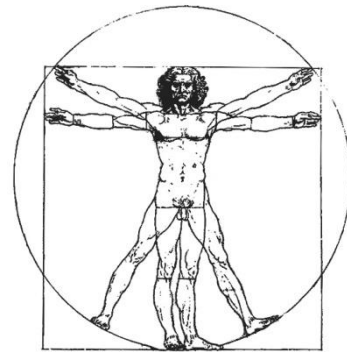


ecbi policy report



# Unilateral Declarations:

The Missing Legal Link  
in the Bali Action Plan

May 2010

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and Tom Ruys

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## Table of Contents

<b>EXECUTIVE SUMMARY .....</b>	<b>1</b>
<b>PART I. THE PROPOSAL .....</b>	<b>3</b>
<b>1. The Problem .....</b>	<b>3</b>
<b>2. Unilateral Declarations – The Strategic Arms Limitation Talks .....</b>	<b>5</b>
<b>3. The Missing Legal Link.....</b>	<b>6</b>
<b>3.1 Plan B.....</b>	<b>7</b>
<b>3.2 Plan B Evaluation.....</b>	<b>7</b>
3.2.1 BASIC: .....	7
3.2.2. United States.....	7
3.2.3. Annex B.....	8
<b>3.3 Plan C.....</b>	<b>8</b>
<b>3.4 Plan C Evaluation.....</b>	<b>8</b>
3.4.1. US and Annex B .....	8
3.4.2. BASIC .....	9
<b>3.5 Conclusion.....</b>	<b>10</b>
<b>PART 2. THE LEGAL FRAMEWORK.....</b>	<b>12</b>
<b>4. ‘Legally Binding’?.....</b>	<b>12</b>
<b>4.1 Main Sources of International Law .....</b>	<b>12</b>
4.1.1 Treaties .....	12
4.1.2 Customary law .....	13
4.1.3. General principles of law, judicial decisions, and doctrine .....	14
<b>4.2 Other Sources of International Law?.....</b>	<b>15</b>
4.2.1. Decisions of International Organizations (IOs) .....	15
4.2.2. Decisions by Conferences of the Parties.....	15
<b>4.3 Practical Implications – the ‘Compliance Pull’ of international law .....</b>	<b>17</b>
4.3.1. International law Enforcement Bodies .....	17
4.3.2. Legally binding – what’s in a name? .....	18
4.3.3. The compliance pull of the Kyoto Protocol.....	20
<b>5 Unilateral Declarations.....</b>	<b>22</b>
<b>5.1. The principle recognized by the ICJ.....</b>	<b>22</b>
<b>5.2. Conditions – the Guiding Principles .....</b>	<b>23</b>
<b>5.3. Unilateral declarations concerning greenhouse gas emission reductions.....</b>	<b>25</b>
<b>Table of Boxes</b>	
Box 1. Applying UDAs as the Missing Legal Link in the BAP – a schematic blueprint .....	2
Box 2. The Bali Road Map LCA-track Compromise .....	3
Box 3. Chinese NAMA Notification, 28 January 2010 .....	10
Box 4. Joint Statement, Third Meeting of BASIC Ministers Cape Town, 25 April 2010 .....	10
Box 5. Sources of international law .....	16

## Executive Summary

The Bali UN Climate Conference in December 2008 succeeded in resolving a long-standing disagreement between developing countries and the USA by introducing a special negotiating track on Long-term Cooperative Action (LCA) under the UN Framework Convention on Climate Change – as separate from the Kyoto Protocol (KP) negotiation track – and by introducing a clear distinction within the former between the mitigation agenda for developing and for developed countries (in paragraphs 1.b.i and 1.b.ii<sup>i</sup>). However, what the Bali Conference did not achieve, was a consensus on how the outcome(s) of the two tracks would relate to each other – what the legal form of the Copenhagen Agreed Outcome (CAO, as it was known) would be.

There was a clear effort in the months leading up to the Copenhagen Climate Conference in December 2009 to ‘fuse’ the two tracks, i.e. to have a single outcome, preferably in the form of a legally binding international treaty to supplant the Kyoto Protocol (which was meant by some to be based on the ‘key elements’ of the Protocol). However, since Copenhagen, almost everybody has realized that this is not going to happen, that we are back on the twin-tracks of the Bali Action Plan (BAP), and back with the question of what the legal format of a Cancun Agreed Outcome (again CAO) in December this year could be.

The problem is that if key Parties in the KP-track insist that *all* major economies take on legally binding commitments through a global and comprehensive climate treaty, then the negotiations seem to be doomed to have no agreed outcome. The aim of this Report is to suggest a way forward which could avoid this doomsday scenario.

The solution to the legal format problem proposed here is based on the fact that treaties are not the only way in which countries can bind themselves internationally. An alternative instrument which has been used in the past – for example in avoiding the breakdown of the second round of the Strategic Arms Limitation Talks (SALT II) between the US and the then USSR – is that of issuing a Unilateral Declaration (UD).

The proposal, described in some detail in Part I of this Report, is simply to use such Unilateral Declarations to provide a legal patch between the simplest outcomes of the two tracks, namely an amendment of the Protocol regarding a post-2012 commitment period for the KP-track, and a set of COP decisions under the LCA-track. As summarized in Box 1, the idea is that key Parties would endorse certain aspects of the LCA outcome through Unilateral Declarations, which would hopefully be sufficient for the Annex B Parties to the Kyoto Protocol to agree on a second commitment period.

The point here is simply that, in principle, it is possible to have a (mitigation) deal which is legally binding for all of the key Parties which, while being compatible with the twin-track approach of the Bali Action Plan, does not rely on a grand-unifying treaty. It is possible to patch the twin-tracks of the Bali Action Plan together through the use of Unilateral Declarations.

This patchwork solution clearly lacks the elegance of the sort of global cap-and-trade deal some might wish to see. However, it may well work, making it worth considering – before throwing out the baby with the global trading treaty bathwater and sacrificing it on the altar of a global carbon price!

The Second Part of the Report is devoted to providing some legal background on International Law, Unilateral Declarations, and what it means to be legally binding. The concept ‘legally binding’ is, certainly not a binary one (black or white) in international law. It should not be mixed up with

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<sup>i</sup> See Box 2.

‘enforceability’ or ‘enforcement’. The compliance pull of the Kyoto Protocol, which is generally accepted to contain ‘legally binding’ emission reduction obligations, might, everything being taken into account, appear to be less stringent or deterrent than one might suppose. The concept ‘legally binding’ in international law is rather a question of grey scales between the extremes of white and black.

Unilateral Declarations do not figure amongst the main sources of international law, namely treaties, customary law, general principles of law, judicial decisions, and the teachings of the most highly qualified legal experts. Nevertheless Unilateral Declarations were, for example, used in the Strategic Arms Limitations Talks. The legally binding character of Unilateral Declarations was confirmed by the International Court of Justice in the Nuclear Test Case. In this case the ICJ defined the two main conditions for Unilateral Declarations to be legally binding: (1) the acts should be public or generally known, and (2) should evidence the intention of the State to be bound. These conditions have recently been codified and refined in the ‘Guiding Principles applicable to Unilateral Declarations of States capable of creating legal obligations’ adopted by the International Law Commission.

Unilateral Declarations regarding emission reduction obligations, and the monitoring and verification thereof are feasible from an international law point of view and could be used as a way out of the actual climate negotiation stalemate.

**Box 1. Applying UD as the Missing Legal Link in the BAP – a schematic blueprint**

- |                      |  |
|----------------------|--|
| Step 1 (treaty law): | Amendment of the Kyoto Protocol and its Annex B  |
| Step 2 (COP/CMP):    | (1) Adoption of a set of COP decisions providing for an opt-in mechanism, through which non-KP parties could assume binding commitments by means of UD, and; the installation of a verification regime<br><br>(2) Alternative approach: parallel COP & CMP decisions (a) providing for an opt-in mechanism, through which non-KP parties could assume binding commitments by means of UD (COP), and; (b) opening up the Kyoto verification regime (itself established through a CMP decision) – and possibly the Kyoto flexibility instruments ? – to non-KP parties issuing such UD (COP & CMP) |
| Step 3 (UDs):        | Issuance of legally binding Unilateral Declarations through which States would opt-in to unconditional (US?) and/or conditional (BASIC countries?) commitments, and would signal participation in the COP/CMP-established verification regime (possibly also in the flexibility mechanisms?).  |

Each of the three steps would need to come about more or less simultaneously, as part of a global package deal. The conditional or unconditional commitments of the US and the BASIC countries would in this hypothesis derive their legally binding character directly from the UD (and not from the COP decisions).

## Part I. The Proposal

### I. The Problem

Ever since the 1997 Byrd-Hagel US Senate Resolution in the US Senate,<sup>i</sup> it has been clear that the main problem in setting up an international climate change regime is to balance demands for equal or differentiated treatment between three key ‘players’: the US, the major developing countries (the BASIC Group<sup>ii</sup>), and the Kyoto Protocol Parties with mitigation commitments (Annex B). Byrd-Hagel demanded completely equal treatment of the US with the BASIC countries, which, for well-known reasons, was completely unacceptable to them. The US repudiation of the Protocol in 2001 almost led to its demise, not least because some Annex B countries felt, for a number of reasons – such as competitiveness concerns – that they could not take on legally binding targets in the absence of the US (or the BASIC Group). As it happens, the Kyoto Protocol did enter into force, but these tripartite tensions did not disappear, as witnessed in December 2007 at the Bali Climate Conference, which was to set the agenda for negotiations of the future of the UN climate change regime.

#### **Box 2. The Bali Road Map LCA-track Compromise**

The Conference of Parties [...] decides to launch a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012, in order to reach an agreed outcome and adopt a decision at its fifteenth session, by addressing, *inter alia*, [...] enhanced national/international action on mitigation of climate change, including, *inter alia*, consideration of:

- [1.b.i] Measurable, reportable and verifiable nationally appropriate mitigation commitments or actions, including quantified emission limitation and reduction objectives, by all developed country Parties, while ensuring the comparability of efforts among them, taking into account differences in their national circumstances;
- [1.b.ii] Nationally appropriate mitigation actions by developing country Parties in the context of sustainable development, supported and enabled by technology, financing and capacity-building, in a measurable, reportable and verifiable manner;

The main achievement of Bali was that by introducing two distinct negotiating tracks, the tripartite problem was ‘factored’ into two distinct issues:

- (i) the relationship between the US and the BASIC countries, to be dealt with under the negotiations of the ‘Ad Hoc Working Group on Long-term Cooperative Action under the Convention’ (AWG-LCA), and

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<sup>i</sup> 105th Congress, 1st Session, S.Res. 98, 25 July 1997.

<sup>ii</sup> Brazil, China, India, and South Africa.

(ii) the relationship between the outcome of these negotiations and the outcome of the negotiations of the ‘Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol’ (AWG-KP).

The breakthrough of the last night at Bali, in turn, was the agreement between the US and the BASIC countries as to the general format of their relationship under the AWG-LCA, enshrined in paragraph 1.b of the Bali Action Plan (see Box 2). The obvious similarities between 1.b.i and 1.b.ii enabled the US to claim that their demand for equal treatment was sufficiently respected, while the equally obvious differences (nationally appropriate mitigation actions or ‘NAMAs’ versus quantified Emission Limitation and Reduction Objectives or ‘QELROs’) enabled the BASIC countries to claim that differentiated treatment was sufficiently retained. It was a major compromise on both sides, and something that must not be jeopardized in the endgame of the negotiations.

What Bali did not manage to achieve, however, was agreement on the second ‘factor’ – the relationship between the outcome(s) of the two negotiating tracks, i.e. on the form of the ‘Copenhagen Agreed Outcome’. Given that the outcome of the AWG-KP – which is after all the AWG on **Further Commitments for Annex I Parties** under the KP – is meant to be an amendment of the Kyoto Protocol, and in particular of its Annex B and, as such, part of a **legally binding treaty**, the debate has essentially become focused on whether the outcome of the AWG-LCA would be a **set of COP decisions**, or a **legally binding treaty** (either complementing, replacing, or subsuming the Kyoto Protocol).

*The USA has no intention of ratifying the Kyoto Protocol, and prefers an “Implementing Agreement”. Through a set of clear decisions under the UNFCCC, this would formalize and strengthen the existing provisions of the Climate Change Convention for voluntary, non-binding commitments to reduce GHGs and report on emissions. This kind of “pledge-and-review” mechanisms would provide an international platform for a country to pledge an economy-wide emission target, or a policy or set of actions. There would also be transparency mechanisms for reporting and reviewing emissions data, but no sanctions for not meeting the pledge.<sup>i</sup>*

Many of the KP Annex B Parties have insisted from the outset that the US should be under legally binding obligations. The US, true to Byrd-Hagel, objects that this would only be possible if the BASIC countries were also legally bound. Developing countries, in turn, have insisted that there be no (structural) changes to either the Kyoto Protocol or the Convention, ruling out, in particular, any such legally binding treaty outcome for the LCA-track. According to them, the only acceptable outcome of

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<sup>i</sup> Kristian Tangen, *The Odd Couple? The Merits of two Tracks in the International Climate Change Negotiations*, Briefing Paper 59, The Finnish Institute of International Affairs, 30 April 2010: p.3

the negotiations is an amendment of Annex B for the AWG-KP, and a (set of) COP decisions for the AWG-LCA. The European Union, for its part, has repeatedly made a binding increase of its emissions reduction target (from 20 to 30 per cent) conditional on the conclusion ‘of a global and comprehensive agreement for the period beyond 2012’, whereby ‘other developed countries commit themselves to comparable emission reductions and developing countries contribute adequately according to their responsibilities and respective capabilities’.<sup>i</sup>

In light of the above, we are thus, *de facto*, left with two options: ***either everyone is legally bound, or nobody is***. Also, given the situation described in the previous paragraph, one could be forgiven for thinking that we are doomed to the second option: a ‘regime’ of ‘Implementing Agreements’ with merely domestic commitments, if any at all. However, this is not necessarily the case. Indeed, with international attention focused steadily on the need for a new or amended treaty, the fact that the conclusion of such a treaty is not the only option in international law through which countries may assume legally binding obligations is often ignored. In this context, we believe that the recourse to binding Unilateral Declarations, in combination with a set of COP decisions and an amendment of the Kyoto Protocol, could perhaps offer a way out of the present stalemate.<sup>ii</sup>

## 2. Unilateral Declarations – The Strategic Arms Limitation Talks<sup>iii</sup>

Our proposal on the legal format of the twin-track negotiation outcome is based on a legal instrument which was used to overcome a similar problem in nuclear arms control negotiations between the USA and the then Soviet Union in the late 1970s. The first round of Strategic Arms Limitation Talks (SALT I) between the United States and the then Soviet Union led to a five year *Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Arms* (‘Interim Agreement’) which stated that parties intended to replace it as soon as possible with a more comprehensive agreement. As the 3 October 1977 expiry date of the Interim Agreement drew nearer, however, it became apparent that the SALT II negotiations on this more comprehensive agreement would not be concluded until after that date.

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<sup>i</sup> For example, EU, Council conclusions on Climate Change, follow-up to the Copenhagen Conference, Brussels, 15 March 2010, paragraph 10.

<sup>ii</sup> Indeed, it would provide a tool to overcome the strongest argument put forward against the twin-track approach advocated in Tangen (2010), namely that *if there is an alternative framework that is less binding, no new countries will adopt Annex B commitments and some of the current Annex B countries will refuse to inscribe post-2012 commitments*[p.6f.]

<sup>iii</sup> Source: George A. B. Peirce, ‘Arms control: SALT – unilateral policy declaration by the United States’, *Harvard International Law journal*, Vol.19 (1978), pp: 372-7.



On 23 September 1977, US Secretary of State Cyrus Vance issued a *unilateral declaration* indicating the intention of the United States to take no action inconsistent with the provisions of the Interim Agreement during the second round of talks (SALT II), provided that the Soviet Union exercise similar restraint. The Soviet government issued an analogous declaration on 26 September.

This led to two interrelated debates: on one hand, concerning the legal status of such a declaration under international law, and, on the other, whether President Carter had the competence, under US constitutional law, to have such a Unilateral Declaration issued.<sup>i</sup>

While their binding character is examined in greater detail in Part 2 below, it is sufficient at this point to stress that Unilateral Declarations may, under certain conditions, effectively generate legally binding obligations on the part of the issuing State. The main requirement is that the declarations are public, and manifest the State's will to be bound. Opinions of both the International Court of Justice and its predecessor, the Permanent Court of International Justice, indeed support the proposition that a unilateral statement may bind a state when the statement expresses an intention to be bound which could in good faith be relied on by other states, and the representative issuing the statement has the authority to do so.<sup>ii</sup>

### 3. The Missing Legal Link

Clearly, the failure of START II to produce an agreement in time to prevent a gap in applicable international law strikes an unhappy chord with respect to the current climate change negotiations. However, it may also hold the solution. It seems fair to say that Plan A, namely to replace the Kyoto Protocol with a treaty with legally binding commitments for all key Parties (US, Annex B, BASIC) as the outcome of the twin-track negotiations, did not survive Copenhagen.<sup>iii</sup> In other words, the time for Plan B has come, but what, short of giving up the international effort, could this be?

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<sup>i</sup> Remark: Whether the President had the authority to issue the unilateral declaration in question depended primarily on whether it contravened Section 33 of the Arms Control and Disarmament Act which prohibits any such legally binding agreement obligating the US to limit its armaments without authorization by Congress through legislation or Senate consent to a treaty. While the President enjoys broad constitutional powers in the conduct of foreign policy, including the authority to conclude executive agreements without congressional consent, such binding agreements must be consistent with *pre-existing legislation* enacted by Congress in the exercise of its constitutional authority.

<sup>ii</sup> It may moreover be noted that, by virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are always considered competent under international law to formulate such declarations, regardless of their precise constitutional prerogatives. The implication is that if such a declaration is issued by either of the aforementioned authorities, the State will be legally bound under international law, even in the hypothesis that the person making the declaration overstepped his or her constitutional competences. See *infra*, Section 5.

<sup>iii</sup> For more on this, see Benito Müller, *Copenhagen 2009 – Failure or final wake-up call for our leaders?*, Oxford Institute for Energy Studies, EV49, February 2010. Available at [www.OxfordClimatePolicy.org](http://www.OxfordClimatePolicy.org)

### 3.1 PLAN B

During the 2009 ecbi Oxford Seminar, a senior negotiator mentioned the idea of a Unilateral Declaration as a means of establishing the LCA-KP balance *for developed countries*, as referred to in paragraph 1.b.i. without having to give up or amend either the Kyoto Protocol, or the Convention. In other words, the idea was for the LCA outcome to be a COP decision, but with an added Unilateral Declaration by the US acknowledging the relevant obligations of the decision, which would make them legally binding in international law.

- AWG-KP Outcome: *Amendment of Annex B* to the Kyoto Protocol
- AWG-LCA Outcome: A set of *COP decisions*, to be endorsed by a *Unilateral Declaration from the US*.

### 3.2 PLAN B EVALUATION

How might this plan fare with the main protagonists?

#### 3.2.1 BASIC:

It is hard to see how there could be any resistance from the BASIC Group, or indeed from any developing country, to such an outcome. It corresponds precisely to their preferred outcome, with or without US endorsement.

#### 3.2.2. UNITED STATES

Given the obvious difficulties in obtaining the two-thirds Senate majority required to ratify an international treaty, this solution might be acceptable to the US administration, provided it does not create any strong domestic backlash, particularly with respect to the need to seek the ‘advice and consent of the Senate’.<sup>i</sup> However, the SALT II case suggests<sup>ii</sup> that it might be possible to avoid such a backlash if the UD is based on a simple majority Senate resolution, such as the one previously sponsored by Senators Byrd and Hagel.

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<sup>i</sup> *He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur;* [US Constitution, Art 2.2].

<sup>ii</sup> Some senators remained concerned, however, that the United States declaration was a ‘diplomatic innovation, the Parallel Unilateral Policy Declaration (PUPD)’, by means of which the President could circumvent the constitutional requirement for advice and consent of the Senate to a treaty. On 3 October 1977, the Senate *considered* a concurrent *resolution* expressing its support for the administration’s stated intention to continue to abide by the terms of the Interim Agreement. The Chairman of the Senate Foreign Relations Committee explained that the resolution was not intended to imply that congressional consent to the Executive’s action was required or that the United States was bound by the declaration. During debate, however, the resolution was returned to the Foreign Relations Committee on a point of order and *was not re-introduced*.

Having said this, it might also be seen by the US as disrupting the delicate Bali Action Plan balance between the US and the BASIC countries, by requiring only the former to issue such a declaration.

### *3.2.3. ANNEX B*

Would a US UD concerning the outcome of the LCA negotiations be sufficient to get Annex B Parties to agree on a second commitment period of the Kyoto Protocol? Not necessarily. One factor is that such an agreement not only depends on the legal format of the outcome, but also on its substance. In particular, given paragraph 1.b.i of the Bali Action Plan (see Box 2), it stands to reason that the US would have to take on mitigation obligations which are not only measurable, reportable, and verifiable, but also comparable in effort to the envisaged second commitment period targets. Given the debates in Copenhagen, the type of verification envisaged may also be an issue.

However, these substantive issues are quite independent of the legal format, in the sense that they will have to be resolved in order to achieve the presupposed get the presupposed agreed outcome of the AWG-LCA track in the first place. In the present context, a more important potential obstacle to Plan B might be for some Annex B Parties to join a potential US objection demanding some form of legal commitment by the BASIC Group Parties. Given the sensitivity of such a demand, it would be difficult not to interpret it essentially as a sign of bad faith – for trying to avoid the blame of failing to agree on a second commitment period to which one has no intention of agreeing oneself. However, just in case this is not so, there might just be a Plan C that could conceivably overcome even this obstacle.

## **3.3 PLAN C**

Plan C is essentially the same as Plan B, with the addition of further UDs by the BASIC countries:

- **AWG-KP Outcome:** Amendment of Annex B to the Kyoto Protocol
- **AWG-LCA Outcome:** A set of COP decisions, to be endorsed by Unilateral Declarations from the US and the BASIC countries.

## **3.4 PLAN C EVALUATION**

### *3.4.1. US AND ANNEX B*

Being essentially the same as Plan B with respect to the demands on either the US or Annex B Parties, the relevant points raised in the previous evaluation also apply here. Indeed, both plans share something else that has not yet been mentioned, namely the temptation of Annex B Parties to forgo the Kyoto Protocol and to opt for the UD-route instead. In the context of Plan C, at least, this would not be a wise move. While the US might not be too bothered, it would remove any chance that the

BASIC Group members would even contemplate to issue their own UD. Indeed, the likelihood that this might happen is one of the key questions in this scenario.

Another key question concerning plan C, which is not intrinsically a ‘*global and comprehensive agreement* for the period beyond 2012’, is whether it will prove sufficient to move the EU from its present 20 per cent emission reduction target to the 30 per cent emission reduction target for the period beyond 2012. The EU focus on a global and comprehensive agreement was again reflected in the EU’s notification to the UNFCCC Secretariat of 28 January 2010: ‘*as part of a global and comprehensive agreement for the period beyond 2012, the EU reiterates its conditional offer to move to a 30 per cent reduction by 2020 compared to 1990 levels, provided that other developed countries commit themselves to comparable emission reductions and developing countries contribute adequately according to their responsibilities and respective capabilities*’.<sup>1</sup> Will the EU stick to a rather formal vision based on this legal format or will an (as to substance) acceptable package deal suffice to move towards its 30 per cent target? This could lead to a heavy debate within the EU. However, the Commission communication of 9 March 2010, referred under the heading ‘negotiations roadmap’ to ‘a legally binding global deal’. This wording is coming closer to the wording used by, for example, Australia (‘global deal ... advanced economies take on commitments comparable to Australia’s’) and Japan (‘fair and effective international framework in which all major economies participate and on agreement by those economies on ambitious targets’) in their notifications to the UNFCCC Secretariat, which are more neutral as to the legal format of the outcome of the international climate change negotiations.

### 3.4.2. BASIC

It is difficult to say whether the BASIC countries would be amenable to this sort of a solution. The key attraction, as mentioned above, of both plans for the BASIC countries – indeed for developing countries generally – would be the format of the outcome of the negotiations: the ***retention of the Kyoto Protocol***, and a (set of) ***COP decisions for the LCA-track*** following the guidance of the ***Bali Road Map***.

The main difficulty, however, would clearly be the long-standing refusal by many developing countries, including from the BASIC Group, to take on legally binding targets as part of an outcome of the current negotiations. China, in particular, has been absolutely clear on this: the communication to the UNFCCC Secretariat regarding the Nationally Appropriate Mitigation Actions (NAMAs) China is willing to undertake stresses that these *are voluntary in nature* (see Box 3).

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<sup>1</sup> Text available at [http://unfccc.int/files/meetings/application/pdf/europeanunioncphaccord\\_app1.pdf](http://unfccc.int/files/meetings/application/pdf/europeanunioncphaccord_app1.pdf)

**Box 3. Chinese NAMA Notification, 28 January 2010**

*China will endeavor to lower its carbon dioxide emissions per unit of GDP by 40-45 per cent by 2020 compared to the 2005 level, increase the share of non-fossil fuels in primary energy consumption to around 15 per cent by 2020 and increase forest coverage by 40 million hectares and forest stock volume by 1.3 billion cubic meters by 2020 from the 2005 levels.*

Please note that the above-mentioned autonomous domestic mitigation actions are voluntary in nature and will be implemented in accordance with the principles and provisions of the UNFCCC, in particular Article 4, paragraph 7.

[http://unfccc.int/files/meetings/application/pdf/chinacphaccord\\_app2.pdf](http://unfccc.int/files/meetings/application/pdf/chinacphaccord_app2.pdf)

Having said this, the Chinese communication might actually point to the way in which Plan C might have a chance of implementation after all. As in the case of the US UD, the key here is the substance of the envisaged BASIC UDs. As mentioned above, it seems extremely unlikely that, say, China would even contemplate turning the submitted autonomous NAMAs figures into internationally binding obligations. However, what if the subject of the BASIC UDs were the sort of NAMAs actually referred to in the Bali Action Plan (paragraph 1.b.ii, see Box 2), i.e. actions which are *supported and enabled by technology, financing and capacity-building, in a measurable, reportable and verifiable manner*? Indeed, what if they referred to conditional obligations of the form ‘if we receive that much support, then we will mitigate this much’? It would seem that this ought to be less objectionable to the Parties in question than the idea of simple (absolute/unconditional) binding obligations, but it is difficult to judge whether they would be willing to entertain this in exchange for a second commitment period of the Kyoto Protocol. However, this is really an issue of substance which goes beyond the remit of this brief.

Moreover, judging from the communiqué of the most recent BASIC meeting (see Box 4), the idea of some form of legally binding outcome of the LCA track seems to be no longer complete anathema among the group members, and it might just be that the sort of conditional obligations referred to above could be an acceptable legally binding outcome, if adopted through the use of UDs.

**Box 4. Joint Statement, Third Meeting of BASIC Ministers Cape Town, 25 April 2010**

3. The Ministers agreed that in accordance with the mandate of the Bali Roadmap, such agreements must follow two tracks and include an agreement on quantified emission reduction targets under a second commitment period for Annex I Parties under the Kyoto Protocol, as well as a legally binding agreement on long-term cooperative action under the Convention. Ministers felt that a legally binding outcome should be concluded at Cancún, Mexico in 2010, or at the latest in South Africa by 2011.

### 3.5 CONCLUSION

In principle, it is possible to have a legally binding (mitigation) deal for all the key Parties which, while compatible with the twin-track approach of the Bali Action Plan, does not rely on a grand-

unifying treaty. It is possible to patch the twin-tracks of the Bali Action Plan together through the use of Unilateral Declarations.<sup>i</sup>

This patchwork solution clearly lacks the elegance of the sort of global cap-and-trade deal some might wish to see. However, it may well work, and deserves to be considered – before throwing out the baby with the global trading treaty bathwater and sacrificing it on the altar of a global carbon price!

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<sup>i</sup> The unilateral declaration ‘tool’ could also be used under the UNFCCC, in line with the stand-still principle in environmental law and/or the precaution principle, in order to bridge a possible normative gap in anticipation of the achievement of a new treaty or an amendment of the Kyoto Protocol.

## Part 2. The Legal Framework

### 4. ‘Legally Binding’?

Given the widespread insistence that the ongoing negotiation process should result in a ‘legally binding’ outcome, it is worth having a preliminary look at the precise meaning of that phrase, both from the perspective of legal theory, as well as from a more practical angle. It may be observed at the outset that there are widely divergent perceptions on the advantages and disadvantages of ‘legally binding’ emission reduction commitments under international law. On one hand, many in the developing world fear an encroachment on their sovereignty, in particular their sovereign entitlement to economic development. On the other hand however, particularly in the developed world, sometimes suggest that it is, in any event, useless to agree on such ‘legally binding’ commitments, since international law is ultimately voluntary and incapable of effective enforcement. As always, the truth is far more nuanced.

#### 4.1 MAIN SOURCES OF INTERNATIONAL LAW

In essence, the main sources of international law (see Box 5) can be found in the Statute of the International Court of Justice (hereafter ‘ICJ’), annexed to the Charter of the United Nations.<sup>i</sup> Article 38 of the ICJ Statute identifies four different sources: treaties, customary law, general principles of law, and judicial decisions and teachings.

##### 4.1.1 TREATIES

First and foremost, the provision refers to ‘international conventions, whether general or particular, establishing rules expressly recognized by the contesting states’. It is clear that *treaties*, whatever their particular form or designation, are the most common source of international law. This holds true for most branches of international law, including international environmental law, a branch governed by an ever-growing body of framework treaties and implementing protocols/annexes. The conclusion of treaties, their validity and interpretation is authoritatively regulated by the 1969 Vienna Convention on the Law of Treaties.<sup>ii</sup>

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<sup>i</sup> Statute of the International Court of Justice, San Francisco, 26 June 1945, 1 *U.N.T.S.* xvi.

<sup>ii</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *U.N.T.S.* 331.

Multilateral treaties, such as the UNFCCC and the Kyoto Protocol, generally come into being after long periods of negotiations which take place under the auspices of an international conference<sup>i</sup> or the UN General Assembly. When the text does not contain any indications as to how interested States should express their ‘consent to be bound’, the mere signing of the draft treaty will serve both to confirm the final text as well as to express the signing State’s participation to the treaty. However, most modern-day multilateral treaties, including the UNFCCC and the Kyoto Protocol, expressly provide that States, after ‘signing/adopting’ the final treaty text, will only become bound once they have proceeded to ‘ratification’. This additional procedural step generally enables States to obtain the approval of their domestic legislatures before assuming legally binding commitments. States which were not amongst the initial signatories of the treaty text will often be able to ‘accede’ to it at a later stage. In addition, many multilateral treaties state that they will only ‘enter into force’ once a certain minimum number of ratifications has been secured.<sup>ii</sup>

Given that sovereign States are ultimately free to sign up to a treaty or not, most multilateral treaties also contain procedural instructions to be followed by States if they choose to withdraw from them. Thus, Article 27 of the Kyoto Protocol recognizes that KP parties may withdraw from the Protocol ‘at any time after three years from the date’ of entry into force ‘by giving written notification to the Depositary. Any such withdrawal shall take effect upon expiry of one year from the date of receipt (...) of the notification of withdrawal (...)’. In principle, withdrawal from treaties is not subject to any form of penalization as such.

#### 4.1.2 CUSTOMARY LAW

A second source – and one which is typical for *international law* – concerns ‘*customary law*’. This concept is described in Article 38(1)(b) of the ICJ Statute as ‘a general practice accepted as law’. From this description – and from the ICJ case law on the matter<sup>iii</sup> – it can be derived that ‘custom’ presupposes two distinct elements: first, a practice which is exercised by a considerable part of the international community (i.e., state practice, or the material element), and; second, the conviction that this practice is carried out ‘as of right’ (i.e., *opinio iuris*, or the subjective element). The latter element serves to distinguish customary norms from mere comity or habit. (Clearly, the fact that States

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<sup>i</sup> For example, the UNFCCC came about as a result of the UN Conference on Environment and Development (UNCED), held in Rio de Janeiro in June 1992.

<sup>ii</sup> Article 25(1) of the Kyoto Protocol, for example, provided that the Protocol would enter into force 90 days ‘after the date on which not less than 55 Parties to the [UNFCCC], incorporating Parties included in Annex I which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I’ had ratified it.

<sup>iii</sup> For example: ICJ, *Continental Shelf case* (Libyan Arab Jamahiriya v. Malta), Judgment of 3 June 1985, (1985) *I.C.J. Rep.*, p. 13, at paragraph 27.



consistently use white paper for diplomatic correspondence does not imply that they consider this to result from any legal obligation whatsoever. By contrast, if coastal States consistently proclaim a 200-mile exclusive economic zone off their coast, an argument can gradually be made that they do this ‘as of right’.)

In principle, customary and treaty law carry the same authority in the hierarchy of sources.<sup>i</sup> Moreover, contrary to multilateral treaties, States cannot simply withdraw from existing norms of *general* customary law.<sup>ii</sup> On the other hand, custom is admittedly more ‘difficult’ to identify and assess.<sup>iii</sup> Indeed, given the fact that it is in principle an unwritten source of law and that it evolves gradually, it is often far more difficult to determine the precise content of customary rules, and to identify at what moment in time they become binding on states. In any event, since state practice requires a certain lapse of time in order to ripen into international custom, and since international environmental law is a relatively young branch of law, the role of custom is rather limited in this field. It is obvious, in this context, that custom cannot in any way be used to force binding emission reduction obligations on States unwilling to sign up to a new or amended treaty.

#### 4.1.3. GENERAL PRINCIPLES OF LAW, JUDICIAL DECISIONS, AND DOCTRINE

Two sources of lesser importance are also listed in Article 38(1) ICJ Statute. Thus, paragraph c refers to ‘*general principles of law* recognized by civilized nations’. This is a somewhat archaic phrase which points to the residuary role of legal principles that surface in virtually all domestic legal systems, such as the ‘estoppel’ principle or the rule that no one can be judge and party in the same case. Finally, paragraph d acknowledges that ‘*judicial decisions and the teachings* of the most highly qualified publicists’ qualify as a subsidiary means for the determination of rules of law.

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<sup>i</sup> Conflicts between customary and treaty norms are in principle settled along the *lex posterior* and *lex specialis* axioms. Put differently, in case of conflict (1) the later norm takes precedence over the older norm, and (2) the more specific rule takes precedence over the more general one.

<sup>ii</sup> Remark: It should be kept in mind that while customary norms may cover rights and obligations that are not otherwise reflected in any treaty instrument, the two sources may also overlap. Thus, many multilateral treaties contain rights and obligations which are also considered to be part of general customary international law (think, for example, of certain norms dealing with the conduct of hostilities, enshrined in the 1977 First Additional Protocol to the Geneva Conventions). The implication, in the latter scenario, is that these rights and obligations will apply to States, regardless of their having ratified the relevant treaty.

<sup>iii</sup> An ICJ judgment ‘finding’ the existence of a customary norm may be particularly helpful. At the same time, it must be stressed that such judgment will not be the actual ‘source’ of the norm under consideration (this will be the combination of State practice and *opinio iuris*).

## 4.2 OTHER SOURCES OF INTERNATIONAL LAW?

### 4.2.1. DECISIONS OF INTERNATIONAL ORGANIZATIONS (IOS)

While Article 38 of the ICJ Statute neatly sums up the *main* sources of international law, the list is not exhaustive. Indeed, even if no mention thereof is made in the aforementioned provision, it is accepted that *decisions of international organizations* (IOs) may also give rise to international rights and obligations, at least insofar as the IO is acting in a supranational capacity. Thus, when the UN Security Council adopts a decision under the famous Chapter VII of the United Nations Charter, it is in fact establishing legally binding obligations. In similar vein, when the Council of the European Union adopts a Regulation on a trade-related matter, it is in a sense creating (regional) international law.

Caution is needed, however. Indeed, as States are rather fond of their sovereign prerogatives, it is highly exceptional for an IO to be endowed with supranational competences. Most international organizations – including the UN General Assembly – have no authority to take binding decisions vis-à-vis States. Insofar as such bodies do adopt declarations of a general normative character, the resulting instruments will merely constitute examples of so-called ‘soft law’. Contrary to what the label might suggest, ‘soft law’<sup>i</sup> is of a ‘political’ or ‘recommendatory’, rather than ‘legally binding’, nature, although it may gradually pave the way for formal legislation, or may inspire evolutions in customary international law. Otherwise, international organizations’ ‘binding’ power is generally limited to their internal organization and functioning. IOs may indeed use their competences to implement the tasks entrusted to them in their founding treaties, without, however, creating autonomous rights or obligations for States Parties.

### 4.2.2. DECISIONS BY CONFERENCES OF THE PARTIES

The same is true, *mutatis mutandis*, for decisions of Conferences of the Parties, established under certain multilateral treaties. On one hand, in the case that a treaty grants a COP far-reaching powers to adopt binding decisions – whether by consensus or by (simple or qualified) majority – affecting the rights and obligations of the States Parties, the resulting *COP decisions* will indeed give rise to ‘international law’. An interesting case at hand is the Montreal Protocol to the Vienna Convention for the Protection of the Ozone Layer. Article 2.9 of this Protocol unequivocally grants the COP the authority to make significant changes to the obligations of the Parties to reduce consumption and

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<sup>i</sup> ‘Soft law’ instruments are fairly common in the international environmental domain. One of the oldest examples is the 1972 Stockholm Declaration adopted at the UN Conference on the Human Environment.

production of controlled substances, by way of simple COP decisions.<sup>i</sup> On the other hand however, as with IOs, such situations are very much the exception. Most ‘COPs’ are indeed construed as ‘mere’ implementing bodies, tasked with the accomplishment of the international rights and obligations incorporated in the original treaty text, or, in other words, with secondary decision-making. The same is true for the UNFCCC COP. Article 7(2) UNFCCC, for example, provides that the COP ‘shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention’ and shall make ‘*recommendations* on any matters necessary for the implementation of the Convention.’

#### **Box 5. Sources of international law**

##### *Main sources of international law (Article 38 ICJ Statute)*

- Treaties → result from diplomatic negotiations  
→ consent to be bound is normally expressed through signing, ratifying,...
- Custom → requires (1) State practice that is sufficiently uniform, constant, and general, and which demonstrates (2) an ‘acceptance or recognition of this practice as law’
- General principles → supplementary/residuary role
- Case law & legal doctrine → subsidiary role

##### *Other sources of international law*

- Decisions of IOs → mostly limited to implementation and secondary decision-making  
→ ability to create legal rights and obligations depends on founding treaty
- COP decisions → *idem*
- Unilateral statements & acts  
→ can be legally binding if (1) the acts are public or generally known, and  
(2) reflect the intention of the State to be bound

It should be added that when the original treaty provides for an *implicit* (rather than explicit) grant of authority to the Conference of the Parties – as is often the case – a reserved approach is needed. COP decisions that are based on an implicit grant of authority, and that contain allegedly binding obligations on States parties, indeed rest on shaky legal grounds. When a COP decision has been adopted by consensus, no problems may arise as long as the *political* consensus underlying it holds. However, once the underlying consensus unravels and/or a Party fails to abide by its obligations, the weak basis of the decision is bound to create legal problems.<sup>ii</sup> Thus, even if Article 9(1) of the Kyoto Protocol suggests that the CMP<sup>iii</sup> may take ‘appropriate action’ in relation to the

<sup>i</sup> See: CAN International, ‘COP decisions: binding or not?’, 8 June 2009, available at [http://www.climatechange.org/climate-change-basics/by-meeting-and-date/bonn-ii-june-2009/COP%20Decisions\\_CAN\\_legal\\_group\\_June%2008\\_09.pdf](http://www.climatechange.org/climate-change-basics/by-meeting-and-date/bonn-ii-june-2009/COP%20Decisions_CAN_legal_group_June%2008_09.pdf), at 3.

<sup>ii</sup> See *ibid.*, at 2 (referring to two precedents where, following political and legal criticism, far-reaching COP decisions were eventually replaced by formal amendments of the relevant treaties). See also below, Section 4.3., on the creation of the Kyoto compliance regime through a CMP decision.

<sup>iii</sup> ‘Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol’

periodical review of the Protocol, this provision does not give the CMP ‘carte blanche’ to impose new binding obligations.<sup>i</sup> In this context, there can be no doubt that the adoption of new binding emission reduction targets post 2012 must take the form of a formal amendment to the Kyoto Protocol in accordance with Articles 20 and 21 (or of a new treaty altogether), rather than a mere CMP decision.

Finally, having regard to the provisions of the UNFCCC and the Kyoto Protocol, a set of COP and/or CMP decisions would appear to provide an insufficient legal basis on which to impose adequately binding commitments with respect to quantified emission reduction commitments, or financial obligations for developed countries. The respective handicaps of a COP and/or CMP decision could, however, be tackled by having recourse to a supplementary tool, namely ‘Unilateral Declarations’. Indeed, in order to complete our overview of sources of international law, reference must be made to ‘*unilateral statements and acts*’. Within certain confines, legal doctrine asserts that such acts may generate legally binding obligations on the part of the State concerned. Their (possible) legal nature is examined in greater detail in Section 5 below.

#### **4.3 PRACTICAL IMPLICATIONS – THE ‘COMPLIANCE PULL’ OF INTERNATIONAL LAW**

##### *4.3.1. INTERNATIONAL LAW ENFORCEMENT BODIES*

Having identified the various sources of international law, the question which arises next is what practical value can be attached to their ‘legally binding’ character. In this context, it is sometimes argued that the whole construction of international *law* is a chimera, since, in contrast to the domestic legal order, there is no guarantee that the law is enforced and perpetrators sanctioned.<sup>ii</sup> This criticism is certainly understandable insofar as there exists no ‘central enforcer’ to ensure state compliance with international rules, and adjudication of inter-State disputes ultimately rests on the voluntary consent of States to submit their dispute to an international tribunal or to arbitration.<sup>iii</sup> Thus, even if a state makes a declaration accepting the compulsory jurisdiction of the International Court of Justice under Article

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<sup>i</sup> The Kyoto Protocol does, however, contain various provisions that enable the CMP to take *specific* action with respect to rule-making. Article 3(4), for instance, states that the CMP ‘shall decide rules as to which (...) additional human induced activities and land use change and forestry categories (...) shall be added to the assigned amounts for Annex 1 Parties’. See also Articles 5(1), 6(2), 7(4), 8(4), 12(7), 16, 17, 18.

<sup>ii</sup> See: J. Austin, ‘The Province of Jurisprudence Determined’, in C. Morris (ed.), *The Great Legal Philosophers*, University of Pennsylvania Press, Philadelphia, 1971, p. 352.

<sup>iii</sup> The UN Security Council cannot be considered as a central judicial enforcer. On one hand, the Council cannot take binding action in relation to each and every dispute concerning the application of international law; its coercive powers are confined to situations where there exists a ‘threat to the peace, a breach of the peace or an act of aggression’ (Article 39 UN Charter). In addition, it is obvious that the Security Council is an inherently political body, rather than an impartial judicial organ. It is tasked with the preservation of international peace and security, not with upholding international law. It may be recalled, for instance, that the permanent members are in any event shielded from any form of coercive action as a result of their veto power.

36 ICJ of the Statute, it remains free to revoke this declaration under certain conditions – as both France and the USA did following adverse rulings from the Court in 1974 and 1984 respectively.<sup>i</sup>

#### 4.3.2. LEGALLY BINDING – WHAT’S IN A NAME?

At the same time, a number of reservations are relevant. First, the analogy with the domestic legal order is not entirely correct.<sup>ii</sup> Many violations of domestic law, such as traffic offences or tax fraud, undeniably go unpunished. However, no one will therefore state that traffic rules or tax law are not ‘legally binding’. In addition, when the state authorities are condemned by a national court of law, there is again no external force to guarantee the implementation of this adverse judgment. If the judgment is carried out, this is usually because the executive branch itself chooses to do so.<sup>iii</sup>

Second, while enforcement mechanisms are clearly less developed in international law, this does not mean that they are wholly absent. The UN Convention on the Law of the Sea (UNCLOS 1982) and the WTO dispute settlement understanding, for instance, provide for ambitious frameworks of (quasi-) judicial dispute settlement. It should moreover be observed that when a state is affected by non-compliant behaviour of another state, it may under certain conditions engage in proportionate unilateral countermeasures (these are deliberate breaches of international legal obligations owed to the perpetrator state, and which are aimed at halting abusive behaviour on the part of the latter).<sup>iv</sup>

Third, it may be noted that law is not ‘law’ because it is enforced, it is enforced because it is ‘law’; and enforcement would otherwise be illegal.<sup>v</sup> In other words, the preferred view seems to be that sanctioning, while desirable for reasons of *efficiency* and *justice/equity*,<sup>vi</sup> is not a *precondition* for a rule to be ‘law’, but rather a consequence. Indeed, international legal norms can be considered ‘law’

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<sup>i</sup> The USA withdrew after the ICJ asserted jurisdiction vis-à-vis a claim lodged by Nicaragua concerning US assistance to the *contras*. France revoked its declaration accepting compulsory jurisdiction in light of the Nuclear Test case (concerning French nuclear tests in the Pacific Ocean). It should be stressed, however, that a withdrawal from compulsory jurisdiction under Article 36 ICJ Statute will only produce results for the future (and not for claims already filed with the ICJ).

<sup>ii</sup> For an interesting critique, see: A. D’Amato, ‘Is International Law Really “Law”?’ (1984–5), 79 *Northwestern U.L. Rev.*, pp. 1293–1314.

<sup>iii</sup> Abstracting from rules of constitutional and/or procedural law in States allowed to enforce judgments condemning State(s) (authorities) to pay damages or penalties by e.g. sequestering State property.

<sup>iv</sup> See on this Articles 47–50, International Law Commission, *Commentary on the Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, (2001-II) *Y.B.I.L.C. Vol. 2*, 31.

<sup>v</sup> G. Fitzmaurice, ‘The general principles of international law considered from the standpoint of the rule of law’, (1957) 92-II *R.d.C.*, pp. 1–227, at 45.

<sup>vi</sup> cf. ‘Justice must not only be done, but must also be seen to be done.’

because states consider them obligatory and because they believe that a sanction, while perhaps not forthcoming, would be an *appropriate* response to their violation.<sup>i</sup>

In the end, it is remarkable that, in spite of the relatively underdeveloped enforcement of international legal norms, scholars (both legal scholars and international relations adepts) widely agree with Louis Henkin's famous observation that '*almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time*'.<sup>ii</sup> This illustrates that judicial enforcement is only one of several factors inducing compliance with international law. Another important aspect of the 'compliance pull' of international legal norms flows from the fact that they generally serve a state's interests, and tend to become an integral part thereof. For this reason, states will often comply with an institution's set of rules, even if their short-term interest would dictate otherwise. For example, a state on the losing end of a World Trade Organization arbitration would comply with that arbitration award because it could expect to win any subsequent dispute, and would then justifiably expect the losing party to comply, in deference to the ongoing practice of compliance.<sup>iii</sup> The long-term interest in a 'managed anarchy' generally prevails over the short-term profit gained from 'free-riding'. Furthermore, compliance with international law cannot simply be reduced to a rational calculation of costs and benefits. It is indeed an inherent feature of international relations that states' conduct is subject to community judgment, and that states consequently feel the need to explain, defend, and justify their actions, and to persuade others in relation to its permissibility.<sup>iv</sup> This generates pressure to comply, on one hand, out of a common sense of being part of a community – states desire to be perceived as a member of the international community in good standing, and will behave in a certain way because they see it as 'the right thing to do'. Hence, 'peer review' and/or 'naming and shaming' may exercise an important influence, especially in relation to those branches of international law which are of interest to the international community as a whole, such as international criminal law, human rights law, and also international environmental law. On the other hand, repeated application of certain international norms, such as the

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<sup>i</sup> A.C. Arend, 'Toward an Understanding of International Legal Rules', in R.J. Beck, A.C. Arend and R.D. Vander Lugt, *International Rules: approaches from International Law and International Relations*, OUP, Oxford, 1996, pp. 289–309, at 291; G. Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement', (1956) 19 *Modern L. Rev.*, pp. 1–13, at 8. See also: R. Kolb, *Réflexions de philosophie du droit international*, Bruylant, Brussels, 2003, pp. 414–24.

<sup>ii</sup> L. Henkin, *How Nations Behave. Law and Foreign Policy*, Columbia University Press, New York, 1979, (2nd ed.), at 47.

<sup>iii</sup> T.M. Franck, 'The power of legitimacy and the legitimacy of power: international law in an age of power disequilibrium', (2006) 100 *A.J.I.L.*, pp. 88–106, at 92.

<sup>iv</sup> See e.g., I. Johnstone, 'Security Council Deliberations: The Power of the Better Argument', (2003) 14 *E.J.I.L.*, pp. 437–80.

rules pertaining to diplomatic and consular law, may also lead to a form of obedience to the rules as a matter of habit or of bureaucratic routine.

Without engaging in an in-depth study of the ‘compliance pull’ of international law, it is clear that the latter notion should not be narrowed down to the threat of sanctions *sensu stricto*.<sup>i</sup> Several authors have even stressed that when compliance is based on various coercive devices – such as economic sanctions or exclusion (the enforcement model) – treaty regimes are usually *less* efficient than when compliance is based on instruments of active management – such as reporting and data collection, verification and monitoring, capacity-building, and strategic review.<sup>ii</sup> In sum, it must be kept in mind that while different (treaty, customary, or other) international rules may be equally ‘binding’ on states from a legal perspective, their practical ‘compliance pull’ may vary considerably. The obvious starting point is to verify whether the rules under consideration can be invoked before a national or international court of law, yet, this should not be our exclusive focus. Other relevant factors include, among others, the extent to which the norms serve states’ long-term interests; the existence of reporting and monitoring procedures; the nature of the rules (technical or normative); and their degree of precision (vague norms are more easy to circumvent than more determinate ones).

#### 4.3.3. THE COMPLIANCE PULL OF THE KYOTO PROTOCOL

If we now turn to the *possible ‘compliance pull’ of the binding emission reduction targets under the existing Kyoto Protocol*, it must be observed at the outset that there appears to be virtually no scope for *judicial* enforcement in case of non-compliance. Contrary to, for instance, either the UN Convention on the Law of the Sea or the WTO Dispute Settlement Understanding, the Kyoto Protocol does not provide for any form of judicial or quasi-judicial sanctioning. Furthermore, given that the obligations concerned are not directly owed to other States, it appears highly questionable whether a State would have the required interest or *locus standi* to bring a claim of non-compliance before the International Court of Justice.<sup>iii</sup>

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<sup>i</sup> For a brief overview, see e.g., T. Ruys, ‘When law meets power: public international law and the recourse to military force’, in W. Devroe, E. Claes & B. Keirsbilck (eds.), *Facing the Limits of the Law*, Springer, 2008, pp. 253–72, at 253–61.

<sup>ii</sup> See in particular: A. Chayes and A.H. Chayes, *The new sovereignty: compliance with international regulatory agreements*, Harvard University Press, Cambridge, 1995, at 25, 271–85.

<sup>iii</sup> In principle, a State’s breach of international law can only be invoked before an international court or tribunal (such as the ICJ) by an *injured* State. For instance, Article 42 of the ILC Draft Articles on State responsibility suggests that:

‘A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to :

(a) that State individually; or

On the other hand, it is true that the CMP has worked out an internal sanction regime,<sup>i</sup> according to which an Annex I party exceeding its assigned amount (i) loses its eligibility under the international emission trading regime, (ii) has to submit a compliance action plan, and (iii) has to make up the difference in the following period, plus an additional 30 per cent of the excess emissions. In addition, non-compliance by an Annex I party with its monitoring and reporting obligations of articles 5 and 7 of the Protocol is sanctioned by the suspension of eligibility to the flexible mechanisms.<sup>ii</sup>

The CMP decision establishing the aforementioned compliance regime was adopted in Montreal at the first Meeting of the Parties and was based on Article 18 of the Kyoto Protocol, which states that:

‘The Conference of the Parties serving as the meeting of the Parties to this Protocol [CMP] shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.’

It may be observed, however, that the CMP decision concerned not only installed ‘procedures and mechanisms to address cases of non-compliance’ – in the sense of Article 18 KP – but also provided for binding consequences in cases of non-compliance. In other words, the decision could be regarded as an example of a COP decision going beyond the explicit grant of authority incorporated in the founding treaty (cf. *supra*). As a result, it might be expected that the effect of the absence of an unequivocal legal basis of the Kyoto compliance regime – more particularly the absence of a formal

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- (b) *a group of States including that State, or the international community as a whole, and the breach of the obligations:*
- i.) specially affects that State; or*
  - ii.) is of such character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.’*

In light of the reference to ‘specially affected’ States in Article 42(b)(i), the question could nonetheless be raised whether the ICJ would be willing to accept jurisdiction if a claim were to be brought by an island State such as Tuvalu, or by one of the least developed countries threatened with advancing desertification, against an Annex B State that would appear to be in manifest breach of its obligations under the Kyoto Protocol and that has issued a declaration accepting the compulsory jurisdiction of the Court (under Article 36 of the ICJ Statute).

<sup>i</sup> See ‘Procedures and Mechanisms relating to compliance under the Kyoto Protocol’ (Decision 24/CP.7).

<sup>ii</sup> See e.g. the decision of the Enforcement Branch of the Compliance Committee CC-2009-1-8/Croatia/EB of 26 November 2009 which suspended Croatia’s eligibility to participate in the mechanisms under 6 (JI), 12 (CDM) and 17 (emission trading).



amendment as prescribed by Article 18 KP – will arise when an enforcement decision would entail harsh consequences for a non-compliant Member State.<sup>i</sup>

As a result of the aforementioned ‘amendment issue’ and because the sanction of making up the difference plus 30 per cent of the excess emissions in the following commitment period has little meaning as long as there is no second commitment period, the compliance regime of the Kyoto Protocol would appear less severe than one might conclude at first sight.<sup>ii</sup>

Still, this does not detract from the fact that the Kyoto Protocol is a legally binding instrument.<sup>iii</sup> Nor does it imply that the Kyoto regime does not exert any ‘compliance pull’ whatsoever. However, it appears that the Protocol derives its ‘compliance pull’ mainly from factors other than the existence of an actual sanction regime. Indeed, the Protocol seems to be built along what the Chayeses have described as a ‘management model’, based on reporting and data collecting obligations, periodical review etc., rather than an ‘enforcement model’.<sup>iv</sup> In addition, it is clear that for a high-profile multilateral treaty, which the Kyoto Protocol undoubtedly is, ‘peer pressure’ and ‘naming and shaming’ are forces to be reckoned with.

## 5 Unilateral Declarations

### 5.1. THE PRINCIPLE RECOGNIZED BY THE ICJ

Earlier, we attested that, in addition to the more ‘traditional’ sources of international law, such as treaties and custom, ‘unilateral acts and statements’ may also give rise to legal rights and obligations under international law. By way of illustration, reference was made to the US and Soviet declarations in relation to the Strategic Arms Limitation Talks (Section 2). Another prominent example is the declaration issued in 1957 by the Egyptian government concerning the use of the Suez Canal, in which certain international obligations were accepted. The declaration was communicated to the UN

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<sup>i</sup> M. Montini, ‘The compliance regime of the Kyoto Protocol’ in W.Th. Douma, L. Massai and M. Montini (eds.), *The Kyoto Protocol and Beyond. Legal policy challenges of climate change*, Asser, The Hague, 2007, pp. 102 and 104–5.

<sup>ii</sup> Remark: in the event that the Kyoto Protocol were to be amended to address a second commitment period, it would appear desirable to simultaneously rectify the imperfect legal basis of the existing compliance regime.

<sup>iii</sup> For example, P. Cameron, ‘History of climate change law and policy’ in P.Q. Watchman (ed.), *Climate Change: A Guide to Carbon Law and Practice*, Globe Business Publishing, London, 2008, p 31; Y. Slingenberg, ‘The international climate policy developments of the 1990s’ in J. Delbeke et al (eds.), *EU Energy Law. Volume IV. EU Environmental Law. The Greenhouse Gas Emission Trading Scheme*, Claeys & Casteels, 2006.

<sup>iv</sup> See in particular: A. Chayes and A.H. Chayes, *The new sovereignty: compliance with international regulatory agreements*, Harvard University Press, Cambridge, 1995, at 25, 271–85.

Secretary-General, together with a letter explaining that it was to be considered as an ‘international instrument’ and registered as such by the UN Secretariat.<sup>i</sup>

The legally binding character of certain unilateral acts and statements was explicitly confirmed by the International Court of Justice in the 1974 *Nuclear Test cases*. In this case, Australia and New Zealand submitted a claim before the ICJ in relation to French nuclear tests.<sup>ii</sup> Interestingly, the Court concluded that France was legally bound by repeated public statements, made by French officials in preceding years, attesting that France would no longer conduct atmospheric nuclear testing in the Pacific Ocean. The Court explained that for unilateral acts to have legal consequences, (1) the acts should be public or generally known, and (2) should show the intention of the State to be bound. As long as the act was explicit and unambiguous, the form was deemed irrelevant. There was moreover no requirement of a *quid pro quo* or of any subsequent acceptance or response by other States.<sup>iii</sup>

In the *Frontier Dispute* case, the ICJ moreover recognized that in order to be ‘legally binding’, unilateral acts and statements must not necessarily be directed specifically to one or more individual State.<sup>iv</sup> The implication is that, when a State unilaterally assumes obligations, such as emission reduction targets, which are not ‘owed’ to any State in particular but which affect the international community as a whole, they may equally be regarded as sources of international law. At the same time, the Court warned that one should be cautious in deriving legally binding obligations from unilateral conduct, especially ‘when it is a question of unilateral conduct not directed to any particular recipient’.<sup>v</sup> In other words, in the latter case, the threshold of proof as to the existence of an intent to be bound should be applied particularly strictly.

## 5.2. CONDITIONS – THE GUIDING PRINCIPLES

Authoritative guidance on the preconditions and binding impact of Unilateral Declarations can be found in the ‘*Guiding Principles applicable to unilateral declarations of States capable of creating*

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<sup>i</sup> See I. Brownlie, *International Law*, OUP, Oxford, 7th ed., 2008, at 641.

<sup>ii</sup> ICJ, *Nuclear Test Case (New Zealand & Australia v. France)*, Judgment of 20 December 1974, paragraphs 43 et seq. Consider also: PCIJ, *Legal Status of Eastern Greenland*, Judgment of 5 April 1933, Series A/B53.

<sup>iii</sup> I. Brownlie, *International Law*, OUP, Oxford, 7th ed., 2008, at 641.

<sup>iv</sup> ICJ, *Frontier Dispute Case (Burkina Faso v. Mali)*, Judgment of 22 December 1986, paragraphs 39–40.

<sup>v</sup> Ibid. The Court moreover emphasized that, in the context of the *Nuclear Test cases*, the French government could not have expressed an intention to be bound ‘otherwise than by unilateral declarations’. Also urging a cautious approach: ICJ, *North Sea Continental Shelf (Federal Republic of Germany v. Denmark & the Netherlands)*, Judgement of 20 February 1969, paragraphs 27–8.

*legal obligations*’ adopted by the International Law Commission (ILC) in 2006.<sup>i</sup> The first principle unequivocally confirms that ‘[d]eclarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected.’

Principle 1 thus essentially reiterates the two requirements spelled out by the ICJ in the *Nuclear Test* cases. The fourth Guiding Principle adds a supplementary requirement: ‘A unilateral declaration binds the State internationally *only if* it is made by an authority vested with the power to do so.’ At the same time, in accordance with the law of treaties,<sup>ii</sup> the provision affirms that ‘[b]y virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations.’<sup>iii</sup> Hence, if either of the aforementioned authorities would issue a Unilateral Declaration, stating that his or her country will assume binding emission reduction targets, the State concerned would be legally bound at the international level, regardless of the precise parameters of the person’s constitutional prerogatives.<sup>iv</sup>

Principles 3,<sup>v</sup> 5<sup>vi</sup> and 7<sup>vii</sup> elaborate on the idea that, while the precise form of a Unilateral Declaration (written or oral) is immaterial, it will only entail obligations for the formulating State if it is stated ‘in clear and specific terms’, taking account of the circumstances at hand.

In accordance with the ICJ’s *Frontier Dispute* judgment, Principle 6 recognizes that Unilateral Declarations ‘may be addressed to the international community as a whole, to one or several States or

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<sup>i</sup> ILC, ‘Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto’, 2006, available at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_9\\_2006.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_9_2006.pdf).

<sup>ii</sup> Cf. Article 7(2), 46 Vienna Convention on the Law of Treaties; Article 3 of the ILC Draft Articles on State responsibility.

<sup>iii</sup> ILC, ‘Guiding Principles’, Principle 4: ‘(...) *Other persons representing the State in specified areas may be authorized to bind it, through their declarations, in areas falling within their competence.*’

<sup>iv</sup> Thus, the Commentary to ‘Principle 4’ observes that in the case of a declaration by the Colombian Foreign Minister about Venezuelan sovereignty over the Los Monjes archipelago, ‘the note itself was set aside in domestic law because its author had no authority to make such a commitment, yet the Colombian authorities did not challenge the validity of the commitment at the international level.’ *Ibid.*

<sup>v</sup> ‘*To determine the Legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise.*’

<sup>vi</sup> ‘*Unilateral declarations may be formulated orally or in writing.*’

<sup>vii</sup> ‘*A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated.*’

to other entities'. Last but not least, Principle 10 stresses that a Unilateral Declaration that has created legal obligations for the State making the declaration<sup>i</sup> cannot be revoked arbitrarily: 'In assessing whether a revocation would be arbitrary, consideration should be given to: (a) any specific terms of the declaration relating to revocation; (b) the extent to which those to whom the obligations are owed have relied on such obligations; (c) the extent to which there has been a fundamental change in the circumstances.'

Interestingly, the ILC's Commentary on the 'Guiding Principles' contains an extensive analysis of the ICJ's case law on the topic, and makes reference to a variety of relevant precedents. Apart from the aforementioned declaration by Egypt on the Suez Canal and French statements on nuclear testing, examples include among others: Jordan's waiver of claims to the West Bank territories; the 'Ihlen Declaration' by the Norwegian Foreign Minister on the topic of Denmark's sovereignty over Greenland; Swiss statements concerning the privileges and immunities of United Nations staff; a declaration by the Colombian Foreign Minister about Venezuelan sovereignty over the Los Monjes archipelago; a declaration by the Cuban Foreign Minister concerning the supply of vaccines to Uruguay, etc.<sup>ii</sup>

### 5.3. UNILATERAL DECLARATIONS CONCERNING GREENHOUSE GAS EMISSION REDUCTIONS

It is therefore perfectly possible for Unilateral Declarations to entail legally binding obligations for the State concerned, including *obligations pertaining to emission reduction targets and the like*. The essential conditions are that the declarations are public and/or generally known, and that they clearly reflect an intention to be bound. In the case of a formal, written statement – possibly deposited with the UN Secretariat or the UNFCCC Secretariat – everything would hinge upon the actual text of the statement and the surrounding context. If the statement were to be cast in terms of being voluntary, or as a political commitment of some sort, it should not be regarded as a source of international law. In contrast, if the statement were to unequivocally proclaim that the State concerned considers itself bound by the – conditional or unconditional – obligations mentioned therein, there would be no doubt as to its legally binding character. Furthermore, it must be recalled that the official issuing the declaration should be competent to do so, albeit with the notable qualification that heads of State, heads of Government or Foreign Ministers are in any event considered competent to bind their

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<sup>i</sup> Remark: as recognized in Principle 9, unilateral declarations cannot result in obligations for other States. By analogy: Articles 34–5 Vienna Convention on the Law of Treaties (on the (im)possibility for treaties to entail obligations for third parties).

<sup>ii</sup> ILC, 'Guiding Principles'. For an extensive analysis, see: 'ILC, Eighth Report on unilateral acts of States: consideration of certain acts', 26 May 2005, Doc. A/CN.4/557, available at [http://untreaty.un.org/ilc/guide/9\\_9.htm](http://untreaty.un.org/ilc/guide/9_9.htm).

country internationally. In other words, if the US President were to issue a Unilateral Declaration setting out binding emission reduction targets, it would be immaterial from an international legal perspective whether or not he or she was acting within the boundaries of his or her constitutional powers.

Within the confines spelled out above, the obligations laid down in a ‘Unilateral Declaration’ could be as ‘legally binding’ as comparable obligations enshrined in a treaty or originating in customary law. What then about their ‘compliance pull’? Admittedly, the prospect for judicial enforcement would be as slim as for the existing commitments under the Kyoto Protocol (cf. *supra*). Conversely, ‘peer pressure’ and ‘naming and shaming’ could also act as forceful factors inducing compliance vis-à-vis unilateral emission reduction commitments. Admittedly, by contrast, the compliance pull of the Unilateral Declarations would be less strong than that of the Kyoto commitments, insofar as the mechanisms of ‘active management’ – i.e. reporting and data collection, verification, monitoring, capacity-building, etc. – would not *ipso facto* apply to the former. As mentioned in Part 1, this handicap could be redressed by means of a set of COP (or COP and CMP) decisions, such as the envisaged AWG-LCA outcome, providing for the possibility of States ‘opting in’ to such implementation mechanisms (either those existing under the Kyoto Protocol or new ones) by expressly subscribing thereto in their Unilateral Declarations.