

KENYA'S COMMENTS ON THE REPORT OF THE SECRETARY GENERAL ENTITLED 'GAPS IN INTERNATIONAL ENVIRONMENTAL LAW AND RELATED INSTRUMENTS: Towards a global pact for the environment'

Introduction

The Government of Kenya notes the report by the UN Secretary General entitled "*Gaps in the International Environmental Law and environmental –related instruments: towards a global pact for the environment*" dated 30th November 2018.

The GoK notes that the rationale for development of the Global pact is to have a comprehensive and unifying international instrument clarifying all the principles of international environmental law which would contribute to making the same more effective and strengthen their implementation.

However, the GoK has the following concerns:-

1. On the principles of international environmental law (Chapter II)

GoK reiterates that the Rio Declaration on the Environment and Development of 1992 encapsulates all the core principles of IEL such as: precautionary approach, sustainable development (inter and intra generational equity), polluter pay principles, environmental impact assessments, environmental democracy, common but differentiated responsibility amongst others, except for the non –regression and progression which is relatively new and has been incorporated into the Paris Agreement so it is now applicable as part of principle of International Environmental Law.

Therefore, there is no need for development of new instrument to capture principles of International environmental law again under the Global Pact.

2. Proliferation and fragmentation of International Environmental law treaties (Chapter V)

The GoK notes that indeed environmental law treaties have proliferated since the Stockholm Conference on Human Environment in 1972, and that all these treaties seeks to address specific areas of environmental law. It is fact which has to be admitted that new treaties and protocol in environmental will continue to be negotiated under the UN, so long as new challenges continue to exist.

Therefore, proliferation and fragmentation of international environmental law is inevitable as is in other areas of public international law. There exist tools for resolution of fragmentation in international law and this was elaborated in a report by the UN

International Law Commission of 2006 ¹ And article 31 and 32 of the Vienna Convention on the law of treaties.

Therefore, fragmentation in international environmental law should not be an issue since other areas of international law are experiencing the same.

Moreover, there are various UN Agencies and other institutions which deal with matters related to environment such as FAO, WIPO, IAEA, WTO, ICAO, IMO, UN Oceans, UNEP, UN –Habitat which often develop treaties and protocols in their respective areas which relate to environment which cannot be stopped nor merged into one entity under the proposed Global Compact for the environment.

3. Institutional Governance for the Environmental Law Instruments (Chapter V)

The report by the UN Secretary General has decried the lack of coordination AND cooperation amongst various treaty bodies and secretariats of various UN treaties concerning and dealing with environmental matters. The Government of Kenya concurs that there is need to have synergy akin to that being witnessed between Conference of Parties of the Basel, Rotterdam and Stockholm Conventions.

Therefore, there is the need to enhance coordination and cooperation amongst the secretariats of these environmental treaties through consolidation and establishment of reporting mechanism at UNEP. The reports notes that UNEP was established to promote international cooperation in the field of environment and to provide general policy guidance for the direction and coordination of environmental programmes within the UN System.

Therefore, creating a bigger role for UNEP in coordination, cooperation and supervision of the activities of the various environmental treaty bodies under the proposed Global Pact for Environment will augur well with the Rio +20 Conference outcome document entitled “The Future We want” and the UN General Assembly Resolution of 2012 which decided to strengthen and upgrade UNEP and establish universal membership to its Governing Council which has made many other UN institutions to acquire significant environmental responsibilities such as UNDP, UN–Habitat, FAO, IMO, IAEA, ICAO, and ILO.

4. National implementation challenges (Chapter VI)

The report by the UN Secretary General highlights numerous challenges being faced by members’ states in fulfilling their commitments under various UN Environmental treaties such as lack of capacity building, inadequate finances, lack of technology and inadequate

¹ FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW . Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi.

engagement with other stakeholders. GoK position is that similar challenges have been encountered in other legal instruments and international institutions, and the solution has been provision of technical assistance and financial resources by development partners in accordance with the Addis Ababa Action Agenda of the Third International Conference on Financing for Development (2015).

5. Liability & Redress for Trans boundary Environmental Damage and Dispute Resolution (Chapter VI)

Other than oil pollution and nuclear damage which have regimes for redress and apportionment of liability, the UN member states can use the *Draft Articles on State Responsibility for International Wrongful Acts* developed by the International Law Commission in 2001 as the applicable regime for redress for Trans boundary environmental harm. Already different judicial institutions and tribunals all over the world are using the draft Articles and the same are progressive becoming customary international law.

Therefore, it might not be necessary to develop another regime on state responsibility to govern environmental harm.

Similarly, on dispute resolution, there exist numerous fora for resolution of environmental related disputes such as International Court of Justice, International Tribunal for Law of the Sea, Arbitral Tribunals under the Law of the Sea (UNCLOS), WTO Dispute Settlement Body, Permanent Court of Arbitration (PCA) and many ad hoc tribunals which have been created to resolve such matters.

Moreover, Article 33 of the UN Charter provides different mechanism for resolution of disputes and judicial process is not the only option. Therefore, there may be no need to create a new judicial institution dedicated to environmental matters except that focus should be on ensuring implementation of the decision of the aforementioned judicial bodies/dispute resolution bodies.

6. REMARKS ON THE CONCLUSION (Chapter VII)

- The Government of Kenya reiterates that the on-going efforts to explore negotiation of a possible instrument should not undermine the existing multilateral environmental agreements (MEA) and instead build on them, and should be based on the principle of common and differentiated responsibility and permanent sovereignty over natural resources.
- The ongoing efforts should seek to strengthen UNEP as was decided in the Rio +20 conference outcome document 'The Future we want', so that it can coordinate and ensure cooperation amongst various secretariats of Multilateral Environmental

Agreements, and build synergy based either on cluster or thematic areas of the MEA, similar to synergy being witnessed between Basel, Rotterdam and Stockholm Conventions.

- It should also strengthen UNEP by consolidating reporting mechanism, supervision, coordination and cooperation amongst UN environmental treaty instruments under UNEP.
- We reiterate that fragmentation in international environmental law has been necessitated by the fact that different aspects of environment require, specific – tailored made multilateral environmental agreement since “*one size fit all approach*” cannot work in the field of International Environmental Law. Moreover, legal tools exists in Article 31 to 33 of the Vienna Convention on the Law of Treaties on how to interpret treaties even in incident of fragmentation. The aforementioned provisions have now become customary international law. Moreover, International Law Commission in its report of 2006 entitled “*Fragmentation of international law: difficulties arising from diversification and expansion of international law*” adopted by UN General Assembly in December 2006 provides guidelines on how to resolve problems associated with fragmentation in international law.
- Any supposed “gap” or “deficiency” in Multilateral Environmental Treaty identified should be addressed through that treaty mechanism by state parties therein only, and not through an external process which involve non-state parties.
- Developing and Least Developed Countries (LDCs) facing challenges in fulfilling their national commitments on various Multilateral Environmental Agreement , due to technical, financial and technological challenges should be assisted as was agreed in the *Addis Ababa Action Agenda on Financing for Development of 2015* and the *Montevideo Program on Environmental Law* respectively.

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