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APA 7th ed.

Moore, John Norton. (1999). *Enhancing compliance with international law: neglected remedy*. *Virginia Journal of International Law*, 39(4), 881-1016.

Chicago 17th ed.

John Norton Moore, "Enhancing Compliance with International Law: A Neglected Remedy," *Virginia Journal of International Law* 39, no. 4 (Summer 1999): 881-1016

McGill Guide 9th ed.

John Norton Moore, "Enhancing Compliance with International Law: A Neglected Remedy" (1999) 39:4 Va J Int'l L 881.

AGLC 4th ed.

John Norton Moore, 'Enhancing Compliance with International Law: A Neglected Remedy' (1999) 39(4) *Virginia Journal of International Law* 881

MLA 9th ed.

Moore, John Norton. "Enhancing Compliance with International Law: A Neglected Remedy." *Virginia Journal of International Law*, vol. 39, no. 4, Summer 1999, pp. 881-1016. HeinOnline.

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Enhancing Compliance With International Law: A Neglected Remedy

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This article was initially written as part of a larger project for the United States Arms Control and Disarmament Agency. The views herein expressed are solely those of the author. Although this article has been updated and revised, I have decided to leave in references to the draft form of the Restatement (Third) in order to provide the developmental sequence as American Law Institute (ALI) views evolved on this subject. For present ALI views, of course, the current Restatement (Third) should be consulted.

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I. THE CONTEMPORARY CONTEXT OF A NEGLECTED REMEDY

On the eve of the millennium, international law can boast an impressive array of normative systems. The bulk of such systems, such as those regulating the use of force, diplomatic protection, trade, commercial aviation, oceans use, and the environment, among many other substantive areas, seek to provide a stable and efficient milieu for relations among nations. That is, they address a core role of international law in enabling a rule of law *among* nations.

Subsequent to the Holocaust, with increasing urgency and impetus, international law has also developed an impressive body of rules and principles to control the behavior of governments toward their own peoples. This body of international law, most importantly encompassing the bulk of modern human rights law, seeks also to enhance a rule of law *within* nations. Typically such norms are most important in seeking to control extreme behavior of non-democratic systems themselves lacking a meaningful rule of law.

One of the most promising avenues of research in international law and relations today emphasizes the great importance of the rule of law within nations, as one of the most important factors in promoting the rule of law among nations. Increasingly we are understanding that the achievement of the rule of law in both pri-

mary senses, that is both among and within nations, is mutually reinforcing. This approach, focused on government structures and systemic incentives, began primarily in peace research focused on the causes of war, but has since broadened to encompass a full range of fundamental foreign policy goals from economic development to famine avoidance.¹

Yet another promising body of research, drawn initially from game theory and, more broadly, economic theory, has focused on why a regime of laws both is expected to emerge, and normatively should emerge, in promoting common interests among Nations.² It tells us that a central dilemma of an international system, either of states, or increasingly even of non-state actors, is the need to create regimes and institutions which will enable and encourage cooperative behavior beneficial to all parties rather than second-best damage-limiting strategies.

Against this background of the reality of massive growth in international normative systems and impressive research supporting both the "is" and the "ought" of such growth, the old arguments of the "Realists", in the endless debate between the Realists (with a capital "R") and the Idealists, seem increasingly hackneyed. Quite simply, and now quite obviously, if we did not have international law we would need to invent it. But as the work of generations of great international lawyers gives testament, human behavior is

1. See, e.g., BRUCE RUSSET, *GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD* (1993); R.J. RUMMEL, *DEATH BY GOVERNMENT* (1994); John Norton Moore, *Toward A New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security, and War Avoidance*, 37 VA. J. INT'L L. 811 (1997).

2. See, e.g., William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U. J. INT'L L. & POL'Y 227 (1997); John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139 (1996).

Economics 101, with its focus on the need for rules of the game to regulate contract, exchange, property, and unauthorized coercion, leads to the same conclusions both as to the great importance of international law and to the fact that if international law did not exist, it would be expected to arise.

While this body of scholarship is correct in its important use of cross-disciplinary knowledge, some manifestations seeming to suggest the discovery of interdisciplinary work in international law would seem to have missed a central intellectual theme of much of the last century, particularly evident in the writings of the legal realists and the post-legal realists. Professors Charney, D'Amato, Damrosch, Dillard, Falk, Frank, Henkin, Higgins, McDougal, Reisman, Schachter, Schwebel, Sohn, Weston, Wright, and many other superb international lawyers, would be startled by the proposition that interdisciplinary work in international law began in the last decade. See, for example, Aceves, *id.* at 229 n.10, describing the *recent* "alternative approach" as "an interdisciplinary approach to the study of international affairs."

ahead of our theory and already has invented international law in abundance.³ Today only diehard "Realists" unfamiliar with the breadth of modern international law and unaware of the powerful empirical evidence as to the centrality of the rule of law, within as well as among nations, still challenge the relevance of law.

But in one sense, the "Realists" still have an important point. For the rule of law is not simply normative systems and broad acceptance of the authoritativeness of such laws. Rather, it is such systems coupled with patterns of community compliance.⁴ And sadly, while many modern normative systems have patterns of high community compliance, others still have failure rates with catastrophic consequences for human dignity and progress. Surely, *the* greatest weakness of the contemporary international system is not the absence of authoritative norms, or underlying intellectual understanding about the need for such norms, but rather the all-too-frequent absence of compliance.

I believe that the greatest challenge for the future of the rule of law internationally is to enhance rates of compliance, even in areas traditionally considered by the Realists as unregulable by law, for example control of illegal aggression.⁵ The need for enhanced

3. From Grotius to Baxter, Bowett, Brierly, Dillard, Henkin, Higgins, Jenks, Leigh, McDougal, Schwebel and Sohn, among many others, the message is the same. There is and should be an international law. Though the differences among these scholars are significant, this is a central and concordant theme of all.

4. Perhaps the most developed jurisprudential approach focused clearly on the importance of patterns of compliance, as well as authority, is found in the work of Myres McDougal, Harold Lasswell, W. Michael Reisman, and associated scholars sometimes referred to as the "New Haven" or "Policy Science" approach. See, e.g., HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* (1992); Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in the World Constitutive Process: How International Law is Made*, in *INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* (M. McDougal & W. Reisman eds., 1981); John Norton Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662 (1968).

5. For "Realist" views, see, for example, ADDA B. BOZEMAN, *THE FUTURE OF LAW IN A MULTICULTURAL WORLD* (1971); A. T. Mahan, *The Deficiencies of Law as an Instrument of International Adjustments*, 194 N. AM. REV. 674 (1911); and HANS J. MORGENTHAU, *IN DEFENSE OF THE NATIONAL INTEREST: A CRITICAL EXAMINATION OF AMERICAN FOREIGN POLICY* (1951).

For classical responses to the "Realists," see, for example, Myres S. McDougal, *Law & Power*, 46 AM. J. INT'L L. 102 (1952); Philip C. Jessup, *The Reality of International Law*, 18 FOREIGN AFFAIRS 244 (1940); HARDY CROSS DILLARD, *SOME ASPECTS OF LAW AND DIPLOMACY* (1957); John Norton Moore, *The Legal Tradition and the Management of National Security*, in *TOWARD WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. MCDUGAL* 321 (W.M. Reisman & B.H. Weston eds., 1976);

compliance with international norms today, as well as the more effective promotion of liberal democracy (a subject for another day), far outweighs the need for further development of general normative systems, or further refinements in the existing international rules. Yet we continue to focus more attention on refinement of such systems rather than on enhanced compliance with them.⁶

This article will examine one set of related remedies in traditional international law for promoting enhanced compliance with treaties, a central fundament of the international rule of law. That is, it will examine the law of reprisal and the law of permitted response to breach of agreement. It does so in the hope that we may more broadly revitalize modes of enhancing compliance with international law generally and promote greater attention to issues of compliance by focusing attention on some of the classical remedies. It may also illustrate how an understandable quest for perfect institutions may along the way have inhibited the most important mechanisms of reciprocity in promoting compliance in a decentralized international system. And it may also alert us to how neglected in actual practice invocation of legal mechanisms for promoting compliance has become. Given the central importance of *pacta sunt servanda* for the stability and effectiveness of the international legal system, it is of the utmost importance to enhance levels of compliance in observance of international agreements as one important area in enhancing compliance with international law generally.

II. THE LAW OF PERMITTED RESPONSE TO BREACH OF AGREEMENT

A. *General Purpose and Principles*

International law today clearly recognizes the general principle that a treaty party may terminate a bilateral treaty or suspend its operation in whole or in part in response to a prior material

ANTHONY D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* (1987); and LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* (1968).

6. A good example of this is the considerable activity following the Gulf War calling for a new set of normative standards to prevent Saddam Hussein's anti-environmental actions in torching the Kuwaiti oil wells. Those who called for such new norms took little notice of the fact that Saddam Hussein's actions were already grave breaches of the law of war and that the real problem was enforcing compliance with existing norms. See, e.g., J.N. Moore, *Concluding Remarks*, in 69 *INT'L LAW STUDIES* 629, 630 (R.J. Grunwald et al. eds., 1996).

breach by the other party.⁷ This doctrine historically stems from two related strands in international law, that of non-forcible reprisal to a prior breach of an international legal obligation as a sanction to ensure compliance with international legal obligation, and that of permitted countermeasures within the law of treaties as a principle of justice excusing one party from performance of its obligations under a treaty which the other party has previously breached. As such, this general principle reflects two important policy needs of the international legal system. First, it is under-

7. See, e.g., T.O. ELIAS, *THE MODERN LAW OF TREATIES* 114-18 (1974) (written by a scholar who subsequently became President of the International Court of Justice); A.D. MCNAIR, *THE LAW OF TREATIES* 571, 573 (1961); SHABTAI ROSENNE, *BREACH OF TREATY* (1985); IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 188-90 (1984); BHEK P. SINHA, *UNILATERAL DENUNCIATION OF TREATY BECAUSE OF PRIOR VIOLATIONS OF OBLIGATIONS BY OTHER PARTY* 214-15 (1966); Lori Fisler Damrosch, *Retaliation or Arbitration—or Both? The 1978 United States-France Aviation Dispute*, 74 AM. J. INT'L L. 785 (1980); Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 60, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679; RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 158 (1965) [hereinafter RESTATEMENT (SECOND)]; and RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 335 (1987) [hereinafter RESTATEMENT (THIRD)]. See also 1 D.P. O'CONNELL, *INTERNATIONAL LAW* 284-86 (1965). Professor O'Connell quotes President Coolidge, the arbitrator in the *Tacna Arica* arbitration, as saying: "[a] wilful refusal of either party so to do [not accepting a treaty obligation to negotiate] would have justified the other Party in claiming discharge from the provision." *Id.* at 285.

For a discussion of this proposition under the law of non-forcible reprisal and "state responsibility," see OMER Y. ELAGAB, *THE LEGALITY OF NON-FORCIBLE COUNTERMEASURES IN INTERNATIONAL LAW* (1988); *Summary Records of the Meetings of the 31st Session*, [1979] 1 Y.B. INT'L L. COMM'N 54-63, U.N. Doc. A/CN.4/SER.A/1979 [hereinafter 1979 Y.B. INT'L L. COMM'N (Vol. 1)]; and *Report of the Commission to the General Assembly on the Work of its Thirty-First Session*, [1979] 2 Y.B. INT'L L. COMM'N 115-22, U.N. Doc. A/CN.4/SER.A/1979/Add.1 (Part 2) [hereinafter 1979 Y.B. INT'L L. COMM'N (Vol. 2, Part 2)] (discussing the work of the International Law Commission concerning "State Responsibility").

See also Frederic L. Kirgis, Jr., *Some Lingering Questions about Article 60 of the Vienna Convention on the Law of Treaties*, 22 CORNELL INT'L L.J. 549 (1989). This article, which was published after the completion of this study, seems to adopt the Restatement (Third) position that the Vienna Convention requires a "significant violation of a provision essential to the agreement," and that "a relatively minor violation of an essential provision in a treaty would not be a material breach." *Id.* at 555. It also concludes:

[I]f a material breach does occur, the nonbreaching party may immediately suspend its performance proportionally—at least if the breach is sudden and the suspension is partial; and (3) if a nonmaterial breach occurs, the nonbreaching party may immediately suspend its performance, subject to the restrictions in the law of state responsibility on the use of countermeasures.

Id. at 555, 572-73 (footnotes omitted).

For an excellent discussion about enforcing international law generally, see Lori F. Damrosch, *Enforcing International Law through Non-forcible Measures*, 269 RECUEIL DES COURS 9 (Collected Courses of the Hague Academy of Int'l Law 1997).

stood that in a system lacking adequate centralized mechanisms for remedying treaty violation, permitting the parties to unilaterally take responsive countermeasures may be one of the most important mechanisms in the international system in encouraging compliance with treaty obligations. Second, our sense of justice and fair play—and the whole meaning and purpose of treaty agreements rooted in mutuality of obligation—rebel at a mechanistic effort to hold one party to all of its treaty obligations when the other party has previously materially breached its obligations. Although these principles are of great importance in the operation of the international legal system as a whole—and the law of treaties within that system—it has also long been understood that this doctrine must be reasonably circumscribed so as not to become an open-ended invitation for the unilateral termination of treaties and thus serve to harm a centerpiece of the international legal order. Over the years, international legal scholars have roughly divided into two camps depending on which side of the policy coin they have felt most important, protecting effective sanction against prior breach or avoiding overly-broad invocation of prior breach as a threat to the sanctity of treaties. The first camp has tended to broadly support the right of a state to terminate or suspend a treaty in response to even minor breaches of agreement. The second has sought to qualify the general right, particularly by reference to “materiality” or “seriousness” of breach giving rise to the right, and linkage with compulsory third party dispute settlement as a condition for more than provisional suspension of obligations.⁸

Development of the law from two basic doctrinal branches of international law and with the additional crosscut of roughly two competing scholarly perspectives on the underlying policy context (as well as the normal contextual complexity of any general legal

8. For a discussion of the development of the law in this area, see SINHA, *supra* note 7, and the *Research in International Law, Under the Auspices of the Faculty of the Harvard Law School*, reprinted in 29 AM. J. INT'L L. 653, 1077-96 (Supp. 1935) [hereinafter *Harvard Research on Treaties*]. This Harvard Draft was squarely within the second camp, particularly as to the effort to condition the right of response to review by compulsory third party dispute settlement.

One factor influencing this second camp's approach was almost certainly its focus on a standard permitting “termination” in response, a much more drastic response than partial suspension. Indeed, Sir Gerald Fitzmaurice, clearly a leading proponent of the second camp, seemed to adopt the view that even “ordinary” as opposed to “fundamental” breaches would justify corresponding countermeasures not leading to termination. See ROSENNE, *supra* note 7, at 15-16.

norm applied in differing settings) has led to some lingering uncertainty at the edges as to the precise legal requirements of the general principle but has, if anything, even strengthened the universality with which the general principle is recognized within the contemporary international legal system. Development of the law of permitted response to prior breach of agreement, and the competing schools concerning policy considerations underlying its appropriate requirements, is summarized well in the second report of the International Law Commission (ILC) on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur:

The great majority of writers recognize that the violation of a treaty by one party may give rise to a right in the other party to abrogate the treaty or to suspend the performance of its own obligations under the treaty. Nor is it easy to see how the rule could be otherwise, since good sense and equity rebel at the idea of a State being held to the performance of its obligations under a treaty which the other contracting party is refusing to respect. Moreover, on general principles, a violation of a treaty right, as of any other right, may give rise to a right to take non-forcible reprisals and, clearly, these reprisals may properly relate to the defaulting party's rights under the treaty. Opinion differs, however, as to the extent of this right and the conditions under which it may be exercised. Some writers, in the absence of effective international machinery for securing the observance of treaties, are more impressed with the innocent party's need to have this right as a sanction for the violation of the treaty. These writers tend to formulate the right in unqualified terms, giving the innocent party a general right to abrogate the treaty in the event of a breach. Other writers are more impressed with the risk that a State may allege a trivial or even fictitious breach simply to furnish a pretext for denouncing a treaty which it now finds embarrassing. These writers tend to restrict the right of denunciation to "material" or "fundamental" breaches and also to subject the exercise of the right to procedural conditions.⁹

9. *Second Report on the Law of Treaties*, by Sir Humphrey Waldock, *Special Rapporteur*, U.N. Doc. A/CN.4/156 and Add.1-3, reprinted in [1963] 2 Y.B. INT'L L. COMM'N 36, 73, U.N. Doc. A/CN.4/SER.A/1963/Add.1 [hereinafter *Second Report by Sir Humphrey Waldock*] (footnotes omitted).

Similarly, Professor Oliver J. Lissitzyn says in his "Foreword" to Sinha's important monograph on *Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by Other Party*:

The old notion that "war" is the ultimate sanction of observance of treaties, though still occasionally encountered in legal literature, is obsolete. It was never really applicable to treaties of non-political character or effective against stronger powers, and it is inconsistent with the modern abhorrence of war and with the legal restrictions on the use of force which express the consensus of mankind in the nuclear age. But force as a sanction applied by individual states has been outlawed before a centralised system of enforcement of international law by world community organs has been created. As a result, states must place greater reliance than ever on non-violent self-help as a means of protecting their legal rights. Among the forms of such self-help is unilateral denunciation of a treaty in response to its breach by the other party. The possibility of such denunciation not only operates as a deterrent against treaty violations, but often permits the innocent party to protect itself against a continuing inequality of burdens and benefits which might otherwise result, contrary to its legitimate expectations, from the disregard of the treaty by the other party. It may thus serve as an instrument of justice.

Yet the dangers inherent in the unilateral denunciation of treaties by states as a measure of self-help are evident. The stability of treaty relationships may be seriously impaired if breaches are alleged merely for the purpose of getting rid of treaty obligations which have become undesirable for other reasons. Fear of such misuse of the remedy of unilateral denunciation led some jurists in the interwar period to doubt that a treaty violation gave the innocent party a right to such denunciation, or to hedge the exercise of this right by special requirements. The Harvard Research in International Law, for example, optimistically sought to do away with the self-help aspect of denunciation by providing that only "a competent international tribunal or authority" could declare that a treaty had ceased to be binding because of a prior violation by another party. Even the Legal Adviser of the U.S. De-

partment of State was inclined to doubt, in 1935, that the remedy of unilateral denunciation had sufficient support in the practice of states. Other jurists have pointed out that an innocent party can often adequately protect its interests by suspending performance of its obligations under the violated treaty in whole or in part rather than by definitively terminating them. The growing number of multilateral treaties, moreover, has served to emphasize the possible injustice of denunciation or suspension vis-à-vis all the other parties as a remedy for a breach committed by one of them.

Practice since World War II has afforded new instances of resort to unilateral denunciation as a remedy for non-observance of treaties and has served largely to dispel doubts that a right of such denunciation, at least with respect to bilateral treaties, exists in international law. Both the United Nations International Law Commission and the American Law Institute, in their current efforts to codify or restate the law of treaties, recognize this right.¹⁰

At least with respect to the developmental strand rooted in the law of treaties, as opposed possibly to that of the law of reprisal, the law of permitted response to prior breach of agreement has been codified (or progressively developed) in Article 60 of the Vienna Convention on the Law of Treaties. The Vienna Convention was the product of two sessions of a one hundred-and-ten-nation conference on the law of treaties held in 1968 and 1969 and itself rooted in a draft prepared by the United Nations International Law Commission over a fifteen-year period.¹¹ The Treaty was

10. Oliver J. Lissitzyn, *Foreword to SINHA, supra* note 7, at xv-xvii.

11. See Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970). Mark E. Villiger's book contains an interesting history of Article 60 of the Vienna Convention on the Law of Treaties and state practice under it. He cautiously concludes: "[i]t is doubtful whether Art. 60 as a whole is declaratory of customary law. . . . State practice must still accumulate and become more consistent before a rule can eventually emerge." M. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* 369 (1985). His general discussion of Article 60 is at 357-80. He also reports, however, that "[m]ost writers . . . see the main principle in Art. 60 as being established in general international law, but many details as new. . . ." *Id.* at 369. With respect to the important issue of the meaning of a "material breach" under Article 60 Villiger writes:

Subpara. 3(b) [of the Vienna Convention] focuses on the breach, namely the non-performance, of single treaty provisions "essential to the accomplishment of the object and purpose of the treaty." 3(b) does not require a fundamental

adopted at Vienna by a vote of 79 to 1 and came into effect on January 27, 1980, after ratification by the thirty-fifth country.¹² While not yet ratified by the United States, the Convention is in large part regarded by the United States as embodying the customary international law of the law of treaties.¹³ Thus, in its Letter of October 18, 1971, submitting the Treaty to the President, Secretary of State William P. Rogers said:

The Treaties Convention which emerged from the Vienna Conference is an expertly designed formulation of contemporary treaty law and should contribute importantly to the stability of treaty relationships. Although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice. . . .¹⁴

And, specifically with respect to Article 60, Secretary Rogers said:

Article 60 recognizes the long-standing doctrine that a material breach of a treaty by one party may be invoked by the other party to terminate the treaty or to suspend the performance of its own obligations under the treaty. . . .¹⁵

Subsequently, on June 11, 1986, Mary V. Mochary, Deputy Legal Adviser to the Department of State, testified before the Senate Foreign Relations Committee in support of the Vienna Convention on the Law of Treaties that:

breach affecting central purposes of the treaty. Some parties may even view performance of an arbitration clause as essential in this sense. Furthermore, it is, with respect, futile to raise the issue of minor breaches of essential provisions, because 3(b) only asks whether a (major or minor) *breach* affects the accomplishment of the object or purpose of the treaty. At any rate these criteria depend on the subjective judgment of the innocent parties. . . .

Id. at 372. (footnotes omitted) See also *id.* at 379 n.164.

12. RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Introductory Note, at 1 (Tent. Draft No. 6, Vol. 2, 1985) [hereinafter 1985 REVISED RESTATEMENT].

13. It is highly probable that, among some others, the articles embodying the new mechanisms for third-party resolution of disputes are not customary international law and would be binding only on treaty parties. As will be seen, this is the United States legal position and that adopted in the 1985 draft of the Revised Restatement of the Foreign Relations Law of the United States.

14. Letter of Submittal from Secretary of State William P. Rogers to the President, Transmitting the Vienna Convention (Oct. 18, 1971) at 1.

15. *Id.* at 6.

[T]he Vienna Convention on the Law of Treaties was adopted in 1969 at a conference in which delegations from 110 countries participated. The Convention is now in force for 51 countries. The rules in the Convention constitute the basic rules for treaty-making in the world today. Although the United States is not yet a party, it follows most of the rules in the conduct of its treaty business since most of the rules reflect customary law. . . .¹⁶

Importantly, Deputy Legal Adviser Mochary went on to say:

[T]he Convention includes procedural mechanisms for settlement of disputes that do not reflect customary law and cannot be invoked by the United States until it becomes a party to the Convention.¹⁷

Similarly, the 1985 draft of the *Revised Restatement of the Foreign Relations Law of the United States* says in its "Introductory Note":

This Restatement accepts the Vienna Convention as presumptively codifying the customary international law governing international agreements, and therefore as foreign relations law of the United States even though the United States has not adhered to the Convention.¹⁸

16. Written Statement by Deputy Legal Adviser Mary V. Mochary Before the Senate Foreign Relations Comm. (June 11, 1986) at 1.

17. *Id.* at 1-2.

18. 1985 REVISED RESTATEMENT, *supra* note 12, Introductory Note, at 2 (III-2). The Introductory Note goes on to discuss a few instances where the rule of the Convention is at variance with the United States understanding of international law and "a few other instances . . . [where] the difference between the Convention and customary law as the United States sees it is more subtle, being a matter of emphasis and degree." *Id.*

The Restatement (Third), makes the same point as follows in its Introductory Note:

This Restatement accepts the Vienna Convention as, in general, constituting a codification of the customary international law governing international agreements, and therefore as foreign relations law of the United States even though the United States has not adhered to the Convention. See § 111. In a few instances, the Convention moves beyond or deviates from accepted customary international law, and the Restatement therefore departs from the Convention pending United States adherence to it. See, e.g., § 301, cmt. b; § 313, Reporters' Note 4. In a few other instances, the difference between the Convention and customary law is a matter of emphasis and degree and can be accommodated within the text of the Convention. Since the United States may become a party to the Convention, this Restatement uses the text of the Convention as a guide, with deviations indicated as appropriate in Comment and Reporters' Notes. See, e.g., §§ 325, 326, 336.

RESTATEMENT (THIRD), *supra* note 7, Introductory Note to Part III, at 144-45.

The comment to section 337 of the 1985 *Revised Restatement* goes on to say:

Article 66 of the Vienna Convention goes further and directs that, if twelve months elapse without a solution, the parties shall submit the matter to the International Court of Justice, to arbitration or to the conciliation procedure specified in the annex to the Convention. These requirements will not apply to or benefit the United States until it becomes a party to the Convention.¹⁹

And in footnote one to its "Introductory Note" on "The Vienna Convention on the Law of Treaties," the 1985 *Revised Restatement* says:

The Final Provisions relating to the conclusion of the Vienna Convention itself, and undertakings as to means for resolving disputes about international agreements, apply only since the Convention came into force and are binding only on the parties.²⁰

Thus, it is reasonably clear in United States foreign relations law that Article 60 of the Vienna Convention generally reflects customary international law but that the Vienna Convention obligations as to means for resolving disputes do not reflect customary law and would apply only between parties which, at present, do not include the United States. Article 60 of the Vienna Convention provides in full:

TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY AS A CONSEQUENCE OF ITS BREACH

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
2. A material breach of a multilateral treaty by one of the parties entitles:
 - (a) the other parties by unanimous agreement to

19. 1985 REVISED RESTATEMENT, *supra* note 12, § 337, cmt. a.

20. *Id.* at 1 n.1.

suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State, or

(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.²¹

21. Article 31(3) of the Vienna Convention of the Law of Treaties provides that in interpreting a treaty "[t]here shall be taken into account, together with the context: . . . (c) any relevant rules of international law applicable in the relations between the parties." Vienna Convention on the Law of Treaties, *supra* note 7. The law of permitted response to prior breach of treaty is at least in part rooted in the customary international legal doctrine of non-forcible reprisal as a sanction for prior breach and it thus might be argued

The general principle of a legal right to suspend performance in response to a prior breach of agreement is also reflected in United States treaty practice apart from its position that Article 60 generally reflects a long-standing customary law principle. Thus, on January 2, 1791, James Madison, then a member of the House of Representatives, wrote concerning the Anglo-American Treaty of Peace of September 3, 1783, in a letter to Edmund Pendleton, the President of the Virginia Supreme Court of Appeals:

[T]hat a breach on one side (even of a single article, each being considered as a condition of every other article) discharges the other, is as little questionable; but with this reservation, that the other side is at liberty to take advantage or not of the breach, as dissolving the treaty. . . .²²

Similarly, Secretary of State Thomas Jefferson wrote to Mr. Hammond, the British Minister in Washington, in a letter of May 29, 1792, concerning repeated British violations of the same treaty:

On the breach of any article of a treaty by the one party, the other has his election to declare it dissolved in all its articles, to compensate itself by withholding execution of equivalent articles; or to waive notice of the breach altogether.²³

that such doctrine—or its underlying policy rationale—should permit prior breach to be taken into account in any interpretive settings which might reasonably permit different interpretations. Moreover, since the Vienna Convention simply may not address the law of non-forcible reprisal, arguably prior breach may be a factor to consider in such interpretive settings quite independently of Article 31.

22. See 5 J.B. MOORE, DIGEST OF INTERNATIONAL LAW 321 (1906), cited in SINHA, *supra* note 7, at 106.

23. See DANIEL GARDNER, TREATIES ON INTERNATIONAL LAW 244 (1844), cited in SINHA, *supra* note 7, at 106.

These statements by Madison and Jefferson both embody the “broad” view that the prior breach of *any* article, major or minor, releases the other party, at its election, from its treaty obligations.

Another example in American diplomatic practice is given in Whiteman’s Digest of International Law:

In 1938 the American Ambassador at Paris reported that the French Minister of Foreign Affairs had stated that both he and the British Secretary of State for Foreign Affairs had reminded the Rumanian representative at the 100th session of the League of Nations Council in Geneva “that the treaty guaranteeing the rights of minorities in Rumania was the same treaty which had given Rumania both Transylvania and Bessarabia, and had stated that if the Rumanian Government should destroy the integrity of this treaty by attacking the Jewish minority in Rumania, the French and British Governments would regard the entire treaty, including the portions which give Transylvania and Bessarabia to her, annulled by the action of the Rumanian Government itself.

More recently, Abram Chayes, the Legal Adviser of the Department of State, said in a legal opinion of August 12, 1963, made available to the Senate Committee on Foreign Relations in connection with Senate hearings on the Limited Test Ban Treaty of 1963:

A breach of treaty obligations by one party is considered in international law to give other parties the right to terminate their obligations under the treaty. . . .

In international law, violation of a treaty by one party makes the treaty voidable at the option of the other parties. Whether there has been a violation, and whether it is serious enough to justify termination is for each party, acting in good faith, to decide. The right to void the treaty must be exercised within a reasonable time after the violation has become known.

The right of unilateral abrogation for cause has apparently never been adjudicated in an international court. [It has, however, been alluded to in at least two cases before the Permanent Court of International Justice.] It has, however, been confirmed by publicists generally, and by United States, British, and Soviet authorities, among others.²⁴

Similarly, on March 1, 1978, State Department Legal Adviser Herbert J. Hansell replied to a question from Senator Howard H. Baker, Jr., in connection with the debate on the Panama Canal Treaties about the legal effect of a material breach by Panama of the proposed Treaties:

14 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 473 (1970). *See generally id.* at 468-78 (discussing the "situation as to termination or suspension of the operation of a treaty as a consequence of its violation").

24. *See WHITEMAN, supra* note 23, at 474-75. The United States also invoked the doctrine in connection with the North Vietnamese breach of the 1954 Geneva Accords. *See id.* at 475-76. In that case a legal memorandum prepared by State Department Legal Adviser Meeker said "a material breach of an agreement by one party entitles the other at least to withhold compliance with an equivalent, corresponding, or related provision until the defaulting party is prepared to honor its obligations." Memorandum Prepared by State Department Legal Adviser Leonard Meeker, *The Legality of United States Participation in the Defense of Viet-Nam* (March 4, 1966), *quoted in WHITEMAN, supra* note 23, at 476. *See also* the United States Note to Vietnam of April 20, 1973, *discussed in* ARTHUR W. ROVINE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 479 (1973); and 5 J.B. MOORE, DIGEST OF INTERNATIONAL LAW 322 (1906). An excerpt from this note appears in text at note 144 *infra*.

[A] material breach of the Panama Canal Treaty by Panama would entitle the United States to suspend performance of its obligations in whole or in part. Article 60(1) of the Vienna Convention on the Law of Treaties provides that:

A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

....

In the event of a material breach by Panama of its obligations, it would be perfectly appropriate for the U.S. to withhold performance of these and other U.S. obligations under the Treaty until Panama complied once again with its obligations.²⁵

It should be noted that, quite apart from United States foreign relations law and practice recognizing the general principle of a right of response at least to prior material breach of agreement, the principles set out in Article 60 of the Vienna Convention as to such a right of response are widely accepted internationally, and, if anything, they may reflect requirements viewed by some states as too strict for establishing the right of responsive suspension. In their important article on "The Treaty on Treaties," Richard D. Kearney and Robert E. Dalton of the Office of the State Department Legal Adviser wrote:

The point made in the Commission's commentary that "the great majority of jurists recognize that a violation of a treaty by one party may give rise to a right in the other party to abrogate the treaty or to suspend the performance of its own obligations under the treaty" was borne

25. *Unilateral Abrogation or Material Breach*, in MARIAN LLOYD NASH, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 767 (1978). See also, CONGRESSIONAL RESEARCH SERVICE, 98TH CONG., 2D SESS., *TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE* 158-59 (1984) (quoting U.S. DEPARTMENT OF STATE, *DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW* 767 (1978)). See also NASH, *supra*, at 769-70, for the Memorial of the United States in the U.S.-France Air Services Arbitration; *RESTATEMENT (THIRD)*, *supra* note 7, § 335(1) ("A material breach of a bilateral agreement by one of the parties entitles the other to invoke the breach as a ground for terminating the agreement or suspending its operation in whole or in part.").

out in the discussions at Vienna. No delegation denied the principle, although several expressed the view that a less strict approach to the article was required. The conference rejected all initiatives to weaken the rather conservative formulation adopted by the Commission.²⁶

Jurists of the former Soviet Union also seemed to recognize this general doctrine;²⁷ and, in its Advisory Opinion of June 21, 1971 on Namibia, the International Court of Justice said:

The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject. In the light of these rules, only a material breach of a treaty justifies termination, such breach being defined as:

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty (Art. 60, para. 3).²⁸ That is, the International Court of Justice has said that the rule in Article 60 of the Vienna Convention on response to breach may, at least "in many respects," "be considered as a codification of existing customary law."

In his important analysis of state practice and the views of publicists on the issues of response to prior breach of agreement, Sinha concludes his section on the views of jurists by saying:

The jurists substantially agree that unilateral denunciation is a norm of international law. Some publicists justify the correctness of this principle by specifically noting an analogous rule in private law. A number of writers

26. Kearney & Dalton, *supra* note 11, at 495, 539.

27. See, e.g., SINHA, *supra* note 7, at 34. In this connection it should be noted that Article 60 of the Vienna Convention was adopted without a dissenting vote, and that the Vienna Convention on the Law of Treaties, particularly including Article 60, entered into force for the Soviet Union on May 29, 1986.

28. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, 1971 I.C.J. 13, 47 [hereinafter I.C.J. Advisory Opinion of 21 June 1971].

are aware of the possibility of misuse of this principle by dishonest states parties to treaty transactions. However, they believe that under conditions governing international legal order there is no reasonable alternative to this rule.

They differ however in regard to circumstances under which the exercise of this right is justified. The traditional jurists tend to regard a treaty as a mere bilateral compact; and, they assert that any type of breach justifies the exercise of this right by an innocent party. Among modern jurists some, while declaring or implying the existence of this rule, either ignore or express doubts relative to the limitation of substantial breach. The dominant trend among the modern Anglo-American jurists appears to be to circumscribe this rule by such equitable considerations as extinctive prescription, severability of provisions and the necessity for showing a substantial breach. Such post second-world war collective expressions of opinion as the American Law Institute's proposed official draft on the foreign relations law of the United States and the report of the United Nations International Law Commission, covering the work of its fifteenth session, May 6 - July 12, 1963, advocate these limitations, upon the exercise of the right of unilateral denunciation. The Soviet jurists also seem to incline to the view that only a substantial breach renders a treaty voidable at the pleasure of an innocent party.

The differences among the jurists, however, are more in regard to details rather than in principle, for they essentially concur that the doctrine of unilateral denunciation is not only grounded in the considerations of justice and equity but is also confirmed by the general practice of states.²⁹

It is highly probable, although not completely free from doubt, that the requirements embodied in Article 60 of the Vienna Convention for lawful responsive termination or suspension embody only the requirements rooted in the law of treaties and that, in some respects, particularly whether there may be a right of pro-

29. SINHA, *supra* note 7, at 33-34.

portional suspension in response even to a minor breach of treaty, requirements for suspension of a limited particular obligation may be more liberal as rooted possibly in the law of non-forcible reprisal. Conversely, it is possible that some requirements rooted in the law of non-forcible reprisal may be stricter than those set out in Article 60 and rooted in the law of treaties.³⁰ The issue, of course, is whether the law of non-forcible reprisal continues as a ground for treaty termination or suspension in whole or in part. It seems highly probable, although again the issue is not completely free from doubt, that it does continue and this seems to be the United States position.

Writing in 1961 prior to adoption of the Vienna Convention, Lord McNair, a former President of the International Court of Justice, states the classic law of non-forcible reprisal as it applies to remedy breach of treaty as follows:

[A]lthough the use or threat of force for the purpose of stopping or redressing an international delinquency has now been condemned by the treaties referred to above, the right to resort to non-forcible reprisals or other non-forcible measures in order to stop or redress a breach of treaty remains. (We have already excluded retorsion in the sense assigned to it by Oppenheim.) We are aware of no reason why a State injured by the breach of a treaty by another party should not take non-forcible reprisals against it, that is, non-forcible measures (economic, financial, or other) which would, but for the fact that they are reprisals, be illegal; for instance, the partial non-observance of a commercial treaty by taking action which would otherwise be contrary to it such as the prohibition of exports to or imports from the wrong-doing country, or the blocking of the banking accounts of the nationals of the wrong-doing State, or a refusal to permit the otherwise lawful landing of fish caught by the wrong-doing State's nationals in a manner, or in a place, made illegal by a fisheries convention. But, even when a resort to non-forcible reprisals is justified, the measures adopted

30. For example, Article 60 does not seem to embody a proportionality requirement; moreover, although this is not clear, reprisal may—if it is assumed to be solely a remedy to bring about compliance—at least in some settings require conditionality in linkage between suspension and continuing violation.

must be proportionate to the nature and the gravity of the injury sustained.³¹

In his Second Report on the Law of Treaties, prepared for the United Nations International Law Commission, Special Rapporteur Sir Humphrey Waldock wrote to explain a suggested limitation of the right to terminate or suspend a particular provision to that which has been broken (a limitation not adopted in the final Article 60):

Admittedly, it may also be put upon the basis of a right to take non-forcible reprisals and upon that basis it is arguable that the innocent party may suspend the operation not necessarily of the provision which has been broken of but some other provision of special concern to the defaulting party. The terms of paragraph 2 are not intended to exclude whatever other rights may accrue to the innocent party by way or [sic] reprisal; but it is thought better not to introduce the law of reprisals, as such, into the present article. Naturally, any abrogation or suspension of the whole or part of the treaty under paragraph 3 will be without prejudice to the innocent party's right to claim compensation for any loss or damage resulting from the breach.³²

Similarly, and even more clearly, the International Law Commission wrote in its 1966 Report to the General Assembly in commentary to what became Article 60 of the Vienna Convention:

The Commission considered that the action open to the other party in the case of a material breach is to invoke either the termination or the suspension of the operation of the treaty, in whole or in part. The right to take this action arises under the law of treaties independently of any right of reprisal, the principle being that a party cannot be called upon to fulfil its obligations under a treaty when the other party fails to fulfil those which it undertook under the same treaty. This right would, of course, be without prejudice to the injured party's right to present an international claim for reparation on the basis of

31. MCNAIR, *supra* note 7, at 578.

32. *Second Report by Sir Humphrey Waldock, supra* note 9, at 76.

the other party's responsibility with respect to the breach.³³

Taken together these comments suggest that the International Law Commission believed that it was codifying (or progressively developing) the law of material breach rooted in the law of treaties and that this was without prejudice to the rights of the parties concerning lawful reprisals or damages. Similarly, while not specifically mentioning the law of reprisals, the Commission reported in discussing the scope of the draft articles on the law of treaties that:

[T]he draft articles do not contain provisions concerning the question of the international responsibility of a State with respect to a failure to perform a treaty obligation. This question, the Commission noted in its 1964 report, would involve not only the general principles governing the reparation to be made for a breach of a treaty, but also the grounds which may be invoked in justification for the non-performance of a treaty. As these matters form part of the general topic of the international responsibility of States, which is to be the subject of separate examination by the Commission, it decided to exclude them from its codification of the law of treaties and to take them up in connexion with its study of the international responsibility of States.

And:

[T]he Commission did not consider that it should cover the whole question of the relationship between treaty law and customary law, although aspects of that question are touched in certain articles.³⁴

In this connection, it should also be noted that Article 73 of the Vienna Convention, as adopted, provides:

The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States or from the international re-

33. *Report of the International Law Commission on the Work of the Second Part of its Seventeenth Session and on its Eighteenth Session*, U.N. Doc. A/6309/Rev.1 (1966), reprinted in [1966] 2 Y.B. INT'L L. COMM'N 169, 255, U.N. Doc. A/CN.4/SER.A/1966/Add.1 [hereinafter *1966 Reports of the Commission*].

34. *Id.* at 177 (footnotes omitted).

sponsibility of a State or from the outbreak of hostilities between States.³⁵

Following adoption of the Vienna Convention, T. O. Elias, who subsequently became President of the International Court of Justice, wrote in his important book, *The Modern Law of Treaties*, which he describes as written "in the light of the Vienna Convention".³⁶

It is generally agreed that the breach of a treaty obligation by one party entitles the other party to retaliate by means of peaceable reprisals. The question, however, is to determine the extent of as well as the conditions for the exercise of this right of termination or suspension entailing reprisals. On the one hand, the innocent party should have a right to repudiate the treaty in case of a breach; on the other hand, it is important to insist that, in order for the innocent party to exercise such a right, the alleged breach must be material, that is, not trivial or fictitious.

35. Vienna Convention on the Law of Treaties, *supra* note 7, art. 73. However, Article 42 of the Vienna Convention provides in its paragraph 2 that "[t]he termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty." Vienna Convention on the Law of Treaties, *supra* note 7, art. 42(2).

For treaty parties this article may at first seem to give rise to a classic "complementarity" between Articles 73 and 42, at least where Article 42 is intended to apply, concerning the availability of non-forcible reprisal as a separate ground for termination or suspension of a treaty obligation in response to prior breach of agreement. The International Law Commission Commentary to Article 42, however, makes clear that the general reservation in Article 73 leaving aside the law of "international responsibility of a State" was regarded as "covering the draft articles as a whole," thus presumably including and overriding Article 42. *1966 Reports of the Commission, supra* note 33, at 237. Moreover, Article 42, rooted in all the obligations of the Treaty, may not reflect customary international law binding on non-parties, particularly if any such obligations, for example the procedural articles of the Treaty, do not reflect customary international law. In this connection, it should be noted that Article 42 was not invoked by the arbitral tribunal in the 1978 United States-France Air Services arbitration as a grounds for requiring a "materiality" standard of the triggering breach.

36. ELIAS, *supra* note 7, at 5. Elias also writes in his preface:

[T]here can hardly be any Foreign Ministry in Member States and non-Member States alike that has not been using the Convention as the most authoritative source for its guidance in the conduct of inter-State relations. . . . It can safely be said that, despite the understandable delay in its ratification, the Convention is now part and parcel of contemporary international law.

... In the case of a bilateral treaty, the injured party may under conditions just outlined in the preceding paragraph take action in the nature of a reprisal *either* in addition to terminating the treaty or suspending its operation or in substitution therefore, when a material breach has been committed by the defaulting party. Questions relating to any consequential claim for payment of reparation to the injured party or to any State responsibility on the part of the defaulting party have nothing to do with the principle of the right of an innocent party to terminate the treaty or to suspend its operation in the event of a breach by the other, defaulting party.³⁷

Professor Bruno Simma of the Institut für Volkerrecht, Rechts- und Staatsphilosophie, München, wrote in 1970:

Article 60 constitutes one of the provisions with regard to which—aside from procedural shortcomings [to which we will return]—the limited scope of the Vienna Convention on the Law of Treaties will be felt both clearly and painfully. While Article 60 and its related provisions carefully and equitably regulate the application of the reactions to breach having their *sedes materiae* in the law of treaties, any examination of the breach situation limited to an analysis of the rules of the Vienna Convention will, due to the exclusion of similar reactions having their *sedes materiae* in the law of international responsibility, provide the observer with an incomplete picture.³⁸

Similarly, Professor Simma clearly adopted the view in 1978 in the *German Yearbook of International Law* that both non-forcible reprisals suspending treaty obligations and withholding performance under treaty law existed as sanctions for prior breach of treaty and that Article 60 of the Vienna Convention did not codify the law of non-forcible reprisal which existed side-by-side with it. Thus he wrote:

If, however, the “balancing” of treaty performance goes beyond these limits, i.e., if it takes the form of non-

37. *Id.* at 114.

38. Bruno Simma, *Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its Background in General International Law*, 20 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 5, 83 (1970). See also ROSENNE, *supra* note 7, at 3-8.

performance of treaty obligations, such a reaction can be considered as justified only as a measure of self-help, as a sanction countering the treaty violation of the defaulting partner. Suitable for such sanctions are either reprisals (if "symmetrical" to the breach or violation preceding it, known also as "specific reprisals" or "reprisals in kind"), or the right to withhold performance of a treaty in accordance with the principle *inadimplenti non est adimplendum*. The decision of a state, however, whether to resort to reprisals or to suspension of the performance of treaty obligations subsequent to a breach, falls within the competence of its central organs responsible for the conduct of its external affairs.³⁹

[T]he above-presented case convincingly proves that a treaty suspension in accordance with Art. 60 of the Vienna Convention needs to be sharply distinguished from a suspension as a measure of reprisal. Emphasis on this point is justified, because even literature published after 1969 includes opinions which neglect or ignore this differentiation, blur or even attack it. The response codified in Art. 60 is based on the consideration that a state cannot be reasonably expected to continue the performance of its treaty obligations in relation to a party which fails to perform its share. It has its *sedes materiae* in the law of treaties and has nothing to do with reprisals. Admittedly, a reprisal may also take the form of a temporary suspension of a violated treaty ("specific reprisal", "reprisal in kind"), but then it would not serve the purpose of re-establishing the balance of treaty rights and obligations but rather would be applied for the purpose of exerting coercive pressure on the party responsible for a breach.

This difference of function results in a differentiation as to the respective legal regimes. The author has dealt with this point in greater detail elsewhere. It may be best clarified by an examination of Art. 72 of the Vienna Convention, which regulates the consequences of the suspension of the operation of a treaty (*inter alia*, subsequent to a breach) and according to which such a suspen-

39. Bruno Simma, *Termination and Suspension of Treaties: Two Recent Austrian Cases*, 21 GERMAN Y.B. OF INT'L L. 74, 85-86 (1978) [hereinafter Simma, *Termination*].

sion “*releases the parties* between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension”. *Both* sides are thus temporarily liberated from their treaty obligations. It is absurd to view such a legal consequence as one intended also as the result of a reprisal, as long as the nature of reprisals is asserted to be that of offensive means suitable for exerting coercive pressure.⁴⁰

And Professor Simma writes in footnote fifty-one:

The legal regime of reprisals as a consequence of treaty breaches is excluded from the scope of the Vienna Convention by its Article 73, according to which the Convention shall not prejudice any question that may arise in regard to a treaty from, *inter alia*, the international responsibility of a state.⁴¹

In the post-Vienna Treaty 1978 United States-France Air Services Arbitration, the United States took the position that a retaliatory suspension by the United States in response to a prior French breach of the United States-France Air Services Agreement could be rooted under either the theory of reprisals or the law of treaties, for both require a prior breach of an international obligation.⁴² In its reply to the French Memorial, the United States also took the position that even a less than “material” breach could justify a proportional suspension of obligations:

The U.S. action was justified under either the theory of reprisals and retorsion, or under the law of treaties. As a practical matter, these two doctrines overlap considerably and thus will be considered together. . . .

. . . .

As France correctly notes, both the theory of reprisals and the customary international law of treaties require a prior breach of an international obligation before application of a sanction in the form of withholding a treaty right. The United States does not claim that the law is

40. *Id.* at 88-89 (footnotes omitted).

41. *Id.* at 88 n.51.

42. Case Concerning the Air Services Agreement of 27 March 1946 (U.S. v. Fr.), 54 I.L.R. 304, 320. See also NASH, *supra* note 25, at 769, 771-72.

otherwise. What is clear, however, is that France violated its treaty obligation to the United States . . . and remained in continuous violation. . . . This violation provides the necessary predicate for retaliatory action.

....

France also argues that if there were a violation, it was too minor to justify a retaliatory response under treaty law doctrines. The authorities it cites for this proposition relate to the termination of a treaty as a consequence of its breach, or to the temporary suspension of the entire treaty or severable portions thereof. The United States took no such action. It has always considered the treaty fully in force during the period of the dispute and never purported to terminate or wholly suspend its application. Rather it took steps toward a limited withdrawal of certain rights of the French carriers corresponding to the rights denied the U.S. carriers. This action is justified under international law though the underlying French breach would not have justified termination or suspension of all rights and obligations under the treaty.

The reasons for considerably more caution where a treaty is to be terminated or wholly suspended are clear. If a trivial or nonmaterial breach gave the aggrieved party an excuse to terminate all treaty obligations, the rule of *pacta sunt servanda* would be seriously impaired. However, where the sanction to be invoked is a simple reciprocal withdrawal of rights, the rule of proportionality provides an adequate safeguard. This is particularly true where, as here, the proportional countermeasures are invoked only pending restoration of bilateral rights for an interim period pending judicial resolution of the dispute by arbitration.

If the French argument were extended to apply to situations where termination or total suspension are not involved, there would in effect be no sanction and hence no deterrent for most sorts of breaches. For this reason the majority of commentators recognize the aggrieved state's

right to invoke proportional countermeasures short of termination or suspension.⁴³

A three-judge arbitral tribunal, with Judge Riphagen as President and Professors Ehrlich and Reuter as Arbitrators, held for the United States without stating whether it was acting under the law of treaties or the law of non-forcible reprisal, or both. In doing so, however, it did not invoke the materiality rule as embodied in Article 60 of the Vienna Convention. The tribunal said:

Under the rules of present-day international law, and unless the contrary results from special obligations arising under particular treaties, notably from mechanisms created within the framework of international organisations, each State establishes for itself its legal situation vis-à-vis other States. If a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through "counter-measures."⁴⁴

In a 1980 article in the *American Journal of International Law* discussing the *Air Services Arbitration*, Professor Lori Fisler Damrosch, who had been Deputy Agent for the United States in the Arbitration, took the position that Article 60 of the Vienna Convention should not be considered an exclusive statement of the rights of a party injured by a breach of treaty. Professor Damrosch wrote:

Yet Article 60, whether or not it enunciates existing principles of international law on the points it addresses, cannot—or at least should not—be considered an exclusive statement of the rights under customary international law of a party injured by a breach of treaty. Most important, the article omits any discussion of less than material breaches. By this omission the drafters might have intended to preclude any sanction for nonmaterial breaches. Alternatively, they might have intended only to confirm the right to terminate or suspend a treaty in

43. NASH, *supra* note 25, at 771-72 (footnotes omitted). The United States went on to argue that the French breach was a "serious" or "material" breach of the agreement.

44. Case Concerning the Air Services Agreement of 27 March 1946 (U.S. v. Fr.), *supra* note 42, at 337.

response to a material breach, and to preclude these drastic measures unless a breach was material, without prejudice to the availability of other lesser responses to lesser breaches. The former interpretation would in effect eliminate any deterrent for a vast category of treaty violations, and runs contrary to good sense.

By reading between the lines of the International Law Commission's commentary, it is fortunately possible to conclude that the Commission did not intend to foreclose appropriate responses to breaches not covered by Article 60's materiality standard. The Commission indirectly recognized that rights of reprisal would be available under international law wholly apart from any codification of the law of treaties. It is not at all clear why the Commission failed to confirm these rights explicitly in the text of the draft articles. In view of the sound policy reasons for preserving a deterrent to minor as well as major treaty breaches, the references to materiality in the text should be read not as excluding entirely the right to respond to minor breaches, but simply as a means to ensure that minor breaches are not used as a pretext for denouncing a treaty which has become inconvenient or for suspending performance of more than proportional obligations.

The tribunal in the U.S.-France arbitration did not discuss the issue of materiality, though both sides had argued it. France claimed that its denial of the right to change gauge (which in its view did not constitute a breach) was certainly not a violation of a provision "essential to the accomplishment of the object or purpose of the treaty" within the meaning of Article 60, and hence could not supply the legal basis for a U.S. suspension of obligations owed to France. The United States asserted, on the other hand, that the French conduct (which forced Pan Am to abandon an economic method of operation) had effectively grounded Pan Am in violation of the Agreement's essential purpose of providing air services. As a subsidiary point, the United States argued that even a minor breach could justify proportional countermeasures. In finding for the United States on the retaliation issue, the tribunal did not refer to the Vienna Convention

or to any purported materiality rule, and thus may well have considered that the right to take proportional countermeasures exists regardless of the materiality of the breach. Let us assume so.⁴⁵

Thus, there is substantial reason for believing that in addition to the treaty law right of suspension for prior breach as embodied in Article 60 of the Vienna Convention, customary international law also includes a right of non-forcible reprisal which, at least in some respects, particularly where the "materiality" standard is required, may be more liberal than, or otherwise different from, the requirements embodied in Article 60.⁴⁶

45. Damrosch, *supra* note 7, at 790-91.

46. For a discussion of the concept of reprisal under classic international law, see, for example, EVELYN SPEYER COLBERT, *RETALIATION IN INTERNATIONAL LAW* (1948); ALBERT E. HINDMARSH, *FORCE IN PEACE: FORCE SHORT OF WAR IN INTERNATIONAL RELATIONS* (1933); FRITS KALSHOVEN, *BELLIGERENT REPRISALS* (1971) (particularly the discussion of reprisals at 1-33); and L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE: VOL. II: DISPUTES, WAR AND NEUTRALITY* 114-23 (H. Lauterpacht ed., 5th ed. 1935). For a highly non-traditional approach, influenced by a phenomenological perspective, see NICHOLAS GREENWOOD ONUF, *REPRISALS: RITUALS, RULES, RATIONALES* (Research Monograph No. 42, Center of International Studies, Princeton University, 1974).

Oppenheim, in his classic treatise, as edited by Lauterpacht, specifically cites "non-compliance with treaty obligations" as a violation of international law for which reprisals are admissible. OPPENHEIM, *supra*, at 115. His classic discussion cites no requirement that this triggering treaty violation be of an "essential" or "material" provision. His discussion also makes clear that reprisals may consist of "a refusal to perform such acts as are under ordinary circumstances obligatory, such as the fulfilment of a treaty obligation. . . ." *Id.* at 120.

A monograph in the Oxford Monographs in International Law series provides what may well be the most detailed discussion of the status of non-forcible reprisal in contemporary international law. That monograph is OMER YOUSIF ELAGAB, *THE LEGALITY OF NON-FORCIBLE COUNTER-MEASURES IN INTERNATIONAL LAW* (1988). A principal conclusion of the Elagab monograph with reference to the necessary elements of non-forcible reprisal law is stated in the Introduction to Chapter 3:

The conclusions reached in the preceding chapter represent what might be regarded as the standard procedure for resort to non-forcible counter-measures on the basis of customary law as it had evolved by 1945. From those conclusions it is possible to delineate what appear to be the prima-facie conditions of legitimate non-forcible counter-measures. These are: (a) existence of breach; (b) the making of an unfulfilled demand for redress; and (c) observance of the principle of proportionality. The definitive character of these conditions and the particular aspects of their application will be analysed in the ensuing chapters of the present study. While the nuances of these conditions present questions, it will be shown that unequivocal recognition has been accorded in post-war State practice to the right of resort to counter-measures.

Id. at 37. The Elagab monograph goes on to develop the parameters of each of these three requirements in separate chapters. It also contains a chapter on "The Legality of Non-forcible Counter-measures within the Law of Treaties" which contains the following

discussions of the status of the customary law right to terminate or suspend a treaty by way of reprisal and the relationship between this customary right and the Vienna Convention:

After an examination of the pertinent doctrinal views, jurisprudence, and State practice, the following conclusions are offered on the question of the right to terminate or suspend a treaty by way of reprisal.

1. The preponderant view is that a material breach entitles an aggrieved party to terminate or suspend its obligations under the treaty as against the defaulting party.
2. In the case of a minor breach, the aggrieved party may withhold performance of its obligation under the treaty without affecting the legal validity of the treaty in a definitive sense.
3. The injured party must exercise its right of reprisal within reasonable time.
4. The aggrieved party must make a demand for redress before it can resort to retaliatory measures.
5. A measure taken by way of reprisal must be proportionate to the breach. None the less, there is no definite legal requirement that such a measure should be restricted to the violated provision, or indeed to the violated treaty.
6. Where there is a machinery for the settlement of disputes, the aggrieved party is precluded from taking retaliatory measures pending the outcome of the proceedings within that machinery.
7. The non-performance of treaty obligations as a reprisal should not extend to humanitarian conventions.
8. Where a party to a multilateral treaty violates it to the extent that only one contracting party is injured, the latter is not entitled to withhold performance of its obligations in relation to the other parties who are not guilty of the breach. However, the injured party may withhold performance of its obligations towards the defaulting party.

Id. at 152-53.

Paragraph I of Article 60 of the Vienna Convention provides: 'A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.' What immediately draws the attention in this provision is the adoption of the formula 'to invoke as a ground'. The Commission explained that in employing this formula it intended to emphasize that 'the right arising under the article is not a right arbitrarily to pronounce the treaty terminated'. In consequence, such a right can only be exercised in accordance with the procedure prescribed in the Convention. This feature marks a distinction between the right accruing to an aggrieved party under the Convention, and that which accrues to it under the customary law of reprisals. It should, however, be stated that in the case of the latter, the only procedural requirement is the making of an unfulfilled demand for redress.

It is now proposed to examine the kind of remedy envisaged in paragraph I of Article 60. As regards the option of termination, it is clear beyond doubt that such a course produces a definitive result. In this respect Article 70(I) (a) of the Convention provides that the termination of a treaty 'releases the parties from any obligation further to perform the treaty'. Although such a remedy is related to the general principle of non-forcible counter-measures, it is not identical to it. The difference between the two lies in the fact that non-forcible counter-measures do not necessarily have irreversible consequences. As concerns the option of suspension, Article 72(I) (a) of the Convention stipulates that such

conduct releases the parties from mutual obligations during the period of the suspension. Subparagraph I(b) of the same Article provides that the suspension 'does not otherwise affect the legal relations between the parties established by the treaty'. The Commission emphasized that 'the legal nexus between the parties established by the treaty remains intact and that it is only the operation of its provisions which is suspended'. This limitation brings the remedy of suspension under the Convention approximately into line with the non-performance of obligation by way of counter-measure.

As regards the concept of proportionality, it has been shown that proportionality is one of the conditions of resort to counter-measures. By contrast, neither the text of Article 60 nor its *travaux préparatoires* make any reference to proportionality. However, the application of such a condition to Article 60 may be implied on the basis of customary law as well as on logic.

A further ground for differentiating between counter-measures and the remedies envisaged in Article 60(I) concerns what constitutes the objects in each case. In the case of the former, the range of such objects is very wide since it can extend to treaties other than the one that has been violated. With respect to the latter, only the violated treaty may be terminated or suspended. One could envisage, however, situations in which termination or suspension under Article 60(I) would have no effect on the defaulting State. The present writer subscribes to the view expressed by Mr de Luna that in such situations 'the injured State could then, as a reprisal, suspend the application of another treaty'.

A final ground for distinction between the two types of remedies concerns the performance of obligations imposed by general international law. It is noteworthy that Article 43 expressly provides that termination or suspension under the Convention 'shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law, independently of the treaty'. Such restriction set on the options open to an aggrieved State does not appear entirely incompatible with the restriction imposed by customary law on the right of resort to counter-measures. In the latter case, however, provided that there are no collateral constraints, an aggrieved State may suspend a treaty provision even if it contains some obligation under general international law.

Finally, it is noteworthy that in the course of a debate on an earlier draft of the present Article 60(I), some members of the Commission, including the Special Rapporteur, ventured into the realms of the law of reprisals. Eventually, however, Waldock considered that it was better 'not to introduce the law of reprisals as such' into that Article. Commenting on Draft Article 57, the Commission declared its position as follows:

The right to take this action arises under the law of treaties independently of any right of reprisal, the principle being that a party cannot be called upon to fulfil its obligations under a treaty when the other party fails to fulfil those which it undertook under the same treaty.

Id. at 157-59 (footnotes omitted).

Under customary international law a breach of treaty may be responded to by taking counter-measures after an unsuccessful demand for reparation. By contrast, the right of termination or suspension under Article 60 of the Vienna Convention has been made subject to very stringent conditions. Most importantly, the Article deals fairly strictly with the concept of material breach, and makes no reference to minor breaches. This may be interpreted as an implicit recognition of the right to resort to counter-measures for less serious breaches. The second major condition for invoking Article 60 is that an aggrieved party must follow a very lengthy procedure before it can terminate or suspend.

As a final caveat in dealing with the general principles of the law of permitted response to breach of agreement, actual state practice may be more liberal and varied than the specificity of the Vienna Convention would suggest. Professor Simma makes this point in introductory remarks in his article on "Termination and Suspension of Treaties" in the *German Yearbook of International Law*:

The greater part of the more recent state practice regarding the termination and suspension of treaties is far from making that impression of orderliness and sophisti-

There can be no doubt that proportionality, which is a condition of counter-measures, applies to action taken under Article 60 of the Vienna Convention. This conclusion is based on ordinary legal logic, which implies that the Convention should be understood in the context of other rules of international law. However, it may be stated that, unlike the case of counter-measures, action taken under Article 60 must be restricted to the treaty that has been violated.

Counter-measures may, subject to certain exceptions, be taken against a treaty provision which embodies obligations imposed by international law independently of that treaty. In contrast, Article 43 of the Vienna Convention excludes such a possibility under the regime established by the Convention.

A final distinction between the category of counter-measures and Article 60 concerns the effects of the action taken. In the case of counter-measures, it is only in exceptional circumstances that the effects are irreversible. Conversely, under Article 60 (multilateral treaties excepted) an aggrieved party always has the option to put an end to the treaty.

It is is [*sic*] noteworthy that under Article 60 and according to the principle of counter-measures an aggrieved party is precluded from resort to action if the treaty stipulates peaceful settlement. Furthermore, provisions concerning humanitarian treatment cannot be violated.

To conclude, although the regime established by Article 60 represents a very specific form of counter-measures which deals only with the issue of material breach, it can to a certain extent be compared with the principle of non-forcible counter-measures. This is because they both reflect the same doctrine, notwithstanding that the rationale for the former appears to be based exclusively on reciprocity.

Id. at 163-64 (footnotes omitted).

In its work on "State Responsibility," the International Law Commission proposed the following article on countermeasures:

Article 30. Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.

1979 Y.B. INT'L L. COMM'N (Vol. 2, Part 2), *supra* note 7, at 115.

The discussion of this article seemed to assume a requirement of proportionality in settings of individual national invocation of non-forcible reprisals as response to a prior international wrongful act. *See* 1979 Y.B. INT'L L. COMM'N (Vol. 1), *supra* note 7, at 55-63, 58. Alexander Yankov of Bulgaria is reported as saying, "Lastly, it was only common sense that there should be proportionality between the internationally wrongful act and the corresponding responsive action or sanction." *Id.* at 58.

cation, which an examination of the relevant Part V of the Vienna Convention on the Law of Treaties would suggest. It cannot be denied that states in their practice do invoke the *grounds* of termination and suspension as codified or progressively developed by the Convention. They are, however, in most cases very liberal when dealing with the question of compliance with the conditions, forms and limits of invoking these grounds.⁴⁷

Whatever the precise requirements and doctrinal basis and the care with which states adhere to these limits in their practice, there can be no doubt that customary international law today recognizes a general right to suspend a treaty obligation in response to prior breach of treaty. And while it is probably not an exclusive basis for such rights, Article 60 of the Vienna Convention embodies requirements widely regarded as authoritative of state practice and international law at least justifying actions meeting its requirements. These propositions would also seem completely consistent with United States views and practice. Underlying the general proposition are important policies providing non-forceful sanction to treaty parties for policing violations of international agreements, maintaining reciprocity of obligation in the face of prior breach, and upholding fundamental fairness and justice in not strictly holding one treaty party accountable when the other has already breached the treaty. These policies are, if anything, even more important in the case of sensitive national security related agreements, for example arms control agreements, where compliance and reciprocity may be vital both to the national security of the treaty parties and to the integrity of the process itself.

It is relevant in any treaty setting in which a successor state to the former Soviet Union may be a party, also to note that the Soviet Union acceded to the Vienna Convention on the Law of Treaties on April 29, 1986, and that the treaty entered into force for them on May 29, 1986. As communicated by the United Nations Secretary General on June 9, 1986, the Soviet instrument of accession containing several reservations and a declaration provides:

VIENNA CONVENTION ON THE LAW OF TREATIES
CONCLUDED AT VIENNA ON 23 MAY 1969

47. Simma, *Termination*, *supra* note 39, at 74 (footnotes omitted).

ACCESSION BY THE UNION OF SOVIET SOCIALIST REPUBLICS

The Secretary-General of the United Nations, acting in his capacity as depositary, communicates the following:

On 29 April 1986, the instrument of accession by the Government of the Union of Soviet Socialist Republics to the above-mentioned Convention was deposited with the Secretary-General.

The instrument of accession contains the following reservations and declaration:

(Translation)(Original: Russian)

Reservations:

The Union of Soviet Socialist Republics does not consider itself bound by the provisions of article 66 of the Vienna Convention on the Law of Treaties and declares that, in order for any dispute among the Contracting Parties concerning the application or the interpretation of articles 53 or 64 to be submitted to the International Court of Justice for a decision, or for any dispute concerning the application or interpretation of any other articles in Part V of the Convention to be submitted for consideration by the Conciliation Commission, the consent of all the parties to the dispute is required in each separate case, and that the conciliators constituting the Conciliation Commission may only be persons appointed by the parties to the dispute by common consent.

The Union of Soviet Socialist Republics will consider that it is not obligated by the provisions of article 20, paragraph 3 or of article 45 (b) of the Vienna Convention on the Law of Treaties, since they are contrary to established international practice.

Declaration:

The Union of Soviet Socialist Republics declares that it reserves the right to take any measures to safeguard its interests in the event of the non-observance by other

States of the provisions of the Vienna Convention on the Law of Treaties.

In accordance with article 84 (2), the Convention will enter into force for the Union of Soviet Socialist Republics on 29 May 1986, i.e. the thirtieth day after the date of deposit of its instrument.⁴⁸

B. *Requirements Concerning the Prior Breach of Agreement*

An important threshold issue in the general international law of permitted response to breach of agreement is whether there is any requirement concerning the "essentiality," "seriousness" or "materiality" of the prior breach which would justify response and, if so, what the nature of the requirement is. This issue is further complicated by the dual doctrinal basis, already discussed, of treaty law and non-forcible reprisal law, both of which may be applicable in breach of agreement settings. This section will examine these issues first by analyzing treaty law as a basis, second by analyzing non-forcible reprisal law as a basis, third by reviewing the treatment of this issue in the *Restatement of the Foreign Relations Law of the United States*, and finally by briefly reviewing the law and policies at stake.

As has been discussed, there was a major split historically in the approaches of jurists to the treaty law basis of permitted response to breach of agreement. One loose grouping of jurists emphasized the interconnectedness of treaties and supported a right of termination or suspension for *any* breach of agreement. It might be said that the focus of this group was the unfairness of holding one party to an agreement previously breached by the other party and the need for effective remedy for breach in a decentralized system. A second loose grouping of jurists emphasized the need to limit response to prior breaches of a "serious" or "essential" or "fundamental" nature and otherwise sought to confine the right to suspend or terminate in response through procedural and other checks. This grouping of jurists was principally focused on the fear that an overly-broad rule of response could undermine the sanctity of treaties through invocation of trivial violations as a pretext for

48. *Multilateral Treaties Deposited with the Secretary-General: Status as of 31 December 1986*, at 760, U.N. Doc. ST/LEG/SER.E/5 (1987).

treaty suspension or termination.⁴⁹ In this respect, it should be noted that the legal consequence being debated between these two general approaches was the relatively drastic consequence of suspension or termination of a treaty *in toto* in response to a prior breach. Thus, when they reflected on the issue, adherents to the second approach generally conceded that a lesser responsive suspension of a treaty only in part might not require the high standards of "fundamental" or "serious" breach they sought to impose as a standard for complete suspension or termination.⁵⁰ This latter

49. On these two loose groupings of scholars, see, e.g., SINHA, *supra* note 7, at 84. See also *Harvard Research on Treaties*, *supra* note 8, at 653, 1077-96. This Harvard Research states:

Oppenheim neatly summarizes the views of the publicists by saying:

Violation of a treaty by one of the contracting States does not *ipso facto* cancel the treaty; but it is within the discretion of the other party to cancel it on this ground. There is indeed no unanimity among writers on International Law in regard to this point, since a minority make a distinction between essential and non-essential stipulations of the treaty, and maintain that only violation of essential stipulations creates a right for the other party to cancel the treaty. But the majority of writers rightly oppose this distinction, maintaining that it is not always possible to distinguish essential from non-essential stipulations, that the binding force of a treaty protects non-essential as well as essential stipulations, and that it is for the faithful party to consider for itself whether violation of a treaty even in its least essential parts, justifies its cancellation.

Id. at 1082 (quoting L. OPPENHEIM, 1 INTERNATIONAL LAW 756 (4th ed. 1928)). Note that Oppenheim, a giant of international law, both supports the right of cancellation without regard to whether an "essential" provision was violated and calls it the majority view, even in a setting where the issue is cancellation of the whole treaty and not merely proportional suspension of obligations under the treaty. This more drastic remedy of suspension of the entire agreement, not partial proportional suspension, was the focus of the Harvard Research with its pull toward enhanced restrictions on the right of response.

As has been seen, it should be noted that both James Madison and Thomas Jefferson supported the view that the breach of *any* article of a treaty justified suspension in response. See SINHA, *supra* note 7, at 105-06.

In a recent article written from a game theoretical-institutionalist perspective, Professor John Setear argues for a rule focused on "the impact of the breach rather than . . . the importance of the breached treaty provision." John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 VA. L. REV. 1, 10-11 (1997). Setear goes on to propose a redraft of Article 60 of the Vienna Convention that would, among other changes, redraft section 60(3)(b) to read: "(b) the violation of a provision that leads to a substantial deprivation of the benefits otherwise obtainable by the victims of the breach from the treaty." *Id.* at 117 (emphasis added).

50. See, for example, the discussion of this distinction embodied in the Fitzmaurice draft of the law of treaties for the International Law Commission (ILC) in the Second Report by Sir Humphrey Waldock:

In the first place, his draft [Sir Gerald Fitzmaurice for the ILC] limited the right of denunciation to cases of "fundamental breach", which he defined as "a breach of the treaty in an essential respect, going to the root or foundation of the

distinction between the standard required for suspension or termination *in toto* and that required for suspension only in part is an important distinction generally obscured in discussion of the law. Arguably, whatever the nature of the breach, the real limiting factor should be one of proportionality of response, but the treaty law basis, particularly under the Vienna Convention, has not proceeded in that vein.⁵¹

As has been seen, modern international law concerning the treaty law basis of permitted response to prior breach of agreement is embodied in Article 60 of the Vienna Convention on the Law of Treaties. Article 60, which on this issue of "seriousness" of the prior breach, seems to adopt a standard somewhat intermediate to the conflicting traditional approaches of the jurists, provides:

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

....

3. A material breach of a treaty, for the purposes of this article, consists in:

- (a) a repudiation of the treaty not sanctioned by the present Convention; or

treaty relationship between the parties, and calling in question the continued value or possibility of that relationship in the particular field covered by the treaty". The draft further provided (article 19, paragraph 2 (i) and (ii)) that the breach "must be tantamount to a denial or repudiation of the treaty obligation, and such as either to (a) destroy the value of the treaty for the other party; (b) justify the conclusion that no further confidence can be placed in the due execution of the treaty by the party committing the breach; or (c) render abortive the purposes of the treaty". By another provision (article 18, paragraph 2) the draft distinguished cases of fundamental breach from "cases where a breach by one party of some obligation of a treaty may justify an exactly corresponding non-observance by the other, or, as a retaliatory measure, non-performance of some other provision of the treaty". He considered that "in such cases there is no question of the treaty, or its obligations, as such, being at an end; but merely of particular breaches and counter-breaches, or non-observances, that may or may not be justified according to circumstances, but do not affect the continued existence of the treaty itself".

Second Report by Sir Humphrey Waldock, supra note 9, at 74.

51. But the decision of the international arbitral tribunal in the United States-France Air Services Agreement case arguably does take this approach.

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.⁵²

In the *Namibia* case, the International Court of Justice strongly suggested that the “material breach” standard, as defined in Article 60 of the Vienna Convention, is customary international law, at least for “termination” of a treaty.⁵³

The International Law Commission Commentary to Article 60 makes it clear that the Commission rejected the very tough standard of “fundamental” breach and associated restrictive definition as proposed by Sir Gerald Fitzmaurice, a predecessor Special Rapporteur to Sir Humphrey Waldock.⁵⁴ Similarly, it makes clear that its concept of “material” is intended to reflect those breaches which would not have been permitted as treaty reservations. Thus, Sir Humphrey Waldock’s second report says as commentary with respect to an earlier draft on this point:

The previous Special Rapporteur, as mentioned in paragraph 5 above, defined a “fundamental” breach as one “going to the root or foundation of the treaty relationship between the parties and calling in question the continued value or possibility of that relationship in the particular field covered by the treaty.” This definition and the further qualifications put upon it by the previous Special Rapporteur seem perhaps to put the concept of a “fundamental” breach rather high. The present draft, though inspired by the same general considerations, seeks to define a “material” breach of a treaty by reference to the attitude adopted by the parties with regard to reservations at the time when they concluded the treaty; and, if they said nothing about reservations at that time, then by reference to the “object and purpose” of the treaty—the criterion used for determining the power to make reservations in such a case. The reason, of course, is that, although the two questions are not identical, there is a certain connexion between the views of the contracting States concerning the making of reservations and

52. Vienna Convention on the Law of Treaties, *supra* note 7, art. 60.

53. I.C.J. Advisory Opinion of 21 June 1971, *supra* note 28, at 46-47. The Court did not address the requirement for the lesser responsive action of suspending in part as, for example, the earlier Fitzmaurice ILC draft had.

54. See *supra* note 50 for a description of this tough standard.

their views concerning what are to be regarded as material breaches of the treaty. It therefore seemed logical, in formulating the present article, to take into account the rules regarding the making of reservations provisionally adopted by the Commission in article 18 of part I.

13. The definition of "material" breach in paragraph 2 has three clauses. Sub-paragraph (a) gives the repudiation of the treaty as the first and most obvious form of material breach. Although the point is obvious, it needs to be stated, if only to underline that the repudiation of a treaty by one party does not of itself terminate its obligations under the treaty. If that were true, as was pointed out by Vattel, "engagements could readily be set aside and treaties would be reduced to empty formalities". The main definition is in sub-paragraph (b), and under it the concept of a "material" breach contains two restrictive elements: the breach must be "substantial", so as to amount to a setting aside of the particular provision by the defaulting party; and the provision must be one apparently regarded by the parties as a necessary condition of their entering into the treaty. The latter point, however, is stated in as objective terms as possible by linking it, for the reasons explained in the previous paragraph, to the conditions under which the treaty permits reservations to be made. Where the treaty is silent as to the power to make reservations then the test, as in article 18 of the present Special Rapporteur's first report (A/AC.4/144), is compatibility with the object and purpose of the treaty.⁵⁵

And the Report of the International Law Commission to the General Assembly on the relevant portions of Article 60 as subsequently adopted in the Vienna Convention says on this point:

Paragraph 3 defines the kind of breach which may give rise to a right to terminate or suspend the treaty. Some

55. *Second Report by Sir Humphrey Waldock, supra* note 9, at 76 (footnotes omitted). In his *Fifth Report on the Law of Treaties*, Sir Humphrey Waldock, the International Law Commission Special Rapporteur, suggested a definition of "material breach" as "[t]he violation of a provision which is essential to the effective execution of any of the objects or purposes of the treaty." *Fifth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur*, U.N. Doc. A/CN.4/183 and Add.1-4, reprinted in [1966] 2 Y.B. INT'L L. COMM'N 1, 37, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

authorities have in the past seemed to assume that any breach of any provision would suffice to justify the denunciation of the treaty. The Commission, however, was unanimous that the right to terminate or suspend must be limited to cases where the breach is of a serious character. It preferred the term "material" to "fundamental" to express the kind of breach which is required. The word "fundamental" might be understood as meaning that only the violation of a provision directly touching *central* purposes of the treaty can ever justify the other party in terminating the treaty. But other provisions considered by a party to be essential to the effective execution of the treaty may have been very material in inducing it to enter into the treaty at all, even although these provisions may be of an ancillary character. Clearly, an unjustified repudiation of the treaty—a repudiation not sanctioned by any of the provisions of the present articles—would automatically constitute a material breach of the treaty; and this is provided for in sub-paragraph (a) of the definition. The other and more general form of material breach is that in sub-paragraph (b), and is there defined as a violation of a provision essential to the accomplishment of any object or purpose of the treaty.⁵⁶

T. O. Elias, who participated in the work of the Vienna Conference and subsequently became President of the International Court of Justice, has defined a "material" breach under the Vienna Convention as one "not trivial or fictitious." In his important post-Vienna Convention work on *The Modern Law of Treaties* he says:

On the one hand, the innocent party should have a right to repudiate the treaty in case of a breach; on the other hand, it is important to insist that, in order for the innocent party to exercise such a right, the alleged breach must be material, that is, not trivial or fictitious.⁵⁷

Egon Schwelb, who served as Rapporteur of the Study Group on the Law of Treaties of the American Society of International Law, called attention in a 1967 article to the fact that as adopted by the International Law Commission Article 60 of the Vienna

56. *1966 Reports of the Commission*, *supra* note 33, at 255.

57. ELIAS, *supra* note 7, at 114.

Convention does not by its text limit in any way the nature of the violation except that it be "of a provision essential to the accomplishment of the object or purpose of the treaty." Schwelb wrote:

According to its text *any* violation of a provision essential to the accomplishment of the object or purpose of the treaty is by definition a material breach. Any breach of such a provision, however trivial a breach it may be, is deemed to be a material breach. The adjective "material", standing alone, conveys the idea of the opposite of immaterial, the opposite of trivial. If a legal definition is added, however, which makes *every* violation of an important provision a *material* breach the concept of "material breach" is extended beyond what these two words by themselves connote. Such widening of the meaning of the word "material" "for the purposes of the present article" is not desirable and the records of the Commission's proceedings show that this cannot have been the Commission's intention.

The 1963 draft of the article, like the 1966 text, made the qualification of a breach as material dependent exclusively on the character of the provision which had been violated although the definition of the type of provision was then somewhat different from the present text ("a provision which is essential to the effective execution of any of the objects or purposes of the treaty." [Art. 42 (3) (b) of the 1963 text]). The 1963 draft was therefore open to the same observations as the text of 1966. However, Sir Humphrey Waldock's draft of 1963 did take care of this problem by providing that "A *material* breach of a treaty results from [. . .](b) a breach *so substantial* as to be tantamount to setting aside any provision [. . .](ii) the failure to perform which is not compatible with the effective fulfilment of the object and purpose of the treaty." It is certainly appropriate that only the violation of an *essential provision* should bring about the right of the other party or parties to terminate or to suspend the treaty. But in addition to stipulating for this *basic requirement*, it should, in this writer's view, be also provided that only a *serious* or *substantial* or *important violation* should be a condition for the other party's (or parties') remedies under the article. A trivial breach even of an essential pro-

vision should not be available as a pretext for denouncing a treaty.⁵⁸

While Schwelb writes that the limitation he notes “cannot have been the Commission’s intention,” the important change from the 1963 Waldock draft which he discusses that specifically met his point is some evidence (arguably quite important) from the Commission’s work suggesting that the Commission may indeed have intended a looser standard. In his concluding observation Schwelb again calls attention to this limitation of the text of the Vienna Convention and cites it as an example “where improvements of the existing text would appear to be desirable.” Thus, Schwelb writes:

Draft Article 57 [60 as adopted in the Convention] is a necessary provision. Its main content conforms to general principles of law and its concrete provisions, as they have emerged from the deliberations of the International Law Commission, are equitable, well drafted and clear.

In the present article, attention has been drawn to a few points where improvements of the existing text would appear to be desirable. Of these, the following appear to be the most important:

In the definition of “material breach” in paragraph 3 (b) the character of the violated provision and not also the character of the violation itself is made the exclusive criterion.⁵⁹

Since Professor Schwelb’s clear recommendation for change in what became Article 60 was published in the July 1967 issue of the *Indian Journal of International Law*, dated before both sessions of the Vienna Conference held in 1968 and 1969, and since the Conference made no such change as recommended by Professor Schwelb, it can be argued that this is some evidence—although perhaps only a weak inference—that the Conference intended only to define “material” breach by reference to the nature of the violated provision and not, in addition, by the nature of the violation of a qualifying provision. In any event, the clear text of the

58. Egon Schwelb, *Termination or Suspension of the Operation of a Treaty as a Consequence of Its Breach*, 7 INDIAN J. INT’L L. 309, 314-15 (1967) (footnotes omitted).

59. *Id.* at 333-34.

Vienna Convention was unchanged on this point by the Conference.⁶⁰

It may also be relevant in assessing any requirements as to the "seriousness" or "materiality" of a prior breach to take account of the point made by the international arbitral tribunal in the *United States-France Air Services Agreement* decision. That is, it is necessary to take into account not only the importance of the breach for the particular agreement but also "the importance of the questions of principle arising from the alleged breach" which, the tribunal made clear, could include impact on a broader framework of related agreements. Thus, the tribunal said:

In the Tribunal's view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the counter-measures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France.⁶¹

Finally, with respect to the issue of "seriousness" or "materiality" under the law of treaties as a grounds for permitted response to prior breach, it should be noted that the International Law

60. In connection with any such inference, it should be noted that whether or not in response to Professor Schwelb's discussion of the differences between the Restatement (Second) and ILC draft concerning severability, the final Article 60 added "in whole or in part" to sections 2(a) and 2(c) when the ILC draft discussed by Professor Schwelb had not. Apparently this change was made in response to a United Kingdom proposal. See Kearney & Dalton, *supra* note 11, at 540. See also *infra* note 83 and accompanying text.

61. Case Concerning the Air Services Agreement of 27 March 1946 (U.S. v. Fr.), *supra* note 42, at 338.

Commission Commentary to what became Article 60 of the Vienna Convention specifically singles out “disarmament treaties” as treaties where a breach by one party may not only undermine the treaty regime vis-à-vis another party but, in a multilateral treaty, against all parties. Thus, the Commentary says:

Paragraph 2(c) is designed to deal with the problem raised in the comments of Governments of special types of treaty, e.g. disarmament treaties, where a breach by one party tends to undermine the whole regime of the treaty as between all the parties. In the case of a material breach of such a treaty the interests of an individual party may not be adequately protected by the rules contained in paragraphs 2(a) and (b). It could not suspend the performance of its own obligations under the treaty vis-à-vis the defaulting State without at the same time violating its obligations to the other parties. Yet, unless it does so, it may be unable to protect itself against the threat resulting from the arming of the defaulting State. In these cases, where a material breach of the treaty by one party radically changes the position of every party with respect to the further performance of its obligations, the Commission considered that any party must be permitted without first obtaining the agreement of the other parties to suspend the operation of the treaty with respect to itself generally in its relations with all the other parties. Paragraph 2(c) accordingly so provides.⁶²

That is, the International Law Commission seemed sensitive to the reality that arms control treaties may present special problems in protecting the interests of treaty parties in settings of prior breach of agreement. The problem discussed, however, was that in a setting of breach by one party of a multilateral disarmament treaty rather than that in a setting of breach of a bilateral treaty.

If this issue of “seriousness” or “materiality” of the initial breach is approached from the standpoint of non-forcible reprisal law as an alternate basis for response to prior breach of agreement, it seems probable that there is no such requirement of “serious” or “material” attached to the prior breach as a condition for a lawful reprisal in response. Rather, the law of reprisal would seem to deal with this issue by requiring that the response be not dis-

62. 1966 Reports of the Commission, *supra* note 33, at 255 (paragraph number omitted).

proportionate to the preceding violation. Thus, Lord McNair, in his important work on *The Law of Treaties* seems to adopt the view that suspension of a corresponding or analogous treaty provision would be permissible in response to even a minor breach of treaty as a reprisal even though he adopts a test of "fundamental" for "unilateral abrogation" of a treaty following prior breach. Lord McNair writes:

In practice, at any rate in regard to minor breaches of treaty, it is not uncommon for the injured State, by way of sanction, to suspend the operation of a provision corresponding to, or analogous with, the provision broken. The precise juridical status of this practice is not clear, and little authority exists. The practice seems to fall into the category of non-forcible reprisals, and it does not evince an intention to abrogate either the whole treaty or the portion of it which has been broken.⁶³

Concerning the "materiality" standard under reprisal law after the Vienna Convention, Professor Lori Fisler Damrosch writes in her 1980 article in the *American Journal*:

The Vienna Convention on the Law of Treaties is the logical starting place for an inquiry into the state of the law on permissible responses to a perceived breach of treaty. Under Article 60, a material breach by one party to a treaty entitles the other party to terminate the treaty or suspend its operation in whole or in part. A material breach is defined as a repudiation not sanctioned by other provisions of the Vienna Convention, or a violation of a provision essential to the accomplishment of the object or purpose of the treaty.

With many articles of the Vienna Convention it is relatively easy to ascertain whether the drafters intended to codify existing international law or, alternatively, to create a new rule to take effect between the parties only upon the convention's entry into force. Article 60 does not fall clearly into either of these categories. On the one hand, the International Law Commission noted the lack of consensus among jurists over some of the key concepts

63. MCNAIR, *supra* note 7, at 573. As to his test of "fundamental" in considering "unilateral abrogation" generally within a treaty law context, see *id.* at 571.

addressed in the article and the paucity of state practice to illuminate the issues. On the other hand, the Commission appeared to assume that the basic principle underlying Article 60 was, in the words of Judge Anzilotti's famous dissent in *Diversion of Water from the Meuse*, "so just, so equitable, so universally recognized, that it must be applied in international relations also."

Yet Article 60, whether or not it enunciates existing principles of international law on the points it addresses, cannot—or at least should not—be considered an exclusive statement of the rights under customary international law of a party injured by a breach of treaty. Most important, the article omits any discussion of less than material breaches. By this omission the drafters might have intended to preclude any sanction for nonmaterial breaches. Alternatively, they might have intended only to confirm the right to terminate or suspend a treaty in response to a material breach, and to preclude these drastic measures unless a breach was material, without prejudice to the availability of other lesser responses to lesser breaches. The former interpretation would in effect eliminate any deterrent for a vast category of treaty violations, and runs contrary to good sense.

By reading between the lines of the International Law Commission's commentary, it is fortunately possible to conclude that the Commission did not intend to foreclose appropriate responses to breaches not covered by Article 60's materiality standard. The Commission indirectly recognized that rights of reprisal would be available under international law wholly apart from any codification of the law of treaties. It is not at all clear why the Commission failed to confirm these rights explicitly in the text of the draft articles. In view of the sound policy reasons for preserving a deterrent to minor as well as major treaty breaches, the references to materiality in the text should be read not as excluding entirely the right to respond to minor breaches, but simply as a means to ensure that minor breaches are not used as a pretext for denouncing a treaty which has become inconvenient or for suspending performance of more than proportional obligations.

The tribunal in the U.S.-France arbitration did not discuss the issue of materiality, though both sides had argued it. France claimed that its denial of the right to change gauge (which in its view did not constitute a breach) was certainly not a violation of a provision "essential to the accomplishment of the object or purpose of the treaty" within the meaning of Article 60, and hence could not supply the legal basis for a U.S. suspension of obligations owed to France. The United States asserted, on the other hand, that the French conduct (which forced Pan Am to abandon an economic method of operation) had effectively grounded Pan Am in violation of the Agreement's essential purpose of providing air services. As a subsidiary point, the United States argued that even a minor breach could justify proportional countermeasures. In finding for the United States on the retaliation issue, the tribunal did not refer to the Vienna Convention or to any purported materiality rule, and thus may well have considered that the right to take proportional countermeasures exists regardless of the materiality of the breach. Let us assume so.⁶⁴

The Restatement (Second) of the Foreign Relations Law of the United States, adopted prior to the Vienna Convention, provides in pertinent part on this point:

§158. Violation of Agreement

(1) Upon violation of an international agreement, any aggrieved party may, within a reasonable time and except as otherwise provided in the agreement

(a) suspend performance of its obligations towards the violating party so long as the latter is in violation, if the violation and suspension involve corresponding provisions or the suspension is otherwise reasonably related to the violation, . . .⁶⁵

Comment c to this section says:

64. Damrosch, *supra* note 7, at 789-91 (footnotes omitted). Professor Damrosch goes on to discuss the requirements of proportionality under the reprisal approach. *See id.* at 791-92.

65. RESTATEMENT (SECOND), *supra* note 7, § 158.

Suspension of performance by aggrieved party. A violation of the agreement entitles the aggrieved party to withhold the performance of its own obligations under the agreement as a means of compelling the defaulting party to perform, provided the remedy is fairly related to the injury suffered in the manner specified in Subsection (1)(a).⁶⁶

Thus, the *Restatement (Second)*, adopted before the Vienna Convention, requires no condition of “seriousness” or “materiality” of the prior breach but rather deals with the general issue with a “reasonable relation” or “fairly related” standard concerning the responding suspension, analogous to the requirement of proportionality in response in the law of reprisal. The draft *Revised Restatement of the Foreign Relations Law of the United States*, adopted after the Vienna Convention and explicitly based on it, says in the relevant section:

*A material breach of a bilateral international agreement by one of the parties entitles the other to invoke the breach as a ground for terminating the agreement or suspending its operation in whole or in part.*⁶⁷

Comment b to section 345 of Tentative Draft No. 1 of the *Revised Restatement* of April 1, 1980, provided:

Materiality of breach. Not every breach of an agreement is material, only a repudiation of the agreement that is not permitted by the rules in this chapter, or a violation of a provision essential to the treaty. Each party may determine whether there has been a breach by another party and whether it is material, except when the agreement provides a collective mechanism for doing so.⁶⁸

This same comment b is modified in Tentative Draft No. 6 of the *Revised Restatement* of April 12, 1985, to add the word “significant” before violation and the qualifying phrase “comes under this section.” The comment as modified reads in material part:

66. *Id.* cmt. c, at 485.

67. 1985 REVISED RESTATEMENT *supra* note 12, § 335(1).

68. RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 345 cmt. b (Tentative Draft No. 1, 1980) [hereinafter 1980 REVISED RESTATEMENT].

Materiality of breach. Not every breach of an agreement is material; only a repudiation of the agreement that is not permitted by the rules in this chapter, or a significant violation of a provision essential to the agreement comes under this section. Each party may determine whether there has been a breach by another party and whether it is material, except when the agreement provides a collective mechanism for doing so.⁶⁹

Thus, Tentative Draft No. 6 of the *Revised Restatement* seems to have sought to remedy the point noted by Egon Schwelb by adding the word "significant" before violation. It should be noted that this qualification as to the nature of the violation itself of a qualifying provision is not one of "fundamental" or "serious" or even "material," but rather the lesser standard of "significant" where, of course, the text of the Vienna Convention itself contains no qualifying standard at all. It should also be noted that the addition of the language "comes under this section" could well have been intended to make clear that the law of non-forcible reprisal is not covered at all by section 335 of the *Revised Restatement*. This conclusion also seems suggested by comment e to Tentative Draft No. 6 which provides in pertinent part:

Other remedies for breach. This section does not exclude other remedies for breach, for example, a claim by an aggrieved party against the offending party for damages, or resort to arbitration as provided within the agreement in question or in some other agreement between the parties.⁷⁰

Thus, nothing in the *Revised Restatement* requires a conclusion that the law of non-forcible reprisal, apparently without qualification as to "seriousness" or "materiality" of the violation, has in any way been preempted by the Vienna Convention as an alter-

69. 1985 REVISED RESTATEMENT, *supra* note 12, § 335 cmt. b. Similarly, the RESTATEMENT (THIRD) provides:

Materiality of breach. Not every breach of an agreement is material. This section applies only to a significant violation of a provision essential to the agreement. Each party may determine whether there has been a breach by another party and whether it is material, except when the agreement provides some other mechanism for doing so.

RESTATEMENT (THIRD), *supra* note 7, § 335 cmt. b.

70. 1985 REVISED RESTATEMENT, *supra* note 12, § 335 cmt. e.

nate legal ground for permitted response to prior breach of agreement.

The policy rationale underlying the requirement of “materiality” in the current law of treaties seems to be to prevent a minor or trivial violation from being used as a pretext to suspend or terminate a treaty. At the same time it seems generally recognized that it would be grossly unfair to an aggrieved treaty party to deny it the right of suspension either in whole or in part if a significant violation occurs “of a provision essential to the accomplishment of the object or purpose of the treaty.” This latter standard seems intended to reflect an objective test as to whether a reservation would have been permitted to the provision in question. It should be importantly noted that under the Vienna Convention definition of “material breach,” the emphasis is on the nature of the provision violated in the prior breach, not on the nature of the violation of that provision. And when the 1985 draft of the *Revised Restatement of the Foreign Relations Law of the United States* sought to add an additional qualification concerning the nature of the violation of a qualifying provision violated, a requirement not contained in the text of the Vienna Convention at all, it chose the standard “significant” not “fundamental” or “serious” or even “material.” Importantly also, the law of non-forcible reprisal, which seems to be available as an alternate ground for permitted response to prior breach of agreement, seems to have no requirement of “seriousness” or “materiality” of the prior triggering breach and it incorporates the underlying policies at stake in the requirement that the responding suspension not be disproportionate to the triggering breach.

C. *Substantive Requirements Concerning the Permitted Response*

In addition to any requirements concerning the “seriousness” or “materiality” of the triggering breach, a number of possible substantive requirements concerning the permitted response should be reviewed in fully understanding the law of permitted response to prior breach of agreement. This section will review in turn issues concerning permissibility of only partial suspension, permissibility of suspending a provision other than that violated, proportionality of response, waiver, acquiescence, and estoppel, “conditionality” or linkage to continuing violation, and avoidance of acts tending to obstruct resumption of treaty operation.

1. *Permissibility of Only Partial Suspension*

One reason responsive suspension of obligations has been only infrequently invoked in response to prior violations of agreements may be an erroneous belief that the only permitted response is suspension or termination of the agreement as a whole. Yet under both treaty law and non-forcible reprisal law as a basis for responsive suspension it is clear that suspension may be only partial and need not suspend or terminate an agreement as a whole, in contrast, for example, with treaty withdrawal clauses.

With respect to treaty law as a basis, both Articles 60 and 44 of the Vienna Convention make clear that partial suspension is permissible in response to prior material breach of agreement. Article 60(1) specifically says material breach entitles the aggrieved party to suspend the operation of the treaty "in whole or in part." And Article 44(2) makes it clear that Article 60 provides an exception to the requirement that "withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty."⁷¹ Apparently, suspensions in response to breach of agreement have long been a setting in which partial suspension has been recognized.⁷² In framing the draft for the Vienna Convention, the International Law Commission was faced with the issue of other settings, in addition to

71. Article 44, paragraphs 2 and 3 of the Vienna Convention on the Law of Treaties provide:

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application;
 (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and
 (c) continued performance of the remainder of the treaty would not be unjust.

Vienna Convention on the Law of Treaties, *supra* note 7, art. 44 (emphasis added).

72. Sir Ian Sinclair writes:

Traditionally, it was thought that separability was permissible only in the context of the exercise of a right to terminate a treaty on the ground of a breach by the other party. . . .

There is therefore good reason to think that Article 44 constitutes an innovation in the law of treaties in extending the principle of separability beyond the particular case of breach. . . .

SINCLAIR, *supra* note 7, at 166.

that of prior breach, in which separability should be permissible. It was clear that separability was to be permitted in settings of response to prior breach. Thus, in its Commentary to what became Article 44 of the Vienna Convention, the International Law Commission said:

The separability of treaty provisions was until comparatively recently considered almost exclusively in connexion with the right to terminate a treaty on the ground of a breach of the other party. Certain modern authorities, however, have advocated recognition of the principle of separability in cases of invalidity and in determining the effect of war upon treaties. . . .

The Commission, while favouring the recognition of the principle of separability in connexion with the application of grounds of invalidity, termination, etc., considered it desirable to underline that the integrity of the provisions of the treaty is the primary rule. Accordingly, *paragraph 2* of the article lays down that a ground of invalidity, termination, etc. may be invoked only with respect to the whole treaty except in the cases provided for in the later paragraphs *and in cases of breach of the treaty*.⁷³

And in its Commentary to what became Article 60 the Commission said:

The Commission considered that the action open to the other party in the case of a material breach is to invoke either the termination or the suspension of the operation of the treaty, *in whole or in part*. The right to take this action arises under the law of treaties independently of any right of reprisal, the principle being that a party cannot be called upon to fulfil its obligations under a treaty when the other party fails to fulfil those which it undertook under the same treaty.⁷⁴

It is also important to note that in the Conference debate on what became Article 60 of the Vienna Convention the United States delegation proposed an amendment that would have added a requirement of proportionality in decisions by a responding state

73. 1966 Reports of the Commission, *supra* note 33, at 238 (emphasis added) (paragraph numbers omitted).

74. *Id.* at 255 (emphasis added).

whether to suspend in whole or in part. The proposed amendment would have added to the end of paragraph one [and also at the end of paragraph 2(b)] the language: "as may be appropriate considering the nature and extent of the breach and the extent to which the treaty obligations have been performed." The debate on this proposal made it clear that no immediate amendment to this effect was possible and the United States Delegation accepted a United Kingdom suggestion that the issue be shifted to the consideration of the separability article. In that context the proposal was defeated as failing to obtain a majority vote when put to the vote. Thus, a specific proposal to limit the discretion of states as to their ability to respond in whole or in part was not adopted by the Conference. In any event, this proposal did not challenge the central point that response should be permitted in part as opposed to suspension of an entire treaty and, indeed, it can be argued sought to encourage partial as opposed to total suspension where proportional.⁷⁵

With respect to non-forcible reprisal law as a basis for responsive suspension of treaty obligations, there seems to be no requirement inconsistent with partial suspension. As we have seen, for example, Lord McNair talks of non-forcible reprisals in which "the injured State, by way of sanction, . . . [suspends] the operation of a provision corresponding to, or analogous with, the provision broken . . . and it does not evince an intention to abrogate either the whole treaty or the portion of it which has been broken. . . ."⁷⁶ Similarly, Oppenheim's classic discussion of reprisal, as edited by Lauterpacht, discusses no limitation against partial suspension of treaty obligations and, indeed, his use of the singular "a treaty obligation" at least implies that partial suspension of obligation is one permitted response.⁷⁷

The *Restatement of the Foreign Relations Law of the United States* supports this conclusion that a responsive suspension to prior breach may be partial. Section 158 of the *Restatement (Second)*, adopted prior to the *Vienna Convention*, sets out a right of responsive suspension that extends to "corresponding provisions or . . . [a] suspension . . . otherwise reasonably related to the viola-

75. See the discussion of this proposal in Kearney & Dalton, *supra* note 11, at 540.

76. MCNAIR, *supra* note 7, at 573. For the full quote, see *supra* text accompanying note 64 of this part of the study.

77. OPPENHEIM, *supra* note 46, at 120.

tion.”⁷⁸ And it permitted termination: “as between itself and the violating party a separable part of the agreement that includes the obligations violated and obligations of the aggrieved party clearly intended to be their counterpart”⁷⁹

The draft *Revised Restatements* of April 1, 1980, and April 12, 1985, adopted after the Vienna Convention and largely based on the Convention, simply track that Convention and declare that a material breach “entitles the other to invoke the breach as a ground for terminating the agreement or suspending its operation in whole or in part.”⁸⁰

Professor Egon Schwelb has indicated that the Vienna Convention would provide the parties greater discretion in the Article 60(1) bilateral treaty setting as to severability of response than the old pre-Convention section 158 of the *Restatement (Second)*:

The A.L.I. draft’s approach to the question of separability of treaty provisions differs from that of Article 57 of the I.L.C. draft. The latter leaves, in paragraph 1 and 2 (b), the choice between the suspension and termination of the whole treaty or of part only of the treaty to the aggrieved party, and seems to exclude partial termination or suspension altogether in the cases contemplated in subparagraphs 2 (a) and (c). The A.L.I. draft seems to exclude the discretion of the aggrieved party and to make the choice dependent on objective criteria. It leans in favour of terminating separable parts of the agreement where such parts objectively exist and it subjects the termination of the entire agreement to the more exacting conditions of its Sec. 158 (1) (c).⁸¹

It might also be noted that both the *Restatement (Second)* and Professor Schwelb’s discussion of the difference between the *Restatement (Second)* and the ILC draft in this respect were published before Conference adoption of the Vienna Convention on May 22, 1969, and thus were available to the Conference dele-

78. *RESTATEMENT (SECOND)*, *supra* note 7, § 158(1)(a).

79. *Id.* § 158(1)(b), at 484. *See also id.* cmt. d, at 485.

80. 1980 REVISED *RESTATEMENT*, *supra* note 68, § 345(1); 1985 REVISED *RESTATEMENT*, *supra* note 7, § 335(1).

81. Schwelb, *supra* note 58, at 332. *See also* Professor Schwelb’s general discussion of the severability issue at 330-31.

gates.⁸² Nevertheless, the Conference clearly adopted a less restrictive standard of severability than that contained in the *Restatement (Second)*. More importantly, in response to a United Kingdom proposal, it even added the language "in whole or in part" to sections 2(a) and 2(c) of what became Article 60 when, as discussed by Professor Schwelb, the ILC draft articles submitted to the Conference had not done so. In any event, this flexibility was already in the ILC draft as presented to the Conference with respect to paragraph 1 on "material breach of a bilateral treaty."⁸³

Publicists also seem clearly to support the permissibility of only partial suspension of obligation. Ambassador Shabtai Rosenne writes in his 1985 monograph on *Breach of Treaty*:

[A]rticle 44 on the separability of treaty provisions lays down, in paragraph 2, the principle that a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty, except as provided in the following paragraphs (which give a limited authority for the separability of some of the treaty's provisions) "or in article 60." The effect of that is that the party injured by material breach may make a separation of any provision of the breached treaty as part of its reaction to the breach.⁸⁴

Similarly, Professor Quincy Wright seems to have concluded that separability is permissible based on the draft ILC article that became Article 60.⁸⁵ And in his important 1966 study of *Unilateral Denunciation of Treaty Because of Prior Violations of Obligations By Other Party*, written prior to the Vienna Convention Conference, Bhek Sinha noted:

An innocent party . . . may choose to suspend certain or all of the provisions of the violated treaty, or it may sim-

82. The RESTATEMENT (SECOND) was published in 1965. Professor Egon Schwelb's article was published in the July 1967 issue of the INDIAN JOURNAL OF INTERNATIONAL LAW. The Vienna Convention Conferences were held in 1968 and 1969.

83. Schwelb, *supra* note 11, at 310. See Schwelb, *supra* note 11, at 318 for a discussion of how the ILC draft left open interpretation of material breach. Compare the draft discussed by Professor Schwelb appearing on page 310 of his article with the final Art. 60 of the Vienna Convention. See Kearney & Dalton, *supra* note 11, at 540, for a brief discussion of the United Kingdom proposal.

84. ROSENNE, *supra* note 7, at 7.

85. Q. Wright, *The Termination and Suspension of Treaties*, 61 AM. J. INT'L L. 1000, 1002-03 (1967).

ply ignore violations of obligations by other party or parties. There are many instances of states, parties to treaties, resorting to these steps instead of actually exercising the right of unilateral denunciation.⁸⁶

To summarize, it is clear that both under treaty law and non-forcible reprisal law as bases for responsive suspension, an aggrieved party may elect to respond to a prior breach of an agreement by partial as opposed to total suspension of treaty obligations. The Vienna Convention contains no specific limitation on this option and the Conference specifically failed to adopt a proposal whose thrust was to link this option to a requirement of proportional suspension.

2. *Permissibility of Suspending a Provision Other than that Violated*

An issue closely related to the permissibility of only partial suspension is the permissibility of suspending a provision other than that violated. That is, assuming that partial suspension is permissible in response to a prior violation, must that partial suspension be confined to the provision violated or is the responding state free to suspend some other provision of the treaty? Current law, both that rooted in treaty law and that rooted in non-forcible reprisal law, seems clearly to permit suspension of a provision other than that violated.

It can be argued that the current law on this point makes it more likely that the basic rule of permitted response to breach of agreement might be abused by states using one provision as a pretext to withdraw from another onerous obligation. On the other

86. SINHA, *supra* note 7, at 84. Writing prior to the Vienna Convention Bhek Sinha summarized what he termed "the rule of unilateral denunciation" as existing under the following conditions:

(1) That an innocent party may denounce all of its obligations arising under a treaty the provisions of which form an indivisible whole on the ground of prior substantial breach or breaches;

(2) That an innocent party to a treaty containing different types of obligations may unilaterally denounce its obligations only under those provisions seriously affected by violation or violations and those reasonably related to the seriously violated ones, and not under those unaffected;

(3) That the right of unilateral denunciation must be exercised within a reasonable period of time.

Id. at 214-15. Note that his pre-Vienna Convention discussion of separability in paragraph 2 above closely paralleled the pre-Vienna Restatement test for separability as embodied in § 158(1)(a) of the RESTATEMENT (SECOND) published in 1965.

hand, the basic treaty law rule is qualified by the "materiality" standard to lessen this risk while the non-forcible reprisal law rule is similarly qualified by a proportionality of response requirement. Moreover, to restrict the right of response of a responding state to the provision breached would dramatically lessen the potential sanction available from responsive suspension and would maintain control of the breach setting with the breaching state. If, for example, one nation had only reluctantly agreed to a provision pushed by the other side, then a subsequent violation of the unfavored provision could only be met by a counter-violation of that same provision. In settings where the impact of provisions is asymmetrical within an overall balanced agreement such a rule could work substantially to undercut the deterrent effectiveness of the responsive suspension rule. Thus, on balance, the current rule not confining the right of partial suspension to the provision breached would seem the more policy responsive.

The language of the Vienna Convention in Article 44 on separability and in Article 60 on termination or suspension in response to breach seems strongly to support the conclusion that there is no requirement confining partial response. Article 60 speaks without qualification of a right to suspend operation of a treaty "in part." And despite discussion in Article 55, paragraph 3 of a right limited only to "particular clauses," the right to suspend in a setting of prior breach of agreement as set out in paragraph 2 of Article 44 is not so qualified.

The background history of Article 60 in the Vienna Convention also supports the conclusion that there is no such obligation to restrict a response to the provision breached. Thus, in his 1963 "Second Report" to the ILC, Sir Humphrey Waldock spoke of the previous Special Rapporteur's draft as distinguishing "cases of fundamental breach from 'cases where a breach by one party of some obligation of a treaty may justify an exactly corresponding non-observance by the other, or, as a retaliatory measure, non-performance of some other provision of the treaty'."⁸⁷ That is, Waldock recognized that the previous Special Rapporteur's draft (presumably that of the third Special Rapporteur, Sir Gerald Fitzmaurice) permitted, at least in some settings, responsive non-performance of provisions other than those breached. More importantly, Waldock's 1963 draft of the article that subsequently became Article 60 of the Vienna Convention specifically limited

87. *Second Report by Sir Humphrey Waldock, supra* note 9, para. 6, at 74.

responsive suspension either to the treaty as a whole or to “only the provision of the treaty which has been broken.”⁸⁸ This limitation, however, had been dropped by the time the final ILC draft was formulated for presentation to the Vienna Convention and no such limitation was adopted by the Conference. Nor is any such limitation even hinted at in the final ILC Commentary on its draft articles⁸⁹ which says flatly “that the action open to the other party in the case of a material breach is to invoke either the termination or the suspension of the operation of the treaty, in whole or in part.”⁹⁰ It should also be noted in this respect that the *Restatement (Second) of the Foreign Relations Law of the United States*, which had been published in 1965 with a limitation on responsive suspension to a “corresponding” provision or where “the suspension is otherwise reasonably related to the violation,”⁹¹ apparently was not able to persuade either the ILC in its final draft or the Conference to adopt even this intermediate “reasonably related” requirement on the responsive suspension.

Given its legislative history, Ambassador Shabtai Rosenne seems clearly correct in summarizing, as we have seen, the legal effect of Articles 44 and 60 of the Vienna Convention as follows: “the party injured by material breach may make a separation of any provision of the breached treaty as part of its reaction to the breach.”⁹²

With respect to non-forcible reprisal law as a basis, it seems reasonably clear that responsive suspension is not limited to a provision breached. Indeed, reprisal law operates in a setting where it may be applied far removed from a triggering violation of international law in another treaty or not even in a treaty at all as long as it is a proportional response.⁹³ In this respect, recall that even Waldock, who, in his 1963 draft, sought to confine the treaty law basis to the provision breached, conceded that “it is arguable” the

88. *Id.* at 73. See also Waldock’s adoption of this limitation in his commentary. While indicating that if the basis is non-forcible reprisal—not dealt with by the draft—that “it is arguable that the innocent party may suspend the operation not necessarily of the provision which has been broken of [sic] but some other provision of special concern to the defaulting party.” *Id.* ¶ 14, at 76.

89. See *1966 Reports of the Commission*, *supra* note 33, at 253-55.

90. *Id.* at 255.

91. RESTATEMENT (SECOND), *supra* note 7, § 158(1)(a).

92. ROSENNE, *supra* note 7, at 7.

93. See, for example, the discussion of reprisal in OPPENHEIM, *supra* note 46. See also A. DAVID, *THE STRATEGY OF TREATY TERMINATION 217-90* (1975). This discussion clearly adverts to responses to treaty breach going beyond the breached treaty.

rule was different in reprisal law.⁹⁴ And Lord McNair in discussing non-forcible reprisal as a basis—prior to the Vienna Convention—talked of a right “to suspend the operation of a provision corresponding to, or analogous with, the provision broken.”⁹⁵

As has been seen, the *Restatement (Second) of the Foreign Relations Law of the United States*, published in 1965, permitted responsive suspension of provisions “corresponding” to or “otherwise reasonably related to the violation.”⁹⁶ But it permitted partial termination only of “a separable part of the agreement that includes the obligations violated and obligations of the aggrieved party clearly intended to be their counterpart.”⁹⁷ The April 1, 1980, and April 12, 1985, draft *Revised Restatements*, however, based largely on the Vienna Convention, drop these limitations on response and merely track the Vienna Convention’s unrestricted language of “terminating the agreement or suspending its operation in whole or in part.”⁹⁸

Prior to finalization and adoption of the Vienna Convention, a United States legal memorandum of March 4, 1966, on United States defensive assistance to the Republic of Viet-Nam used language “that a material breach of an agreement by one party entitles the other at least to withhold compliance with an equivalent, corresponding, or related provision until the defaulting party is prepared to honor its obligations.”⁹⁹

Also writing prior to finalization and adoption of the Vienna Convention, Bhik Sinha’s work on *Unilateral Denunciation of Treaty Because of Prior Violations of Obligations By Other Party* suggests that responsive suspension is not limited by a requirement that any partial response must be directed solely at the breached provision. As we saw in reviewing the previous issue of permissibility of only partial response, Sinha wrote: “An innocent party . . . may choose to suspend certain or all of the provisions of the violated treaty. . . .”¹⁰⁰

And in his concluding summary of the rule he termed “unilateral denunciation” he said: “[t]hat an innocent party to a treaty

94. *Second Report by Sir Humphrey Waldock*, *supra* note 9, at 76.

95. MCNAIR, *supra* note 7, at 573.

96. RESTATEMENT (SECOND), *supra* note 7, § 158(1)(a).

97. *Id.* § 158(1)(b), at 484.

98. 1980 REVISED RESTATEMENT, *supra* note 68, § 345(1); 1985 REVISED RESTATEMENT, *supra* note 12, § 335(1).

99. See WHITEMAN, *supra* note 23, at 475-76.

100. SINHA, *supra* note 7, at 84.

containing different types of obligations may unilaterally denounce its obligations only under those provisions seriously affected by violation or violations and those reasonably related to the seriously violated ones, and not under those unaffected. . . ."¹⁰¹

Sinha clearly adopts the view, writing prior to the Vienna Convention, that partial responsive suspension is not limited solely to the provision breached. His own limitation, however, which is closely analogous to the old section 158 of the *Restatement (Second)*, seems likely to have become superceded by the Vienna Convention which has no such limitation.

In summary, it seems clear that the current law of partial responsive suspension to a prior breach, whether rooted in treaty law or non-forcible reprisal law, does not limit such response to the provision breached. And it seems probable that there is no other current limitation, such as that in the *Restatement (Second)*, controlling which provisions may be suspended in response to a material breach under treaty law or pursuant to a proportional response under non-forcible reprisal law. Materiality of the initial breach under treaty law and proportionality of the responding suspension under non-forcible reprisal law, however, remain considerable checks to ensure reasonable action in application of the current law of suspension in response to prior breach.

3. *Proportionality of Response*

In her 1980 article in the *American Journal*, Professor Lori Fisler Damrosch writes: "Under traditional doctrine, the legality of a retaliatory breach of treaty is judged by whether it is a proportional response to a prior material breach."¹⁰² While the issue is somewhat unclear and it is quite possible that, in some sense at least, proportionality is a requirement for responsive suspension under both treaty law and non-forcible reprisal law bases for such responsive suspension, careful analysis of current law suggests that "materiality" of breach is a requirement under a treaty law basis and that "proportionality," in some sense at least, is a requirement under a non-forcible reprisal law basis. Both doctrines perform similar functions in reducing the risk that a minor or trivial breach by one party will be used to set aside an important obligation of another, thus impairing the integrity of agreement. The *United*

101. *Id.* at 215.

102. Damrosch, *supra* note 7, at 807. Professor Damrosch then substantially qualifies this proposition.

States-France Air Services Agreement decision, however, in which the international arbitral tribunal failed to make clear whether it was operating under "treaty law" or "non-forcible reprisal law" or both yet said: "[i]t is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach; this is a well-known rule;"¹⁰³ this suggests that it may be dangerous to seek to sharpen proportionality distinctions too clearly based on whether the underlying basis of a responsive suspension is treaty law or non-forcible reprisal law. On the other hand, a careful appraisal of the law requires appraisal both of treaty and non-forcible law bases.

With respect to the "treaty law" basis for responsive suspension of treaty obligations, nothing in the text of Article 60 of the Vienna Convention or otherwise in the text of the Convention qualifies the right to terminate or suspend operation in whole or in part by a requirement that the responsive suspension be "proportional." Similarly, the detailed Commentary to the predecessor article in the work of the International Law Commission also contains no such reference to a requirement of "proportionality" in response.¹⁰⁴ Most importantly, a United States proposal at the Vienna Conference to introduce an element of proportionality into Article 60 by adding the language "as may be appropriate considering the nature and extent of the breach and the extent to which the treaty obligations have been performed" was not adopted either in connection with Article 60 or Article 44. Indeed, when pressed to a vote in connection with Article 44 it failed to obtain a

103. *Case Concerning The Air Services Agreement of 27 March 1946 (U.S. v. Fr.)*, *supra* note 42, at 304, 338. This is, of course, a clearly accepted rule of non-forcible reprisal law, at least in the sense, as expressed, of "some degree of equivalence," and if the tribunal's decision is based on that ground, as it may well be, it would be consistent with the distinction subsequently developed in this section.

104. *See 1966 Reports of the Commission, supra* note 33, at 253-55. *See also Second Report by Sir Humphrey Waldock, supra* note 9, at 72-77. *But see* O. ELAGAB, *supra* note 7, at 163-64, who writes:

There can be no doubt that proportionality, which is a condition of counter-measures, applies to action taken under Article 60 of the Vienna Convention. This conclusion is based on ordinary legal logic, which implies that the Convention should be understood in the context of other rules of international law.

Id.

There is no indication in Elagab's analysis on this point that he was aware that a United States proposal to incorporate an element of proportionality in the Vienna Treaty was not adopted by the Conference, or that to some extent at least the concept of materiality in the law of treaties may be incorporating some of the same policies underlying the concept of proportionality in the law of non-forcible reprisal. *See id.* at 158 for Elagab's discussion of this issue.

majority.¹⁰⁵ Thus, there is a substantial case to be made that the treaty law basis for suspension of treaty obligations in response to prior breach is qualified only by a “materiality” of prior breach standard and not by an additional requirement of “proportionality” in response.

With respect to non-forcible reprisal law as a basis for responsive suspension, it seems reasonably clear that “proportionality” or “equivalence” of response, in some sense and to some degree at least, is a requirement. Thus, Lord McNair, as we have seen, talked of suspending “a provision corresponding to, or analogous with, the provision broken.”¹⁰⁶ Professor Oppenheim, in his classic treatise on *International Law*, as edited by Lauterpacht, says, in discussing the general law of reprisals: “[r]eprisals, be they positive or negative, must be in proportion to the wrong done, and to the

105. See the account of this proposal and its failure to be adopted in Kearney & Dalton, *supra* note 11, at 540.

In proposing to introduce a requirement of proportionality, the United States Delegation said:

The United States delegation thought it would be helpful to introduce into the article itself a rule that the injured party had no right to make a response disproportionate to the nature of the breach.

....

The United States amendment emphasized two factors relevant in determining a just proportion between the breach and the response to it. The words “considering the nature and extent of the breach” provided criteria for testing the seriousness of the breach. The words “the extent to which the treaty obligations have been performed” were intended to permit evaluation of the breach in the context of past and future operation of the treaty.

....

His delegation was not seeking to condone or encourage any kind of breach, but it thought the interests of all nations would be served by introducing an element of fairness into an article on which the maintenance of all treaty relations depended.

United Nations Conference on the Law of Treaties, Official Records, 1st Sess. 1968, at 354, U.N. Doc. A/CONF.39/11 (1969). And again the United States Delegation said:

[I]t had been asked whether a material breach of a treaty should not always give the injured party the choice between total termination or suspension of the treaty and partial termination or suspension. His delegation thought that the question should be settled according to each individual case and that it was practically impossible to lay down a strict rule which would allow complete freedom of choice. That was why the United States delegation had submitted its amendment In its opinion, a decision should be taken in each case that was fair to both parties to the treaty[.]

With regard to the suggestion made by the United Kingdom representative, his delegation recognized that its amendment was linked with the question of separability and had no objection to its being considered in connexion with article 41 if the Committee of the Whole so desired.

Id. at 357.

106. MCNAIR, *supra* note 7, at 573.

amount of compulsion necessary to get reparation."¹⁰⁷ His statement of this "proportionality" requirement not only extends it in the alternative to a linkage between either the wrong done *or* "the amount of compulsion necessary to get reparation," but his discussion also makes clear that he conceives "proportionality" as giving broad latitude to the responding state. Thus, he gives as an example:

For instance, a State would not be justified in arresting, by way of reprisal, thousands of foreign subjects living on its territory because their home State had denied justice to one of its subjects living abroad. But it would be justified in ordering its own courts to deny justice to all subjects of that foreign State, or in ordering its fleet to seize several vessels sailing under the flag of that State, or in suspending a commercial treaty with it.¹⁰⁸

In her 1980 article on the *United States-France Aviation* dispute, Professor Damrosch has the following discussion of "proportionality":

One point to which the tribunal did devote some attention was the question of the proportionality between the alleged breach and the U.S. response. This was an issue the parties had briefed in some detail, not because they differed on the appropriate legal rule, but because they strongly disagreed over the application of the rule to the facts of the case.

France argued that there can be no proportionality between the denial of a right to institute a new and disputed service and the interruption of an undisputed service conducted over many years. Further, in France's view the economic consequences of the Pan Am service and the Air France service were grossly disproportionate.

The United States would have been hard pressed to deny the second point. It thus argued that since the French ac-

107. OPPENHEIM, *supra* note 46, at 120. For the proposition that countermeasures in response to an internationally wrongful act must be proportional, see the statement of Alexander Yankov of Bulgaria, made during the work of the International Law Commission in considering the law of "State Responsibility." 1979 Y.B. INT'L L. COMM'N (Vol. 1), *supra* note 7, at 58.

108. OPPENHEIM, *supra* note 46, at 120.

tion had effectively denied Pan Am the right to operate a West Coast-Paris service, it was appropriate to deny the French carrier its rights on a symmetrical route. The tribunal took a slightly different tack:

In the Tribunal's view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the counter-measures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France.

This passage is interesting on several counts. First, it permits states to apply countermeasures that would be disproportionate in an economic sense, in order to enforce a principle. Second, it implies that considerations of principle are all the more weighty when third countries are watching. Figuring third-country reactions into the proportionality formula is novel but sensible, especially in the aviation context. Because of the worldwide network of essentially similar agreements, the way two states interpret and apply their bilateral agreement can have repercussions far beyond the particular case. And apart from questions of aviation practice or policy, a deliberate and effective response to a treaty violation can have, as the tribunal indicated, "an exemplary character directed at other countries": in other words, "the character of a sanction." An overly niggardly approach to proportion-

ality could conceivably detract from the importance of the retaliatory sanction as a deterrent to potential treaty violators. Under this reasoning, the injured party should have an adequate degree of flexibility in assessing the appropriate level of response and should not be subjected to *ex post facto* censure for having failed to achieve precise equivalence.¹⁰⁹

This discussion by Professor Damrosch is not only important in calling attention to the general requirement of "proportionality" or "equivalence," in some sense at least, when the basis for responsive suspension is rooted in non-forcible reprisal law, but it is particularly interesting in quoting and stressing the conclusion of the international arbitral tribunal that in assessing "some degree of equivalence" [or proportionality] "it is essential . . . to take into account not only the injuries suffered . . . but also the importance of the questions of principle arising from the alleged breach."¹¹⁰ Moreover, the tribunal also made it clear that in considering the importance of the questions of principle, the consequences of the breach can be placed in a broader context of multiple agreements or a series of agreements:

If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France.¹¹¹

This principle may be of particular importance for the future in assessing whether some degree of "equivalence" or "proportionality" is present in responsive suspensions rooted in non-forcible reprisal law and possibly even by analogy in assessing "materiality" of breach under a treaty law basis.

It should also be noted that Professor Damrosch warns "[a]n overly niggardly approach to proportionality could conceivably detract from the importance of the retaliatory sanction as a deterrent to potential treaty violators." This would seem particularly appli-

109. Damrosch, *supra* note 7, at 791-92.

110. Case Concerning the Air Services Agreement of 27 March 1946 (U.S. v. Fr.), *supra* note 42, at 304, 338.

111. *Id.*

cable to treaties where incentives to cheat may be high, requiring in turn a realistic deterrent mechanism if the law of responsive suspension is to be other than of academic interest.

The *Restatement (Second) of the Foreign Relations of the United States* did not in its section 158 on "Violation of Agreement" include any general requirement of proportionality in response, apart from the previously discussed limitations on partial suspension and termination of a separable part of the agreement embodied in subparagraphs (1)(a) and (1)(b). These paragraphs provided:

(1) Upon violation of an international agreement, any aggrieved party may, within a reasonable time and except as otherwise provided in the agreement

(a) suspend performance of its obligations towards the violating party so long as the latter is in violation, if the violation and suspension involve corresponding provisions or the suspension is otherwise reasonably related to the violation,

(b) terminate as between itself and the violating party a separable part of the agreement that includes the obligations violated and obligations of the aggrieved party clearly intended to be their counterpart,¹¹²

The draft *Revised Restatement*, in contrast, tracks Article 60 of the Vienna Convention and, as such, contains no provision, direct or indirect, requiring proportionality in response apart from the "materiality" of breach requirement previously discussed.¹¹³

With respect to treatment of this issue by jurists, it is interesting to note again that the very detailed analysis of the general law of suspension of treaty obligations in response to prior breach of treaty done by Bhikpati Sinha prior to finalization or adoption of the Vienna Convention concludes without specifying any general rule of proportionality but rather adopting a requirement of "substantial breach" for total denunciation and the following requirement for partial suspension: "That an innocent party to a treaty containing different types of obligations may unilaterally de-

112. RESTATEMENT (SECOND), *supra* note 7, § 158(1)(a)-(b). See also cmts. c and d.

113. 1980 REVISED RESTATEMENT, *supra* note 68, § 345, at 176-77; 1985 REVISED RESTATEMENT, *supra* note 12, § 335.

nounce its obligations only under those provisions seriously affected by violation or violations and those reasonably related to the seriously violated ones, and not under those unaffected. . . ."¹¹⁴

And in a relatively brief discussion of "proportionality" Sinha draws on the principle of "proportionality" [or non-disproportionality] in reprisal law largely to support a test of "substantial" for a triggering breach.¹¹⁵ This may, indeed, be how any requirement of proportionality has become embodied in the law, at least in treaty law based responsive suspensions.

To summarize the requirement of "proportionality," if any, in the responsive termination or suspension, it is not clear that there is any such requirement, apart from that embodied in the "materiality" requirement for a triggering breach, when the basis for suspension is treaty law, as reflected in Article 60 of the Vienna Convention and the current *Revised Restatement of the Foreign Relations Law of the United States*. Indeed, a United States proposal at Vienna to embody an element of proportionality of response in Article 60 was not adopted by the Conference. When the basis is non-forcible reprisal law not embodying the "materiality" requirement, it is probable that at least to some degree and to some extent there is a requirement of "equivalence" or "proportionality" in response. Thus, it would seem unlikely that a tribunal would permit termination or suspension of an important treaty or treaty obligation as a reprisal in response to a mere technical, trivial, or minor violation, at least of a non-"material" treaty provision. But as the Oppenheim-Lauterpacht discussion of the proportionality requirement in classic reprisal law illustrates, responding states are given substantial latitude in response to a prior breach of international law and the requirement is not one of just tit for tat. Moreover, as the *Air Services* opinion illustrates, tribunals are likely to assess proportionality in a broad context taking account of any issue of principle involved or any effect of non-response on a broader network of treaty relations. And, as Professor Damrosch warns (*supra*): "[a]n overly niggardly approach to proportionality could conceivably detract from the importance of the retaliatory sanction as a deterrent to potential treaty violators." Whether or not strictly required by the law of responsive suspension, and whatever the legal basis for the action, it would

114. SINHA, *supra* note 7, at 215.

115. *Id.* at 85-88. "The principle of proportionality favours the limitation of substantial breach." *Id.* at 85.

seem preferable as a policy matter to ensure that any such termination or suspension meets a realistic real-world requirement of "proportionality" or reasonableness in response, but, importantly, also taking into account the requirements of deterring the prior violation in context.

4. *The Related Issues of Waiver, Acquiescence, and Estoppel*

It is generally recognized as one element in the law of permitted response to prior breach of agreement that a responding party should deal fairly and in good faith in invoking a response. Thus, a party should not act inconsistently with a subsequent express agreement concerning the treaty made after becoming aware of all the facts of the prior breach, or inconsistently with a pattern of conduct tacitly waiving or acquiescing in the breach or unfairly misleading the other party about the breach. In particular, recognizing the potential for abuse in the law of response to breach of agreement, it is important not to permit a party to treat a breach "as if nothing had happened, and only raise the matter at a much later date when it desires for quite other reasons to put an end to its obligations under the treaty."¹¹⁶ The aggregation of general principles of international law underlying this "element" in the law of permitted response to breach are variously raised under the doctrinal rubrics of "waiver," "acquiescence," "estoppel," "preclusion," "extinctive prescription" or simply under the textual injunction that the right of response must be exercised within a reasonable time after the breach is fully known.¹¹⁷ Perhaps the principle underpinnings of this aggregation of doctrine in the breach of agreement setting are that a party should not be permitted to terminate or suspend a treaty in response to a prior breach that has been expressly, or impliedly through a pattern of conduct, agreed as not affecting treaty relations or in a setting in which agreement or prolonged tacit acceptance has unfairly misled the other treaty party about the effect of the breach. It should also be understood, however, as is always the case in applying these doctrines, that if they are overly rigorously applied they would effectively negate the legal right to respond that is at stake, without reasonably promoting any policies of good faith or fair dealing. In this respect, it

116. *1966 Reports of the Commission, supra* note 33, at 239.

117. It is possible to make learned studies of the technical differences between these doctrines, and scholars have done so, but in practice there tends to be a substantial overlap in their real-world invocation.

is clear in breach settings that a party must be given time that is reasonable in the real-world fully to understand the nature of the breach, formulate national policies in response, utilize any appropriate machinery under an agreement, and seek through time a negotiated solution to the problem. Under most agreements, such a reasonable period is likely to be measured in years or even decades.¹¹⁸ Indeed, any effort to apply these doctrines to marginal settings or short time periods without such real-world opportunities to ascertain the full nature of the breach, utilize available procedural machinery and seek through time to negotiate solutions could, by creating pressures for quick responses, profoundly undercut stability of agreement as well as the complementary policy underlying the law of response that seeks to encourage negotiated solutions between the parties. For these reasons, as well as a general reluctance to conclude that states have agreed through a pattern of inaction alone, international tribunals have been quite cautious generally in accepting claims of acquiescence or estoppel.¹¹⁹ The governing principle here is likely to continue to be good faith in a real-world context in which, it should be remembered, the other party has breached the agreement and the purpose of the response rule is both to provide fairness for the responding party and to sanction breach in a decentralized international system.

With respect to the specific law of permitted response rooted in treaty law, prior to the Vienna Convention, the "good faith" issues discussed in this subheading were generally treated under a requirement said to be one that the response must be made within a "reasonable time" after the breach. Thus, Article 27 of the "Harvard Research on the Law of Treaties" included the phrase "acting within a reasonable time after the failure."¹²⁰ And the commentary to this phrase said:

It is only fair to require that a State should exercise with reasonable promptness the rights provided for in this article in cases where it considers that those rights have accrued to it. If it were allowable to "sleep upon" rights of

118. As will be seen, the Vienna Convention rejected a United States-Guyana proposal that would have barred a state from challenging the validity of a treaty to which it had acquiesced for 10 years. Principal opponents of this proposal sought to reopen or preserve even older claims. Major international claims successfully invoking acquiescence have generally been settings measured in decades of acceptance.

119. The response of the International Court of Justice to the Canadian claims of acquiescence and estoppel in the *Gulf of Maine* case provides an example.

120. *Harvard Research on Treaties*, *supra* note 8, at 1077.

this nature indefinitely, and to bring them forward after an undue lapse of time, international relations would be deprived of the necessary degree of stability and security.¹²¹

Similarly, McNair's classic treatise on *The Law of Treaties* qualifies the "right of unilateral abrogation accruing to one party from the breach of a treaty by the other party" by the requirement "that it must be exercised within a reasonable time after the breach."¹²² In his book on *Unilateral Denunciation of Treaty*, published in 1966 shortly before adoption of the Vienna Convention, Sinha concludes: "[t]hat the right of unilateral denunciation must be exercised within a reasonable period of time."¹²³ Sinha's discussion of this principle under the rubric of "extinctive prescription" further elaborates:

There is a category of opinion shared by such jurists as Anzilotti, Oppenheim, Hyde, Lord McNair and Fitzmaurice which holds that the right of unilateral denunciation ought and must be exercised within a reasonable time. Thus these jurists circumscribe this right by the principle of extinctive prescription. This limitation on the principle of unilateral denunciation is indeed well-grounded in the considerations of justice and equity and it is supported by some diplomatic practice. . . .

. . . like the concepts of substantial breach and severability of the provisions of a treaty the question of the applicability [sic] of this rule in a given case is left to the subjective decision of each disputing party.

Despite the fact that the rule of extinctive prescription is subject to the vicissitudes of subjective determination it is maintained that its recognition as a limitation on the exercise of the right of unilateral denunciation is just and reasonable, for it infuses good sense, stability and order in treaty relationships. It would indeed be manifestly unjust for an innocent party to resort to unilateral termination of its obligations on the ground of prior breaches of obligations by [the] other party after a lapse of a rea-

121. *Id.* at 1093.

122. MCNAIR, *supra* note 7, at 571.

123. SINHA, *supra* note 7, at 215.

sonable period of time during which it gave the impression that the treaty obligations were subsisting.¹²⁴

To the same effect, a legal opinion of the State Department Legal Adviser Abram Chayes dated August 12, 1963, says of the general right of response, and citing Lauterpacht as authority: “[t]he right to void the treaty must be exercised within a reasonable time after the violation has become known. . . .”¹²⁵ It should be noted that all of the above authorities seemed to contemplate a setting in which a response took the form of terminating an entire treaty rather than merely suspending another obligation under the treaty. Termination of an entire treaty would, in most settings, be more drastic than suspension in part and, as such, it is possible that any requirement of response within a “reasonable time” under the pre-Vienna Convention doctrine would be construed more liberally in most settings invoking only partial suspension in response. *The Restatement (Second) of the Foreign Relations Law*, also adopted before the Vienna Convention in 1965, qualifies the right of response by the phrase “within a reasonable time” and it does contemplate partial suspension or termination.¹²⁶ Comment *b* to section 158 of the *Restatement (Second)* provides:

Action required in reasonable time. An aggrieved party may waive its right to suspend its own obligations under the agreement by failure, within a reasonable time, to assert such right or otherwise to indicate that it no longer considers itself to be bound.¹²⁷

An early International Law Commission draft would have incorporated a rule in the breach article itself that:

negated the right to terminate a treaty on the basis of a fundamental breach if—

....

- b) the claim to terminate is not made within a reasonable time of the breach; [or]
- c) the other party has condoned or waived the

124. *Id.* at 81, 83.

125. WHITEMAN, *supra* note 23, at 474-75, 475.

126. RESTATEMENT (SECOND), *supra* note 7, § 158(1).

127. *Id.* cmt. b, at 484.

breach¹²⁸

Instead, however, the only relevant provision in the Vienna Convention as recommended in the final ILC report, and with minor drafting changes finally adopted, appeared in the separate article (Article 45) on "Loss of a Right to Invoke a Ground for Invalidating, Terminating, Withdrawing From or Suspending the Operation of a Treaty." Article 45 as adopted provides:

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 [the response to breach article] and 62 if, after becoming aware of the facts:

(a) It shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) It must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.¹²⁹

The ILC Commentary to this article says:

The foundation of the principle that a party is not permitted to benefit from its own inconsistencies is essentially good faith and fair dealing (*allegans contraria non audiendus est*). The relevance of this principle in international law is generally admitted and has been expressly recognized by the International Court of Justice itself in two recent cases.

The principle has a particular importance in the law of treaties. As already mentioned in previous commentaries, the grounds upon which treaties may be invalidated, terminated or suspended in operation involve certain risks of abuse. Another risk is that a State, after becoming aware of an essential error in the conclusion of the

128. *Second Report by Sir Humphrey Waldock, supra note 9, at 75. See also the discussion of Article 47, in Report of the International Law Commission Covering the work of its fifteenth Session, 6 May - 12 July 1963, with Annexes, U.N. Doc. A/5509, reprinted in [1963] 2 Y.B. INT'L L. COMM'N 187, 212-13, U.N. Doc. A/CN.4/SER.A/1963/Add.1.*

129. Vienna Convention on the Law of Treaties, *supra note 7, art. 45.*

treaty, an excess of authority committed by its representative, a breach by the other party, etc., may continue with the treaty as if nothing had happened, and only raise the matter at a much later date when it desires for quite other reasons to put an end to its obligations under the treaty. The principle now under consideration places a limit upon the cases in which such claims can be asserted with any appearance of legitimacy.

....

The Commission considered that the application of the rule in any given case would necessarily turn upon the facts and that the governing consideration would be that of good faith. This being so, the principle would not operate if the State in question had not been aware of the facts giving rise to the right or had not been in a position freely to exercise its right to invoke the nullity of the treaty.¹³⁰

It should be noted that in adopting Article 45 the Vienna Conference rejected a United States-Guyana joint amendment in the nature of a statute of limitations "that would have barred a state from challenging the validity of a treaty after it had been in force for ten years."¹³¹ This proposal and its rejection seems to make clear the long time that may be required to bar a claim by tacit conduct and, of course, also makes clear that the Article does not preclude claims even older than ten years as the basis of response under Article 60. Indeed, the Report of the United States Delegation to the Vienna Conference makes this even clearer in terms of a principal motivation of opponents of the proposed ten-year limitation:

The rule in Article 45, which deals with estoppel or acquiescence, is derived from two cases decided by the International Court of Justice. We joined with Guyana in proposing an amendment in the nature of a statute of limitations. A State would be precluded from challeng-

130. *1966 Reports of the Commission*, *supra* note 33, at 239 (paragraph numbers and footnotes omitted). For a discussion of Article 45, arguing that it does not impose "restrictions upon the circumstances in which an estoppel may be invoked," see SINCLAIR, *supra* note 7, at 168-69. See also Kearney & Dalton, *supra* note 11, at 527 (seeming to concur on this point).

131. Kearney & Dalton, *supra* note 11, at 527.

ing a treaty in which it had acquiesced for ten years. The amendment was rejected; its principal opponents were the many States that wished to reopen or preserve old claims.¹³²

Apparently an amendment, with the former Soviet Union as a sponsor, "to gut the article by deleting the rule regarding acquiescence by reason of conduct," was also rejected by the Conference.¹³³

With respect to treaty law as a basis for response to breach of treaty, Article 45 would now seem the presumptive starting point rather than the previous "reasonable time" principle. The reasonable time principle, however, at least if understood as requiring a substantial period of years in most cases, would seem incorporated in Article 45(b).

With respect to the right of response as rooted in non-forcible reprisal law, it would seem that the same basic principles of good faith and fairness underlying treaty law as a basis would also apply to any right of response rooted in reprisal law. Although neither the classic general discussion of reprisal law by Oppenheim-Lauterpacht¹³⁴ nor the more specific discussion in the treaty context by Lord McNair¹³⁵ mentions any requirement of "reasonable time" or otherwise limits the response right by comparable requirements, these requirements, at least in general terms, may well be assumed as another part of general customary international law even when the basis is non-forcible reprisal. Article 45, as such, of course, would not seem the starting point for considering a right of response rooted in non-forcible reprisal law.

The *Revised Restatement of Foreign Relations Law*, unlike the *Restatement (Second)* which incorporated the "reasonable time" standard, seems to rely on Article 45 of the Vienna Convention, in

132. *Report of the United States Delegation to the United Nations Conference on the Law of Treaties, Vienna, Austria, March 21 to May 24, 1968, and April 9 to May 23, 1969*, at 26 (November 7, 1969) [hereinafter *U.S. Delegation to Vienna Conference*]. See also Kearney & Dalton, *supra* note 11, at 527 (ascribing opposition to the amendment also to "the group that was opposed to changes in the Commission's text as a matter of principle," in addition to those wishing to preserve old claims).

133. See Kearney & Dalton, *supra* note 11, at 527-28. Similarly, at the time of its accession to the Vienna Convention the Soviet Union entered a reservation to Article 45(b) declaring this article "contrary to established international practice." MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL 856 (1997).

134. OPPENHEIM, *supra* note 46, at 114-23.

135. MCNAIR, *supra* note 7, at 573.

keeping, of course, with the thrust of the *Revised Restatement* largely to follow the Vienna Convention. Thus, comment *g* to section 331 of Tentative Draft No. 6 provides:

Waiver of grounds for invalidation. A party may lose the right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of an agreement by conduct that expressly or by implication amounts to waiver of the ground, and acquiescence in the continuing validity of the agreement. Vienna Convention, Article 45.¹³⁶

To summarize the related issues of waiver, acquiescence and estoppel, there are general requirements rooted in good faith and fair dealing that a responding party should not act inconsistently with a subsequent express agreement concerning the treaty made after becoming aware of all the facts of the prior breach, or inconsistently with a pattern of conduct tacitly waiving or acquiescing in the breach or unfairly misleading another party relying on such actions. A failure to respond to the known breach within a reasonable time, which in context may be a matter of even a decade or more, may amount to such conduct. On the other hand, it is clear that this general requirement should not negate the right of response in settings where the dimensions of the breach may not be fully known or appreciated or where negotiations have been begun or are generally continuing on the breach and its resolution or on related issues in a broader context. If this requirement of "reasonable time" or "waiver" or "estoppel" were invoked too soon it could well create undue pressure to terminate negotiations and respond, something that could be particularly harmful, for example, in arms control settings where encouraging negotiated solution to the frequently complex and time-consuming compliance problems is to be preferred.¹³⁷ In this respect, the ILC Commentary to Article 45 of the Vienna Convention seems sensible when it says: "The Commission considered that the application of the rule in any

136. 1985 REVISED RESTATEMENT, *supra* note 12, § 331, cmt. *g*. Tentative Draft No. 1 of April 1, 1980 incorporated this principle under comment *c* to section 348. 1980 REVISED RESTATEMENT, *supra* note 69, § 348, cmt. *c*.

137. Moreover, in considering operation of the principle from a pattern of tacit conduct in a bilateral arms control setting with successor states of the former Soviet Union, it may be relevant that at Vienna the Soviets opposed negation of a right to respond based on tacit conduct as opposed to express agreement.

given case would necessarily turn upon the facts and that the governing consideration would be that of good faith."¹³⁸

Importantly, given the existence of Article 45 of the Vienna Convention on Treaties, the United States should ensure whenever it expressly agrees to the extension or continuation in operation of a particular treaty, that it does not lose its right of response to existing treaty violations. In this connection, it would normally seem advisable to expressly reserve any such rights in general terms, unless it is intended that they be lost.¹³⁹ It may be, of course, that a deliberate decision could be made in some settings that agreement on extension is an opportunity to remove existing uncertainties as to responsive rights of both sides by eliminating all such rights. If so, Article 45 provides a convenient vehicle. Any such decision, however, should certainly be a knowing decision.

In connection with possible claims of waiver, acquiescence and estoppel in any treaty setting in which a successor state to the former Soviet Union were a party, it should be noted that the Soviet accession of April 29, 1986, to the Vienna Convention on the Law of Treaties, set out in text at note 48 *supra*, contained the following reservation: "The Union of Soviet Socialist Republics will consider that it is not obligated by the provisions of article 20, paragraph 3 or of article 45 (b) of the Vienna Convention on the Law of Treaties (set out in text at 133 *supra*) since they are contrary to established international practice." Note that this Soviet reservation declares Article 45(b) of the Vienna Convention "contrary to established international practice."

5. *Conditionality: The Issue of Linkage to Continuing Violation*

The law is not entirely clear as to whether a permitted response to a prior breach of agreement, whether rooted in treaty or non-forcible reprisal law, must cease when the other treaty party rectifies the breach and resumes full compliance. There is, for example, no provision of the Vienna Convention squarely on point. Nevertheless, there is authority suggesting that under either treaty

138. *1966 Reports of the Commission, supra* note 33, at 239.

139. It is remotely arguable that even such an express reservation would not be adequate given the language of Article 45, but given the purpose and background of Article 45 as rooted in "good faith and fair dealing," it would be completely anomalous not to regard such an express reservation as adequate. Moreover, not to do so would set the Vienna Convention against its most important principle, embodied in Article 26, of *pacta sunt servanda*.

law or reprisal theory, the right of permitted response is conditional on continuing treaty violation by the other party.

With respect to treaty law as a basis, Article 72(2) on "Consequences of the Suspension of the Operation of a Treaty" provides: "During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty."¹⁴⁰ And in its Report to the General Assembly on the predecessor provision of Article 72(2) the International Law Commission said that:

[P]aragraph 2 . . . specifically requires the parties, during the period of the suspension, to refrain from acts calculated to render the operation of the treaty impossible as soon as the ground or cause of suspension ceases. The Commission considered this obligation to be implicit in the very concept of "suspension", and to be imposed on the parties by their obligation under the *pacta sunt servanda* rule . . . to perform the treaty in good faith.¹⁴¹

It seems implicit in this article and commentary, at least in suspension as opposed to termination settings, that a suspension in response to breach of agreement should cease when the other party rectifies the breach and resumes full compliance. But since Article 70 on the "Consequences of the Termination of a Treaty" has no provision comparable to Article 72(2), it is unclear whether a termination in part, if permitted by the Vienna Convention,¹⁴² would be limited by the conditionality requirement.

Similarly, with respect to non-forcible reprisal law as a basis, the discussion of a number of publicists suggests that any reprisal must cease when the reason for the reprisal has been rectified. Thus, the Oppenheim-Lauterpacht discussion of the classic international law of reprisal says:

reprisals must at once cease when the delinquent State makes the necessary reparation. Individuals arrested

140. Vienna Convention on the Law of Treaties, *supra* note 7, art. 72(2).

141. *1966 Reports of the Commission*, *supra* note 33, at 267.

142. Although not clear, partial termination may well be permitted by the Vienna Convention. See *Second Report by Sir Humphrey Waldock*, *supra* note 9, at 73, 76 (commenting on the contemplation of partial termination in some settings). See also Vienna Convention on the Law of Treaties, *supra* note 7, art. 44(2). Note that Article 60(2), concerning material breach of a multilateral treaty, in contrast with Article 60(1), dealing with the bilateral setting, uses language of "suspend the operation in whole or in part or to terminate it. . . ." *Id.* art. 60(2).

must be set free, goods and ships seized must be handed back, occupied territory must be evacuated, suspended treaties must again be put into force, and the like.¹⁴³

In an example given in his discussion of non-forcible reprisals in response to breach of treaty, Lord McNair uses the language "so long as the limit first imposed [the prior breach] continues" to qualify his discussion of the responding right.¹⁴⁴ And in her discussion of the 1978 *United States-France Aviation* dispute, Professor Lori Fisler Damrosch says: "a qualification implicit in any justification of retaliation is that a responsive countermeasure must be proportional and must cease either when its purpose is achieved or when its continuation would be inconsistent with actions of a functioning tribunal. . . ."¹⁴⁵

The *Restatement (Second) of the Foreign Relations Law of the United States* seemed to confirm conditionality in suspension settings while implying that it was not required in partial termination settings. Thus, sections 158(1)(a) and (b) provide:

(1) Upon violation of an international agreement, any aggrieved party may, within a reasonable time and except as otherwise provided in the agreement

(a) suspend performance of its obligations towards the violating party so long as the latter is in violation, if the violation and suspension involve corresponding provisions or the suspension is otherwise reasonably related to the violation,

(b) terminate as between itself and the violating party a separable part of the agreement that includes the obligations violated and obligations of the aggrieved party clearly intended to be their counterpart,¹⁴⁶

143. OPPENHEIM, *supra* note 46, at 122.

144. MCNAIR, *supra* note 7, at 573.

145. Damrosch, *supra* note 7, at 806. In contrast, Sinha does not list conditionality among his list of requirements for the right of "unilateral denunciation." See SINHA, *supra* note 7, at 214-15.

146. RESTATEMENT (SECOND), *supra* note 7, § 158(1)(a)-(b). The 1985 draft Revised Restatement essentially tracks the Vienna Convention in summarized form in section 338

These sections, clearly permitting partial termination in one setting, and clearly differentiating between the obligations of conditionality, required in suspension settings but not required in partial termination settings, suggest that partial termination not conditioned by the conditionality requirement may be permissible. An early Waldock draft for the ILC clearly contemplated partial termination in response as permitting a party an additional option to: "denounce only the provision of the treaty which has been broken or suspend its operation" ¹⁴⁷

Since this provision did not make its way into the final Vienna Convention, it is at least arguable, if not probable, that its limitation on the partial termination right to the provision broken is not included, while partial termination, which is not inconsistent with the language of Article 60(1) of Vienna, is permitted. Similarly, the language of Article 44(2) of the Vienna Convention specifically considering separability, by including the word "terminating" as well as the word "suspending," seems to support the conclusion that partial termination, as well as partial suspension, is permitted under Article 60. If so, at least arguably such a partial termination—as opposed to a partial suspension—proceeding under a treaty law basis would not be qualified by the conditionality requirement.

United States diplomatic practice seems routinely to assume conditionality, although in settings in which it is not clear that the issue has been fully addressed in all its ramifications after adoption of the Vienna Convention. Thus, in his memorandum of March 4, 1966, on "The Legality of United States Participation in the Defense of Viet-Nam," State Department Legal Adviser Leonard Meeker said: "These increases were justified by the international law principle that a material breach of an agreement by one party entitles the other at least to withhold compliance with an equivalent, corresponding, or related provision until the defaulting party is prepared to honor its obligations." ¹⁴⁸

In a United States diplomatic note to Vietnam dated April 20, 1973, the United States said in notifying Vietnam of its decision to suspend mine-clearance operations:

and in doing so seems not to address meaningfully the conditionality point. See 1985 REVISED RESTATEMENT, *supra* note 12, § 338.

147. *Second Report by Sir Humphrey Waldock*, *supra* note 9, at 73.

148. Memorandum prepared by State Department Legal Adviser Leonard Meeker, *supra* note 24, at 476.

This suspension is justified as a response to the numerous material breaches of the Agreement by the Democratic Republic of Viet-Nam in accordance with the rule of international law as set forth in Article 60 of the 1969 Convention on the Law of Treaties. The United States is, of course, prepared to resume mine-clearance operations as soon as the Democratic Republic of Viet-Nam begins to act in compliance with its obligations under the Agreement.¹⁴⁹

And, as has been seen, State Department Legal Adviser Herbert J. Hansell replied on March 1, 1978 to Senator Howard Baker about the Panama Canal Treaties that “[i]n the event of a material breach by Panama of its obligations, it would be perfectly appropriate for the U.S. to withhold performance of these and other U.S. obligations under the Treaty until Panama complied once again with its obligations.”¹⁵⁰

The law of conditionality rooted in treaty law as a basis for response seems somewhat unclear, particularly in any setting of partial termination of treaty obligations as opposed to partial suspension. Nevertheless, there is significant support for the proposition that generally a permitted response to a prior breach must cease when the other treaty party rectifies the breach and resumes full compliance. This seems at least suggested by United States practice and seems generally accepted in the law of non-forcible reprisal as a basis for response. Certainly, however, any such requirement should be reasonably interpreted in light of its underlying purpose to facilitate respect for treaty obligations and international law. If one breach is remedied but another is continuing then there should be no obligation to cease a responsive suspension. Moreover, in some settings, particularly vitally important and interlinked ones, such as arms control agreements, the efficiency of a permitted response in offsetting gains that may result from the violation itself and that may remain even when the violation technically ceases, should not be solely under the control of the violating state. Indeed, in arms control settings, where incentives for violation may be substantial, and deterrence critical, it is not clear that a rule permitting a state to violate with the only real-

149. ROVINE, *supra* note 24, at 482. It is not clear in this example whether the prospective conditional resumption of treaty obligations by the United States was felt to be rooted in legal requirement or simply policy choice.

150. NASH, *supra* note 25, at 767.

world penalty being that it must stop if caught and the other side responds is adequate. That is, there may be some settings of treaty violation where partial termination leading to a possibly permanently reduced level of compliance on both sides, and not conditioned on continuation of a violation, may be a more appropriate remedy for material breach than partial suspension so conditioned. While nothing in the Vienna Convention specifically addresses this point, the ILC Commentary to what became Article 60 does recognize in the multilateral treaty context the special problem of undermining the "regime" of a multilateral disarmament treaty.¹⁵¹ And, as we have seen, it is quite possible, if not probable, that the Vienna Convention regime which includes no conditionality requirement in its Article 70 on "Consequences of the Termination of a Treaty," would permit partial termination without conditionality in an appropriate setting.

6. *Issues Concerning Avoidance of Acts Tending to Obstruct Resumption of Treaty Operation*

As has been seen, Article 72(2) of the Vienna Convention requires that "[d]uring . . . [a] period of . . . suspension [in accordance with the present Convention] the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty."¹⁵² The initial draft of this provision, as put forth by the International Law Commission, said: "During the period of suspension, the parties should refrain from acts tending to render the resumption of the operation of the treaty impossible."¹⁵³

Richard D. Kearney and Robert E. Dalton describe the following Conference history in moving from this suggestion to the adopted article:

The Mexican Delegation introduced an amendment to Article 72, somewhat akin to the language in Article 18, which would have added an obligation to refrain during the period of the suspension from acts which would "frustrate the object of the treaty." In its report on the article, the drafting committee proposed deletion of the expression "to render . . . impossible," which had been

151. See *1966 Reports of the Commission*, *supra* note 33, at 255. See generally Simma, *supra* note 39, at 88-89 (distinguishing between reprisal and treaty law as a basis for suspension of a treaty).

152. Vienna Convention on the Law of Treaties, *supra* note 7, art. 72(2).

153. ELIAS, *supra* note 7, at 207.

suggested by the Commission, and substitution of the words “to obstruct.” This improvement, which not only resolved the point raised by the Mexican amendment but also avoided possible confusion with Article 61 on supervening impossibility of performance, was adopted without objection.¹⁵⁴

As has been seen, the ILC Commentary to its initial suggestion says:

[P]aragraph 2 . . . specifically requires the parties, during the period of the suspension, to refrain from acts calculated to render the operation of the treaty impossible as soon as the ground or cause of suspension ceases. The Commission considered this obligation to be implicit in the very concept of “suspension”, and to be imposed on the parties by their obligation under the *pacta sunt servanda* rule . . . to perform the treaty in good faith.¹⁵⁵

Judge T. O. Elias, who participated importantly in the work of the Vienna Convention, describes the operation of Article 72(2) as:

[T]he parties are enjoined, during the period of suspension of the treaty, to refrain from any act or omission which is likely to make the operation of the treaty impossible after the occasion for the suspension has ceased. This requirement rests squarely on the ground of good faith implicit in the *pacta sunt servanda* principle.¹⁵⁶

As has been seen, there is no comparable provision in the Vienna Convention to that found in Article 72(2) governing “Consequences of the Suspension of the Operation of a Treaty” in termination settings. Specifically, Article 70 governing “Consequences of the Termination of a Treaty” has no comparable provision. Thus, possibly in any partial termination, as opposed to partial suspension setting, this requirement would not be applicable as embodied in Article 72(2).

Article 72(2) is, of course, rooted in treaty law as a basis for response to breach. It is possible, however, that the general princi-

154. Kearney & Dalton, *supra* note 11, at 556-57. See also ELIAS, *supra* note 7, at 207-08 (discussing the Mexican proposed amendment to Article 72 at the Vienna Conference).

155. 1966 *Reports of the Commission*, *supra* note 33, at 267.

156. ELIAS, *supra* note 7, at 207.

ple might also be applied to response to breach rooted in non-forcible reprisal law. As a general principle, it would seem to go beyond the requirement of conditionality discussed in the immediately preceding section to focus on ensuring that the character of actions taken during the suspension period is not such as would be "tending to obstruct the resumption of the operation of the treaty." Again, however, this requirement should be read reasonably in context in light of the overall Convention and the purposes of Article 60 itself. If read too literally, it could become an argument against almost any real-world suspension in response to prior breach thus vitiating Article 60 and a major purpose of the Vienna Convention as a whole. In this respect, Judge Elias's description of the operation of Article 72(2) would seem reasonable. Surely also, the intent of Article 72(2) would not seem to permit a prior breaching party simply to complain that a particular effective response would make resumption of treaty relations impossible thereby also making acting on that response illegal for the responding state. Presumably the nature of the responding actions would be judged by an objective or reasonableness standard and not purely by a subjective standard of a complaining violating state.

D. *Possible Procedural Requirements Concerning the Permitted Response*

In addition to substantive requirements concerning the prior breach of agreement and permitted response, there may also be procedural requirements concerning the permitted response. The next heading, D(1), will briefly discuss the generally accepted and non-controversial principle that the parties may by agreement establish special rules or procedures applicable in the event of breach. Section D(2) will then provide a discussion of the state of the law concerning any other procedural requirements for permitted response. Although international law reflects an historic controversy about linkage between the substantive right of response and compulsory dispute settlement, present customary international law would seem at least to embody a requirement of notice to the other party of the proposed response and grounds therefor and willingness to seek a peaceful resolution of the dispute through mechanisms that might include efforts at negotiated settlement or, if mutually agreed, some mechanism of third party dispute settlement.

1. *Use of Any Provisions in the Treaty Applicable in the Event of Breach*

It is a general principle of international law, reflected in Article 26 of the Vienna Convention, that states are free to agree as to their mutual relations and that such agreements between the parties should be respected. Thus, it is not surprising that the international law of permitted response to breach would advert to the possibility that states may have, either in the breached treaty or in a general instrument relating to dispute settlement, agreed to special rules or procedures in the event of breach by one party. If so, such special rules or procedures would be binding and one would expect this result whether a basis for response is rooted in treaty law or non-forcible reprisal law. Thus, Article 60(4) of the Vienna Convention on the Law of Treaties, the general article on "Termination or Suspension of the Operation of a Treaty as a Consequence of Its Breach," provides: "The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach."¹⁵⁷

The principle embodied in this paragraph was sufficiently obvious that the entire discussion of it provided in the ILC Report of the Commission to the General Assembly said: "*Paragraph 4* merely reserves the rights of the parties under any specific provisions of the treaty applicable in the event of a breach."¹⁵⁸ Judge T. O. Elias writes of this provision: "[T]he rights of the parties to make specific provision in the treaty which will be applicable in the event of a breach are preserved, since nothing prevents the parties from so providing if they wish."¹⁵⁹

Similarly, Article 65(4) of the Vienna Convention establishing the "Procedure To Be Followed with Respect to Invalidity, Termination, Withdrawal From or Suspension of the Operation of a Treaty" provides: "Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes."¹⁶⁰ And, again, the ILC Commentary on this paragraph is brief as befitting an obvious point: "*Paragraph 4* merely provided that nothing in the article is to affect the position of the parties

157. Vienna Convention on the Law of Treaties, *supra* note 7, art. 60(4).

158. 1966 Reports of the Commission, *supra* note 33, at 255.

159. ELIAS, *supra* note 7, at 116.

160. Vienna Convention on the Law of Treaties, *supra* note 7, art. 65(4).

under any provisions regarding the settlement of disputes in force between the parties."¹⁶¹

In support of these basic principles, comment *e* to section 335 of the 1985 draft *Revised Restatement of the Foreign Relations Law of the United States* provides:

This section does not exclude other remedies for breach, for example, a claim by an aggrieved party against the offending party for damages, or resort to arbitration as provided within the agreement in question or in some other agreement between the parties. An agreement may be interpreted as excluding termination or suspension for breach, as by making another remedy exclusive. Termination for breach requires notice but is not subject to any waiting period that might be stipulated in the agreement for a denunciation.¹⁶²

In keeping with the right of response to prior breach as an important customary international law principle of treaty law, it is to be assumed that any modification of this right by agreement of the parties would require a clear intent to do so. Certainly, as the International Court of Justice in the *Namibia* case said, the mere silence of a treaty about the right of response would in no way waive that right. Thus, in a passage that T. O. Elias, who subsequently became the President of the International Court of Justice, described as a holding,¹⁶³ the Court said:

It has been contended that the Covenant of the League of Nations did not confer on the Council of the League power to terminate a mandate for misconduct of the mandatory and that no such power could therefore be exercised by the United Nations, since it could not derive from the League greater powers than the latter itself had. For this objection to prevail it would be necessary to show that the mandates system, as established under the League, excluded the application of the general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human person contained in treaties of a humanitarian

161. 1966 *Reports of the Commission*, *supra* note 33, at 263.

162. 1985 REVISED RESTATEMENT, *supra* note 12, § 335, cmt. e.

163. ELIAS, *supra* note 7, at 118.

character (as indicated in Art. 60, para. 5, of the Vienna Convention). The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded.¹⁶⁴

Judge Elias, who also chaired the Committee of the Whole at the Vienna Convention, writes of this paragraph in the Court's opinion: "It would be superfluous to comment on this authoritative and per lucid interpretation and application of the relevant paragraphs of Article 60 of the Vienna Convention."¹⁶⁵

It is also clear, as the last sentence in the 1985 draft *Revised Restatement* comment *e* set out above makes clear, that the presence of a general denunciation or withdrawal clause in a treaty and a possible time period for such denunciation or withdrawal in such a clause¹⁶⁶ does not affect the general right of response for prior breach. These are simply separate issues and are clearly regarded as such in general diplomatic practice. As an example of this, Article IV of the 1963 Limited Test Ban Treaty has a withdrawal clause requiring notice of withdrawal three months in advance. On August 5, 1963, during Senate hearings on the Test Ban Treaty Senator Humphrey asked Secretary of State Rusk the following question:

Mr. Secretary, if the Soviets were to abrogate the treaty and were to have an explosion in one of the prohibited environments—let's say in the atmosphere or under water and we knew it—would we have to wait 90 days before we can respond with our answer either to test or to leave the obligations of the treaty?

Secretary Rusk replied:

It is our view that we would not have to wait 90 days, because the obligation of the Soviet Union not to test in the

164. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (Jun. 21), at 47.

165. ELIAS, *supra* note 7, at 118.

166. Article XV(2) of the 1972 ABM Treaty, with its six-month-notice requirement for withdrawal, is such a clause. See Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., art. XV, § 2, 23 U.S.T. 3435, 3446.

prohibited environment is central to the very purposes and existence of this agreement, and it is clearly established through precedents of American practice and international law over many decades that where essential consideration in a treaty or agreement fails through violation on the other side that we ourselves are freed from those limitations. Now, I would be very glad to make available to the committee a legal brief on this point, because where the gut of the treaty collapses, we are not limited just by the withdrawal clause.

The "legal brief" referred to by Secretary Rusk was an opinion of the State Department Legal Adviser Abram Chayes of August 12, 1963, entitled "Right of the United States to withdraw from the nuclear test ban treaty in the event of violation by another party." The opinion stated in pertinent part:

The question has been raised whether the United States would have to give 3 month's notice prior to withdrawing if another party conducted nuclear weapon tests in the atmosphere, or committed some other act in plain violation of the treaty. The answer is "No."

A breach of treaty obligations by one party is considered in international law to give other parties the right to terminate their obligations under the treaty. Article IV is not intended as a restriction of that right. The three original parties recognized that events other than violations of the treaty might jeopardize a country's "supreme interests" and require that country to resume testing in the prohibited environments. Article IV permits withdrawal, upon 3 months' notice, in this case. If another party violated the treaty, the United States could treat the violation as an "extraordinary event" within the meaning of article IV, or it could withdraw from the treaty immediately.¹⁶⁷

2. *Notification and Dispute Settlement*

It is generally accepted that in most settings a party invoking a right of suspension or termination in response to a breach should provide notice to the other party and the classic law of reprisal has

167. WHITEMAN, *supra* note 23, at 473-74.

been said to require an effort at negotiation or at least an "unsatisfied demand" to cease the prior violation before implementation of the reprisal. There has been a vigorous debate among international lawyers, however, as to whether the right of response may only be fully exercised in conjunction with acceptance of some means of compulsory third-party dispute settlement. Publicists supporting such a linkage have emphasized the risk to the integrity of treaties by permitting the parties unilaterally to invoke a prior breach as grounds for response and have generally been optimistic about the availability of appropriate third-party machinery. Publicists opposing such a linkage have emphasized the general rule of international law that states are not subject to compulsory third-party resolution of disputes without their consent and have generally supported the importance of relatively unrestricted responsive action as an important real-world remedy to protect the integrity of agreement for all parties. As will be seen, this first or "linkage" position was classically reflected in the 1935 Harvard Research "Draft Convention on the Law of Treaties," although the draftsmen of this Convention were forced to admit that there was substantial opinion to the contrary. This "linkage" position was not universally accepted by scholars or perhaps even generally accepted by governments. Indeed, the *Restatement (Second) of the Foreign Relations Law of the United States*, adopted in 1962, did not follow the linkage approach and took the position that "it cannot be said that diplomatic negotiations are required before unilateral abrogation on the ground of violation of the agreement" (set out in text *infra* at 974). And when in 1966 the International Law Commission forwarded its draft articles that were the basis of work at the Vienna Convention, its Article 62 on general procedures only weakly incorporated a linkage requirement based on the general admonition that if "objection has been raised" then "the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations" (set out in text *infra* at 975). In turn, there was a major battle at the Vienna Conference on dispute settlement provisions of the proposed treaty with the United States, among others, urging strong compulsory third-party settlement procedures. A last minute Conference resolution of the issue provided generally for reference to the International Court of Justice in the single instance of a dispute concerning the validity of a treaty in conflict with a "peremptory norm" of general international law or "jus cogens." Any other disputes concerning the invalidity, termination, withdrawal from

and suspension of the operation of a treaty arising under Part V of the Vienna Convention would be submitted to non-binding conciliation as provided in an annex to the Convention. Subsequent to the Vienna Convention, it is probable that these compulsory dispute settlement mechanisms, including the conciliation procedure pursuant to the annex, have not been accepted as customary international law binding on non-treaty parties and this is the view of the United States as well as that of the draftsmen of the 1985 draft *Revised Restatement*. Thus, at present, Nations would seem bound under general customary international law generally to give notice to the other treaty party of any actions taken in response to breach¹⁶⁸ and generally to accept some peaceful dispute resolution procedure, including negotiation as such a procedure, as accepted by the parties.¹⁶⁹ Probably also, they should in most settings seek to negotiate satisfactory resolution of the breach before implementing responsive measures, although it is not at all clear that this is required by customary international law. They would not, however, be required to refrain from implementing responsive actions pending resolution of the dispute (this would be true even if the responding state had accepted a general prior agreement with the breaching state to submit disputes to third-party resolution) nor to accept any particular modality of dispute resolution.

Development of the law concerning possible notification and dispute settlement requirements, as summarized above, is illustrated by the following authorities:

The fifth edition of Oppenheim's treatise on *International Law*, as edited by Hirsch Lauterpacht, describes the classic law of reprisal as "admissible only after negotiations have been conducted in vain for the purpose of obtaining reparation from the delinquent State."¹⁷⁰ But the only authority cited for this proposition is a footnote referring not to negotiations but rather to "a request": "See the *Naulilaa* case between Portugal and Germany, decided in

168. Note, however, that under Article 65(5) of the Vienna Convention "the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation." Vienna Convention on the Law of Treaties, *supra* note 7, at art. 65(5).

169. This obligation may in some settings stem from Article 33 of the United Nations Charter as much as from the law of response to breach. The Charter obligation, however, is qualified by the threshold reference to "any dispute, the continuation of which is likely to endanger the maintenance of international peace and security. . . ." U.N. CHARTER art. 33, ¶ 1.

170. OPPENHEIM, *supra* note 46, at 122.

1928 by a special arbitral tribunal, where it was held that reprisals are illegal if they are not preceded by a request to remedy the alleged injury. . . .¹⁷¹

Indeed, a more accurate description of the *Naulilaa Incident Arbitration*,¹⁷² which was a forcible and not a non-forcible reprisal, is that at least forcible reprisals require "an unsatisfied demand" to cease the international legal violation before a permitted response may be taken.¹⁷³

Article 27 of the Harvard Research "Draft Convention on the Law of Treaties" provides in full:

Article 27. Violation of Treaty Obligations

- (a) If a State fails to carry out in good faith its obligations under a treaty, any other party to the treaty, acting within a reasonable time after the failure, may seek from a competent international tribunal or authority a declara-

171. *Id.* at 122 n.1. A great source of confusion in the law of reprisal has been confusion of the requirements of the general law of non-forcible reprisal with the old law of forcible reprisal. See Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1 (1972) and Robert Tucker, Note, *Reprisals and Self-Defense: The Customary Law*, 66 AM. J. INT'L L. 586 (1972) for analysis of forcible reprisals involving armed force. Robert Tucker's analysis questions and limits even in the use of force setting the "prior attempt to obtain redress" requirement generally accepted based on the *Naulilaa* arbitration. Thus, he writes:

The condition that reprisals must be preceded by the attempt to obtain redress by other means was stipulated in the *Naulilaa* arbitration (1928). Although subsequently treated by most writers as authoritative on the customary law of reprisals, the arbitrators did not refer to earlier authority in support of their interpretation. Indeed, had the arbitrators sought earlier authority, it must be doubted whether they could have found much support for their insistence that reprisals are permitted only after the effort has been made, and has failed, to obtain redress by other means. For the practice of states permitted considerable uncertainty on this point and that uncertainty was reflected in the standard treaties of an earlier period.

But even if the *Naulilaa* arbitration is followed on the necessity that must be established before resorting to reprisals, care must be taken to avoid reading into the award what is not there. The award does not state that reprisals must be preceded by the attempt to obtain redress by peaceful means if it is clear that in the circumstances such attempt will prove unavailing. Nor can the award be taken to mean that the necessity conditioning reprisals is independent of the kind of provocation and of the intent with which it has been committed.

Id. at 592-93 (notes omitted).

172. *Naulilaa Incident Arbitration*, 8 Trib. Arb. Mixtes 409, (Port-Ger. 1928), translated and discussed in BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS 903-04 (3d ed. 1971).

173. See generally Rex Zedalis, *On the Lawfulness of Forceful Remedies for Violations of Arms Control Agreements: 'Star Wars' and Other Glimpses at the Future*, 18 N.Y.U. J. INT'L L. & POL. 73, 116 & n.141, 129 (1985).

tion to the effect that the treaty has ceased to be binding upon it in the sense of calling for further performance with respect to such State.

(b) Pending agreement by the parties upon and decision by a competent international tribunal or authority, the party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty *vis-à-vis* the State charged with failure.

(c) A provisional suspension of performance by the party seeking such a declaration will not be justified definitively until a decision to this effect has been rendered by the competent international tribunal or authority.¹⁷⁴

This "Harvard Research" proposal, never adopted as such by governments, may have been the high water mark of the procedural linkage position in assessing permitted response to prior breach of agreement. It should be noted that by its terms it applies solely to the more drastic response of termination of treaty obligations in full, thus arguably requiring a more careful procedural linkage than lesser responses. Similarly, even this "Harvard Research" draft proposal permitted provisional suspension pending a decision by a "competent international tribunal or authority." The underlying optimism reflected in this draft about future availability of effective international dispute settlement mechanisms to make such a mandatory procedural linkage workable is reflected in the drafters' "comment" to Article 27:

The view that a State may, simply by its own unilateral act, terminate a treaty as between itself and a State which it regards as having violated the treaty, although supported by some authority, is largely the product of an earlier day when the community of nations was unorganized and without machinery for the settlement of disputes by judicial processes. It is believed that such a view should no longer prevail in an age which has at its disposal the elaborate and efficient machinery for the orderly and just settlement of international differences such as has come into existence in recent years. Consequently, a form of relief is provided for in this article . . . which is

174. *Harvard Research on Treaties*, *supra* note 8, at 662.

not unlike that afforded by the declaratory judgment in municipal law.¹⁷⁵

It should also be noted that in arriving at this procedural linkage, the "Harvard Research" was probably acting more in a proposed law-making than a law-describing mode and was largely ignoring the publicists it itself cited. Indeed, its "comment" on Article 27 went on to declare:

Although, as indicated above, many writers, and not a few diplomats, have asserted that States have a right unilaterally to *terminate* their obligations under a treaty in the type of situation under discussion in this comment, most of the writers have done so with misgivings and have recognized that such a right might all too easily be abused. To avoid such abuse, some of them have tried to qualify the right by saying that it could be exercised only as a last resort, only in case there had been a serious breach or a breach of an essential, as distinguished from a non-essential, provision in the treaty. Such limitations are of no effect, however, if left solely to the decision of the party terminating the treaty, and, not without regret to be sure, the writers have generally recognized that, in the absence of any international tribunal or authority to decide the issue, a State would have to be and could be the judge of its own case where it alleged that another State had violated a treaty with it and proceeded, therefore, to regard the treaty as terminated between it and the alleged offending State.¹⁷⁶

Writing in 1964, prior to the Vienna Conference, Bhik Sinha rejects this "Harvard Research" linkage position as either positive law or preferred law in his important study of *Unilateral Denunciation of Treaty Because of Prior Violations of Obligations By Other Party*.¹⁷⁷ In doing so, he emphasizes that under current international law, for a variety of policy and pragmatic considerations, states are not bound by compulsory third-party dispute settlement except where they have specifically accepted it. To have a

175. *Id.* at 1077.

176. *Id.* at 1089. It should also be noted that the "comment" to Article 27(b) assumes that the competent dispute settlement machinery will be as agreed upon between the parties and that this is one reason that provisional suspension should be permitted. *See id.* at 1094.

177. SINHA, *supra* note 7, at 96-99, 209-11.

rule that disputes concerning non-forcible response to prior breach must automatically be so subjected is a violation of this principle. Indeed, he might well have further asked why this category of treaty disputes, as opposed to many others, should be so singled out for linkage. Sinha says in response to the "Harvard Research" position:

[T]he ideal of third party judgment or *nemo iudex in propria causa sua* has yet to become a rule of international law. The doctrine of sovereignty is one of the fundamental norms of the international legal system, and one of the manifestations of this doctrine is that a state ought not and must not be coerced or adjudged by a third party or authority without its consent.¹⁷⁸

Under contemporary international law it is not only that only a signatory power has the right, in the absence of specific agreement, to interpret or determine the occurrence and nature of a violation of a treaty obligation but also that it alone has the right to determine the expediency or necessity of recourse to reprisals or sanctions. Parties to a treaty, at variance in regard to interpretation or application of treaty obligations, are not obliged, in the absence of an agreement, to consult, seek or accept third party intervention. Nor do third parties or authorities normally have the right to interfere or intervene in disputes between the signatory powers. Professor Lauterpacht rightly observes that "the absence in international society of compulsory jurisdiction of courts is tantamount to a general recognition of the right of self-help."¹⁷⁹

. . . the fact remains that under international law a party to a treaty, in the absence of an agreement, has the right to refuse to submit to third party adjudication of disputes resulting from divergences of opinion relative to interpretation or application of treaty norms. . . .

. . . parties to treaties have traditionally been reluctant to seek or submit to third party adjudicatory processes for the settlement of disputes pertaining to treaty applica-

178. *Id.* at 96-97.

179. *Id.* at 98.

tion. The most usual method for the settlement of such disputes has been diplomatic negotiations. Although there are several instances of the exercise of the right of unilateral denunciation, in no instance did a denouncing party seek or receive a prior authorisation or approval from an international judicial authority.

The fear of the abuse of the right of unilateral denunciation appears to be exaggerated.¹⁸⁰

Sinha's summary of conditions for the right of response to prior breach under customary international law contains no procedural linkage with notice, prior negotiation, or, as discussed and rejected by him, submission to third-party adjudication.¹⁸¹ In support of Sinha's position, the 1965 *Restatement (Second) of the Foreign Relations Law of the United States* contains no procedural linkage in its relevant section 158. And the Reporters' Note to this section notes:

Negotiation in good faith prior to termination. There are relatively few cases in which an international agreement has been terminated by unilateral abrogation under the rule stated in this Section. In practice, the allegation that an agreement has been violated is dealt with by diplomatic negotiations, which may even result in revision of the agreement, so that the stage is seldom reached where the aggrieved party would resort to unilateral abrogation. It is not clear that this practice is accepted by the parties to international agreements as a rule of law, and hence it cannot be said that diplomatic negotiations are required before unilateral abrogation on the ground of violation of the agreement. The practice is sufficiently developed, however, to suggest that refusal to negotiate followed by unilateral abrogation would cast doubt on the good faith of the party abrogating the agreement. Another significant factor in determining the good faith of such a party would be its willingness to submit the issue to adjudication.¹⁸²

180. *Id.* at 209-10.

181. *Id.* at 214-15.

182. RESTATEMENT (SECOND), *supra* note 7, § 158, reporters' note.

In its 1966 Report to the General Assembly, which served as the basis of work for the Vienna Conference on the Law of Treaties, the International Law Commission recommended three procedural articles providing in relevant part only for notice of the measure proposed and the grounds therefore and, "except in cases of special urgency," a three-month delay for implementation without objection and an effort at "a solution through the means indicated in Article 33" of the United Nations Charter in the event objection is made.¹⁸³ This was, of course, a major pullback from the "Harvard Research" strong linkage position. These procedural articles 62-64 provided in full:

Article 62. Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which claims that a treaty is invalid or which alleges a ground for terminating, withdrawing from or suspending the operation of a treaty under the provisions of the present articles must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the grounds therefor.
2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 63 the measure which it has proposed.
3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.
4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

183. *1966 Reports of the Commission, supra* note 33, at 261-64.

5. Without prejudice to article 42, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

....

Article 63. Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 62 shall be carried out through an instrument communicated to the other parties.

2. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

....

Article 64. Revocation of notifications and instruments provided for in articles 62 and 63

A notification or instrument provided for in articles 62 and 63 may be revoked at any time before it takes effect.¹⁸⁴

In its Commentary to proposed article 62 the ILC indicated that it was aware of the dispute, as reflected in comments of governments and otherwise, concerning procedural linkage, and particularly linkage with independent adjudication. Nevertheless, the Commission concluded that it would not be realistic to go beyond recommending notice, a "proper opportunity" for the other party to state its views and then, in the event of objection, to provide that a peaceful solution should be sought through the general means indicated in Article 33 of the United Nations Charter,¹⁸⁵

184. *Id.* at 261-62 (art. 62), 263 (art. 63), 264 (art. 64) (footnotes omitted).

185. Article 33 of the United Nations Charter provides in full:

which, of course, includes negotiation as one such means.¹⁸⁶ Thus, its Commentary said in part:

[T]he Commission considered it essential that the present articles should contain procedural safeguards against the possibility that the nullity, termination or suspension of the operation of a treaty may be arbitrarily asserted as a mere pretext for getting rid of an inconvenient obligation.

....

In 1963, some members of the Commission were strongly in favour of recommending that the application of the present articles should be made subject to compulsory judicial settlement by the International Court of Justice, if the parties did not agree upon another means of settlement. Other members, however, pointed out that the Geneva Conventions on the Law of the Sea and the two Vienna Conventions respectively on Diplomatic and on Consular Relations did not provide for compulsory jurisdiction. While not disputing the value of recourse to the International Court of Justice as a means of settling disputes arising under the present articles, these members expressed the view that in the present state of international practice it would not be realistic for the Commission to put forward this solution of the procedural problem. After giving prolonged consideration to the question, the Commission concluded that its appropriate course was, first, to provide a procedure requiring a party which invoked the nullity of a treaty or a ground for terminating it to notify the other parties and give them a proper opportunity to state their views, and then, in the event of an objection being raised by the other party, to provide that the solution of the question should be

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

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

U.N. CHARTER art. 33.

186. See *1966 Reports of the Commission*, *supra* note 33, at 262-63.

sought through the means indicated in Article 33 of the Charter. In other words, the Commission considered that in dealing with this problem it should take as its basis the general obligation of States under international law to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered" which is enshrined in Article 2, paragraph 3 of the Charter, and the means for the fulfilment of which are indicated in Article 33 of the Charter.

Governments in their comments appeared to be at one in endorsing the general object of the article, namely, the surrounding of the various grounds of invalidity, termination and suspension with procedural safeguards against their arbitrary application for the purpose of getting rid of inconvenient treaty obligations. A number of Governments took the position that paragraphs 1 to 3 of the article did not go far enough in their statement of the procedural safeguards and that specific provisions, including independent adjudication, should be made for cases where the parties are unable to reach agreement. Others, on the other hand, expressed the view that these paragraphs carry the safeguards as far as it is proper to go in the present state of international opinion in regard to acceptance of compulsory jurisdiction. The Commission re-examined the question in the light of these comments and in the light also of the discussions regarding the principle that States "shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered", which have taken place in the two Special Committees on Principles of International Law concerning Friendly Relations and Co-operation between States. It further took into account other evidence of recent State practice, including the Charter and Protocol of the Organization of African Unity. The Commission concluded that the article, as provisionally adopted in 1963, represented the highest measure of common ground that could be found among Governments as well as in the Commission on this question. In consequence, it decided to

maintain the rules set out in the 1963 text of the article, subject only to certain drafting changes.¹⁸⁷

In its paragraph-by-paragraph Commentary on its proposed article 62, the Commission described the operation of the suggested rules as:

Paragraph 1 provides that a party claiming the nullity of the treaty or alleging a ground for terminating it or withdrawing from it or suspending its operation shall put in motion a regular procedure under which it must first notify the other parties of its claim. In doing so it must indicate the measure which it proposes to take with respect to the treaty, i.e. denunciation, termination, suspension, etc. and its grounds for taking that measure. Then by *paragraph 2* it must give the other parties a reasonable period within which to reply. Except in cases of special urgency, the period must not be less than three months. The second stage of the procedure depends on whether or not objection is raised by any party. If there is none or there is no reply before the expiry of the period, the party may take the measure proposed in the manner provided in article 63, i.e. by an instrument duly executed and communicated to the other parties. If, on the other hand, objection is raised, the parties are required by *paragraph 3*, to seek a solution to the question through the means indicated in Article 33 of the Charter. The Commission did not find it possible to carry the procedural provisions beyond this point without becoming involved in some measure and in one form or another in compulsory solution to the question at issue between the parties. If after recourse to the means indicated in Article 33 the parties should reach a deadlock, it would be for each Government to appreciate the situation and to act as good faith demands. There would also remain the right of every State, whether or not a Member of the United Nations, under certain conditions, to refer the dispute to the competent organ of the United Nations.

Even if, for the reasons previously mentioned in this commentary, the Commission felt obliged not to go be-

187. See *id.*

yond Article 33 of the Charter in providing for procedural checks upon arbitrary action, it considered that the establishment of the procedural provisions of the present article as an integral part of the law relating to the invalidity, termination and suspension of the operation of treaties would be a valuable step forward. The express subordination of the substantive rights arising under the provisions of the various articles to the procedure prescribed in the present article and the checks on unilateral action which the procedure contains would, it was thought, give a substantial measure of protection against purely arbitrary assertions of the nullity, termination or suspension of the operation of a treaty.

Paragraph 4 merely provided that nothing in the article is to affect the position of the parties under any provisions regarding the settlement of disputes in force between the parties.

Paragraph 5 reserves the right of any party to make the notification provided in paragraph 1 by way of answer to a demand for its performance or to a complaint in regard to its violation, even though it may not previously have initiated the procedure laid down in the article. In cases of error, impossibility of performance or change of circumstances, for example, a State might well not have invoked the ground in question before being confronted with a complaint—perhaps even before a tribunal. Subject to the provisions of article 42 concerning the effect of inaction in debarring a State from invoking a ground of nullity, termination or suspension, it would seem right that a mere failure to have made a prior notification should not prevent a party from making it in answer to a demand for performance of the treaty or to a complaint alleging its violation.¹⁸⁸

And in the course of its Commentary on its proposed article 63 the Commission said:

188. See *id.* at 263 (paragraph numbers omitted). For a discussion of the ILC proposal, supporting instead the “Harvard Research” draft approach, see Wright, *supra* note 85, at 1000.

The importance of the present article, in the view of the Commission, is that it calls for the observance of a measure of formality in bringing about the invalidation, termination, etc. of a treaty, and thereby furnishes a certain additional safeguard for the security of treaties. In moments of tension the denunciation or threat to denounce a treaty has sometimes been made the subject of a public utterance not addressed directly to the other State concerned. But it is clearly essential that any such declaration purporting to put an end to or to suspend the operation of a treaty, at whatever level it is made, should not be a substitute for the formal act which diplomatic propriety and legal regularity would seem to require.¹⁸⁹

The Vienna Conference itself proved to be a major battleground between those seeking strong dispute settlement provisions in general, including the United States, and those opposing such provisions, including the former Soviet Union.¹⁹⁰ In their excellent summary of the work of the Vienna Conference, Richard Kearney and Robert Dalton describe how the Conference struggled through two sessions with this problem of general dispute settlement machinery and how on the final day of the second session a group of Asian and African delegations succeeded in putting together a proposal which became Article 66 of the Vienna Convention.¹⁹¹ In their discussions, Kearney and Dalton point out that:

[T]he United States also put in a proposed amendment to develop a number of technical points not covered in the thirteen-state amendment. The main elements of the

189. See *1966 Reports of the Commission, supra* note 33, at 264. With respect to whether this implied ILC draft and subsequent explicit Vienna Convention requirement (in Article 67(1)) of notice *in writing* reflects customary international law, Judge Elias writes:

While it is true that notifications need not always be made in writing and that it might sometimes be going too far to make such a request, international practice shows that cases have arisen in the past where oral notifications had created difficulties and uncertainties for all the parties concerned.

ELIAS, *supra* note 7, at 197.

190. This dispute settlement battle at the Vienna Conference was a battle about general dispute settlement procedures and not one simply focused on dispute settlement in the context of the right to respond to prior breach.

191. Kearney & Dalton, *supra* note 11, at 545-57. Judge T.O. Elias, who as Attorney General of Nigeria chaired the Committee of the Whole at the Vienna Conference, also has a superb and detailed description of the background negotiations at Vienna leading to the procedural articles of the Vienna Convention in ELIAS, *supra* note 7, at 188-98.

United States proposal included establishment of a commission on treaty disputes charged with effecting settlement through conciliation and empowered to order provisional measures to preserve the rights of parties, a special rule governing performance in breach cases, and reference of disputes not resolved through conciliation to arbitration at the request of any disputant unless the parties agreed to submit the dispute to the International Court of Justice.¹⁹²

They also point out in discussing overall sentiment for strong dispute settlement machinery along the lines of the United States proposal how initially in committee at the first session:

[o]f the 53 delegations that spoke in the committee, 30 favored improvement, 22 were opposed, and 1 was undecided. Neither side knew accurately how the 50 silent states would vote. The United States Delegation estimated that there was a majority against disputes-settlement. Opponents of improved procedures, such as the Ukrainian Soviet Socialist Republic Delegation, seemed to believe that they would be able to defeat any disputes-settlement proposal.¹⁹³

And while substantial additional support was obtained for strengthened general dispute settlement provisions at the second session, in substantial measure as a result of vigorous United States intersessional work, Kearney and Dalton point out that a measure for substantially strengthened dispute settlement embodying a compulsory binding mechanism and incorporating a number of features of the United States proposal was not able to obtain the needed two-thirds votes for adoption in plenary.¹⁹⁴ This failure set the stage for the last minute adoption of what became Article 66 of the Convention, which for disputes other than *jus cogens*, embodied a procedure whereby either party to a dispute could refer it to non-binding conciliation on the basis of a specified annex to the Convention.¹⁹⁵

192. Kearney & Dalton, *supra* note 11, at 548.

193. *Id.* at 549.

194. *Id.* at 549-51.

195. As to possible pragmatic limitations on the meaning of "non-binding," however, see Kearney & Dalton, *supra* note 11, at 555. *But see*, the Statement of Carl F. Salans, Acting Legal Adviser of the Department of State, Before the Senate Foreign Relations

Kearney and Dalton repeatedly make clear that the former Soviet Union and then associated states strongly opposed strengthened compulsory dispute settlement procedures at the Vienna Conference. Thus, they write:

A second obstacle [to an adequate disputes-settlement procedure] was the fervid and long-standing opposition of the Soviet Union and its associates to any form of impartial decision-making for the settlement of international disputes. This opposition stems in large measure from the basic tenets of the Marxist-Leninist ideology that courts exist to further state policies and not to judge them. To have a tribunal outside the system scrutinizing state action doubled the unacceptability.¹⁹⁶

And they point out that in committee during the first session: “[t]he U.S.S.R. and the Eastern Europeans opposed all proposals to improve procedures for settlement of disputes.”¹⁹⁷

As finally adopted at Vienna, the procedural articles of the Vienna Convention provide in full:

SECTION 4. PROCEDURE

Article 65. PROCEDURE TO BE FOLLOWED WITH RESPECT TO INVALIDITY, TERMINATION, WITHDRAWAL FROM OR SUSPENSION OF THE OPERATION OF A TREATY

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

Committee Regarding the Convention on the Law of Treaties (Aug. 3, 1972), at 6 (“it is not binding upon them”).

196. Kearney & Dalton, *supra* note 11, at 546.

197. *Id.* at 548. On opposition of the former Soviet Union to compulsory dispute settlement at the Vienna Conference, see *U.S. Delegation to Vienna Conference, supra* note 132, at 11; and Letter of Submittal from Secretary of State William P. Rogers to the President, Transmitting the Vienna Convention (Oct. 18, 1971), at 7. On Soviet opposition to third-party dispute settlement in the response to breach context, see generally SINHA, *supra* note 7, at 97.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.
3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.
4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.
5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 66. PROCEDURES FOR JUDICIAL SETTLEMENT, ARBITRATION AND CONCILIATION

If, under paragraph 3 of article 65, no solution has been reached within a period of twelve months following the date on which the objection was raised, the following procedures shall be followed:

(a) Any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(b) Any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United

Nations.

Article 67. INSTRUMENTS FOR DECLARING INVALID, TERMINATING, WITHDRAWING FROM OR SUSPENDING THE OPERATION OF A TREATY

1. The notification provided for under article 65, paragraph 1 must be made in writing.
2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

Article 68. REVOCATION OF NOTIFICATIONS AND INSTRUMENTS PROVIDED FOR IN ARTICLES 65 AND 67

A notification or instrument provided for in article 65 or 67 may be revoked at any time before it takes effect.¹⁹⁸

Because Article 66(b) of the Vienna Convention adopts a new conciliation mechanism for dispute settlement, it would seem highly probable, if not certain, under general rules for recognition of customary international law, that the conciliation commission process embodied in Article 66(b) is not customary international law binding on non-parties to the Vienna Convention. This, not surprisingly, is the United States position even though it was one of the strongest supporters of strengthened dispute settlement procedures at the Vienna Conference. Thus, in a written statement by Mary V. Mochary, State Department Deputy Legal Adviser, before the Senate Foreign Relations Committee on June 11, 1986, it was pointed out that "the Convention includes procedural mechanisms for settlement of disputes that do not reflect customary law and cannot be invoked by the United States until it be-

198. Vienna Convention on the Law of Treaties, *supra* note 8, Part V, § 4, arts. 65, 66, 67, 68. See also the "Annex" to the Convention on the conciliation procedure as set out in Article 66.

comes a party to the Convention."¹⁹⁹ Similarly, although as has been seen the draft *Revised Restatement of the Foreign Relations Law of the United States* adopts the Vienna Convention as presumptively codifying the customary international law governing international agreements, it specifically exempts Article 66 as included in customary international law. The 1985 draft *Revised Restatement* says that "requirements [of Article 66] will not apply to or benefit the United States until it becomes a party to the Convention."²⁰⁰

Because it seems clear that Article 66 of the Vienna Convention is not customary international law binding on the United States,²⁰¹ it is particularly useful to review the full treatment of this procedural linkage issue by the 1985 draft Revised Restatement to see what procedural requirements are viewed by the American Law Institute as now binding under customary international law in a post-Vienna Convention setting. First, it should be noted that the "Introductory Note" about "The Vienna Convention on the Law of Treaties" confirms in a relevant sentence and footnote:

While the Convention has not yet been ratified by the United States, in its Letter of Submittal to the President, the Department of State said that "[a]lthough not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice." . . .¹

1. The reference was to the substantive provisions of the Convention. The Final Provisions relating to the conclusion of the Vienna Convention itself, and undertakings as

199. Written Statement By Deputy Legal Adviser Mary V. Mochary Before the Senate Foreign Relations Comm. (June 11, 1986), at 1-2.

200. 1985 REVISED RESTATEMENT, *supra* note 12, § 337, cmt. a.

201. In addition to the discussion above for this conclusion, Professor Lori Fisler Damrosch, in her important article on the 1978 *United States-France Aviation* dispute, takes the position that even Article 65 of the Vienna Convention "is apparently not a codification of customary international law." See Damrosch, *supra* note 7, at 804. See also Simma, *Termination*, *supra* note 39, at 80, in which he implies that in at least one case the Austrian government also has not regarded the Vienna Convention procedural provisions as "customary international law."

Professor Simma himself takes the view that recent state practice largely relies on the grounds for termination in response to breach as set forth in the Vienna Convention without strictly following the "conditions, forms and limits of invoking these grounds." *Id.* at 74. Moreover, he treats the Vienna Convention "link established between substantive rights and certain procedural rules" as progress over "hitherto existing customary international law." *Id.* at 79.

to means for resolving disputes about international agreements, apply only since the Convention came into force and are binding only on the parties.²⁰²

Second, section 337 of the draft *Revised Restatement* provides in full:

§337. PROCEDURE WITH RESPECT TO INVALIDITY, TERMINATION, OR SUSPENSION OF AGREEMENT

(1) *A party that invokes either a defect in its consent to be bound by an international agreement or a ground for impeaching its validity, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim.*

(2) *If, after the expiry of a reasonable period after the receipt of the notification, no party has raised any objection, the party making the notification may carry out the measure which it has proposed.*

(3) *If timely objection to a notification in accordance with Subsection (1) has been made by any other party, the parties must resort to any dispute resolution procedure provided for in the agreement, or in the absence of such provision, to any other procedure for settlement to which the parties are otherwise committed.*²⁰³

The "Source Note" to section 337 says in full: "This section adapts Article 65(1) and (2) of the Vienna Convention."²⁰⁴

The "Comment" to section 337 provides in full:

a. Obligation to seek peaceful solution of disputes. Article 65(3) of the Vienna Convention calls upon parties to seek peaceful solutions to controversies about the con-

202. 1985 REVISED RESTATEMENT, *supra* note 12, Introductory Note (citation omitted).

203. *Id.* § 337, at 222 (337-1). Note that the 1980 draft Revised Restatement included the Vienna Convention three month standard within the proposed section language itself. See 1980 REVISED RESTATEMENT, *supra* note 63, § 348(2). Indeed, the 1985 draft language of section 337 is more general than the 1980 draft in several respects, possibly suggesting caution in conclusions about the status of Article 65 of the Vienna Convention as customary international law.

204. 1985 REVISED RESTATEMENT, *supra* note 12, § 337, Source Note. Note the use of the term "adapts," not "adopts."

tinuing validity of treaties by those means for peaceful settlement of disputes generally indicated in Article 33 of the United Nations Charter. This would include resort to any dispute resolution procedure provided for in the agreement. Article 66 of the Vienna Convention goes further and directs that, if twelve months elapse without a solution, the parties shall submit the matter to the International Court of Justice, to arbitration or to the conciliation procedure specified in the annex to the Convention. These requirements will not apply to or benefit the United States until it becomes a party to the Convention. (See Introductory Note, section 1, footnote 1.)

This section, then, following Article 65 of the Vienna Convention but not Article 66, can be said to be merely incorporating and particularizing the general obligations of the Charter. The United States is also a party to various agreements which include clauses committing the parties to use specified mechanisms for resolving disputes arising under those agreements. Thus, other sources of law involve the United States in commitments generally equivalent to those in Subsection (3); in turn, the United States can invoke similar commitments by other states. The requirement of giving notice (Subsection (1)) seems to be a logical corollary of such an obligation. Although the three months waiting period Vienna Convention. [sic] Article 65(2) is not to be found outside that Convention, it may be regarded as a basis for a customary standard of a reasonable period of delay.

b. Notification. The instrument of notification required by this section should be in writing and signed by competent authority. Vienna Convention, Article 67. See also §301. It should indicate the measure proposed to be taken and the reasons therefor. Except in cases of special urgency it should indicate a period for objections of not less than three months after its receipt. Vienna Convention, Article 65(2).²⁰⁵

And the Reporters' Note to this section says in full: "*Previous Restatement.* The previous Restatement in a Reporters' Note to

205. *Id.* cmts. a and b, at 148-50 (337-1 to 337-3).

§158 stated that it was common to engage in diplomatic negotiations prior to unilateral termination, but expressed doubt whether there was a rule of law requiring such action."²⁰⁶

It should be noted that the "Source Note" says "adapts" not "adopts" in reference to the procedures embodied in Articles 65(1) and (2) of the Vienna Convention. Nevertheless, the general effect of the section and comment seems to be roughly to follow Articles 65 and 67 (but not 66) of the Vienna Convention as customary international law. In turn, this closely approximates the initial recommendation to the Vienna Conference by the International Law Commission embodying only a reasonable notice and effort at peaceful resolution standard. The draft *Revised Restatement* as a whole, however, is abundantly clear that Article 66 of the Vienna Convention, embodying a mechanism for reference to conciliation, is not customary international law binding on the United States and would apply to the United States only if it were to become a party to the Convention.

It should also be noted that while the text of section 337(2) speaks only of "a reasonable period" after receipt of notification, the comment says that the three-month waiting period from Article 65(2) of the Vienna Convention "may be regarded as a basis for a customary standard of a reasonable period of delay." The draft *Revised Restatement*, of course, as the comment further clarifies, also incorporates the "except in cases of special urgency" standard of Article 65(2) of the Vienna Convention as a basis for customary international law.

The post-Vienna Convention position of the United States on procedural requirements concerning permitted response to breach is summarized usefully in the "Reply of the United States to the Memorial Submitted by the Government of the French Republic" in the 1978 *United States-France Air Services Agreement Arbitration*:

France argues that under both the theory of reprisals and doctrines of treaty law, no sanction may be applied where alternative means of satisfaction exist. In the present case, the alternative means would be negotiation and arbitration.

206. *Id.* reporters' note, at 150 (337-3).

The authorities cited on the theory of reprisals relate primarily to armed reprisals in the pre-U.N. Charter era. To this extent they are clearly not in point. Armed reprisals, which are now generally considered to be illegal, have never been thought to be other than a remedy of last resort.

The considerations relevant to armed reprisals are quite different from those concerning an interim withdrawal of rights under a treaty. With respect to the latter, the French position of total abstention pending dispute settlement would represent a drastic change from the existing state of customary international law and could hardly be accepted until institutions of international adjudication have evolved to the point that there are tribunals in place with the authority to indicate interim measures of protection on an immediate basis. Under the French theory, a treaty violator who benefited from the status quo would have no incentive to cooperate in the expeditious conclusion of arbitration proceedings; such a party would rely simply on the theory that somewhere years down the road arbitration would provide adequate satisfaction to the victim. It is not hard to see why France adopts this position in the present case; but would it take the same view in a case where it became the victim of a treaty violation?

In fact, however, customary international law has not evolved to the point of requiring abstention pending exhaustion of all other means of recourse, and indeed the practice of states is entirely to the contrary. Commentators have noted that the *Naulilaa* arbitration award cited by France, which involved the destruction by force of certain forts and posts in Angola, cited no authority for its dictum on this point. To the extent that *Naulilaa* purports to supply such authority, it does so only in the context of armed reprisals.

France, having asserted that the United States should have withheld any retaliatory action as long as other means could have provided satisfaction, suggests that such satisfaction could have come from either: (a) a formal demand to the French; (b) negotiation or further

consultations; or (c) the arbitral award of this Tribunal. With respect to the first, the United States formally requested that France acknowledge the U.S. carrier's change of gauge right on March 22, April 12, May 4, and on each occasion that U.S. and French officials met to consult up to the date of signature of the *Compromis*. On May 18 the U.S. specifically warned, by diplomatic note, that countermeasures would be taken if France did not end the violation. All of these demands remain unsatisfied to the present day. There is no merit to the French argument that the C.A.B.'s action preceded a demand, and France certainly does not admit that if such a demand were renewed it would be satisfied. Furthermore, the preparatory steps which the C.A.B. was required to take as a matter of domestic law [14 CFR 213.3(c), (d) (Jan. 1, 1978)] need not await international formalities.

France also claims that the process of negotiation could provide satisfaction in the present case, and that the United States did not fulfill its duty under international law to negotiate in good faith. The United States recognizes a duty under international law and under articles VIII, X, and XIII of the Agreement to engage in good faith consultations with a view toward resolving differences that arise under the Agreement. This duty was met in the present case by the consultations held in Paris and Washington on April 24, June 1-2 and 28-29, and July 10-11, as well as by the written communications which had been exchanged from March 22 on.

The United States does not accept the French argument that the United States should have agreed in the course of these consultations to "negotiate" a new bargain other than the one already struck in 1946. The duty is to consult, not to renegotiate a *quid pro quo* for a right which already exists. Satisfaction in the present case could consist only of the full vindication of this right. France at no point suggests that further consultations would have resulted in this outcome, and thus U.S. forbearance was not required. Indeed, the resolution in the *Compromis* was accepted by the United States despite its insufficiencies, since the passage of time had made it impossible to re-

coup the already lost 1978 summer revenues. The acceptance of this interim solution by the United States, despite the inability of Pan Am to take economic advantage of the compromise, clearly demonstrates the good faith negotiations on the part of the U.S. Government.

Finally, France argues that the United States was precluded from taking retaliatory action because the arbitration process could afford adequate satisfaction to the United States. We are confident that the Tribunal will indeed rule in our favor on the first question submitted [third country change of gauge]. However, we do not accept the proposition that an injured party must defer all action until after the outcome of an arbitration. This proposition finds no support in the theory of nonforcible reprisals, for the reasons stated *supra* at 29-30, and is likewise unsupported by treaty law doctrine.

The most that can be said for the French position is that attempts to evolve international law in this direction have been made but have failed. In 1935 the Harvard Draft Convention on Law of Treaties proposed the following article 27:

“(a) If a State fails to carry out in good faith its obligations under a treaty, any other party to the treaty, acting within a reasonable time after the failure, may seek from a competent international tribunal or authority a declaration to the effect that the treaty has ceased to be binding upon it in the sense of calling for further performance with respect to such State.

“(b) Pending agreement by the parties upon and decision by a competent international tribunal or authority, the party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty *vis-à-vis* the State charged with failure.

“(c) A provisional suspension of performance by the party seeking such a declaration will not be justified definitively until a decision to this effect has been rendered by the competent international tribu-

nal or authority.”

Subsection (b), of course, supports the U.S. point of view that treaty rights may be temporarily suspended pending arbitration, for the reasons stated in the commentary by the drafters of the article:

“It is apparent, therefore, that it might frequently be within the power of the state alleged to have committed the breach to prevent or delay submission of the matter to an international tribunal or authority simply by neglecting or refusing to agree upon any such tribunal or authority, or by denying that tribunals or authorities which it already had agreed upon for certain purposes possess jurisdiction to make the sort of declaration referred to in this article. Furthermore, even after the states concerned have agreed upon a competent international tribunal or authority, a considerable time will necessarily elapse before it can render its decision. In consideration of these facts, and in view of the further fact that continued performance of its obligations under a treaty *vis-à-vis* a state charged with breach thereof might prove costly or even involve irreparable damage to the state seeking the declaration, if the decision is ultimately in its favor, it seems only reasonable to permit the latter state to suspend the performance of its own obligations under the treaty *vis-à-vis* the state charged with failure pending agreement upon a competent international tribunal or authority, and pending final decision by such authority.”

As a later commentator has noted:

“Although there are several instances of the exercise of the right of unilateral denunciation, in no instance did a denouncing party seek or receive a prior authorization or approval from an international judicial authority.”

Nor did the Vienna Convention on the Law of Treaties result in the development of a norm of abstention pending dispute settlement. Article 65 of the Convention establishes procedures for termination or suspension of a

treaty in the event of breach, but in no way supports the French position here. Rather, as the United States commented on the draft International Law Commission article at the time,

“there is nothing in [this article] which prohibits the claimant party from terminating or withdrawing from the treaty while one or more of the procedures under Article 33 of the Charter are carried out.”

The International Law Commission refrained from including a limitation on this point, because it concluded that the article as drafted “represented the highest measure of common ground that could be found among governments as well as in the Commission on this question.”

Thus the French position must be rejected as unsupported by any authority and not in accordance with the practice of states.²⁰⁷

This United States formal position during relevant litigation seems to implicitly concede the right to notice or “demand” and explicitly concedes a “duty under international law . . . to engage in good faith consultations with a view toward resolving differences that arise under the Agreement.” It clarifies that this latter duty, however, is a duty “to consult, not to renegotiate a *quid pro quo* for a right which already exists.” And it clearly rejects the strong linkage position in Article 27 of the “Harvard Research” draft which it describes as having “failed,” and denies either that customary law or the Vienna Convention resulted “in the development of a norm of abstention pending dispute settlement.” On this latter point it says: “customary international law has not evolved to the point of requiring abstention pending exhaustion of all other means of recourse, and indeed the practice of states is entirely to the contrary.”

It should also be noted that footnotes forty and forty-six of the United States Reply in the *Air Services Agreement* case said in relevant part:

[40] Indeed, had the arbitrators [in the *Naulilaa* arbitration] sought earlier authority, it must be doubted

207. Reply of the United States of America to the Memorial Submitted by the Government of the French Republic, reprinted in NASH, *supra* note 25, at 768, 772-75.

whether they could have found much support for their insistence that reprisals are permitted only after the effort has been made, and has failed, to obtain redress by other means. For the practice of states permitted considerable uncertainty on this point and that uncertainty was reflected in the standard treaties [*sic*: treatises] of an earlier period.

[46] An amendment proposed by the United States [at the Vienna Conference] would have required a prior determination under compulsory procedures for other grounds for termination of a treaty (*e.g.*, *jus cogens*), but specifically provided for suspension of corresponding treaty provisions in the case of a material breach, pending a judicial determination. . . . This proposal was ultimately withdrawn by the United States in an effort to consolidate support behind another compulsory dispute settlement proposal.²⁰⁸

The distinguished Arbitral Tribunal in the *Air Services Agreement* case agreed with the United States that under present law there is no obligation to defer countermeasures pending a satisfactory outcome of negotiations and that this principle was not changed by a specific treaty clause calling for regular consultation "with a view to assuring the observance of the principles and the implementation of the provisions" of the agreement. The Tribunal said in full on this point:

84. Can it be said that the resort to such countermeasures, which are contrary to international law but justified by a violation of international law allegedly committed by the State against which they are directed, is restricted if it is found that the Parties previously accepted a duty to negotiate or an obligation to have their dispute settled through a procedure of arbitration or of judicial settlement?

85. It is tempting to assert that when Parties enter into negotiations, they are under a general duty not to aggravate the dispute, this general duty being a kind of emanation of the principle of good faith.

208. *Id.* at 777 (citations omitted).

86. Though it is far from rejecting such an assertion, the Tribunal is of the view that, when attempting to define more precisely such a principle, several essential considerations must be examined.

87. First, the duty to negotiate may, in present times, take several forms and thus have a greater or lesser significance. There is the very general obligation to negotiate which is set forth by Article 33 of the Charter of the United Nations and the content of which can be stated in some quite basic terms. But there are other, more precise obligations.

88. The Tribunal recalls the terms of Article VIII of the 1946 Agreement, which reads as follows:

In a spirit of close collaboration, the aeronautical authorities of the two Contracting Parties will consult regularly with a view to assuring the observance of the principles and the implementation of the provisions outlined in the present Agreement and its Annex.

This Article provides for an obligation of continuing consultation between the Parties. In the context of this general duty, the Agreement establishes a clear mandate to the Parties to make good faith efforts to negotiate on issues of potential controversy. Several other provisions of the Agreement and the Annex state requirements to consult in specific circumstances, when the possibility of a dispute might be particularly acute. Finally, Article X imposes on the Parties a special consultation requirement when, in spite of previous efforts, a dispute has arisen.

89. But the present problem is whether, on the basis of the above-mentioned texts, counter-measures are prohibited. The Tribunal does not consider that either general international law or the provisions of the Agreement allow it to go that far.

90. Indeed, it is necessary carefully to assess the meaning of counter-measures in the framework of proportionality. Their aim is to restore equality between the Parties and to encourage them to continue negotiations with mutual

desire to reach an acceptable solution. In the present case, the United States of America holds that a change of gauge is permissible in third countries; that conviction defined its position before the French refusal came into play; the United States counter-measures restore in a negative way the symmetry of the initial positions.

91. It goes without saying that recourse to counter-measures involves the great risk of giving rise, in turn, to a further reaction, thereby causing an escalation which will lead to a worsening of the conflict. Counter-measures therefore should be a wager on the wisdom, not on the weakness of the other Party. They should be used with a spirit of great moderation and be accompanied by a genuine effort at resolving the dispute. But the Arbitral Tribunal does not believe that it is possible, in the present state of international relations, to lay down a rule prohibiting the use of counter-measures during negotiations, especially where such counter-measures are accompanied by an offer for a procedure affording the possibility of accelerating the solution of the dispute.

92. That last consideration is particularly relevant in disputes concerning air service operations: the network of air services is in fact an extremely sensitive system, disturbances of which can have wide and unforeseeable consequences.

93. With regard to the machinery of negotiations, the actions by the United States Government do not appear, therefore, to run counter to the international obligations of that Government.

94. However, the lawfulness of such counter-measures has to be considered still from another viewpoint. It may indeed be asked whether they are valid in general, in the case of a dispute concerning a point of law, where there is arbitral or judicial machinery which can settle the dispute. Many jurists have felt that while arbitral or judicial proceedings were in progress, recourse to counter-measures, even if limited by the proportionality rule, was prohibited. Such an assertion deserves sympathy but requires further elaboration. If the proceedings form part

of an institutional framework ensuring some degree of enforcement of obligations, the justification of counter-measures will undoubtedly disappear, but owing to the existence of that framework rather than solely on account of the existence of arbitral or judicial proceedings as such.

95. Besides, the situation during the period in which a case is not yet before a tribunal is not the same as the situation during the period in which that case is *sub judice*. So long as a dispute has not been brought before the tribunal, in particular because an agreement between the Parties is needed to set the procedure in motion, the period of negotiation is not over and the rules mentioned above remain applicable. This may be a regrettable solution, as the Parties in principle did agree to resort to arbitration or judicial settlement, but it must be conceded that under present-day international law States have not renounced their right to take counter-measures in such situations. In fact, however, this solution may be preferable as it facilitates States' acceptance of arbitration or judicial settlement procedures.

96. The situation changes once the tribunal is in a position to act. To the extent that the tribunal has the necessary means to achieve the objectives justifying the counter-measures, it must be admitted that the right of the Parties to initiate such measures disappears. In other words, the power of a tribunal to decide on interim measures of protection, regardless of whether this power is expressly mentioned or implied in its statute (at least as the power to formulate recommendations to this effect), leads to the disappearance of the power to initiate counter-measures and may lead to an elimination of existing counter-measures to the extent that the tribunal so provides as an interim measure of protection. As the object and scope of the power of the tribunal to decide on interim measures of protection may be defined quite narrowly, however, the power of the Parties to initiate or maintain counter-measures, too, may not disappear completely.

97. In a case under the terms of a provision like Article X of the Air Services Agreement of 1946, as amended by the Exchange of Notes on 19 March 1951, the arbitration may be set in motion unilaterally. Although the arbitration need not be binding, the Parties are obliged to "use their best efforts under the powers available to them to put into effect the opinion expressed" by the Tribunal. In the present case, the Parties concluded a *Compromis* that provides for a binding decision on Question (A) and expressly authorises the Tribunal to decide on interim measures.

98. As far as the action undertaken by the United States Government in the present case is concerned, the situation is quite simple. Even if arbitration under Article X of the Agreement is set in motion unilaterally, implementation may take time, and during this period countermeasures are not excluded; a State resorting to such measures, however, must do everything in its power to expedite the arbitration. This is exactly what the Government of the United States has done.

99. The Tribunal's Reply to Question (B) consists of the above observations as a whole. These observations lead to the conclusion that, under the circumstances in question, the Government of the United States had the right to undertake the action that it undertook under Part 213 of the Economic Regulations of the C.A.B.²⁰⁹

In her important 1980 law review article discussing this arbitration, Professor Damrosch thoroughly reviews the arguments for and against permitting non-forcible countermeasures pending peaceful resolution of the dispute and strongly concludes:

Even where good faith arguments can be made both for and against the existence of a prior breach, the better rule seems to be to permit appropriate, *i.e.*, measured and proportional, self-help measures *pendente lite*, as was done in the U.S.-France case. . . .

209. Case Concerning the Air Services Agreement of 27 March 1946 (U.S. v. Fr.), 54 INT'L L. REPORTS 304, 338-41. It might be noted that the dissenting opinion of Reuter pointed out that the commitment "to close collaboration and regular consultations" under the agreement "is particularly true for a matter on which they [the parties] failed to agree when the Agreement was concluded." *Id.* at 347.

... As a general matter ... the existence of a dispute settlement clause in a treaty should not require abstention from retaliation during the period before the victim party can obtain satisfaction from a tribunal.²¹⁰

Because of her able and thorough canvassing of the arguments on both sides, it may be useful to review the full discussion of Professor Damrosch in arriving at her conclusion. She writes in an important part of her discussion of this issue:

The critical legal issue raised by France on the relationship between retaliation and arbitration is whether a pre-existing commitment to arbitrate—in this case the U.S. commitment rather than the French commitment—requires a party to refrain from self-help measures pending the outcome of the proceeding. France contended that resort to retaliatory measures while negotiations were under way on the terms of the *compromis* of arbitration was not consistent with the assumption that both parties would fulfill the arbitration commitment in good faith: the U.S. conduct both anticipated the outcome of the arbitral award and presupposed that arbitration would be ineffective in redressing the U.S. grievance. France further contended that invocation of part 213 was an illegitimate application of pressure that caused France to make concessions it would not otherwise have made on the terms of the *compromis*. The French position has particular appeal when the alleged treaty violator believes in good faith that it has committed no breach. In these circumstances a self-help retaliatory remedy can seem both presumptuous and precipitous.

The French position on abstention from retaliation pending arbitration has respectable scholarly authority to support it. In 1934 the Institute of International Law took the position that acts of reprisal are illegal where there is a previously agreed provision between the parties for peaceful settlement of disputes. More recently, Roberto Ago asserted this proposition (citing the Insti-

210. Damrosch, *supra* note 7, at 806, 807. She also writes in her conclusion "since the interplay and even escalation of responses before a dispute reaches a tribunal can serve important purposes, that dynamic process should not be stifled by a blanket rule of abstention from self-help measures pending arbitration." *Id.* at 807.

tute's resolution as authority) in a report to the International Law Commission on state responsibility, and the Commission itself appears to have accepted the concept, without analyzing its implications. The concept also draws support from its consistency with the concept that pending arbitration or adjudication states should take no steps to aggravate or extend the dispute; this concept has been developed in International Court rulings on applications for interim protective orders, and some commentators have argued that it constitutes a legal obligation of all states that have made commitments to resolve disputes through third-party methods.

The United States, on the other hand, had argued to the tribunal that the concept of abstention pending arbitration finds no support in state practice and thus has not found its way into the corpus of customary international law, that states must be able to take the steps necessary to preserve their rights and restore the balance of equities before a tribunal is in a position to act, and that (as discussed above) measures such as those taken by the United States can help ensure that the other party's commitment to arbitration is enforced and implemented in a practical, meaningful way.

It is worth considering how this problem will be handled under the Vienna Convention on the Law of Treaties (for the states that are parties and for treaties concluded after the effective date of the convention, since the article in question is apparently not a codification of customary international law). Article 65 of the convention establishes procedures for the termination or suspension of a treaty in the event of breach. A party alleging grounds for termination or suspension, including breach, must notify these grounds to the other party and indicate the responsive measures it proposes to take. Except in cases of special urgency, it may take these measures only after 3 months have elapsed without objection to the proposed response. In the event of objection, the parties are to seek a solution through the means indicated in Article 33 of the United Nations Charter, which, of course, can include arbitration or adjudication.

Apparently, the drafters of the convention intended to limit the sanction of retaliatory suspension of treaty rights within the 3-month period to very urgent cases, but they did not indicate any intent to preclude such measures after this period but before the completion of arbitral or adjudicatory procedures. As the United States commented on the International Law Commission's draft that became Article 65, "there is nothing in [this article] which prohibits the claimant party from terminating or withdrawing from the treaty while one or more of the procedures under Article 33 of the Charter are carried out."

Presumably, states becoming parties to the Vienna Convention and concluding treaties after its entry into force can reserve the right in future treaties to terminate or suspend without waiting 3 months if they believe that course will better suit their purposes. But for those states, like the United States, that are not yet parties, the question is whether customary international law does or should constrain their flexibility to act when they have entered into a prior agreement to submit disputes to third-party resolution. The authorities noted above would say that there is such a constraint. But the inherent flaw in this position is obvious from a recent and vivid example.

On November 4, 1979, in flagrant violation of its obligations under customary international law and four international agreements, each of which has a binding dispute settlement clause, the Government of Iran acquiesced in the takeover of the United States Embassy in Tehran and the seizure of 63 hostages by a group of militant students. On November 14, 1979, the United States ordered the blocking of all assets of the Iranian Government in the United States or held by persons subject to the jurisdiction of the United States. The blocking order, though it had additional motivations and legal justifications, can be characterized under international law as a legitimate response by the United States to Iran's manifest violations of its treaty obligations.

Can it plausibly be argued—as the literal wording of the Institute of International Law’s 1934 resolution and other authorities noted above seem to contemplate—that the United States should have refrained from any retaliatory response until after dispute settlement proceedings were exhausted? It is true that on November 29, 1979, the United States filed an application with the International Court of Justice for an adjudication of Iran’s international responsibility; and on December 15, 1979, the Court ordered provisional measures of protection at the request of the United States—an order Iran flouted. But even if the Court had had the power to enforce its interim order, the entry of the order came 17 days after the U.S. request for interim relief and 41 days after the commencement of the crisis. Surely the United States did not have to initiate an adjudicatory proceeding and wait for an order to be entered and flouted before it could implement responsive and proportional countermeasures. The Iran example also makes clear that a dispute settlement clause in a treaty that codifies obligations under customary international law should not be regarded as depriving an aggrieved party of its customary international law remedy, retaliatory sanctions.

It is true that the U.S.-Iranian example would probably be considered a “case of special urgency,” both under the Vienna Convention and under any customary international law rule that might otherwise restrict the victim state’s freedom of movement. But other illustrations can also prove the point. Suppose the initial breach does not threaten life or otherwise fall within “extreme urgency,” but suppose further that there is no plausible legal justification for the breaching party’s conduct. Should the victim state be disadvantaged because it has previously signed a dispute settlement agreement? Must it embark on lengthy and expensive litigation pursuant to that agreement to obtain authorization to suspend its performance in response to the breach? Surely not.

Even where good faith arguments can be made both for and against the existence of a prior breach, the better rule seems to be to permit appropriate, *i.e.*, measured and proportional, self-help measures *pendente lite*, as was

done in the U.S.-France case. The dynamics of that case disprove rather than prove the validity of the arguments for a rule constraining the victim state's action. Though the United States did not argue, and the tribunal did not imply, that France might otherwise have failed to live up to its obligation to arbitrate in good faith, the tribunal was persuaded that the U.S. action had a facilitating effect in seeing that the dispute was resolved by arbitration.

The right to retaliate pending arbitration, though important, should not be unqualified. The tribunal in the U.S.-France dispute, while approving the U.S. action during the period before the tribunal came into existence, stated that the "situation changes once the tribunal is in a position to act. To the extent that the tribunal has the necessary means to achieve the objectives justifying the counter-measures, it must be admitted that the right of the Parties to initiate such measures disappears." Furthermore, a qualification implicit in any justification of retaliation is that a responsive countermeasure must be proportional and must cease either when its purpose is achieved or when its continuation would be inconsistent with actions of a functioning tribunal. Another situation at least arguably calling for abstention from retaliatory acts exists when a multilateral treaty establishes an effective framework for authorizing and legitimizing retaliation as a sanction for breach. Under Article XXIII of the General Agreement on Tariffs and Trade, for example, if one party considers that another party has not carried out its obligations, it may seek authorization from the contracting parties (acting collectively) to suspend the application of equivalent obligations. As a general matter, however, the existence of a dispute settlement clause in a treaty should not require abstention from retaliation during the period before the victim party can obtain satisfaction from a tribunal.²¹¹

The draft *Revised Restatement*, *United States-France Air Services Agreement* arbitral tribunal, and Damrosch positions seem the correct interpretation of the current customary law of procedural requirements concerning permitted response to breach. There is,

211. *Id.* at 802-07.

nevertheless, some possible suggestion in the recent writings of well respected publicists to the contrary.²¹²

With respect to responses rooted in treaty law, it would seem that the United States would, prior to accession to the Vienna Convention, be required to implement any such responses with notice to the other treaty party, provision of a reasonable time to respond, and willingness to seek to resolve the matter through some means of peaceful resolution of disputes, which could be negotiation. A strict application of the procedural provisions of the Vienna Convention that may be presumptive of customary international law, would require that the notice be in writing and indicate the measures proposed to be taken with respect to the treaty and the reasons therefor, that the reasonable time given for objection be not less than three months, except in cases of special urgency, and that the notice be signed by the Head of State, Head of Government, Minister for Foreign Affairs or other representative of the state acting with full powers. It would be preferable also, although may not be required by international law, that a reasonable effort have been made to negotiate or otherwise resolve the dispute prior to implementing the responsive action. The United States, however, would not be bound to submit the dispute to compulsory third party resolution of disputes unless otherwise committed by agreement with the other party. And it would not be required to wait for agreement on or final decision in any third party dispute settlement before implementing the responsive measures. Most simply, in most settings, the United States today would seem able to take responsive action after notifying the other party in writing from the Secretary of State or a representative with full powers that because of a prior breach by the other party it intends to take particular responsive measures no sooner than three months from receipt of the notice if either the other party does not object or, if it does, that a negotiated solution is not found, and that it is prepared to begin (or continue) discussions immediately on resolving the prior breach and any related dispute. Although not necessary, its position would be strengthened by also offering to submit the dispute to an agreed upon procedure for third party resolution, if a procedure can be found acceptable to

212. See, e.g., ROSENNE, *supra* note 7, at 35 ("Article 60 of the Vienna Convention cannot be dissociated from the procedure set forth in articles 65-68."); Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice*, 68 AM. J. INT'L L. 51 (1974).

both parties. With respect to responses rooted in non-forcible reprisal law, it can be argued that the only procedural requirement is an unsatisfied demand to remedy the prior breach and, if the dispute is one “the continuance of which is likely to endanger the maintenance of international peace and security” then, under Article 33 of the United Nations Charter the responding party should first “seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.” It would seem best in every case, however, regardless of the basis for the action, to proceed to responsive implementation at least only after reasonable notice of the proposed action as a response and reasonable effort at negotiated solution leaving the matter of the prior breach not satisfactorily resolved.

In connection with dispute settlement requirements under the Vienna Convention on the Law of Treaties in treaty settings involving successor states to the former Soviet Union, it should be noted that the Soviet accession of April 29, 1986, to the Vienna Convention, previously set out in text at note 48 *supra*, contained the following reservation:

The Union of Soviet Socialist Republics does not consider itself bound by the provisions of article 66 of the Vienna Convention on the Law of Treaties and declares that, in order for any dispute among the Contracting Parties concerning the application or the interpretation of articles 53 or 64 to be submitted to the International Court of Justice for a decision, or for any dispute concerning the application or interpretation of any other articles in Part V of the Convention to be submitted for consideration by the Conciliation Commission, the consent of all the parties to the dispute is required in each separate case, and that the conciliators constituting the Conciliation Commission may only be persons appointed by the parties to the dispute by common consent.

E. *Authority Under National Law to Take Action Terminating or Suspending a Treaty in Whole or in Part in Response to Prior Breach of Agreement*

There is substantial authority for the proposition that the President has authority, acting alone, to suspend or terminate a treaty in whole or in part in response to prior breach of agreement. In-

deed, it seems virtually certain constitutionally that, at least in the absence of congressional action, the President has authority, acting alone, to suspend a treaty in whole or in part for prior material breach of agreement.

This presidential authority seems firmly rooted as a theoretical matter, not only in the President's Article II, section 1 general "executive Power" and other express and implied presidential foreign affairs and national security powers, but also of particular importance, in the specific Article II, section 3 grant of authority to the President to "take Care that the Laws be faithfully executed."

The general clarity of the law in this area is reflected in the new black letter summary in section 339 of the *Restatement (Third) of the Foreign Relations Law of the United States* which provides:

§339. Authority to Suspend or Terminate International Agreement: Law of the United States

Under the law of the United States, the President has the power

(a) to suspend or terminate an agreement in accordance with its terms;

(b) to make the determination that would justify the United States in terminating or suspending an agreement because of its violation by another party or because of supervening events, and to proceed to terminate or suspend the agreement on behalf of the United States; or

(c) to elect in a particular case not to suspend or terminate an agreement.²¹³

F. *Summary Overview of the Law*

It is a well-established principle of international law that a party to a bilateral treaty may respond to a prior material breach of agreement by a suspension of some or all of its own duties under the treaty. This principle, rooted both in the law of non-forcible reprisal and the law of treaties, serves important dual policies of

213. RESTATEMENT (THIRD), *supra* note 7, § 339. The Restatement (Third) roots its conclusion in "the constitutional authority of the President to conduct the foreign relations of the United States." *Id.* cmt. a. For a discussion of any congressional authority in this area, see section V(B)(6)(b) of this study.

fairness in not holding one party to strict accountability when the other party is in breach, and sanction in offering one of the few real-world mechanisms for enforcing compliance with treaty obligations. The conditions under which this principle may be invoked are as follows:²¹⁴

Requirements Concerning the Prior Breach of Agreement

The law of treaties, as reflected in Article 60 of the Vienna Convention, permits response at least to a significant violation “of a provision essential to the accomplishment of the object or purpose of the treaty.” The policy rationale underlying this requirement of “materiality” in the current law of treaties seems to be to prevent a minor or trivial violation from being used as a pretext to suspend or terminate a treaty. At the same time it seems generally recognized that it would be grossly unfair to an aggrieved treaty party to deny it the right to suspension either in whole or in part if a significant violation occurs “of a provision essential to the accomplishment of the object of purpose of the treaty.” This latter standard seems intended to reflect an objective test as to whether a reservation would have been permitted to the provision in question. It should be importantly noted that under the Vienna Convention definition of “material breach” the emphasis is on the nature of the provision violated in the prior breach rather than the nature of the violation of that provision.

The law of non-forcible reprisal, which seems to be available as an alternate ground for permitted response to prior breach of agreement, seems to have no requirement of “seriousness” or “materiality” of the prior triggering breach and it incorporates the underlying policies at stake in the requirement that the responding suspension not be disproportionate to the triggering breach.

It should also be noted that the arbitral decision in the *United States-France Air Services Agreement* case indicated that it may be necessary in assessing “seriousness” or “materiality” of a breach to take into account not only the importance of the breach for the particular agreement but also “the importance of the questions of principle arising from the alleged breach” which, the tribunal made clear, could include impact on a broader framework of related agreements.

214. This summary is for the purpose of providing an overview and is for convenience only. The reader is urged to review the discussion of each point as set out in this part to capture the full complexity of the law.

Substantive Requirements Concerning the Permitted Response

Permissibility of Only Partial Suspension

Under both treaty law and non-forcible reprisal law as bases for responsive suspension, an aggrieved party may elect to respond to a prior breach of an agreement by partial as opposed to total suspension of treaty obligations. The Vienna Convention contains no specific limitation on this option and the Conference specifically failed to adopt a proposal whose thrust was to link this option to a requirement of proportional suspension.

Permissibility of Suspending a Provision Other than that Violated

The current law of partial suspension in response to prior breach, whether rooted in treaty law or the law of non-forcible reprisal, does not limit such response to the provision initially breached. Rather, the responding party may suspend the provisions breached or other provisions of the breached treaty.

Proportionality of Response

With respect to treaty law as a basis for response to breach, it is not clear that there is any requirement of “proportionality” in the responsive termination or suspension apart from that embodied in the “materiality” requirement for a triggering breach reflected in Article 60 of the Vienna Convention. Indeed, a United States proposal at Vienna to embody an element of proportionality of response in Article 60 was not adopted by the Conference.

With respect to non-forcible reprisal law as a basis, it is probable that there is at least some requirement of “equivalence” or “proportionality” in the response. It would seem unlikely that a tribunal would permit termination or suspension of an important treaty or treaty obligation as a reprisal in response to a mere technical, trivial, or even minor violation, at least of a non-material treaty provision. In the general law of non-forcible reprisal, however, states are given substantial latitude in response to a prior violation of international law and are not limited simply to tit for tat. Moreover, as the *Air Services* opinion illustrates, tribunals are likely to assess proportionality in a broad context taking account of any issue of principle involved or any effect of non-response on a broader network of treaty relations. And as Professor Lori Fisler Damrosch suggests: “[a]n overly niggardly approach to propor-

tionality could conceivably detract from the importance of the retaliatory sanction as a deterrent to potential treaty violators.”

The Related Issues of Waiver, Acquiescence, and Estoppel

There are general requirements rooted in good faith and fair dealing that a responding party should not act inconsistently with a subsequent express agreement concerning a treaty made after becoming aware of all the facts of the prior breach, or inconsistently with a pattern of conduct tacitly waiving or acquiescing in the breach or unfairly misleading another party relying on such actions. A failure to respond to the known breach within a reasonable time, which in context may be even a decade or more, may amount to such conduct. Clearly, however, where a party promptly has called a breach to the attention of the other party and has sought unsuccessfully to resolve it through continuing negotiations it would not seem reasonable to invoke arguments concerning waiver, acquiescence or estoppel against responsive action. The International Law Commission Commentary to Article 45 of the Vienna Convention seems sensible when it says: “[t]he Commission considered that the application of the rule in any given case would necessarily turn upon the facts and that the governing consideration would be that of good faith. . . .”

Given Article 45 of the Vienna Convention with its provision that: “[a] State may no longer invoke a ground for . . . terminating . . . or suspending . . . a treaty . . . if, after becoming aware of the facts . . . it shall have expressly agreed that the treaty . . . continues in operation . . .”, the United States should ensure that in negotiations agreeing that previous treaties are “valid” or “remain in force” or “continue in operation” that it does not inadvertently waive its rights concerning prior breaches of those treaties.

Conditionality: The Issue of Linkage to Continuing Violation

The law is not clear as to whether a permitted response to a prior breach of agreement, whether rooted in treaty or non-forcible reprisal law, must cease when the other treaty party rectifies the breach and resumes full compliance. There is, for example, no provision of the Vienna Convention squarely on point and a substantial case can be made that there is no such requirement in treaty law in settings of full or partial termination. Nevertheless, there is authority suggesting that under either treaty or reprisal law bases the right of permitted response is conditional on con-

tinuing treaty violation by the other party. This conclusion is implicit in some United States diplomatic practice in this area and seems generally accepted in the law of non-forcible reprisal as a basis for response. Certainly, however, any such requirement should be reasonably interpreted in light of its underlying purpose to facilitate respect for treaty obligations and international law. The right of response must be adequate to deter intentional breach.

Issues Concerning Avoidance of Acts Tending to Obstruct Resumption of Treaty Operation

Article 72(2) of the Vienna Convention requires that “[d]uring [a] period of . . . suspension [in accordance with the present Convention] the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.” Judge Elias, who participated importantly in the work of the Vienna Conference, describes the operation of this provision as: “[T]he parties are enjoined, during the period of suspension of the treaty, to refrain from any act or omission which is likely to make the operation of the treaty impossible after the occasion for the suspension has ceased. . . .”

It is unclear whether this requirement governing partial suspension settings would also apply to partial termination settings under the Vienna Convention. It is also unclear whether this requirement would be applied to a response rooted in non-forcible reprisal law.

While it might be prudent to assume applicability of this or some related general principle in all partial suspension or termination settings, again the requirement should be read reasonably in context in light of the purposes of the overall law of permitted response.

Possible Procedural Requirements Concerning the Permitted Response

Use of Any Provisions in the Treaty Applicable in the Event of Breach

States may, either in the disputed treaty or elsewhere, have agreed to specific procedures concerning the law of permitted response to breach or specific procedures for settlement of disputes including disputes concerning breach of treaty. If so, such proce-

dures would be binding on the parties. In keeping with the right of response to prior breach as an important customary international law principle of treaty law, however, any modification of this right by agreement of the parties would seem to require a clear intent to do so. Certainly, as the International Court of Justice in the *Namibia* case said, the mere silence of a treaty about the right of response would in no way waive that right. Similarly, the presence of a general denunciation or withdrawal clause in a treaty and a possible time period for such denunciation or withdrawal in such a clause does not effect the general right of response for prior breach.

Notification and Dispute Settlement

Article 66 of the Vienna Convention establishes a mechanism for compulsory but non-binding conciliation in disputes concerning response to prior breach under the Convention. The United States strongly supported compulsory dispute settlement procedures at the Vienna Conference while the former Soviet Union strongly opposed such procedures. As a non-party to the Vienna Convention the United States does not regard itself as bound, until any future accession to that treaty, by the Treaty's procedural mechanisms for settlement of disputes, which it believes do not reflect customary international law.

At present, the United States would seem bound under general customary international law generally to give notice to the other treaty party of any actions it takes in response to breach and generally to accept some peaceful dispute resolution procedure, which could include negotiation as such a procedure, as accepted by the parties. Probably also, it should in most settings seek to negotiate a satisfactory resolution of the breach before implementing responsive measures, although it is not at all clear that this is required by customary international law. It would not, however, be required to refrain from implementing responsive actions pending resolution of the dispute nor to accept any particular modality of dispute resolution, nor to follow any specific period of delay.

With respect to responses rooted in treaty law, it would seem that the United States would, prior to accession to the Vienna Convention, be required to implement any such responses with notice to the other treaty party, provision of a reasonable time to respond, and willingness to seek to resolve the matter through some means of peaceful resolution of disputes, which could be ne-

gotiation. A strict application of the procedural provisions of the Vienna Convention that may, at least in part, be presumptive of customary international law, would require that the notice be in writing and indicate the measures proposed to be taken with respect to the treaty and the reasons therefor, that the reasonable time given for objection be not less than three months, except in cases of special urgency, and that the notice be signed by the Head of State, Head of Government, Minister for Foreign Affairs or other representative of the state acting with full powers. It would be preferable also, although it may not be required by international law, that a reasonable effort have been made to negotiate or otherwise resolve the dispute prior to implementing the responsive action. The United States, however, would not be bound to submit the dispute to compulsory third-party resolution of disputes unless otherwise committed by agreement with the other party. And it would not be required to wait for agreement on or final decision in any third-party dispute settlement before implementing the responsive measures.

Most simply, in most settings, the United States today would seem able to take responsive action after notifying the other party in writing from the Secretary of State or a representative with full powers that, because of a prior breach by the other party, it intends to take particular responsive measures (and in non-urgent cases no sooner than three months from receipt of the notice if either the other party does not object or, if it does, that a negotiated solution is not found) and that it is prepared to begin (or continue) discussions immediately on resolving the prior breach and any related dispute. Although not necessary, its position would be strengthened by also offering to submit the dispute to an agreed-upon procedure for third-party resolution acceptable to both parties.

With respect to responses rooted in non-forcible reprisal law, it can be argued that the only procedural requirement is an unsatisfied demand to remedy the prior breach and, if the dispute is one "the continuance of which is likely to endanger the maintenance of international peace and security" then, under Article 33 of the United Nations Charter, the responding party should first "seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." It would seem best, however, regardless of the basis for the action, to proceed to responsive implementation at least only after reasonable

notice of the proposed action as a response and reasonable effort at negotiated solution leaving the matter of the prior breach not satisfactorily resolved.

Authority Under National Law to Take Action Terminating or Suspending a Treaty in Whole or in Part in Response to Prior Breach of Agreement

It seems clear constitutionally that, at least in the absence of congressional action, the President has authority, acting alone, to suspend a treaty in whole or in part for prior material breach of agreement. Both the *Restatement (Second)* and, more recently, the *Restatement (Third) of the Foreign Relations Law of the United States* support this view. As in all settings involving important treaty obligations, however, it would seem prudent as a policy matter for the Executive branch to notify and consult with congressional leaders prior to implementing any such policy. This would seem particularly so in any setting where Congress has expressed an interest in consultations concerning responsive measures.

III. CONCLUSION

The law of permitted response to breach of agreement is a potentially powerful mechanism for promoting compliance with international law. That it has been so little used suggests how little governments have focused on legal mechanisms for promoting compliance. This absence of use, however, may also reflect an understandable reluctance toward decentralized remedies as an earlier generation of international lawyers sought a perfection that has neither materialized nor is likely to do so.²¹⁵ We should today

215. On uncertainty and ambiguity in the law of permitted response to breach see, in addition to the discussion of issues and competing approaches analyzed in this article, John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139 (1996). Setear writes:

The rules on material breach are significantly indeterminate. A material breach may consist either of an unauthorized repudiation of the treaty or of "[t]he violation of a provision essential to the accomplishment of the object or purpose of the treaty." Commentators have argued whether the tiniest violation of an essential provision is sufficient to constitute a material breach under the Vienna Convention, or whether the violation of the essential provision must instead be severe enough actually to hinder accomplishment of the object or purpose of the treaty. Debates over which terms in a treaty are essential to the accomplishment of its purpose have also occurred.

look anew at this mechanism, ensuring interpretations that make it an effective tool in the vital struggle for the rule of law.

The struggle for compliance, with law, is, of course, a central struggle going beyond any one mechanism. Above all, we must focus on the need for enhanced compliance as *the* central need of the international legal system. We must extend the effort at effective compliance across both traditional and creative new approaches.²¹⁶ And we must be realistic in fashioning mechanisms that work. For as Thomas Jefferson once reminded us, “[W]hile the laws shall be obeyed all will be safe.”²¹⁷

Id. at 167 (footnotes omitted). For a discussion of “efficient breach” of international agreements, see R. Morrison, *Efficient Breach of International Agreements*, 23 *DENV. J. INT’L L. & POL’Y* 183 (1994).

216. In relation to newer approaches to enhancing compliance with international law generally, there is a newer focus in international law and international relations theory that I have sought to develop in my own writings, concerning the importance of incentives and incentive structures for regime elites. Domestically, governmental structures may be the most important factor affecting such incentives, while, from the international system, the most important factor may be deterrence, as broadly conceived in all its positive and negative permutations. Note that under this approach, it is deterrence focused on decision elites, not deterrence against a population as a whole, which is the key element. Thus, this approach suggests heightened focus of deterrence directly on regime elites in those non-democratic systems failing to provide adequate internal checks against extreme abuse, either of aggressive war against other nations or democide against their own population. See Moore *supra* note 1, at 857-77. The creation of the new International Criminal Court reflects increasing awareness of the need to apply deterrence directly to regime elites.

217. Thomas Jefferson: Original draft of first Inaugural Address, March 4, 1801, *reprinted in* 8 *THE WRITINGS OF THOMAS JEFFERSON* 1 n.1 (P. Ford ed. 1897).