NATIONALLY DETERMINED CONTRIBUTIONS POST-GLOBAL STOCKTAKE: THE MAKING OF *PRESCRIBED QUALIFIED UNILATERAL ACTS* IN INTERNATIONAL LAW

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ABSTRACT

One of the core elements of the global response to climate change under the Paris Agreement are Parties' nationally determined contributions (NDCs). Their self-determined nature is often perceived as a major weakness of the treaty regime. This Article revisits the legal nature of NDCs and examines their legal position in international law. It demonstrates that NDCs can be situated within the infinite variety of unilateral acts. To capture the specific nature of NDCs, the Article introduces the category of *prescribed qualified unilateral acts*: Unilateral acts that are prescribed by the treaty and subsequently qualified through treaty-based rules and procedures. The global stocktake, a new and central oversight mechanism created by the Paris Agreement, is at the centre of this qualifying process. Within the inherently dynamic architecture of the Paris Agreement and primarily through the global stocktake, the submission cycle's procedural rules and the content of NDCs are progressively qualified. The Article argues that Parties have a distinct legal duty to directly translate the outcomes of the global stocktake into contributions that are suitable means for achieving the treaty's objectives, based on the nature of NDCs as *prescribed qualified unilateral acts* in international law. The argument has significant implications for the 'next round' of submissions after the global stocktake. At a more theoretical level, the Article shows how a treaty regime develops as autopoietic system with iterative processes that incentivise legal developments in international (environmental) law.

I. INTRODUCTION

International environmental law depends on common standards, regulatory frameworks, and negotiating processes capable of securing near universal participation and support.[1] The scientific, technological, legal and political complexities involved in the international environmental law-making have spawned creative processes and instruments, often oscillating between 'soft' law,[2] law as part of the 'corpus of international law on the environment',[3] and hybrid legal practices.[4] The Paris Agreement,[5] adopted under the United Nations Framework

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[1] Patricia Birnie, Alan Boyle and Catherine Redgwell, *Birnie, Boyle and Redgwell's International Law and the Environment* (4th ed., OUP 2021) 14, 108.

[2] See e.g. Pierre-Marie Dupuy, 'Soft Law and the International Law on the Environment' (1991) 12 Michigan Journal of International Law, 420; Alan Boyle, 'International Lawmaking in an Environmental Context' 427 Recueil des Cours 61, 62; Catherine Redgwell, Patricia Birnie and Alan Boyle, *International Law and the Environment* (OUP 2009), 27.

[3] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226, 241 para. 29.

[4] Jutta Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' Leiden Journal of International Law 15 (2002) 1.

[5] The Paris Agreement, opened for signature 16 February 2016, UNTS I-54113, entered into force 4 November 2016.

Convention on Climate Change (UNFCCC),[6] requires in its 'centrepiece'[7] provision of article 4(2) first sentence that '[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve.' With these nationally determined contributions (NDCs), States set out their national climate targets and measures and connect these with the international treaty and sub-treaty processes (such as using market-based instruments under article 6 Paris Agreement to demonstrate compliance with NDCs), to contribute to the achievement of the treaty's long-term targets, including towards limiting the increase in global temperature as required by article 2(1)(a) Paris Agreement.

All NDCs are recorded in what was until 2022 still an interim public registry and has since become the permanent registry, maintained by the UNFCCC Secretariat, publicly accessible on the website.[8] Parties to the Paris Agreement have also requested the Secretariat to produce an annual synthesis report of NDCs and relevant updates.[9] The 2022 version of this report contains the information of NDCs of 193 Parties,[10] including 142 new or updated NDCs communicated by 169 Parties, recorded in the NDC registry as of 23 September 2022. The report covers 94.9 per cent of the total global emissions in 2019.[11] The 2023 version of the report represents 195 Parties, 153 new or updated NDCs communicated by 180 Parties, with a total of 20 Parties having communicated new or updated NDCs since 23 September 2022.[12] Some States combine unconditional targets with conditional targets in their NDCs.[13] These conditional targets depend on the availability of enhanced financial resources, technology transfer and technical cooperation, capacity-building support, access to market-based mechanisms as well as absorptive capacity of forests and other ecosystems.[14]

The Secretariat uses the guidance produced by the Conference of Parties (COP) and the Conference of Parties serving as Meeting of Parties under the Paris Agreement (CMA) on the information necessary for clarity, transparency and understanding of NDCs as a framework for synthesising the relevant information.[15]

The fundamental role of Parties' self-perception to determine the substance of their NDCs defines the Agreement's bottom-up approach and sets it apart from the Kyoto Protocol's

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[6] United Nations Framework Convention on Climate Change, 1771 UNTS 177, entered into force 21 March 1994.
[7] Lavanya Rajamani, 'Innovation and Experimentation in the International Climate Change Regime' (2020) 404 Recueil des Cours 114.
[8] *Paris Agreement* (n 5) art 4(12) Paris Agreement. For the registry see <https://unfccc.int/NDCREG> last accessed 25 March 2024.
[9] Report of the Conference of the Parties on its twenty-first session, FCCC/CP/2015/10/Add.1 para. 25, and the yearly request of the meeting of Parties under the Paris Agreement (CMA), e.g., for the 2021 report FCCC/PA/CMA/2021/8/Rev.1 and for the 2022 report Decision 1/CMA.3, para. 30.
[10] The Paris Agreement is legally binding in 195 Parties out of 198 Parties to the UNFCCC, <https://unfccc.int/process/the-paris-agreement/status-of-ratification> last accessed 25 March 2024.
[11] See the yearly Synthesis Reports of the UNFCCC Secretariat, NDC Synthesis Report by the Secretariat, [hereinafter *NDC SYR (year)*], *NDC SYR 2022*, FCCC/PA/CMA/2022/4 para. 1.
[12] *NDC SYR 2023*, FCCC/PA/CMA/2023/12 para. 1.
[13] In 2022 and in 2023, NDCs of 82 per cent of Parties were unconditional, at least in part, *NDC SYR 2022* para. 67; unchanged in *NDC SYR 2023*, ibid paras. 31, 66.
[14] *NDC SYR 2022* ibid paras. 67, 69; the importance of the opportunity to use markets was already stated by Parties in the Cancun Pledges, see e.g. Norway <https://unfccc.int/topics/mitigation/workstreams/pre-2020-ambition/compilation-of-economy-wide-emission-reduction-targets-to-be-implemented-by-parties-included-in-annex-i-to-the-convention> last accessed 13 April 2024.
[15] Decision 1/CP.21 para. 27; Decision 4/CMA.1 Annex I; *NDC SYR 2023* (n 12) para. 2.

regime.[16] Yet in making these submissions, States are neither acting entirely voluntarily nor discretionary. The rules that qualify the process and content of NDC submissions can be systematised in three interconnected legal levers that constrain the scope of self-perception and each of these levers will be even more impactful if it can be demonstrated that NDCs constitute binding instruments in international law, as *prescribed qualified unilateral acts*. Evaluating the legal nature of NDCs has implications for the treaty-internal wiring of a formative rhythm that ties the NDC submission to the global stocktake as a process of collective oversight, and it has a treaty-external dimension in so far as the autopoietic system[17] generates a new category of unilateral acts in general international law.[18]

Beginning with the treaty text, the first legal lever is that with their submissions, States discharge a legal obligation ('shall') to submit and maintain an NDC, in line with article4 (2) Paris Agreement.[19] The Paris Agreement provides additional layers of mandatory and recommendatory rules designed to shape the content and the comparability of NDCs,[20] paying due regard to the need for differentiation according to the principle of common but differentiated responsibilities.[21] An example is the normative expectation expressed in article4(3) that

> '[E]ach Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect the highest possible ambition.'

In light of the wording of this and other provisions, there has been a lively discussion in the literature about the legal characteristics, if any, of some of these normative expectations.[22] The academic debate will inform the discussion in this article, not least because the different views present a number of counterarguments that deserve to be carefully addressed.[23] However, it is important to note that for the central argument in this article, the discussion surrounding the

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[16] Lavanya Rajamani, 'The 2015 Paris Agreement: Interplay between Hard, Soft and Non-Obligations' (2016) 28(2) Journal of Environmental Law 337, 354; cf. Peter Lawrence and Daryl Wong, 'Soft Law in the Paris Climate Agreement: Strength or Weakness?' 26 (2017) Review of European, Comparative and International Environmental Law 276, 281.

[17] Niklas Luhmann, 'The Autopoiesis of Social Systems' in Felix Geyer and Jan van der Zouwen (eds), *Sociocybernetic Paradoxes: Observation, Control, and Evolution of Self-Steering Systems* (Sage, London 1986) 171, 174; Anthony D'Amato, 'International Law as an Autopoietic System' in Rüdiger Wolfrum and Volker Roeben (eds), *Developments of International Law in Treaty Making* (Springer 2005) 335, see below Part V.

[18] Cf. Ellen Hey, *Regime Interaction in Ocean Governance* (Brill, 2020) 86.

[19] Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (OUP 2017) 231; Rajamani, 'The 2015 Paris Agreement: Interplay between Hard, Soft and Non-Obligations' (2016) 28(2) *Journal of Environmental Law,* 337, 354.

[20] Cf *Bodansky, Brunnée* and *Rajamani* ibid 251.

[21] Christina Voigt and Felipe Ferreira, 'Dynamic differentiation': The principles of CBDR-RC, progression and highest possible ambition in the Paris Agreement' (2016) 5 Transnational Environmental Law 285, 290; Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65 International and Comparative Law Quarterly 493, 505.

[22] Daniel Bodansky 'The Legal Character of the Paris Agreement' (2016) *25(2) Review of European, Comparative and International Environmental Law,* 142, 146, 147.
146; Daniel Bodansky, 'The Paris Climate Change Agreement: A New Hope?' (2017) 110 American Journal of International Law 288. 304; Lawrence and Wong (n 16) 278; Meinhard Doelle, 'Assessment of Strengths and Weaknesses' in Daniel Klein *et al* (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press 2017) 378; Benoit Mayer, 'Obligations of Conduct in the International Law on Climate Change Mitigation: A Defence' (2018) 27 Review of European, Comparative & International Environmental Law 130, 131.

[23] See this Part, section 2 and Part III, 1. c.

convoluted wording of the provision that mandates the preparation, submission and maintenance of the NDC is not the primary interest. The main focus rests on the obligation(s) that emerge from the *submission* as a legally relevant form of State action. It will be demonstrated that once the NDC is submitted and registered through the Secretariat, it becomes itself a *legal* instrument, binding upon the respective State. It is then a second question to establish the substantial scope of each Party's contribution.

The second legal lever builds on the close connection of the NDC submission with the global stocktake as a central process of collective oversight, established in article 14. Reading the provision at a glance, the global stocktake appears to be an ambition-enhancing and fundamentally legal mechanism, aimed at narrowing the leeway of Parties' discretion for the NDC's scope in a five-yearly rhythm, depending on the findings in respect of global progress towards the treaty's goals that each stocktake will reveal. Nevertheless, some of the subsequent decisions that Parties adopted to shape the global stocktake as a process, might suggest otherwise, by emphasising the political nature of the procedural elements and the non-policy prescriptive nature of the outcome.[24] It will be shown that determining the legal nature of NDCs has direct implications for the potential of the global stocktake to qualify future NDCs, independently from the global stocktake's (own) legal or political nature.

The legal bearing of the Paris Agreement Rulebook[25] and the article 6 Rulebook[26] on Parties' discretion constitutes the third legal lever for qualifying NDCs. The Paris Agreement Rulebook (the Paris Rulebook) was adopted as a comprehensive set of Parties' decisions at the 24th Conference of the Parties (COP24) in Katowice.[27] At that time, no consensus could be reached for the critical rules to operationalise article 6, and the so-called article 6 Rulebook was only adopted at COP26 in Glasgow.[28] The Paris Rulebook sets forth guidance and rules on modalities and procedures to enhance consistency and comparability of NDCs.[29] Importantly, it contains concrete informational requirements that Parties must fulfil, to provide the 'Information on Clarity, Transparency and Understanding' (ICTU) for their NDCs.[30] While following these rules constitutes a strong recommendation for first and updated first NDCs, the rules are mandatory for second and subsequent NDCs.[31] In addition, the later adopted article 6 Rulebook provides guidance and modalities for the market-based instruments, shedding a new

[24] Decision 19/CMA.1 FCCC/PA/CMA/2018/3 para. 13: 'Decides that the outputs of the components of the global stocktake referred to in paragraph 3 above should summarize opportunities and challenges for enhancing action […]'; para. 14: 'Emphasizes that the outputs of the global stocktake should focus on taking stock of the implementation of the Paris Agreement to assess collective progress, have no individual Party focus, and include non-policy prescriptive consideration of collective progress […].'

[25] Also called the *Katowice Climate Package*, available at <https://unfccc.int/process-and-meetings/the-paris-agreement/the-katowice-climate-package/katowice-climate-package>, last visited 13 April 2024, see also the Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on the third part of its first session, FCCC/PA/CMA/2018/3/Add.1.

[26] Decision 2/CMA.3 FCCC/PA/CMA/2021/10/Add.1 on *Guidance on cooperative approaches referred to in Art 6, paragraph 2, of the Paris Agreement*, Decision 3/CMA.3 on *Rules, modalities and procedures for the mechanism established by Art 6, paragraph 4, of the Paris Agreement* and Decision 4/CMA.3 on *Work programme under the framework for non-market approaches referred to in Art 6, paragraph 8, of the Paris Agreement.*

[27] Ibid (n 25).

[28] Art 6 Rulebook (n 26).

[29] This point will be further elaborated in Part III. 3.

[30] Decision 4/CMA.1 Annex I (n 25) *Information to facilitate clarity, transparency and understanding of nationally determined contributions, referred to in decision 1/CP.21, paragraph 28*.

[31] Whereas for first NDCs, the annex uses the language 'should', ibid.

light on the function of NDCs for the yet-to-be established global carbon market.[32] These rules provide legal constraints for Parties' self-perception and pull participants into collective action[33] for the protection of a community interest[34] that constitutes a collective goal. These subsequently adopted rules of conference and meetings of Parties can in some cases be qualified as subsequent agreement of Parties according to article 31 paragraph 3 (a) of the 1969 Vienna Convention on the Law of Treaties, they interpret and develop the treaty text.[35]

While all three legal levers – the legal validity of NDCs, the global stocktake and the two Rulebooks in conjunction with the treaty text – constitute entry points that are suitable, if not dedicated, to subsequently qualifying the content of NDCs, the core argument in this article is based on the qualification of NDCs as a new category of prescribed qualified unilateral acts.[36] If NDCs can be positioned within the infinite variety of unilateral acts in international law, significant consequences for Parties' post-global stocktake obligations arise.

In addition, there is a further implication of the argument that reaches beyond the Paris Agreement and directs our thinking about the law as it emerges from a specific legal sub-system, the international law on climate change, and its function in interaction with international law. Building a new category of unilateral acts inevitably raises questions about the reception of the law as it evolves within international climate law, construed as an autopoietic system, in general international law. It has been claimed in the literature that international environmental law is a more or less self-contained regime, that could even qualify as being self-sufficient.[37] This claim has been rebutted with the assertion that international environmental law is not a separate system of law but that it is part of international law as a whole.[38] The premise of this Article is that the climate change regime is developing as an autopoietic system that depends on its own internal qualifying processes but remains in a process of subtle communication with international environmental law and with general international law. Therefore, the argument will draw on the observation that a significant shift in the political economy of international law has occurred with the conclusion of the Paris Agreement. This shift is induced by the treaty's distinct balance between two key elements, the multilateral treaty authority and sovereign decision-making.[39] These two elements regulate the specific legal autopoiesis of the climate change regime with ramifications for general international law. The purpose of the Article is to turn the assumption that a new category of prescribed qualified unilateral acts emerges from the specific regime as it evolves in response

[32] Decision 2/CMA.3, Annex, Section IV (n 26) (Reporting) and Decision 3/CAM.3, Annex, B (Methodologies) (n 26).
[33] Early work of Jakob Werksman, 'The Conference of Parties to Environmental Treaties' in Jakob Werksman (ed.), *Greening International Institutions* (Routledge 1996) 55, 58.
[34] Samantha Besson 'Community Interests in International Law: Whose Interests Are They and How Should We Best Identify Them?' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (OUP, 2018) 36, 38.
[35] *Brunnée* (n 4) 21; Petra Minnerop, 'The Legal Effect of the Paris Rulebook on the Doctrine of Treaty Interpretation' in Peter Cameron, Xiaoyi Mu and Volker Roeben (eds), *The Global Energy Transition* (Hart 2021) 101, 109.
[36] Consistent with the general use of terms, the expressions 'unilateral act' and 'unilateral measure' are used interchangeably.
[37] James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012), 12.
[38] *Boyle* (n 2), 60.
[39] Cf. James Crawford, 'Sovereignty as a Legal Value', in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012), 117.

to climate change, into a well-founded argument that manifests the '[i]nevitability of change'[40] in general international law.

Identifying law and analysing rules that allow to distinguish between law, soft law and political statements,[41] is undoubtedly an important exercise for international lawyers.[42] While it carries the potential to strengthen the rule of law,[43] one caveat is on order here. There is, admittedly, a fine line between identifying legal content and perfecting law-making ex post.[44] Wishful thinking will blur the line between what is and what is not law. At the same time, there is also the risk that contemporary legal analysis surrenders to an interpretation of the nature of NDCs that usurps the narrative of a contentious negotiating history.[45] However, the negotiating history is only one means of treaty interpretation among others, and most importantly, it is only a *supplementary* means of interpretation, according to customary international law[46] and article 32 of the Vienna Convention on the Law of Treaties (VCLT).[47] Moreover, it is well recognised that treaties in international law evolve, beyond the views that were expressed during the negotiations, in the 'travaux préparatoires',[48] and even the original wording of their provisions.[49] This has indeed been famously confirmed by the International Court of Justice

[40] Hersch Lauterpacht 'Basis of International Law: The Inevitability of Change'(1976–1977) 7 Australian Yearbook of International Law 401.
[41] Suyash Paliwal, 'The Binding Force of G-20 Commitments' The Yale Journal of International Law (2014) 40 online 1, 4.
[42] W Michael Reisman and Manhnoush H Arsanjani, 'The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes' 19 (2004) Foreign Investment Law Journal 328, 329.
[43] W Michael Reisman, 'Order, Freedom, Justice, Power: The Challenges for International Law' (1981) 75 Proceedings of the Annual Meeting American Society of International Law 101, 103; H Koh, 'Why Do Nations Obey International Law?' (1997) 106 Yale Law Journal 2599, 2646-2649.
[44] W Michael Reisman, The International Lawmaking Function, 351 (2010) Recueil des Cours 119, 130, 135-38; Eva Kassoti, 'Interpretation of Unilateral Acts in International Law' (2022) 69 Netherlands International Law Review 295, 296; Ingo Venzke, 'Sources in interpretation theories: the international law-making process' in S Besson and Jean d'Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (OUP 2017) 401.
[45] UNFCCC Decision 1/CP.17 *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action*, UN Doc. FCCC/CP/2011/9/Add.1, 15 March 2012 para. 2; L Rajamani, 'The Durban Platform for Enhanced Action and the Future of the Climate Regime' (2012) 61 International and Comparative Law Quarterly 501, 507.
[46] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43, 109, 110 para. 160; *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* [2004] ICJ 136, 174 para. 94.
[47] Vienna Convention on the Law of Treaties (VCLT) 1155 UNTS 331, entered into force on 27 January 1980 [hereinafter *VCLT*]. The *VCLT* abstains from defining the term 'supplementary', see Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, Cambridge University Press 2013) 218.
[48] As the Special Rapporteur Waldock explained in his third report '*travaux préparatoires* are not, as such, an authentic means of interpretation', A/CN.4/167 and Add.1-3, 58–59, para. 21. For a recent study into the use of travaux in treaty interpretation see Esmé Shirlow and Michael Waible, 'A Sliding Scale Approach to Travaux in Treaty Interpretation: The Case of Investment Treaties' British Yearbook of International Law (2021) 1, 4.
[49] UN ILC, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries* (2018) II. Yearbook of the International Law Commission, draft conclusion 7 commentary paras. 24, 35 [*ILC Draft Conclusions 2018*] conclusion 8 commentary para. 2; Irina Buga, 'Subsequent Practice and Treaty Modification' in *Conceptual and Contextual Perspectives on the Modern Law of Treaties*, Michael J Bowman and Dino Kritsiotis (eds, Cambridge University Press 2018) 363, 365; The European Court of Human Rights (ECtHR) qualifies the European Convention on Human Rights as a 'living instrument' that is capable of evolving over time, cf. *Tyrer v the United Kingdom*, No. 5856/72 ECHR Series A No. 26 para. 31; recently confirmed again in *Verein KlimaSeniorinnen Schweiz v Switzerland*, App No 53600/20 (online, published 9 April 2024). In that case, the ECtHR acknowledged the concerns of the respondent government and most of the intervening governments (at para. 453) that 'the principles of the

(ICJ) for the Charter of the United Nations.[50] The evolving nature of (treaty) law means that revisiting early-years scholarship is equally on order.

The Article is divided into five main parts, followed by a conclusion. Part II situates NDCs within the infinite variety of unilateral acts, starting with a historical perspective on 'unperfected acts' before moving to a comparative assessment of relevant examples of unilateral acts. The 'units of comparison'[51] are selected from general international law and international environmental law. Based on the commonalities of these treaty-based unilateral acts, Part III introduces and explains the new category of 'prescribed qualified unilateral act'. Part IV draws on relevant subsequent state practice under the Paris Agreement, to establish the extent to which Parties have assigned legal valence to NDCs. Part V argues that international climate change law is an autopoietic system with iterative processes that exert an evolutive impulse on general international law. Part VI concludes.

II. Historical Roots and Comparative Units for Juridical Acts

States take juridical acts regularly,[52] at the level of national and international law, and these acts occur in an infinite number of variations.[53] Unilateral acts are often adopted without recourse to international law or multilateral authority.[54] Concerns about the lawfulness or the domestic implications of these actions will regularly be raised and assessed within the legal standards set by constitutional law and procedural provisions. By contrast, unilateral acts at the international level are 'governed' by international law, because they are associated with the potential to regulate relations with another sovereign state.[55] They may create reasonable expectations and be relied upon by other states,[56] and they could even impose values and standards on others.[57]

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harmonious and evolutive interpretation of the Convention should not be used to interpret the Convention as a mechanism of international judicial enforcement in the field of climate change and to transform the rights enshrined in the Convention into rights to combat climate change'. However, it proceeded to state (at para. 455) that 'a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement'.

[50] The ICJ found in the *Namibia* Advisory Opinion, that the term 'concurring votes' in Art 27, paragraph 3, of the Charter of the United Nations included abstentions, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971] ICJ Rep 16, 22 para. 22.

[51] Mathias Siems, 'The Power of Comparative Law: What Types of Units Can Comparative Law Compare?' (2020) 67 American Journal of Comparative Law 861, 863.

[52] The terms 'juridical act', 'unilateral declarations' and 'unilateral act' are used interchangeably in so far as they concern legally binding measures.

[53] Report of the Commission to the General Assembly on the work of its forty-eighth session, Yearbook of the International Law Commission (1996) Vol II part two at 141, Addendum 3 Unilateral Acts of States; discussing unilateral acts relating to the environment, Phillippe Sands, '"Unilateralism", Values, and International Law' (2000) 11 European Journal of International Law 291, 293; Camille Goodman, 'Acta Sunt Servanda? A Regime for Regulating the Unilateral Acts of States at International Law' (2006) 25 Australian Yearbook of International Law 43.

[54] *Sands* ibid 292; Karl Zemanek, 'Unilateral Legal Acts Revisited' in Karl Wellens (ed), *International Law: Theory and Practice - Essays in Honour of Eric Suy* (Brill 1998) 209, 210.

[55] *Sands* ibid 293; *Zemanek* ibid 210.

[56] *Sands* (n 53) 293.

[57] Ibid.; *Goodman* (n 53) 45.

Therefore, unilateral acts at the international plane raise questions about the intention of the acting state to be bound and the consideration of the expectation of other states.[58] Behaviours capable of legally binding states vis-à-vis other states range from formal declarations to informal conduct,[59] including silence in some situations.[60] In determining the legal scope of an unilateral act, the interpreter must 'proceed with great caution',[61] a task made even more difficult in the current troubled international legal system. It is perhaps precisely for that reason that there has been a remarkable paucity of legal literature dealing in depth with unilateral acts in the last twenty years, with a few exceptions.[62]

A. The infinite variety of 'unperfected' unilateral acts

The discussion about the nature of unilateral behaviour of states has deep roots in the academic literature,[63] with views expressed as diverse as the variations of unilateral acts. It has been noted that there is hardly 'another branch of international law in which doctrinal concepts have for such a long time been in sharp contrast with international realities and practice'[64] and it has been suggested more recently that conceptual innovation is necessary for unilateral acts in the age of social media.[65] Early scholarly thinking includes the traditional conceptions of Pufendorf and Grotius about the role of a 'state's promise' as source of an independent legal obligation.[66] Anzilotti is often seen as the first writer to attempt a distinguishable systematic and terminology.[67] Dogmatic approaches that began to distinguish between categories of unilateral

[58] Text adopted by the International Law Commission at its Fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10), (2006) Yearbook of the International Law Commission, vol. II, Part Two, preamble.

[59] Instructive for the assessment of an allegedly non-binding declaration under Art 36 paragraph 2 of the Statute of the Court is *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)*, Preliminary Objections [1961] ICJ Rep 17, 31 seq. The Court stated that the declaration was indeed legally binding upon Thailand (at 34): 'the Court could not accept the plea that this intention had been defeated and nullified by some defect not involving any flaw in the consent given, unless it could be shown that this defect was so fundamental that it vitiated the instrument by failing to conform to some mandatory legal requirement'.

[60] Text adopted by the International Law Commission at its Fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10). *Yearbook of the International Law Commission, 2006*, vol. II, Part Two, 369 preamble para. 177 [hereinafter *ILC Guiding Principles 2006*]; D Azaria, 'State Silence as Acceptance: A Presumption and an Exception, British Yearbook of International Law (2024) 1, 6.

[61] *Frontier Dispute (Burkina Faso v Republic of Mali)* [1986] ICJ Rep 554, 573 para. 39; *ILC Guiding Principles 2006* (ibid.) principle 7 commentary para. 2.

[62] Notably, *Goodman* (n 53); Kassoti (n 44) 295; Eva Kassoti, *The Juridicial Nature of Unilateral Acts of States in International Law* (Brill, 2015); Przemysław Saganek, *Unilateral Acts of States in Public International Law* (Brill, 2015).

[63] Franz Pflüger, *Die einseitigen Rechtsgeschaefte im Voelkerrecht* (Schulthess & Co, 1936). Arguing for a very significant role of the principle of good faith is Georg Schwarzenberger, 'The Fundamental Principles of International Law' (1955) 87 Recueil des Cours 190, 312-14.

[64] Vladimir Đuro Degan, 'Unilateral act as a source of particular international law' Finnish Yearbook of International Law 1994 (5) 149, 151; Vladimir Đuro Degan, *Sources of International Law* (Martinus Nijhoff 1997) chapter VI.

[65] Erlend Serendahl, Unilateral Acts in the Age of Social Media (2018) 5 Oslo Law Review 126.

[66] Víctor Rodríguez Cedeño and María Isabel Torres Cazorla, 'Unilateral Acts in International Law' in Anne Peters (ed), *Max Planck Encyclopedias of International Law*, online, para. 7; Werner Levi, *Contemporary International Law. A Concise Introduction* (Boulder, San Francisco, Oxford, 1991) 200; further *Pflüger* (n 63); Paul Guggenheim, 'La validité et la nullité des actes juridiques internationaux' (1949) 74 Recueil des Cours 191

[67] Dionisio Anzilotti, *Cours de droit international* (Athenaeum Roma 1923); J W Garner, 'The International Binding Force of Unilateral Oral Declarations' (1933) 27 The American Journal of International Law 493, 494;

measures emerged in the 20th century,[68] led by Degan[69] and Rubin.[70] Especially since 1950, and based on the case law,[71] distinctions were drawn based on substantive content of juridical acts, discerning categories of promise,[72] notification,[73] recognition,[74] and waiver.[75]

The UN's International Law Commission (ILC)[76] started its work on unilateral acts in 1996 and adopted after eight reports[77] a set of ten guiding principles with commentary in 2006, led by Special Rapporteur Victor Rodriguez Cedefio.[78] Reasons for considering the topic included:

> In the interest of legal security and to help bring certainty, predictability and stability to international relations and thus strengthen the rule of law, an attempt should be made to clarify the functioning of this kind of acts and what the legal consequences are, with a clear statement of the applicable law.[79]

In its first report, the ILC Special Rapporteur noted that the lack of a theory of international unilateral acts of states was 'unquestionably a hindrance to any systematic study of the topic.'[80] The task of agreeing on a clear statement of the applicable law proved indeed difficult but the ILC eventually concluded its work with the 'Guiding Principles applicable to unilateral declarations of states capable of creating legal obligations' in 2006.[81] The analysis in this

see *Legal Status of Eastern Greenland,* Judgment of 5th April 1933, PCIJ Series A/B, 1932, No 53, 22, at 36 [hereinafter *Legal Status of Eastern Greenland*] and the Dissenting Opinion of Judge Anzilotti 91.

[68] *Garner* ibid 497.

[69] *Degan*, Sources of International Law (n 64) 325.

[70] Alfred P Rubin, 'The international legal effects of unilateral declarations' (1977) 71 American Journal of International Law 1.

[71] For example, JD Sicault traces the nuclear test cases in 'Du caractère obligatoire des engagements unilatéraux en droit international public' (1979) 83 *Revue Général de Droit International Public* 633.

[72] Often in using an analogy to municipal law and contract law, cf., A Gigante, 'The Effect of Unilateral State Acts in International Law' (1969) 2 New York University Journal of International Law and Politics 333, 345; emphasising the role of certain treaty provisions Eric Suy**,** *Les actesjuridiquesu nilateraux en droit international public* (Paris, Librairie Général de Droit et de Jurisprudence 1962); and *Zemanek* (n 54) 211.

[73] Georg Schwarzenberger, 'Fundamental Principles of International Law' (1955) 87 Recueil des Cours 191, 262

[74] Ibid.

[75] Charles De Visscher, 'Remarques sur l'évolution de la jurisprudence de la Cour internationale de justice relative au fondement obligatoire de certains actes unilatéraux' (1969) 55 Bulleting de L'Académie Royale de Belgique 34; *Degan,* Sources of International Law (n 64) 326.

[76] The International Law Commission's work is generally regarded as providing evidence of the existing law according to Art 38 paragraph 1 lit. d of the ICJ Statute, Alan Boyle, 'International Lawmaking in an Environmental Context' (2023) 427 Recueil des Cours 84, 89.

[77] International Law Commission, First Report on Unilateral Acts of States, 50th Session, UN Doc A/CN.4/468 (1998); Second Report on Unilateral Acts of States, 51st Session, UN Doc A/CN.4/500 (1999); Third Report on Unilateral Acts of States, 52nd Session, UN Doc A/CN.4/505 (2000); Fourth Report on Unilateral Acts of States, 53rd Session, UN Do A/CN.4/519 (2001); Fifth Report on Unilateral Acts of States, 54tth Session, N Doc /CN.4/525 (2002), Sixth Report on Unilateral Acts of States, 55th Session, UN Doc A/CN.4/534 (2003); Seventh Report on Unilateral Acts of States, 56th Session, UN Do A/CN4/542 (2004); Eighth Report on Unilateral Acts of States, 57th Session, UN Doc A/CN.4/557 (2005) [*hereinafter [number] report on unilateral acts of States*].

[78] *ILC Guiding Principles 2006* (n 60).

[79] *First report on unilateral acts of States* (n 77) para.3 c).

[80] Ibid para. 9.

[81] *ILC Guiding Principles 2006* (n 60).

Article will draw on these guiding principles that seek to codify and develop international law,[82] and reflect the jurisprudence of the international courts and tribunals.

Undoubtedly, the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) have on several occasions seized the opportunity of clarifying the criteria for unilateral acts as the fundament for a legal obligation. The *Eastern Greenland* case with the mysterious 'Ihlen Declaration' added an intriguing angle to the historical scholarly discussion at the time. The PCIJ found that the assurance given by the Norwegian Foreign Minister to his Danish counterpart, that 'the plans of the Royal [Danish] Government respecting Danish sovereignty over the whole of Greenland … would meet with no difficulties on the part of Norway'[83] had a binding effect in international law.[84] Therefore, it rendered the occupation of parts of Greenland through Norway unlawful.[85] Notably, the 'promise' had been given by Norway in a verbal form, without using explicit legal terminology or indeed articulating the intention to be bound. Clearly, the PCIJ trusted that the meaning of the phrase 'no difficulty on the part of Norway' was sufficiently concise so as to convey the idea that it excluded the possibility of a lawful occupation. Already in this case, it became tangible in the Court's reasoning that the objective of the state's promise cannot be put at risk in the aftermath through an unsuitable or even contradicting conduct.

The ICJ expanded on this in the *Nuclear tests* case:

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. *When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration*. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the state was made.[86]

With this elaborate reasoning, the Court advanced the argument that conduct following the juridical act must be consistent with the declaration made, and thus be suitable to achieve the ultimate purpose of the statement.[87] The unarticulated implication is that the state has with its 'undertaking' confirmed that it can and will choose a conduct that has a specific outcome. The

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[82] The International Law Commission was established by the General Assembly to undertake the mandate of the Assembly, under art 13 (1) (*a*) of the Charter of the United Nations to 'initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification'. See <https://legal.un.org/ilc/last> visited 15 April 2024.
[83] *Legal Status of Eastern Greenland* (n 67) 36; Thomas Franck, 'Word Made Law: The Decision of the ICJ in the Nuclear Test Cases' (1975) 69 American Journal of International Law 612, 620.
[84] *Legal Status of Eastern Greenland* (n 67) 69.
[85] Ibid 75.
[86] *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253, 267 para. 43; and *Nuclear Tests (New Zealand v France)*, id. 457 (Emphasis added by author) [hereinafter *Nuclear Tests cases*].
[87] Ibid para. 46.

unilateral act organises the relationship between the 'promising' state and those states that have an interest in the promise, as a matter of law.[88] Interestingly, the ICJ did not stipulate that the legal effect was dependent on mutual obligations, not even an explicit reaction of other states was required.[89]

In both cases, the Court confirmed that legal obligations arose from the respective unilateral acts.[90] These legal obligations are not of a lesser nature than those that emerge from bilateral or multilateral agreements.[91] The ICJ considered as the sole relevant question whether the language revealed a clear intention of the state to deal with a matter in a legally binding way.[92] Thereby, it assigned legal valence to what has been perceived in the academic discourse as 'an unperfected legal act' and, not surprisingly, the Court has been criticised for this decision.[93] Reisman has argued that there are costs of disregarding formalities in international law, pointing towards the constitutive implications of the decision that transcended the case at hand. Scholars, but not courts in his view, can cautiously reconstruct unperfected legal acts.[94] Suffice to say that the following argument does not attempt to set aside the formalities of international law. By contrast, the argument employs formalities and rules of a specific treaty regime within the normative framework of international law, to examine how formalities are changing and require careful reconstruction themselves.

The potential for complications with unilateral acts is amplified in situations where several states make individual promises to achieve a collectively defined goal that can only be achieved if all states abide by their declarations – a typical scenario of collective action problems. In that situation, a further question surfaces: What are the consequences if these unilateral acts together are not, or no longer, suitable to achieve the commonly agreed goal? Certainly, not one single state can carry the burden of achieving a goal set by a group of states let alone the international community, yet on the other hand, does not the promise to align own targets with the continued and realistic possibility of achieving a collective goal, given within the authority of a multilateral treaty, mean that each state's conduct must meet the criteria that the treaty establishes for the unilateral act, including its 'promise qualifying' mechanisms?

The following proceeds on the premise that a general difference exists between unilateral acts that are linked to a treaty regime and 'therefore governed by the specific treaty regime in which they are subsumed'[95] and independent unilateral acts. The general difference between these two types has been confirmed in the jurisprudence of the ICJ,[96] but of course the 'independence' of any measure is a question of degree in an interdependence world. The questions raised above can only be answered within an analytical framework that takes into consideration the specific characteristics of treaty-based unilateral acts generally and of the individual treaty regime specifically. The next two sections establish general treaty-based

[88] *Zemanek* (n 54) 209, 210; *Franck* (n 83) 612, 620
[89] *Rubin* (n 70) 5.
[90] *Nuclear Tests cases* (n 86).
[91] Ibid.
[92] Ibid paras 44 ,45.
[93] *Reisman* (n 44) 135-38; *Rubin* (n 70) 28.
[94] *Reisman* ibid.
[95] *First report on unilateral acts of States* (n 77) Add.1 para. 16.
[96] *Zemanek* (n 54).

characteristics of unilateral acts, before moving to the Paris Agreement's specific ones (the NDCs) in Part III.

B. Autonomy in defining the instrumentum and the negotium of unilateral acts

Unilateral acts in international law shape the legal and not just the political relations with other states.[97] Assumed under the authority of treaty regimes, unilateral acts are often subject to qualifying rules and mechanisms, through the evolution of the treaty regime to which they also contribute. The Paris Agreement is neither the first nor the only multilateral environmental agreement that not only invites but *mandates* treaty-based submissions by Parties.[98] Often, treaty regimes can only function because they take recourse to unilateral acts as their integral elements. Especially multilateral Environmental Agreements create complex systems of mutually agreed and self-determined obligations, under regimes with multilateral authority.[99]

The ILC acknowledged and never abandoned the systematic differentiation that unilateral acts or declarations consists of two elements, the legal declaration (the *instrumentum*) and the substance of the obligation that is created (the *negotium*).[100] This differentiation between instrument and substance is derived from the jurisprudence of the ICJ.[101] Various attempts have been made in the literature to categorise unilateral acts further in relation to their proximity to treaty regimes and hence, to the will of other states. However, the ILC abstained from providing additional categories to avoid any restriction of the scope of its work.[102] Nevertheless, it remains a matter of fact that the extent to which unilateral acts are related to the expressed interests of other states varies significantly. Furthermore, the ICJ has repeatedly confirmed that this relatedness to the will of other states can create a 'consensual bond'[103] that could even constitute a standing offer to other states to submit a unilateral declaration in the context of a treaty.[104]

On that basis, the following differentiates between autonomous unilateral acts and treaty-based unilateral acts as the vertices that define a spectrum of variation, and the argument also takes on board the ILC's distinction between the form (the instrumentum) and the substance (the negotium) of the unilateral act.

1. Autonomy, interdependence and the difference between instrument and content

Autonomous legal acts have been defined as those that manifest the will of a state, largely independently, both in form and in substance, from the will of other states.[105] As noted earlier, it may not be possible to fully establish independence in an interdependent world, however, the key differentiation is that these unilateral acts occur independently from specific treaty

[97] *Kassoti* (n 62) 143; J Crawford, *Brownlie's Principles of International Law* 402.
[98] This will be explored in subsection b).
[99] Krzysztof Skubiszewski, 'Enactment of Law by International Organizations' British Yearbook of International Law 41 (1965) 198-201.
[100] *Second Report on Unilateral Acts of States* (n77) paras. 42, 44; *Goodman* (n 53) 48.
[101] *Case concerning the Temple of Preah Vihear* (n 59) 24, 34; *Fisheries Jurisdiction (United Kingdom v Iceland)* [1973] ICJ Rep 3, 15 para. 29: '[…]have reference only to instruments in which the parties had assumed a general obligation'; *Fisheries Jurisdiction (Spain v Canada)* [1998] ICJ Rep 432, 454 para. 47.
[102] ILC Doc A/54/10, Report of the ILC on the work of its 51st session, Yearbook 1999 vol II(2) para. 542.
[103] *Fisheries Jurisdiction (Spain v Canada)* (n 101) para. 46.
[104] *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections [1998] ICJ Rep 275, 291 para. 25; *Fisheries Jurisdiction (Spain v Canada)* (n 101) paras. 45, 46.
[105] *Goodman* (n 53) 48, 49.

requirements and can be addressed to just one states or several states[106] or to the international community as a whole.[107] Examples of unilateral acts that remain entirely within bilateral relations are the already discussed *Ihlen* declaration,[108] or the declaration made by Cuba to promise the supply of vaccines to Uruguay.[109] Some of these unilateral acts may not be directed to any particular recipient at all,[110] or they concern initially only certain states but then reach importance for the international community as a whole.[111] The latter was the case when Egypt promised to respect the terms and the spirit of the 1888 *Constantinople Convention Respecting the Free Navigation of the Suez Canal*.[112]

Autonomous unilateral acts can also set forth a legal rule that subsequently receives general following and become enshrined in treaty law, as was the case with the *Truman Proclamation* of 28 September 1945 on the Continental Shelf regime[113] where other states responded with analogous claims.[114] The ICJ subsequently found that the *Truman Proclamation* furnished 'an example of a legal theory derived from a particular source that has secured general following';[115] it was later included in article 2 of the 1958 *Geneva Convention on the Continental Shelf*.[116]

In contrast to these predominantly autonomous acts, unilateral acts can display a tangible degree of interdependence with the expressed will of other states, and operate independently only for one of the components, e.g. either the *instrumentum* or the *negotium*.[117] Variations are infinite: there are treaty-based unilateral acts,[118] where the treaty allows,[119] invites,[120] or even mandates a particular unilateral act.[121] For treaty-based unilateral acts, the instrument will often

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[106] See *First Report on Unilateral Acts of States* (n 77) 83.
[107] See also the Swiss statements concerning the United Nations and its staff members (tax exemptions and privileges) *Eighth Report on Unilateral Acts of States* (n 77) paras. 138-156.
[108] Ibid para. 117.
[109] *Eighth Report on Unilateral Acts of States* (n 77) paras. 15 and 16.
[110] *Frontier Dispute Burkina Faso v Republic of Mali* (n 61) para. 39.
[111] Declaration on the Suez Canal and The Arrangements for its operation, UN A/3577, 25th April 1957.
[112] Ibid Convention Respecting the Free Navigation of the Suez Canal, 241 (1957) UNTS 265 No. 3821, entered into force 22 December 1888.
[113] *Eighth Report on Unilateral Acts of States* (n 77) para. 127.
[114] See e.g., Mexico, ibid para. 132.
[115] *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3, 53 para. 100; *ILC Guiding Principles 2006* (n 60) principle 9 commentary para. 2.
[116] *North Sea Continental Shelf* ibid para. 47.
[117] Robert Y Jennings and Arthur Watts (eds), *1 Oppenheim's International Law* 1187, 1192 (London, Longman, 1996); *Rubin* (n 70) 4, 5.
[118] This is different from the perception of treaties as a sequence of unilateral acts; *Zemanek* (n 54) 210-11; *Rubin* (n 70) 8.
[119] United Nations Convention on the Law of the Sea, 1833 UNTS 397 [hereinafter *UNCLOS*], entered into force 16 November 1994. Art 3 UNCLOS confirms the right to establish the breadth of the territorial sea up to a limit not exceeding 12 nautical miles, measure form baselines determined in accordance with the Convention. See also the provision on Archipelagic baselines, Art 47.
[120] Ibid Art 76 paras. 4, 7; Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, UN Doc A/Conf.232/2023/4* (19 June 2023) [hereinafter *BBNJ*], Art 12 BBNJ, see further the detailed description of the proposal regarding the establishment of area-based management tools, including marine protected areas, under Art 19 BBNJ.
[121] Ramsar Convention on Wetlands of International Importance especially as waterfowl habitat, 996 UNTS 245, entered into force 21 December 1975 [hereinafter *Ramsar Convention*]. Art 2(4) reads: 'Each Contracting Party shall designate at least one wetland to be included in the List when signing this Convention or when

be agreed within the treaty but the substance is defined by the state at a later stage.[122] However, the reverse can also be true. An example of an act where the decision about the instrument operates independently but the substance of the obligation is pre-defined in relation to a treaty provision, is the declaration accepting the jurisdiction of the ICJ under article 36 of its Statute.[123] The Court viewed the acceptance of the compulsory jurisdiction of the Courts as an unilateral act of state sovereignty that, at the same time, establishes a specific 'consensual bond' with other states that have accepted the jurisdiction.[124] The consequence of this consensual bond is that the bar for a derogation from a previous expression of a state's acceptance of jurisdiction is high.[125]

It is often futile to even attempt a precise definition of when a state is expressing its 'free' will, and this has been discussed extensively in the literature, not least for the specific historic context of the *Ihlen* Declaration.[126] The critical point for the discussion here is that the two components, the form of action that creates legal effects and the scope of these effects, or the substance, can be distinguished, including for treaty-based unilateral acts, and with that, there are two entrance points for evaluating the respective legal scope of the unilateral act. First, in relation to the *instrumentum* (the form) and second, concerning the *negotium* (the substance).[127] It is also important to note that even if unilateral acts are entirely autonomous, i.e., not woven into the fabric of a treaty regime or made in the context of treaty negotiations, the ICJ found that the law of treaties can be applied by analogy to the modification, termination or withdrawal of unilateral acts, a state cannot 'amend the scope and the contents of its solemn commitments as it pleases'.[128] For example, the Court held in the *Nicaragua* judgment, and confirmed this finding subsequently in the *Cameroon* case, that, in any event:

> 'the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity'.[129]

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depositing its instrument of ratification or accession, as provided in Art 9' <https://www.ramsar.org/sites/default/files/documents/library/current_convention_text_e.pdf> last accessed 15 April 2024.

[122] Such as identifying a concrete wetland for protection, see *Ramsar Convention* (n 121).

[123] It is important to note though that the Court strictly gives priority consideration to the wording of these declarations and only applies the rules of the VCLT by analogy in cases where States accept the jurisdiction of the Court under Art 36 of the Statute; *Goodman* (n 53) 49.

[124] *Fisheries Jurisdiction (Spain v Canada)* (n 101) para. 46.

[125] Ibid at para. 45: 'An additional reservation contained in a new declaration of acceptance of the Court's jurisdiction, replacing an earlier declaration, is not to be interpreted as a derogation from a more comprehensive acceptance given in that earlier declaration'.

[126] This declaration was made in a negotiating situation, as noted above, and has therefore been discussed as a reciprocal statement rather than an autonomous unilateral act. Rubin (n 70) 4; Charles de Visscher, 'Remarques sur l'dvolution de la jurisprudence de la cour intemationale de justice relative au fondement obligatoire de certains actes unilatgraux' in Jerzy Makaraczyk (ed), Essays in International Law in Honour of Judge Manfred Lachs (1984) 462.

127 Anzilotti (n 67) 339; Rubin (n 70) 4, 8, 9. This point will be addressed in detail under 3.

[128] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* Jurisdiction and Admissibility [1984] ICJ Rep 392, 418 para. 59 [hereinafter *Nicaragua case*].

[129] Ibid para. 63; *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections [1998] ICJ Rep 275, 295 para. 33.

The view expressed by the Court not only brings autonomous acts into the scope of the law of treaties, it also strengthens the argument that unilateral acts that manifest a degree of interdependence with a treaty, or are even prescribed *by* the treaty, must even more so be treated according to the law of treaties.[130] *A fortiori*, an argument by analogy is inevitably even more convincing for treaty-based unilateral acts.[131] The case law of the ICJ suggests that priority consideration must be given to the wording of the declaration,[132] and to fully assess the intention, it is important to include the circumstances,[133] which comprises the relevant treaty or treaty negotiation context to which the measure or declaration is connected.[134]

2. Treaty-based unilateral acts in multilateral (environmental) Agreements

The Paris Agreement is not the first or the only multilateral treaty regime that makes the submission of a unilateral act mandatory. There are apt examples in other areas of international law and in international environmental law, where binding unilateral acts are either invited,[135] required for the operation of[136] or participation in[137] the treaty regime. These unilateral acts within treaty regimes regularly serve the multilaterally endorsed object and purpose of that treaty,[138] often based on scientific consensus.[139] In some cases, the treaty creates opportunities for states to exercise treaty rights according to the treaty provision. The state is free to decide to adopt a unilateral act, but if it does proceed with it, certain substantive and procedural constraints are imposed. For example, the just concluded United Nations Biodiversity of Areas Beyond National Jurisdiction (BBNJ) Treaty[140] establishes in article 19 a number of criteria and key elements for proposals regarding the establishment of area-based management tools.[141] It sets forth a detailed process for the assessment of proposals[142] that ultimately refers the decision-making power back to the collective will – the Conference of Parties.[143] In other cases, the functioning of the entire treaty system and the achievement of its objectives may be

[130] Serendahl (n 65) 130.
[131] Cf. *ILC Guiding Principles 2006* (n 60) principle 7 at 377; *Armed Activities on the Territory of the Congo* (New Application: 2002) *(Democratic Republic of the Congo v Rwanda)*, Jurisdiction and Admissibility [2006] ICJ Rep 6, 28 paras. 49, 52.
[132] *Fisheries Jurisdiction (Spain v Canada)* (n 101) para. 46. See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (n 129) para. 30 [hereinafter *Land and Maritime Boundary between Cameroon and Nigeria*]; *ILC Guiding Principles 2006* (n 60) principle 7 para. 3.
[133] *Armed Activities on the Territory of the Congo* (n 131) para. 53.
[134] *Frontier Dispute Burkina Faso v Republic of Mali* (n 61) paras. 40, 53, and *Nuclear Tests cases* (n 86) paras. 51, 53; Eva Kassoti, 'Juridical Nature of Unilateral Acts in International Law' (2012-2013) Finnish Yearbook of International Law 411, 446; *ILC Guiding Principles 2006* (n 60) principle 5 para. 3.
[135] Definition of the breadth of the territorial see *UNCLOS* (n 119), Art 3 confirms the right to establish the breadth of the territorial sea up to a limit not exceeding 12 nautical miles, measure form baselines determined in accordance with the Convention. See also the provision on Archipelagic baselines, Art 47.
[136] Cf the notification procedure of the Cartagena Protocol on Biosafety, Art 8-10 and Art 12, https://bch.cbd.int/protocol/text/; *UNCLOS* (ibid) Art 76 paras. 4, 7; *BBNJ* (n 120) Art 12, see further the detailed description of the proposal regarding the establishment of area-based management tools, including marine protected areas, under Art 19 BBNJ.
[137] *Ramsar Convention* (n 121) Art 2(4) reads: Each Contracting Party shall designate at least one wetland to be included in the List when signing this Convention or when depositing its instrument of ratification or accession, as provided in Art 9.
[138] Ibid.
[139] Harry Scheiber, 'From Science to Law in Politics: A Historical View of the Ecosystem Idea and its Effects on Resources Management' (1999) 24 Ecology Law Quarterly 631.
[140] *BBNJ* (n 120); see for a discussion on the allocation of risk and liability Neil Craik, Tara Davenport and Ruth Mackenzie, *Liability for Environmental Harm to the Global Commons* (Cambridge University Press 2023) 129.
[141] Ibid Art 19 para. 4 a-j.
[142] Ibid Arts 20, 21.
[143] Ibid (n 120) Art.

dependent on the existence and the prescribed substance of these unilateral acts with the treaty, a key example is the Ramsar Convention on Wetlands of International Importance especially as waterfowl habitat that makes membership dependent on the designation of at least one protected wetland.[144]

Unilateral acts can also serve to clarify the content of commitments that originate from treaty law including bilateral agreements.[145] As discussed in this section, there are multilateral treaties that rely on flexible mechanisms of individually defined obligations of states within the boundaries of a framework that applies to all. In all these instances, the substantial scope of the obligation created – if any – must be distinguished from the conditions of their creation.[146]

A first example of a regime that *allows* rather than *mandates* unilateral declarations is the GATS. The GATS framework sets forth binding rules for all Parties (concerning market access, national treatment and most-favoured-nation (MFN) treatment) and it allows Parties to make specific commitments through a positive list in form of national services schedules.[147] A specific commitment in a service schedule is 'an undertaking to provide market access and national treatment for the service activity in question on the terms and conditions specified in the schedule' and it is legally binding.[148] These schedules become integral parts of the Agreement and regulate the conditions under which the GATS rules apply in the specific jurisdiction.[149] In making such a commitment, a state sets forth a binding obligation to allow the specified level of market access and national treatment, and it precludes market restricting measures.[150] Just as binding tariffs, these schedules set forth guarantees that the conditions of entry and operation in the market will remain stable and not be changed to the disadvantage of economic operators.[151] General principles and rules, such as the MFN treatment, remain applicable.[152] The treaty provides further safeguards to ensure the GATS can achieve its objectives.[153] For example, the national schedules must follow a standardised approach as far as possible, including for the terminology and the information that is to be provided.[154] In addition, no withdrawals may be made within the first three years of the commitment, and after that, any modification or withdrawal requires agreement on compensatory adjustments.[155]

Other treaty regimes not only invite but *require* unilateral measures as a condition for membership. Most prominently, as mentioned above, the Ramsar Convention demands ('shall') that a Party designates at least one protected wetland upon ratification or accession.[156]

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[144] *Paris Agreement* (n 5) art 4.
[145] See *Nicaragua case* (n 128) para. 261, where the ICJ considered the content of commitments in light of unilateral communications; *Zemanek* (n 54) 209-221, 215.
[146] *Nuclear Tests cases* (n 86) para. 44.
[147] https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm A Handbook on Reading WTO Goods and Services Schedules, 34, 35.
[148] Ibid.
[149] https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm
[150] WTO Secretariat, *A Handbook on Reading WTO Goods and Services Schedules* (Cambridge University Press 2009) 34, 35.
[151] GATS Schedules. https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm
[152] Ibid.
[153] Ibid.
[154] *A Handbook on Reading WTO Goods and Services Schedules* (n 150) 36.
[155] Ibid.
[156] *Ramsar Convention* (n 121) art 2(4) reads: 'Each Contracting Party shall designate at least one wetland to be included in the List when signing this Convention or when depositing its instrument of ratification or accession,

This designation not only opens the door for ratification or accession, but it has also further legal implications for the state's duty to undertake an environmental risk assessment under customary international law.[157] The ICJ found in *Construction of a Road*, that '[t]he presence of Ramsar protected sites heightens the risk of significant damage because it denotes that the receiving environment is particularly sensitive.'[158] Thus, the designation as 'protected wetland' triggered the obligation of Costa Rica to undertake an environmental impact assessment.[159] This illustrates that a treaty-based unilateral act (the designation of a wetland) not only constitutes an integral element of the treaty, but it also demonstrates how the act is henceforth governed by the specific treaty and by general international law.

Another example is the International Convention for the Regulation of Whaling that establishes a regime composed of the Convention and a regularly updated Schedule for the management of various types of whales.[160] The Schedule is maintained by the International Whaling Commission and is part of the Convention.[161] It requires Contracting Governments to declare ('shall') open seasons of a limited time when catching of some types of whales is permitted,[162] provided that certain quotas are not exceeded,[163] and the overall condition of the stock allows for catching.[164] Parties are obliged ('shall') to make such determinations[165] and there are further rules that concretise the substantial content that these declarations must provide.[166]

The Convention on International Trade in Endangered Species of Wild Fauna and Flora[167] equally depends on measures to be taken by the Parties (see article VIII). Any Party can submit to the Secretariat a list of species which it identifies as being subject to regulation under article II paragraph 3. Rules of procedure apply to the submission and the withdrawal of the list and article XVI paragraphs 2 and 3 and the Party must also include any relevant domestic laws and regulations applicable to the protection of such species on the list.

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as provided in Article 9.'
https://www.ramsar.org/sites/default/files/documents/library/current_convention_text_e.pdf.

[157] *Nicaragua case* (n 128) para. 155.

[158] Ibid.

[159] Ibid para. 153; see also Katalin Sulyok, *Science and Judicial Reasoning. The Legitimacy of International Environmental Adjudication* (Cambridge University Press 2020) 81.

[160] International Convention for the Regulation of Whaling, 161 UNTS 72, entered into force on 10 November 1948, art I(1).

[161] Ibid.

[162] Ibid Schedule, amendments made by the Commission at its 68th Meeting in October 2022. Section II, para. 2 (c); see the limits for Baleen Whales at 8.

[163] Ibid

[164] See Ibid., e.g. Schedule II. Seasons, paras. 2-4, 12 and 16. Available at <https://archive.iwc.int/pages/view.php?ref=3606&k=&search=&offset=0&order_by=relevance&sort=DESC&archive=>

[165] Ibid Section II, Seasons, para. 4 (d).

[166] Ibid Schedule II, paras. 4-6. Schedule II 4(b) states: 'Each Contracting Government shall declare for all land stations under its jurisdiction, and whale catchers attached to such land stations, one open season during which the taking or killing of baleen whales, except minke whales, by the whale catchers shall be permitted.'; Schedule, Section VI. Information Required, para. 31.

[167] Convention on international trade in endangered species of wild fauna and flora, 993 UNTS 1-14537, entered into force 1 July 1975.

A slightly different but nevertheless interesting approach exists under the International Convention for the Prevention of Pollution from Ships (MARPOL).[168] To enforce compliance with the Convention, states have concluded several memoranda of understanding on port state control as additional measures.[169] This approach is now being regularised through a legally binding Port State Measures Agreement, the first binding international agreement to target illegal, unreported and unregulated (IUU) fishing which was adopted by the Food and Agriculture Organisation in 2009.[170] Under its article 7, each Party has an obligation ('shall') to designate and publicise the ports to which vessels may request entry, and the Party shall provide a corresponding list.[171]

A distinct pattern emerges from these examples. Similarly to the Paris Agreement, these treaty regimes set forth procedural obligations coupled with room for manoeuvre for states to define the substance of the subsequently adopted unilateral acts, be they allowed or mandated. The procedural obligations must be discharged by all Parties, often specifying a standardised format for the submission. By adopting the actual unilateral act, a new legal reality between Contracting Parties emerges, that has been anticipated and prepared by the treaty to be fully shaped by the unilateral action. Taken together, these unilateral acts define the functioning of the treaty regime, and at the same time, the unilateral acts become governed by the treaty system and by general international law. It is interesting to note that the treaties remain silent on specific criteria of the intention to be bound. Under general international law, however, the legal valence of a unilateral measure depends on the state's implicit or explicit intention to be bound. Given that treaty-based unilateral acts involve a two-staged decision-making, on the *instrumentum* (in the treaty) and the *negotium* (after the conclusion of the treaty), there are two points at which the intention matters, and this will be addressed in the following.

C. The intention to be bound

The consent of States grounds international law,[172] indeed any law-making process at the international level places a 'premium' on the intention of states,[173] and the legal bindingness of unilateral acts depends on it.[174] This intention sets the unilateral act apart from a political act whereby the state shapes a political relationship with other states but outside the legal sphere.[175] It is not always an easy task to distinguish the political from the legal sphere.[176] Yet rules of construction of legally binding conduct serve to clarify and to limit the circumstances under

[168] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1977 UNTS 138, entered into force 2 October 1983, available from <https://www.imo.org/en/About/Conventions/Pages/Default.aspx>.
[169] Available from <https://www.imo.org/en/OurWork/MSAS/Pages/PortStateControl.aspx> last accessed 18 May 2024.
[170] Available from <https://www.fao.org/3/i5469t/I5469T.pdf> last accessed 18 May 2024.
[171] Art 7, see also art 8 that outlines the minimum standards of the information requirements that must be fulfilled before the Party can grant entry to its port.
[172] *The Case of the S.S. Lotus (France v Turkey)* PCIJ Series A No 10, 18.
[173] D Costelloe, 'Compatibility in the Law of Treaties and Stability in International Law' (2022) British Yearbook of International Law 1, 35.
[174] *Degan*, Unilateral act as a source of particular international law (n 64) 188; *Legal Status of Eastern Greenland* (n 67) 71, Dissenting Opinion of Judge Anzilotti 91.
[175] First report of the ILC (n 77) para. 43; arguing for a less binary categorisation P Sands, 'The Political and the Legal: Comments on Professor Tushnet's Paper' (2007) 3 International Journal of Legal Context 319, 321.
[176] *Rubin* (n 70) 24, 26.

which a legal obligation emerges and avoid 'injecting into international practice any confusion to which an arbitrarily imposed binding obligation would give rise'.[177]

1. Consent to treaty as intention to be bound?

The ILC was inspired by the established case law of the ICJ when it limited its consideration of unilateral acts to those 'taking the form of formal declarations formulated by a state with the intent to produce obligations under international laws.'[178] Therefore, any application of the ILC guiding principles depends on the prior qualification of the unilateral act as one that qualifies as such *strict senso*, i.e., one that is formulated with the intent to produce legal obligations, and this 'depends on the intention of the State in question'.[179] The guiding principles will not be directly applicable to unilateral acts that operate in the political sphere[180] and they do not provide guidance for the identification of 'legal' unilateral acts.

The ICJ found that if an intention to be bound can be derived from the state's action, then it is also 'well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, *may* have the effect of creating legal obligations.'[181] While not explicit in this statement, the intention to be bound must, as a general rule, encompass the creation of legal obligations, i.e., those that the State can foresee when adopting the unilateral act, on the basis of the principle of State consent.[182] At the same time, the word 'may' indicates that there can be unilateral acts that concern legal situations but do not have the effect of creating legal obligations. The qualification as a legal instrument *stricto senso* is therefore independent from the determination of concrete legal obligations.

The content and the circumstances of the declaration or action are critical to determine the intention and to identify if the unilateral act encompasses a legal obligation.[183] For example, the ICJ found in the *Military and Paramilitary Activities in and against Nicaragua* and *Frontier Dispute* cases, that no legal intention could be derived from the content of the declarations or the circumstances in which they were made.[184] This coheres with ILC's conclusion in principle 3 that to determine the scope of the legal obligations created it is 'necessary to take account of the content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise'.[185]

The factual circumstances include treaty negotiations as discussed below. It is still a separate question to which extent, if at all, the consent to a treaty comprises the intention to be bound by a yet-to-be-adopted unilateral measure. This question is by no means trivial, since treaty interpretation turns on the ordinary meaning of the text, in light of the object and purpose of

[177] *Gigante* (n 72) 33, 341.
[178] *ILC Guiding Principles 2006* (n 60) preamble 370.
[179] *Frontier Dispute Burkina Faso v Republic of Mali* (n 61) para. 39.
[180] This does not foreclose application by analogy.
[181] *Nuclear Tests cases* (n 86) para. 43, emphasis added by the author.
[182] *Rights of Minorities in Upper Silesia* (Minority Schools) (1928) PCIJ ser. A, No. 15, 25; Christian Tomuschat, 'Obligations Arising for States Without or Against Their Will' (1993) 241 Recueil des Cours 195; Nico Krisch, The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108 American Journal of International Law 1.
[183] *ILC Guiding Principles 2006* (n 60) principle 3; *Nuclear Tests cases* (n 86) para. 53*; Case concerning the Frontier Dispute* (n 179) paras. 39, 40; *Aegean Sea Continental Shelf* [1978] ICJ Rep 3, 28, 43 paras. 69, 106.
[184] *Nicaragua case* (n 128) para. 261.
[185] *ILC Guiding Principles 2006* (n 60) principle 3 commentary para. 2.

the treaty,[186] and while Parties' intent is expected to be reflected in the treaty's object and purpose, it is *not* a separate criterion for treaty interpretation.[187] Consequently, the question is not one of timing only, it also relates to the scope of obligations that can potentially emanate from the agreed terms of the treaty pertaining to unilateral acts. As the comparative analysis has demonstrated, it is not unusual to determine the parameters of a (later) legal course of action in a treaty, that can then be concretised at a future point in time. However, the concretisation is important, because it leaves room for the operationalisation of the intent that is not pre-determined by the consent to the treaty. On the other hand, the scope for concretisation can of course be constraint, in full or to some extent, through the terms of the treaty.[188]

Therefore, for the argument that states can consent to a unilateral measure that they will adopt, by consenting to a treaty, it is indeed essential to differentiate between the *instrumentum* as the agreed form of action and the *negotium* as the substantial scope of the obligation.[189] Unless the latter is clearly defined in the treaty, the specific role of the intention to be bound that underlies the obligatory nature of a unilateral act, demands a careful approach. If Parties provide in the treaty text for the adoption of unilateral acts as an instrument, without clearly prescribing the content, then the consent to the treaty can only encompass the state's will to be bound by the *instrumentum*. Otherwise, consent to a treaty would undermine the role of intent for individually assumed, concrete obligations.

If there is consent to a treaty that provides for a specific form of legal action, then the intention to be bound could occur, for the first time, at the conclusion of the treaty. Different scenarios are possible. States could adopt a treaty provision that exactly provides for the *instrumentum* and for the *negotium* of the measure, which is to be adopted at a later stage. Or they leave only limited discretion, such as the selection of a specific wetland, for the state to determine at a later point. These questions and the ensuing, necessary differentiations have so far not been addressed in the literature. In fact, there has been no discussion at all about the earliest point in time at which the intention to be bound can be expressed for a future unilateral act. This is surprising since many treaty regimes rely on mechanisms whereby multilateral authority and unilateral measures are coalescing. Therefore, it is critical to establish in relation to treaty based unilateral acts if states have already expressed the commitment to be bound at the time they concluded the treaty, even if they only agreed on the *instrumentum*, i.e., the possibility to adopt a legal *form* of action. Two different questions must be distinguished. First, does the consent to the treaty include the consent to an obligation to adopt a unilateral act as a legal form of action, at a later stage? Second, if that is the case, to which extent is a state at that later stage still free to decide, that the unilateral measure is (still) legally binding? Only then can a third

[186] *VCLT* (n 47) art 31 para. 1; Fuad Zarbiyev, 'Consenting to Treaty Commitments' in S Besson (ed), *Consenting to International Law* (Cambridge University Press 2024) 163, 165.
[187] Samantha Besson, 'State Consent and Disagreement in International Law-Making: Dissolving the Paradox' (2016) 29 Leiden Journal of International law, 289, 291.
[188] Cf. *Arbitral Award of 3 October 1899 (Guyana v Venezuela)* [2020] ICJ Rep 455, 475, 476 para. 72 [hereinafter *Arbitral Award*].
[189] The ILC made this differentiation early on in the discussion about the terminology (unilateral act/unilateral declaration), Second Report on Unilateral Acts of States, 5th Session, UN Doc A/CN.4/500 (1999) on Unilateral Acts of States, 55h Session. The ILC eventually settled on using both terms simultaneously and to proceed with a study of the evolution of different acts and declarations that would allow to distinguish between those that are capable of producing a legal as opposed to a political effect. See *Eighth Report on Unilateral Acts of States* (n 77) para. 3.

question be addressed, that is, if the unilateral measure is found to be legally binding, what is the scope of the legal obligations, if any?

In relation to the first question, it appears logical and reasonable to assume that with the acceptance of a treaty *obligation* to adopt a certain unilateral measure, comes the acceptance that this measure, in the legal form the treaty stipulates, discharges the state from the legal obligation. In so doing, the measure already has legal consequences. From that viewpoint, it would be contradictory to argue that a state submits the required measure but has no intention to be bound by it, as in that case the effect of fulfilling a legal obligation would not be achieved either.

That a different point in time can exist to identify the intention to be bound by a later action, even that of a third Party, is in fact supported in the case law. The ICJ found in *Arbitral Award of 3 October 1899* that Venezuela and Guatemala were bound by the Geneva Agreement that conferred the authority to a third Party to choose the means of settlement in any given dispute.[190] The Court discussed whether Parties gave their consent to judicial settlement of a controversy under article IV (2) of the Geneva Agreement at the time when they consented to the treaty, or alternatively, if a further confirmation of their intention was necessary at the point when the dispute eventually occurred. The provision at the heart of the dispute refers to a 'decision' by a third party, in this case the Secretary General, for the choice of means of settlement.[191] The Court concluded that the Secretary General had the authority to make a binding decision as to the means of settlement of the dispute, including his choice of judicial settlement as a means of dispute resolution.[192] The Court explained that the decisive point in time for Parties to exclude any of the means of settlement would have been the negotiations of the Geneva Agreement.[193] This reasoning entails that by consenting to the treaty, Parties not only conferred the authority to a third party to make a decision, but they also agreed to be bound by that third party's independent decision without preserving the right of a final confirmation or indeed a deviation from their prior consent. Thus, the consent to the treaty encompassed the consent to the choice of a third party even though neither the subject of the dispute nor the concrete means of dispute settlement were foreseeable at the point in time, especially given the choice of various means afforded in article IV(2) Geneva Agreement.[194]

Conversely, an interpretation of the consent to the treaty that would limit the legal valence of a prescribed legal form of action, based on the observation that the scope of the ensuing legal obligations can still be self-determined, not only risks conflating the *instrumentum* with the *negotium*, but it would also directly contradict the intention of Parties as expressed in their consent to the treaty. Such interpretation would be similar to denying an international agreement the qualification as a legally binding treaty, merely because the substantive

[190] *Arbitral Award* (n 188) para. 71.
[191] Ibid para. 67
[192] Ibid paras. 78, 82.
[193] Ibid para. 82.
[194] Geneva Agreement, signed on 2 May 1966 and registered with the UN Secretariat on 5 May 1966, 561 UNTS 322. In accordance with art IV, paragraph 2, should those Governments fail to reach agreement, the decision as to the means of settlement shall be made by an appropriate international organ upon which they both agree, or, failing that, by the Secretary-General of the United Nations, ibid para. 43.

obligations are limited, vague, and in need of further 'fleshing out'.[195] Instead, it is widely accepted that the scope of substantive legal obligations is without prejudice for the qualification of the form of a treaty, and there is no reason why unilateral acts should be treated differently from treaties in that respect. The ICJ made a similar differentiation regarding the legal nature and the scope of the *Ihlen* declaration, both of which demanded careful interpretation. It found that the declaration was a unilateral act,[196] and that it was unconditional and definitive, therefore, it could not be replaced with a conditional declaration or a different interpretation.[197] However, this act was not *per se* constitutive of Denmark's sovereignty over all of Greenland.[198] Conversely, the scope of the unilateral act was to be determined separately from the question of the legal nature of the declaration. The ICJ interpreted the scope as being limited to the commitment of Norway not to interfere with *existing* sovereignty.[199] The clear distinction between the legal nature of the instrument and the scope of obligations created meant that Norway had to refrain from occupying the territory or otherwise dispute the Danish claim to sovereignty.[200]

This coheres with the ILC's guiding principles that operate on the premise that it is possible to separate the concrete legal effects of a unilateral act from the qualification of that act as legally binding. This is one of the fundamental premises upon which the ILC based its draft principles.[201] As has been noted, the term 'such declarations' already refers to those *stricto senso*, as the ILC only dealt with binding unilateral acts. Therefore, principle 3 acknowledges that it is possible to separate the *legal nature* of the unilateral act from any legal effects that they have, and the circumstances and the reactions of other states are important for the determination of the legal effect. To the extent the treaty requests a legal form of action, instead of only a political declaration, the intention to be bound by the submission can be derived from the acceptance of a legal obligation to make the submission. This leads to the second question posed above, the continuity of the intention to be bound.

2. Continuity of the intention to be bound

While the intention to be bound can thus be present at the time of the conclusion of the treaty and before the concrete measure is adopted, this does not entail that it is redundant at the time the state adopts the respective unilateral act. Finding the continued intention to be bound is a matter of treaty interpretation and a question of the factual circumstances of each unilateral act.[202] In accordance with the rule of interpretation enshrined in article 31, paragraph 1, of the VCLT, a treaty must be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[203]

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[195] The Paris Agreement is a key example of a treaty in need of fleshing out, see *Rajamani* (n 16); Petra Minnerop, 'Taking the Paris Agreement forward: Continuous Strategic Decision-making on Climate Action by the Meeting of the Parties' (2018) 21 Max Planck Yearbook of United Nations Law 124, 140.

[196] *Legal Status of Eastern Greenland* (n 67) 72: 'From the foregoing, it results that the Court is unable to regard the Ihlen declaration of July 22nd, 1919, otherwise than as unconditional and definitive.'

[197] Ibid 73.

[198] Ibid 69, 72.

[199] Ibid 72, 73.

[200] Ibid 73.

[201] *ILC Draft Principles 2006* (n 60) principle 3 reads:
'To determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise.'

[202] These will be considered in Part IV.

[203] These elements of interpretation are to be considered as a whole. *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)*, Preliminary Objections [2017] ICJ Rep 3, 29, para. 64.

Parties have consented to a 'regime-building' treaty text that sets forth obligations and procedures in the anticipation of individual and collective measures. Consent to such a regime entails a presumption of continuity in the intention to be bound.[204] However, two scenarios are possible that could interrupt this continuity, and these require case-specific analysis, both in relation to the specific treaty and the state practice.[205]

First, the submitting state could in theory abandon the intention to be bound by making an explicit statement in that regard, with the actual submission of the unilateral measure. It is of course a different question altogether whether such behaviour would comply with the treaty, but the sovereign state remains, in theory, in control of its intention to be bound. The second scenario is closely related to the first but less dramatic, albeit equally undermining the treaty's object and purpose. Given that it is possible to separate the qualification of the legal nature of unilateral measure from its legal effect, is entirely conceivable for a state to limit the legal effects of individual unilateral measures while adhering to the legal form.

The following part applies the criteria established so far and argues that the Paris Agreement provides an answer also for the third question, the scope of the legal obligations created by the unilateral acts the treaty prescribes. The category of prescribed qualified unilateral acts captures the continuity of the intention to be bound and the progressive qualification of legal substance.

III. A New Category: Prescribed Qualified Unilateral Acts

The Paris Agreement couples leeway for Parties to determine NDC substance with rules and mechanisms to ensure an increasing degree of consistency and coherency. The approach is consistent with that observed in other multilateral environmental agreements in so far as some of these examples equally prescribe unilateral acts. However, it goes significantly beyond the existing examples in its provision to progressively shape the content of treaty-based unilateral acts. The dominant qualifying process for NDCs is the global stocktake provided for in article 14 which is intertwined with the submission cycle for NDCs. This twinning of collective oversight with unilateral conduct establishes a key mechanism that narrows the leeway of Parties in defining NDC substance. The qualifying component is elevated to a new level of treaty-based authority over the required unilateral acts, and this argument becomes even more impactful if it can be demonstrated that NDCs are legal instruments.

A. *NDCs as prescribed unilateral acts*

The specific importance of all relevant circumstances in the legal evaluation of unilateral behaviour within a treaty context, demands that the intention of Parties is interpreted within the entire treaty structure.[206] The Paris Agreement articulates a legal obligation ('shall') not only to submit but also to maintain the NDC.[207] This obligation encompasses the preparation, communication and maintenance' as related but discrete actions. Taken together, these actions convey the idea of a pledge that will henceforth be the foundation in international law of Parties' climate action at the domestic level. NDCs connect the international with the national legal order. The following explores this proposition in three steps. It first turns to the

[204] Moving from 'rule consent' to 'regime consent', see *Zarbiyev* (n 186) 173.
[205] This will be provided in the following Part III and IV.
[206] Cf. *ILC Guiding Principles 2006* (n 60) principle 3.
[207] The Court previously observed in its Judgment on the preliminary objections in the case concerning that the use of the word 'shall' in the provisions of a Convention should be interpreted as imposing an obligation on States Parties to that Convention, *Immunities and Criminal Proceedings (Equatorial Guinea v France)* [2018] ICJ Rep 292, 321 para. 92.

assumption that the consent to the regime of the Paris Agreement encompasses the consent to submit NDCs as a legal obligation, therefore, it includes the intention to be bound. Second, the principle of good faith operates in two related perspectives: within the treaty regime and in respect of each NDC, once submitted. As such, it generates and protects reasonable expectations in respect of treaty compliance and, based on the NDCs, in respect of continuity of the intention to be bound and the quality of the submission. In a third step, the counterargument will be addressed. It has been raised in the literature that the wording of the Paris Agreement was specifically chosen by Parties to avoid that legal valence would be assigned to NDCs.

1. Consent to treaty and the intention to the bound

The ICJ has recognised that treaty contexts, including at the stage of negotiations, create situations in which unilateral behaviour of a state is more likely to be legally relevant. One of the major differences between the *Ihlen* declaration and the *Nuclear tests* case, was that the Norwegian Foreign Minister made his declaration in the wider context of a negotiating situation. Meanwhile, in the *Nuclear test* case, the ICJ found nevertheless that the declaration was binding 'even though they were not made within the context of international negotiations.'[208] Therefore, while the context of treaty negotiations may usher in a presumption of an increased willingness of states to adopt a binding unilateral act, legally binding acts can occur entirely outside any treaty or negotiating context.[209]

In this respect, it is worth noting that NDCs indeed emerged from the intended nationally determined contributions (INDCs) that were originally submitted in the context of the negotiations of the Paris Agreement.[210] Parties then agreed to accept a legal obligation to submit NDCs in accordance with the rules of a legally binding treaty regime. The Paris Agreement prescribes the submission of an NDC as a legal obligation. The consent to the treaty comprises the consent to adopt NDCs in order to fulfil a legal obligation. As has been shown above, the qualification of unilateral conduct as legally binding does not depend on the requisite of a precise obligation,[211] in the same way as a treaty can exist without establishing clear duties.[212] There is also no conflict with the nationally determined nature of NDCs, because the scope of the NDCs is still reserved for the discretionary decision-making of each state. The freedom to define the content of the NDC does neither require nor encompass the choice of the legal form, as this is prescribed by the terms of the treaty.

The use of the term 'Parties' in connection with the obligation that applies to all, to 'pursue mitigation measures', indicates that the treaty encompasses a common intention that is congruent with the individual intention to be bound. While the wording has been employed to counter the argument that NDCs could entail individual obligations, given that the 'collective' of Parties and not individual Parties are addressed,[213] there is no interpretative rule that would support such reading. By contrast, it is well recognised in rules on treaty interpretation that the

[208] See for a discussion of this point *Rubin* (n 70) 3.
[209] *Nuclear Tests cases* (n 86).
[210] Available from <https://www4.unfccc.int/sites/submissions/indc/Submission%20Pages/submissions.aspx> last accessed 3 April 2024.
[211] Ibid.
[212] This is especially the case for treaties that depend on further concretising rules to become operational. The are nevertheless legally binding in accordance with the VCLT.
[213] *Bodansky* (n 22) 146.

reference intention 'of parties', e.g., in plural, refers to the *common* intention of Parties.[214] In the words of Justice Schwebel, '[I]t does not refer to the singular intention of each party which is unshared by the other. To speak of "the" intention of "the parties" as meaning the diverse intentions of each party would be oxymoronic'[215] Therefore, it is precisely by using the word 'Parties' that states have expressed the intention to be bound that is shared by all; knowing that only then will the treaty regime be equipped to achieve the long-term goals. With the creation of prescribed unilateral acts, Parties broadened the basis for applying the principle of good faith as will be shown in the next section. Meanwhile, in a legal order that is based and dependent on the continuous consent of Parties, it is equally possible that a change in the intention occurs at a later stage or that the terminology used in the NDCs remains too ambiguous to identify any concrete legal content. This point refers to state practice and will be discussed in Part IV as a matter of scrutiny of individual submissions.

2. Good faith and continuity of the intention to be bound

The ICJ has repeatedly noted that the principle of good faith governs the creation and performance of legal obligations through unilateral acts in the same way as for treaty-based obligations:

> 'Trust and confidence are inherent in international co-operation, in particular in an age when this Co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.'[216]

This reasoning conveys that trust and confidence are generated and protected by the operation of the principle of good faith. The principle of 'good faith' is deeply rooted in the international legal order and a 'well-established principle of international law',[217] and as such, entrenched in treaty law. It is set forth in article 2(2) of the Charter of the United Nations and enshrined in article 26 of the Vienna Convention on the Law of Treaties. In international environmental agreements, it is often found in the context of dispute settlement, where Parties are required to consider the non-binding awards of conciliation commissions in good faith.[218] The Paris Agreement particularly refers to the aim of building trust and confidence in the context of the Enhanced Transparency Framework in article 13.[219]

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[214] Dissenting Option Justice Schwebel, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* [1995] ICJ Rep 27.
[215] Ibid.
[216] *Nuclear Test cases* (n 86) para. 49.
[217] *Land and Maritime Boundary between Cameroon and Nigeria* (n 101) para. 38.
[218] UNFCCC (n 6) art 14(6); Protocol to the 1979 Convention on Long range Transboundary Air Pollution on Persistence Organic Pollutants, entered into force 28 January 1988, 2230 UNTS 79, art 12(6); the 1979 Convention entered into force on 16 March 1983.
[219] *Paris Agreement* (n 5) art 13(1) reads: In order to build mutual trust and confidence and to promote effective implementation, an enhanced transparency framework for action and support, with built-in flexibility which takes into account Parties' different capacities and builds upon collective experience is hereby established.

The first case that mentioned the principle of good faith was indeed the *Arbitral Award of 7 September 1910 in the North Atlantic Fisheries* case.[220] Subsequently, the PCJI referred to it[221] and the ICJ has built on this practice from 1952,[222] including in the cases concerning *Fisheries Jurisdiction*[223] and *Nuclear Tests*.[224]

The ICJ has concretised the meaning of 'good faith' in an environmental context, when it acknowledged in *Gabcikovo-Nagymoros* that the implementation of specific obligations requires 'the mutual willingness to discuss in good faith actual and potential environmental risks.'[225] This was confirmed and indeed qualified in *Certain Activities and Construction of a Road*, where the Court held that in order to fulfil the due diligence obligation of preventing significant transboundary harm, the state planning an activity must consult with the potentially affected state in good faith to 'determine the appropriate measures to prevent or mitigate that risk'.[226]

Most importantly, the principle of good faith even buttresses a legal presumption of future lawful conduct after a declaration of an act as wrongful. The Court noted in that respect in the *Navigational and Related Rights* case that 'there is no reason to suppose that a state whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed'. Consequently, assurances and guarantees of non-repetition will be ordered only 'in special circumstances'.[227] While the principle is thus firmly anchored in international law, it rather operates to ensure that existing obligations are complied with and is not a source of obligations *per se*.[228]

It can be derived from the ICJ's jurisprudence that for treaty-based unilateral acts, the principle of good faith operates in two ways. Firstly, it ensures compliance with the treaty obligations, and secondly, it protects the reasonable expectations of other states in respect of the adopted unilateral acts that are prescribed by the treaty. The double-folded role of the principle of good faith in the generation and protection of reasonable expectations, both under the treaty and based on individual NDCs, is the foundation of trust within the Paris Agreement, as recognised in domestic courts. For example, the German Constitutional Court found that national activities should 'serve to strengthen international confidence' and 'resolving the global climate problem is thus largely dependent on the existence of mutual trust that others will also strive to achieve the targets.'[229]

The ILC saw it as a conceptual challenge to clearly distinguish between a purely autonomous decision of the acting state to be bound and the legal bindingness of the unilateral act as a result

[220] United Nations, Reports of International Arbitral Awards, Vol. XI, p. 188.
[221] *Factory at Chorzów*, Merits, Judgment No. 13, 1928, PCIJ, Series A, No. 17, p. 30.
[222] *Rights of Nationals of the United States of America in Morocco* [1952] ICJ Rep 176, 212.
[223] *Fisheries Jurisdiction Case (Federal Republic of Germany v Iceland)* [1974] ICJ Rep 175, 202 para. 70.
[224] *Nuclear Tests cases* (n 86) paras. 46.
[225] *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, 67 para. 112.
[226] *Certain Activities in the Border Area* (n 157) para. 168.
[227] *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213, 267 para. 150.
[228] *Land and Maritime Boundary between Cameroon and Nigeria* (n 101) para. 39.
[229] *Neubauer v Germany*, Federal Constitutional Court of Germany, BVerfG, Beschluss des Ersten Senats vom 24. März 2021- 1 BvR 2656/18 -, Rn. 1-270, para. 203. English translation available at <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html>

of the confidence placed in it by other states. The expectation of other states is one of compliance with the treaty, i.e., in the context of the Paris Agreement, that a submission will be made and that it will be maintained. It is only after the unilateral measure is submitted (in this case, the NDC), that other states will place confidence in the continuity of the intention to be bound of the submitting state, and in addition, in the quality of the content of the submission and its alignment with the objectives and the qualifying criteria of the respective treaty regime.

While it is true that NDCs are 'housed' outside of the agreement,[230] the existence of a public registry, and the yearly synthesis reports of the Secretariat upon request of the CMA, ensure that the international community takes 'cognizance' of NDCs and states will place confidence in them.[231] This built-in publicity serves indeed a very specific purpose under the Agreement: the publicity of a registry speaks to the tendency of states to define own ambition vis-à-vis that of others.[232] For example, during the second commitment period under the Kyoto Protocol, several developed country Parties made an increase in their own ambition dependent on that of other high emitting Parties. For example, the EU included in the Doha Amendment the statement that:

> '[A]s part of a global and comprehensive agreement for the period beyond 2012, the European Union reiterates its conditional offer to move to a 30 per cent reduction by 2020 compared to 1990 levels, provided that other developed countries commit themselves to comparable emission reductions and developing countries contribute adequately according to their responsibilities and respective capabilities.'[233]

Even before, as part of the Cancun Pledges, Parties were not only signalling to maintain their existing pledges but also offering higher quantified emissions reduction targets, provided that other developed Parties would commit to comparable reductions and that developing countries would contribute adequately according to their responsibilities and capabilities.[234] Publicity not allows that Parties take cognizance of and place confidence in the unilateral acts, it ultimately serves to increase ambition that is conditioned by that of others. The NDC registry establishes the factual conditions for the operation of the principle of good faith and fundamentally promotes demonstrable continuity in the intention to be bound. Not least the differentiation between the unconditional and the conditional elements in NDCs manifests the intention of the submitting state, and its corresponding capacity, to achieve at a minimum, the conditional target. It underlines the continuity of the intention to be bound and to move beyond the unconditional target, provided that certain conditions are met.

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[230] Jutta Brunnée, 'State Consent in the Evolving Climate Regime' in Samantha Besson (ed), *Consenting to International Law* (Cambridge University Press 2024) 180, 199.
[231] See the requirement as established in *Nuclear Test cases* (n 86) para. 46.
[232] Doha amendment to the Kyoto Protocol, note 7, https://unfccc.int/files/kyoto_protocol/application/pdf/kp_doha_amendment_english.pdf
[233] Ibid Similar statements were made by Liechtenstein (note 9) and Norway (note 10).
[234] See *Cancun Pledges*, Switzerland, https://unfccc.int/topics/mitigation/workstreams/pre-2020-ambition/compilation-of-economy-wide-emission-reduction-targets-to-be-implemented-by-parties-included-in-annex-i-to-the-convention.

3. The counterarguments: does the Paris Agreement imply a limitation to the intention to be bound?

While it thus appears perfectly logical to argue that Parties consented to the legal nature of NDC at the time the Paris Agreement was concluded, the wording of article 4(2) Paris Agreement could challenge that argument. The provision has attracted a lively debate in the literature. The first sentence clearly states that 'Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve'. Scholars have devised an argument in favour of the non-obligatory character of each country's pledge in light of the use of 'contribution' rather than 'commitment'.[235] For one school of thought, the fact that each Party defines the *content* of the pledge excludes the possibility that NDCs *themselves* possess the prerequisites of a 'proper' legal act.[236] Thus, the second sentence is seen as to imply only one reading – states cannot only define the substance and the scope of their contributions, but they have the power to evade the legal bindingness of their NDCs.[237] This view entails that in the absence of a clearly articulated treaty obligation to achieve the NDC's targets, NDCs cannot be seen as a legally binding form of action either.

The argument is often supported by pointing to the complex negotiating history[238] and treaty terminology that avoids any acceptance of a pre- or centrally determined climate targets and instead establishes obligations of conduct rather than of result.[239] Another school of thought argues for the double bindingness of NDCs, based on both, article 4(2) of the Paris Agreement and the fact that NDCs are regularly adopted with the intention to achieve.[240]

Undoubtedly, issues of the legal valence of NDCs during the Paris Agreement's negotiations reflect one of the most fundamental underlying tensions within the UNFCCC.[241] In Warsaw, during COP13, the wording nationally determined 'contributions' rather than 'commitments' was carefully chosen.[242] It has been noted that the formulation repeats article 4(2) UNFCC which did also not create any legal obligation.[243] This view risks ignoring that in light of the tensions during the negotiations, where the US and the EU formed very different views on the legal nature of NDCs, Parties poignantly confirmed that the preparation and communication of

[235] *Bodansky* (n 22) 146.
[236] Lavanya Rajamani and Jutta Brunnée, 'The Legality of Downgrading Nationally Determined Contributions under
the Paris Agreement: Lessons from the US Disengagement' (2017) 29 Journal of Environmental Law 537, 542; see also *Bodansky, Brunnée and Rajamani* (n 16).
[237] *Bodansky* (n 22) 146, 147.
[238] For an overview of options on the table for the Paris Agreement, see Sandrine Maljean-Dubois, Thomas Spencer and Matthieu Wemaere, 'The Legal Form of the Paris Climate Agreement: a Comprehensive Assessment of Options' CCLR 68 (2015).
[239] Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press, 2009) 76.
[240] Benoit Mayer, 'International Law Obligations Arising in Relation to Nationally Determined Contributions' (2018) 7 TEL 251, 266; Jorge E Viñuales, 'The Paris Agreement on Climate Change' (2016) 59 German Yearbook of International Law 11, 27.
[241] *Bodansky*, *Brunnée* and *Rajamani* (n 236) 231; Daniel Bodansky, 'The Copenhagen Conference: A Post-Mortem', (2010) 104 American Journal of International Law, 230, at 232–233; *Rajamani* (n 45) 501, 507.
[242] Decision 1/CP.19 para. 2 (b), FCCC/CP/2013/10/Add. 1.
[243] *Bodansky* (n 22) 146, citing Daniel Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary' (1003) 18 Yale Journal of International Law, 451, at 516–517.

nationally determined contributions would be 'without prejudice to the legal nature of the contributions'.[244]

Furthermore, the negotiating history, while important, is only a supplementary means of treaty interpretation, employed when authentic means of interpretation lead to inconclusive results.[245] Another reading remains therefore possible. The role assigned to the wording of article 4(2) first sentence could only convince if the second sentence would *exclude* NDCs from the legal sphere altogether, as a matter of the common intention of Parties – which is not the case. Instead, the provision leaves it to the discretion of each state to define the legal scope of their NDC's substance, leaving the obligation to submit and maintain untouched, while also obliging every state to comply by adopting mitigation measures suitable to achieve the aim of the NDC. Concerning the obligation to adopt mitigation measures, a further point of contention is the phrase 'intends to achieve' in the first sentence, which has been interpreted as a 'good faith expectation'[246], that qualifies the procedural obligation in the absence of an obligation to fulfil a specific commitment.[247] However, a different reading is possible, where the added emphasis on the 'intention' can also be viewed as a confirmation of the intention to be bound by the NDC, i.e. an intention to achieve the NDC at the time it is submitted.

Further discussion is sparked by article 4(2) second sentence that reads 'Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.' The dominant interpretation of the second sentence is that of an obligation of conduct, not as an obligation of result.[248] For an obligation of conduct, only a certain behaviour is required, while an obligation of result demands that a certain outcome is attained.[249] However, even the interpretation as an obligation of conduct does not *per se* contravene the argument that the 'promise' of a certain conduct is legally relevant as a form of state action. Norms of conduct are equally governed by law as those that demand to attain a certain result,[250] as such, they can constitute juridical acts. It is simply not possible to derive from the freedom to decide on the substance – be that a certain conduct or a conduct that yields a specific result – that the instrument itself *cannot* be a legally binding measure. Moreover, and independently from the obligation set forth in article 4(2), and in light of the global stocktake and the sub-treaty rules that govern NDCs, it seems reasonable to assume that NDCs are more than mere obligations of conduct. They are of a hybrid nature, where conduct is coupled with the promise to achieve a global goal, in an iterative process, they are close relatives of Public Law's 'outcome duties'.[251]

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[244] Decision 1/CP.19 (n 242) para. 2 (b).
[245] Art 32 VCLT prescribes that '[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of art 31, or to determine the meaning when the interpretation according to art 31 (a) leaves the meaning ambiguous or obscure; or b. leads to a result which is manifestly absurd or unreasonable.'
[246] *Rajamani* (n 7) 114.
[247] Ibid
[248] Ibid 116.
[249] Ibid 115, referring to Pierre-Marie Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility' (1999) 10 EJIL 375.
[250] See for a discussion in relation to climate change obligations *Mayer* (n 22) 132.
[251] Colin Reid, 'A new sort of duty? The significance of "outcome" duties in the climate change and child poverty acts' (2012) 4 Public Law 749.

The view that NDCs are not legally binding has indeed been opposed but never fully argued by a second school of thought that points out that NDCs could qualify under international law as a subsequent agreement or subsequent practice (article 31(3)(a)-(b) VCI T) in interpreting provisions of the UNFCCC and the Paris Agreement, and it has been pointed out but not established that they could, potentially, constitute binding unilateral acts.[252] This has been echoed by others who stress the potential double-bindingness of NDCs.[253] It may be possible to argue that NDCs represent subsequent agreement on the interpretation of article 4(2).[254] This would entail that submissions of individual NDCs fulfil the relevant criteria, i. e. that they embody a common understanding on the interpretation of the treaty provision, in this case article 4(2) Paris Agreement. One would need to demonstrate that Parties in their submissions intend to clarify the substance of the treaty.[255] However, expressing such a common understanding of article 4(2) may not be at the forefront of states' intentions when submitting their NDCs. First and foremost, Parties commit to making a more or less specific contribution to tackling climate change, an increasing number includes an absolute economy-wide and quantified emissions reduction target. It may therefore be more convincing to qualify NDCs as relevant state practice in the sense of article 31(3)(b) VCLT from which a subsequent agreement can be derived, and this point will be picked up again in part IV to buttress the argument that state practice confirms the legal bindingness of NDCs.

Interestingly, even the school of thought that is sceptical towards the claim that NDCs are legally binding upon states, agrees that some rules that were devised in the Rulebook concerning NDCs, are legally binding.[256] For example, the rules on accounting employ mandatory language and are widely seen as legally binding for the second round of NDCs.[257] Similarly, the Rulebook on article 6 and bilateral agreements that are emerging to design cooperative approaches operate on a reinforced commitment that participating Parties will comply with their NDCs.[258] It appears difficult to reconcile, if not contradictory, to accept legally binding accounting rules, if the NDCs that set forth accounting baselines are not legally

[252] *Viñuales* (n 240)11; Harald Winkler, 'Mitigation', in Daniel Klein *et al*. (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press 2017), 141-65, at 147.
[253] Mayer (n 240) 252.
[254] *Viñuales* (n 240)27.
[255] UN ILC Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries (2018), conclusion 4 para. 1 commentary paras. 13-15. Adopted by the International Law Commission at its seventieth session, in 2018 *Yearbook of the International Law Commission, 2018*, vol. II, Part Two.
[256] Second, para 32 'decides that Parties shall apply the [accounting] guidance in paragraph 31' to their second and subsequent NDCs. Assuming this decision is ratified by the meeting of the Paris Agreement's parties (CMA), after the agreement comes into force, the accounting guidance in the COP21 decision will be legally binding, since art 4(13), requires parties to account for their NDCs in accordance with guidance adopted by the CMA.
[257] Lavanya Rajamani and Daniel Bodansky, 'The Paris Rulebook: Balancing International Prescriptiveness with National Discretion' (2019) International and Comparative Law Quarterly 1023, 1032.
[258] Decision 2/CMA.3, Annex, FCCC/PA/CMA/2021/10/Add.1 Guidance on cooperative approaches referred to in art 6(2) of the Paris Agreement, see e.g., paras. 1(f), 2(a), 4(c).

binding.[259] The same holds true for informational requirements.[260] Expecting Parties to comply with a legal obligation to submit information on transparency, clarity and understanding of the NDCs, and in the future, to explain how the global stocktake has informed their NDCs, cannot convince from the point of view that the main submission as such is a mere political statement and not legally binding.

In light of the above, the discussion that focuses on the wording of article 4(2) does not stand in the way of the assumption that it is possible to assign legal valence to NDCs as prescribed unilateral acts. Specifically the wording in the second sentence ('Parties') speaks in favour of a shared intention,[261] at the point of the conclusion of the treaty.

B. The global stocktake as qualifying process and reasonable expectations

The primary legal mechanism that qualifies the treaty-prescribed unilateral acts under the Paris Agreement is the global stocktake. The Paris Agreement could have simply provided for a five-year cycle of NDC submissions coupled with an expectation of raising ambition. Instead, it has tied the submission cycle and the normative expectation to a corresponding five-year rhythm of the global stocktake, it thereby introduced a specific promise-qualifying 'modèles de justice procédurale'.[262] The objective of the modèle 'global stocktake' is to assess the collective efforts in relation to the attainment of the treaties' targets.[263]

The nexus is especially strengthened through article 14 para. 3:

> 'The outcome of the global stocktake shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support in accordance with the relevant provisions of this Agreement, as well as in enhancing international cooperation for climate action.'

[259] Most Parties (83 per cent) communicated information on the assumptions and methodological approaches to be used for accounting anthropogenic GHG emissions and, as appropriate, removals, corresponding to their NDCs. Of those Parties, most (87 per cent) referred to the 2006 IPCC Guidelines, while some others (11 per cent) referred to the Revised 1996 IPCC Guidelines for National Greenhouse Gas Inventories. Some also mentioned the 2019 Refinement to the 2006 IPCC Guidelines for National Greenhouse Gas Inventories, the IPCC Good Practice Guidance and Uncertainty Management in National Greenhouse Gas Inventories and/or the IPCC Good Practice Guidance for Land Use, Land-Use Change and Forestry.

[260] *NDC SYR 2021*, FCCC/PA/CMA/2021/8/Rev.1 para. 54: 'CMA 1 adopted further guidance on the information necessary for clarity, transparency and understanding of NDCs. In communicating their second and subsequent NDCs, Parties shall provide the information necessary for clarity, transparency and understanding contained in annex I to decision 4/CMA.1 as applicable to their NDCs. In addition, CMA 1 strongly encouraged Parties to provide this information in relation to their first NDC, including when communicating or updating it by 2020'.

[261] Cf. Dissenting Option Justice Schwebel (n 214).

[262] See for a differentiation, starting with the *modèles de Rawls*, Hélène Ruiz Fabri, 'La justice procédurale en droit international' (2023) 432 Recueil des Cours 25.

[263] *Paris Agreement* (n 5) art 14(1): 'The Conference of the Parties serving as the meeting of the Parties to this Agreement shall periodically take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals (referred to as the 'global stocktake'). It shall do so in a comprehensive and facilitative manner, considering mitigation, adaptation and the means of implementation and support, and in the light of equity and the best available science.'
Art 14(2): 'The Conference of the Parties serving as the meeting of the Parties to this Agreement shall undertake its first global stocktake in 2023 and every five years thereafter unless otherwise decided by the Conference of the Parties serving as the meeting of the Parties to this Agreement.'

The global stocktake has been developed through sub-treaty rules as a Party-driven process, conducted in a transparent manner and with the participation of non-Party stakeholders.[264] The first edition of this process started at COP26 and concluded at COP28.[265] Testing the achievability of the treaty's objectives is intricately linked to the global stocktake. Decision 19/CMA.1, adopted as part of the Katowice Climate Package at COP24, specifically recognises the importance of the global stocktake for 'enhancing the collective ambitions and support towards achieving the purpose and long-term goals of the Paris Agreement.'[266] The modalities of the global stocktake are laid down in the operational part of Decision 19/CMA.1, for the three key pillars of mitigation, adaptation[267] and means of implementation and support.[268]

The CMA divided the global stocktake into three distinct but overlapping phases[269] of information collection, technical assessment, and the consideration of outputs,[270] ending at CMA5 in November 2023.[271] The first phase was dedicated to the collection of information, with the sources of information listed in paras. 36 and 37.[272] As part of the second phase, the technical assessment, a technical dialogue was established to undertake a focused exchange of views through roundtables, workshops and other activities.[273] The technical dialogue was prepared and conducted by two co-facilitators,[274] divided into three phases (T.D. 1.1 to T.D. 1.3) and held in conjunction with SB56, SB57 and SB58 respectively.[275] For each of these meetings, the co-facilitators provided guiding questions for the input of Parties and non-Party stakeholders,[276] and a summary report after each SB conference.[277] In addition, at the end of the technical assessment phase, an overarching factual synthesis report was published with key findings.[278]

The final phase, ending at the 5th Meeting of Parties under the Paris Agreement (CMA5) during the 28th Conference of Parties (COP28) in Dubai, was concerned with the consideration of outputs.[279] This part of the process focused on discussing the implications of the findings of the technical assessment with a view to achieving the outcome of the global stocktake in 'updating and enhancing, in a nationally determined manner, their actions and support, as well as international cooperation'.[280] Decision 19/CMA.1 provided that the global stocktake should serve to assess the collective progress, and that outputs would be non-policy prescriptive and

[264] Decision 19/CMA.1 (n 24) para. 10.
[265] Decision 1/CMA.5 FCCC/PA/CMA/2023/16/Add.1.
[266] Decision 19/CMA.1 (n 24).
[267] Decision 11/CMA.1, para. 14 FCCC/PA/CMA/2018/3/Add.1; Decision 12/CMA.1 para. 7 FCCC/PA/CMA/2018/3/Add.1.
[268] Decision 19/CMA.1 (n 24) para. 1.
[269] Ibid para. 26.
[270] Decision 19/CMA.1 (n 24) para. 3 a-c.
[271] Ibid para. 8.
[272] Ibid.
[273] Decision 19/CMA.1 (n 24) paras. 5, 6.
[274] Para. 6 c.; Prior to the start of the first TD, a non-paper was prepared to assist Parties, Available at <https://unfccc.int/documents/274746> last accessed 5 May 2024.
[275] Decision 19/CMA.1 (n 24) para. 4; Technical dialogue of the first global stocktake, Synthesis report by the co-facilitators, FCCC/SB/2023/9 of 8 September 2023, para. 72.
[276] Non-Paper (n 274) starting at 6.
[277] Decision 19/CMA.1 (n 24) para. 31.
[278] Ibid and Technical dialogue of the first global stocktake, Synthesis report by the co-facilitators (n 275).
[279] Decision 19/CMA.1 (n 24) para. 33.
[280] Ibid para. 34 a-c.

summarise opportunities, challenges and best practices.[281] Accordingly, CMA5 summarised Parties' collective progress, not that of individual Parties[282] and published the outcome in the format of a CMA decision.[283] Decision 1/CMA.5 notes significant shortcomings for all three components, mitigation, adaptation and means of implementation and support.[284] In particular, for mitigation, Parties noted with 'significant concern' that global greenhouse gas emissions trajectories were not in line with the temperature goal of the Paris Agreement and that the window for raising ambition and for implementation was rapidly narrowing.[285] Parties also endorsed the IPCC findings with a narrower focus on the 1.5 °C limit:

> 'limiting global warming to 1.5 °C with no or limited overshoot requires deep, rapid and sustained reductions in global greenhouse gas emissions of 43 per cent by 2030 and 60 per cent by 2035 relative to the 2019 level and reaching net zero carbon dioxide emissions by 2050'.[286]

As part of the procedural outcomes, Parties launched a 'Road Map to Mission 1.5 °C' to enhance international cooperation and to keep 1.5 °C within reach.[287] In addition, it was decided that information collection for the second global stocktake will start at CMA8 in November 2026.[288]

In relation to the substantive requirements, Decision 19/CMA.1 articulated the expectation that Parties will update and enhance their actions and support under the Paris Agreement, based on the non-policy prescriptive outputs.[289] Parties are 'called upon' to take into account a list of factors.[290] Following the conclusion of the first global stocktake, the procedural and logistical elements will be reviewed on the basis of the past experience.[291] Parties are now 'invited' to present their NDCs, as informed by the outcome of the global stocktake, at a special event held under the auspices of the Secretary-General of the United Nations.[292] There is, therefore, a

[281] Ibid paras. 13, 14.
[282] Ibid para. 14.
[283] Decision 1/CMA.5 (n 265).
[284] Ibid A, B, C.
[285] Ibid para. 24.
[286] Ibid para. 27.
[287] Ibid para. 191.
[288] Ibid para. 194.
[289] Decision 19/CMA.1 (n 24) para. 14.
[290] Decision 1/CMA.5 (n 265) para. 28: 'a) Tripling renewable energy capacity globally and doubling the global average annual rate of energy efficiency improvements by 2030;
(b) Accelerating efforts towards the phase-down of unabated coal power;
(c) Accelerating efforts globally towards net zero emission energy systems, utilizing zero- and low-carbon fuels well before or by around mid-century;
(d) Transitioning away from fossil fuels in energy systems, in a just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050 in keeping with the science;
(e) Accelerating zero- and low-emission technologies, including, inter alia, renewables, nuclear, abatement and removal technologies such as carbon capture and utilization and storage, particularly in hard-to-abate sectors, and low-carbon hydrogen production;
(f) Accelerating and substantially reducing non-carbon-dioxide emissions globally, including in particular methane emissions by 2030;
(g) Accelerating the reduction of emissions from road transport on a range of pathways, including through development of infrastructure and rapid deployment of zero-and low-emission vehicles;
(h) Phasing out inefficient fossil fuel subsidies that do not address energy poverty or just transitions, as soon as possible;'
[291] Ibid para. 15.
[292] Ibid para. 17.

collective expectation that NDCs will be improved in light of the outcomes of the global stocktake.

The ILC recognised in the preamble of the *Guiding Principles 2006* the difficulties to establish 'whether the legal effects stemming from the unilateral behaviour of a state are the consequence of the intent that it has expressed or depend on the expectations that its conduct has raised among other subjects of international law'.[293] Principle 3 alludes to the fact that the reactions of other states must be taken into account when determining the legal scope of already binding unilateral acts, i.e. unilateral acts *stricto senso*. The reactions of other states and the underlying 'reasonableness' of their expectations must be determined in light of the qualifying criteria that the treaty regime provides to ensure that the treaty's object and purpose can be achieved. In light of the endorsed temperature target, and the decisions of Parties on the science and urgency, with the enhanced focus on the lower mark of 1.5 °C as average temperature limitation globally,[294] it is reasonable for other states to assume that each NDC is and remains at all times suitable to comply with the criteria for submissions and to achieve the objective of limiting global warming to as close as possible to 1.5 °C.[295] With the outcome of the first global stocktake, Parties have learned that an implementation gap and an ambition gap exist, and that their reasonable expectations will not be fulfilled.[296] NDCs are not the suitable means that they were expected to be.[297] Full implementation of existing NDCs will still frustrate the reasonable expectation of all Parties that they can achieve, collectively, the set treaty goals.[298] However, the nature of the promise given with any unilateral act entails that it remains a suitable means to achieve the promised outcome, this promise gives rise to reactions in form of NDC submissions of other states. If the suitability is not, or no longer, a justified expectation, established through a treaty-based collective process that measures progress, then compliance with these legal instruments, collectively and individually, will frustrate the expectation of the international community. The finding that all NDCs taken together are inadequate, translates into the inadequacy of each individual NDC and places the burden on every state to demonstrate that its individual submission is suitable to achieve the treaty's object and purpose. It necessitates that a Party rebuts a legal presumption, and if that is not possible, an improved NDC is called for. This obligation results from the legal nature of NDCs as treaty-prescribed legal instruments and goes beyond the informational requirement of Parties to demonstrate how the outcome of the global stocktake has informed their new NDCs.[299] However, the argument is buttressed by progressively tighter due diligence obligations of Parties relating to informational and accounting requirements as will be discussed in the following.

C. Due diligence obligations pertaining to NDCs

As has been explained in the introduction, the global stocktake is the main legal lever for the qualifying process of NDCs, but it is supported by due diligence obligations that are entrenched in treaty and sub-treaty norms. A due diligence obligation is one of 'conduct on the part of a

[293] *ILC Guiding Principles 2006* (n 60) preamble 369.
[294] Decision 1/CP.27 (*Sharm el-Sheikh Implementation Plan*) FCCC/CP/2022/10/Add.1 paras. 4-8; 1/CMA.5 CCC/PA/CMA/2023/16/Add.1 paras. 25-28.
[295] *Paris Agreement* (n 5) art 2(1) lit. a, Decision 1/CMA.3 paras. 21, 22; 1/CP.27 para. 7.
[296] Ibid para. 2.
[297] Ibid paras. 21-23.
[298] Ibid paras. 26, 27.
[299] Ibid para. 165, referring to art 4(9) of the Paris Agreement and the relevant guidance as provided by Decision 4/CMA.1 (n 25) paras. 7, 13.

subject of law'.[300] In international law, due diligence obligations have deep historical roots,[301] are often ancillary to primary duties, and frequently invoked in the context of the responsibility of states for the activities of private actors.[302] These obligations are not constitutive of a duty of result but rather of a certain standard for states' conduct. The concrete content of due diligence duties varies over time[303] and it depends on the area of law in which they occur, i.e., in human rights law,[304] humanitarian law,[305] investment law,[306] or – as is the case here, in international environmental law.[307] Due diligence obligations can be laid down in treaty law or be rooted in customary international law.[308] The most fundamental due diligence obligation in customary international environmental law is the duty not to cause damage to the environment of other states or areas beyond the limits of national jurisdiction'[309]

The Paris Agreement's text lays the foundation for due diligence obligations by stipulating that Parties prepare, submit and maintain their NDCs. These treaty-based primary duties have been further developed in the Paris Agreement Rulebook.[310] In preparing their NDCs, Parties must

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[300] Timo Koivurova and Krittika Singh, 'Due Diligence' in A Peters (ed), *Max Planck Encyclopedia of Public International Law*, online, para. 1.
[301] *Alabama Arbitration of 1872*, *Alabama Claims of the United States of America against Great Britain,* Award rendered on 14 September 1872 by the tribunal of arbitration established by art I of the Treaty of Washington of 8 May 1871, Vol. 125, 131, 132.
[302] Draft Arts on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, art 2, Yearbook of the International Law Commission, 2001, vol. II, Part Two.
[303] *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion [2011] ITLOS Rep 10 para. 117: 'The content of "due diligence" obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that "due diligence" is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity.'
[304] General Comment No 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights, E/C.12/GC/24; General Comment No 31 (2003) under the International Convention on Civil and Political Rights, CCPR/C/21/Rev.1/Add. 13.
[305] Common art 1 of the Geneva Conventions reads: [t]he High Contracting Parties [to] undertake to respect and to ensure respect for the present Convention in all circumstances'. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (GC I), entered into force 21 October 1950; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 75 UNTS 85 (GC II), entered into force 21 October 1950; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 75 UNTS 135 (GC III) entered into force 21 October 1950; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (GC IV), entered into force 21 October 1950.
[306] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, entered into force, 14 October 1966.
[307] Additional Protocol 1 of 1977 to the Geneva Conventions of 1949, art 35, paragraph 3, prohibits the employment of 'methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment'; Convention of 18 May 1977 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, prohibits the use of weapons which have 'widespread, long-lasting or severe effects' on the environment (Art. 1); principle 21 of the Stockholm Declaration of 1972, A/CONF.48/14/Rev.1; principle 2 of the Rio Declaration of 1992, A/CONF.151/26 (Vol. I); *Legality of the Threat or Use of Nuclear Weapons* (n 3) para. 27; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14, 55, 56 para. 101 (speaks of 'significant damage') [hereinafter *Pulp Mills*]; *Trail Smelter Case*, *United States v Canada*, Awards of 16 April 1938 and 11 March 1941 United Nations, Reports of International Arbitral Awards vol. III, 1905, 1965.
[308] Commentary to art 2 ARSIWA, UN ILC 'Report of the International Law Commission on the Work of its Fifty-Third Session, 23 April–1 June and 2 July–10 August 2001, (2001) UNYBILC vol II part II, at 34.
[309] *Legality of the Threat or Use of Nuclear Weapons* (n 3) para. 29; *Gabcikovo-Nagymaros Project* (n 225) para. 53; *Pulp Mills* (n 307).
[310] See above (n 25).

comply with certain informational requirements as set out in the ICTU.[311] In particular, Parties must provide information on how the preparation of its NDC has been informed by the outcomes of the global stocktake.[312]

In the Paris Agreement Rulebook, Parties have interpreted existing and developed new due diligence obligations on reporting and accounting.[313] Parties are required ('shall') to clearly indicate and report the accounting approach for their NDCs,[314] including targets, baselines and metrics.[315] Accounting rules and informational requirements become mandatory for second and later NDCs.[316] A Party that intends to use market based instruments under article 6(2) or article 6(4) must provide the information to clarify how it has used internationally transferred mitigation outcomes for its NDCs.[317] The duty to maintain NDCs entails that Parties undertake a corresponding adjustment when trading mitigation outcomes, so-called Internationally Traded Mitigation Outcomes (ITMOs).[318] The rationale is that the reduction in emissions that is achieved and transferred to another state is reflected in the state's NDC that purchases the ITMO while being deducted from the emissions reductions achieved by the selling state, to avoid double counting.[319] If done properly, emissions increase for the selling state and decrease for the buying state.[320]

Using Parties' decisions for the interpretation and development of treaty obligations raises questions about treaty interpretation and the authority of conferences of Parties over legally binding obligations.[321] The practice of COP decisions to employ prescriptive language in relation to Parties, even in the absence of a clear authorisation in the treaty text, has met with unease.[322] The question has been discussed under the doctrine of interpretation in the literature and in light of the ILC draft conclusions on treaty interpretation that found that COP decisions – depending on their wording – can constitute subsequent agreement of Parties on the interpretation of treaty rules[323] especially when they are adopted by consensus or by a unanimous vote.[324] A different perspective arises from the viewpoint of the doctrine of sources, where interpretative rules in Parties' decisions arguably have a lesser legal force than a treaty provision.[325] The ICJ recently found that the term 'decision' *per se* signals an important difference from a mere recommendation, entailing a binding character. The Court held in *Arbitral Award* that the word 'decision' was not synonymous with 'recommendation' and that

[311] Decision 4/CMA.1 Annex (n 25) Information to facilitate clarity, transparency and understanding of nationally determined contributions, referred to in decision 1/CP.21, paragraph 28. FCCC/PA/CMA/2018/3/Add.1
[312] Ibid Annex, para.4 (c).
[313] Ibid Annex I and Annex II.
[314] FCCC/PA/CMA/2018/3/Add.2 (n 25) Decision 18/CMA. 1 Annex, paras. 71, 74, 77.
[315] Ibid paras. 74, 75.
[316] Decision 4/CMA.1 (n 25) para. 14.
[317] Decision 18/CMA.1 (n 25) para. 77; over 77 per cent of Parties state in their NDCs that they will use at least one market-based instrument to demonstrate compliance with the NDCs, *NDC SYR 2023* (n 12).
[318] Ibid.
[319] Paras. 77 (d).
[320] Ibid.
[321] *Minnerop* (n 35).
[322] *Rajamani,* (n 246) 128; *Brunnée* (n 4) 32.
[323] *ILC Draft Conclusions 2018* (n 49).
[324] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* [2014] ICJ Rep 226, 248 para. 46. For a discussion on this ruling see Jean d'Aspremont, 'The International Court of Justice, the Whales, and the Blurring of the Lines between Sources and Interpretation' (2016) 27 European Journal of International Law.
[325] *D'Aspremont*, ibid.

it suggested a binding character.[326] This supports the view that where Parties 'decide' to concretise a treaty provision, they can indeed develop treaty-based due diligence obligations in a legally binding way, depending on the clarity of the wording. The UNFCCC Synthesis Reports equally confirm that Parties adhere to the decision-based due diligence rule pertaining to their NDCs.[327]

IV. Subsequent Practice of States in Relation to NDC Submissions

The previous section has demonstrated that NDCs qualify as unilateral acts *stricto senso*, and that the intention to be bound occurred for the first time at the conclusion of the Paris Agreement. That leaves two questions unanswered. The first concerns the continuity of this intention in the actual submission. Regardless of the operation of the principle of good faith in favour of continuity of the intention to be bound, a previously existing intention could be repealed with the submission of the actual NDCs, explicitly or impliedly. This does not imply that such behaviour would be lawful, in fact, it would contravene the wording of the Paris Agreement and the obligation to implement the NDC as a legal instrument. The second question concerns the legal scope of the obligations created, if any. As has been explained, it is possible to adopt a legally binding instrument, without setting forth clear legal obligations.[328]

The point of departure for the next section is that each individual NDC submission is a unilateral act that is legally binding, *unless* the state has indicated in the NDC that it no longer holds the view that the submission is legally relevant and that it instead represents as mere political measure. The text, context and circumstances of each NDC had to be analysed for this,[329] and the next section summarises the results of this exercise. Furthermore, if no such change in the intention to be bound can be established, it is then a second task to identify which concrete legal obligations emerge from the submission. It is entirely possible that a state does not refute to be legally bound but nevertheless submits an NDC that lacks 'teeth' in the absence of clear substantial obligations.

A. NDC submissions

The following will not qualitatively assess the legal scope of the NDCs or if the Party is submitting an NDC that is fair and ambitious, represents a progression over previous submissions and presents a 'fair share'.[330] The analysis focuses on evidence that suggests the *continued intention* of Parties to be legally bound by their NDC. For this to be the case, it is neither necessary that an explicit mention of that will is provided nor that the legal relevance of the submission is acknowledged, instead, in line with the case law discussed, it is sufficient that the unilateral act is made publicly and that it continues to manifest the will to be bound.[331] This entails the Party should not have, at the point it submits its NDCs, explicitly or impliedly revoked its prior intention to be bound when it consented to an obligation to *submit and*

[326] *Arbitral Award of 3 October 1899* (n 188) para. 72.
[327] *NDC SYR 2023* (n 12).
[328] See above Part II, 3, see also the definition of 'treaty' in the VCLT, art 2(1): '"treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;'
[329] *Rajamani* (n 7) 135.
[330] Ibid
[331] *ILC Guiding Principles 2006 (n 60)* principle 3.

maintain a NDC. The content and the circumstances of the unilateral measure and the reactions to which they give rise are critical for a full legal evaluation.[332]

1. The continuity of the intention in NDC submissions

All current 195 NDCs are made publicly available in the UNFCCC registry. A survey of these NDCs found that none of the Parties indicate in their wording the withdrawal of their intention to be bound.[333] To the contrary, Parties regularly confirm that with the submission, they fulfil a legal obligation under the treaty, stressing the aim of achieving the outlined objectives, and all submissions are shown as 'live' in the registry. The circumstances of the submissions are defined by the cycle of the conferences of Parties that called for a new or enhanced NDC at the previous COP, a practice established by Decision 1/CP.21 that stipulated that Parties that submitted an NDC with a timeframe up to 2025 or 2030 had to communicate by 2020 new NDCs and to do so every five years thereafter.[334] After the global stocktake, Parties are now invited to 'put in place new or intensify existing domestic arrangements for preparing and implementing their successive nationally determined contributions'[335] and to present these at a special event, held under the auspices of the UN Secretary General.[336]

Nevertheless, there is significant variation in the design, coverage, and substantial scope of NDCs and in the readiness of Parties to submit second NDCs instead of enhanced first NDCs. Enhancing first NDCs delays the application of the progressively stricter informational and accounting obligations for second NDCs.[337] Even in the light of substantial differences in setting targets and providing metrics to measure progress, the continuity of the intention to be bound by NDCs is still present across the submissions. Examples given here include those states that together count for more than two-thirds of current GHG emissions.[338] Any change in any of these states' NDCs would therefore have a significant impact on the global climate.[339] Of these ten Parties,[340] nine have submitted enhanced first NDCs while one Party has not provided any submission.[341] Arguably, not submitting an NDC breaches the obligation under the Paris Agreement but does not challenge the argument pertaining to the legal nature of NDCs as a self-standing instrument. The nine Parties that have submitted enhanced first NDCs address in their submissions how they will maintain and implement their NDCs. Parties' reasoning for so doing ranges from acting on 'own initiative'[342] to compliance with the Paris

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[332] Ibid

[333] The NDCs have been accessed via the registry at <https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs>.

[334] Decision 1/CP.21 paras. 23, 24, see further Decision 6/CMA.3 for common time frames of nationally determined contributions referred to in art 4(10) Paris Agreement, FCCC/PA/CMA/2021/10/Add.3 para. 2.

[335] Decision 1/CMA.5 (n 265) para. 171.

[336] Ibid para. 191.

[337] Decision 4/CMA.1 (n 25) para. 14.

[338] Available from <https://www.wri.org/insights/interactive-chart-shows-changes-worlds-top-10-emitters>

[339] The ICJ found that there can be groups of States that are specially affected, and while all States are affected by climate change, those that can make the biggest difference, and are – that sense specially affected – are the major emitters. For the differentiation of the ICJ, made in the context of the elements regarded as necessary to establish a conventional rule*, North Sea Continental Shelf* (n 115) para. 73.

[340] The USA, the EU, China, Russia, India, Indonesia, Brazil, Iran, Japan, Canada, all NDC can be accessed via the UNFCCC portal at <https://unfccc.int/NDCREG> last accessed 5 May 2024 [hereinafter *NDC registry*].

[341] Ibid with the exception of Iran.

[342] China clarified in the NDC that addressing climate change is not 'at others' request but on China's own initiative. It is what China needs to do to achieve sustainable development at home, as well as to fulfil its due obligation to build a community with a shared future for mankind. China will implement a proactive national strategy on climate change.', *NDC registry* (n 340).

Agreement[343] and with Decision 1/CMA.3.[344] In updating their first NDCs, these Parties regularly clarify that their new submission constitutes the improved version under article 4 Paris Agreement, and that it will replace the previous NDC upon receipt of the NDC by the Secretariat.[345] A full scrutiny of the various NDCs' legal effects is neither necessary for the argument that they constitute binding legal instruments, nor possible within the limits of this article. However, a few observational remarks in the following demonstrate the range of Parties' substantial promises.

2. The variation in substantial scope

The main difference in the variation of the legal effects of NDCs results from the self-determined nature of the substantial scope, i.e. not from the submission of a political instead of a legal instrument. All of the submissions of the major emitting Parties include information about how the Party intends to implement the NDCs at the national level, such as China's 14th Five-Year Plan for the National Economic and Social Development from 2021 that sets a target of reducing energy consumption and CO2 emissions per unit of GDP.[346] Albeit formulated as a carbon intensity reduction pledge in relation to GDP, China made a separate pledge to 'establish the system of controlling total CO2 emissions.'[347] In a similar vein, India communicated an updated first NDC in the shape of an increased target for reducing the 'emissions intensity of its GDP by 45% by 2030', compared to the 2005 level.[348]

The United States of America explicitly refer to compliance with article 4 of the Paris Agreement in submitting their NDC,[349] setting an economy-wide target 'of reducing net greenhouse gas emissions by 50-52 percent below 2005 levels in 2030'[350] within an NDC that is developed to be 'both ambitious and achievable'[351]. The submission signals that it is designed to promote the aims of the Paris Agreement, 'including pursuing efforts to limit global average temperature increase to 1.5 °C, as well as the need to drive toward net zero global emissions no later than 2050.'[352] This demonstrates the intention that the NDC will make a substantive contribution towards the long-term temperature limitation and it specifically emphasises that the USA can deliver on the NDC.[353] In light of the negotiating history, the United States's NDC relies on subjective wording that indicates an intention, such as 'pursuing efforts', confirming its position during the negotiations not to accept a legally binding obligation of result.[354]

[343] India's Updated First Nationally Determined Contribution Under Paris Agreement (2021-2030), *NDC registry* (n 340) 1.
[344] Enhanced Nationally Determined Contribution of the Republic of Indonesia (2022), *NDC registry* (n 340) 1.
[345] Update of the NDC of the European Union and its Member States (2020) para. 27, *NDC registry* (n 340).
[346] China's 'New Goals and New Measures for Nationally Determined Contributions' (Unofficial Translation), *NDC registry* (n 340) 2.
[347] Ibid 35.
[348] India's Updated First Nationally Determined Contribution Under Paris Agreement (2021-2030), *NDC registry* (n 340) 2.
[349] The United States of America Nationally Determined Contribution Reducing Greenhouse Gases in the United States: A 2030 Emissions Target, *NDC registry* (n 340) 7.
[350] Ibid 1, 6, the target is set as below 2005 'net emissions' levels in the table.
[351] Ibid 14.
[352] Ibid.
[353] Ibid 15.
[354] *Rajamani*, Innovation and Experimentation (n 7) 136.

The EU submitted its INDC in March 2015, with an annex containing quantifiable and qualitative information on the INDCs.[355] The INDC became the EU's NDC upon ratification of the Paris Agreement in October 2016, with a target of at least 40% economy-wide reduction of greenhouse gas emissions by 2030, compared to 1990 levels.[356] In December 2019, the European Council adopted a target of climate neutrality by 2050.[357] An new target was submitted to the UNFCCC as an updated and enhanced NDC in December 2020 ahead of COP26, replacing the 2015 NDCs and providing for a 'net domestic reduction of at least 55% in greenhouse gas emissions by 2030 compared to 1990'[358] and this target was confirmed albeit not updated, in the NDC in October 2023.[359] However, the NDC provided additional information on its NDC including the newly adopted legislative measures such as the European Climate Law of June 2021 and the updated legislation of the 'fit for 55' framework that specifies, among other measures, energy efficiency and renewable energy targets.[360] The EU's NDC has been viewed in the literature as an exception, reflecting the block's strong position regarding the legal bindingness of NDCs in the negotiations.[361] It promotes the idea of environmental state responsibility by clearly stating a binding target for result, and the EU has enshrined this bindingness in European Law.[362]

Russia referred to the NDC and its target for limiting GHG emissions as 'part of the implementation of the Paris Agreement'.[363] The NDC outlines a target to achieve by 2030 a 70 per cent emissions reduction relative to the 1990 level, 'taking into account the maximum possible absorptive capacity of forests and other ecosystems and subject to sustainable and balanced social economic development of the Russian Federation.'[364] While the target is thus subjected to external factors that may change and influence its achievability, it nevertheless illustrates commitment to implement the Paris Agreement through this NDC. Some methodological aspects regarding to a possible recalculation of the target remain ambiguous yet coupled with the prospect that detailed information will be provided in annual National Inventory Reports should recalculations become necessary.[365]

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[355] See for the history of the submissions the most recent 2023 Submission by Spain and the European Commission of behalf of the European Union and its Member States, *NDC registry* (n 340) para. 1.
[356] Ibid para. 2.
[357] Ibid para. 3
[358] Ibid para. 4.
[359] Ibid.
[360] Ibid paras. 5-7,
[361] EU position for the UN climate change conference in Paris: Council conclusions, available at <https://www.consilium.europa.eu/en/press/press-releases/2015/09/18/counclusions-un-climate-change-conference-paris-2015/> last visited 5 May 2024, para. 7.
[362] Ibid.; Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), arts 1 and 2, Intermediate targets are set in art 4, OJ EU L.243/1, see further on State Responsibility and International Environmental Law Catherine Redgwell, 'The Wrong Trousers: State Responsibility and International Environmental Law' in Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013), 257, 260.
[363] Nationally Determined Contribution of the Russian Federation as part of the implementation of the Paris Agreement of December 12, 2015, *NDC registry* (n 340).
[364] Ibid at 1.
[365] Ibid at 8.

Japan submitted an updated NDC in October 2021 that sets out its aims to reduce GHG emissions by 46 per cent in 2030, compared to 2013 levels.[366] The NDCs states that this absolute and economy-wide target is aligned with the temperature goal of the Paris Agreement and the long-term goal of achieving net-zero by 2050.[367] The language indicates that Japan abstains from adopting the target as an obligation of result.

Brazil submitted a fourth update to its first NDC in October 2023, 'updated pursuant to relevant CMA decisions and adjusted to clarify its level of ambition'.[368] It will submit its second NDC in 2025.[369] It sets forth an enhanced commitment (compared to the 2022 version) to reduce its greenhouse gas emissions in 2025 by 48.4%, compared with 2005'[370] and in 2030 by 53.1% compared to 2005, with a 'long-term objective to achieve climate neutrality by 2050.'[371] Brazil states that by adjusting its NDC, it shows its full commitment to the Paris Agreement, and that the level of ambition exceeds the expectations placed upon a developing country.[372] While the climate neutrality objective is not formulated as an obligation of result, the interim targets for reductions in 2025 and 2030 articulate quantified reduction goals, based on the country's own inventory data.[373]

Indonesia communicated its 3rd update to the first NDC in September 2022, 'as mandated by Decision 1/CMA.3' whereby Parties were 'requested to revisit and strengthen their NDC target to align with the Paris Agreement temperature goal by the end of 2022'.[374] The NDC frames progression in the context of further emissions reductions compared to a business-as-usual-approach.[375] Interestingly, it mentions especially in the context of progression that the NDC translates the 'Paris Agreement Rule Book (Katowice Package) into Indonesia's context with a view to enhance effectiveness and efficiency in implementing the agreement and in communicating its progress and achievement as part of the responsibility of the party to the agreement'[376] thus including for reaching the temperature goal of the Paris Agreement.[377] This underlines how the collective achievability of the Paris Agreement's temperature target is the very rationale of the country's individual NDC.

Canada submitted an updated NDC in 2021 that states an economy-wide emissions reduction target of 40-45% below 2005 levels by 2030.[378] Canada is committed to reaching net-zero GHG emissions by 2050. The Canadian Net-Zero Emissions Accountability Act, which received Royal Assent on June 29, 2021, codified the Government of Canada's commitment for the country to achieve net-zero GHG emissions by 2050.[379] The submission is based on the IPCC

[366] Japan's Nationally Determined Contribution (NDC), *NDC registry* (n 340).
[367] Ibid.12, 13.
[368] Federative Republic of Brazil Nationally Determined Contribution (NDC) to the Paris Agreement under the UNFCCC, *NDC registry* (n 340).
[369] Ibid at 1.
[370] Ibid.
[371] Ibid.
[372] Ibid.
[373] Ibid.
[374] Enhanced Nationally Determined Contribution, Republic of Indonesia, 2022, *NDC registry* (n 340).
[375] The Enhanced NDC increases the unconditional emission reduction target of 31.89%, compared to 29% in the 1st NDC. The BAU scenarios of emission projection started in 2010. Ibid at 12.
[376] Ibid 1 para. 4.
[377] Ibid 2, 15.
[378] Canada's 2021 Nationally Determined Contribution under the Paris Agreement, *NDC registry* (n 340) 12.
[379] Ibid 10.

Special Report on Global Warming of 1.5°C that shows that global GHG emissions must reach net-zero in most pathways that limit global warming to 1.5°C and Canada posits that its enhanced NDC aligns with that.[380]

These major emitting Parties not only set out their national targets in the NDCs, but they also include how they will 'maintain' and implement their NDCs. While there is a discrepancy in terms of detail and level of planning pertaining to national laws, policies and strategies, none of the submissions would support the argument that Parties seek to renege from their intention to be bound. Not surprisingly, the clarity of terms that define the legal substance are the main lever for Parties to adjust the legal effects of their NDCs. The concrete legal effects will also depend on the domestic legal frameworks. However, read on their face, most of the outlined plans and targets are destined to define future action, and to direct policy choices and sector-specific developments that are deemed to be adequate to achieve the goal.[381]

This coheres with the findings of the UNFCCC 2022 Synthesis Report.[382] The yearly reports leave no doubts that there is still an ambition and an implementation gap, in combination with an upward trajectory on many components and strands of action in NDCs. For example, the 2023 edition of the report states that a total of 99 per cent of Parties outlined in their NDCs domestic mitigation measures as key instruments for achieving mitigation targets for their NDCs.[383] New or updated NDCs that were submitted after COP26 revealed that the share of Parties that indicated phasing down unabated coal power generation and phasing out inefficient fossil fuel subsidies and reforming fossil fuel subsidies, had increased by three times.[384] Furthermore, 94 per cent of Parties set themselves quantified mitigation targets and over 80 per cent of Parties articulate these as economy-wide targets.[385] Meanwhile, only 14 per cent of Parties communicated quantitative targets for renewable energy in electricity generation by 2030, consistent with 1.5 °C pathways.[386]

As mentioned earlier, there are additional rules in the Paris Agreement Rulebook, on Information, Clarity, Transparency and Understanding (ICTU) that are legally binding for second and later NDC submissions,[387] even though there are still some vague terms present in these rules such as 'as appropriate' that limit their stringency. For Parties' inclination to adopt the rules, the 2023 Synthesis Report differentiates as follows. It indicates that 95 per cent of Parties provided the information necessary for clarity, transparency and understanding of their NDCs in accordance with article 4(8) of the Paris Agreement and paragraph 27 of Decision 1/CP.21.[388] Of the Parties that submitted new or updated NDCs, 94 per cent provided such further specified elements of the ICTU as requested by the CMA guidance.[389] For example, 84 per cent of Parties provided more detailed information on assumptions and methodology in

[380] Ibid 22.
[381] Cf. Athanasios P Mihalakas and Emilee Hyde, 'Implementation of Nationally Determined Contributions under the Paris Agreement - Comparing the Approach of China and the EU' (2020) 6 Athens Journal of Law 407, 419.
[382] *NDC SYR 2023* (n 12) para. 46, as requested by Decision 1/CMA.3 para. 30.
[383] *NDC SYR 2023* (n 12) para. 171.
[384] Ibid para. 32.
[385] Ibid para. 4 (a) and (b).
[386] Ibid para. 29.
[387] Ibid para. 53, with reference to Annex I to decision 4/CMA.1.
[388] Ibid para. 60.
[389] Ibid.

their new or updated NDCs.[390] An increasing number of Parties provide adaptation information and 81 per cent of Parties included an adaptation component in their NDCs.[391] The difference in adherence to rules suggests that the use of mandatory language in the text of the agreement and confirmed in relevant decisions, generates a comparably higher level of compliance.

B. Judicial pronouncements

Courts play a critical role in overcoming collective action failures and stabilising expectations.[392] They increasingly rely upon an inter-jurisdictional judicial discourse to strengthen their position in cases that challenge national levels of ambition by reference to international law.[393]A significant number of domestic and international courts have seized the opportunity to express their views on the obligations of states[394] and even corporations under the Paris Agreement,[395] ranging from standard-setting treaty for the domestic legal response,[396]

[390] Ibid para. 87.
[391] Ibid para. 25.
[392] Eyal Benvenisti, 'Community Interests in International Adjudication' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests across International Law* (Oxford University Press 2018) 70, 71; Ben Batros and Tessa Khan, 'Thinking Strategically about Climate Change' in César A Rodrıguez Garavito (ed), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (Cambridge University Press 2021) 104.
[393] Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 American Journal of International Law 241; Petra Minnerop and Ida Roestgaard, 'In Search of a Fair Share: Article 112 Norwegian Constitution, International Law, and an Emerging Inter-Jurisdictional Judicial Discourse in Climate Litigation' (2021) 44 Fordham International Law Journal 847.
[394] Most recently, the International Tribunal for the Law of the Sea, Advisory Opinion, case No. 31, 21 May 2024 recognises the climate change regime as an 'extensive treaty regime addressing climate change that includes the UNFCCC, the Kyoto Protocol, the Paris Agreement, Annex VI to MARPOL, Annex 16 to the Chicago Convention, and the Montreal Protocol, including the Kigali Amendment. The Tribunal considers that, in the present case, relevant external rules may be found, in particular, in those agreements' (para. 137); *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda*, ECLI:NL:HR:2019:2007; *Friends of The Irish Environment CLG v Ireland* [2017]; *Leghari v Pakistan*, (2015) W.P. No. 25501/2015; *R. (on the application of Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin) [89]; *Mathur v His Majesty the King in Right of Ontario*, 2023 ONSC 2316; Rupert F Stuart-Smith, Friederike EL Otto, Aisha I Saad, Gaia Lisi, Petra Minnerop, *et al*., 'Filling the evidentiary gap in climate litigation' (2021) Nat. Clim. Chang. 11, 651–655; Cf. United Nations Environment Programme (2023) *Global Climate Litigation Report: 2023 Status Review* 65 <https://wedocs.unep.org/20.500.11822/43008> last accessed 10 April 2024.
[395]*Milieudefensie v Royal Dutch Shell*, C/09/571932 / HA ZA 19-379 paras. 4.1.2, 4.4.26-4.4.37, ECLI:NL:RBDHA:2021:5339; *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 paras. 431-435
[396] *R. (on the application of Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Amin), 18 July 2022 [5], [10], [202], [247]

the qualification as supra-legal human rights treaty,[397] to an explanation how NDCs provide a yardstick for domestic climate action.[398]

One of the most clearly articulated but nevertheless widely under-appreciated statements concerning the legal character of NDCs in domestic law stems from the judgment of the UK Supreme Court in the judgement on the *Third Runway Extension to the Heathrow Airport* where the Court stated:

> 'Notwithstanding the common objectives set out in articles 2 and 4(1), the Paris Agreement did not impose an obligation on any state to adopt a binding domestic target to ensure that those objectives were met. The specific legal obligation imposed in that regard was to meet any NDC applicable to the state in question.'[399]

The Supreme Court left no doubt that in its view, an obligation exists to meet the objectives of an NDC. It does not limit the obligation to pursue activities to meet the objective or to pursue activities to implement the NDC. This pronouncement establishes a generally applicable state obligation of producing a certain outcome. It confirms a view that was expressed in the literature already in 2012 that new 'outcome duties' emerged under the UK Climate Change Act.[400]

The UK Supreme Court is not alone in taking this position. Similar views have been expressed by the French Conseil d'Etat and the Federal Constitutional Court of Germany. A poignant statement was made by the Prague Municipal Court[401] about the interpretation of article 4 Paris

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[397] Most explicit in *PSB et al v Brazil* (on Climate Fund) (2022), Supreme Court of Brazil; see further Human Rights Commission of the Philippines, *National Inquiry on Climate Change Report*, 2022, 159, 160 <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2022/20220506_Case-No.-CHR-NI-2016-0001_judgment.pdf> last accessed 4 April 2024; *Hauraki Coromandel Climate Action Inc v Thames- Coromandel District Council* [2021] 3 NZLR 280 (HC); The Human Rights Council adopted a resolution on 8 October 2021 that introduces a new Special Rapporteur on the promotion and protection of human rights in the context of climate change, A/HRC/RES/48/14; see further John H. Knox (Special Rapporteur to the Human Rights Council), *Rep. of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. A/HRC/37/59, annex (Jan. 24, 2018); See the Report on Human Rights of the Commission on Human Rights of the Philippines <https://chr.gov.ph/wp-content/uploads/2022/05/CHRP-NICC-Report-2022.pdf> last accessed 5 April 2024.

[398] *Smith v Fonterra*, [2024] NZSC 5 [30], [31]; *Friends of the Earth, Clientearth, Good Law Project v Secretary of State for Energy Security and Net Zero* [2024] EWHC 995 (Admin), 2024 [123]; *Notre Affaire à Tous and Others v France*, N°s. 1904967, 1904968, 1904972, 1904976/4-1, 14 October 2021, at 21, 22; *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92 [85]-[87], [133]; see further M Burger and M A Tigre, 'Global Climate Litigation Report: 2023 Status Review' available from https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?art=1203&context=sabin_climate_change; J Setzer and C Higham, 'Global trends in climate change litigation: 2023 snapshot' available from <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf>.

[399] *R (on the application of Friends of the Earth Ltd and others) (Respondents) v Heathrow Airport Ltd (Appellant)* [2020] UKSC 52 para. 71; see for a discussion of the case J Bell and L Fisher L, 'The 'Heathrow' Case: Polycentricity, Legislation, and the Standard of Review' (2020) 83(83) Modern Law Review 1468.

[400] Reid (n 251) 743.

[401] *Klimatická žaloba ČR v Government of the Czech Republic*, Judgment No. 14A 101/2021 of the Municipal Court in Prague from 15 June 2022

Agreement, however, the judgment was later overturned by the Supreme Court.[402] The Prague Municipal Court interpreted the Paris Agreement according to article 31(1) and article 31(2)(a), of the VCLT. On that basis, the Municipal Court concluded that the second sentence of article 4(2) of the Paris Agreement imposed an obligation to implement mitigation measures aimed at achieving the objective of the NDCs.[403] The Court found that it was 'apparent from a linguistic interpretation that this is not a mere recommendation, since the Parties used the verb 'shall' in that provision to denote an obligation, not the recommending 'should'.[404] In a notable turn the Court engaged with the above mentioned debate in academic scholarship and accepted, in a first step, that the verb 'pursue' was indeed not synonymous with implementation.[405] In a second step, based on customary roles of treaty interpretation, the Court distanced itself from the interpretation in the literature that limited the obligatory character of the provision, stating that the wording did not 'mean without further qualification that the Parties are not obliged to implement the measures.'[406] Consequently, the Municipal Court summarized:

> 'that the second sentence of Article 4(2) of the Paris Agreement requires a Party to ensure that its mitigation measures are directed towards achieving the NDC objective. This requirement implies an obligation to take mitigation measures. The obligation to take mitigation measures with the aim of achieving a reduction of at least 55% in greenhouse gas emissions by 2030 compared to 1990 levels is sufficiently specific to be directly applicable and reviewable by the Court.'[407]

In *Grande Synthe*, of November 19, 2020, the French Conseil d'Etat ruled for the first time on a case concerning compliance with national commitments to reduce greenhouse gas emissions.[408] The Conseil d'Etat first found that the request of the city, a coastal city particularly exposed to the effects of climate change, was admissible.[409] On the merits, the Conseil d'Etat noted that although France had committed to reducing its emissions by 40% by 2030, the government had regularly exceeded its own emission ceilings and had unlawfully postponed reduction efforts beyond 2020.[410]

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[402] Supreme Administrative Court, 9 As 116/2022 – 166, available from <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2023/20230220_13440_decision.pdf> , last accessed 6 April 2023 (in Czech), unofficial translation available at <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/2022061513440_judgment.pdf>last accessed 12 May 2024.
[403] *Klimatická žaloba* (n 401) paras. 244-248.
[404] Ibid.
[405] Ibid para. 248, directly addressing the argument made by *Bodansky* (n 22) 146.
[406] Ibid para. 248.
[407] Ibid para. 250.
[408] *Commune de Grande Synthe*, 1 July 2021, at 6 (Decide, art 2), in French <http://climatecasechart.com/climate-change-litigation/non-us-case/commune-de-grande-synthe-v-france/> last accessed 13 May 2022; see the explanatory note of the Conseil D'Etat (in English) <https://www.conseil-etat.fr/Pages-internationales/english/news/greenhouse-gas-emissions-the-conseil-d-etat-annuls-the-government-s-refusal-to-take-additional-measures-and-orders-it-to-take-these-measures-before>
[409] *Commune de Grande Synthe*, 19 November 2020, No 427301, (Decide, at 10), in French < https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20201119_Not-Yet-Available_decision-2.pdf>.
[410] *Commune de Grande Synthe* (n 408), the decision confirms that exceeding national targets can be a cause for ecological damage, see on causation and attribution Petra Minnerop and Friederike E L Otto 'Climate Change and Causation: Joining Law and Climate Science on the basis of Formal Logic' (2020) 27 Buffalo Environmental Law Journal 49, 56, 68.

In Germany, the Federal Constitutional Court declared the first Climate Protection Law of the country as being partially unconstitutional.[411] The calculations of the national carbon budget were directly linked to the temperature target of the Paris Agreement and the analysis of the NDCs by the UNFCCC Secretariat.[412] The Constitutional Court noted that the Paris Agreement did not specify the greenhouse gas reduction quotas or emissions reductions that would have to be met in order to achieve the targets, while the European Union had committed itself to reducing its GHG emissions by at least 40% by 2030 compared to 1990.[413] The Court pointed out that based on the evaluations of the NDCs submitted to the UNFCCC, greenhouse gas emissions by 2030 were expected to be worldwide not compatible with reduction pathways that could limit global warming to 1.5 °C or even 2 °C.[414] This formed the backdrop against which the Court then examined the adequacy of the German carbon budget calculations and the corresponding pathway of necessary emissions reductions.[415]

These cases support the view that NDCs determine the legal yardstick for government action in domestic law, especially confirming that the national targets can be and indeed must be translated into national carbon budgets. The view that national carbon targets are necessary to provide credible legal frameworks to implement a state's NDC has now been confirmed by the European Court of Human Rights (ECtHR). In the case *KlimaSeniorinnen v Switzerland*, the ECtHR stated that it was not convinced that credible climate targets could exist without a national carbon budget, devised in accordance with the state's NDC.[416] The Court found that there was a 'legally relevant relationship of causation' between the action or inaction of states on climate change and the harm affecting individuals.[417] It set forth a list of criteria that Parties to the Convention on Human Rights would need to take account of, in order to discharge their positive obligations under article 8 (the right to family life) and article 2 ECHR (the right to life). The Court reserved the right of what could be called a 'continued pathway review'. It means that in assessing whether a state has remained within its margin of appreciation, the Court will examine, whether the competent domestic authorities, be it at the legislative, executive or judicial level, have had due regard to a number of considerations and due diligence obligations in order to achieve a set target.[418] Consistently, these courts have upheld the view

[411] *Neubauer v Germany* (n 229), Petra Minnerop, 'Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court' (2022) 34 Journal of Environmental Law 135; Christoph Möllers and Nils Weinberg, 'Die Klimaschutzentscheidung des Bundesverfassungsgerichts' (2021) 76 Juristen Zeitung 1069 .
[412] Ibid paras. 9, 10, 226, 227.
[413] Ibid para. 9.
[414] Ibid paras. 10, 234-239.
[415] Ibid paras. 243, 244.
[416] *Verein KlimaSeniorinnen Schweiz v Switzerland* (n 49) para. 570.
[417] Ibid para. 478.
[418] Ibid para. 550: 'When assessing whether a State has remained within its margin of appreciation (see paragraph 543 above), the Court will examine whether the competent domestic authorities, be it at the legislative, executive or judicial level, have had due regard to the need to:
(a) adopt general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments;
(b) set out intermediate GHG emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies;
(c) provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets (see sub-paragraphs (a)-(b) above);

that a state cannot evade its responsibility by pointing to the contribution of other states. This is the reverse side of the argument that collective failure in making sufficient progress towards the global goal, translates into individual responsibility, unless a state can demonstrate that its measures are following a pathway that is commensurate with the agreed goal.

V. An Autopoietic System with Qualifying Processes

Up to this point, four key practical but nevertheless impactful consequences resonate from the analysis that NDCs are prescribed qualified unilateral acts. First, states must submit NDCs and follow a conduct as required to meet the objectives of their NDCs. Second, such conduct can only be aligned with the long-term goals of the treaty if the individual NDC is aligned with the treaty's object and purpose. In other words, the NDC must be a suitable means that sets forth a pathway commensurate with limiting the global average temperature increase to as closely as possible to 1.5 °C. Third, if it becomes evident, through the global stocktake, that the collective temperature goal will not be achieved based on the current trajectory of combined efforts, then this gives rise to the legal presumption that individual NDCs are equally insufficient. Fourth, as a matter of law, any individual NDC that is inadequate must be replaced, immediately, with one that is adequate to achieve the temperature target and the long-term objectives of the Paris Agreement. In other words, the collective finding of the global stocktake qualifies the treaty-prescribed unilateral acts, demands the submission of improved NDCs and interrupts the five-yearly submission cycle. A further fifth point resonates from the analysis, it promotes a systemic-vision of international law[419] that explains how the international law on climate change has matured and could assume a law-stabilising role in international law.

A. The theoretical premise of autopoiesis

This section serves to strengthen the argument and to expand its explanatory force for conceptual legal change beyond the Paris Agreement, by testing it against theoretical premises that construct the law of a specific subject area as an autopoietic system.[420] Any legal order must anticipate the possibility of anarchy in order to survive, and it must nurture its order-producing fabric.[421] The premise of autopoiesis modelling is that it can help to identify risk posed by order-diminishing tendencies by offering an explanation for a system's behaviour in light of its self-perpetuating components.[422]

(d) keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence; and
(e) act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures.'

[419] *Benvenisti* (n 392) 70, 76.

[420] This builds an empiric-theoretical relationship to better understand reality, based on the observation that 'Empirical research is by no means closer to the reality of the outside world than theory. Even from empirical experience we know that often the opposite is true. The hard facts about the external world that empirical research pretends to produce are in reality highly artificial constructs, excessively selective abstractions, mere internal artefacts of the scientific discourse that are both as real and as fictional as are theoretical constructs.' J Paterson and Günther Teubner, 'Changing Maps: Empirical Legal Autopoiesis' (1998) 7 Social and Legal Studies 451, 455.

[421] *D'Amato* (n 17) 368.

[422] Ibid.

It would go beyond the scope of the article to provide a full discussion of system theory, and the criticism it has been subjected to.[423] Instead, the aim of the following is to make sense of the observed structures that produce international law on climate change, within the realm of and the effects on general international law. In doing so, it becomes even more apparent that the climate change law/international law interplay can indeed be explained as a 'network of events which reproduces itself',[424] and that the system of law produced within a legal sub-system builds the environment for other systems.[425] These interactions not only explain but also generate the complexities that each legal (sub-) system has to master. Understanding some of the key system-internal structures and the points of intervention between systems identifies law-stabilising opportunities and rule-undermining tendencies.

Applying the concept of autopoiesis to international law is not new, it has been used to explain and anticipate change within a complex sub-regime of treaty-based law that evolves from a variety of legal instruments.[426] It has not been used, so far, to reason that a specific system illuminates our understanding of legal characteristics as they pertain to unilateral acts or that it produces legal presumptions about their quality as a result of the connection between unilateral behaviour and multilateral authority. The concept will thus be employed here to assist our thinking about the law.

The theory of international law as an autopoietic system is rooted in the history of general systems theory.[427] Across disciplinary boundaries, a system is defined as a mechanical or theoretical ensemble of physical or conceptual components that exist distinct from its environment and that add something new, often unexpected, to the understanding of the inner working mechanisms within the system.[428] A force imparted on one of the component affects the entire system.[429] Legal scholars developed on that basis heuristically useful models for legal systems, including for the international law system, often drawing from philosophical literature.[430]

Whereas social systems had been previously been viewed primarily as input-output models, Luhmann brought to the fore 'their internal operation of self-production (that is,

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[423] See for a discussion G Teubner, 'The Evolution of Autopoietic Law' in G Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (De Gruyter 1987), 217; Paterson and Teubner ibid 451; Michael King, 'The Truth about Autopoiesis' (1993) 20 Journal of Law and Society 218; Richard Weisberg, 'Autopoiesis and Positivism' (1991) 13 Cardozo Law Review 1721.

[424] *Luhmann* (n 17) 171, 174; Günther Teubner, 'How the Law Thinks: Towards a Constructive Epistemology of Law' (1989) 23 Law and Society Review 727; Jürgen Habermas*, The Philosophical Discourse. Twelve Lectures* (Cambridge, MIT press 1987) 371.

[425] *King* (n 423) 219.

[426] *D'Amato* (n 17) 349, *Luhmann* (n 17) 171, 174; Lon L Fuller, *The Principles of Social Order* (Duke University Press 1981), Lewis A Kornhauser, *World Apart? An essay on the Autonomy of Law* (Toronto 1998) 78; Robert O Keohane and David G Victor, 'The Regime Complex for Climate Change', Harvard Project on International Climate Agreements, Belfer Center, 2010; S Diamond, 'Autopoiesis in America' (1991) 13 Cardozo Law Review 1763.

[427] *D'Amato* (n 17) 344; Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1992) 13 Cardozo Law Review 1419, 1422; Elinor Ostrøm, 'Polycentric Systems for Coping with Collective Action and Global Environmental Change (2010) 20 Global Environmental Change, 550.

[428] Eervin László (eds), *The Relevance of General Systems Theory* (Braziller, New York 1972); *D'Amato* (n 17) 344.

[429] Ludwig von Bertalanffy, *General Systems Theory. Foundations, Development, Applications* (Braziller, New York 1968) 19-27.

[430] *D'Amato* (n 17) 346.

autopoiesis).'[431] He characterised autopoietic systems by an inherent emergent property, aimed at perpetuating and consolidating the norms and ultimately the system as such.[432] Accordingly, systems can comprise sub-systems that evolve along similar lines as the main autopoietic system. The subtle notion of 'closed system' that underlies some of the thinking has attracted strong debate in the literature, where the argument for a more nuanced understanding of autonomy versus autopoiesis as a matter of degree has been proposed.[433] It is not necessary here to take a position on the reasons that speak for or against that view, the premise is that the advantage of considering a smaller sample of norms and principles can be purely epistemologically. As D'Amato has put it, 'it makes it easier to understand the internal wiring of the system if it is clearly ascribed', without reaching a final conclusion as regards the 'closeness' of the system.[434]

B. International law on climate change as an autopoietic system

To identify as an autopoietic system, a legal regime must be sufficiently distinct from its environment while still remaining cognitively open.[435] It must self-produce and self-maintain but incorporate new events and developments from outside the system.[436] Thus, a legal autopoietic system reproduces in reference to its own internal logic without being agnostic to co-evolving social and legal structures.[437]

The international regime on climate change builds an operatively distinct sub-system in which general rules of international law, e.g., as pertaining to unilateral acts, are modified through a specific set of regime-building rules. The analysis has demonstrated that this system refines and modifies the rules of international law without violating them, through two main intervention points. First, it draws a distinction between the point in time at which the intention to be bound can be observed for treaty-based unilateral acts. It has so far not been articulated that the intention to be bound can precede the adoption of the unilateral acts, most likely because no sub-system of international law has so fundamentally relied on the prescription of unilateral acts that are both, substantially open to national determination and subject to the treaty's qualifying processes. Second, applying the general rules on unilateral acts within the specific treaty context, following the system-internal logic, has triggered a necessary distinction between the *instrumentum* and the *negotium*. This distinction is not foreign to the law of treaties, where a treaty can be binding without setting forth rules that can be operationalised. It is also a distinction that formed the underlying current of the ILC draft principles, explicitly mentioned in the second report of the Special Rapporteur. It follows indeed a more general distinction between legal form and substance.

The legal system primarily created by the Paris Agreement and its sub-treaty rules coheres with these characteristics. The submission and maintenance of NDCs adheres to the system-specific rules of regulatory reproduction and consolidation, facilitated by yearly conferences and meetings of Parties, designed to develop and stabilise the system. At the same time, the system

[431] *King* (n (n 423) 219; Niklas Luhmann, 'Autopoiesis, Handlung, and kommunikative Verständigung' (1982) Zeitschrift far Soziologie 366, 370.
[432] Hubert Rottleuthner, 'A Purified Sociology of Law: Niklas Luhmann on the Autonomy of the Legal System' (1989) 23 Law and Society Review 779, 783.
[433] *King* (n 423) 222; *Teubner* (n 423) 423217, 219.
[434] *D'Amato* (n 17).
[435] Ibid.
[436] Ibid 350.
[437] Ibid.

remains open to variation due to the explicit deference to latest scientific developments and, importantly, through the continuous connection with domestic law, and national self-determination, embedded in a steady rhythm of intergovernmental negotiations. It thus connects with fundamental principles of state consent and sovereignty as pertaining to international law generally. The system's internal wiring is shaped by the combination of specific prescriptive and qualifying processes that determine how the collective goals will be achieved.

C. The qualifying process

NDCs initially afford a wider discretion to Parties, yet over time, according to the rules of the regime, the margin of discretion becomes narrower, by applying the rules that the autopoiesis generates. The Paris Agreement is so far unique in devising a constantly evolving qualifying mechanism. It perpetuates itself according to its own self-producing order that remains intersected with the outside world. This self-producing order is geared towards a progressive process of attainment. The system can only fulfil its aims if it is implemented in that outside world of international and domestic law, it draws from and depends on the principles of international (environmental) and domestic law.

The new category of prescribed qualified unilateral acts reveals the potential for a shift in the political economy of international law on climate change that has (at least) two tenets. First, the continuous control of the multilateral treaty authority over the unilateral acts of sovereign states regulates the legal autopoiesis of the climate change regime through an inextricable coupling of collective procedure with sovereign decision-making. The collective procedure is designed to qualify subsequent iterations of the unilateral acts upon which the treaty's success depends, with a direct bearing on states' duties under the Paris Agreement.

Second, this development in a clearly ascribed area of international law influences how we perceive the conceptual framing of the category of unilateral acts in international law. The sub-system rules within the autopoietic system point towards the potential of a stronger 'consensual bond'[438] between states, that remains nevertheless fragile if collective expectations cannot be met. The qualifying process leads to the anticipation of a direction of unilateral law-creation upon which the success of the autopoietic system depends. The mutual reliance on interdependent contributions defines the reasonableness of expectations. The observation that a new category exists in a specific system of law irritates our traditional thinking about unilateral acts in general international law, yet it equally shows that legal instruments can be designed to pull participants towards collective action. The category of prescribed qualified unilateral acts is both, an emergent property and a diagnostic tool for success or failure.

The lasting effect of any shift in the political economy of international law on climate change rests on the regulatory success of the prescribed qualified unilateral acts/global stocktake axis. It leaves room for sovereign decision-making, but only within intra-organisational justification vis-à-vis treaty-based authority and collectively agreed goals. Properly implemented in NDCs, the global stocktake could overcome power-dynamics in the interest of a safer climate.

[438] *Fisheries Jurisdiction (Spain v Canada)* (n 101) para. 46.

VI. Conclusions

The overriding purpose of this Article was to evaluate the legal nature of NDCs within the architecture of the Paris Agreement. Based on the case law of the ICJ, the draft principles of the ILC, coupled with historic examples and a comparative analysis of unilateral acts in international (environmental) law, the Article introduced the category of *prescribed qualified unilateral acts*. This new category has ramifications for the generation of law in the autopoietic system of international law on climate change and for international law's concept of unilateral acts more generally. In respect of the generation of international law on climate change, the following points can be concluded.

First, NDCs are *prescribed* unilateral acts because the treaty mandates their submission and maintenance. The functioning of the treaty depends on the quality of individual NDCs.

Second, NDCs are legally binding instruments, while their substantial scope can still be defined at the time the submission is made. The consent to the treaty comprises the intention to be bound, and that intention confers on the NDCs the character of a legal undertaking. The principle of good faith promotes the continuity of the intention to be bound; the state practice of NDC submissions confirms this continuity. In other words, even a vaguely determined contribution is still a binding legal instrument, just as a treaty remains binding even if it sets forth general rules that require further clarification in order to be operationalised.

Third, the global stocktake is an iterative process that subsequently *qualifies* the prescribed unilateral acts, within an overall dynamic architecture of an agreement that is as much reliant upon trust as it is on continuous negotiations and sovereign decision-making. The Paris Agreement is not modest, it prescribes qualified unilateral acts.

Fourth, to comply with the qualifying processes and rules, NDCs must be improved in light of the outcome of the global stocktake, as a matter of law and without any further delay. The assumption is that no state has made a promise that fully suits the treaty's object and purpose. Once the unilateral legal instrument is submitted, a state is – according to the ICJ – *legally required to follow a course of conduct consistent with the declaration*, to ensure that the promise for which the instrument was adopted, can be achieved. For treaty-based unilateral acts, this consistency of conduct necessitates that the declaration and its inherent promise serve the object and purpose of the treaty. Only *then* can a course of conduct consistent with the declaration be lawful. The reverse side of that is that conduct aligned with an inadequate NDC cannot fulfil the 'promise' for which it has been adopted.

On that basis, the Article has provided a thoroughly developed analysis to demonstrate how the outcome of the global stocktake can be translated into individual responsibility of each state. The global stocktake is a screening – if not an oversight – mechanism: If the outcome reveals that the target of the Paris Agreement is no longer achievable, then this finding will limit Parties' discretion for the next round of NDCs. The collective test is a subsequent qualifying process for individual NDCs, it creates a logical presumption that the collective effort mirrors the quality of individual promises.

The argument is supported by the sub-treaty rules surrounding both, the NDC submission and the global stocktake. While it has been argued in the literature that informational, reporting and accounting requirements are mainly procedural and that for this reason no obligation of result can exist, it has been demonstrated here that these procedural rules have the effect of qualifying

the content of future NDCs. In combination with the legal nature of the required instruments and the global stocktake, these rules have been designed for substantial fine-tuning upon which reasonable expectations of the international community rest.[439]

A further fifth point resonates from the analysis. It relates to the ramification of the new category of prescribed qualified unilateral acts for international law, through the interaction of the sub-system of international law on climate change and general international law. The climate change regime is maturing as an autopoietic system that depends on its own internal processes, yet it equally remains in subtle communication with the very foundation of international law. This autopoietic climate change system has a bearing on the system-internal legal obligations of states and offers a new prospect for a consensual bond that can pull Parties into collective action through unilateral acts. It thus carries the potential to consolidate the law within the system and to sharpen the paradigm of unilateral acts in international law.

To develop the argument, the Article has taken up a new viewpoint that has so far not been considered in international law scholarship: the intention to be bound can *precede* the actual submission of the unilateral act, at least in the context of treaty-based unilateral acts. Consent to the multilateral treaty authority underpins the legal valence of the unilateral act, it signals the first point in time at which the intention to be bound occurs. This not only contravenes the risk of decay of consent[440] but it enhances, if not elevates, the meaning of consent under multilateral treaty regimes, as expression of a common intention that is shared by all and therefore encapsulates corresponding individual intentions. As such, it has a direct bearing on the discussion of the fragmentation of international law and its concepts that has largely been seen as producing benefits for powerful states.[441] Regime consent is inextricably connected with a conceptual paradigm of general international law. This dynamic re-centres the focus for defining regime success or failure to the individual contribution of each state, with the potential to interrupt power dynamics within the system across several points of intervention, and the global stocktake could be one of them. In developing a system-specific moulding for unilateral acts, international climate change law could unfold an evolutive impulse for international law generally.

The interpretative approach in this Article, while seemingly impossible in the light of some of the earlier scholarship on the Paris Agreement, finds confirmation in the practice of states through NDCs submissions and judicial pronouncements. The Article has addressed the counterarguments that were voiced in the earlier works on the Paris Agreement, and demonstrated that the legal valence of NDCs can be determined beyond the limitations assigned to the wording of article 4(2) Paris Agreement. International law remains a 'rage for order'[442] and the greatest challenge facing international law remains the need for more of it. Multistate coordination regularly works better through predicable legal means.

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[439] See the Quantified economy-wide emissions emission reduction targets for 2020, Annex I Parties, available from <https://unfccc.int/topics/mitigation/workstreams/pre-2020-ambition/compilation-of-economy-wide-emission-reduction-targets-to-be-implemented-by-parties-included-in-annex-i-to-the-convention>.

[440] Eyal Benvenisti and George W Downs, 'Comment on Nico Krisch "The Decay of Consent: International Law in an Age of Global Public Goods", (2014) 108 AJIL Unbound 1, 2; *Krisch* (n 182).

[441] Eyal Benvenisti and Geroge W Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law, (2007) 60 Stanford Law Review 595, 619.

[442] James Crawford, 'Chance, Order, Change: The Course Of International Law General Course On Public International Law' (2013) 365 Recueil de Cours 369.