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Towards a Global Pact for Environment: From a Hard Law Instrument to a Soft Law Tool?

by

Sophie Domaine*

Abstract

In nowadays troubled global scenario, characterised by the rise of bilateral agreements and nationalist trends, one area of interest for international law should maintain a multilateral architecture: environmental concerns are global public goods, affecting every country in the world. Their solution must be agreed upon at a multilateral level to be effective and operative. For this reason, the UN General Assembly adopted, in May 2018, a resolution entitled Towards a Global Pact for the Environment. This resolution requested the Secretary-General of the United Nations to draft a technical and evidence-based report identifying and assessing gaps in international environmental law and environment-related instruments, which was released at the end of November 2018. An established Ad hoc open-ended working group, under the auspices of the General Assembly, analysed this report, discussing possible options to address the highlighted shortcomings and gaps. This working group delivered its recommendations in May 2019 opting for a political declaration concerning the environment, to be adopted in 2022 during a UN high level meeting for the fiftieth anniversary of the Stockholm Conference.

This paper will highlight the Global Pact process, from its draft to the discussions of the Ad hoc working group and its recommendations, as well as the Secretary-General's (SG) report on gaps in international environmental law. After analysing the debate that spread in doctrine over the need for a Pact, attention will be given to the missed opportunity to conclude an overarching multilateral treaty concerning international environmental principles and to the role a soft law document could nevertheless play in the field.

Keywords: Global Pact for the Environment; International environmental law; United Nations; UNEP; Multilateral environmental agreements; Soft law

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Towards a Global Pact for Environment: From a Hard Law Instrument to a Soft Law Tool?

I. The Global Pact for the Environment initiative

In nowadays troubled worldwide scenario, characterised by the rise of bilateralism and nationalist and protectionist trends, one area of international law is bound to maintain a multilateral architecture: international environmental law.

Indeed, recently, discussions related to international environmental law reached the level of the United Nations General Assembly (UNGA): a UNGA resolution entitled “Towards a Global Pact for the Environment”¹ was adopted on May 10th, 2018 (the so-called *Enabling resolution*). The adoption of this concise but significant resolution was promoted by France which, already in September 2017, presented the idea of the Global Pact for the Environment² (GPE), i.e. a binding multilateral instrument including all principles of international law for the protection of the environment, in a collateral event called ‘Summit on a Global Pact for the Environment’, at the ministerial week of the 72nd session of the General Assembly.

It is arguably due to the context of climate emergency, and in general to the importance lately given to environmental issues, that the UNGA adopted this resolution by a large majority of 143 votes, with 5 votes against – including United States and Russia – and 7 abstentions, in an unusually short timeframe.³ The *Enabling resolution* highlights the need to address in a comprehensive and coherent manner the challenges arising from the environmental degradation characterising our time and makes two important requirements. First, it requested the Secretary-General of the United Nations to write a technical and evidence-based report⁴ identifying and assessing gaps in international environmental law and environment-related instruments, in order to strengthen their implementation. The resolution also provided for the creation, under the auspices of the General Assembly, of an *Ad Hoc*

¹ UNGA resolution, *Towards a Global Pact for the Environment*, UN Doc. A/RES/72/277, 10 May 2018.

² GIEP, *Draft Global Pact for the Environment, Preliminary draft of the group of experts*, June 2017, available at <https://globalpactenvironment.org/uploads/EN.pdf> (consulted on 19 June 2019).

³ THIEFFRY Patrick, *The Proposed Global Pact for the Environment and European Law*, *European Energy and Environmental Law Review* 2018, pp. 182-187, p. 182.

⁴ UNGA Report of the Secretary-General, *Gaps in international environmental law and environment-related instruments: towards a global pact for the environment*, UN Doc. A/73/419, 20 November 2018.

Open-ended Working Group (AHOEWG) to assess the report and discuss possible options to address the highlighted shortcomings and gaps in international environmental law, namely, among others, the lack of a single overarching normative framework, the deficit in coordination at law-making level, the institutional fragmentation and the existence of a heterogeneous set of actors. The ultimate goal of the *ad hoc* working group – after having conducted a careful analysis on the necessity, scope, parameters and feasibility of an international instrument – was the approval of a recommendation directed to the General Assembly for the convening of an intergovernmental conference to adopt the Pact or another comprehensive and unifying multilateral instrument of international environmental law. The *ad hoc* working group made its recommendations at the end of its third and final working session, on May 22nd, 2019, opting for a political declaration, to be adopted in 2022 during a UN high level meeting for the fiftieth anniversary of the Stockholm Conference.

This paper will highlight the Global Pact process, from its draft to the discussions of the *ad hoc* working group and its recommendations, as well as the Secretary-General's (SG) report on gaps in international environmental law. After analysing the debate that spread in doctrine over the need for a Pact, attention will be given to the missed opportunity to conclude an overarching multilateral treaty concerning international environmental principles and to the role a soft law document could nevertheless play in the field.

A. The draft Global Pact for the Environment

The concept of a Pact for the Environment has its origins from a spontaneous initiative of the international civil society. In 2015, the *Commission environnement* of the French legal think tank *Le Club des Juristes*, presided by Yann Aguila, Attorney at the Paris Bar and Associate Professor at the University of Paris I Panthéon-Sorbonne, worked on a report concerning strengthening the effectiveness of international environmental law,⁵ which constituted the basis for the draft of the Global Pact. This, in fact, derives from a project set up by a network of internationally renowned lawyers – among which we can find professors, judges and lawyers from more than 40 countries – led by the *Commission environnement* of the mentioned think tank, with the support of the Academy of Environmental Law of the International Union for the Conservation of Nature (IUCN) and its World Commission on Environmental Law. This initially informal network was then formalised in a working group – *Groupe international d'experts pour le Pacte* (GIEP) – which outlined the draft Pact and presented it for the first time on June 24th, 2017, at the Université la Sorbonne.⁶ The main aim of this initiative was the conclusion of a comprehensive binding instrument of international

⁵ Le Club des Juristes, *Renforcer l'efficacité du droit international de l'environnement - Devoirs des Etats, droits des individus*, November 2015, available on <http://www.leclubdesjuristes.com/les-commissions/rapport-renforcer-lefficacite-du-droit-international-de-lenvironnement-devoirs-des-etats-droits-des-individus-2/> (consulted on 19 June 2019).

⁶ Le Club des Juristes, *Toward a Global Pact for the Environment: Action for the planet, action through law*, 1st June 2017, available at <http://www.leclubdesjuristes.com/toward-a-global-pact-for-the-environment-action-for-the-planet-action-through-law> (consulted on 19 June 2019).

law, under the auspices of the United Nations, which would codify in one text every principle of international environmental law developed since the Stockholm⁷ and Rio⁸ Declarations and reorganise the fragmented regulation of the different environmental sectoral areas – e.g. climate, biodiversity, desertification, etc. – in order to give coherence to the entire set of rules of the field.⁹ This instrument – the Pact – was therefore intended as an ‘umbrella treaty’, i.e. a “general, cross-cutting, universal reference instrument constituting the cornerstone of international environmental law” in light of which each sectoral convention would have been analysed and interpreted.¹⁰

After being formalized, the GIEP has been chaired by Laurent Fabius, president of the French *Conseil Constitutionnel* and, previously, president of the well-known UNFCCC CoP21 held in Paris. Indeed, in alignment with the adoption of the Paris Agreement, that entered into force in 2016, France embraced the initiative and put forward, to the international community, the intention of working together to draw up a single, coherent text. In September 2017, the President of the French Republic, Emmanuel Macron, in the context of the ministerial week of the 72nd session of the General Assembly, presented the idea of a Global Pact in a collateral event called, specifically, “Summit on a Global Pact for the Environment”, attended by many heads of State and government, but especially by the Secretary General of the United Nations¹¹ and the Executive Director of the UNEP¹² who expressed interest and support for the project.¹³

The idea of codifying the principles of international environmental law in a binding international instrument is not new: in the 1987 report of the World Commission on Environment and Development, “Our common future”, we can already find two recommendations to the General Assembly of the United Nations, i.e. the preparation of a universal declaration and then the adoption of a convention for the protection of the environment and sustainable development.¹⁴ The 1992 Rio Declaration on Environment and Development is surely an important milestone for the global environmental governance, but, not being binding, its effectiveness is limited as compared to the adoption of a binding convention.¹⁵

⁷ General Assembly, *Declaration of the United Nations Conference on the Human Environment*, UN Doc. A/RES/2994, 15 December 1972.

⁸ General Assembly, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I), 12 August 1992.

⁹ Le Club des Juristes, *White Paper - Towards a Global Pact for the Environment* ('White Paper'), September 2017, available at https://www.leclubdesjuristes.com/wp-content/uploads/2017/05/CDJ_Pacte-mondial-pour-lenvironnement_Livre-blanc_UK_web.pdf (consulted on 19 June 2019), p. 26.

¹⁰ White Paper, cit., p. 16 ff.

¹¹ Mr António Guterres.

¹² Mr Erik Solheim.

¹³ On 12 December 2017, France also hosted an international climate summit in Paris, the "One Planet Summit", co-organized with the United Nations and the World Bank, as part of France's ongoing commitment to respond to the ecological emergency. See <https://onu.delégfrance.org/Le-One-Planet-Summit> (consulted on 19 June 2019).

¹⁴ World Commission on Environment and Development, *Our Common Future: Report of the World Commission on Environment and Development*, ('Brundtland report'), 10 March 1987, chapter 12, section 5.2, par. 85-86, available at <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> (consulted on 19 June 2019).

¹⁵ AGUILA Yann, VINALES Jorge E., *A Global Pact for the Environment: Conceptual Foundations*, in Aguila Yann, Viñuales Jorge E. (eds), “A Global Pact for the Environment - Legal Foundations”, Cambridge (2019), pp. 12-29, p. 12.

The IUCN tried to develop an ‘International Draft Covenant on Environment and Development’ on the basis of the recommendations of the Brundtland report but its attempts to introduce discussions about this text at the 1992 Rio Conference failed.¹⁶ This has left the question of the creation of a third generation of fundamental rights linked to the protection of the environment¹⁷ still open.¹⁸

In this direction, the draft Global Pact takes into account all the principles of international law developed until now through treaties, customary international law and soft law instruments and includes some principles that are new to the field. The detailed analysis of the draft is beyond the scope of this study;¹⁹ however, we will briefly go through the principles encompassed in order to have a general overview of the text.

First of all, the right to an ecologically sound environment²⁰ and the duty to take care of the environment – to be borne by every State, institution and person – are enshrined in the first two articles. The draft text goes on with the well-known principles of integration and sustainable development and intergenerational equity (Articles 3-4). The principle of prevention is partitioned in its four components: no harm, transboundary harm, obligation to carry out an environmental impact assessment (EIA) and due diligence (Article 5). Precaution and remediation to environmental damages are included, and so is the polluter-pays principle (Articles 6-7-8). The principles of environmental democracy are illustrated in Articles 9, 10 and 11, making use of the terminology already applied by the Aarhus Convention²¹ and the Escazù Agreement²² on access to information, participation and justice in environmental matters. Subsequent articles focus on education and training (Article 12), research and innovation (Article 13) and on the significant role that non-State actors play in the protection of the environment (Article 14). Three novel principles make their appearance in the international panorama: the principles of effectiveness of environmental norm,²³ resilience and non-regression. Article 18 of the draft Pact expresses the principle of cooperation, while the following one deals with the protection of the environment in relation to armed conflicts. The principle of common but differentiated responsibilities is

¹⁶ A fifth, updated version of the draft, written by IUCN in collaboration with the International Council of Environmental Law is now available: IUCN, *Draft International Covenant on Environment and Development*, 5th ed., 2017, available at <https://portals.iucn.org/library/node/46647> (consulted on 19 June 2019).

¹⁷ Along the lines of the two Covenants adopted by the General Assembly of the United Nations in 1966 on civil and political rights and on economic, social and cultural rights.

¹⁸ White Paper, cit., p. 4. See also RAITH Jasmin, *The ‘Global Pact for the Environment’ - A new instrument to protect the planet?*, in *Journal for European Environmental & Planning Law* (2018), pp. 3-23, p. 4.

¹⁹ For an in-depth analysis of all principles encompassed in the draft Pact see AGUILA YANN, VIÑUALES JORGE E. (eds), “A Global Pact for the Environment - Legal Foundations”, Cambridge (2019).

²⁰ On this point, see in detail BOYD David R., *The Right to a Healthy and Sustainable Environment*, in Aguila Yann, Viñuales Jorge E. (eds), “A Global Pact for the Environment - Legal Foundations”, Cambridge (2019), p. 30-43; and also DUPUY Pierre-Marie, VIÑUALES Jorge E., *International Environmental Law*, Cambridge, Cambridge University Press (2018), 2^o ed., 594 p., p. 374 ff.

²¹ UNECE, *Convention on access to information, public participation in decision-making and access to justice in environmental matters*, 25 June 1998.

²² ECLAC, *Regional agreement on access to information, participation and justice in environmental matters in Latin America and the Caribbean*, UN Doc. LC/CNP10.9/5, 4 March 2018.

²³ A sort reaffirmation of the *acta sunt servanda* principle in the environmental field.

codified in Article 20, entitled “Diversity of national situations”. The 6 closing articles contain final clauses, among which the creation of a monitoring mechanism to facilitate implementation and to promote compliance with the provisions of the draft text (Article 21).²⁴

B. The SG’s report on gaps in international environmental law

Of course, the draft Pact does not have any binding legal value: since the first drafting of the text by the GIEP, it was clear that the adoption of a final multilateral instrument regarding the protection of the environment would have needed to go through negotiations of a new document, e.g. by the United Nations.²⁵ In fact, neither the *Enabling Resolution* nor the report of the UN Secretary General refers, except for its title, to the draft Global Pact for the Environment.

The report by the UN Secretary-General – *Gaps in international environmental law and environment-related instruments: towards a global pact for the environment*²⁶ – was presented at the 73rd session of the General Assembly and published in December 2018. This report is extremely important because not only represents a sound and complete analysis of the subject, as requested by the *Enabling resolution*, but it is also the first ever report written by a United Nations Secretary General on the subject of international environmental law.²⁷ The purpose of the report was to highlight gaps in international environmental law, including the analysis of international treaties that have different objectives than the sole environmental protection, in order to identify areas that need stronger implementation and to serve as a basis for discussions for the *Ad hoc* open-ended working group.

The report considers five areas in which gaps in international environmental law are clear: shortcomings about principles of international environmental law; deficiencies related to existing sectoral regimes; lacks concerning international instruments in some way linked to environmental protection; weaknesses of the global environmental governance; and inadequacies of implementation and effectiveness. Many different categories of gaps are singled out. First of all, because all the legal instruments for the protection of the environment have been developed without a global strategy and a coherent structure, there are some ‘blank spots’, i.e. sectors that are completely unregulated by internationally binding agreements,

²⁴ Similar to the one established by the Paris agreement.

²⁵ THIEFFRY, cit., p. 18.

²⁶ UNGA Report of the Secretary-General, *Gaps in international environmental law and environment-related instruments: towards a global pact for the environment*, cit.

²⁷ World Commission on Environmental law of the International Union for the Conservation of Nature (IUCN), International Council of Environmental Law (ICEL), International Group of Experts for the Pact (GIEP), *Note on the United Nations Secretary-General's Report, 'Gaps in international environmental law and environment-related instruments: towards a global pact for the environment'*, 10 December 2018, available at https://www.iucn.org/sites/dev/files/noteforungsgenvillawrptdec2018_final.pdf (consulted on 19 June 2019) p. 3.

such as the sustainable use of forests, pollution of marine areas by land-based debris, marine pollution by plastics or the protection of soils.²⁸

Looking at the principles of international environmental law, the report shows that since there is no single regulatory framework defining what can be characterised as a principle of general application, their status, as well as their scope and extent, tends to remain uncertain. The interpretation of those principles is often diverse and inconsistent, giving rise to a risk of negative impact on the application of environmental rules at the State level. To solve this problem, the report explicitly states that an international instrument, comprehensive and unitary, with the aim of clarifying the scope of each principle, is necessary.²⁹ This codification of principles could also be useful to fill the gaps related to the discipline of sectoral environmental regimes, which are quite independent, therefore lacking uniformity and creating potential overlaps and contrasts.³⁰

Shortcomings are also found in sectoral regimes when looking at the environmental governance: with a view to improve it, the various intergovernmental bodies set up under different international environmental agreements should cooperate more, hopefully under the auspices of the United Nations Environmental Program (UNEP).³¹ In the same way, synergies and harmony need to be established between the environmental field and other areas of international law: relationships between international environmental law and other international law regimes that indirectly affect the subject, such as trade and investment, should be fostered. A comprehensive set of principles could certainly serve as foundation to reconcile economic and social objectives with environmental goals.³²

Still, the greatest gap in international environmental law remains the lack of effective implementation of many multilateral environmental agreements (MEAs).³³ As highlighted by one article of the draft Pact,³⁴ effective application of international law is the key element in ensuring adequate environmental protection; however, relevant treaties are generally poorly implemented at national level, often because of lack of financial resources, technical capacity or political will. A possible remedy, as pointed out by the SG's report, could be the requirement of greater coordination and cooperation between States and with UNEP, as well as the promotion of legal assistance, education and training in environmental law within the UN.³⁵

²⁸ VOIGT Christina, *How a 'Global Pact for the Environment' could add value to international environmental law*, in Review of European, Comparative and International Environmental Law (2019), pp. 13-24, p. 17.

²⁹ *Gaps in international environmental law*, cit., par. 10.

³⁰ According to the ECOLEX database there are now more than 500 multilateral environmental agreements, https://www.ecolex.org/result/?q=&type=treaty&xdate_min=&xdate_max=&tr_type_of_document=Multilateral (consulted on 19 June 2019).

³¹ *Gaps in international environmental law*, cit., par. 79-38.

³² *Note on the United Nations Secretary-General's Report*, cit., p. 14.

³³ *Gaps in international environmental law*, cit., par. 86.

³⁴ Draft Global Pact for the Environment, cit., Art. 15 "Effectiveness of environmental norms".

³⁵ *Note on the United Nations Secretary-General's Report*, cit., p. 18.

C. The AHOEWG discussions and its final recommendations

Following an organizational session, held in New York in September 2018, where the provisional agenda was discussed,³⁶ three substantive sessions of the *Ad hoc* open-ended working group took place in Nairobi, as foreseen by the *Enabling resolution*,³⁷ in January, March and May 2019. The *Ad hoc* open-ended working group started working on the basis of the content of the previously illustrated Secretary-General's report.³⁸ Besides States, the three substantive sessions of the working group were also opened to relevant non-governmental organizations in consultative status with the Economic and Social Council, as well as to those accredited to relevant environmental conferences and summits.³⁹

The discussions of the working group focussed mainly on possible options to address the highlighted gaps in international environmental law, debating about guiding objectives, substantive recommendations and considerations for further work. The discussion about international environmental law principles is for sure the more interesting. The options proposed by the delegations to overcome difficulties related to their interpretation, implementation and inconsistency embraced various assumptions, including holding further inter-governmental meetings, creating an International Court for the Environment and – most importantly in light of the draft Global Pact initiative – negotiating a new international instrument. Delegations expressed various ideas as to the nature and form of this instrument: possibilities ranged from a binding treaty, to a high-level political declaration or a document from the General Assembly.⁴⁰

In relation to the lack of cooperation and synergy in the governance of international environmental law, several delegations stressed that strengthening the role of UNEP would have been an option to solve the problem, especially because UNEP development was already foreseen in the declaration produced at the end of Rio+20 conference.⁴¹ The role of UNEP was also emphasised as a solution to tackle the inadequacy of the implementation of international environmental law, because it could be transformed in a body really able to provide concrete and innovative measures to ensure the necessary support to developing countries, especially from a financial point of view. Delegations also suggested requesting

³⁶ General Assembly, *Report of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/277 of 10 May 2018 entitled "Towards a Global Pact for the Environment"*, UN Doc. A/AC.289/2, September 2018.

³⁷ *Enabling resolution*, cit. par. 5.

³⁸ *Co-Chairs' Summary of the First Substantive Session of the Ad Hoc Open-Ended Working Group*, 29 January 2019, available at https://globalpact.informea.org/sites/default/files/meetings/29-Jan-3-Oral-summary-version-for-circulation_25January.pdf (consulted on 19 June 2019).

³⁹ *Enabling resolution*, cit. par. 4.

⁴⁰ General Assembly, *Report of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/277*, UN Doc. A/AC.289/6, 5 April 2019.

⁴¹ General Assembly, *The future we want*, UN Doc. A/CONF.216/L.1, 19 June 2012, par. 88.

the General Assembly to draw up a list of good practices and models respectful of the environment in public-private partnerships.⁴²

At the end of the third session of work, the 22nd May 2019, the *ad hoc* open-ended working group produced some recommendations for the General Assembly, as required by the *Enabling resolution*.⁴³ The document, reached by consensus, starts by underlining the objectives guiding the recommendations, in particular the strengthening of the protection of the environment for present and future generations by supporting the full implementation of the 2030 Agenda for Sustainable Development, as well as the outcome of the UN Conference on Environment and Development (Rio+20). It then goes on by listing substantive recommendations for the UNGA, among which, significantly, are the following: to promote further analysis of the principles of international environmental law; to call on the intergovernmental bodies of the various multilateral environmental agreements to work to strengthen cooperation and coordination; to mandate UNEP to develop strategies, within the framework of the United Nations, to best support the Member States in implementing international environmental norms and in integrating environmental policies into other areas of law.

The main point of these recommendations, however, lies in the “Consideration of further work” part. In order to reach more easily some practical conclusions, the two presidents of the *ad hoc* working group⁴⁴ outlined some elements that had been agreed during the debate in a ‘Non-paper’, which was shared to prepare the final discussions.⁴⁵ With regard to the way in which the work of the *ad hoc* group was expected to be concluded, the ‘Non-paper’ indicated that the working group should have asked the General Assembly to convene a high-level United Nations conference, preceded by the establishment of a preparatory committee, for the adoption of an international instrument – the nature of which was still under discussion – to reinforce the application of international environmental law. What we can read in the ‘Non-paper’ was followed in the decisions of the working group as for the guiding objectives and substantive recommendations sections; on the contrary, recommendations on future development of the work were quite different than the ones drafted in the ‘Non-paper’. Indeed, the only agreement that could be reached was that the *Ad hoc* working group would send its results to the United Nations Environment Assembly

⁴² *Co-Chairs' oral summary of discussion*, 26 March 2019, available at <https://www.un.org/pga/73/wp-content/uploads/sites/53/2019/03/27-March-open-ended-working-group.pdf> (consulted on 19 June 2019).

⁴³ *Recommendations, as agreed by the working group*, 22 May 2019, available at <https://wedocs.unep.org/handle/20.500.11822/28367> (consulted on 19 June 2019).

⁴⁴ Amal Mudallali, ambassador and representative of Lebanon to the United Nations, and Francisco Duarte Lopes, ambassador and permanent representative of Portugal.

⁴⁵ *Co-Chairs' non-paper, Draft elements of recommendations to the seventy-third session of the General Assembly of 25 April 2019*, available at <https://wedocs.unep.org/handle/20.500.11822/28155> (consulted on 19 June 2019).

(UNEA)⁴⁶ for its examination and for the preparation, for its fifth session in February 2021, of a political declaration to be submitted to a high-level meeting of the United Nations, in the context of the fiftieth anniversary of the creation of UNEP.⁴⁷

This result, considering the high expectations and rapidity that characterised the beginning of the Global Pact initiative, can be seen as sort of failure; or, perhaps, the ‘Non-Paper’ proposals were quite too optimistic. Since the beginning, in fact, the negotiations faced several practical and substantive difficulties, such as the lack of participation of countries in Nairobi and the majority of them rejecting the notion of a legally binding agreement and the idea of a potential new agreement. Although there were clear divisions related to the content of the Global Pact, diplomats, with the participation of civil society, and the pressure of a few Member States were able to reach an agreement aiming at trying to bridge the divide.⁴⁸ The recommendations adopted reflect therefore the best outcome that could be achieved at that moment.

As requested by the AHOEWG report,⁴⁹ the General Assembly, via resolution 73/333 of 30th August 2019,⁵⁰ welcomed all its recommendations, i.e. the objectives guiding the recommendations, the substantive recommendations and the steps for further work.⁵¹ In particular, the UNGA endorsed the circulation of the above-mentioned recommendations to Member States of the United Nations, to the members of specialized agencies and to the governing bodies of MEAs and their submission to the UNEA for the preparation of a political declaration for a United Nations high-level meeting.

II. The future of the initiative: its relevance as soft law

As previously illustrated, the shortcomings in international environmental law analysed in the SG’s ‘Gaps report’ – the fragmented nature of environmental legislation, both in terms of principles and at the level of norms relating to the different sectoral regimes; the lack of an organic global environmental governance; the absence of a comprehensive view of the field; and implementation inadequacies – were traced back to a single cause: a significant uncertainty about the scope and interpretation of the principles of international environmental law. The conclusion seemed clear, and it was already highlighted in the SG’s report since the authors recommended to the AHOEWG that “[a] comprehensive and unifying

⁴⁶ The United Nations Environment Assembly (UNEA) was created in June 2012, when world leaders called for UN Environment to be strengthened and upgraded during the United Nations Conference on Sustainable Development, also referred to as RIO+20. It is the world’s highest-level decision-making body on the environment. It addresses the critical environmental challenges facing the world today.

⁴⁷ *Recommendations, as agreed by the working group of 22 May 2019*, cit. UNEP was established at the Stockholm Conference in 1972.

⁴⁸ TIGRE Maria Antonia, *World Leaders Debate the Future of the Global Pact for the Environment*, Columbia Center on Sustainable Investment, available at <http://ccsi.columbia.edu/files/2019/09/Global-Pact-Event-Tigre.pdf> (last consulted 17 October 2019).

⁴⁹ General Assembly, *Report of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/277*, A/AC.289/6/Rev.1, 13 June 2019.

⁵⁰ General Assembly, *Follow-up to the report of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/277*, A/RES/73/333, 5 September 2019.

⁵¹ *Supra*, pp. 10-11.

environmental instrument clarifying all the principles of environmental law would contribute to making them more effective and strengthen their implementation”.⁵² Thus, an overarching multilateral treaty, being negotiated in an intergovernmental conference,⁵³ appeared to many the best solution to pursue.

A. The doctrinal debate

Evidently, a lively debate about the need for a Global environmental pact, its legitimacy and the attempts to bring coherence and unity to the international environmental law field spread in doctrine. The project was supported by over a hundred experts⁵⁴ in environmental law who consider the action of negotiating and drafting a multilateral treaty to be mature and realistic: a “proof of concept” proving credibility and confidence.⁵⁵ Recalling the ‘White Paper’ of *Le Club des Juristes*, collecting environmental principles on a binding agreement would have a positive impact on the general structure of international environmental law, providing coherence and completeness among sectors. Moreover, according to the proponents, a Global Pact could potentially influence the domestic legal systems, particularly the legislative power, requiring States to implement principles into national law.⁵⁶

At the same time, however, doubtful opinions started circulating.⁵⁷ Certain academics, agreeing with Boyle’s⁵⁸ scepticism over an overarching binding environmental treaty, argue that agreements such as the GPE would only bind – the few – State parties to it, offering little substantive obligations and no recourse in the event of its violation.⁵⁹

Professor Voigt⁶⁰ states that a GPE, in the form of a legally binding treaty, or even of a soft document, by consolidating international environmental law principles could increase their relevance and usage, even in national jurisprudence. It could also facilitate their interpretation and fill normative gaps. It would remain however uncertain if the codification of environmental principles *per se* would help fostering environmental protection, implementation

⁵² *Gaps in international environmental law*, cit. par. 10.

⁵³ Along the lines of the Paris agreement experience.

⁵⁴ Among which it is important to mention Professors Boisson de Chazournes, Faure, Prieur, Rajamani and Vinuales; James Thornton, founding president of the environment-related law firm ClientEarth; David Boyd, United Nations Special Rapporteur on Human Rights and the Environment.

⁵⁵ AGUILA, VIÑUALES, cit., p. 23.

⁵⁶ White Paper, cit., p. 32; see also VOIGT, cit., p. 14.

⁵⁷ See, for example, FRENCH Duncan, KOTZÉ Louis J., ‘Towards a Global Pact for the Environment’: *International environmental law’s factual, technical and (unmentionable) normative gaps*, Review of European, Comparative and International Environmental Law (2019), pp. 25-32; KOTZÉ Louis J., FRENCH Duncan, *A critique of the Global Pact for the environment: a stillborn initiative or the foundation for Lex Anthropocena?*, International Environmental Agreements (2018), p. 811-838; BINIAZ Susan, *The UNGA Resolution on a ‘Global Pact for the Environment’: A Chance to Put the Horse Before the Cart*, Climate Law Blog, Sabin Center for Climate Change Law, 16 August 2018, available at <http://blogs.law.columbia.edu/climatechange/2018/08/16/the-unga-resolution-on-a-global-pact-for-the-environment-a-chance-to-put-the-horse-before-the-cart/> (consulted on 19 June 2019).

⁵⁸ Professor Alan Boyle is Emeritus Professor of Public International Law at the University of Edinburgh.

⁵⁹ BISHOP Gemma-Kate, *The Global Pact for the Environment: A critical evaluation*, GoLegal, 3rd January 2019, available at <https://www.golegal.co.za/global-pact-environment-evaluation/> (consulted 19 June 2019).

⁶⁰ Dr. juris Christina Voigt is professor at the Department of Public and International Law, University of Oslo, Norway. She contributed to the draft the SG’s report as a UNEP consultant.

and synergies between MEAs.⁶¹ In any case, working on principles requires caution, because they are a dynamic element of international law, constantly evolving, in need of regular review, in time-consuming and difficult negotiations. Therefore, any attempt to codify those principles will need to consider the necessity of dynamism, abstractness and indeterminacy, without – on the other hand – falling into over-simplification and reduction to minimum standards.⁶² For these reasons, Professor Voigt highlighted other ways to enhance the effectiveness of international environmental law suggesting a “toolbox”, i.e. a package of recommendations (rather than a single outcome), not limited to principles or to one sole strategy and instrument. With the right political support, even a toolbox – and not necessarily a treaty – would add value to the international environmental law field.⁶³

Besides, Susan Biniiaz⁶⁴ underlined that it is debatable whether a unified body of international environmental law is actually desirable since environmental problems are highly diverse so that a ‘one-size-fits-all’ could not be automatically more effective. Moreover, she highlighted that it would not necessarily be advantageous to turn non-legally binding principles into binding ones: as a matter of fact, various principles, even if non-binding, “have played, and should continue to play, a useful backdrop role in the development of environmental law”.⁶⁵ The main argument against this subject is enunciated by Professor Viñuales who states that, although different principles and formulations have been developed since the early 1970s, these are “not sufficient and cannot compensate for the lack of specifically tailored responses”. The principles should not remain undefined and ambiguous because excessive dynamism, width and softness would lead to their inconsistent application and undermine the rule of law. A GPE would, therefore, serve to “crystallise and consolidate a long-matured process that has slowly but surely earned the trust of most countries and peoples around the world”.⁶⁶

The importance of a Global Pact was also discussed by the current Special Rapporteur on Human Rights and the Environment,⁶⁷ who stated that the agreement would act as a “catalyst” because, firstly, it would press States to recognize environmental rights. Secondly, the

⁶¹One way evoked by Voigt would be the use of the principle of ‘systemic integration’, included in article 31(3)(c) of the Vienna Convention on the Law of Treaties, as an interpretative principle that could help coordination between different areas of environmental law. See VOIGT, cit., p. 20.

⁶² *Ibid.*, p. 22.

⁶³ *Ibid.*

⁶⁴ Susan Biniiaz served for over thirty years in the State Department's Legal Adviser's Office, where she was a Deputy Legal Adviser, as well as the lead climate lawyer and a lead climate negotiator from 1989 until early 2017. She is now Visiting Lecturer in Law at Yale Law School.

⁶⁵ BINIAZ Susan, *10 Questions to Ask About the Proposed 'Global Pact for the Environment'*, Columbia Law School, Sabin Center for Climate Change Law, August 2017, available at <http://columbiaclimatelaw.com/files/2017/08/Biniiaz-2017-08-Global-Pact-for-the-Environment.pdf> (consulted 19 June 2019).

⁶⁶ BURGER Michael, PAREJO Teresa, SACHS Lisa, *Global Perspectives on a Global Pact for the Environment*, Columbia Center on Sustainable Investment, 19 September 2018, available at <http://ccsi.columbia.edu/2018/09/19/global-perspectives-on-a-global-pact-for-the-environment/> (consulted on 19 June 2019) [Professor's Viñuales opinion].

⁶⁷ David R. Boyd is Associate Professor of Law, Policy, and Sustainability at the Institute for Resources, Environment, and Sustainability and the School of Public Policy and Global Affairs at the University of British Columbia.

adoption of a GPE would compel the ‘diligent’ States, where those rights are already legally recognised, to take additional measures to protect the environment and its related rights.⁶⁸

B. The Pact as a soft law tool

Codifying principles in a treaty, as previously seen, could be risky; plus, there is no certainty that a binding treaty would represent the preferable solution in order to act swiftly and constrain countries to act towards environmental safeguard. Before the AHOEWG negotiations, many considered that a Global Pact for the Environment was an idea whose time had come,⁶⁹ a crucial development aimed at providing environmental protection with a systemic legal recognition.⁷⁰ For many, the adoption by the international community of a binding international environmental treaty enshrining the principles of environmental law, and the right to live in a healthy environment, would have constituted the expression of an actual and concrete political commitment to the urgency of the current environmental crisis.⁷¹ It’s becoming clear, indeed, that at the current pace of international environmental law-making, and of its insufficient implementation, the increasing degradation of the environment would hardly be tackled.⁷²

To be successful, however, the Global Pact initiative would have needed higher political support; instead, the lack of political will was manifest during the third session of the AHOEWG. Notwithstanding the *momentum* which was created around the Global Pact for the Environment initiative, the recommendations taken by the working group are directed to the endorsement of a simple political declaration. This decision, compared with the previous ideas about an intergovernmental conference and a new binding international instrument, are rather disappointing. One of the two Co-Chairs, Duarte Lopes, admitted during his final considerations that the result of the work of the *ad hoc* group was weak. Political procrastination probably led States to act in a protective way, so that fear played a major role in the end: fear of losing sovereignty, of complicating existing environmental regimes, of redefining principles and their application and, especially for developing countries, of engaging in initiatives that they do not have the capacity to implement on their own.⁷³ Indeed, the NGOs which participated to the negotiations pointed out that the biggest gap in international environmental law is the lack of political will.⁷⁴

⁶⁸ *Ibid.* [Professor’s Boyd opinion].

⁶⁹ *Ibid.* [Former rapporteur Knox’s opinion].

⁷⁰ YOUNG Margaret, *Global Pact for the Environment: Defragging international law?*, Ejl:Talk!, 29 August 2018, available at <https://www.ejltalk.org/global-pact-for-the-environment-defragging-international-law/> (consulted 19 June 2019).

⁷¹ *Ibid.* [Professor’s Pilar Moraga Sario opinion].

⁷² RAIH, cit., p. 23.

⁷³ Earth Negotiations Bulletin, *Summary of the Third Substantive Session of the Ad Hoc Open-ended Working Group towards a Global Pact for the Environment*, cit.

⁷⁴ WAGNER Lynn, *Global Pact Talks Forward Recommendations to UNEA-5*, IISD/SDG Knowledge Hub, 28 May 2019, available at <https://sdg.iisd.org/news/global-pact-talks-forward-recommendations-to-unea-5/> (consulted on 19 June 2019).

Can we detect a decline of multilateralism in the unsuccessful process which characterised the Global Pact for the Environment initiative up to now? While the *Enabling resolution* was passed easily and rapidly because adopted by a majority vote, it was impossible, within the *Ad hoc* open-ended working group, to reach consensus on the binding nature of a future international instrument, the United States of America and Brazil being totally against, in line with their political situation. Consensus made the recommendations achieved completely different from the premises because States weren't ready to embark on the obligations a new environmental treaty would bear.

Still, since an agreement was reached, the AHOEWG negotiations can be considered a good example of multilateral cooperation and the compromise document issued by the AHOEWG can be envisioned as the first step of an ongoing process, which could maybe broaden the work done so far on the GPE: as we know, the General Assembly sent the AHOEWG recommendations to the UNEA, therefore the way is open for further discussions on a future environmental instrument, even because from now until 2022 the 'environmental pressure' on States will grow stronger.⁷⁵ Most importantly, international discussions on the means to increase the effectiveness of international environmental law are likely to be promoted at the UN level.

If the adoption of an overarching environmental treaty is still far, and perhaps not desirable, the last General Assembly's resolution, backing the work and the recommendations that the AHOEWG has done on the Global Pact initiative, constitutes, nevertheless, an important document in the international environmental law field, where acts with a soft law character are traditionally mixed with hard law.⁷⁶ In fact, international law relating to the environment is largely negotiated by States via General Assembly resolutions, decisions of conference of parties of MEAs and through forms of non-binding soft law.⁷⁷ Being the environmental field in constant dynamism – because of its strong connection with science – the role of soft law in the development and application of international environmental norms is crucial.⁷⁸ Soft law, in fact, offers many advantages compared to the more traditional forms of hard law, so much that it has been deemed a more effective alternative.⁷⁹ The fact that environmental treaties take longer to negotiate, risk to be unambitious – because they target a compromise – and are limited in their application until their ratification suggests the need for better alternatives that can respond to the immediate environmental threats.⁸⁰ Due to the pragmatism of the discipline, what really is important in international

⁷⁵ ALVAREZ, cit.

⁷⁶ REDGWELL CATHERINE, *Sources of International Environmental Law: Formality and Informality in the Dynamic Evolution of International Environmental Law*, in d'Aspremont Jean, Besson Samantha (eds.), "The Oxford Handbook of the Sources of International Law", Oxford (2017), p. 941.

⁷⁷ *Ibid.*, pp. 957-958.

⁷⁸ *Ibid.*, 958.

⁷⁹ AHMED ARIF, MUSTOFA MD. JAHID, *Role of soft law in environmental protection: an overview*, Global Journal of Politics and Law Research (2016), p. 10.

⁸⁰ *Ibid.*

environmental law is to solve environmental problems: “whether a given approach is ‘law’ in the traditional sense may be secondary, [w]hat matters is which approach is best suited to achieving the desired results in a certain context”.⁸¹ In a context of lack of political will, a soft law document represents the best approach to be taken, since the alternative of an instrument of hard law is not given – or, in any case, this would compel only the few States accepting the binding treaty.

By keeping the discussions related to the protection of the environment alive at the UNEA level, as highlighted by the General Assembly resolution of September 2019, it is easy to imagine that the support towards a Global Pact would continue to grow. Even if not binding, the recommendations adopted by the AHOEWG and endorsed by the General Assembly could constitute a sort of “toolbox”, as already envisaged – as an alternative to the Pact – by Professor Voigt.⁸² This could contain a package of recommendations – the ones issued by the AHOEWG and future ones to be adopted by the UNEA or through UNGA resolutions – incorporating principles and norms already reflecting hard law and including others with a soft law character. By capturing several aspects of international environmental law, the toolbox – clarifying the overall situation – could provide improvements in the field and enhance effectiveness of environmental protection. We know that more than 500 MEAs are in force at the moment, the problem lying in their implementation: because of the often-cited lack of political will or resources and capacity, environmental related treaties are generally not correctly applied, giving rise to some of the aforementioned ‘gaps’ in international environmental law. The answer to this challenge, ultimately, does not have to be always “making more law” but it can also be the improvement of coordination⁸³ among different treaty bodies and, particularly, between States and UNEP, as correctly highlighted by the AHOEWG report. This solution can be addressed by a soft law instrument, just like an UNEA ministerial declaration, resolution or decision – that could become part of this ‘toolbox’ – which is likely to be accepted in an easier way than a treaty by States and therefore be more effective. At the same time, this form of international cooperation would contribute to preserve the role of multilateralism.

C. The value of principles

With regard to the draft of the Global Pact for the Environment, as conceived by *Le Club des Juristes*, a reflection on the principles thereby codified is needed. The draft *per se* belongs to a project which is, from the point of view of the sources of international law, completely

⁸¹ BRUNNÉE JUTTA, *Sources of International Environmental Law: Interactional Law*, in d'Aspremont Jean, Besson Samantha (eds.), “The Oxford Handbook of the Sources of International Law”, Oxford (2017), p. 960.

⁸² VOIGT, cit., p. 22.

⁸³ *Ibid.*

informal: the instrument did not become an international treaty, it did not reach the possibility of a formal process of international cooperation and therefore was not negotiated by traditional diplomatic actors;⁸⁴ instead, it was codified by the civil society. However, many principles included in the draft have already reached the legal status of customary international law or are encompassed in treaties. This is the case of the no harm principle and the principle of prevention (Article 5 of the draft Pact), in relation to which the ICJ confirmed their customary international law status,⁸⁵ being therefore binding for every State. When considering the procedural face of prevention, inserted in the draft at Article 5, it is uncontested that the obligation to carry out an EIA also reflects customary international law.⁸⁶ The principle of public participation and access to justice in environmental matters – contained in Principle 10 of the Rio declaration – is now the subject of two international conventions: the 1998 Aarhus convention and the 2018 Escazù agreement on access to information, public participation in decision-making and access to justice in environmental matters (Article 9-10-11 of the draft). These principles are surely binding for the parties to the mentioned agreements.

The legal status of other principles is still being discussed: article 6 of the draft Pact contains the precautionary principle. It is well known that the precautionary ‘approach’ does not reflect yet customary international law, even if notions of precaution are found in many environmental treaties⁸⁷ and it has been acknowledged as well in some decisions of international courts.⁸⁸ Even if at present precaution only serves as an interpretational aid in international environmental law, the incorporation of the precautionary approach into many treaties and soft law documents – just like the Global Pact initiative – has initiated a potential trend towards making this approach a principle of customary international law. The same applies to the polluter-pays principle (Article 8 of the draft) which is not yet part of general international law but it is a binding principle in EU law.⁸⁹ Although having been discussed by the ICJ since the 90s,⁹⁰ the principle of sustainable development (Article 3 of the draft), strictly tied with the principle of inter-generational equity (Article 4 of the draft),

⁸⁴ PAUWELYN JOOST, *Informal International Lawmaking: Framing the Concept and Research Questions*, in Pauwelyn Joost, Wessel Ramses, Wouters Jan (eds.), “Informal international lawmaking”, Oxford (2013), pp. 16-20.

⁸⁵ ICJ, *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment of April 9th, 1949, I.C.J. Reports 1949, P. 4.; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of April 20th, 2010, I.C.J. Reports 2010, p. 14; and *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of July 8th, 1996, I.C.J. Reports 1996, p. 226.

⁸⁶ ICJ, *Pulp Mills case*, cit.; ITLOS, *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion of February 1st, 2011, ITLOS Reports 2011, p. 10.

⁸⁷ *United Nations Framework Convention on Climate Change*, signed in New York on May 9th, 1992 and entered into force on March 21st, 1994, signatories: 165, parties: 197, UNTS: vol. 1771, p. 107, Art. 3.3; IMO, *Protocol to the 1972 Convention on The Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, signed in London on November 7th, 1996 and entered into force on March 24th, 2006, Art. 3; *Vienna Convention for the Protection of the Ozone Layer*, signed in Vienna on March 22nd, 1985 and entered into force on September 22nd, 1988, signatories: 28, parties: 198, UNTS: vol. 1513, p. 293, preamble.

⁸⁸ ECtHR, *Affaire Tătar c. Roumanie*, Judgment of January 27th, 2009, available at <http://hudoc.echr.coe.int/eng?i=001-90909> (consulted on 21 October 2019); ITLOS, Advisory Opinion on Responsibilities and Obligations of States, cit.; WTO, Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, adopted on February 13th, 1998, DSR 1998:I, p. 135.

⁸⁹ Art. 191 TFEU.

⁹⁰ ICJ, *Gabčíkovo-Nagyymaros Project (Hungary v. Slovakia)*, Judgment of September 25th, 1997, I.C.J. Reports 1997, p. 7.

is considered more a concept than a customary principle of international environmental law having a normative value. In this case, the principle, included in soft law document since Stockholm Declaration, is used as a complement to hard law instruments.⁹¹

Other principles inserted in the draft Pact, as previously illustrated, are completely new to the environmental field, i.e. effectiveness of environmental norm, resilience and non-regression.⁹² The so-called ‘duty to take care of the environment’, whose incorporation in a treaty project is relatively original, seems more a declaration than a principle.⁹³ These assertions may, however, have an important declaratory effect and help influencing future policies and agreements. Moreover, not having been codified and fixed in a treaty, these principles can still be developed in a dynamic way, in order to better tackle environmental threats.

Overall, the principles codified in the draft Pact and brought to the attention of the international community through the AHOEWG sessions and report may be useful to influence the interpretation, application and development of future rules of law. Just like the principles of international environmental law have become customary international law, even the remaining principles could be over time recognized as legal rules.⁹⁴ Even if not yet enforceable, they will serve to express standards that are becoming widely shared within the international community.

While waiting for the future steps that will lead the UNEA to the organization of the UN high-level meeting in 2022, aimed at strengthening the implementation of international environmental law and international environmental governance, we must welcome with favor the outcomes the Global Pact for the Environment initiative has achieved until now. Even if the result is quite different from what was intended by its promoters, the products of the Global Pact process, in particular the SG’s report on gaps in international environmental law and the AHOEWG recommendations, represent valuable soft law documents that will be able to influence further developments on environmental protection. The agreement reached at the end of the Ad hoc working group sessions – although not envisaging an overarching global treaty – is extremely important to keep environmental multilateral diplomacy alive: indeed, multilateralism will be reinforced through further UN level meetings and via international cooperation, for example with better coordination between already

⁹¹ SHELTON DINAH, *Introduction. Law, Non-Law and the Problem of ‘Soft Law’*, in Shelton Dinah (ed.), “Commitment and Compliance: The Role of Non-binding Norms in the International Legal System”, Oxford (2003), p. 10.

⁹² The non-regression principle was already implicitly referred to in the Paris Agreement which is in practice irreversible, due to its progressive nationally determined contributions (United Nations Framework Convention on Climate Change, *Adoption of the Paris Agreement*, UN Doc. FCCC/CP/2015/L.9/Rev.1, 12 December 2015, Art. 4.3).

⁹³ FRANCONI FRANCESCO, *A General Duty of Care towards the Environment*, in Aguila Yann, Viñuales Jorge E. (eds), “A Global Pact for the Environment - Legal Foundations”, Cambridge (2019), pp. 37-43.

⁹⁴ BOHOSLAVSKY JUAN PABLO, ESPÓSITO CARLOS, *Principles Matter. The Legal Status of the Principles on Responsible Sovereign Financing*, in Espósito Carlos, Li Yuefen, Bohoslavsky Juan Pablo (eds), “Sovereign Financing and International Law”, Oxford (2013), p. 81.

existing environmental-related instruments.⁹⁵ Moreover, the AHOEWG recommendations endorsed the full implementation of the 2030 Agenda for Sustainable Development,⁹⁶ with the result of connecting the Global Pact for the environment initiative to other international environmental law instruments: looking at the current political *momentum* around environmental concerns, we can affirm that the multilateral architecture of international environmental law is still very much vital.

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⁹⁵ As required by the AHOEWG substantive recommendations. See Report of the ad hoc open-ended working group, cit., p. 9.

⁹⁶ *Ibid.*

List of abbreviations

AHOEWG	Ad Hoc Open-ended Working Group
CoP	Conference of Parties
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EIA	Environmental Impact Assessment
EU	European Union
GIEP	Groupe international d'experts pour le Pacte
GPE	Global Pact for the Environment
ICJ	International Court of Justice
IUCN	International Union for the Conservation of Nature
ITLOS	International Tribunal for the Law of the Sea
MEA	multilateral environmental agreement
NGO	non-governmental organization
SG	Secretary-General
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNEA	United Nations Environment Assembly
UNEP	United Nations Environmental Program
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
WTO	World Trade Organisation

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