



# A Global Pact for the Environment – Conceptual Foundations

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# A Global Pact for the Environment: Conceptual Foundations

Yann Aguila\* and Jorge E. Viñuales\*\*

## INTRODUCTION

The adoption, on 10 May 2018, of UN General Assembly Resolution A/72/L.51, entitled 'Towards a Global Pact for the Environment' ('Enabling Resolution'),<sup>1</sup> has justifiably attracted great public attention, including expressions of support and, inevitably, also criticism. The resolution called for the establishment of an *Ad Hoc* Open-ended Working Group, which met in early September 2018 in New York and is scheduled to meet three more times in Nairobi in the first half of 2019<sup>2</sup> to discuss the substantive aspects of the initiative for a Global Pact for the Environment (GPE). Much could be said about this initiative, in which the authors of this article are closely involved, and which has received ample coverage in the media<sup>3</sup> as well as in

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<sup>1</sup> Resolution A/72/277, 'Towards a Global Pact for the Environment', 10 May 2018, UN Doc. A/72/L.51.

<sup>2</sup> Report of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/277 of 10 May 2018 entitled "Towards a Global Pact for the Environment", Draft, UN Doc. A/AC.289/L.1.

<sup>3</sup> See e.g. 'Bid for environmental rights pact to kick off in Paris tomorrow', *The Times of India* (23 June 2017); 'Un pacte mondial pour protéger l'environnement. Le texte élaboré par des juristes et des experts internationaux, a été remis à M. Macron samedi 24 juin', *Le Monde* (25 June 2017); 'Un projet de pacte Mondial pour l'environnement', *Le Figaro* (24 June 2017); 'Macron promet de défendre un "pacte mondial pour l'environnement"', *Reuters* (24 June 2017); 'Wang Yi Attends Global Pact for the Environment Summit', *Ministry of Foreign Affairs of the People's Republic of China* (20 September 2017); Hong Xiao, 'China lauds UN environment pact', *Chinadaily* (20 September 2017); 'Macron rilancia all'Onu un Patto globale per il clima', *La Stampa* (21 September 2017); 'Secretário-geral da ONU pede apoio a pacto ambiental proposto pela França', *Nações Unidas no Brasil* (22 September 2017); L. Fabius, Y. Aguila, 'Un pacto medioambiental', *El País* (2 August 2018); 'Global Pact will boost international environmental governance', *The Guardian* (Nigeria) (25 September 2018); 'Appel de 100 juristes pour l'adoption d'un Pacte mondial pour l'environnement', *Le Monde* (9 October 2018); 'The time is now for a global pact for the environment', *The Guardian* (9 October 2018); 'Uhuru: Kenya committed to fight against climate change', *Daily Nation* (Kenya) (11 November 2018).

academic and policy circles.<sup>4</sup> In the specific context of this article,<sup>5</sup> however, we will limit ourselves to two basic observations, which will provide the necessary background for the analysis of the intellectual origins and conceptual foundations underlying the GPE.

The first observation is that it would be a mistake to see the Enabling Resolution or even the initiative for a GPE as a mere current development. Quite to the contrary, these developments are the reflection of deeper trends that have been operating in the background for decades. For this reason, our second observation is that a broad question such as whether the adoption of a GPE is desirable, with certain contents that will be discussed later, is best answered not by zooming in to argue about the details – which are, indeed, a matter for debate – but by zooming out to understand the fundamentals.

This is why, this article first situates the search for a global framework instrument on environmental protection in a long-term perspective and then discusses the main reasons why it is needed. Against this background, we then present the current expression of this much broader trend, in the form of the initiative for a GPE and the momentum it has generated in policy circles, first and foremost at the level of the UN General Assembly. But the need for such an instrument heavily depends on its nature, content and articulation with existing international instruments, which must be designed to specifically allow for significant flexibility in its implementation by States with different legal systems and political realities. For that reason, we propose an analytical framework to guide the delicate exercise of striking a balance between a range of different considerations.

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<sup>4</sup> See e.g. M. Burger, T. Parejo, L. Sachs (eds.), *Global Perspectives on a Global Pact for the Environment*, Sabin Center for Climate Change Law (Columbia University, 20 September 2018, available at: <http://blogs.law.columbia.edu/climatechange/2018/09/20/global-perspectives-on-a-global-pact-for-the-environment/>) (with contributions from M. Anglés Hernández, Sumudu Atapattu, Lisa Benjamin, Susan Biniaz, Daniel Bodansky, Ben Boer, David R. Boyd, Maxine Burkett, Bharat H. Desai, Fabrizio Fracchia, Pilar García Pachón, Michael B. Gerrard, John H. Knox, Pilar Moraga Sariago, Damilola S. Olawuyi, Nilufer Oral, Luciano Parejo Alfonso, Jorge E. Viñuales, Alex L. Wang). In addition, many meetings have been held around the world, including in Paris (Conference 'Towards a Global Pact for the Environment', La Sorbonne, 24 June 2017), New York (Conference on the Global Pact for the Environment, Columbia University, 20 September 2017), Bogotá (Symposium on the Global Pact for the Environment organized by the Attorney General of the Nation, 1 March 2018), Brasilia (Round Table on the Global Pact for the Environment, World Water Forum, 19 March 2018), Dakar (Conference 'L'Afrique s'engage pour la Planète', 14 May 2018), Geneva (Conference on the Global Pact for the Environment at the UN International Law Commission, 10 July 2018), Santiago de Chile (Coloquio 'Pacto mundial del medio ambiente, derechos humanos, y constitución', 28 August 2018), Québec (Conférence 'Une opportunité pour un Canada plus vert? Le projet de Pacte mondial pour l'environnement', 21 September 2018), Ottawa ('Le projet onusien de Pacte mondial pour l'environnement : quelles implications pour le Canada?', 24 September 2018), Beijing (Conference on the legal aspects of a healthy environment, 12 October 2018), Naples ('Une patto globale per l'ambiente', 19 October 2018).

<sup>5</sup> This article is part of a wider research project that brings together the knowledge and expertise of several generations of international environmental lawyers from around the world to contribute to the development of a Global Pact for the Environment. The authors wish to acknowledge the participation in this research project, the results of which will be published in the form of an edited volume, of the following contributors (in alphabetical order): Virginie Barral, Antonio Benjamin, Laurence Boisson de Chazournes, David Boyd, Edith Brown Weiss, Pierre-Marie Dupuy, Leslie-Anne Duvic-Paoli, Jonas Ebbesson, Francesco Francioni, Guillaume Futhazar, Shotaro Hamamoto, Marie Jacobsson, Walter Kälin, Yann Kerbrat, Sandrine Maljean-Dubois, Makane Mbengue, Jane McAdam, Pilar Moraga, Nilufer Oral, Michel Prieur, Alexander Proelß, Qin Tianbao, Lavanya Rajamani, Nicholas Robinson, Monserrat Rovalo Otero, Jason Rudall, Christina Voigt,

The latter point has been misinterpreted in some circles, sometimes disingenuously so. The heart of the initiative for a GPE is not the specific formulation of certain principles in the draft project or even the architecture retained for it. Much more importantly, it is the widely shared impression that this is an idea whose time has come.

## THE GLOBAL PACT IN THE EVOLUTION OF GLOBAL ENVIRONMENTAL GOVERNANCE

The ambition to develop a global pact for the environment is not new. In situating the current initiative, it is important to clarify what forms this ambition has taken in the past and how they fitted within the broader context of global environmental governance.

The first significant attempt to develop a global framework for environmental protection is certainly the Conference on the Human Environment held in Stockholm in June 1972.<sup>6</sup> This is widely considered as the constitutional moment of international environmental law,<sup>7</sup> as well as a catalyzer for domestic environmental law.<sup>8</sup> The ‘framework’ provided fell short of a global treaty, but it defined the province of global environmental governance and set the institutional and strategic foundations for further action on environmental protection.<sup>9</sup> The international context was, however, not entirely auspicious for such an important development. Indeed, the deep ideological and policy divides of the Cold War<sup>10</sup> and, no less important, of the quest

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<sup>6</sup> Report of the United Nations Conference on the Human Environment, Stockholm 5-16 June 1972, UN Doc. A/CONF.48/14/Rev.1. For contemporary assessments of the outcomes see A. Kiss and D. Sicault, ‘La Conférence des Nations Unies sur l’environnement (Stockholm, 5–16 June 1972)’ (1972) 18 *Annuaire français de droit international* 603; L. B. Sohn, ‘The Stockholm Declaration on the Human Environment’ (1973) 14 *Harvard International Law Journal* 423. For two contemporary accounts of key figures see W. Rowland, *The Plot to Save the World. The Life and Times of the Stockholm Conference on the Human Environment* (Toronto/Vancouver: Clarke, Irwin & Company, 1973); M. Strong, ‘One Year after Stockholm: An Ecological Approach to Management’ (1973) 51 *Foreign Affairs* 690.

<sup>7</sup> See e.g. P.-M. Dupuy, J. E. Viñuales, *International Environmental Law* (Cambridge University Press, 2<sup>nd</sup> edn 2018), pp. 8-12; Ph. Sands, J. Peel, A. Fabra, R. MacKenzie, *Principles of International Environmental Law* (Cambridge University Press, 4<sup>th</sup> edn. 2018), pp. 29-32; J. Cretella Neto, *Curso de Direito Internacional do Meio Ambiente* (Sao Paulo: Saraiva, 2012), pp. 127-141; J. J. Ruiz, ‘Orígenes y Evolución del Derecho Internacional del Medio Ambiente’, in F. Sindico, R. Fernández Egea, S. Borràs Petinat (eds), *Derecho Internacional del Medio Ambiente* (London: Cameron May, 2011), pp. 3-30; U. Beyerlin, T. Marauhn, *International Environmental Law* (Oxford: Hart Publishing, 2011), pp. 7-8; D. Hunter, J. Salzman, D. Zaelke, *International Environmental Law and Policy* (New York: Foundation Press, 4<sup>th</sup> edn 2011), pp. 140-145; P. Birnie, A. Boyle, C. Redgwell, *International Law and the Environment* (Oxford University Press, 3<sup>rd</sup> edn 2009), pp. 48-50; L. Guruswamy, K. L. Doran, *International Environmental Law* (St Paul MN: Thomson-West, 2007), pp. 34-39; A. Kiss, J.-P. Beurier, *Droit international de l’environnement* (Paris: Pedone, 3<sup>rd</sup> edn, 2004), pp. 32-34.

<sup>8</sup> See e.g. Lutz, R. L., ‘The Laws of Environmental Management: A Comparative Study’ (1976) 24 *American Journal of Comparative Law* 447. For a statement of environmental law before the Conference, see Woodrow Wilson International Centre for Scholars (ed.), *The Human Environment, Vol II: Summary of National Reports submitted in preparation of the United Nations Conference on the Human Environment* (Washington D.C., 1972).

<sup>9</sup> Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, UN Doc. A/CONF 48/14/Rev.1.

<sup>10</sup> In early May 1972, the Nixon administration announced the mining of the Haiphong harbour, in a major escalation of the Vietnam war. Moreover, countries of the then Soviet Block abstained from participating in the Stockholm Conference in

for 'permanent' economic sovereignty by newly independent States and other developing countries<sup>11</sup> undermined, to some extent, the representative character of the statements made at Stockholm.<sup>12</sup> Yet, the Stockholm Conference provided a solid basis on which to build a more structured framework.

During the 1980s, the efforts leading to the adoption of the World Charter for Nature<sup>13</sup> and, following the realization – in the 1982 meeting of UNEP's Governing Council – of the scope of environmental degradation, the establishment of the World Commission on Environment and Development ('WCED'), generated momentum for a second and more structured attempt. Two key recommendations of WCED's outcome report, *Our Common Future*, were indeed the adoption of a Universal Declaration as well as of a Convention on Environmental Protection and Sustainable Development.<sup>14</sup> One of the leading international organizations active in the area of environmental protection, the International Union for the Conservation of Nature (IUCN), developed on that basis a Draft International Covenant on Environment and Development, which it sought to introduce – through the delegation of Iceland – in the process leading to the United Nations Conference on Environment and Development, held in Rio de Janeiro in June 1992.<sup>15</sup> But the attempts to have such an instrument adopted were unsuccessful. Yet, IUCN, through its Environmental Law Programme, has made efforts to keep this idea alive, revising and updating the 'Draft Covenant' since the 1990s.<sup>16</sup>

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protest of the exclusion of East Germany. See E. P. Morgan, 'Stockholm: The Clean (But Impossible) Dream' (1972) 8 *Foreign Policy* 149.

<sup>11</sup> A major milestone of this quest was the adoption by the UN General Assembly of Resolution 1803(XVII) on 'Permanent sovereignty over natural resources', 14 December 1962, UN Doc. A/RES/1803/XVII. On the legal process leading to this resolution see N. Schrijver, *Sovereignty over Natural Resources* (Cambridge University Press, 1997). For the wider historical context explaining the need to assert 'permanent' sovereignty see B. Simpson, 'Self-determination and decolonization', in M. Thomas, A. Thomson (eds.), *The Oxford Handbook of the Ends of Empire* (Oxford University Press, 2017), chapter 19.

<sup>12</sup> The tension between development and environmental protection as potentially conflicting goals found expression, among others, in the meeting held at Founex, on the outskirts of Geneva, one year before the Stockholm Conference (Development and Environment: Report and Working Papers of Experts Convened by the Secretary-General of the United Nations Conference on the Human Environment, Founex, Switzerland 4-12 June 1972) and, subsequently, in December 1971, with the adoption of a resolution by the UN General Assembly asserting the over-riding importance of development ('Development and Environment', 20 December 1971, UN Doc. 2849 (XXVI)). On this tension see K. Mickelson, 'The Stockholm Conference and the Creation of the South-North Divide in International Environmental Law and Policy', in S. Alam, S. Atapattu, C. Gonzalez, J. Razzaque (eds.), *International Environmental Law and the Global South* (Cambridge University Press, 2016), pp. 109-129.

<sup>13</sup> World Charter for Nature, 28 October 1982, UN Doc. A/RES/37/7.

<sup>14</sup> Report of the World Commission on Environment and Development, 'Our Common Future', 10 March 1987, chapter 12, 'Towards Common Action: Proposals for Institutional and Legal Change', at section 5.2, para. 85-86.

<sup>15</sup> UN Doc A/CONF.151/PC/WG.III/4. See J. E. Viñuales, 'The Rio Declaration on Environment and Development. Preliminary Study', in See J. E. Viñuales (ed.), *The Rio Declaration on Environment and Development. A Commentary* (Oxford University Press, 2015), pp. 1-64, at p. 10.

<sup>16</sup> The IUCN, in collaboration with the International Council of Environmental Law, have pursued work on a 'Draft Covenant', which now has several editions. See IUCN, *Draft International Covenant on Environment and Development* (5th edn, IUCN 2017), available at: <https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=2443> (visited on 13 November 2018).

By contrast, the idea to adopt by consensus, and this time by the full international community, a universal declaration came to fruition in the form of the 1992 Rio Declaration on Environment and Development.<sup>17</sup> At the time, some saw the Rio Declaration as a step backwards because of the prominent place it gives to development concerns.<sup>18</sup> However, with the benefit of hindsight, the Rio Declaration can be considered as the closest step taken so far to formulate a set of consensual and balanced constitutional principles for global environmental governance.<sup>19</sup> Its principles, several of which were newly minted or stated for the first time in an authoritative instrument with global reach,<sup>20</sup> have been subsequently taken up in a range of global treaties. Three major illustrations of this influence are provided by the precautionary principle (stated in Principle 15 as an approach),<sup>21</sup> the principle of common but differentiated responsibilities (stated in Principle 7)<sup>22</sup> and the principle of public participation in environmental matters (stated in Principle 10).<sup>23</sup> Other principles, particularly the three norms that constitute the heart of customary international environmental law,<sup>24</sup> namely prevention (stated in Principle 2),<sup>25</sup> the

<sup>17</sup> 'Rio Declaration on Environment and Development', 13 June 1992, UN Doc. A/CONF.151/26. Rev.1. On this instrument see Viñuales, *Preliminary Study*, above n. 15.

<sup>18</sup> See e.g. Mann, H., 'The Rio Declaration' (1992) 86 *American Society of International Law Proceedings* 405, at p. 409; Pallemarts, M., 'International Environmental Law from Stockholm to Rio: Back to the Future?' (1992) 1 *RECIEL* 254, at p. 256; Wirth, D. A., 'The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?' (1994/1995) 29 *Georgia Law Review* 599, at p. 648.

<sup>19</sup> Viñuales, *Preliminary Study*, above n. 15, p. 60.

<sup>20</sup> See *ibid.*, pp. 15-16, discussing the model proposed by the late Alexandre Kiss, according to whom no less than seven principles of international environmental law (common but differentiated responsibilities, precaution, polluter-pays, environmental impact assessment, notification of emergencies, notification and consultation in case of risk, peaceful settlement of disputes) were newly stated in the Rio Declaration. See A. Kiss, 'The Rio Declaration on Environment and Development', in Campiglio et al (eds.), *The Environment After Rio: International Law and Economics* (London/Leiden: Graham & Trotman/Martinus Nijhoff, 1994), pp. 55-64.

<sup>21</sup> See A.A. Cançado Trindade, 'Principle 15: Precaution', in J. E. Viñuales (ed.), *The Rio Declaration on Environment and Development. A Commentary* (Oxford University Press, 2015), pp. 403-428; M. M. Mbengue, *Essai sur une théorie du risqué en droit international public. L'anticipation du risqué environnemental et sanitaire* (Paris: Pedone, 2009); A. Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (The Hague: Kluwer, 2002).

<sup>22</sup> See P. Cullet, 'Principle 7: Common but Differentiated Responsibilities', in J. E. Viñuales (ed.), *The Rio Declaration on Environment and Development. A Commentary* (Oxford University Press, 2015), pp. 229-44; L. Rajamani, *Differential Treatment in International Environmental Law* (Oxford University Press, 2006).

<sup>23</sup> See J. Ebbesson, 'Principle 10: Public Participation', in J. E. Viñuales (ed.), *The Rio Declaration on Environment and Development. A Commentary* (Oxford University Press, 2015), pp. 287-309; A. Epiney, S. Diezig, B. Pirker, S. Reitmeyer, *Aarhus-Konvention. Handkommentar* (Baden Baden: Nomos, 2018).

<sup>24</sup> See *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 665, at para. 104. On the current state of customary international law relating to environmental protection see J. E. Viñuales, 'La Protección Ambiental en el Derecho Internacional Consuetudinario' (2017) 69 *Revista Española de Derecho Internacional* 71; P.-M. Dupuy, 'Formation of Customary International Law and General Principles', in D. Bodansky, J. Brunnée, E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007), pp. 449-466.

<sup>25</sup> See L.-A. Duvic Paoli and J. E. Viñuales, 'Principle 2: Prevention', in Viñuales, J. E. (ed.), *The Rio Declaration on Environment and Development. A Commentary* (Oxford University Press, 2015), pp. 107-38; Duvic Paoli, L.-A., *The Prevention Principles*

requirement to conduct an environmental impact assessment (stated in Principle 17)<sup>26</sup> and the duty of cooperation (stated in Principles 18 and 19),<sup>27</sup> also received their authoritative formulation in the Rio Declaration. But these examples also illustrate the limitations of a statement of principles in a 'soft-law' instrument such as the Rio Declaration. Such limitations highlight the need for a Global Pact.

## THE NEED FOR GLOBAL PACT

The adoption of a GPE would constitute an important milestone in the evolution of international environmental law and, more generally, of global environmental governance. There are several reasons for it, some which are readily apparent and some others which require a more detailed understanding of international, comparative and domestic law. The first reason is relatively straightforward; the Rio Declaration is not binding as such, a feature that has prevented some principles from deploying their full effects.<sup>28</sup>

The second reason is the absence of a broader common core of legally binding principles on which significant gaps in the regulation could rely upon, which leaves certain important questions too open or unsettled. Most observers would accept that plastic pollution is currently a matter that has largely remained unaddressed or has 'fell between the cracks' of international instruments. In fact, the entire land-based marine pollution regime rests, at the global level, only on soft-instruments, and the same is true of the critical problem of air pollution, which is only regulated regionally at the present.<sup>29</sup> These are certainly not minor lacunas that can be addressed by mere

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in *International Environmental Law* (Cambridge University Press, 2018); Xue Hanqin, *Transboundary Damage in International Law* (Cambridge University Press, 2003).

<sup>26</sup> See N. Craik, 'Principle 17: Environmental Impact Assessment', in J. E. Viñuales (ed.), *The Rio Declaration on Environment and Development. A Commentary* (Oxford University Press, 2015), pp. 451–70; Craik, N., *The International Law of Environmental Impact Assessment* (Cambridge University Press, 2008); N. A. Robinson, 'International Trends in Environmental Impact Assessment' (1992) 19 *Boston College Environmental Affairs Law Review* 591.

<sup>27</sup> See L. Boisson de Chazournes and K. Sangbana, 'Principle 19: Notification and consultation on activities with transboundary impact', in J. E. Viñuales (ed.), *The Rio Declaration on Environment and Development. A Commentary* (Oxford University Press, 2015), pp. 492–507; P. Okowa, 'Principle 18: Notification and Assistance in Case of Emergency', in J. E. Viñuales (ed.), *The Rio Declaration on Environment and Development. A Commentary* (Oxford University Press, 2015), pp. 471–92; F. Francioni, H. Neuhold, 'International Cooperation for the Protection of the Environment: The Procedural Dimension', in W. Lang, H. Neuhold, K. Zemanek (eds.), *Environmental Protection and International Law* (1991), pp. 203–226.

<sup>28</sup> See e.g. *European Communities – Measures affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R (29 September 2006), paras. 7.88–7.90; *India – Certain Measures Relating to Solar Cells and Solar Modules*, AB Report (16 September 2016), WT-DS456/AB/R, paras. 592, 596, 5.149.

<sup>29</sup> See e.g. ASEAN Agreement on Transboundary Haze Pollution, 10 June 2002, available at [www.ecolex.org](http://www.ecolex.org) (TRE-001344); Convention on Long-Range Transboundary Air Pollution, adopted in Geneva on 13 November 1979, 1302 UNTS 217. On these instruments see P. Nguitragool, *Environmental Cooperation in South-East Asia: ASEAN's Regime for Transboundary Haze Pollution* (London: Routledge, 2011); J. Sliggers and W. Kakebeeke (eds.), *Clearing the Air. 25 Years of the Convention on Long-Range Transboundary Air Pollution* (New York/Geneva: United Nations, 2004); A. Byrne, 'The 1979 Convention on Long-Range Transboundary Air Pollution: Assessing its Effectiveness as a Multilateral Environmental Regime after 35 Years' (2015) 4 *Transnational Environmental Law* 37.

'tweaks' here and there. In time, they will call for an organised binding response. In the meantime, their broad regulation could rely on a general statement of binding principles.

Thirdly, there are even broader questions that influence the operation of the entire international environmental law system and that have been largely overlooked. A major example is consumption-driven environmental degradation, i.e. environmental degradation in one country led by consumption in others.<sup>30</sup> Unfortunately, neither the Rio Declaration<sup>31</sup> nor the numerous multilateral environmental agreements (MEAs) have much to offer in this regard. The large majority of them (with the notable exception of CITES<sup>32</sup>) focus on production and, thus, they offer almost no means to address the situation of a country in which environmental degradation is driven by foreign consumption.

Fourthly, yet another form of gap concerns the possible conflicts between instruments with limited sectorial or spatial scope. The ocean may appear, from the perspective of the climate change regime or that of the ocean dumping regime as a carbon sink or a carbon sequestration dumpsite,<sup>33</sup> but that is in open conflict with the requirements of the provisions on the protection and preservation of the marine environment under the UN Convention on the Law of the Sea<sup>34</sup> or in the ongoing negotiations relating to the protection of biodiversity beyond national jurisdiction.<sup>35</sup> Legally, there are no overarching principles, aside from the limited set of customary international environmental law norms, that could provide solutions to such far-

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<sup>30</sup> In two cases, China sought to justify restrictions on the exports of certain raw materials and rare earths on the grounds that foreign demand led to their over-extraction, which in turn was a harmful activity for the environment in China. In both cases, China relied on the general exception in Article XX(g) of the General Agreement on Tariffs and Trade (GATT), but the argument was rejected. See *China – Measures related to the Exportation of Various Raw Materials*, Panel Reports, WT/DS394/R; WT/DS395/R; WT/DS398/R (5 July 2011), para. 7.586; *China – Measures Relating to the Exportation of Rare Earths, Tungsten, and Molybdenum*, AB Report (7 August 2014), WT/DS431/AB/R, WT/DS432/AB/R, and WT/DS433/AB/R, paras. 5.188-5.194. Other examples of consumption-driven environmental degradation abroad include so-called indirect land-use change, plastic pollution of the oceans, and emissions from production of carbon-intensive goods for export markets. See e.g. D. M. Lapola et al., 'Indirect land-use changes can overcome carbon savings from biofuels in Brazil' (2010) 107 *PNAS* 3388; J. R. Jambeck et al., 'Plastic Waste Inputs from Land into the Ocean' (2015) 347 *Science* 768; *Global Perspectives on a Global Pact for the Environment*, above n. 4 (contribution by A. Wang); R. Muradian et al., 'Embodied Pollution in Trade: Estimating the "Environmental Load Displacement" of Industrialised Countries' (2002) 41 *Ecological Economics* 51; J. Kitzes et al., 'Consumption-Based Conservation Targeting: Linking Biodiversity Loss to Upstream Demand through a Global Wildlife Footprint' (2017) 10 *Conservation Letters* 531.

<sup>31</sup> See the study by C. Voigt, 'Principle 8: Sustainable Patterns of Production and Consumption and Demographic Policies', in J. E. Viñuales (ed.), *The Rio Declaration on Environment and Development. A Commentary* (Oxford University Press, 2015), pp. 245-267.

<sup>32</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 UNTS 243.

<sup>33</sup> See K. Rakhyun, 'Is a new multilateral environmental agreement on ocean acidification necessary?' (2012) 3 *RECIEL* 243; Y. Downing, 'Ocean acidification and protection under international law from negative effects: a burning issue amongst a sea of regimes?' (2013) 2 *Cambridge Journal of International and Comparative Law* 242.

<sup>34</sup> United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397, Art 192.

<sup>35</sup> See E. Barritt, J. E., Viñuales, *A Conservation Agenda for Biodiversity Beyond National Jurisdiction. Legal Scan* (C-EENRG: Report to UNEP World Conservation and Monitoring Centre, May 2016), pp. 35-39.

reaching conflicts. Thus, when one considers the questions of ‘gaps’ seriously, beyond the superficial references to commonly acknowledged lacunae, there is a much deeper need for a binding overarching framework.

A fifth problem, related to the previous one, comes from the fact that some of the Rio principles have been understood and treated differently across treaty contexts and their related dispute settlement mechanisms, with important practical implications. Three examples concern the different positions taken with respect to the nature and scope of precautionary principle/approach,<sup>36</sup> those regarding the spatial scope of the requirement to conduct an environmental impact assessment,<sup>37</sup> and those relating to public participation.<sup>38</sup> This divergence is possible because of a lack of an overarching statement of binding principles.

A sixth and important reason is that the guidance provided by the Rio Declaration to national legislators and courts is neither clear nor strong enough.<sup>39</sup> The example of the precautionary principle/approach provides, once again, an apposite illustration. One can attempt, in this regard, to identify uses of this principle and to organise them across a spectrum that goes from more conservative to more ambitious ones.<sup>40</sup> Such references have indeed been used: (i) to caution against the principle’s ‘potentially paralysing effects’<sup>41</sup>; (ii) to assess whether certain measures expressly adopted on

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<sup>36</sup> The divergence is serious with respect to precaution, with different international courts and tribunals considering that (i) it is not a recognised norm of customary international law (*EC – Biotech*, above n. 28, para. 7.88) or, conversely, (ii) that it is indeed recognised (*Tatar v. Romania*, ECtHR Application No. 67021/01, Judgment (27 January 2009), para. 120.), with two positions in-between, namely (iii) that is an emerging norm (*Responsibilities and Obligations of States sponsoring Persons and Entities with respect to Activities in the Area*, Case No. 17, ITLOS (Seabed Dispute Chamber), Advisory Opinion (1 February 2011), para. 135) or (iv) that it ‘may be relevant’ for interpretation purposes (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 14, para. 164). See Dupuy/Viñuales, above n. 7, pp. 72-73.

<sup>37</sup> Whereas the ICJ has only recognised the requirement to conduct an environmental impact assessment in a transboundary context (*Pulp Mills*, above n. 36, para. 204; *Costa Rica/Nicaragua*, above n. 24, para. 104), the Seabed Chamber of the ITLOS and an arbitral tribunal acting under Annex VII of the UNCLOS have recognised that this requirement also applies to activities with a potential impact on the global commons or disputes areas (*Responsibilities in the Area*, above n. 36, para. 145; *In the matter of the South China Sea Arbitration before and Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (Republic of the Philippines v. People’s Republic of China)*, PCA Case No. 2013-19, Award (12 July 2016), paras. 947-948). See Dupuy/Viñuales, above n. 7, p. 79.

<sup>38</sup> Whereas in the *Pulp Mills* case, the ICJ seemingly rejected – albeit in ambiguous terms – the idea that there may be an applicable public participation requirement that must be taken into account in defining the content of an EIA (*Pulp Mills*, above n. 36, para. 216), the ECtHR recognised the need for public participation, as fleshed out in principle 10 of the Rio Declaration and the 1998 Aarhus Convention, in a case against Turkey, which is not a party to the latter (*Taskin and Others v. Turkey*, ECtHR Application no. 46117/99, Decision (10 November 2004), paras. 99–100). See Dupuy/Viñuales, above n. 7, p. 88.

<sup>39</sup> See Y. Aguila, S. Maljean-Dubois, ‘Un Pacte mondial pour l’environnement, pour quoi faire ?’, *The Conversation* (19 juin 2017), available at : [www.theconversation.com](http://www.theconversation.com) (visited on 13 November 2018).

<sup>40</sup> See J. E. Viñuales, *The Architecture of Comparative Environmental Law* (forthcoming 2019), chapter 4; E. Scotford, ‘Environmental Principles across Jurisdictions: Legal Connectors and Catalysts’, in E. Lees, J. E. Viñuales (eds.), *The Oxford Handbook of Comparative Environmental Law* (Oxford University Press, forthcoming 2019), chapter 29.

<sup>41</sup> Canada: *Canadian Parks and Wilderness Society v Canada (Minister of Canadian Heritage)*, 2003 FCA 197 (reasoning that, to avoid such paralysing effects, projects that are otherwise socially and economically useful must be allowed to proceed before their environmental consequences are known).

the basis of the precautionary principle are indeed justified under this principle;<sup>42</sup> (iii) as a stand-alone norm relevant to produce procedural effects (the reversal of the burden of proof)<sup>43</sup>; (iv) as a stand-alone norm relevant to for the interpretation of an environmental provision governing a case;<sup>44</sup> (v) as a stand-alone norm for reviewing of government action<sup>45</sup>; (vi) as a stand-alone norm creating a positive procedural obligation<sup>46</sup>; (vii) as a stand-alone norm redefining the parameters of liability (effectively transforming a fault-based liability system into a strict liability one)<sup>47</sup>; and (viii) as a stand-alone norm requiring the creation of a new administrative system.<sup>48</sup> One possible reason for this variation is that the understanding of this principle fluctuates significantly across jurisdictions. Legislators and judges who are aware of

<sup>42</sup> EU: Case T-257/07 *France v Commission* [2011] ECR II-05827 (by contrast with relying on this principle on a stand-alone basis, i.e. to conduct an administrative review of a measure which has not been adopted on precautionary grounds. See Case T-229/04 *Sweden v Commission* [2007] ECR II-2437.

<sup>43</sup> Australia (New South Wales): *Telstra Corporation Ltd v Hornsby Shire Council*, [2006] NSWLEC 133; (2006) 67 NSWLR 256 (relying on the precautionary principle to require the proponent of a development – the installation of mobile phone antennas – to establish the absence of risk); Brazil: STJ, *Resp n 1330027/SP, 3a turma*, decision of 11 June 2012 (civil liability case where the burden of proving the impact on aquatic fauna caused by the construction of a dam was reversed required the proponent to establish that its project would not have the alleged impact); Canada: *Resurface Corp v. Hanke*, 2007 SCC 7; *Clements v Clements*, 2012 SCC 32 (where causation rules were relaxed somewhat in a case in which the defendant negligently had created a risk and scientific uncertainty prevented the plaintiff from proving causation); India: *Vellore Citizens' Welfare Forum v Union of India* AIR 1996 SC 2715 (where the industry was deemed to bear the burden of proving that its activity caused no harm); Indonesia: *Ministry of Environment v. PT. Kalista Alam*, Decision of the Supreme Court No. 651 K/PDT/2015 (28 August 2015) (applying precautionary reasoning – presented as in *dubio pro natura* – to effect a relaxation of causation requirements).

<sup>44</sup> Mexico: *Case XXVII.3o9 CS.*, SJFG, 10<sup>th</sup> Period, Book 37, December 2016, 1840 (relying of Principle 15 of the Rio Declaration to interpret the right to a healthy environment enshrined in Article 4 of the Mexican Constitution).

<sup>45</sup> Australia (New South Wales): *Telstra Corporation Ltd v Hornsby Shire Council*, [2006] NSWLEC 133; (2006) 67 NSWLR 256 (relying on the precautionary principle to assess a decision of the planning authorities to refuse the installation of two mobile phone antennas); Canada: *Centre Québécois du droit de l'environnement v. Canada (Environment)*, 2015 FC 773 (where government inaction – failure to protect endangered species – violated the duty to consider the precautionary principle), *Wier v. Canada (Health)*, 2011 FC 1322 (where the government's refusal to review a pesticide despite disagreement among government scientists as to the pesticide's risk violated the duty to consider the precautionary principle); Brazil: TRF 1a região, *Apelação cível n 2001.34.00.010329-1/DF*, decision of 12 February 2004 (suspending the operating license of insecticide plants pending further impact studies); TRF 2, *Agravo de instrumento 0004075-70.2012.4.02.0000, 5a turma*, decision of 31 July 2012 (suspending oil exploration activity pending further impact studies); India: *Vellore Citizens' Welfare Forum v Union of India* AIR 1996 SC 2715 (relying administrative action with respect to certain tanneries operating in the India State of Tamil Nadu); UK: *Downs v Secretary of State for Environment, Food and Rural Affairs* [2009] Env LR 19 (relying on the precautionary principle to assess a pesticide approval process).

<sup>46</sup> Brazil: STJ, *Resp 1172553/PR, 1a turma*, decision of 27 May 2014 (requiring the conduct of an environmental impact assessment despite the absence of an express requirement to do so in the governing law); Canada: *Castonguay Blasting Ltd. v. Ontario (Environment)*, 2013 SCC 52 (requiring companies to report the release of seemingly benign materials to enable the government to respond in case of possible environmental harm).

<sup>47</sup> Indonesia: *Dedi et al. V. PT. Perhutani*, Decision of the Supreme Court No. 1794 K/PDT/2004 (22 January 2007) (relying on the precautionary principle to determine the strict liability in tort law for the damage suffered by the victims of a landslide in the area where the respondent held a concession).

<sup>48</sup> Brazil: STF, *Recurso Extraordinário n 737.977/SP*, decision of 4 September 2014 (relying on the 'international law principle of precaution' to require pre-emptive mechanisms to address actions that threaten the sustainable use of ecosystems); India: *S Jagannath v Union of India and ors* 1997 (2) SCC 87 (requiring, among others, extensive public regulatory action to remedy the environmental damage caused by intensive shrimp farming).

the scope of the environmental crisis would be certainly more empowered in their everyday work if they could rely on a binding treaty rather than on a soft-law instrument. Environmental protection may face great resistance in some specific periods of the political life of a country, but international norms are patient. Lack of reliance on them or even open confrontation do not necessarily jeopardise their operation.

Finally, a binding instrument assorted of an institutional structure, even a very light one, would be more conducive to the constant interpretation of its principles, either *in concreto*, e.g. in the context of specific communications, or *in abstracto*, e.g. by means of authoritative interpretations such as the practice of general comments in human rights committees.

Overall then, although the Rio Declaration has made a lasting contribution to global environmental governance, its very nature prevents it from addressing the type of problems faced by the current global environmental governance structure.

## THE INITIATIVE FOR A GLOBAL PACT AND THE UN PROCESS

The previous section briefly presented the broader context of the initiative for a GPE. The initiative emerged in the run-up to the Paris Agreement. The period going from the Rio Summit on Sustainable Development, held in June 2012,<sup>49</sup> to the adoption of the Paris Agreement in December 2015<sup>50</sup> saw several major developments, most notably the Addis Ababa Action Agenda on Financing for Development in July<sup>51</sup> and the 2030 Agenda for Sustainable Development, with its Sustainable Development Goals (SDGs), in September 2015.<sup>52</sup>

In this more specific context, in November 2015, the *Commission Environnement* of the *Club des juristes*, a legal think-tank based in Paris, released a report on how to strengthen the effectiveness of international environmental law.<sup>53</sup> The report made 21 recommendations, including the adoption of an International Environmental Pact.<sup>54</sup> Following the adoption of the Paris Agreement, former COP-21 President Laurent

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<sup>49</sup> The outcome of the major international conference was entitled 'The Future We Want', 11 September 2012, UN Doc. A/Res/66/288.

<sup>50</sup> 'Adoption of the Paris Agreement', Decision 1/CP.21, 12 December 2015, FCCC/CP/2015/L.9.

<sup>51</sup> 'Addis Ababa Action Agenda of the Third International Conference on Financing for Development', Resolution 69/313, 27 July 2015, UN Doc A/RES/69/313, Annex.

<sup>52</sup> Resolution 70/1, 'Transforming our World: The 2030 Agenda for Sustainable Development', 21 October 2015, UN Doc A/RES/70/1.

<sup>53</sup> Report: 'Increasing the effectiveness of international environmental law: duties of States, rights of individuals', Environment Commission of the Club des juristes, November 2015 ([www.clubdesjuristes.com](http://www.clubdesjuristes.com)). See in particular the Foreword of the report: 'Treaties, States and Citizens', Yann Aguila, president of the Environment Commission, p. 13.

<sup>54</sup> See Y. Aguila, 'La adopción de un pacto internacional para la protección del medio ambiente' (2016) 34 *Revista Aranzadi de Derecho Ambiental* (Mayo-Agosto); Y. Aguila, 'L'adozione di un Patto internazionale per la protezione dell'ambiente' (2016) 3 *Rivista giuridica dell'ambiente* 563.

Fabius decided to support the idea and to take it to the international level. Throughout 2016, a documentary basis was assembled by the *Commission Environnement* and, in early 2017, an international network of environmental law experts was set up. Today, this network has over 100 experts from more than 40 different countries representing all legal systems and a wide variety of country situations. Under the aegis of the *Commission Environnement*, and with support from a smaller group of experts who handled the drafting, this network made a range of submissions over five rounds of structured consultations which unfolded in the first half of 2017. Such consultations addressed matters such as the need (or not) for an international treaty, its overall structure, its content and, more specifically, the formulation of the principles that would feature in the draft agreement. The drafting process also benefitted from some previous efforts, including IUCN's Draft Covenant<sup>55</sup> and another draft project<sup>56</sup> developed by the *Centre International de Droit Comparé de l'Environnement* (CIDCE), a non-governmental organization based in France.

In order to finalise the draft text, an expert meeting was convened in Paris at the facilities of France's *Conseil Constitutionnel* on 23 June 2017. For logistical reasons, only some 30 experts participated in this meeting, which under the chairmanship of Laurent Fabius proceeded to the discussion and adoption of the draft project. The following day, at a high-profile symposium held at the *Grand Amphithéâtre de la Sorbonne*, the draft project was presented by Mr Fabius to French President Emmanuel Macron, in a ceremony featuring former UN Secretary-General Ban Ki-moon, former Governor of California Arnold Schwarzenegger, the French Minister of the Environment Nicolas Hulot, the Mayor of Paris Anne Hidalgo, several other political figures, and a wider public of experts, diplomats, students and interested people.<sup>57</sup>

Between June 2017 and early November 2018, when the present article was written, several major steps have been taken to support the idea of a GPE, including many expert gatherings,<sup>58</sup> a high-level event on the sidelines of the General Assembly meeting on 19 September 2017 entitled 'Summit on a Global Pact for the Environment',<sup>59</sup> a Sino-French Summit between French President Emmanuel Macron

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<sup>55</sup> See above n. 16.

<sup>56</sup> See *Projet de Pacte international relatif au droit des êtres humains l'environnement* du CIDCE, available at: <https://cidce.org/fr> (visited on 13 November 2018).

<sup>57</sup> See Y. Aguila, 'Vers un Pacte mondial pour l'environnement. Acte fondateur à Paris le 24 juin 2017' (2017) 25 *La semaine juridique* 718.

<sup>58</sup> See above n. 4.

<sup>59</sup> See Speech delivered by President Emmanuel Macron during the international launch summit of the 'Global Pact for the Environment', which took place during the 72nd United Nations General Assembly, available at [www.diplomatie.gouv.fr](http://www.diplomatie.gouv.fr) (visited on 13 November 2018).

and Chinese President Xi Jinping on 8-10 January 2018,<sup>60</sup> and the meeting of the UN General Assembly in which the Enabling Resolution was adopted.

This meeting was held in early May 2018, under point 14 of the Agenda of the UN General Assembly's plenary.<sup>61</sup> The French delegation introduced the Draft Resolution (A/72/L.51) to which the Kenyan delegation proposed minor amendments (A/72/L.53), essentially aimed at ensuring that the process unfolds in Nairobi. Some other delegations (the United States, the Russian Federation, the Philippines and Syria) took the floor to oppose the project or aspects of it. The arguments aired by these delegations included matters of process (e.g. the fact that the project had not been sufficiently discussed or that France had not engaged with the chairperson of the Group of 77 plus China), the need for respect of the sovereignty of States to exploit their natural resources, the need to focus on the implementation of existing instruments rather than on using political capital for an additional normative development, and matters of formulation relating to the need to leave the outcome of the *ad hoc* group open-ended. Interestingly, a recorded vote was requested (instead of the frequent practice of adoption without a vote), which yielded a 143 majority, with only six votes against (Philippines, Russian Federation, Syria, Turkey, United States, and Iran, although the latter noted at the end that its vote had been inaccurately recorded, because it supported adoption) and six abstentions (Belarus, Malaysia, Nicaragua, Nigeria, Saudi Arabia, Tajikistan). This distribution of votes, and the identity of the current governments – not the countries – voting against the resolution, speaks for itself. It is, however, important to recall it in an article that hopefully will serve as a record for future generations to know where the resistance came from.

The arguments, although not entirely unfounded, ring hollow. The GPE has been in the making for decades, and asking for more time is possibly a euphemism for supporting inaction. The same applies to arguments relating to improving implementation by means of piecemeal – at best – corrections in existing agreements. Adequate consultation of the chairperson of the Group of 77 plus China would have certainly useful, but developing countries vote massively in favour of the resolution and the Chinese delegation explicitly took the floor to support the French initiative. As for references to sovereignty, there is no element in the proposal or in the idea of a GPE that explicitly or implicitly encroaches upon sovereignty as understood in contemporary international law. Perhaps the reaction was a resurgence from the past, as suggested by the Syrian delegate who noted, quite surprisingly in the light of the

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<sup>60</sup> Joint Declaration between the People's Republic of China and the French Republic, 10 January 2018, para 8 ('China and France intend to continue their constructive dialogue on the formulation of the Global Pact for the Environment'), translation available at: [http://www.xinhuanet.com/english/2018-01/11/c\\_136886038.htm](http://www.xinhuanet.com/english/2018-01/11/c_136886038.htm) (visited on 13 November 2018).

<sup>61</sup> See 'General Assembly Decides to Establish Working Group Aimed at Identifying Gaps in International Environmental Law', UN Meeting coverage, GA 12015 (10 May 2018), available at: <https://www.un.org/press/en/2018/ga12015.doc.htm> (visited on 13 November 2018).

existence of hundreds of global environmental treaties, that ‘the concept of world environmental law was still legally controversial’. In all events, these and other concerns will have ample room for discussion in the process envisioned in the Enabling Resolution.

In a nutshell, the resolution calls for 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’.<sup>62</sup> This report, which is expected for late November 2018, will be discussed by an ‘ad hoc open-ended working group’ with a view to ‘consider 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’.<sup>63</sup> The working group is tasked with ‘making recommendations [to the General Assembly], which may include the convening of an intergovernmental conference to adopt an international instrument’.<sup>64</sup> Ambiguity is pervasive in this and other formulations used in the Enabling Resolution. What seems far more precise is the demanding timeframe for the *ad hoc* group to do so, namely during the first half of 2019. The President of the UN General Assembly appointed two co-chairs for the working group, one from Portugal (Ambassador Francisco António Duarte Lopes) and the other from Lebanon (Ambassador Amal Mudallali). The group held its first meeting on 5-7 September 2018 to address organizational matters. Three other meetings focusing on substance will be held in the first half of 2019 (the last session is scheduled to start on 20 May 2019), all in Nairobi, as had been the wish of the Kenyan delegation. This is key to ensure the buy-in from developing countries as well as from UN Environment (UNEP).

It is important to note, as will become apparent in the next section, that the initiative for a GPE never expected for the draft project to be adopted as such, or even in a mildly revised form. The text proposed is above all representative of an approach, which may change significantly, even fundamentally during the negotiations. The key expectation is that negotiations will indeed start and that the ‘instrument’ envisioned by the negotiation mandate will constitute a step further than the Rio Declaration.

## **NATURE, CONTENT AND INTERACTION WITH EXISTING INSTRUMENTS**

### *A BINDING INSTRUMENT*

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<sup>62</sup> Enabling Resolution, above n. 1, para 1.

<sup>63</sup> *Ibid.*, para 2.

<sup>64</sup> *Ibid.*

The initiative for a GPE specifically aims for the adoption of a binding treaty providing an umbrella to a wider body of treaties commonly called multilateral environmental agreements (MEAs). Although the Enabling Resolution leaves the question open, referring only to '*possible options* to address possible gaps [ ... ] and, if deemed necessary, the scope, parameters and feasibility of an *international instrument*',<sup>65</sup> the explicit mention of the 'convening of an intergovernmental conference to adopt an international instrument' makes abundantly clear that the recommendations of the *ad hoc* working group may lead to the adoption of a treaty. At the very least, that 'possible option' is certainly within the cards. Some observers have suggested that a soft-law instrument could also be a possible option. That position is consistent with the terms of the Enabling Resolution, but at odds with its spirit, as highlighted in the very title of the resolution 'Towards a Global *Pact* for the Environment'.

The term 'Pact' unequivocally refers to a binding treaty. It was selected, among several other terms falling under the *genus* treaty (e.g. covenant, convention, agreement, treaty, protocol), both for its similarity in at least three UN languages (Pact, *Pacte*, *Pacto*) and in order to convey the generality of the instrument envisioned, which is to be a 'Pact' adopted by States but emphasising the role of much wider body of stakeholders. In addition, the term Pact connotes a general value stance taken by the international community, much as in the context of the recently drafted Global Compacts on Migration and Refugees.<sup>66</sup>

Since the early stages of the initiative, and throughout the discussions within the network of experts, it was clearly understood that the draft project was only intended as a basis for discussion that would be subject to detailed scrutiny by all States and very likely undergo substantial, even fundamental modifications. At the same time, however, the draft project was intended to substantiate the claim that over a hundred environmental law experts, including academics but also practitioners, from all four corners of the World considered the idea to be realistic and ripe for action. Thus, the draft project is, in many ways, a 'proof of concept' developed to lend credibility to the larger enterprise of launching negotiations to conclude a GPE. This clarification is important, because much of the criticism that the initiative has faced, including from overtly hostile quarters, either rely on the aforementioned euphemisms for inaction or focus on details of formulation in the draft project which will very likely change in the course of the negotiations, without undermining the overall idea.

#### *FUNDAMENTAL CHOICES RELATING TO CONTENT AND DESIGN*

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<sup>65</sup> *Ibid* (italics added)

<sup>66</sup> See Global Compact for Safe, Orderly and Regular Migration, text finalised on 13 July 2018, to be adopted at an Intergovernmental Conference scheduled for 10-11 December 2018; Global Compact on Refugees, text finalised by the UN High Commissioner for Refugees on 26 June 2018, expected to be endorsed by the UN General at the end of 2018.

The contents of the draft project reflect a number of fundamental choices arising from the consultation process. These choices concern: (1) the conciseness of the instrument, (2) a formulation emphasising its enduring character, (3) its adaptability to different country contexts, (4) a balance between rights and duties, (5) a balance between well-established principles and novel ones, and (6) a balance between the normative and the institutional dimension.

The draft project is specifically drafted as a very concise document, a few pages long, avoiding as much as possible unnecessary complications. This is consistent not only with the end result sought by the initiative for a GPE, i.e. a binding statement of fundamental principles, but also with the nature of the draft project as such, which is to provide an accessible basis for discussion that can be scrutinized in great detail by States and other stakeholders, without requiring inordinate amounts of time and effort.

The style used in the formulation of the project seeks to avoid any excessive embeddedness in our present time or, more specifically, it attempts to formulate principles of enduring relevance for the present but also the future. This is a common feature of instruments that are expected to deploy their effects through long periods of time, such as constitutions, human rights treaties, constitutive instruments of international organisations, and the like. However, unlike many of these other treaties, the endurance of the draft project does not rest on a heavy institutional architecture but on the general formulation of its principles. This is because the scientific understanding of environmental problems, as well as of the suitability of different answers, is constantly changing.

The generality of the formulation is also important for the adaptability of the draft project to the very different circumstances prevailing across countries. It would be unfair to say that the draft project assumes that 'one size fits all'. This important consideration was specifically taken into account by the expert network and the drafting committee, which did their utmost to ensure that the text is sufficiently general to be capable of providing normative guidance while at the same time allowing States to tailor the implementation of the principles in the GPE to their own circumstances.

Reflecting the wide recognition, at the domestic level,<sup>67</sup> and the increasingly pressing calls, at the international level,<sup>68</sup> for a right to an environment of a certain

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<sup>67</sup> See D. Boyd, *The Environmental Rights Revolution* (Vancouver: UBC Press, 2012); J. R. May, E. Daly, *Global Environmental Constitutionalism* (Cambridge University Press, 2015).

<sup>68</sup> See UN expert calls for global recognition of the right to safe and healthy environment, 5 March 2018 (former Special Rapporteur John Knox 'I hope the Human Rights Council agrees the the right to a healthy environment is an idea whose time is here. The Council should consider supporting the recognition of this right in a global instrument'); Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 19 July 2018, UN Doc. A/73/188, para. 37 ('The time has come for the United Nations to formally recognize the human right to a safe, clean, healthy and sustainable environment, or, more simply, the human right to a healthy environment'); Statement by David R. Boyd, Special Rapporteur on human rights and the environment at the 73rd session of the General Assembly, 25 October 2018 ('after six years as mandate holder, Professor Knox came to the conclusion that there is a glaring gap in the global human rights system. He and I are in 100% agreement that it is time for the UN to recognize the fundamental human right to live in a safe, clean, healthy and sustainable environment').

quality (often characterized with the adjective ‘healthy’, ‘clean’, ‘safe’ or ‘generally satisfactory’), the draft project formulates, in its Article 1, a ‘right to an ecologically sound environment’.<sup>69</sup> This statement is mirrored, in Article 2, by the assertion of a correlative ‘duty to take care of the environment’. Importantly, this duty is incumbent on ‘[e]very State or international institution, every person, natural or legal, public or private’.<sup>70</sup> This is a very progressive stance, which has been criticized for excessively expanding the spectrum of duty-bearers and, thereby, possibly undermining the role of the State as the primary duty-bearer in connection with both human rights and environmental norms. This is a relevant point, which States will need to examine in great detail in their discussions concerning a future GPE. The current formulation of Article 2 is designed to put on the table the full spectrum of possible duty-bearers or, in other words, to highlight that the duty to take care of the environment is not to be conceived of only as a duty of States. The architecture of the draft project flows from this combination of a right and a duty. In Articles 3 to 20, the draft project states a series of rights (e.g. Articles 9, 10 and 11, which unravel Principle 10 of the Rio Declaration, but explicitly stating that these are rights of ‘every person’) and duties (on a range of duty-bearers, including ‘States’ or the ‘Parties’, but also ‘their sub-national entities’,<sup>71</sup> ‘present generations’<sup>72</sup> or, by avoiding the identification of a specific duty-bearer, any entity which is in a situation covered by the duty<sup>73</sup>).

The principles featured in the draft project include well-known norms,<sup>74</sup> in some cases using formulations that clarify previous ambiguities or expand the principles’ scope.<sup>75</sup> But the project also innovates by including principles, which so far had not

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<sup>69</sup> See Draft Global Pact for the Environment (24 June 2017), Article 1; *White Paper: Toward a Global Pact for the Environment* (September 2017), both available at: [www.pactenvironment.org](http://www.pactenvironment.org) (visited on 13 November 2018).

<sup>70</sup> See *Introductory Report on the Draft Global Pact for the Environment* (September 2018), p. 7.

<sup>71</sup> Draft Global Pact for the Environment, above n. 69, Article 17.

<sup>72</sup> *Ibid.*, Article 4.

<sup>73</sup> *Ibid.*, Article 6 on ‘Precaution’, or Article 20 on ‘Diversity of national circumstances’.

<sup>74</sup> See e.g. the principle of integration, the principle of inter-generational equity, the prevention principle and the requirement to conduct an environmental impact assessment, precaution, the polluter pays principle, the triad of access to environmental information, participation in environmental decision-making and access to justice or cooperation.

<sup>75</sup> See e.g. Article 4 on the principle of inter-generational equity (compared with Principle 3 of the Rio Declaration, which only referred to inter-generational equity at the end as a consideration in the exercise of the right to development). For the conceptual underpinnings of this principle see E. Brown Weiss, ‘The Planetary Trust: Conservation and Intergenerational Equity’ (1984) 11 *Ecology Law Quarterly* 495. Another example is Article 8 on the polluter-pays principle, which expands the remit of the principle not only as a national instrument but also as a principle governing the relations among States, and it clarifies that the cost shall be borne by the ‘originator’ of the damage (compare with Principle 6 of the Rio Declaration). See generally P. Schwartz, ‘The Polluter-pays Principle’, in J. E. Viñuales (ed.), *The Rio Declaration on Environment and Development. A Commentary* (Oxford University Press, 2015), pp. 429-450.

featured in a general statement of principles<sup>76</sup> or even in previous treaties.<sup>77</sup> The expert group sought to strike a balance between the consolidation and the innovation function of the project. Consolidation is important to strengthen existing norms as well as to assuage potential concerns of States reluctant to undertaking new commitments. Yet, some measure of innovation is also important because the project must be an additional step in the evolution of global environmental governance and, as much as possible, an inspiring and energizing one.

Finally, the draft project strikes a balance between its normative dimension (the formulation of principles) and its institutional one (the creation of a new body). Sensitive to the concerns expressed by several members of the expert group, which more broadly reflect States' concerns, the draft project provides for a very light institutional component. Indeed, Article 21 contemplates the creation of a Committee of independent experts, whose structure and mandate would be midway between that of the committees set up by human rights instruments and that of the compliance committees established by MEAs. The non-adversarial approach followed by Article 21 of the draft project is derived from the latter source, specifically from Article 15 of the Paris Agreement, which reflects similar provisions in earlier MEAs. However, because the draft project does not provide for the creation of a Conference of the Parties or of any other strong institutional architecture, this committee would operate in a manner akin to that of the Human Rights Committee established by the 1966 International Covenant on Civil and Political Rights. The articulation of these two components, namely a statement of principles and a Committee of independent experts with general and specific compliance as well as interpretive functions, seeks to achieve a focus on implementation without relying on a heavy institutional structure.

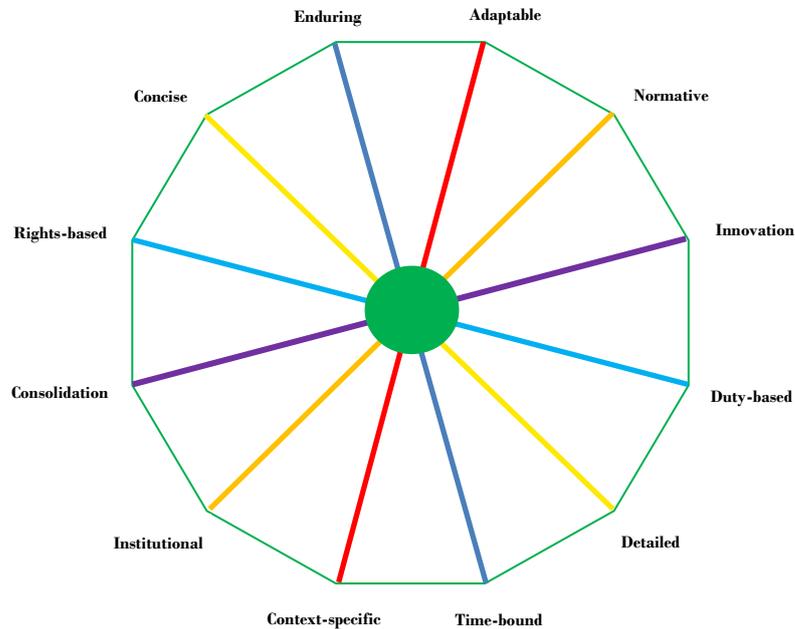
Figure 1 summarises these six dimensions in graphic form.

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<sup>76</sup> See e.g. Article 17 on the Principle on 'Non-Regression'. On this principle see generally M. Prieur, G. Sozzo, *La non-régression en droit de l'environnement* (Brussels: Bruylant, 2012).

<sup>77</sup> See e.g. Article 14 on the 'Role of non-State actors and sub-national entities' or Article 16 on the Principle of 'Resilience'. On the realities underpinning the recognition of these two concepts see H. Bulkeley et al, *Transnational Climate Change Governance* (Cambridge University Press, 2014) and N. Robinson, 'Evolved Norms: A Canon for the Anthropocene', in C. Voigt (ed), *A Rule of Law for Nature* (Cambridge University Press, 2013), pp. 46-71.

**Figure 1: Dimensions of the Global Pact for the Environment**



This figure is offered as a tool for the discussion and design of a potential GPE which may arise from the work of the *ad hoc* working group. A balance in all six dimensions, and perhaps in some others, will need to be struck by the working group and, as the case may be, by the intergovernmental conference. Commentators, whether from academic or policy circles, would also need to shed light on these dimensions and, more specifically, on the advantages and disadvantages of different combinations. The conceptual chart offered in figure 1 will hopefully be of use to provide some structure to the debates.

#### *INTERACTION WITH EXISTING INSTRUMENTS*

The Enabling Resolution, in its paragraph 9, '[r]ecognises that the process indicated above [i.e. the *ad hoc* open-ended working group and its possible continuation by an intergovernmental conference] should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies'.

It is important, in clarifying the scope of this paragraph, to dispel one common misunderstanding. A GPE would neither exclude the application of other instruments to the same situation nor be prevented from applying when such other instruments apply. It is possible for existing instruments to be either more specific or more general than the proposed GPE, or even both more specific and more general at the same time (the analysis may have to be conducted provision by provision or clause by

clause). It is also possible that the proposed GPE may cover areas left open by existing instruments (e.g. providing a global fallback regime for matters as diverse as plastic pollution or, more generally, land-based pollution or atmospheric pollution, before a more targeted instrument is adopted) or that it may contribute to their interpretation in such a way that unlocks the potential of certain provisions (e.g. to clarify the implications of some existing treaties for consumption-driven pollution). These and other forms of interaction are possible and acceptable.

Out of all the possible forms of interaction between existing instruments and the proposed one, only those whereby the latter would 'undermine' the former are to be avoided. The term 'undermine' must be understood, in this context, as capable of defeating the environmental protection purpose of existing treaties. As long as the proposed GPE does not defeat the environmental protection purposes pursued by these many instruments, the approach would be deemed consistent with the parameters set in paragraph 9. It is difficult to conceive how the proposed GPE could defeat those purposes. Those who argue against the proposed GPE or a specific provision included in it would have the burden to identify how exactly and to what extent there is a genuine risk that the Pact may undermine an existing instrument. Such arguments should be established in a manner that is no less 'technical and evidence-based' than the report envisaged in the Enabling Resolution.

It should be noted that, from a technical standpoint, the International Court of Justice has expressly recognised that different norms may all apply together to cover different aspects of a complex situation. Thus, the Court has referred to the need to take into account the prevention of environmental harm in assessing the necessity and proportionality of an armed action taken in self-defence<sup>78</sup> or, more specifically, to the possibility that human rights norms and norms of international humanitarian law (by analogy, also environmental norms) may apply together.<sup>79</sup> For present purposes, the relevance of this point is to recall that different norms are not necessarily mutually exclusive. The principles formulated in a general statement such as the proposed GPE could (i) apply together with other more specific norms and treaties, (ii) without either excluding their application or being excluded by it, and (iii) making a useful contribution to the regime governing a range of different situations, either by addressing aspects left open by existing treaties or by contributing to the interpretation of the latter.

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<sup>78</sup> *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p. 226, para. 30.

<sup>79</sup> *Ibid.*, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, para. 106.

## PROSPECTS

It is for States to decide whether the adoption of a GPE, of a nature, scope and content to be discussed, is indeed an idea whose time has come. It is of course very likely that, fifty years from now, arguments against the GPE will look like arguments against the 1966 International Human Rights Covenants, or even the 1948 Universal Declaration on Human Rights or the 1948 Genocide Convention, i.e. as either politically motivated or, at best, as retrograde.

The proposed GPE is not an unrealistic idea. It is, in our view, a logical next step in the evolution of global environmental governance. The adoption of an overarching statement of principles is consistent with the practice in many other areas of international law. One could refer in this regard not only to human rights but also to the law of the sea,<sup>80</sup> trade law,<sup>81</sup> international criminal law,<sup>82</sup> or international humanitarian law.<sup>83</sup> The situation is similar at the domestic level. Countries from all corners of the world have adopted general environmental statutes<sup>84</sup> which, despite their diverging scope, have a transversal application to environmental protection and seek to provide some unity and coherence of principle to sectoral statutes. In many cases, these general statutes came after sectoral ones,<sup>85</sup> precisely to provide some measure of consolidation and coherence. We do not see why similar considerations would not be relevant for international environmental law.

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<sup>80</sup> See UNCLOS, above n. 34.

<sup>81</sup> See Agreement establishing the World Trade Organisation, 15 April 1994, 1867 UNTS 154.

<sup>82</sup> See Rome Statute on the International Criminal Court, 17 July 1998, 2187 UNTS 90.

<sup>83</sup> See the four Geneva Conventions, with their two substantive additional protocols: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 8; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, 12 August 1949, 75 UNTS 287; Protocol Additions to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3; Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609.

<sup>84</sup> See e.g. Brazil: *National Environmental Policy Act* (1981); Canada: *Canadian Environmental Protection Act* (1999); China: *Environmental Protection Law* (EPL)(2014); France: *Environment Code* (2000); India: *Environment (Protection) Act*, No. 29 of 1986; Indonesia: *Law No. 32/2009 of on Environmental Protection and Management* (2009) (EPMA); Japan: *Environmental Basic Law*, Law No. 91/1993 (1993); Korea: *Basic Environmental Policy Act*, Law No. 4257 (BEPA)(1990); Mexico: *General Act on Ecological Balance and Environmental Protection* (LGEEPA) (1988); Singapore: *Environmental Protection and Management Act* (1999); South Africa: *National Environmental Management Act* (NEMA)(1998); UK: *Environment Act* (1995); US: *National Environmental Policy Act* (NEPA) (1969). The scope of these different framework laws is different, with some providing a detailed and encompassing framework and others only a narrow and procedural one. But the main point is the need for transversality. See Viñuales, *The Architecture*, above n. 40, chapter 2.

<sup>85</sup> Two contrasting efforts at consolidation are those in France and Germany. In both countries, the fragmentation of sectorial laws led to sustained efforts towards the development of a framework instrument. In France, this process resulted in the adoption of the Environment Code in 2000 (on the need for such Code see M. Prieur, *Rapport sur la faisabilité d'un code de l'environnement* (Paris: Ministère de l'Environnement, 1993)). In Germany, these attempts have so far been unsuccessful (see S. Gabriel, 'The Failure of the Environmental Code. A Restrospective' (2009) 39 *Environmental Policy and Law* 174). The case of Germany is an exception to the broader general trend towards some degree of consolidation.

There is, however, much room for arguing about the nature, scope and content of an overarching instrument and, in offering a framework (figure 1) to structure the diversity of arguments as well as in fleshing out how a balance between different considerations was struck in the draft project, this article hopes to contribute to such discussions and provide a written record for future generations of how this generation sought to address the problems – largely of our own making – that they will face much more acutely.