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Gaps in international environmental law and environment-related instruments: towards a global pact for the environment

Report of the Secretary-General

Summary

The present report has been prepared pursuant to General Assembly resolution 72/277 entitled "Towards a Global Pact for the Environment", in which the Assembly requested the Secretary-General to submit, at its seventy-third session in 2018, 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.

current, sectoral, approach to international environmental law and help fill the gaps in the rules laid out in treaties. While some principles of international environmental law are now well recognized through their incorporation into issue-specific multilateral environmental agreements and have been affirmed by a number of international courts and tribunals, others enjoy neither clarity nor judicial consensus as to their applicability, nor recognition in binding legal instruments. This has an impact on the predictability and implementation of sectoral environment regimes.

Second, international environmental law is piecemeal and reactive. It is characterized by fragmentation and a general lack of coherence and synergy among a large body of sectoral regulatory frameworks. This leads to an important deficit

I. Introduction

1. Most environmental challenges and problems and their impacts are transboundary, and some are global in nature, which led to the early recognition that international cooperation among States through appropriate legal frameworks was indispensable to the creation of effective responses and solutions. International environmental law is the area of public international law that addresses States and international organizations with respect to the protection of the environment.[1] It does not operate in isolation, but is anchored in the rules and principles of general public international law. The traditional sources of international law set out in article 38 of the Statute of the International Court of Justice have given rise to a large body of international legal obligations whose primary objective is the protection of the environment and the sustainable use of natural resources.[2]

2. International treaties adopted at the regional and global levels, commonly referred to as multilateral environmental agreements, are the dominant sources of international environmental law. A vast body of multilateral environmental agreements, comprising more than 500 instruments, have been adopted so far. Each agreement addresses a specific environmental challenge and is legally and institutionally distinct from the others. The incremental and piecemeal nature of international environmental law-making has resulted in a proliferation of largely sectoral regulatory regimes and a fragmented international legal framework for the protection of the environment.[3] Fragmentation has become a frequent phenomenon in international law, and is one of the consequences of multilateral decision-making.

3. There is no single overarching normative framework in the area of international environmental law that sets out what might be characterized as rules and principles of general application. However, many other areas of international law have some binding framework instruments that contain general rules whose scope is broad enough to cover more specific rules and principles in sectoral or regional instruments and provide for a certain degree of coordination and coherence. Examples include the human rights covenants, international trade law and the international law of the sea. In most of these areas, however, the framework agreements codified existing customary norms and in most cases, if not all, pre-dated the development of more specific treaties. It has been noted that the fragmented structure of international environmental law and the incremental process of regime creation inevitably lead to the situation where some environmental challenges are addressed, while others are not.

4. Customary international environmental law is sparse. The existence of a rule of customary international law requires that there be a settled practice together with opinio juris of States (a belief that the practice is rendered obligatory by the existence

[1] See Alan Boyle and Catherine Redgwell, *International Law and the Environment*, 4th ed. (Oxford University Press, 2019); Philippe Sands and others, *Principles of International Environmental Law*, 4th ed. (Cambridge University Press, 2018); Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press, 2011); Daniel Bodansky, Jutta Brunnée and Ellen Hey, eds., *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2008).

[2] Sands and others, *Principles of International Environmental Law*, p. 102.

[3] While the focus of the present study is on fragmentation within international environmental law, such incoherence also extends to the interaction between rules of international environmental law and those applicable to other areas of international law, such as those relating to armed conflict, a topic currently being considered by the International Law Commission (ILC) (see A/73/10, paras. 164–218).

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certain aspects of international human rights law.[34] While most global multilateral environmental agreements adopted since the United Nations Conference on Environment and Development, held in Rio de Janeiro, Brazil, in 1992, endorse public access to information and public participation by some means, many of the underlying legal developments have taken place regionally and with remarkably little geographic symmetry.[35] This constitutes a significant gap in international environmental law.

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and international instruments on this subject do not universally or completely define the scope and content of the right. Regional agreements that recognize the right to a healthy environment generally pertain to human rights law and do not take into account the specificities of environmental issues. Several such agreements do not allow individuals or mot

cost-effective environmental mitigation action, whether a State is an export or import State,[72] whether a State is affected by the issue[73] or several other categories.[74] The Paris Agreement states that, in the context of climate change, differentiation is dynamic, not limited to particular parameters and has to be seen in the light of different national circumstances.[75]

Non-regression and progression

22. The principle of non-regression is relatively new to the field of environmental law, while its underlying idea of disallowing backtracking is well understood in systems that protect human rights and in labour law. The idea that once a human right is recognized, it cannot be restrained, destroyed or repealed is shared by all major international instruments on human rights.[76] The corollary to the principle of non-regression is the principle of progression. Non-regression aims at ensuring that environmental protection is not weakened, while progression aims at the improvement of environmental legislation, including by increasing the level of protection, on the basis of the most recent scientific knowledge. The Paris Agreement is explicit in this regard and provides, in article 4, paragraph 3, that each successive nationally determined contribution "will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition".

II. Gaps relating to existing regulatory regimes

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December 2015, aims, inter alia, at holding the increase in global average temperatures to well below 2 above pre-industrial levels and pursuing efforts to limit the temperature increase to 1¯ 0 Ť pe= Ť Ò ˙I in

successful, some important substantive gaps exist. The Montreal Protocol addresses only the production and consumption of controlled substances. Some ozone-depleting substances are not controlled under the Montreal Protocol, including some short-lived chemical pollutants and nitrous oxide (N_2O); some specific uses of controlled substances are not subject to any controls, such as uses in feedstock and for quarantine and pre-shipment; and the Protocol does not regulate the disposal of controlled substances that are in banks, such as insulation foams or equipment. With respect to monitoring and verification, all parties are required by the Protocol to report their production and consumption of all controlled substances on an annual basis, even if the substances have been completely phased out. While the Vienna Convention and the Montreal Protocol both provide for ongoing scientific monitoring of the ozone layer, there is no explicit requirement for periodic verification at the national level to ensure that substances that have been phased out remain so. Parties operating under paragraph 1 of Article 5, that is, developing countries that have levels of consumption below the limits defined by the Protocol and receive funding under the Multilateral Fund for the Implementation of the Montreal Prrols, o m{ M ʻ

Convention on Long-Range Transboundary Air Pollution of 1979[106] and its eight

57. The most comprehensive of these instruments is the United Nations Convention

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management and the ineffective implementation and compliance that partly stems from a lack of coordination and capacity. The effectiveness of applicable international legal instruments is affected by the level of participation by States. Gaps also exist with regard to the material or geographical scope of relevant instruments; for example, while some aspects of marine debris, plastics and microplastics are covered by several global, regional and national instruments, none of them, other than some regional action plans on marine litter, are specifically dedicated to these drthes! ! ! !

of certain hazardous substances in the working environment is strictly regulated through several legally binding instruments adopted under the auspices of the International Labour Organization (ILO).[178]

Hazardous wastes

65. The current international regime governing hazardous wastes focuses mainly on their disposal and transboundary movements and trade. It is acknowledged, however, that an approach that includes the minimization or prevention of the generation of waste at the source would provide a more holistic and effective response to the problem.[179] Of note, the European Union, at the regional level, has established quantitative targets regarding the generation of certain categories of wastes.[180]

66. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal of 1989 is the most comprehensive global treaty dealing with hazardous wastes and other wastes (household wastes). The Convention focuses primarily on the control of transboundary movements but also aims at ensuring the minimization of waste generation as well as its environmentally sound management. International focus on the transboundary movement of and trade in hazardous wastes arose out of incidents of illegal trafficking in toxic substances and wastes and the dumping of such products in developing and Eastern European countries in the late 1980s.[181] Several regional agreements were subsequently adopted to complement the Basel Convention.[182] The Basel Convention establishes a strict regime for transboundary movements of wastes, based on a prior informed consent

regulated compared with other media,[186] but legal intervention in the areas of land-based disposal as well as recycling and reuse is either minimal or non-existent. In addition, important gaps remain with respect to regional coverage as well as the regulation of the disposal of marine plastic litter and microplastics, mine tailings and associated wastes from mining operations, and wastes from deep seabed mining.[187] Land-based disposal is sparsely regulated at both the regional and globa~ rom d

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V. Gaps relating to the governance structure of international environmental law

77. The structure of international environmental governance is characterized by institutional fragmentation and a heterogeneous set of actors. Although States remain the primary actors, international environmental governance is a multi-actor governance system that includes international institutions, treaty bodies, non-governmental organizations, the scientific community and the private sector.

78. A multiplicity of global and regional international institutions participate in the task of international environmental law-making and implementation. They comprise entities of the United Nations system and treaty bodies established by multilateral environmental agreements. In the aftermath of the United Nations Conference on the Human Environment (the Stockholm Conference), UNEP was established to promote international cooperation in the field of the environment and to provide general policy guidance for the [illegible]

agreements and other instruments that directly or indirectly affect the environment, such as trade law, investment law and intellectual property rights regimes.

83. Institutional fragmentation and weak coordination between treaties can be addressed through various means, such as: (a) creating clusters and synergies between conventions; (b) mapping existing global and regional action plans and agreements to

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compensation to “costs of measures of reinstatement of the impaired environment undertaken or to be undertaken”. A number of courts and tribunals have, however, awarded compensation for pure environmental damage. In many cases, environmental damage in areas beyond the limiw [7] ‘

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