

Oral summary by the Co-Chairs

Pursuant to General Assembly Resolution 72/277 of 10 May 2018 and the decision taken at the organizational session held from 3 to 5 September in New York, the ad-hoc open-ended working group met in Nairobi from 14 to 18 January 2018 for its first substantive session.

The discussions were rich and wide-ranging, focusing mainly on the content of the Report of the Secretary-General entitled “Gaps in international environmental law and environment-related instruments: towards a global pact for the environment”.

Process

On the process launched by General Assembly Resolution 72/277, there was general agreement on having a constructive, open, transparent and inclusive discussion, as well as consensus on guaranteeing that the process and the ongoing debate should not undermine existing instruments, bodies and processes. The importance of conducting our work on the basis of consensus, and without prejudging its outcome, was highlighted by some delegations, as well as the importance of seeking a pragmatic and realistic outcome.

It was mentioned by a significant number of delegations that the ad-hoc open-ended working group needs to fulfill its mandate in a stepwise manner, with a view to making recommendations to the General Assembly by the end of the first semester of 2019, as requested by the Resolution.

Delegations also highlighted the importance of basing the process on existing relevant political declarations, including the Stockholm Declaration, the Rio Declaration on environment and development, the Rio+20 Declaration, the 2030 Agenda, and the Addis Ababa Action Agenda.

Report

With respect to the Report of the Secretary-General, there was a general agreement that this should not be subject to negotiation.

Several delegations considered that the Report, while not perfect, provides a comprehensive overview on the gaps in international environmental law and environment-related instruments and that it was a good basis for discussion. It was also pointed out by a significant number of delegations that the debate should not be limited to the findings of the Report and be complemented by inputs from delegations.

A few delegations considered that the Report could have provided a deeper and more objective analysis of certain areas, a greater justification for some of its findings and that there were elements of the Report that were beyond its mandate.

Introduction

Several delegations stressed the need to have a clearer definition of a gap. For some delegations, gaps should be interpreted in a narrow sense and be limited to normative ones. In that sense, some “gaps” highlighted in the Report should be instead regarded as challenges. For other delegations, gaps should be considered in their broader meaning, such as normative, institutional or as pertaining to implementation. Some delegations highlighted that the existence of gaps prevented the implementation of international environmental law obligations, while other disagreed with this approach.

For some delegations, fragmentation reflects the diversity of international environmental law and should be considered as an asset, as it is a manifestation of its non-hierarchical character and its need to adapt to provide specific answers to specific situations. Some delegations pointed out that some gaps can be intentional and reflect the necessary compromise among States when negotiating international instruments. Other delegations underlined that fragmentation becomes problematic when it creates a lack of legal clarity and predictability, and that addressing fragmentation would facilitate implementation.

Several delegations stressed that international environmental law is a part of international law and that rules of international law can be used to fill the gaps. Several delegations noted that the role of customary international law, non-binding instruments and regional/national agreements were not sufficiently stressed in the Report and should be given more importance.

Principles

Many delegations underlined the importance of general principles as building blocks of international environmental law. Several delegations stressed the role of principles in promoting legal certainty, enhancing visibility of international environmental law, ensuring consistency of implementation, facilitating interpretation, as well as filling normative gaps.

Several delegations indicated that there is no agreement at this stage on the conclusion of the Report that “*a comprehensive and unifying international instrument clarifying all the principles of environmental law would contribute to making them more effective and strengthen their implementation*”. Some delegations pointed out that the Report failed to offer a solid justification for such a proposal.

Many delegations indicated that they were open to consider working on the consolidation of principles of international environmental law. Amongst these delegations, several signified their openness to considering the possibility of developing a new instrument with that purpose. Different views were shared with respect to the nature of such instrument, including whether it should be legal in nature or not. Several delegations pointed out the need for further discussions on the concrete added-value of such an instrument, whether binding or non-binding, and how its development could contribute to strengthening environment protection.

With regards to the methodology for developing such an exercise, several delegations highlighted the need to take into consideration principles of international environmental law already contemplated in existing instruments and political declarations as well as customary international law. In this regard, it was pointed out by some delegations that there is a risk associated with reopening or redefining existing principles as this could possibly lead to a regression rather than a progression. Several delegations stressed that this work should focus on the principles that gather international consensus. Other delegations indicated that such an exercise would be an opportunity to update existing principles and include emerging principles as international environmental law has considerably developed in the last decades.

Many delegations commented on the importance and content of several principles, including the principle of prevention, precaution, polluter-pays, common but differentiated

responsibilities and respective capabilities, national sovereignty over natural resources, non-regression and progression, equity, access to environmental justice, and the right to a clean and healthy environment. Some delegations pointed out that the identification of principles of international environmental law is a delicate and controversial exercise, and that any action in that regard should wait for the outcome of the study launched by the International Law Commission on the criteria to define general principles of law.

Regulatory regimes

Several delegations reaffirmed the importance of not undermining specific regulatory regimes and avoiding duplication. Some delegations stressed that they must only be addressed in the context of each specific agreement, and not by the ad-hoc open-ended working group which could disrupt on-going processes. Some delegations stressed that the ad-hoc open-ended working group could provide a momentum by sending a strong message from the General Assembly encouraging such structures to address gaps.

Some delegations reaffirmed that the gaps identified in the Report are the result of a political compromise between States or would need to be addressed in specific processes.

Specific comments were made related to the different regulatory regimes. Some delegations noted that the Report did not sufficiently take into account voluntary frameworks.

Environment-related instruments

Some delegations understood "environment-related instruments" as covering non-binding environmental instruments, and not as covering those international legal instruments that have an environmental dimension.

Some delegations stressed the relevance of the environment-related sectors presented in the Report, while noting that other sectors could have been addressed.

On trade instruments, some delegations underscored the need to find a balance between safeguarding trade interests and protecting the environment. Some delegations noted that the

Report did not sufficiently assess the advancements made under the World Trade Organization.

On investment instruments, some delegations noted the growing tendency of taking into account environmental considerations in this sector, while others indicated that environmental clauses were still insufficiently included.

On intellectual property rights, several delegations mentioned the ongoing work in this sector, while others stressed that more progress needed to be made.

On human rights instruments, some delegations noted that many human rights cannot be fully enjoyed without the right to a clean and healthy environment. Some stressed that the human right sector was a distinct system that was not relevant in this context. In this regard, some delegations cautioned against the risk of politicization.

Governance structure

There was a general understanding that the ad-hoc open-ended working group could support the strengthening of the governance structure of international environmental law, while preserving the independence of each Multilateral Environmental Agreement (MEA) and respecting ongoing processes. The role of the United Nations Environment Programme (UNEP) as the global authority on environment in the UN system and the role of United Nations Environment Assembly (UNEA) in addressing governance gaps were re-emphasized by many delegations, as well as the importance of fully implementing paragraph 88 of the Rio +20 Declaration.

The strengthening of synergies and promotion of better coordination and cooperation between MEAs, bodies and processes, building on ongoing initiatives, was stressed by many delegations. In this regard, many supported the idea that the ad-hoc open-ended working group considers the possibility of developing further work on the proposals made in the paragraph 83 of the Report.

There was a broad understanding regarding the importance of non-State actors' participation in governance, including major groups, indigenous people and local communities, youth,

women, NGOs, and the business sector. Several delegations supported a more coherent and pro-active approach to the participation of stakeholders in the different MEAs. Other delegations highlighted that this participation should be carried out in accordance with international and national laws, reflecting the differences of each specific context.

Implementation and effectiveness

Many delegations recognized that gaps relating to the implementation of international environment law exist and need to be addressed.

There is a broad understanding that national implementation is first and foremost the responsibility of States and that many countries face challenges to implement their obligations under the different multilateral environmental agreements, taking into account national circumstances and priorities. There is a need to strengthen capacities of the actors in charge of implementing the obligation at all levels.

Many delegations stressed the need to strengthen the means of implementation to implement international environmental law in line with Agenda 2030 and the Addis Ababa Action Agenda. There was a call for developed countries to increase their support to developing countries through increased financial resources, capacity building and technology transfer, as well as for developing a tracking mechanism in this regard.

Regarding dispute settlements, several delegations emphasized the absence of an international environmental court. Some explained in this regard that the time was not ripe for such a court to be established, indicating that resorting to existing instruments of international law should be the priority. Delegations also underlined the importance of strengthening the capacities of national judicial systems. The role of the Montevideo Programme (Programme of Development and the Periodic review of Environmental Law) was highlighted in this regard.

On liability and redress for transboundary environmental damage, some delegations stressed that States have an obligation of conduct, not an obligation of results. Some delegations highlighted that there was not a predictable obligation for any transboundary environmental damages. While it was highlighted that the few regimes with rules on civil liability are very

specific and not always coherent, many delegations underlined that it would not be appropriate for the ad-hoc open-ended working Group to make recommendations on liability.

Conclusions

As far as conclusions are concerned, delegations reiterated many of their views as expressed earlier in the debate. In considering the way forward, several delegations stressed the importance of being provided, by the Co-Chairs, with elements to guide and structure the next substantive session.

Way forward

It was decided that the second substantive session will take place in Nairobi, from 18 to 20 March 2019. The provisional agenda was adopted. When referring to how the ad-hoc open-ended working group should address item 4 of this provisional agenda entitled “*Discussion of possible options to address possible gaps in international environmental law and environment-related instruments, as appropriate*”, some delegations called for a sequential discussion of possible gaps and possible options to address possible gaps. Other delegations expressed their preference for a more integrated discussion. Some delegations indicated their wish to refer to the Secretary-General’s report in future. The Co-Chairs indicated that they will take into consideration all views expressed during the first substantive session, together with the inputs submitted during the intersessional period, to provide elements to structure and guide the discussions at the next session.