

The Global Pact for the Environment

As a Next Step on the Way Forward for the Earth Charter

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Abstract

The article assesses the possible contribution of the Global Pact for the Environment that is being promoted as a new legally binding instrument into the process of further implementation of the principles of the Earth Charter as an ethical foundation of the global community. The criteria for the assessment were extracted from the provisions of the Earth Charter on its Way Forward. They are: 1) renewing of the commitments of nations to the United Nations; 2) fulfillment of existing obligations; and 3) implementation of the Earth Charter by a legally binding instrument. One conclusion is that the Global Pact for the Environment has the potential to meet these criteria, and the authors welcome the proposal for the Pact not only as a new separate piece of international law, but also as a significant step further on the way of implementation of the Earth Charter.

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Contents

Abstract	1
1. Introduction	3
2. The Earth Charter and the Global Pact: general observations	4
2.1. The scope of the Earth Charter and the Global Pact	4
2.2. Interlinkages between the provisions of the Earth Charter and the Global Pact	6
3. “The Way Forward” of the Earth Charter and the Global Pact	10
3.1. Renewing of the commitments of nations to the United Nations and the Global Pact	10
3.2. Fulfillment of the existing obligations and the Global Pact	12
3.3. The Global Pact as a legally binding instrument	14
4. Final observations and conclusions	15
References	17

The Earth Charter and the Global Pact for the Environment



Figure 1: Overview of synergies between the Earth Charter and the Global Pact for the Environment

1. Introduction

Drafted in 1990s and launched in 2000, the Earth Charter remains a leading broad and inclusive document of ethical principles, which inspire individuals and institutions from all regions and many spheres of knowledge: civil societies, academia, governments and other entities in their development towards a sustainable future. According to the final provisions of the Charter found in “the Way Forward”, the process of building sustainability requires that nations: 1) renew their commitments to the United Nations (UN), 2) fulfil existing international obligations, and 3) implement legally binding instruments on sustainability and development.

The discussion on the Global Pact for the Environment (the Global Pact) took place during the first semester of 2017. Its proposed draft was developed by a group of politicians, jurists, and experts in international environmental law. This effort, initiated by the French government and brought to the UN, in September 2017, draws to the aspiration of further implementation of the Earth Charter. On 10 May 2018, the United Nations General Assembly (UNGA) adopted the resolution “Towards a Global Pact for the Environment” (# 72/277, A/RES/72/277) with 143 votes in favor for the document, while just six countries voted against and six others abstained (United Nations, 2018). The resolution establishes an ad hoc working group to identify gaps in international law, and the Earth Charter could provide a reference and an inspiration to the process.

Firstly, the article presents an assessment of the relevance of the Global Pact to the Earth Charter in general. This includes an overview of the main purpose and areas of action of both documents, interlinkages and other factors. Secondly, an analysis of the Global Pact is done through the lenses of three criteria based on the Earth Charter’s way forward: Could the approval of the Global Pact contribute to the renewing of the commitments of nations to the UN? How could the implementation of the Pact support the fulfilment of existing obligations of the states? Finally, would the Global Pact be a legally binding instrument for the implementation of the Earth Charter? And if yes, how strong could be its legal effects? The article concludes with an observation of the Global Pact’s possible role in the implementation of values and principles of the Earth Charter (see Figure 1 for an overview of the synergies between these documents).

2. The Earth Charter and the Global Pact: general observations

2.1. The scope of the Earth Charter and the Global Pact

The interdependent principles for a sustainable way of life define the scope of the Earth Charter. The Preamble of the Global Pact draft points out that the parties affirm the need to adopt a common position and principles that will inspire and guide the efforts of all to protect and preserve the environment. Moreover, the Global Pact contains provisions of its legal nature as its entering into force and compliance, while the Earth Charter does not embed such provisions.

This brief observation leads to two conclusions: firstly, the scope of the Earth Charter is wider and includes not only protection and preservation of the environment but a sustainable way of life. Secondly, the influence of the Earth Charter goes beyond the realm of law.

Indeed, despite the importance of law in regulating human relations, it is just one among many regulators including ethics, morality, religion and others. The International Union for the Conservation of Nature (IUCN, 2004), in the Preamble of its Resolution³ on the Earth Charter, acknowledges the commitments of the international community to the role of ethics in sustainable development. It refers to the outcome of the World Summit on Sustainable Development in Johannesburg, 2003. K. Bosselmann (2010) notices that the Earth Charter has diverse impacts on the society as an educational tool, system of values, draft covenant and more ambitious – as a starting point in the dialogue on a global constitution.

The Global Pact does not have such an ambition as the Earth Charter, but it is still quite broad in its scope, following its goal to identify legally binding principles to govern the relationships towards the environment. Moreover, the Earth Charter could be an inspirational starting point in this process.

According to D. Suzuki (2008), both “ecology” and “economics” are rooted in the Greek word “oikos”, which means home. While ecology focuses on principles and conditions of how the home is organized, economics is a study of how to manage the home, and to operate within its conditions. Nevertheless, in the policy making process the focus is usually on economic development and the environment marginalized. K. Bosselmann (n.d.) claims that the

³ RESWCC3.022 Endorsement of the Earth Charter

exploitative worldview and John Locke's ideal of individual freedom are still at the core of modern law and economics. However, as Garduady (1955, as cited in Bosselman, n.d) highlighted such a freedom as a "free fox in a free hen-house".

In this context, the Earth Charter offers a significant approach. The document proposes a set of principles on ecological integrity before other principles, which reflects the necessity to develop within the natural limits, and understand the conditions of the environment. K. Boselmann (2010) notices, that the Earth Charter not only defines pillars, but also organizes them in a particular way. A very important feature it has is its emphasis in the interdependence of environment, social and economic challenges. This should be a guidance for the drafting process of the Global Pact. If the aim of the countries is not to reaffirm just existing obligations, but also to make a real step further in the protection of the environment, the shift in the relationship between ecology and economics is essential. That is, give a priority to ecology or at least better consider its importance, otherwise development will not be sustainable.

The tragedy of the commons is a significant framework for current debates on governing the environment where the ideas of Nobel Prize winner Elinor Ostrom on the role of local self-regulation is crucial. On the other side of the spectrum, it is an idea of the Earth trusteeship to establish a World Environmental Organization as a trustee with the authority to settle disputes among countries and maintain them accountable. Some authors including M. Barr (2017) see this idea as utopian, especially in light of the current reassertion of the national sovereignty.

Despite debatable characters of the Earth trusteeship idea, the UNGA (2017) has already recognized changes in the attitude towards the Earth at both national and global levels. Thus, the General Assembly (2017) uses the term "Earth jurisprudence" and notes that some countries recognize the rights of nature in their vision of sustainable development.

K. Bosselmann (2017) recognizes the Earth trusteeship as the institutionalization of the fundamental duty to protect the integrity of Earth's ecological systems. Concerning the skepticism towards a possible implementation, he believes that "sometimes an ideal is closer to reality than we may think" (Bosselmann, 2017). His idea that nation-states could act as trustees for the Earth (Bosselmann, 2017) correlates to the statement on reassertion of a state's sovereignty.

In this context, the role of Principle 11 of the Rio Declaration is significant. This principle defines that states shall enact effective environmental legislation. M. Prieur (n.d.) highlights the word “effective” in this phrase. Therefore, the role of the Global Pact should focus on commitments of states and on implementation of those commitments through national legislation for protection of the environment. The Earth Charter can be an inspirational starting point in the discussion of these commitments.

2.2. Interlinkages between the provisions of the Earth Charter and the Global Pact

Some of the persons involved in the drafting process of the Global Pact were also part of the drafting of the Earth Charter. Among them are Professor Nicholas Robinson, Judge Antonio Herman Benjamin, and Dr. Parvez Hassan (Battista, 2017; Picture 1). N. Robinson (2018) mentions that the French government’s proposal for the Global Pact is rooted in the French domestic Charter for the Environment. He claims that the Global Pact reaffirms the principles of the Rio Declaration and expresses the same values as in the Earth Charter (Robinson, 2018). Professor N. Robinson (2018) highlights that the mission of the Earth Charter is to shine light on international cooperation towards sustainability. Further, he contends that the success of the Global Pact depends on its closeness to the reflection of the Earth Charter.

The Global Pact aims at overcoming the fragmentation of international environmental law by establishing guidelines for implementation of existing obligations of states and development of international environmental regulations. The Global Pact should interlink with the principles and values of the Earth Charter.

Both documents start with the statement of unprecedented pressure on the Earth and environment and the necessity for all to unite in order to move to sustainability. The Earth Charter calls to “join together to bring forth a sustainable global society” and the Global Pact stresses “the need to adopt a common position and principles that will inspire and guide the efforts of all to protect and preserve the environment”.

The Pact reflects many principles of the Earth Charter, such as those stressing concern with prevention of environmental harm, biodiversity loss, gender equality and the role of women, the rights of indigenous peoples, polluter-pays and the importance of education. According to principle 6 (a) of the

Earth Charter, the incompleteness and inconclusiveness of scientific knowledge is not an excuse to avoid actions for prevention of serious and irreversible environmental harm. Article 6 of the Global Pact expresses the same idea of precaution. While it is still debatable whether the precautionary principle is among the general principles of international environmental law, the International Court of Justice in its decision in 2010 on the Pulp Mills dispute between Argentina and Uruguay mentioned the relevance of the precautionary approach for interpretation of the agreements between parties (para. 164). Explicit listing of the precautionary principle in the Global Pact would not only contribute to the development of international environmental law, but also support implementation of Earth Charter principles in all their integrity for sustainable development.

Another important principle - ecological integrity in the Earth Charter is also included in the Global Pact. The previous session observes that understanding of ecological integrity is critical for sustainability.

K. Bosselmann (2008) claims that consciousness still separates humans and nature. This type of opinion is based on economic and anthropocentric rationality, while the ecological integrity is at the core of the ecological life-centered rationality.

According to L. Westra (2008), the first legal document to embed this concept is the US Clean Water Act, 1972. The Act highlights integrity of water as the “interacting component of air, land, water and living organisms including humans”.

The conventional sustainable development follows a structure of three equal pillars: environment, social and economic. However, the Earth Charter goes further and prioritizes ecological integrity, which allows K. Bosselmann (2008) to conclude that the Earth Charter draws the vision of not just three pillars but the temple of life. The fundament of the temple is ecological integrity. Then, the pillars are social and economic justice and the roof is cultural identity.

The draft Global Pact embeds the ecological integrity in its Articles 2 and 18. Article 2 provides states, institutions, and individuals to take care of the environment in a way that everyone would contribute “to the conservation, protection and restoration of the integrity of Earth’s ecosystems”. Article 18 requests actors to cooperate in order to conserve, protect, and restore the integrity of Earth’s ecosystems and community of life. The community of life, the

other key concept of the Earth Charter, appears in the Preamble and is at the core of the ethical proposal of the Charter, in its Pillar I – Respect and Care for the Community of Life.

Other interlinkages between the two documents include pollution prevention principle and avoidance of military activities harming the environment. (see Earth Charter Principle 6d and 6e and Draft Global Pact Articles 5 and 19).

The Earth Charter includes access rights as its basic principles (13 a, b and d). Access rights includes right to environmental information, participation in decision making concerning the environment, and right to access to justice in environmental matters. Regional treaties, such as, the Aarhus Convention and the Escazú Agreement, also contain access rights. However, no global legal document has incorporated access rights. The Global Pact would fill the gap at the global level, as access rights are included in its Articles 9-11. Thus, the Pact would further recognize and promote the Earth Charter principles.

Currently there are other environmental law documents, which are undergoing the drafting process, for example, the World Declaration on the Environmental Rule of Law (IUCN, 2016). The declaration contains the idea of integrity of the biosphere and interdependence of ecological systems and the principle *in dubio pro natura* (Principle 5 of the Declaration). This principle requires, in cases of doubt, to resolve all matters in favor of nature. The ad hoc group can enrich the Pact by learning from this ongoing drafting efforts.

The other relevant document is the Draft International Covenant on Environment and Development (IUCN, 2010). The Draft Covenant includes respect of all life forms among the fundamental ones. The principle describes that “nature as a whole and all life forms warrant respect and are to be safeguarded. The integrity of the Earth’s ecological systems shall be maintained and where necessary restored”. In the forward to the fourth edition of the Draft Covenant, W.E. Burhenne describes the document as “an authoritative reference and checklist for legislators, civil servants and other stakeholders worldwide” (IUCN, 2010). The incorporation of the outstanding work of IUCN into the drafting process of the ad hoc working group would be very beneficial for the Global Pact.

Despite the similarities, there are also the following identified differences between the Earth Charter and the Global Pact:

- 1) Drafting processes. The Global Pact is being drafted among experts in environmental law and government officials. The drafting process of the Earth Charter included the voice of scientists, lawyers, theologians, indigenous peoples, civil society activists. Therefore, different drafting processes would influence respective outcomes.
- 2) Purpose and content. The purposes of the documents overlap though the purpose of the Global Pact is to become an intergovernmental international treaty limited to the realm of international environment law, while the Earth Charter has a broader purpose and offers an ethical framework for global environment and sustainability governance. Different focuses would impact the content of these documents.
- 3) Mechanism of implementation. The implementation of the Earth Charter, as ethical guidelines, is highly diverse and includes a wide range of actions by different individuals and entities without a centralized compliance system. Its main role lies as an ethical reference for policy and decision-making, it fulfils the function of in awareness raising, educating and guiding decision-making for all sectors or groups. The Global Pact, as a legal document, requires intergovernmental and national mechanisms of implementation and monitoring. In the past, the UN often created new organizations to follow up and implement new treaties. Currently, many of the multilateral environmental treaties overlap, making the work of intergovernmental institutions, established at the after mark of these treaties, ineffective at institutional and managerial levels. The fragmentation affects both funding and implementation. If the Global Pact helps with a better articulation and integration of multilateral environmental agreements, this would be a significant contribution to the global environmental governance. This means avoiding creation of a new parallel intergovernmental environment agency for its implementation, and rather consider one global environment organization, as an institution with the capacity to better articulate all global treaties that are currently addressing different environment

agendas. . This could also facilitate the implementation process at national and local level of the numerous global commitments in this area (at least this should be the aim).

3. “The Way Forward” of the Earth Charter and the Global Pact

“The Way Forward” provides the further steps, which according to its drafters, must be applied in order to fully disseminate its provisions in the real life. These steps are: 1) renewing of the commitments of nations to the UN; 2) fulfilment of existing obligations; and 3) implementation of the Earth Charter by legally binding instruments (Figure 2).



Figure 2. Law and the Earth Charter's Way Forward

In view of possible implementation of the Earth Charter through the Global Pact, the following questions should be answered: What does the Earth Charter mean by “renew (ing) their commitments to the United Nations”? Could the approval of the Global Pact contribute to it? How does the implementation of the Pact strengthen and support the fulfilment of existing obligations by states? Finally, would the Global Pact be a legally binding instrument for the implementation of the principles of the Earth Charter and if yes, how strong could its legal effects be?

3.1. Renewing of the nations' commitments to the United Nations and the Global Pact

The first issue is the renewing of the commitments of nations to the UN. The Preamble of the Earth Charter states that the current moment is critical for the Earth and humanity must

choose its future. The final provisions of the Earth Charter highlight that the shift towards sustainability requires change in mind and heart.

S.C. Rockefeller (2005), who chaired the international Earth Charter drafting committee, adds that transition towards the principles of the Earth Charter is an issue of ethics: while science provides information it does not tell us what is right or wrong, only a sense of common responsibility, the will, courage and vision could show the way towards the new Earth's paradigm.

The UNGA adopted the resolution "Transforming our world: the 2030 Agenda for sustainable development" with Sustainable Development Goals and the Paris Agreement in 2015. These were significant milestones towards settling a new normative framework for a sustainable future. The 2030 Agenda offers a unique contribution in articulating under one common umbrella several major world challenges and UN priorities.

Laurent Fabius, the head of COP21 climate forum that adopted the Paris Agreement, is also the President of the Group of experts for the Global Pact. Thus, the continuation of leadership would facilitate the Pact drafting and approving processes.

Renewing national commitments to the UN will facilitate the coordination to support the goals towards sustainability (the 2030 Agenda), global climate actions (the Paris Agreement), and principles of environmental law (the Global Pact), as well as, implementation of the principles of the Earth Charter. This movement illustrates the intention of nations to follow the values of sustainability and common responsibility in face of global threats and challenges.

In this context, the approval of the Global Pact and its entering into force would contribute to the promotion of the Earth Charter principles by strengthening environmental provisions and governance under a new comprehensive and legally binding framework.

On the necessity of a new legally binding Global Pact, K. Bosselmann (2010) declares, "In an age where the entire human species is struggling to overcome its own ecological blindness, a new covenant is needed. Only an act of self-empowerment and renewed confidence can achieve what "democracy" holds as a promise".

The ad hoc working group established under the UNGA resolution has to identify the gaps in international environmental law. It should not only offer new instruments, but also complement and support existing arrangements. This is not an easy task because it requires

reaffirming the status quo, and creating innovative instruments in view of assuring the international society that the Pact would enhance implementation of the existing instruments.

3.2. Fulfillment of the existing obligations and the Global Pact

The global community already has a significant amount of hard law instruments to protect the environment but their enforcement is still far from ideal. That is why fulfilment of existing obligations is one key requirement from the Earth Charter. In this context, do we really need the Global Pact? Moreover, how could its adoption contribute to the implementation of existing obligations of the states?

The Pact skeptics warn that while temptation to support any environmental friendly activity and to nudge other states to implement better ecological protection in the era of Trump is high, one should assess the Global Pact critically (Dodds, 2017; Biniiaz, 2017).

F. Dodds (2017) claims that the time when states adopted new agreements without explicit intention to implement them passed by, and every new agreement with new bodies weakens the role of United Nations Environment Programme (UNEP). According to him, a cluster approach to combine similar areas of environmental law under one umbrella is better than an attempt to unify all the existing environmental law by broad general principles. He also believes that countries like the US, China, and India will stay outside the Pact.

S. Biniiaz (2017) also raises critical questions on the Pact's approach. She hesitates that the idea of broad and legally binding provisions, which the Global Pact promotes, is better for environmental law than case-by-case specific instruments and soft-law norms. The researcher also highlights that the Pact formulates its principles more as hortatory pleases than legally binding obligations. The aim and the scope of the Pact are not clear, the terms and descriptions are not obvious. S. Biniiaz believes that the relation of the Pact with other existing legal documents needs further clarification, and concludes that time and money spent for difficult negotiations on the Pact would be better to used for other issues to protect the environment. These are important points to take into consideration in the process of moving the Global Pact proposal to a next stage.

The supporters of the Pact have already responded to some of the above-mentioned disagreements. With regards to the relation of the Pact with other legal instruments, they claim that the idea of the Pact is to be considered as a supplement. It should support implementation of other agreements, fill the gaps and follow the doctrine of *lex specialis* when the specific norms of other treaties derogate the general ones of the Pact. One recommendation would be to not only to attempt to identify and fulfill the gaps, but also in better articulating existing instruments.

Regarding possible obstacles from China, India and the US, earlier this year China has already shown its support to the Pact by signing the common presidential declaration with France where further constructive dialogue on the Pact is explicitly mentioned.

As E.R. Desombre (2000) claims, the final aim of international environmental agreements is to affect the problems which they address. In this sense, adoption of the Global Pact should lift the level of protection of the environment to the next level.

Which factors would force this direction? The Pact proposes to transfer some soft law to hard law principles. This would raise awareness of the international community towards these principles. This would also increase the flows of information and cooperation between different environmental regimes in searching for common ground (Skjærseth, Stokke, Wettestad, 2006). The effort for states to negotiate treaties is to be able to implement them in future (Skjærseth, Stokke, Wettestad, 2006). The negotiations on the Global Pact show the collective will and illustrate the degree of readiness of states to protect the environment. This feature alone would probably assist countries to restart implementation of existing international agreements. The challenge is to prevent this new movement from legitimatizing existing practices towards over-exploitation of resources and other national policies negatively affecting the environment (Boyle, 1991). The role of transparency, accountability, and participation of Non-Governmental Organizations (NGOs) in the process is crucial (Boyle, 1991).

Despite reasonable doubts and uncertain process of negotiations, the Global Pact has the potential to support implementation of existing environmental agreements. The negotiating process could mobilize collective efforts towards a better protection of the environment, enhance cooperation between states, and maintain environmental issues at the top of the international agenda. These features would contribute to a better implementation of existing

obligations by strengthening political will towards compliance. Once approved, the Global Pact could maintain the inertia of these processes and enhance compliance of the existing regimes.

To conclude this subsection, the UNGA put strengthening the implementation of existing instruments at the core of the Global Pact process. Thus, the para.1 of the UNGA Resolution “requests the Secretary-General to submit to the General Assembly at its seventy-third session in 2018 a technical and evidence-based report that identifies and assesses possible gaps in international environmental law and environment-related instruments with a view to strengthening their implementation”.

3.3. The Global Pact as a legally binding instrument

The next question is: would the Global Pact be a legally binding instrument for the implementation of the principles of the Earth Charter, and if yes, how strong could its legal effects be? The answer to these questions is rooted in the nature of legally binding mechanisms.

The Global Pact (Article 21) establishes a compliance mechanism through meetings of the parties and a Committee of independent experts. The implementation is based on non-punitive, non-adversarial, and transparent means. The Pact assigns the provisions of the Secretariat either to the Secretary-General of the UN or to the Executive Director of UN Environment.

Parties could not extract from the Pact detailed obligations either as in the Kyoto Protocol, nor mechanisms of dispute settlements as in the Aarhus Convention. A major reason behind it is the controversial Canadian withdrawal from the Kyoto Protocol. The dispute settlement mechanism of the Aarhus Convention could partly be explained by its dual nature: both as an environmental and a human rights treaty.

A.E. Boyle (1991) suggests two possible approaches to international environmental protection mechanisms. The first one is a traditional international law approach with dispute resolutions mechanisms. The core actor of this approach is a suffered state claiming for compensation. The idea that the mechanisms of international law serve as trustees of nature is a second approach. This approach highlights that there will be no conflict resolution mechanisms; instead the mechanisms have a fiduciary role in view of protecting the environment. This is the key guiding idea of international legal mechanisms for the environment (Boyle, 1991).

The Global Pact chooses the latter model, which is probably better fitted for environmental protection. The absence of dispute settlement and lack of punitive features of the compliance of the draft Global Pact should not be seen as its disadvantages. Instead, this illustrates that the Pact follows good practices from other environmental treaties, such as, the Paris Agreement.

Therefore, in our view, the Global Pact can be a step further in renewing national commitments for a more sustainable future. It could catalyze implementation of existing environmental agreements and be a legal instrument to better protect the environment. All these features taken together point out that the Global Pact is expected to deepen implementation of the Earth Charter.

4. Final observations and conclusions

The specific nature of the Earth Charter defines its place within the legal realm and its relations with other different instruments. M.E. Febres (Earth Charter, 2015) suggests that the Charter has a dual nature. It is a soft law document that follows progressive criteria of new forms of legitimacy. It is also a *sui generis* legal instrument (of its own kind, unique) combining its legal features with moral norms, which is not typical for classical legal instruments.

In this sense, the Earth Charter lays aside and above legal instruments and at the same time relies on them as they use legal means to promote the principles and values of the Earth Charter. From this perspective, the Global Pact could be considered as a supplement of the Earth Charter as the Pact is a component of the Earth Charter's synchronic and mutually supportive approach towards sustainability. On the other hand, the Earth Charter could be seen as one of the ethical foundations of the Global Pact.

Nevertheless, this correlation leaves room for future architectures, textual expressions, and role of the Global Pact, as well as searching other support to implement the principles of the Earth Charter. The Principle 13 (c) of the Earth Charter on rights to freedom of opinion and expression is at the core in the quest of forming the relationships between the Earth Charter and different legal, spiritual, moral and other institutions.

B. Mackey (2017) who served as a member of the Earth Charter drafting commission asks, “will history view the Earth Charter’s grand vision as just a wistful expression of passing optimistic moment in human history?” His answer is that for maintaining and enhancing the Earth Charter status as a living document, education, governance and activism are crucial, while amendments to the Earth Charter are also a possible development.

However, a possible process for amending the Charter is controversial, because amending it is not the only way of connecting the document with changing reality. Interpretations could be another practical option. Probably this is an even better suit for such sui generis legal instrument as the Earth Charter.

B. Mackey (2017) mentions the role of the principles contained in other sustainable development legal instruments, which together with the Earth Charter principles, establishes the ethical basis to assess national policies and other activities. The Global Pact for the Environment expresses the vision of inclusivity similar to the Earth Charter’s view (e.g. “the Earth’s community of life” in the Preamble and interests of future generations in its Article 4 on intergenerational equity). It has the potential to reinforce existing commitments and take the global community to a higher level of responsibility concerning environment protection and care for the community of life. In this sense, from a hard law perspective, the Pact can offer an opportunity to reinforce and expand existing global commitments to protect the environment and be an important added value and companion for the Earth Charter’s way forward.

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