The draft Global Pact for the Environment
Professor Maria Magdalena Kenig-Witkowska
University of Warsaw
Faculty of Law and Administration
Institute of International Law

The draft Global Pact for the Environment
revised edition

Warsaw, October 2018
Over the last 100 years, about 200 species of vertebrates have become extinct worldwide. Scientists call this process the Earth's Sixth Mass Extinction. For the first time, however, the responsibility lies with just one species — the human. The African lion, whose population has dropped by about 30% in the last 20 years, is one of the species particularly in danger of extinction. Its population decrease is mostly caused by hunting and killing by cattle breeders.
Professor Kenig-Witkowska’s essay introducing the Global Pact for the Environment should be read by everyone interested in environmental law.

The Global Pact is now before the General Assembly of the UN, for discussion and ratification as a treaty. It will form a key building block of the next generation of environmental law, what I think of as Environmental Law 2.0. The present set of laws we have to protect the environment, even if they were well enforced, and often they are not, would still fail to protect life on our planet. The set of laws that, if implemented and enforced, would ensure a healthy future world, that is Environmental Law 2.0.

The Paris Agreement is the most important building block so far laid down, in the architecture of Environmental Law 2.0.

Laurent Fabius, called the father of the Paris Agreement, is also the key proponent of the Global Pact. He sees the Pact as the logical next step after the Paris Agreement.

I recently had the pleasure of hearing him discuss the Pact in Beijing, where ClientEarth invited him to join in training Chinese judges and prosecutors. Fabius made a strong case for the Pact, which guarantees a right to a healthy environment, and access to justice to defend those rights. Current environmental law is spotty in coverage, and international environmental law is mostly soft law. By enshrining the key elements of rule of law for the environment in a binding global treaty, we will get much closer to Environmental Law 2.0. Not all the way there, to be sure, but significantly farther along the path.

Let me offer a couple of examples, from my own practice, about the difference the Pact could make.

First, the Pact has a non-regression clause. Once a level of protection is agreed in law, it may not be rolled back. This is a crucial provision. Often when the requirements of a law bite, those regulated try to reduce standards. This is a common experience when citizens enforce laws against governments. In 2015, for example, ClientEarth won an air quality case against the UK in its own Supreme Court, and the Court issued an injunction requiring the government to clean up the air to the relevant Europe-wide limits. In response, the UK went to Brussels, where it tried to raise those limits. If its gambit had succeeded, the UK could have complied with the injunction without cleaning the air, or reducing premature deaths. The UK did not succeed, but if the Global Pact with its non-regression principle had been in place, they would have been turned back at the door.

Second, the framework of the pact provides an excellent template for sustainable development over the coming decades. During the same recent trip to...
Beijing, we met with senior Chinese officials to discuss their concept of Ecological Civilization. This concept, which I find inspiring and encouraging, underlies a great body of aligned work going on in China. This work reimagines industrial civilization in its relationship to the living world and prescribes deep change, with the vision that there will be a thriving and healthy Chinese civilization in another two millennia.

Ecological Civilization, however, if it is to work at all, must become global, and apply within the economies, cultures and legal systems of all countries.

How might Ecological Civilization be experimented with broadly and in the near term? I would suggest that the Belt and Road Initiative should be seen this way. The Initiative will link more than half the world’s population, across the Asian, African and European continents, with each other and with China. The infrastructure investment to do this over the coming decades will be by far the largest in history. If this infrastructure is deeply green, the world will move quickly in the right direction.

The Global Pact offers the template to green the Belt and Road Initiative. Its right to a healthy environment, coupled with its rights to transparent information and access to dispute resolution, provide the opportunity for the most sophisticated contemporary understanding to be the model for Belt and Road development.

If China, and all those economic actors who will participate, were to model their conduct on the Global Pact, they would embody the environmental law aspect of Ecological Civilization. The second step is to help all the countries in which development will happen to also embody the provisions of the Global Pact in how they allow and participate in the development. China may have to take a leading role in helping to build the capacity of the developing countries that will participate. They will need the help.

These two very different examples, one of the value of non-regression, the second about how the content of the Global Pact could serve as an agreeable template for the largest infrastructure development in history, amply demonstrate its value.

Professor Kenig-Witkowska’s essay lays out clearly the elements of the Pact and the ways it would help make law for the environment globally consistent and coherent. The UN General Assembly voted to bring the Pact forward for consideration by a vote of 143 countries in favour, 5 against. That is an encouraging start for the next great building block of Environmental Law 2.0. We need the Global Pact ratified soon, as time is short.
MARIA MAGDALENA KENIG-WITKOWSKA

Maria Magdalena Kenig-Witkowska is the Professor of Legal Sciences and the Full Professor at the University of Warsaw and a visiting lecturer at a number of universities in Europe, Africa, Asia and the USA. She is the author of many publications in the field of international and European environmental law, and an expert and legal advisor in the field of environmental law for a wide range of international bodies and organisations including: UNEP, UNDP, UNECA, the EU and national authorities. She is also the Chairwoman of the Program Council of the “Civic Society” foundation.

Maria Magdalena Kenig-Witkowska has won the Judge Manfred Lachs Prize and the Ministry of Science and Higher Education Award for outstanding scientific achievements. She is a member of the group of experts working on the draft Global Pact for the Environment (“Group of Experts for the Pact”).
I. INTRODUCTION

1. HOW THE DRAFT PACT EMERGED

The draft Global Pact for the Environment was prepared by the “Group of Experts on the Pact”, an international network of over one hundred world-renowned specialists in environmental law representing more than forty nationalities, chaired by Laurent Fabius, President of the French Constitutional Council. This work was coordinated by the Environment Commission of the “Club des juristes” with the French Constitutional Council. At the 72nd Session of the UN General Assembly, the President of the French Republic, Emmanuel Macron, presented and reviewed the draft Global Pact for the Environment.

The draft Pact reflected the approach to the fundamental principles of law which had been elaborated by an international group of experts representing different legal cultures and, importantly, coming from countries with very different ecosystems. Therefore, the project could take into account the diverse needs and challenges characterising the environment in the different regions.
of the world, from the perspective of the different systems of environmental law. The experts’ task was to elaborate the assumptions of the Pact. It was to be a short, precise text on which consensus could be reached among States, despite the existence, among others, of economic, social and cultural differences as well as those in the natural environment.

In order to carry out this task, the experts took into account primarily the most representative acts of international environmental law and the implementation practice of States and international institutions, choosing the most often cited principles and the most often used wording of these principles and seeking to elaborate provisions which would be as general as possible but would also have a specific legal content.

Another task of the groups of experts was to prepare a text with a clear added value in terms of the development of international environmental law. The draft Global Pact for the Environment was so designed as to facilitate its implementation in national policies and, as a result, in the provisions of national law. Therefore, an attempt was made to achieve a balance between rights and obligations in the wording of the provisions of the draft, taking many circumstances into account, including the special situation of developing countries. This is why its objective range covers not only States, but also non-state actors which have an important role to play in the implementation of environmental law.

2. THE WHITE PAPER “TOWARD A GLOBAL PACT FOR THE ENVIRONMENT”

So-called white papers are documents which often accompany the lawmaking activities of different involved and interested parties, explaining both the reasons for launching a lawmaking initiative in a given legal space and its general objectives. White papers also make it possible to follow the train of thought of the authors of a legal act and the ratio legis for the adoption of a specific content and form of a given act/document. Similar assumptions also accompanied the publication of the White Paper on the draft Global Pact for the Environment, which not only showed the perspective of the legal space in which the draft was elaborated, but was also a sui generis commentary on the provisions which still had an open nature at the draft stage.

The authors of the White Paper accompanying the promotion of the Pact drew attention to a number of phenomena in contemporary international environmental law which provided the ratio legis for the proposed provisions and also the elements incorporating the draft Global Pact into the present body of the norms of international environmental law as a branch of universal international law. From this perspective, the White Paper also contained arguments justifying the launch of work to prepare the Pact and its adoption, arranged in five chapters with their contents referring to such issues as: 1) a diagnosis of the status of contemporary international environmental governance; 2) the proliferation and fragmentation of international environmental law; 3) the Pact as a vehicle for harmonisation of the principles of international environmen-
tal law; 4) the _ratio legis_ for the adoption of a legally binding agreement; 5) the character and functions of the Pact in international legal transactions.

**Ad 1)** The draft Pact is a document corresponding to the contemporary dynamics of the development of international environmental law by adopting the global approach to environmental governance based on a catalogue of codified principles of that law. The proposed catalogue of principles referred to the principles laid down primarily in acts of so-called soft law which had been widely appreciated by the international community; specifically, in the 1972 Stockholm Declaration, the 1992 Rio Declaration and the 1982 World Charter for Nature, as well as to the Sustainable Development Goals.

As said in the White Paper, the aim of the Pact is to codify the main principles of environmental law laid down in different documents with the character of soft law, which would play in the future such a role as the one played by the 1966 Human Rights Covenants with respect to the 1948 Universal Declaration of Human Rights by making these principles legally binding.

As demonstrated by the practice of international legal transactions, at the present development stage of international environmental law, new impetus must be given to environmental governance which would be based on the principle of integration. In the course of the United Nations Sustainable Development Summit in September 2015, the United Nations General Assembly adopted the document “Agenda 2030 for Sustainable Development” based on 17 Sustainable Development Goals (SDGs). It should be noted that the SDGs were part of a really new global strategy because they did not set sectoral commitments but formulated objectives to be achieved in all the sectors covered by the SDG concept. Although these objectives were not binding themselves, they established a common action framework for all the entities engaged in socioeconomic transactions, starting from the national level, through the regional one, to the global one.

The legitimacy of referring to exactly those documents in the White Paper was supported by arguments resulting, among others, from the dynamics of constitutionalisation of principles relating to the environment at the level of national constitutions and the recognition of these principles as legally binding in the case-law of national courts, including the Supreme Courts. In this way, the principles of international environmental law at the global level were strengthened by relevant provisions of national constitutions.

The inclusion of principles laid down in the provisions of national constitutions in the draft Pact was an expression of a growing consensus on their validity. The case-law of national courts, in particular, the case-law of the Supreme Courts, is an additional legal instrument in the process of development of these principles, since it affects the whole national legal system. Codifying the basic principles which are implemented or are to be implemented at the national level, too, the Global Pact for the Environment will also support the

---

desirable process of constitutionalisation of the rights and obligations of different entities in respect of the environment.

Ad 2) The authors of the draft Pact sought to elaborate a document on the content of which there a consensus could be reached, based on numerous examples of compliance with the provisions of the declarations of principles and backed by both States and civil societies, in respect of compliance with the fundamental principles relating to the environment.

Arguing for the purposefulness of the codification of the principles of environmental law, the authors of the White Paper carried out a perspective of general legal acts with the character of soft law, such as the 1972 Stockholm Declaration, the World Charter for Nature adopted in 1982 by the United Nations General Assembly and the 1992 Rio Declaration.

The process of reaffirmation, strengthening and dissemination of the principles which has unfolded since 1972, among others, in the abovementioned acts of soft law indicates the expectations of the international community concerning the codification of the principles of international environmental law. It should be noted that as early as 1987 the so-called Bruntland Report was extended with an Annex proposing principles of environmental law and sustainable development, which had been adopted by the Expert Group of the World Commission on Environment and Development. Subsequently, in 1995 the Expert Group on identification of principles of international law for sustainable development (working for the UN Commission on Sustainable Development) presented a report on the principles relating to the environment. Another attempt to build a catalogue of principles was made in the New Delhi Declaration of Principles of International Law Relating to Sustainable Development, adopted by the International Law Association (ILA) in 2002, which contributed substantially to this process. It would also be difficult to overestimate the role which the International Union for the Conservation of Nature (IUCN) has played in this matter.

Thus, the draft Global Pact for the Environment builds on a series of previous actions and is a sui generis crowning achievement based on the efforts taken to date by the international community to codify the principles of environmental law.

Ad 3) As conceived by the authors of the draft Pact, it is expected to become a vehicle for harmonisation and consistency of international environmental law. It is also expected to be a means of minimising the effects of normative proliferation of multilateral environmental agreements which has led to fragmentation and ad hoc governance of environmental issues and a remedy to the inconsistency of environmental obligations under different legal instruments.
One of the main tasks of the Global Pact for the Environment is the systemic ordering of the principles of international environmental law. The execution of this task is essentially important for the reception of the project, since international environmental law is characterised by a high level of proliferation and fragmentation. Apart from a dozen or so general documents with a universal character, such as declarations which are not legally binding, in the space of international law hundreds of multilateral sectoral agreements are in effect. The authors of the White Paper point out that the main drawback of the sectoral approach to environmental protection is its limitedness. Paradoxically, while promoting international cooperation as a means which the international community applies to cope with global environmental problems, international environmental law attempts to solve these problems in a fragmentary manner, whereas scientific research demonstrates the interdependence of all the aspects of environmental protection.

As the number of environmental agreements grows it becomes increasingly difficult to implement them. States often voice this, in particular, during discussions at the conferences of the parties to different treaties. The inclusion in the Pact of general principles common to environmental law which are already applied in legal transactions will contribute to a systemic ordering of this branch of international law. The subsequently adopted sectoral agreements would be interpreted with reference to the general rules which would have a universal character and horizontal functions with respect to the system of international environmental law.

Ad 4) As a document with binding force, the Pact will strengthen the codified principles, constitute a source of legal certainty and also consolidate the existing standards of the principles of international environmental law; moreover, it will contribute to the direct effectiveness of the principles and the progressive development of international law.

In the authors’ opinion, the fact that States have already adopted in practice certain soft law standards included in the draft Pact reflects the process of formation of customary norms. An international custom arises from two elements – the consent of States to a practice and their recognition of the practice as law. Although international environmental law is a relatively young branch of law, whereas a custom usually forms over a long period of time and on the basis of a repeated practice of States, but – as the authors of the White Paper note – certain customary principles of this law have already been identified, as e.g. Principle 21 of the Stockholm Declaration prohibiting damage to the environment of another State, which principle was recognised by the International Court of Justice (ICJ) in its advisory opinion of 8 July 1996 on the legality of the use of nuclear weapons and its judgement of 20 April 2010 in the case of Pulp Mills.

In the opinion of the authors of the draft Pact for the Environment, the proposed catalogue of legally binding principles will effectively fill in gaps in the

---

5 ICJ Rep. 1996.
systemic approach to environmental law. As rightly emphasised by the authors of the White Paper, national courts are the best place for rulings to take into account the national specificity in determining the importance of the general principles laid down in the Pact when ruling in cases on the consistency of States’ actions with these principles.

Ad 5) As conceived by its authors, the Pact is expected to be a living and evolving instrument, so designed as to support actions for the environment at both national and international levels. The Global Pact for the Environment was designed as an instrument for unifying and structuring environmental law in a longer term. Therefore, the provisions of the draft Pact are as general as possible and create a wide category of legal requirements rather than a catalogue of principles formulated in detail. Thus, generally formulated principles will provide guidance for the introduction of detailed and specific norms. Due to their general character, they are an instrument which can be applied to meet the individual needs and requirements of a given environment. As rightly emphasised by the authors of the White Paper, the principles thus formulated should greatly facilitate negotiations on the adoption of the draft Pact. Due to both their openness and their abstract and general character, it will be possible to adjust them in time and space to the varied conditions of the different legal, political and cultural systems of particular States.

As emphasised by the authors of the White Paper, one of the main objectives of the Global Pact for the Environment is to strengthen the effectiveness of the principles of environmental law, among others, by changing their status from soft law principles to those of hard law by adopting a multilateral treaty. For this reason the Pact must be accompanied by a monitoring mechanism which would ensure the effectiveness of its provisions and is primarily conceived as a forum for an exchange of views among the interested parties and those engaged in the process of environmental protection.
II. CONSTRUCTION OF THE DRAFT PACT

The construction of the draft Pact is an example of the classic structure of a multilateral international agreement. The draft opens with a preamble. Although *sensu stricto* it is not part of the binding provisions of the Pact (as these are included in the disposition) it provides valuable information on the axiological basis, objectives and tasks of the Pact. Therefore, it can play a key role in its interpretation, in accordance with the provision of Article 31(2) of the Vienna Convention on the Law of Treaties.

The preamble gives the basic reasons for creating the draft Pact. Among others, it mentions the growing threats to the environment and the need to respond to them at the global level to ensure better protection of the environment. It also refers to the basic legal acts, such as the 1972 Stockholm Declaration, 1992 Rio Declaration, the 1982 World Charter for Nature, the document “Sustainable Development Goals” adopted by the General Assembly of the United Nations on 25 September 2015, the 1992 United Nations Framework Convention on Climate Change and the 2015 Paris Agreement. It also notes the fact that the planet is losing in an unprecedented manner the elements

---

7 The text of the draft Pact for the Environment, the text of the White Paper and the List of Experts can be found on: pactenvironment.org
of its biodiversity and that this requires urgent action. It also emphasises the need to reaffirm the principle that using natural resources we should ensure the ability of ecosystems to recover, including the capacity to protect biodiversity and ensure human well-being. The preamble recalls that the challenges posed to us by the threats on our planet require close cooperation and the launch of action according to the common but differentiated responsibilities and capabilities, in light of the different national circumstances.

The preamble also recalls the mutual linkages between environmental protection and human rights, the protection of the rights of the indigenous population, as well as intergenerational and intragenerational justice. It underlines the role of non-State actors in environmental protection and recalls the vital role of women in achieving sustainable development goals. It emphasises the fundamental role of science and education. The preamble also indicates a truly global ambition of the Pact to work towards unification of the principles of environmental law.

In the disposition, as intended by the authors of the draft Pact for the Environment, Articles 1 to 21 codify the principles laid down in the provisions under the following titles: Article 1 - Right to an ecologically sound environment; Article 2 - Duty to take care of the environment; Article 3 - Integration and sustainable development; Article 4 - Intergenerational Equity; Article 5 - Prevention; Article 6 - Precaution; Article 7 - Environmental Damages; Article 8 - Polluter-Pays; Article 9 - Access to information; Article 10 - Public participation; Article 11 - Access to environmental justice; Article 12 - Education and training; Article 13 - Research and innovation; Article 14 - Role of non-State actors and subnational entities; Article 15 - Effectiveness of environmental norms; Article 16 - Resilience; Article 17 - Non-regression; Article 18 - Cooperation; Article 19 - Armed conflicts; Article 20 - Diversity of national situations; Article 21 - Monitoring of the implementation of the Pact.

The provisions of Articles 22 to 26 are final clauses typical of international agreements. Article 23 of the Pact is a typical ratification clause. The Pact will be open for ratification, acceptance or approval by States and international organizations.

Article 24 concerns its coming into force (three months after the date of deposit of the last instrument of ratification, approval, acceptance or accession required for it to enter into force). In turn, Article 25 governs the procedure for denunciation of the Pact, under which the Pact may be denounced in written form three years after its entry into force. The denunciation takes effect after one year from the date when the notification of denunciation is submitted (the model has been drawn from the Paris Agreement).

---

8 Since the draft Global Pact for the Environment has not been translated into Polish, the titles of its individual provisions have been translated by the author of this study.
III. A REVIEW OF THE PRINCIPLES CODIFIED IN THE DRAFT PACT

1. INTRODUCTORY ISSUES

Since it follows from the White Paper that the basic goal of the Global Pact for the Environment is to codify the principles of environmental law, it is important to consider what type of principles the proponents of the project had in mind; in particular, as they clearly indicated their sources. In general, it can be said that two trends have emerged in the practice of States’ cooperation in the field of the environment for at least thirty years. On the one hand, there has been a growing awareness of the international community of the need to protect the environment at the global scale, while, on the other, they have been reluctant to make legally binding commitments. This has produced such a great diversity of legal acts with an unspecified character in international legal transactions. The price which the international community pays for such a situation is the unclear character of obligations under these acts. The legal status of these norms becomes even more important in relation to the ruling practice of national and international courts.  

9 See the case of the Gabčíkovo-Nagymaros project, ICJ 92/1997. For more on the judicial practice in such matters see “Compendium of Summaries of Judicial Decisions in Environment Related Cases (With Social Reference to Countries in South Asia)”, SACEP/UNEP/NORAD Regional Symposium on the Role of the Judiciary in Promoting the Role of Law in the Area of Sustainable Development, Colombo, Sri Lanka, 4-6 July 1997.
Using the construction of distinguishing between policies and principles and norms of law, the doctrine indicates the decisive criterion of responsibility which can be derived from the content of a given norm as one of the ways of identifying norms with a binding character. However, there is no doubt that under international law the first and basic criterion is the determination whether a given principle is of a normative character, while another is whether it has been laid down in an international treaty or whether it meets the requirements for being qualified as a norm of customary law.

There is no doubt that the 1992 Rio Declaration adopted in the course of the World Summit was a document with a representative character in terms of the determination of the legal nature of the principles established in it, since as an act of soft law it enjoyed a consensus of almost all the international community as to the definition of a framework for desirable behaviour. Its provisions laid down a catalogue of principles accepted by the international community and with a fairly specific normative position as confirmed by their presence in acts of positive or customary law. Therefore, the Rio Declaration was one of the basic reference points for the authors of the Global Pact for the Environment.

The first two provisions of the draft Pact for the Environment, i.e. Articles 1 and 2 codifying the right to live in an ecologically sound environment and the duty to take care of the environment, constitute two pillars of the Pact and provide the basis for a number of horizontal principles which have already been laid down in environmental law. On this basis, the Pact lists a number of rights and obligations with a horizontal dimension, including general obligations, procedural rights and leading principles of public policies. It can thus be said that these two provisions create a solid basis for arguments supporting the view that the draft Pact provides the grounds for being recognised as a third generation codification of human rights.

2. AN OVERVIEW OF PRINCIPLES

The provision of Article 1 and, at the same time, the first pillar of the draft Global Pact for the Environment codifies the right to live in an ecologically sound environment. In addition to the duty to take care of the environment, this right is one of the two pillars of the Pact. This Article provides that every person has the right to live in an environment adequate for their health, well-being, dignity, culture and fulfilment. This right was clearly articulated in the Stockholm Declaration (Principle 1) and also, in a more general way, in the 1992 Rio Declaration (Principle 1). This right can be found in the constitutions of many States and is now considered to be a general principle of environmental law.

Compared with a similar provision in the Stockholm Declaration, the wording in the Rio Declaration is more general since it no longer refers to the

fundamental character of this right. Still, one cannot fail to see its impact on the process of formation of a customary norm through the general introduction of a provision on an environment (a healthy, adequate, sound one etc.) into national constitutions and into international treaties with very different ranges of objective regulation, such as e.g. the international labour law or the regulations on migrant workers, trade, indigenous peoples, armed conflicts, hazardous waste and public health. The right to a sound quality of the environment has also been codified by regional acts on human rights, the African Charter on Human and Peoples Rights, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights or the European Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters which codifies the procedural aspect of this right (the so-called Aarhus Convention).

The second pillar of the Pact is laid down in its Article 2 and provides for the duty to take care of the environment. In light of its provisions, every State or international institution, every person, natural or legal, public or private, has the duty to take care of the environment. To this end, everyone contributes at their own levels of functioning in their community to the conservation, protection and restoration of the environment and the integrity of the ecosystems on Earth. A similar commitment, although not always phrased as in Article 2 of the Pact, but nevertheless containing its elements which need to be interpreted in a broader context of international law, can be found in many other legal acts, such as e.g. Article 192 of the 1982 Convention of the Law of the Sea or Article 2 of the 1979 Geneva Convention on Long-range Transboundary Air Pollution. The same is laid down, too, in the provisions of Articles 2, 3, 4 and 7 of the Stockholm Declaration or the Rio Declaration in the provision of Principle 2 which reaffirms the international and transboundary range of this principle, providing that, in accordance with the Charter of the United Nations and the principles of international law, States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. In conjunction with Principle 7 of the Rio Declaration, States must cooperate for the purpose of “the conservation, protection and restoration of the integrity of the Earth’s ecosystem”.

The draft Pact uses a general formula of this principle in order to guarantee the widest possible range of obligations arising from the duty to take care of the environment. This duty applies to all entities, thus, States and non-State actors, as well as public entities, including every natural and legal person, as provided for in Article 2.

---


13 For more on this issue see M.M. Kenig-Witkowska, “Prawo do środowiska w prawie międzynarodowym” (“The right to the environment in international law – in Polish”), „Państwo i Prawo”, 2000, No. 8.
Article 3 of the Pact is devoted to the principles of integration and sustainable development. It provides that the Parties to the Pact are obliged to integrate the requirements of environmental protection into all their policies at their planning and implementation stages, at the national and international levels, particularly in order to promote the fight against climate change, the protection of oceans and the maintenance of biodiversity. The draft Pact clearly indicates the integrating character of the norm, which may possibly result from the implementation of the concept of sustainable development. It is important to note that the formulation of the principles of integration and sustainable development in Article 3 of the draft Pact is close to the approach to sustainable development as a goal to be achieved, as presented by the Treaty of Lisbon in Article 3 of the Treaty on the European Union in conjunction with Article 11 Treaty on the Functioning of the European Union containing the so-called integration clause\textsuperscript{14}.

The need to achieve sustainable development became a key issue in the scope of international environmental governance after the concept was put forth at the summit in Rio de Janeiro in 1992 and was developed in the form of 17 Sustainable Development Goals which were adopted in 2015. The Global Pact for the Environment specifies the Sustainable Development Goals (SDGs) as the principle of integration in environmental law by incorporating SDGs into each public policy, including development policy, as well as into production and consumption patterns.

It follows from its meaning resulting from the contents of Principles 3, 4 and 8 of the Rio Declaration that the right to development must be exercised so as to equitably combine the “developmental” and “environmental” needs of the present and future generations and that environmental protection should be an inseparable element of activities related to development processes.

The wording of the provision of Article 3 of the draft Pact takes into account the discretionary character of State actions in these matters and, thus, it provides sui generis guidance for the interpretation of the provisions of the treaty and the manner of its implementation.

Just as the principle of integration, the principle of intergenerational equity laid down in Article 4 of the Pact represents an ambition to gain a horizontal influence on environmental law, since it provides that the principle of intergenerational equity affects decisions concerning the environment. The present generations must ensure that their decisions and actions do not hamper the future generations in meeting their needs. The need to meet “aspirations” or “needs” was already mentioned in the 1972 Stockholm Declaration (in its Article 1). The intergenerational capital was mentioned in the Annex to the 1987 Bruntland Report, in the principles of environmental protection and sustainable development, such as the principle of intergenerational equity. Provisions of this type have been included in all the main intentional agreements, e.g. in the Rio Declaration, the United Nations Framework Convention on Climate Change, the Aarhus Convention on Access to Information, Public Par-

Article 5 of the Pact concerns the duty to prevent environmental harm. This duty is universally recognised in international law. The Pact emphasises both its transboundary and internal dimensions. Article 5 provides that the necessary measures should be taken to prevent environmental harm. States have the duty to ensure that activities under their jurisdiction or control do not cause damage to the environments of other States or in areas beyond the limits of their national jurisdiction.

They should also take measures to ensure that the instrument of an environmental impact assessment is applied to the intended activities at the stage of a plan or a project likely to have a significant adverse impact on the environment. In particular, States should monitor the effects of such activities, plans or programmes which they authorise or engage in, in view of their obligation to exercise due diligence.

The duty to prevent harm can be found in many international agreements, such as e.g. the 1982 Convention on the Law of the Sea (Article 192), the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context (the preamble and Article 2), the 1992 Convention on Biological Diversity and many other legal acts, also including Principles 2, 13, 18 and 19 of the Rio Declaration. In practice, it consists of two obligations: to prevent damage (Principle 2 of the Rio Declaration) and to notify other States of emergencies or, more generally, in case of activities which may cause damage in the territory of other States (Principles 18 and 19 of the Rio Declaration).

Article 6 is devoted to the principle of precaution, applicable to the situation where due to a lack of scientific certainty a given issue falls within the range of a potential risk. The principle of precaution has been widely inscribed into international and national legal acts. The Pact adopts a form of the principle of precaution which ensures its adequate expression in relation to the principle of prevention.

These two principles are sometimes combined and analysed together and certain representatives of the doctrine believe that they can be used interchangeably. In the opinion of others, the principle of prevention should not be confused with the principle of precaution, since in its essence its impact reaches deeper into the sources of environmental protection. Indeed, if the principle of prevention is followed a measure to protect the environment must be taken at the earliest stage when measures are launched – indeed, at each such stage. In contrast, it follows from the essence of the principle of precaution that the absence of scientific evidence indicating the possibility of a phenomenon or process occurring should not be a reason for failing to take measures to prevent serious and irreversible damage. Still, one cannot fail to see a genetic relationship existing between these two principles which results from the implementation of the overriding goal of environment-
tal protection as indicated, among others, by the provisions of Principle 15 of the Rio Declaration.

The principle of precaution has been inscribed in many legally binding acts of international law, such as e.g. the 1985 Vienna Convention for the Protection of the Ozone Layer (the preamble), the 1992 United Nations Framework Convention on Climate Change (Article 3) and the 2000 Cartagena Protocol on Biosafety to the 1992 Convention on Biological Diversity (Articles 10 and 11). The principle of precaution has been laid down in many acts of soft law, such as e.g. the 2015 Oslo Principles on Global Climate Change Obligations (Principle 1) or the 2016 draft International Covenant on the Human Right to the Environment.

Article 7 concerns damage done to the natural environment. The wording of the first part of the provision is fairly general, providing that the necessary measures should be taken to remedy environmental damage. Given that the addressee of this obligation is not specified it can be presumed that Article 7 should be interpreted in light of the provision of Article 2 of the Pact laying down a universal duty to take care of the environment. The other part of Article 7 provides that State-Parties to the Pact should notify other States of any natural disasters or other emergencies likely to produce sudden harmful effects on the environment. States are obliged to cooperate and help in this respect. Principle 22 of the Stockholm Declaration and Principle 13 of the Rio Declaration establish the principle of liability, which means that States should adopt legal regulations on remedying environmental damage, notify of such
damage other States which may be affected by the damage and also impose on them the obligation to cooperate.

In this context, it is important to consider the issue of the relationship between the concepts of damage and environmental pollution since many treaties concerned with the environment use both terms. Characteristically, most regulations fairly precisely define the concept of pollution, while treating the concept of damage in general terms. Thus, it can be concluded that the effectiveness of the application of a classic idea of State liability in international law to environmental damage is quite problematic\(^\text{17}\). From the case-law of the International Court of Justice the principle can be inferred that the State is obliged to prevent environmental damage and refrain from actions which may cause such damage. The Court reaffirmed the principle that a norm of customary law was the obligation to respect the environment of other States or the environment beyond the jurisdiction of any State\(^\text{18}\).

Article 8 concerns the liability under the “polluter pays” principle (PPP), which means that the polluter must bear the costs of pollution, in accordance with Principle 16 of the Rio Declaration and many international agreements. Principle 16 cited in the above sentence provides that national authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment. Many authors do not consider this Principle 16 to be a legal norm on the grounds that its subject is not defined\(^\text{19}\). The compromise wording of this principle in the Rio Declaration also indicates States’ doubts as to its legal character at the level of standards applicable in international relations. Therefore, part of the doctrine considers that the PPP has not the character of a norm of customary law\(^\text{20}\).

There is no doubt, however, that the “polluter pays” principle has a normative character. After the provision on the PPP principle had been incorporated into the Rio Declaration it became a principle with a universal character. The PPP principle has been integrated into many acts of international law and internal practice of many States. The objective which it is expected to achieve is to ensure that the polluter is liable rather than to make him bear the joint responsibility for the actions of other polluters. The attribution of costs of remediating damage to one polluter results from the fact that he has polluted the environment\(^\text{21}\).
Many authors dealing with environmental law point out that the content and application of the PPP principle still remain open to interpretation, in particular, in respect of the types and limits of costs. This does not mean that the PPP principle has not the character of a legal norm, even when considering its fairly “soft” formula laid down in Principle 16 of the Rio Declaration.

Articles 9, 10 and 11 apply to procedural commitments related to access to information, decision-making and access to justice in environmental matters. These rights have been listed in many different acts of international law concerning the environment, both those with the character of soft law, such as the Rio Declaration (Principle 9), and binding international agreements, such as the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Articles 1, 6, 7, 8 and 9), the 2015 Paris Agreement (Article 12) and many others, including acts of soft law, such as e.g. the 2000 Earth Charter, the 2016 ILA Declaration adopted in New Delhi or the 2016 draft International Covenant on the Human Right to the Environment (Articles 8 and 9). The practice of their application at the national level also provides the ground for their inclusion in the catalogue of the principles of environmental law.

It follows from the Articles of the Pact listed above that, firstly, every person has a right of access to environmental information, without having to demonstrate their interest. Public authorities are obliged to collect such information and make it available to the public. Every person also has the right to participate in the process of making decisions which have a significant effect on the environment.

Access to justice is strictly related to the effectiveness of the Pact. In accordance with the provision of Article 10 of the Pact, the Parties should ensure the functioning of an effective and affordable judicial system, including administrative measures, as well as including redress and remedies for damage. Taking into account the fact that this principle will be applied in countries with different judicial systems, the wording of the Pact is sufficiently general to ensure that the national traditions in this scope can be respected.

Article 12 concerns the obligation to ensure education and training on the protection and improvement of the environment, which has been reaffirmed in many conventions (e.g. the 1992 Convention on Biological Diversity (Article 13), the 2015 Paris Agreement (Article 12)), as well as in instruments of soft law, such as e.g. the Stockholm Declaration (Principle 19). It should be borne in mind that environmental education should include the basic elements of the principle of sustainable development (SDG 4).

In accordance with Article 12 of the Pact, the Parties should ensure to the greatest possible extent environmental education not only for the young generation but also for adults. Its purpose is to induce in society responsible behaviour in protecting and improving the quality of the environment. The Parties of the Pact should ensure the freedom of expression and dissemination of envi-

The requirements set for education in this provision of the Pact contribute not only to the emergence of the environmental awareness (both individual and collective) but also to the awareness regarding the effective enforcement of rights and obligations related to the environment. In general, it can be said that the purpose of this principle is to shape public policy.

The purpose of Article 13 is to achieve a similar objective. Indeed, it lays down the obligation to promote research on ecosystems and the introduction of innovations in this scope. States should promote, to the best of their ability, the development of the best knowledge of ecosystems. The State-Parties are obliged to cooperate in this scope, including through exchanges of scientific and technological knowledge, as well as technological innovations. This principle has been inscribed into the contents of many acts of international law, such as e.g. the 1997 Convention on Long-range Transboundary Air Pollution (Articles 3 and 4), the 1982 Convention of the Law of the Sea (Article 200), the 1985 Vienna Convention for the Protection of the Ozone Layer (Article 4), the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (Article 9), the United Nations Framework Convention on Climate Change (Article 4.1 and Article 5), the 1992 Convention on Biological Diversity (Article 1) and the 2015 Paris Agreement (Articles 10.1, 10.2 and 10.5). Reference was also made thereto in the Rio Declaration (Principle 9) and the Stockholm Declaration (Principles 12 and 20).

Article 14 establishes an essential role of non-State actors and local entities in the implementation of the principles of environmental protection under the Pact. It provides that the Parties to the Pact should take the necessary measures to encourage non-State actors, civil society, economic actors, cities and regions to participate in the process of environmental protection. The provisions of the following acts of soft law have conferred an application-related value to this principle: the 2002 Johannesburg Declaration (Principles 27 and 29); the ISO 26000 international standards, the 2010 guidance on social responsibility; the 2011 OECD Guidelines for Multinational Enterprises; UN Resolution A/69/L.85, the 2015 Objectives of Sustainable Development; and many others, as well as international agreements, such as e.g. 1992 Convention on Biological Diversity (Article 10(e)).

Article 15 addresses in general terms the obligation of the State-Parties to ensure the effectiveness of environmental norms, in accordance with Principle 11 of the Rio Declaration, the 2015 version of the IUCN Pact and the 2016 draft International Covenant on the Human Right to the Environment. This principle is based on the requirement for the adoption and implementation of the necessary legal measures. It can be inferred from Article 1 that these measures will ensure the execution of the standards ensuring the human right to an ecologically sound environment, in light of the principle providing for the duty of all the entities listed in Article 2 of the draft Pact to take care of the environment. Article 15 provides that the Parties are obliged to adopt effective environmental laws and to ensure their effective and fair implementation and enforcement.

In interpreting this principle, it is important to note the wording of the second sentence of Principle 11 of the Rio Declaration, which is often ignored in analyses by the doctrine. It contains the element of the common but differentiated
responsibilities, which, paradoxically may be in contradiction with the principle of intergenerational equity.

Articles 16 and 17 represent the efforts by the authors of the Pact to promote the principle of progressive and forward-looking (in view of the emergence of new technologies) development of environmental law, among others, by codifying the principle of strengthening of the capacity of ecosystems to recover (the principle of resilience) and the principle of non-regression. The principle of resilience originates from the concept of "improvement" of the environment laid down in the Stockholm Declaration (Principle 1) or from the spirit of the 1982 World Charter for Nature. In accordance with this principle, when translated into legal measures taken by State authorities the purpose of environmental policy must be not only to remedy environmental damage but also to strengthen the capacity of ecosystems to recover and achieve an equilibrium in the functioning of ecosystems.

Article 17 provides that the Parties should refrain from adopting norms and launching activities which result in reducing the global level of environmental protection guaranteed by the current provisions of law. Indeed, the principle of non-regression is not new in lawmakers. Its elements can be found in Principle 1 of the Stockholm Declaration or in Article 4(3) of the Paris Agreement providing that States’ new, successive commitments to reduce emissions should be larger than those made previously. The principle of non-regression forbids public authorities to make law in order to lower the previously existing level of
Article 17 provides that the Parties should refrain from adopting norms and launching activities that result in reducing the global level of environmental protection guaranteed by the current provisions of law.

Article 18 reafirms the obligation to cooperate for environmental protection at the global scale. This provision refers to the Rio Declaration (Principles 14 and 18), the Stockholm Declaration (Principles 7 and 27), the 1982 Convention of the Law of the Sea (Articles 123 and 198), the 1992 Convention on the Transboundary Effects of Industrial Accidents (the preamble), the 1992 Convention on Biological Diversity (Article 14e) and many others.

Article 18 provides that the Parties to the Pact are obliged to cooperate in order to conserve, protect and restore the integrity of the Earth's ecosystem in good faith and in a spirit of global partnership for the implementation of the provisions of the present Pact. The requirement for cooperation is addressed to the whole system of environmental governance and assumes that States should take action together to conserve, protect and restore the integrity of ecosystems. This provision points out the need to promote the truly international solidarity for the environment, rooted in the community united by the solidarity of living creatures.

In order to determine the normative value of Article 18, the first part of the provision should be separated from the remainder of its content. Indeed, the other part of the provision lays down the principle of the obligation to cooperate in good faith and in a spirit of global partnership, which is universally known in international law. However, given the highly abstract wording which expresses the principle of cooperation, it should be recognised that this is a legal norm rather than a principle, since it concerns an action intended to achieve a specific result.

Article 19 extends the principle of environmental protection to the situations of armed conflicts, in accordance with Principle 24 of the Rio Declaration. It provides that States should take measures to protect the environment in the course of armed conflicts, in accordance with the norms of universal international law governing these matters. The following issues are associated with this position: 1) the extent to which the treaty norms of international environmental law apply at the time of armed conflicts; 2) the scope of general principles of environmental protection in the norms of the international law of armed conflicts; 3) the scope of detailed principles of environmental protection in the norms of the international law of armed conflicts.

Due to the wording of Article 19 of the draft Pact, the range of the regulation does not include the problem of environmental protection during internal armed conflicts, although it is exactly during such conflicts that the environment is exposed to the greatest risk of degradation and irreversible losses. The negative impact of actions of the military on the environment in peacetime should also be monitored.

23  Ibidem, p. 249.
This point of view indicates that the interpretation of the provision of Article 19 should take into account the requirements arising from the principle of sustainable development.

Article 20 codifies the principle of common but differentiated responsibilities, in accordance with Principles 9, 10, 12 and 23 of the Stockholm Declaration and Principles 6, 7 and 11 of the Rio Declaration. This principle has been applied in many international agreements and acts of soft law, to mention only the 1982 Convention of the Law of the Sea (the preamble), the 1985 Vienna Convention for the Protection of the Ozone Layer (the preamble), the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (Articles 5 and 10.1), the United Nations Framework Convention on Climate Change (the preamble and Article 3), the 1992 Convention on Biological Diversity (Article 20), the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change (Articles 10 and 13(4)), the 2015 Paris Agreement (Article 2.2, Article 4(3, 4, 5, 6, 19) and Article 9.3), the 2002 ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development and the 2015 Oslo Principles on Global Climate Change Obligations.

Article 20 provides that the special needs of developing countries, particularly the least developed and those in a special situation because of their "environmental" conditions, should be taken into account. Furthermore, it provides for the application of the principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances.

The purpose of the principle of taking into account the special situation of developing countries in constructing their commitments under international law is to ensure equality in international relations. It is based on a conclusion drawn from the functioning of the international community that States have reached different levels of development and have made different contributions to both the protection and degradation of the environment, although both the doctrine and practice of environmental protection have long criticised the incorporation of different categories of subjects into environmental law and supported the unification of the subjects of this law to one category.

3. MONITORING MECHANISM

One of the major objectives of the Pact is to consolidate the principles of environmental law. The purpose of the transition from soft law to legally binding norms by means of such an instrument as the Pact is to strengthen the effectiveness of the principles governing legal transactions in the field of the environment, e.g. by the ability to refer to them before national and international courts. Therefore, in addition to the codification of principles, the Pact must be accompanied by the monitoring mechanism, which should e.g. ensure their effective implementation before the issues related to the application of these principles are considered by the court.

The needs of developing countries and those in special circumstances will also be taken into account.
In consequence of this, under Article 21, the committee of independent experts is established. Its task is to facilitate the Parties’ implementation of the obligations laid down in the Pact, instead of the imposition of penalties and the use of court procedures, in accordance with the principle of transparency and taking into account the diversity of situations in different countries.

It follows from the practice of international legal transactions that the choice of an extrajudicial mechanism which would facilitate the fulfilment of obligations on the basis of a monitoring system seems to be a suitable one given the challenges faced by environmental law. Such a solution ensures the necessary flexibility, the capacity to adapt and the effectiveness of the implementation of the principles laid down in the provisions of the draft Pact. The mechanism laid down in Article 21 directly refers to the so-called compliance mechanism applied in international environmental law.

This mechanism can be recognised as one of the most significant achievements accomplished by the doctrine and practice of international environmental law. The emergence in treaties of special procedures to be applied in case there is a discrepancy between State practice and the provisions of a treaty (procedures in case of non-compliance) is considered to represent progress towards achieving the effectiveness of the norms of environmental law. Their essential feature is that they do not introduce the responsibility of a State under international law for non-compliance with law. Their primary purpose is to help improve the functioning of the provisions of a treaty; not only when the treaty institutions are notified of such a discrepancy by another Party or when the institutions have gained such information themselves, but also when the Party which fails to comply with the provisions of a treaty notifies itself the treaty institutions of non-compliance of its practice with its norms.

Procedures applied in cases of non-compliance are fairly generally specified and relatively hardly formalised; therefore, in terms of legal safeguards, they can raise a number of doubts, including the most important question whether these procedures do not close the possibility of using a system for the peaceful settlement of disputes as foreseen by international law. Treaties include a standard clause providing that the non-compliance procedure does not violate the principle of the peaceful resolution of international disputes, in accordance with the principles of the United Nations Charter.

Probably in order to achieve the objective of the Pact implying that the general principles laid down in it will constitute a framework to be filled with relevant content in specific cases and will be subject to interpretation by the courts, the draft Pact does not include such a clause. Moreover, the non-compliance procedure is based on the resolution of implementing problems in a non-confrontational manner, which usually brings a positive effect in the functioning of normative systems of environmental protection. It follows from the White Paper that the principles laid down in the Pact will be subject to interpretation by the courts at different levels, including international courts, while the Pact is guided by the principle of the peaceful resolution of international disputes under universal international law using the measures laid down in the United Nations Charter.
It is also important to note that there are at least two elements of non-compliance procedures which give them an advantage over other means of ensuring the effectiveness of implementation of the norms of international environmental law: they consist in enabling the launch of pre-emptive measures by identifying problems of compliance or non-compliance with norms and in placing emphasis on the remedial element, as a result of which, States are quite keen to make use of such mechanisms.
IV. INITIAL QUESTIONS AND COMMENTS

No draft multilateral international agreement is so perfect that it does not raise doubts among not only lawyers but also politicians. Indeed, it is politicians who are the first to forejudge its fate, because the ultimate effect of negotiations on an agreement is primarily the result of a compromise between the contracting parties, each of which has its individual interests, while the final effect in the form of consent to the adoption of a document for further stages of the negotiation process is a decision taken at the highest political levels of the State. Certainly, this remark is also true for the draft Global Pact for the Environment the subject matter of which – the environment – is difficult in legal terms; particularly so as it shows a broader perspective of regulation in the context of the care taken by the international community of the condition of a common good.

It is no wonder then that even a preliminary analysis of the draft Pact for the Environment raises certain doubts and questions which may emerge at the negotiation table. Some of them were already expressed by the participants in the conference mentioned at the beginning of this study. It was organised by the Columbia Center on Sustainable Investment on 20 September 2017 for the purpose of sui generis scientific promotion of the draft Pact before it was

The rising surface temperature of the oceans and ongoing acidification their waters, as well as detrimental effects of human activity are the main reasons for coral bleaching. It is estimated that 100% of coral reefs will disappear within next 100 years.
presented to the international community at the 72nd United Nations General Assembly.

Most debaters participating in the conference had no doubts that more actions should be taken to protect the environment at both the national and international levels. The debaters also confirmed the need to adopt a legally binding document, which would, while containing the basic principles, contribute to unifying environmental law. They also noted a positive effect of the Pact on the operational aspect of the concept of sustainable development. They also raised the issue of a positive effect of the holistic character of the Pact on the development of the so-called green audit in such governance areas as trade, investment and intellectual property.

The debaters also considered the need to codify the principles of so-called soft law, taking into account the fact that such agreements as the 1972 Stockholm Declaration and the 1992 Rio Declaration, contained in acts with the character of soft law, would still continue to be guidance for lawmakers and a pattern to be followed by the private sector. Their attractiveness consists in that they are not a political burden for States which would result from the risk of responsibility for failing to comply with an obligation under international law. The debaters also raised the issue that too much significance was attributed to the binding force of the Pact and somewhat skipped the issue of the effectiveness of implementing its provisions. Therefore, they proposed the introduction of a system of incentives and control mechanisms in order to ensure the greater effectiveness of its provisions. Some participants in the discussion also called for promotion of the Pact which would emphasise its potential for the protection and holistic governance of the global environment.

The first political comment came from Miroslav Lajčák, the Chairman of the 72nd Session of the United Nations General Assembly. In his opinion, the Pact initiative was a step towards strengthening the consistency and integration of the ample body of the existing international environment-related agreements and instruments. He said that, in light of this, the Member States should consider appropriate options of the form of the possible agreement, without losing sight of more than five hundred multilateral agreements governing this field of international relations. The Chairman of the UNGA encouraged States to look at the Pact initiative from the broad perspective of Sustainable Development Goals and to consider in this context the three pillars of sustainable development, i.e. the economic, social and environmental ones, and their inseparability from the point of view of the principles laid down in the draft Pact and the achievement of Sustainable Development Goals (SDGs). The Chairman called for the initiative to adopt the draft Pact to be supported by the United Nations system, civil society, the private sector, academia and other relevant entities which should be involved in this ambitious initiative, saying that their engagement was of key importance for working out the effect of the desirable transformation of the structure of environmental law at all the levels.

“Environmental problems are highly diversified and it is difficult to reduce them to a focal point in order to protect our planet.”

Soon after its promotion, many legal problems related to the draft Pact were initially verbalised by Susan Biniaz in her questions about the Pact. The objectives to be achieved by the proposed Pact for the Environment have been the basic issue informing many of the questions which have been asked. Since not many comments have been expressed to date by the doctrine and practice the questions posed should be primarily addressed with reference to the comments contained in the White Paper “Towards A Global Pact for the Environment”.

A review of the draft Pact and related documents, including the White Paper, shows that the main goal of the Global Pact is to form a general, uniform, consistent body of binding legal principles, in contrast to the now functioning fragmentarised body of principles with a varied nature, most of them with the status of soft law. This general goal of the Pact should be analysed in terms of the question whether the Pact has a chance of contributing to its achievement. In the context of the analysed content of the White Paper concerning the draft Pact, there is no doubt that the question can emerge as to whether it is desirable to unify the body of the principles of international environmental law, since – as the authors of the White Paper often note – environmental problems are very diversified and it is difficult to reduce them to a single denominator from the point of view of its protection, too. They admit that this fact generates one of the main strengths of environmental law and its weakness. Although the overwhelming majority of environmental protection instruments under international law have been designed in an individualised manner and so adjusted as to solve a specific problem, at the same time, they “lose sight” of the complexity of issues related to environmental protection, leading to overlapping obligations. The introduction of a catalogue of legally binding principles creates potential opportunities for coping with problems of this type.

Certainly, there are no objective comparative measures which would make it possible to ultimately assess the value of one or the other approach and its effectiveness. However, the purpose of the authors of the draft Pact was to find in a maze of different principles with a varied character provisions which would also enable a systemic approach to very specific issues and, hence, avoid overlapping obligations of in case of their collision.

The possible transformation of soft law principles into legally binding norms will not eliminate the former ones from legal transactions under international law. The possible doubts regarding the legal standards of particular principles can be resolved by the courts. E.g. the principle of precaution, which for many
States is only guidance on how the substantive nature of an obligation should be understood in the case where science fails to provide ultimate evidence, is legally binding or otherwise. Similarly, in many cases of State practice the principle of intergenerational equity is regarded as a standard which makes political decision-makers sensitive to the needs exceeding those of the present generations. Therefore, there will always be doubts about the cases of ambiguously formulated standards of principles used as the basis for elaborating legally binding regulations.

As rightly noted by Susan Biniaz, the achievement of the objectives of the Global Pact in the scope of the establishment of legally binding norms which could be cited in national courts, too, at least partly depends on the systems of the national legal regimes and is not only related to the implementation of the norms of international law. In turn, the national effectiveness of law as a result of the implementation of accepted international obligations depends on a very large number of factors, including the entities which are involved in this process.

In light of this, the question arises as to whether the provisions of the Pact should reflect the rights and obligations of the Parties to the Pact or, more broadly, codify international law? The purpose of the Pact is to codify principles; the States which are Parties to the Pact will participate anyway in the creation of practice and, thereby, the custom in this matter. International courts will also participate in this process, clarifying the principles and consolidating
them in the case-law. As explained in the White Paper, this purpose is also to be supported *mutatis mutandis* by the monitoring mechanism, including the so-called non-compliance mechanism. This issue is of very practical importance for legal transactions, as noted by Lord Robert Carnwath, Justice of Supreme Court of the United Kingdom, who spoke about Climate Justice and the Global Pact at the Judicial Colloquium on Climate Change and the Law in Lahore. In his opinion, from the point of view of practitioners the Pact can be regarded as a convenient sources of principle which are already well-settled in international and national law and provide for more detailed regulations at the State level. It can be seen that the codification of principles also brings self-evident benefits. From this point of view, the Pact would provide a strong and principled framework for the interpretation and development of law based on a globally shared vision of the environmental rule of law.

At this point, it should be noted that the Pact does not provide for any mechanisms for resolving disputes arising from its interpretation and application, although obviously the principles of universal international law apply to compliance with the provisions of the Pact. This remark brings to the mind a reflection on the liquidation of the Chamber for Environmental Matters of the International Court of Justice in the Hague, which could play the role of a sui generis “constitutional court” e.g. with its advisory opinions on the interpretation and application of the provisions of the Pact.

In the negotiation process, States will probably demand that the fairly generally drafted subjective and substantive scope of each of its provisions should be considered and clarified. It is important to discuss these issues not only for the sake of clarity of obligations but also from the point of view of the principle of reciprocity governing the obligations of the Parties to the Pact. It does not seem that the obligation imposed on the entities listed in Article 2 of the Pact to fulfil the broadly understood duty to take care of the environment and, accordingly, to comply with the provisions of environmental law at all levels, and the associated responsibility solely have a national character. This obligation does not solely result from norms addressing the broad aspect of obligations based on the standards of the principle of integration, either.

In light of the above, the question arises as to whether the Pact should directly govern the behaviour of individuals. In general, the subjects of international law include States, but also other entities to which States have conferred subjectivity. There is nothing special in that an international agreement imposes obligations directly on physical and legal persons, as provided for in Article 2 of the draft Pact. More and more often, individual entities become subjects of international law. Often, international agreements not only confer the status of subjects which enjoy rights onto individuals, but also impose on States the obligation to require their citizens to take appropriate action or to refrain from taking certain actions.

Let us look from this point of view at the content of Article 1 providing for the right to live in an ecologically sound environment, asking, just as Susan Biniaz

---

29 For some time in the doctrine of international law a discussion has been underway on the role of national and international courts in the strengthening of the principles of international law. For more on this issue see e.g. P. Sands, “Climate Change and the Rule of Law: Adjudicating the Future in International Law: Public Lecture”, United Kingdom Supreme Court, 17 September 2015.

30 The text of the speech can be found on the website: pactenvironment.emediaweb.fr/wp-content/uploads/2018/03/Lord-Carnwath-Climate-Justice-and-the-Global-Pact-26
did, whether this right is to be complied with by each Party to the Pact with respect to their own citizens or also with respect to the citizens of the other Parties to the Pact? There is no doubt that consideration should be given to the postulate expressed in the provision of Article 1 in terms which are appropriate for the norms of human rights, particularly in the context of the recurring concept of codification of the so-called third generation of human rights, including the human right to the environment. Commenting on Article 1 establishing the human right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment, J. Raith found it to be one of the most controversial provisions of the draft since it established a new universal, far-reaching human right to the environment\(^{31}\). She also pointed out its fairly general wording, the absence of reference to its implementation and also failure to provide for the institution of an individual complaint in this regard. This gap was also noted by I.M. Zlatescu who commented on it in the context of the Optional Protocols adopted to the Human Rights Covenants\(^{32}\).

Bearing in mind the position of the authors of the draft Global Pact on the Environment on this issue, as documented in the White Paper, at this point it is important to draw attention to the report of 24 January 2018 by J.H. Knox, the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment which was pre-

---

31 J. Raith, *The ‘Global Pact for the Environment’ – A New Instrument to Protect the Planet?*, op.cit.
pared for the Human Rights Council. The report, which puts some order into the perspective of the interaction between human rights and the environment, presents framework principles on human rights and the environment and addresses the human right to a safe, clean, healthy and sustainable environment. These principles provide the basis for States’ obligations under the human right to use a safe, clean, healthy and sustainable environment. It follows from the report that even without the formal recognition of such a human right its elements refer to the entire system of human rights the enjoyment of which depends on the quality of the environment.

Certain provisions encourage a request for clearer wording since they are phrased in the passive voice, e.g. the provision of Article 6 (Precaution) or Article 7 (Environmental Damages). In this context, it can be considered that perhaps the combination of the principle of precaution (Article 6) and the principle of prevention (Article 5) would make it easier to define the entity responsible for their implementation and enable the elaboration of an appropriate provision in the active voice; particularly so as both principles are genetically connected and appear together in many legal acts.

This doubt is related to the general subject matter of the regulation, i.e. the environment. The definition of the environment has been long the subject matter of considerations by the doctrine of environmental law without any constructive conclusions, except for the basic conclusion that the environment is a general category with respect to that which surrounds us. Although certain legal acts define the environment for the purposes of their own regulation, still the attempts to devise the definition of the environment on this basis result in the use of a pars pro toto construction. In effect, this can produce a wide space for manipulation, which has been demonstrated by court rulings in many cases. It does not seem necessary to construct such a definition in such a type of agreement as the Pact is – one that codifies the principles which will be interpreted by the courts. Especially as doubts about the subject matter of regulation are seldom raised with respect to the principles functioning in legal transactions, e.g. those laid down in the 1992 Rio Declaration.

As pointed out by Susan Biniaz, many provisions of the draft have a broad range and this can give rise to important issues of interpretation in the context of legally binding norms, e.g. what are “the requirements of environmental protection” (Article 3) or what are “the needs” of the future generations (Article 4)? Other questions concern such problems as: the definition of environmental damage (Articles 5 and 7); the meaning of the term “effective environmental laws” (Article 15); the concept of necessary measures to restore the diversity and capacity of ecosystems to withstand environmental disruptions and degradation (Article 16); or the global level of environmental protection guaranteed by the current law (Article 17). In accordance with the assumptions of the authors of the Pact, the answers to these questions will be shaped primarily by the case-law and the implementation compliance procedure provided for in Article 21 which will play an essential role in the interpretation of the provisions of the Pact.
The question about the relationship between the Pact and other sectoral agreements has also been asked. The norms of treaty law will apply to the assessment of these relationships. But this issue can also be specified in the course of negotiations. After all, treaty norms do not function in a legal vacuum, but e.g. together with agreements which have been concluded earlier on the same or similar subject matter. In light of this, in the practice of international legal transactions their application involves the need to resolve possible conflicts among the norms for the purpose of the desirable unity of the system of international law norms. Both the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations only contain general guidance on a conflict among treaty norms. In general, in universal international law the relationships between the successively adopted treaties are governed by the principles providing that *lex specialis derogat legi generali* and that *lex posterior derogat priori*. Generally, the doctrine also shares the view that *lex specialis derogat generali*, irrespective of which treaty has been adopted earlier. Under this assumption, it should be recognised that Article 30 of the Vienna Convention on the Law of Treaties will apply, conferring primacy to regulations of specific/sectoral character over the general principles of the Pact.

One of the possible ways of resolving conflicts among international treaties is also the interpretation technique. In general terms, this method consists in using the provisions of one treaty in interpreting and applying the norms of another treaty. Such an approach uses the features of dynamism and flexibility of the norms of international law. It also makes it possible to meet the standards of the principle of coherence and avoid a conflict of norms as well as the need to continuously complement treaties with new annexes. It also indicates the possibility of evolutionary interpretation of treaty norms from different fields which is useful in the process of reinterpretation of these norms in terms of the requirements of environmental law.

The relationships among treaties are primarily governed by the conditions laid down in them. This position has been reaffirmed by the practice of legal transactions under international law. The incorporation of an appropriate clause in to the Pact seems to be a positive action given the doubts which were expressed by the first commentators and which will likely emerge at the further stages of the negotiation process. It would also be important to clarify the impact which the provision of Article 20 of the Pact concerning the diversity of the Parties could have on other agreements.

The establishment of general principles with a binding character will provide a reference framework for the development of future policies on environmental protection and thereby for lawmaking. Inspiring the different levels of en-

---

36 See A. Boyle, Relationship between international environmental law and other branches of international law, in: D. Bodansky, J. Brunnee, E. Hey (Eds.), The Oxford Handbook of International Environmental Law, Oxford 2007.
vironmental governance, the framework of the Pact will be used to achieve a vertical effect of the validity of the general principles laid down in it. In this context, as conceived by its proponents, the provisions of the Pact should become a reference point for the lawmaking dynamics as well as the ruling practice in the process of interpretation of already existing norms, including those considered to be legally binding. Thus, they will contribute to systemic ordering of international environmental law.

Certainly, the wording of the principles can raise doubts and if these are not resolved, e.g. in the negotiation process, they can produce legal confusion. As rightly noted by Susan Biniaz, Article 3 of the Pact refers to the fight against climate change and many of its provisions could possibly also apply to the nationally determined contributions (NDCs). In this context, justified questions are asked whether, in accordance with the provisions of the Pact, State-Parties to the Paris Agreement could be required to ensure that their nationally determined contributions (NDCs) take into account the principle of intergenerational equity (Article 4), the principle of prevention of environmental harm (Article 5), the principles of integration and sustainable development (Article 3) as well as the principle under which it is prohibited to cause damage in the environments of other states or areas beyond the limits of national jurisdiction (Article 5). Thus formulated questions can certainly be asked at the negotiation table. Without going into details of the discussion on the relationships among the provisions of different treaties in terms of the norms of treaty law, it does not seem that this issue could affect the adoption of the Pact.

Doubts are also voiced about the provision of Article 17 of the draft which prohibits non-regression, i.e. bans a return to the previous, lower level of protection. Therefore, it can be considered whether the CITES Convention possibly violates this principle with amendments to the lists in its Appendices. Moreover, in the light of this provision, at the national level will it never be possible to lower the level of protection in any sector of the environment? The answers to these questions seem rhetorical when *pacta sunt servanda* principle is taken into account, since a derogation from this principle leads to a breach of an international commitment. Unless the Parties decide to revise a treaty in compliance with international law. When considering other factors which would be important for taking such decisions it would be necessary to analyse again the doctrine of the rebus sic *stantibus* principle.

A self-evident assumption of the presented draft Pact, which results, among others, from alarming reports on the degradation of the environment at the global scale, is that the global environmental governance would be strengthened by the adoption a legal binding agreement with a wide range and with generally worded principles. From a pragmatic point of view, an agreement with a general character is better for the systemic approach to environmental governance than sectoral agreements would be; moreover, a legally binding agreement, even with a general character, ensures greater legal certainty than declarations with a non-binding character do. The question asked in this context as to whether the possible adoption of the Pact would affect the basic reasons for insufficient environmental protection seems to go somewhat beyond the subject matter of the regulation and the objectives set by the Pact. Apart from the wording related to its basic goal which is the codification of
principles of environmental protection, the Pact does not address the reasons for this insufficient protection, with the exceptions of such causes as proliferation and fragmentation of the norms of international environmental law. Even if these reasons are considered of essential importance for an insufficient level of environmental protection, still against the background of a wide and open catalogue of reasons listed by the doctrine they are only marginal in respect of the legal standard of norms. And it seems that the Pact containing general and binding principles has not an ambition to solve all the problems of environmental protection and its insufficient level. The dynamic development of environmental law demonstrates that they are and probably will still continue to be solved at the levels of sectoral regulations. The adoption of the Pact containing generally formulated principles regarding the functions of horizontal unification of norms will enable their systemic interpretation and thus contribute to improving the effectiveness of law in environmental protection processes.

One of the most often asked questions concerns the possible options of States’ attitudes to the proposed Pact. A positive attitude of some States to the draft will probably result, among others, from their conviction that a new international agreement with broadly formulated legal provisions will exert a positive pressure on the international community towards the implementation of the postulate of effective environmental protection at the global scale.

The States with a sceptical attitude to the draft Pact still have the option of incorporating the provisions of the Pact directly or indirectly into their legal orders in connection with the implementation of the Sustainable Development Goals (SDGs). Many States will justify their position with such arguments as e.g. the uncertainty related to the character of the principles laid down in the draft and their doubts about the codification of the human right to the environment. Therefore, the problem which should be unambiguously solved in the context of the draft Pact is its impact on the existing international agreements and on those to be concluded in the future.

On May 10, 2018 the resolution opening the negotiations towards a Global Pact for the Environment was adopted by the United Nations General Assembly by a very large majority. In connection with that a special ad hoc Open-ended Working Group, opened to NGO participation, is established to consider the report of the Secretary General and to discuss options to address possible gaps in international environmental law and environment-related instruments.

On May 10, 2018 a resolution opening negotiations towards a Global Pact for the Environment was adopted by the United Nations General Assembly by a very large majority.

37 Ibidem.
38 UN doc. A/72/L.51.
ClientEarth is a charity that uses the power of the law to protect people and the planet.

We are international lawyers, scientists and policy experts, finding practical solutions for the world’s biggest environmental challenges.

We are fighting climate change, protecting oceans and wildlife, supporting sustainable forestry, greening energy, making business more responsible and pushing for government transparency. We believe the law is a tool for positive change.

From our offices in London, Brussels, Warsaw, New York City and Beijing, we work on laws throughout their lifetime, from the earliest stages to implementation. And when those laws are broken, we go to court to enforce them.

Credits to:
www.thegreatprojects.com,
www.internationalrivers.org,
www.kkpr4.net,
www.fokarium.com,
www.new.who.int,
www.naukaoklimacie.pl,

Photo credits:
Cover phot: Alto Crew/altocrew.com/Unsplash,
p. 9 i str. 29.: Tomás Muñita/www.internationalrivers.org,
p. 19.: Ilona Jędrasik,
p. 22.: Kace Rodriguez/www.kacerodriguez.com/ Unsplash,
p. 25.: pxhere.com,
p. 34: Colin Rex/colinrex.com/ Unsplash; str. Jeremy Bishop/jeremybishopphotography.com/Unsplash,