

Review Article

The rise and fall of the global pact for the environment



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ABSTRACT:

This article presents a study of the International environmental law as a fragmented system, as well as the following subjects: The French initiative for a global pact for the environment; The process towards a global pact for the environment at the United Nations and the implementation of UNGA Resolution 73/33 on the way forward. It ends with a critical appraisal of the process towards a global pact for the environment.

RESUMEN:

Este artículo presenta un estudio del Derecho ambiental internacional como un sistema fragmentado, así como los siguientes temas: La iniciativa francesa para un pacto global por el medio ambiente; El proceso hacia un pacto global por el medio ambiente en las Naciones Unidas y la implementación de la Resolución 73/33 de la AGNU sobre el camino a seguir. Termina con una valoración crítica del proceso hacia un pacto global por el medio ambiente.

RESUME :

Cet article présente une étude du droit international de l'environnement en tant que système fragmenté, ainsi que les sujets suivants : L'initiative française pour un pacte mondial pour l'environnement ; Le processus vers un pacte mondial pour l'environnement aux Nations Unies et la mise en œuvre de la résolution 73/33 de l'AGNU sur la voie à suivre. Il se termine par une évaluation critique du processus vers un pacte mondial pour l'environnement.

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1 INTERNATIONAL ENVIRONMENTAL LAW AS A FRAGMENTED SYSTEM

The existing international legal regime for the protection of the environment is formed by a myriad of sectoral autonomous agreements and other soft law instruments. The core of the system is made up of more than 500 multilateral environmental agreements (MEA) that have an autonomous character and operate in a closed loop, which poses problems of coordination among the different agreements and with other environmental-related instruments (Churchill – Ulfstein 2000). The system lacks an overarching normative instrument which may help unify the current sectoral approach and fill the gaps in the rules laid out in treaties.

The fragmented structure of international environmental law is the result of the historical conditions under which this body of norms was established. Since the initial stages of the development of international environmental law, innovative ways to overcome its structural deficiencies were found. In addition, possible gaps in international environmental law might eventually be filled through the evolution of customary law, with the contribution of international jurisprudence. However, today it is widely recognized that the fragmentation of international environmental law results in gaps and deficiencies at the law-making and implementation levels and reveals important coherence and coordination challenges that difficult implementation at both the international and national levels.

As a result of fragmentation, various important legal elements have been left behind relating inter alia to international responsibility and liability for environmental damage (specially to the global commons), the proclamation of a human right to a sound environment, and the recognition of emerging principles such as ‘non-regression’. The system is also confronted to various governance challenges such as the need for a new United Nations Organization for the Environment (UNEO), the viability of an International Environmental Court (IEC) or the establishment of a compliance mechanism to control the overall application of existing sectoral multilateral environmental agreements.

Against this backdrop, the amalgamation of sectoral multilateral environmental agreements and other environmental-related instruments generates dramatic examples of problem shifting instead of problem solving with possible fatal consequences for the global environment. As rightly concluded by two eminent specialists, the existence of multiple parallel, overlapping multilateral environmental agreements might in effect not lead to a higher global protection standard and, as a result, the Earth’s environmental conditions have continued to deteriorate despite the accumulating body of environmental law (Kim & Bosselmann, 2013).

In order to remedy this situation, some voices have evoked the need to elaborate a global normative instrument able to fill the existing constitutional gap and improve the functioning of the international body of law for the protection of the environment. In 1987, the Brundtland Report on ‘Our Common Future’ envisaged a Convention on Environmental Protection and Sustainable Development to be prepared by the United Nations General Assembly (WCED, 1987, paras 85–86). In 1989, Professor Alexandre Kiss advocated a general convention that would declare the obligation to protect and preserve the whole biosphere, set out the fundamental principles derived from that obligation, and included the provisions required to clarify its implementation, as with the United Nations Covenants on human rights (Kiss, 1989, p. 258). In 1995, the International Union for the Conservation of Nature (IUCN), in cooperation with the International Council for Environmental Law (ICEL), presented the text of the Draft Covenant on Environment and Development as a model for a comprehensive conventional instrument on principles and rules related to environment and development (IUCN/ICEL, 1995). In 2017, the *Centre International de Droit Comparé de l’Environnement* (CIDCE) presented a Draft of the International Covenant on the Human Right to the Environment as a possible third pact additional to the 1966 International

Covenants on Civil and Political Rights and Economic, Social and Cultural Rights (CIDCE, 2017).

Along the same lines, some specialists promote today the preparation of a legally binding instrument in the form of a global convention, with a light institutional structure to support its operation providing an umbrella to a wider number of multilateral environmental agreements. In their view, a global pact for the environment has the potential to contribute to improving structural coherence in the international response regime for the preservation of the Earth system while promoting social-ecological goals that respect planetary boundaries in the Anthropocene (Fernández and Malwé 2019). The concrete arguments which support the need for a global pact for the environment having a legally binding character have been summarized by Águila and Vinuales as follows: first, general principles of international environmental law are usually embodied in non-binding texts, a feature that has prevented some principles from deploying their full effects; second, there are a number of gaps and deficiencies which leave important questions open or unsettled; third, little attention is paid to non-linear effects of the said gaps and deficiencies; fourth, there are conflicts between legal instruments eventually conducing to problem-shifting instead of problem-solving; fifth, there remain strong divergences in the interpretation and application of basic systemic principles; sixth, guidance provided by international environmental law to national legislators and courts is neither clear nor strong enough; and finally, at the international level there is also a lack of strong institutional bodies having normative, administrative or judicial powers for the protection of the global environment (Aguila & Vinuales 2019 a, pp. 5-6)

Other authorized environmental law experts, building on theories of global constitutionalism, call for the recognition of a clearly agreed unifying goal, whose exact form and nature is to be decided, setting the fundamental *grundnorm* for the international environmental legal system: namely ‘protecting and restoring the integrity of the Earth system’. Such a superior norm (or set of norms and principles) shall be embodied in an agreed global pact for the environment in order to give all international regimes and organizations a shared purpose to which their specific objectives must contribute (Kim & Bosselmann 2013).

2 THE FRENCH INITIATIVE FOR A GLOBAL PACT FOR THE ENVIRONMENT

The current initiative for a global pact for the environment commenced in 2015 when a French legal think tank called the *Club des Juristes* assembled an international network of more than one hundred jurists, from various legal traditions and more than forty nationalities who worked on the project for two years (Parejo & Lobel 2018). The group prepared a preliminary draft of a Global Pact for the Environment that was adopted at an academic event held at the Sorbonne on 24 June 2017 and was subsequently published in a white paper (Le Club des Juristes 2017).

The most innovative environmental provisions of the draft address the need to ensure an adequate remediation of environmental damages (Article 7); the duty to ensure environmental education and training (Article 12) and promote environmental research and innovation (Article 13); the duty to adopt effective environmental norms and ensure their implementation and enforcement (Article 16); and the principles of resilience (Article 16) and of non-regression (Article 18). It also contemplates a compliance mechanism, consisting in a Committee of independent experts to facilitate implementation of and to promote compliance with the provisions of the Pact (Article 21). Article 1 of the Pact recognizes for the first time in a global treaty the right of every person ‘to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment’ and Article 2 stated the duty of every person to take care of the environment.

The draft GPE received several analytical and critical reviews with differing assessments of its legal foundations and potential contribution to improving International Environmental Law. Some scholars contend that the draft pact goes too far, arguing that the project is ‘misguided in its one-size-fits-all-environmental-issues approach, unclear as to its effects on existing international environmental law and potentially undermining of current agreed environmental principles’ (Biniaz 2017, p. 33). Others maintain that the draft comes up short, criticizing the anthropocentric orientation of the pact’s general approach and the limited scope of the draft’s proclamation of a human right to the environment. (Kotzé and French, 2018 pp. 822-823, 834).

3 THE PROCESS TOWARDS A GLOBAL PACT FOR THE ENVIRONMENT AT THE UNITED NATIONS

Following a summit chaired by French President Emmanuel Macron held on the sidelines of the 72nd session of the General Assembly, the motion for a resolution on a GPE was formally submitted by France and ninety co-sponsoring countries to the General Assembly on 7 May 2018. After a short but intense debate a consensus could not be reached and the resolution was adopted with 143 votes in favour, five against, and seven abstentions.¹

General Assembly resolution 72/277, titled ‘Towards a Global Pact for the Environment’ began the process anew following a new methodological approach. It put the draft pact aside and established an open-ended approach to its ultimate outcome. First, it requested the Secretary-General prepare a ‘technical and evidence-based’ report on ‘possible gaps’ in international environmental law and environment-related instruments ‘with a view to strengthening their implementation’ (para. 1). Then, it established an ad-hoc open-ended working group (OEWG), open to all UN member States, specialized agencies and accredited nongovernmental organizations, to consider the Secretary-General’s report and ‘discuss possible options to address possible gaps in international environmental law and environment-related instruments’ (para 2). As for the outcome of the process, the resolution requests that the working group should define, if deemed necessary, ‘the scope, parameters and feasibility of an international instrument, with a view to making recommendations to the General Assembly, which may include the convening of an intergovernmental conference to adopt an international instrument’ (para 2).

In November 2018, the Secretary-General of the United Nations presented the report on gaps in international and environment-related instruments. The report’s first key finding is that ‘there is no single overarching normative framework in international environmental law that sets out what might be characterized as rules and principles of general application’ (para 3). It also affirms that the existing system of international environmental law is piecemeal, reactive, and characterized by fragmentation and a general lack of coherence and synergy among a large body of sectoral regulatory frameworks (para 103). The main gaps and deficiencies resulting from the fragmentation and reactive nature of the system of international environmental law are quite categorically summarized in the report as follows: its principles, which are uncertain, are often affected by a lack of international consensus and a lack of clarity (both content-wise and status-wise) that affect their implementation; the fragmentation and general lack of coherence and synergy among a large body of sectoral regulatory frameworks create an important deficit in coordination at the law-making and implementation levels and a need for better policy coherence, mutual supportiveness and synergies in implementation; the articulation between multilateral environmental

¹¹ The United States, the Russian Federation, the Philippines, Syria, and Turkey voted against the motion; Saudi Arabia, Belarus, Iran, Malaysia, Nicaragua, Nigeria and Tajikistan abstained (the arguments expressed in the discussions and explanations for the votes in UN Doc A/72/PV.88 (10 May 2018)).

agreements and environment-related instruments remains problematic. Thus, the SG report admits the value of an overarching legal framework of environmental principles, noting that a comprehensive and unifying international instrument codifying all the principles of environmental law would contribute to making them more effective and stricter and to their implementation (para 6-5, 43). The report pays also particular attention to the interrelationships between international environmental law and other environment-related instruments in the fields of trade, investments, intellectual property and human rights noting the existence of normative gaps and major challenges (para. 71-76).

The Open-Ended Working Group (OEWG) set-up by resolution 72/277 held three substantive sessions in 2019. Its first session (Nairobi 14 to 18 January 2019) focused on discussing the Secretary-General's report on the gaps in international environmental law and their implications. There was general agreement about the need to ensure that the process would not weaken existing instruments, bodies, or procedures and the importance of working based on consensus so that pragmatic, realistic results could be presented as part of the group's recommendations to the General Assembly. The rule of consensus, a very important strategic objective for some influential delegations, was never formally adopted but it was implicitly assumed as the applicable decision-making procedure for the negotiations. The delegations of the United States and the Russian Federation made clear their opposition to the adoption of a GPE irrespective of its legal form. (Doran et al. 2019 a, p. 8). Most other participants adopted more constructive positions as to the continuity of the process and possible outcomes of the negotiations towards a global pact for the environment.

The main aim of the second substantive session of the OEWG (Nairobi 18 - 20 March 2019) was to discuss 'possible options for addressing possible gaps in international environmental law and environment-related instruments.' The discussions showed deep disagreement on fundamental issues such as: the concept and existence of gaps in international environmental law, the need to codify the guiding principles of international environmental law, and the opportunity to prepare a new international instrument (of a binding or non-binding nature). Given the lack of consensus on the core substantive issues, the debate shifted to mostly procedural aspects, considering possible improvements to existing environmental governance structures, enhanced coordination and cooperation between multilateral environmental agreements and other specific regulatory regimes, and the strengthening of the means of implementation at the national level, without establishing new international legal obligations (Doran et al., 2019 b).

The third substantive session of the working group (Nairobi 20 to 22 May 2019) showed general acceptance that the process should seek to 'reinforce the protection of the environment for present and future generations' and 'help to strengthen the application of international environmental law' while not undermining relevant existing legal instruments, frameworks and bodies. Concerning the substantive recommendations to the General assembly, the working group agreed only in two points: strengthening the means of implementation at the national level along the lines of the Montevideo-5 Programme and to increase coherence in the treatment of cross-cutting issues related to multilateral environmental agreements. On institutional matters, as the USA and the Russian Federation showed deeply confronted views, it was agreed to retain the eclectic formula of the outcome document of the Rio+20 Conference stating that UNEP is the leading global environmental authority 'within the United Nations System'. On the issues of principles of IEL, the delegations' positions were at odds; the European Union, supported by other delegations, stressed the importance of principles and called for continuing dialogue, but the United States and other delegations opposed further discussion on these issues and no further progress was made. On the outcome of the process, after very difficult negotiations discussions, an understanding was reached *in extremis* based on three points: continuity of the process, maintenance of discussions on principles, and preparation by UNEA of a

‘political’ declaration (the word ‘political’ was added at the last moments) ([Doran et al., 209 c](#)).

The outcome of the OEWG discussions was endorsed without debate by the General Assembly in Resolution 73/333 on the follow-up to the report of the ad hoc open-ended working group which’s last paragraph decides to:

Forward these recommendations to the United Nations Environmental Assembly for its consideration, and to prepare, at its fifth session, in February 2021, a political declaration for a United Nations high-level meeting, subject to voluntary funding, in the context of the commemoration of the creation of the United Nations Environmental Program by the United Nations Conference on the human environment, held in Stockholm from 5 to 16 June 1972, with a view to strengthening the implementation of international environmental law and international environmental governance in line with paragraph 88 of the outcome document of the United Nations conference of sustainable development entitled ‘The future we want’.

This outcome of the OEWG discussions and its endorsement by the General Assembly in resolution 73/333 must be considered as a setback for the GPE in the form of a treaty and, consequently, for the recognition of the human right to a healthy environment in a new environmental conventional instrument. In fact, UNGA resolution 73/333 confirms that the outcome of the process will be a mere “political declaration” commemorating the creation of UNEP in 1972 with a view to “strengthening the implementation” of existing international environmental law and institutional governance (but not its progressive development in a global treaty).

4 THE IMPLEMENTATION OF UNGA RESOLUTION 73/333 ON THE WAY FORWARD

The calculated ambiguity of resolution 73/333 in its section on further work has left many loose ends which make all the more difficult its implementation. On 18 February 2020, the Governing bodies of UNEP adopted a roadmap for the implementation of resolution 73/333, consisting in consultations to be held in Nairobi in 2020 and in 2021, under the guidance of two CoFacilitators, the ambassadors from Pakistan, Ms. Saqlain Syedah, and Estonia, Mr. Ado Lohmus. The outbreak of the pandemics caused by COVID-19 has further complicated the negotiations that should bring the process set in motion by resolution 77/277 to a conclusion in 2022.

The first informal substantive consultation meeting on the follow up of UNGA resolution 73/333 took place virtually between July 21 and 22, 2020. The discussions largely reproduced the positions manifested by delegations at the OEWG meetings concerning the non-binding character of the declaration to be adopted that support the implementation of existing frameworks and conventions rather than creating new obligations. Some delegations called for an action-oriented political declaration, recognizing an opportunity for States to encourage greater implementation of existing international obligations. The United States delegation strongly opposed drafting a political declaration focused on ‘actionizing’ the recommendations of General Assembly Resolution 73/333, cautioning against renegotiating the recommendations and working beyond the mandate of the group. On the issue of principles, no progress was made since the delegations insisted in their unmoving position. In conclusion, as stated by MA Tigre:

The meeting allowed States to share their stance on the scope of the political declaration and the proceedings of international environmental governance. Yet the discussions mostly mimicked the debates held in Nairobi, failing to add much new to the table. Similar to the first Nairobi session, there was a lot of discussion on diverse aspects of IEL, with very few action-oriented solutions proposed. The ambition of countries, with a few exceptions, remains low, with the majority opposing new and

future-oriented proposals that would better prevent and prepare for environmental crises (Tigre 2020 b, p. 10821).

On 7 October 2020, with a view to assist parties in the preparative work of the following informal consultation meetings and UNEA-5, the co-facilitators distributed a document containing the draft building blocks of a political declaration to be adopted at a high-level UN meeting in 2022 (Letter from the co-facilitators 73/333 - 7 Oct 2020). Although in essence they are mostly recapitulative, the co-facilitators draft building blocks sketch some elements of openness regarding the recommendations formulated in resolution 73/333. However, the draft building blocks prepared by the co-facilitators did not receive the support of all the concerned parties and the United States expressed its belief that the draft building blocks document does 'not set the stage for success for any future negotiations'.

On the light of the above, it is difficult to determine when, where and how Resolution 73/333 is to be implemented. It seems already settled that the process is heading towards the adoption of the political declaration and the special event for the commemoration of the creation of UNEP (UNEP@50) during the resumed session of UNEA-5 in Nairobi from 28 February to 4 March 2022. However, the when and where of the commemoration of the 1972 UN Conference on the Human Environment (Stockholm+50), and its implications for the reinforcement of the normative structure of IEL are still to be clarified.

5 A CRITICAL APPRAISAL OF THE PROCESS TOWARDS A GLOBAL PACT FOR THE ENVIRONMENT

Looking in retrospect, most commentators consider the road travelled to be a relative failed effort. The ambitious legal initiative launched by France and supported by many members of the United Nations has gradually been watered down to become just another in a list of political declarations on sustainable development (de Lassus Saint-Geniès 2020, p. 11).

The advocates of the conclusion of an international treaty establishing the constitutional bases of the global environmental protection system and limiting the perverse effects of fragmentation are numerous and with solid arguments (Kotzé and Muzangaga 2018). They build in the empirical confirmation that humanity is facing a growing environmental crisis of tremendous magnitude that prevents States and social forces from achieving sustainable development and puts their future at risk. Through the industrial and technological revolutions, we have entered the Anthropocene, a new geological era in which humans have become the main driver of global environmental change. Scientific evidence shows that the rate of anthropogenic global impact on the environment is accelerating and may be exceeding the biophysical thresholds of 'planetary boundaries'. In current conditions, the relationship between humans and nature paints a frightening picture of continual and increasing degradation of the Earth's resources and ecological processes. The most vital elements of the biosphere – such as the air, oceans, freshwater, land, forests, biodiversity and habitats – are suffering a sharp deterioration and some are reaching their critical limits. Some islands and coastal territories may totally or partially disappear as a result of sea-level rise due to the effects of climate change. Enough scientific evidence exists of a multidimensional ecological crisis that is endangering the prospects of social sustainability and threatening the survival of humankind on Earth. As the former director of UNEP, Klaus Töpfer, asserted in 2006:

Today's world is facing an unprecedented environmental crisis ... The degradation of the Earth's environment increasingly threatens the natural resource base and processes upon which all life on Earth depends ... The urgency of balancing development with the Earth's life support systems is being finally recognized and understood. Now it is time to act upon this understanding (UNEP 2006, p. iii).

However, although sharing these premises, other analysts question the added value of a global treaty on the environment, proposing other alternatives (Voigt 2019). Some challenge the usefulness of any legal or political instrument on the subject, considering that the international system for the protection of the environment, although fragmented into several autonomous treaties, does not present real gaps or require a reformulation of its ordering principles that could be counterproductive (Biniaz 2019). In their opinion, the fragmented structure of IEL is the result of the historical conditions under which this body of norms was established. Since the initial stages of the development of IEL, innovative (and often effective) ways to overcome its structural deficiencies were found. Against this backdrop, these scholars are skeptical about how the proposed GPE could remedy the possible structural deficiencies of the system of international environmental law and governance.

In fact, the reason for the failure of the proposed global pact as a legally binding agreement is of a political nature. From the outset, the major world powers expressed their opposition to the GPE, rejecting the need to consolidate principles and recognize environmental rights. In support of their strategic positions rejecting any further action at the law-making level, some States have sustained that there are not real gaps in the international system of norms concerning the protection of the environment (Argentina). Others opposed the reproach of ‘fragmentation’ stressing that it has been the will of States to construe this body of law in such a way (United States) and that the ‘piecemeal approach’ should be regarded as an asset and not as a deficiency of the international legal system (Brazil). In line with these considerations, they have opposed the opportunity to discuss the elaboration of new rules of international environmental law in general and the need to prepare a new global overarching treaty in particular. In their view, the paramount objective of the process towards a global pact for the environment should be to preserve the regulatory and institutional autonomy of existing MEAs and not to add any new super-structural normative instrument. This objective is particularly important for the world’s great powers that feel at ease under the existing sectoral amalgamations of autonomous legal regimes thus rejecting the assumption of additional international environmental obligations and commitments. In the same manner, a number of influential delegations opposed the possibility of further discussions on the principles of international environmental law, stating that the issue should be left to the International Law Commission (ILC) of the United Nations. At the end it was only recognized “the role of the discussions on principles” in order to improve its implementation.

The adoption of UNGA Resolution 73/333 has been welcomed by some as a significant milestone towards improving International Environmental Law. However, it can be argued that, in addition to choosing the weakest possible type of international instrument to be adopted (a mere ‘political’ declaration), the recommendations on the content of the political declaration aim only to strengthen the implementation of existing law, but not to developing new environmental norms. They consist in a repetitious recollection of vague policy objectives expressed in purely hortatory language. The original call for legal ambition implicit in the General Assembly resolution that launched the process towards a Global Compact for the Environment has been progressively diluted into weak policy recommendations (Juste 220 a). At this point, the pertinent question might be: how could a political declaration based on such a weak set of recommendations add value to international environmental law?

6 CONCLUSION

The negotiations surrounding the GPE that were initiated in a spirit of great legal ambition, have reached an impasse regarding the possibility of concluding an international convention that includes environmental human rights. The rejection of the GPE is due to multiple reasons; but it highlights above all the lack of political will of states to advance in the

development of international environmental law in the face of the challenges of the Anthropocene and despite the growing demands of global civil society (Juste 2020 b). For the time being, the set-back of the initiative has taken with it the expectations of promulgating an international Bill of Rights that contemplates and gives constitutional rank to the principles related to environmental human rights. Although the prospects are low, current changes in national governments and the growing awareness of people around the world may eventually lead to a political declaration on a global pact that expresses real commitments to preserve the integrity of the Earth system and enshrines the human right to a healthy environment at the next high-level UN commemorative events scheduled for 2022.

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