

# What to expect from a Global Pact for the Environment?

**Damien Barchiche, Lucien Chabason, Elisabeth Hege (IDDRI), Nilufer Oral (Istanbul Bilgi University Law Faculty), Michel Prieur (University of Limoges), Julien Rochette (IDDRI)**

From a legal viewpoint, international environmental governance is currently built on more than 500 global and regional instruments, covering topics ranging from the air to land and marine ecosystems or dangerous waste. Given the sectoral and geographic fragmentation of this governance, as well as its overall lack of results (despite some unquestionable achievements), the goal of the draft Global Pact for the Environment (hereinafter referred to as the Pact) is to strengthen the implementation and effectiveness of multilateral environmental agreements (MEAs) and, to achieve this, to provide states with an international instrument enabling them to address the gaps in international environmental law (IEL).

Initially a diplomatic initiative that emerged in the wake of the adoption in 2015 of the 2030 Agenda for Sustainable Development and the Paris Climate Agreement, the draft Pact raises three questions: (1) what **added value** – and credibility – can it hope for and obtain in a particularly loaded legal landscape and in a geopolitical context marked by regular challenges to multilateralism? (2) What operational **articulation** would be possible with the many existing agreements and with ongoing negotiations? Is there a risk of interference and thus of potential conflicts? (3) What level of **effectiveness** can reasonably be expected from the Pact?

Based on an analysis of the purpose the Pact could serve and of lessons learned from previous governance experience, this *Issue Brief* identifies several conditions for success, in terms of ambition and universality.

## KEY MESSAGES

The United Nations Secretary-General's report on the Pact confirms a certain number of gaps in international environmental law. Building on this basis, consultations on the draft Global Pact for the Environment should help to rapidly define the scope of future negotiations. Specifically, focusing this scope on the horizontal principles, with environmental policy integration, for instance in trade agreements, and implementation and effectiveness issues appearing as the most relevant. Moreover, negotiations on the Pact may be lengthy, and a certain number of success factors need to be considered.

First, the general principles must be confirmed and translated into justiciable rights and obligations mechanisms accompanied by guarantees

of effective monitoring and implementation. An ambitious Pact could incorporate the principles already established, but also new ideas for principles proposed by the scientific community, the 2030 Agenda for Sustainable Development, civil society or indigenous peoples.

Delivering an ambitious outcome implies not only a persuasive argument, but also a debate process that guarantees the mobilisation of a broad coalition of governments and actors, and thus access of all points of view to these negotiations in order to enrich and consolidate them. This approach would make it possible to launch a global, interdisciplinary discussion on universal principles, by asking states to define their own vision in order to ensure true appropriation of the Pact.

## 1. INTRODUCTION

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Launched by an international network of legal professionals, the draft Global Pact for the Environment<sup>1</sup> was proposed in June 2017, under the patronage of Laurent Fabius, to the French President Emmanuel Macron, who decided to support the initiative in the framework of the United Nations. Intense diplomatic efforts enabled France, along with more than 100 States, to sponsor General Assembly resolution 72/277, *Towards a Global Pact for the Environment*, adopted on 14 May 2018. This resolution requests the Secretary-General to submit a technical, evidence-based report that identifies and assesses possible gaps in international environmental law and environment-related instruments with a view to strengthening their implementation. This report,<sup>2</sup> published on 5 December 2018, must now be discussed by the Member States, in the context of an ad hoc open-ended working group, which will meet for three sessions in the first half of 2019, and will express its opinion on the relevance of launching intergovernmental negotiations with a view to adopting an international instrument.

## 2. A PACT FOR WHAT PURPOSE?

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### 2.1. A response to fragmentation and gaps in international environmental law?

As indicated in the United Nations Secretary-General's report, international environmental law (IEL) has developed in a reactive manner, in response to specific sectoral requirements; numerous instruments have been adopted at different times. This temporal aspect is an important factor in understanding what the report describes as "gaps", "fragmentation" and, consequently, the need for a comprehensive unifying mechanism.

This fragmentation nevertheless seems inevitable given the complexity and specificities of the environment—environments—and the lack of any universal protection formula. Some authors even point out that this fragmentation could in fact be a desirable characteristic of IEL and global governance, for several reasons: current IEL and MEA approaches have been designed in a nuanced manner and adapted to specific fields; in addition, the different IEL regimes, however fragmented they may be, are generally considered to be more flexible, reactive and adaptable, while enabling innovation (Kotzé and French, 2018).

Moreover, the gaps in the international environmental governance framework are not fully addressed by the regional agreements. These agreements clearly make an important contribution to environmental protection, but they remain sectoral and do not all give the same definition and the same scope to the various principles of environmental law.

### 2.2. The need to unify and codify principles to improve their implementation

The definition of general principles of environmental law could be a unifying and codifying tool. These principles are currently spread between several international environmental conventions and declarations, with highly variable definitions and scope. National environmental laws reflect these differences more or less faithfully. A universal treaty, should that be the outcome of the negotiations, could lay out these general principles in a homogenous, coherent manner, and would thus facilitate the work of national legislators and judges, agencies responsible for environmental administration and regional and international courts.

This would require demonstrating that a new treaty or any new instrument is not just another layer to an already protean field, but an essential tool in ensuring coherence and simplifying interpretations that are obstacles to the effectiveness of existing texts. The world conferences of 1972, 1992, 2002 and 2012 strove to provide a comprehensive view of environmental challenges and highlighted certain key principles for the conduct of environmental action. However, the documents resulting from these events have only non-binding value (soft law) and often give rise to different interpretations by States and judges.

It should nevertheless be noted that sources of public international law include not only international treaties and agreements, but also generally accepted custom, the "general principles of law recognised by civilised nations", judicial decisions and doctrine, and sometimes equity (article 38-1 of the Statute of the International Court of Justice). In other words, for some, the fact that principles are adopted as soft law does not make them optional (Dupuy, 1990). However, the aforementioned report by the United Nations Secretary-General lacks a comprehensive view of the effective implementation, or at least acknowledgment, of the principles of the Rio Declaration or of other principles by States and their courts, even when they are not translated into binding legal instruments. In other words, given the growing weight and influence of environmental soft law, what added value is there in translating the principles into legal provisions in the form of a new legal instrument? It may be useful to demonstrate this point.

A new *legally binding* instrument could highlight the need to take account of all environmental elements, not separately, but in an integrated manner, and establish the key principles of action. This will imply making it clear that the effective application of existing texts will be facilitated by a binding framework text, since effectiveness is conditional upon opposability and justiciability, which are more difficult with soft law regulations. It should however be noted that in any case, effectiveness remains only potential or virtual, and could be a dead letter if it is not accompanied by guarantees of access to justice or information for citizens and civil society.

According to the conditions and supported by an argument that is still incomplete, as mentioned above, a Pact could be a tool to collate and codify general environmental principles,

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<sup>1</sup> <http://pactenvironment.org/fr/>

<sup>2</sup> <https://wedocs.unep.org/bitstream/handle/20.500.11822/27070/SGGaps.pdf?sequence=3&isAllowed=y>

to address their gaps and to encourage the emergence of new rights. Global environmental policy would thus be strengthened by a common universal text harmonising the key concepts and general principles of IEL.

Moreover, it will be necessary to clarify the articulation between successive treaties and agreements, which is also governed by public international law. To what extent, on the basis of public international law, could the Pact interact with existing treaties and contribute to their effective implementation? Once again, a legal demonstration should be made.

The Secretary General's report cites sustainable development as one of the principles of IEL and the 2030 Agenda for Sustainable Development as an important milestone in the definition of sustainable development indicators. There are no legal tools for the implementation of Agenda 2030, and a universal instrument on the general principles of environmental law would therefore highlight innovative principles while helping to achieve the Sustainable Development Goals, consistent with their universality and indivisibility. In this sense, it could be wise to combine the principles of Agenda 2030 with those of the "*planetary boundaries*", as proposed by Randers *et al.* (2018).

### 3. HOW TO PRODUCE A PACT

The Secretary General's report is a useful basis for launching consultations that will begin in January 2019 in Nairobi (Kenya). During this consultation phase it will be important, after discussing the relevance of a Pact in view of the governance gaps observed (a point that still needs to be developed, as indicated in the previous section) and its potential added value, to both clarify and expand the scope of the future negotiations.

Proponents of the draft Pact will first need to take account of recent experience in environmental negotiations—the creation of IPBES (also based on a gap analysis); the relative failure of the proposed creation of a World Environment Organisation (WEO); the launch of high seas negotiations—in the light of the following lessons: understanding and addressing the concerns of all parties to enrich and consolidate the negotiation process, developing a solid argument (see above on the elements still missing from this argument), involving the different scientific communities and examining their proposals, engaging NGOs, consolidating EU support over and above the diplomatic efforts already made by France to secure the creation of this informal group, building on the agenda-setting technique of the major conferences, relying on the secretariat and, finally, ensuring adequate financing for the consultation and negotiation process, in order to enable broad access of developing countries to the negotiations. Experience gained from previous processes shows that the development of a legal instrument in the environmental field is likely to be a difficult and potentially lengthy process, and we should not underestimate the time needed to produce an agreement between all parties on a sufficiently ambitious and credible instrument.

Sectoral legal gaps should be excluded from the outset from future negotiations: first, the United Nations cannot engage

in negotiations in all directions; second, only the governance bodies of the different conventions (on the subjects identified in chapter 2 of the report as presenting gaps: chemicals, seas, biodiversity, etc.) are competent to revise framework texts. Likewise, since the institutional topics were dealt with during the Rio+20 Summit in 2012, the only topics of negotiation that should be retained are the horizontal principles, environmental policy integration, for instance in trade agreements, and implementation and effectiveness issues.

## 4. A USEFUL PACT UNDER CERTAIN CONDITIONS

### 4.1. Ambitious content

The added value of the Global Pact for the Environment should lie in the declaration of principles to facilitate the implementation of environmental law, at the global, regional and national levels. It thus seems important that the instrument targeted should be a treaty rather than a simple declaration. In this respect, it would first be wise to include in the Pact principles that are currently considered as fundamental, but not yet incorporated into legally binding global instruments. This is the approach adopted by the Club des Juristes (Club of Lawyers), which, in the 26 articles comprising the draft Pact it published in 2017, includes 20 principles set out in the declarations of Stockholm (1972) and Rio (1992), among which the right to a healthy environment, environmental policy integration, intergenerational equity, prevention, precaution, information and participation.

We believe the ambition of the Pact could go beyond codification alone, by enshrining new principles and recognising new rights.

With regard to principles, some authors (Kotzé and French, 2018) stress in particular that the Pact should include recent doctrinal developments linked to Earth system governance, referring, for example, to planetary boundaries. It could be useful to include other principles, such as ecological solidarity, non-regression or international liability for environmental damage, in the Pact.

But the Pact could also recognise new rights and thereby address certain legal gaps. Granting rights to nature, for example, which is insufficiently acknowledged by international environmental law, even though several states have already adopted texts to this end. And strengthening citizens' rights, whether individual or collective; for instance, there is currently no global mechanism for the protection of environmental rights defenders and whistleblowers. Similarly, the rights of environmentally displaced persons, the victims of sudden- or slow-onset disasters, are not recognised internationally. Issues related to environmental justice, the rights of indigenous peoples, access to justice and to administrative documents for citizens and NGOs, and the rights of stakeholder groups in international negotiations could also be covered by specific provisions. The rights-based approach and interaction between human rights and IEL

could thus get the momentum that is still lacking despite efforts by the United Nations Commission on Human Rights, which, between the Ksentini Report (July 1994) and the Knox Report (March 2018), has invested a great deal in this issue.

The law is not static and IEL in particular is extremely dynamic due to the very nature of its subject. The rules of treaty interpretation set out in the 1969 Vienna Convention on the Law of Treaties take account of any subsequent agreements or practices of States in relation to a treaty. The Global Pact for the Environment, as a subsequent agreement, could provide an important guidance tool to fill the gaps and interpret the multitude of MEAs adopted in different periods and circumstances.

## 4.2. An open process

In order to maximise the chances of success for the draft Pact, it is also important to open the field of discussions by expanding the approach adopted by the Secretary-General's report, which translates a rather classical vision of IEL. In this respect, the Escazú Agreement on environment and human rights, signed on 4 March 2018 within the framework of the Economic Commission for Latin America and the Caribbean, could be considered with interest: far from being a simple replica of the Aarhus Convention, it goes beyond it on many points, and is very comprehensive in the way it is written and very participatory in its philosophy, including in its negotiation.

More broadly, the upcoming discussions will need to address the complex issues of unity and diversity. How can we build an instrument that reflects both the ideal of universalism and respect for cultural diversity? Since this is a matter of legal production, progress in legal anthropology should be kept in mind, reminding us that the law governing relations between human societies and their environment is a social and cultural product, that there are different approaches to the law, that the concept of the environment is discussed as being anthropocentric, and sometimes rejected, and that the perception of nature

may vary according to the society. To achieve this opening, concepts such as *buen vivir* and ecological solidarity are worth discussing with a view to their possible inclusion in the Pact.

Moreover, the Global Pact for the Environment provides a unique opportunity to develop a new approach to the production of international standards, which could contribute to the implementation of the 2030 Agenda for Sustainable Development.

## 4.3. Necessary coalitions

However, the first UN consultations will be held in a difficult international political context, especially where the global environment is concerned. It is obvious that the enthusiasm that marked the adoption of the Paris Agreement just three years ago is long gone. Recent examples show that in many international bodies, the positions of a large number of major countries (United States, Japan, Brazil, Russia, etc.) are hardening, while Europe is clearly no longer in a position to exercise its traditional leadership. This is why it is crucial to develop a convincing argument that can build attractive coalitions, between governments and with non-state actors, around the draft Pact for the Global Environment.

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### CONTACT

damien.barchiche@iddri.org

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Institut du développement durable  
et des relations internationales  
41, rue du Four - 75006 Paris - France

[WWW.IDDRI.ORG](http://WWW.IDDRI.ORG)

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