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Voluntary Commitments as Emerging Instruments in International Environmental Law

Edith Brown Weiss

Georgetown University Law Center, weiss@law.georgetown.edu

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Voluntary Commitments as Emerging Instruments in International Environmental Law

by Edith Brown Weiss*

Today we confront a critical environmental challenge: how to protect the human environment for ourselves and future generations in the face of our unprecedented capacity to alter fundamental physical cycles with global and long-range implications for the robustness of our planet.

Scientists observe that we are leaving the stable Holocene Epoch, embarking on a new geological epoch, the Anthropocene, in which humans are the major force for change to the planet.[1] There is evidence that the fundamental carbon and nitrogen cycles are accelerating significantly, and that the hydrological cycle is speeding up. The latter can lead to devastating impacts from more frequent and intense storms, floods and severe droughts. These developments inherently raise issues of intergenerational equity.

Environmental law must play an important role in this emerging epoch. We need environmental law to help ensure that those living today protect the robustness and integrity of our planet. We also need it to protect the interests of future generations so that they can receive a planet no worse off, on balance, than it was when we received it. This is a big challenge for a field of law that has had little more than 40 years in which to develop.

This challenge is taking place within the context of what may be called a kaleidoscopic world. States, of which there are now more than 195, continue to have a central role in the international system. But in addition, thousands of international organisations (inter-governmental and non-governmental), multinational and national corporations, innumerable networks and informal or transient groups, a myriad of community groups and, recently, millions of individuals also participate in formulating and implementing environmental norms. Because of developments in information technology, changes can take place rapidly, and often unexpectedly. New patterns of interaction emerge.

People communicate regularly by cell phone, Twitter, Facebook, YouTube, blogs, *etc*., locally and across the globe.[2] In the first quarter of 2013, Facebook reported 1,110,000,000 users, with Asia accounting for 319 million, and Europe 269 million.[3] The social network VK, a Cyrillic-based social network, reportedly had about 199 million users as of May 2012.[4] Studies report that Twitter has almost 556 million registered accounts, with an average of 58 million tweets per day.[5] YouTube, as of June 2012, tallied more than one billion unique users each month and globally 25 percent of the video footage that is watched is coming from mobile devices.[6] Blogs are also numerous and are influential sources of opinion. As of June 2013, data on top blog-hosting sites provide the following numbers on blogs and estimates of daily use: Wordpress had 66.7 million blogs, with 382 million daily visitors; Tumblr had 113.7 million blogs with almost 40 million daily visitors; and LiveJournal had 64.9 million blogs with almost 3.7 million daily visitors.[7] These numbers increase monthly. Google's blogger (which includes the former blogspot) does not report the number of blogs that it hosts.

In addition, the number of cell phones in use has grown dramatically, especially in India, south-east Asia, and Africa. In India, for example, wireless phone subscriptions reached 867.02 million in April 2013,[8] and in Africa, mobile phone subscriptions grew from 16.5 million in 2000 to 648.4 million in 2011.[9] These data indicate that information technology is transforming the way that people interact and the ways in which individuals, *ad hoc* groups, and others can influence events and take actions. Governments have also signed on to the new technology, with 125 national governments using Twitter, as of July 2012.[10]

With the new information technology, there are potentially many more active participants contributing to shaping the development and implementation of environmental law. While some of these actors could work against environmental conservation, there is at the same time new space for initiatives and for cooperative efforts that work toward sustainable development. Many may take the form of voluntary commitments.

Environmental law, which for these purposes references international environmental law, has a critical role in this emerging setting of an Anthropocene epoch and a kaleidoscopic world. Importantly, environmental law shapes our behaviour. It provides predictability as to what is expected and thereby contributes to the stability of political and social systems. At the same time, it can protect the dignity of individuals in the environment and foster environmental justice. Environmental law reflects shared values and articulates rules that reflect them. While traditionally, international environmental agreements have reflected such shared values and articulated the common obligations that penetrated within States, in the kaleidoscopic world, shared values will also have to flourish from the bottom up so that actions taken by the myriad of new actors work toward common ends.

* Francis Cabell Brown Professor of International Law at Georgetown University Law Center; awarded the Elizabeth Haub Prize for Environmental Law in 1994.

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Traditional Ways of Making International Environmental Law

Historically, States have made international law by entering into binding agreements, which they are then required to implement within their countries. Those within the country are expected to comply with national laws and regulations implementing the agreement or, in some countries, directly with the international obligations to which their governments have agreed. The relationship between States is horizontal and, within States, hierarchical.

In the decade and a half following the historic United Nations Stockholm Conference on the Human Environment in 1972, States negotiated an unprecedented number of multilateral environmental agreements (MEAs) on a diverse array of subjects. One could speak of "treaty congestion" as they competed for space in covering related topics and sometimes needed extensive national administrative resources to implement them.[11] Different secretariats for different agreements reviewed separate national reports for each agreement. Even where the required information for one overlapped with or was the same as that required for another, the reports were often prepared by different ministries within the national government. Frequently it took much less time to negotiate a new multilateral agreement than to gain the requisite number of States as Parties in order for the agreement to go into effect.

States, legal scholars and others observed that many countries that were party to the agreements were often not in compliance with the obligations in the agreements.[12] Compliance for these purposes includes implementation, compliance with implementing measures, and enforcement of violations.[13] Hence, international attention turned to strengthening compliance with the binding MEAs. The United Nations Environment Programme (UNEP) developed and published two sets of guidelines: one on enhancing compliance with MEAs and the other on national enforcement of violations of national laws implementing these agreements.[14]

Since the year 2000, the rate of negotiation of new MEAs has slowed. While binding agreements continue to be important, in part because of their provisions for dispute resolution and for mandating compliance, other forms of international non-binding legal instruments have become ever more important, such as declarations, codes of conduct, international standards and guidelines.

Non-binding Legal Instruments

Non-binding legal instruments, or what is frequently referred to as "soft law", have always had a significant place in international environmental law. By 1992, a list compiled of binding agreements and non-binding legal instruments concerned with the environment already included almost 900 items.[15] Non-binding legal instruments take many forms: declarations, charters, codes of conduct, resolutions, decisions of international inter-governmental organisations, and guidelines. They set forth norms that States and other actors are expected, although not required, to respect. In the past, they have frequently been a first step toward the later negotiation of binding agreements. For example, the UNEP London Guidelines for the Exchange of Information on Chemicals in International Trade, 1987 and amended in 1989, and the UN Food and Agriculture Organization International Code of Conduct on the Distribution and Use of Pesticides, 1985, laid the basis for a subsequent binding agreement: the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.[16]

States negotiate non-binding legal instruments for many reasons. Sometimes they believe it would not be possible to reach a binding agreement on specific legal obligations, or to convince their Congress or Parliament to ratify such an agreement. Such instruments may also be useful in addressing new problems quickly. They may provide greater flexibility, so that States may alter strategies to address the problem more easily. The transaction costs of negotiating such instruments are usually considerably less. Especially as diverse new environmental problems have arisen, which may affect millions of people globally, non-binding legal instruments can send an important signal about how States and all of the actors are expected to behave, and can foster shared values.[17]

There is considerable literature on the relationship between so-called "hard" and "soft" law, much of which suggests that the latter cannot replace the former and indeed that "soft" law needs support in "hard" law or a "hard" law framework to be effective. To highlight a few of the more recent of these works, Shaffer and Pollack provide an overview of the literature on both forms of law and conclude that most scholars view soft law as second best and only useful when hard law is not available. They suggest that States deliberately use soft law to undermine and change hard-law rules.[18] Guzman and Meyer reject some previous explanations regarding the choice of soft law, including the claim that non-binding instruments are necessarily easier to conclude, and offer their own theories as to why States may indeed choose soft law over hard law.[19] Brummer argues that, in the global financial sector, soft law is endemic and necessary.[20] Two earlier studies on soft law, sponsored by the American Society of International Law, looked across the spectrum of international law to focus on specific cases of non-binding legal instruments and analyse the reasons for using them, compliance with them, and their impacts. The studies generally support the analysis offered earlier as to the reasons for using them and suggest that compliance with them may be as favourable under certain conditions as with binding agreements.[21]

The development of international law in the Arctic illustrates the linkages between such so-called soft law and hard law, namely that non-binding legal instruments can be effective and may lead to the negotiation of binding instruments. When concern arose about the Arctic, the Arctic States signed the Arctic Environmental Protection Strategy in 1991, and subsequently adopted the 1993 Nuuk Declaration on Environment and Development in the Arctic.[22] Although there were loud calls for a binding agreement at that time, the resulting instrument was non-binding. In 1996, the seven Arctic States meeting in Ottawa signed a Declaration establishing the Arctic Council.[23] Again, a non-binding instrument established a formal inter-governmental institution. In both cases, the form enabled

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States to reach agreement and to move forward flexibly to address new challenges in the region.

The Arctic Council created working groups to address various issues: the Conservation of Arctic Flora and Fauna, Protection of the Arctic Marine Environment, Sustainable Development Working Group, the Arctic Monitoring and Assessment Programme, the Arctic Contaminants Action Programme and the Emergency Prevention, Preparedness and Response Working group. Each group created special environmental protection programmes, such as the Circumpolar Protected Area Network. Working groups have also created non-binding legal instruments, such as the Arctic Oil and Gas Exploration Guidelines, guidelines on ship operations in the Arctic, and the Alta Declaration on environmental impact assessment in the Arctic.[24] For the first time, on 15 May 2013, the Arctic countries signed a new binding agreement: the Agreement on Arctic Marine Oil Spill Preparedness and Response.[25]

The Arctic example is especially useful because States operating under non-binding legal instruments have developed and continue to initiate a plethora of new activities to address new challenges to the Arctic. Yet, they operate within a fragmented field of binding legal agreements that pertain to the Arctic: the United Nations Convention on the Law of the Sea (UNCLOS),[26] the International Convention for the Prevention of Pollution from Ships,[27] and the Polar Bear Treaty.[28] Five of the Arctic States – Canada, Denmark, Norway, the Russian Federation and the United States – met in 2008 and adopted the Ilulissat Declaration, which committed the countries to the existing international legal framework, particularly to UNCLOS provisions, and explicitly noted that they "see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean".[29] This contrasts with Antarctica, where a comprehensive overall agreement governs the coverage area[30] and preceded the development of non-binding legal instruments to address various facets of Antarctic problems.

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Voluntary Commitments by States

In international law, States have always possessed the authority to make voluntary commitments to address international issues. Each such commitment represents an exercise of national sovereignty. In practice, States have been reluctant to undertake such commitments in the absence of a commitment by other States to do the same. Hence, there has been the penchant for binding agreements or more recently, in the environmental area, for consensus on non-binding legal instruments. The efforts to address climate change and to promote environmental sustainability have led States to make voluntary commitments to control greenhouse gases (GHGs) and to take measures to promote sustainability, even in the absence of a non-binding legal instrument. The commitments of States after the Climate Conference in Copenhagen, Denmark, in December 2009, illustrate this.

At the Conference, States negotiated but then declined to adopt the Copenhagen Accord, by which States would commit to reducing GHGs. They even declined to approve it as a Conference document, so that it had no legal status. Nonetheless, 141 countries have engaged with the Accord, by being either associated with it or supportive of it. These countries account for about 87 percent of global GHG emissions. Eighty-one States have submitted targets for reducing emissions, with 46 States committing to specific targets and timetables for reducing quantities of emissions, seven States committing to reductions from "business as usual", two States committing to carbon intensity reduction, and 26 States submitting action plans designed to reduce GHG emissions or promote efficiency but without reduction targets.[31] In a few instances, increased commitments were conditional upon other States also

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making specific commitments.[32] In the climate meetings since Copenhagen, States have not renounced these commitments. To the contrary, at the next climate meeting in Cancún, Mexico, they built upon the foundation laid in the Copenhagen Accord.[33]

In the case of climate, these voluntary commitments take place within a broader context of binding agreements: the United Nations Framework Convention on Climate Change and, for many, the Kyoto Protocol.[34] Indeed, States have agreed to negotiate a new binding agreement on climate by 2015, to take effect in 2020 for the period beyond 2020.[35] Yet the voluntary commitments of Copenhagen represent the willingness of States to commit to measures even in the absence not only of a binding agreement, but of consensus on either a non-binding legal instrument or a formal conference document. This development may presage other voluntary commitments by States to address either other global environmental commons issues or environmental issues specific to an area, in which the consequences of not acting are seen as too severe to contemplate.

Voluntary commitments can be especially useful in at least the following contexts: to press ahead in addressing a problem in the context of a general binding commitment, to enable differentiated commitments by States in addressing problems, or, importantly, to take actions when the dangers from inaction are too severe to wait for a formal consensus.

Non-binding Legal Instruments and Voluntary Commitments by Corporate and Non-governmental Organisations

From an environmental perspective, the global increase in voluntary commitments by private industry is a potentially significant development. They may involve an international accord to which companies voluntarily agree to commit themselves. One of the most important examples is the United Nations Global Compact, which sets forth ten principles, three of which directly concern the environment. As of December 2013, the Compact had over 10,000 signatories in more than 140 countries, which included the major companies. In other cases, the instrument involved was negotiated within the private sector.

The globalisation of corporations and the development of international supply chains mean that national regulations are often inadequate and regulation at the international level is needed. These efforts by private industry are often linked to inter-governmental organisations, private-sector networks, non-governmental organisations (NGOs) or other participants in civil society. They take the form of standards, guidelines, codes of conduct, best practices, or similar documents. According to Vogel, "Private regulations that define standards for 'responsible' business practices now exist for virtually every global industry and internationally traded commodity, including forestry, fisheries, chemicals, computers, electronic equipment, apparel, rugs, coffee, cocoa, palm oil, diamonds, gold, toys, minerals, mining, energy, tourism, financial services and athletic equipment".[36] They can take different forms: principles, standards and certification, self-reporting of actions, or adoption of certain processes.[37] By 2010, for example, more than 46,000 firms were certified as compliant with the International Organization for Standardization (ISO) 14001 standard for environmental management systems.[38]

NGOs have also developed standards with which producers are expected to comply and supply their own system of certification. Fair trade is one example of a well-known NGO certification initiative, by which consumers can be informed as to whether a good has been certified as produced in accordance with specific standards. There are many fair-trade certified labels, with Fairtrade Labelling Organizations International (FLO) serving as an umbrella organisation and maintaining a register of updated standards.[39] There are other important initiatives in forests and in fisheries.[40]

The norms that these initiatives encapsulate do not constitute formal binding agreements, even by the private sector. Rather they are non-binding measures that have been formulated by a consensus consisting mostly of non-State actors, to which the private sector voluntarily adheres. Initiatives such as Fairtrade and those applying to fisheries and forests depend upon recognition by consumers in the marketplace. Conceptually, some of the voluntary private-sector initiatives share similarities with the non-binding instruments that governments negotiate in that they are generally easier to negotiate and provide some flexibility in implementation, such as through certification arrangements. When industry self-regulates, the resulting initiatives are often attractive because they may avoid or pre-empt actions by governments. Since the instruments apply to many actors, they may also help to ensure a level playing field in trade relations, and to provide a basis for pressuring others to join or to comply. To date, however, participants in these initiatives often represent only a small fraction of the industry.

Voluntary Commitments for Sustainability

Voluntary commitments are distinguished from other legal forms because they are not made pursuant to a consensus instrument to which the parties have agreed. They are not negotiated. They are generally independent of the commitments of other parties, though they may be in part conditioned upon similar actions by others, as in several commitments that States filed for the Copenhagen Accord. They generally provide for specific actions to be taken within a given time-frame. Ideally, they provide for measurable results.

A growing number of international initiatives solicit and publish voluntary commitments by States and non-governmental entities to sustainable development. Most have their own registries. Several registries aggregate and publish commitments from multiple initiatives. The United Nations is the forum for at least three such initiatives: the UN Sustainable Development Knowledge Platform established as part of the 2012 Rio+20 preparations;[41] the Sustainable Energy for All initiative established by the UN Secretary-General as part of the 2012 Year of Sustainable Energy to solicit commitments by governments, businesses and civil society to take actions to secure global access to sustainable energy by 2030;[42] and the UN Global Compact established in 2000 to solicit corporate commitments to take specific

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actions to further UN goals.[43] Other initiatives in the private sector relevant to environment include the Clinton Global Initiative,[44] which invites commitments from governments and non-governmental bodies globally; the Corporate EcoForum,[45] which is a membership organisation of large companies that publishes commitments to sustainability; and the Natural Resources Defense Council's Cloud of Commitments,[46] which provides an international registry that aggregates commitments from various initiatives. The sites generally do not yet gather data on compliance with the commitments made.

One of the most significant initiatives of this kind is the UN Sustainable Development Knowledge Platform. In the preparations for the Rio+20 Conference, several States and NGOs, including the US-based World Resources Institute, pushed for the creation of a compendium of commitments to promote sustainable development. As part of the conference, international organisations, NGOs and private corporations were invited to make voluntary commitments to take actions to achieve sustainable development. More than 700 commitments were collected during the Conference, which were listed in a new online registry, the United Nations Sustainable Development Knowledge Platform.[47]

The final Report from the Conference, "The Future We Want", explicitly endorsed this initiative in paragraph 283:

> *We welcome the commitments voluntarily entered into at the United Nations Conference on Sustainable Development and throughout 2012 by all stakeholders and their networks to implement concrete policies, plans, programmes, projects and actions to promote sustainable development and poverty eradication. We invite the Secretary-General to compile these commitments and facilitate access to other registries that have compiled commitments, in an Internet-based registry. The registry should make information about the commitments fully transparent and accessible to the public, and it should be periodically updated*.[48]

The UN Sustainable Development Knowledge Platform responds to this mandate. The Platform continues to open to voluntary commitments that meet the criteria "to announce and achieve concrete time-bound deliverables that advance sustainable development". As of early 2013, the Platform listed 1374 commitments, with an estimated worth of more than US$ 637 million. This includes 36 commitments by governments and 128 commitments by major groups of actors in climate change and energy.[49] The Table below lists the voluntary, non-negotiated commitments by countries under Rio+20 and associated initiatives related to climate and energy.

Table 1. Climate-change-related voluntary commitments by countries under international platforms

Country	Platform	Description
Antigua and Barbuda	Rio+20 (Barbados Declaration)	By 2030, achieve 15% renewable energy
Barbados	Rio+20 (Barbados Declaration)	By 2029, achieve 22% electricity energy-efficiency savings relative to "business as usual" (BAU), and 29% of all electricity from renewable sources
Cape Verde	Rio+20 (Barbados Declaration)	By 2020, reduce importation of electricity fuel by 30%, and reduce GHG emissions by 35%; by 2030, become 0% emitting country, and achieve 2% penetration rate of electric vehicles
China	Rio+20	US$ 31.7 million for project to help small island States, least developed countries, and African countries with climate change
Cook Islands	Rio+20 (Barbados Declaration)	By 2015, 50% renewable energy; by 2020, 100% renewable energy
Dominica	Rio+20 (Barbados Declaration)	By 2020, become carbon-negative by exporting renewable energy, and increase renewable energy generation to 100%
Fiji	Rio+20 (Barbados Declaration)	By 2015, utilisation of biofuels in transport sector
Ghana	Sustainable Energy for All	By 2020, achieve 10% renewable energy
Grenada	Rio+20	By 2020, reduce GHG emissions by 20% below BAU (Barbados Declaration); by 2030, become 100% green in electricity and transport sectors
Guyana	Rio+20 (Barbados Declaration)	By 2030, develop hydropower to provide 90% of electricity
Liechtenstein	Rio+20	By 2020, increase share of sustainable energy from 8% to 20%, reduce CO_2 emissions by 20% (same as Copenhagen Commitment), and reduce energy consumption by 20%

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Country	Platform	Description
Maldives	Rio+20 (Barbados Declaration)	By 2020, achieve carbon neutrality in energy sector (same as Copenhagen Commitment)
Marshall Islands	Rio+20 (Barbados Declaration)	By 2020, achieve 20% efficiency improvement in transportation sector fuel use, 20% of energy through indigenous renewable resources, and 40% reduction in CO_2 emissions below 2009 levels (same as Copenhagen Commitment)
Mauritius	Rio+20	By 2025, increase share of renewable energy to 35% (Barbados Declaration); by 2020, increase forest tree cover, implement reforestation programme, and extend surveillance of protected areas by 80%
Nauru	Rio+20 (Barbados Declaration)	By 2015, achieve 50% of energy provided by alternative sources; by 2025, viable power-generating capacity including alternative renewable energy sources
Samoa	Rio+20 (Barbados Declaration)	By 2030, increase contribution of renewable energy to total energy by 20%
Seychelles	Rio+20 (Barbados Declaration)	By 2030, 15% of energy supply from renewable energy
Solomon Islands	Rio+20 (Barbados Declaration)	By 2030, replace current use of imported fossil fuel for electricity by 100%
St Lucia	Rio+20 (Barbados Declaration)	By 2020, reduce public-sector electricity consumption by 20%, and increase contribution of renewable energy by 20%
St Vincent and the Grenadines	Rio+20 (Barbados Declaration)	By 2012, reduce projected electricity generation by 5%; by 2015, deliver 30% of electricity output from renewable sources; by 2020, reduce projected electricity generation by 15%, and deliver 60% of electricity output from renewable sources
Timor-Leste	Rio+20 (Barbados Declaration)	By 2020, 50% of power generation from renewable energy
Tonga	Rio+20 (Barbados Declaration)	By 2020, improve efficiency of electricity by 18%, and include 50% renewable energy in energy transformation sector
Tuvalu	Rio+20 (Barbados Declaration)	By 2020, power generation 100% from renewable energy

Prepared by Lydia Slobodian. *Source*: United Nations Sustainable Development Knowledge Platform, at http://sustainabledevelopment.un.org.

Major corporations have also made commitments under the various voluntary initiatives referenced above. These may be more significant than the commitments made by States. Some of the commitments are from large multinational corporations, whose revenues eclipse the economies of some countries. They are in the form of targets and timetables. Microsoft, for example, has committed to achieve net zero-carbon emissions by 2013. The Bank of America has committed US$ 50 billion over the next 10 years to financing activities that advance a low-carbon economy. Bridgestone has committed to securing 100 percent of its materials from sustainable sources by 2030. Dell has committed to reducing its GHG emissions by 40 percent by 2015. SABMiller has committed to reducing fossil fuel emissions from on-site energy use by 50 percent per hectolitre of lager produced by 2020, relative to 2008 levels. See the Annex to this article, for a list of major voluntary commitments by corporations related to climate and energy.

While these commitments are in themselves significant, they certainly are not enough to effect a sufficient change in behaviour to meet the growing need for a globally sustainable economy. But they do have the potential to leverage consumer opinion to encourage competitors and others to make similar commitments. Of course, for this to happen, the public must know about the commitments and be willing to respond accordingly.

Voluntary Commitments in a Kaleidoscopic World

The above analysis addressed voluntary commitments by major actors in the public and private sectors. In a kaleidoscopic world, individuals, *ad hoc* coalitions, informal groups, transient networks, and other such actors become important. Their actions may often be characterised as bottom-up. They may respond to both immediate issues, which may emerge and change rapidly, and to longer-term challenges. And each of them may alter their focus in response to changing conditions.

Voluntary commitments could have an important role in bottom-up empowerment. They produce "buy-in" by

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those who make them. If we are to address the momentous environmental issues confronting us locally and globally, we need to mobilise everyone to engage in sustainable development and living patterns. Voluntary commitments are useful because they do not depend on negotiated outcomes, can be initiated quickly (at least in theory), and can be adapted to local practices and culture. They give actors flexibility, because the party making the commitment is responsible for specifying its content. Such actions should be able to draw upon best practices and to showcase best practices to facilitate learning. Voluntary commitments can inform others and build a favourable reputation for those taking them. They can build momentum toward broader efforts to live sustainably. They can provide space for cooperative efforts. Such efforts complement, but are not a substitute for, commitments by States and major private-sector actors.

Concerns about Voluntary Commitments

While voluntary commitments are becoming an important feature in the environmental-law landscape, they also raise significant issues. Such issues will increase as more actors in the kaleidoscopic world voluntarily take initiatives and other actions relevant to environmental law. Some environmental problems, especially global ones like climate change or marine pollution, require that States work together to address them and that they agree upon what needs to be done. They also require that other actors behave in certain ways. While voluntary commitments may be an important, perhaps necessary, step in the face of inaction, they cannot be regarded as a substitute for negotiated norms and requirements. Indeed they may, in the long run, depend upon the latter for their effectiveness.

Voluntary commitments in the private sector rest in large measure upon the premise that they enhance the reputation of those making them, although there is little evidence that such commitments have been reflected in sales or share prices.[50] Scholarly literature on corporate compliance with regulations also suggests that reputation is an important factor in motivating compliance.[51] The concern with reputation can be used to encourage commitments as well as to guard against "green wash" in the commitments.

One of the most significant problems with voluntary commitments made in the absence of a negotiated consensus on the obligation is that they may not be enunciated in formats that are compatible with each other or comparable. The qualitative data, for example, may not be standardised or sufficiently comparable for civil society, investors and others to use in assessing overall advancement toward sustainability.

This leads to the issue of monitoring. Since there may be hundreds or thousands of commitments in different formats and with different content, it will be challenging to monitor compliance with each commitment. This will be the case, even if there is full transparency of commitments and of reporting on progress in meeting them. Developments in information technology may improve this situation in the future.

Voluminous voluntary commitments also raise difficult issues of accountability. The traditional view of accountability is that the party responsible for carrying out an obligation must be held to account if it is not carried out. But this requires tracking an actor's compliance with its commitment and being able to impose consequences for not meeting the commitment. None of the international registries track compliance with voluntary commitments. Especially in a kaleidoscopic world where many commitments may not be centrally registered, accountability can be difficult, and can potentially involve high transaction costs.

Perhaps most of all, the growing use of voluntary commitments points to the need for platforms that compile and aggregate individual commitments and that make the commitments readily accessible online. Such platforms can be formed at the local, regional and international levels, and by civil society organisations as well as governments. A few integrating platforms should facilitate our ability to assess the comprehensiveness of voluntary commitments, to identify significant gaps, and to encourage cooperation. They also need to provide space for those making the commitments to report regularly on their implementation of them, so that it may be possible to track compliance.

The Importance of Common Values

All of the above rests on having a set of common values, from which commitments can emerge and desirable behaviour can be derived. While international environmental agreements traditionally reflected such values and articulated shared commitments, which penetrated hierarchically downward within States for implementation; in the kaleidoscopic world, the common values and shared commitments will also need to flourish from the bottom up. Since individuals, *ad hoc* coalitions, and informal or transient groups of actors will increasingly be able to influence the development and implementation of international environmental law, common values become essential. Otherwise, voluntary commitments can be a fig leaf covering inaction, or can be drastically insufficient to achieve a sustainable world.

One of the significant features of our information technology revolution is that individuals increasingly communicate globally. Indeed, young people are growing up with an outlook that assumes they can communicate with others elsewhere. This emerging global linkage provides an avenue for fostering shared values about the environment and sustainable development. It could provide a means for fostering bottom-up commitments and actions that address our environmental problems and foster sustainable development.

For international environmental law, the above analysis suggests that we need to broaden the range of relevant actors beyond States to encompass those coming to prominence in the kaleidoscopic world and to consider the modes of communication. It also suggests that we should take an expansive view of the range of relevant instruments so as to include not only the traditional binding and non-binding legal instruments but also the voluntary commitments that

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all actors may increasingly make and rely upon. Binding multilateral agreements continue to be important, and States should continue to pursue them, but they are insufficient to address our growing and complex environmental issues effectively. For that, we will need everyone's assistance. This requires developing common values that are culturally sensitive to conserve our environment for present and future generations.

The author thanks Lydia Slobodian for research assistance.

Annex

Climate-change-related voluntary commitments by corporations under international platforms

Committer	Platform	Description
Accenture	Sustainable Energy for All	By 2013, support UN Sustainable Energy for All programme office, and establish Accenture Development Partnership to support energy access
Acumen Fund, Inc.	Clinton Global Initiative	Invest US$ 3 million in companies providing renewable energy to poor
Agritech Faso	Sustainable Energy for All	Construct biomass-to-energy power plant, including five units of 1 MW each
Aid Green, Ltd	Sustainable Energy for All	By 2016, increase carbon-credit-related business to 20% of gross sales
Applied Materials, Inc.	Clinton Global Initiative	Fund participation of 18 energy entrepreneurs at Santa Clara University training programme over next three years
ArcelorMittal	Sustainable Energy for All	By 2020, reduce CO_2 emissions by 8% per tonne of steel produced relative to 2007
ARM Holdings	Sustainable Energy for All	By 2013, expand engineering personnel by 10% to research energy-efficient microprocessors, graphics processors, *etc*., and create collaborative initiatives to improve energy efficiency
Artron Enterprise Commitments	China Going Green	Adopt methods to reduce energy consumption and emissions, and guarantee materials comply with FSC/COC standards
Asea Brown Boveri Limited (ABB)	Sustainable Energy for All	By 2015, ensure energy and resource efficiency of ABB operations improves by 2.5% per year
Banco Santander	Global Compact	By 2014, increase purchase of renewable energy from 2.45 million kWh to 3.86 million kWh; by 2013, reduce GHG emissions and energy consumption by 7.5%
Bank of America	Sustainable Energy for All	Commit US$ 50 billion over next 10 years to finance activities that advance the low-carbon economy
BASF SE	Sustainable Energy for All	By 2020, reduce GHG emissions per metric ton of sales product by 40% relative to 2002, and improve energy efficiency in production by 35% relative to 2002
Bayer AG	Sustainable Energy for All	Improve energy efficiency and develop tools and strategies for sustainable buildings
Beijing Vantone Real Estate	China Going Green	Ensure residential projects comply with Green Product standard and all commercial projects with Leadership in Energy and Environmental Design (LEED) standards; allocate 0.5% of profits to environmental product development; five-year plan to reduce carbon emissions by 2.45 million tons
BMW Group	Sustainable Energy for All	By 2020, reduce resource consumption per vehicle by 45% (relative to 2006), and reduce product CO_2 emissions by 50% (relative to 1995)
Bridgestone	Global Compact	100% sustainable materials by 2030
Brisa Auto-Estradas de Portugal, S.A.	Global Compact	By 2012, decrease electricity consumption by 10% (relative to 2009), decrease fuel consumption by 3%, decrease water consumption by 3%, decrease waste generation by 3%, and decrease GHG emissions by 6%

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Committer	Platform	Description
Cementos Argos S.A.	Global Compact	By 2022, reduce CO_2 emissions per ton by 20%, and substitute 7.5% of fossil fuels with alternative fuels
China Petroleum and Chemical Corporation	Global Compact	By 2015, reduce SO_2 emissions by 12%, COD by 12%, NHx by 10%, and NOx by 10%
China Vanke	China Going Green	By end of 2012, achieve garbage reduction of 30–40%; new residential buildings use 87% wood, 20% less energy, 63% lower water costs, green-star standards, and FSC-certified wood
Citigroup	Clinton Global Initiative	Develop and offer energy-efficiency finance solutions
CLP Holdings Limited	Sustainable Energy for All	By 2020, achieve 20% renewable energy, 30% non-carbon-emitting energy, reduce carbon intensity of generating portfolio to 0.6kg CO_2/kWh from 0.84 CO_2/kWh in 2007 (28% reduction); by 2035, reduce carbon intensity of generating portfolio to 0.45 kg CO_2/kWh (45% reduction); by 2050, reduce carbon intensity of generating portfolio to 0.2 kg CO_2/kWh (75% reduction)
d.light design	Sustainable Energy for All	Expand production and distribution of solar lamps
Dell	Global Compact	By 2015, reduce GHG emissions by 40%, and increase cumulative take-back volume to 1 billion pounds
Deloitte LLP	Sustainable Energy for All	By 2021, reduce GHGs by 35% per full-time equivalent (FTE) relative to 2011
Det Norske Veritas	Global Compact	By 2012, reinvest 6% of revenue in development of sustainable technology including low carbon
DGB Financial Group	Sustainable Energy for All	By 2020, reduce CO_2 emissions by 10% relative to 2008, and reduce energy consumption by 1% every year
Disney	Corporate EcoForum	By 2015, fund 6,000 acres of reforestation including one project that results in enhancing carbon sequestration
Dupont	Sustainable Energy for All	By 2020, reduce non-renewable energy use by 10% per dollar revenue relative to 2010; by 2015, reduce by 3%; by 2015, increase revenue from products that reduce GHGs or increase energy efficiency by US$ 2 billion
Eaton Corporation	Sustainable Energy for All	By 2015, reduce water used by 20% relative to 2010, and reduce GHG emissions by 25% relative to 2012
Ecodes	Rio+20	Reduce CO_2 emissions *per capita* by 20% relative to 2010
Embraco	Sustainable Energy for All	Invest 3% of revenue in research in increasing energy-efficiency levels in refrigerator compressors
EnerNOC	Clinton Global Initiative	Adopt Green Button standard to provide consumers with information about their energy use
Eni	Sustainable Energy for All	By 2015, reduce GHG emissions per k of hydrocarbon production by 40% compared to 2010
Entergy	Sustainable Energy for All	By 2020, reduce CO_2 emissions from power plants and purchases to 20% below 2000 levels
Eskom Holdings	Sustainable Energy for All	By 2016, increase thermal plant efficiency by 150 MW; by 2017, reduce internal energy consumption by 15%
Femsa	Sustainable Energy for All	By 2013, use renewable energy for 85% of energy needs of Mexican operations (based on size of operations in 2010)
GDF SUEZ	Global Compact	By 2017, increase activities in energy efficiency by 40%; by 2015, increase renewable energy capacity by 50%; by 2015, develop biodiversity action plan at each sensitive site in the European Union (EU)

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Committer	Platform	Description
Global Compact Network Pakistan	Global Compact	By 2017, achieve 20% reduction in energy use, and compliance with Euro 2 low-emission standards in vehicles
Green Mountain College	Clinton Global Initiative	By 2013, reduce carbon footprint by 66% relative to 2007 levels
Henkel AG, Co. KGAA	Sustainable Energy for All	By 2030, triple value created for footprint; by 2015, reduce energy per production unit by 15%, reduce water per production unit by 15%, and increase sales per production unit by 10%
Himin Solar	China Going Green	Achieve 40% utilisation rate of renewable energy, 30% reduction of carbon emissions, 90% utilisation rate of rain water, 70% sewage recycling, 80% recycling of engineering waste, and 80% recycling of construction waste
Hitachi	Sustainable Energy for All	By 2025, help reduce CO_2 emissions by 100 million tons relative to 2005 through Hitachi products and services
Holcim Group	Sustainable Energy for All	By 2015, reduce average specific net CO_2 emissions ($kgCO_2$/tonne cementitious materials) by 25% relative to 1990
Infosys	Sustainable Energy for All	Reduce consumption by 50%, source 100% of electricity from renewables, and become carbon neutral
ItalCementi Group	Sustainable Energy for All	By 2015, have 10% of thermal energy demand for cement production from alternative fuels and biomass
ITC Limited	Global Compact	By 2017, retain status as carbon-positive, water-positive despite growth in business
Johnson Controls	Clinton Global Initiative	Adopt Green Button standard to provide consumers with information about their energy use
KPMG International	Sustainable Energy for All	By 2015, seek to reduce GHG emissions per FTE by 15% (relative to 2010)
Lafarge	Sustainable Energy for All	By 2020, use 50% alternative fuels in all entities Lafarge controls, reduce CO_2 emissions by 33% (relative to 1990 levels), and, by 2015, contribute to 500 energy-efficient construction projects
Marriott International	Corporate EcoForum	In Amazon's Juma Basin, achieve 20% reduction in energy and water consumption by 2020; US$ 500,000 in 2012
Marriott; OPIC	Rio+20	Commit US$ 2,000,000 to build hotels meeting environmental standards such as LEED
Masdar	Sustainable Energy for All	Install 500kWp photovoltaic plant in Tonga by 2013
MeadWestvaco	Sustainable Energy for All	By 2015, reduce use of fossil fuels by 25%
Metsä Group	Global Compact	By 2020, source all wood from sustainably managed forests, reduce fossil CO_2 emissions in production by 30%, and improve energy efficiency by 10%
Microsoft	Sustainable Energy for All	Achieve net zero-carbon emissions by 2013
Mitsubishi Chemical Holdings Corporation	Global Compact	By 2015, reduce GHGs by 17% in Japan from 2005
National Confederation of Hellenic Commerce	Sustainable Energy for All	By 2014, achieve 7% reduction in operational carbon footprint across 700 SMEs of the retail sector (relative to 2012)

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Committer	Platform	Description
National Ready Mixed Concrete Association	2030 Challenge for Products	Manufacture products that meet carbon footprint limits of 30% below product average in 2014, 35% in 2015, 40% in 2020, 45% in 2025 and 50% in 2030
Nike, Inc.	Sustainable Energy for All	Achieve 20% reduction in CO_2 emissions per unit from FY11 levels through FY15
Nokero International Ltd	Sustainable Energy for All	Provide universal access to solar energy in the Navajo Nation
Osaka Gas	Sustainable Energy for All	By 2014, improve environmental management efficiency in gas business by 26% over 2009 levels
Philips	Sustainable Energy for All	By 2015, improve energy efficiency of product and solutions portfolio by 50% (relative to 2009)
Polarstem	Global Compact	From 2012, offer free or reduced rate communications services for sustainable projects and organisations within Switzerland equalling 10% of annual turnover
Procter and Gamble	Global Compact	By 2020, replace 25% of petroleum-based materials with renewable materials (relative to 2010), carry out 70% of washing machine loads using cold water, and achieve 20% packaging reduction per consumer
Quanta Computer	China Going Green	Incorporate carbon management into long-term strategy
Renault, Nissan	Global Compact	By 2016, have 1.5 million electric vehicles on roads; by 2012, have five different electric vehicles available to consumers
Rezidor Hotel Group	Sustainable Energy for All	By 2016, reduce energy consumption in all hotels by 25%
Rockefeller Foundation	Sustainable Energy for All	By 2014, commit to engage with initiatives to expand energy provision in rural India: awarded US$ 6.3 million, may award an additional US$ 1 million
SABMiller	Global Compact	By 2020, reduce fossil fuel emissions from on-site energy use by 50% per hectolitre of lager produced relative to 2008
SCA	Sustainable Energy for All	By 2020, reduce CO_2 emissions from fossil fuels and electricity and heating by 20% relative to 2005, triple production of biofuels from forests, and increase production of wind power to 5 Twh
Schneider Electric	Sustainable Energy for All	Increase number of people who receive Energy Savings Education
Siemens	Sustainable Energy for All	By 2014, grow externally verified Environmental Portfolio from EU 29.9 billion to EU 40 billion
Skanska AB	Sustainable Energy for All	In 2015, 50% of all commercial development projects started in Nordic markets will meet "Deep Green" targets: 0 net use of primary energy, near 0 carbon in construction, 0 unsustainable materials, and 0 net water use for buildings
SKF	Sustainable Energy for All	By 2016, reduce total annual energy use by 5% below 2006 levels, require that 100% of suppliers are certified under Energy Management Standard ISO 50001, reduce CO_2 emissions/tonne-km for all transport by 30% below 2011 levels, and increase revenue from carbon-reducing/energy-saving portfolio to 10 billion SEK
Sompo Japan Insurance Inc.	Global Compact	By 2020, reduce CO_2 emissions by 40.5%; by 2050, reduce CO_2 emissions by 56%
Statoil ASA	Global Compact	By 2020, reduce gas flaring to two tons of gas flared per 1000 tons of hydrocarbons produced
Telefonica	Sustainable Energy for All	By 2015, reduce energy consumption in networks per equivalent access by 30% (relative to 2007)

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Committer	Platform	Description
Total	Sustainable Energy for All	Provide access to solar lamps and kits for five million low-income people by 2015
Toyola Energy Limited (Ghana)	Sustainable Energy for All	By 2020, sell three million energy-efficient cooking stoves and 30,000 solar lanterns and home systems to poor households in sub-Saharan Africa
Unilever	Sustainable Energy for All	By 2020, halve the environmental footprint of making and use of products
University of Texas at Austin	Clinton Global Initiative	Pursue LEED certification on all new buildings
Vestas	Sustainable Energy for All	By 2015, procure 100% renewable electricity and 55% renewable energy
Xerox	Global Compact	By 2013, develop carbon management practices with different jurisdictions in Indonesia; by 2014, identify priority opportunities for emissions reduction

Prepared by Lydia Slobodian.

Sources: Clinton Global Initiative, http://www.clintonglobalinitiative.org; Natural Resources Defense Council, Cloud of Commitments, http://www.cloudofcommitments.org; United Nations Sustainable Development Knowledge Platform, http://sustainabledevelopment.un.org; UN Business, http://business.un.org/en/browse/commitments; Corporate EcoForum and The Nature Conservancy, The New Business Imperative: Valuing Natural Capital (2012), available at http://corporateecoforum.com/valuingnaturalcapital/; and Sustainable Energy for All, http://www.sustainableenergyforall.org.

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State Responsibility for Wrongful Acts: Comments on Some ILC Articles

by Julio Barboza*

In 2001, after forty years of work, the International Law Commission (ILC) produced excellent articles on the international responsibility of States (herein, the "ILC Articles").[1] These Articles were annexed to UN General Assembly Resolution 56/83. The following paper comments on Articles 1 and 2 and on others of the ILC Articles as related to them. It is meant to be a contribution from a former member of the Commission to the on-going process of assimilation of the results of the ILC Articles project into international practice.

Articles 1 and 2 should be examined together. Other articles follow lines originated in the texts of these two. Article 1 is a key, and sets a basic principle: "every internationally wrongful act of a State entails the international responsibility of that State". Article 2 develops the all-important concept of "wrongful act" of the State. Specifically, paragraph (a) defines an "act of the State" and (b) sets out when an act of the State is "wrong".

Classically, commentators note the omission of any reference to "injury" or "damage" in the combined text of Articles 1 and 2. That omission seems to indicate that the ILC has taken sides in the old debate about whether injury is necessary to give rise to responsibility. Around the idea of continuing violation of an obligation (Article 14.2), other notions are grouped, including continued duty of performance (Article 29) and cessation (Article 30). The relationship between these three concepts is governed by an internal logic seemingly at odds with the normal operation of the responsibility mechanism.

The Mechanism of Responsibility

Referring to the normal operation of the responsibility mechanism, *i.e.*, the sequence from breach of primary obligation to legal consequences, the mechanism is simple: once the primary obligation is breached, it is forthwith replaced by the secondary obligation (of reparation) and so extinguished. But once extinguished it cannot be violated any more, which undercuts the notion of continuing violation. On the other hand, in a continuing violation, the secondary obligations cannot enter into play until the damage has been quantified, *i.e.*, until the unlawful conduct stops and consequently the damage to the injured State has ceased and reparation, perhaps, been established.

The existence of continuing violations having already been included in the ILC Articles at Article 14, it seemed necessary that the primary obligation would need to remain in force, if it were to continue being breached. In fact, both the notions of continued duty of performance and of cessation of violation are dependent on the concept of continuing violation.

Thus, the mechanism of responsibility cannot work in its usual way, *i.e.*, by the immediate operation of the obligation to make reparation. Cessation provides a new starting point from which secondary obligations can enter into play. Although different, however, the concepts of continued duty of performance and cessation were given the role of guardians of the sanctity of international obligations. However, given that the Articles perceive an identity between the roles played by cessation and

* Former Ambassador of the Argentine Foreign Service (retired); Former legal Adviser to the Argentine Minister of Foreign Affairs; former member and President of the International Law Commission, where he served as special rapporteur in the liability topic; former Judge and President of UN Administrative Tribunal; and Professor of International Law at Buenos Aires National University Law School (Graduate Division); recipient of the 2012 Elizabeth Haub Award for Environmental Diplomacy.

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