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DO NDCS SUBMITTED BY THE PARTIES UNDER THE PARIS AGREEMENT IMPLY BINDING COMMITMENTS? A LEGAL ANALYSIS

SHARABAN TAHURA ZAMAN*

NDCs submitted by State Parties under the PA genuinely do not represent commitments and intentions from the author State to be legally bound by the pledges they've communicated within their submitted NDCs. While NDCs reflect the political will and aspirations of nations, tied to their socio-economic realities, they lack concrete, enforceable domestic mitigation standards. This dilemma poses pressing questions: If NDCs are primarily political declarations and domestic courts don't hold states accountable for their submitted mitigation targets, how can we ensure states fulfill their pledges for mitigation? Can NDCs genuinely drive state behavioral change for energy transition? Furthermore, there is a double-edged challenge: (1) NDCs often lack ambition, and (2) nations frequently fail to meet modest targets, exacerbated by vague NDCs. As they presently stand, submitted NDCs are woefully inadequate to drive the transformative energy transitions required to meet the ambitious goals set forth in the PA. Comparing NDCs to a charitable fundraising effort, where everyone pledges what they can afford, raises a valid question: Why should we expect these promises to add up to the necessary level of action? With the current NDC mechanisms, all we can do is hope that when countries observe each other's efforts and recognize how far we are from our target, they will step up their efforts next time. To address these limitations, leveraging global climate governance and

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negotiations is essential. Vulnerable nations can pressure major economies for compliance. Strengthening NDC governance through transparency, robust stocktaking, and stringent reporting obligations, supported by expert-based reviews, can enhance compliance efforts. Creating urgency and ambition can be achieved through rigorous stocktaking and emission reduction report cards. Fostering coordination and understanding among nations, especially major emitters, is crucial. Governments should include explanations with their NDC submissions to enhance mutual understanding and transparency. In conclusion, NDCs face hurdles in driving meaningful energy transition. The NDC process may require revisions, including specific features, expert feasibility checks upon submission, and improved monitoring and reporting standards. These were rejected in 2015, but eight years have shown that the current system falls short.

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I. INTRODUCTION

The Paris Agreement 2015 (PA)[1] represents a pivotal moment in international climate diplomacy, in which Nationally Determined Contributions (NDCs) were established as a key mitigation norm.[2] Under Article 3 and 4 of the PA, State Parties are mandated to regularly communicate their NDC as part of the global response to climate change.[3] Furthermore, they are required to implement necessary measures to fulfill these contributions.[4] The aim is to meet the global temperature goals of the PA, specifically limiting the temperature increase to 1.5°C and 2°C, which can be achieved by reducing greenhouse gas (GHGs) emissions.[5] This embodies the intersection of international climate governing laws and domestic policies in the fight against climate change.[6] This paper explores the potential of NDCs to drive the behavioral change of States for mitigation actions and unlock energy transition from a legal perspective.

Climate change is the most pressing challenge today due to anthropogenic GHGs emissions causing global warming and environmental harm.[7] These changes disrupt ecosystems,

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1. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement].

2. *Id.* art. 3–4; By the term "norm," the paper indicates an evaluative standard that aims to guide, influence, or regulate the behavior of states and non-state actors. *See* DANIEL M. BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 87 (2010) (distinguishing the various definitions of "norm") [hereinafter BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW].

3. Paris Agreement, *supra* note 1, art. 4.2.

4. *Id.*

5. *Id.* art. 2.1 (a).

6. *See* BENOIT MAYER, INTERNATIONAL LAW OBLIGATIONS ON CLIMATE CHANGE MITIGATION 5 (2022) (describing the Paris Agreement's requirement for legal and policy changes by parties) [hereinafter MAYER, INTERNATIONAL LAW OBLIGATIONS].

7. *See* Dan A. Farber, *The Philanthropy Gap*, LEGAL PLANET (May 11, 2023), https://legal-planet.org/2023/05/11/the-philanthropy-gap (quoting Larry Kramer of the Hewlett Foundation's statement that climate change is "the biggest, most important problem of our time"); *see also* United Nations Framework Convention on Climate Change art. 1(1), May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107 (acknowledging that human activities have increased atmospheric

socioeconomic systems, and human well-being.[8] Addressing this crisis demands a global, concerted effort, with a global transition to sustainable, low-carbon energy systems.[9] The term "low-carbon energy transition" refers to the shift from fossil fuel-dependent economies to sustainable, low-carbon ones, signifying a long-term move away from GHGs-emitting fossil fuels.[10] A transition away from fossil fuels (oil, natural gas, and coal) would see movement towards renewable energy sources like wind and solar, alongside energy storage technologies like lithium-ion batteries.[11] The key drivers of this energy transition include greater renewable energy integration, sector electrification, and advancements in energy storage technology.[12] This transition reshapes energy production and

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concentrations of GHGs, which has an adverse effect on natural ecosystems and humanity) [hereinafter UNFCCC].

8. *See* Farber, *supra* note 7 (quoting Larry Kramer, head of the Hewlett Foundation, calling upon "anyone who cares about our children's and grandchildren's futures to step forward"); *see also* United Nations Framework Convention on Climate Change, *supra* note 7, art. 1(1) (stating that "the widest possible cooperation by all countries and their participation" is needed to combat climate change).

9. *See* KEVIN R. GRAY ET AL., THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW 359 (1st ed. 2016) (commenting on the international dimension of renewable energy); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022 57 (2022) [hereinafter IPCC] (concluding that "purposeful and increasingly coordinated planning and decisions at many scales of governance" is needed to achieve a global transition to a sustainable world); Volker Roeben & Gokce Mete, What Do We Mean When We Talk About International Energy Law? 5 (July 22, 2019) (working paper) (on file with the University of Edinburgh Centre for International and Global Law) (commenting that interconnected global energy markets and international cooperation are necessary to transition to cleaner alternatives to fossil energy sources).

10. *See* Xifeng Wu et al., *Low Carbon Transition in Climate Policy Linked Distributed Energy System,* 1 GLOB. TRANSITIONS PROC. 1 (2020) (noting that the low carbon transition is an international hot topic proposed by many countries); *Low Carbon Transition*, EARTH SYSTEM GOVERNANCE—TASKFORCE ON CONCEPTUAL FOUNDATIONS, https://www.earthsystemgovernance.net/conceptual-foundations/?page_id=131 (defining low carbon transition as an economic shift to a sustainable, low carbon economy).

11. *See What is Energy Transition?*, S&P GLOBAL (Feb. 24, 2020), https://www.spglobal.com/en/research-insights/articles/what-is-energy-transition (noting that in addition to the transfer to renewable energy sources, electrification and improvements in energy storage are key drivers of the energy transition).

12. *See id.* (comparing the need for technological advancements with the

consumption, mitigating climate change's adverse effects.[13]

Given this, academics worldwide emphasize the urgent need for a strong international legal framework to expedite an effective low-carbon energy transition.[14] In 2023, at the Twenty Eighth Conference of the Parties (COP28), Parties acknowledge the need for urgent GHGs emission reductions in line with 1.5°C pathways.[15] They urge ambitious, economy-wide emission targets aligned with the 1.5°C limit.[16] By 2030, commitments include tripling global renewable energy capacity, doubling the annual rate of energy efficiency improvements, expediting the phase-out of unabated coal power, and globally advancing towards net-zero emission energy systems with a focus on zero- and low-carbon fuels.[17] Considering these, this research delves into whether the NDCs submitted by State Parties under the PA genuinely represent States' commitments and intentions to be legally bound by the pledges they have communicated within their submitted NDCs. In other words, to what extent do the submitted NDCs reflect the Parties' intention to be legally bound under the PA? This question invites an assessment of the legal and political dynamics surrounding NDCs, providing insights into the level of commitments and sincerity demonstrated by Parties through their submitted NDCs.

It is essential to grasp why addressing this question is crucial for comprehending the role of NDCs in driving behavioral changes for

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necessary structural, permanent changes to energy supply, demand, and prices in the energy transition).

13. *See id.* (noting that businesses are adapting to the energy transition in accounting for long-term climate risks and opportunities); Wu et al., *supra* note 10, at 1 (describing the building of distributed energy systems as a promising contribution to the reduction of GHGs).

14. *See* Peter Kayode Oniemola, *International Law on Renewable Energy: The Need For a Worldwide Treaty*, 56 GER. Y.B. INT'L L. 281, 283 (2013) (declaring the current international legal framework on renewable energy to be "weak and uncertain"); Neil Gunningham, *Confronting the Challenge of Energy Governance*, 1 TRANSNAT'L ENV'T L. 119, 119 (2012) (stating, over ten years ago, that the greatest challenge affecting environmental law is within the sphere of energy law and governance).

15. *See* Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, ¶¶ 3–5, U.N. Doc. FCCC/PA/CMA/2023/L.17 (Dec. 13, 2023).

16. *See id.* ¶ 23.

17. *See id.* ¶ 28.

promoting energy transition. In the context of international environmental law, a "norm" typically (though not always) refers to a standard or guideline designed to steer or affect behavior.[18] The PA adopted a flexible, bottom-up, non-punitive,[19] pledge-and-review approach in its mitigation governance mechanisms.[20] NDC related provisions rely on a complex matrix of obligations and actions, underscored by deadlines and facilitative oversight mechanisms.[21] Furthermore, PA established no court or dispute settlement mechanisms, instead relying on Article 14 of the United Nations Framework Convention on Climate Change (UNFCCC).[22] Considering the unique legal characteristics of NDC-related provisions, it is crucial to understand how countries perceive these provisions and the specific commitments and targets each party pledged under their respective NDCs. Since NDCs operate on a flexible, bottom-up, non-punitive approach without an in-built dispute settlement mechanism, the implementation of pledges lies at the discretion of State Parties. This context makes the examination of State Parties' interpretation of NDC-related provisions a critical task. This examination is particularly vital in assessing whether NDCs can drive a behavioral shift among States towards a low-carbon energy

18. *See* BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 2, at 87 (noting the double meaning of "norm" as both descriptive and prescriptive of behavior).

19. *See* Paris Agreement, *supra* note 1, arts. 13, 15.

20. *See* Sharaban Tahura Zaman, *The Bottom-Up Pledge and Review Approach of Nationally Determined Contributions (NDCs) in the Paris Agreement: A Historical Breakthrough or a Setback in New Climate Governance?*, 5 IALS STUDENT L. REV. 3, 3 (2018) (explaining that the bottom-up pledge and review approach of NDCs is intended to catalyze and gradually ratchet up adequate mitigation actions) [hereinafter Zaman, *The Bottom-Up Pledge*].

21. *See* Sharaban Tahura Zaman, *Exploring the Legal Nature of Nationally Determined Contributions (NDCs) Under International Law*, 26 Y.B. INT'L ENV'T L. 98, 101 (2015) (describing the combination of bottom-up approach with top-down oversight in NDCs) [hereinafter Zaman, *Exploring NDCs*].

22. UNFCCC, *supra* note 7, art. 1(1); *see also* Paris Agreement, *supra* note 1, art. 24; Article 14(1) of the UNFCCC, incorporated into the Paris Agreement through Article 24, outlines a dispute resolution mechanism. It requires parties in dispute over the Paris Agreement's interpretation or application to attempt to settle the dispute through negotiation or other peaceful means of their choice. If these initial efforts fail, Article 14(5) of the UNFCCC allows for compulsory conciliation as the next step in resolving the dispute.

transition, considering the varying understanding and perception of State Parties towards NDC-related provisions. However, a detailed analysis of 193 submitted NDCs[23] is beyond the scope of this thesis. Hence, this paper has evaluated the NDC submissions of five countries (USA, India, China, Bangladesh, Tuvalu) and the European Union, considering their geographical location, emission rates, as well as their development and economic factors. This article includes the four top emitters, a representative non-developed country, and an island state—representative of the major national groupings in climate negotiations.[24]

It is important to highlight that, in line with the main research question, this paper does not primarily dig deep into the legal assessment of the specific NDC-related rules in Article 4 of the PA.[25] Instead, it aims to give a clearer picture of how countries view their obligations related to their submitted NDCs. To do this, the paper examines how courts interpret the NDCs and emission reduction commitments that States have put forth within the PA.

Before delving into the paper's focus, it is essential to grasp two key concepts: "obligation of conduct" and "obligation of result."[26] Climate change treaties include both types of obligations.[27] An obligation of conduct requires a country to exert genuine effort toward achieving a

23. *See Nationally Determined Contributions Registry*, UNFCCC, https://unfccc.int/NDCREG.

24. *See id*.

25. To delve into the specific NDC-related rules in Article 4 of the PA, readers can refer my papers: Zaman, *The Bottom-Up Pledge*, *supra* note 20, at 3 (exploring the nature of the bottom-up pledge and review approach of NDCs); Zaman, *Exploring NDCs*, *supra* note 21, at 101 (discussing the evolution of NDCs from the climate regulatory regime and analyzing their enforceability through the lens of international law); Sharaban Tahura Zaman, *The Energy Transition Under the Paris Agreement: Assessing the Existing Normative Directions*, 46 ENVIRONS: ENV'T L. & POL'Y J. U. CAL. DAVIS 2, 204 (2023) (analyzing the Paris Agreement's ability to influence a state's behavior to pursue an economy-wide energy transition) [hereinafter Zaman, *The Energy Transition*].

26. *See* MAYER, INTERNATIONAL LAW OBLIGATIONS, *supra* note 6, at 184 (detailing the dichotomy between obligations of conduct and obligations of result).

27. *See* LAVANYA RAJAMANI, INNOVATION AND EXPERIMENTATION IN THE INTERNATIONAL CLIMATE CHANGE REGIME 115 (2020) (defining "obligation of conduct" as focused on the striving towards the achieving a certain result and "obligation of result" as focused on the attainment of a result).

goal, emphasizing actions taken rather than guaranteed results. [28] The effort or endeavor might be aimed at a specific target (which may or may not be reached) or it could be directed towards a more general ambition or goal. [29] It is crucial to understand that an obligation of conduct sets a standard for behavior or action rather than demanding a specific course of action. [30] The emphasis lies in the effort's quality rather than specifying procedures.[31] Importantly, legal responsibility is based on the adequacy of effort, not the attainment of the final goal.[32]

In contrast, an obligation of result mandates a State or party to attain a specific outcome or target, not just make an effort.[33] This outcome can refer to achieving intermediate steps outlined in the Agreement, not necessarily achieving ultimate goal of that Agreement.[34]

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28. *See id.* at 115–16 (identifying the word "aim" in the Paris Agreement as signaling an "obligation of conduct"); *see also* Pierre-Marie Dupuy, *Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 EUR. J. INT'L L. 371, 375 (1999) (illustrating the concept of "obligation of conduct" with the relationship of a doctor to a patient, where the doctor has no obligation to heal or cure the patient but must do everything a reasonable person and competent physician can do to look after the patient).

29. *See* Benoit Mayer, *Obligations of Conduct in the International Law on Climate Change: A Defence*, 27 REV. EUR., COMPAR. & INT'L ENV'T L. 130, 132 (2018) (contrasting the requirements of obligations of means/conduct with those of obligations of result) [hereinafter Mayer, *Obligations of Conduct*].

30. *See* MAYER, INTERNATIONAL LAW OBLIGATIONS, *supra* note 6, at 187 (explaining that the confusion in these definitions originated from mistranslations of Special Rapporteur Roberto Ago's report, drawn from the French civil law tradition, into English).

31. *See* MAYER, INTERNATIONAL LAW OBLIGATIONS, *supra* note 6, at 187 (noting that a key distinction between these concerns is that is obligations of conduct leave it to the debtor to "select the appropriate means of implementation").

32. *See* Mayer, *Obligations of Conduct*, *supra* note 29, at 130–31 (contrasting commentaries on the Paris Agreement that claim it incorporates a "good faith expectation of results" with those that see it as failing to impose any "substantive obligations"); MAYER, INTERNATIONAL LAW OBLIGATIONS, *supra* note 6, at 187 (noting that under obligations of conduct, it is the debtor who selects the "appropriate means of implementation").

33. *See* Dupuy, *supra* note 28, at 375 (clarifying that the classical differentiation of these obligations is generally understood by scholars trained in the civil law tradition, but not by common law scholars).

34. *See id.* (illustrating that when the obligation of conduct is to prevent a given

Obligations of conduct in international environmental law are akin to unseen but prevalent forces, like dark matter in the universe.[35] They are more common than obligations of result in global environmental regulations.[36] Assessing the fulfillment of an obligation of conduct is often more complex than for an obligation of result because it involves subjectively reviewing a country's efforts, not simply checking for a specific outcome.[37] To demonstrate non-compliance with an obligation of conduct, a practical approach is to identify the necessary steps a country should have taken to fulfill its duties, highlighting whether the required behavior was adopted or not.[38]

The paper is divided into three parts. Firstly, it traces the development of the NDC concept within Climate Governance. In the subsequent section, it explores whether Parties have the intention to be legally bound by their submitted NDCs and analyzes into the international legal status of these submissions. Finally, the paper delves into domestic and international court interpretations of submitted NDCs and their implementations. It concludes with closing thoughts and a way forward.

II. UNFOLDING THE EVOLUTION OF NDCS

The United States' refusal to join the 1997 Kyoto Protocol (KP) and the developing country parties' rejection of extending the KP's mitigation commitments for all States highlighted the need for an alternative global mitigation regime.[39] The NDCs, introduced under

event from happening, a state will only be held responsible for steps not actually taken if another state can prove that damage suffered could have been prevented).

35. *See* MAYER, INTERNATIONAL LAW OBLIGATIONS, *supra* note 6, at 187–88 (regretting that obligations of conduct often go unnoticed despite being more common than obligations of result).

36. *See id.* (noting that they are more common when following the civil law definition).

37. *See id.* at 184 (comparing the subjective evaluation of obligations of conduct with the more objective evaluation of obligations of result).

38. *See id.* (describing how appropriate measures a state would be expected to take or would need to take can be identified).

39. *See* JUTTA BRUNNÉE, PROCEDURE AND SUBSTANCE IN INTERNATIONAL ENVIRONMENTAL LAW 197 (2021) (stating that developing countries, in addition to the U.S., rejected the Kyoto Protocol out of concern over development needs and capacity limitations).

the PA, resulted from years of efforts by Parties to find a universally acceptable formula.[40] It is worth noting that, UNFCCC has been the foundation of UN climate governance for three decades.[41] Under the UNFCCC, two key legally binding treaties (KP and PA) and non-binding treaties (e.g., 2010 Cancun Agreement[42], 2011 Durban Platform[43], and 2022 Glasgow Climate Pact[44]) were adopted.[45] UNFCCC provides the overall governance framework for reducing global GHGs emissions, focusing on GHGs not regulated by the Montreal Protocol.[46] The KP complemented UNFCCC until the adoption of the PA, which rendered the KP ineffective after 2020.[47]

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40. *See id.* at 197–98 (positioning the Paris Agreement, for all intents and purposes, as the successor of the Kyoto Protocol); DANIEL BODANSKY ET AL., INTERNATIONAL CLIMATE CHANGE LAW 91 (1st ed. 2017) (detailing the treatment of treaty-based standards by states as binding international law, negotiated with considerable care) [hereinafter BODANSKY ET AL., INTERNATIONAL CLIMATE CHANGE LAW].

41. *See* BODANSKY ET AL., INTERNATIONAL CLIMATE CHANGE LAW, *supra* note 40, at 118 (commenting on the benefits of the longstanding FCCC remaining the "foundation of the UN climate regime").

42. United Nations Framework Convention on Climate Change, Decision 1/CP.16, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action Under the Convention, U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011) [hereinafter The Cancun Agreements].

43. United Nations Framework Convention on Climate Change, Draft Decision 1/CP.17, Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, U.N. Doc. FCCC/CP/2011/L.10 (Dec. 10, 2011) [hereinafter The Durban Climate Conference].

44. United Nations Framework Convention on Climate Change, Decision 1/CMA.3, Glasgow Climate Pact, U.N. Doc. FCCC/PA/CMA/2021/10/Add.1 (Mar. 8, 2022) [hereinafter Glasgow Climate Pact].

45. *See* BODANSKY ET AL., INTERNATIONAL CLIMATE CHANGE LAW, *supra* note 40, at 118 (emphasizing that the UNFCCC remains the "foundation of the UN climate regime").

46. *See* Gunningham, *supra* note 14, at 119 (arguing that energy law and governance must be at the forefront of humanity's approach to climate change); United Nations Framework Convention on Climate Change, *supra* note 7, art. 4(1)(b) (directing parties to "formulate, implement, publish, and regularly update . . . programmes containing measures to mitigate climate change . . . and measures to facilitate adequate adaption to climate change").

47. *See* BODANSKY ET AL., INTERNATIONAL CLIMATE CHANGE LAW, *supra* note 40, at 160–61 (reviewing the role of the Kyoto Protocol in the evolution of the climate regime).

Mitigation obligations in the climate governance regime vary in scope, duration, and targets,[48] reflecting diverse legal characteristics.[49] States adapt these obligations to mitigate sovereignty,[50] costs,[51] uncertainties, compliance expenses, resource constraints, and economic conditions.[52] Over time, States have sought non-binding instruments like COP Decisions[53] or retained control over mitigation obligations' contents, definitions, and interpretations to avoid strict legally binding commitments.[54] UNFCCC's emission reduction rules represent the first step in international climate law.[55] Though the legal architecture of these obligations is indistinct and attenuated,[56] UNFCCC, as a burden-sharing framework, necessitates good-faith participation and reasonable efforts from all parties, including having developed counties provide financial assistance to developing countries.[57] UNFCCC forms the foundation for translating general

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48. *See* MAYER, *supra* note 6, at 37–38 (distinguishing between three types of commitments under the main climate treaties).

49. *See id.* at 38–39 (noting previous multilateral environmental agreements whose architecture the UNFCCC seeks to emulate); RAJAMANI, *supra* note 27, at 96 (describing how parties carefully calibrated the legal character of the Paris Agreement's provisions to ensure continued control over content, definition, and interpretation of obligations).

50. *See* RAJAMANI, *supra* note 27, at 111 (noting that the international climate change regime has moved towards "soft" provisions, procedural rather than substantive obligations, the use of differentiated norms to tailor capacities, and facilitative oversight mechanisms in order to address concerns over "sovereignty costs").

51. For instance, losing decision-making power over consequential decisions to nationally determine emission reduction targets, energy choice, economic development goals and patterns, and lifestyles.

52. *See* RAJAMANI, *supra* note 27, at 125 (commenting on the allowance within COP decisions for nimble and responsive action).

53. *See id.* at 79 (noting that because COP decisions are not legally binding, there is no implementation requirement).

54. *See id.* (describing states' efforts to avoid legally binding obligations from within the drafting process of legally binding instruments).

55. *See* ALEXANDER ZAHAR, INTERNATIONAL CLIMATE CHANGE LAW AND STATE COMPLIANCE 90 (2015) (noting that the FCCC did not establish a formal compliance system to ensure states comply with its emission obligations) [hereinafter ZAHAR, INTERNATIONAL CLIMATE CHANGE LAW].

56. *See id.* (elaborating that the FCCC established neither a substantive nor a procedural compliance system).

57. *See id.* (explaining that states are expected to comply with regime rules

mitigation obligations into State-specific targets and timetables through a follow-up treaty, as realized in the PA.[58] Therefore, this part of the paper will analyze how the concept of NDCs was developed in the negotiations of the PA's governing architecture to shape States' emission reduction behavior.

A. TRACING THE CONCEPTUAL DEVELOPMENT OF NDCS IN CLIMATE GOVERNANCE

It is often argued that GHGs emissions are primarily produced by individuals and industries rather than States.[59] This argument suggests that managing the climate change problem is most effective when addressed at the level where emissions originate.[60] This argument is valid because immediate, drastic GHGs emissions cuts are likely to be unattainable for most State Parties since governments have limited control over individuals and industries beyond their own activities.[61] Given this reality and the gravity of the climate change issue, a bottom-up State-level agreement is deemed the most suitable solution.[62]

However, in 1997, when KP was adopted to supplement mitigation obligations under the UNFCCC, a different approach was taken.[63] Instead of an obligation of conduct, the parties adopted obligations of result, imposing legally binding mitigation obligations with sanctions

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regardless of whether an accountability mechanism is in place).

58. *See* BRUNNÉE, *supra* note 39, at 197–98 (explaining that the Paris Agreement is the result of state parties' efforts to find an emissions mitigation formula for all states); *see also* BODANSKY ET AL., INTERNATIONAL CLIMATE CHANGE LAW, *supra* note 40, at 158 (noting that the FCCC laid the basis for the Paris Agreement).

59. *See* ZAHAR, INTERNATIONAL CLIMATE CHANGE LAW, *supra* note 55, at 89 (explaining that some do not view states as the source of greenhouse gas emissions).

60. *See id.* (arguing that such an approach is a "reductionist trap" that should be avoided).

61. *See id.* (acknowledging that states cannot likely deliver on immediate and drastic emission cuts because their governments do not have the power to regulate at this level).

62. *See id.* (advocating for a solution by agreement at state level, given the global nature of climate change).

63. *See* BODANSKY ET AL., INTERNATIONAL CLIMATE CHANGE LAW, *supra* note 40, at 160 (noting that the KP imposed legally binding targets which were broad and accompanied by stringent reporting, review, and enforcement measures).

on Annex I countries while excluding non-Annex I countries from emission reduction obligations.[64] Many scholars attribute the failure of the KP on its heavy reliance on legally binding emission reduction targets that created a stark division between Annex and non-Annex countries.[65] The failure of the KP underscored the political nature of global climate change negotiations, influenced by a small number of powerful States.[66] It also revealed a preference among parties for bottom-up, State-level agreements with reduced sovereignty costs, allowing parties to determine emission reduction targets aligned with national circumstances and economic development needs.[67] These factors played a role in the demise of the KP, with the United States' refusal to join and developing countries' rejection of its mitigation

64. Under the UNFCCC, countries are categorized into three groups. Annex I countries, primarily industrialized or developed nations, bear significant historical responsibility for GHGs emissions, and are expected to take the lead in mitigating climate change. Annex II countries, a subset of Annex I nations, also members of the OECD, have an additional role of providing financial and technological assistance to non-Annex countries. Non-Annex countries, mainly developing or less economically developed nations, have historically contributed less to emissions and are not bound by the same legally binding emission reduction targets as Annex I countries. Instead, they are encouraged to take voluntary actions to mitigate emissions, with support from Annex I and Annex II countries; *see* BRUNNÉE, *supra* note 39, at 167 (explaining that the KP created quantified targets with clear compliance and non-compliance indicators); *see also* DANIEL A. FARBER & CINNAMON P. CARLARNE, CLIMATE CHANGE LAW 56 (2D ED. 2023) (distinguishing between Annex I countries, which were mostly developed countries, and Annex II countries, all of which were developing).

65. *See* BRUNNÉE, *supra* note 39, at 168 (citing firm emission reduction targets as one factor in the KP's failure); *see also* DAVID G. VICTOR, THE COLLAPSE OF THE KYOTO PROTOCOL AND THE STRUGGLE TO SLOW GLOBAL WARMING 52 (2001) (highlighting the political barriers that exist when countries that care little about global warming and fear the cost of emission caps are expected to participate in the emissions mitigation regime).

66. FARBER & CARLARNE, *supra* note 64, at 56 (noting that a limited number of states have controlled the climate change regime and explaining that the participation of major developed countries would have been necessary to bring the KP into force).

67. *See* BODANSKY ET AL., INTERNATIONAL CLIMATE CHANGE LAW, *supra* note 40, at 212 (noting a preference among developed-developing countries for the practice of "Nationally Determined Contributions" and respect for national circumstances and self-differentiation).

obligations sealing its fate.[68]

These failure factors also shaped the concept of NDCs as a key mitigation tool in the PA.[69] Instead of detailing the negotiation history leading to the adoption of the PA and NDCs,[70] this paper explores how these factors contributed to the development of NDCs. Understanding this background is crucial to grasp the unique legal character of submitted NDCs, which will be discussed in the next section.

From 2005 to 2015, climate negotiations aimed to establish a balanced, long-term approach for global mitigation that would encompass States beyond those covered by the KP, including non-Annex countries and the USA, which had rejected the Protocol in 2001.[71] In 2009, the Copenhagen Climate Conference failed to achieve its intended 'agreed outcome' but did result in a political agreement that shaped mitigation governance.[72] The Copenhagen Accord adopted in that conference,[73] though lacking formal legal

68. *See* BRUNNÉE, *supra* note 39, at 167, 169 (stating that the US rejection of the KP and reluctance of developing countries to expand the regime sparked the realization that a global mitigation regime was needed); *see also* BODANSKY ET AL., *supra* note 40, at 212 (detailing three factors that led to the movement away from an international push for legal form).

69. *See* BRUNNÉE, *supra* note 39, at 167, 169 (noting that the US rejection of the KP marked a shift in attitudes towards finding a more long term and genuinely global solution); *see also* BODANSKY ET AL., INTERNATIONAL CLIMATE CHANGE LAW, *supra* note 40, at 212 (recognizing the differences between a binding legal instrument and non-binding international contributions).

70. *See* Zaman, *The Energy Transition*, *supra* note 25, at 225–26 (exploring the negotiation histories that eventually led up to the adoption of the PA and NDC).

71. *See* BRUNNÉE, *supra* note 39, at 169 ("The Paris Agreement is the result of the parties' efforts, over several years, to fnd a formula that would be acceptable to all States."); *see also* RAJAMANI, *supra* note 27, at 98 (noting a resistance to legally binding instruments after the KP entered into force in 2005).

72. *See* RAJAMANI, *supra* note 27, at 101 (noting that while the Copenhagen Accord did not have legal status, it was negotiated by the world's most powerful heads of States making it politically salient).

73. Report of the Conference of the Parties on its fifteenth session, held in Copenhagen from 7 to 19 December 2009. This source details action taken by the Conference of the Parties at its fifteenth session. Conference of the Parties, *Report of the Conference of the Parties on its Fifteenth Session, Held in Copenhagen from 7 to 19 December 2009*, ¶¶ 2, 4–5, U.N. Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010).

status, initiated a voluntary pledge process for GHGs mitigation actions involving all States, including non-Annex countries.[74] Large GHGs emitters like China, India, and Brazil submitted their domestic emissions commitments pledges for the first time.[75] In 2010, the Cancun Climate Conference formally incorporated this political compromise into the UNFCCC process through the Cancun Agreement.[76] In 2011, at the Durban Climate Conference, parties launched new climate negotiations to replace the KP post-2020, leading to the adoption of the PA and NDCs.[77] While negotiating the concept of NDCs and shaping the new mitigation-related governance regime, the mitigation-related political compromise captured in Copenhagen and recognized in Cancun became an important model.[78]

As mentioned before, the failure factors of the KP also contributed to the development of NDCs within the PA.[79] The question is how? The compromise from the Copenhagen negotiations signaled a shift away from the strict division between Annex and non-Annex countries in terms of emission reduction obligations.[80] Moreover, the 2011 Durban outcome indicated that the KP would expire by 2020, and a new legally binding governing regime was on the horizon.[81] As the

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74. *See* FARBER & CARLARNE, *supra* note 64, at 64 (noting that the outcomes under the Copenhagen Accord were the result of in-camera negotiations among a handful number of the powerful head of state from the United States, China, India, Brazil, and South Africa).

75. *See* Zaman, *The Energy Transition*, *supra* note 25, at 215 (stating that more than half of global GHG emissions are produced by the US, China, India, and the EU).

76. Conference of the Parties, *Report of the Conference of the Parties on its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010*, ¶¶ 2(c), 6, 13, 43, 45, U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011).

77. Conference of the Parties, *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action*, ¶¶ 2, 5, 7–8, U.N. Doc. FCCC/CP/2011/L.10 (Dec. 10, 2011).

78. *See* FARBER & CARLARNE, *supra* note 64, at 64–65 (explaining that the Copenhagen Accord and Cancun Agreements helped revive the possibility of global climate change institutions).

79. *See id.* at 63, 67 (explaining that NDCs reflect Parties' ambitions while allowing for differentiations in responsibilities and acknowledging national circumstances).

80. *See* RAJAMANI, *supra* note 27, at 115 (detailing how after the US rejected the KP, the regime shifted to ensuring the KP could enter into force without the US).

81. *See id.* (noting that after the Durban negotiations, Parties wanted to retain

UNFCCC was poised to introduce new legally binding mitigation obligations for all States, negotiations surrounding NDCs and mitigation provisions reflected the parties' intention to recalibrate the legal character of NDCs.[82] Parties sought to ensure that NDCs and other emission reduction-related provisions would be legally binding but less stringent than those in the KP.[83] Throughout the negotiations, parties emphasized key components to be reflected in NDCs and emission reduction-related provisions along with control over several aspects of mitigation-related obligations.[84]

First, States wanted absolute control over defining and interpreting mitigation-related obligations.[85] This intention of parties can be explained well by describing how the word "contribution" was selected for NDCs. The term "contribution" was chosen for NDCs to indicate greater State autonomy, framing them as offerings or gifts rather than obligations and promoting parity between developed and developing countries.[86]

Second, States aimed to retain discretionary power over the core content of their mitigation-related commitments.[87] Singapore's intervention during negotiation clarifies that, "the term nationally determined excludes any possibility that the contributions could be internationally negotiated or multilaterally imposed."[88] This stance

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control over the content, definition, and interpretation of obligations in the new instrument).

82. *See id.* (discussing techniques used by the Parties to control the legal character of provisions).

83. *See* BRUNNÉE, *supra* note 39, at 169 (noting that the PA established comparatively few substantive legal obligations).

84. *See id.* (describing the dramatic shift away from the binding obligations of the KP).

85. *See* RAJAMANI, *supra* note 27, at 115 (noting the techniques Parties used to shape the legal character of the Paris Agreement's provisions and retain control over content, definitions, and interpretation of the obligations it imposed).

86. *See id.* at 116 (explaining that the term "contributions" creates a sense of equality between developing and developed countries by allowing both to provide contributions rather than assume commitments).

87. *See id.* at 117 (stating that NDCs allow parties to retain discretion over the content, scope, nature, and application of their obligations).

88. *See id.* (highlighting that the idea of "nationally determined" contributions as opposed to contributions that are subject to negotiation is key to the success of the PA).

also reflects the rejection of a top-down approach with imposed commitments and underscores the negotiation goal of preserving broad discretion over NDC content for all parties.[89] Negotiations to determine the scope and extent of their mitigation-related contributions were also highly contentious and only resolved during the Paris Rulebook negotiations. [90]

Third, States had divergent views on whether NDC commitments should be conditional or unconditional.[91] Many developed countries favored unconditional NDC based on national resources.[92] According to Switzerland, NDCs commitments should be based on "nationally owned."[93] While developing countries argued for conditional commitments tied to support received.[94] There was also disagreement on the level of effort required for NDC-related commitments.[95]

These expectations led to a significant shift from a top-down, legally binding overarching mitigation obligation to a model that granted individual States absolute determining power in their contributions to GHGs emissions reduction.[96] In 2014, at the Lima Climate Conference, this flexible, State-driven mitigation model was formalized when Parties were invited to submit their first intended

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89. *See id.* at 118 (explaining that the Paris Rulebook emphasizes State's discretion over their obligations, including their informational requirements).

90. *See id.* at 118–19 (explaining that the final compromise during the Rulebook negotiations was that Parties are only explicitly required to submit NDCs related to mitigation)*; see also* Conference of the Parties, *Report of the Conference of the Parties on its Twenty-first Session, Held in Paris from 30 November to 13 December 2015*, ¶¶ 22–64, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 26, 2016).

91. *See* RAJAMANI, *supra* note 27, at 120–21 (noting that many developing countries view NDCs as conditional on receiving adequate support).

92. *See id.* at 120 ("Several developed countries believe NCDs should be unconditional, and based on what countries can commit to with their own resources").

93. *See id.* (suggesting an unconditional responsibility on the state to provide contributions).

94. *See id.* (highlighting a split in perspectives between developed and developing countries).

95. *See id.* (listing suggested conditions for implementation, including effort and access to financial and technological support).

96. *See* FARBER & CARLARNE, *supra* note 64, at 66 (noting that this shift occurred in the lead up to the 2015 meeting in Paris).

NDCs.[97] Major GHGs emitting nations, both developed and developing, responded to this call and submitted their first intended NDCs, creating optimism for reshaping the climate governing regime through the PA.[98] By accepting this inclusive, flexible, State-driven, discretionary mitigation model, the global community moved away from the binding obligation of results at the core of the KP's mitigation regime.[99] Instead, it returned to the obligation of conduct embedded under the general mitigation obligation of the UNFCCC.[100] This shift in approach raises the question of if the climate mitigation governing regime went back to square one, from where UNFCCC had started its journey, would it soon realize that wide, discretionary, State-driven general mitigation obligations is not well equipped to shape behavioral change toward emission reduction? Further discussion will explore this matter.

III. PARTIES' PERCEPTIONS OF SUBMITTED NDCS AND ITS RELATED OBLIGATION UNDER PA

The evolution of NDCs in climate governance reveals a strong demand by Parties for control over NDC components and emission reduction provisions during negotiations. The deliberate choice of the term "contribution" in NDCs was a strategic move to emphasize State autonomy and avoid strict obligations.[101] Parties adamantly rejected international negotiation or multilateral imposition of mitigation-related obligations, defending their discretion over NDC content.[102] These negotiations strongly emphasized the determination to preserve

97. *See id.* (explaining that the broad participation in the Lima Call for Climate Action created positive momentum going into the Paris meeting).

98. *See id.* (noting that the US, China, India, and the EU were all part of the Lima Call and participated in the release of NDCs).

99. *See* BRUNNÉE, *supra* note 39, at 169 (categorizing the PA as the KP's successor).

100. *See id.* at 169–70 (comparing the PA's lack of substantive obligations with the KP's binding obligations).

101. *See* RAJAMANI, *supra* note 27, at 115–18 (explaining that the term "contributions" was carefully chosen as a means to signal support for state autonomy and parity between states).

102. *See id.* (noting that the term "contributions" could encompass many forms beyond mitigation, such as adaptation, finance, technology transfer, and more).

national interests and flexibility, highlighting nations' unwavering desire for control over the nature and extent of their mitigation commitments.[103] However, amidst this fierce assertion of sovereignty, a pertinent question arises: do Parties genuinely intend to be bound by the commitments they freely submit in their NDCs? In other words, Do the NDCs submitted by the Parties manifest their will to be bound? To address this, the study explores State Parties' perceptions of NDC-related provisions both during the framework's development and afterward.

PA anchors NDC provisions under Articles 3 and 4.[104] Article 3 mandates all Parties "to undertake and communicate ambitious effort" in their respective NDCs' to achieve the Agreement's goal as stated in Article 2.[105] Article 4.2 requires each Party to prepare, communicate, and maintain successive NDCs while pursuing domestic mitigation measures.[106] Article 4.9 mandates Parties to communicate their NDCs every five years.[107] All these obligations apply to each State and focus on "conduct" rather than "results."[108] These obligations are legally binding norms using the term "shall," enforced through non-adversarial mechanisms under Article 13, 14 15 and relying on international review, peer pressure, and reputational cost.[109]

It is important to emphasize that one of the PA's major achievements was significantly broadening state participation in GHGs mitigation.[110] This expansion was made possible through

103. *See id.* (describing the high degree of international dispute over what contributions should be).

104. Paris Agreement, *supra* note 1, arts. 3, 4, 13–15.

105. *Id.* art. 3.

106. *Id.* art. 4.2.

107. *Id.* art. 4.9.

108. *See* Zaman, *The Energy Transition*, *supra* note 25, at 235 (discussing obligation of conduct versus obligation of result).

109. Paris Agreement, *supra* note 1, arts. 13–15; *See* Zaman, *The Energy Transition*, *supra* note 25, at 208, 226, 236–37 (discussing the transparency framework under Article 13, the global stocktake under Article 14, and the compliance mechanism under Article 15).

110. *See* BODANSKY ET AL., INTERNATIONAL CLIMATE CHANGE LAW, *supra* note 40, at 22–26 (suggesting that the FCCC has participation from States representing over 85% of the world's emissions but noting that greater participation does not necessarily result greater effectiveness).

unilateral, self-selected commitments and pledges under the NDCs.[111] These declarations, prepared by State Parties, are not subject to international negotiation or included in the PA's body or annex.[112] Instead, they are separately registered in the UNFCCC Secretariat's public registry.[113] While the NDC provisions reflect common goals, the unique nature of these "unilateral declarations," registered outside the PA, raises questions about their legal force.[114] Scholars have debated whether they can create legal obligations on State Parties outside the PA regime.[115] Under international law, this section will firstly assess the legal status of "unilateral declarations" made by a State to determine what elements are required for a "unilateral declaration" to be legally binding. Subsequently, it will investigate whether submitted NDCs can be considered legally binding unilateral declarations. The main goal is to determine if parties truly intend to be bound by their unilaterally declared NDC commitments.

A. UNILATERAL DECLARATIONS' LEGAL STATUS IN INTERNATIONAL LAW

In the Nuclear Tests (*Australia v. France*)[116] case the International Court of Justice (ICJ) acknowledged the capacity of unilateral declarations to create legal obligations.[117] It found that the French government's statements constituted a unilateral declaration,

111. *See* RAJAMANI, *supra* note 27, at 169 (attributing broad participation to the Cancun commitments and the Paris NDCs).

112. *See id.* at 246–47 (noting that the central mitigation commitment in the PA does not impose an obligation to achieve NDC objectives or take measures to achieve them).

113. Paris Agreement, *supra* note 1, art. 4.12.

114. *See* Mayer, *Obligations of Conduct*, *supra* note 29, at 136–37 (noting that changes in circumstances could prevent the realization of NDCs under the current flexible approach).

115. *See* RAJAMANI, *supra* note 27, at 169 (acknowledging that unilateral declarations can create legal obligations but that the obligation depends on the intent of the State); Mayer, *Obligations of Conduct*, *supra* note 29, at 136–37 (stating that international courts and tribunals have considered obligations of conduct); *see also* MAYER, INTERNATIONAL LAW OBLIGATIONS, *supra* note 6, at 252 (explaining the debate among international lawyers regarding how to characterize NDCs).

116. Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. 253, ¶¶ 41, 43, 50–51 (Dec. 20).

117. Nuclear Tests, 1974 I.C.J. Rep. 253, ¶¶ 43, 46.

obligating France to cease atmospheric nuclear tests.[118] This recognition was reaffirmed in subsequent judicial decisions, such as in the Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. US*) case 1986;[119] Proceedings Pursuant to the OSPAR Convention (Ireland/UK) case 2003;[120] Chagos Marine Protected Area Arbitration (Mauritius/UK), Award 2015;[121] Obligation to Negotiate Access to the Pacific Ocean (*Bolivia v. Chile*) case 2018.[122]

In Nuclear Tests case, the ICJ held that an intention to be bound could be inferred from the content, context, and public communication of an intent to achieve a specific outcome.[123] The ICJ noted that while the French government did not explicitly declare an intention to be bound, its public statements about ceasing atmospheric nuclear tests created a reasonable expectation that other States could rely on them.[124] As a result of France's statement expressing "its intention effectively to terminate these tests," it was bound to assume that other States might rely on these statements' effectiveness.[125] The Court held that France had undertaken an obligation to cease its nuclear tests through a series of unilateral declarations of its intent.[126] The ICJ emphasized that States could trust unilateral declarations, expecting the obligations arising from them to be honored.[127] Unilateral declarations could serve as a means for States to voluntarily undertake obligations towards the international community as a whole, without the need for specific addressees or acceptance by other States.[128]

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118. *Id.* ¶ 51.

119. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 259, 261 (June 27).

120. Proceedings Pursuant to the OSPAR Convention (Ir. v. U.K.), Final Award, 23 R.I.A.A. 59, ¶ 90 (July 2, 2003).

121. Award in the Arbitration Regarding the Chagos Marine Protected Area Between Mauritius and the United Kingdom of Great Britain and Northern Ireland (Mauritius v. U.K.), Award, 31 R.I.A.A. 359, ¶ 446 (Mar. 18, 2015).

122. Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile), Judgment, 2018 I.C.J. 507, ¶¶ 146–48 (Oct. 1).

123. Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶ 41 (Dec. 20); MAYER, INTERNATIONAL LAW OBLIGATIONS, *supra* note 6, at 267.

124. Nuclear Tests, 1974 I.C.J. 253, ¶ 41.

125. *Id.* ¶ 41.

126. *Id.* ¶ 41.

127. *Id.* ¶ 46.

128. *Id.* ¶ 50–51.

In the Nuclear Tests case, the ICJ emphasized the importance of a State's "intention" to be bound when interpreting unilateral declarations.[129] It held that a public undertaking with the intent to be bound, even if not made in the context of international negotiations, is binding.[130] Therefore, a State's unilateral declaration, when made with a clear intention to be bound, creates legal responsibilities that are enforceable even outside international negotiations, without requiring a response or acceptance from other states.[131] The ICJ reiterated the significance of the State's intent in the Frontier Dispute case in 1986, highlighting that it all depends on the intention of the State in question.[132] Thus, the intention to be bound is a fundamental aspect of the legal nature of a unilateral declaration, distinguishing it from mere political statements.[133]

Now, from the perspective of international law, it is time explore how to determine if a unilateral declaration genuinely reflects the authoring State's intent to establish binding commitments. When determining the "intention to be bound," the ICJ's judgment in the Nuclear Tests case highlighted two critical factors for establishing the clear intention of the authoring State and determining the legal nature of a unilateral declaration.[134]

The first step involves understanding the author State's intent by

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129. *See* RAJAMANI, *supra* note 27, at 170 (describing the holdings of the Nuclear Tests and Frontier Dispute cases, both of which come from the ICJ).

130. Nuclear Tests, 197 I.C.J. 253, ¶ 43.

131. *See* RAJAMANI, *supra* note 27, at 170 (explaining the holding of the Nuclear Tests case in tandem with the Frontier Dispute case); Nuclear Tests, 1974 I.C.J. 253, ¶ 43.

132. Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. 554, ¶ 39 (Dec. 22).

133. *See* Victor Rodriguez Cedeño (Special Rapporteur), *First Report on Unilateral Acts of States*, ¶¶ 133–51, U.N. Doc. A/CN.4/486 (Mar. 5, 1998) (listing the criteria for determining the strictly unilateral nature of international legal acts of States); Eva Kassoti, *Interpretation of Unilateral Acts in International Law*, 69 NETH. INT'L L. REV. 295, 300, 302 (2022) (arguing that the use of clear and specific wording in conjunction with a set of contextual indicators are indicia of the intention to create a binding unilateral commitment).

134. *See* Kassoti, *supra* note 133, at 302 (stating that the Court in the Nuclear Tests case identified the element of unilateralism and the element of the intention of the author State to become bound as the essentials of the legal nature of unilateral acts).

examining the "content" and "context" of their statement.[135] The text and contents of a unilateral declaration serve as primary indicators of a country's true intention to be legally bound.[136] In the Nuclear Tests case, commitments with clear and precise texts were seen as genuine legal intentions, a view echoed in other cases like the Armed Activities case and a 2018 judgment regarding access to the Pacific Ocean.[137] Conversely, vague terms and the absence of a clear timeline often suggest that a commitment is more political than legally binding.[138] For instance, a statement by the Rwandan Minister lacked specific terms and a clear timeframe, rendering it too vague to be considered a binding unilateral commitment.[139]

Beyond content and text, a State's unilateral act can reveal its intention through the "context" and manner in which it is made.[140] Publicity of the act, for example, offers a strong indication.[141] In the Nuclear Tests case, the ICJ emphasized that the French statements made publicly were a factor in determining their binding nature.[142] The location or forum of the statement is also crucial, with declarations made during judicial proceedings often viewed as binding, as seen in historical cases like the Mavrommatis Palestine Concessions and

135. Nuclear Tests, 1974 I.C.J. 253, ¶ 51.

136. *See* Kassoti, *supra* note 133, at 302 (arguing that the text of the act is the primary consideration in determining its content, and that its context as well as the circumstances surrounding its making are also interpretative elements that need to be considered).

137. Nuclear Tests, 1974 I.C.J. 253, ¶¶ 43, 46, 51, 53; Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. Reports 6, 28-29; Obligation to Negotiate, 2018 I.C.J. 507, ¶ 146.

138. *See* Kassoti, *supra* note 133, at 311 (describing the importance of clear and specific wording for the purpose of inferring an intention to be bound).

139. Armed Activities on the Territory of the Congo (Dem Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶¶ 50–52.

140. *See* Kassoti, *supra* note 133, at 308-09 (detailing the ICJ's judgment in the Nuclear Tests case which reveals that the Court indicated that what one is seeking when ascertaining the legal nature of a unilateral act is the 'objective' or 'manifest' will of the author).

141. *See id.* at 311–12 (providing examples of circumstances in which a unilateral act was made which can be indicative of the author's manifest intent to become bound).

142. Nuclear Tests, 1974 I.C.J. 253, ¶ 43.

Certain German Interests in Polish Upper Silesia.[143] Furthermore, the authority behind the declaration matters, with statements from top figures, such as Heads of States, carrying significant weight.[144] In the Nuclear Tests case, emphasis was placed on the importance of statements from the French President.[145] In summary, the more public, formal, and high-ranking the source of a unilateral declaration, the more likely it reflects a State's genuine intention to abide by it.[146]

The second step involves understanding the author State's intent by examining its good faith and the reliance placed on the unilateral act by other States. In the Nuclear Tests case, the ICJ underscored the significance of "good faith" as a fundamental principle for creating and upholding legal obligations.[147] The Court highlighted the importance of trust and confidence in international relations.[148] Consequently, when a State makes a unilateral declaration, other States can trust it and expect the commitments in the declaration to be honored.[149] This stance supports the idea that intentions should be objectively understood based on how they are presented and perceived by others.[150] It is essential to note that unilateral acts are subject to a strict standard of interpretation. If there is ambiguity, it is assumed that the State did not fully intend to be bound by its statement.[151] This

143. *See* Kassoti, *supra* note 133, at 312 (providing that this indicator was already acknowledged as showing a manifest intent of its author to become bound in the Mavrommatis Palestine Concessions and Certain German Interests in Polish Upper Silesia cases through the PCIJ); The Mavrommatis Palestine Concessions (Greece v. U.K.), Judgment, 1924 P.C.I.J. (ser. A) No. 2, ¶ 6 (1924); German Interests in Polish Upper Silesia (Ger. v. Pol.), Judgment, 1926 P.C.I.J. (ser. A) No. 7, ¶ 4 (1926).

144. *See* Kassoti, *supra* note 133, at 315 (providing that the authority that formulated the unilateral act on behalf of the author State is also relevant in establishing whether the act expresses a manifest intention to become bound); Nuclear Tests, 1974 I.C.J. 253, ¶ 49.

145. Nuclear Tests, 1974 I.C.J. 253, ¶ 49.

146. *See* Kassoti, *supra* note 133, at 315–16 (detailing factors which indicate a manifest intention to become bound by an act).

147. Nuclear Tests, 1974 I.C.J. 253, ¶ 46.

148. *Id.*

149. *Id.*

150. *See* Kassoti, *supra* note 133, at 309–11 (explaining that the standard of interpretation to be applied to unilateral acts is a restrictive one).

151. *See id.* (providing that, in cases of doubt, there is a presumption that the

stringent interpretation aligns with a fundamental principle of international law: States should not be obligated without clear intent.[152]

The International Law Commission (ILC) conducted a comprehensive study on this topic, leading to the adoption of the Guiding Principles Applicable to Unilateral Declarations Capable of Creating Legal Obligations.[153] These principles outline the requirements for such declarations: they must be made publicly by a competent state agent, manifest the will to be bound, and be stated in clear and specific terms.[154] During the ILC discussions on developing Guiding Principle 1, which emphasizes that public declarations showing a clear intent to be bound can create legal obligations, the majority of members agreed that a State's intention played a vital role in conferring legal effects on unilateral declarations.[155] In a 2002 debate, Pellet, a significant supporter of the Commission's effort to codify unilateral acts, stressed the importance of States' choices in

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author State did not possess the requisite degree of intention to become bound).

152. S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, ¶ 44 (Sept. 7). In the S.S. Lotus case, the Permanent Court of International Justice (PCIJ) stated that: International law manages how independent countries interact. The rules they follow come from agreements they willingly enter into or from widely accepted customs. These rules help these countries work together and achieve shared goals. Any limits on a country's freedom have to be clearly stated; they can't just be assumed. (emphasis added).

153. *See* MAYER, INTERNATIONAL LAW OBLIGATIONS, *supra* note 6, at 65 (stating that in the ILC's analysis, a declaration capable of creating legal obligations must be made: (1) publicly, (2) by a competent state agent, and (3) it must manifest the will to be bound as evidenced by the content and context of the writing).

154. *Report of the International Law Commission, Fifty-eighth Session*, 61 U.N. GAOR Supp. No. 10, U.N. Doc. A/61/10, at 370, 372, 377 (2006), *reprinted in* [2006] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/2006/Add.1 [hereinafter ILC].

155. *See Summary Record of the 2772nd Meeting*, U.N. Doc. A/CN.4/SR.2772, *reprinted in* [2003] 1 Y.B. Int'l L. Comm'n 144–45, A/CN.4/SER.A/2003 (providing that unilateral acts did not describe a set of formal arrangements but rather the sociological reality of the State activity, which might occur unilaterally but could often be found in the context of interaction with other States) [hereinafter 2772nd Meeting]; Kassoti, *supra* note 133, at 301 (stating that the court in the Nuclear Tests case identified the element of unilateralism and the element of the intention of the author State to become bound as the essentials of the legal nature of unilateral acts).

international law, noting that when States make unilateral statements, they are bound because they choose to be, similar to how they follow treaties by their own decision to be bound and limit their actions.[156]

The ILC noted that declarations could be made orally or in writing and might be directed at various entities, including the international community as a whole, one or more States, or other entities.[157] In cases of doubt, obligations must be interpreted restrictively (Guiding Principle 7).[158] The ICJ in the Nuclear Tests case established a strict interpretation standard, emphasizing that not all unilateral acts imply a legal commitment.[159] This aligns with Guiding Principle 7, which underscores the need for strict interpretation to determine the presence of a country's obligation and provides guidance on understanding an act's "content" to ensure actual legal responsibilities.[160]

In summary, to determine the legal binding nature of a unilateral declaration, one must assess the clear intent of the author State.[161] This evaluation typically involves analyzing both the content of the act and the context in which it was presented.[162] A unilateral declaration is more likely to be considered binding if it employs clear and specific language, is made publicly, presented in formal settings, and originates from a high-ranking official.[163] To ascertain the "intention to be bound," also requires considering the principle of good faith, as well as the trust, confidence, and reliance placed by other states in the unilateral declaration.[164] Nevertheless, the overall approach to

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156. *See* 2772nd Meeting, *supra* note 155, ¶ 1 (detailing parts of Mr. Pellet's role in the meeting).

157. ILC, *supra* note 154, at 369, 376.

158. *Id.* at 377; MAYER, INTERNATIONAL LAW OBLIGATIONS, *supra* note 6, at 65.

159. *See* Kassoti, *supra* note 133, at 299–302 (providing further explanation on the meaning of Guiding Principle 7).

160. *Id.* at 310.

161. *See id.* (articulating a perspective that the intention of the author State is the determinant factor in attributing legal effects to unilateral acts).

162. *See id.* at 302 (stating that there is consensus in doctrine that unilateralism and the intention to be bound are the essential elements of the legal nature of unilateral acts).

163. *See id.* at 315–16 (focusing on the interpretation of unilateral acts from the standpoint of ascertaining their binding force).

164. *See id.* at 308 (pointing to references made by the ICJ in the Nuclear Tests judgment to good faith and to other States' reliance on a unilateral act).

interpreting unilateral declarations remains strict to ensure unequivocal certainty of intent.[165]

For NDCs to be legally binding unilateral declarations, they must meet the specific key elements mentioned above.[166] The NDC's content must be clear, precise, and unambiguous, using specific terms to outline commitments, responsibilities, and a definite timeframe for execution.[167] It must be publicly disclosed in an official manner, with contextual factors, such as the statement's location or forum, contributing to its legitimacy.[168] Issued by an authorized entity, such as a Head of State, the declaration should reflect good faith and inspire reliance among other states, fostering trust and confidence.[169] A strict interpretation mechanism is essential to ascertain genuine legal obligations within the declaration, preventing broad or misleading interpretations.[170] These elements collectively form the basis for a unilateral declaration's legal bindingness, promoting accountability and international cooperation.

NDCs are prepared by national executive bodies and are publicly communicated through the UNFCCC Secretariat's public registry.[171] Parties have consistently been encouraged to present their NDCs in a way that enhances clarity, transparency, and understanding of their

165. *See* Kassoti, *supra* note 133, at 315–16 (stating that the standard of interpretation to be applied in this context is a restrictive one).

166. *See id*. at 302–16 (providing that the two main essential elements of the legal nature of unilateral acts are unilateralism and the intention to be bound).

167. *See id.* (stating that according to the ICJ, one ascertains whether a given instrument of unilateral character does or does not express the objective intention to create binding obligations through its content and the context attending its making).

168. *See id.* at 312 (detailing that the forum in which the act was made, and more particularly the fact that a unilateral act is given in the context of judicial proceedings, is also an indicator of the manifest intention of its author to become bound thereby).

169. *See id.* at 309 (providing language from the Nuclear Tests holding which stresses that one of the basic principles governing the creation of legal obligations is the principle of good faith).

170. *See id.* at 309–10 (highlighting that the standard of interpretation to be applied to unilateral acts is a restrictive one).

171. *See* MAYER, INTERNATIONAL LAW OBLIGATIONS, *supra* note 6, at 66 (providing information on universal declarations and its relevance to climate change mitigation).

intended contributions, as stipulated in Article 4.8 of the PA.[172] Essentially, an NDC acts as a global declaration, communicating a commitment to the global good, with the hope that other nations will join in.[173] Drawing a parallel, the public communication of emission reduction goals by national governments, along with the consensus adoption of the PA's text, could signify the collective intent of Parties to be legally bound by their NDCs.[174] After using the international law framework discussed in this section, the following section will examine whether NDCs are legally binding unilateral declarations or predominantly political statements. Central to this analysis is the fundamental question: Do Parties genuinely intend to be bound by their submitted NDCs?

B. DO PARTIES INTEND TO BE BOUND BY THEIR SUBMITTED NDCS?

Unilateral actions, commitments, and contributions are vital in the climate change regime. According to Rajamani, in a few cases, they may indicate an intent to be bound.[175] Regarding NDCs, if we can identify a source of bindingness related to their content, it would complement the PA's NDC-related provisions.[176] Due to political constraints, the PA's NDC provisions can only establish procedural and conduct obligations related to Parties' NDCs.[177] If Parties'

172. *See* Mayer, *Obligations of Conduct*, *supra* note 29, at 130–40 (suggesting that obligations of conduct, as the basis for international cooperation on climate change mitigation, hold great promise if objectives are clearly defined and if compliance is effectively and transparently monitored).

173. *See* MAYER, INTERNATIONAL LAW OBLIGATIONS, *supra* note 6, at 66 (presenting a comprehensive doctrinal study of states' obligations on climate change mitigation, which arise not only from climate treaties but also from customary international law, unilateral declarations, and, possibly, human rights treaties).

174. *See* Mayer, *Obligations of Conduct*, *supra* note 29, at 130–40 (arguing that communications such as NDCs may constitute unilateral declarations that also create legal obligations).

175. RAJAMANI, *supra* note 27, at 173.

176. *Id.* at 170–71 (explaining that if an independent source of "bindingness" in relation to the content of NDCs submitted by parties can be found, it can complement a multilateral framework).

177. *Id.* (explaining that because of political constraints, the Paris Agreement's NDC provisions can only establish procedural obligations in relation to the NDCs of parties to the agreement).

submitted NDCs can be considered unilateral declarations with an intent to be bound, this could aid in legally enforcing emission reduction targets and commitments.[178] Analyzing the text, context, and circumstances of all 193 submitted NDCs is practically impossible to determine if they express a "will to be bound" and would have legal effects.[179] Therefore, this part will briefly examine select NDCs as illustrative examples to determine if they demonstrate an intent to be bound during their preparation and communication.

In the PA negotiations, both developed and developing nations clearly showed reluctance to adopt strict legal obligations for their NDCs.[180] The central and most challenging issue in the negotiations was defining the level to which NDCs should be legally binding.[181] This concern mirrored discussions from earlier UNFCCC negotiations.[182] Some, like the European Union (E.U.) and certain island nations, favored making NDCs legally binding to enhance commitment and credibility.[183] In contrast, the United States argued for an extensive transparency system as an alternative to strict bindingness, fearing it could discourage participation or reduce ambition.[184] Considering the divergent views of Parties and sensitivity,

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178. *See id.* at 170 (explaining that unilateral declaration can create legal obligations if they are made publicly in clear and specific terms and manifest a will to be bound).

179. *See id.* at 171 (explaining how difficult it would be to examine all of the NDCs to determine whether they manifest a will to be bound).

180. *See id.* at 115–17 (explaining how during negotiations, parties to the Paris Agreement worked to avoid creating legal obligations for themselves).

181. Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope?*, 110 AM. J. INT'L L. 288, 297 (2016) (explaining that one of the most contentious points during negotiations for the Paris Agreement was whether the NDCs would be legally binding upon the parties) [hereinafter Bodansky, *The Paris Climate Change Agreement*].

182. *Id.* (explaining how the Paris Agreement negotiations concerning whether to make NDCs legally binding mirrored similar discussions for the United Nations Framework Convention on Climate Change).

183. *Id.* (explaining how the European Union and small island states argued that NDCs should be legally binding, because that would indicate a higher level of commitment, give the NDCs more credibility, and be more likely to result in implementation).

184. *Id.* (explaining that in contrast to the European Union, the United States argued against making the NDCs legally binding, rather advocating for a system of transparency, because this would accomplish the same goals, while making them

the Warsaw Decision did not clearly define the legal standing of NDCs; they were referred to as "contributions" instead of "commitments."[185] This uncertainty continued until the final moments of the Paris climate negotiations, where a key debate centered on changing "should" to "shall" regarding developed countries' emission reduction targets (Article 4.4 of the PA).[186] In the final PA draft, changing "should" to "shall" turned a future NDC guideline into a strict legally binding obligation for developed countries to undertake emission reductions.[187] Although the circumstances behind this change remain uncertain, it was evident that retaining "shall" would risk United States participation.[188] After deliberation, the Secretariat clarified that "shall" was a "technical" mistake and would be corrected to "should" in the finalized text.[189] As a result, the PA's NDC-related provisions mainly consist of procedural obligations and require Parties to "pursue domestic mitigation measures with the aim of achieving the objectives of their contributions" instead of strictly set targets.[190] According to Bodansky, while the PA provides hope for global climate

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legally binding might discourage compliance).

185. U.N. Framework Convention on Climate Change, Report of the Conference of the Parties on its Nineteenth Session Held in Warsaw from 11 to 23 November 2013, ¶ 2(b), U.N. Doc. FCCC/CP/2013/10/Add.1 (Jan. 31, 2014); Bodansky, *The Paris Climate Change Agreement*, *supra* note 181, at 297 (explaining that the Warsaw Decision characterized NDCs as nationally determined "contributions" instead of "commitments").

186. Bodansky, *The Paris Climate Change Agreement*, *supra* note 181, at 294 (explaining how during the Paris Agreement negotiations, one main area of contention was whether to use "should" or "shall" with regard to recommendations about future NDCs); *see* RAJAMANI, *supra* note 27, at 123 (explaining how during the Paris Agreement negotiations, the debate about "shall" or "should" was the last major debate).

187. Bodansky, *The Paris Climate Change Agreement*, *supra* note 181, at 294 (explaining how in the Paris Agreement, changing "should" to "shall" in a provision converted the form of future NDCs into a legal requirement).

188. *Id.* (explaining how the United States advocated for replacing "shall" with "should" to make it a recommendation and not an obligation, and that the change from "should" to "shall" inspired opposition to the agreement from the United States).

189. *Id.* (explaining that in the final Paris Agreement, the parties agreed to use "should").

190. *Id.* at 297 (explaining how, regarding NDCs, the Paris Agreement requires parties to pursue domestic mitigation measures to achieve their commitments).

policy's future, its accommodation of prevailing political dynamics makes the Agreement's historical significance somewhat debatable.[191]

Since 2015, a consistent issue with submitted NDCs has been their lack of "clarity, transparency, and understanding," often accompanied by various caveats and conditions.[192] In the lead-up to the adoption of the 2018 Rulebook, efforts were made to address these concerns by requiring Parties to provide specific information related to their NDCs for clarity and transparency.[193] However, both developed and developing countries opposed this approach because NDCs are self-determined, and Parties dictate informational requirements based on their chosen NDCs.[194] While there was an attempt to narrow down "conditions" linked to NDCs by discussing their "features," this was unsuccessful.[195] Countries argued that specifying features would contradict the self-determined nature of mitigation contributions, undermine a State's discretionary power and flexibility, and go against the principle of "common but differentiated responsibilities and respective capabilities in light of different national circumstances" as secured under Article 4.3 of the PA, applicable to both developed and developing countries.[196] Furthermore, flexibility and discretion were crucial for the broad participation that led to the PA.[197] Consequently, by the end of the 2018 Rulebook negotiations, the decision against listing "features" of NDCs prevailed, with the 2018 Rulebook noting that these features are "outlined in the relevant provisions of the

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191. *See generally id.* at 319 (explaining how the Paris Agreement was as much as could have been expected given the politics involved).

192. RAJAMANI, *supra* note 27, at 171 (explaining how with the Paris Agreement NDCs, many are unclear, opaque, and confusing, and feature caveats and conditions).

193. *Id.* (explaining how the Paris Agreement Rulebook required parties to the agreement to provide more clarity regarding their NDCs).

194. *Id.* (explaining how since NDCs are self-selected, parties to the Paris Agreement could choose which further information to provide about their NDCs).

195. *Id.* (explaining how parties to the Paris Agreement unsuccessfully tried to limit the scope of conditions placed upon their NDCs by discussing their "features").

196. *See id.* at 121, 249 (explaining that parties to the Paris Agreement argued that prescribing features for NDCs would be inconsistent with parties' authority to self-determine the NDCs, but that the agreement instead included common responsibilities for parties).

197. *Id.* at 249 (explaining how flexibility for parties was crucial to creating the Paris Agreement, which may not have been possible without this flexibility).

PA."[198]

Thus, under the current regime, NDCs still have numerous attached caveats and conditions.[199] These, along with the multilateral negotiating context where many Parties resisted and limited legally binding contributions, often suggest an "intent not to be bound."[200] Parties refer to NDCs as outcome goals they aim to pursue or achieve.[201] Among the 193 NDCs, there is considerable diversity in terms of targets, including absolute economy-wide GHGs mitigation targets, targets reflecting deviations from "business as usual" emissions, sectoral targets, emissions intensity targets, and policies and actions.[202] Parties have significant flexibility and discretion in defining, determining, and conditioning their NDCs.[203] Some have clear set targets, while others aim to reach their goals.[204] Many NDCs depend on conditions like market methods or international support.[205]

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198. U.N. Framework Convention on Climate Change, Further Guidance in Relation to the Mitigation Section of Decision 1/CP.21, Decision 4/CMA.1, U.N. Doc. FCCC/PA/CMA/2018/3/Add.1, ¶ 19 (2018); RAJAMANI, *supra* note 27, at 121 (explaining how the Paris Rulebook noted that features of the NDCs were outlined in the Paris Agreement as opposed to there being a broad discussion about those features).

199. RAJAMANI, *supra* note 27, at 171 (explaining that NDCs have numerous caveats and conditions).

200. *Id.* (explaining that because of the caveats and conditions that Paris Agreement parties have placed upon their NDCs, they have, in fact, demonstrated an intent not to be bound by their commitments).

201. U.N. Framework Convention on Climate Change, Rep. of the Conf. of the Parties on its Twenty-First Session, Decision 1/CP.21, U.N. Doc. FCCC/CP/2015/10/Add.1, ¶ 27 (Jan. 26, 2016) (adopting the Paris Agreement); *cf.* International Law Obligations Arising in Relation to Nationally Determined Contributions, at 252 (explaining that the Paris Agreement creates treaty obligations, specifically the obligation to pursue mitigation objectives that NDCs define).

202. RAJAMANI, *supra* note 27, at 247 (explaining the broad range of targets that exists among the various NDCs).

203. *Cf. id.* (examining the vast range of targets and specifications among the various NDCs).

204. *Cf.* International Law Obligations Arising in Relation to Nationally Determined Contributions, *supra* note 201, at 268 (explaining that while some NDCs specifically identify mitigation targets in clear and specific terms, as a way of showing good faith in their efforts).

205. RAJAMANI, *supra* note 27, at 247 (explaining that most conditions on NDCs are for the use of market mechanisms or support from abroad).

Some have both conditional and unconditional components.[206] Apart from NDC wording and content, the context of communication and reactions it elicits should be considered.[207] Relevant circumstances also play a role in determining if an NDC can create legal obligations.[208] We will analyze the text of specific countries' NDCs, considering their wording, content, context, and circumstances to determine if Parties genuinely intend to create legally binding obligations through these unilateral declarations.

The U.S. federal government submitted a stronger NDC target on April 22, 2021, in line with its rejoining efforts.[209] This NDC is an improvement from the 2016 submission.[210] According to the submitted NDC, "the United States is setting an economy-wide target of reducing its net greenhouse gas emissions by 50-52 percent below 2005 levels in 2030."[211] The terms "setting" and "target" suggest that this is an expected goal, indicating that the United States is not firmly committed or obligated to it. The NDC covers all GHGs but relies on international offset credits and reserves the right to use them, preserving flexibility.[212] The use of "as appropriate" in the

206. *Id.* (explaining that many NDCs contain both conditional and unconditional components).

207. International Law Obligations Arising in Relation to Nationally Determined Contributions, *supra* note 201, at 265.

208. *Id.* (explaining that, when considering whether an NDC manifests the will of the party to be bound, one must take the content of each declaration into account to determine whether it creates legal obligations).

209. U.N. Secretariat, The United States of America Nationally Determined Contribution 1 (Apr. 22, 2021), https://unfccc.int/sites/default/files/NDC/2022-06/United%20States%20NDC%20April%2021%202021%20Final.pdf (demonstrating the United States' higher NDC target) [hereinafter Nationally Determined Contribution].

210. U.S. DEP'T OF STATE EXEC. OFF. OF THE PRESIDENT, THE LONG-TERM STRATEGY OF THE UNITED STATES: PATHWAYS TO NET-ZERO GREENHOUSE GAS EMISSIONS BY 2050 12 (Nov. 2021), https://www.whitehouse.gov/wp-content/uploads/2021/10/us-long-term-strategy.pdf (explaining how the 2021 NDC target is higher than the one from 2016).

211. Nationally Determined Contribution, *supra* note 209, at 1 (setting out the United States' goal of reducing greenhouse gas emissions by around 50% below 2005 levels by 2030).

212. *See* THE LONG-TERM STRATEGY OF THE UNITED STATES, *supra* note 210 at 5, 35, 36, 37, 46 (explaining that the United States' NDC covers all greenhouse gases, although recognizing how difficult it is to remove them all and allowing their

implementation planning process implies a lack of firm commitment to a specific strategy.[213] The NDC aims for net-zero emissions without specific reduction and removal goals, and there is no established, non-legally binding review process.[214] The U.S. NDC includes negotiation history which indicates reluctance to commit to a specific legally binding result.[215]

China submitted its updated NDC to the UNFCCC on October 28, 2021.[216] This NDC states that "China will strive to reach a CO_2 emissions peak before 2030 and achieve carbon neutrality before 2060."[217] The use of "strive" suggests that China is making an effort but does not commit to a binding obligation. While the 2021 NDC is stronger than the first one, it falls short of the 1.5°C global goal, lacks economy-wide coverage or fixed targets, and primarily focuses on CO_2 emissions and does not include major emissions from areas like energy, farming, waste, and industry.[218] Their other targets only address the energy sector.[219] There are no NDC implementation planning process. China's NDC lacks clarity on the need for international support or international elements.[220] It is vague in many aspects, indicating a lack of strong commitment and intention to be bound by these goals. Additionally, the NDC negotiation history leading up to the PA and 2018 Rulebook shows that China has no

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use if offset by carbon dioxide removal).

213. *Cf.* Nationally Determined Contribution, *supra* note 209, at 9 (demonstrating how in the United States' NDC, the planning process that the United States says it would implement would be done "as appropriate.").

214. *Cf. id.* at 14 (demonstrating that the United States set out its NDC to help achieve net zero emissions, with the target created after the White House Office of Domestic Climate Policy performed a sector-by-sector analysis of the potential to reduce emissions).

215. RAJAMANI, *supra* note 27, at 172 (explaining that the United States' NDC indicates an intent not to be bound, based on negotiating history and the text of the NDC).

216. *China*, CLIMATE ACTION TRACKER (last updated Nov. 22, 2023), https://climateactiontracker.org/countries/china/targets.

217. *Id.* (demonstrating China's current NDC target emissions levels).

218. *Cf. id.* (demonstrating that China's emissions target in its NDC is rated as "poor").

219. *Cf. id.* (explaining that China could meet its energy-related NDC targets without significant policy implementation).

220. *Id.* (explaining that China will "strive" to meet its target goals).

intention of committing to specific legally binding obligations under its NDC-related pledges and commitments.

In August 2022, India updated its initial NDC from 2015, manifesting a will not to be bound.[221] It has both conditional and unconditional targets.[222] The unconditional target is "to reduce emissions intensity of its GDP by 45% by 2030 from 2005 levels," while the conditional target aims for "50% cumulative electric power installed capacity from non-fossil fuel-based energy resources by 2030."[223] These goals imply desired outcomes rather than firm commitments, suggesting India's aspiration to achieve them but without fully committing to achieve them. Their pursuit is subject to India's development priorities, particularly poverty eradication, and relies on clean technologies and global financial resources.[224] While India's NDC covers the entire economy, it lacks specific sectoral targets.[225] These climate targets and policies are considered insufficient for the 1.5°C global goals.[226] The "context and

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221. RAJAMANI, *supra* note 27, at 172 (explaining that India's NDC manifests an intent not to be bound, especially given the caveats it included).

222. Conditional targets in NDCs are emissions reduction goals that countries commit to achieving, but they are contingent on specific conditions or requirements being met, such as financial support or technology transfer. Unconditional targets, on the other hand, are firm and legally binding emissions reduction commitments that countries make without any conditions.

223. Gov't of India, India's Updated First Nationally Determined Contribution Under Paris Agreement 2 (Aug. 2022), https://unfccc.int/sites/default/files/NDC/2022-08/India%20Updated%20First%20Nationally%20Determined%20Contrib.pdf (demonstrating India's NDC target emissions levels) [hereinafter India's Updated First Nationally Determined Contribution Under Paris Agreement].

224. India's Intended Nationally Determined Contribution: Working Towards Climate Justice 29 (2015), https://archive.nyu.edu/bitstream/2451/40702/2/indias%20intended%20nationally%20determined%20contribution.pdf (explaining that India tied its NDC goals to its development agenda, specifically the eradication of poverty, while working to achieve its goals through technology and international support).

225. *See generally* India's Updated First Nationally Determined Contribution Under Paris Agreement, *supra* note 223, at 2–3 (laying out India's goals under its NDC).

226. *Cf. India*, CLIMATE ACTION TRACKER (last updated Dec. 4, 2023), https://climateactiontracker.org/countries/india/targets (explaining that India's emissions targets under its NDC will likely not significantly lower global emissions).

circumstances" reflect India's consistent reluctance to negotiate legally binding instruments and obligations within the climate change regime.[227] Additionally, India's Declaration upon PA ratification underscores its commitment to the PA contingent upon access to cleaner energy sources, technologies, and global financial resources.[228]

However, the European Union's NDC, which is grounded in binding E.U. law, stands as an exception.[229] In December 2020, the E.U. submitted an updated NDC stating "the E.U. and its Member States wish to communicate the following NDC. The E.U. and its Member States, acting jointly, are committed to a binding target of a net domestic reduction of at least 55% in greenhouse gas emissions by 2030 compared to 1990."[230] The E.U. NDC uses terms like "committed" to convey binding commitment, but its binding nature arises from the underlying E.U. law (Regulation (E.U.) 2018/842) rather than solely from the declaration itself.[231] Considering the "context and circumstances," it is important to highlight that throughout the PA negotiations, the E.U. and its Member States consistently advocated for legally binding emission reduction obligations.[232] This historical context provides further insight into their

227. RAJAMANI, *supra* note 27, at 172 (explaining that India's NDC reflects its reluctance to negotiate legally binding instruments and obligations within the climate change sphere).

228. *Id.* at 172–73 (explaining that India's commitment to implementing its Paris Agreement commitments is contingent on access to cleaner energy sources and technology from other countries).

229. *See id.* at 173 (explaining that the European Union's NDC, which is based on EU law, is an exception to the trend of NDCs that do not create binding targets).

230. Ger. & Eur. Comm'n, Update of the NDC of the European Union and its Member States 6, ¶ 27 (Dec. 17, 2020), https://unfccc.int/sites/default/files/NDC/2022-06/EU_NDC_Submission_December%202020.pdf (demonstrating the European Union's own NDC target emissions goal).

231. RAJAMANI, *supra* note 27, at 173 (explaining that the although the European Union uses the word "committed" in its NDC to demonstrate its intent to be bound, it is actually EU law that binds the EU in its NDC goals); Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on Binding Annual Greenhouse Gas Emission Reductions by Member States from 2021 to 2030 Contributing to Climate Action to Meet Commitments under the Paris Agreement and Amending Regulation (EU) No 525/2013, 2018 O.J. (L 156), art. 1.

232. *See Timeline—Paris Agreement on Climate Change*, EUR. COUNCIL OF THE

commitment, since whether an obligation is legally binding depends on the party's intent.[233] Therefore, it is possible that the E.U. is legally bound by its commitment even if other parties are not bound by theirs.

Apart from the E.U., Least Developed and small island countries also advocated for legally binding mitigation obligations.[234] From Least Developed Countries, analyzing Bangladesh's NDC reveals a lack of intention to be legally bound.[235] Both its unconditional and conditional targets are based on hypothetical or projected scenarios, employing policy-oriented language rather than concrete terms.[236] In policy language, these targets suggest potential outcomes under specific conditions or assumptions, not clear-cut obligations. This means Bangladesh outlines potential reductions without making concrete promises and maintains flexibility based on numerous

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EUR. UNION, https://www.consilium.europa.eu/en/policies/climate-change/paris-agreement/timeline-paris-agreement (demonstrating that in 2014, the European Union was advocating for a binding target emissions goal for itself).

233. *2010 Treaty Event, Towards Universal Participation and Implementation: Fact Sheet #5*, UNITED NATIONS (2010), https://treaties.un.org/doc/source/events/2010/Press_kit/fact_sheet_5_english.pdf (explaining that in order to become a party to a treaty, a country must express a consent to be bound by the treaty).

234. Daniel Bodansky, *Paris Agreement* 3, U.N. AUDIOVISUAL LIBR. INT'L L., (2021), https://legal.un.org/avl/pdf/ha/pa/pa_e.pdf [hereinafter Bodansky, *Paris Agreement*] (explaining how the impetus for the Paris Agreement negotiations came from the European Union and small island states).

235. *Cf.* Bangl. Ministry Env., Forest and Climate Change, Nationally Determined Contributions (NDCs) 2021, Bangladesh (Updated) 22 (Aug. 26, 2021) [hereinafter Bangladesh NDC], https://unfccc.int/sites/default/files/NDC/2022-06/NDC_submission_20210826revised.pdf (demonstrating that Bangladesh made both conditional and unconditional contributions in its NDC).

236. In the unconditional scenario, GHGs emissions would be reduced by 27.56 Mt CO2e (6.73%) below Business as usual (BAU) in 2030 in the respective sectors. 26.3 Mt CO2e (95.4%) of this emission reduction will be from the Energy sector while 0.64 (2.3%) and 0.6 (2.2%) Mt CO2e reduction will be from AFOLU (agriculture) and waste sector respectively. There will be no reduction in the IPPU sector; In the conditional scenario, GHGs emissions would be reduced by 61.9 Mt CO2e (15.12%) below business as usual (BAU) in 2030 in the respective sectors. This reduction is in addition to the proposed reductions in unconditional scenario. The conditional mitigation measures will be implemented by Bangladesh, only if there is external financial/technology support. The conditional scenario has 59.7Mt CO2e (96.46%) emission reduction from the Energy sector, while 0.4 (0.65%) and 1.84 (2.97%) Mt CO2e reduction will be from AFOLU (agriculture) and Waste Sector respectively. There will be no reduction in the IPPU Sector.

factors. In this context, it can be inferred that Bangladesh does not commit to fixed obligations for its targets.

When examining Tuvalu's NDC, a small island country, the situation appears mixed. Tuvalu commits to a clear and unequivocal pledge to reduce GHGs emissions from the electricity sector by 100%, aiming for almost zero emissions by 2030.[237] However, when addressing the entire energy sector, Tuvalu takes a less definitive stance. Their NDC mentions an "indicative quantified economy-wide target to reduce total GHGs emissions from the entire energy sector to 60% below 2010 levels by 2030."[238] The term "indicative" suggests that this goal is a current plan, not a firm commitment, allowing for potential revisions based on evolving circumstances. While Tuvalu is committed to the electricity sector, its pledge to the broader energy sector remains flexible.[239] It is important to note that under Article 4.6 of the PA, least developed and small island countries have flexibility in preparing their NDCs, considering their unique situations.[240]

Many countries, including Bangladesh, Nigeria, the Philippines, Ethiopia, Vietnam, Indonesia, and Mexico, set emission reduction targets that are largely conditional on international support compared to their domestic pathways.[241] The question arises: if they receive adequate support, will they be legally bound to implement these targets? The answer is likely negative. For example, Bangladesh's conditional emission reduction targets state that:

> In the conditional scenario, GHGs emissions would be reduced by 61.9 Mt CO_2e (15.12%) below BAU in 2030 in respective sectors. These reductions

237. Gov't of Tuvalu, Updated Nationally Determined Contribution (NDC) 6 (Nov. 16, 2022), https://unfccc.int/sites/default/files/NDC/2023-02/Tuvalus%20Updated%20NDC%20for%20UNFCCC%20Submission.pdf (demonstrating Tuvalu's NDC target emissions levels).

238. *Id.*

239. *Id.* at 12 (demonstrating that Tuvalu's NDC does not provide specific targets for its energy sector).

240. Bodansky, *Paris Agreement*, *supra* note 234, at 1 (explaining that the Paris Agreement gives developing countries more flexibility in creating their NDCs).

241. W.P. Pauw et al., *Conditional Nationally Determined Contributions in the Paris Agreement: Foothold for Equity or Achilles Heel?* 20 CLIMATE POL'Y 468, 469, 479 (2020) (explaining that many countries' contributions through their NDCs are conditional on receiving international support, whether finance, technology, or capacity building).

> are in addition to the proposed reductions in the unconditional scenario. Bangladesh will implement the conditional mitigation measures only with external financial/technology support. The conditional scenario includes a 59.7 Mt CO_2e (96.46%) reduction in the Energy sector, 0.4 Mt CO_2 e (0.65%) reduction in the AFOLU (agriculture) sector, and 1.84 Mt CO_2 e (2.97%) reduction in the Waste sector. There will be no reduction in the IPPU Sector.[242]

Examining this paragraph reveals that a nation may not be legally bound to implement its conditional targets even after receiving stipulated support. The term "conditional" implies that the commitment depends on specific criteria, such as external financial or technological aid, but it does not automatically imply a legal obligation. Additionally, the NDCs mention the need for "external financial/technology support," but the absence of clear stipulations regarding the nature or amount of this support creates ambiguity. Without explicit details, it is difficult to bind Bangladesh legally, as the received aid could be argued as inadequate or not aligning with their expectations. The declaration that "the conditional mitigation measures will be implemented by Bangladesh, only if there is external financial/technology support" indicates intent but lacks the robustness of a firm legal commitment.[243] The NDC lacks specifics about how received support will be used, further challenging the establishment of a legal obligation. The distinction between "unconditional" and "conditional" targets implies that while Bangladesh would consider the implementation of unconditional targets, the conditional ones might be more flexible, even if external support is received. In summary, Bangladesh's intent to pursue its conditional targets with aid does not strongly suggest a legal obligation, especially when considering the ICJ's "strict interpretation standard" in the Nuclear Tests case, along with emphasizes for clear, precise, and unambiguous language in determining the legal bindingness of unilateral declarations.

C. KEY FINDINGS

The analysis of NDCs from six countries reveals a lack of precision

242. Bangladesh NDC, *supra* note 235, at 6.
243. *Id.*

and clarity, making it challenging to consider them legally binding obligations. While these NDCs have been officially communicated through the UNFCCC Secretariat's public registry and officially published by the respective national governments, it is unlikely that they hold legally enforceable status.[244] The authority responsible for these declarations primarily resides in the executive branches of these national governments.[245] However, it is worth noting that the internal separation of powers within a State can play a role in determining the binding nature of these declarations in international law.[246] For instance, countries like the U.S. and Bangladesh necessitate approval from their Congress or Parliament, a process known to be fraught with complexities and challenges, which may further complicate their status as legally binding international commitments.[247]

Furthermore, formulation of NDCs—including text, context, negotiation history, and surrounding circumstances—does not inspire strong confidence in their legal bindingness. These commitments appear more as expressions of political will rather than concrete legal obligations, failing to meet the stringent interpretation criteria set by the ICJ and the ILC for legally binding Unilateral Declarations. Therefore, it can be argued that NDCs presented by Parties reflect political aspirations and intentions rather than definitive unilateral legal commitments. While the principle of good faith ideally requires honoring these pledges, the ambiguity and lack of precision, context, negotiation history, and surrounding circumstances make them signal of political will with good faith to deliver, rather than clear intentions with legally binding obligations.[248] While NDCs are pivotal in setting national directions, the international community must uphold their political commitments and collaborative spirit to advance the global climate mitigation agenda. Therefore, the next section of the paper will explore judicial decisions regarding NDC implementation and interpretation.

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244. Bodansky, *Paris Agreement*, *supra* note 234, at 1.

245. 2010 Treaty Event Towards Universal Participation and Implementation, *supra* note 233.

246. *Nationally Determined Contributions*, *supra* note 201, at 269–70.

247. *See generally id.* (referencing the issues that can arise between national law and approval by legislative branches and international commitments and treaties).

248. *Id.* at 266.

IV. NDCS AND ITS IMPLEMENTATION: ANALYZING JUDICIAL DECISIONS

Courts and tribunals have traditionally played a limited role in shaping and enforcing international environmental laws, with disputes primarily resolved through political bodies, such as inter-governmental negotiations for establishing norms, and legislative bodies and executive branches for application.[249] However, there is a noticeable shift in recent times, especially in the context of climate change law, where courts are becoming more active.[250] The PA has witnessed a rise in climate-related cases at both domestic and international levels since 2017.[251] These cases cover various aspects, including human rights, enforcement of climate-related laws, fossil fuel extraction, climate transparency, corporate liability, and adaptation to climate change impacts.[252]

International courts and tribunals are also increasingly sought for guidance on climate change matters, with requests for advisory opinions from institutions like the ICJ, UNCLOS, and the Inter-American Court of Human Rights.[253] This trend is influenced by the PA's flexibility, allowing States Parties more leeway in implementation and making judicial governance more important, particularly at the domestic level, where States face various pressures and expectations.[254]

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249. BODANSKY ET AL., *supra* note 40, at 283–84.

250. *Id.* at 284.

251. *Id.*; U.N. ENV'T PROGRAMME, GLOBAL CLIMATE LITIGATION REPORT: 2023 STATUS REVIEW (2023), http://www.unep.org/resources/report/global-climate-litigation-report-2023-status-review; Press Release, U.N. Environment Programme, Climate Change Litigation More Than Doubles in Five Years, Now a Key Tool in Delivering Climate Justice (July 27, 2023) [hereinafter U.N.E.P. Press Release].

252. U.N.E.P. Press Release, *supra* note 251.

253. Benoit Mayer & Harro van Asselt, *The Rise of International Climate Litigation*, 32 REV. EUR., COMPAR. & INT'L ENV'T L. 175, 176 (2023); Daniel Bodansky, *Advisory Opinions on Climate Change: Some Preliminary Questions*, 32 REV. EUR., COMPAR. & INT'L ENV'T L. 185, 186 (2023) [hereinafter Bodansky, *Advisory Opinions on Climate Change*].

254. Sandrine Maljean-Dubois, *Climate Litigation: The Impact of the Paris Agreement in National Courts*, TAIWAN L. REV. 211, 213 (2022).

Previous sections of this paper have explored whether submitted NDCs reflect a Party's genuine intention to be bound. This section builds on this foundation by examining select judicial decisions to understand how NDCs are interpreted by courts. This includes exploring domestic and international court rulings related to NDC.[255] This examination is crucial for determining the potential legal status and enforceability of NDCs in the context of energy transitions, which can affect their implementation through international or domestic legal proceedings.[256] The section is divided into two parts: the first evaluates domestic court decisions, while the second analyzes the rise of international climate litigation and its impact on NDC implementation. By navigating these dimensions, this section is aiming to contribute to a deeper understanding of courts' interpretations of submitted NDCs and their implementations to achieve PA's temperature goals.

A. DOMESTIC JUDICIAL INTERPRETATIONS

Judicial decisions are evaluated based on how domestic courts interpret submitted NDCs under the PA and the implementation directions they provide for NDCs, their targets, to meet PA temperature goals.

In the context of emission reduction, litigation in domestic courts can be categorized as actions against: government;[257] decision-makers;[258] the private sectors;[259] or for breaching international law obligations, i.e. the PA.[260] As of now, the most significant case

255. *Gloucester Resources Ltd. v Minister for Planning*, [2019] NSWLEC 7 (Austl.); BVerfG, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20, Mar. 24, 2021, http://www.bverfg.de/e/rs20210324_1bvr265618en.html (hereinafter *Neubauer*); *State of the Netherlands v. Urgenda Foundation*, ECLI:NL:HR:2019:2007, Judgment (Sup. Ct. Neth. Dec. 20, 2019) (Neth).

256. *Urgenda Foundation*, ECLI: NL:HR:2019:2007; *Gloucester Resources Ltd*, NSWLEC 7; 234 LEGRA 257.

257. Often termed strategic litigation, aiming to instigate broader shifts in public climate policy concerning emission reduction targets and PA.

258. Involve challenging decisions to grant licenses, permits, and planning permissions.

259. Claims made against fossil fuel companies for their contributions to GHGs emission.

260. Kleoniki Pouikli, *Editorial: A Short History of the Climate Change*

concerning climate mitigation is the *State of the Netherlands vs Urgenda Foundation* case (hereinafter referred as Urgenda case), an action against Dutch government.[261] In December 2019, the Hague Court of Appeal ruled that the Dutch government must reduce greenhouse gas emissions from Dutch soil by at least 25% compared to 1990 levels by the end of 2020.[262] This decision was based on customary norms (the Dutch duty of care or no harm rule), international human rights treaty rules, and UNFCCC principles, finding the Dutch government responsible for breaching Articles 2 and 8 of the European Convention on Human Rights (ECHR).[263]

In June 2015,[264] the Urgenda Foundation challenged the Dutch Climate Act in the Hague District Court, which aimed for a maximum reduction of 17% in GHGs emissions by 2020.[265] Urgenda argued that this target was insufficient and that the State had a duty to protect against imminent climate change dangers.[266] The Hague District Court ruled in favor of Urgenda, ordering the State to achieve a minimum 25% reduction in Dutch emissions by 2020 compared to 1990 levels.[267] The Hague Court of Appeal upheld this decision in 2019.[268]

The decision did not mention the Netherlands' NDC or its adequacy.[269] It also did not attempt to interpret NDC-related obligations under the PA. However, it focused on interpreting the temperature goals of PA, particularly under Article 2.1, and referenced Articles 4.16 and 4.17 of the Agreement.[270] The Court rooted the Netherlands' responsibility in the European Convention on Human

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Litigation Boom Across Europe, 22 ERA FORUM 569 (2021).

261. *Urgenda Foundation*, ECLI: NL:HR:2019:2007.

262. *Id.*

263. Maljean-Dubois, *supra* note 254, at 215; Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) art. 2, 8, April 4, 1950, 213 U.N.T.S. 232; *Urgenda Foundation*, ECLI: NL:HR:2019:2007.

264. Just before the adoption of the Paris Agreement.

265. *See Urgenda Foundation*, ECLI: NL:HR:2019:2007 at 2.2.2.

266. *Id.* at 5.

267. *Id.*

268. *Id.* at 5.2.

269. Netherlands submitted its first NDC in July 2017.

270. *See Urgenda Foundation*, ECLI: NL:HR:2019:2007 at 5.2 (arguing article 4.16 and 4.17 of the PA apply to regional economic integration organizations (REIO)).

Rights (ECHR) while acknowledging its role as a party to the UNFCCC and the PA.[271] The Court highlighted that both UNFCCC and PA emphasize the individual responsibility of States to limit global warming and strengthen national climate plans progressively.[272] The Court did not contest the urgent need for measures to reduce GHGs emissions, but contested the extent of its obligations under Articles 2 and 8 of the ECHR. [273] The Court of Appeal ruled that the State must achieve a 25% reduction in GHGs emissions compared to 1990 levels by the end of 2020.[274] It also acknowledged the State's commitment to further actions to reach the desired 95% reduction by 2050.[275] In the decision no implementation directions are outlined for submitted NDCs and its targets. The Court of Appeal directed the State to adhere to the lower limit (25%) of the internationally endorsed 25-40% reduction range for 2020 temperature goals.[276] The specifics of compliance measures, including any necessary legislative actions, were left to the State's discretion.[277]

The Court of Appeal addressed the State's argument that it should not make political decisions regarding GHGs emissions reduction.[278] It clarified that in the Dutch system, the government and parliament are responsible for such decisions, granting them significant discretion in political judgments.[279] The Court's role is to ensure that while exercising this discretion, they stay within legal boundaries.[280] In the Urgenda case, the Court ruled on the adequacy of national emission reduction targets and provided directions to achieve the PA's temperature goals.[281] However, specific interpretations of NDC-related obligations under the PA and implementation directions for

271. *Id.* at 5.6.1–5.8.
272. *Id.* at 7.3.2.
273. *Id.* at 5.3.1–5.3.2.
274. *Id.* at 8.1.
275. *Urgenda Foundation*, ECLI: NL:HR:2019:2007 at 7.2.1.
276. *Id.* at 7.1.
277. *Id.* at 8.2.7.
278. *Id.* at 8.2.4.
279. *Id.* at 8.3.2.
280. *See* Benoit Mayer, *The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of The Hague*, 8 TRANSNAT'L ENV'T L. 167, 187 (2019) (discussing the Court's consideration of the emissions target).
281. *Id.* at 168.

NDCs were not included. The Court based its interpretation of emission reduction obligations on international customary norms, human rights treaties, UNFCCC, and the PA's temperature goals, emphasizing individual state accountability for limiting global warming and improving national climate policies.[282]

In contrast, in the *Greenpeace Netherlands v. State of the Netherlands* case, the Hague District Court rejected Greenpeace's claim that the Dutch government was obligated to impose strict climate conditions on the airline bailout under the UNFCCC and PA.[283] The Court stated that these agreements did not require reducing international aviation emissions and that the Dutch State's responsibility was limited to in-country emissions.[284] It also found that Greenpeace's proposed emission cap exceeded globally agreed aviation climate targets.[285]

Similar to the Urgenda case, but a more explicit ruling on integrating the PA and NDCs into domestic policy is seen in the *Gloucester Resources Limited v. Minister for Planning* case (hereinafter referred as Gloucester case), stemming from a merits review appeal in New South Wales (NSW), Australia, involving decision-makers' actions.[286] Gloucester Resources Limited (GRL) sought approval for an open-cut coal mine near Gloucester, facing opposition from residents due to concerns about various impacts, including climate change.[287] GRL appealed the initial denial of consent to the NSW Land and Environment Court, questioning whether the government could reject the coal mine application based on climate change and other considerations.[288] The Court, after

282. *Urgenda Foundation*, ECLI: NL:HR:2019:2007 at 5.7.

283. *See Stichtung Greenpeace Nederland v. State of the Netherlands*, (2020) case no. C/09/600364 / KG ZA 20-933, ¶ 5.

284. Pouikli, *supra* note 260, at 576.

285. *Id.* The author was unable to analyze the original texts of the judicial decisions as they were in Dutch. Instead, the author analyzed the decisions by relying on other literature.

286. *Gloucester Resources Ltd*, NSWLEC 7; 234 LEGRA 257; Brian J Preston, *The Influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms (Part I)*, 33 J. ENV'T L. 227, 235 (2021).

287. *Gloucester Resources Ltd*, NSWLEC 7; 234 LEGRA 257 ¶¶ 3–4, 6.

288. Preston, *supra* note 286, at 245; *Gloucester Resources Ltd*, NSWLEC 7; 234 LEGRA 257 ¶ 307.

assessing the project's pros and cons, upheld the government's rejection.[289] The ruling concluded that the project was not a "sustainable use" due to the cumulative climate change effects and substantial environmental and social costs associated with the coal mine in that area.[290]

While this domestic court decision did not provide implementation directions for NDCs, it did attempt to interpret NDC-related provisions under PA, including temperature goals, the entire agreement, and Australia's submitted NDC targets and net-zero timeframe.[291] The interpretation of NDC-related obligations under the PA starts with Australia's commitment to reducing GHGs emissions through its NDC, aiming for a 26-28% reduction below 2005 levels by 2030.[292] Additionally, the NSW Government also endorses the PA and strives for net-zero emissions by 2050.[293] The Court emphasizes the global goal of achieving net-zero emissions by the latter part of the century, as outlined in Article 4.1 of the PA, applying to developed nations like Australia who must update their NDCs with utmost ambition while considering their capacities.[294] This interpretation aligns with the PA's flexible approach, avoiding specifying means to achieve NDC goals and extending flexibility to state laws without restricting new coal mine approvals.[295] The Court's assessment also adopts the carbon budget approach to assess cumulative NDCs' adequacy for the long-term temperature goal, which supports the denial of the coal project in line with the carbon budget principles.[296] Comparing this with the Urgenda case, the Hague Court of Appeal rejected the Netherlands' market substitution argument in the European context.[297] It stressed individual States' responsibility, including the Netherlands, to reduce CO_2 emissions.[298]

289. *Gloucester Resources Ltd*, ¶ 8.
290. *Id.* ¶ 696.
291. *Id.* ¶¶ 440, 452.
292. *Id.*
293. *Id.* ¶ 452.
294. *Id.*¶ 307.
295. *Id.* ¶¶ 441, 450.
296. *See generally id.* (elaborating on the Court's assessment to adopt the carbon budget approach in assessing cumulative NDC adequacy).
297. Preston, *supra* note 286, at 255.
298. *Id.* at 231.

Similarly, the Gloucester case emphasizes the accountability of developed countries, like those in PA, for reducing emissions.[299] While the Court does not impose a blanket prohibition on new coal mine approvals, it acknowledges that supporting such projects may conflict with the goal of achieving net-zero emissions.[300] This case underscores the increasing influence of the PA on assessments of fossil fuel ventures.[301] Overall, the Gloucester case highlights the significance of the PA and submitted NDCs, and their impact on national-level energy and environmental policy decisions, including licenses, permits, and planning permissions.[302]

Like the Gloucester case, the Thabametsi Case[303] in South Africa and the Vienna Airport Case[304] in Austria examine how the PA's goals influence decisions regarding domestic carbon-intensive projects.[305] While these cases address the PA's temperature goals and NDCs differently, they highlight the need for a domestic legal system that can consider international law when implementing temperature goals.[306] In both cases, the claimants did not directly seek to enforce the PA's temperature goals or NDCs but questioned whether domestic rules should align with the Agreement's climate objectives.[307] However in Thabametsi Case the ruling emphasized that it is important to account for climate change impacts in line with the

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299. *Id.* at 235.

300. *See id.* (discussing Paris Agreement and its influence in decisions).

301. *Id.* at 255–56.

302. *Id.*

303. *EarthLife Africa Johannesburg v Minister of Env't Affairs and Others*, 65662/16 (2017).

304. *In re Vienna-Schwechat Airport Expansion* (2017) VfGH, E 875/2017-32, E 886/2017-31 ¶¶ 16–18.

305. The author was unable to analyze the original texts of the judicial decisions as Vienna Airport Case was in German language and Thabametsi Case decisions was not available during the time of writing this analysis. Instead, the author analyzed the decisions by relying on other literature.

306. *See* Anna-Julia Saiger, *Domestic Courts and the Paris Agreement's Climate Goals: The Need for a Comparative Approach*, 9 TRANSNAT'L ENV'T L. 37, 40 (2020) (discussing a comparative approach for how to deal with an international interpretation of domestic decisions).

307. *See id.* at 41 (addressing the question of international law on domestic decisions).

expected peak and decline of GHGs emissions set by the NDC.[308]

Similar to Urgenda's case, in *Neubauer et al. v. Germany* case (2020), German youths challenged the Federal Climate Protection Act in the Federal Constitutional Court for its insufficient goal of a 55% reduction in greenhouse gases by 2030 from 1990 levels.[309] They argued it violated their human rights under Germany's constitution and the PA's mandate to limit global temperature rise to "well below 2°C."[310] They claimed a 70% reduction by 2030 was necessary for Germany to meet its PA obligations.[311] In 2021, the Court partly ruled against the Act, emphasizing Germany's constitutional duty for climate protection and fair burden distribution across generations.[312] It marked a pivotal shift in recognizing fundamental rights against shifting climate burdens to future generations and noted the Act's potential violation of these rights.[313] The decision did not delve into NDCs under the PA or the E.U.'s NDCs but discussed the PA's temperature goals and emission reduction duties, directing domestic alignment with climate governance and reduction targets.[314] No implementation directions for NDCs are given. Acknowledging a carbon budget, the Court called for its fair allocation between current and future generations, stressing the global shared responsibility in addressing climate change.[315] Following this verdict, the German government revised its climate targets to net-zero emissions by 2045 and a 65% reduction by 2030, reflecting the Court's guidance.[316]

In *Greenpeace Nordic Association v. Ministry of Petroleum and Energy* (2020), a different judicial decision emerged, challenging a specific judicial decision rather than a broad government policy.[317]

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308. *See id.* at 47 (discussing the Austrian Vienna Airport case).
309. BVerfG, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20, ¶ 4, Mar. 24, 2021, http://www.bverfg.de/e/rs20210324_1bvr265618en.html.
310. *Id.* ¶ 1.
311. *Id.* ¶ 5.
312. *Id.* ¶ 96.
313. *Id.* ¶ 146.
314. *Id.* ¶ 115.
315. *See* Pouikli, *supra* note 260, at 579 (emphasizing the decision as evidence of a shifting conscious that recognizes climate change as a current and future human rights issue.)
316. *Id.* at 576.
317. Nature and Youth Norway v. Ministry of Petroleum and Energy (People v.

The Borgarting Court of Appeal upheld the government's decision to issue licenses for deep-sea oil and gas exploration.[318] The Court found that uncertainties about future emissions from exported oil did not warrant prohibiting these licenses, despite the Norwegian constitution's environmental and climate protections.[319] Differing from the Urgenda case, the Court ruled that these actions did not violate Articles 2 or 8 of the ECHR.[320] The Court recognized the 1.5/2°C temperature targets but interpreted Article 4.2 of the PA to mean that Parties should progressively enhance their efforts, acknowledging non-uniformity in each country's contributions.[321] The decision referenced Norway's NDCs but did not provide explicit guidance on implementing NDCs, national targets, or PA's temperature goals.[322] Additionally, the Court ruled that it was not an appropriate forum for scrutinizing government decisions on complex climate measures, citing a lack of expertise and technical knowledge in the judiciary to interpret scientific reports and translate them into legal decisions, thus highlighting the complexity of climate change issues.[323]

The Shell case, *Milieudefensie et al. v. Royal Dutch Shell plc*, marked a groundbreaking judicial ruling in corporate accountability for climate change mitigation.[324] The key issue of this case centers on whether a private company violated its duty of care and human rights obligations by inadequately addressing its role in climate change mitigation.[325] This case essentially delves into the realm of corporate accountability for climate mitigation.[326] The Hague District Court

Arctic Oil), HR-2020-846-J, case no. 20-051052SIV-HRET, ¶¶ 2, 3, 5 (Nor. 2020).

318. *Id.* ¶¶ 12, 251, 252, 302.

319. *Id.* ¶¶ 147, 154, 168, 238.

320. *Id.* ¶ 43.

321. *Id.* ¶¶ 26, 57, 58.

322. Nature and Youth Norway, HR-2020-846-J, case no. 20-051052SIV-HRET, ¶¶ 26, 62.

323. *Id.* ¶ 5; *see* Pouikli, *supra* note 260, at 583 (discussing the general knowledge of judiciaries compared to the complex, technical knowledge across a number of various interests).

324. Vereniging Milieudefensie v. Royal Dutch Shell Plc., C/09/571932/HA ZA 19-379, ¶ 5 (Neth. 2021).

325. *Id.* ¶ 3.2.

326. *See* Laura Burgers, *An Apology Leading to Dystopia: Or, Why Fueling*

imposed a unique obligation on Shell, to reduce its GHGs emissions by 45% by 2030 compared to 2019 levels, including both operational emissions and those from its products.[327] This decision, enforceable even during appeals, did not directly interpret NDCs but considered global temperature goals and net-zero emission timelines.[328]

As the case, focused on a private company rather than the Dutch government, ruling does not interpret obligations related to NDCs or provide guidance on their implementation.[329] However, it does consider global temperature goals and the timeline for achieving net-zero emissions.[330] While NDC implementation is primarily a governmental responsibility, it is the actions of companies, corporations, and individuals that drive emissions on the ground.[331] The Shell case highlights the critical role of companies and individuals in driving emissions, affecting national and global scenarios.[332] This emphasizes the importance of non-State actors like Shell in climate action, underscoring the Court's unique rationale in holding them accountable for emission reductions.[333]

The case emphasized the role of non-State actors like Shell in mitigating climate change.[334] The Court held that Shell's duty of care extends globally, requiring it to reduce emissions impacting Dutch citizens and dismissing the notion that other companies' emission

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Climate Change is Tortious, 11 TRANSNAT'L ENV'T L. 419, 420 (2022) (discussing the court's lack of consideration regarding sectoral practices).

327. *Vereniging Milieudefensie*, C/09/571932/HA ZA 19-379, ¶ 5.3.

328. *See Milieudefensie et al. v. Royal Dutch Shell plc.*, SABIN CENTER FOR CLIMATE CHANGE LAW (2019), https://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc (noting its appeal in 2022); *Vereniging Milieudefensie*, C/09/571932/HA ZA 19-379 ¶¶ 3.1, 4.4.34.

329. *Vereniging Milieudefensie*, C/09/571932/HA ZA 19-379, ¶ 4.4.29.

330. *Id.* ¶¶ 3.1, 4.4.34.

331. *See* Jeff Turentine, *What Are the Causes of Climate Change?*, NAT. RES. DEF. COUNCIL (Sept. 13, 2022), https://www.nrdc.org/stories/what-are-causes-climate-change#natural (last accessed Mar. 14, 2024) (breaking down the various factors that contribute to carbon emissions).

332. *Vereniging Milieudefensie*, C/09/571932/HA ZA 19-379, ¶¶ 4.4.18, 4.4.49.

333. *See* Thomas Hale, *The Role of Sub-state and Non-state Actors in International Climate Processes*, CHATHAM HOUSE, Nov. 2018, at 1, 2 (summarizing non-state actors' contributions to climate change and its mitigation).

334. *Vereniging Milieudefensie*, C/09/571932/HA ZA 19-379, ¶¶ 4.4.17, 4.4.21.

reductions could offset Shell's responsibilities.[335] The Court acknowledged Shell's limitations in single-handedly tackling global climate challenges but stressed its obligation to "control and influence" emissions within its capacity.[336] Referring to IPCCC[337] reports and the PA, the Court recognized the global consensus for a 45% reduction by 2030 and net-zero by 2050, applying this standard to non-State actors like Shell.[338] Thus, the case underscores the importance of emission reduction responsibilities for non-State actors, aligning with global net-zero emission reduction pathways by 2050.[339]

Now let us shift focus to the judicial decisions in the United States. In the United States, most climate litigation cases target specific infrastructure projects and are based on various laws related to human rights, constitutional rights, tort claims, the environment, natural resources, energy, and land use.[340] The Clean Air Act has played a significant role, especially after the 2007 *Massachusetts v. Environmental Protection Agency* case, which affirmed the Environmental Protection Agency's (EPA) authority to regulate GHGs emissions from new motor vehicles. [341] However, it is important to note that in 2022, the Supreme Court imposed limitations on the EPA's ability to create strict emission reduction rules.[342]

Private climate litigation in the United States has generally not succeeded so far due to dismissals based on principles like the "non-

335. *Id.* ¶¶ 4.4.53–54.
336. *Id.* ¶ 4.4.49.
337. The Intergovernmental Panel on Climate Change (IPCC).
338. *Vereniging Milieudefensie*, C/09/571932/HA ZA 19-379, ¶ 2.3.5.2.
339. *Id.*
340. As of August 2023, total 1,522 climate litigations are filed in the United States alone; *see* Reneé Cho, *Climate Lawsuits Are on The Rise: This is What They're Based On*, STATE OF THE PLANET (Aug. 9, 2023), https://news.climate.columbia.edu /2023/08/09/climate-lawsuits-are-on-the-rise-this-is-what-theyre-bas ed-on (discussing legal strategies used by climate activists in the United States); Katrina Zimmer, *The Challenges and Promises of Climate Lawsuits*, KNOWABLE MAG. (May 11, 2023), https://knowablemagazine.org/content/article/society/2023/the-challenges-and-promises-climate-lawsuits (analyzing trends and statistics related to climate activist efforts in the United States).
341. Massachusetts v. E.P.A., 549 U.S. 497, 559–60 (2007); *see* Cho, *supra* note 340 (utilizing this court case as an example of environmentalist strategies); West Virginia v. E.P.A., 1597 U.S. 697, 706 (2022).
342. *West Virginia v. E.P.A.*, 1597 U.S. at 733.

justiciable political questions" doctrine, which restricts courts from deciding inherently political matters.[343] In the United States, the political question doctrine limits the courts to deciding only legal issues that are justiciable, while avoiding inherently political matters.[344] Consequently, when it comes to climate change, the courts have deferred to the executive branch, recognizing that these issues involve policy determinations.[345] Cases were also dismissed due to lack of standing, res judicata, statute of limitations, and difficulty in proving causation.[346]

Juliana v. United States (hereinafter referred as Juliana case) is a significant example of climate litigation filed against the U.S. government.[347] The Juliana case involved 21 young plaintiffs alleging that the government's actions contributing to high CO_2 levels violated their constitutional rights to life, liberty, and property, as well as the government's duty to protect public trust resources.[348] Indeed, the Juliana case invokes complex questions about the role of the judicial system in addressing climate change, injury in relation to standing, and constitutional rights.[349] However, in 2020, the Ninth Circuit ruled that the plaintiffs lacked standing for their claims.[350] The Court also stated

343. *See* Geetanjali Ganguly et al., *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38 OXFORD J. LEGAL STUD. 841, 846–48 (2018) (expanding on the first wave of climate litigation in the U.S.).

344. *See id.* at 848 (discussing how the environmental issues fell under the political question doctrine).

345. Marbury v. Madison, 1 Cranch 137, 165–66 (1803); Baker v. Carr, 369 U.S. 186, 211 (1962); Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9 Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013); *see* Ganguly et al., *supra* note 343, at 848 (summarizing the courts' deferment to the executive branch).

346. Res judicata is a common law doctrine that prevents the same parties from re-litigating claims that have already been decided by a competent court; Comer v. Murphy, No. 1:11-cv-00220-LG-RHW, 8, 12 (S.D. Miss. Mar. 20, 2012).

347. Juliana v. United States, 217 F.Supp. 3d 1224, 1233 (D.Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9 Cir. 2020).

348. *Id.*

349. *See* Samantha Hawkins, *Landmark Climate Case Sent to Trial by Oregon Federal Judge*, BLOOMBERG LAW (Jan. 2, 2024), https://news.bloomberglaw.com/environment-and-energy/landmark-climate-case-sent-to-trial-by-oregon-federal-judge (offering critiques of the judicial role in the climate crisis).

350. *See* Case Comment, *Federal Courts—Justiciability—Ninth Circuit Hold That Developing and Supervising Plan to Mitigate Anthropogenic Climate Change Would Exceed Remedial Powers of Article III Court:* Juliana v. United States, 947

that requiring the federal government to create a detailed plan for reducing fossil fuel emissions exceeded the Court's authority under Article III.[351] This case highlights the challenges of using the judiciary in the United States for broad structural reform, like climate change mitigation.[352] Notably, the Juliana case did not reference PA or NDCs. This is because the United States re-entered the PA in January 2021 and submitted its first NDC in April 2021.[353] Consequently, judicial decisions in the United States have not emphasized NDC-related obligations, implementation directions, long-term temperature goals, or net-zero targets as much as climate litigation outside the country.

B. INTERNATIONAL CLIMATE LITIGATION'S IMPACT ON NDC IMPLEMENTATION

Between December 2022 and January 2023, three requests for advisory opinions were made to three different international tribunals.[354] Vanuatu proposed that the UN General Assembly seek an advisory opinion from the ICJ regarding "the obligations of States" to protect the climate system and the legal consequences thereof.[355] Shortly after, the Commission of Small Island States on Climate

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F.3d 1159 (9th Cir. 2020), 134 HARV. L. REV. 1929, 1931 (2021) (summarizing the 9th circuit's ruling).

351. Juliana v. United States, 947 F.3d 1159, 1170, 1173 (9th Cir. 2020).

352. *See* Case Comment, *supra* note 350, at 1933, 1935 (discussing how the ruling narrows the remedial measures available). The Juliana v. United States case continues to face significant legal hurdles. On May 1, 2024, a three-judge panel of the 9th Circuit Court of Appeals ordered the dismissal of the case, instructing Judge Ann Aiken to dismiss the lawsuit without leave to amend. This decision came after plaintiffs amended their complaint to address standing issues identified in 2020. The plaintiffs and their legal team are now considering requesting a rehearing with a larger panel of judges from the 9th Circuit.

353. See The White House, *Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies* (Apr. 22, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies (describing the Biden Administration's climate change efforts).

354. *See* Daniel Bodansky, *Advisory Opinions on Climate Change: Some Preliminary Questions*, 32 REV. EUR., COMPAR. & INT'L L. 185, 185 (2023) (reporting on the three advisory opinions).

355. Report of the I.C.J., at 1, U.N. Doc. A/77/L.58 (2023).

Change and International Law (COSIS) requested an advisory opinion from the International Tribunal for the Law of the Sea (ITLOS) to clarify "the [climate change] obligations of parties to the UN Convention on the Law of the Sea (UNCLOS)."[356] In January 2023, Chile and Colombia sought an advisory opinion from the Inter-American Court of Human Rights (IACtHR) regarding "States' obligations to address the climate emergency within the framework of international human rights law."[357] This section will focus on analyzing the ICJ request, as it pertains more closely to emission reduction, the PA, the UNFCCC, and customary international law.[358]

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356. Letter from Commission of Small Island States on Climate Change and International Law to International Tribunal for the Law of the Sea (Dec. 12, 2022), available at https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf. It is worth noting that, on May 21, 2024, ITLOS issued the advisory opinion on climate change obligations under UNCLOS. The opinion outlined several key obligations for state parties. States must prevent, reduce, and control marine pollution from greenhouse gas (GHG) emissions (Articles 1(1)(4), 194(1), 194(2)). They are required to adopt and enforce laws to control marine pollution from land-based sources, vessels, and the atmosphere (Articles 207, 212, 211, 213, 222, 217). Additionally, states must cooperate and assist vulnerable developing states in addressing marine pollution from GHG emissions (Articles 197, 200, 201, 202). States are also obliged to monitor, report, and conduct environmental impact assessments on marine pollution from GHG emissions (Articles 204, 205, 206). The advisory opinion emphasized that fulfilling obligations under the Paris Agreement alone is not sufficient. UNCLOS requires a stringent level of due diligence in regulating GHG emissions, mandates additional obligations to prevent transboundary harms, and necessitates the protection of marine habitats and species vulnerable to climate impacts. Available at https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_350_EN.pdf.

357. *See Chile y Colombia realizan inédita consulta a la Corte Interamericana de Derechos Humanos sobre emergencia climática*, MINISTERIO DE RELACIONES EXTERIORES (Jan. 9, 2023), https://minrel.gob.cl/noticias-anteriores/chile-y-colombia-realizan-inedita-consulta-a-la-corte-interamericana-de (reporting on the precedent the court will set).

358. *See* Maria Tigre and Jorge Bañuelos, *The ICJ's Advisory Opinion on Climate Change: What Happens Now?*, CLIMATE LAW A SABIN CENTER BLOG (Mar. 29, 2023), https://blogs.law.columbia.edu/climatechange/2023/03/29/the-icjs-advisory-opinion-on-climate-change-what-happens-now (discussing the Advisory Opinion's focus on the UNFCCC); Mayer & van Asselt, *supra* note 253, at 177 (2023) (describing how the ICJ, ITLOS, and IACTHR will need to decide if they have jurisdiction on the matter).

The ICJ has been asked to provide an advisory opinion that clarifies States' legal obligations regarding climate change.[359] The first question seeks to define these obligations under international law concerning the mitigation of harmful anthropogenic GHGs emissions for both current and future generations.[360] The second question focuses on State liability for breaching these obligations, particularly regarding legal consequences for affected countries, especially small island nations, and individuals suffering from climate change impacts.[361] Essentially, the ICJ's advisory opinion will address whether countries must take specific actions under international law to prevent and remedy climate change's adverse effects on both the climate and the well-being of present and future generations.[362] The request is pending, and while ICJ advisory opinions are not legally binding, they hold significant legal weight and moral authority as the UN's principal judicial body.[363] The initiative is generating legal debates about the advisory opinion's potential impact on emission reduction and NDC implementation.[364]

This international litigation initiative is important for strengthening mitigation efforts.[365] Given the global nature of climate change and its mitigation obligations, the ICJ is arguably better suited than domestic

359. *See* Tigre & Bañuelos, *supra* note 358 (stating the court would provide an authoritative statment on the science).

360. *See id*. (summarizing the questions that will be posed to the court).

361. *See id.* (summarizing the human rights considerations that court will also make).

362. *See Request for an Advisory Opinion on the Obligations of States with Respect to Climate Change,* SABIN CENTER FOR CLIMATE CHANGE LAW (2023), https://climatecasechart.com/non-us-case/request-for-an-advisory-opinion-on-the-obligations-of-states-with-respect-to-climate-change (acknowledging the impact the decisions will have on future generations).

363. *See* Tigre & Bañuelos, *supra* note 358 (describing the importance of the pending advidory opinion); *see* Mayer & van Asselt, *supra* note 253, at 178 (discussing the lack of enforcement mechanisms).

364. *See* Bondasky, *supra* note 253, at 186 (describing arguments related to the need for the international judiciary to get involved); *see* Mayer & van Asselt, *supra* note 253, at 178 (explaining how judicial involvement may allow for more diverse interests to be considered and involved).

365. *See* Mayer & van Asselt, *supra* note 253, at 176 (discussing the increased use of litigation for environmentalist interests).

courts to interpret and apply international norms.[366] Unlike domestic courts, the ICJ can address any legal question, regardless of its political implications.[367]

The ICJ advisory opinion presents several potential benefits and opportunities. Firstly, it can clarify States' obligations regarding mitigation by specifying their responsibilities to prevent and address climate change impacts.[368] This clarification can establish clear standards for evaluating State compliance, especially concerning NDCs implementation and related obligations under the PA.[369] Furthermore, the ICJ can define due diligence standards in accordance with PA Articles 2(1) and 4(3), providing clarity on mitigation obligations.[370] Furthermore, the advisory opinion may strengthen State emission reduction targets under the PA.[371] It can also serve as a reference for domestic courts, aiding them in understanding international law obligations.[372] This could, in turn, impact domestic climate litigation positively.[373] Lastly, the opinion might influence international climate negotiations, potentially resolving disputes and shaping expectations among various stakeholders involved in climate-related activities.[374] In summary, the pending ICJ advisory opinion sparks significant legal discourse and has the potential to clarify State responsibilities and impact both international and domestic mitigation

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366. *See id.* (explaining how the global nature of the crisis is suited for international litigation).

367. *See id.* (describing the various capabilities that ICJ has that domestic courts do not).

368. *See* Tigre & Bañuelos, *supra* note 358 (describing the unprecedented opportunity the court has).

369. *See id.* (asserting that the court's position not only allows for clarification but for stronger enforcement and cooperation).

370. *See* Christina Voigt, *The Power of the Paris Agreement in International Climate Litigation*, 32 REV. EUR., COMPAR. & INT'L L. 237, 239, 246 (2023) (stating that diligence standards adopted in UN climate treaties such as the Paris Agreement should be considered when determining diligence standards under customary law).

371. *See* Tigre & Bañuelos, *supra* note 358 (claiming that the advisory opinion can influence state decisions).

372. *See id*. (stating that the advisory opinion may influence other courts or litigation).

373. *Id.*

374. *Id.* (claiming that negotiators may look to the advisory opinion to break through gridlock surrounding the issues of loss and damage).

efforts.

Considering the complexity of mitigation-related obligations, it is challenging to predict whether the ICJ can provide meaningful answers in this regard.[375] There is a risk that the ICJ's advisory opinion may disappoint or lack constructive guidance.[376] For instance, it might limit itself to discussing States' collaboration responsibilities under the PA and the UNFCCC, or it could merely restate existing treaty provisions without significantly clarifying state obligations.[377]

Furthermore, the advisory opinion's impact on international processes and institutions raises concerns.[378] Bodansky worry that judicial rulings could make climate negotiations more contentious.[379] In this regard, Bodansky raises a crucial question about the relationship between climate negotiations and legal judgments in shaping international climate law.[380] Achieving a global consensus among States is crucial for the legitimacy of the UN climate regime, and introducing international courts into this sensitive process may not be suitable.[381] International climate litigation could also undermine trust in the international legal system that supports climate cooperation.[382]

If the advisory opinion becomes highly specific, such as setting quantitative global emissions reduction goals or outlining emission

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375. *See* Mayer & van Asselt, *supra* note 253, at 181 (stating that the complexities of the questions at hand renders it difficult to assess the persuasiveness of an international court's opinion).

376. *See id.* at 183 (claiming that international courts risk their credibility when deciding climate litigation cases).

377. *See id.* at 182 (claiming that international courts may err on the side of caution and issue opinions that are too vague or general to implement in practice).

378. *See id.* at 182–83 (outlining that states may not defer to the decisions of international courts on climate matters).

379. *See id.* at 182–83 (claiming that climate litigation may make international negotiations more adversarial between disparate parties).

380. *See* Bodansky, *Advisory Opinions on Climate Change*, *supra* note 253, at 186 (questioning the impact of climate litigation on the process of negotiating binding climate commitments).

381. *See id.* at 186 (highlighting the importance of state-negotiated international law in creating a body of climate law).

382. *See* Mayer & van Asselt, *supra* note 253, at 182–83 (questioning the efficacy of international courts in setting national climate policy).

reduction formulas, it could disrupt climate negotiation dynamics, potentially causing rejection by some nations and limited impact on those needing behavioral change.[383] On the other hand, if the ICJ determines that international law imposes no additional obligations beyond existing commitments in the UNFCCC and the PA, or that due diligence is merely met by complying with procedural obligations under the PA, it could hinder the development and implementation of mitigation-related laws under the global regime.[384]

Questions arise about whether international courts are suitable institutions for determining States' responses to climate change-related policy issues.[385] Climate change is a politically charged and contentious area with vague norms open to multiple interpretations, leading to concerns about the legitimacy of courts deciding State obligations.[386] This raises the issue of why climate law should be shaped through judicial means rather than political processes.[387] Additionally, it's important to assess whether the judiciary has the institutional competence for this role.[388] There are doubts about whether international courts and tribunals are capable of deciding on national climate policies, which are complex and can have unintended consequences.[389]

The most significant question is whether an advisory opinion can prompt major emitters like the United States, China, India, Russia, or Brazil to take substantial action against GHGs emissions and alter their behaviors.[390] Unfortunately, the likelihood of an advisory opinion

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383. *See* Bodansky, *Advisory Opinions on Climate Change*, *supra* note 253, at 188.

384. *Id.*

385. *See* Mayer & van Asselt, *supra* note 253, at 178 (referencing the challenges involved with using international courts in dictating domestic law).

386. *See* Bodansky, *Advisory Opinions on Climate Change*, *supra* note 253, at 191 (stating that international courts' legitimacy is tied to interpreting and applying the law, rather than making law).

387. *Id.*

388. *See id.* (questioning the judiciary's institutional competence in making climate law compared to a political process of making law).

389. *See* Mayer & van Asselt, *supra* note 253, at 183 (arguing that the imposition of international judicial decisions onto domestic legislation may not be effective).

390. *See* Bodansky, *Advisory Opinions on Climate Change*, *supra* note 253, at 189 (stating that larger economies are likely more hesitant to comply with an ICJ

leading to such changes is low, as these opinions lack binding authority, and States are not obligated to accept or alter their positions based on them.[391] According to Bodansky, practical effectiveness suggests that negotiations are more likely than litigation to influence State behavior and reduce emissions. [392] Supporters of advisory opinions argue that they can complement negotiations by providing clarity on terms and obligations.[393] Climate change discussions often use ambiguous terms like "common but different responsibilities and respective capabilities," "developed countries," and "progression" to facilitate UN negotiation consensus.[394] An advisory opinion from judges who may not fully understand these nuances could disrupt delicate compromises.[395] Clarifying State obligations regarding climate change might unintentionally favor one side, complicating negotiations.[396] The more the ICJ specifies State obligations, the greater the risk of (i) some States rejecting it as judicial overreach with limited impact; (ii) damaging the tribunal's legitimacy; and (iii) disrupting ongoing negotiations.[397]

C. Key Findings

Domestic courts have largely overlooked interpreting NDC-related obligations under the PA, raising questions about why they have not incorporated these insights when addressing domestic emission reduction responsibilities. They also have not assessed the adequacy of submitted NDC targets. Instead, they have focused on various aspects, including the 1.5/2°C goals, the overall Agreement, the objective of achieving net-zero emissions by 2050, the significance of

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advisory opinion).

391. *See id.* at 190 (explaining the non-binding nature of ICJ advisory opinions on national courts).

392. *Id.* at 192.

393. *See id.* at 191 (presenting the argument that the advisory opinion can help define issues that may arise during negotiations).

394. *See id.* (outlining the reasons why ambiguity facilitates the negotiation process).

395. *See* Bodansky, *Advisory Opinions on Climate Change*, *supra* note 253, at 191.

396. *See id.* (highlighting the risks posed to negotiations when intentional ambiguities are defined).

397. *Id.* at 192.

submitted NDCs within national policy frameworks, and the alignment of national climate policies with the PA's long-term temperature goals.[398] It is important to note that domestic courts typically view the PA as an agreement operating under the UNFCCC and a global consensus on climate change, potentially missing opportunities to leverage its specific legal obligations for stronger climate action.

Furthermore, it is striking that domestic courts often do not derive specific legal obligations directly from the PA itself, except for its overall objectives. For example, in *the Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy* case, the interpretation of Article 4.2 of the PA concluded that Parties are obligated to do their "best," meeting legal obligations of conduct but potentially falling short of the PA's long-term goals.[399] Interestingly, even though the E.U.'s NDC is legally binding, most E.U. judicial decisions have not heavily considered it.[400] Instead, domestic courts have focused more on national legislative emission reduction targets.[401] These targets play a central role in verdicts, with courts often invoking human rights principles, international norms, domestic legislation (including public nuisance laws), and national emission reduction targets aligned with the PA's temperature goals.[402] Notably, the submitted NDCs of individual State Parties have not been a primary focus in these cases. State-submitted NDCs are often seen as policy documents reliant on

398. *See* Saiger, *supra* note 306, 45–49 (highlighting the Austrian domestic court as an example that ignores NDC targets generally and instead focusing on the overall goals of the Paris agreement).

399. *See* Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy (People v Arctic Oil), HR-2020-2472-P, case no. 20-051052SIV-HRET at ¶ 58 (holding that the obligation created an obligation for countries to do their best as responsibilities are not evenly distributed).

400. *See* Spain & European Commission, *Update of the NDC of the European Union and its Member States*, (Oct. 16, 2023) https://unfccc.int/sites/default/files/NDC/2023-10/ES-2023-1017%20EU%20submission%20NDC%20update.pdf at ¶ 5 (reiterating the legally binding nature of the European Climate Law).

401. *See* Saiger, *supra* note 306, at 45–49 (listing the courts of Austria and South Africa as examples which have focused on domestic emission targets rather than the NDC).

402. *See* Mayer & van Asselt, *supra* note 253, at 175–76 (highlighting the influence of domestic emissions targets on domestic judicial rulings).

government discretion for implementation.[403] This highlights the complex and multifaceted nature of submitted NDCs in climate litigation within domestic legal systems.

The analysis of the request for an ICJ advisory opinion on emission reduction obligations reveals potential benefits and significant drawbacks. The ICJ could clarify States' legal obligations for climate change mitigation, providing clear standards for NDC-related compliance under the PA and addressing its ambiguous provisions. It could strengthen state emission reduction targets under the PA, serve as a reference for domestic courts, and influence domestic climate litigation. Additionally, it could impact international climate negotiations positively, breaking existing stalemates and shaping normative expectations among climate stakeholders.

However, the non-binding nature of ICJ advisory opinions raises questions about their practical impact, especially on major emitters. Involving international courts in climate negotiations may lead to controversy and undermine cooperation and trust. There is concern that an advisory opinion, if not carefully crafted, might disrupt compromises reached in international climate negotiations, hindering progress.[404] Doubts also exist about whether international courts can effectively decide on complex national climate policies, potentially leading to inefficient or damaging outcomes.[405] Lastly, there is skepticism about whether an advisory opinion can compel substantial action against GHGs emissions by national governments, especially major emitters, given its non-binding nature.[406]

The analysis of domestic and international litigation highlights that GHGs mitigation is inherently political, and international climate litigation alone cannot readily resolve this complex issue.[407]

403. *See id.* (stating that some domestic courts have deferred to political institutions to implement climate agreements).

404. *See* Bodansky, *Advisory Opinions on Climate Change*, *supra* note 253, at 191 (reiterating the delicate nature of international negotiation processes).

405. *See id.* (stressing the court's role in identifying the law rather than making it).

406. *See id.* at 189 (expressing doubt over the ability of the advisory opinion to influence the decisions of major emitters).

407. *See id.* at 190 (stressing the political nature of GHG emissions mitigation that international courts are not equipped to address on their own); Mayer & van

International courts and tribunals may have a limited and uncertain role in driving stronger climate action, as compliance with their decisions varies among national governments, and not all domestic courts may enforce these decisions.[408] Nevertheless, such outcomes can contribute valuably to mitigation efforts if efficiently crafted, adding to the growing body of climate change jurisprudence and providing a legal foundation for further developing mitigation obligations.[409] International tribunals, like the ICJ, primarily interpret existing laws rather than create new ones, and their legitimacy rests on their proficiency in identifying, interpreting, and applying these laws.[410]

However, significance of judicial governance in reinforcing NDC implementation and related obligations remains uncertain.[411] It is essential to recognize that litigation may not be the initial optimal choice for an international climate governance regime aiming for consensus among all States.[412] The most effective approach to addressing climate change globally involves establishing a governance regime that engages all nations and enforces science-backed measures to prevent catastrophic climate change.[413] However, given the misalignment of state emission reduction efforts with global goals and the urgency of the climate crisis, one must question whether it is imperative to utilize every possible forum to amplify emission reduction efforts. The stakes are exceptionally high, and complacency

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Asselt, *supra* note 253, at 176, 183 (further highlighting the political nature of environmental regulation).

408. *See* Bodansky, *Advisory Opinions on Climate Change*, *supra* note 253, at 190; Mayer & van Asselt, *supra* note 253, at 183 (stating that domestic courts have varied responses to complying with ICJ determinations).

409. *See* Bodansky, *Advisory Opinions on Climate Change*, *supra* note 253, at 190–91; Mayer & van Asselt, *supra* note 253, at 182–83 (both arguing that even though the advisory opinion is non-binding, it can still impact the trajectory of environmental law).

410. *See* Bodansky, *supra* note 253, at 190.

411. *See* BODANSKY ET AL., INTERNATIONAL CLIMATE CHANGE LAW, *supra* note 40, at 290 (questioning the significance of international tribunal decisions on domestic obligations).

412. *See id.* (stating that litigation may be a second-best choice in establishing international obligations).

413. *See id.* (stressing the importance of engaging actors in the process rather than imposing obligations created by litigation).

is not an option.

V. CLOSING REMARKS

NDCs submitted by State Parties under the PA generally do not represent commitments and intentions from the author State to be legally bound by the pledges they have communicated within their submitted NDCs.[414] However, the E.U.'s NDC is an exception.[415] The analysis of submitted NDCs from six countries also reveals that these documents often resemble vague unilateral policy declarations. While NDCs reflect the political will and aspirations of nations, tied to their socio-economic realities, they lack concrete, enforceable domestic mitigation standards.[416] This dilemma poses a pressing question: If NDCs are primarily political declarations and domestic courts do not hold States accountable for their submitted mitigation targets, how can we ensure States fulfill their pledges for mitigation? Can NDCs genuinely drive State behavioral change for energy transition? As time dwindles and the stakes for our planet's future remain high, this challenge becomes ever more urgent.

Scholars agree that NDC effectiveness may be checked by assessing how much its impact on State behavior for climate mitigation.[417] Have NDCs and their governance framework succeeded in significantly reducing GHGs emissions from States?[418] The 2023 Synthesis Report from the first Global Stocktake provides a clear answer: "global emissions are not on track to limit warming to 1.5 °C above pre-industrial levels"[419] Despite NDCs, emissions remain misaligned with

414. *See Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy (People v Arctic Oil)*, ¶ 58 (stating that parties to the PA are expected to try their best and that their NDCs do not constitute binding obligations).

415. *See* Spain & European Commission, *supra* note 400, at 1 (reiterating that the EU's Climate Law is a legally binding NDC).

416. *See* BODANSKY ET AL., INTERNATIONAL CLIMATE CHANGE LAW, *supra* note 40, at 232 (stating that NDCs are unlikely to create binding obligations).

417. *See id.* at 359.

418. *See id.* (raising the question of NDC impact on emission reduction).

419. *See* Framework Convention on Climate Change (FCCC), *Technical Dialogue of the First Global Stocktake: Synthesis Report by the Co-facilitators on the Technical Dialogue*, ¶ 15, U.N. Doc. FCCC/SB/2023/9 (Sept. 8, 2023) [hereinafter FCCC, *Technical Dialogue*] (stating that global emissions are on track to derail plans to slow climate change).

the PA's goals, indicating challenges in driving substantial state-level reductions in GHGs emissions.[420]

The report highlights that our mitigation efforts fall short of PA's 1.5/ 2°C goals.[421] It points to "implementation gaps" indicating that current policies and actions are insufficient to achieve temperature goals.[422] Current NDCs are estimated to fall short of the 1.5°C target by around 20-24 Gt CO_2 equivalent by 2030.[423] To address this, there is an urgent need "to increase both the mitigation ambition of NDCs and the implementation of measures to achieve their targets."[424] The report emphasizes the importance of accelerating implementation to make progress toward PA's goals through a holistic approach.[425] It identifies a double-edged challenge with two key aspects: (1) lack of ambition in submitted NDCs and (2) countries routinely not meeting their modest pledged NDC targets, worsened by the vague, ambiguous nature of many NDCs.[426] This article highlights these challenges discussed earlier and emphasizes the difficulty of assessing countries' genuine progress in meeting their NDC targets due to the lack of clarity in the submitted NDCs.

Climate mitigation and energy transition require significant physical changes toward clean energy at the State level, driven by individual States and their governed entities.[427] While States are not bound by international mitigation obligations to strictly deliver their mitigation targets, they hold the primary responsibility for action through domestic regulatory frameworks.[428] This makes climate mitigation a personal and State-driven matter, relying on political will and commitment at the government level, as well as the behavior of

420. *See id.* ¶¶ 9–11 (highlighting the difficulty in reducing state-level emissions).

421. *See id.*

422. *See id.* ¶ 10 (stressing the need for further action to achieve goals set by the PA).

423. *See id.*

424. FCCC, *Technical Dialogue*.

425. *See id.* (stating that the implementation of climate policy must speed up and cover broader ground to reach agreed upon targets).

426. *Id.*

427. *See* Alexander Zahar, *The Nature of Climate Change*, 35 J. ENV'T L. 295, 296 (2023) (stating that the problem of climate change is one that is resolved legally at the domestic level).

428. *See id.* at 306 (reiterating the domestic nature of climate change policy).

governed entities and their reliance on fossil fuels.[429] The effectiveness of climate initiatives hinges only on the dedication of state-level governments prioritizing local climate mitigation efforts.[430] Given the limitations of climate negotiations, international law, and the importance of national sovereignty, this is inevitable. However, as Zahar points out, "no good may come of this freedom," underscoring that relying solely on government discretion does not guarantee effective outcomes.[431] Indeed, 2023 Synthesis Report confirms limited progress in transitioning to clean energy despite a flexible bottom-up approach.[432]

Furthermore, our current submitted NDCs reflect domestic political challenges rather than serving as a legally binding global force for action. This framework can face obstacles such as climate skepticism and the influence of powerful interests like fossil fuel companies and state-owned utilities. The bottom line: our actions lack the strength to drive real change, and NDCs alone will not inspire countries to transform their energy systems. As they presently stand, submitted NDCs are woefully inadequate to drive the transformative energy transitions required to meet the ambitious goals set forth in the PA. Comparing NDCs to a charitable fundraising effort, where everyone pledges what they can afford, raises a valid question: Why should we expect these promises to add up to the necessary level of action? Furthermore, some countries, due to economic growth, may need to increase emissions despite their best intentions. With the current NDC mechanisms, all we can do is hope that when countries observe each other's efforts and recognize how far we are from our target, they will step up their efforts next time.

Recalling the identified double-edged challenge in the paper and the 2023 Synthesis Report, the pressing question is: How can we overcome these obstacles and make genuine progress?

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429. *Id.*

430. *See id.* at 298 (stating that an effective climate change policy requires domestic government support to be effective).

431. *See id.* at 306 (highlighting the possible shortcomings of a solely domestic focus on climate policy).

432. *See* UNFCCC, *supra* note 7, ¶¶ 1–2 (stating that the clean energy transition has started too slowly).

Firstly, the PA introduced a flexible and bottom-up NDC framework. While it has weaknesses, it is globally accepted, with 195 nations submitting NDCs,[433] (including 142 new or updated ones),[434] marking a historic commitment to ambitious mitigation actions.[435] It is also worth emphasizing that during the PA negotiations, the consensus was that NDCs would not merely be moral promises but would be implemented by States.[436]

Therefore, to tackle NDC limitations, we should leverage the strengths of global climate governance and negotiations. Vulnerable nations can pressure major economies for compliance. Strengthening NDC governance through transparency, robust stocktaking, and stringent reporting obligations, supported by expert-based reviews, can enhance compliance efforts.[437]

Creating urgency and ambition can be achieved through rigorous stocktaking and emission reduction report cards. Fostering coordination and understanding among nations, especially major emitters, is crucial.

Governments should include explanations with their NDC submissions to enhance mutual understanding and transparency. The NDC process may require revisions, including specific features, expert feasibility checks upon submission, and improved monitoring and reporting standards. These were rejected in 2015, but eight years have shown that the current system falls short.[438] The ICJ may potentially play a role in urging states toward ambition and NDC implementation at the national level through its advisory opinions.

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433. *See generally* UNFCCC, *supra* note 7 (listing which countries have submitted their NDCs).

434. *See* United Nations Framework Convention on Climate Change (UNFCCC), *Nationally Determined Contributions Under the Paris Agreement. Synthesis Report by the Secretariat*, ¶ 1, U.N. Doc. FCCC/PA/CMA/2022/4 (Oct. 26, 2022).

435. *See id.* ¶ 4(e) (highlighting the unprecedented commitment of submitted NDCs).

436. *See* RAJAMANI, *supra* note 27, at 198 (stressing the obligatory nature of NDCs).

437. *See id.* at 218 (stating the various ways that NDC governance can improve overall compliance).

438. *See id.* at 221–22 (stating that the current system of NDCs is inadequate in reaching the PAs goals).

Yet, a dilemma arises: if nations falter in prioritizing climate action domestically, can we anticipate change in international governance and climate negotiations? Who will lead this transformation? Our mechanisms must evolve to the crisis's complexity.

In conclusion, we must comprehensively reevaluate our approach to energy transition due to the climate crisis's urgency. Strengthening the existing NDC framework through transparency, accountability, and global coordination is necessary. Every nation has a role to play. This is not just policy; it's imperative. Let us act decisively for a sustainable future.

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