**Conclusion**

Although the ICJ has not imposed the optimal conditions for fruitful negotiation, it has nonetheless laid the groundwork for future courts to conduct a more rigorous analysis of states’ efforts to negotiate. The court’s caution against requiring too high or too formal of a

\textsuperscript{110} See Racial Discrimination Judgment, 50 I.L.M. 607, ¶ 107.
\textsuperscript{112} See Bilder, supra note 109, at 481; Cornelius F. Murphy, The Obligation of States to Settle Disputes by Peaceful Means, 14 Va. J. Int’l L. 57, 60–61 (1973).
\textsuperscript{113} See Murphy, supra note 112, at 60.
\textsuperscript{114} See Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15, 123 (Dec. 2) (separate opinion of Judge Fitzmaurice).
\textsuperscript{115} See Racial Discrimination Judgment, 50 I.L.M. 607, ¶ 131.
\textsuperscript{116} See Scheffer, supra note 5, at 153.
\textsuperscript{117} See Noyes, supra note 42, at 858.
\textsuperscript{118} See Scheffer, supra note 42, at 858.
\textsuperscript{119} See Racial Discrimination Judgment, 50 I.L.M. 607, ¶ 151.
\textsuperscript{120} See Noyes, supra note 42, at 861–62.
threshold may be interpreted as recognition that states’ rights of access to the court should not be unduly restricted. However, the refusal to mandate a particular form or substance in diplomacy may itself be calculated to promote negotiation. Knowledge that lack of a diplomatic settlement will result in litigation adds pressure for a respondent to engage fully, although a prohibitive rule may encourage respondent states to delay with perceived impunity. Nevertheless, diplomacy can be direct without being unduly burdensome or lengthy. Unless the ICJ requires diplomacy in a form that removes the disincentives of adjudication for a respondent, states may perceive preconditions of negotiation in a compromissory treaty clause as an illusory safeguard of their interests, and refuse to accept the court’s jurisdiction on those terms.