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10 Questions to Ask About the Proposed "Global Pact for the Environment"

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By Susan Biniaz*

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There is no doubt that more needs to be done, both nationally and internationally, to protect the environment. It is tempting, particularly during the Trump era, to welcome any concerted effort to do so. The issue is whether the proposed "Global Pact" is the right vehicle for enhancing environmental protection.

The Global Pact was launched this past June in Paris, with support from, among others, President Macron of France and former California Governor Arnold Schwarzenegger.[1] At least in its preliminary state, the Pact reflects broad, cross-cutting principles in legally binding form. France intends to seek support at the upcoming UN General Assembly for proceeding with the development of the Pact.

The proposed Pact raises numerous issues of both a legal and policy nature that should be addressed in deciding whether to embark on the negotiation of such an instrument. The questions below are intended to provoke at least part of the necessary discussion.

1. What is its purpose(s)?

- The Global Pact's purpose(s) has been characterized in several different ways, e.g.:
  - to create a "unified" or "coherent" body of law, as opposed to the currently "fragmented"

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[1] *See* Global Pact for the Environment, Preliminary Draft (June 24, 2017), https://perma.cc/L4PM-PTV2.

approach to international environmental issues;

- to give legally binding effect to various "soft law" principles;
- to set out law that can be relied upon by courts at both the national and international levels; and/or
- to create an environment-oriented human rights treaty.

- Each of these purposes should be analyzed in terms of both:
  - whether it is desirable; and
  - if so, whether the draft Global Pact achieves it.
- As one example, it is highly debatable whether a "unified" body of international environmental law is actually desirable.
  - Environmental problems are highly diverse.
  - One of the hallmarks and strengths of international environmental law has been that each agreement/approach is designed in a nuanced manner tailored to the particular problem at hand.
  - In some cases, stringency in terms of both content and enforcement may be paramount, even if some State participation is sacrificed; in other cases, the opposite may be true. Most cases fall somewhere in the middle, with careful balances being struck in terms of substance, phrasing, "bindingness," flexibility, review of implementation, etc. Innovative solutions have abounded.
  - While some see this approach as "fragmented," others see it as enabling creative and innovative case-appropriate solutions.
  - It is not at all clear that a "one-size-fits-all" approach would be more "coherent" or that it would be more effective – or even as effective -- in addressing a wide range of environmental problems.
- As another example, it would not necessarily be advantageous to turn non-legally binding principles into legally binding ones (even if agreement could be reached on which ones to include and how to formulate them). Various principles, even if "only" non-binding, have played, and should continue to play, a useful backdrop role in the development of environmental law. That is in fact the role that many of the Rio Declaration principles have played:
  - Thinking about "precaution," for example, can helpfully inform the nature of substantive

commitments where the relevant science is not definitive.

- Thinking about future generations can sensitize decision-makers to interests beyond those of the current generation.

But it is not clear that the vague principles that serve as a foundation for the development of issue-specific law are suitable for legal obligations themselves. Further, if such principles are themselves law, what is their relationship to more specific law? Are they intended to override the carefully balanced approaches to particular issues? At a minimum, the approach could create substantial legal confusion.

- In terms of the Global Pact's achieving its goals, to the extent that it is intended to set forth law to be relied upon in national courts, it would depend, at least in part, on each State's domestic legal system whether that purpose would be achieved. Domestic legal effect, including application by courts, would not necessarily flow automatically from the existence of the Pact.
- To the extent there is an intention to have the Global Pact relied upon in international courts, this prospect raises the important question whether the Pact is intended to reflect the law only as among its Parties or to codify international law more broadly.
  - If the latter, even States not intending to join the Pact would want to pay careful attention to its contents.
  - Even if only the former, the notion of being able to invoke the Pact's legal provisions in an international adjudication may be considered at odds with the "facilitative" nature of the approach to compliance and implementation set out in the Pact.

2. Is the Pact about a State's duties to other States? Its own people? Or both?

- Some of the draft Pact's provisions apply by their terms to environmental impacts affecting other States, while others appear to apply only to domestic situations or are open-ended.
- The intended reach of each provision would need to be considered and clarified. As one example, with respect to the proposed obligation to take measures to "ensure an adequate remediation of environmental damages," there would be a significant difference between having it apply only within a Party's territory or also extraterritorially.
- Addressing these issues would be important not only for the sake of clarity of obligation, but also in terms of assessing the extent of each Party's interest in other Parties' compliance and

implementation. As drafted, the Pact does not make clear whether a Party has an interest in another Party's compliance:

- only where the allegedly non-complying Party has caused transboundary environmental impacts;
- even where the impacts are purely domestic;
- even where the impacts are purely domestic but only if they relate to one of the human rights-related obligations; and/or
- for another reason.

- A related question is whether the Pact is intended to regulate directly the conduct of individuals. The "subject" of international law is generally States (and sometimes international organizations); it is quite unusual for an international agreement to impose duties directly on individuals, as the draft Pact does in Article 2. International agreements generally target the conduct of individuals by imposing obligations on States to require their nationals (or those under their jurisdiction) to do X or refrain from doing Y.
- With respect to Article 1's articulation of each person's "right to live in an ecologically sound environment," is this right to be honored by each Party with respect to its own nationals or also to those of other Parties?
- Finally, several provisions are written in the passive voice (such as Article 5's "[t]he necessary measures shall be taken…." and Article 6's "…lack of scientific certainty shall not be used…."), leaving unclear who is responsible for implementing them.

3. What is the intended scope of the Pact?

- The draft Global Pact addresses protection of "the environment."
- In the context of a hortatory declaration, it might be acceptable to be imprecise about the scope of the term.
- However, in a legal instrument intended to set forth far-reaching legally binding obligations, it raises a critical definitional issue.
- The draft Pact's inclusion of the law of armed conflict suggests that a very broad approach is intended. Is this the case? For example:
  - Does it include fisheries conservation? (If so, is the geographic scope each Party's EEZ or the oceans more generally?)
  - Does it cover whaling?

- Does it include trade law (such that, for example, the provision on "precaution" would potentially apply to the ability of a Party to restrict imports)?

4. What do the provisions mean?

- Many of the draft provisions are extremely broad, a characteristic that may work for certain non-binding, backdrop principles but raises significant interpretive issues in the context of legally binding obligations.
- For example:
  - What are "the requirements of environmental protection"? (Article 3)
  - What are the "needs" of future generations (e.g., do they include economic security; who is to evaluate potentially competing needs and by what process; and what would "compromise" such needs? (Article 4)
  - What is "environmental harm"? (Article 5)
  - What is an "effective" environmental law? (Article 15)
  - Which measures are necessary to "restore the diversity and capacity of ecosystems . . . to withstand environmental disruptions and degradation"? (Article 16)
  - What is the "global level of environmental protection guaranteed by current law"? National law? International law? (Article 17)
- Given the breadth and vagueness of such provisions, who is to decide on their interpretation and application? Each Party? The Parties collectively? National courts? International courts?
  - Appropriately, the compliance/implementation procedure provided for in Article 21 does not appear to have a role in interpretation, given its purely facilitative nature.

5. What is its relationship to other international agreements?

- A key issue is the intended relationship between the Pact and other agreements, typically specifically designed to address particular issues.
- Theoretically, an overarching environmental agreement might relate to other, more specific agreements, by, e.g.:
  - overriding them to the extent of any inconsistency;
  - supplementing them where a specific agreement does not address a particular issue;
  - aiding in interpreting them; or
  - not affecting them, either because it so provides (such as through a "savings clause") or

because of a theory of "lex specialis."

- Alternatively, an agreement might set out general principles and call for the future elaboration of more specific rules/standards by another body (as the Law of the Sea Convention does with respect to marine pollution).
- The draft Global Pact raises serious issues along these lines. In the absence of a clear articulation of the intent, legal confusion would abound. In some cases, there might also be unintended consequences, such as where States may have considered and deliberately rejected the inclusion of one of the Pact's general legal principles in a more specific agreement.
- Taking the Paris Agreement as an example:
  - A Party to the Paris Agreement must prepare and submit regular "nationally determined" contributions ("NDCs"), but the Agreement does not impose particular substantive requirements on the content of such contributions.
  - Article 3 of the Pact specifically references the "fight against climate change," and many of its provisions could potentially apply to the content of NDCs. For example:
    - Would the Global Pact require a Party to ensure that its NDC was guided by intergenerational equity (Article 4)? That it would prevent environmental harm (Article 5)? That it was consistent with sustainable development (Article 3)? That it integrated the requirements of environmental protection (Article 1)? That it did not cause damage to other States or areas beyond national jurisdiction (Article 5)?
  - The Pact raises numerous other Paris-related questions, e.g., whether Article 16 on resilience imposes on Paris Parties additional obligations regarding adaptation.
- Taking Article 6 on "precaution" as an example:
  - The draft Global Pact articulates a particular version of "precaution."
  - There are many other versions of a precautionary "principle" or "approach" reflected in various international agreements, each designed to address the particular environmental problem at hand.
  - These articulations of precaution vary in many ways, including, e.g., with respect to: how likely the harm has to be, how serious the harm has to be, how inconclusive the science has to be, and what kind of measures should not be postponed.
  - The expression of precaution in the London Protocol, e.g., is different from the Global Pact in each one of these dimensions.

  - There are other variations found in the Biosafety Protocol, the Stockholm Convention, the Straddling Stocks Agreement, the WTO SPS Agreement, and the UN Framework Convention on Climate Change, among many others. Each was designed specifically for the agreement/topic in question.
  - What effect, if any, would this article have on the London Protocol or any other agreement with a different version of precaution?
- Taking Article 9 on access to information as an example:
  - This draft provision omits all the nuances contained in the main international agreement on this subject, i.e., the Aarhus Convention. It would sweep in all information, without carve-outs, even for confidential business information.
  - For this reason, its drafting is far more appropriate for a hortatory principle than for a legally binding obligation. (The same is true for the provisions on public participation and access to environmental justice.)
  - While it is unlikely that negotiators would agree to such a stark articulation of a right to access to information, assuming they did, how would it relate to the far more detailed provisions of the Aarhus Convention?
- Taking Article 17 on "non-regression" as an example:
  - Would it be a violation of this provision for the Parties to CITES to move a species from Appendix I to Appendix II?
  - At the national level, would it literally mean that domestic environmental laws could never move in a less-protective direction? Would no other factors be relevant?
- The draft Pact provides for "special attention" to be given to the "special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable." It also provides for account to be taken, "where appropriate," of the Parties' "common but differentiated responsibilities and respective capabilities, in light of different national circumstances."
  - Environmental agreements are extremely diverse when it comes to whether and, if so, how they make distinctions among Parties.
  - Many make no distinction at all and deliberately so (e.g., the Antarctic Environment Protocol).
  - Those that do distinguish among Parties vary considerably in terms of whether the

distinctions are implicit or explicit, which commitments they apply to, whether they are based on particular categories of Parties or not, etc. For example:

- The Minamata Convention on Mercury does not differentiate substantive obligations but provides for financial assistance to run to developing countries and countries with economies in transition.
- The London Protocol allows Parties, on a self-selected basis, to opt for a "transitional" period before having to implement certain Protocol obligations.
- The Montreal Protocol allows a sub-set of developing countries to take advantage of a grace period with respect to certain obligations.
- The Paris Agreement provides for self-differentiated "nationally determined contributions" and otherwise addresses distinctions among Parties in different ways across the various aspects of the Agreement.

  - It would therefore be extremely important to make clear what effect any Pact provision on differentiation was intended to have on other agreements. Even if it were clarified that it was to have no effect on existing agreements, it would need to be clear whether it was to affect future agreements.
  - In addition, given that the "CBDR" principle applies in only certain contexts (and Article 20's particular expression of it is found only in the Paris Agreement), it would also be critical to clarify the intended application of the phrase "where appropriate." Would the Parties to the Global Pact determine where CBDR was appropriate, defer to other agreements, or other?

- These are just a few examples of the concerns that, if not clearly addressed, would inevitably arise from the very nature of the proposed Pact.

6. Where do the draft provisions come from?

- In some cases, it appears that a provision is intended as a legally binding version of an existing principle (or variation on a principle), e.g., precaution, the "polluter pays" principle.
  - As noted, the precise formulations are somewhat arbitrary, in that there are many "legitimate" variations of these principles in the international environmental sphere.
  - In the case of "polluter pays," it should further be noted that it is not as clear as it is in the Rio Declaration that it applies solely at the national level (per the OECD's original articulation of the principle), not internationally.

- In some cases, it appears that a provision is a heavily truncated version of an existing body of international law (e.g., access to information, public participation).
    - In the case of armed conflict, it is not clear whether it is intended to be a highly condensed version of existing law ("pursuant to their obligations under international law") or to change the law of armed conflict. In any event, this topic is likely to be highly controversial.
- In some cases, a provision may derive from the domestic law of certain States (e.g., a human right to a particular kind of environment).
- In some cases, a provision may be borrowed from an international agreement. The compliance/implementation approach, for example, appears to derive from the Paris Agreement.
- Finally, the provision on "non-regression" may derive from previous, un-adopted proposals made internationally (such as in the run-up to Rio+20). It may also derive loosely from the Paris Agreement's notion of "progression;" however, it should be stressed that "progression" in Paris is non-legally binding and highly context-specific.

7. Does the draft Pact address the actual causes of inadequate environmental protection?

- The apparent premise of the Pact is that global environmental protection would be enhanced through an overarching agreement with broad, legally binding provisions (broad presumably being better than specific and binding being better than non-binding).
- But is it clear that such an agreement would get at the root causes of inadequate protection?
- Protection may be inadequate due to, e.g., resource constraints, lack of political will, and/or ineffective enforcement.
- In such cases, it does not appear that a new agreement containing broad, binding principles would address those underlying issues.
- Rather, financial/technical assistance, the development of model laws, and/or capacity-building for enforcement might be warranted.

8. Would the general rules in the Global Pact help solve particular international environmental problems, where the devil is often in the details?

- To the extent the Pact is intended to apply to the development of future international environmental law, would it be helpful?
- Taking as an example the recent negotiation of ICAO's market-based offsetting mechanism to address greenhouse gas emissions from international aviation:
  - It does not appear that provisions at the high level of generality contained in the Pact would have helped resolve any of the contentious, context-specific issues at play.
  - On the contrary, resolving those issues required innovative, problem-specific solutions (e.g., participation in the early phases based on voluntary opt-in; bespoke exceptions to participation during the later phases; and a "dynamic" formula for offsetting requirements over time).
- Similarly, last year's negotiation of the Kigali Amendment to the Montreal Protocol, which phases down HFC production and consumption, would seemingly not have benefitted from the existence of broadly articulated legal principles. Rather, negotiating States reached agreement through highly specific approaches, including the creation of several new groups of Parties entitled to various forms of flexibility.

9. What would a negotiated Global Pact look like, and would it provide added value?

- What is a new Global Pact likely to look like?
- Some States may welcome a new international agreement with broadly framed legal provisions.
  - They may consider that, on the international plane, it will push other States in the direction of greater environmental protection.
  - On the domestic plane, they may seek the incorporation, direct or indirect, of the agreement's provisions into their national law. (States with certain types of legal systems may be quite comfortable with environmental law at a high level of generality.)
- At the same time, many States will likely have concerns with the Pact's approach, whether

related to the provisions' legal character, breadth, human rights aspects, or otherwise.

  - They will predictably be wary of affecting existing international agreements (whether superseding or supplementing them) or prejudging future ones.
  - They will likely also have strong concerns about reducing to single formulations either multi-varied principles or complex bodies of laws.

- The inclusion of climate change alone would guarantee a difficult negotiation.
- A resulting Global Pact, if it could be negotiated, would likely include provisions with multiple caveats, exceptions, and areas of non-application. There is a legitimate question whether it would add value or might, in fact, end up simply creating legal confusion and negatively affecting existing legal regimes.

10. What is the opportunity cost of negotiating a Global Pact?

- States have limited "band width" for negotiations related to international environmental issues.
- In that regard, is the negotiation of a new Global Pact – which is likely to be quite controversial and time-consuming – the best use of time and resources?
- Is there a better alternative, taking into account the actual impediments to enhanced environmental protection?

A new "Global Pact" may or may not be the appropriate next step towards improving global environmental protection. Further consideration is warranted regarding the insufficiencies of the current system and the potential remedies, including the merits of an overarching international agreement on the environment. To the extent States decide to pursue a new, broadly framed agreement, they should take care to ensure that there is clarity concerning, inter alia, its purpose(s), its obligations, and its intended legal effect, including in relation to other international agreements of a more specific nature.