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► **To cite this version:**

Sophie Gambardella. International environmental law (2019). Yearbook of international disaster law, 2021, 2019 (2), pp.492-500. halshs-02997571

HAL Id: halshs-02997571

<https://shs.hal.science/halshs-02997571v1>

Submitted on 10 Nov 2020

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International environmental law (2019)

*Sophie Gambardella**

1. Introduction

The evolution of international environmental law has been profoundly affected by a number of disasters. After the Chernobyl accident in 1986, for example, two international conventions were adopted: the Convention on Early Notification of a Nuclear Accident and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency. Similarly, the Torrey Canyon accident and the subsequent oil spill led to the establishment of the International Oil Pollution Compensation Funds (IOPC Funds) and the adoption of the 1969 International Convention on Intervention on the High Seas in Cases of Oil Pollution Casualties. There are many illustrations of this international environmental law adopted in response to disasters.

However, international environmental law has not only developed in the aftermath of disasters. Numerous texts of international environmental law have been adopted to prevent such events, such as the Vienna Convention on the Protection of the Ozone Layer and the Convention on Biological Diversity. On the basis of the observation that a disaster risk could occur, States have anticipated their occurrence by concluding an agreement. Certain texts, such as the Montreal Protocol on Substances that Deplete the Ozone Layer adopted following the Vienna Convention, have made it possible to prevent disasters from occurring. On 15 October 2016, the States Parties to the Montreal Protocol had adopted the Kigali Amendment for the phase-down of hydrofluorocarbons. Although hydrofluorocarbons are not ozone-depleting substances, they are gases that can contribute to global warming. The Kigali Amendment entered into force on 1 January 2019, which will contribute to the 2°C objective of the Paris Agreement¹. For others conventions, the results are more contrasted. For example, the two-degree objective set by the Paris Agreement seems completely unrealistic today, given the lack of ambition of the voluntary commitments made by States. However, beyond these two degrees, all climatologists say that we are going to have to face large-scale climate disasters. The balance sheet for biodiversity is not much more pleasing. “Biodiversity – the diversity within species, between species and of ecosystems – is declining faster than at any time in human history” warns the last Summary for Policymakers from the Intergovernmental Science-Policy Platform on Biodiversity (IPBES) and Ecosystem Services, the summary of which was approved at the 7th session of the IPBES Plenary (29 April – 4 May 2019) in Paris². However, the IPBES report stresses the role of nature and its services in reducing people's vulnerability to economic, social and environmental disasters.

"Environmental disaster", "ecological disaster", these expressions unfortunately seem to have become the leitmotif of our international society in the 21st century, at a time when international environmental law is constantly developing. The discussions and debates on its coherence, effectiveness and efficiency which have, from its inception, fuelled the doctrine are being revived by increasingly gloomy scientific publications on the state of the planet. In this context, the aim of this short contribution is to focus our attention on elements of practice having specific relevance for 2019, namely two multilateral environmental agreements under negotiation within the United Nations – the Global Pact for the environment and the International legally

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¹ The text of Kigali amendment is available at : https://ozone.unep.org/sites/default/files/2019-04/Original_depository_notification_english_version_with_corrections.pdf

² The summary for policymakers is available at: https://ipbes.net/sites/default/files/ipbes_7_10_add.1_en_1.pdf

binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ) – and on the last Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, which enabled real progress to be made in the management of plastic waste responsible for a real ecological disaster. The current crisis of multilateralism will be revealed through the study of current international negotiations. However, this should not lead to the conclusion that there is a crisis in international law insofar as positive developments in international environmental law are taking place within the existing legal and institutional corpus, as evidenced by the decisions of the States Parties to the Basel Convention.

2. What future for the Global Pact for the Environment?

The latest chronicle of international environmental law, published in the Yearbook of international disaster law in 2019³, had traced the origins of the Global Compact and reported on the progress of negotiations on the text⁴. At the time, United Nations General Assembly resolution 72/277 on "Towards a Global Pact for the Environment"⁵ launched the negotiations on the Pact through the establishment of an ad hoc open-ended working group open to the participation of all United Nations Member States and members of the institutions. While all signals seemed to be in the green for the adoption of a binding text, the report issued in May 2019 by this ad hoc group put a brake on the ambitions of the drafters of the Pact. In its report issued on 13 June 2019⁶, the panel submitted thirteen recommendations to the UN General Assembly. Within these recommendations, the panel focused on two areas to enhance the effectiveness and efficiency of international environmental law.

The first component is an institutional component. Indeed, the *Ad Hoc* Group, on the one hand, reaffirms the role of the United Nations Environment Programme as the international coordinating body for environmental protection and, on the other hand, invites all the secretariats of the multilateral environmental agreements to cooperate. In view of the institutional fragmentation of international environmental law, which the Secretary-General of the United Nations had again emphasized in his report in 2018⁷, the *Ad hoc* Group has logically made a large number of recommendations aimed at improving the coherence of international environmental law.

The second component of the *Ad hoc* Group's recommendations focuses on strengthening the effectiveness of international environmental law. The *Ad hoc* Group calls upon States to ratify multilateral environmental agreements widely and to make every effort at the national level to make them effective. Again, the *Ad hoc* Group echoes the Secretary-General's observation in his 2018 report that: "The lack of effective implementation of many multilateral environmental

³ Marlies Hesselman, International environmental law (2019), YIDL, vol.1, issue 1., available at : https://brill.com/view/journals/yido/1/1/article-p436_436.xml

⁴ For a full review of the Global Compact for the Environment, see the article by Sandrine Maljean-Dubois in this issue.

⁵ UNGA Res 72/227 (10 May 2018) UN Doc A/RES/72/227

⁶ Report of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/277, Third substantive session, Nairobi, 20–22 May 2019, A/AC.289/6/Rev.1

⁷ Report of the Secretary General, "Gaps in international environmental law and environment-related instruments: towards a global pact for the environment", Seventy-third session, Agenda item 14, Integrated and coordinated implementation of and follow-up to the outcomes of the major United Nations conferences and summits in the economic, social and related field, A/73/419, p.33.

agreements has been identified as a major gap in addressing environmental challenges"⁸. In this context, the adoption of the Global Pact for the Environment seemed to be the logical follow-up to the recommendations made by the *Ad Hoc* Group. The adoption of a binding text enshrining the main principles of international environmental law could, according to the initiators, make it possible not only to ensure the consistency of all environmental policy conducted at the international level, but also to enhance its effectiveness through the establishment of a Committee to monitor the implementation of the convention. However, the *Ad hoc* Group has not followed this path.

Once the thirteen recommendations had been listed, the Working Group envisaged for the continuation of the work that the United Nations General Assembly would widely transmit these recommendations, in particular to the United Nations Environment Assembly with a view to preparing in February 2021 a political declaration for a high-level United Nations meeting. The idea of the adoption of a binding text therefore seems to have been rejected by the Working Group. The Global Compact for the Environment is thus dissolved in a more consensual form for States: a simple political declaration. The United Nations General Assembly by its resolution 73/333 of 30 August 2019 will finish burying any hope of seeing the idea of the adoption of a legally binding text revived since it subscribes to all the recommendations of the *Ad Hoc* Group. This shift from hard law to soft law is not, however, surprising for the internationalist jurist. Indeed, the current international context is tending towards a retreat from multilateralism, the illustrations of which are unfortunately multiplying every day. In the past year alone, the World Trade Organization has been plunged into an unprecedented crisis that has now led to the blockage of its dispute settlement body and the resignation of its Director-General. In addition, the World Health Organization was deprived last year of the financial contribution of the United States, which finally gave notice a few days ago of its intention to withdraw from the organization. This mistrust of international organisations and multilateralism is therefore not fertile ground for draft international texts to germinate. The Global Pact for the Environment is a collateral victim of a tense international situation.

Some observers believe, however, that a premature end to the Global Pact negotiations would not be a step backwards for international environmental law. Quite the contrary. The very philosophy behind the idea of such a text was contested during the negotiations in Nairobi, as some rather environmentally friendly states were not convinced that a binding text could play a corrective role to the fragmentation of international environmental law. For these States, the difficulties associated with the fragmentation of international environmental law "could be solved by empirical and practical means, such as the bringing together of chemical conventions or common reporting. As for the effective implementation of IEL at the national level, it is more a matter of implementing practical means and active policies, rather than establishing a "super global agreement" to encompass the MEAs"⁹. International environmental law has not been built on a pyramidal model but rather as a network. However, attempting to "hyper-structure" international environmental law vertically is like trying to fit a circle into a square. Perhaps it would be better to accept this circle and try to make the elements that make it up coherent by strengthening the channels for the circulation of technical and financial resources, technical and legal standards, and governmental and non-governmental actors. It must be borne in mind that ecological disasters lie in wait for us and that legal responses must be swift. However, the classic path of a binding multilateral treaty is a long way off without a certain favourable

⁸ *Ibid.*, p.36.

⁹ Lucien Chabason and Elisabeth Hege, "Failure of the Global Pact for the Environment: a missed opportunity or a bullet dodged?", IDDRI, available at: <https://www.iddri.org/en/publications-and-events/blog-post/failure-global-pact-environment-missed-opportunity-or-bullet>

outcome and therefore seems today sometimes, depending on the field, to be out of step with the ecological emergency.

3. What directions in the BBNJ negotiations?

The interactions between oceans and climate are nowadays indisputable. On the one hand, climate change has now well-known impacts on the seas and oceans: rising water levels, melting glaciers, ocean acidification, proliferation of invasive species, environmental degradation, loss of biodiversity... On the other hand, the oceans play a fundamental role in climate regulation - the high seas are considered to be the largest carbon sink as the oceans store fifty times more carbon than the atmosphere. Indeed, the oceans are home to a double carbon pump: a biological carbon pump and a physical carbon pump. The physical carbon pump allows denser water to sink to the depths and carry the dissolved carbon with it. This phenomenon is facilitated in cold water. However, global warming tends to diminish the role played by this carbon pump. The biological carbon pump, on the other hand, transfers carbon from the surface to the seabed via the food chain. The carbon is then stored over the long term. However, rapid imbalances in marine ecosystems can reverse the phenomena so that sinks sometimes become sources, as in the North-East Atlantic. The intrinsic biological and physical interactions between oceans and climate should therefore be reflected in international law to prevent future ecological disasters.

On 24 December 2017, the United Nations General Assembly adopted resolution 72/249¹⁰, in which it decided to establish an Intergovernmental Conference to consider a draft international legally binding text relating to the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction. This decision of the General Assembly follows a long process of reflection initiated within the United Nations in 2004 through the establishment of an Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction. The Intergovernmental Conference convened by the General Assembly was originally scheduled to hold four sessions: one in 2018, two in 2019 and one in 2020, which was eventually postponed owing to the global health context. Substantive negotiations are expected to focus on pre-delineated topics, namely: marine genetic resources, including benefit-sharing issues; environmental impact assessments; area-based management tools, including marine protected areas; and capacity-building and transfer of marine technology. At the first session in 2018, the historical antagonisms between States of the North and the South re-emerged, including the question of whether the high seas should be applied the legal regime of freedom or that of the common heritage of mankind. This divergence between States has hindered progress in the negotiations on the first issue, namely, marine genetic resources and benefit-sharing issues. On the other hand, consensus was reached on the issue of area-based management tools, and the essential role of regional fisheries organizations in implementing such tools was recalled on that occasion. As the second session of the negotiations approached, States continued to negotiate on topics rather than on a draft text. It was not until the second session in 2019 that a draft text prepared by the Chair of the intergovernmental conference, Rena Lee, was discussed. This text is composed of twelve parts¹¹.

¹⁰ UNGA 72/249 (24 december 2017) UN DOC A/RES/72/249

¹¹ Available at: <https://undocs.org/en/a/conf.232/2019/10>

With regard, first, to the issue of marine genetic resources, which is dealt with in part II of the preliminary draft text, negotiations have made progress on that part, although points of divergence remain, in particular with regard to the geographical, material and temporal scope of the objectives of that part. Indeed, States agreed on the objectives set out in article 7, such as capacity-building for developing States and the fair and equitable sharing of benefits arising from the utilization of marine genetic resources in areas beyond national jurisdiction. However, they have yet to agree on whether this part refers to marine genetic resources "from", "accessed in", "originating from" or "collected in" areas beyond national jurisdiction, or whether a combination of these formulations should be used. Similarly, although States appear to have agreed that fish and other living resources used as a commodity would not fall within the scope of this part, the question of whether this should be specified in the agreement remains open, indicating that consensus on this issue is still fragile. Finally, the most sensitive issues in the negotiations on marine genetic resources, such as access to resources, benefit-sharing and intellectual property rights, on the other hand, are still at the heart of tensions between those States that support the regime of freedom on the high seas and those that support the regime of the common heritage of mankind. However, if the issue of the applicable legal regime is not resolved at the last session of the Conference, the Agreement may well resemble an empty shell with regard to marine genetic resources.

Secondly, States discussed part III of the preliminary draft text on measures such as area-based management tools, including marine protected areas. While most States agree with the idea of more widespread introduction of such tools, there are still differences of opinion on how such tools should be administered. Indeed, many international bodies already manage protected areas in the marine spaces within their scope. However, if the text under discussion creates new bodies dedicated to the identification, creation and administration of such areas, how will their work be articulated with that of existing bodies? This reflection on the degree of internationalisation of procedures also reflected in the discussions on Part IV of the preliminary draft text dedicated to environmental impact assessments. Some States consider that an international management of these tools is not useful given the number of bodies already existing on the international scene with competence on the high seas.

On the eve of the fourth and last session of the International Conference, a preliminary draft exists¹², was discussed and certain points were the subject of a consensus among States. However, the initial antagonisms have still not been overcome, even though some delegations recalled the contents of the IPBES report and that of the Intergovernmental Panel on Climate Change (IPCC) on the ocean and the cryosphere, both of which state that urgent action is needed if we are not to be faced with environmental, health and social disasters.

4. Plastic waste in the scope of the Basel Convention

For many years, the production of plastic waste has been exponential and most of this waste is not recycled. This double phenomenon leads to a real ecological disaster embodied in particular by the existence of a seventh plastic continent of 1.6 million km² in the Pacific. International environmental law has long since taken up the issue of transboundary movements of waste and specially plastic wastes. In her 2019 Law of the Sea chronicle, Anastasia Telesetsky noted that: 'The existing International Convention for the Prevention of Pollution from Ships (MARPOL) and the London Convention on Dumping of Wastes at Sea already prevent plastic litter from

¹² The Revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction is available at: <https://undocs.org/en/a/conf.232/2020/3>

being deliberately released from vessels¹³. In 2019, a more global fight against pollution of the oceans by plastics has been orchestrated under the auspices of the Basel Convention. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was adopted under the auspices of the United Nations Environment Programme on 22 March 1989 and entered into force on 5 May 1992. The Convention provides a framework for the transboundary movement of wastes by, inter alia, requiring parties to reduce the generation of wastes, to treat and dispose of wastes as close as possible to their place of generation and to reduce the quantities of wastes transported across national borders. In order to achieve these objectives, the Convention has established procedures for, inter alia, notification of transboundary movements of waste. However, the transboundary movement of plastic waste has so far been poorly regulated by the Convention.

At the fourteenth Conference of the Parties to the Basel Convention, held from 29 April to 10 May 2019 in Geneva, Norway proposed amendments to Annexes II, VIII and IX of the Convention to ensure that the Convention covers transboundary movements of plastic waste. These amendments, which were adopted, create a new entry for non-hazardous plastics waste, which is subject to the control system of the Convention, in annex II to the Convention; a new entry for hazardous plastics waste, which is subject to the enhanced control system, in annex VIII; and a new entry for non-hazardous plastics waste, which is not subject to the control system of the Convention, in annex IX to the Convention¹⁴. In addition to these amendments, the States Parties adopted Decision BC-14/13 entitled “Further actions to address plastic waste under the Basel Convention”¹⁵. The objective of this decision is to prevent and minimize the generation of plastic waste and to improve its management and control of its transboundary movements. Parties are, for example, invited to set time-bound targets and adopt measures to ensure that plastic packaging is designed to be reused or recycled in a cost-effective manner. However, the most innovative aspect of this decision is the creation of a Basel Convention Partnership on plastics waste, as it aims to involve all public and private stakeholders in order to develop co-ordinated actions for the disposal of plastics waste. The Convention has thus taken full ownership of this issue on the international scene.

¹³ Anastasia Telesetsky, *Law of the sea* (2019), YIDL, vol 1, issue 1, available at: https://brill.com/view/journals/yido/1/1/article-p455_455.xml

¹⁴ Decision BC-14/12 - Amendments to Annexes II, VIII and IX of the Basel Convention

¹⁵ Decision BC-14/13 - Further actions to address plastic waste under the Basel Convention