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**ARE THE AIMS OF THE PROPOSED GLOBAL  
PACT FOR THE ENVIRONMENT DESIRABLE AND  
WILL THE PACT ADD ANY VALUE TO  
INTERNATIONAL ENVIRONMENTAL LAW?**

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**Abstract:**

The Global Pact for the Environment (the Pact) is attempting to strengthen international environmental law by reducing fragmentation and incorporating general principles into a binding instrument. This is desirable because the current system lacks consistency and clarity.

The precautionary approach is an example of a general principle included in the Pact. The various formulations of the precautionary approach demonstrate how fragmentation can cause inconsistencies. Fragmentation of the international system needs to be reduced in order to make international environmental law more effective. The Pact proposes to do this by becoming an instrument that can guide future interpretation and implementation of general principles. The Pact will strengthen general principles but fails to address the regulatory gaps in international environmental law.

The Pact is attempting to create a binding instrument. A binding is necessary because general principles are currently not enforceable without a multilateral environmental agreement and the current formulations of the principles lack clarity. The precautionary approach demonstrates the weaknesses of soft law and international law which explains why a binding instrument is necessary.

**Keywords:**

International Environmental Law – Fragmentation – Soft law – International Customary Law – Precautionary Approach

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## I. Introduction

The draft proposal of the Global Pact for the Environment (the Pact) is an agreement that has been presented by the French government which intends to set out general principles of international environmental law into a binding document.<sup>1</sup> The Pact will consist of twenty general principles that set out fundamental rights regarding the protection of the environment.<sup>2</sup> The Pact is attempting to “strengthen the coherence of global governance of the environment” which is “currently characterized by the fragmentation of international institutions and the multiplication of international environmental norms.”<sup>3</sup> Additionally, the Pact is proposing a binding instrument because most general principles of international environmental law have been included in soft law instruments; such as the Rio Declaration.<sup>4</sup> The Pact was submitted to the General Assembly in September 2017. A working group will meet in September 2018 to discuss it further. The Pact will be subject to negotiations however, this paper will analyse the draft Pact’s current form.

The Pact is intending to address two issues of international environmental law: the fragmentation of the international environmental law system and the lack of a binding instrument that contains the general principles of international environmental law. The Pact’s commitment to strengthen the coherence of international environmental law has been questioned; including whether its aims are desirable and whether it can achieve these aims.<sup>5</sup> I will analyse whether the aims of the Pact are desirable and the likely effect the

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<sup>1</sup> “The content of the Pact” (22 August 2018) pactenvironment  
<<http://pactenvironment.org/aboutpactenvironment/le-contenu-du-pacte/>>

<sup>2</sup> “The reasons for the Pact” (22 August 2018) pactenvironment  
<<http://pactenvironment.org/aboutpactenvironment/les-raisons-du-pacte/>>

<sup>3</sup> Laurent Fabius *Towards a Global Pact for the Environment* (Le Club des Juristes, White Paper, September 2017) at 8

<sup>4</sup> At 8

<sup>5</sup> Susan Biniarz “10 Questions to Ask About the Proposed “Global Pact for the Environment”” (paper presented to Sabin Center for Climate Change Law, Columbia, August 2017) at 2

Pact will have on international environmental law. I will use the precautionary approach as an example of a general principle of international environmental law to demonstrate the issues that the system faces and how the Pact could potentially address them.

The first section of this paper will analyse the advantages and disadvantages of fragmentation. This will assist addressing whether the first aim of the Pact is desirable. The first aim of the Pact is to provide greater coherence and structure to international environmental law by “adopting a general, cross-cutting, universal reference instrument constituting the cornerstone of international environmental law.”<sup>6</sup> Currently, the law is considered fragmented as it is comprised of hundreds of multilateral environmental agreements (MEAs) and conventions which each govern ‘independent’ issues of environmental law.<sup>7</sup> Fragmentation has allowed agreements to be tailored for the specific environmental issues raised. There are a wide range of problems in the environment which means a “one-size-fits-all” approach may not make the system more coherent.<sup>8</sup>

I believe that it is desirable to reduce fragmentation in international environmental law and that the Pact will be able to achieve this by providing a guiding formulation of general principles. Fragmentation has resulted in overlap and inconsistencies between regimes, hindering the effectiveness of international environmental law, which needs to be addressed. The Pact would continue to allow specific agreements to be implemented, while providing a universal benchmark for interpreting obligations and creating environmental policy. The precautionary approach is an example that demonstrates the Pact’s ability to add clarity to general principles. The formulation of the precautionary approach in the Pact

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<sup>6</sup> Fabius, above n 3, at 26

<sup>7</sup> Rak Hyun Kim “Unravelling the Maze of Multilateral Environmental Agreements: A Macroscopic Analysis of International Environmental Law and Governance for the Anthropocene” (Ph.D. in Philosophy thesis, Australian National University, 2013) at 5

<sup>8</sup> Biniaz, above n 5, at 2

does not vary significantly from existing formulations but can be used as reference point in interpretation of existing obligations.

The second section of this paper will be analysing the advantages and disadvantages of introducing a binding instrument to address whether the second aim of the Pact is desirable. The Pact is attempting “soft law codification” to give more authority and certainty to environmental principles. I will discuss whether it is desirable for the international environmental law system to have a binding instrument setting out international environmental law principles. Two alternatives to a binding instrument that I will evaluate are soft law instruments and international customary law. Firstly, my analysis will address whether turning soft law principles into legally binding ones is desirable. Secondly, the role of international customary law could influence the Pact’s effectiveness. If the principles are established as international customary law, it is questionable whether the Pact provides any value to the strengthening of its principles. I will analyse the different ways the Pact could interact with international customary law.

A binding instrument, such as the proposed pact, would be desirable because it would provide a level of certainty to existing principles that other sources of law cannot. The Pact would make existing principles enforceable without the need for independent treaties between states. Regardless of whether the principles are part of international customary law, the Pact will solidify their binding status. The precautionary approach can be used as an example to show that without binding authority, principles are limited in their power and adoption. The precautionary approach would benefit greatly by being incorporated into a binding instrument.

Throughout analysis it will become apparent that the aims of the Pact are desirable and will provide a source of clarity and coherence in international environmental law. The Pact

will help deal with issues of fragmentation while remaining adaptive and responsive. Further, a binding instrument will clarify state obligations and be enforceable. Finally, the precautionary approach is a good example of how the Pact will achieve its aims and why those aims are desirable.

## II. *Reducing Fragmentation*

### A. Introduction

The aim of this section is to evaluate whether the Pact will achieve its aim of providing greater coherence and structure to international environmental law. The main issue of the current system is that it is characterised by fragmentation. Fragmentation in the international system has occurred because there has been a rapid expansion of international law over the past half-century.<sup>9</sup> Currently, the international environmental law system includes over 1,100 MEAs (including amendments) and over 1,500 bilateral agreements.<sup>10</sup> This de facto system is messy and complicated. Fragmentation issues are not isolated to international environmental law; however, it is increasingly problematic considering how interconnected global environmental issues are becoming.

To evaluate whether the Pact will provide coherence to the system it is necessary to discuss whether reducing fragmentation is desirable. I will analyse the advantages and disadvantages of reducing fragmentation. Although fragmentation has helped address various issues of environmental protection, it is believed that the ‘maze’ of MEAs is not suitable to combat the Anthropocene.<sup>11</sup> This is evident because the global environment continues to deteriorate despite the accumulation of agreements. It is also necessary to

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<sup>9</sup> International Law Commission *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* A/CN.4/L.682 (2006) at 14

<sup>10</sup> Kim, above n 7, at 5

<sup>11</sup> Rak Hyun Kim and Klaus Bosselmann “International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements” (2013) 2 *Transnational Environmental Law* 285 at 286

discuss whether the Pact can achieve its aims. The Pact aims to structure international environmental law by becoming a general instrument that can be used as a universal reference for the interpretation and implementation of general principles. I will use the precautionary approach as an example to demonstrate how consistency of general principles could increase coherence in a fragmented system.

### B. Desirability

One argument for why it would be undesirable for the Pact to introduce general principles is because they may be unequipped to respond to issues in international environmental law. The one benefit of fragmentation is it allows regimes to target specific and diverse issues of international environmental law. The current system uses different degrees of legality to respond to the various environmental issues. Having one standard for a wide range of environmental problems might ineffectively deal with issues or result in less coherence.<sup>12</sup> General law may be too rigid to deal with the specific nature of some environmental problems. Additionally, an alternative variation to the existing obligations may cause more confusion.

Specific rules are often necessary in addressing international environmental law, but the Pact does not intend to restrict the ability to make specifically tailored law. Specifically-tailored regimes can enable creativity and produce innovative solutions for specific contexts.<sup>13</sup> It would not be desirable for the Pact to restrict the ability for regimes to respond in this way. As mentioned earlier, the Pact will be an instrument that sets out general law is that it can guide the adopting of future policy.<sup>14</sup> The Pact would not impede on the ability for states or regimes to introduce agreements tailored to specific

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<sup>12</sup> Biniiaz, above n 5, at 2

<sup>13</sup> At 2

<sup>14</sup> Fabius, above n 3, at 34

environmental issues. The policy behind the Pact explicitly says that special conventions will be exceptions to the general principles set out.<sup>15</sup>

The Pact's purpose is then questioned if they are anticipating needing future agreements to handle new environmental challenges. Having a benchmark for general principles would be a useful tool for future agreements but does not entirely address the current issues surrounding inconsistencies of interpretations. Tensions could arise between the application of the general principles and the range of MEAs that are tailored towards the various arrays of sub-species of international environmental law. As well as difficulties with clarity, inconsistencies between obligations can result in a lack of implementation from states which would impede the Pact's overall effectiveness.<sup>16</sup> This issue has not been addressed in the Pact's white paper which leaves it uncertain whether fragmentation would be eased.

It could be undesirable to introduce a set of general principles, but this could be combatted if the Pact encouraged a move away from specific regimes and towards addressing environmental issues as interconnected. Environmental issues are more globalised which means that it may be less necessary to have specific regimes. The development of international environmental law started with geographically contained transboundary issues. More recently these issues have compounded because MEAs have become globally applicable, some enjoying near universal membership.<sup>17</sup> Despite the specific nature of some environmental issues, a common perspective amongst international environmental law scholars is that environmental issues need to be treated as interconnected in order to effectively respond to environmental challenges.<sup>18</sup> If regimes moved away from specific

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<sup>15</sup> At 8

<sup>16</sup> At 27

<sup>17</sup> International Law Commission, above n 9, at 11.

<sup>18</sup> Kim, above n 11, at 286



law and instead applied broad principles it could increase consistency throughout the system. The Pact could solve this problem as it has purposely been designed in general terms, so it can be adopted globally and be universally applied.<sup>19</sup>

Reducing fragmentation of international environmental law would be desirable because it would help clarify obligations under agreements and improve the effectiveness of MEAs. The main disadvantage of a fragmented system is that the substance of treaties can overlap. Overlapping can result in two main problems: The first is that states can owe different obligations under international law and it is unclear which obligation should exercise authority over the others.<sup>20</sup> The second problem is that various obligations can contain differing and conflicting interpretations, because a majority of agreements in international environmental law are responses to fragmented legal issues. These issues often contain varying, and sometimes contradicting, positions of principles across MEAs.<sup>21</sup>

It would be valuable to clarify how conflicting obligations should interact to improve coherence in international environmental law, but the Pact is not addressing this issue of fragmentation. The Pact is not proposing to change obligations under MEAs or change how agreements interact but merely provide a general expression of international environmental law principles.<sup>22</sup> Issues over which treaty should prevail will follow ordinary rules of international law. The Vienna Convention on the Law of Treaties sets out guidelines for when disputing parties are members of the same treaties. It states that the most recently adopted treaty has authority.<sup>23</sup> However, the convention did not anticipate

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<sup>19</sup> Fabius, above n 3, at 9

<sup>20</sup> W Bradnee Chambers *Interlinkages and the effectiveness of multilateral environmental agreements* (United Nations Unity Press, Hong Kong, 2008) at 149

<sup>21</sup> Kim, above n 11, at 286

<sup>22</sup> United Nations Environment Assembly Towards a Pollution-Free Planet (United Nations Environment Assembly of the United Nations Environment Programme, Brochure, 2017) at 2

<sup>23</sup> The Vienna Convention on the Law of Treaties 1155 UNTS 331 (Opened for signature 23 May 1969, entered into force 1 January 1980), art 30

the number of MEAs and their associated complexities and in many cases the issue cannot be simply considered a matter of succession.<sup>24</sup> There would need to be an alternative solution to deal with this issue of overlap because the Pact is not equipped to respond to it.

The issue of differing and conflicting interpretations needs to be resolved to strengthen the coherence of the current system. The current treaty congestion results in inconsistencies which makes agreements inefficient and increases non-compliance.<sup>25</sup> Analysis conducted in 2013 demonstrated that 80 percent of MEAs have at least one connection to another environmental agreement.<sup>26</sup> Environmental problems are continuing to become less localised and more global which means more overlap can be anticipated.<sup>27</sup> The Pact is meant to respond to this issue by providing accepted versions of current general principles in international environmental law.<sup>28</sup> This is to add clarity to general principles. The policy makers of Pact believe that the Pact will direct adjudicators and treaty-interpreters which will clarify existing obligations.<sup>29</sup>

It would be desirable to reduce fragmentation in international environmental law. The overlap of agreements and regimes impacts international environmental law's effectiveness. The one disadvantage of reducing fragmentation is that it would impact the ability to have law tailored for specific environmental issues. The Pact has addressed this by explicitly setting out that any specific regimes will sit on top of the Pact. The Pact also has the potential to reconstruct the development of international environmental law in order to address interconnected issues. Additionally, it would be desirable to address issues

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<sup>24</sup> Chambers, above n 20, at 149

<sup>25</sup> Bethany Lukitsch Hicks "Treaty Congestion in International Environmental Law: The Need for Greater International Coordination" (1999) 32 *The University of Richmond Law Review* 1643 at 1644

<sup>26</sup> Lawrence Susskind and Saleem Ali *Environmental Diplomacy: Negotiating more effective global agreements* (Oxford University Press, New York, 2015) at 94

<sup>27</sup> Kim, above n 7, at 293

<sup>28</sup> Fabius, above n 3, at 8

<sup>29</sup> At 33

of overlap to make obligations clearer. The proposed Pact appears to be a useful tool that could achieve coherence in the current international environmental law system. Whether it is capable of doing so is the next question to be addressed.

### C. Capacity

It would be desirable for the Pact to clarify obligations of various environmental principles, but it is uncertain whether the Pact has the capacity to do so. I will be looking at the Pact's incorporation of the precautionary approach as an example of one of the twenty general principles the Pact contains. To achieve this, I will first set out the current formulations of the precautionary approach and identify any inconsistencies or confusions. I will, subsequently, demonstrate how the Pact will vary the existing formulations of the principle and identify the extent to which the Pact will make the international environmental law system less fragmented. Finally, I will also discuss whether there are any alternative options that would achieve the same goals of the Pact.

The precautionary approach is a strategy for assessing risks.<sup>30</sup> The principle encourages decision makers to assess whether any harm to the environment will likely result from proposed activities.<sup>31</sup> It establishes a 'rationale for action.'<sup>32</sup> The principle was first applied in the Rio Declaration 1992. Since the Rio Declaration, the principle has been adopted in many environmental treaties such as: the Montreal Protocol, the Framework Convention on Climate Change and the Biodiversity Convention.<sup>33</sup> It is endorsed as an

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<sup>30</sup> Jonathan Wiener "Precaution" in Daniel Bodansky, Jutta Brunnee and Ellen Hey (ed.) *The Oxford Handbook of International Environmental Law* 598 at 598

<sup>31</sup> James Cameron and Juli Abouchar "The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment" (1991) 14:1 *Boston College International and Comparative Law Review* 1 at 2

<sup>32</sup> Rene von Schomberg "The Precautionary Principle: Its Use within Hard and Soft Law" (2012) 3:2 *European Journal of Risk Regulation* 147 at 148

<sup>33</sup> Shirley Scott "How Cautious Is Precaution? Antarctic Tourism and the Precautionary Principle" (2001) 50:4 *The International and Comparative Law Quarterly* 963 at 964

important strategy in dealing with risk of harm on the environment but there is no single agreed understanding of what the principle entails.<sup>34</sup> The precautionary approach requires some form of response when a threat of harm is uncertain but the principle is unclear in how it is applied in practice. The most commonly debated issue is about the threshold of uncertainty and harm required to invoke the principle.<sup>35</sup> The burden and standard of proof is also up for debate.<sup>36</sup>

The Rio declaration is the most accepted formulation of the precautionary approach. The Rio declaration is not legally binding however it remains the most cited agreement of the precautionary approach.<sup>37</sup> Principle 15 of the Rio Declaration states:

“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”<sup>38</sup>

It has been argued that the formulation of the principle in the Rio Declaration could be stronger. The principle in the Rio Declaration is structured passively, which weakens the obligations to use the precautionary approach and focuses more on the context of the activity in question. Fisher used alternative phrasing to demonstrate how the principle could be firmer: “States must apply the precautionary approach so as to protect the environment.”<sup>39</sup> Another component that weakens the Rio Declaration’s formulation of the principle is the fact the instrument refers to the ‘precautionary approach’ rather than the

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<sup>34</sup> Wiener, above n 30, at 602

<sup>35</sup> Daniel Kazhdan “Precautionary Pulp: “Pulp Mills” and the Evolving Dispute between International Tribunals over the Reach of the Precautionary Principle” (2011) 39:2 *Ecology Law Quarterly* 527 at 529

<sup>36</sup> At 530

<sup>37</sup> At 533

<sup>38</sup> The Rio Declaration on Environment and Development A/CONF.151/26 (Vol. I) (1992), art 15

<sup>39</sup> Douglas Fisher *Legal Reasoning in Environmental Law* (Edward Elgar Publishing Limited, Cheltenham, 2013) at 125

‘precautionary principle.’ Using the ‘precautionary approach’ is believed to be a weaker formulation of the principle because it is considered more pragmatic. The US, in particular, prefers the ‘precautionary approach’ because it is more compatible with assessing risks and costs associated with activities.<sup>40</sup>

The various formulations of the precautionary approach, since the Rio Declaration, demonstrate how fragmentation can cause state confusion. Because the principle can be applied in a variety of ways, states are unsure of their obligations. A strong formulation of the precautionary approach will usually entail a reversal of the burden of proof. A weaker formulation will include caveats, such as a requirement to consider cost-effectiveness. The Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR convention) is an example of a strong formulation of the principle.<sup>41</sup> The standard for when the principle is evoked is when there are reasonable grounds to believe that a threat of environmental harm exists without requiring any conclusive evidence of a causal relationship between the activity and the harm. Comparatively, the United Nations Framework Convention of Climate Change (UNFCCC) incorporates a weak formulation of the principle because it requires a standard of serious and irreversible risk of harm and has a requirement to consider “cost-effective” policy in light of the “socio-economic contexts.”<sup>42</sup>

The current formulation of the precautionary approach in the Pact attempts to incorporate the most commonly accepted variation of the principle. The Pact introduces a “Precaution”

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<sup>40</sup> Nathan Dinneen “Precautionary discourse: Thinking through the distinction between the precautionary principle and the precautionary approach in theory and practice” (2013) 32:1 *Politics and the Life Sciences* 2 at 3

<sup>41</sup> Ellen Hey *Advanced Introduction to International Environmental Law* (Edward Elgar Publishing, Cheltenham, 2016) at 54

<sup>42</sup> Chambers, above n 20, at 117

provision in article 6. The wording in Article 6 of the proposal does not differ greatly from the formulation in the Rio Declaration. Article 6 of the Pact states:

“Where there is a risk of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing the adoption of effective and proportionate measures to prevent environmental degradation.”<sup>43</sup>

Both applications used the word ‘shall’ which is indicative of a stronger obligation on state’s behaviour. If ‘should’ was used it would imply a choice.<sup>44</sup> A major difference is the limitations of ‘cost-effective’ measures and proportionality. Most versions of the precautionary approach since the Rio Declaration have omitted the "cost-effective measures" limitation,<sup>45</sup> so it is not surprising that the Pact has done the same. Another difference with the Rio Declaration is the fact the Pact refers to the principle as ‘Precaution’ rather than the ‘precautionary approach. This could indicate a desire to strengthen the principle more without entering debate over its discourse.

The actual value the Pact could provide for international environmental law is dependent on the final formulation of the principle. The application of the precautionary approach seems to be stronger than what was initially set out in the Rio Declaration, but it is important to recognise that this is a preliminary draft of the agreement. The Pact will still need to be negotiated which means the formulation of the principle could be weakened.

Since the Rio Declaration, there have been different approaches to the adoption of the precautionary approach. The various approaches to incorporating the precautionary approach indicate how different contexts could require a different level of precaution.

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<sup>43</sup> The Preliminary Draft of the Global Pact for the Environment (24 June 2017) accessible from: <<http://pactenvironment.emediaweb.fr/wp-content/uploads/2017/07/Global-Pact-for-the-Environment-project-24-June-2017.pdf>>

<sup>44</sup> Biniiaz, above n 2, at 2

<sup>45</sup> Kazhdan, above n 39, at 551

They could also demonstrate how state's interests are reflected during treaty negotiations. When the General Assembly negotiates the standard of obligation that article 6 should impose, it will be important to discuss how aspirational they want the provision to be. The Pact could provide a minimum standard that all agreements must accept. There are two issues with imposing a low standard: the first is that it could restrict higher standards being formulated in the future as reluctant states will have a foundation to insist on a lower standard. The second is that it is unclear what effect it would have on the interpretation of existing agreements with higher standards such as OSPAR.

Having overarching formulations of general principles could guide interpretation of the principle across regimes but the main issue the Pact has failed to address is how the Pact will interact with other agreements. If this agreement is meant to direct and assist future policy in international environmental law, there is a danger that it could prevent a stronger version from developing. This could restrict policy from properly addressing the various environmental problems which require different degrees of protection. Another problem is that the Pact could only be used to assist interpretation of another treaty if all parties in conflict are party to the same treaties.<sup>46</sup> Regarding existing treaties, the Pact could cause upset if it interferes with the balance found in previous treaty negotiations.<sup>47</sup> Aside from clarifying that the Pact will be a framework to set underneath specific conventions, the Pact has failed to fully establish its place in international environmental law. There is no conflict clause in the current draft and there is nothing that prevents the Pact from becoming another MEA that contributes to the fragmentation of the international system.<sup>48</sup>

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<sup>46</sup> Jasmine Raith "The 'Global Pact for the Environment' - A New Instrument to Protect the Planet?" (2018) 15:1 *Journal for European Environmental and Planning Law* 3 at 20

<sup>47</sup> At 20

<sup>48</sup> At 21

One alternative to introducing a Pact that sets out general principles would be to introduce institutional linkages that address the issues the Pact has failed to address. Explicit linkages can be set out in agreements by outlining institutional mechanisms such as consultation across organisations. The UN has attempted to create institutional mechanisms, but it has not been effective. For example the Environmental Management Group was created in order to increase coherence across agencies but resulted in more fragmentation and overlaps in the international environmental law system.<sup>49</sup> UNEP has recently created the UN Environment Assembly (UNEA) to overlook cooperation with UN institutions and MEAs.<sup>50</sup> Currently UNEA enjoys the membership of all UN member states which has provided a strong platform for leading environmental policy.<sup>51</sup> This indicates that institutional linkages may be developed or implemented through the UNEA.

An alternative to using UNEA to create linkages would be to allow them to develop naturally. Linkages can occur through practice and implementation of agreements. It can be argued that regardless of the absence of external authority, MEAs have the ability to interact with each other.<sup>52</sup> If MEAs are established as a network of norms and institutions international environmental law is neither fragmented nor completely connected.<sup>53</sup> This would allow for international environmental law to be tailored to specific issues while avoiding overlap and inconsistencies. However, these institutional linkages have not been developed because environmental issues have been typically viewed as separate problems.<sup>54</sup>

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<sup>49</sup> Chambers, above n 20, at 75

<sup>50</sup> United Nations Environment Assembly “About the UN Environment Assembly” United Nations Environment Programme <<http://web.unep.org/environmentassembly/about-un-environment-assembly>>

<sup>51</sup> Fabius, above n 3, at 8

<sup>52</sup> Kim, above n 7, at 31

<sup>53</sup> At 51

<sup>54</sup> At 6



The main advantage of the Pact is that it is progressing faster than the alternative solutions. The biggest barrier for international environmental law is that it is dealing with urgent environmental problems so needs a solution soon. It could be possible that international environmental law will eventually create practices that guide how MEAs should interact with time. Unfortunately, environmental issues are growing substantially faster than the development of natural linkages and therefore this approach could be considered ineffective in addressing environmental challenges. UNEA could provide assistance to regulate interaction but to help the coherence of international environmental law the Pact will be useful. A written set of general principles of international environmental law will not address all the regulatory gaps in international environmental law but will provide a source for legal reasoning and interpretation.<sup>55</sup>

The Pact's incorporation of the precautionary approach demonstrates that the Pact's proposed benefits are limited. It provides an accepted formulation of the principle that can aid interpretation for future and existing agreements however it fails to clarify how the Pact will interact with these other agreements. Article 6 seems to be moderate in terms of the obligation it imposes on states, but the Pact will need to clarify how it interplays with specific areas of international environmental law to avoid increasing confusion in the law.

### *III. Implementing a Binding Instrument*

#### *A. Introduction*

This section will analyse the advantages and disadvantages of introducing a binding instrument. The Pact aims to give legally binding effect to various soft law instruments. Many of the documents that set out general principles of international environmental law,

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<sup>55</sup> Kim, above n 9, at 292

such as the Rio Declaration, are not legally binding.<sup>56</sup> Some of the principles contained in the Pact are binding through other treaties but lack clarity and consistency, as discussed in the first section of the paper. The second section of this paper will focus on the benefits of introducing a binding instrument by weighing hard law against soft law and international customary law.

The two main alternative to a binding instrument are soft law and international customary law. Soft law is often critiqued as being less desirable than hard law, however soft law can have its advantages.<sup>57</sup> The absence of a binding written instrument does not necessarily imply that some principles in soft law instruments have no authority in the international system.<sup>58</sup> Alternatively, principles can have binding effect if they are established as customary international law.<sup>59</sup> If the principles contained in the Pact were already part of customary international law, it is questionable whether it would add any additional value to the international environmental law system.<sup>60</sup>

To evaluate whether it is desirable to put existing soft law principles into a binding instrument, I will weigh the advantages and disadvantages of soft law instruments in the international system and analyse whether the Pact will benefit the existing international environmental law system by hardening existing soft law principles. I will also discuss the role that customary international law plays in the international system by looking at the precautionary approach. I will determine whether the Pact is likely to change state's

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<sup>56</sup> Hey, above n 41, at 72

<sup>57</sup> Dinah Shelton "Soft Law" in David Armstrong (ed.) *Routledge Handbook of International Law* (Routledge, US, 2009) 68 at 68

<sup>58</sup> Stephen Toope "Formality and Informality" in Daniel Bodansky, Jutta Brunnee and Ellen Hey (ed.) *The Oxford Handbook of International Environmental Law* 107 at 108

<sup>59</sup> Pierre-Marie Dupuy "Formation of Customary International Law and General Principles" in Daniel Bodansky, Jutta Brunnee and Ellen Hey (ed.) *The Oxford Handbook of International Environmental Law* 450

<sup>60</sup> Biniiaz, above n 5, at 1

existing obligations and therefore, whether the Pact will add any value to the international environmental law system.

## B. Soft Law

Soft law is typically defined as any written instrument that does not set out binding standards on states.<sup>61</sup> Soft law is very different from traditional methods and sources of international law but plays a major role in the international system. Unlike hard law, there are no legal consequences of soft law. Soft law instruments are political commitments; which means they give rise to political consequences.<sup>62</sup> It can be difficult to distinguish between hard and soft law. It is usually distinguishable by control provisions;<sup>63</sup> however hard and soft law can be expressed on a continuum as the firmness of obligations can vary within the two forms.<sup>64</sup> Soft law is usually indicative of a compromise between states wanting to conclude a treaty and states opposed to any regulatory instrument. This is preferred to no outcome or a diluted and vague application of a principle.<sup>65</sup> A state's preference for a soft law form can indicate they do not consider themselves bound by a principle. On the other hand, soft law can become customary international law or be a declaration of an already established norm.<sup>66</sup> Soft law can also impact a states' behaviour despite no strict obligations. It can create expectations that may shape behaviour and avoid disputes.<sup>67</sup> The premise that principles should shape international law and policy, even if they are not binding, is the foundation for soft law.<sup>68</sup>

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<sup>61</sup> Shelton, above n 57, at 68

<sup>62</sup> At 68

<sup>63</sup> At 167

<sup>64</sup> Toope, above n 58, at 108

<sup>65</sup> Christine Chinkin "The Challenge of Soft Law: Development and Change in International Law" (1989) 38:4 *The International and Comparative Law Quarterly* 850 at 861

<sup>66</sup> At 857

<sup>67</sup> Edith Brown Weiss "Understanding Compliance with International Environmental Agreements: the Baker's Dozen Myths" (1999) 31 *University of Richmond Law Review* 1555 at 1567

<sup>68</sup> Toope, above n 58, at 121

Soft law's main advantage for international environmental law is that it is flexible. The flexibility of soft law allows for consensus of conduct to develop over time.<sup>69</sup> This allows for opinions to consolidate. This flexibility allows non-binding instruments to adapt to change.<sup>70</sup> Flexibility is important for international environmental law because environmental issues are constantly changing, and the law needs to be able to respond.<sup>71</sup> Additionally, soft law's ability to change easily is better suited to deal with technical matters, such as international environmental law.<sup>72</sup> One of the biggest issues with the Pact codifying a set of principles is that it could make international environmental law rigid and unable to deal with the changing nature of environmental challenges. This challenges the idea that a binding document is desirable.

The Pact's White Paper explains that while flexibility is important for dealing with matters related to the environment, there is too much doubt in the authority of environmental principles.<sup>73</sup> The White Paper argues that soft law instruments have been favoured in international environmental law because of their flexible nature. This preference has resulted in a system that lacks traditional sources of law.<sup>74</sup> Putting environmental principles into a binding instrument would consolidate obligations and add more structure to the system. In order to avoid rigidity and ensure the Pact is effective it will need the capacity to adapt to unforeseen environmental, scientific and technological developments. The White Paper explains that the Pact will be adaptable through its interpretation. The Pact is not intending to create a set of rules but uses general principles in order to be applicable to multiple practical situations and guide future implementation of more

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<sup>69</sup> Shelton, above n 57, at 72

<sup>70</sup> Weiss, above n 67, at 1568

<sup>71</sup> Shelton, above n 57, at 72

<sup>72</sup> At 75

<sup>73</sup> Fabius, above n 3, at 30

<sup>74</sup> At 30

specific and concrete rules.<sup>75</sup> These general principles will be open to state interpretation which will give the law more flexibility in order to exist as a long-term instrument.

Another benefit of soft law is that it can lead to hard obligations. Soft law can lead to hard law if principles or provisions are incorporated into a binding treaty or become customary international law as a consequence of state practice.<sup>76</sup> Soft law's role in the law-making process has meant that it is usually a step towards a future obligation rather than an actual duty. It seems oxymoronic to cite an advantage of soft law as its ability to become hard law. This clearly indicates that it would be preferable to give soft law principles binding effect in order for them to have more weight in the international system. It is easy to understand why this reasoning would encourage the use of soft law in situations where it might not be possible to create a formal treaty. Formal treaties are costly and time consuming, and there may be internal state restrictions of implementing binding treaties.<sup>77</sup> They almost always result in delayed implementation or the dilution of the resulting outcome. In these situations, it is understandable why scholars would stress the advantages of soft law over no law; however, there is clearly an assumption that it would be more beneficial to have principles incorporated into a binding agreement.

Positivism is a legal theory that supports the idea that hard law is preferable to soft law.

The assumption that clear and hard rules are better than guidelines is based on a positivist approach to the law. Positivism has been heavily critiqued in relation to international law because it is believed to be outdated in a globalised society.<sup>78</sup> Positivism creates an impulse to describe law as rigid definitions.<sup>79</sup> This does not reflect the circumstances that

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<sup>75</sup> At 34

<sup>76</sup> Shelton, above n 57, at 68

<sup>77</sup> At 72

<sup>78</sup> Toope, above n 58, at 112

<sup>79</sup> At 117

international environmental law has developed under. International environmental law has developed during a period where norms have been increasing in popularity and in a system, which is becoming less state-centric.<sup>80</sup> Positivism does not support soft law because it does not have legal consequences. This fails to recognise how influential political consequences can be in an increasingly globalised world.<sup>81</sup> Despite the growing trend towards accepting soft law as influential, the system is still heavily based on positivism hierarchies. This means that hard law will continue to be more desirable.

It is established that hard law is needed to approach international environmental law because the current system lacks the ability to enforce its general principles without a binding treaty. There is a risk that adopting a binding instrument would make the international environmental law system too rigid, but the current structure of the Pact will allow room for interpretation. Due to the broad articulation of the principles, the Pact would be able to remain adaptive and responsive and ensure states follow their obligations.

### C. International Customary Law

The Pact's aim to incorporate environmental principles into a binding agreement is not desirable if there is a better avenue for giving principles binding force. International customary law is an alternative source of hard law. If it were possible for principles to become hard law through becoming a part of international customary law, then the Pact is unnecessary. I will discuss the advantages of customary international law over treaty law and then analyse whether it is desirable to have a binding agreement by looking at the precautionary approach.

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<sup>80</sup> At 115

<sup>81</sup> At 113

The advantages of the customary international law are similar to those of soft law.

Customary law is more flexible because norms can slowly change over time and adapt to different developments.<sup>82</sup> This contrasts the strict and formal process that treaty-making is subject to. This is important as environmental issues need to be addressed promptly but remain open for development as the issues rapidly evolve.<sup>83</sup> The formal process of treaty negotiations is also costly. The combination of the high costs and strenuous process discourages states from wanting to renegotiate a treaty once it is complete.<sup>84</sup> As discussed, the Pact can combat issues of flexibility because of its general and abstract nature so this advantage is not convincing.

Another benefit that is exclusive customary law is its ability to bind all states. Customary international law needs opinion juris to become binding and once that is satisfied the rule is accepted to bind all states, unless a state persistently objects to the norm throughout its creation. Treaties, on the other hand, only bind those privy to the agreement.<sup>85</sup> This allows customary law to fill in regulatory gaps which treaty law does not address and therefore can bind a wider audience to a legal obligation.<sup>86</sup> This means that customary international law does not necessarily need to tackle issues such as implementation and cooperation.

This is a strong argument for why international customary law may be more desirable

Customary international law has disadvantages when compared with law set out in treaties.

Customary international law will not be as clear as a written text.<sup>87</sup> The rule is based on state practice, but state practices can evolve from a myriad of sources.<sup>88</sup> State practice can

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<sup>82</sup> Geoffrey Palmer "New Ways to Make International Environmental Law Source" (1992) 86 *The American Journal of International Law* 283 at 266

<sup>83</sup> Cameron, above n 31, at 35

<sup>84</sup> Paul Diehl and Charlotte Ku *The Dynamics of International Law* (Cambridge University Press, New York, 2010) at 66

<sup>85</sup> Dupuy, above n 59, at 450

<sup>86</sup> Cameron, above n 31, at 34

<sup>87</sup> Palmer, above n 82, at 266

<sup>88</sup> Cameron, above n 31, at 35

also be incoherent and sparse which means it can be difficult to define the specific obligations.<sup>89</sup> The biggest advantage a written instrument has over informal law is that it is generally more precise.<sup>90</sup> Precise law does not necessarily mean that it is better complied with but it does make it easier for states to know how to comply with an obligation.<sup>91</sup> The benefit of clear articulation of principles is that it can direct state behaviour more effectively and opens avenues for future advocacy.<sup>92</sup>

International customary law can also lack clarity without judicial approval. Customary law can remain murky until an international tribunal or court establishes its parameters.<sup>93</sup>

Without judicial authority, it is difficult to know when a norm is binding and what the practice requires from states. This can be problematic because states have generally tried to resolve environmental issues out of court. Alternatively, when issues are presented in court, parties rely on principles set out in a treaty rather than international customary law.<sup>94</sup>

Customary international law's uncertain nature makes it less desirable than a binding instrument. Implementing a treaty might be a long process but as soon as it is complete there are settled rules that can outline practice and dictate normative rules for the next era.<sup>95</sup> Additionally, treaties do not require ongoing reinforcement in order for the obligations to continue.<sup>96</sup> The UN has made it clear that there is no hierarchy of sources for international law;<sup>97</sup> however there is a clear preference, especially in a positivist

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<sup>89</sup> Dupuy, above n 59, at 454

<sup>90</sup> Toope, above n 58, at 108

<sup>91</sup> Weiss, above n 67, at 1573

<sup>92</sup> Toope, above n 58, at 118

<sup>93</sup> Diehl, above n 84, at 148

<sup>94</sup> Dupuy, above n 59, at 453

<sup>95</sup> Diehl, above n 84, at 61

<sup>96</sup> At 70

<sup>97</sup> International Law Commission, above n 9, at 116



system, for the normative structure that treaties provide.<sup>98</sup> Written instruments appear to be more desirable for clarity and coherence.

The issue remains that customary international law will better address the issues of regulatory gaps that I have raised. This avenue of achieving binding law is only open to general principles if they can be established as customary international law. The Pact will be more desirable for those principles which are not customary international law. I will use the precautionary approach as an example to show how customary international law impacts the potential value added by the proposed Pact. Problems with the precautionary approach's status show why the Pact is needed. The precautionary approach has traditionally only been set out in non-binding sources but has continued to play a major role in the development of international environmental law.<sup>99</sup> The status of the principle is highly debated. As already stated, for a principle to be considered customary international law it must have state practice and *opinion juris*.

There is strong evidence of state practice of the precautionary approach. 178 countries signed the Rio Declaration and subsequently the precautionary approach has received near-universal adoption.<sup>100</sup> Countries including Germany, France, Belgium, the UK, Sweden, the Netherlands, Denmark, Norway, Canada and the US all incorporate the precautionary approach as a guiding rule for their environmental policy. There is clear state support for the principle and growing evidence of state practice.<sup>101</sup> The concept of the precautionary approach was already introduced to Swedish, Swiss and German law prior to the Rio Declaration. In 1992, the European Union incorporated express provisions in the

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<sup>98</sup> At 45

<sup>99</sup> Biniiaz, above n 5, at 2

<sup>100</sup> Lynda Collins "Security of the person, peace of mind: a precautionary approach to environmental uncertainty" (2013) 4:1 *Journal of Human Rights and the Environment* 79

<sup>101</sup> Cameron, above n 31, at 6

Maastricht Treaty ensuring their environmental policy was to be based on the precautionary approach. Later, in 1999, Canada revised its Canadian Environmental Protection Act to include the principle. Additionally, in 2005, France adopted the principle in its environmental charter and constitution.<sup>102</sup> There appeared to be significant evidence of state practice which indicated the precautionary approach was heading towards becoming customary international law. The principle has been adopted globally for environment governance which indicates there is state practice.<sup>103</sup>

Opinio juris is harder to determine but the magnitude of states adopting the precautionary approach is indicative of consensus. Immediately following the Rio Declaration, it appeared that the precautionary approach was going to become a part of international customary law. In the nineties, scholars drew comparisons between the emergence of rules on space sovereignty and the precautionary approach. They viewed the development of the precautionary approach as rapid that they believed it would result in customary international law so quickly that it was comparable to the instant custom seen with space sovereignty.<sup>104</sup> The assumption that the principle was going to become international customary law immediately following the Rio Declaration was reflected in international cases. It was clear the precautionary approach was emerging as a key factor in judicial cases. In the *New Zealand v France* (Order) case in the International Court of Justice (ICJ) in 1995 Weeramantry J stated that the precautionary approach was gaining support as a part of international environmental law.<sup>105</sup> However no tribunal or court has been prepared to say it has become international customary law.<sup>106</sup>

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<sup>102</sup> Wiener, above n 30, at 600

<sup>103</sup> Collins, above n 100, at 88

<sup>104</sup> Cameron, above n 31, at 20

<sup>105</sup> Fisher, above n 39, at 179

<sup>106</sup> *Argentina v Uruguay* [2006] ICJ 135 at 5.66

Court's and tribunals are a useful tool for deciding whether a principle has sufficient *opinio juris*. The issue of the precautionary approach's status was put towards the International Tribunal for the Law of the Sea (ITLOS) in the *Bluefin Tuna* case.<sup>107</sup> The applicants argued that the principle had gained customary law status, but Liang J was not prepared to fully accept that claim. Liang J was prepared to apply a precautionary approach to the case by using its incorporation in the United Nations Convention on Law of the Sea. The judge noted, though it was approaching, the precautionary approach had not yet reached the status as a legal rule.<sup>108</sup> The precautionary approach was used to interpret the treaty in its role as a general principle of international environmental law.<sup>109</sup> The *MOX Plant* case was a similar preliminary injunction to stop environmental harm but the tribunal found that the precautionary approach did not need to be applied.<sup>110</sup> ITLOS made it clear the reason they did not apply the precautionary principle was because there was no urgency and therefore no injunction was necessary. The judges made it clear that the case did not reject precaution and that *Bluefin Tuna* remained ITLOS's position on the issue.<sup>111</sup>

The ICJ had to determine the status of the precautionary approach in *Pulp Mills on the River Uruguay*.<sup>112</sup> Before the *Pulp Mills* case the precautionary approach had only been mentioned in dissents and concurrences in the ICJ.<sup>113</sup> The *Pulp Mills* case clarified some debate over the precautionary approach but the ICJ was not prepared to say it was an established rule of customary international law. The main reason the court was not prepared to find the precautionary approach was a principle of customary international law

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<sup>107</sup> *New Zealand v Japan* [1999] ITLOS Order of 27 August 1999 at [12] per Liang J

<sup>108</sup> At [16] per Liang J

<sup>109</sup> Fisher, above n 39, at 184

<sup>110</sup> *Ireland v United Kingdom* [2001] ITLOS 10 at [75]

<sup>111</sup> At [21] per Szekely J

<sup>112</sup> *Argentina v Uruguay* [2006] ICJ 135 at 5.66

<sup>113</sup> Kazhdan, above n 94, at 539

was because the principle lacked consensus over its legal status, meaning and application.<sup>114</sup> While the court did not find it was a binding rule it did say it could be used as a tool for interpretation which supported the trend that the principle is on its way to becoming customary international law.<sup>115</sup>

More recently, ITLOS has confirmed the ICJ's position on the precautionary approach. The ITLOS Advisory Opinion on Seabed mining also stated that the principle is not a part of customary international law. However, the Advisory Opinion acknowledged that there is a trend towards the precautionary approach becoming customary international law.<sup>116</sup> The use of the principle in an increasing amount of treaties and agreements supports this trend. Additionally, the finding in *Pulp Mills on the River Uruguay*, that says the principle can be a useful tool to interpret a bilateral treaty between parties, also supports this trend.<sup>117</sup>

Following judicial decisions, the precautionary approach, as it stands, has probably not acquired customary law status. The *Pulp Mills* case was decided in 2010; eighteen years after the Rio Declaration. This is not a particularly long period of time when considering the formation of customary international law however, it does demonstrate that the predicted trajectory of the precautionary approach immediately following the Rio Declaration was incorrect.

Defining the precautionary approach as a general principle of international environmental law appears to be an accepted categorisation. As discussed earlier, general principles are distinguishable from customary international law because they are not binding on states,

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<sup>114</sup> *Argentina v Uruguay*, above n 106, at 5.66

<sup>115</sup> Responsibilities and obligations of States with respect to activities in the Area Advisory Opinion 1 February 2011 ITLOS Reports 2011 10 at 42

<sup>116</sup> At 41

<sup>117</sup> At 42

however, under the Statute of the ICJ, general principles can be used to help decide disputes.<sup>118</sup> General principles are similar to soft law, so if it is accepted that the precautionary approach has not established itself as customary international law the Pact will be adding value by strengthening how the precautionary approach is being applied in the international system. Bodansky believes that the precautionary approach is no more than a general principle of international environmental law.<sup>119</sup> He argues it is a standard rather than a rule. Its authority as a principle derives from it being the best approach to dealing with scientific uncertainty but not because it is a part of international customary law.<sup>120</sup> Because the principle lacks effective application, its binding character remains uncertain without the implementation of a binding treaty.

It would be desirable for the precautionary principle to become a binding rule in international environmental law and the Pact would be able to do this. The principle has been widely received by states and internationally, but it still has not been established as customary international law. Despite starting with a good trajectory immediately following the Rio Declaration, the principle has not yet established normative practices that can clearly be defined as an international rule. The principle remains a general principle of international environmental law which indicates the Pact would be incredibly beneficial to the international system if could successfully incorporate the principle in a binding treaty.

#### IV. Conclusion

The draft proposal of the Global Pact for the Environment aims to properly address the current fragmentation in international environmental law and give legally binding effect to various soft law principles. The Pact could provide clarity to the current system by being

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<sup>118</sup> United Nations Statute of the International Court of Justice (18 April 1946), art 38

<sup>119</sup> Daniel Bodansky *The Art and Craft of International Environmental Law* (Harvard University Press, US, 2010) at 201

<sup>120</sup> At 201

used as a benchmark for the interpretation and implementation of general principle of international environmental law. Using the precautionary principle as an example it was clear that the various formulations of a general principle can cause confusion.

Issues resulting from overlap of MEAs demonstrate that it is desirable to reduce the current fragmentation. Concerns about rigidity can be mitigated by the Pact's general nature. The broad definitions of the principles make the Pact more likely to remain adaptive and responsive when dealing with environmental issues. Because the Pact is only intending to be a general framework, further agreements will be necessary to deal with specific environmental problems.

Currently, the Pact does not properly address the regularity gaps found in the system. If the Pact could explain how international environmental law should interact with each other and fill in the current gaps in the system, it would do a better job at strengthening coherence in international environmental law.

Putting general principles of international environmental law into a binding document would benefit the system. A binding instrument is preferable over soft law. Although soft law provides a level of flexibility that environmental issues would benefit from, it lacks weight in the current positivist system. Customary international law, on the other hand, has legal authority but lacks the clarity of a written instrument. The Pact will be able to make current principles more precise by articulating them in a written instrument.

The inherent time it takes to conduct negotiations is the biggest challenge in introducing a treaty to the international system. Soft law is easier to negotiate, and customary international law does not have any time restrictions on enforcement once it has been established. Even though customary international law allows for flexibility and is binding on states, its vagueness contributes to uncertainty in the international environmental law

system. It would be beneficial to the international system if principles were clearer. The Pact could provide this clarity.

The precautionary approach was used as an example of how the Pact can strengthen general principles' status. The precautionary approach has a strong foundation but lacks precision and is currently not binding on states generally. Articulating the precautionary approach into the Pact would require comprehensive guides on how it is to be interpreted in other existing or future treaties or conventions.

The precautionary approach has not become customary international law which means there is opportunity for the Pact to introduce a version of the principle that is binding and legally enforceable. There is a clear need for a general agreement that outlines environmental principles and is binding. Other general principles of international environmental law would benefit from being incorporated in a treaty that was ultimately intended to strengthen their status.

In conclusion, there is a clear need for the aims of the Pact. There are still some issues the Pact cannot properly address; however, it is going to strengthen the international environmental law system in the ways that it can.

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