Unratified Treaties, Unilateral Declarations and *Modus Vivendi*: Circumstances to be considered to have Effect on State Parties

Zewdu Mengesha*

Introduction

International law arises from the consent of states and state practice. The Vienna Convention on the Law of Treaties (VCLT, 1969) is an authoritative international document regarding treaties between and among states. The VCLT provides rules and guidelines concerning the conclusion, entry into force, reservations, interpretation, amendments, modification, invalidity, termination and suspension of the operation of treaties.[1] In order to have binding effect, a treaty must fulfill the requirements provided under the VCLT. Some have argued that agreements that do not have a 'normative' character, laying down specific legal obligations rather than simply asserting political positions, wishes or intentions, are not treaties.[2] However, there is a fascinating tendency in international law to cite, as authoritative and even "binding," acts that have not been legally completed, despite the fact that the formalities of completion are explicit requisites for their legality.[3]

In the decisions of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ), it is possible to observe that

* LLB (Bahir Dar University), LLM (Addis Ababa University), Lecturer in Law, Bahir Dar University. The author is very grateful to Ato Fasil Amedetsion, the Editor in Chief, and the two anonymous reviewers. The writer can be reached at: zewdu_mengesha@yahoo.com.

[1] Vienna Convention on the Law of Treaties, 1969 [here in after VCLT].
[2] Reuter, Paul, *Introduction to the Law of Treaties*, revised 2nd edition, publication of the Graduate Institute of International Studies, Geneva, 1989, p. 26.
[3] Riesman, W. Michael, Unratified Treaties and Other Unperfected Acts in International Law: Constitutional Functions, *Vanderbilt Journal of Transnational Law*, Vol. 35, No. 3, May 2002, p. 729.

unratified agreements, unilateral statements (acts) of states, *modus vivendi* and other unperfected treaties are creating legally binding obligations. The *Eastern Greenland* and *Nuclear Tests* cases provide poignant examples.[1] So long as such decisions have their own impact on countries, and it is common to see that such treaties are used, it is important to study these court decisions. Nevertheless, concerns emanate from uncertainty over the conditions that must be fulfilled for unperfected agreements to have binding legal effect in the eyes of international courts; in other words, the question of when, how, and why certain unperfected treaties should be treated as binding is an important issue requiring clarification. In addition, it will provide a description for legal advisors in the Ministry of Foreign Affairs trying to predict whether or not such undertakings may create binding legal obligations.

In fact, international courts do give justifications as to why they base their decisions on unperfected treaties. Therefore an attempt will be made to analyze these justifications. The author will look at the affirmative arguments and the counter-arguments concerning why unperfected treaties should be treated as binding or not.

1. Normative contents of unperfected treaties

Most scholars on the subject agree that treaties have become the primary source of international law. This is because treaties are a more direct and formal method of international law creation. Thus the concept of the treaty

[1] Pauwelyn, Joost, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law*, Cambridge University Press, 2003, p. 144.

and the manner in which it operates have become of paramount importance to the evolution of international law.[2]

A treaty is an agreement between state parties. The VCLT of 1969 defines "treaty" under Art. 2(1) as:

> […] 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.

This definition indicates the importance of treaties in creating international rules for regulating interests on the subject.[3] Scholars in international law have classified treaties into various categories.[4]

According to the usage of the US State Department, an "unperfected" treaty is one which has been signed but which has "for one reason or another definitely failed to go into force."[5] Unperfected treaties are a form of agreement which has not undergone the formal steps and met the procedural requirements necessary for a treaty to create legal obligations based on the accepted principles of customary international law regarding treaties and the VCLT of 1969.

---

[2] Show, Malcolm N., *International Law*, 6th edition, Cambridge University Press, Cambridge, 2008, pp. 902-903 [hereinafter Show, *International Law*].

[3] Sangroula, Yubaraj, International Treaties: Features and Importance, Kathmandu School of Law, p. 1, available at: www.ksl.edu.np (last visited 25 February 2014).

[4] A treaty may be classified as bilateral or multilateral, based on the number of parties involved in the treaty; multilateral treaties deposited with the Secretary General of the United Nations, which are called "open" multilateral treaties, or U.N. multilateral treaties, and other multilateral treaties that are not deposited with the Secretary General. A treaty may also be classified as a constitutional treaty or a framework treaty; it can also be classified as an unratified treaty, *modus vivendi* and the like.

[5] Jessup, Philip C., List of Unperfected Treaties, *The American Journal of International Law*, Vol. 27, No. 1 (January 1933), pp. 138-139.

Unperfected treaties may include unratified treaties,[6] unilateral statements by government officials (unilateral undertakings),[7] *modus vivendi*,[8] and other types of unperfected agreements. Although it is clear that this type of agreement lacks the formality required in the VCLT, it is also becoming increasingly evident that unperfected treaties have some force of law, as state parties now cite such unperfected agreements in their pleadings, and international courts even use them in adjudicating cases. This also alerts countries that they should take due care as they undertake treaty negotiations with other states.

Now let us take a look at the different types of unperfected treaties and the conditions that should be considered with each of these types of agreements.

[6] Unratified treaties are treaties that are signed but remain unratified by the domestic legal system.

[7] Unilateral behavior of states on the international plane, and thus behaviors that may legally bind states, may take the form of formal declarations or mere informal conduct including, in certain situations, silence, on which other states may reasonably rely. See generally, International Law Commission, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, Preamble, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_9_2006.pdf (last visited 27 February 2014).

[8] "It is an instrument of toleration looking towards a settlement. [...] Normally, it is used for provisional and interim arrangements which ultimately are to be replaced by a formal agreement of a more permanent and detailed character. [...] Usually a *modus vivendi* is agreed in a most informal way and does not require ratification." Bernhardt, Rudolf (ed.), *Encyclopedia of Public International Law*, Elsevier, Amsterdam, 1997, Vol. 3, cited by Duhaime's International law Dictionary, available at: http://www.duhaime.org/LegalDictionary/M/ModiVivendi.aspx (last accessed 13 November 2014).

1.1 Conditions to be considered in order to give effect to unratified treaties

Unratified treaties are treaties that are signed by state representatives (mostly by the executive branch official of that state) but remain unratified by the domestic legal system for various reasons.[9] Since the principle of separation of powers took hold, domestic legal systems have commonly been separated into the legislative, executive and judicial branches, each of these organs having their own powers and respective obligations not to encroach upon the power of the other branches of state government. Because of this concept, the international legal system also allows state organs to take part in treaty formation based on their respective powers as provided for in their own domestic legal systems.[10]

Under international law, a nation does not become a party to a treaty until it expresses its "consent to be bound." Traditionally, this consent may be expressed in a variety of ways, including through a nation's signature of the

[9] There are different reasons why states after signing a certain treaty fail to ratify it. For example, in the U.S. the president might submit a treaty to the Senate and have it defeated there, although this happens only rarely; a president might withhold submission of the treaty to the Senate because of perceived opposition in that body, perhaps with the hope that the Senate's position — and perhaps its composition — would change; or a president may submit a treaty to the Senate and have it languish there, once its supporters in the Senate realize that they do not have sufficient votes for advice and consent. A president might also sign a treaty without being committed to ratification, perhaps in an effort to stay involved in subsequent negotiations related to the treaty or in the institutions established by the treaty, or for symbolic political benefits. Another reason why a treaty might be signed by the United States but remain unratified is a change in policy that occurs as a result of a new presidential administration. For these and other reasons the state concerned may fail to ratify a treaty. See generally, Bradley, Curtis A., Unratified Treaties, Domestic Politics, and the U.S. Constitution, *Harvard International Law Journal*, Vol. 48, pp. 308-310.

[10] The issue of ratification by the domestic legal system after the signing of the treaty by the representative of the state may be cited here.

treaty.[11] Under modern practice, however, a signature is not typically regarded as a manifestation of consent to be bound, especially for multilateral treaties. Instead, consent is manifested through a subsequent act of ratification — the deposit of an instrument of ratification or accession with a treaty depositary in the case of multilateral treaties, and the exchange of instruments of ratification in the case of bilateral treaties.[12] It has also long been settled that the act of signing a treaty does not obligate a nation to ratify the treaty. The separation of signature and ratification for modern treaties reflects the domestic law of many countries, which requires that the executive obtain legislative approval before concluding treaties. As a matter of general rule, States are bound by international law not to defeat the object and purpose of treaties that they have signed but not ratified,[13] therefore the unilateral signature of the president or his agent can bind that respective State to certain international legal obligations.

Ratification of treaties in republican systems such as that found in the United States is a critical bulwark of the separation of powers and checks and balances.[14] This means that the domestic legal system empowers the different organs of the state to perform their own separate roles in order to ensure that certain treaties have binding effect.

Historically, the constitutive rules of international law viewed unratified treaties as unperfected acts that generated no rights or obligations. The only function of the signatures of the negotiators was to authenticate the text that had been agreed upon. The VCLT purported to "progressively develop" this

[11] VCLT, *supra* note 1, Art. 11.
[12] See generally, Bradley, *supra* note 12, p. 313.
[13] VCLT, *supra* note 1, Art. 18.
[14] Riesman, *supra* note 3, p. 743.

dimension of treaty practice by going beyond customary international law and imposing an obligation on a signatory not to act in such a way as to frustrate the object of the treaty, at least until such time as the signatory had decided not to ratify the treaty.[15] For this reason, the US "un-signing" of the Rome Statute was undertaken in order not to be bound by any obligations—even the obligation not to undermine the object and purpose of the treaty—even though the US Congress had never ratified the treaty. Therefore, being a signatory of a certain treaty cannot be without meaning. If a party that has signed an agreement is expected to maintain a sincere commitment to at least the treaty's "object and purpose."[16] However the VCLT affirmed the need for ratification for a treaty to enter into force when the instrument itself indicates that ratification is necessary.[17]

We must also note the issue of provisional application before the treaty actually enters into force.[18] In fact this provisional application may be considered to be in conflict with the domestic legal systems and the principle of separation of powers, given that it imposes obligation upon states before the agreement at issue has gained the acceptance of the legislature.[19]It is clear

[15] Ibid., p. 742.

[16] VCLT, *supra* note 1, Article 18, which deals with the obligation not to defeat the object and purpose of a treaty prior to its entry into force. "A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

[17] Ibid., Art. 14(1)(a).

[18] Ibid., Art. 25.

[19] It must be clear that while we talk about provisional application we must take care that we are not jeopardizing the power divisions (separation of powers) among different organs of the government.

that sometimes unperfected treaties will cause problems regarding what value and effect must be provided for a treaty that fails to fulfill the bureaucratic procedural requirements under any given domestic legal system. In fact, the question can be considered from two different perspectives; the first with regard to the obligation of the state to the other contracting party or parties of that specific unratified treaty, and the second with respect to the domestic application of the unratified treaty.

As the VCLT states, the consent of the state is required by way of ratification in cases where the treaty requires consent in order for a state to be bound, and requires that this consent be expressed by means of ratification.[20] The issue comes up in cases where the negotiating states come to an agreement that ratification should be required and later one of the negotiating states fails to ratify the treaty. What legal effect do such unratified treaties have under international law, and also under the domestic legal system? What conditions should the unratified treaty have to meet in order to have legal effect? These are important issues that need to be discussed.

In cases where the unratified treaty has the status of international customary law, this will not create much problem, as long as that international customary law serves as a source of law for the ICJ[21] and the parties to the dispute are able to show the existence of such custom. But the importance of eventual ratification is highlighted by two international decisions. In the *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder*, the PCIJ considered whether Poland should be bound by the

[20] VCLT, *supra* note 1, Article 14(1)(a).

[21] United Nations, Statute of the International Court of Justice, 18 April 1946, Art. 38(1)(b). See also the dissenting opinion of Judge Weeramantery in the case between New Zealand and France (the *Nuclear Tests* case), Judgment of 20 December 1974, Para. 63, available at: http://www.icj-cij.org/docket/files/97/7567.pdf (last visited 29 September 2014).

provisions of the Barcelona Convention on the Regime of Navigable Waterways of International Concern, a treaty which Poland had signed but not ratified. The court concluded that the Barcelona Convention could not be relied on against Poland, stating that "it cannot be admitted that the ratification of the Barcelona Convention is superfluous…"[22] A similar result was reached by the ICJ in the *North Sea Continental Shelf* cases, where the court refused to hold the Federal Republic of Germany bound by the provisions of the Geneva Convention on the Continental Shelf, which the state had signed but not ratified.[23]

Starting from the period when the PCIJ began to use unratified treaties as a means of adjudicating cases, unratified treaties which are unperfected by definition, have come to be considered somewhat binding. There are instances that show such unratified treaties treated as authoritative instruments and ascribed full legal value.

Now let us consider examples from the jurisprudence of the ICJ in which the Court relied explicitly on an unratified treaty, an unperfected legal act. In the *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* in which a final judgment was rendered on 16 March 2001,[24] Qatar argued that its *de jure* control of the entire peninsula had been recognized since 1913, pursuant to a "Convention relating to the Persian Gulf and Surrounding Territories," concluded between the United Kingdom

[22] Permanent Court of International Justice, Case relating to the Territorial Jurisdiction of the International Commission of the River Oder, 1929 P.C.I.J., Ser. A, No. 23. cited by Martin, A., The International Legal Obligations of Signatories to an Unratified Treaty, *Maine Law Review*, Vol. 32, 1980, pp. 276-277.
[23] Ibid., p. 277.
[24] International Court of Justice, *Qatar v. Bahrain, Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Judgment of 16 March 2001.

and the Ottoman Empire. Although both parties agreed that the 1913 Anglo-Ottoman Convention was never ratified, they differed as to its value as evidence of Qatar's sovereignty over the peninsula.[25] The Court observed that signed but unratified treaties may constitute an accurate expression of the understanding of the parties at the time of signature. In the circumstances of this case, the Court came to the conclusion that the Anglo-Ottoman Convention did represent evidence of the views of Great Britain and the Ottoman Empire as to the factual extent of the authority of the *Al-Thani* ruler in Qatar up to 1913.[26] Finally, the Court held that the first submission made by Bahrain could not be upheld, and that Qatar had sovereignty over Zubarah.[27]

At this juncture, it is vital to ask a question: What were the conditions that made the ICJ use this unratified treaty as a means of adjudicating the case? In the first instance, the court noted that the text of Article 11 of the Anglo-Ottoman Convention was "*clear*," that "it is agreed between the two Governments that the said peninsula will, as in the past, be governed by the Sheikh Jasim-bin-Sani and his successors."[28] Thus, Great Britain and the Ottoman Empire did not recognize Bahrain's sovereignty over the peninsula, including Zubarah.[29] From a close reading of paragraph 90 of the case concerning the Maritime Delimitation and Territorial Questions between Qatar and Bahrain, we note that the clarity of the treaty content regarding the point of dispute may serve as a basis for making an unratified treaty binding upon the parties to that treaty. As long as the treaty content is clear and

[25] Ibid., Para. 88.
[26] Ibid., Para. 89.
[27] Ibid., Para. 97.
[28] Ibid., Para. 90.
[29] Ibid., Para. 90.

unambiguous about the issue that has arisen between the parties that signed but unratified treaty may constitute an accurate expression of the understanding of the parties at the time of signature, although the instrument is not yet ratified. And this may serve as a reason to treat this unratified treaty as having a legal value.

The second situation in which an unratified treaty may be treated as having legal significance is in situations where the unratified treaty is supplemented by another treaty which is ratified.[30] Here, the issue addressed in the two treaties may be different; what matters is whether the ratified treaty between the parties refers to the unratified treaty. If it does, this gives the unratified treaty binding legal effect despite the fact that the formal requirements of completion have not been met.[31]

The third reason that an unratified treaty may be given binding legal effect is related to maintaining an existing situation. The international court, as well as the international legal system, generally prefers to maintain things as they are, rather than creating something new. Therefore, if the unratified treaty helps to uphold the *status quo*, the international court may base its decision on the unratified treaty, when no other perfected treaty settles the

[30] In the Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, the Court also notes that Article 11 of the 1913 Convention is referred to by Article III of the Anglo-Ottoman treaty of 9 March 1914, duly ratified that same year. Article III defined the boundary of the Ottoman territories by reference to "the direct, straight line in a southerly direction … is separating the Ottoman territory of the *sanjak* of Nejd from the territory of Al-Qatar, in accordance with Article 11 of the Anglo-Ottoman Convention of 29 July 1913 relating to the Persian Gulf and the surrounding territories." See generally Para. 91.

[31] The reference in the 1914 treaty, which was ratified, is to the line in Article 11 in the 1913 treaty. The function of the 1914 treaty, however, was different from its predecessor, and, in context, the only point in the 1913 treaty that would have been relevant to the 1914 treaty concerned the boundary of the Kingdom of Najd, now Saudi Arabia, not the question of who was to have political control on the Qatari peninsula. *Supra* note 3, p. 734.

issue at hand. Thus courts set things right, as if the treaty had been binding all along.[32] It is easier for courts to do this than to create something new, but the matter is a bit more difficult when the court grounds its decision on unratified treaties, because they may assume positions that significantly affect the state's interest. Hence the courts must consider the practical consequences of their decisions, and beyond this they should know that they do not have any right to legislate.

The fourth circumstance in which unratified treaties may be interpreted as legally significant arises when the failure of ratification occurs for reasons extraneous to the states party to that specific treaty, and later one of them wants to withdraw on the ground of non-ratification of the treaty by its counterparts.[33] In this situation, it is possible to argue that, if the state party who fails to ratify a certain treaty is trying to avail itself of conditions that are extraneous to that treaty, the state should not be permitted to avoid the requirements of that unratified treaty. This is a matter of *pacta sunt servanda* (an individual's word must be kept). International courts may able to give some sort of legal value to a treaty that is not ratified for reasons external to the state concerned.

However this has its own problems, especially with regard to the concept of separation of powers in domestic legal systems. For example, the

[32] Taken from a class discussions on the course of treaty law for LLM candidates in the Public International Law program, Addis Ababa University School of Law. The professor was Mr. Fasil Amdetsion, who was also serving as Senior Policy and International Legal Adviser at the Ministry of Foreign Affairs of Ethiopia. He is currently working as an attorney in the New York law firm of Wachtell, Lipton, Rosen & Katz.

[33] The non-ratification of the convention is due to events that are external to the state concerned. For example, in the Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Qatar contends that the non-ratification of this Convention was largely attributable to the outbreak of the First World War. See generally, *supra* note 27, Para. 46.

imposition of international obligations based on the signature of a treaty poses a constitutional question for the United States. Article II of the U.S. Constitution specifies a process that requires the president to obtain the advice and consent of two-thirds of the Senate in order to make treaty commitments.[34] Therefore the international courts should be careful when adjudicating cases based on unratified treaties.

The other important issue that must be considered with regard to unratified treaties is their role and application in domestic courts. This is also an important concern. In a supplementary brief for the United States Department of Justice in the case *John Doe I et al. vs. Unocal Corporation et al*., *amicus curiae* notes that under the governing analysis established by the Supreme Court, it is plainly erroneous to construct the Alien Tort Statute (ATS) itself as conferring a private cause of action.[35] Moreover, it is clearly improper to infer a cause of action when the documents relied upon by the court to discern norms of international law were not themselves intended by that executive or Congress to create rights capable of domestic enforcement through legal actions by private parties.[36] If the U.S. refuses to ratify a treaty, regards a UN resolution as non-binding or declares a treaty not to be self-executing, there obviously is no basis for a court to infer a cause of action to enforce the norm

[34] United State Constitution, Art. II, § 2.

[35] In this regard, based on Rule 29(a) of the federal Rules of Appellate Procedure, the Department of Justice notes that "neither the ATS itself, nor international law norms, based on documents such as unratified and non-self-executing treaties, nor non-binding UN resolutions, provide any basis for inferring a cause of action." See generally, The United States Court of Appeals for the Ninth Circuit, John Doe I, et al. vs. Unocal Corporation, et al., on appeal from the United States District Court Supplemental Brief for the United States of America, as Amicus Curiae, pp. 13-14, available at; http://dg5vd3ocj3r4t.cloudfront.net/sites/default/files/legal/Unocal-doj-unocal-brief.pdf (last visited 29 September 2014).

[36] Ibid., p. 14.

embodied in those materials, because to enforce such agreements is anti-democratic and at odds with the principles of separation of powers.[37] As for treaties not ratified by the United States, it is clearly inappropriate for the courts to adopt and enforce principles contained in instruments that the president and/or the senate have declined to embrace as binding on the United States or enforceable as a matter of U.S. law through judicially created causes of action.[38]

In fact it is possible to see that U.S. courts pay some sort of obeisance to certain principles in unratified agreements.[39] The courts have affirmed that the U.S. signature on a treaty, though it remains unratified, carries sufficient acknowledgement of the underlying agreement that it may be used as an aid in interpreting domestic law.[40] In this regard it is also said that unless the state makes its intention clear *not* to be a party to a treaty, and it is voted down or rejected formally on the floor of the Senate, or in an equivalent manner, then even after the treaty has already been signed the state is obliged to refrain from arguments which would defeat its object and purpose. This is true as long as a convention has been signed or instruments exchanged constituting the treaty subject to ratification, acceptance or approval, until the state shall

[37] Ibid., p. 15.
[38] Ibid., pp. 15-16.
[39] A treaty is sometimes said to have force of law only if ratified. Courts, however, often use non-ratified treaties as aids in statutory construction. See generally, Horner, Christopher C., The Perils of "Soft" and Unratified Treaty Commitments: The Emerging Campaign to "Enforce" U.S. Acknowledgements Made In and Under the Rio Treaty and Kyoto Protocol Using Customary Law, WTO, Alien Tort Claims Act, and NEPA Competitive Enterprise Institute, July 2003, pp. 44-45, available at: http://cei.org/studies-issue-analysis/updated-perils-soft-and-unratified-treaty-commitments (last visited 29 September 2014).
[40] Ibid., p. 44.

have made its intentions clear not to become a party to the treaty.[41] That the United States has not ratified a number of treaties does not necessarily mean that the U.S. will not become a party to them.[42] This shows that there is a possibility of application of these unratified treaties in the domestic courts as long as the treaty does not run contrary to domestic law. However, the issue of separation of powers among the different organs of the domestic legal system is also at stake, because the courts are giving some sort of status to a treaty which lacks the ratification of the Senate. Though a treaty is not yet ratified, U.S. practice signals that courts may use such unperfected treaties as long as their application does not contradict the domestic laws of the country. This indicates that an unratified treaty may only serve to fill a gap in the domestic legal system.

1.2 Unilateral declaration: A source of legal obligation for the declaring state

According to the International Law Commission's Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, states may find themselves bound by their unilateral behavior on the international plane. Behavior that may legally bind a state may take the form of a formal declaration or mere informal conduct—including, in certain situations, silence—on which other states may reasonably rely.[43]

---

[41] Ibid., pp. 46-47. See generally, Congressional Records, a speech from Senator Inhofe, 13 October 1999, pp. 65-66, available at: http://www.clw.org/pub/clw/coalition/inhofe101399.htm (last visited 29 September 2014).
[42] Bradley, *supra* note 12, p. 310.
[43] United Nations Report of the International Law Commission, Fifty-eighth session, General Assembly Official Records Supplement No. 10 (A/61/10), 1 May-9 June and 3 July-11 August 2006, p. 368, available at: http://legal.un.org/ilc/reports/english/a_61_10.pdf (last visited 29 September 2014).

Unilateral state declarations may consist of unilateral pronouncements that affect the rights and duties of other countries. It may be argued that in its strictest sense, unilateral declarations of intent cannot constitute international agreements because an agreement, by definition, requires at least two parties. For example, a unilateral commitment or declaration in the form of a promise to send money to a country to help earthquake victims, but without reciprocal commitments on the part of the other country, would be a promise of a gift and not an international agreement.[44] However, there are situations under which unilateral commitments or declarations of intent may become binding international agreements.[45] Such instances involve parallel undertakings by two or more states that are unilateral in form but in content constitute bilateral or multilateral agreements. Such reciprocal unilateral declarations occur regularly in international relations.[46] The ICJ and its predecessor PCIJ have both used such unilateral declarations as a means of adjudicating cases.[47] Unilateral commitments have been held legally binding for the party making the commitment, though it was not made in a multilateral context.

---

[44] Congressional Research Service Library of Congress, Treaties And Other International Agreements: The Role of the United States Senate, Congressional Research Service Library of Congress, a study prepared for the Committee on Foreign Relations, United States Senate, 106th Congress, 2nd Session, January 2001, p. 59.

[45] This is because of the fact that the international courts were observed using such declarations as a source of law while adjudicating cases.

[46] This supports the premise that ‘‘reciprocal’’ unilateral declarations that accept the compulsory jurisdiction of the International Court of Justice under Article 26 of the Court’s Statute have been held by that Court to constitute an international agreement among the declaring states. See generally, Anglo-Iranian Oil cases (U.K. v. Iran), 1952 I.C.J. 93 (July 22). See also, United Nations Report of the International Law Commission, *supra* note 47, p. 59.

[47] In the case concerning a dispute between Denmark and Norway over sovereignty in Eastern Greenland (1933), the Permanent Court of International Justice used the declaration made by the Norwegian Foreign Minister, called the *Ihlen Declaration*. Similarly, in the *Nuclear Tests* case (Australia & New Zealand v. France), 1974, the International Court of Justice used statements made by the French authorities.

When, how and why unilateral declarations may be given binding legal effect by international courts is an important issue. First, let us consider the cases that the international courts have decided based on unilateral declarations and then we will consider the different points that should be emphasized when adjudicating such cases.

The Royal Danish Government brought a case in the PCIJ against the Royal Norwegian Government on the grounds that the latter government had published a proclamation on 10 July 1931 declaring that it had proceeded to occupy certain territories in Eastern Greenland. In the contention of the Danish Government, these territories were subject to the sovereignty of the Crown of Denmark. The PCIJ used historical evidence brought by the two countries regarding their respective claims over the legal status of Eastern Greenland. The Court also looked at the verbal undertakings called the *Ihlen declaration*,[48] which is the reply given by the Norwegian Minister for Foreign Affairs to the Danish Minister on 22 July 1919. This states that: - "the plans of the Royal Government in regard to the sovereignty of Denmark over the whole of Greenland would not encounter any difficulties on the part of Norway."[49] Denmark argued that this indicated recognition of existing Danish sovereignty over Greenland. The Court considered it beyond any dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a

[48] The *Ihlen Declaration*, made during a purely bilateral meeting between the Danish Minister of Foreign Affairs and the Norwegian ambassador to Copenhagen, on 22 July 1919.

[49] Permanent Court of International Justice, Denmark v. Norway**,** the Legal Status of Eastern Greenland, 5 April 1933, Para. 58, available at: www.worldcourts.com/pcij/eng/decisions/1933.04.05_greenland.htm (last visited 29 September 2014).

foreign power, in regard to a question falling within his province, was binding upon the country to which the Minister belonged.[50] The Court concluded that Norway was under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and *a fortiori* to refrain from occupying a part of Greenland.[51]

At this point, we have to ask whether there was any agreement between the two countries. Are declarations of this kind binding upon the state? This declaration was a mere verbal undertaking, not a formal written agreement, and as such there was no ratification by the domestic parliament of that country. Therefore it can be argued that the *Ihlen declaration* fails to fulfill the requirements that would give it the status of binding declaration. Hence the validity of this agreement is in question.[52]

A second pertinent set of cases, known as the *Nuclear Tests Cases*, involves Australia and New Zealand, on the one hand, and France on the other.[53] In 1974 France made various public statements through which it announced its intention to cease the conduct of atmospheric nuclear tests following the completion of a series of these tests. The first of these statements was contained in a communiqué which was issued by the office of the president of the French Republic on 8 June 1974 and transmitted in particular to the applicant: "… in view of the stage reached in carrying out the

[50] Ibid., Para. 192.
[51] Ibid., Para..202.
[52] However there are also other arguments which are forwarded in this issue so long as this Declaration is made during a purely bilateral meeting whether this declaration constituted a unilateral act is controversial.
[53] International Court of Justice, Australia v. France, Nuclear Tests Case, 20 December 1974, at http://www.icj-cij.org/docket/files/58/6093.pdf last visited 9/29/2014. The proceedings instituted before the court concerned the legality of atmospheric nuclear test conducted by France in south pacific; the original and ultimate objective of New Zeeland/Australia is to obtain a guaranty for the termination of such like test in the region.

French nuclear defense programme France will be in a position to pass on the stage of underground explosions as soon as the series of tests planned for the summer is completed."[54] Further statements were contained in a note from the French Embassy in Wellington, a letter from the president of France to the prime minister of New Zealand, a press conference given by the French president, a speech made by the Minister for Foreign Affairs before the UN General Assembly and a television interview and press conference given by the Minister for Defense.[55]

In this case, the ICJ considered these statements to convey an announcement by France of its intention to cease conducting atmospheric nuclear tests following the conclusion of the 1974 series of tests.[56] What was the legal value of these unilateral declarations, especially if France were later to decide that its national security required it to resume nuclear tests? Could a unilateral declaration create an obligation, similar to the obligation created by a treaty?[57] The Court concluded that the French declarations constituted an undertaking possessing legal effect."[58] From these two cases decided by the ICJ and its predecessor, the Permanent Court of Justice, we can observe the possibility that unilateral state declarations may create legal obligations.

The ILC's Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations set down the conditions that must be fulfilled in order to make a unilateral declaration binding on a state, producing legal obligations under international law. According to these

[54] Ibid., Para. 34.
[55] Ibid., Para. 33-40.
[56] Ibid., Para. 41.
[57] Riesman, *supra* note 3, p. 737.
[58] International Court of Justice, *Nuclear Tests* case, *supra* note 56, Para. 51.

Guiding Principles, a declaration made publicly and manifesting the will to be bound may have the effect of creating a legal obligation.[59] When the conditions are met, the binding character of such declarations is based on good faith. States concerned may then take them into consideration and rely on them, and such states are entitled to require that such obligations be respected.[60]

The wording of Guiding Principle 1, which seeks both to define unilateral acts in the strict sense and to indicate what they are based on, is directly inspired by the dicta in the Judgments handed down by ICJ on 20 December 1974 in the *Nuclear Tests* case.[61] It is also worth noting that the declarations made in the two cases discussed above were made publicly. But this does not mean that any declaration made by a state representative will have binding effect on a state.

It is also necessary to take into account the content of the statements at issue and all of the factual circumstances in which they were made, as well as the reactions they produced.[62] It is possible to infer from the above decisions of ICJ that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. The intention to be bound is to be ascertained by the interpretation of the act.[63]

---

[59] International Law Commission, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, *supra* note 10, Principle 1.
[60] Ibid.
[61] Commentary on the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, *Yearbook of the International Law Commission: 2006*, Vol. II, Part Two, p. 370.
[62] International Law Commission, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, *supra* note 10, Principle 3.
[63] International Court of Justice, *Nuclear Tests* case, *supra* note 56, Para. 33-40.

With regard to their intention and to the circumstances in which they were made, declarations may be held to constitute an engagement of the state making the declaration. For example, in the *Nuclear Tests* case the Court said that the validity of the statements and their legal consequences must be considered within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations among states.[64] It is the actual substance of the statements, and the circumstances attending their making, from which the legal implications of the unilateral act must be deduced. The subject of these statements is clear and they were addressed to the international community as a whole, and therefore the Court holds that they constitute an undertaking possessing legal effect.[65] However it is not easy to reach such a conclusion, nor is it easy to predict whether a statement will be binding or not. Arguably, this lax standard allows the courts to decide whatever they want given the circumstances.

The other important factor that needs to be considered is who made the declaration. According to the Guiding Principles, a unilateral declaration binds the state internationally only if it is made by an authority vested with the power to do so.[66] It is a well-established rule of international law that the Head of State, the Head of Government and the Minister of Foreign Affairs are deemed to represent the state merely by virtue of their functions, even without having the document that authorizes this.[67] State practice shows that

[64] International Court of Justice, *Nuclear Tests* case, *supra* note 56, Para. 51.
[65] Ibid.
[66] International Law Commission, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, *supra* note 10, Principle 4.
[67] VCLT, *supra* note 1, Art. 7(2).

unilateral declarations creating legal obligations for states are quite often made by the persons who occupy these positions without their capacity to commit the state being called into question.[68] Other persons representing the state in specified areas may be authorized to bind it, through their declarations in areas falling within their competence.[69]

Unilateral declarations may be formulated orally or in writing.[70] State practice shows the many different forms that unilateral declarations by states may take. As noted above, the various declarations by France about the cessation of atmospheric nuclear tests took the form of a communiqué from the Office of the President of the Republic, a diplomatic note, a letter from the President sent directly to those to whom the declaration was addressed, a statement made during a press conference and a speech to the General Assembly.[71] In the *Nuclear Tests* cases, the Court emphasized:

> [W]ith regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements.[72] Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which do not require that they should be couched in written form. Thus the question of form is not decisive.[73]

[68] It is possible to observe in the Nuclear Tests case, as well as the case between Denmark and Norway, that the declarations are made by individuals that have the power to represent the state.
[69] International Law Commission, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, *supra* note 10, Principle 4.
[70] Ibid., Principle 5.
[71] Commentary on the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, *supra* note 64, p. 375.
[72] International Court of Justice, *Nuclear Tests* case, *supra* note 56, Para. 45.
[73] Ibid., pp. 267-268 and 473, Para. 45 and 48.

Therefore the question of form is not important as long as the party who is claiming to avail itself based on a unilateral declaration is able to show the existence of such a declaration in any form. The other important question is whether the declaration is made in clear and specific terms.[74] A unilateral declaration entails obligations for the formulating state only if it is expressed in clear and specific terms. In the case of doubt as to the scope of obligations resulting from such a declaration, the obligations must be interpreted in a restrictive manner. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated.[75] In the *Nuclear Tests* decisions, it is possible to observe that the clarity and specificity of the declaration is important. The Court stressed that a unilateral declaration may have the effect of creating legal obligations only if it is stated in clear and specific terms.[76] In addition, the unilateral declaration must not contradict peremptory international norms, because a unilateral declaration which is in conflict with a peremptory norm of general international law is void.[77] The invalidity of such a unilateral act derives from the analogous rule contained in article 53 of the VCLT. If the unilateral declaration fulfills these

[74] International Law Commission, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, *supra* note 10, Principle 7.
[75] Ibid.
[76] International Court of Justice, *Nuclear Tests* case, *supra* note 56, Para. 43, 46 and 51.
[77] International Law Commission, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, *supra* note 10, Principle 8.

conditions, it is possible to assume that states may find themselves bound by their unilateral behavior on the international plane.

Although the practice of international courts shows that a unilateral declaration may create legal obligations on the state making the declaration, there are objections from various parties. The ICJ's decisions, although binding only on the parties in these particular cases, may be considered problematic for legal analysts because they run contrary to the legal principles that have traditionally governed such unilateral pronouncements or statements of intent.[78] Moreover, the analysts argue, among other things, that governments are unlikely to accept the view that their policy pronouncements are binding. If such pronouncements are subject to interpretation as legal commitments by the ICJ, some observers point out that few states would submit to its jurisdiction.[79] Therefore it is possible to take the position that international courts should be careful while adjudicating cases based on unilateral declarations.

1.3 Modus vivendi as a means of creating legal obligation on state parties

A *modus vivendi* is a temporary arrangement entered into for the purpose of regulating a matter of conflicting interests, until a more definite and permanent arrangement can be obtained in treaty form.[80] The *Encyclopedia of Public International Law* also defines *modus vivendi* as:-

[78] The United States Court of Appeals for the Ninth Circuit, John Doe I et al. vs. Unocal Corporation et al., *supra* note 39, p. 60.
[79] Ibid.
[80] Duhaime's International law Dictionary; available at: http://www.duhaime.org/LegalDictionary/M/ModiVivendi.aspx (last accessed 13 November 2014).

> […] an arrangement of a temporary and provisional nature concluded between subjects of international law which gives rise to binding obligations to the parties. [...] It is an instrument of toleration looking towards a settlement. […] Normally, it is used for provisional and interim arrangements which ultimately are to be replaced by a formal agreement of a more permanent and detailed character. […] Usually a *modus vivendi* is agreed in a most informal way and does not require ratification.[81]

The usual way to complete such a temporary agreement is by way of an exchange of correspondence between diplomats.[82] There are a number of agreements that are entered into between states in the form of *modus vivendi;* however the binding legal effect of such agreements is questioned in international law. But it is also possible to observe from trends in the international courts that they are using such agreements as a means to create legal obligations. The most important example in this regard is the maritime boundary dispute between Libya and Tunisia, decided by the ICJ in 1982.[83] The questions before the court concerned which principles and rules of international law may be applied to the delimitation of the continental shelf appertaining to the Socialist People's Libyan Arab Jamahiriya and the Republic of Tunisia.[84] In this case the ICJ used what it called a tacit *modus vivendi* between France and Italy—when those states ruled, respectively,

---

[81] Bernhardt, Rudolf (ed.), *Encyclopedia of Public International Law*, Elsevier, Amsterdam, 1997, Vol. 3, pp. 442-443.

[82] Ibid.

[83] International Court of Justice, Tunis vs. Libyan Arab Jamahiriya Case Concerning the Continental Shelf, Judgment, 24 February 1982, available at: http://www.icj-cij.org/docket/files/71/6527.pdf (last visited 4 October 2014).

[84] Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, Digest of International Cases on the Law Of The Sea, United Nations, New York, 2006, p. 61, available at: http://www.un.org/depts/los/doalos_publications/publicationstexts/digest_website_version.pdf (last visited 4 October 2014).

Tunisia and Libya—as a means to adjudicate the case at hand. The *modus vivendi*, which ran at a forty-five degree angle to the section of the coast where the land boundary began, had, as its initial function, to obviate incompatible fishing claims that had been generating disputes and incidents between the two colonial powers.[85] The Court held that a line close to the coast, which neither party had crossed when granting offshore oil and gas concessions nor which thus constituted a *modus vivendi*, was highly relevant.[86]

A *modus vivendi* is a quintessential unperfected international legal act. It is inherently non-binding. Indeed, its whole function is to suspend conflict over whatever is the subject of the *modus vivendi* in order to permit the parties to interact peacefully and productively pending the settlement of the matter.[87] But in this case we see that an agreement which is temporary in nature was used as a source of binding legal obligation.

However, this does not mean that every modus *vivendi* will create a binding legal obligation on the state parties to the agreement. So what are the factors we have to take into consideration? Among the central issues here is that forced us to apply a *modus vivendi* in the first place, as one important factor may be related to the absence of an agreed and clearly stated agreement.[88] The *modus vivendi* may evidence a binding legal obligation where there is no specific binding treaty that exists dealing with the issue at hand. In this case we may resort to the use of an existing *modus vivendi* to

[85] International Court of justice, Tunis vs. Libyan Arab Jamahiriya Case Concerning the Continental Shelf, Judgment, *supra* note 86, Para 56-57.
[86] See ICJ Reports, 1982, pp. 18, 71, 84 and 80–86, cited by Show, supra note 5, pp. 606-607.
[87] Riesman, *supra* note 3, p. 738.
[88] International Court of justice, Tunis vs. Libyan Arab Jamahiriya Case Concerning the Continental Shelf, Judgment, *supra* note 86, Para. 70-71.

tackle the case. Certainly, a scholar or historian studying the diplomatic relations between France and Italy in North Africa and then between the successor states of Libya and Tunisia would have included the *modus vivendi* as one of the factors contributing to stable and peaceful relations in the maritime area between the governments over more than half a century.[89]

The second factor is related to the question of whether it is possible to show that the *modus vivendi* has been employed or respected to a certain extent for a certain period of time.[90] Here we need to consider whether the *modus vivendi* is respected by the parties to the agreement. If we successfully able to observe the existence of such a respected agreement, this might warrant its acceptance through historical justification, and we can assume that this might be the basis of a binding norm.

Another important issue to consider is whether the *modus vivendi* has been formally contested by either side during the relevant period of time.[91] If the *modus vivendi* is not contested by either party from the time when the agreement was entered, this may indicate that the parties have been willing to be governed by that agreement; therefore we may ascribe it a legal value. This point is reinforced by the fact that the international legal system generally prefers to maintain the status quo. Courts may favor a *modus vivendi* for this reason and favor its use as evidence.

Although a *modus vivendi* is by definition a temporary and non-binding treaty, negotiators must assume that whatever they write *ad*

[89] Riesman, *supra* note 3, P.741

[90] International Court of justice, Tunis vs. Libyan Arab Jamahiriya Case Concerning the Continental Shelf, Judgment, *supra* note 86, Para. 70.

[91] Ibid., Para. 70-71.

referendum may at some point be used against their state, even without subsequent ratification. In fact, court decisions on this point may prove to be a disincentive for agreeing to *modus vivendi*.

The above case shows us that the ICJ is using *modus vivendi* as a means to adjudicate cases, but it is rarely questioned about the legality of using such an agreement as a binding norm. This is because a *modus vivendi* is an agreement that is not binding by definition. So interpreting this thing as a perfected agreement and binding a state by it goes against the intention of the state at the time of agreement. International lawyers generally agree that an international agreement is not legally binding unless the parties intend it to be. Put more formally, a treaty or international agreement is said to require an intention by the parties to create legal rights and obligations or to establish relations governed by international law.[92] If that intention does not exist, an agreement is considered to be without legal effect.[93] For this reason, it is possible to see why scholars of international law and treaty law contest the position taken by the international court of justice.

2. Conclusions and the way forward

By their nature, unperfected agreements fail to fulfill the requirements that would allow them to be considered perfected. The ICJ is the principal judicial organ of the United Nations and its judgments are usually considered highly persuasive with respect to international law.[94] The ICJ was established by the

[92] See O'Connell, D. P,, *International Law*, 2nd ed, 1970, p. 195; Mcnair, Arnold, *Law of Treaties*, 1961, p. 6; cited by Schachter, Oscar, Editorial comment on the twilight existence of non-binding international agreement, *American Journal of International Law*, Vol. 71, 1977, p. 296.
[93] Ibid., pp. 296-297.
[94] Rubin, S., The International Legal Effects of Unilateral Declarations, *The American Journal of International Law*, Vol. 71, No. 1, 1977, p. 1.

UN Charter and its function is governed in accordance with the provisions of the ICJ Statute.[95] The ICJ is not empowered by Article 38(1) of the statute to decide in accordance with international law any disputes submitted to it using sources of law other than the ones enumerated.[96]

With regard to unratified treaties, it is clear that the state is obliged to abstain from performing acts that will go against the object and purpose of any treaty signed by the state. Although signing is no longer viewed as a manifestation of consent to be bound to a treaty, many international law scholars and lawyers contend that signing does impose certain obligations on the signatory state.[97] This contention is based on a provision in the Vienna Convention, a treaty that regulates the formation, interpretation, and termination of treaties. Article 18 of the VCLT states that a nation that signs a treaty is "obliged to refrain from acts which would defeat the object and purpose [of the treaty] until it shall have made its intention clear not to become a party to the treaty." Most modern constitutions require intervention of the legislature before the Head of State signs the instrument of ratification. In fact, it is by ratification that the state expresses its intent to be legally bound by the treaty. Until the instrument of ratification is drawn up, signed, and exchanged with the other parties, or deposited with one of them or with an international organization, the state is not bound by the treaty.[98] However, when an international tribunal assigns an unperfected treaty legal value despite its non-ratification, there is a prospective constitutive consequence.

[95] See United Nations, Statute of the International Court of Justice, *supra* note 25, Article 1.
[96] O'Connell, *supra* note 95, p. 29.
[97] Bradley, *supra* note 12, p. 314.
[98] Sangroula, *supra* note 6, p. 4.

The flexibility that a negotiator enjoys in experimenting with different packages of concessions in order to strike a consensus with the other party is reduced, for henceforth the negotiator must assume that whatever he or she writes *ad referendum* may be used against his or her state, even without subsequent ratification.[99]

Most of the time, it is the executive branch of the government that negotiates and makes undertakings with the external relations and commitment of the state. Making these undertakings binding upon a state without passing through the steps required in that state's domestic legal system goes against the principles of checks and balances and separation of powers. Beyond this, it can be said that applying undertakings without the consent of the organs of the state concerned is a clear infringement on the state's sovereignty.

We have examined the ways in which the ICJ is using unilateral declaration of states as a source of binding law and a means to adjudicate cases. But this trend is highly contested by scholars. Legal analysts consider the ICJ's decision in this matter problematic, although binding only on the parties to particular cases,[100] because it runs contrary to the legal principles that have traditionally governed such unilateral pronouncements or statements of intent. Moreover, the analysts argue, among other things, that governments are unlikely to accept the view that their policy pronouncements are binding. If such pronouncements are subject to interpretation as legal commitments by the ICJ, some point out that few states would submit to its jurisdiction.[101] It is also arguable that the ICJ is exceeding its authority in searching for a rule of

[99] Riesman, *supra* note 3, p. 743.
[100] See United Nations, Statute of the International Court of Justice, *supra* note 25, Article 59.
[101] Rubin, *supra* note 97, pp. 28-30.

law, as the ICJ is not authorized to adjudicate cases based on unperfected treaties since none of these unperfected treaties fall under the provisions of article 38(1) of the Statute of the ICJ. The implications for the United States with its long history of reluctance to submit to the jurisdiction of the court do not need further elaboration here.[102] The existence of such trends in the international courts suggests that diplomats should be careful in their undertakings with other countries' diplomats.

Despite the above discussion, I am not asserting that unperfected agreements and other unperfected acts should serve no purpose. Rather, these distinct forms of agreement have their own advantages. In fact, it is possible to argue that even unperfected legal acts, such as unratified treaties, can influence the expectations and behavior of states. The rules of making and ratifying treaties are not absolute. In fact, states decide how to bring into being legally binding undertakings. As a result, there are often problems created by 'uncertainties' in the rules. Such uncertainties create confusion as to whether contracting parties merely wanted to undertake 'political commitment' or to take on 'legal obligations.'[103] With the emergence of an increasing number of states and the horizontal as well as vertical expansion of international law, the traditional theories fail to account for the interests and aspirations of the international community as a whole and the changes that have taken place. It is therefore necessary to articulate a dynamic and comprehensive theory that creates a basis for legal obligations that may make allowances for the international community's interests and inspirations. International jurists can make a significant contribution in this connection. The ICJ also has to be careful

[102] Ibid., p. 30.
[103] Sangroula, *supra* note 6, p. 4.

when it adjudicates cases based on unperfected treaties. For example, the mere expression of political commitment does not constitute an agreement with binding effect; therefore, such commitments should not be interpreted to create legal obligations.[104]

When unperfected treaties are used, it should be only in limited situations where no other alternatives are available for the court, and as a means to fill the gap for settlement of the case at hand. The courts are also expected to give details and convincing justifications as to why they are resorting to using any unperfected treaty. All the facts of the situation regarding the case at hand must be examined carefully. Such acts should only bind the state making them if they evidence of an intention to be bound.[105] Nevertheless, it is important to emphasize that legal advisors should be cautious with regard to the possible legal effects of such undertakings by their respective government officials.

[104] Ibid., p. 5.
[105] Pauwelyn, *supra* note 4, p. 143.