

ARTICLE
THE CONCEPT OF AN AGREEMENT IN
INTERNATIONAL LAW

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I. INTRODUCTION

The concept of “agreement” plays a foundational role in international law. Treaties, which form one of the primary sources of international legal obligation, are defined under Article 2(1)(a) of the Vienna Convention on the Law of Treaties (VCLT) as “agreements between states” that are intended to be legally binding and governed by international law.¹ Yet, despite this definitional centrality, international law has developed no generally accepted, stand-alone theory of what constitutes an “agreement.” Similarly, the term recurs throughout the work of the International Law Commission (ILC), in state practice, and in scholarly writing, almost always without clarification.² In many contexts, the idea of agreement is invoked without explanation or definition, and treated as if it were self-evident.

This lack of conceptual precision has become increasingly problematic. International legal practice is replete with instruments that do not qualify as treaties, but which are nonetheless consistently referred to as “agreements.” International actors now routinely adopt a variety of binding and

1. See Vienna Convention on the Law of Treaties, art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; U.N. OFF. OF LEGAL AFFS., TREATY HANDBOOK, ¶ 5.3.4, U.N. SALES No. E.12.V.1 (2012); DUNCAN B. HOLLIS, THE OXFORD GUIDE TO TREATIES 19 (Duncan Hollis, 1st ed., 2012).

2. See generally James Leslie Brierly (Special Rapporteur on the Law of Treaties, International Law Commission), *[First] Report on the Law of Treaties*, UN Doc. A/CN.4/23 (Apr. 14, 1950), 2 Y.B. INT'L L. COMM'N 222, 227, U.N. Doc. A/CN.4/23; Hersch Lauterpacht (Special Rapporteur on the Law of Treaties, International Law Commission), *[First] Report on the Law of Treaties*, UN Doc. A/CN.4/63 (1953), reprinted in 2 Y.B. INT'L L. COMM'N 90, 93–94, U.N. Doc. A/CN.4/63; Gerald Gray Fitzmaurice (Special Rapporteur on the Law of Treaties, International Law Commission), *[First] Report on the Law of Treaties*, UN Doc. A/CN.4/101 (Mar. 14, 1956), reprinted in 2 Y.B. INT'L L. COMM'N 104, 117, U.N. Doc. A/CN.4/101; Sir Humphrey Waldock (Special Rapporteur on the Law of Treaties, International Law Commission), *First Report on the Law of Treaties*, UN Doc. A/CN.4/144 & Add.1 (Mar. 26, 1962), 2 Y.B. INT'L L. COMM'N 27, 31, art. 1(a), U.N. Doc. A/CN.4/144; see also ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 28 (3rd ed. 2013); Duncan B. Hollis & Joshua J. Newcomer, *'Political' Commitments and the Constitution*, 49 VA. J. INT'L L. 507, 522 (2009); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 586 (2005); Oscar Schachter, *Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296, 296–97 (1977); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. (2000); Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 INT'L ORG. 401 (2000); Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORG. 495 (1991); Duncan B. Hollis, *Delimiting "Agreements" for International Law*, 65 VA. J. INT'L L. ONLINE 1, 4 (2024).

non-binding instruments, unwritten consensus documents, declarations, summit communiqués, framework arrangements, and “deals” that blur the line between unilateral statements and bilateral or multilateral agreements, some of which may have legal consequences. Yet, the existence of an agreement is a threshold question in multiple doctrinal contexts. It underpins treaty formation, serves as the premise for “subsequent agreements” in treaty interpretation, and operates as an organizing principle for non-binding instruments. While non-state actors may not generally enter into treaties (aside from the recognized treaty-making capacity of international organizations), they frequently conclude agreements.³ In parallel, the law of unilateral acts requires distinguishing unilateral promises from bilateral or multilateral agreements.⁴ Yet despite this foundational role, scholarly engagement with the concept of agreement has been sparse. Beyond brief treatments in the 1970s and Duncan Hollis’s more recent work on tacit consent, the topic has received “remarkably limited attention in international law and international relations.”⁵

This article seeks to fill that gap by identifying the constitutive elements of agreement as distinct from treaty law. To this end, the

3. See, e.g., William Thomas Worster, *Relative International Legal Personality of Non-State Actors*, 42 BROOK. J. INT’L L. 207, 232–40 (2016); William Thomas Worster, *The Arms Trade Treaty Regime in International Institutional Law*, 36 U. PA. J. INT’L L. 995, 1044–46 (2015); William Thomas Worster, *The Human Rights Obligations of the Holy See under the Convention on the Rights of the Child*, 31 DUKE J. INT’L & COMP. L. 351, 360–65 (2021); William Thomas Worster, *Coming Full Circle: The International Legal Status of the International Olympic Committee*, 31 U. MIAMI INT’L & COMP. L. REV. 389, 399–402 (2024).

4. See, e.g., Nuclear Tests (Austr. v. Fr.), Judgment, 1974 I.C.J. 253 (Dec. 20); Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. 457 (Dec. 20); Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile), Judgment, 2018 I.C.J. 507, ¶ 141 (Oct. 1); Int’l L. Comm’n, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto*, [2006] U.N. Doc. A/61/10, 2 Y.B. INT’L L. COMM’N 369 (2006) [hereinafter *Guiding Principles*]; EVA KASSOTI, THE JUDICIAL NATURE OF UNILATERAL ACTS OF STATES IN INTERNATIONAL LAW 46–55 (2015); PRZEMYSŁAW SAGANEK, UNILATERAL ACTS OF STATES IN INTERNATIONAL LAW 59 (2015); ERIC SUY, LES ACTES JURIDIQUES UNILATÉRAUX EN DROIT INTERNATIONAL PUBLIC 140–41 (1962); K. Zemanek, *Unilateral Legal Acts Revisited*, in INTERNATIONAL LAW – THEORY AND PRACTICE: ESSAYS IN HONOUR OF ERIC SUY 209, 210–12 (Karel Wellens ed., 1998).

5. See generally Kelvin Widdows, *What is an Agreement in International Law?*, 50 BRIT. Y.B. INT’L L. 117 (1979); Kelvin Widdows, *On the Form and Distinctive Nature of International Agreements*, 7 AUSTL. Y.B. INT’L L. 114 (1976–77); Fritz Münch, *Comments on the 1968 Draft Convention on the Law of Treaties: Non-binding Agreements*, 29 ZAÖRV 1, 1 (1969).

article draws on treaty law, state practice, judicial decisions, and the writings of scholars to extract those constitutive features of agreement that recur across legal contexts and forms. This article proceeds from the premise that agreement is conceptually distinct from bindingness: one may have an agreement that is not a treaty, but not a treaty without an agreement. An agreement may thus be adopted without any intention to constitute a treaty. The result is a definition that captures what makes a communication or exchange an “agreement” for the purposes of international law and situates it within broader frameworks of international legal obligation and state conduct. Specifically, this article concludes that an agreement under international law is the conclusion of an intentional and mutual acceptance of a precise and certain *idem* between actors empowered to form agreements on behalf of international legal participants. This definition captures what is common to both treaties and other kinds of international agreements, without collapsing into a purely functional or purposive account. As such, it offers a doctrinally grounded way to assess whether an agreement exists, even in cases where its legal effects or binding nature remain contested.

II. DISTINGUISHING AGREEMENTS FROM TREATIES

Agreements are not synonymous with treaties. Confusion partly stems from the occasional use of the term “agreement” to describe a treaty as a whole, rather than as one of its constitutive elements.⁶ Waldock’s First Report as International Law Commission Special Rapporteur on the Law of Treaties exemplifies this tendency by defining an “international agreement” as “an agreement intended to be governed by international law and concluded between two or more States or other subjects of international law.”⁷ On this view, all international agreements

6. See MALCOLM N. SHAW, *INTERNATIONAL LAW* 654 (7th ed., 2014) (“A treaty is basically an agreement between parties on the international scene.”); HOLLIS, *supra* note 1, at 10–11 (“What is a treaty? Simply put, it is an international legal agreement . . . A treaty requires an international agreement”); 22 C.F.R. § 181.2(a)(1) (“The parties must intend their undertaking to be legally binding, and not merely of political or personal effect. Documents intended to have political or moral weight, but not intended to be legally binding, are not international agreements. An example of the latter is the Final Act of the Helsinki Conference on Cooperation and Security in Europe.”).

7. See Waldock, *supra* note 2, at 32, art. 1(a); see also Int’l L. Comm’n, Rep. on the Work of Its Sixty-Fourth Session, *Draft Articles on the Responsibility of International*

would be treaties, and therefore binding, leaving no conceptual space for non-binding agreements.⁸

However, treaties and agreements cannot be conflated. The UN Charter and the VCLT both refer to treaties and agreements as distinct categories.⁹ By defining a treaty as “an international agreement concluded between States in written form and governed by international law,” the drafters of the VCLT clearly viewed treaties as but one type of agreement.¹⁰ After all, as others have observed, “no legal system upholds all agreements,”¹¹ suggesting that the concept of agreement is broader than that of treaty. This is reinforced by practice: many instruments, such as

Organizations, with Commentaries, at 49, art. 2(a), U.N. Doc. A/66/10 (2011) (defining “international agreement” narrowly as a binding agreement between two or more subjects of international law).

8. See Brierly, *supra* note 2, ¶¶ 19–20; JAN KLABBERS, *THE CONCEPT OF TREATY IN INTERNATIONAL LAW* 51 (1996); Münch, *supra* note 5, at 1.

9. See U.N. Charter art. 102(1) (“[e]very treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it”); VCLT, *supra* note 1 at art. 31(3). See also Sir Humphrey Waldock (Special Rapporteur on the Law of Treaties, International Law Commission), *Fourth Rep. on the Law of Treaties*, at 11, ¶ 1, U.N. Doc. A/CN.4/177 (Mar. 25, 1965) (“Nor does it appear to be correct to say that the term ‘agreement’ is nothing else than a synonym of ‘treaty’.”); Int’l L. Comm’n, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries*, UN Doc. A/73/10 [hereinafter *ILC Draft conclusions on subsequent agreements*] (“While every treaty is an agreement, not every agreement is a treaty . . . Therefore, it is not necessarily binding.”); *id.* at concl. 10(1), cmt (9); Malgosia Fitzmaurice, *The Identification and Character of Treaties and Treaty Obligations Between States in International Law*, 73(1) BRIT. Y.B. INT’L 141, 148 (2002).

10. See Fitzmaurice, *supra* note 2, at 40 (suggesting that treaties were “a sub-class of a wider genus of ‘agreements’”); Int’l L. Comm’n, *Draft Articles on the Law of Treaties, with commentaries*, art. 2, cmt. (1)(a), 2 Y.B. INT’L L. COMM’N (1966) (stating that treaties are “a species of a wider genus of international agreements”) [hereinafter *ILC Draft Articles on the Law of Treaties*]; Int’l L. Comm’n, *Commentary to the Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations*, art. 2, cmt. 1(a), 2(1) Y.B. INT’L L. COMM’N 36–37 (1982) (noting that the provisions of the Draft Articles for international organizations were limited to treaties and excluded “agreements not intended to be binding under international law”); *Guiding Principles*, *supra* note 4, princ. 4, cmt. 6 (reaffirming that an “agreement” may or may not rise to the level of a treaty); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* I 572 (6th ed. 2003) (“not every agreement in written form between subjects of international law is a treaty,” nonetheless “all treaties are agreements”); ROBERT JENNINGS & ARTHUR WATTS, *OPPENHEIM’S INTERNATIONAL LAW* 1206 (9th ed. 1992) (“the word ‘agreement’ in its broadest sense covers all international arrangements,” while “a treaty is a particular form of international agreement.”); ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 17–19 (2d ed., 2007) (“‘treaty’ is a subset of ‘international agreement’”).

11. See Fitzmaurice, *supra* note 9, at 143.

memoranda of understanding, are plainly agreements, though not treaties. As Klabbers and Brölmann have shown, so-called “gentlemen’s agreements” are understood as deliberate, politically binding understandings that do not constitute treaties, but are certainly agreements.¹²

III. THE REDUNDANCY OF “BETWEEN STATES” AND “INTERNATIONAL”

The definition of “treaty” in the VCLT mentions that treaties are agreements that are “international” and “concluded between States.”¹³ The qualifiers of “international” and “between States” add little substantive content. “Between States” merely reiterates Articles 1 and 6 of the VCLT, which state that the Convention applies only to treaties between States and that States have capacity to conclude them.¹⁴ Likewise, the expression “international” in the VCLT definition contributes little beyond emphasizing that not all agreements are treaties.¹⁵ Hollis and Villiger note that the qualifier simply reinforces this point.¹⁶ If “international” is taken to mean “governed by international law,” that element is already present in the VCLT text; if it means “between States,” it duplicates the separate phrase to that effect.¹⁷ The travaux préparatoires confirm this redundancy. At the Vienna Conference, Chile, Spain, and Syria argued that any agreement between States was necessarily “international” and that the term was unnecessary.¹⁸ Italy disagreed, suggesting that some

12. See JAN KLABBERS, *INFORMAL AGREEMENTS IN INTERNATIONAL LAW* 107–13 (Duncan B. Hollis ed., 2012); Catherine M. Brölmann, *A Flat Earth? Mapping the Fault Lines in International Law: Are We Being Constructive?*, 1 INT’L ORGS. L. REV. 3, 38–44 (2007).

13. See VCLT, *supra* note 1, art. 2(1)(a).

14. See *id.* art. 6.

15. See Fitzmaurice, *supra* note 9, at 146.

16. See Brierly, *supra* note 2, ¶ 19; Waldock, *supra* note 9, at 11 ¶ 1; LORD ARNOLD MCNAIR, *LAW OF TREATIES* 4–5 (1961); MARK E. VILLIGER, *COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* 77 (2009); HOLLIS, *supra* note 1, at 20.

17. See ILC *Draft Articles on the Law of Treaties*, *supra* note 10, art. 2, cmt. (6).

18. See U.N. Conference on the Law of Treaties, *Fourth meeting of the Committee of the Whole*, ¶ 2, U.N. Doc. A/CONF.39/C.1/SR.4 (Mar. 29, 1968) (Chile); see also *id.* ¶ 20 (Spain); U.N. Conference on the Law of Treaties, *Fifth meeting of the Committee of the Whole*, ¶ 7, U.N. Doc. A/CONF.39/C.1/SR.5 (Mar. 29, 1968) (Syria) [hereinafter *Fifth meeting of the Committee of the Whole*]; Klabbers, *supra* note 8, at 54.

agreements between States are not international in nature.¹⁹ New Zealand opposed deletion, reasoning that the qualifier reaffirmed the VCLT's application only to agreements between "full subjects of international law."²⁰ The United States supported retaining the term, although without explanation.²¹ Syria eventually abandoned its position, leaving Chile and Spain isolated,²² and the drafting committee rejected their proposal without providing reasons.²³ The result is that "international" and "between States" largely reiterate what is already implicit: treaties are concluded between States and international organizations.²⁴ By implication, however, these qualifiers also suggest that agreements involving other actors, such as agreements between a State and a non-State entity, are not treaties, though they remain agreements.²⁵

19. See *Fifth meeting of the Committee of the Whole*, *supra* note 18, ¶ 20 (Italy) ("he opposed the proposal by Spain (A/CONF.39/C.1/L.28) to delete the word 'international' before the word 'agreement' in paragraph 1(a), because there were agreements between States which did not constitute international agreements.").

20. See *id.* ¶ 77 (Australia) ("The qualification 'international' in paragraph 1(a) of article 2 should be maintained to make clear that the article was dealing with agreements between States that were full subjects of international law.").

21. See *id.* ¶ 115 (US) ("His delegation had given thought to the suggestion to delete the word 'international' before 'agreement' in paragraph 1(a) (A/CONF.39/C.1/L.28) but, on balance, had reached the conclusion that it should be retained.").

22. See U.N. Conference on the Law of Treaties, 87th mtg. Comm. of the Whole, ¶ 25, U.N. Doc. A/CONF.39/C.1/SR.87 (Chile) ("In addition to advancing that argument, he had also proposed that anything that was superfluous should be deleted from the International Law Commission's definition. It was pointless, for example, to say that a treaty was an 'international' agreement governed by international law 'embodied in a single instrument or in two or more related instruments', or to speak of a 'particular designation'. The Chilean delegation still held that view.").

23. See U.N. Conference on the Law of Treaties, *Report of the Committee of the Whole on its Work at the first session of the Conference*, ¶ 35(i)(e), U.N. Doc. A/CONF.39/14; U.N. Conference on the Law of Treaties, *Vienna Convention on the Law of Treaties*, art. 2(1)(a), U.N. Doc. A/CONF.39/27 (rejecting the proposal).

24. See Waldock, *supra* note 2, at 32; VILLIGER, *supra* note 16, at 78. Some scholars have even gone so far as to argue in favor of any entity with international legal personality having subjectivity or treaty-making power. See ROBERT KOLB, *THE LAW OF TREATIES* 16–21 (2016); Frank Berman & David Bentley, *Treaties and Other International Instruments*, in SATOW'S DIPLOMATIC PRACTICE 598, 599–600, § 33.23 (Sir Ivor Roberts ed., 7th ed. 2016).

25. See Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations art. 2(1)(a), Mar. 20, 1986, 25 I.L.M. 543, 578.

IV. ORAL OR WRITTEN

Unlike treaties, agreements under international law need not be in written form.²⁶ The VCLT defines treaties as a specific type of agreement and expressly requires that they be in writing.²⁷ By implication, agreements more generally are not confined to written instruments,²⁸ a reading supported by the VCLT Commentary.²⁹

While practice involving accepted oral agreements is limited, notable examples do exist. These include the Ihlen Declaration in the Eastern Greenland case,³⁰ a 1936 telephone conversation between France, the United Kingdom, and the United States on monetary matters,³¹ the Silesian Loan affair,³² the oral settlement in the Great Belt case,³³ Canada's oral statement (and its

26. See KOLB, *supra* note 24; KLABBERS, *supra* note 8, at 49; MCNAIR, *supra* note 16, at 4; Duncan B. Hollis, *A Comparative Approach to Treaty Law and Practice*, in NATIONAL TREATY LAW AND PRACTICE, 1, 12–13; J.G. Brouwer, *The Netherlands*, in NATIONAL TREATY LAW AND PRACTICE 483, 486; Germán Cavellier, *Colombia*, in NATIONAL TREATY LAW AND PRACTICE 193, 196.

27. See VCLT, *supra* note 1, art. 2(1)(a); Hollis, *supra* note 1, at 19; *but see* Hollis, *supra* note 26, at 12–13 (identifying the unusual practice of considering oral agreements as treaties); HOLLIS, *supra* note 1, at 24 (2012) (also identifying this practice).

28. See Hollis, *supra* note 2, at 1 (discussing tacit agreements).

29. See VCLT, *supra* note 1, art. 3; Legal Status of Eastern Greenland case (Den. v. Nor.), Judgment, 1933 P.C.I.J. (ser. A/B) No. 53, at 76, 91 (dissenting opinion by Anzilotti, J.) (“The outcome of all this is therefore an agreement, concluded between the Danish Minister, on behalf of the Danish Government, and the Norwegian Minister for Foreign Affairs, on behalf of the Norwegian Government, by means of purely verbal declarations. . . . Moreover, there does not seem to be any rule of international law requiring that agreements of this kind must necessarily be in writing, in order to be valid.”); Fitzmaurice, *supra* note 9, at 161.

30. See Den. v. Nor., 1933 P.C.I.J. (ser. A/B) at 22–23, 69–73; HOLLIS, *supra* note 1, at 24.

31. See Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, in STUDIES IN WORLD PUBLIC ORDER 404–17 (Myres S. McDougal ed., 1960).

32. See also MCNAIR, *supra* note 16, at 8–9 (characterizing Silesian loan affair as an oral treaty).

33. See Passage Through The Great Belt (Fin. v. Den.), Order, 1992 I.C.J. Rep. 348, 348 (Sep. 10) (recording the notification of settlement to the Court); Press Release, Foreign Press Services, The Oral Agreement Between Finland and Denmark on the Passage Through the Great Belt Dispute (Sept. 4, 1992), *reprinted in* 3 FIN. Y.B. INT’L L. 610–13 (1992); KLABBERS, *supra* note 8, at 50 n.71; AUST, *supra* note 2, at 7–9; Hollis & Newcomer, *supra* note 2, at 527 n.78 (suggesting that the Great Belt settlement might be a political commitment instead); HOLLIS, *supra* note 1, at 24.

acceptance) regarding a deep seabed mining treaty,³⁴ and negotiations in the Access to the Pacific Ocean case.³⁵ These examples are exceptional but demonstrate that international law recognizes agreements formed through oral communications.

V. MUTUALITY

For an agreement to exist, the parties must communicate in a way that reaches concordance. Hollis refers to this as “mutuality,”³⁶ meaning an exchange of communications between two or more parties,³⁷ not a spontaneous act by a single state.³⁸ Although Brierly did not define “agreement” in his ILC Report, he considered the term adequate to “exclude unilateral declarations,” implicitly requiring more than one actor.³⁹ The ICJ has endorsed this understanding, noting that communication may even be indirect, through intermediaries.⁴⁰

A. Mere Conversation is Not Enough

However, mere conversation or parallel unilateral statements do not suffice. Many unilateral statements are issued in bilateral

34. See Philippe Gautier, *Non-Binding Agreements*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2006) (“unless the political intention of the drafters is clearly expressed or manifest, the court will not lightly characterize as a non-binding agreement an instrument, even if informal, containing clear commitments.”).

35. See *Bol. v. Chile*, 2018 I.C.J. 540, ¶ 97; Memorial of Bolivia, *Bol. v. Chile*, Vol. I, ICJ Doc. 153-20140417-WRI-01-00-EN ¶ 295 (Apr. 17, 2014); see also *Maritime Dispute (Peru v. Chile)*, 2014 I.C.J. 3, 38–41, ¶¶ 91–102 (Jan. 27).

36. See KLABBERS, *supra* note 8, at 51; Duncan B. Hollis, *Defining Treaties*, in THE OXFORD GUIDE TO TREATIES 20 (2d ed., 2020); Organization of American States, Inter-American Juridical Committee, *Guidelines of the Inter-American Juridical Committee on Binding and Non-Binding Agreements*, at 38–40, OAS Resolution CJI/RES. 259 (XCVII-O/20) (1st ed., 2020) [hereinafter OAS IAJC Guidelines]; Duncan B. Hollis, *Binding and Non-Binding Agreements, Final Report*, at 11 n.2, OAS Doc. OEA/Ser. Q. CJI/doc. 614/20 rev.1 corr.1 (1st ed., 2020).

37. See KLABBERS, *supra* note 8, at 51–53; Hollis & Newcomer, *supra* note 2, at 522; HOLLIS, *supra* note 1, at 20.

38. See KLABBERS, *supra* note 8, at 51–53; Hollis & Newcomer, *supra* note 2, at 522; Hollis, *supra* note 2, at 4.

39. See Brierly, *supra* note 2, ¶ 20; KLABBERS, *supra* note 8, at 51.

40. See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.)*, Judgment, 1994 I.C.J. Rep. 112, 133 ¶ 10 (July 1) (dissenting opinion by Oda, J.) (arguing that the minutes were not a binding treaty because the exchange was not directly between the two parties, but rather through the third party, Saudi Arabia).

contexts,⁴¹ yet tribunals have clarified that a series of unilateral declarations on a common topic does not create an agreement.⁴² There must be a “meeting of the minds”⁴³ or “volontés

41. See KLABBERS, *supra* note 8, at 51.

42. See *Can. Cattlemen for Fair Trade (CCFT) v. U.S., Award on Jurisdiction*, ¶¶ 186–87 (UNCITRAL Arb. under NAFTA Ch. 11 2008), <https://www.italaw.com/cases/documents/192> [perma.cc/D8R3-S7SS] (“The Respondent maintains that there is such a ‘subsequent agreement’, and points to its own statements on the issue, before this Tribunal and elsewhere; to Mexico’s Article 1128 submission in this arbitration; and to Canada’s statements on the issue, first in implementing the NAFTA, and, later, in its counter-memorial in the Myers case. All of this is certainly suggestive of something approaching an agreement, but, to the Tribunal, all of this does not rise to the level of a ‘subsequent agreement’ by the NAFTA Parties.”). *Cf. Qatar v. Bahr.*, 1994 I.C.J. at 133 ¶ 10; see also ILC *Draft conclusions on subsequent agreements*, *supra* note 9, concl. 10(1), cmt. (1) (“An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding . . .”); *id.* cmt. (7) (“ . . . a subsequent agreement . . . presupposes a ‘common act’”); *id.* concl. 4, cmt. (10) (“Subsequent agreements . . . are hence distinguished based on whether an agreement of the parties can be identified as such, in a common act or undertaking . . . A ‘subsequent agreement’ . . . must therefore be ‘reached’ and presupposes a deliberate common act or undertaking by the parties, even if it consists of individual acts by which they manifest their common understanding regarding the interpretation of the treaty or the application of its provisions.”); KLABBERS, *supra* note 8, at 51–53; Hollis & Newcomer, *supra* note 2, at 522; HOLLIS, *supra* note 1, at 20; Brierly, *supra* note 2, at 227, ¶ 20; Georg Nolte (Special Rapporteur on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation), *First report on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, ¶ 74, U.N. Doc. A/CN.4/660 (Mar. 19, 2013) (“ . . . Subsequent agreements and subsequent practice are distinguished according to whether a common position can be identified as such, in a common expression, or whether it is necessary to indirectly identify an agreement through particular conduct or circumstances.”).

43. See *International Status of South West Africa*, Advisory Opinion, 1950 I.C.J. Rep. 128, 170–71 (July 11) (separate opinion by Read, J.) (“It is sufficient for the present purposes, to state that an ‘arrangement agreed between’ the United Nations and the Union [of South Africa] necessarily included two elements: a meeting of minds, and an intention to constitute a legal obligation.”); *Bol. v. Chile*, 2018 I.C.J. 602–03, ¶ 14 (dissenting opinion by Salam, J.) (“I would add that the fact that Bolivia took six months to send a Note responding to receipt of the Trucco Memorandum does not as such preclude a meeting of minds between the Parties.”); *Joined Cases C-102/13 & C-165/12, Parliament & Comm’n v. Council*, 2015 E.C.R. ¶ 61 (“At the end of that process [offer-acceptance], the expression of the concurrence of wills . . . constitutes an agreement”); *Can. Cattlemen for Fair Trade (CCFT) v. US, Award on Juris.*, ¶¶ 186–87 (UNCITRAL Arb. under NAFTA Ch. 11, Jan. 28, 2008) (“The Respondent maintains that there is such a ‘subsequent agreement’, and points to its own statements on the issue, before this Tribunal and elsewhere; to Mexico’s Article 1128 submission in this arbitration; and to Canada’s statements on the issue, first in implementing the NAFTA, and, later, in its counter-memorial in the Myers case. All of this is certainly suggestive of something approaching an agreement, but, to the Tribunal, all of this does not rise to the level of a ‘subsequent agreement’ by the NAFTA Parties.”); Brierly, *supra* note 2, at 227, ¶ 20; J. L. Weinstein, *Exchange of Notes*, 29 BRIT. Y.B. INT’L L. 205, 226 (1952) (“It is the consensus of the parties which is the essence of the agreement and not

concordantes" [concordant wills].⁴⁴ This view is echoed in the ILC's Draft Conclusions on Subsequent Agreements and in the opinions of judges such as Yves Daudet and Salah el-Dine Tarazi, who stressed the need for communication expressing a common will.⁴⁵

Mutuality is most clearly shown in negotiations with proposals and counter-proposals leading to congruent texts.⁴⁶ A reply showing awareness of converging positions may suffice; however, where communications fail to converge substantively, no agreement exists.⁴⁷ In agreements, final texts should be largely similar,⁴⁸ though perfect identity is unnecessary,⁴⁹ but divergence suggests counter-offers, not consensus.⁵⁰

the instrument, no matter what form it takes"); VILLIGER, *supra* note 16, at 77; Widdows, *supra* note 5, at 122.

44. See PAUL REUTER, INTRODUCTION AU DROIT DES TRAITÉS ¶ 65 (3d ed. 1995) [hereinafter REUTER, INTRODUCTION].

45. See *Bol. v. Chile*, 2018 I.C.J. at 613, ¶ 31 (dissenting opinion by Daudet, J.); *Aegean Sea Continental Shelf (Greece v. Turk.)*, Judgment, 1978 ICJ Rep. 3 (Dec. 19) (separate opinion by Tarazi, J.). See also ILC *Draft conclusions on subsequent agreements*, *supra* note 9, concl. 10(1), cmt. (7) ("... a subsequent agreement... presupposes a 'common act'"); *id.* concl. 4, cmt. (10) ("Subsequent agreements... are hence distinguished based on whether an agreement of the parties can be identified as such, in a common act or undertaking... A 'subsequent agreement'... must therefore be 'reached' and presupposes a deliberate common act or undertaking by the parties, even if it consists of individual acts by which they manifest their common understanding regarding the interpretation of the treaty or the application of its provisions."); KLABBERS, *supra* note 8, at 51.

46. See *Bol. v. Chile*, 2018 I.C.J. at 609 ¶ 11, 613 ¶ 32 (dissenting opinion by Daudet, J. *ad hoc*).

47. See *Kasikili/Sedudu Isls (Bots. v. Namib.)*, Judgment, 1999 I.C.J. Rep. 1045, 1077 ¶ 55, 1094, ¶¶ 74–75; *Seda et al. v. Colombia*, ICSID Case No. ARB/19/6, Award (International Centre for Settlement of Investment Disputes 2024) ¶ 695 ("In the present arbitration, Respondent's position on the ESI Provision and its interpretation evolved, as Respondent itself admitted, and gradually aligned with the U.S. position."); *Eur. Molecular Bio. Lab. Arb. (EMBL v. Germ.)*, Award (Arb. Trib., June 29, 1990) 105 I.L.R. 1, 54–56 ("As a 'reply' to the question put by the other side an agreement between the parties as defined by the declaration comes into existence."); ILC *Draft conclusions on subsequent agreements*, *supra* note 9, concl. 10(1), cmt. (8) ("For an agreement... to be 'common', it is... sometimes necessary that the parties have a mutual awareness of a shared understanding.").

48. See *Bol. v. Chile*, 2018 I.C.J. at 544 ¶ 109, 549–50 ¶ 132.

49. See *Bol. v. Chile*, 2018 I.C.J. at 507 ¶ 24 (dissenting opinion by Daudet, J. *ad hoc*) ("While it is true that the texts are not exactly the same word for word, to use that as grounds for rejecting the Bolivian position is overly formalistic, in so far as the texts both mention an agreement to enter into direct negotiations and refer to the same object of the negotiation..."). But see *Seda et al. v. Colombia*, ICSID Case No. ARB/19/6, Award ¶ 695 ("Even now, these positions are congruent, but not identical, which makes designating them as 'agreement' a rather tall order.").

50. See *Bol. v. Chile*, 2018 I.C.J. at 601 ¶ 9.

B. Distinguishing Unilateral Acts from Bilateral Acts

Agreements are certainly not unilateral acts. In fact, agreements can be negatively defined as not constituting unilateral acts. A unilateral act is, as Hugh Thirlway notes, “an act of will of a single State”⁵¹ and does not require concordance.⁵²

In practice, however, distinguishing unilateral from bilateral acts can be difficult, especially where negotiations involve interacting unilateral statements.⁵³ States themselves sometimes debate whether undertakings are given unilaterally or agreed bilaterally. For example, during U.S.–Brazil nuclear export negotiations, Brazil asked whether the U.S. preferred a bilateral exchange of notes or a unilateral statement to the IAEA.⁵⁴ The parties ultimately chose a unilateral note, avoiding domestic political risks while still satisfying U.S. regulators.⁵⁵ Similarly, in one case, Cuba pledged vaccines to Uruguay but tied the pledge to

51. See Brierly, *supra* note 2, at 227 ¶ 20; Klabbbers, *supra* note 8, at 51; Hugh Thirlway, *Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning*, 294 RECUEIL DES COURS 267, 337-38 (2002).

52. See Thomas M. Franck, *Word Made Law: The Decision of the ICJ in the Nuclear Test Cases*, 69 AM. J. INT'L L. 612, 617 (1975).

53. See Hollis, *supra* note 36, at 33-34 (“Since treaties and unilateral declarations both decry formalities, however, it can be difficult at times to distinguish instances of mutual agreement from unilateral action. . . . In practice, therefore, it may be difficult to differentiate the acceptance of an earlier offer to make a treaty from a unilateral commitment.”).

54. See U.S. Dep’t of State, Cable No. 1978VIENNA08511_d (Sept. 21, 1978) ¶ 2, https://www.wikileaks.org/plusd/cables/1978VIENNA08511_d.html [perma.cc/BM7Q-PE4B] (“Carvalho [Brazilian Governor to the IAEA] said he was unclear as to what the US desired, i.e. a bilateral exchange of notes or a Brazilian statement to the Agency.”).

55. See *id.* (“[Brazilian Deputy Assistant Secretary] Nosenzo indicated that the assurance might take a number of forms but that a ‘unilateral’ note provided by Brazil to us and confirming verbal assurances given to Smith by Silveria in June might be best both from the point of view of satisfying NRC and minimizing political reactions in Brazilia [sic] that might be triggered by US note requesting written assurance. Carvalho agreed and said he would consider proposed Brazilian note and get back to us.”). See also Matt Viser et al., *Ukraine Live Briefing: Biden meets Zelensky at G-7, announces \$375M aid package including ammunition, weaponry*, WASH. POST (May 21, 2023), <https://www.washingtonpost.com/world/2023/05/21/russia-ukraine-war-news/> [perma.cc/7N22-7CCA] (“President Biden unveiled a \$375 million military assistance package for Ukraine at the Group of Seven summit on Sunday, the latest pledge from Washington of aid that totals \$37 billion since Russia’s war began. . . . The United States will support a joint effort to train Ukrainian pilots to fly fighter jets, including the coveted F-16s, Biden said Sunday, with the understanding that Kyiv would not use the jets to escalate the conflict beyond Ukraine’s borders. ‘I have a flat assurance from Zelensky that they will not, will not, use it to go into Russian geographic territory,’ Biden told reporters.”).

reciprocal debt concessions.⁵⁶ Uruguay rejected this “gift” characterization and treated the pledge as a commercial exchange, reducing Cuba’s debt accordingly.⁵⁷ Cuba maintained that normally, a unilateral act could not be refused, but, in essence, this was an exchange of value.⁵⁸ In further examples, states mixed their approach to whether an act was bilateral or unilateral. Austria’s declaration of neutrality, though unilateral in form, was registered with the UN as a treaty, which would necessarily be bilateral or multilateral.⁵⁹ Egypt did the same with its Suez Declaration.⁶⁰ Other acts initially framed as unilateral have later been treated as bilateral, for example, the WTO panel’s view of the Eastern Greenland declaration.⁶¹

56. The declaration in question states: “The Government of Cuba will keep its word, and early in June will deliver to Uruguay the remaining 800,000 of the total 1,200,000 doses of meningitis vaccine which it is committed to donating.” See Statement by Felipe Pérez Roque, Minister for Foreign Affairs of Cuba (Apr. 4, 2002) discussed in Víctor Rodríguez Cedeño (Special Rapporteur on Unilateral Acts of States), *Eighth report on unilateral acts of States*, ¶¶ 36–43, U.N. Doc. A/CN.4/557 (May 26, 2005).

57. See *id.* ¶¶ 36–43; *cf. id.* ¶¶ 96, 103.

58. See *id.* ¶¶ 36–43.

59. See BUNDESVERFASSUNGSGESETZ ÜBER DIE NEUTRALITÄT ÖSTERREICHS [FEDERAL CONSTITUTIONAL LAW ON THE NEUTRALITY OF AUSTRIA], B.G.Bl. Nr. 211/1955, arts. 1–2 (Oct. 26, 1955) (Austria); Memorandum from Donald A. Wehmeyer, U.S. Dep’t of State, Off. L. Advisor, Nature of Austria’s neutrality and legal implications of United States response to the neutrality declaration (Nov. 16, 1955), cited in 1 MARJORIE M. WHITEMAN & GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 350 (1963) (“This Declaration, with the obligations therein, constitutes an international instrument and will be deposited and registered with the Secretariat of the United Nations.”); Josef Kunz, Editorial Comment, *Austria’s Permanent Neutrality*, 50 AM. J. INT’L L. 418, 420 (1956) (translating Austrian constitutional federal statute arguing for binding status). Note that Degan concludes that the Austrian Declaration of Neutrality was neither unilateral nor autonomous. See VLADIMIR ĐURO DEGAN, SOURCES OF INTERNATIONAL LAW 299 (1997).

60. See Declaration made by the Government of Egypt on the Suez Canal and the arrangements for its operation (Apr. 24, 1957), 265 U.N.T.S. 300. Contrary to most scholars, see, e.g., DEGAN, *supra* note 59, at 300. Suy and Rousseau argue that the Suez Declaration was not unilateral because it did not contain any new commitments; see SUY, *supra* note 4, at 140–41; 1 CHARLES ROUSSEAU, PRINCIPES GÉNÉRAUX DU DROIT INTERNATIONAL PUBLIC 425–26 (1944). France argued that Egypt’s declaration could be altered or withdrawn unilaterally regardless of registration. See United Nations Security Council OR, 12th yr., 776th mtg., ¶ 59 (“[A] unilateral declaration, even if registered, . . . cannot be anything more than a unilateral act, and we must draw the conclusion from these findings that just as the Declaration was issued unilaterally, it can be amended or annulled in the same manner.”).

61. See The Trade Act of 1974, WTO Case No. WT/DS152/R, ¶ 4.103 (Panel Report, Dec. 22, 1999); Den. v. Nor., 1933 P.C.I.J. at 35–36, 56.

C. The Centrality of Acceptance

The decisive feature of an agreement is the condition of acceptance—without it, a unilateral offer cannot bind both parties.⁶² The CJEU considers that an accepted offer will give rise to an agreement,⁶³ with the other state remaining free either to accept or to respond with a counter-offer.⁶⁴ The ICJ has concluded along the same lines.⁶⁵ In *Kasikili/Sedudu Islands*, the Court found no agreement where the parties explicitly acknowledged the absence of one, agreed to disagree, refrained from objecting to the characterization of disagreement, advanced contradictory claims, or shifted from positions that might otherwise have supported

62. See *Austr. v. Fr.*, 1974 I.C.J. at 269 ¶ 50 (“As was observed above, to have legal effect, there was no need for these statements to be addressed to a particular State, nor was acceptance by any other State required.”); CLAUDE SCHENKER, SWITZERLAND, FED. DEP’T OF FOREIGN AFFS., PRACTICAL GUIDE TO INTERNATIONAL TREATIES ¶ 23 (2015), https://www.eda.admin.ch/dam/eda/en/documents/publications/Voelkerrecht/Praxisleitfaden-Voelkerrechtliche-Vertraege_en.pdf [perma.cc/7A23-WW3Z] (citing Switzerland, Administrative Case Law of the Federal Authorities (ACLFA), 60.133 (1996 IV)) (“No counterparty is required. No acceptance is necessary”); Model Diplomatic Note (undated), reprinted in U.S. DEP’T OF STATE, OFF. OF THE LEGAL ADVISOR, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2020, at 416 (2021); US Dep’t of State, Cable No. 07ALGIERS652_a (May 13, 2007) ¶¶ 1, 4, 12, https://wikileaks.org/plusd/cables/07ALGIERS652_a.html [perma.cc/L4HK-LFKL]; CRAWFORD, BROWNIE’S, *supra* note 4, at 404; CHRISTIAN ECKART, PROMISES OF STATES UNDER INTERNATIONAL LAW 60 (2012) (“[A]n offer does not require another manifestation of will in order to have its legal effect”); DEGAN, *supra* note 59 at 299–305 (arguing that the Austrian Neutrality Declaration, which purports to produce obligations for more than the declarant state, cannot be given unilaterally and therefore cannot constitute a unilateral promise, so it must constitute an offer); NGUYEN QUOC DINH, DROIT INTERNATIONAL PUBLIC 324–25 (1975); Eva Kassoti, *Interpretation of Unilateral Acts in International Law*, 69 NETH. INT’L L. REV. 295–326 (2022); Eric Suy & Nicolas Angelet, *Promise*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 3 (Rüdiger Wolfrum ed., 2007); Eric Suy, *Some Unfinished New Thoughts on Unilateral Acts of States as a Source of International Law*, 26 J. JURID. SCI. 1, 3 (2001) (“effect without the involvement by other subjects of international law”).

63. See *Parliament & Commission v. Council*, Opinion of Advocate General Sharpston ¶ 72 (“As I see it, there are two options: either the Declaration is a unilaterally binding instrument or it is a unilateral declaration intended to produce legal effects only when subsequently accepted by the third State in whose favour it was made (in which case it is only one side of an international agreement).”).

64. See *Parliament & Commission v. Council*, ¶ 60 (“[F]or an agreement it is usually for that State to send an offer targeted at certain other interested States, which are then free to accept or not, or indeed, as the case may be, to request that changes be made to the offer.”).

65. See *Bots. v. Namib.*, 1999 I.C.J. at 1077 ¶ 55, 1094 ¶¶ 74–75; see also *Greece v. Turk.*, 1978 I.C.J. 3, 55–61 (separate opinion by Tarazi, J.); *Bol. v. Chile*, 2018 I.C.J. 607, ¶ 31 (dissenting opinion by Daudet, J. *ad hoc*); KLABBERS, *supra* note 8, at 51.

agreement.⁶⁶ This requirement is especially important in treaty practice involving multiple instruments where not all provisions may reflect mutually accepted terms.⁶⁷ Similarly, a pledge made at the request of one state during negotiations does not automatically

66. See *Bots. v. Namib.*, 1999 I.C.J. at 1086 ¶ 62(3) (“[I]n 1948 a local official from the Caprivi and a local official from Bechuanaland . . . recorded that they had ‘neither arrived at, nor expressed any joint opinion on the effect of these facts on the ownership of the Island’”); *id.* ¶¶ 62–63(6) (“[T]he local officials in the Caprivi Strip and in Bechuanaland, aware of the positions of their respective superior authorities but keen to remain on neighbourly terms, agreed to shelve their legal differences and to maintain, until further notice, the status quo ante . . .”); *id.* ¶¶ 62–63(7) (“[T]he local official in the Caprivi Strip described the question of the ‘Northern Waterway’ as ‘concomitant’ with that of the ‘legal aspect regarding Kasikili Island’, and his counterpart in Bechuanaland did not challenge this”); *id.* ¶¶ 62–63(5) (“[T]he higher authorities in South Africa, while not disputing the possibility . . . and at the same time demonstrating a flexible attitude . . . clearly asserted their claims to the Island”); *id.* ¶¶ 62–63(4) (“[T]he higher authorities in Bechuanaland . . . were initially inclined to accept those claims, on condition that they retained access to the northern channel, but later, after consulting London, they abandoned that idea”).

67. See “Hoshinmaru” (*Japan v. Russ. Fed’n*), Prompt Release, Judgment, 2005–2007 ITLOS Rep. 18, 46–47, ¶¶ 86–87 (Aug. 6) (“The Protocol or minutes of a joint commission such as the Russian-Japanese Commission on Fisheries may well be the source of rights and obligations between Parties [*citing* *Qatar v. Bahr.*, 1994 I.C.J. at 112] . . . The Tribunal notes that, while on some matters the Protocols of the meetings mention agreed views, this is not the case as regards the criteria notified by the Russian side as to the setting of the bond.”).

become a bilateral agreement;⁶⁸ only when a unilateral statement expressly accepts another's proposal can an agreement exist.⁶⁹

Unilateral pledges may nonetheless play functional roles in negotiations, narrowing issues, sustaining mediation processes, or framing talks.⁷⁰ South Korea, for example, sought U.S. security

68. See U.S. Dep't of State, Cable No. 1978LONDON09651_d (June 19, 1978), https://www.wikileaks.org/plusd/cables/1978LONDON09651_d.html [perma.cc/N6AM-6U82]; U.S. Dep't of State, Cable No. 1978STATE247046_d (Sept. 28, 1978), https://www.wikileaks.org/plusd/cables/1978STATE247046_d.html [perma.cc/D38L-NLUB]; U.S. Dep't of State, Cable No. 1979STATE292943_e (Nov. 9, 1979), https://www.wikileaks.org/plusd/cables/1979STATE292943_e.html [perma.cc/35EE-XEUB]; *Minority Schools in Albania*, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 64, at 4–23 (Apr. 6); *S.S. "Edna"* (U.S. v. Gr. Brit.), 3 R.I.A.A. 1585, 1589–90 (Dec. 22, 1934); *Interpretation of the Air Transport Services Agreement* (U.S. v. Fr.), 16 R.I.A.A. 5, 23 (Dec. 22, 1964); *Claims Arising out of Decisions of the Mixed Graeco-German Arbitral Tribunal* (Greece v. Fed. Rep. Ger.), 19 R.I.A.A. 27, 51 (Jan. 26, 1972); *Lac Lanoux Arbitration* (Fr./Spain), 12 R.I.A.A. 281, 304–05, 311–13 (Nov. 16, 1957); Testimony of John H. Holdridge, Assistant Sec'y of State for E. Asian Affs. in *China-Taiwan: United States Policy: Hearing Before the H. Comm. on Foreign Affs.*, 97th Cong. 15–16 (Aug. 18, 1982). Note, however, that states have attempted to recharacterize unsolicited unilateral acts as offers for acceptance. See, e.g., Cedeño, *supra* note 56, ¶ 39 (regarding the statement by the Minister for Foreign Affairs of Cuba concerning the supply of vaccines to the Eastern Republic of Uruguay, where Uruguay recharacterized the unilateral act as an offer for an agreement, "[I]n this case there was a reaction on the part of the Government of Uruguay, which rejected the donation, and the Central Bank of Uruguay deducted the price of the vaccines from Cuba's debt to Uruguay.").

69. See Cedeño, *supra* note 56, ¶ 17 (regarding the note dated Nov. 22, 1952, from the Minister for Foreign Affairs of Colombia, "[T]he Government of Venezuela replied to this note on the same date through its Ambassador in Bogotá. The text of this note reads as follows: 'Minister, I have the honour to inform you of the receipt of your letter No. GM-542 of today's date, setting forth the conclusions that the Government of Colombia has reached with regard to the Los Monjes archipelago, as a result of the cordial talks which the Governments of our two countries have held on that subject in recent months through our embassies in Bogotá and Caracas. My Government fully agrees with the terms of your note'").⁵⁶

70. See S.C. Res. 2124, ¶¶ 1–2 (Nov. 12, 2013); Letter from Robert Lansing, Sec'y of State, to Paul Ritter, Swiss Minister (Feb. 12, 1917), *reprinted in* U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1917, Supp. 1, The World War, doc. 129 (1931), <https://history.state.gov/historicaldocuments/frus1917Supp01v01> [perma.cc/H2RZ-YNSD]; Telegram from Sec'y of State to Minister in El Sal. (Mar. 27, 1935), No. 91, *reprinted in* U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN, FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1935, The American Republics, vol. IV, doc. 555 (1953), <https://history.state.gov/historicaldocuments/frus1935v04> [perma.cc/4H66-YUYP]; Telegram from Francis B. Sayre, Acting Sec'y of State, to the Chargé in El Sal. (Nov. 16, 1936), No. 258, *reprinted in* U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN, FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1936, The American Republics, vol. V, doc. 484 (1954), <https://history.state.gov/historicaldocuments/frus1936v05> [perma.cc/48VA-5HSX]; Telegram from Cordell Hull, Sec'y of State, to Louis Goethe Dreyfus, Jr., Minister in Iran (May 2, 1942), *reprinted in* U.S. DEP'T OF

assurances to exclude security matters from its negotiations with North Korea.⁷¹ Mediating states may also draft communications for others to issue.⁷² Yet, as the *Minority Treaties* case shows, if no acceptance is required, such assurances remain unilateral.⁷³ As a result, it can sometimes be unclear whether acceptance was solicited. For example, the communications between President Putin and President Macron during the 2022 Ukraine crisis were described at different times as unilateral pledges or as an agreement.⁷⁴

STATE, OFF. OF THE HISTORIAN, FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1942, The Near East and Africa, vol. IV, doc. 321 (1963), <https://history.state.gov/historicaldocuments/frus1942v04> [perma.cc/DXT9-F72J].

71. See U.S. Dep't of State, Cable No. 1979SEOUL09231_e (June 22, 1979), https://wikileaks.org/plusd/cables/1979SEOUL09231_e.html [perma.cc/U7XE-M8AK].

72. See U.S. Dep't of State, Cable No. 09TOKYO1807_a (Aug. 7, 2009) (observing that some assurances have a standard template); U.S. Dep't of State, Cable No. 09TOKYO1780_a (Aug. 4, 2009), https://wikileaks.org/plusd/cables/09TOKYO1807_a.html [perma.cc/5WCC-7J67]; U.S. Dep't of State, Cable No. 06ZAGREB1346_a (Nov. 8, 2006) ¶ 1, https://wikileaks.org/plusd/cables/06ZAGREB1346_a.html [perma.cc/7C76-3S4J]; Telegram from James F. Byrnes, Sec'y of State, W. Averell Harriman, to Ambassador in the Soviet Union (Aug. 22, 1945, 7 p.m.), reprinted in U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN, FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1945, The Far East, China, vol. VII, doc. 697 (1969), <https://history.state.gov/historicaldocuments/frus1945v07> [perma.cc/83KR-MNL4]; *Minority Schools in Albania*, 1935 P.C.I.J. (ser. A/B) No. 64 at 4–23; *Prosecutor v. Simić et al.*, Case No. IT-95-9-PT, Status Conference, Transcript at 69 ll. 12–13, 72 ll. 11–22, 73 ll. 19–22 (Int'l Crim. Trib. Former Yugoslav., Pre-Trial Chamber, Mar. 26, 1998), <http://www.icty.org/x/cases/simic/trans/en/980326mh.htm> [perma.cc/R3X7-JKFU].

73. See *Interpretation of the Air Transport Services Agreement*, 16 R.I.A.A. 5, 23 ¶ 45 (“[Secretary General of Civil and Commercial Aviation to the Director for France of PAA (June 4, 1955); Lac Lanoux Arbitration (Fr./Spain), 12 R.I.A.A. 281, 304–05, ¶ 9; Eur. Parl., Comm. on Constitutional Affs., Rapporteur: Rafał Trzaskowski, Report on Unilateral Statements Entered in the Minutes of Council Meetings (2011/2090(INI)) (July 14, 2011), Doc. PE 460.608v02-00, A7-0269/2011, at 1 (Explanatory Statement)]”).

74. See *Ukraine Crisis: Macron Says Putin Pledges No New Ukraine Escalation*, BBC (Feb. 9, 2022), <https://www.bbc.com/news/world-europe-60299790> [perma.cc/8YE5-QQKA] (“Mr Putin hinted on Monday that some of Mr Macron’s proposals ‘could form the basis of further joint steps’ . . .”); Luke Harding et al., *Macron Claims Putin Gave Him Personal Assurances on Ukraine*, GUARDIAN (Feb. 8, 2022), <https://www.theguardian.com/world/2022/feb/08/macron-zelenskiy-ukraine-talks-moscow-denies-deal-to-de-escalate> [perma.cc/N6R6-P2TM] (“Emmanuel Macron . . . claiming that he had received personal assurances from Vladimir Putin . . . French officials said Putin had pledged . . . Putin’s spokesperson, Dmitry Peskov, denied that Putin had agreed with Macron to de-escalate. ‘This is wrong in its essence. Moscow and Paris couldn’t do any deals. . .’”); G. Quay, *Macron Says Putin Gave Him an “Assurance” That There Will Be No “Escalation” on Ukraine*, WEEK (Feb. 8, 2022), <https://theweek.com/ukraine/1009936/macron-says-putin-gave-him-an-assurance-that-there-will-be-no-escalation-on-ukraine>

VI. INTENT TO AGREE

Much has been written about the intent needed to form a treaty. In short, the parties must intend to create a treaty in order to do so, that is to say that they must intend to create rights and obligations under international law that would lead to state responsibility should they be violated.⁷⁵ This discussion will not be repeated here. While states must intend to create a treaty in order to do so, it only stands to reason that they must intend to agree in order to create an agreement. Note that if states evidence intent to agree, such intent clearly satisfies the requirement of intent, but might also contribute to evidence of manifesting intent to be bound. However, intent to agree should not be conflated with intent to be bound. For example, a large number of mutual communications between states reach agreement, and leave no doubts such acts were volitional, yet are also clearly not intended to be binding.⁷⁶

If states must intend to agree in order to create an agreement, and must intend to be legally bound in order to create a treaty, and that treaties are a subset of agreements, then we have the result that, in order to create a treaty, states must intend to both agree and to create legally binding rights and obligations. Aust concludes that the use of the term “agree” in mutual communications evidences intent to bind legally as well as, clearly, to reach an agreement.⁷⁷ Yet, it cannot be that in order for mutual communications to constitute an agreement that the parties must

[perma.cc/B8JQ-CNK8] (“... a French official also told reporters the two presidents ‘had agreed ...’”).

75. See *Bol. v. Chile*, 2018 I.C.J. at 573 ¶ 11 (dissenting opinion by Robinson, J.); *Maritime Delimitation in the Indian Ocean (Som. v. Kenya)*, Judgment, 2017 I.C.J. Rep. 3, ¶¶ 79, 105 (Feb. 2); *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 (I) I.C.J. Rep. 14, ¶ 128 (Apr. 20); *Greece v. Turk.*, 1978 I.C.J. at 44, ¶ 107; *Joined Cases C-102/13 & C-165/12, Parliament & Commission v. Council*, 43, ¶ 25; KOLB, *supra* note 24, at 16; KLABBERS, *supra* note 8, at 51–53; Anthony Aust, *Alternatives to Treaty-Making: MOUs as Political Commitments*, in *THE OXFORD GUIDE TO TREATIES* 46, 48 (Duncan B. Hollis ed., 2012); Hollis, *supra* note 1, at 19–20; Hollis & Newcomer, ‘Political’ Commitments, *supra* note 2, at 522.

76. See Aust, *supra* note 75, at 48–49.

77. See *id.* at 48–49 (“consciously employing a fairly standard form, and mandatory terminology such as ‘shall’, ‘agree’, ‘undertake’, ‘rights’, ‘obligations’, and ‘enter into force’. In contrast, when they do not intend to conclude a treaty, but rather an MOU [non-legally-binding], instead of ‘shall’ they use a less mandatory term, such as ‘will’; such terms as ‘agree’ or ‘undertake’ are avoided ...”).

have the intent to be legally bound, because many agreements clearly contain political, non-binding content, yet are still agreements.⁷⁸ In the ILC project on subsequent agreements and practice, the Special Rapporteur concluded that “. . . international courts and tribunals have not required that an ‘agreement’ under article 31, paragraph 3, reflect the intention of the parties to create new, or separate, legally binding undertakings.”⁷⁹ This conclusion is supported by state practice confirming that it is possible for a non-legally-binding communication to still be an agreement that contains a commitment.⁸⁰

A. Explicit Intent

Sometimes states are explicit: they declare that they have reached an agreement,⁸¹ even while acknowledging it is not legally

78. See *Qatar v. Bahr.*, 1994 I.C.J. at 112, ¶¶ 24–25; *Delimitation of the Maritime Boundary between Bangladesh & Myanmar in the Bay of Bengal* (Bangl./Myan.), Case No. 16, Judgment, 2012 ITLOS Rep. 4, 28 ¶ 64 (Mar. 14) (concluding that the minutes are not legally binding but not rejecting the submission that the communications constitute an agreement); Michael Bothe, *Legal and Non-Legal Norms—A Meaningful Distinction in International Relations?*, 11 NETH. Y.B. INT’L L. 65, 72–73 (1980); Raustiala, *supra* note 2, at 584–85; Aust, *supra* note 75, at 46.

79. See ILC *Draft Conclusions on Subsequent Agreements*, *supra* note 9, concl. 10(1), cmt. 11.

80. See Berman & Bentley, *supra* note 24, § 33.23, at 599–600 (“The fact that an MOU is not legally binding does not however mean that entering into one entails no commitment; as indicated earlier, the commitment is one of a policy rather than a legal kind, and issues of good faith and reputation are just as much at stake in the one case as in the other.”). 24

81. See, e.g., *Agreement in the Form of an Exchange of Letters Between the European Union and the Kingdom of Morocco on the Amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement Establishing an Association Between the European Communities and Their Member States, of the One Part, and the Kingdom of Morocco, of the Other Part*, Eur. Union-Morocco, Feb. 6, 2019, 2019 O.J. (L 34) 4 (“Letter from the Union: ‘Dear Sir, . . . I would be obliged if you would confirm that your Government is in agreement with the above.’ B. Letter from the Kingdom of Morocco: ‘Dear Sir, . . . I am able to confirm that my Government is in agreement with the contents of your letter.’”); Arg. v. Uru., 2010 (I) I.C.J. ¶¶ 132–33; Bangl./Myan., 2012 ITLOS Rep. 4, 28 ¶ 64; *Iron Rhine (“Ijzeren Rijn”) Railway* (Belg./Neth.), 27 R.I.A.A. 35, 98 ¶ 156 (Perm. Ct. Arb. 2005); U.S. Dep’t of State, Cable No. 05HANOI716_a (Mar. 24, 2005) ¶¶ 1, 7, 9, 13, 15, https://wikileaks.org/plusd/cables/05HANOI716_a.html [perma.cc/Y77P-TMUM]; U.S. Dep’t of State, Cable No. 1975STATE233935_b (Oct. 1, 1975) ¶ 13, https://wikileaks.org/plusd/cables/1975STATE233935_b.html [perma.cc/4WZZ-AFSN]; U.S. Dep’t of State, Cable No. 1979STATE066988_e (Mar. 18, 1979) ¶ 2, https://wikileaks.org/plusd/cables/1979STATE066988_e.html [perma.cc/C4UC-BSHH]; U.S. Dep’t of State, Cable No. 1979TELAV05384_e (Mar. 17, 1979), https://wikileaks.org/plusd/cables/1979TELAV05384_e.html [perma.cc/KF84-NLTS];

binding.⁸² In essence, they can agree that they agree. States often employ model agreement templates containing language to that effect.⁸³ Such boilerplate is persuasive, though not conclusive. In theory, parties might even agree that their communications constitute an “agreement” for purposes of the VCLT definition of a treaty, though no clear examples appear in practice of such a specific statement.

Conversely, parties may expressly deny that there is an agreement. They could distinguish between understandings reached by agreement and those conveyed by unilateral statement, or even affirm that, despite participating in negotiations, they were not a party to any resulting agreement.⁸⁴ Following the voluntarist perspective, one would imagine that where the parties disagree whether an agreement was reached,⁸⁵ they have not reached

U.S. Dep’t of State, Cable No. 1979BONN04303_e (Mar. 9, 1979) ¶ 10, https://wikileaks.org/plusd/cables/1979BONN04303_e.html [perma.cc/W9EM-R2A4]; U.S. Dep’t of State, Cable No. 1977STATE204681_c (Aug. 26, 1977) ¶ 1, https://wikileaks.org/plusd/cables/1977STATE204681_c.html [perma.cc/2Z8N-6YDS]; U.S. Dep’t of State, Cable No. 1975SECT014031_b (Oct. 2, 1975), https://wikileaks.org/plusd/cables/1975SECT014031_b.html [perma.cc/37ZG-M58Y]; Telegram from Sec’y of State to Embassy in Nicar. (July 23, 1954, 7:40 p.m.), *reprinted in* U.S. DEP’T OF STATE, OFF. OF THE HISTORIAN, FOREIGN RELATIONS OF THE UNITED STATES, 1952–1954, *The American Republics*, vol. IV, doc. 610 (1941); Memorandum from Div. of Far E. Affs. (Jan. 11, 1924), *reprinted in* U.S. DEP’T OF STATE, OFF. OF THE HISTORIAN, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1924, vol. II, at 339–74 (1939). *But see* Jan Klabbbers, *Informal Instruments Before the European Court of Justice*, 31 COMM. MKT L. REV. 997, 1001 n.20 (1994) (relating the anecdote of parties to the GATT seeming to forget whether an agreement had been reached in the first place; *see also* Brazil—Brazilian Internal Taxes, Case GD/3, GATT Docs. GATT/CP.3/42, GATT/CP.3/42/Corr.1, GATT/CP.4/SR.21, GATT/CP.5/37, BISD II/181, 186 (Gen. Agreement on Tariffs & Trade, June 30, 1949, Apr. 11, 1950, Dec. 7, 1950); JONATHAN HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* ch. 12 (1975)).

82. *See* Arg. v. Uru., 2010 (I) I.C.J. ¶¶ 132–33; Belg./Neth., 27 R.I.A.A. at 35, 98 ¶ 156.

83. *See* U.S. Dep’t of State, Cable No. 1977STATE218028_c (Sept. 12, 1977) ¶ 3, https://wikileaks.org/plusd/cables/1977STATE218028_c.html [perma.cc/PS6V-ZHQC]; U.S. Dep’t of State, Cable No. 1979BONN04303_e (Mar. 9, 1979) ¶¶ 9–10, https://wikileaks.org/plusd/cables/1979BONN04303_e.html [perma.cc/QL6Z-SRTA]; U.S. Dep’t of State, Cable No. 1979TELAV05384_e (Mar. 17, 1979), https://wikileaks.org/plusd/cables/1979TELAV05384_e.html [perma.cc/RGT4-52S8]; U.S. Dep’t of State, Cable No. 1979STATE066988_e (Mar. 18, 1979) ¶ 4, https://wikileaks.org/plusd/cables/1979STATE066988_e.html [perma.cc/ZE2L-8V26].

84. *See* U.S. Dep’t of State, Cable No. 1975SECT014031_b (Oct. 2, 1975), https://wikileaks.org/plusd/cables/1975SECT014031_b.html [perma.cc/4FUH-HTDB].

85. *See* Qatar v. Bahr., 1994 I.C.J. at 112, 120–22 (“the Minutes are not a simple record of a meeting, similar to those drawn up within the Tripartite Committee; they do not merely give an account of discussions and summarize points of agreement and

agreement. However, this is not the case.⁸⁶ State assertions that they had not agreed, when in fact they had, can be rejected. Bodies such as the International Court of Justice have taken the view that they need to resort to the text and circumstances of the exchanges to know whether an agreement was reached.⁸⁷ In situations where their communications would objectively constitute an agreement, but the parties themselves agree that it is not an agreement, then the question, while it may be interesting from an academic perspective, is essentially moot.

B. Implicit Intent and Terminology

Aside from explicitly stating that the exchange constitutes an agreement (or not), such intent can be implicit. Just as courts and tribunals have been reluctant to require particular mandatory terminology to establish the existence of a treaty, they have also not required particular terms to constitute an agreement as an element of a treaty.

Some formulations, however, carry special weight because of their legal connotations. In the *Somalia v. Kenya* case, the ICJ found an MOU to constitute a treaty (and, by implication, an agreement), when it included the use of the term “shall be agreed.”⁸⁸ In the *Bay of Bengal* case at ITLOS, the Tribunal held that the use of the term “Agreed Minutes” was highly persuasive evidence that an agreement had been reached,⁸⁹ notwithstanding Myanmar’s

disagreement.”); U.S. Dep’t of State, Cable No. 08TRIPOLI505_a (June 26, 2008), https://wikileaks.org/plusd/cables/08TRIPOLI505_a.html [perma.cc/A4EG-ES6W] (“After two days of negotiations to attempt to finalize language for a military-to-military memorandum of understanding (MOU), the U.S. and Libyan teams identified four areas of disagreement requiring further consultations with their respective capitals”).

86. See Hollis, *supra* note 2, at 1 (“But where there is no consensus on an agreement’s existence, more work is needed on how to identify one.”).

87. See *Greece v. Turk.*, 1978 I.C.J. ¶¶ 95, 107 (concluding that the parties’ communiqué did not constitute a “commitment” to submit the states’ dispute to the ICJ, which would bind the parties to accept the court’s jurisdiction); see also OAS IAJC Guidelines, *supra* note 36, at 26 (“States should rely on the actual terms used and the surrounding circumstances to discern whether or not an agreement will arise (or has already come into existence).”).

88. See *Som. v. Ken.*, 2017 I.C.J. ¶ 37(6).

89. See *Bangl./Myan.*, 2012 ITLOS Rep. 4, 30 ¶ 72 (“It adds that the existence of an agreement is also evidenced by the terminology used, namely ‘Agreed Minutes’”); *Bangl./Myan.*, 2012 ITLOS Rep. 235, 252–53 (Lucky, J., dissenting opinion). *But see* *Agreed Minutes*, *Germ.–U.S.*, 98 INT’L L. REP. 1–13 (1994) (widely understood to constitute a treaty).

submission that the term was very unusual for a treaty.⁹⁰ In Myanmar's view, "Agreed Minutes" was more typical of a record of a meeting than a treaty,⁹¹ which would likely not be an agreement. However, the Tribunal ultimately concluded that a treaty had not been formed. However, this decision does not necessarily mean that the parties had not formed an agreement; it only means that the agreement was not a treaty instrument. The ITLOS decision was premised on the lack of a definitive conclusion to the negotiations, not the lack of agreement. As noted above, Aust even argues that the term "agree" not only demonstrates agreement but also intent to bind legally.⁹² Therefore, the use of the term "agreed" or similar terms should be very persuasive, if not definitive, for the existence of an agreement.

Other words do not necessarily carry the same inherent significance and are more context-dependent, such as "proposed,"⁹³ "accepted,"⁹⁴ "decided,"⁹⁵ and "resolved."⁹⁶ The ICJ has affirmed that terms such as "decision" or "resolve," alone and divorced from their context, are not sufficient to find an agreement.⁹⁷ States have affirmed that the expressions "agreement" or "this constitutes an agreement" are not mandatory as long as they substantively agree.⁹⁸

Lastly, the parties might later characterize the communications as having constituted an agreement. Whether the

90. See *Bangl./Myan.*, 2012 ITLOS Rep. 4, 30 ¶ 75 ("Myanmar responds that the expression 'Agreed Minutes' . . . 'is not a common designation for a document that the participants intend to constitute a treaty'").

91. See *Bangl./Myan.*, 2012 ITLOS Rep. 4, 30 ¶ 75 ("Myanmar responds that the expression 'Agreed Minutes' is often employed in international relations 'for the record of a meeting'").

92. See Aust, *supra* note 75, at 48–49 ("consciously employing a fairly standard form, and mandatory terminology such as 'shall', 'agree', 'undertake', 'rights', 'obligations', and 'enter into force'. In contrast, when they do not intend to conclude a treaty, but rather an MOU [non-legally-binding], instead of 'shall' they use a less mandatory term, such as 'will'; such terms as 'agree' or 'undertake' are avoided . . .").

93. See *Bol. v. Chile*, 2018 I.C.J. at 507 (Daudet, J. *ad hoc*, dissenting opinion, ¶ 10).

94. See *Greece v. Turk.*, 1978 I.C.J. at 44 ¶ 107; *Qatar v. Bahr.*, 1994 I.C.J. at 112 ¶¶ 24, 32; *Bol. v. Chile*, 2018 I.C.J. at 609 ¶ 10 (dissenting opinion by Daudet, J. *ad hoc*).

95. See *Greece v. Turk.*, 1978 I.C.J. ¶ 104; *Bol. v. Chile*, 2018 I.C.J. at 507 (Salam, J., dissenting opinion, ¶ 14); *id.* (Daudet, J. *ad hoc*, dissenting opinion, ¶ 30).

96. See *Greece v. Turk.*, 1978 I.C.J. ¶¶ 97–98; *Bol. v. Chile*, 2018 I.C.J. at 507 (Daudet, J. *ad hoc*, dissenting opinion, ¶ 30). 454

97. See *Greece v. Turk.*, 1978 I.C.J. ¶¶ 97–98, 104. 45

98. See U.S. Dep't of State, Cable No. 05HANOI716_a (Mar. 24, 2005) ¶¶ 1, 9, 11, 12, 13, https://wikileaks.org/plusd/cables/05HANOI716_a.html [perma.cc/R7MK-6X4M].

parties regard the bilateral communications as a treaty strongly suggests, perhaps conclusively establishes, that they regard them as an agreement. Yet in other cases, the parties might note that the mutual communications resulted in binding obligations,⁹⁹ meaning that the communications must have necessarily amounted to an agreement. However, for the purposes of establishing an agreement, such a statement can only be indicative, though not determinative. After all, the communications could create binding obligations as a binding unilateral statement which does not require agreement. In other cases, the parties might acknowledge that the understanding was not binding, yet affirm that it was an agreement.¹⁰⁰

VII. CONTENT OF THE AGREEMENT

The definitional core of an “agreement” in international law lies in the presence of an *idem*, i.e., a meeting of the minds between the parties on some content.¹⁰¹ The nature, scope, and particulars of this content vary widely. This section will address (1) the substance of the *idem*, (2) its precision, and (3) its originality.

A. Substance of the Idem

International law imposes no categorical limitation on the subject matter of the *idem*, with the only exception being commitments that violate jus cogens norms.¹⁰² Nothing in the concept of “agreement” requires that it be prescriptive in content or concern future behavior. It may relate to a prescriptive proposition (what the parties will or will not do in the future) or a descriptive proposition (a fact the parties accept as true). In both

99. See U.S. Dep’t of State, Cable No. 07MOSCOW2928_a (June 18, 2007) ¶¶ 2, 4, https://wikileaks.org/plusd/cables/07MOSCOW2928_a.html [perma.cc/S2NE-KNNK] (reproducing diplomatic note from Russian Ministry of Foreign Affairs).

100. See U.S. Dep’t of State, Cable No. 1975STATE233529_b (Oct. 1, 1975) ¶¶ 9, 10, 12, https://wikileaks.org/plusd/cables/1975STATE233529_b.html [perma.cc/AML3-V367].

101. See *Bol. v. Chile*, 2018 I.C.J. at 507 (Robinson, J., dissenting opinion, ¶ 50).

102. See KLABBERS, *supra* note 12, at 120–21 (“Even if not binding, such instruments may not be used to sidestep norms of a higher order or erga omnes obligations”); Catherine Brölmann, *Law-Making Treaties: Form and Function in International Law*, 74 NORDIC J. INT’L L. 383, 387 (2005).

cases, the essential element is mutual consent to the same proposition, not the proposition's normative quality.¹⁰³

In practice, most international agreements do concern future commitments: provisions that prescribe conduct, allocate rights or duties, or create obligations to perform or refrain from certain acts.¹⁰⁴ These clauses, if contained in a treaty, give rise to obligations under international law. Some authors have therefore argued that treaties must contain commitments to future behavior,¹⁰⁵ even if that behavior is purely one-sided.¹⁰⁶ Hollis describes a commitment as a "shared expectation of future behavior."¹⁰⁷ The *idem* thus must reflect a clearly identifiable course of future behavior in order for diplomatic exchanges to constitute an agreement.¹⁰⁸ This may be "a change from the status quo or a continuation of existing behaviour."¹⁰⁹ Klabbbers takes a similar view that certain forms of "agreement," such as an "agreed view" or "common position" do not create obligations capable of violation, because there is no action to be undertaken.¹¹⁰ He grounds this conclusion in the language of the VCLT, reasoning that an "'agreed view' or a 'common position' [cannot] be void or voidable if there is no action to be undertaken," and that concepts such as suspension or termination "make little sense" in such

103. See AUST, *supra* note 2, at 19–20 (4th ed. 2023); KLABBERS, *supra* note 8, at 44–46. 8

104. See *Qatar v. Bahr.*, 1994 I.C.J. at 112, ¶¶ 24, 27; IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 28–31 (2d ed. 1984).

105. See *Greece v. Turk.*, 1978 I.C.J. ¶¶ 106–07; *id.* at 57 (separate opinion by Tarazi, J.); *Bol. v. Chile*, 2018 I.C.J. at 586 ¶ 50 (dissenting opinion by Robinson, J.); 8 KLABBERS, *supra* note 8, at 51–53; 24 KOLB, *supra* note 24, at 16; 2 RAUSTIALA, *supra* note 2, at 584–85; Hollis & Newcomer, *supra* note 2, at 521–22; HOLLIS, *supra* note 1, at 20; 2 LIPSON, *supra* note 2, at 498; Schachter2, *supra* note 2, at 299.

106. See HOLLIS, *supra* note 1, at 20; Lipson, *supra* note 2, at 498.

107. See KLABBERS, *supra* note 8, at 51–53; OAS IAJC Guidelines, *supra* note 36, at 38–40; Schachter, *supra* note 2, at 299; Raustiala, *supra* note 2, at 581; Hollis & Newcomer, *supra* note 2, at 522; Hollis, *supra* note 36, at 19–21. See, e.g., *Greece v. Turk.*, 1978 I.C.J. at 57 (separate opinion by Tarazi, J.).

108. See OAS IAJC Guidelines, *supra* note 36, ¶ 1.1 ("Agreement. Although its usage in a text is often indicative of a treaty, the concept may be defined more broadly to encompass mutual consent by participants to a commitment regarding future behavior."); see also Degan, *supra* note 59, at 361; KOLB, *supra* note 24, at 16; KLABBERS, *supra* note 8, at 51–53; Raustiala, *supra* note 2, at 584–85; Hollis & Newcomer, *supra* note 2, at 522; Hollis, *supra* note 2, at 6–7.

109. HOLLIS, *supra* note 1, at 20.

110. See KLABBERS, *supra* note 8, at 53.

contexts.¹¹¹ He further maintains that there is no legal bar to a state changing its position.¹¹² Following the same line of reasoning, the ILC has determined that a declaration of principle does not carry binding force.¹¹³ That being said, most authors agree that while there must be some content or “substance,”¹¹⁴ the *idem* or content requirement of the commitment is very minimal.¹¹⁵

However, this position is ¹¹⁶not so clear. The VCLT does not expressly require normativity for an agreement to qualify as a treaty.¹¹⁷ The ICJ has likewise recognized that certain legal acts, such as accepting the Court’s jurisdiction, do not require normative content.¹¹⁸ In *Certain Norwegian Loans*, the Court upheld France’s acceptance of jurisdiction even though it reserved to France the discretion to determine which cases could be heard.¹¹⁹ The Court

111. *See id.*

112. *See id.*

113. *See ILC Draft Articles on the Law of Treaties, supra* note 10, arts. 1–10, 14–17 (with commentary).

114. *See* Raustiala, *supra* note 2, at 581. 2

115. *See* Lauterpacht, *supra* note 2, at 97 (“The fact that the obligation provided for in the instrument can be fulfilled by a somewhat nominal act of the parties does not necessarily detract from its character as a treaty”). 2

116. *See* *Qatar v. Bahr.*, 1994 I.C.J. at 112, ¶¶ 30–31 (“The Court concludes that the Minutes of 25 December 1990, like the exchanges of letters of December 1987, constitute an international agreement creating rights and obligations for the Parties. . . Turning now to an analysis of the content of these texts, and of the rights and obligations to which they give rise . . .”); *Arg. v. Uru.*, 2010 I.C.J. 14, 63–68 ¶¶ 132–150; JEAN D’ASPREMONT, *FORMALISM AND THE SOURCES OF INTERNATIONAL LAW* 175 (2011); REUTER, *INTRODUCTION, supra* note 44, at 30; 1 ROUSSEAU, *supra* note 60, at 156–57; Jean d’Aspremont, *Current Theorizations About the Treaty in International Law*, in *THE OXFORD GUIDE TO TREATIES* 49 (Duncan B. Hollis ed., 2d ed. 2020); Raustiala, *supra* note 2, at 581; Basdevant, *Règles générales du droit de la paix*, 208 *RECUEIL DES COURS* 471–692 (1936); Paul Reuter, *Traité et transactions: Réflexions sur l’identification de certains engagements conventionnels*, in *INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION: ESSAYS IN HONOUR OF ROBERTO AGO* 403 (1987). Note that occasionally some authorities take the view that “softening” the content of an agreement might result in rendering it non-binding. *See, e.g.*, OAS IAJC Guidelines, *supra* note 36, ¶ 9.

117. *See* VCLT, *supra* note 1, art. 2(1)(a). 1

118. *See* *Arg. v. Uru.*, 2010 I.C.J. 14, 63–68 ¶¶ 132–150; *Qatar v. Bahr.*, 1994 I.C.J. at 112, ¶¶ 30–31.

119. *See* *Certain Norwegian Loans* (Fr. v. Nor.), Judgment, 1957 I.C.J. Rep. 9, 21, 23–27 (July 6) (“The Court does not consider that it should examine whether the French reservation is consistent with the undertaking of a legal obligation . . . The validity of the reservation has not been questioned by the Parties. . . In consequence the Court has before it a provision which both Parties to the dispute regard as constituting an expression of their common will relating to the competence of the Court.”). *Cf.* *North Sea Continental Shelf* (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, 47 ¶ 72 (understanding normative content to be a constitutive element of customary international law).

concluded that the acceptance of the Court's jurisdiction was valid and bound France, notwithstanding that it contained no normative content.¹²⁰ Sitting as a judge in that case, Lauterpacht criticized this outcome, even though he had, somewhat incongruously, determined that normative content was not a requirement for an act to constitute a treaty when he was the Special Rapporteur on the Law of Treaties.¹²¹

In practice, a small number of treaties appear to have no, or at least very little, normative content at all. Some treaties permit states to decide for themselves the scope of the treaty's application, including whether any of the terms apply to them at all.¹²² Others might provide for highly vague commitments that might not have any basis for assessing violations and risk leaving extensive discretion to the parties.¹²³ Whether these treaties have no normative content at all, or include some *de minimis* content, is, of course, contested. Nonetheless, their normative content is, at best, minimal.

That being said, whether or not this argument of little to no normativity is correct concerning the content of a treaty, such a discussion only applies to treaties, not necessarily to agreements. After all, diplomatic statements are often employed to confirm

120. See *Fr. v. Nor.*, 1957 I.C.J. at 48–50 (separate opinion by Lauterpacht, J.); see also *Interhandel (Switz. v. U.S.)*, Preliminary Objections, Judgment, 1959 I.C.J. Rep. 6, 118 (Mar. 21) (dissenting opinion by Lauterpacht, J.) (reaffirming his views in *Certain Norwegian Loans*).

121. Lauterpacht explicitly rejected the prior view of Brierly, who had argued in favor of a requirement of normative content. Compare Brierly, *supra* note 2, at 223 with Lauterpacht, *supra* note 2, at 100. See also H. Lauterpacht (Special Rapporteur on the Law of Treaties), *Second Report on the Law of Treaties*, U.N. Doc. A/CN.4/87 & Corr.1 (July 8, 1954).

122. See, e.g., Framework Convention for the Protection of National Minorities, Feb. 1, 1995, ETS 157; FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES - EXPLANATORY REPORT, ¶ 12 (1995) ("It should also be pointed out that the framework Convention contains no definition of the notion of 'national minority'. It was decided to adopt a pragmatic approach, based on the recognition that at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States.").

123. See, e.g., Framework Convention on the Protection and Sustainable Development of the Carpathians, art. 2(1), May 22, 2003, 3159 U.N.T.S. 1 ("The Parties shall pursue a comprehensive policy and cooperate for the protection and sustainable development of the Carpathians. . ."); *id.* art. 4(1) ("The Parties shall pursue policies aiming at conservation, sustainable use and restoration of biological and landscape diversity throughout the Carpathians."). Note, however, that the Framework Convention does establish a permanent Secretariat. See *id.* art. 15.

empirically verifiable facts, such as recording the existence of boundary pillars,¹²⁴ but also including those that are difficult to substantiate, such as the existence of intentions.¹²⁵ Factual assurances may concern matters like the existence of domestic legislation¹²⁶ or international legal obligations.¹²⁷ They may also make mixed legal/factual determinations, or reach factual conclusions derived from the application of law or from a state's

124. See, e.g., *Land and Maritime Boundary Between Cameroon and Nigeria* (Cameroon v. Nigeria, Eq. Guinea intervening), Judgment, 2002 I.C.J. Rep. 303, ¶¶ 115–19 (Oct. 10) (relying on the 1920 procès-verbal of colonial demarcation); *Land, Island and Maritime Frontier Dispute* (El Salv. v. Hond., Nicar. intervening), Judgment, 1992 I.C.J. Rep. 351, 388, ¶ 45 (citing to procès-verbaux of the boundary delimitation by the Mixed Commission); *Frontier Dispute* (Burk. Faso v. Mali), Judgment, 1986 I.C.J. Rep. 554, 597–600, ¶¶ 81–85 (Dec. 22) (discussing the interpretation of the 1935 exchange of notes concerning the recording of the boundary and acknowledgement of the “de facto situation”).

125. See *id.*; U.S. Dep’t of State, Cable No. 1975ATHENS02693_b (Apr. 7, 1975) para. 5, https://wikileaks.org/plusd/cables/1975ATHENS02693_b.html [perma.cc/BLM7-ZZEZ] (“The Ambassador asked if assurances from Turkey that it had no aggressive intent would be sufficient to allow Greece to leave the islands demilitarized. Tzounis replied that assurances would not be enough as the Turks would interpret them as they saw fit.”) (original entirely in uppercase); U.S. Dep’t of State, Cable No. 1975STATE233935_b (Oct. 1, 1975) paras 25–26, https://wikileaks.org/plusd/cables/1975STATE233935_b.html [perma.cc/8D96-3B9N] (original entirely in uppercase).

Taken together, mixed together, these various statements of political intention and conditional legal commitments comprise executive Agreements. But the content and the legally-binding character – if any – of the disparate elements on those agreements can only be understood by consideration of each, particular element. When those elements are analyzed, it is clear to me that they constitute policy statements, expressions of political intent on the part of the United States, and commitments which, however, will be definitely undertaken only when the Congress so Agrees or has already Agreed. . . . In short, many of the provisions of the documents in question do not by any standard rise to the level of international commitments. They are no more than statements of intention typical of diplomatic exchanges. This is not to say that the intentions of the United States, and the statements of those intentions, are not important. They are very important. Let us endeavor to ensure that they continue to be. But they do not bind, and not understood to bind, the United States. See U.S. Dep’t of State, Cable No. 1975SECTO14031_b (Oct. 2, 1975), §3, 1, https://wikileaks.org/plusd/cables/1975SECTO14031_b.html [perma.cc/FRE2-WAQR] (vaguely suggesting that assurances may be either distinct from or assimilate to policy statements) (“In the normal conduct of diplomacy, many high-level officers of the US Government, including the President, are every day providing assurances and expressions of intention regarding US policy.”) (original entirely in uppercase).

126. See *Othman (Abu Qatada) v. U.K.*, App. No. 8139/09, ¶ 189 (Jan. 17, 2012), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%5B%22001-108629%22%5D%7D> [perma.cc/5CW7-RPSP].

127. See *Bol. v. Chile*, 2018 I.C.J. ¶ 107; 8KLABBERS, *supra* note 8, at 88.

interpretation of applicable legal rules.¹²⁸ These types of factual assurances are governed by standard evidentiary norms, requiring evaluation of their reliability, credibility, and truthfulness. Moreover, when the asserted fact affirms an existing legal obligation, this recognition does not create a new obligation but may serve as evidence of the obligation's existence.¹²⁹

Taken together, these observations confirm that the object of an agreement in international law may be either prescriptive or descriptive, and that the presence of prescriptive content is not a definitional requirement. The critical element is the existence of an *idem*: the mutually accepted proposition that forms the substance of the agreement.

B. Precision of the Behavior

For an *idem* to exist, the agreement must be sufficiently precise. While some ambiguity is tolerated,¹³⁰ tribunals generally require that the text must be sufficiently precise, clear and

128. See *Peru v. Chile*, 2014 I.C.J. at 52–56, 65, ¶¶ 131–33, 136, 141, 178; Human Rights Committee Dec., 1298/2004, *Becerra Barney v. Colombia*, UN Doc. CCPR/C/87/D/1298/2004, ¶ 6.3 (Aug. 10, 2006); *Minority Schools in Albania*, 1935 P.C.I.J. at 29; United Nations Tribunal in Libya, Decision, 12 R.I.A.A. 348, 368–70 (Jan. 31, 1953); *Salem Case (Egypt/U.S.)*, 2 R.I.A.A. 1161, 1181–82, ¶¶ 3–4 (June 8, 1932); *Exchange of Letters constituting an Agreement between the Kingdom of the Netherlands and the Federal Republic of Germany concerning the designation of the 'Avantis' industrial park as a shared industrial park, Ger.-Neth.*, Aug. 11, 2006, 2006 Trb. 23 (entered into force Nov. 1, 2007) (agreement in relation to the Agreement between the Kingdom of the Netherlands and the Federal Republic of Germany for the avoidance of double taxation with respect to taxes on income and on capital, as well as various other taxes, and for the regulation of other matters in the field of taxation of 1959). This agreement simply recognizes that the named business park qualifies under the double-taxation treaty and takes note of the location of the international boundary posts as the map coordinates. See also William Thomas Worster, *Questioning U.S. Immigration Law Compliance with Treaties for Trade and Investment*, 50 BROOK. J. INT'L L. 1, 67 (2025) (discussing how the respective states agreed in an exchange of notes that Pecten, a Shell subsidiary, qualified as corporation under the Bilateral Investment Treaty between the two states).

129. See *International Status of South West Africa*, 1950 I.C.J. 128, 135–36.

130. See *Qatar v. Bahr.*, 1994 I.C.J. 132 (separate opinion by Valticos, J.) (“I am likewise prepared to admit, albeit less readily, that one may also consider as an agreement the Minutes signed in Doha under somewhat obscure conditions and in terms which have appeared ambiguous. There was indeed an agreement to come to the Court.”).

unambiguous,¹³¹ so that the content can be identified,¹³² and support an inference that an agreement was reached.¹³³ Precision is obviously a relative concept. Schachter noted that “imprecision and generalities are not unknown in treaties of unquestioned legal force” and cited to the UN Charter.¹³⁴ He also concluded that many non-binding agreements were highly precise and definite.¹³⁵ Fitzmaurice observed that treaties of peace, amity, or alliance are often vague yet their binding force is unquestioned.¹³⁶ Hollis and Newcomer suggest that this turns on whether the communications contain “principles, standards or rules.”¹³⁷ In their view, principles, such as the precautionary principle in the Rio Declaration, evaluate conduct but do not provide norms for conduct,¹³⁸ and standards, such as the sustainable forest conservation criteria in the Santiago Declaration, provide norms though do not establish *ex ante* measures of evaluating the conduct.¹³⁹ Only rules, such as the

131. See *Greece v. Turk.*, 1978 I.C.J. at 55 (separate opinion by Tarazi, J.); Abbott et al., *2supra* note 2, at 401–19.

132. See Abbott et al., *2supra* note 2, at 401–19 (arguing that the degree of precision is a factor in the normative force of the agreement; in their view, a significant lack of precision means that an agreement is less likely to be binding).

133. See *Bangl./Myan.*, 2012 ITLOS Rep. 4, 14 ¶¶ 24–25; *Bangl./Myan.*, 2012 ITLOS Rep. 235, 252–54 (dissenting opinion by Lucky, J.)

134. 2Schachter, *supra* note 2, at 298. See also LOUIS B. SOHN & THOMAS BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 505–14, 946–7 (1973).

135. See Schachter, *supra* note 2, at 299.

136. Fitzmaurice, *supra* note 2, at 117. See, e.g., *Inter-American Convention Against Corruption*, art. III, Mar. 29, 1996, 35 I.L.M. 724 (“[T]o consider the applicability of measures within their own institutional systems. . .”); Francis A. Mann, *Reflections on a Commercial Law of Nations*, 33 BRIT. Y.B. INT’L L. 20, 32 (1957) (“The fact that obligations imposed by a treaty are ‘indefinite and elastic’ or ‘can be fulfilled by a somewhat nominal act of the parties’ does not . . . render a treaty so uncertain as to lead to unenforceability . . . A treaty which creates nothing but mutual duties to consult or to negotiate about certain matters or in certain contingencies would give rise to contractual obligations. They would not be far-reaching, but they are capable of being defined and they must be discharged in good faith. They are light, but not uncertain in character.”).

137. See Hollis & Newcomer, *supra* note 2, at 531; see also Schachter, *supra* note 2, at 297; Abbott, et al., *supra* note 2, at 413.

138. See U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I), princ. 15 (Aug. 12, 1992).

139. See *The Santiago Declaration: Statement on Criteria and Indicators for the Conservation and Sustainable Management of Temperate and Boreal Forests*, in CRITERIA AND INDICATORS FOR THE CONSERVATION AND SUSTAINABLE MANAGEMENT OF TEMPERATE AND BOREAL FORESTS iv, iv (2d ed. 1999). But see *Case 1/75*, Opinion of the Court, 1975 E.C.R. 1355 (observing that the content of the agreement must contain a “standard”); Fitzmaurice, *supra* note 2, at 117 (“[I]t seems difficult to refuse the designation of treaty to an instrument - such as, for instance, a treaty of peace and amity, or of alliance - even if it only

London Chemical Guidelines for “minimum information to be provided”, provide ex ante norms for future behavior.¹⁴⁰ The ICJ, for example, has rejected communications as not constituting a commitment of anything when the text only mentions that the state would “agree to dedicate every effort” to realizing an outcome,¹⁴¹ because it does not specify what effort would be dedicated. Keeping in mind that we are only attempting to establish the rules for agreement, not treaties, the level of precision seems to be quite low. After all, the Rio Declaration is quite clear and precise that it provided for the precautionary principle.¹⁴² What is critical is not precise modalities of the substance, but, at a very low threshold, that an *idem* can be identified.¹⁴³

C. Original Content

Continuing with the requirement of content in an agreement, a final question might be whether the content must be wholly original and unique in order to constitute an *idem* for an agreement. Fitzmaurice argues that this is the case.¹⁴⁴ However, while it is true that creating new obligations evidences making a commitment,¹⁴⁵ it does not appear that the communication must have original content in order to constitute an agreement. Reaffirming commitments is, of course, common in treaty law.

establishes a bare relationship and leaves the consequences to rest on the basis of an implication as to the rights and obligations involved, without these being expressed in any definite articles.”).

140. See Daniel Bodansky, *Rules vs. Standards in International Environmental Law*, 98 AM. PROC. SOC’Y INT’L L. 275, 276 (2004).

141. See *Military & Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 261 (June 27) (“The Organization of American States Charter has already been mentioned, with its respect for the political independence of the member States; in the field of domestic policy, it goes no further than to list the social standards to the application of which the Members “agree to dedicate every effort”, including . . .”).

142. See *Rio Declaration on Environment and Development*, *supra* note 138.

143. See *Bol. v. Chile*, 2018 I.C.J. 549–50 ¶¶ 132, 135; Schachter, *supra* note 2 at 297; Abbott, et al., *supra* note 2, at 410; Hollis & Newcomer, *supra* note 2, at 531.

144. See Malgosia Fitzmaurice, *Concept of a Treaty in Decisions of International Courts and Tribunals*, 20 INT’L CMTY. L. REV. 137, 149 (2018); *but see* *South China Sea* (Phils v. China), PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶¶ 214–15 (Oct. 29, 2015).

145. See Case C-327/91, *Fr. v. Comm’n*, Judgment, 1994 E.C.R. I-3641 ¶¶ 6-8, 15.

Multiple human rights instruments duplicate provisions,¹⁴⁶ and Security Council resolutions often reaffirm Charter-based obligations.¹⁴⁷ In *Qatar v. Bahrain*, the ICJ treated minutes reaffirming prior obligations as an agreement.¹⁴⁸ And of course, it is well known that the VCLT is understood to constitute a binding restatement of rules under customary international law.¹⁴⁹ Accordingly, diplomatic engagements need not create wholly new obligations to constitute agreements. Reaffirming, restating, or cross-referencing existing obligations may suffice, provided there is some *idem*.

VIII. UNEQUIVOCAL COMMITMENT

A mere concurrence on the same proposition is not, in itself, sufficient to constitute an agreement. To qualify as such, the statement must give rise to an expectation, potentially even reliance, on its proposition.¹⁵⁰ However, this does not mean that all forward-looking statements are binding; if that were the case, virtually all diplomatic communications about the future would create expectations, which is clearly not so. Rather, for a statement to rise to the level of a commitment, states have consistently

146. For example, regarding the right to a nationality, see, e.g., Convention on the Nationality of Married Women arts. 1–3, Aug. 11, 1958, 309 U.N.T.S. 65; Convention on the Reduction of Statelessness, arts. 1(1), 11, Aug. 30, 1961, 989 U.N.T.S. 175; International Convention on the Elimination of All Forms of Racial Discrimination art. 5(d)(iii), Dec. 21, 1965, 660 U.N.T.S. 195; International Covenant on Civil and Political Rights, arts. 16, 24(3), Dec. 16, 1966, 999 U.N.T.S. 171; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 29, Dec. 18, 1990, 2220 U.N.T.S. 3; G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities, art. 18(1) (Dec. 13, 2006). See also G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 15 (Dec. 10, 1948); G.A. Res. 61/295, U.N. Declaration on the Rights of Indigenous Peoples, art. 6 (Sept. 13, 2007).

147. See S.C. Res. 1973, ¶¶ 6–12, 17–18 (Mar. 17, 2011) (regarding the flight ban); *id.* ¶¶ 19–21 (regarding freezing assets); *id.* ¶¶ 22–23 (regarding designated certain individuals), *id.* ¶ 1 (“Demands the immediate establishment of a cease-fire and a complete end to violence and all attacks against, and abuses of, civilians”), *id.* ¶ 3 (“Demands that the Libyan authorities comply with their obligations under international law, including international humanitarian law, human rights and refugee law. . .”).

148. See *Qatar v. Bahr.*, 1994 I.C.J. at 112 ¶ 25.

149. See, e.g., *Cameroon v. Nigeria*, 2002 I.C.J. at 429, ¶ 263; *Som. v. Kenya*, 2017 I.C.J. at 21, ¶ 42; KLABBERS, *supra* note 8, at 40–41; M. FITZMAURICE & O. ELIAS, *CONTEMPORARY ISSUES IN THE LAW OF TREATIES* 6–25 (2005); VILLIGER, *supra* note 16, at 83; AUST, *supra* note 2, at 14–16; Hollis, *supra* note 26, at 9.

150. See Schachter, *supra* note 2, at 299.

required that it be made in unequivocal¹⁵¹ or unconditional¹⁵² terms, effectively amounting to a guarantee. In the case of factual assertions, the state must not express hesitancy about the fact's existence.

While some authorities focus on past or existing facts or positions, many agreements use language that signals future conduct with a high degree of certainty.¹⁵³ A state might even

151. See Telegram from Robert Lansing, Sec'y of State, to John Garrett, Minister to the Neth. (Apr. 22, 1918, 6:00 p.m.), *reprinted in* U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1918, Supp. 1, The World War, vol. II, doc. 524 (1933), <https://history.state.gov/historicaldocuments/frus1918Supp01v02/d524> [perma.cc/52ZL-27RB]; Telegram from Byrnes, Sec'y of State, to Harriman, Ambassador in the Soviet Union (Aug. 22, 1945, 7:00 P.M.), *reprinted in* U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN, FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1945, The Far East, China, vol. VII, doc. 697 (1969), <https://history.state.gov/historicaldocuments/frus1945v07/d697> [perma.cc/Y3GM-BMEZ]; U.S. Dep't of State, Cable No. 09BRUSSELS856_a (June 22, 2009) ¶¶ 5–7, https://wikileaks.org/plusd/cables/09BRUSSELS856_a.html [perma.cc/DN4K-AFA7]; U.S. Dep't of State, Cable No. 05HANOI716_a (Mar. 24, 2005) ¶¶ 1, 6, 7, 11, 13, https://wikileaks.org/plusd/cables/05HANOI716_a.html [perma.cc/9SYX-LX3K]; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PEOPLE'S REPUBLIC OF CHINA – U.S., IMPLEMENTATION OF THE 1985 AGREEMENT FOR CO-OPERATION CONCERNING THE PEACEFUL USES OF NUCLEAR ENERGY (1998), <https://www.oecd-neo.org/upload/docs/application/pdf/2020-11/nlb61.pdf> [perma.cc/PC8B-SNGD] (noting that US law requires the President to certify that “China has provided clear and unequivocal assurances to the United States that it is not assisting and will not assist any non-nuclear weapon State in acquiring nuclear explosive devices”).

152. See *Greece v. Turk.*, 1978 I.C.J. at 44, ¶ 107; *Bangl./Myan.*, 2012 ITLOS Rep. 235, 252–53 (dissenting opinion by Lucky, J.).

153. See, e.g., Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorization, May 7, 2014, 2014 O.J. L 134/3 (May 7); European Council Press Release 144/16, EU-Turkey Statement, 18 March 2016 (Mar. 18, 2016); European Union Memorandum MEMO/15/5860, EU-Turkey joint action plan (Oct. 15, 2015); Memorandum of Understanding Between the Government of the UK and the Government of Jordan Regulating the Provision of Undertakings in Respect of Specified Persons Prior to Deportation, Jordan-U.K., Aug. 10, 2005, <https://www.statewatch.org/media/documents/news/2005/aug/uk-jordan-MOU.pdf>; U.N. Secretary-General, Letter dated June 20, 1980 from the Secretary-General Addressed to the Minister of Foreign Affairs and Information of South Africa, UN Doc. S/14011 (June 20, 1980) (“the United States has received explicit and reliable assurances from each of the parties to the Bilateral Agreement that all Cuban troops will be withdrawn from Angola by July 1, 1991, and that no Cuban troops will remain in Angola after that date”); U.S. Dep't of State, Cable No. 1976STATE296028_b (Dec. 4, 1976) ¶ 1, https://wikileaks.org/plusd/cables/1976STATE296028_b.html [perma.cc/SHP7-EL9N] (“Obtain the still outstanding YARG [Yemen Arab Republic Government] non-transfer assurances for the 12 M-102 Howitzers [long-range artillery weapon] which the SAG [Saudi Arabian Government] loaned to the YAR [Yemen Arab Republic].”); Letter from John Foster Dulles, Sec'y of State, to Richard Nixon, Vice President, (Nov. 4, 1953), *reprinted in* U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN, FOREIGN RELATIONS OF THE UNITED STATES, 1952–

explicitly declare its agreement to be “binding,” which at minimum conveys a heightened level of certainty,¹⁵⁴ and potentially indicates an intent to engage state responsibility in the event of non-compliance. By contrast, when states do not characterize their pledges as unequivocal or definite, the intention becomes more ambiguous. Such statements may emphasize influencing factors in decision-making or deliberately leave the proposed conduct open to varied interpretations,¹⁵⁵ thereby failing to establish a clear expectation of performance.

The precision of the obligation can inform the certainty of the *idem*, but the two are not identical. The focus here is not on the specificity of the *idem* itself, but on the specificity of the fact’s existence or the specificity of the commitment’s certainty. A statement may merely reflect the fact of “intentions” rather than “promises” of future behavior yet still constitute an agreement. Importantly, this notion of fact of holding “intentions” should not be confused with “intent” to be legally bound. Here, “intentions” refers to the current existence of a state of mind: the present motivation or plan to act in a certain manner, but without a

1954, Korea, vol. XV, pt. 2, doc. 792 (1984), <https://history.state.gov/historicaldocuments/frus1952-54v15p2/d792> [perma.cc/55UL-W2GN] (“For reasons given in the letter [enclosed letter from President Eisenhower to President Rhee], which you will fully understand, it is necessary to get some explicit written assurance from Rhee that he is not going to start the war up again on the gamble that he can get us involved in his effort to unite Korea by force.”); Telegram from Joseph Grew, Ambassador in Japan, to Cordell Hull, Sec’y of State, (Sep. 25, 1937), *reprinted in* U.S. DEP’T OF STATE, OFF. OF THE HISTORIAN, FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1937, The Far East, vol. III, doc. 611 (1954), <https://history.state.gov/historicaldocuments/frus1937v03/d620> [perma.cc/X5M5-HS3T] (“the Vice Minister was noncommittal and was disposed to give no reply until the Ambassador informed him that the War and Navy Departments had that morning given explicit assurances respectively to the French Military and Naval Attachés that the island would not be occupied, whereupon the very modest Minister hastened to corroborate the fact and to give his assurances in addition.”); Lord Advocate (representing the Taiwanese Judicial Authorities) v. Dean, Judgment, [2017] UKSC 44.

154. *See, e.g.*, U.N. SCOR, 50th Sess., 3514th mtg., ¶ 114 (documenting Iran’s preference for a legally-binding treaty over a non-legally-binding Agreement).

155. *See* U.S. Dep’t of State, Cable No. 1974STATE175353_b (Aug. 10, 1974), https://wikileaks.org/plusd/cables/1974STATE175353_b.html [perma.cc/FP8K-FXEL] (assuring other states that new US President Ford will continue substantive US foreign policy under Nixon and retain Kissinger as Secretary of State); U.S. Dep’t of State, Cable No. 10TELAVIV417_a, ¶ 4 (Feb. 23, 2010), https://wikileaks.org/plusd/cables/10TELAVIV417_a.html [perma.cc/Z5ZB-U5CZ].

promise to do so.¹⁵⁶ In essence, by “intentions,” the state expresses that it presently, factually, holds a conceptual course of action in mind that it plans to pursue, unless its priorities shift or its enthusiasm later wanes. While such a statement might not be sufficiently committal for a treaty, it is sufficient for an agreement, because it expresses a fact.

Where a promise or the existence of a fact is explicitly conditioned on further consideration, consultations or deliberation by one party, it does not constitute an agreement.¹⁵⁷ In such cases, commitment is better understood as an unequivocal expectation of either a change from the status quo or the continuation of existing behavior. For example, in the *Nicaragua* case, the ICJ found that Nicaragua’s various statements within the Organization of American States did not amount to an agreement.¹⁵⁸ Although Nicaragua expressed intentions to act, those statements were explicitly contingent upon future elections and the choices of the Nicaraguan people.¹⁵⁹ Accordingly, while the statements reflected contemplated future conduct, they lacked the certainty required to form a commitment.¹⁶⁰ Similarly, when a state’s future conduct depends on the actions of a third party¹⁶¹ or where the statements expressly disclaim the existence of an agreement,¹⁶² they lack the necessary level of certainty. The third party might even be a different branch of the same government, such as when the executive conditions its statement on legislative

156. See U.S. Dep’t of State, Cable No. 1975FREETO00166_b (Jan. 29, 1975), ¶¶ 2-3, https://wikileaks.org/plusd/cables/1975FREETO00166_b.html [perma.cc/SV6N-49DH] (mere statement of “intention”).

157. See Bangl./Myan., 2012 ITLOS Rep. 4, 28–29, ¶¶ 66–67, 92; Hollis, *supra* note 2, at 1. For discussion of interpreting silence in relation to the formation of an agreement, see Japan v. Russ. Fed’n, 2005–2007 ITLOS Rep. 18, 46–47 ¶¶ 85–87 (“[S]ilence did not constitute agreement on bond payments”); *Salini Costruttori S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award, ¶ 98 (Jan. 31, 2006) (non-response to claim of agreement did not constitute agreement).

158. See 141 *Nicar. v. U.S.*, 1986 I.C.J. at 88–89, ¶ 167.

159. See *id.*

160. See *id.*

161. See DEGAN, *supra* note 59, at 361–62; Münch, *supra* note 5, at 8 (giving the example of the Potsdam Protocol regarding Polish territory, which was dependent on the actions of Germany, a third party).

162. See Bangl./Myan., 2012 ITLOS Rep. 4, 34–35, ¶¶ 93–94; DEGAN, *supra* note 59, at 361–62; Fitzmaurice, *supra* note 9, at 153.

participation.¹⁶³ In such scenarios, no expectation of performance arises and, consequently, no commitment is formed. On the other hand, when a statement uses a conditional “if-then” structure, linking certain behavior to the conduct of the other contracting party rather than to that of a third party, then an agreement may exist.¹⁶⁴

In addition, the communications should be more than a record of a meeting¹⁶⁵ or a list of discussion topics, merely noting that the parties had agreed on a solution.¹⁶⁶ Rather, in order to constitute an agreement, the parties should not list commitments but state facts or make commitments in the instrument itself.¹⁶⁷ In the *Somalia v. Kenya*, during the preliminary objections phase, the ICJ found a text to constitute an agreement despite the fact that the purported agreement largely contained a list of points of agreement, for example, agreeing that the delimitation had not yet been settled,¹⁶⁸ that the parties held common and diverging interests in the dispute,¹⁶⁹ and that they were determined to work together.¹⁷⁰ Notwithstanding this list of points, the communications also included commitments. These commitments contained statements that Kenya “has no objection to the inclusion of the areas under dispute in the submission by” Somalia,¹⁷¹ that the parties will take certain actions,¹⁷² that their submissions shall not prejudice their positions,¹⁷³ and that they shall agree on delimitation.¹⁷⁴ Thus, while some of the terms merely state understandings, other terms waive rights or establish legal positions, and pledge to take future physical actions.¹⁷⁵

163. See U.S. Dep’t of State, Cable No. 1975STATE233529_b (Oct. 1, 1975), ¶¶ 9, 11, https://wikileaks.org/plusd/cables/1975STATE233529_b.html [perma.cc/96VF-YYGD].

164. See *Bol. v. Chile*, 2018 I.C.J. at 613 ¶ 29 (dissenting opinion by Daudet, J. *ad hoc*).

165. See *Qatar v. Bahr.*, 1994 I.C.J. at 121 ¶ 25; *Bangl./Myan.*, 2012 ITLOS Rep. 151, 154–55 ¶ 19 (separate opinion by Ndiaye, J.).

166. See *Qatar v. Bahr.*, 1994 I.C.J. at 121 ¶ 25; *Nicar. v. U.S.*, 1986 I.C.J. 61, ¶ 106.

167. See *Qatar v. Bahr.*, 1994 I.C.J. at 121 ¶ 25; *Nicar. v. U.S.*, 1986 I.C.J. 61, ¶ 106.

168. See *Som. v. Kenya*, 2017 I.C.J. at 18–19 ¶ 37(2).

169. See *id.* ¶ 37(3).

170. See *id.*

171. See *id.* ¶ 37(4)–(5).

172. See *id.* ¶ 37(5).

173. See *id.*

174. See *id.* ¶ 37(6).

175. See *Som. v. Kenya*, 2017 I.C.J. at 36–39 ¶¶ 88–96.

A complaint following non-compliance may indicate that at least one party, and possibly both, held an expectation that the behavior would occur.¹⁷⁶ Such a complaint might take the form of an allegation of breach or general liability, or even a formal invocation of state responsibility, should the agreement also constitute a treaty. When the term “violation” is used in relation to diplomatic communications, it may imply that the communications are being treated as a source of legal obligation, though it does not alone establish that the communications amounted to an agreement or treaty.¹⁷⁷ However, even absent an express invocation of state responsibility, a complaint may still convey dissatisfaction and reflect an expectation that is sufficient to demonstrate the existence of a commitment.¹⁷⁸ For example, although some scholars contend that the Budapest Memorandum did not constitute a treaty, the fact that its breaches elicited formal complaints suggests that it included commitments,¹⁷⁹ even if those commitments did not necessarily give rise to legal responsibility. Once again, while subjective expectation and full compliance are not constitutive elements of an agreement, they may serve as evidence that the agreement entailed concrete commitments.

IX. INDIVIDUALS EMPOWERED TO AGREE

While international law imposes clear rules on who may bind a State to a treaty,¹⁸⁰ it is less certain whether the same formal

176. See Memorandum by the Div. of Far E. Affs., Dep’t of State, *Résumé of the Administrative Measures Proposed by United States Government for Adoption by Japanese Government, and Acceptance Thereof of Counter Proposals by Japanese Government, 1907–1908* (“The Gentlemen’s Agreement”), to Mr. Taketomi, Sec’y of the Japanese Embassy (Apr. 8, 1924), reprinted in U.S. DEP’T OF STATE, OFF. OF THE HISTORIAN, *FOREIGN RELATIONS OF THE UNITED STATES 1924*, vol. II, doc. 279 (1939), <https://history.state.gov/historicaldocuments/frus1924v02/d279> [perma.cc/VJA8-LKV4]; Schachter, *supra* note 2, at 299.

177. See Memorial of United States, U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Written Proceedings, 1980 I.C.J. Pleadings 126 (Jan. 12, 1980).

178. See *Greece v. Ger.*, 19 R.I.A.A. at 51.

179. See Berman & Bentley, *supra* note 24, § 33.23, at 599–600 n.41.

180. See U.S. Dep’t State, Cable No. 1978STATE135528_d (May 26, 1978), https://wikileaks.org/plusd/cables/1978STATE135528_d.html [perma.cc/VCA6-R69S]; U.S. Dep’t State, Cable No. 1974ISLAMA05582_b (June 11, 1974), https://wikileaks.org/plusd/cables/1974ISLAMA05582_b.html [perma.cc/6YM5-KP7M]; REUTER, INTRODUCTION, *supra* note 44, at 30; Hubert Beemelmans & Hans D. Treviranus, *Germany*, in NATIONAL TREATY LAW, *supra* note 26, at 317, 319–20; Neville J. Botha, *South Africa*, in NATIONAL TREATY LAW, *supra* note 26, at 581–84; William E. Butler, *Russia*, in

requirements apply to international agreements generally. Practice offers some evidence of parallel requirements,¹⁸¹ particularly where States wish to ensure credibility and predictability in their relations. Yet, in functional terms, the distinction may be of limited consequence: if an arrangement qualifies as a treaty, the treaty rules on authority apply; if it does not, its status under international law depends less on formal

NATIONAL TREATY LAW, *supra* note 26, at 540; Franz Cede & Gerhard Hafner, *Austria*, in NATIONAL TREATY LAW, *supra* note 26, at 59, 64–65; Xue Hanqin, Hu Zhiqiang & Fan Kun, *China*, in NATIONAL TREATY LAW, *supra* note 26, at 155, 159; Takao Kawakami, *Japan*, in NATIONAL TREATY LAW, *supra* note 26, at 417; K. Thakore, *India*, in NATIONAL TREATY LAW, *supra* note 26, at 352.

181. See VCLT, *supra* note 1, arts. 7–8 (setting out when a person is considered to represent a State for purposes of adopting, authenticating, or expressing consent to be bound by a treaty, and when an unauthorized act may be confirmed by the State); U.S. Dep’t State, Cable No. 08TUNIS1137_a (Nov. 4, 2008), https://wikileaks.org/plusd/cables/08TUNIS1137_a.html [perma.cc/X79Y-AXYG] (treating authority to conclude or implement a non-treaty international arrangement as a distinct issue in diplomatic practice); Letter from Cordell Hull, Sec’y of State, to Henry Morgenthau, Jr., Sec’y of the Treasury (Apr. 24, 1941), *reprinted in* U.S. DEP’T OF STATE, OFF. OF THE HISTORIAN, FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1945, The Far East, China, vol. VII, doc. 697 (1969), <https://history.state.gov/historicaldocuments/frus1941v05/d661> [perma.cc/66XZ-BLL7] (stating that Chinese diplomatic assurances could be accepted as authoritative confirmation that the proposed loan agreement had been approved by China’s competent authorities and that specified officials were authorized to sign it, making it internationally valid and binding); Memorandum from Wu Ting-fang, Minister to China, to David Hill, Acting Sec’y of State (Sep. 11, 1900), *reprinted in* U.S. DEP’T OF STATE, OFF. OF THE HISTORIAN, FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1945, The Far East, China, vol. VII, doc. 697 (1969), <https://history.state.gov/historicaldocuments/frus1900/d327> [perma.cc/3LN8-LD27] (transmitting an imperial edict identifying Li Hung Chang as an envoy plenipotentiary with “full discretionary powers” to discuss and deal with pending questions); *Qatar v. Bahr.*, 1994 I.C.J. at 122–23, ¶¶ 23–25 (treating signed minutes as an international agreement after considering the official capacity of the signatories and the terms of the instrument); ILC *Draft conclusions on subsequent agreements*, *supra* note 9, concl. 7 (addressing when conduct may be attributed to a party for purposes of subsequent agreements or subsequent practice in treaty interpretation); “ARA Libertad” (*Arg. v. Ghana*), Provisional Measures, 2012 ITLOS Rep. 332, 333–34 ¶ 4 (Dec. 15) (recording the appointment of agents to represent the States before the Tribunal); *LJR v. Austl.*, Comm. No. 316/2007, Dec., UN Doc. CAT/C/41/D/316/2007, ¶ 2.7 (Comm. Against Torture Nov. 26, 2008) (describing diplomatic assurances given by Australian authorities and later relied upon in assessing the State’s conduct); *Seda v. Colom.*, ICSID Case No. ARB/19/6 ¶ 695 (noting the authority or attribution of representations made in the relevant inter-State dealings); Claims arising out of decisions of the Mixed Graeco-German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles (*Greece v. Germ.*), 19 R.I.A.A. 27, 51 (Jan. 26, 1972) (considering whether Germany was willing or able to incur an obligation during negotiations and whether the relevant agreement imposed an obligation to negotiate).

empowerment and more on its perceived reliability and political weight.¹⁸² Klabbers has noted that in the realm of “gentlemen’s agreements” (non-binding arrangements often concluded by senior officials) the authority of the signatory can significantly influence the agreement’s perceived seriousness and durability, even when no binding legal obligation is created.

X. AN AGREEMENT MUST BE CONCLUDED

In addition to reaching mutual, intentional, and unequivocal concordance on precise content, an agreement must be concluded. This is a requirement for treaties, and a similar concept must also apply to agreements. In the view of some scholars, this requirement for treaties means that the negotiations have ended and the parties have reached a “definitive engagement that the parties are bound by the instrument under international law,”¹⁸³ though this view does appear to blur conclusion with intent or consent to be bound. The VCLT makes a distinction between the “text of the treaty” and the “treaty”, only using the latter term after the consent to be bound is expressed.¹⁸⁴ It would appear that “concluded” means the end of negotiations and creation of a definitive text, prior to consent being given.¹⁸⁵ This notion of “conclusion” appears to be supported by the ICJ in the Access to the Pacific Ocean case when it observed that the purported treaty only opened a dialogue, rather than closed it.¹⁸⁶ Because a treaty is a type of agreement, agreements would most likely need to also be concluded in the sense of reaching a final, definitive written or unwritten understood text. While this aspect of agreement will likely overlap considerably with mutuality, this aspect emphasizes

182. See AUST, *supra* note 2 at 45–46; Christine Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMPAR. L. Q. 850, 856–57 (1989); Schachter, *supra* note 2, at 302–03.

183. See J.L. Brierly (Special Rapporteur on the Law of Treaties), *Second report: revised articles of the draft convention*, U.N. Doc. A/CN.4/43 (Apr. 10, 1951); Fitzmaurice, *supra* note 2, at 121 ¶¶ 48–52; Waldock, *supra* note 2, at 32, art. 1(a); RICHARD GARDINER, *TREATY INTERPRETATION* 209–11 (2009); VILLIGER, *supra* note 16, at 77–79; Hollis, *supra* note 1, at 21.

184. See VCLT, *supra* note 1, arts. 7–18, 24(4); Hollis, *supra* note 1, at 21.

185. See GARDINER, *supra* note 183, at 211; VILLIGER, *supra* note 16, at 79; AUST, *supra* note 2, at 92–93; Hollis, *supra* note 1, at 21–22.

186. See *Bol. v. Chile*, 2018 I.C.J. 549–52 ¶¶ 132–39.

the decision to recognize the mutuality, stop negotiating, and then record the agreement.

XI. CONCLUSION

The concept of agreement in international law is central to the formation of legal relationships, yet the legal system provides no single, authoritative account of what constitutes an agreement. Unlike treaties, whose formation is governed by detailed rules under the VCLT, the broader category of agreement, whether binding or non-binding, treaty or non-treaty, is scattered across disparate doctrines and case law. Some of the requirements for agreement can only be inferred from the law of treaties.

This article has aimed not to propose a new functional theory, but to identify and clarify the underlying elements that recur across these sources and give content to the idea of agreement in international law. Through an analysis of treaties, memoranda of understanding, joint statements, minutes, and even informal arrangements, this article has sought to distill the common features that characterize an agreement: the conclusion of an intentional and mutual acceptance of a precise and certain *idem* between actors empowered to agree on behalf of participants in international law. These elements, drawn from practice, offer a working framework for determining when an agreement exists under international law.

The need for such a framework is increasingly pressing. As states and international actors adopt varied forms of cooperation outside traditional treaty-making, the line between binding and non-binding instruments, and between agreements and unilateral acts, has blurred. As a result, it is becoming increasingly difficult to navigate disparate communications and identify when parties have agreed. Clarifying the basic elements of agreement allows legal actors, adjudicators, and scholars to speak more precisely about when agreement arises and when it does not.