Ministerio de Relaciones Exteriores y Culto

Submission of Argentina in preparation of the Second Substantive Meeting to discuss possible options to address possible gaps in international environmental law and environment-related instruments, as appropriate.

I. Introduction

Argentina is of the view that paragraph 1 and 2 of the UNGA's resolution 72/277 are intrinsically linked. This means a process in which its different steps are temporally successive and substantially interrelated.

First of all, the Secretary-General had to submit a technical and evidence-based report identifying and assessing possible gaps in international environmental law and environment-related instruments. The report was submitted on November 30th.

Argentina recalls that the Spanish version says "*posibles lagunas en el derecho internacional del medio ambiente y los instrumentos relacionados con el medio ambiente*" and the French version says "*lacunes éventuelles du droit international de l'environnement et des textes relatifs à l'environnement*". Therefore, taking into account Article 33.4 of the Vienna Convention on the Law of Treaties, the meaning of the term "gap", used in the English version, should be interpreted in a way that best reconciles the terms used in other versions. In Argentina's view, this interpretation would be "gap" as a lacuna, excluding the interpretation of the term "gap" as a void, defect or deficiency.

Secondly, an ad hoc open-ended working group had to consider the report [where possible gaps in international environmental law and environment-related instruments were identified and assessed].

Then, the ad hoc open-ended working group will discuss possible options to address possible gaps in international environmental law and environment-related instruments, as appropriate, [identified and assessed in the technical and evidence-based report submitted by the Secretary-General.]

Argentina considers that the possible gaps in international environmental law should have emerged from the technical and evidence-based report submitted by the Secretary-General and not from other sources not identified in the UNGA's Resolution 72/277. Otherwise, Parties will not be in a fair position to assess, in a timely manner, other possible gaps in international environmental law and environment-related instruments identified and assessed in other sources, including inputs from Member States in preparation of the upcoming Second Substantive Meeting.

II. Possible gaps in international environmental law and environment-related instruments

Argentina supports the view that International law is complete and all situations, including those related to environmental issues, can be solved by application of international law as reflected in international conventions, international custom and general principles of law.

Furthermore, Argentina considers that fragmentation of international law has not been a cause of systemic inconsistency or lack of coherence among different sources of international law, including international environmental law. In fact, Argentina notes that, from a technical and evidence-based point of view, no gap in international environmental law and environment-related instruments has been identified neither in the Report submitted by the Secretary General nor in other source of information. In addition, it must be highlighted that throughout the contemporary history of international law, *non liquet* has not been pronounced in a single case.[1]

Argentina is deeply concerned on recognizing the existence of gaps in the international environmental law because of the systemic and unprecedented risk that this recognition could imply. The recognition of gaps in international law, in environmental field among others, would imply the recognition that there are some international matters which are governed by the state of nature, out of the scope of international law. This recognition would open the *Pandora box* for the adoption of unilateral actions in those fields which could be unilaterally defined as unregulated because of the existence of a gap in international law.

Argentina is concerned that such approach could undermine the international legal system, as a fundamental pillar of our international community, because of an individual purpose of having an international instrument to regulate a particular field. Although Argentina recognizes the importance of international environmental law, the relevance of

[1] L'Institut de Droit International denied the declaration of non liquet by international tribunals in its Resolution saying *"le tribunal arbitral ne peut refuser de prononcer sous le prétexte qu'il n'est pas suffisamment éclairé soit sur les faits, soit sur les principes juridiques qu'il doit appliquer.* See INSTITUT DE DROIT INTERNATIONAL (1875), Session de La Haye – Projet de règlement pour la procédure arbitrale international, Article 19; Kelsen considered systemic *non liquet* as logically impossible, since every issue is either settled by a specific legal rule, and failing that, by a 'residual negative principle' which states that anything that is not specifically prohibited is lawful. See KELSEN, H. (1952), Principles of International Law, New York, p. 306; Lauterpacht, stated that the "general principles of law" are one of the tools that the international judge is not only permitted, but obligated, to use to fill in gaps in the fabric of the law as a matter of the law's completeness. See LAUTERPACHT, H. (1958), The Development of International Law, p. 166; LAUTERPACHT, H. (1958), Some Observations on the Prohibition of "Non Liquet" and the Completeness of the Law, in Symbolae Verzijl. Présentées au Professeur J.H.W. Verzijl à l'occasion de son LXX-ième anniversaire pp. 196, 205.

Ministerio de Relaciones Exteriores y Culto

the predictability of its scope and content and the need to enhance its full implementation, Argentina considers that the systemic cost to pay could be too high.

III. Possible challenges in international environmental law and environment-related instruments

At the first substantive meeting there was a wide consensus on recognizing that challenges related to the implementation of international environmental law exist and need to be addressed. In their report, Co-chairs stated that there was a broad understanding that many countries face challenges to implement their obligations under different multilateral environmental agreements. There is a need to strengthen capacities of the actors in charge of implementing the obligation at all levels. The need to enhance the provision of means of implementation to implement international environmental law was also stressed. There was a call for developed countries to increase their support to developing countries through increased financial resources, capacity building and technology transfer.

This general agreement was also empirically confirmed in a recent publication on the environmental rule of law made by UNEP2. In this report, the authors acknowledge that Environmental law and institutions have grown dramatically in the last few decades, but they are still maturing. Environmental laws have taken root around the globe as countries increasingly understand the vital linkages between environment, economic growth, social cohesion and peace. Countries have adopted many implementing regulations and have started to enforce the laws. These and other environmental laws, rights, and institutions have helped to slow—and in some cases to reverse—environmental degradation and to achieve the public health, economic, social, and human rights benefits that accompany environmental protection. Too often, though, there remains an implementation challenge.

Evidence shows that implementation of multilateral environmental agreements is generally more challenged by the lack of means of implementation than by alleged gaps in international environmental law. Taking into account that since 1972 more than 1100 environmental agreements have entered into force, it would be difficult to affirm that our society has a rule problem that will be solved having a new rule.

Another point raised at the first substantive meeting was the need of strengthening and/or promoting better coordination and cooperation between MEAs, bodies and processes. There was a wide consensus on the need to avoid overlapping and duplication among MEAs in order to promote coordinated and cost-efficient environmental actions.

[2] UNEP (2019). Environmental Rule of Law: First Global Report.

Argentina considers that the process called from UNGA Resolution 72/277 represents an opportunity to enhance cooperation and coordination among existing environmental institutional bodies.

IV. Possible options to address possible gaps in international environmental law and environment-related instruments.

Argentina considers that if there are no gaps in international environmental law, no action should be taken to address an inexistent problem. Argentina reiterates that all situations, including those related to environmental issues, can be solved by the application of international law as reflected in international conventions, international custom and general principles of law. In addition, there is no evidence against this assertion.

However, some Member States indicated that a compilation of international environmental principles needs to be done in order to provide legal certainty, enhancing visibility of international environmental law, ensuring consistency of implementation, facilitating interpretation.

In this regard, Argentina is of the view that an initial differentiation needs to be done. On the one hand, there are *general principles of law* which are one of the principal sources of international law according article 38.1 (a), (b) y (c) of the Statute of the International Court of Justice. They do not need to be compiled to be mandatory. On the other hand, there are *international environmental principles* which are customary rules. Consequently, to be considered as a source of international law, they are conditioned to be proved as an international custom, this is, as evidence of a general practice accepted as law[3]. Customary law does not need to be compiled in writing to be mandatory.

In both cases, a "compilation" or "codification" process of principles or practices should be preceded by a general acceptance of the States that those principles or practices are general principles of law or customary law. In fact, a codification process takes place after compiling and analyzing that a set of State practices that are recognized as a general practice accepted as law, in order to systematize them in written[4]. This approach has an additional challenge which is to establish an internationally agreed methodology for indicating what principles and practices are general principles and customary law, as appropriate. On these topics, the International Law Commission (ILC) included into its Programme of work the following two issues: 1) "Identification of customary international

[3] PODESTA COSTA, L.A. y RUDA, J.M, Derecho Internacional Público, TEA, 1996, p. 18.
[4] BARBERIS, Julio A., Formación del derecho internacional, Buenos Aires, Editorial Abaco, 1994, p. 235 y ss.

law", at its sixty-fourth session, in 2012 and 2) "General principles of law", at its seventieth session, in 2018.

Argentina is of the view that the Commission can provide an authoritative clarification on the nature, scope and functions of customary international law and general principles of law, as well as on the way in which they are to be identified. Furthermore, in order to avoid duplication, one of the main challenges identified in the Secretary-General's report, and eventually contradictory results, Argentina considers that the Commission constitutes the proper institutional body, under United Nations framework, to conduct these studies. Then, the Commission could be mandated to find and shed light on those general principles and customary law related to the environment.

Argentina asserts that the identification of practices accepted as law or the identification of general principles of law requires a process based on evidence and it is not a matter only subject to negotiation. Therefore, in case Member States decide to negotiate an instrument, legally binding or not, to include a list of "principles" of the international environmental law, it should be noted that this list will not necessarily recognize and systematize customary law or general principles of law. This list of "principles", understanding the meaning of the word "principle" in a vague sense and not as a source of international law, will eventually be just a binding treaty among Parties or a non-binding declaration, but cannot be considered as an international custom or general principles of law, as principal sources of international law.

V. Possible options to address challenges in international environmental law and environment-related instruments.

Argentina suggests the following options to address the aforementioned challenges:

In the context of reaching the full implementation of MEAs, the Working Group could recommend the General Assembly to estimate the financial resources needed to achieve the full implementation of MEAs. Likewise; it would be advisable to conduct a survey to establish capacity building needs and types of technology that should be transferred, for optimal implementation across the board.

After defining this target, developed countries could commit to a goal of mobilizing or providing, in accordance with MEAs, a determined amount of money to address the implementation needs of developing countries. This funding could come from a wide variety of sources, public and private, bilateral and multilateral, including alternative sources of finance.

In order to avoid overlapping, duplication of efforts and waste of financial, human resources and time, the Working Group could recommend the General Assembly to organize a workshop where representatives of different MEAs' could identify overlapped topics across their agendas and propose ways to promote common topics to be dealt with simultaneously by sharing common working groups or meetings, as appropriate.

A good and previous example can be found in Decision 14/30 of the Conference of the Parties to the Convention on Biological Diversity which requested the organization of a workshop to facilitate discussions among Parties of the various biodiversity-related conventions to explore ways in which the conventions can contribute to the elaboration of the framework and identify specific elements that could be included in the framework;

VI. Conclusions

Argentina concludes that:

There is evidence that there are no gaps in international environmental law because all situations, including those related to environmental issues, can be solved by application of international law as reflected in international conventions, international custom and general principles of law.

There is room to work on improving multilateral commitment on providing and mobilizing sufficient means of implementation to achieve the full implementation of MEAs and to strengthen cooperation and coordination among existing convention, bodies, programmes and strategies toward sustainable development.