



# A Global Pact for the Environment

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## **Introduction**

States have adopted many principles for the environment, including the "polluter pays" principle and the obligation to prepare environmental impact assessment for activities that may have a significant harmful transboundary effect. Yet these commitments have often developed in disparate ways and in instruments that may use different terms, with the result that even well-accepted principles may be challenging for non-specialists to discern, inconsistencies in the law may develop, and questions may arise as to which are legally binding and which are interpretative principles. To initiate a formal discussion, and possibly an eventual treaty negotiation, of "gaps in international environmental law and environment-related instruments with a view to strengthening their implementation," the United Nations General Assembly (UNGA) adopted resolution 72/277, "Towards a Global Pact for the Environment," (GPE resolution) on May 10, 2018; the first meeting will take place September 5–7, 2018, at UN Headquarters in New York City.

The resolution was based on the draft "Global Pact for the Environment" (GPE), setting out twenty core environmental principles.<sup>[1]</sup> It was elaborated by an international group of 100 legal experts (Group of Experts for the Pact) and presented to the UNGA by French President Emmanuel Macron. At the fall 2018 UNGA session, UN Secretary-General Guterres will present a gap report, which will be taken up in 2019 by a Working Group. The resolution encourages engagement by civil society and international law experts.

This *Insight* provides context for the GPE and indicates its nature and scope. It then examines the GPE's role in international law as "soft law," customary international law, and treaty law.

## **Process and Background**

The GPE evolved from decades of intergovernmental and civil society efforts to improve environmental protection and management, most recently the Paris Agreement on climate change and the UN Sustainable Development Goals. United Nations-led initiatives contributed, *inter alia*, the Rio Principles, agreed during the 1992 Earth Summit on

Environmental and Development.<sup>[2]</sup> Civil society's significant contributions include the International Union for Conservation of Nature (IUCN) "Draft International Covenant on Environment and Development." The IUCN Draft Covenant provides a model for the GPE, but is a more comprehensive set of articles covering broad principles and specific issues related to environment and development, with a detailed commentary, regularly updated since 1995.<sup>[3]</sup>

### **Nature and Purpose of the GPE**

The draft GPE is a succinct statement of principles, in contrast to the lengthy detail of many multilateral environmental agreements. This drafting approach has been successfully used in other areas of international law. A fairly recent example is the International Law Commission's (ILC) Articles on State Responsibility, whose simply stated fifty-nine articles are accompanied by a substantial commentary. The drafters have also compared GPE to the Human Rights Covenants, and substantively the GPE's provisions may be considered the third generation of rights, following the first generation civil and political rights, and second generation economic, social, and cultural rights.

The purpose of a legally binding GPE would be "to cluster in a single document with legal force the major principles that guide environmental actions."<sup>[4]</sup> The effect of a legally binding agreement would vary depending on the social and legal context of a particular country. Most states would likely seek to integrate the principles into domestic law. In countries like the United States, that would be necessary to become legally binding as a matter of U.S. law, since the GPE would likely be considered a non-self-executing treaty.<sup>[5]</sup> By comparison, to challenge a law in France, one needs to refer to a superior norm, which can be constitutional or international law; the GPE would be such an international law. A number of judges have indicated that the GPE would be a useful tool in contexts like investment treaty interpretation, arbitration, and domestic law. Practitioners have noted that an agreed statement of principles would clarify obligations of corporate social responsibility, indicate international minimum standards, and create a level playing field for their clients.

### **The Draft GPE Articles**

Many of the draft GPE articles have long been accepted law. For these, it is the specific choice of words that may be debated. They include obligations, expressed in GPE Article 5 (Prevention), to prevent transboundary environmental harm, to prepare environmental impact assessments where a significant adverse transboundary environmental impact is likely, and to use due diligence in implementing such activities (also in Article 15). The provision on environmental harm, Article 7, is phrased in new language but it embodies the customary international law obligation of reparation and the duty to notify other states of natural disasters or emergencies. The related rule that the polluter must pay for (some) harm, Article 8, and Article 18 on the duty to cooperate, are, likewise, already understood as rules of customary law.<sup>[6]</sup> Article 19 reminds states of their obligations under international law regarding environmental protection in relation to armed conflicts. Recognition that states are differently circumstanced and that sometimes their obligations will be implemented in different ways is commonplace in modern treaties and appears here as Article 20.

The right to an ecologically sound environment, Article 1, appears in many national constitutions and some international declarations and decisions.<sup>[7]</sup> The corresponding duty to conserve, protect, and restore the integrity of the Earth's ecosystem, Article 2, is clearly a corollary to Article 1, although it is less often stated directly.

Some articles are widely referenced as guiding principles in international environmental agreements and are used as interpretative rules by international courts. Article 4 requires

consideration of intergenerational equity in decisions and actions.<sup>[8]</sup> Article 5 presents a formulation of the precautionary principle, which courts have sometimes referred to instead as an "approach," not a decisional rule.<sup>[9]</sup> The principles of access to information, Article 9, public participation, Article 10, and access to justice, Article 11, have developed into binding law in many jurisdictions.<sup>[10]</sup> Article 12, education and training, and Article 13, research and innovation, are complementary to these.

Three newer principles reflect the concerns and practices of recent years. Article 14 says that states shall encourage non-state actors to implement the GPE. Cities' participation in the Paris Agreement illustrates this concept. Recognition of our time as the Anthropocene era gives rise to the resilience principle, Article 16, focused on the ability of ecosystems and human communities to withstand, recover from, and adapt to environmental disruptions and degradation. The non-regression principle, Article 17, prohibits reducing a preexisting degree of protection, with precursors in the Stockholm Declaration on the Human Environment and in Belgian law.

### **Legally Binding?**

The GPE Working Group process and a possible treaty will clarify the status and content of environmental law norms. It may function in a manner similar to the ILC or the International Law Association, elucidating the content, status, meaning and application of the principles to reach an agreement that will strengthen the rules. As a diplomatic process, the Working Group's work will promote political buy-in, in contrast to the independent expert opinions offered by ILC and International Law Association scholars and practitioners.

Should the GPE evolve into a treaty, it would mark widespread agreement on which principles are binding law and which are soft law. However, the form of a treaty alone does not guarantee a norm is binding. Hence, some principles, even when enshrined in treaty form, reflect "soft law"—norms that are widely recognized but are not sufficiently precise or enforceable to be considered legally binding rules. Soft law principles are often used as interpretative guides. Conversely, sources other than treaties may also exercise strong normative effect. For example, practitioners report that the Ruggie principles have affected their clients' corporate social responsibility policies, even though they do not have the status of a treaty. The GPE, even if it does not become a treaty, could similarly carry significant normative weight in state and non-state practice.

Whether a legally binding agreement should be pursued generates sharply differing opinions. Some argue that "legally binding" is not an important distinction because the draft GPE articles are already recognized as customary international law, and are found in numerous formal treaties, international court decisions, state practice, UNGA and UN Security Council resolutions, and other instruments and practices.

Others observe that the treaty form offers gravitas and precision. They point to the institutional and social pressures to comply that will be engaged if states accept GPE as legally binding obligations.

And yet others argue that the broadly worded articles of the draft GPE are not suitable for a legally binding instrument<sup>[11]</sup> and that such a high level of abstraction may not fit specific situations. Several criticisms reflect a preference for being able to tailor the language of a principle to circumstances, or deciding when a general principle will apply and when it can be ignored.

If the GPE becomes a legally binding instrument designed to strengthen certain norms, it remains to be determined what that means in practice and in relation to preexisting treaties and customary law.

## Conclusion

There is general agreement that better compliance with existing environmental norms is needed. Noncompliance typically results from lack of understanding of what is required by a law, lack of resources and capability to implement obligations, and lack of political will. As a treaty, the GPE would address the first concern by providing an authoritative reference. Detailed application of the broad principles set forth in the GPE could then be provided through commentaries and model laws to assist with implementation and incorporation of the principles into domestic law.

However, there is a clear split between those who would prefer a consistent understanding of the principles that have evolved through the legal process over the last fifty or so years and those who prefer to maintain maximum flexibility for negotiation. The latter argue that they need room for nuance and constructive ambiguity; others that selective application undermines important social norms.

The international community has manifested its interest in pursuing the concept of the Global Pact for the Environment through the ad hoc Working Group, as 143 nations voted for resolution 72/277. When the 73rd session of the General Assembly of the United Nations opens in September, states and stakeholders will have the opportunity to examine the existing body of international law for the environment for gaps and to refine the draft GPE into an agreed statement of principles.

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[1] *Draft Global Pact for the Environment*, Global Pact for the Environment, available at <http://pactenvironment.org/the-pact/> (last visited Sept. 4, 2018); *Global Pact for the Environment*, IUCN World Commission on Environmental Law, <https://www.iucn.org/commissions/world-commission-environmental-law/our-work/global-pact-environment> (last visited Sept. 4, 2018).

[2] U.N. Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, *Rio Declaration on Environment and Development and Agenda 21*, U.N. Doc. A/CONF.151/26 (Vol. I), Annexes 1, 2 (Aug. 12, 1992).

[3] International Council of Environmental Law (ICEL) & IUCN Environmental Law Programme, *Draft International Covenant on Environment and Development: Implementing Sustainability* (5th ed., 2015), available at <https://portals.iucn.org/library/node/46647>.

[4] Global Pact for the Environment, <http://pactenvironment.org> (last visited Sept. 4, 2018).

[5] *Medellin v. Texas*, 552 U.S. 491, 129 S.Ct. 360, 171 L. Ed .2d 833 (2008).

[6] *See, e.g., Mox Plant Case (Ireland v. U.K.)*, Provisional Measures, Case No. 10, Order of Dec. 3, 2001, ¶ 82, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_10/published/C10-O-3\\_dec\\_01.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/published/C10-O-3_dec_01.pdf) ("[T]he duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law.").

[7] David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (2012); *see also* John Knox (Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment), Rep. on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment U.N. Doc. A/HRC/37/59 (2018) [hereinafter Special Rapporteur Rep.].

[8] *See, e.g.*, Convention Concerning the Protection of the World Cultural and Natural Heritage art. 4, 1037 U.N.T.S. 151, 27 U.S.T. 37, 11 I.L.M. 1358 (1972). *See generally* Edith Brown Weiss, *Intergenerational Equity*, Max Planck Encyclopedia of Public International Law (2013).

[9] *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. Rep. 14, ¶ 164 (Apr. 20), available at <http://icj-cij.org/files/case-related/135/135-20100420-JUD-01-00-EN.pdf>.

[10] *See, e.g.*, Special Rapporteur Rep., *supra* note 7; UNEP, *Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters* (2010).

[11] *See, e.g.*, Susan Biniaz, *10 Questions to Ask About the Proposed "Global Pact for the Environment"*, Columbia Law School, Sabin Center for Climate Change (2017), available at <http://columbiaclimatelaw.com/files/2017/08/Biniaz-2017-08-Global-Pact-for-the-Environment.pdf>.