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Failure of the Global Pact for the Environment: a missed opportunity or a bullet dodged?

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Questions may be raised over why the draft Global Pact for the Environment (GPE) has not delivered the success expected by its promoters during the working group set up by the UN General Assembly, the third and final negotiation session of which ended on May 23, 2019 in Nairobi, Kenya. This failure may be the result of several factors, related on one hand to the current geopolitics of global environmental governance,

and on the other to the content of the draft itself. What lessons can be learned from this experience in terms of both international cooperation as well as a more effective implementation of environmental policies?

Geopolitics of the draft Pact: a foregone conclusion?

Firstly, reservations have been raised regarding the negotiation mode at the United Nations: characterised by the search for consensus, it favours states with nationalist orientations, thus enabling them to defeat majorities—which in some ways represents an extension of the conflicts occurring between nationalists and progressives. However, there are many political virtues in this search for consensus and it does not necessarily lead to paralysis. We have seen this with the Paris Agreement on climate and in the current negotiations on the high seas. Indeed, an advantage of the search for consensus is that it creates a positive political atmosphere: it avoids the “free rider” syndrome, which is so damaging to the mutual construction of policies to sustainably manage the planet.

In reality, however, a minority of opponents did not single-handedly defeat the Pact. While the Pact had many sympathisers, there were ultimately very few advocates who found themselves able to adopt a harder line in defence of the idea of a binding instrument. Many countries that are usually very environmentally friendly, such as Switzerland, Norway and Canada, expressed reservations and did not give the Pact their full support. In addition, many countries—particularly in Africa—although supportive of the initiative, expressed concerns that the need was much more about increasing the means of effectively implementing international agreements in terms of administrative and financial capacities, rather than on creating a new legal tool.

Some countries also expressed dissatisfaction over the lack of joint construction since the launch of the idea of the Pact, beyond a group of experts involved, albeit an international one. Since its launch in September 2017, the UN mechanism to develop the Pact has been extremely rapid. To enable this rapidity, the resolution left in ambiguities regarding the very content of the negotiations. While there are positives in this approach, the result also shows that States need time to take ownership of such negotiations; moreover, initial ambiguities have never been completely removed. The consequences of this feeling were tangible. Firstly, the Member States in the European Union were divided, particularly between the French and German positions, the latter being much less convinced about the relevance of a binding instrument. As a result, the EU's diplomatic ability and influence on debates was considerably weakened, especially because those Member States that supported the Pact could not air their views in plenary sessions—as the EU speaks with only one voice. In these types of negotiations, a united and active position for the EU is of paramount importance. Secondly, several Latin American countries played a pivotal role in these negotiations: Mexico and Costa Rica in particular, who were quite positive regarding the draft Pact without necessarily supporting its binding nature, expressed regret over the lack of time allowed for a more in-depth exchange of ideas.

We can also question the virtual absence of major environmental NGOs, the voices of which are so important during the negotiation of multilateral environmental agreements (MEAs). Such NGOs did not come forward to participate, nor did they start mobilising their resources, because they remained unconvinced of the project's added value for their campaigns.

Post-Pact pathways: Stockholm+50 in 2022

Ultimately, the draft Pact, along with any type of binding instrument, has been implicitly rejected. However, preparations for the Stockholm+50 conference could benefit from the guidelines adopted in Nairobi, if they were to be

retained by the United Nations General Assembly. The final text¹ adopted at least confirms an objective that has already been entrusted to the United Nations Environment Assembly (UNEA), that of making preparations for the 50th anniversary of the Stockholm Conference, to be held in 2022; it provides detail on some parts of its agenda and calls for plans for a draft declaration in this context. For international environmental law (IEL) and for global environmental governance in the institutional sense, this therefore refers to discussions to be held within this 3-year deadline, a period that will have to be used well if this conference is to have such an ambitious outcome.

Besides the obvious disappointment in the result, what can we interpret from these very intense negotiations? Have we missed an opportunity or dodged a bullet, and what perspectives can be outlined for the future? Two interpretations are possible.

For the Pact to be considered as a lost opportunity, it would need to be a positive initiative that could have had an effective follow-up but would have failed for purely anecdotal or circumstantial reasons. This is not the case. In reality, the Nairobi negotiations revealed a major lack of consensus regarding the very objective of the Pact, namely: to consolidate a set of principles that remain in a soft law state, and to make them legally binding and therefore citable in national courts, and in parallel to address the fragmentation of IEL.²

Many countries and experts are not in favour of this approach and regard the fragmentation of IEL as inherent to environmental governance. This could be solved by empirical and practical means, such as the bringing together of chemical conventions or common reporting. As for the effective implementation of IEL at the national level, it is more a matter of implementing practical means and active policies, rather than establishing a “super global agreement” to encompass the MEAs.

The failure of the draft Pact can also be regarded as a risk avoided, as well as the beginning of a positive perspective.

The view that a risk has been avoided is a reasonable assumption if a small majority, which could perhaps have been envisaged from the outset, had adopted the draft negotiation of a new treaty. Many countries, including the most significant ones, would not have signed the future Pact and their contributions to the negotiation would have weakened its content, particularly the scope of principles already acquired. Others would have signed but not ratified, which is common. In addition, finally, many countries would not have allowed their citizens or their NGOs to invoke international law before the national courts. In other words, in the current circumstances, a façade agreement could have led to the increased fragmentation and weakening of IEL. Many countries committed to the environmental cause had feared this outcome.

With this perspective removed, and based on the recommendations of the working group, the pathway may be clear and sufficient time freed up ahead of 2022 for intensive efforts on IEL implementation. The rights-based approach could be one of its elements. The extension of regional Aarhus-type agreements for Europe or Escazú³ for Latin America are good examples.

If such a trajectory becomes possible and all interested parties invest in it, then the time dedicated, money spent, and CO₂ emitted for the three Nairobi negotiating sessions will not have been in vain.

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¹ <https://www.unenvironment.org/events/conference/towards-global-pact-environment>

² See IDDRI's Issue Brief from early 2019 on the Global Pact for the Environment

3 See IDDRI's Issue Brief on the Escazú Agreement