INTERNATIONAL COUNCIL OF CHEMICAL ASSOCIATIONS

April 9, 2019

Her Excellency Dr. Amal Mudallali
Ambassador and Permanent Representative
of Lebanon to the United Nations
By Email to contact@lebanonun.org

His Excellency Francisco Duarte Lopes
Ambassador and Permanent Representative
of Portugal to the United Nations
By Email to portugal@un.int

Dear Ambassador Mudallali and Ambassador Duarte Lopes:

The International Council of Chemical Associations (ICCA) is pleased to provide these written comments in response to your request at the Second Session of the Open-Ended Working Group (OEWG) to consider options to address possible gaps in international environmental law and environmental related instruments, in accordance with United Nations General Assembly Resolution 72/277 dated May 10 2018 entitled "Toward a Global Pact for the Environment" (GPE). This submission complements ICCA's earlier submission of comments to several government delegations.

ICCA is the voice of the worldwide chemical industry. ICCA represents an industry with global turnover of more than $5.7 trillion, directly and indirectly employing over 120 million persons. Our industry is committed to sustainable development and believes chemistry plays an integral role in solving our world's sustainability challenges. Through Responsible Care® and initiatives to build chemical management capacity by governments and companies, the chemical industry advances sustainable management of materials in all their phases and achieves greater improvement and transparency in environmental, health, and safety performance.

Based on our commitment to sustainability and our long experience in international instruments (e.g., the Stockholm, Basel, and Rotterdam Conventions, and many others affecting chemicals) and forums (e.g., the U.N. Environment Assembly (UNEA) and the U.N. Strategic Approach to Internationals Chemicals Management (SAICM)), ICCA offers the following comments on the discussions to date on the content and possible form of a Global Pact for the Environment.

ICCA appreciates the approach outlined by the United Nations General Assembly (UNGA) resolution 72/277 to identify potential gaps in international environmental law, evaluate whether those gaps need to be filled, and describe potential next steps to fill those gaps. In fact, some of the gaps identified in the November, 2018 Secretary General's report highlight the need for improvement in important areas where ICCA has been promoting improvements and changes. Unfortunately, neither the report nor the discussion to date have addressed the impact of non-binding but influential and effective initiatives (e.g. SAICM). Nor does the discussion to date provide meaningful solutions to the gaps identified. Indeed, the discussion through the second session of the OEWG has not clarified how a global, legally binding treaty to codify principles of international environmental law would in fact address the implementation, capacity, financial

and technical hurdles identified by the majority of governments, and by our experience in improving chemicals management, as the real barriers to universality in application and interpretation of international environmental law.
ICCA believes that a comprehensive and unifying international instrument clarifying all principles of environmental law is not necessary, and a distraction from addressing the problems with implementation identified in the OEWG's discussion to date. Notably, the analysis in the Secretary General's report does not support the need for a global treaty on "principles", and it does not demonstrate that such an instrument would yield concrete solutions.

Our position that a legally binding treaty is not necessary is based on several reasons. Although it is true that "there is no single overarching normative framework that sets out what might be characterized as the rules and principles of general application in international environmental law," each of the environmental agreements or instruments adopted thus far addresses a specific environmental challenge. Each is legally and institutionally distinct from others. We disagree with the premise that pervades the Secretary General's report that this is an inherently negative development. When each of the instruments and agreements was negotiated, the parties thoroughly considered the acceptable metes and bounds of the instrument.

Some who promote a legally binding treaty as the proper outcome of the GPE contend that the legal principle of *lex specialis derogate legi generali* (a law governing specific matter overrides a law governing general matters) ensures that the codification of international environmental law principles will not affect the significant number of environmental agreements or instruments that have been adopted thus far. ICCA believes this argument to be of dubious weight, since any codification or interpretation of specific principles (such as precaution, substitution, or non-regression) will necessarily be more specific than the reflection of those principles in existing instruments. Moreover, the proponents of a treaty have not established that the similar legal principle of *lex posterior derogate legi priori* (the "younger" law overrides prior law) will not, or cannot, apply. Attempting to negotiate an agreement that is intended to inform the interpretation of existing agreements therefore presents a high risk of inadvertent or unforeseen impacts on those agreements, including impacts that were not intended by the parties that originally agreed to be bound by them.

For this reason, any attempt to retroactively superimpose a single umbrella over 500 existing discrete agreements and instruments is a significant legal and practical undertaking. We believe it would take years of due diligence and analysis to perform properly, largely because a legally binding GPE treaty would trigger re-review or *de facto* amendment of some, most or all of those underlying agreements – and all at once. This would not only be disruptive, but could divert attention to pressing environmental and health issues while that review is underway. Given the limited resources and negotiating capacity that currently constrain international environmental institutions, such an effort cannot be justified in the absence of a compelling case that it would solve problems on a large scale. No such compelling case has been made.

ICCA also believes the discussion to date on the GPE has failed to address key considerations in environmental law. For example, a major shortcoming in the Secretary General's report relates

to access by the public to information held by authorities. The report describes the principle of access to information, participation in decision-making and access to environmental justice as foundational elements in international environment law. But these statements are accompanied by no discussion or qualification on the generally accepted principle that access to information can be appropriately limited to protect confidential or proprietary information.[1,2] In short, we believe that the GPE discussion has not addressed the full scope of existing international legal principles that have an impact on international environmental law. That omission has important consequences for the practical ability to conclude a legally binding treaty to purports to codify principles of international environmental law. And that omission, in turn, has significant potential implications for economic development, competitiveness, and jobs.

ICCA agrees that environmental principles have changed and evolved over time. ICCA believes that rather than attempting to codify legal principles applicable to all existing international environmental agreements, it would be more useful and practical for the governance mechanisms of older agreements and instruments to consider the Secretary General's report and the discussion in the OEWG to determine if their agreements or instruments should be updated.

ICCA has consistently stressed the importance of the following components of effective approaches to chemicals and waste management. We believe these components are equally applicable to and necessary for the enhanced implementation of international environmental legal instruments more generally[3]:

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[1] The emphasis on the need to protect confidential information is balanced in some notable environmental instruments. For example, articles 21 and 22 of the Dubai Declaration on International Chemicals Management appropriately balance these interests (and makes it clear that information relating to the health and safety of humans and the environment should not be regarded as confidential). The Declaration states:

> *21. We will facilitate public access to appropriate information and knowledge on chemicals throughout their life cycle, including the risks that they pose to human health and the environment;*
> *22. We will ensure that, when information is made available, confidential commercial and industrial information and knowledge are protected in accordance with national laws or regulations or, in the absence of such laws and regulations, are protected in accordance with international provisions. In making information available, information relating to the health and safety of humans and the environment should not be regarded as confidential;*

[2] Considering the aspiration of the U.N. SAICM process to provide a clearing house function on chemical information, ICCA has recommended that national bodies and institutions take the lead in developing an international navigator, including existing databases, in cooperation with OECD, U.N. Environment and SAICM secretariat. Such a navigator could be based on the publically available information within EU IUCLID and EUCLEF (EU Chemicals Legislation Finder), together with other databases, including those from US, Canada and Japan and the OECD eChemPortal that would contribute to the capacity building efforts. Recognizing the right to protect proprietary/confidential information does not mean that basic information related to health or environmental protection will not be available.

[3] We note that the Secretary General's report expressly endorses these concepts. For example, page 2 of the summary of the report includes the following statement:

> There should also be more effective reporting, review and verification measures and robust compliance and enforcement procedures and mechanisms, ensuring that those States that require support have adequate resources to enable them to effectively implement their commitments, and the role of non-State actors should be enhanced at multiple levels.

- Greater and more effective stakeholder involvement
- Improved reporting
- Better implementation of existing programs by governments
- Increased focus on assistance and capacity building to ensure that all countries have basic policies and legislation in place to safely manage chemicals and waste through the life cycle.

Of these four key areas, ICCA particularly emphasizes the need for assistance to developing countries. In our view, the governments and stakeholders of more developed countries must share best practices, technical knowledge and appropriate resources. Capacity building can enhance the fundamental ability to manage chemicals and waste safely in countries that need it most. ICCA and its members have contributed to capacity building in our sector by, for example, our engagement in the U.N. Strategic Approach to International Chemicals Management (SAICM) and implementation of our Responsible Care program in more than 60 countries around the world. We remain committed to the objective of sound management of chemicals and waste beyond 2020.

ICCA strongly recommends that the OEWG consider alternatives to a legally binding treaty as an outcome. We believe several alternatives to a treaty offer the prospect of real improvement in the implementation and enforcement of international environment law.

- U.N. General Assembly Direction/Guidance to Existing International Environmental Bodies. One option to drive improvements in the four key areas noted above is direction or guidance from the General Assembly to the existing international treaty and other organizations to assess the state of implementation, consider options for addressing any identified gaps, and implementing those gaps as soon as possible. In effect, the Parties to the existing instruments and organizations could commit to a review of how well participation, reporting, implementation, and capacity building are addressed, within each instrument and organization. We believe that direction to the secretariats and Parties to international instruments would be a practical and effective way to achieve improvements in these areas. The direction or guidance could take the form of a Resolution or Declaration, and could include recommendations to complete the review within a time certain, a "toolkit" of questions to consider or benchmarks to evaluate, with a request for a subsequent report back to a central organization such as U.N. Environment.
- U.N. General Assembly Direction to Assess Specific "Gaps". The OEWG could also focus the GPE outcome on identifying one or more of the "gaps" in the Secretary General's report and request that an existing treaty body or organization take steps to fill those gaps. In general, this outcome should also address the four key problems we identified earlier, given the coverage of these issues in the Secretary General's report.

Similarly, the report acknowledges at page 35 the role of improved participation of stakeholders, including business and industry, in environmental forums and instruments.

- Leverage the Montevideo Programme on the Development and Review of Environmental Law. Another appropriate outcome of the discussion on the GPE would be to highlight and leverage U.N. Environment Assembly Resolution 2/19. The final assessment and proposals that were produced in respect of Resolution 2/19 were presented and approved at UNEA4 (UNEP/EA.4/L.24, March 9, 2019). The resolution adopted the Montevideo Programme V, in both preambular language and in paragraph 2, reaffirmed

  > [t]he importance of environmental law as one of the key areas of work of the United Nations Environmental Programme, and the potential contribution of the Montevideo Programme V in that regard, **in particular to strengthen the related capacity in the countries** and contribute to the implementation of the 2030 Agenda for Sustainable Development and **the further development of international environmental law**, in accordance with resolutions and decisions of the United Nations Environment Assembly and other relevant United Nations bodies. (Emphasis added).

  The significant benefit of a referral to the Montevideo Programme is the fact that it is U.N. Environment's own effort to transform legal principles and science-based policies into action-oriented rules and standards of conduct. It is expressly designed to "guide the identification and implementation of priority actions in the field of international environmental law to be undertaken by the United Nations Environment Programme, in collaboration with other relevant actors." Montevideo Programme V Statement, Paragraph 1. ICCA believes a reference to Montevideo could ensure coherence between aspirational goals for international environmental law and pragmatic outcomes that enhance implementation.

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We very much appreciate the opportunity to participate in the working sessions of the OEWG, and look forward to a robust discussion of the options at the Group's third session in May, 2019. If we can provide any additional information on ICCA's comments, please feel free to contact me at 1 202 249 6400, or mike_walls@americanchemistry.com.

Sincerely,

Michael P. Walls
Vice-President, Regulatory & Technical Affairs
American Chemistry Council
On behalf of the International Council of Chemical Associations

cc: catalina.pizarro@un.org