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Not All that Glitters Is Gold

An Analysis of the Global Pact for the Environment Project

Géraud de Lassus Saint-Geniès

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Centre for International Governance Innovation

67 Erb Street West
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About the Author

Géraud de Lassus Saint-Geniès is a post-doctoral fellow with CIGI's International Law Research Program and a Social Sciences and Humanities Research Council post-doctoral fellow at McGill University's Faculty of Law. He is also a lecturer at Laval University's Faculty of Law. His research interests include climate law and governance, environmental law, transnational regulatory processes, and the link between culture and sustainable development. Géraud holds an LL.D. from Laval University's Faculty of Law and from Université Paris 1 Panthéon-Sorbonne.

About the Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

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Acronyms and Abbreviations

CBD	Convention on Biological Diversity
CFCs	chlorofluorocarbons
COP 21	21st Conference of the Parties
GPE	Global Pact for the Environment
HFCs	hydrofluorocarbons
ICJ	International Court of Justice
IEL	international environmental law
ITLOS	International Tribunal for the Law of the Sea
LOSC	United Nations Convention on the Law of the Sea
OEWG	open-ended working group
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

Executive Summary

The Global Pact for the Environment (GPE) is a draft treaty prepared in 2017 by a French think tank, Le Club des Juristes, which aims at strengthening the effectiveness of international environmental law (IEL) by combining its most fundamental principles into a single overarching, legally binding instrument. In May 2018, the United Nations General Assembly (UNGA) adopted *Towards a Global Pact for the Environment*, a resolution that established an intergovernmental working group to discuss the necessity and feasibility of adopting an instrument such as the GPE, with a view to making recommendations to the UNGA. As the working group nears its final session, scheduled for May 20–22, 2019, this paper discusses the extent to which codifying the fundamental principles of IEL into a treaty could increase the problem-solving effectiveness of environmental governance. The analysis suggests that the added value of the proposed GPE (or any such instrument) may not be as evident as what its proponents argue. The paper also highlights the fact that the adoption of such an instrument could generate unintended consequences that would hinder the development of more effective environmental standards in the future.

Introduction

International law has been used to protect the environment for more than 40 years. Despite extensive use of this tool (as evidenced by the large number of multilateral, regional and bilateral treaties adopted on a myriad of environmental issues[1]), environmental quality continues to decline. Biodiversity is diminishing at an alarming pace, greenhouse gas concentrations in the atmosphere continue to rise and the pressure on the marine environment is unabated. International environmental agreements may have led to successes in some cases,[2] but their proliferation clearly did not halt the generalized process of environmental degradation.

This lag between the abundance of environmental agreements and the deterioration of the overall state of the earth is not new. Over the past decades, legal scholars and political scientists have devoted considerable attention to how to enhance the effectiveness of IEL. Reflection on this topic has recently been revived by a proposal from the French government to "strengthen"[3] IEL by combining its most fundamental principles into a new general, universal and overarching treaty — the GPE — that would supplement existing sectoral agreements.

The idea to adopt such an instrument originates from a French think thank, Le Club des Juristes, which drafted a preliminary version of the GPE. Unveiled in June 2017, this draft treaty was presented as an essential tool to "improve global environmental governance and provide it with a true effectiveness."[4] French President Emmanuel Macron immediately endorsed this initiative and publicly vowed to push it through the UNGA.[5] Following a diplomatic push from the French government, the UNGA adopted, in May 2018, a resolution entitled *Towards a Global Pact for the Environment*, which officially launched an intergovernmental process that could potentially lead to the adoption of the GPE.[6]

Considering the gravity of the environmental crisis, one should not dismiss serious initiatives aimed at enhancing environmental protection out of hand. As well, gathering all the fundamental principles of IEL into a legally binding text is certainly an idea that is worthy of consideration. Indeed, these fundamental principles have so far only been gathered in soft law instruments,

1 It is generally estimated that there are more than 500 international treaties related to the environment. Report of the Executive Director, *International Environmental Governance*, UNEP, presented at the Meeting of the Open-Ended Intergovernmental Group of Ministers or their Representatives on International Environmental Governance, UN Doc UNEP/IGM/1/2 (2001).

2 For instance, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) is widely considered as having contributed to the gradual shrinking of the ozone hole observed since the early 2000s.

3 Emmanuel Macron (Speech by the President of France, delivered at the Summit on the Global Pact for the Environment, 19 September 2017), online: <https://newyork.consulfrance.org/spip php?article4452>.

4 Club des Juristes, "Toward a Global Pact for the Environment" (2017) White Paper [Club des Juristes, "Toward a Global Pact"] at 8, online: <www.leclubdesjuristes.com/wp-content/uploads/2017/05/CDJ_Pacte-mondial-pour-lenvironnement_Livre-blanc_UK_web.pdf>.

5 *Ibid* at 16.

6 *Towards a Global Pact for the Environment*, GA Res 72/277, UNGAOR, 72nd Sess, UN Doc A/RES/72/277 (2018) [UNGA, *Towards a Global Pact*].

such as the Stockholm Declaration or the Rio Declaration. Moreover, with its numerous sectoral agreements, IEL is highly fragmented and, unlike most other areas of international law, still lacks an overarching treaty that would represent the "cornerstone"[7] of this field. This is why for some, the GPE project is deemed necessary to "fill a gap"[8] in IEL and "create a unifying perspective"[9] so that IEL can be more organized and coherent.

The GPE project may look like "such a good idea" (as the director-general for environment of the European Commission recently put it),[10] or even appear as "a logical next step in the evolution of global environmental governance."[11] However, not all that glitters is gold, as the saying goes, and the key question that should guide the discussions on the GPE project is whether such an instrument is actually needed to increase the effectiveness of IEL and improve the overall state of the earth. Arguing that an overarching treaty on the environment needs to be adopted simply because such a treaty currently does not exist is not a compelling argument. What matters is whether the GPE project (or any similar instrument)[12] would have an "added value" for IEL by yielding results that otherwise could not be achieved.

Answering this question is not easy. Assessing the tangible benefits of environmental treaties always poses considerable methodological challenges,[13] and in this case the challenges are even bigger, as the goal of the GPE project is not to solve a specific environmental problem but rather to provide "environmental governance with a true effectiveness."[14] Moreover, the answer can only be prospective at this stage, as it largely depends on a range of unknown factors, such as the content that a GPE would have, its legal form, its membership, the extent to which parties would comply with it, how it would influence the behaviour of its parties and the dynamic that the negotiation of this treaty could create both domestically and internationally.

With regard to all those aspects, it is impossible to make projections. The only thing that can be said at present is that it seems very unlikely that the international community will simply adopt the draft treaty prepared by the Club des Juristes. And even if states do decide to consider this draft as a basis for their discussions, which is by no means a given, the document would necessarily undergo significant changes. One can also expect that universality would be hard to achieve, given that the United States and Russia voted against the May 2017 UNGA resolution. A GPE could hardly be deemed to constitute a cornerstone of IEL if it does not gain universal, or near universal, support.

The point could also be made that, in any case, the GPE project prepared by the Club des Juristes is not what is the most needed to address the actual causes of inadequate environmental protection. For instance, one could argue that the fact that trade and environment are addressed through different bodies of law is a much bigger problem for the effectiveness of IEL than the fragmentation of IEL and its alleged lack of coherence. As Susan Biniaz notes, environmental protection "may be inadequate due to various reasons, for example, resource constraints, lack of political will, and/or ineffective enforcement. In such cases, it does not appear that a new agreement containing broad, binding principles would address those underlying issues. Rather, financial/technical assistance, the development of model laws, and/or capacity-building for enforcement might be warranted."[15]

7 Club des Juristes, "Toward a Global Pact", *supra* note 4 at 8.

8 *Ibid* at 26.

9 *Ibid* at 19.

10 Daniel Calleja Crespo (Speech by the Director-General for Environment, European Commission, delivered at the EU Parliament, 6 February 2019), online: <https://vimeo.com/317458687>.

11 Yann Aguila & Jorge E Viñuales, "A Global Pact for the Environment: Conceptual Foundations" (2019) 28:1 Rev Eur, Comp & Intl Envtl L 10.

12 In this paper, the expression "the GPE project" refers to the draft treaty prepared by the Club des Juristes. The expression "a GPE" is used to refer to any potential legally binding instrument of general scope that would codify fundamental principles of IEL and would pursue the same objectives as those of the GPE project.

13 Daniel Bodansky, "Implementation of international environmental law" (2011) 54 Japanese YB Intl L 63 [Bodansky, "Implementation"].

14 Club des Juristes, "Toward a Global Pact", *supra* note 4 at 16. It should be noted that the report does not specify what kind of "effectiveness" it refers to. This is problematic as the concept of effectiveness has different meanings and can be understood in different ways. A distinction is usually made between *legal* effectiveness, *behavioural* effectiveness and *problem-solving* effectiveness. See Bodansky, "Implementation", *supra* note 13 at 63–68. See also Sandrine Maljean-Dubois, "Introduction: The Effectiveness of Environmental Law: A Key Topic" in Sandrine Maljean-Dubois, ed, *The Effectiveness of Environmental Law* (Cambridge, UK: Intersentia, 2017) 1.

15 Susan Biniaz, "10 Questions to Ask About the Proposed 'Global Pact for the Environment'", Sabin Center for Climate Change Law (2017) at 9, online: <http://columbiaclimatelaw.com/files/2017/08/Biniaz-2017-08-Global-Pact-for-the-Environment.pdf>.

That said, adopting a GPE does not prevent all those things from being done in parallel. There can be various ways to strengthen IEL and they are not mutually exclusive — although it can sometimes be better to channel the attention toward one process.

On another level, one could surmise that the debate over the need to adopt the GPE project is mainly attributable to the differences that exist between legal cultures and, as such, is largely ideological. So far, the development of IEL has essentially been a reactive, decentralized and bottom-up process. Yet common law is usually presented as a process of the same nature.[16] The GPE project rests on the assumption that IEL needs to have an overarching treaty that represents its cornerstone. This assumption seems to be more aligned with civil law systems, in which centralized and top-down approaches are perceived as more important than in common law systems. It is no wonder that the GPE project is an initiative that originates from France and in which French legal scholars have played an active role.[17] In that sense, one could argue that the debate over the GPE project is in fact a debate on whether existing IEL is really "international" (or democratic) and whether it is disproportionately influenced by common law lawyers, only to conclude that such a discussion may be fruitless since "international law is unlikely ever to be fully 'international.'"[18]

As these preliminary considerations show, the debate over the necessity of a GPE and its potential benefits is not simple. However, for the proponents of this project, it seems quite clear that adopting an umbrella treaty laying out the fundamental principles of IEL would enhance environmental protection, because it would:

- "alleviate the inconveniences of the fragmentation [of IEL] and improve the consistency of the numerous existing sectorial environmental agreements";[19]
- prevent some important environmental issues from remaining "unaddressed" by falling "between the cracks" of existing sectoral instruments;[20] and
- enable national and international courts to rely upon the fundamental principles of IEL in their legal reasoning, as these principles would be legally binding.[21]

As this paper will suggest, these three assumptions are debatable and it is far from clear that the adoption of a GPE would necessarily lead to such results, or even that such results would necessarily improve the effectiveness of IEL and/or the quality of the environment. The goal of this paper is not to say that a GPE should or should not be adopted. Rather, its objective is to highlight that the added value of the proposed GPE project may not be as evident as some may say. To contextualize the discussions, this paper starts with some background information about the GPE project.

Background on the GPE Project

The GPE project finds its origins in the work of the Club des Juristes, the French think thank that prepared a report in the run-up to the Paris climate conference (the 21st Conference of the Parties [COP 21] to the United Nations Framework Convention on Climate Change [UNFCCC]) on ways to make IEL more effective.[22] Among other things, the report considered that IEL was not suffering "from a lack of norms" but rather "from their dispersal, their fragmentation even," and that this situation was affecting the "accessibility of the environmental norm, which is little known about and therefore little applied."[23] According to the report, the fact that the founding principles

16 Jeffrey J Rachlinsky, "Bottom-Up versus Top-Down Lawmaking" (2006) 73:3 U Chicago L Rev 933.

17 The point could also be made that the GPE project reflects a faith in the value of the codification of international law and that the opposition between supporters and opponents of this initiative is in fact another expression of the long-standing debate about the advantages and risks of codification.

18 Anthea Roberts, *Is International Law International?* (Oxford, UK: Oxford University Press, 2017) at 321.

19 Club des Juristes, "Toward a Global Pact", *supra* note 4 at 16.

20 Aguila & Viñuales, *supra* note 11 at 3.

21 *Ibid* at 30.

22 Club des Juristes, "Increasing the Effectiveness of International Environmental Law: Duties of States, rights of individuals" (2015) Club des Juristes Environment Committee at 12, online: <https://globalpactenvironment.org/uploads/CDJ_Rapports_Increasing-the-effectiveness_Nov.2015_UK.pdf>.

23 *Ibid* at 100.

of IEL are enshrined in soft law instruments was another issue, as these principles cannot always "be invoked before a court"[24] because of their lack of binding force. To address these shortcomings, the report recommended the adoption of an international treaty that would lay down the founding principles of IEL and become the cornerstone of this area of international law.[25]

Following this report, the Club des Juristes established a Group of Experts (a network of more than 100 lawyers and legal scholars from all legal traditions, representing almost 40 nationalities, and chaired by Laurent Fabius, the president of COP21 and current president of the French Constitutional Council), which drafted a preliminary version of a treaty that contained, *inter alia*, environmental law principles as well as the right to a healthy environment. In doing so, the objective of the Group of Experts was to elaborate a concise instrument that could last and be adaptable to different country contexts, and that would reflect a balance between rights and duties, well-established principles and novel ones, and normative and institutional aspects.[26] In accordance with this approach, the Club des Juristes drafted a relatively short text composed of a brief preamble and 26 articles embodying well-established principles (such as integration and sustainable development, intergenerational equity, prevention, precaution, access to information, public participation and access to environmental justice) and newer principles (such as the right to an ecologically sound environment, resilience, non-regression,[27] and the role of non-state actors and subnational entities in environmental governance).

As for its institutional dimension, the draft treaty provides for the creation of a compliance mechanism (to consist of a committee of independent experts) and a secretariat, but no conference of the parties. This institutional design raises some questions. In the absence of a conference of the parties, one may ask for instance how the rules and procedures of the compliance mechanism will be developed. Article 21 of the draft GPE partly addresses this issue by indicating that one year after the entry into force of the GPE, "the Depositary shall convene a meeting of the Parties which will establish the modalities and procedure by which the Committee shall exercise its functions." However, what will happen if amendments need to be made to these modalities and procedures? How and by whom the members of the committee will be appointed? Electing the members of a compliance committee is usually a task that falls upon the conference of the parties.[28] More fundamentally, beyond these "technical" aspects, the question remains whether states will be willing to accept a compliance mechanism that does not function under the authority of a permanent political body.[29]

From the outset, the draft GPE received mixed reactions. Some scholars welcomed the proposal positively and saw in this initiative "the type of innovative, big thinking necessary to reverse course on environmental degradation."[30] Conversely, others considered that the draft GPE only regurgitated many of the accepted principles of IEL and that this initiative was therefore bringing "little new on the table."[31] At the diplomatic level, the draft GPE was presented at a side event organized by France during the high-level segment of the 72nd session of the UNGA. The idea to adopt such an instrument

24 *Ibid* at 102.

25 *Ibid* at 104.

26 Aguila & Viñuales, *supra* note 11 at 7.

27 The non-regression principle, set out in article 17 of the draft GPE, reads as follows: "The Parties and their sub-national entities refrain from allowing activities or adopting norms that have the effect of reducing the global level of environmental protection guaranteed by current law." The objective of this principle is to ensure the safeguarding of existing environmental laws and regulations so that the level of environmental protection cannot be reduced. Thus the non-regression principle aims at preventing the implementation of any retrogressive measure in the field of environmental law. A similar principle can be found in the field of international human rights. See M Prieur, "The principle of non-regression" in Michael Faure, ed, *Elgar Encyclopedia of Environmental Law*, vol VI (Cheltenham, UK: Edward Elgar, 2016) 251.

28 This is notably the case in the Paris Agreement, with its mechanism to facilitate implementation and promote compliance provided for in article 15. See *Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement*, Dec 20/CMA.1, UNFCCC/PA/CMA/2018/3/Add.2 (2019).

29 It is also unclear how this compliance mechanism would work in practice. Article 21 of the draft GPE indicates that the function of the compliance mechanism and its committee is to monitor the implementation of the GPE. However, since the GPE project states only broad principles, the question remains as to what kind of information parties would have to report to demonstrate that they have implemented the GPE, and whether the information reported would enable the committee to establish cases of non-compliance.

30 Teresa Parejo Navajas & Nathan Lobel, "Framing the Global Pact for the Environment: Why It's Needed, What It Does, and How It Does It" (2018) 30:1 Fordham Envtl L Rev 31 at 61.

31 Louis J Kotzé & Duncan French, "A critique of the Global Pact for the Environment: A stillborn initiative or the foundation for *Lex Anthropocenae*?" (2018) 18:6 Intl Envtl Agreements: Politics, L & Economics 1.

elicited interest and, with the support of 71 other delegations, France subsequently introduced a draft resolution to the UNGA, which led to the adoption in May 2018 of the resolution *Towards a Global Pact for the Environment*.[32] Essentially, this resolution:

- requested the UN Secretary-General to prepare "a technical and evidence-based report that identifies and assesses possible gaps in international environmental law and environment-related instruments with a view to strengthening their implementation;"[33] and
- established an ad hoc open-ended working group [OEWG] to "consider" the UN Secretary-General's report and "discuss possible options to address possible gaps in international environmental law and environment-related instruments, as appropriate, and, if deemed necessary, the scope, parameters and feasibility of an international instrument, with a view to making recommendations, which may include the convening of an intergovernmental conference to adopt an international instrument, to the Assembly during the first half of 2019."[34]

The resolution did not task the OEWG with negotiating a legally binding instrument. Its mandate is only to "consider" the UN report, to "discuss possible options to address possible gaps" in IEL and to make "recommendations" to the UNGA. These recommendations can include "the convening of an intergovernmental conference," but this is just one of the options that states could choose. Also, the fact that the resolution refers to "an international instrument" means that the OEWG could recommend establishing an intergovernmental conference to negotiate a non-legally binding text. The OEWG has, therefore, a wide discretion in deciding how to move this process forward.

The OEWG held its first session in January 2019. During this meeting, delegates considered the report prepared by the secretary-general. Made available in November 2018, this report noted that there are "significant gaps and deficiencies with respect to the applicable principles of environmental law; the normative and institutional content of the sectoral regulatory regimes, as well as their articulation with environment-related regimes; the governance structure of international environmental law; and the effective implementation of, compliance with and enforcement of international environmental law."[35] Furthermore, the report indicated that "[i]nternational environmental law and its effective implementation could be strengthened through such actions as the clarification and reinforcement of principles of international environmental law," and that "[t]his could be done through a comprehensive and unifying international instrument that gathers all the principles of environmental law."[36]

To a certain extent, the conclusion of the report might have given the impression to some states that it was already prejudging what the outcome of the OEWG had to be and, unsurprisingly, the report faced a critical reception.[37] In particular, several delegations (including Argentina, Iran and Morocco) expressed reservations about the need to adopt a new comprehensive legal instrument. As mentioned above, for some (and notably the European Union), a GPE is deemed necessary to "fill a gap" in IEL. However, not all states are of the view that the absence of an overarching treaty on the environment constitutes a gap. For instance, for Argentina, "any gaps and shortcomings in IEL are in implementation, and relate to financing, capacity building, and technology transfer, hinge on political will, and can be addressed through existing institutions."[38] From this perspective, the adoption of a GPE can of course not appear as a priority.

The concept of "gaps in IEL" is far from clear and lends itself to various interpretations. As Duncan French and Louis Kotzé note, this notion, "though easily understood at a linguistic level, raises fundamental complexities conceptually."[39]

32 UNGA, *Towards a Global Pact*, *supra* note 6. The resolution was adopted by a vote of 143 in favour to five against (Philippines, Russia, Syria, Turkey, the United States), and seven abstentions (Belarus, Iran, Malaysia, Nicaragua, Nigeria, Saudi Arabia, Tajikistan).

33 *Ibid* at para 1.

34 *Ibid* at para 2.

35 Report of the Secretary-General, *Gaps in international environmental law and environment-related instruments: towards a global pact for the environment*, UNGAOR, 73rd Sess, UN Doc A/73/419 (2018) at 42.

36 *Ibid* at 2.

37 "Summary of the First Substantive Session of the Ad Hoc Open Ended Working Group towards a Global Pact for the Environment" (2019) 35:1 Earth Negotiation Bull 13 ["Summary of First Substantive Session"].

38 *Ibid*.

39 Duncan French & Louis J Kotzé, "'Towards a Global Pact for the Environment': International environmental law's factual, technical and (unmentionable) normative gaps" (2019) 28:1 Rev Eur, Comp & Intl Envtl L 26.

A gap, they explain, can be factual ("gaps in the coverage of IEL on matters that arguably should be regulated"[40]), technical ("a gap between the obligations states assume and full implementation"[41]) or normative ("These gaps concern omitted — as in some way non-extant — rules and principles"[42]). And they rightly point out that the "identification and assessment of normative gaps…[is] a difficult process, since it is inherently subjective and depends on whatever norms States believe should exist."[43] Subjectivity is equally at the heart of the identification of the two other forms of gaps. Thus, during the first meeting of the OEWG, delegates expressed different positions on what constitutes a gap in IEL, whether such gaps exist and, if so, how they could be addressed.[44]

The fact that the adoption of a GPE could undermine existing environmental agreements is another concern that was conveyed during this meeting. This was already touched upon in the UNGA resolution, which recognized that the process "should not undermine existing relevant legal instruments and framework and relevant global, regional and sectoral bodies."[45] This concern relates to the delicate question of the relationship between a potential GPE and other existing agreements. As the Club des Juristes indicated, the GPE project is meant to become "the cornerstone of international environmental law, with the sectoral conventions being the mode of implementation for specific areas of the general principles of the Pact."[46] However, if that were the case, serious issues would arise. To illustrate that, Susan Biniaz gives the following example. Let's assume that a GPE is adopted and that it contains a non-regression principle. Would it mean that parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora would no longer be allowed to move a species from Appendix I to Appendix II?[47] Adding an overarching treaty to IEL, Biniaz explains, might have "unintended consequences, such as where States may have considered and deliberately rejected the inclusion of one of the Pact's general legal principles in a more specific agreement."[48]

The principle of *lex specialis* (that special law derogates from general law), a "widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts,"[49] arguably would help to avoid these types of unintended consequences. However, as Anja Lindroos notes, "There are a variety of rules of interpretation and other maxims that may be applied in conflict resolution, such as…*lex posterior*."[50] Because "no particular principle or rule can be regarded as of absolutely validity,"[51] *lex posterior* "may take precedence over *lex specialis*, or they may be applied concurrently."[52] For greater clarity and legal predictability, a GPE could contain a provision specifying its relationship with other environmental agreements. But what would such a provision say? If the provision states that special conventions have precedence over this GPE to the extent of any inconsistency, or that this GPE does not affect the rights and obligations of other agreements, such a GPE would not solve one of the problems it seeks to address (that is, the lack of coherence of IEL). On the other hand, a provision stating that a GPE has precedence over the sectoral agreements would generate a great deal of legal confusion. Biniaz argues that the relationship between a GPE and other environmental agreements would need to be "clearly addressed." But providing "clarity" on that matter is likely to be a complex task.

Following the January meeting, a second substantive session of the OEWG took place in March 2019. This time, the objective was to

40 *Ibid* at 27.

41 *Ibid* at 28.

42 *Ibid*.

43 *Ibid* at 32. For a similar view, see the contribution of Daniel Bodansky in "Global Perspectives on a Global Pact for the Environment" (19 September 2018), Columbia Center on Sustainable Investment (blog), online: <http://ccsi.columbia.edu/2018/09/19/global-perspectives-on-a-global-pact-for-the-environment/>.

44 "Summary of First Substantive Session", *supra* note 37.

45 UNGA, *Towards a Global Pact*, *supra* note 6 at para 9.

46 Club des Juristes, "Toward a Global Pact", *supra* note 4 at 8.

47 Biniaz, *supra* note 15 at 6.

48 *Ibid*.

49 Martti Koskenniemi (Chair), International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UNGAOR, 58th Sess, UN Doc A/CN.4/L.682 (2006) at 34.

50 Anja Lindroos, "Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*" (2005) 74:1 Nordic J Intl L 27 at 40-41. For an application of the *lex specialis* maxim, see: International Court of Justice, *Case concerning certain questions of mutual assistance in criminal matters* (*Djibouti v France*), Judgment of 4 June 2008.

51 C Wilfred Jenks, "The Conflict of Law-Making Treaties" (1953) 30 Brit YB Intl L at 407.

52 Lindroos, *supra* note 50 at 41.

discuss options to address possible gaps in IEL and environment-related instruments, with a view to laying the foundations of the recommendations the OEWG will be making to the UNGA at the end of its third session, scheduled in May 2019. More specifically, delegates were invited to "consider options to address gaps or challenges in principles, governance, implementation, and specific regulatory regimes of environment-related instruments."[53] The adoption of a GPE was therefore not the "explicit subject of the talks."[54] However, that issue dominated the discussions and "the wide divergence of views seen in January persisted, with many states rejecting, or expressing doubt about the possibility of a legally binding treaty."[55]

After the January and March sessions of the OEWG, it seems that what was initially presented as a simple, federative and logical project — "an idea whose time has come"[56] to quote Yann Aguila and Jorge Viñuales — aimed at filling an obvious vacuum in IEL is gradually turning into a contentious and divisive issue that is getting tangled in the intricacies of a multilateral negotiation process. But diplomacy is one thing, and what could more fundamentally jeopardize the GPE project is the fact that adopting this treaty without undermining the legal predictability of existing environmental agreements appears extremely difficult. If the risks are perceived as more important than the benefits, the GPE project could remain in draft form. But as the proponents of the GPE argue, this initiative would have a tangible impact on slowing the degradation of the natural world, as improving the coherence of IEL would increase its effectiveness.

53 "Summary of the Second Substantive Session of the Ad Hoc Open Ended Working Group towards a Global Pact for the Environment: 18-19 March 2019" (2019) 35:2 Earth Negotiation Bull 1.

54 *Ibid* at 9.

55 *Ibid*.

56 Aguila & Viñuales, *supra* note 11 at 2.

The GPE and the Fragmentation of IEL

Alleviating the "inconvenience" resulting from the fragmentation of IEL is one of the *raisons d'être* of the GPE project. The proponents of this initiative point out that environmental regimes have been created on an ad hoc basis "without real coordination,"[57] and that because of this there are today a "myriad of intertwined and overlapping rules"[58] on specific environmental issues. They argue that this situation leads to "inconsistencies between parties' obligations" and makes the "enforcement" of environmental agreements "more difficult."[59] According to them, IEL "suffers from intrinsic normative fragmentation,"[60] and the adoption of a "general, cross-cutting, universal reference instrument constituting the cornerstone of international environmental law"[61] could contribute to addressing this shortfall.

The fact that IEL is composed of a myriad of sectoral and specialized agreements is of course indisputable. And although this fragmentation[62] is not *per se* a negative phenomenon — Biniaz, for instance, points out that fragmentation can even have advantages, especially because it enables states to craft agreements that are "designed in a nuanced manner tailored to the particular problem at hand"[63] — it is also indisputable that the existence of this myriad of sectoral and specialized agreements entails inconvenience. For instance, the objective of an environmental agreement can be frustrated by the measures taken to implement other environmental agreements. The proliferation of environmental institutions also poses practical challenges, notably with regard to the participation of countries with limited financial and human resources. But the question

57 Club des Juristes, "Towards a Global Pact", *supra* note 4 at 26.

58 *Ibid*.

59 *Ibid* at 27.

60 *Ibid*.

61 *Ibid* at 26.

62 Fragmentation is used here as a descriptive word that refers to "the emergence of specialized and (relatively) autonomous rules or rule complexes, legal institutions and spheres of legal practice" (Koskenniemi, *supra* note 49 at 11).

63 Biniaz, *supra* note 15 at 2.

as to whether a GPE would be helpful to alleviate such inconvenience is more debatable. The answer also depends very much on what one considers an "inconvenience." For instance, is the fact that some principles of IEL — such as the precautionary principle[64] — are formulated differently from one environmental agreement to another an inconvenience? One could say that this is the case, as principles that bear the same name do not necessarily have the same meaning in different contexts. However, from a practical standpoint, does it really have an influence on the effectiveness of IEL? Although formulated differently, the principles exist independently in different treaty regimes in which they each produce legal effects.

Would a GPE Improve Consistency in the Pursuit of Environmental Objectives?

A well-known problem, one that stems from the fact that environmental agreements are relatively autonomous and often have a limited scope, is that the actions taken to achieve the goal of a specific treaty can potentially frustrate the objective pursued by another treaty. A good example of this is the case of the 1987 Montreal Protocol, whose implementation undermined, for many years, the efforts undertaken through the UNFCCC and the Kyoto Protocol to tackle global warming. Indeed, by restricting the production of chlorofluorocarbons (CFCs), the Montreal Protocol stimulated the production of hydrofluorocarbons (HFCs), which can be used as replacements for CFCs but are also powerful greenhouse gases. Another example can be found in the rules developed under the UNFCCC and the Kyoto Protocol to enable the use of forest carbon sinks for mitigation purposes. Because these rules gave little attention to biodiversity, many authors highlighted that these provisions could lead to domestic projects (such as large-scale monoculture plantations) that could go against the objective of the Convention on Biological Diversity (CBD).[65]

That said, in both cases, ad hoc solutions were found to manage the difficulties arising from the fragmentation of the legal instruments adopted to protect the ozone layer, the climate and biodiversity. For HFCs, in 2016 the parties to the Montreal Protocol adopted the Kigali Amendment to establish a timetable to phase down the production and usage of these substances (even though HFCs are not ozone-depleting substances). As for the interplay between climate change and biodiversity, synergies between the two issues have gradually been recognized within both the UNFCCC and the CBD, even though "there seems to be less openness to address biodiversity conservation with the UNFCCC than the opposite in the CBD, where Parties have shown a particular interest in linking biodiversity and climate change related issues."[66]

These two examples show there are already multiple ways to ensure consistency in the pursuit of different environmental objectives. New rules can be adopted inside the treaty regimes. Cooperation between the secretariats of the conventions and institutional linkages can be developed.[67] Cross-references to other relevant legal instruments can be included in the agreements or in the decisions adopted by the conference of the parties. And at the domestic level, states can also act to ensure that measures to implement their commitments under a specific treaty do not go against the objectives pursued by other environmental treaties to which they are parties. Besides, it is well established that the international normative environment cannot be ignored when treaties are interpreted and applied. This is precisely the idea expressed by article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).[68]

Certainly, none of these solutions is perfect. New rules require consensus, institutional linkages and financial resources, and conferences of the parties have limited and specific mandates that cannot be exceeded. But this does not change the fact that

64 The formulations of the precautionary principle and the principle of common but differentiated responsibilities are not the same in the Rio Declaration and in the UNFCCC, even though these two instruments were both adopted in 1992.

65 See e.g. Harro Van Asselt, "Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regimes" (2012) 44:4 NYU J Intl L & Pol'y 1205.

66 Sandrine Maljean-Dubois & Matthieu Wemaëre, "Biodiversity and climate change" in Elisa Morgera & Jona Razzaque, eds, *Biodiversity and Nature Protection Law* (Cheltenham, UK: Edward Elgar, 2017) 295.

67 Karen N Scott, "International Environmental Governance: Managing Fragmentation through Institutional Connection" (2011) 12:1 Melbourne J Intl L 177. See also W Bradnee Chambers, *Interlinkages and the Effectiveness of Multilateral Environmental Agreements* (New York: United Nations University Press, 2008) at 311.

68 Article 31(3) of the VCLT, states: "There shall be taken into account, together with the context: … c) any relevant rules of international law applicable in the relations between the parties."

tools and legal techniques to ensure coherence between the sectoral agreements already exist, and that new solutions can be developed even in the absence of an overarching treaty on the environment.[69] Whether these tools and techniques are used probably has more to do with political will (or knowledge of the situations where the implementation of a treaty frustrates the objective of another) than with the absence of a GPE.

If the adoption of a GPE is not necessary to create synergies between environmental treaties, could such an instrument at least "improve the consistency of the numerous existing sectorial environmental agreements"?[70] It seems difficult to answer the question *in abstracto*. If a GPE only reiterates principles that are already enshrined in sectoral treaties, it is difficult to see how this instrument could help to avoid situations where the actions undertaken under one treaty undermine the objective of another treaty. But a GPE could also contain a specific provision to avoid this kind of scenario. If this were the case, one can assume that such a provision would seek to address this issue from a systemic perspective, since the GPE project is meant to have a general scope.

For instance, a provision of this kind could call on each party to ensure that the domestic actions it takes to fulfill its conventional environmental obligations do not frustrate the objectives of other environmental treaties to which it is a party. This would be more specific than the principle of "systemic integration"[71] stated in article 31(3)(c) of the VCLT and the provision could act as a reminder that would encourage states to implement their environmental commitments in a more holistic manner. That said, a provision of this kind would also raise complex legal questions and could therefore have some practical implications. For instance, what is an environmental treaty? Is the Cartagena Protocol on Biosafety an environmental treaty? Or is it about trade, or health? Environmental law is a label that has no normative value in itself. Also, what is the threshold to determine that a domestic action could "frustrate" the objective of another treaty? Moreover, the situations where the implementation of a treaty hinders (or could potentially hinder) the objectives of another may not always be anticipated. In the case of the Montreal Protocol, the increase in the production of HFCs was an unexpected consequence that could hardly have been predicted.

From a practical perspective, it is interesting to note that even in the context of environmental agreements that deal with the same issue, it can be exceedingly difficult for parties to agree on harmonization rules between two treaties. The relationship between the UNFCCC and the Paris Agreement is a good example. During the negotiations of the Paris Agreement, developing and developed countries had different positions on how the future climate treaty would be linked to the UNFCCC. Developing countries wanted to closely tie the Paris Agreement to the UNFCCC, so they would have a legal basis to refer to the principle of common but differentiated responsibilities and respective capabilities enshrined in the UNFCCC. Conversely, developed countries wanted the Paris Agreement to represent a "paradigm shift" away from the UNFCCC to avoid that possibility.[72] Because of this divergence of views, the Paris Agreement does not clearly indicate the nature of its relationship with the UNFCCC. As a result, whether the principles enshrined in the UNFCCC also apply to the members of the Paris Agreement is a question that remains unsettled. Considering this example, which is very specific, one may wonder whether states will be willing to agree on including an open-ended rule in a GPE that would define the relationship between this instrument and all other environmental agreements.

Another possibility would be to include a provision in a GPE stating that when new environmental rules are negotiated, appropriate consideration should be given to other environmental treaties. But here again, such a provision would be extremely vague (What is a rule? In the case of COP decisions, are guidelines, procedures and modalities rules?) and difficult to implement in practice, considering the number of environmental treaties and given

69 In 2006, the parties to the Stockholm Convention on Persistent Organic Pollutants, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal launched a process to increase the cooperation and coordination among these three instruments. See John Carter Morgan III, "Fragmentation of International Environmental Law and the Synergy: A Problem and a 21st Century Model Solution" (2016) 18:1 VJEL 134.

70 Club des Juristes, "Towards a Global Pact", *supra* note 4 at 16.

71 Campbell McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention" (2005) 54:2 ICLQ 279.

72 Daniel Bodansky, Jutta Brunnée & Lavanja Rajamani, *International Climate Change Law* (Oxford, UK: Oxford University Press, 2017) at 222.

the interconnection between environmental issues. The point here is that it seems easier (and presumably more efficient) to harmonize the pursuit of separate environmental objectives on an ad hoc basis (and/or at the domestic level) than to try to address the issue from a systemic perspective at the multilateral level. Furthermore, the adoption of an overarching treaty does not guarantee that the consistency in the pursuit of different environmental objectives will be improved.

Would a GPE Ensure Consistency in Judicial Interpretation?

Fragmentation of IEL can yield another form of inconvenience when the same principles of IEL are interpreted differently by different jurisdictions. The inconvenience of such a normative conflict between an earlier and a later interpretation of a principle is evident. As Martti Koskenniemi explains, "Differing views about the content of general law create two types of problem. First, they diminish legal security. Legal subjects are no longer able to predict the reaction of official institutions to their behaviour and to plan their activity accordingly. Second, they put legal subjects in an unequal position vis-à-vis each other. The rights they enjoy depend on which jurisdiction is seized to enforce them."[73]

Aguila and Viñuales identify three examples of divergent interpretation, which concern "the different positions taken with respect to the nature and scope of the precautionary principle/approach, those regarding the spatial scope of the requirement to conduct an environmental impact assessment and those relating to public participation."[74] They contend that each of these divergences was "possible because of a lack of an overarching statement of binding principles."[75] However, the point is debatable.

For instance, in the case of the precautionary principle, the World Trade Organization (WTO) panel in *EC—Approval and Marketing of Biotech Products* considered that the legal status of this principle was unsettled and refused to take a position on whether this principle was a recognized principle of general or customary international law.[76] Conversely, in its advisory opinion on the *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Dispute Chamber of the International Tribunal for the Law of the Sea (ITLOS) observed that "the precautionary principle approach has been incorporated into a growing number of international treaties and other instruments," and deemed that "this has initiated a trend towards making this approach part of customary international law."[77] While there is no fully fledged conflict of interpretation here, the divergence of interpretation does create some legal uncertainty. Would that have been preventable if a GPE had been in force? The question remains open.

In the two cases, the issue was whether the precautionary principle had customary status. Therefore, even if a GPE had enunciated this principle in a binding treaty, this would not have been crucial to answer the question. The precautionary principle is already enunciated in many treaties and not all principles that are enshrined in treaties are part of customary law. The sustainable development principle/concept/objective is an important example of this. Furthermore, in *EC—Approval and Marketing of Biotech Products*, the panel indicated that "the rules of international law to be taken into account in interpreting the WTO agreements…are those which are applicable in the relations between the WTO Members."[78] Thus, a GPE without a membership similar to that of the WTO would have very limited implications inside the WTO. In such a case, a GPE would only "shed light on the meaning and scope"[79] of the WTO agreements. And this can already be done with existing environmental agreements.

A similar point could be made with regard to the divergence expressed by the International Court of Justice (ICJ) and the Seabed Chamber regarding the spatial scope of the requirement to

73 Koskenniemi, *supra* note 49 at 32.

74 Aguila & Viñuales, *supra* note 11 at 4 [footnotes omitted].

75 *Ibid.*

76 *European Communities–Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Corr.1 and Add.1, 2, 3, 4, 5, 6, 7, 8 and 9, adopted 21 November 2006 at para 7.89 (Panel Report) [*EC–Measures Affecting Biotech*].

77 ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, No 17 (1 February 2011) at para 135 [ITLOS, *Responsibilities and Obligations*].

78 *EC–Measures Affecting Biotech*, *supra* note 76 at para 7.68. For a critique of this position, see Benn McGrady, "Fragmentation of International Law or 'Systemic Integration' of Treaty Regimes: EC–Biotech Products and the Proper Interpretation of Article 31(3)(C) of the Vienna Convention on the Law of Treaties" (2008) 42:4 J World Trade L 589.

79 *EC–Measures Affecting Biotech*, *supra* note 76 at para 7.94.

conduct an environmental impact assessment. In the *Pulp Mills* case, the ICJ considered that an environmental impact assessment must be carried out "when activities which may be liable to cause transboundary harm" are projected.[80] The following year, the Seabed Chamber concluded that the ICJ's reasoning "in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction" and "resources that are the common heritage of mankind."[81]

Article 5 ("prevention") of the draft GPE states that parties "shall take the necessary measures to ensure that an environmental impact assessment is conducted prior to any decision made to authorise or engage in a project, an activity, a plan, or a program that is likely to have a significant adverse impact on the environment." As this shows, this provision does not address the issue of the spatial scope of the requirement to conduct an environmental impact assessment. Therefore, if that provision had been in force, and if both the ICJ and ITLOS had taken into account this provision in their reasoning, each jurisdiction could still have come to a different conclusion. If a GPE is meant to be a concise instrument, its usefulness to clarify the meaning of other international principles will be limited. And in the worst case, a GPE could even be invoked by two different jurisdictions to justify different interpretations. Ironically, a GPE could potentially increase the inconvenience resulting from the fragmentation of IEL, whereas its objective is precisely to manage, and reduce, such inconvenience. It is also notable that adding another treaty will increase the "treaty congestion" phenomenon that Edith Brown Weiss highlighted more than two decades ago.[82]

Beyond the issue of consistency in judicial interpretation, it seems important to consider the broader impacts that the adoption of a GPE could have on the judicial interpretation process itself and its contribution to the progressive development of IEL. The function of the GPE, as the proponents of this instrument explain, is to codify the fundamental principles of IEL. Yet if codification may increase legal certainty in some cases, codification also entails the risk of "revealing divergencies where none had been expressed or anticipated before"[83] and "giving to any actual or assumed discrepancy a rigid complexion of finality."[84] Thus, if the fundamental principles of IEL were codified into a treaty, judges could be less likely to further clarify the content of these principles, or even recognize new principles, through the customary process. This could be problematic for environmental protection, as it could restrain the role that international judicial bodies can play — and have played in recent years — in the progressive development of IEL. And because one can doubt that states will be able to agree on particularly ambitious and/or specific rules in a GPE,[85] the adoption of such an instrument could have the effect of "freezing" IEL at a low standard.[86] Of course, the content of a GPE could always be changed in the future. But modifying the content of a treaty is a complex and uncertain operation, while the customary process allows judges to continuously adapt and clarify the meaning of the principles of IEL in a more flexible way, on the basis of the cases they have to adjudicate.

One could argue, however, that the benefits of a GPE should not be examined only from the limited point of view of legal interpretation and that the adoption of such an instrument could bring shifts in thinking about IEL that would lead, in the long term, to positive developments.

A New International Environmental Constitutionalism?

When carefully analyzed, the discourse on the GPE project may give the impression that the underlying objective of the project's proponents is to give IEL an embryonic "constitution" or something

80 *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*), Judgment of 20 April 2010, ICJ Reports at para 204.

81 ITLOS, *Responsibilities and Obligations*, *supra* note 77 at para 148.

82 Edith Brown Weiss, "International Environmental Law: Contemporary Issues and the Emergence of a New World Order" (1993) 81:2 Geo LJ 675.

83 Hersch Lauterpacht, "Codification and Development of International Law" (1955) 49:1 AJIL 16 at 32.

84 *Ibid*.

85 As Hersch Lauterpacht observed, "As a rule, universal acceptance of the results of codification can be achieved in the international sphere only at the risk of making it nominal and retrogressive. This is so in particular in periods when political divisions in the world and the conflict of some fundamental notions of law as between groups of states render impracticable, in most matters, any attempt to achieve generally agreed statement or development of the law" (*ibid* at 38).

86 The inclusion of the non-regression principle into a legally binding instrument could also have a chilling effect on the development of environmental law at the domestic level. States could be more reluctant to adopt progressive and ambitious regulations, knowing that they will not be allowed to reduce the level of environmental protection they achieve afterward.

similar.[87] Of course, the draft GPE does not intend to fulfill many of the functions that constitutions traditionally serve, such as establishing institutions and decision-making processes and defining the relationship between the legislative, executive and judiciary branches. However, the draft GPE does intend to lay out the principles that a specific community (i.e., the international community) considers the most fundamental and to make them legally binding, which is a function that many constitutions serve. The idea that the GPE could become "the cornerstone of international environmental law, with the sectoral conventions being the mode of implementation for specific areas of the general principles of the Pact,"[88] also reinforces the impression that this project aims at pushing IEL in the direction of greater constitutionalization. The words "cornerstone" and "mode of implementation" suggest that a form of hierarchy would emerge between a GPE and the existing sectoral environmental agreements, as is usually the case between a constitution and the law.[89] As Daniel Bodansky notes about the relevance of the constitutionalism discourse in international law, some may be tempted to say that "[e]xamining international law through the empirical lens of constitutionalism…is helpful…to see aspects of the international legal system that might otherwise be overlooked or insufficiently appreciated."[90] The idea here is that the "presence of some constitutional features in international law" can suggest "the need for others."[91]

Constitutions are usually at the top of the pyramid of norms. They usually enunciate fundamental principles and provide for the creation of a constitutional court of justice and stable institutions. Moreover, many constitutions impose procedural and substantive limitations on public power, such as voting rules and respect for human rights.[92] Thus, if it is true that the presence of some constitutional features suggests the need for others, then it logically follows that the adoption of an overarching treaty enunciating the fundamental principles of IEL and representing the cornerstone of IEL would give greater legitimacy to any project seeking to introduce other features of domestic constitutions in IEL. If IEL has universal, legally binding and fundamental principles, then why would it not also have an International Environmental Court of Justice and a World Environmental Organization? Why would decisions and treaties of the conference of the parties not be adopted by a simple majority vote, instead of requiring consensus to be approved? And why would so much emphasis be put on sovereignty, since constitutions impose constraints on public power?

In that sense, a potential benefit of adopting a GPE might be that it could initiate an incremental process of transformation of IEL, as it would help to legitimize positions and proposals aimed at downplaying the importance of state consent in IEL. This is crucial since "nonconsensual norms and decision-making processes…need…to play a larger role…to respond to collective action problems."[93] But this is all very hypothetical and the analogy between domestic and international law has its limits. It is hard to believe that the level of constitutionalization in IEL will ever be similar to that of the domestic legal orders and that states will accept limitations on their powers to which they have not consented. In any case, if a GPE initiates an incremental process of transformation of IEL, the benefits that could result from that process would certainly be distant, whereas the current environmental crisis requires immediate changes.

87 According to John H. Knox, the draft GPE is nothing less than "a proposal for a new international environmental constitution": John H Knox, "The Global Pact for the Environment: At the crossroads of human rights and the environment" (2019) 28:1 RECIEL 41.

88 Club des Juristes, "Towards a Global Pact", *supra* note 4 at 8.

89 Without embarking too extensively on a discussion of international constitutionalism, it is interesting to note that constitutionalization (which refers to the process of establishing international norms that serve constitutional functions) is often presented in the legal discourse as a possible response to the fragmentation of international law. See Jan Klabbers, Anne Peters & Geir Ulfstein, "Setting the scenes", in Jan Klabbers, Anne Peters & Geir Ulfstein, eds, *The Constitutionalization of International Law* (Oxford, UK: Oxford University Press, 2009). It seems this is precisely the case with the GPE project, which is deemed necessary by its proponents to alleviate the "inconvenience" resulting from the fragmentation of IEL.

90 Daniel Bodansky, "Is There an International Environmental Constitution?" (2009) 16:2 Ind J Global Leg Stud 581.

91 *Ibid*.

92 *Ibid* at 572.

93 *Ibid* at 583.

The GPE and the "Factual" Gaps in IEL

As mentioned above, factual gaps in IEL can be described as "gaps in the coverage of IEL on matters that arguably should be regulated."[94] An example of a factual gap that is often given in the context of the discussion on the GPE is the case of marine plastic pollution. On the one hand, "there is widespread if not universal agreement that *something* must be done."[95] On the other, "[m]ost observers would accept that plastic pollution is currently a matter that has largely remained unaddressed or has 'fallen between the cracks' of international instruments."[96] Certainly, the provisions of the United Nations Convention on the Law of the Sea (LOSC) that deal with pollution from land-based sources (in particular, articles 207 and 213) provide a broad framework. That said, and even if the issue is currently being discussed at the UN Environment Assembly,[97] no specific agreement has been adopted yet to combat marine plastic pollution.

For the proponents of the GPE, there is no doubt that a question such as marine pollution will require a dedicated treaty to be adequately addressed. However, they argue, "in the meantime" the regulation of this matter "could rely on a general statement of binding principles."[98] Their point is that because of its broad scope of application, a GPE could act as a backstop and help to avoid a situation where no rule of international law would prohibit an action that is harmful for the environment.

While a GPE could very well serve this function, it should be noted that there can be situations where states will not necessarily think or want to apply a general rule to address a specific environmental issue. For instance, states might not always be aware that something is harmful for the environment. Or they could argue that the general rule does not provide enough indications on how to address a complex source of pollution. Because of a lack of scientific knowledge or a lack of precision of the principles, the backstop function of a GPE could therefore be less beneficial for the environment than the proponents of the GPE tend to suggest.

One could also argue that there are already several general principles in IEL that could play the role of a backstop. In the case of marine pollution, in addition to the provisions of the LOSC, the principle of prevention already obliges states "to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control."[99] The principle has long been recognized as a customary rule, yet this has not prevented more and more plastic from being discharged into the oceans. Would enshrining this principle in a GPE change that? It seems difficult to respond clearly in the affirmative. Maybe it would if states establish an institution that will gradually develop guidelines to indicate specific areas in which the principles enshrined in a GPE should be applied, and define a reporting mechanism. This is not an option that has been foreseen by the drafters of the GPE, however, and if it has been the case, the GPE project would have lost its original function, which is to be a treaty of general application.

Furthermore, presenting the draft GPE as a broad, common core of legally binding principles that could serve as a backstop entails a risk. If a GPE were adopted, states could indeed invoke this instrument to oppose the elaboration of more detailed agreements on new environmental issues on the grounds that such issues could be adequately addressed simply by applying the general principles contained in this GPE. They could argue that this approach is the best way to protect the environment while allowing each state to take into account its own national circumstances. Surely, this would be a bad faith argument, as there is "a general view that the most effective form of international environmental regulation is the adoption of detailed rules, occurring within specific treaty regimes."[100] This could be another unintended consequence of the adoption of a GPE.

94 French & Kotzé, *supra* note 39 at 27.

95 *Ibid.*

96 Aguila & Viñuales, *supra* note 11 at 3.

97 United Nations Environment Assembly, *Marine Litter and Microplastics*, UNEP/EA.3/Res.7, UNEP (2018).

98 Aguila & Viñuales, *supra* note 11 at 4.

99 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996 at para 29.

100 French & Kotzé, *supra* note 39 at 27.

The GPE and the Legally Binding Nature of the Principles of IEL

Another objective that the proponents of the GPE aim to achieve with this instrument is to set out legally binding principles "capable of being relied upon in court"[101] and which "may be invoked directly by individuals."[102] The argument here is that, contrary to a declaration (such as the Rio Declaration), a treaty "can be invoked before a judge," and that adopting a GPE "would thus enable a domestic court to monitor the compliance of national laws and regulations with the guiding environmental principles, which is not presently possible with mere declarations."[103] Again, this argument needs to be put into perspective.

To begin with, it must be recalled that many of the principles that have been included in the draft GPE prepared by the Club des Juristes are already enshrined in other treaties. Some of them also have a customary status. Thus, for those principles at least, enshrining them once again in a treaty would probably not have much added value with regard to their domestic justiciability. For instance, in Canada, prohibitive rules of customary law (that is to say, rules that are mandatory and not permissive) are automatically incorporated into domestic law, unless there is a conflicting legislation.[104] So the principles mentioned in the GPE project that also have a customary status, and that can be interpreted as prohibitive rules, can already be applied by Canadian judges.[105] Things could be different if new principles of IEL were included in a GPE, such as the right to an ecologically sound environment,[106] or the non-regression principle. But the role that such principles could play domestically would also depend on how each jurisdiction defines the relationship between its domestic legal order and international law.

In Canada, individuals are usually not allowed to invoke treaties before the judge as the basis for a claim. It is true that the provisions of a treaty may sometimes constitute a "direct source of rights and obligations" domestically, but only if they are incorporated in statutory laws.[107] As Charles-Emmanuel Côté explains, this "hypothesis is not the most common one in Canadian legislation" as the incorporation of a treaty into Canadian law requires a "clear and unequivocal" intention of the legislator.[108] Therefore, unless the principles of the GPE project are incorporated in a statute, it is very unlikely that this instrument could be invoked directly by individuals as a source of rights and obligations. A GPE could still have an added value (provided that new principles of IEL are included in this treaty) for the interpretation of Canadian law. If judges are not allowed to directly apply treaties that have not been incorporated, they are allowed to use them as a source of interpretation of domestic law. As the Supreme Court of Canada ruled in the 2007 case of *R v Hape*: "It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result."[109]

According to this position, environmental agreements to which Canada is a party are sometimes invoked by individuals to sustain the claim that environmental statutes should be interpreted in a manner that is consistent with the objective of those agreements. In *Environmental Defence Canada v Canada (Fisheries and Oceans)*, for instance, the applicant successfully argued that the concept of "critical habitat" mentioned in section 41(1)(c) of the Species at Risk Act had to be "interpreted so as to satisfy Canada's commitment,

101 Club des Juristes, "Towards a Global Pact", *supra* note 4 at 30.

102 *Ibid* at 33.

103 *Ibid* at 32.

104 *R v Hape*, [2007] 2 SCR 292 at para 39 [*Hape*]; *Kazemi Estate v Islamic Republic of Iran*, [2014] 3 SCR 176 at para 61. Rules that are permissive require legislative action to become Canadian law.

105 This is notably the case for the prevention principle and the duty to conduct an environmental impact assessment, which can be regarded as mandatory customary rules.

106 Although included in regional agreements (for instance, article 4.1 of the 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean), this right has never been recognized in a universal treaty.

107 Phillip M Saunders, "The Role of International Environmental Law in Canadian Courts" in Allan E Ingleson, ed, *Environment in the Courtroom* (Calgary, AB: University of Calgary Press, 2019) 153.

108 Charles-Emmanuel Côté, "Applying International Law to Canadian Environmental Law" in Ingleson, *supra* note 107, 145.

109 *Hape*, *supra* note 104 at para 53.

under Article 8(b) of the *Convention [on Biological Diversity]*, to promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings."[110] However, it should be noted that the provision of international law that was invoked in that case was very specific, as it concerned only the issue of biodiversity. This provision was therefore very relevant for the interpretation of the Species at Risk Act. Because a GPE is likely to have a general scope, one might wonder to what extent Canadian judges would feel comfortable using such a broad instrument to interpret statutory provisions that are very specific. If a GPE were invoked in a domestic court, a judge might say that the provisions of the instrument are too vague to provide clear direction on how to interpret a Canadian statute and thus consider that the GPE is not a useful source of international law for interpretation purposes.

It should also be noted that the Supreme Court of Canada has already referred in its legal reasoning to a principle of IEL that lacked binding force. In the famous 2001 ruling of *Spraytech v Hudson,* Justice L'Heureux-Dubé wrote, in an *obiter dictum*, that her interpretation of a municipal bylaw that restricted the use of pesticide to specific locations respected "international law's 'precautionary principle', which is defined...in the *Bergen Ministerial Declaration on Sustainable Development* (1990)."[111] The interesting part here is that Justice L'Heureux-Dubé did not refer to a treaty but to an instrument (i.e., a declaration) that is not a formal source of international law. She also did not explicitly recognize that the precautionary principle had entered the corpus of customary international law. Thus, in so doing, the Supreme Court of Canada seems to have indicated that "in appropriate cases, international norms that are not legally binding on Canada may inform statutory interpretation."[112] Such an approach raises methodological concerns, as it tends to blur the distinction between non-binding and binding law.[113] However, what the *Spraytech* ruling shows is that while principles of IEL may lack binding force, this fact does not always prevent domestic judges from using them in their reasoning.[114]

The justiciability of international law in domestic courts is a complex question that depends on many legal and non-legal elements (such as the sensitivity of judges to international law, their predisposition to judicial activism, and the knowledge that lawyers have of international law). In any case, it does not appear that a GPE is a necessity to enable domestic judges to use principles of IEL in their judicial work.

Conclusion

The goal of this paper was not to say that a treaty codifying the fundamental principles of IEL should, or should not, be adopted. Its objective was only to make the point that such a treaty might not be the panacea to the current environmental crisis and that its adoption would not necessarily improve the quality of the environment or increase the problem-solving effectiveness of IEL. Moreover, the article sought to highlight the fact that the adoption of a GPE would raise new legal issues and could generate unintended consequences that could jeopardize the legal predictability and perhaps hinder the development of more detailed environmental standards in the future. The fact is that it is difficult to negotiate an overarching treaty on the environment when many of the building blocks of IEL have already been developed.

That said, launching negotiations for the elaboration of a legally binding instrument codifying the fundamental principles of IEL similar to that of the draft treaty prepared by the Club des Juristes is only one of the options that the

110 2009 FC 878, para 53.

111 *Spraytech v Hudson (Town)*, [2001] 2 SCR 241 at para 31.

112 Stephen Toope & Jutta Brunnée, "A Hesitant Embrace: Baker and the Application of International Law by Canadian Courts" in David Dyzenhaus, ed, *The Unity of Public Law* (London, UK: Hart, 2004) 357 at 379.

113 Phillip M Saunders, "Canada" in August Reinisch, ed, *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford, UK: Oxford University Press, 2013) 79. See also Gib van Ert, "The problems and promise of *Spraytech v Hudson*" (2001) 39 Can YB Intl L 371.

114 There are also cases where judges would circumvent the issue of the lack of binding force of a principle by concluding that the principle is part of the customary international law. For instance, in *Vellore citizens welfare forum v Union of India* (AIR 1996 SC 2715 at para 15), the Supreme Court of India considered that the precautionary principle was "part of the customary international law" and could therefore be accepted as part of the domestic law of India.

OEWG could recommend at its third substantive session, scheduled for May 2019. Considering that several states have already expressed their opposition to the adoption of an instrument of this nature, the probability that the OEWG will only recommend that the UNGA convene an intergovernmental conference to negotiate a treaty seems low. Instead, the OEWG could recommend the negotiation of a non-legally binding instrument and/or suggest something completely different than the negotiation of a text (such as an extension of the mandate of the OEWG so that states can continue their work, or the launch of a process to assess how existing sectoral environmental agreements could be better implemented). A range of different options, or a combination of options, can be contemplated. In any case, referring to the word "treaty" or "legally binding instrument" in the OEWG recommendation may not be desirable. The use of this terminology could indeed cripple the upcoming discussions at the UNGA, as states could be more cautious and adopt less progressive and/or flexible positions if they know that the outcome is intended to be legally binding, or that it could be enshrined in an instrument that could eventually have such a legal value.

At this stage, the challenge for states engaged in the OEWG negotiations is to agree on an outcome that is likely to be the most beneficial for enhancing environmental protection and to which all states can agree. If no agreement is found, or if the outcome of the third OEWG session does not provide more clarity on the goal of this process and the direction to which it is heading, the risk could be that negotiations on the GPE would stall and divergences between states' positions would widen and intensify. Four years after the adoption of the Paris Agreement, which was hailed as a major diplomatic success, such a scenario could very well lead to a new crisis in environmental multilateral diplomacy, which could in turn have profound repercussions on all aspects of environmental governance, and perhaps more generally on international law itself.

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Centre for International
Governance Innovation

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

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