

# ARTICLE: THE NEW INTERNATIONAL LAW-MAKERS?: CONFERENCES OF THE PARTIES TO MULTILATERAL ENVIRONMENTAL AGREEMENTS

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## LexisNexis Summary

... Similarly, COPs frequently develop reporting or compliance monitoring mechanisms through consensus-based resolutions or decisions - CITES, the Ramsar Convention, the Montreal Protocol, and the Kyoto Protocol's COPs have all done so in one form or another. ... Conclusion Consensus-based COP activity results in resolutions and decisions by the parties to the underlying treaty that can influence the substantive obligations of the parties in numerous ways, affect the internal workings of the treaty regime and its institutions, and serve efforts to enhance the effectiveness of the treaty. ... For example, new allocations for ozone-depleting substances under the Montreal Protocol, or criteria for listing of species under CITES or wetlands under the Ramsar Convention hold little meaning without reference to the parties' underlying treaty obligations. ... Axis 1: Voting and Level of Consent One axis along which we might evaluate the legal status of consensus-based COP activity is the degree of consent required and achieved for the activity in question. ... By contrast, the question we need to ask if we want to accurately reflect the role of consensus-based COP activity for states' international legal obligations is: What is the relationship of consensus-based COP activity to the underlying treaty obligations of the parties to that treaty? ... The Crown referred to the VCLT provisions on interpretation, discussed further below, and noted that a tribunal could, under Article 31(3)(a) take into account subsequent agreements of the parties to the treaty when interpreting the treaty. ... However, allowing for the possibility of this interpretation at least as it pertains to common terms used by multiple treaties has the potential to open up avenues for integration to limit systemic fragmentation. ... By contrast, when parties act within a particular treaty, they are only constrained by that treaty's obligations and the obligations they are subject to under other regimes and general international law.

## Text

[\*232]

### Introduction

What do Conferences of the Parties to multilateral environmental agreements contribute to international legal obligation? What does the answer mean for adaptability, fragmentation, and accountability in the international legal system?

This Article adds to a nascent and still limited awareness that something important is afoot in international law: the activity of Conferences of the Parties (COPs) to multilateral environmental agreements (MEAs).<sup>1</sup> Some of this activity - such as formal amendments to a treaty or protocol - requires a state party's consent before it will be binding on

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<sup>1</sup> See Jutta Brunnee, *Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements*, in *Developments of International Law in Treaty Making* 101 (Rudiger Wolfrum & Volker Roeben eds., 2005) [hereinafter Brunnee, *Reweaving the Fabric*]; Jutta Brunnee, *COPing with Consent: Lawmaking Under Multilateral Environmental Agreements*, 15 *Leiden J. Int'l L.* 1 (2002) [hereinafter Brunnee, *COPing with Consent*]; Robin R. Churchill & Geir Ulfstein, *Autonomous In-*

that state. This activity fits easily within traditional categories of the sources of international law and gives rise to new obligations for states that are identifiable as hard law. However, other activity by COPs does not require the consent of every state party to the treaty in order to come into effect and does not provide for any form of opt-out for dissenting states; it is agreed on by consensus or, failing consensus, some form of majority vote. I term this consensus-based COP activity.

Through this consensus-based activity, COPs frequently pass agreements that alter the application and scope of their treaties. Conventional categories for the sources of international law are inadequate to capture the significance of this consensus-based COP activity. As the Article discusses, this activity does not fit within the traditional sources of hard law - that is, treaty and custom. Yet relying by default on the usual classification [\*233] of this activity as soft law is also inadequate, because it obscures the complex relationship between consensus-based COP activity and the underlying treaty obligations of the parties to that treaty.

Focusing on whether consensus-based COP activity is really law is misplaced. Instead, we should be asking what the relationship is between consensus-based COP activity and the original international legal obligations of the parties to the underlying treaty. Reframing the question in this way gives us a new and more accurate picture of the role of COP activity. The picture we get is of a series of resolutions and decisions that, although they do not generally stand apart from the parties' primary treaty obligations, enrich those original legal obligations by thickening them.

Viewing COP activity in this light also gives us a more complex picture of the international legal system. We begin to see a system that allows for adaptability, flexibility, and learning in response to new scientific and social information. At the same time, recognizing some legal status for COP activity highlights the potential for increasing sectoral fragmentation in the international legal system. However, reframing the question about the role of consensus-based COP activity also offers opportunities to better manage this sectoral fragmentation. Recognizing the legal significance of consensus-based COP activity therefore has implications for international law generally, beyond multilateral environmental agreements and international environmental law.

The Article begins in Part I by exploring the kinds of activity that result from consensus-based decisionmaking at COPs, using representative examples from a few key multilateral environmental agreements. Part II then considers, first, how this activity fits into conventional approaches to the sources of law and, second, the relevance of soft law and hard law distinctions to consensus-based COP activity. Neither approach is satisfactory because each is designed to assess provisions that can hold independent normative force. Yet the significance of consensus-based COP activity lies not in the possibility that it can create new stand-alone legal rules, but in its tightly bound relationship to the underlying treaty obligations of the parties. Part II therefore concludes by suggesting that we reframe the question from one about whether this activity is law to one about this activity's relationship to the parties' underlying treaty obligations. Part III discusses the implications of this reframing, focusing on two different tribunal decisions - one from the United States and one from the Netherlands - that addressed the legal status of consensus-based COP decisions.

[\*234] Finally, Part IV addresses what recognizing the significance of this consensus-based COP activity adds to discussions about fragmentation and accountability in the international legal system.

Whether COP activity is hard or soft law is not the most important question. Rather, it is more important to focus on understanding the role consensus-based COP activity plays in the international legal system and the implications of that role for states' international legal obligations. The Article argues that consensus-based COP activity contributes to international legal obligation by thickening the obligations of the parties to the underlying treaty. Although not all consensus-based COP activity has this effect, this activity can thicken these obligations in a few ways. It can deepen the parties' obligations by contributing to implementation and effectiveness.<sup>2</sup> It can add to the fullness of the obligations by adding to the text of the original treaty through interpretation and guidance. In doing so, it contributes to our understanding of fragmentation in the international legal system and of ways to manage that fragmentation.

## I. Consensus-Based COP Activity

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stitutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law, [94 Am. J. Int'l L. 623 \(2000\)](#).

<sup>2</sup> I use the term deepen in a slightly different way than the notion of "depth of cooperation" discussed by Downs et al., although there is some overlap. See George W. Downs et al., Is the Good News About Compliance Good News About Cooperation?, 50 Int'l Org. 379 (1996).

### A. Defining Consensus-Based COP Activity

Multilateral environmental agreements are a dominant force in international environmental law.<sup>3</sup> These MEAs result in longstanding mutual commitments and cooperation, create institutions that coordinate science, explore new frontiers of environmental policy, and address the intersection of environmental issues with development, human rights, and trade. As treaties, they represent one of the most accepted sources of international legal obligation.<sup>4</sup> A state that has consented to be bound by an MEA that is in force is, under international law, bound to comply with it.<sup>5</sup>

**[\*235]** However, the picture of a binding MEA as an expression of the consent of its states parties is more complicated than might appear at first sight. Over the past few decades, these MEAs have developed a mode of operation that calls into question some of our understandings and assumptions about international legal obligation, particularly as it pertains to treaty regimes.<sup>6</sup>

To operate on an ongoing basis, these MEAs generally establish an institution known as a Conference of the Parties, a COP,<sup>7</sup> made up of representatives of all of the states parties to the MEA, who meet regularly—every year, every other year, or every few years. These COPs are the supreme body of the treaty.<sup>8</sup> Some COPs allow non-party states, non-governmental organizations (NGOs), and other non-parties to observe and sometimes participate in discussions and negotiations.<sup>9</sup> However, the voting members of the COP are representatives of the states parties and have one vote per state.<sup>10</sup>

COPs engage in a number of activities, which can be broken down into two subsets for the purposes of this Article. First, COPs undertake activities that require the formal consent of a state before that state can be bound by them.

<sup>11</sup> Even if formal consent is not required, these activities allow for some kind of opt-out, ensuring that a state that does not **[\*236]** wish to be bound will not be.<sup>12</sup> Examples of COP activity requiring formal consent include formal amendments to the treaty text, amendments to appendices or annexes, and the conclusion of protocols - new treaties - un-

<sup>3</sup> See Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 *Geo. L.J.* 675, 679-81 (1993).

<sup>4</sup> See Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 933.

<sup>5</sup> This principle - known as *pacta sunt servanda* - is elaborated in Article 26 of the Vienna Convention on the Law of Treaties (VCLT), which states that "every treaty in force is binding upon the parties to it and must be performed by them in good faith." VCLT art. 26, May 23, 1969, 1155 U.N.T.S. 331; see also Anthony Aust, *Modern Treaty Law and Practice* 179-80 (2d ed. 2007) (noting that the principle of *pacta sunt servanda* is regarded as "the fundamental principle of the law of treaties").

<sup>6</sup> Brunnee, *Reweaving the Fabric*, supra note 1, at 106 (explaining that "it is in this continuous process of treaty development that Conferences of the Parties (COPs) and their subsidiary bodies have come to be the main venues for lawmaking activities and, therefore, the focus of growing interest in shifting patterns in international environmental lawmaking").

<sup>7</sup> See Churchill & Ulfstein, supra note 1, at 623-25 (listing agreements that create COPs or COP equivalents).

<sup>8</sup> *Id.* at 631; see also, e.g., Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 13(1), Dec. 10, 1997, 37 I.L.M. 22 (1998) (entered into force Feb. 15, 2005) [hereinafter Kyoto Protocol]; United Nations Framework Convention on Environment and Development: Framework Convention on Climate Change art. 7(2), May 9, 1992, 31 I.L.M. 849 (entered into force Mar. 21, 1994) [hereinafter UNFCCC]; Convention on International Trade in Endangered Species of Wild Fauna and Flora [CITES], *The Structure of CITES*, <http://www.cites.org/eng/disc/org.shtml> (last visited Sept. 21, 2009) (indicating that the CITES COP is the supreme institutional body of the treaty).

<sup>9</sup> See, e.g., Kyoto Protocol, supra note 8, arts. 13(2), 13(8); UNFCCC, supra note 8, art. 7(6); CITES art. XI(7), Mar. 3, 1973, 27 U.S.T. 1087, 12 I.L.M. 1085; Convention on Wetlands of International Importance Especially as Waterfowl Habitat art. 7(1), Feb. 2, 1971, T.I.A.S. No. 11,084, 996 U.N.T.S. 245 [hereinafter Ramsar Convention].

<sup>10</sup> See, e.g., Kyoto Protocol, supra note 8, art. 13(2); CITES, supra note 9, art. XI(7); Ramsar Convention, supra note 9, art. 7(2).

<sup>11</sup> See, e.g., CITES, supra note 9, art. XVII(3) (providing that an amendment to the treaty will enter into force only for parties that have accepted it in accordance with the terms of the treaty); UNFCCC, supra note 8, art. 15(4) (providing that an amendment to the treaty will enter into force only for parties that have accepted it in accordance with the procedures in Article 15).

<sup>12</sup> See, e.g., CITES, supra note 9, arts. XV(1)(c), XV(2)(l), XV(3) (allowing for parties to enter reservations to amendments of Appendices I and II of the Convention so that they will not be bound by those amendments); UNFCCC, supra note 8, art. 16(3) (providing that annexes to the treaty will enter into force at a certain time for all parties except those that have indicated their non-acceptance of the annex).

der a framework convention.<sup>13</sup>

The second category of activities is the focus of this Article. This activity requires only consensus by the states parties - not formal consent - to be binding, and does not provide for any kind of opt-out by an objecting state. Where consensus cannot be achieved, the product of this activity might come into force on the basis of a majority or super-majority vote, which would then bind all states parties, whether or not they voted in favor of the resolution or decision.<sup>14</sup> Sometimes, consensus may be equivalent to unanimity, suggesting that where resolutions or decisions are adopted by consensus, they have been adopted by the consent of all the parties and are not, therefore, different from the consent-based COP activity described above.<sup>15</sup> However, consensus differs from consent because a state does not have to consent formally to be bound by a decision reached by consensus. Further, where consensus and/or unanimity cannot be achieved, this activity may enter into force for all parties after a majority or super-majority vote. As such, a state does not have to consent formally to a provision to be bound by it. Indeed, under a consensus-based procedure backed up by a majority or super-majority voting procedure, a state could actively object to a provision and still be bound if that provision were to be considered binding.

[\*237] This activity - which I term consensus-based COP activity - is a significant force in international environmental law. The following Part explores the full range of this activity.

#### B. Exploring the Range of Consensus-Based COP Activity

Using a consensus-based decision-making process, COPs perform a range of activities that result in resolutions and decisions without which the treaty cannot be adequately understood. COPs interpret treaty obligations and develop rules, modalities, and procedures for implementation of particular provisions of the treaty. They also provide guidance to the parties about implementation, consider compliance and dispute resolution matters, establish subsidiary organs, address financial and organizational aspects of the treaty and its subsidiary organs, and set strategic frameworks for the future of the treaty.

Some of this COP activity addresses the external obligations of the parties, in that it directly affects the obligations the parties have undertaken as they implement the treaty.<sup>16</sup> Other resolutions and decisions address only the internal operation of the treaty, in that they only address the parties' activity at the COP or the activity of subsidiary bodies to the COP.<sup>17</sup> Yet even these can have an effect on the substantive obligations of the parties. To better illustrate the relationship of consensus-based COP activity to the parties' underlying treaty obligations, the following Parts distinguish between activity that affects the external obligations of the parties and activity that affects the internal obli-

<sup>13</sup> See UNFCCC supra note 8; see also, e.g., Kyoto Protocol, supra note 8, art. 13(2) (providing that only parties to the Kyoto Protocol may participate in decisionmaking under the Protocol).

<sup>14</sup> See, e.g., Kyoto Protocol, supra note 8, art. 13(5) (providing that the rules of procedure for the COP for the Kyoto Protocol will be the same as under the UNFCCC except as otherwise decided by consensus by the parties to the Kyoto Protocol); UNFCCC, supra note 8, art. 7(3) (authorizing the COP to adopt rules of procedure that will include specified majorities for the adoption of particular decisions); Ramsar Convention, supra note 9, art. 7(2) (providing for COP resolutions and decisions to be adopted by simple majority, unless otherwise specified by the treaty). Use of the terms "resolutions" and "decisions" depends on the terminology used by a particular treaty, although in some treaties, the terms signify different kinds of activities. See infra notes 102-104 and accompanying text.

<sup>15</sup> See Royal C. Gardner, *Perspectives on Wetlands and Biodiversity: International Law, Iraqi Marshlands, and Incentives for Restoration*, 15 *Colo. J. Int'l Envtl. L. & Pol'y*, 2003 Yearbook, Summer 2004, at 1, 2-9 [hereinafter Gardner, *Perspectives on Wetlands*] (discussing controversy about the meaning of "consensus" at the Eighth Conference of the Parties to the Ramsar Convention).

<sup>16</sup> These might also be termed effects on the "substantive" obligations of the parties. Geir Ulfstein, *Comment on Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements*, in *Developments of International Law in Treaty Making*, supra note 1, at 145, 146 [hereinafter Ulfstein, *Comment*].

<sup>17</sup> See *id.* at 149 (distinguishing between substantive law-making by international organizations - including COPs - and internal law-making and arguing that only the former needs express authorization in the treaty text); Churchill & Ulfstein, supra note 1, at 631-43 (discussing as two separate categories of activity the internal powers of multilateral environmental agreements (MEAs) and their decision-making powers relating to the parties' substantive obligations).

gations of the parties.<sup>18</sup>

### 1. Effects on External Obligations

Activity that addresses the external obligations of the parties may affect the substantive obligations with which the parties have undertaken [\*238] to comply under the treaty. This activity may affect these substantive obligations either directly or indirectly.

Although direct changes to the parties' external obligations are often made through consent-based COP activity,<sup>19</sup> sometimes changes are made through consensus-based COP activity.

Under the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol),<sup>20</sup> for example, the COP is authorized to adopt adjustments and reductions of production or consumption of ozone-depleting substances covered by the Protocol through a consensus-based procedure.<sup>21</sup> Failing consensus, these adjustments can be made by a two-thirds majority vote of the parties present and voting at the COP.<sup>22</sup> The adjustments are binding on all parties, regardless of whether or not they voted in favor of them.<sup>23</sup>

Under the Ramsar Convention on Wetlands of International Importance (Ramsar Convention), it is the parties' responsibility to designate wetlands for listing on the Convention's List of Wetlands of International Importance.<sup>24</sup> The treaty text itself contains only a sparse set of criteria to guide this listing.<sup>25</sup> Even so, the Ramsar COPs have modified these criteria several times, moving them away from their original focus on waterfowl - the primary impetus for many states' support of the treaty.<sup>26</sup> The criteria for listing wetlands now include references to a wetlands' relationship to major river basins or coastal systems. They also supplement earlier criteria that support listing on the basis of numbers of waterbirds with additional criteria based on numbers of fish and other species of wetland dependent, non-avian animals.<sup>27</sup> Thus, the criteria the [\*239] parties are meant to apply to listing decisions have been extensively elaborated upon and have changed over the years.<sup>28</sup>

<sup>18</sup> The distinction between external and internal effects may appear at first sight to be a distinction between substance and procedure. However, the fault lines are different since an external effect might include a procedure with which a state party is bound to comply, and an internal effect might include a substantive provision with which a subsidiary body is bound to comply.

<sup>19</sup> See, e.g., CITES, *supra* note 9, art. XV (setting out the procedures for amendments to Appendices I and II of the treaty and allowing for reservations to those amendments).

<sup>20</sup> Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541 [hereinafter Montreal Protocol]. For the amended text, see <http://www.unep.org/ozone/pdfs/Montreal-Protocol2000.pdf> (last visited Nov. 11, 2009).

<sup>21</sup> See *id.* art. 2(9)(a). Article 2(9) was added through amendments to the Protocol in 1990. Ulfstein, Comment, *supra* note 16, at 147.

<sup>22</sup> Montreal Protocol, *supra* note 20, art. 2(9)(c).

<sup>23</sup> *Id.* art. 2(9)(d).

<sup>24</sup> Ramsar Convention, *supra* note 9, art. 2(1).

<sup>25</sup> See *id.* art. 2(2).

<sup>26</sup> See International Conference on the Conservation of Wetlands and Waterfowl, Heiligenhafen, F.R.G., Dec. 2-6, 1974, Recommendations of the Heiligenhafen Conference, 1974, available at [http://www.ramsar.org/cda/ramsar/display/main/main.jsp?zn=ramsar&cp=1-31-10723021\\_4000\\_0](http://www.ramsar.org/cda/ramsar/display/main/main.jsp?zn=ramsar&cp=1-31-10723021_4000_0) (last visited Oct. 25, 2009) (establishing in 1974 the first criteria for designation of wetlands of international importance).

<sup>27</sup> See Strategic Framework and Guidelines for the Future Development of the List of Wetlands of International Importance, Res. VII.11 (COP 7, 1999), as amended by Res. VII.13 (COP 7, 1999), Res. VIII.11 (COP 8, 2002), Res. VIII.33 (COP 8, 2002), Res. IX.1 Annexes A, B (COP 9, 2005), Res. X.20 (COP 10, 2008), available at [http://www.ramsar.org/cda/ramsar/display/main/main.jsp?zn=ramsar&cp=1-31-10520823\\_4000\\_0](http://www.ramsar.org/cda/ramsar/display/main/main.jsp?zn=ramsar&cp=1-31-10520823_4000_0) (last visited Nov. 11, 2009).

<sup>28</sup> M.J. Bowman, The Ramsar Convention Comes of Age, XLII *Neth. L. Rev.* 1, § 7 (1995) (arguing that the elaboration of the criteria for listing has been a key aspect of the Convention's development from a convention focused on individual species of waterfowl to one concerned about ecosystems in general). The COPs have also developed guidance on listing. See, e.g., Eighth Meeting of the Conference of the Parties to the Ramsar Convention, Valencia, Spain, Nov. 18-26, 2002, Additional Guidance for Identifying and Designating Under-Represented Wetland Types as Wetlands of International Importance, Res. VIII.11, available at [http://www.ramsar.org/pdf/res/key\\_res\\_viii\\_11\\_e.pdf](http://www.ramsar.org/pdf/res/key_res_viii_11_e.pdf) (last visited Nov. 11, 2009).

Sometimes a resolution or decision speaks directly to the external obligations of the parties in a way that goes beyond the parameters of the original treaty's obligations. At the Second Conference of the Parties to the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal (Basel Convention),<sup>29</sup> the parties adopted Decision II/12, which would have banned the transport of hazardous wastes from OECD countries to non-OECD countries.<sup>30</sup> This ban was not contemplated by the treaty text, which approaches regulation of international trade in waste through information and consent rather than through prohibitions and bans.<sup>31</sup>

Consensus-based COP activity can also have indirect effects on the external obligations of the parties. These can occur in a number of ways, two of the most significant of which are through the COPs' role in interpreting treaty terms and in providing guidance to parties about implementation.<sup>32</sup>

[\*240] Although the Ramsar Convention's overall approach is primarily to rely on exhortations rather than strong substantive requirements,<sup>33</sup> its COPs have still spent significant time defining those treaty terms that inform the external, substantive obligations of the parties. They have done this using resolutions adopted by a simple majority of the parties. Under the treaty, the parties are to formulate and implement their national wetlands planning "so as to promote the conservation of the wetlands included in the List [of Wetlands of International Importance], and as far as possible the wise use of wetlands in their territory."<sup>34</sup> The parties must also "arrange to be informed ... if the ecological character of any wetland" in their territory that is on the List "has changed, is changing, or is likely to change."<sup>35</sup> With the assistance of their Scientific and Technical Review Committee, the Ramsar Convention COPs have extensively defined and re-defined the key terms contained in these provisions - "ecological character" and "wise use."<sup>36</sup> In addition, the Secretariat to the Convention, authorized by the COP, has prepared seventeen handbooks providing guidance to domestic managers of wetlands about how to implement the wise use of wetlands.<sup>37</sup> These handbooks include "relevant guidance adopted by several meetings of the Conference of the Parties, ... as well as selected background documents presented at these COPs."<sup>38</sup> Thus, through interpretation and guidance, the Ramsar COPs have elevated the significance of "wise use" as a core obligation of the treaty. This arguably shifts the emphasis away from listed sites towards an emphasis on the overall obligation to maintain the wise use of all wetlands within a state party's territory.<sup>39</sup>

<sup>29</sup> See Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 126 [hereinafter Basel Convention].

<sup>30</sup> Report of the Second Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Geneva, Switz., Mar. 21-25, 1994, Decision II/12, UNEP/CHW.2/30 (Mar. 25, 1994), available at <http://www.basel.int/meetings/cop/cop1-4/cop2repe.pdf> (last visited Oct. 25, 2009) [hereinafter Decision II/12, Basel Convention].

<sup>31</sup> Jacob Werksman, *The Conference of Parties to Environmental Treaties*, in *Greening International Institutions* 55, 63-64 (Jacob Werksman ed., 1996) (discussing Decision II/12 as an example of a COP making changes to the substantive obligations of a treaty); see also Gunther Handl, *Comment: International "Lawmaking" by Conferences of the Parties and Other Politically Mandated Bodies*, in *Developments of International Law in Treaty Making*, supra note 1, at 127, 130-36 (describing other examples of activity by COPs that have led to disputes among the parties to the treaty about that activity's legal status).

<sup>32</sup> See Churchill & Ulfstein, supra note 1, at 641 (discussing the role COPs play in the interpretation of agreements).

<sup>33</sup> See Royal C. Gardner & Kim Diana Connolly, *The Ramsar Convention on Wetlands: Assessment of International Designations Within the United States*, 37 ELR 10089, 10089-90 (2007) [hereinafter Gardner & Connolly, Ramsar Convention]; Annecoos Wiersema, *A Train Without Tracks: Re-Thinking the Place of Law and Goals in Environmental and Natural Resources Law*, 38 *Envtl. L.* 1239, 1285 (2008) [hereinafter Wiersema, *Train Without Tracks*].

<sup>34</sup> Ramsar Convention, supra note 9, art. 3(1).

<sup>35</sup> *Id.* art. 3(2).

<sup>36</sup> See, e.g., Ninth Meeting of the Conference of the Parties to the Ramsar Convention, Kampala, Uganda, Nov. 8-15, 2005, *A Conceptual Framework for the Wise Use of Wetlands and the Maintenance of Their Ecological Character*, Res. IX.1, Annex A, available at [http://www.ramsar.org/pdf/res/key\\_res\\_ix\\_annexa\\_e.pdf](http://www.ramsar.org/pdf/res/key_res_ix_annexa_e.pdf) (last visited Sept. 14, 2009).

<sup>37</sup> Ramsar Convention Secretariat 2007, *Ramsar Handbooks for the Wise Use of Wetlands* [hereinafter Ramsar Handbooks], available at [http://www.ramsar.org/cda/ramsar/display/main/main.jsp?zn=ramsar&cp=1-30-3321323\\_4000\\_0](http://www.ramsar.org/cda/ramsar/display/main/main.jsp?zn=ramsar&cp=1-30-3321323_4000_0) (last visited Nov. 11, 2009).

<sup>38</sup> *Id.*

<sup>39</sup> See Wiersema, *Train Without Tracks*, supra note 33, at 1291.

[\*241]

## 2. Effects on Internal Obligations

Other COP resolutions and decisions address only the internal operation of the treaty. Examples include the criteria used when parties vote at the COP on formal amendments to the treaty and the instructions for work to be done by a subsidiary body. Even this internal activity can have significant effects on the way in which the treaty operates and, indirectly therefore, on the substantive obligations of the parties.<sup>40</sup>

For example, under the Convention on International Trade in Endangered Species (CITES), listing of a species on one of two main appendices is key to the operation of the treaty's intended protection of internationally traded species.<sup>41</sup> Amendment of these two appendices is subject to a consent-based procedure.<sup>42</sup> However, the criteria used for listing decisions by the parties are the product of consensus-based COP resolutions.<sup>43</sup> The most recent criteria include an elaborate set of both biological and trade criteria for listing.<sup>44</sup> These criteria took several COPs to finalize, as parties fought over issues that represent key disputes regarding the operation of the treaty as a whole - in particular the role of sustainable utilization in species conservation, presumptions about listing, and the role of the precautionary principle in listing decisions.<sup>45</sup>

[\*242] The listing criteria are addressed to the parties to be applied both in proposals for listing and in their votes on listing.<sup>46</sup> Although they do not directly alter the parties' external obligations under the treaty, the terms of the criteria inevitably shape the way the parties consider how the treaty should apply to particular species. This is especially true because the criteria affect the central operating methodology of the treaty - protection through listing on the appendices. As they debated the criteria, the parties' comments often seemed to accept implicitly that the criteria established by the COP related to the treaty's operation as a whole and that the parties would be bound to apply them.<sup>47</sup>

The CITES COPs have also agreed to other resolutions that are internally directed but that contribute to the overall implementation and effectiveness of the treaty, for example by establishing monitoring systems for certain species like

<sup>40</sup> Of course, some internally directed COP activity has very little if any effect on the obligations of the parties. It is routine, for example, for the parties to thank the host state to the COP and to determine the location of the next host state. However, in some instances, even the choice of location for the next COP might affect how the parties act within the treaty. For example, Japan withdrew its proposed reservation to the Appendix I listing of the African elephant under CITES, despite its interest in continuing trade in ivory, apparently because of concern that damage to Japan's reputation might prevent it from hosting the next Conference of the Parties. Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* 268-69 (1995).

<sup>41</sup> CITES, *supra* note 9, arts. II-IV. CITES also provides for a third appendix. See *id.* arts. III(3), V. Listing on Appendix III carries less significance than listing on Appendix I or II. *Id.* art. V. Amendments to Appendix III do not require a vote of the parties, but do allow for reservations by states parties. *Id.* art. XVI.

<sup>42</sup> Amendments of Appendices I and II require a two thirds majority vote of the parties present and voting, but also allow for reservations. See *id.* arts. XVI, XVII, XXIII.

<sup>43</sup> The treaty sets out a standard for listing on either Appendix I or II. See *id.* art. II. However, the criteria established by the COPs elaborate on these standards in far more detail.

<sup>44</sup> Fourteenth Meeting of the Conference of the Parties to CITES, The Hague, Neth., June 3-15, 2007, Criteria for Amendment of Appendices I and II, Conf. 9.24 (Rev. CoP14) (amending Res. Conf. 9.24 (1994)), available at <http://www.cites.org/eng/res/all/09/E09-24R14.pdf> (last visited Oct. 25, 2009) [hereinafter CITES Criteria]. Although the final amendments were adopted at the Fourteenth Conference of the Parties, the major revisions to the previous criteria began at the Twelfth Conference of the Parties. *Id.*

<sup>45</sup> For a discussion of the role of the precautionary principle in these criteria and the debates surrounding that role, see Annecoos Wiersema, *Adversaries or Partners? Science and the Precautionary Principle in International Treaties for the Protection of Wildlife Treaty Regimes*, 11 J. Int'l Wildlife L. & Pol'y 211 (2008).

<sup>46</sup> See CITES Criteria, *supra* note 44; see also CITES, *supra* note 9, art. XV.

<sup>47</sup> See, e.g., Twelfth Meeting of the Conference of the Parties, CITES, Santiago, Chile, Nov. 3-15, 2002, Criteria for Amendment of Appendices I and II, CoP12 Doc 58 Annex 5a, at 1, 4, 5, available at <http://www.cites.org/eng/cop/12/doc/E12-58-A5a.pdf> (last visited Nov. 11, 2009) (recording the comments of Australia, Great Britain, Norway, and New Zealand in response to proposed amendments to the criteria at the Twelfth Meeting of the Conference of the Parties to CITES).

elephants and a significant trade review process.<sup>48</sup> These monitoring systems are implemented and supervised by subsidiary bodies to the COP.<sup>49</sup>

The Kyoto Protocol on Climate Change provides a similar example.<sup>50</sup> At its core, the Kyoto Protocol is an emissions trading scheme. Parties with fixed emissions limits can fulfill their obligations by earning emissions credits through the flexible mechanisms outlined under the treaty, Joint Implementation, the Clean Development Mechanism, and an overall emissions trading scheme.<sup>51</sup> In 2001, the COP to the Kyoto Protocol's framework convention - the United Nations Framework [\*243] Convention on Climate Change<sup>52</sup> - adopted a set of decisions that addressed the implementation of these flexible mechanisms.<sup>53</sup> More recently, the Kyoto Protocol's own COP-equivalent - the Conference of the Parties to the UNFCCC Acting as Meeting of the Parties to the Kyoto Protocol<sup>54</sup> - has agreed to decisions that address the availability of emissions credits for small-scale afforestation and reforestation projects.<sup>55</sup> These decisions, in affecting domestic land use practices, could have a significant effect on states parties' domestic activities.

By establishing modalities and procedures for implementing and monitoring the flexible mechanisms of the Kyoto Protocol, the meeting of the parties is in one sense simply determining how its own subsidiary organs will monitor the activities of the parties. The parties' substantive obligations are thereby not directly affected. However, by determining criteria for the issuance of credits, this COP activity does affect how the parties can meet their overall substantive obligations under the treaty to reduce greenhouse gas emissions. Thus, this consensus-based COP activity has both internal and external implications.

Similarly, COPs frequently develop reporting or compliance monitoring mechanisms through consensus-based resolutions or decisions - CITES, the Ramsar Convention, the Montreal Protocol, and the Kyoto [\*244] Protocol's

<sup>48</sup> See Tenth Meeting of the Conference of the Parties, CITES, Harare, Zimb., June 9-20, 1997, Conf. 10.10: Trade in Elephant Specimens, Rev. CoP14, amended at the Fourteenth Meeting of the Conference of the Parties, CITES, The Hague, Neth., Jun. 3-15, 2007, available at <http://www.cites.org/eng/res/all/10/E10-10R14.pdf> (last visited Nov. 11, 2009) (establishing, among other things, a system for monitoring the illegal killing of elephants, known as MIKE, and an elephant trade information system, known as ETIS); Twelfth Meeting of the Conference of the Parties to CITES, Santiago, Chile, Nov. 3-15, 2002, Conf.12.8: Review of Significant Trade in Specimens of Appendix-II Species, Rev. CoP 13, amended at Thirteenth Meeting of the Conference of the Parties to CITES, Bangkok, Thai., Oct. 2-14, 2004, available at <http://www.cites.org/eng/res/all/12/E12-08R13.pdf> (last visited Nov. 11, 2009).

<sup>49</sup> See Conf. 10.10: Trade in Elephant Specimens, *supra* note 48; Conf. 12.8: Review of Significant Trade in Specimens of Appendix-II Species, *supra* note 48.

<sup>50</sup> See Kyoto Protocol, *supra* note 8.

<sup>51</sup> *Id.* arts. 6, 12, 17.

<sup>52</sup> See UNFCCC, *supra* note 8.

<sup>53</sup> These decisions are known as the Marrakesh Accords. See Framework Convention on Climate Change, Marrakesh, Morocco, Oct. 29-Nov. 10, 2001, Report of the Conference of the Parties on Its Seventh Session: Addendum, FCCC/CP/2001/13/Add.1, (Jan. 21, 2002), available at <http://unfccc.int/resource/docs/cop7/13a01.pdf> (last visited Oct. 25, 2009) [hereinafter Marrakesh Accords]. Prior to the Protocol's entry into force, its Framework Convention's COP provided the parties with some indication of the future direction of the Protocol. Marrakesh Accords, *supra*, at 3; Brunnee, *Reweaving the Fabric*, *supra* note 1, at 114.

<sup>54</sup> The Kyoto Protocol specifies that the COP to its framework convention, the United Nations Framework Convention on Climate Change, shall serve as the meeting of the parties to the Protocol. Kyoto Protocol, *supra* note 8, art. 13.

<sup>55</sup> See Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, Poznan, Pol., Dec. 3-15, 2007, Decision 9/CMP.3: Implications of Possible Changes to the Limit for Small-Scale Afforestation and Reforestation Clean Development Mechanism Project Activities, in Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on Its Third Session: Addendum, at 26, U.N. Doc. FCCC/KP/CMP/2007/9/Add.1 (Mar. 14, 2008), available at <http://unfccc.int/resource/docs/2007/cmp3/eng/09a01.pdf> (last visited Oct. 25, 2009); First Session of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, Montreal, Can., Nov. 28-Dec. 10, 2005, Decision 5/CMP.1: Modalities and Procedures for Afforestation and Reforestation Project Activities Under the Clean Development Mechanism in the First Commitment Period of the Kyoto Protocol, at 61, U.N. Doc. FCCC/KP/CMP/2005/8/Add.1 (Mar. 30, 2006), available at <http://unfccc.int/resource/docs/2005/cmp1/eng/08a01.pdf> (last visited Oct. 25, 2009).

COPs have all done so in one form or another.<sup>56</sup> These resolutions or decisions take the form of procedural obligations that do not affect the substance of the parties' commitments. They often operate through rules binding on subsidiary organs within the treaty regime like the Secretariat. Yet by creating measures to enhance compliance, they add to the substantive implementation of the parties' obligations and thereby have an external effect.<sup>57</sup> Indeed, under the Ramsar Convention, the COPs have facilitated and enhanced the core procedural approach of the treaty by requiring reporting by the state prior to each COP and by providing extensive guidelines and commentary on those reports.<sup>58</sup> Because procedural mechanisms and shaming lie at the heart of the Ramsar Convention's means of protecting international wetlands,<sup>59</sup> the COP's role in developing procedures for reporting and disseminating information that can result in shaming recalcitrant states must be seen as significant.

Finally, COPs contribute to development and implementation of the treaty by establishing and directing subsidiary bodies. COP resolutions and decisions direct these subsidiary bodies to develop interpretations or propose technical specifications.<sup>60</sup> Some of this subsidiary activity will [\*245] be subject to consent-based procedures before it can come into effect, binding only those states that agree to be bound. However, the fact that the COPs set the agenda for the subsidiary bodies gives the COPs a degree of control over the direction of the treaty.<sup>61</sup>

### 3. Conclusion

Consensus-based COP activity results in resolutions and decisions by the parties to the underlying treaty that can influence the substantive obligations of the parties in numerous ways, affect the internal workings of the treaty regime and its institutions, and serve efforts to enhance the effectiveness of the treaty.

This exploration of COP activity highlights, however, that this activity does not result in resolutions or decisions that can be divorced from the underlying treaty. These resolutions and decisions are tightly connected with the original treaty and enrich it by thickening the parties' obligations. Although not all consensus-based COP activity will have this effect, it can thicken these obligations in a few ways. It can deepen the obligations by contributing to implementation and effectiveness. It can add to the fullness of the obligations by adding to the text of the original treaty through interpretation and guidance.

<sup>56</sup> See Jutta Brunnee, *The Kyoto Protocol: Testing Ground for Compliance Theories?*, 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Heidelberg J. Int'l L.) 255, 275 (2003) (F.R.G.) (describing how the Kyoto compliance committee tries to decide non-compliance cases by consensus); Gerhard Loibl, *Reporting and Information Systems in International Environmental Agreements as a Means for Dispute Prevention - The Role of "International Institutions"*, 5 *Non-State Actors & Int'l L.* 1, 3-12 (2005) (describing the reporting requirements established by the COPs of a number of different environmental agreements).

<sup>57</sup> Brunnee, *Reweaving the Fabric*, supra note 1, at 111; Ulfstein, *Comment*, supra note 16, at 148-50 (stating that COPs also frequently implement financing provisions, producing a similar dynamic between internal and external effects on the parties' implementation).

<sup>58</sup> See Bowman, supra note 28, at 14 (noting that the first COP Parties to the Ramsar Convention called upon all parties to submit reports to the Bureau at least six months prior to the holding of each COP meeting); see also, e.g., Eighth Meeting of the Conference of the Parties to the Ramsar Convention, Valencia, Spain, Nov. 18-26, 2002, *Enhancing the Information on Wetlands of International Importance (Ramsar Sites)*, Res. VIII.13, available at [http://www.ramsar.org/pdf/res/key\\_res\\_viii\\_13\\_e.pdf](http://www.ramsar.org/pdf/res/key_res_viii_13_e.pdf) (last visited Nov. 11, 2009); Sixth Meeting of the Conference of the Parties to the Ramsar Convention, Brisbane, Austl., Mar. 19-27, 1996, *Submission of Information on Sites Designated for the Ramsar List of Wetlands of International Importance*, Res. VI.13, available at [http://www.ramsar.org/pdf/res/key\\_res\\_vi.13e.pdf](http://www.ramsar.org/pdf/res/key_res_vi.13e.pdf) (last visited Nov. 11, 2009).

<sup>59</sup> Wiersema, *Train Without Tracks*, supra note 33, at 1285-87.

<sup>60</sup> See, e.g., Eleventh Meeting of the Conference of the Parties to CITES, Gigiri, Kenya, Apr. 10-20, 2000, Conf. 11.1: *Establishment of Committees*, Rev. CoP14, amended by Fourteenth Meeting of the Conference of the Parties to CITES, The Hague, Neth., June 3-15, 2007, *CITES Strategic Vision: 2008-2013*, Res. 14.2, available at <http://www.cites.org/eng/res/11/11-01R14.shtml> (last visited Oct. 25, 2009) (establishing committees and specifying their general terms of reference); Fourteenth Meeting of the Conference of the Parties to CITES, The Hague, Neth., June 3-15, 2007, *Periodic Review of the Appendices*, Conf. 14.8, available at <http://www.cites.org/eng/res/14/14-08.shtml> (last visited Oct. 25, 2009) (instructing the Animals and Plants Committee to establish a schedule for the periodic review of the appendices to CITES).

<sup>61</sup> COPs also develop plans of action and strategic plans for the future of the treaty. These can be directed at both states parties and to the COP or subsidiary bodies. See, e.g., Fourteenth Meeting of the Conference of the Parties to CITES, The Hague, Neth., June 3-15, 2007, *CITES Strategic Vision: 2008-2013*, Conf. 14.2, available at <http://www.cites.org/eng/res/14/14-02.shtml> (last visited Oct. 31, 2009) (addressing the parties, the Secretariat, and the Standing Committee).

As such, this consensus-based COP activity can be viewed as having a close relationship to the treaty. However, it generally cannot be seen as giving rise to stand-alone legal or even political obligations. COP resolutions and decisions hold little meaning but for their connection to the treaty.

However, this recognition of the effects of consensus-based COP activity does not tell us how we should regard the activity's legal status or its place in schemas of international legal obligation.

While COP activity has been noticed by commentators over the years, very few have delved deeply into the question of how it should be viewed in terms of international legal obligation.<sup>62</sup> Two notable exceptions include [\*246] the seminal article by Churchill and Ulfstein in 2000 and the compelling work of Jutta Brunnee.<sup>63</sup>

Churchill and Ulfstein's piece addresses the full range of COP activity - consent-based and consensus-based - and argues that COPs should be viewed as international organizations.<sup>64</sup> Thus, the product of COPs should be evaluated according to the rules applicable to international organizations. However, even Churchill and Ulfstein do not reach definitive conclusions about the legally binding status of some COP activity - for example COP resolutions or decisions that interpret provisions of the treaty - even when such activity has substantive implications for the parties.<sup>65</sup>

Focusing on examples from the UNFCCC and the Kyoto Protocol, Jutta Brunnee's work delves into the implications of COP activity on our understanding of international law as the product of consent by states.<sup>66</sup> She argues that the recognition that COPs are engaged in what she terms "de facto law-making" forces us to question our traditional view of international legal obligation.<sup>67</sup>

The following Part both builds on and departs from this work as the Article begins to address the thorny question of the legal status of consensus-based COP activity.

[\*247]

## II. Exploring the Legal Status of COP Activity

### A. The Sources of International Law: Can Consensus-Based COP Activity Be Hard Law?

For those ready to embrace the argument that COP activity is a significant and currently undervalued source of international legal obligation, the most obvious first step is to consider whether it can appropriately fall within the two traditional categories of sources of international law: treaty and custom.<sup>68</sup> If so, it could be argued that consensus-based COP activity could give rise to hard law and not just soft law obligations. However, as we shall see, consensus-based COP activity does not fit easily into either category.

<sup>62</sup> See, e.g., Malgosia Fitzmaurice & Olufemi Elias, *Contemporary Issues in the Law of Treaties* 254-69 (2005); Werksman, *supra* note 31; Nikolaos Lavranos, *Multilateral Environmental Agreements: Who Makes the Binding Decisions?*, 11 *Eur. Envtl. L. Rev.* 44 (Feb. 2002); Loibl, *supra* note 56; Peter H. Sand, *Institution-Building to Assist Compliance with International Environmental Law: Perspectives*, 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Heidelberg J. Int'l L.), 774 (1996) (F.R.G.).

<sup>63</sup> See generally Churchill & Ulfstein, *supra* note 1; see also Brunnee, *Reweaving the Fabric*, *supra* note 1; Brunnee, *COPing with Consent*, *supra* note 1.

<sup>64</sup> Churchill & Ulfstein, *supra* note 1, at 631-43, 655, 658.

<sup>65</sup> *Id.* at 641-42. Treating COPs as international organizations and therefore COP resolutions and decisions as equivalent to the authorized activity of an international organization does not mean that all commentators would automatically treat these resolutions and decisions as hard international law. See, e.g., Mario Prost & Paul Kingsley Clark, *Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?*, 5 *Chinese J. Int'l L.* 341, pt. III (2006) (discussing whether international organizations make law).

<sup>66</sup> See generally Brunnee, *Reweaving the Fabric*, *supra* note 1; see also Brunnee, *COPing with Consent*, *supra* note 1.

<sup>67</sup> Brunnee, *Reweaving the Fabric*, *supra* note 1, at 118.

<sup>68</sup> Statute of the International Court of Justice, *supra* note 4, art. 38(1). I have excluded general principles of law from this list because these refer to general principles of law recognized in the domestic systems of states and are not applicable here.

Generally, a treaty is understood to be an agreement between states that is intended to create obligations for those states under international law.<sup>69</sup> Although, as discussed below, some COP activity could be said to be intended to have legal effects and to have been consented to by all states parties to the treaty, we shall see that stretching this to a finding that the parties have created a new international legal agreement is problematic. Some commentators have speculated that consensus-based COP activity could amount to a subsequent agreement by the parties.<sup>70</sup> Under rules for interpretation of treaties, such agreements are recognized as relevant to the interpretation of the original provisions of a treaty.<sup>71</sup> However, this does not mean that this interpretive device would then automatically elevate the activity to being seen as hard international law.

The second main category of hard law, customary international law, might initially seem to pose more opportunity for legal status. Based on a combination of state practice and *opinio juris*, this source seems to provide an opportunity for more flexible reflection on intent and consent.<sup>72</sup> As interpreted by most commentators, customary international law allows legal rules to emerge on the basis of broad consensus rather than the consent of each state. The legal rules that emerge from this broad [\*248] consensus are then binding on all states.<sup>73</sup> More recent iterations of the standards for customary international law have even appeared to elevate statements above action for a finding of customary international law, and allow for faster development of legally binding rules based on custom.<sup>74</sup> Under this approach, some commentators are willing to recognize the possibility that declarations emanating from a U.N. conference or the terms of resolutions from the General Assembly can give rise to customary international law.<sup>75</sup> However, not all such activity can give rise to customary international law: a custom's legal status is dependent on factors such as the degree of consent by states and the nature of the activity.<sup>76</sup> In other words, this status depends on whether the parties understand the activity to have legal relevance.<sup>77</sup>

What is the parties' understanding when they pass resolutions or decisions at COPs? Is it analogous to the product of a U.N. sponsored conference or a U.N. General Assembly resolution? The problem with both categories of sources of international law - treaties and custom - is that they provide a framework that does not fit with the reality of consensus-based COP activity. Standards for whether an agreement amounts to a treaty binding under international law or whether a declaration by a U.N. sponsored conference or General Assembly resolution could give rise to customary international law obligations are applicable to those types of instruments because they are capable of existing as independent legal obligations. It is therefore possible to focus on the intent of the states that have drafted these documents to determine whether the parties understood that they were creating new rules and understood that they would have legal status.

The difficulty with applying these approaches to consensus-based COP activity is that this activity is inextricably bound up with the underlying treaty obligations of the parties.<sup>78</sup> As we saw in the exploration of consensus-based COP activity in Part I above, COPs affect the obligations of the parties through activity related to the underlying terms and objective of the treaty. The significance of the COP activity for the parties' obligations derives from the way in which that activity is connected to the treaty and how it consequently affects that treaty's terms. This is [\*249] true whether the consensus-based COP activity is external or internal in its focus. For example, new allocations for

<sup>69</sup> See Aust, *supra* note 5, at 16, 20 (expanding on the definition of a treaty under the VCLT art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331, recognized as customary international law, and the International Law Commission's Commentary to the Treaty); see also *Aegean Sea Continental Shelf (Greece v. Turk.)*, 1978 I.C.J. 3, at 39-44 (Dec. 19).

<sup>70</sup> See, e.g., Churchill & Ulfstein, *supra* note 1, at 641.

<sup>71</sup> VCLT, *supra* note 5, art. 31(3)(a).

<sup>72</sup> See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, [95 Am. J. Int'l L. 757 \(2001\)](#).

<sup>73</sup> See, e.g., Jonathan I. Charney, *Universal International Law*, [87 Am. J. Int'l L. 529, 536-38 \(1993\)](#).

<sup>74</sup> *Id.* at 537; Roberts, *supra* note 72, at 758.

<sup>75</sup> Charney, *supra* note 73, at 537, 544-45; Roberts, *supra* note 72, at 758.

<sup>76</sup> Roberts, *supra* note 72, at 758.

<sup>77</sup> Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* 19 (1999).

<sup>78</sup> Ulfstein seems to acknowledge this when he discusses the Kyoto Protocol. See Ulfstein, *Comment*, *supra* note 16, at 148.

ozone-depleting substances under the Montreal Protocol, or criteria for listing of species under CITES or wetlands under the Ramsar Convention hold little meaning without reference to the parties' underlying treaty obligations. Their significance lies in how they relate to the underlying treaty obligations and thereby shape them.

The exception to this interdependence highlights the rule. The Basel Convention's decision banning the transport of waste from OECD to non-OECD countries referred to in Part I above could exist as a stand-alone legal rule.<sup>79</sup> It created a ban that was not contemplated by the terms of the underlying treaty and could be said, therefore, to have departed from the treaty. Because of its stand-alone nature, the decision can more easily be evaluated under traditional tests for international law to determine whether it qualifies as a new international agreement or as emerging customary international law. Had the parties all agreed about the decision's legal status, it could be argued that the decision formed or was close to forming new hard international law<sup>80</sup> capable of operating independently of the treaty.

In turn, the fact that the parties did not all agree about the decision's legal status after it had been passed counters an argument that it was hard international law. The ultimate solution to the issue was to pass an official amendment to the treaty at the next COP along the same terms as the contentious decision.<sup>81</sup> This amendment is subject to a consent-based procedure, rather than a consensus-based one - it will only bind states that have agreed to be bound by it.<sup>82</sup>

Consensus-based COP activity does not usually generate this level of debate about its legal status, even though, as we have seen, it does influence the parties' obligations and activities under the treaty.<sup>83</sup> This is because most consensus-based COP activity cannot, as a factual matter, [\*250] give rise to new independent legal obligations. Thus, as long as the parties continue to be committed to the underlying treaty, they can shape its direction through consensus-based COP activity without fearing a new set of independent legal obligations. Although resolutions and decisions are sometimes surrounded by vigorous debate, they do not give rise to new stand-alone legal obligations that can be assessed independently of the original treaty. It is therefore difficult to characterize consensus-based COP activity as falling neatly within either treaty or custom as hard international law.

#### B. A More Flexible Approach to Analyzing the Legal Status of Consensus-Based COP Activity

These traditional categories of sources of international law have their exceptions and flexible interpretations.<sup>84</sup> Over the years, some commentators have sought to move away from rigid categorizations of how we should locate international legal obligation.<sup>85</sup> One way to resolve the problem of an overly rigid framework is to focus on certain attributes of consensus-based COP activity that relate to the key concerns of international lawyers engaged in a search for legal obligation: how to find sovereign states bound by law without undermining their sovereign status. As Koskeniemi describes it, it is the constant struggle between concreteness and normativity, between apology and uto-

<sup>79</sup> See Decision II/12, Basel Convention, *supra* note 30.

<sup>80</sup> The parties adopted Decision II/12 by consensus. Concerns about the decision's legal status were raised subsequently by some parties. See Fitzmaurice & Elias, *supra* note 62, at 258; Werksman, *supra* note 31.

<sup>81</sup> See Third Meeting of the Conference of the Parties to the Basel Convention, Geneva, Switz., Sept. 18-22, 1995, Decision III/1: Amendment to the Basel Convention, U.N. Doc. UNEP/CHW.3/35 (Nov. 28, 1995), available at [http://www.basel.int/meetings/cop/cop1-4/cop3decisions\\_e.pdf](http://www.basel.int/meetings/cop/cop1-4/cop3decisions_e.pdf) (last visited Oct. 25, 2009); Fitzmaurice & Elias, *supra* note 62, at 258; Werksman, *supra* note 31, at 64-65.

<sup>82</sup> Decision III/1 is not yet in force but will enter into force once ratified by three fourths of the states parties that have accepted the amendment, and then only with respect to the ratifying states. See Basel Convention, *supra* note 29, art. 17(5).

<sup>83</sup> Cf. Handl, *supra* note 31, 130-36 (describing examples in which the legal status of COP activity and similar activity in MEAs has been the subject of disagreement).

<sup>84</sup> See Aust, *supra* note 5, at 16 (warning "that the law of treaties is extremely flexible and can accommodate departures from normal practice"). See generally Roberts, *supra* note 72 (demonstrating the wide range of views as to what makes up customary international law).

<sup>85</sup> See, e.g., Oscar Schachter, Towards a Theory of International Obligation, in *The Effectiveness of International Decisions* 9 (Stephen M. Schwebel ed., 1971). See generally Robert Y. Jennings, What Is International Law and How Do We Tell It when We See It?, 37 *Schweizerisches Jahrbuch für Internationales Recht* 59 (1981) (F.R.G.) (discussing increased confusion about the sources of international law). See also Brunnee, *Reweaving the Fabric*, *supra* note 1, at 118-23.

pia.<sup>86</sup>

By breaking free of the conventional categories or definitions of treaty and customary international law, we might analyze consensus-based COP activity along a number of different axes that focus on attributes such as consent, intent, and effect.<sup>87</sup> Each of these axes could [\*251] then be used to provide a window into how we should understand a given activity's legal status.

First, consensus-based COP activity could be evaluated according to the degree of consent achieved in passing the resolution or decision. Second, it might be discussed according to the degree of specific authorization contained in the treaty - a kind of delegated consent. Third, it could be broken down according to the degree of normative force with which it is phrased. Fourth, consensus-based COP activity could be discussed with reference to its effect on the obligations and implementation of the treaty by the parties, perhaps distinguishing between external and internal effects.

#### 1. Axis 1: Voting and Level of Consent

One axis along which we might evaluate the legal status of consensus-based COP activity is the degree of consent required and achieved for the activity in question. In most instances, resolutions and decisions are passed by consensus. In the absence of consensus, a treaty may require a majority or super-majority vote<sup>88</sup> and, if the required majority is achieved, consensus-based COP activity will become binding on all parties, including those that did not agree to the provision or vote in favor of it.

It is unclear whether consensus itself means unanimity.<sup>89</sup> Whether or not we equate consensus with unanimity in evaluating COP activity, a resolution or decision passed by consensus can be said to have been consented to by more states than a resolution or decision passed by super-majority or majority vote. This axis provides, then, a sliding scale of significance based on the degree of consent achieved for the resolution or decision.<sup>90</sup>

Using the axis of level of consent could allow us to argue that a resolution or decision has achieved the status of either a new agreement between the parties or some form of instant or emerging customary international law.

[\*252]

#### 2. Axis 2: Level of Authorization by the Treaty - Delegated Consent

COPs have authority from the treaty text to work on specific issues, as well as general authority to further the implementation and effectiveness of the treaty. Thus, another axis along which to evaluate COP activity is the degree of general or specific authority pursuant to which a COP is acting.<sup>91</sup>

Most treaty articles specifically creating a COP provide the COP with general authority to perform tasks that will enhance the implementation and the effectiveness of the treaty. For example, CITES authorizes its COP to "review the implementation of the present Convention" and "where appropriate, make recommendations for improving the ef-

<sup>86</sup> Martti Koskenniemi, *The Politics of International Law*, 1 *Eur. J. Int'l L.* 4, 7-9 (1990) [hereinafter Koskenniemi, *The Politics of International Law*]; see also Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005) [hereinafter Koskenniemi, *From Apology to Utopia*].

<sup>87</sup> See Brunnee, *Reweaving the Fabric*, supra note 1, at 110-13 (discussing different frameworks through which to view COP activity in the climate change regime: authorization, language, and institutional law).

<sup>88</sup> See UNFCCC, supra note 8; Kyoto Protocol, supra note 8; Ramsar Convention, supra note 9, art. 7(2).

<sup>89</sup> See Gardner, *Perspectives on Wetlands*, supra note 15, at 2-9 (discussing controversy over the meaning of "consensus" at the Eighth Conference of the Parties to the Ramsar Convention).

<sup>90</sup> It should be noted that it will not always be possible to identify which parties voted for or against a particular provision due to the occasional use of secret ballots. However, parties will often reveal their preferences in debates and might attach explanatory documents clarifying their positions. This can happen even where a measure is passed by consensus.

<sup>91</sup> See Ulfstein, *Comment*, supra note 16, at 150, 153 (arguing that internal law-making by COPs should be regarded as binding on the COP, subsidiary bodies, and the Secretariat, as well as states when acting within the treaty body).

fectiveness of the present Convention.”<sup>92</sup> Similar language is contained in other MEAs.<sup>93</sup>

This general authorizing provision also tends to provide somewhat open-ended powers related to particular aspects of the treaty. Thus, the same article in CITES authorizes the COP to “make such provision as may be necessary to enable the Secretariat to carry out its duties, and adopt financial provisions; ... review the progress made towards the restoration and conservation of the species included in Appendices I, II, and III; [and] receive and consider any reports presented by the Secretariat or by any Party.”<sup>94</sup>

In addition, some treaties expressly authorize the COP to implement specific aspects of the treaty. The Montreal Protocol on Substances that Deplete the Ozone Layer was amended in 1990 specifically to authorize the COP to make amendments that did not require ratification to be binding.<sup>95</sup> These specific authorizations can also take the form of authorizing the COP to elaborate on aspects of the treaty that cut to the heart of the treaty’s mode of operation. In addition to its general authorization under the treaty, the COP to the UNFCCC is charged throughout the treaty text [\*253] to perform a number of specific activities, including provisions for financial mechanisms<sup>96</sup> and parties’ reports.<sup>97</sup>

The Kyoto Protocol, already more specific than its framework convention, the UNFCCC, gives even more significant authority to its version of the COP - the UNFCCC Conference of the Parties Acting as Meeting of the Parties (COP/MOP). This COP/MOP is specifically authorized by the Protocol to develop guidelines, modalities, procedures, rules, and guidelines for the key provisions of the Protocol: its flexible mechanisms of Joint Implementation, the Clean Development Mechanism, and an overall emissions trading scheme.<sup>98</sup> As discussed in Part I above, the COP has done substantial work in response to this mandate.

Thus, the legal status of consensus-based COP activity could be evaluated according to the degree of authorization contained in the treaty itself, relying on a notion of consent to delegated law-making power. Ulfstein, for example, argues that authorized internal rules should be considered internally binding within the treaty regime.<sup>99</sup> Here, one might also differentiate between forms of authorization, so that generally authorized activities could be perceived as less directly authorized and therefore of a lesser legal status than specifically authorized activity. This approach would echo how we view the activity of international organizations and is consistent with the treatment of COPs as international organizations, as advocated by Churchill and Ulfstein.<sup>100</sup>

### 3. Axis 3: Level of Obligation Contained in the Language of the COP Activity - Intent

Consensus-based COP activity also varies in the type of language used to address the parties and in who is addressed - the states or subsidiary bodies. Different types of language convey different intentions and expectations about the degree of obligation and legal force contained in the resolution or decision.<sup>101</sup>

<sup>92</sup> CITES, *supra* note 9, art. XI(3).

<sup>93</sup> See UNFCCC, *supra* note 8, art. 7; Kyoto Protocol, *supra* note 8, art. 13; Ramsar Convention, *supra* note 9, art. 6.

<sup>94</sup> CITES, *supra* note 9, art. XI(3). In addition, the COP is authorized to consider and adopt amendments to Appendices I and II in accordance with Article XV. The relevant provisions require a two thirds majority vote of the parties present and voting but allow for reservations. *Id.* arts. XI(3)(b), XVI, XVII, XXIII. This is, therefore, a consent-based activity rather than a consensus-based activity. See also Ramsar Convention, *supra* note 9, art. 6.

<sup>95</sup> See Montreal Protocol, *supra* note 20 and accompanying text; Brunnee, *Reweaving the Fabric*, *supra* note 1, at 110 (arguing that “Article 2.9 is remarkable in that it allows for formally binding lawmaking by the Meeting of the Parties in relation to alterations of the treaty’s substance, indeed, of its central commitments”).

<sup>96</sup> UNFCCC, *supra* note 8, art. 11.

<sup>97</sup> See, e.g., *id.* art. 12. The COP is the supreme body of the treaty and is given an explicit mandate to direct the activity of the Secretariat and other subsidiary bodies. *Id.* arts. 7-10.

<sup>98</sup> See Kyoto Protocol, *supra* note 8, arts. 6, 12, 17. Brunnee, *Reweaving the Fabric*, *supra* note 1, at 110-11 (“The design of this emissions trading regime is not merely a technical matter, it is at the very heart of the Kyoto Protocol. During the negotiations for the protocol, international emissions trading was among the most controversial issues.”).

<sup>99</sup> Ulfstein, *Comment*, *supra* note 16.

<sup>100</sup> Churchill & Ulfstein, *supra* note 1; see also *supra* notes 64-65 and accompanying text.

<sup>101</sup> See Brunnee, *Reweaving the Fabric*, *supra* note 1, at 111.

[\*254] First, even the designation of something as a resolution or decision can be significant. Some COPs differentiate between resolutions, decisions, recommendations, and notifications, each one conveying varying degrees of normative force. For example, the CITES COP produces resolutions and decisions.<sup>102</sup> Of these two categories of activity, resolutions have the most overtly normative role, since they are used to provide long-standing guidance on the treaty.<sup>103</sup> By contrast, COP decisions are used for instructions to subsidiary bodies, to be implemented by a specified time.<sup>104</sup>

Second, and more importantly, even those forms that have the greatest normative force - such as resolutions under CITES or decisions under the Basel Convention - can vary significantly in their language. For example, CITES Resolution 14.8 on Periodic Review of the Appendices uses "shall," "should," "are encouraged," and "must" within the same Resolution.<sup>105</sup> By contrast, CITES Resolution 14.4 regarding cooperation between CITES and the International Tropical Timber Organization uses the terms "urges," "encourages," and "recommends."<sup>106</sup> Much of the Basel Convention's COP activity uses the term "requests" and "invites" when addressing the parties.<sup>107</sup>

Sometimes differences in language seem to track whether a COP is addressing parties directly with regard to their external obligations, where less forceful language might be used, or whether it is addressing its own internal operations or its subsidiary organs, where more forceful language is used.<sup>108</sup> For example, the Basel Convention tends to reserve more forceful language for directives to its subsidiary bodies.<sup>109</sup> This is [\*255] not an exact correlation, however. For example, in CITES, the criteria for listing - directed at states parties, who will both propose listing and vote on listing proposals, and at the treaty's subsidiary bodies, who will comment on listing proposals and sometimes make recommendations - contain mandatory language throughout.<sup>110</sup>

Finally, at the lowest level of normative force, COPs may authorize or endorse guidance manuals produced by technical bodies. This guidance is intended for use by domestic agencies and parties implementing the treaty.<sup>111</sup>

This axis might be seen, then, as representing the intent of the parties as to the normative force of the COP activity. As such, it is arguable that COP resolutions using terms like "shall" have a harder legal status than those that simply "urge" the parties to act. Using this axis, these latter would be regarded as soft law or as reflecting political rather than legal commitments.

#### 4. Axis 4: Effect in Implementation

A fourth axis along which to evaluate consensus-based COP activity's legal status is that of effect. Do the parties implement these COP resolutions and decisions or act as though they are legally binding?<sup>112</sup>

<sup>102</sup> CITES Resolutions, <http://www.cites.org/eng/res/intro.shtml> (last visited Oct. 25, 2009); Decisions of the Conference of the Parties, <http://www.cites.org/eng/dec/intro.shtml> (last visited Oct. 25, 2009).

<sup>103</sup> Decisions of the Conference of the Parties, *supra* note 102.

<sup>104</sup> *Id.*

<sup>105</sup> See Fourteenth Meeting of the Conference of the Parties to CITES, The Hague, Neth., June 3-15, 2007, Conf. 14.8: Periodic Review of the Appendices, available at <http://www.cites.org/eng/res/14/14-08.shtml> (last visited Oct. 25, 2009).

<sup>106</sup> See Fourteenth Meeting of the Conference of the Parties to CITES, The Hague, Neth., Jun. 3-15, 2007, Conf. 14.4: Cooperation Between CITES and ITTO Regarding Trade in Tropical Timber, available at <http://www.cites.org/eng/res/14/14-04.shtml> (last visited Oct. 25, 2009).

<sup>107</sup> See, e.g., Ninth Meeting of the Conference of the Parties, Bali, Indon., June 23-27, 2008, Requests Directed at Parties and Other Stakeholders Contained in the Decisions of the Ninth Meeting of the Conference of the Parties, available at <http://www.basel.int/convention/rfc/rfcCOP9.doc> (last visited Oct. 25, 2009).

<sup>108</sup> See, e.g., Cooperation Between CITES and ITTO Regarding Trade in Tropical Timber, *supra* note 106 (using the term "directs" when addressing the Secretariat but "urges," "recommends," and "encourages" when addressing the parties directly).

<sup>109</sup> *Id.* at 2.

<sup>110</sup> CITES Criteria, *supra* note 44.

<sup>111</sup> See, e.g., Ramsar Handbooks, *supra* note 37.

<sup>112</sup> This assessment has analogies to the approach of some legal pluralists. See Paul Schiff Berman, Global Legal Pluralism,

For this inquiry, the discussion of Part I above might be combined with empirical work about how the parties implement the convention and what significance they accord the resolutions and decisions of COPs.<sup>113</sup> Following this axis as a measure of legal status, we might also determine that external effects are more legally significant than internal effects because they have a more direct effect on the parties and are therefore likely to have more effect on implementation. Following this view, the mix of internal and external effects would fall somewhere in the middle of the axis.

#### 5. Using the Axes to Determine Legal Status

The four axes - intentionally placed in an order that produces a sliding scale from consent to effects-based determinations of their legal status - provide a potential means of assessing the international legal [\*256] status of consensus-based COP activity. Following consent-based models of varying strictness, our assessment of the legal status of this activity could focus on the degree of consent achieved or the level of authorization for the COP activity that represents consent for delegated rule-making (Axes 1 and 2). Still within a consent-based model, albeit a less strict one, we might focus on the intent expressed by the parties as to the legal status of the resolution or decision (Axis 3). Moving away from a consent-based model, we could evaluate legal status by reference to the effect of the COP activity on the parties (Axis 4).

Any temptation to use a single axis to determine legal status should be avoided. While each axis offers some insight into the legal status of a particular COP resolution or decision, a single axis alone cannot give us a sufficiently rich picture of the relationship of consensus-based COP activity to international legal obligation. Further, the selection of one axis over another inevitably involves the selection of either an apologist or a utopian perspective on international legal obligation.<sup>114</sup>

Take, for example, Axis 2, which considers how the level of authorization for COP activity contained in the treaty affects the status of this activity. This axis simply provides us with information about whether the COP itself has acted within the scope of its powers but not about the normative force of the activity. For some, this amount of information is sufficient. For example, Ulfstein argues that authorized activity can be considered legally binding, while unauthorized activity has legally binding status only within the internal operation of the treaty.<sup>115</sup> However, relying on this axis alone might lead to a finding of hard law even where that was not intended by the parties voting on the decision or resolution. Further, even if a COP resolution inconsistent with treaty authorizations might be *ultra vires* according to the law of international organizations, it might nevertheless be considered hard law by virtue of a sufficient level of consent and demonstration of intent by the voting parties. The fact that the Basel Convention's decision regarding trade in waste between OECD and non-OECD countries was likely *ultra vires* does not alone negate the possibility that other factors could have led commentators to view it as legally binding. Thus, the level of authorization and the framework of the law of international organizations can only be one factor in analyzing the legal status of COP activity.

Relying solely on intent as expressed by the language of the COP resolution or decision is also insufficient. If a COP resolution phrased in [\*257] obligatory language can be regarded as hard law (or almost hard law) simply on the basis of language, this might suggest that COP activity could stand alone as an independent provision. Sometimes, this might be true. However, the substance of most COP activity rarely stands separate from the underlying treaty. The criteria for listing species under CITES, for example - although written using mandatory language - cannot stand apart from the underlying treaty's listing procedure.

The same problem applies when relying only on the consent axis. For a stand-alone provision like Decision II/12 of the Basel Convention, consent could be the key determinant. However, for most consensus-based COP decisions, their connection to the underlying treaty obligations makes it difficult to determine whether consent to the provision itself includes consent that it give rise to a new stand-alone legal rule.

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[80 S. Cal. L. Rev. 1155 \(2007\).](#)

<sup>113</sup> Although Brunnee does not directly address effects, her use of the term "de facto law-making" raises the possibility of a form of legal status afforded this activity because of its practical significance. See Brunnee, *Reweaving the Fabric*, supra note 1; cf. Ulfstein, Comment, supra note 16.

<sup>114</sup> See Koskenniemi, *The Politics of International Law*, supra note 86, at 12; Koskenniemi, *From Apology to Utopia*, supra note 86.

<sup>115</sup> Cf. Ulfstein, Comment, supra note 16, at 148-51.

Finally, reliance on effect alone threatens to undermine the value of legal obligation completely, in favor of a realist view of international relations<sup>116</sup> - or, to put it in Koskenniemi's terms, it offers an apologist perspective of international law.<sup>117</sup> Even those inclined toward a broad reading of intent might shy away from a reading that relies only on effect to determine the legal status of an instrument.

Any one axis alone is insufficient to answer the question of whether COP activity should be regarded as hard international law because each axis highlights one aspect of the sources of international law while negating or ignoring others. Relying on one axis to determine legal status risks both over- and underinclusiveness. And each axis could be used to find that a particular COP resolution or decision is hard international law in a way that misunderstands the nature of COP activity.

The simple response is that all axes should be relevant to a determination of the legal status of consensus-based COP activity. So what happens when we combine the axes and try to apply them? The mix of consent, intent, and effects actually illuminates the way in which COP activity operates within the treaty. The way in which all of these axes operate within the context of analyzing consensus-based COP activity is different from the way in which they would operate in relation to independent, stand-alone normative statements.

Each axis serves the particular context of COP activity. Consent is consent to the COP activity's effect on the underlying treaty, whether direct or delegated. Intent here is directed specifically at how the parties [\*258] and subsidiary organs implement and interpret treaty provisions. And effects relate to the effects of the COP activity on the parties' original obligations. Combining the axes to consider the legal status of a particular example of consensus-based COP activity highlights this particular context.

The significance of COP activity lies in both its relationship to the parties' underlying legal obligations under the treaty and the intent of those parties. COP activity is significant when it thickens the original treaty obligations and when it is intended to thicken them. As part of this thickening, it can deepen the obligations by contributing to effectiveness and compliance. It can add fullness to them by elaborating on the framework provided by the text of the treaty through interpretations and guidance. This thickening can happen even if a COP resolution is couched in non-mandatory terms, when it affects only the internal obligations of the parties, or when it is only generally authorized.<sup>118</sup>

Consensus-based COP activity is inseparable from and should be viewed in relation to the party's underlying treaty obligations. Analyzing consensus-based COP activity according to all four axes helpfully illustrates the complexity of consensus-based COP activity, while also demonstrating that attempts to analyze COP activity according to conventional standards for finding legal obligation are fraught with difficulty.

When we ask whether consensus-based COP activity is hard international law within these conventional standards, we become caught in a set of questions far removed from the context of parties' decisionmaking at COPs. This in turn suggests that a one-size-fits-all determination of their legal status or relationship to underlying treaty obligations is impossible.

We need then, a new question. But before we can determine what that question should be, we must consider whether the more usual approach of classifying consensus-based COP activity as soft law proves [\*259] any more helpful for understanding this activity's role in the international legal system.

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<sup>116</sup> See Kenneth W. Abbott et al., *The Concept of Legalization*, 54 *Int'l Org.* 401 (2000); Kal Raustiala, *Form and Substance in International Agreements*, 99 *Am. J. Int'l L.* 581, 589 (2005); Ulfstein, *Comment*, supra note 16, at 149.

<sup>117</sup> Koskenniemi, *The Politics of International Law*, supra note 86; Koskenniemi, *From Apology to Utopia*, supra note 86.

<sup>118</sup> One way to understand this argument is using the framework proposed by Abbott et al. in their discussion of legalization. See Abbott et al., supra note 116. The authors define legalization in terms of obligation, precision, and delegation. Using these three dimensions, it is possible to locate the degree of legalization of a particular regime along a continuum. *Id.* at 401-02. Of the three characteristics, delegation is the most significant for our purposes, since it means "that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules." *Id.* at 401. Although the authors are primarily focused on dispute resolution in their discussion of delegation, *id.* at 415, the notion of delegation as they define it could also be applied to the work of COPs. Using this framework, then, we could see the activity of COPs as contributing the delegation characteristic of legalization, thereby "hardening" the legal effect of the parties' original treaty obligations.

### C. Placing Consensus-Based COP Activity Within the Soft Law Debate

Commentators generally refer to the consensus-based resolutions and decisions of COPs as soft law, perhaps to avoid some of the problems with applying standard tests for finding hard international law to this activity.<sup>119</sup> After all, if consensus-based COP activity is not hard law - or rarely hard law - why not simply refer to it as soft law and move on? This Part argues that despite some initial appeal of the term soft law for this kind of COP activity, it is ultimately unhelpful for a full understanding of the relationship between consensus-based COP activity and the parties' substantive legal obligations under the underlying treaty.

Much activity in the international system that cannot be classified as international law under traditional categories appears to have normative implications, including legally normative implications.<sup>120</sup> Recognizing this, commentators have relied on the notion of soft law to fill in the gap between non-law and traditional hard law:

"Soft" law certainly constitutes part of the contemporary law-making process but, as a social phenomenon, it evidently overflows the classical and familiar legal categories by which scholars usually describe and explain both the creation and the legal authority of international norms. In other words, "soft" law is a trouble maker because it is either not yet or not only law.<sup>121</sup>

Soft law can be classified as such on the basis of either its form or its substance. Focusing on form, the term is used to describe statements and resolutions that do not fall within definitions of a treaty "because the parties to it do not intend it to be legally binding."<sup>122</sup> As they do not meet the formal requirements of a treaty, these instruments cannot be considered law under traditional categories. Examples include General [\*260] Assembly resolutions and declarations. In international environmental law, the Stockholm and Rio Declarations could both fall within the category of soft law.<sup>123</sup>

More contentiously, some commentators also argue that an instrument might be considered soft law because of its substance. Here, even if the form of the instrument resembles that of a hard legal commitment such as a treaty, if the substance is insufficiently precise or determinate to hold the parties to any clearly understood obligation, the instrument might be deemed soft law.<sup>124</sup>

If these instruments do not meet the formal requirements of international law, why would they be termed law at all? Commentators frequently focus on the significance of the so-called soft law instrument for hard law. They assert that soft law may contribute to the development of hard law, actually becoming hard law over time<sup>125</sup> by providing a framework for a subsequent treaty<sup>126</sup> or by serving as an authoritative statement of states' views that might then

<sup>119</sup> See, e.g., Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 Int'l & Comp. L.Q. 901, 905 (1999); Edith Brown Weiss, *The Rise or the Fall of International Law?*, 69 [Fordham L. Rev.](#) 345, 352 (describing the work of COPs as one of the most important sources of soft law).

<sup>120</sup> See Boyle, *supra* note 119, at 902, 906-07; C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 Int'l & Comp. L.Q. 850, 865-66 (1989) [hereinafter Chinkin, *The Challenge of Soft Law*]; Weiss, *supra* note 119, at 352-53.

<sup>121</sup> Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 Mich. J. Int'l L. 420, 420 (1991).

<sup>122</sup> Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 Int'l & Comp. L.Q. 787, 787 (1986).

<sup>123</sup> U.N. Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (June 13, 1992); U.N. Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14 (June 16, 1972).

<sup>124</sup> Boyle, *supra* note 119, at 907; Christine Chinkin, *Normative Development in the International Legal System*, in *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* 21, 30 (Dinah Shelton ed., 2000) [hereinafter Chinkin, *Normative Development*]; Dupuy, *supra* note 121, at 430.

<sup>125</sup> Dupuy, *supra* note 121, at 433; see also Boyle, *supra* note 119, at 905.

<sup>126</sup> See Boyle, *supra* note 119, at 904; Jennings, *supra* note 85.

serve as evidence of customary international law or crystallize into customary international law.<sup>127</sup>

Dupuy notes that soft law "can help to define the standards of good behavior corresponding to what is nowadays to be expected from a 'well-governed State' without having been necessarily consecrated as an in-force customary norm."<sup>128</sup> Soft law instruments can have an impact on national legislatures and national legislation.<sup>129</sup> International standards based on soft law are available for use by international and municipal judges or arbitrators, and can be of use in everyday interstate diplomacy.<sup>130</sup>

**[\*261]** Thus, for Dupuy, the reason to take soft law seriously is its indirect effect on and relationship to more traditionally recognized hard law.<sup>131</sup> As he says:

Albeit indirect, the legal effect of "soft" law is nevertheless real. "Soft" law is not merely a new term for an old (customary) process; it is both a sign and product of the permanent state of multilateral cooperation and competition among the heterogeneous members of the contemporary world community.<sup>132</sup>

Or, as Klabbers, a critic of the term puts it, "the term soft law, thus (admittedly loosely) delimited, denotes those instruments which are to be considered as giving rise to legal effects, but do not (or not yet, perhaps) amount to real law."<sup>133</sup>

The work of COPs is generally considered to fit easily within the category of soft law. Boyle, writing about treaties and soft law, refers to the activities of COPs within his explanation of soft law's role.<sup>134</sup> He argues that "although of themselves these instruments may not be legally binding, their interaction with related treaties may transform their legal status into something more."<sup>135</sup> He observes that soft law may provide the detailed rules and technical standards required for implementation of some treaties, thus buttressing the obligation of a treaty.<sup>136</sup> Other commentators also generally refer to consensus-based COP activity as soft law, usually in passing before moving on to discuss in greater depth the substance of the activity in question.<sup>137</sup>

**[\*262]** Describing COP activity as soft law [could be the end of the discussion. However, criticisms from non-believers, as well as a closer examination of the relationship of consensus-based COP activity to the underlying treaty obligations, suggest that something is missing from this description. Over the years, commentators have argued

<sup>127</sup> Boyle, *supra* note 119, at 906; Chinkin, *Normative Development*, *supra* note 124, at 32.

<sup>128</sup> Dupuy, *supra* note 121, at 434.

<sup>129</sup> *Id.* at 434.

<sup>130</sup> *Id.* at 434-35.

<sup>131</sup> *Id.* at 435; see also Boyle, *supra* note 119, at 901-13 (discussing the "subtle and diverse" relationship between soft law and treaties).

<sup>132</sup> Dupuy, *supra* note 121, at 435. These instruments remain classified as soft law because they are still regarded as non-binding. "The adoption of non-binding normative instruments by international organizations and non-state actors reflects the growing complexity of the international legal system, in which states no longer have an exclusive role, but have yet to relinquish full law-making functions to other entities. The result is normative content in non-binding form." Alexandre Kiss, *Commentary and Conclusions, in Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* 223, 228 (Dinah Shelton ed., 2000).

<sup>133</sup> Jan Klabbbers, *The Redundancy of Soft Law*, 65 *Nordic J. Int'l L.* 167, 168 (1996). There may also be a normative push to recognize soft law because of the advantages it might have when compared to hard law. As Boyle observes, "soft law instruments will normally be easier to amend or replace than treaties, particularly when all that is required is the adoption of a new resolution by an international institution. Treaties take time to replace or amend, and the attempt to do so can result in an awkward and overlapping network of old and new obligations between different sets of parties." Boyle, *supra* note 119, at 903.

<sup>134</sup> Boyle, *supra* note 119, at 905.

<sup>135</sup> *Id.* at 906.

<sup>136</sup> *Id.* at 905.

<sup>137</sup> See, e.g., Churchill & Ulfstein, *supra* note 1, at 641.

that the concept of soft law lacks a coherent theoretical underpinning,<sup>138</sup> lacks support in state practice,<sup>139</sup> or threatens the integrity of the international legal system as a system of laws.<sup>140</sup>

Critics of the notion of soft law frequently focus on the binary aspects of legal obligation: something is either law or not law.<sup>141</sup> Reinforcing this with a focus on intent also suggests that something that states did not intend to be law cannot be considered a different form of law simply because a commentator might prefer that outcome.<sup>142</sup> Even those who acknowledge that it may not always be easy to distinguish between what is law and what is not law, or what is prelegal and what is legal, may resist the urge to dilute the effect of designating something as law by allowing the "grey zone" to be recognized as a kind of law.<sup>143</sup>

Supporting his argument that the notion of soft law is logically incoherent, Klabbers observes that even if courts do sometimes seem to recognize soft law and use it in their deliberations, they do so only by elevating soft law to hard law in order to make it hierarchically equivalent to the law they must apply.<sup>144</sup> Thus, even if soft law considerations stand at the origins of norms, "at some point during their existence as norms they are inevitably transformed into either hard law or non-law. Even if soft law would play a role in law-making ... , it does not play a role in the application of law."<sup>145</sup>

These criticisms provide two important lessons when considering how we should think about consensus-based COP activity. First, they [\*263] suggest that even the more fluid approach to international legal obligation reflected by proponents of the concept of soft law is subject to hierarchies of norms. Even if they are unwilling to see this activity as non-law, soft law proponents still accept that it is not hard law. Thus the binary classification of legal obligation becomes a tripartite classification.

Yet this tripartite classification - hard law, soft law, non-law - does not adequately capture the particular relationship that COP activity has with the underlying legal obligation of the treaty. For, to the extent that COP resolutions and decisions thicken treaty obligations, it is no longer possible to argue that the treaty obligation is hierarchically superior to the COP obligation. Instead, they are inextricably intertwined.

Some commentators seem to recognize this when they argue that treaty interpretation provisions might allow for COP resolutions and decisions to be taken into account as subsequent agreements of the parties under the provisions on interpretation contained in Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT).<sup>146</sup> COP resolutions and decisions would then be relevant for interpretation of the parties' original agreement. This is discussed in more detail in Part IV below. However, using COP activity to interpret an underlying treaty obligation would not necessarily change the status of the particular COP activity at issue from soft to hard law or mean that all consensus-based COP activity should automatically be regarded as hard law. Yet, following Klabbers, once a court is willing to use COP activity to interpret an underlying treaty obligation, it would be incoherent to suggest that the COP activity remains soft law.<sup>147</sup>

<sup>138</sup> Klabbers, *supra* note 133, at 168.

<sup>139</sup> *Id.*; Raustiala, *supra* note 116, at 587.

<sup>140</sup> Prosper Weil, *Towards Relative Normativity in International Law?*, [77 Am. J. Int'l L. 413, 441 \(1983\)](#). Weil fears that failure to abide by the procedural formalities of international law creation might lead to an unequal international legal system, whereby "those privileged to partake of that legislative power are in a position to make sure that their own hierarchy of values prevails and to arrogate the right of requiring others to observe it." *Id.*

<sup>141</sup> Raustiala, *supra* note 116, at 586 (claiming "that legality is best understood as a binary, rather than a continuous, attribute"); Dinah Shelton, *Normative Hierarchy in International Law*, [100 Am. J. Int'l L. 291, 320-21 \(2006\)](#). But cf. Chinkin, *Normative Development*, *supra* note 124, at 32 (describing categories of hard and soft law as lying within a continuum that itself is constantly evolving).

<sup>142</sup> Raustiala, *supra* note 116, at 590.

<sup>143</sup> Weil, *supra* note 140, at 417-18.

<sup>144</sup> Klabbers, *supra* note 133, at 172-77.

<sup>145</sup> *Id.* at 179.

<sup>146</sup> VCLT, *supra* note 5, art. 31(3)(a).

<sup>147</sup> See Klabbers, *The Redundancy of Soft Law*, *supra* note 133 and accompanying text.

However, Klabbers' approach suggests that it is only at the moment of interpretation of a treaty provision by a dispute resolution body that COP activity can be converted to hard law. This explanation fails to capture the reality of the international legal system. It suggests that in the absence of a tribunal declaring what the law is, the parties exist in a nebulous world without clear, hard obligations. This does not, however, reflect the practice of parties to treaties. Where consensus-based COP activity thickens the underlying treaty obligation, it does so without ever passing through the hands of a dispute resolution body relying on provisions of the VCLT for interpretation. Both external and internal decisionmaking shape the expectations and obligations of the parties in relation to each other under the treaty regime.

[\*264] Using the term soft law to capture this relationship thereby threatens to diminish the effect of consensus-based activity on hard treaty obligations. It is not the underlying motivation of some of the proponents of the term soft law that is problematic; many of them advocate a far more contextual and rich approach to defining international legal obligation than either the binary or tripartite perspective seems to allow.<sup>148</sup> It is that in the hands of the debate, the initial question of whether a type of activity should be categorized as hard law, soft law, or non-law takes on a significance that obscures the reality of what it describes.

The depiction of COP activity as soft law obscures what COP activity is actually doing in relation to the underlying treaty obligation. Consensus-based COP activity is so tightly bound up with the original legal obligation of the treaty that its relationship is materially different from the relationship of soft law to hard law described by commentators above (or that is reflected by General Assembly resolutions and declarations of U.N.-sponsored conferences or private actors). COP activity does not create norms, whether legally binding or not. Yet it also does not stand removed from normative legal obligations. Rather, it thickens the original legal obligation. As such, even the tripartite notion of hard law, soft law, and non-law is insufficient to capture its legal significance.

These problems arise because the soft law/hard law debate asks the wrong question. It asks: Is this law or is this politics? And if it is not hard law, can it then be described as another form of law, albeit hierarchically inferior? Again, the question suggests that we can evaluate consensus-based COP activity as if it had independent normative - and possibly legally normative - status, misunderstanding the way in which COP activity contributes to parties' normative obligations.

By contrast, the question we need to ask if we want to accurately reflect the role of consensus-based COP activity for states' international legal obligations is: What is the relationship of consensus-based COP activity to the underlying treaty obligations of the parties to that treaty?

### III. Consequences of Reframing the Question

What happens when we change the question from one asking whether consensus-based COP activity is international law to one asking what relationship this activity has to the parties' underlying treaty obligations? Reframing the question in this way allows us to explore the particular [\*265] relation that COP activity has to underlying treaty obligations, using all four axes.

With this approach, not all consensus-based COP activity will be seen as having an intended effect on the parties' obligations. Indeed, some COP activity will be sufficiently independent of the parties' underlying treaty obligations that it will not be subject to this different approach. For example, Decision II/12 of the Basel Convention regarding the transport of waste between OECD and non-OECD countries could be regarded, on this approach, as so distinct from the underlying treaty's approach that it cannot be considered as having a tight enough relationship with the parties' treaty obligations to warrant evaluating its status as law under anything other than the conventional categories.

Even for those unwilling to consider that consensus-based COP activity could be considered hard law, reframing the question allows for a more nuanced approach to international legal obligation and a more careful inquiry into what parties intend. Parties almost certainly do not intend to create new stand-alone legal obligations. However, they also almost certainly do not intend for COP activities to have no effect on the treaty.

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<sup>148</sup> See, e.g., Boyle, *supra* note 119, at 901-05; Chinkin, *The Challenge of Soft Law*, *supra* note 120, at 865-66; Dupuy, *supra* note 121, at 435; Schachter, *supra* note 85, at 30-31.

Two different tribunal decisions highlight the different results that ensue from reframing the question we ask about consensus-based COP activity. Both decisions, one from the United States and the other from the Netherlands, address the legal status of COP resolutions or decisions and their relationship to the original treaty obligation of the state party. In each case, the outcome turns at least in part on the characterization of this COP activity as binding or not binding on the parties. Each tribunal took a different approach. Although this difference may be at least partly attributable to the constitutional structure of each country and the place of international law in its domestic legal system, the way in which each tribunal dealt with the consensus-based COP activity at issue was sufficiently different to warrant comment.

#### A. National Resources Defense Council v. Environmental Protection Agency <sup>149</sup>

In 2006, the Court of Appeals for the D.C. Circuit reheard a case brought by the Natural Resources Defense Council (NRDC) challenging the Environmental Protection Agency's rules regarding methyl bromide. The NRDC argued that the Environmental Protection Agency (EPA) had violated decisions of the COP to the Montreal Protocol on Substances [\*266] that Deplete the Ozone Layer that had changed a number of provisions applicable to the states parties' production of methyl bromide. <sup>150</sup> The changes had not been made by formal adjustment, a procedure recognized in the Montreal Protocol and requiring consent by a state to be enforceable against that state. Rather the changes had been made by decision of the Montreal Protocol's COP. <sup>151</sup>

The United States had incorporated the treaty into U.S. law through the Clean Air Act, and had made specific provision for automatic incorporation of formal adjustments and amendments to the Protocol. <sup>152</sup> The Clean Air Act said nothing, however, about COP activity that did not fall into either of those categories. <sup>153</sup>

In the initial briefing, only the petitioner - the NRDC - spent any time on the legal status of the COP decisions. <sup>154</sup> This is surprising, since the respondent - the EPA - would have benefited more from the argument. Even the NRDC's discussion on the issue was limited. Although both parties agreed that the decisions did not count as formal adjustments, they focused the bulk of their attention in initial briefing on the question of whether the EPA had complied or not complied with the requirements of these COP decisions rather than on the legal status of those decisions. <sup>155</sup>

The D.C. court, however, took a different approach. After oral argument, it ordered supplemental briefing specifically on the question of the legal status of the COP decisions. <sup>156</sup> In its decision, the court concentrated its argument on the fact that the incorporating statute within the United States did not explicitly incorporate subsequent changes to the requirements of the Protocol that did not fall within the category of amendments or adjustments. Although much of the court's analysis focused on U.S. constitutional requirements that would not allow [\*267] automatic incorporation of the new provisions, <sup>157</sup> two aspects of its analysis are worth noting here.

The court determined that it could not use the decisions of the COPs as interpretive devices relevant as subsequent prac-

<sup>149</sup> See [Natural Res. Def. Council v. Env'tl. Prot. Agency](#), 464 F.3d 1 (D.C. Cir. 2006).

<sup>150</sup> Id. at 5.

<sup>151</sup> Id. at 4-5.

<sup>152</sup> See [42 U.S.C. §§7671-7671q](#).

<sup>153</sup> NRDC, 464 F.3d at 8.

<sup>154</sup> [Final Opening Brief for Petitioner at 23-25](#), NRDC, 464 F.3d 1; cf. [Final Brief for the Respondent](#), NRDC, 464 F.3d 1 (No. 04-1438); [Final Reply Brief for Petitioner](#), NRDC, 464 F.3d 1 (No. 04-1438). In supplemental briefing ordered by the court after oral argument, both parties addressed the legal status of the COP decisions. See [Supplemental Brief for Petitioner at 3](#), NRDC, 464 F.3d 1 (No. 04-1438); [Supplemental Brief for the Respondent](#), NRDC, 464 F.3d 1 (No. 04-1438).

<sup>155</sup> [Final Reply Brief for Petitioner](#), NRDC, 464 F.3d 1 (No. 04-1438); [Final Brief for the Respondent](#), NRDC, 464 F.3d 1 (No. 04-1438); [Final Opening Brief for Petitioner](#), NRDC, 464 F.3d 1 (No. 04-1438).

<sup>156</sup> See NRDC, 464 F.3d at 5; [Supplemental Brief for Petitioner](#), NRDC, 464 F.3d 1 (No. 04-1438); [Supplemental Brief for the Respondent](#), NRDC, 464 F.3d 1 (No. 04-1438).

<sup>157</sup> NRDC, 464 F.3d at 8-9.

tice of the parties unless there were ambiguity in the original agreement.<sup>158</sup> Since these new methyl bromide provisions substantively changed the original obligations of the parties, it would not make sense to view the first allocations as ambiguous or the second set as filling in gaps in the first set.<sup>159</sup>

Further, although it was not necessary to its holding, the court stressed that the new requirements constituted a political agreement between the parties because they had not gone through formal amendments or adjustments and because the parties had not invoked compliance mechanisms against the United States.<sup>160</sup> The new allocations had not been agreed to following the formal legal requirements for amendments or adjustments and could not, therefore, be viewed as reflecting the intent of the parties to be bound by them.<sup>161</sup>

The two different ways discussed in this Article of asking the question about consensus-based COP activity's legal status suggest a reason for this outcome. The court's focus on the original obligation and any ambiguity in that obligation left the court in turn having to determine the legal status of COP decisions that, as we have seen, would not otherwise fall within the traditional categories of international legal obligation. Viewing the two obligations as independent meant that the court had to decide both whether the modifications were law or non-law - with no room for soft law to have legal effect in this tribunal setting - and what the hierarchical status of the modifications was as compared to the original treaty obligation.

It is not hard to see that a tribunal faced with the question in this way would place the original treaty obligation on a higher hierarchical level than the subsequent modification agreed to by consensus of the parties.

Had the court been willing to frame the question differently, however, it might have reached a different conclusion. If it had asked what relationship the COP activity had to the parties' original treaty obligations, there would have been room to consider the COP activity as modifying the original obligation. Focusing on the relationship between the two instruments takes away the need to determine a hierarchy of legal norms - or to choose a single axis along which to test legality. This, [\*268] in turn, might have negated the constitutional arguments that the modifications had not been incorporated into U.S. law, because it would have treated the COP activity as inextricably bound up with the original commitments of the United States under the Montreal Protocol, incorporated into U.S. law through legislation.<sup>162</sup>

Primarily, the D.C. court decision suggests that when COP activity is assessed according to the straight question of whether it is law, there is little room to see the way in which COP activity contributes to the parties' underlying treaty obligations and the way in which it is intended to contribute to those obligations.

#### B. Lac Wetland Case<sup>163</sup>

In 2007, the Netherlands Crown issued an opinion with regard to obligations under the Ramsar Convention that

<sup>158</sup> Id. at 9.

<sup>159</sup> Id.

<sup>160</sup> Id. at 10.

<sup>161</sup> Id.

<sup>162</sup> The court's own example of what it considered an analogous situation highlights this point again:

To illustrate, suppose the President signed and the Senate ratified a treaty with Germany and France to conserve fossil fuel. How this is to be accomplished the treaty does not specify. In a later meeting of representatives of the signatory countries at the United Nations, a consensus is reached to lower the speed limits on all major highways of the signatory nations to a maximum of 45 miles per hour. No one would say that United States law has thus been made. Id. at 9.

<sup>163</sup> See Jonathan M. Verschuuren, Ramsar Soft Law Is Not Soft at All, available at [http://www.ramsar.org/pdf/wurc/wurc\\_verschuuren\\_bonaire.pdf](http://www.ramsar.org/pdf/wurc/wurc_verschuuren_bonaire.pdf) (last visited Oct. 25, 2009) [hereinafter Verschuuren, Soft Law] (translating and summarizing the Netherlands Crown Decision of Sept. 11, 2007 in the case lodged by Competent Authority for the Island of Bonaire concerning the annulment of two of its decisions on the Lac wetland by the Governor of the Netherlands Antilles). This piece is an informal translation of Verschuuren's case law annotation in Dutch. See Verschuuren, Verdrag van Ramsar art. 3, 35 Milieu & Recht 28 (2008) (Neth.) (on file with author) [hereinafter Verschuuren, Verdrag van Ramsar]. References are provided to both the English and Dutch versions of Verschuuren's case law annotation. The decision itself has not been published.

took a very different approach to COP resolutions.<sup>164</sup> The question for the Crown was whether the Competent Authority for the Island of Bonaire, part of the Netherlands Antilles, had failed to comply with obligations under the Ramsar [\*269] Convention because it had failed to complete environmental impact assessments (EIAs).<sup>165</sup> The text of the Ramsar Convention does not require EIAs explicitly.<sup>166</sup> However, COPs to the Convention had elaborated on the "wise use" obligations of the parties and had concluded resolutions and recommendations that included an obligation to perform EIAs.<sup>167</sup>

The Crown drew on these COP resolutions and recommendations in its decision.<sup>168</sup> The Crown stated that they added to the duties laid down in the Convention itself and were particularly important because the treaty text itself was so sparse.<sup>169</sup> The Crown referred to the VCLT provisions on interpretation, discussed further below, and noted that a tribunal could, under Article 31(3)(a) take into account subsequent agreements of the parties to the treaty when interpreting the treaty.<sup>170</sup> The Crown also noted that the resolutions and recommendations had been adopted by unanimous vote in which the Netherlands had participated.<sup>171</sup> The Crown concluded that the resolutions and recommendations regarding environmental impact assessments were therefore binding on the Netherlands.<sup>172</sup> Accordingly, a failure to perform EIAs as required by these resolutions and recommendations amounted to a failure to comply with the Ramsar Convention itself.<sup>173</sup>

While this decision was in part possible because the Crown determined that the Ramsar Convention was automatically binding on the Dutch authorities, without the need for incorporation through domestic law,<sup>174</sup> this alone cannot explain the difference in outcome between the Dutch decision and that of the U.S. Court in *NRDC v. EPA*. Had the Dutch Crown viewed the COP resolutions and recommendations as [\*270] merely political commitments, as the U.S. Court did, it could have easily dismissed the charge that the Netherlands was failing to comply with its Ramsar obligations. Indeed, if the Crown had begun with this view, it could have been faced with a picture of two competing norms - one requiring assessment and the other with no such requirement. It would then have had to rank them hierarchically.<sup>175</sup>

Yet the Crown does not appear to have approached the question this way. Instead, it seems to have asked what the reso-

<sup>164</sup> I rely on Verschuuren's case law annotations for a window into the Crown's reasoning in this case. See generally Verschuuren, *Soft Law*, supra note 163; Verschuuren, *Verdrag van Ramsar*, supra note 163. Although the Crown is not a court, in this case it was acting in a judicial capacity to resolve a challenge to decisions by the Competent Authority for the Island of Bonaire, part of the Netherlands Antilles. Through a provision in Dutch law, challenges to decisions of the Governor of the Netherlands Antilles are made to the Crown rather than to the courts that usually deal with appeals in administrative cases (i.e., the *Afdeling Betuursrechtspraak van de Raad van State*, or the Administrative Jurisdiction Division). See Verschuuren, *Soft Law*, supra note 163, at 3; Verschuuren, *Verdrag van Ramsar*, supra note 163, at 33.

<sup>165</sup> See Verschuuren, *Soft Law*, supra note 163, at 3; Verschuuren, *Verdrag van Ramsar*, supra note 163, at 33.

<sup>166</sup> See Ramsar Convention, supra note 9.

<sup>167</sup> Verschuuren, *Soft Law*, supra note 163, at 1-3; Verschuuren, *Verdrag van Ramsar*, supra note 163, at 28-29, 30-31.

<sup>168</sup> Verschuuren, *Soft Law*, supra note 163, at 2-3; Verschuuren, *Verdrag van Ramsar*, supra note 163, at 30-32.

<sup>169</sup> Verschuuren, *Soft Law*, supra note 163, at 2; Verschuuren, *Verdrag van Ramsar*, supra note 163, at 32.

<sup>170</sup> Verschuuren, *Soft Law*, supra note 163, at 2; Verschuuren, *Verdrag van Ramsar*, supra note 163, at 31-32.

<sup>171</sup> Verschuuren, *Soft Law*, supra note 163, at 2, 5; Verschuuren, *Verdrag van Ramsar*, supra note 163, at 32, 34. It is unclear whether the Crown had actual evidence of a unanimous vote or whether it conflated consensus with unanimity.

<sup>172</sup> Verschuuren, *Soft Law*, supra note 163, at 2; Verschuuren, *Verdrag van Ramsar*, supra note 163, at 32.

<sup>173</sup> Verschuuren, *Soft Law*, supra note 163, at 2; Verschuuren, *Verdrag van Ramsar*, supra note 163, at 32.

<sup>174</sup> Verschuuren, *Soft Law*, supra note 163, at 2, 4; Verschuuren, *Verdrag van Ramsar*, supra note 163, at 32-33.

<sup>175</sup> This cannot be attributed solely to a difference in the original obligation allowing the Crown to apply the VCLT's provisions on subsequent agreements because the very act of recognizing the COP resolutions and recommendations is what creates the possibility for applying them as a subsequent agreement.

lutions were intended to contribute to the legal obligations of the parties under the original treaty.<sup>176</sup> Asking the question in this way left open the possibility that the resolutions and recommendations be seen as inextricably linked to the original treaty obligations. As such, the Crown could apply the resolutions and recommendations to the state party without in any way explicitly overriding the original treaty.

Why the difference? It is arguable that instead of focusing on formal classifications of whether COP activity could be considered law, the Netherlands Crown focused on the relationship between the COP resolutions and the original treaty obligation.

Implicitly the Crown was asking not whether the resolutions were law, but rather what the relationship of the resolutions and recommendations was to the party's international legal obligations under the treaty. As such, the Crown left room for the resolutions and recommendations to be considered part of the states parties' legal obligations under the treaty.<sup>177</sup> And the Crown was able to do this without having to answer whether these resolutions could stand alone outside of their connection to the wise use obligation of the Ramsar Convention.

[\*271]

#### IV. The Implications of Reframing the Question for Fragmentation and Accountability

What are the broader implications of changing the question we ask about consensus-based COP activity? If we view consensus-based COP activity as activity that thickens the parties' legal obligations under treaties, we begin to see a picture of the international legal system that is somewhat different from the tripartite picture of hard law commitments, soft law commitments, and political commitments.

We now see a picture of MEAs with a set of legal obligations that are tailored to the treaty. To the extent that consensus-based COP activity enriches the original commitments of the parties, it contributes to the development of specialized regimes with thick legal obligations that are adaptable, shifting over time as the parties develop them through COPs and their subsidiary organs. This picture, in turn, has implications for our picture of fragmentation in the international legal system and how we manage that fragmentation. It also has implications for accountability.

##### A. Adaptability

Relying on consensus-based decisionmaking to develop the obligations of the parties to a treaty allows for a degree of flexibility and adaptability in law-making that is not true of treaty-making.<sup>178</sup> This in turn allows for the development of regimes that can respond to changes in scientific knowledge or can even provide for processes to manage uncertainty without needing to begin afresh with a new treaty.<sup>179</sup> Although some of this adaptability and flexibility is reflected in the rise of framework conventions that provide for the negotiation of protocols, even these cannot compete with the ability of COPs to respond to new scientific information.

Indeed, many of the examples of activity discussed in Part I reflect shifts in understanding of environmental problems and advances in understanding of how to manage them. Thus, changes to the criteria for listing under the Ram-

<sup>176</sup> This reading is consistent with the Crown's acknowledgement that the resolutions and recommendations were "especially important because Article 3 [of the Ramsar Convention] itself does not offer much to hold on to." Verschuuren, *Soft Law*, supra note 163, at 2; see also supra note 175; Verschuuren, *Verdrag van Ramsar*, supra note 163, at 32.

<sup>177</sup> Verschuuren, *Soft Law*, supra note 163, at 2-3; Verschuuren, *Verdrag van Ramsar*, supra note 163, at 32. It could be argued that the difference between the U.S. and Dutch decision-making bodies lay in their emphasis on different axes for assessing legal status: that is, intent, as expressed by form, versus consent, as expressed by equating consensus with unanimity. However, this distinction cannot fully explain the different attitudes of the tribunals because the choice of axis itself likely depended on the significance each tribunal was willing to give to the COP activity in the first place.

<sup>178</sup> This point is frequently made with regard to soft law instruments in general. See, e.g., Boyle, supra note 119, at 903, 905; Dupuy, supra note 121, at 421; Chinkin, *The Challenge of Soft Law*, supra note 120, at 851, 852-53, 860 (observing that the process of negotiating soft law instruments can be as complex and lengthy as the process of negotiating treaties); see also Martti Koskenniemi, *International Legislation Today: Limits and Possibilities*, 23 *Wis. Int'l L.J.* 61, 78-80 (2005) [hereinafter Koskenniemi, *International Legislation Today*] (discussing the increasing "deformalisation" of international law today).

<sup>179</sup> Boyle, supra note 119, at 905; Edith Brown Weiss, *Introduction*, in *International Compliance with Nonbinding Accords* 1, 5 (Edith Brown Weiss ed., 1997).

sar Convention and CITES draw on changes in [\*272] scientific understanding about wetlands and their place in the ecosystem and changes in knowledge about species' viability, respectively. Amended allocations of methyl bromide under the Montreal Protocol also reflect advances in scientific knowledge about methyl bromide.

COP activity can respond not only to changes in scientific knowledge but also to learning about what is effective for dealing with environmental problems, incorporating insights into implementation, social resistance, and factors that influence effectiveness. Thus, the push to acknowledge the benefits of sustainable utilization for some species' survival in CITES reflects recognition of the effect of markets and of people's behavior on the value society places on species, which in turn can affect more indirect threats like habitat destruction. Similarly, the emphasis on wise use in the Ramsar Convention incorporates the recognition that people are part of the wetlands ecosystem and are, therefore, relevant to protection strategies. At the same time, the CITES COPs have developed monitoring devices in order to learn about the effects of trade on certain species, allowing the COP to respond and adjust the protection status of a species if the need arises.<sup>180</sup>

The role of COPs is not limited to responding to scientific and social learning. COPs can also enhance efficiency. Delegating the determination of procedures for the Kyoto Protocol's flexible mechanisms for forms of emissions trading and for various treaties' compliance and monitoring systems is a more efficient use of the parties' time. It also allows for some flexibility in those procedures so that they can adapt in response to monitoring and information about their effectiveness for implementation of the treaty.

At the same time, where core obligations of a treaty would be directly affected by COP activity, the parties can retain control by determining that those changes should be subject to a consent-based, rather than a consensus-based procedure - for example, changes to species listed on the CITES appendices or a complete change in the form of compliance mechanism that the treaty might apply to the parties.

Consensus-based COP activity also responds to shifts in scientific understanding of environmental problems in another way. By defining the terms of the treaty and authorizing guidance for implementation that can be used by national implementing authorities, COPs allow for treaty obligations to infiltrate national boundaries, so that they can be applied more easily at the local level. This ability to move beyond the international scale is consistent with the multiple, nested scales of management [\*273] required for sound environmental protection.<sup>181</sup> If, as Jonathan Verschuuren has found, the one thing that Ramsar site managers understand about the Ramsar Convention is the obligation of wise use, this may be due to the significant time and effort that the Ramsar COP's subsidiary bodies have devoted to elaborating guidance in the implementation of wise use.<sup>182</sup>

This multiple scale benefit to COP activity not only allows information to move from the top down to lower levels of governance and management, but can also allow information to move more readily from the bottom upward. COP activity allows information to move both ways by allowing for more participation by NGOs, scientists, and other private parties, and, more importantly, by relying on these groups for information that in turn feeds into the possibilities to respond to the information described above. Consensus-based COP activity affects the level of participation of non-governmental organizations<sup>183</sup> (NGOs) and private individuals, such as scientists and academics in interna-

<sup>180</sup> See supra note 48 and accompanying text.

<sup>181</sup> See Bradley C. Karkkainen, Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism, *21 Va. Envtl. L.J.* 189, 209 (2002); Wiersema, Train Without Tracks, supra note 33, at 1251.

<sup>182</sup> See Jonathan Verschuuren, The Case of Transboundary Wetlands Under the Ramsar Convention: Keep the Lawyers Out!, *19 Colo. J. Int'l Envtl. L. & Pol'y* 49, 119 (2008). Verschuuren notes that actors generally have a sense only of the broad concept of wise use, and not of its detailed elaboration. He argues, however, that increasing the legal status of the work of convention bodies might contribute to the effectiveness of the treaty. Id. at 125-27; see also Gardner & Connolly, Ramsar Convention, supra note 33.

<sup>183</sup> The Ramsar Convention has five international organization partners, three of which are NGOs. See Ramsar Memoranda of Understanding and Cooperation with Other Conventions and International Organizations, [http://www.ramsar.org/cda/ramsar/display/main/main.jsp?zn=ramsar&cp=1-31-115\\_4000\\_0](http://www.ramsar.org/cda/ramsar/display/main/main.jsp?zn=ramsar&cp=1-31-115_4000_0) (last visited Nov. 11, 2009). Some of these NGOs provide assistance to the parties.

tional law-making.<sup>184</sup> This is because resolutions and decisions generally provide for more avenues for participation by NGOs and technical and scientific individuals, particularly since resolutions are frequently based on the work of technical bodies, with input from NGOs. Sometimes NGOs work in close partnership with a treaty's institutions, tracking information and providing data to the Secretariat and the parties.<sup>185</sup> Thus, when [\*274] consensus-based COP activity shapes the obligations of the parties, those obligations are being shaped by more than just the states parties present at the COPs.

In these ways, consensus-based COP activity allows for a form of adaptability and flexibility in law-making at the international level that treaties do not allow.<sup>186</sup> In doing so, it has the potential to make international law more closely aligned and responsive to scientific and social developments, in turn perhaps enhancing both implementation and effectiveness. This adaptability also comes with other consequences, however, which may not be wholly positive for the international legal system.

## B. Fragmentation

### 1. Sectoral Fragmentation<sup>187</sup>

As COPs become increasingly focused on thickening the original obligations of their underlying treaty, modifying interpretations and guidance, adapting commitments in response to the work of their scientific and technical advisers, and developing the strategic framework for the treaty as a whole, they may contribute to the formation of increasingly self-referential regimes. This self-referential activity can in turn lead to a particular type of fragmentation within the international legal system.

Commentators have been expressing increasing concern about fragmentation in the international legal system. In 2006, concluding six years of study, the International Law Commission (ILC) produced a 256-page report, finalized by Martti Koskenniemi, that identified different forms of fragmentation in the system and proposed a framework for addressing it that focused on legal reasoning rather than strict rules of hierarchy.<sup>188</sup> The ILC was careful to stress that fragmentation was not an [\*275] unmitigated evil; to reflect this, the Study Group had changed its name from one that talked about risks to one that talked about difficulties.<sup>189</sup>

The ILC's final report focused on difficulties related to the work of tribunals faced with conflicts between different rules.<sup>190</sup> This focus on tribunals is consistent with the heavy emphasis on fragmentation in the dispute resolution setting.<sup>191</sup> However, the ILC's report went further than some commentators, observing that these conflicts arise not

<sup>184</sup> For example, the Ramsar Convention's Scientific and Technical Review Panel includes seventeen members: a representative for each of the geographical regions, a representative for each of the Panel's priority work areas, and a representative for each of the Convention's International Organization Partners. See The Scientific and Technical Review Panel (STRP), [http://www.ramsar.org/cda/ramsar/display/main/main.jsp?zn=ramsar&cp=1-31-111\\_4000\\_0](http://www.ramsar.org/cda/ramsar/display/main/main.jsp?zn=ramsar&cp=1-31-111_4000_0) (last visited Nov. 11, 2009).

<sup>185</sup> An NGO named "Traffic," for example, contributes information to the CITES Secretariat about illegal traffic of species listed under the Convention. See <http://www.traffic.org> (last visited Oct. 25, 2009). The Ramsar Convention's authorizing provision for its COP includes a requirement that "representatives of the Contracting Parties at such Conferences should include persons who are experts on wetlands or waterfowl by reason of knowledge and experience gained in scientific, administrative or other appropriate capacities." Ramsar Convention, *supra* note 9, art. 7(1).

<sup>186</sup> See *supra* notes 182-183 and accompanying text.

<sup>187</sup> See generally Andreas Fischer-Lescano & Gunther Teubner, Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law, *25 Mich. J. Int'l L.* 999 (2004).

<sup>188</sup> See Study Group of the Int'l Law Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi) [hereinafter ILC, Fragmentation].

<sup>189</sup> *Id.* at 8; Bruno Simma, Fragmentation in a Positive Light, *25 Mich. J. Int'l L.* 845, 846-47 (2004); see also William W. Burke-White, International Legal Pluralism, *25 Mich. J. Int'l L.* 963 (2004) (describing fragmentation as more of a transformation to a pluralist legal system and noting some of the benefits of this shift in the dispute resolution context); ILC, Fragmentation, *supra* note 188, at 14 (observing the positive reasons for specialization).

<sup>190</sup> ILC, Fragmentation, *supra* note 188, at 16.

<sup>191</sup> See, e.g., Burke-White, *supra* note 189.

only as a result of an increasing number of tribunals but also as a result of different kinds of fragmentation.<sup>192</sup> The fragmentation most relevant to this Article is not that resulting from a proliferation of specialized tribunals.

The fragmentation most relevant to this Article is fragmentation resulting from a proliferation of increasingly specialized functional regimes. This type of fragmentation, termed sectoral fragmentation by Fischer-Lescano and Teubner, reflects society's increasing functional fragmentation into different issue-specific policy arenas.<sup>193</sup>

If we recognize that consensus-based COP activity contributes to states parties' international legal obligations and not just their political obligations, our picture of fragmentation in the international legal system begins to look more like the sectorally fragmented system described by Fischer-Lescano and Teubner. Consensus-based COP activity and the thickening of the obligations of the parties as a result of that activity add to the specialization of MEA regimes, and do so through consensus. This specialization and the potential for COPs to develop increasingly thick obligations means that regimes can become increasingly self-referential. This can happen not only in the sense that environmental treaties may increasingly disregard other systems, such as the trade system, but also in the sense that they may disregard or misread the needs of other environmental issue areas.<sup>194</sup> For example, the climate change regime under [\*276] the Kyoto Protocol does not adequately take into account concerns about biodiversity protection.<sup>195</sup> Further, as COP activity facilitates the contributions of scientists and NGOs to these treaty regimes, the community of participants operating within a particular treaty or set of treaties may also become increasingly self-referential. Recognizing the significance of COP activity to the legal obligations of the parties facilitates our understanding of the richness of these regimes not only as political regimes, but also as legal regimes. That in turn increases the likelihood of a system developing with increasingly self-referential legal regimes.

## 2. Opportunities for Addressing Fragmentation in Dispute Resolution Settings

Reframing the question about the nature of COP activity is not just about providing a window into fragmentation. It also provides us with ways to manage that fragmentation. This is because reframing the question takes us away from questions about the hierarchy of legal norms and provides for a different approach to understanding parties' legal obligations.<sup>196</sup> This in turn has implications for how we manage fragmentation.<sup>197</sup>

The two tribunal decisions discussed in Part III suggest different ways to treat COP activity. This affects how we might deal with fragmentation, at least within the dispute resolution context. The avenue for this approach lies in the techniques available for treaty interpretation under the VCLT, which appear to have played a small role in the two tribunal decisions.

In its provisions on interpretation, generally regarded as reflecting customary international law, Article 31 of the VCLT states that in interpreting a treaty:

[\*277]

(3) There shall be taken into account, as well as context,

<sup>192</sup> ILC, Fragmentation, *supra* note 188, at 10-11.

<sup>193</sup> Fischer-Lescano & Teubner, *supra* note 187, at 1008-09; see also Koskeniemi, *International Legislation Today*, *supra* note 178, at 81-83.

<sup>194</sup> Some commentators have expressed concern that a fragmented legal system could result in some fields dominating others. See, e.g., Matthew Craven, *Unity, Diversity and the Fragmentation of International Law*, 2003 *Finnish Y.B. Int'l L.* 1, 5; Harro van Asselt et al., *Global Climate Change and the Fragmentation of International Law*, 30 *Law & Pol'y* 423, 426 (2008); see also W. Bradnee Chambers, *Interlinkages and the Effectiveness of Multilateral Environmental Agreements* (2008) (discussing increasing recognition of the lack of coordination among MEAs and ways to improve the effectiveness of MEAs by creating better interlinkages).

<sup>195</sup> See Imke Sagemuller, *Forest Sinks Under the United Nations Framework Convention on Climate Change and the Kyoto Protocol: Opportunity or Risk for Biodiversity?*, 31 *Colum. J. Envtl. L.* 189, 207 (2006); Van Asselt et al., *supra* note 194, at 428-29.

<sup>196</sup> Fischer-Lescano & Teubner, *supra* note 187, at 1003 (arguing that hierarchical schemes to address fragmentation have a "minimal chance of success" and also misunderstand the cause of norm collision).

<sup>197</sup> See *id.* at 434-35; Van Asselt et al., *supra* note 194, at 430-31 (observing that if COP decisions were regarded as lawmaking within the scope of the VCLT, "the scope for application of international law on conflicts would substantially expand").

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.<sup>198</sup>

These interpretive principles are not intended to be used only in cases of ambiguity. In its commentaries on the ILC's draft Article 27, which became Article 31, the ILC made it clear that the provisions in Article 31(3) were to be read together with the provisions in Article 31(1) and 31(2), and that Article 31(3) was not hierarchically inferior to the context of the treaty.<sup>199</sup> The order, the ILC stated, followed logic, rather than any hierarchy:

It is only logic which suggests that the elements in paragraph 3 - a subsequent agreement regarding the interpretation, subsequent practice establishing the understanding of the parties regarding the interpretation and relevant rules of international law applicable in the relations between the parties - should follow and not precede the elements in the previous paragraphs. The logical consideration which suggests this is that these elements are extrinsic to the text. But these three elements are all of an obligatory character and by their nature could not be considered to be norms of interpretation in any way inferior to those which precede them.<sup>200</sup>

"Subsequent agreement" under Article 31(3)(a) does not refer to a treaty as such, but only to an agreement. As the ILC's commentary states, "an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation."<sup>201</sup>

**[\*278]** As for subsequent practice under Article 31(3)(b), it "constitutes objective evidence of the understanding of the parties as to the meaning of the treaty."<sup>202</sup> Its value "varies according as it shows the common understanding of the parties as to the meaning of the terms."<sup>203</sup> Although earlier texts of this provision had included a reference to practice that "establishes the understanding of all the parties," this phrase was omitted in the final text.<sup>204</sup> The Commission "considered that the phrase "the understanding of the parties' necessarily meant "the parties as a whole."<sup>205</sup> Thus, the word "all" was omitted merely "to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice."<sup>206</sup>

Commentators have periodically suggested that the provisions of the VCLT on subsequent agreements might be used to allow for COP resolutions and decisions to be relevant to a dispute resolution body interpreting a treaty.<sup>207</sup> This would not automatically change the status of all consensus-based COP activity from soft law to hard law. Yet, unless a tribunal is willing to see COP activity as something more than soft law or more than an interpretive de-

<sup>198</sup> VCLT, *supra* note 5, art. 31(3).

<sup>199</sup> Cf. Lord McNair, *The Law of Treaties* 428-29 (1961) (regarding the possibility of reference to subsequent agreement and practice as something applicable only in cases of ambiguity).

<sup>200</sup> Draft Articles on the Law of Treaties with Commentaries, 1966 Y.B. Int'l Law Comm'n, 187, 220 [hereinafter ILC, Draft Articles].

<sup>201</sup> *Id.* at 221.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 222.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> See, e.g., Churchill & Ulfstein, *supra* note 1, at 641.

vice, it will be hard for that tribunal to use COP activity to override an existing treaty obligation.<sup>208</sup> The Dutch Crown's approach and the new question posed in this Article suggests, however, that there is a way for a tribunal to consider COP activity without having to take the step of determining that COP activity is actually hard law fitting within traditional categories of international law.

This is because the VCLT's interpretive provisions, when placed alongside the question of what the relationship of COP activity is to the original parties' obligations, allows for a more careful exploration of the current legal obligations of those parties. As such, COP activity may be relevant to a tribunal's decisionmaking even without a declaration that it is hard international law.

This alone does not, however, implicate fragmentation. For that we need to stretch a little beyond current practice. In the dispute resolution context, seeing consensus-based COP activity as legally relevant opens up the possibility that a tribunal can understand the activity of the parties at COPs as contributing to the overall legal obligations of those parties. [\*279] This might in turn allow tribunals to look beyond their own treaty's activities where the same issue is addressed in multiple fora.

This would be a far-reaching application of the subsequent agreement and practice provisions of the VCLT. Even if the VCLT allows for recognition of subsequent agreements in the manner I have proposed, this does not automatically mean that regimes should be able to look beyond the confines of their own regime for subsequent agreements in other regimes.<sup>209</sup> However, allowing for the possibility of this interpretation at least as it pertains to common terms used by multiple treaties has the potential to open up avenues for integration to limit systemic fragmentation. Even if a tribunal is not permitted to look beyond its own regime in the case of a conflict, it might be willing to do so in the face of a gap. In those cases, the recognition of the significance of COP activity would provide a more accurate reflection of the state of the parties' obligations.

Further, the potential to push the VCLT to help limit systemic fragmentation becomes more compelling when we look to Article 31(3)(c) of the VCLT, which allows for "any relevant rules of international law applicable in the relations between the parties" to be taken into account when interpreting a treaty.<sup>210</sup> Barely commented on at the time of the ILC's commentaries to the Draft Convention on the Law of Treaties, this provision was the subject of its own study when the ILC addressed fragmentation.<sup>211</sup>

Arguably, Article 31(3)(c) allows for a tribunal to look beyond its own regime to apply general international law.<sup>212</sup> If we accept the ILC's view that no regime is entirely self-contained in the sense that no regime is completely independent of international law beyond its own regime, this clause could have important implications.<sup>213</sup> Where COP activity is seen as contributing to the legal obligations of the parties and shaping them, it is, in turn, more likely that this activity can be seen as part of the body of general international law.<sup>214</sup> This is, of course, not true of very technical or specific COP resolutions or decisions, such as allowances for methyl bromide under the Montreal Protocol, but could be true of [\*280] interpretations and similar developments under a treaty.<sup>215</sup> Further, it might be true where

<sup>208</sup> Klabbers, *supra* note 133, at 172-77 (arguing that when soft law is applied it becomes "indistinguishable" from hard law).

<sup>209</sup> See ILC, *Fragmentation*, *supra* note 188, at 212-13.

<sup>210</sup> VCLT, *supra* note 5, art. 31(3)(c).

<sup>211</sup> See ILC, *Fragmentation*, *supra* note 188, at 10, 206-44.

<sup>212</sup> *Id.* at 212-13 (noting that tribunals can go beyond the four corners of their constitutive instrument when resolving disputes).

<sup>213</sup> *Id.* at 91-97; see also Anja Lindroos & Michael Mehling, *Dispelling the Chimera of "Self-Contained Regimes": International Law and the WTO*, 16 *Eur. J. Int'l L.* 857 (2005).

<sup>214</sup> See ILC, *Fragmentation*, *supra* note 188, at 214 (observing that Article 31(3)(c) of the VCLT refers to "rules" of general international law).

<sup>215</sup> Questions remain about the exact scope of Article 31(3)(c). See ILC, *Fragmentation*, *supra* note 188, at 232-43. Temporal questions could be particularly significant for the application of Article 31(3)(c) to consensus-based COP activity. See *id.* at 240-43; see also Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 *Geo. Wash. Int'l L. Rev.* 573, 611-13 (2005); Chris Wold, *Ninth Intergovernmental Meeting on the Action Plan for the Caribbean Environment Programme and Sixth Meeting of the Contracting Parties to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region*, Kingston, Jam., Feb. 14-18, 2000, *Legal Assessment of Compatibility Issues Between the Protocol Concerning Specially Protected Areas and Wildlife (SPA) to the Cartagena Convention and the Convention on International Trade in Endangered Species of Wild*

treaty bodies elaborate on common terms or principles.<sup>216</sup>

In some instances, tribunals will look beyond their own regime for assistance in interpreting a particular provision or determining its legal status. The WTO, for example, has canvassed a range of different bodies and instruments to help it consider the status of the precautionary principle in international law, before concluding that the principle would not override the provisions of the agreement at issue in the dispute before it.<sup>217</sup> Although the WTO Appellate Body and Panel did not explicitly decide on the status of the precautionary principle in international law,<sup>218</sup> it is arguable that if the principle had a higher legal status, it would have had more relevance for the WTO's dispute resolution bodies, particularly in their application of Article 31(3)(c) of the VCLT. Recognizing COP activity as significant for understanding international legal obligation could have allowed the WTO's dispute resolution bodies to recognize that the precautionary principle formed the subject of ongoing COP activity, which in turn affected the parties' obligations under those treaties. [\*281] This would, in turn, have changed the inquiry by the WTO and the status of the principle under international law. Instead of asking about the status of the precautionary principle and its definition as law or non-law, the WTO could have engaged in a more searching inquiry into the way in which original obligations have been shaped by subsequent agreement or practice - referring to VCLT Article 31(3)(a) or (b) - or into the "rules of international law applicable in the relations between the parties" - referring to VCLT Article 31(3)(c).<sup>219</sup>

Recognizing the significance of consensus-based COP activity for the parties' underlying treaty obligations elevates its status as part of international law and allows it to become visible to a tribunal, in part by removing questions of hierarchy that would otherwise tie the tribunal's hands.

### 3. Opportunities for Addressing Fragmentation Beyond the Dispute Resolution Setting

This change in how we view COP activity also has the potential to affect levels of sectoral fragmentation outside of the dispute resolution setting. Since much of international law, and particularly international environmental law, will never see the inside of a dispute resolution tribunal, these are potentially the more wide-ranging opportunities.<sup>220</sup> Further, as both the ILC's final report and Fischer-Lescano and Teubner note, techniques for addressing conflicting rules before dispute resolution tribunals cannot resolve underlying norm conflicts.<sup>221</sup>

A tribunal is bound to apply a certain set of laws.<sup>222</sup> Thus, although in some instances, the VCLT's interpretive provisions might allow for a review of other regimes' activity, as suggested in the example of the WTO, this will not al-

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Fauna and Flora (CITES), at 11-12, U.N. Doc. UNEP (DEC)/ CAR IG 17/INF.5, available at <http://www.cep.unep.org/events-and-meetings/i-spaw-cop/ig17-inf5en.pdf> (last visited Oct. 25, 2009).

<sup>216</sup> See Harro van Asselt, *Dealing with the Fragmentation of Global Climate Governance: Legal and Political Approaches in Interplay Management 9* (Global Governance Working Paper No. 30, 2007), available at <http://www.glogov.org/images/doc/WP30.pdf> (last visited Oct. 25, 2009).

<sup>217</sup> Panel Report, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, at 336-41, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006) (adopted Nov. 21, 2006) [hereinafter WTO Panel, EC-Biotech]; Appellate Body Report, *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, at 46-49, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (adopted Feb. 13, 1998) [hereinafter WTO Appellate Body, EC-Hormones]; see also ILC, *Fragmentation*, supra note 188, at 223-28. On the role of international law in WTO decisionmaking, see generally Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 *Am. J. Int'l L.* 535 (2001). See also Lorand Bartels, *Applicable Law in WTO Dispute Resolution Proceedings*, 35 *J. World Trade* 499 (2001); Lindroos & Mehling, supra note 213.

<sup>218</sup> WTO Appellate Body, *EC-Hormones*, supra note 217, at 47-48; WTO Panel, *EC-Biotech*, supra note 217, at 340-41.

<sup>219</sup> VCLT, supra note 5, art. 31(3).

<sup>220</sup> Contrary to the perception which seems to be developing in some quarters, the principle [of systemic integration in Article 31(3)(c)] is certainly not a universal panacea [for fragmentation] ... . No principle which relies on techniques of interpretation alone can do that." Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 *Int'l & Comp. L.Q.* 279, 318 (2005); see also Joost Pauwelyn, *Conflict of Norms in Public International Law 272-73* (2003); Borgen, supra note 215, at 619 (noting that recent incidents of treaty conflicts were resolved, if at all, through negotiations rather than in courtrooms).

<sup>221</sup> Fischer-Lescano & Teubner, supra note 187, at 1021-22, 1030; ILC, *Fragmentation*, supra note 188, at 17.

<sup>222</sup> Cf. ILC, *Fragmentation*, supra note 188, at 212-13 (arguing that tribunals can go beyond the four corners of their constitutive instrument when resolving disputes).

ways be true.<sup>223</sup> In addition, tribunals in different [\*282] regimes are more likely to feel bound by hierarchies related to jurisdiction and competence, even if the hierarchical status of COP activity is changed.<sup>224</sup>

By contrast, when parties act within a particular treaty, they are only constrained by that treaty's obligations and the obligations they are subject to under other regimes and general international law.<sup>225</sup>

If our discourse of international legal obligation is able to take account of consensus-based COP activity as significant for a party's legal obligations, this could result in parties paying increasing attention to the thick obligations they and their counterparts incurred in other treaties. This in turn could result in linkages across treaties, as states parties learn from the activities of other conventions and find ways to borrow from them and grow mutually.<sup>226</sup> This development could limit the self-referential quality of otherwise increasingly specialized regimes, while still allowing for the specialization that can be fruitful for particular regimes.<sup>227</sup> Thus, it is not only a tribunal that can be cognizant of another treaty's interpretation of a term like the precautionary principle, but it is also the representatives of states parties.<sup>228</sup>

This opportunity benefits from the flexibility and adaptive possibilities of COP activity, which are not bound by the same strictures as amendments to treaty texts or completely new treaties. Beyond the dispute [\*283] resolution setting, parties have a tremendous opportunity to become aware of possibilities for cooperation and collaboration, borrowing and learning across different sectoral regimes.<sup>229</sup> This could create opportunities for productive learning and development, with a continued thickening of their obligations, based on enhanced knowledge and a less self-referential approach within a particular regime.

The recognition of a kind of legal status enhances these opportunities because it allows for a level of visibility of COP activity that would otherwise be missing, as well as a reflection on the relationship of the COP activity to the parties' underlying treaty obligations.

### C. Risks for Accountability

The adaptability that consensus-based COP activity allows and the opportunities for managing fragmentation lead, however, to some risks with respect to accountability.<sup>230</sup> There is no guarantee that COPs will use their power respon-

<sup>223</sup> See McLachlan, *supra* note 220, at 304 (observing that although the WTO Appellate Body has made "extensive reference to other rules of international law in carrying out its interpretive functions," in at least two decisions the Appellate Body ultimately found that "the express obligations assumed by the parties under the Covered Agreements of the WTO overrode the principles of international environmental law whose application was sought"). McLachlan was a participant in the ILC Study on Fragmentation of International Law and worked specifically on questions relating to Article 31(3)(c). See *id.* at 279; see also ILC, *Fragmentation*, *supra* note 188, at 224.

<sup>224</sup> McLachlan, *supra* note 220, at 318 ("The principle of systemic integration must take its place alongside a wider set of techniques which resolve such conflicts by choosing between two rival norms.").

<sup>225</sup> See ILC, *Fragmentation*, *supra* note 188, at 208.

<sup>226</sup> See Van Asselt et al., *supra* note 194, at 436 (discussing ways in which the WTO panel could use material from the Kyoto Protocol); *id.* at 431-32 (recognizing the legal significance of COP decisions as an important step to evaluating different proposals for interlinkages). There is a growing literature addressing linkages across treaties in response to the volume of treaties, with some addressing political linkages and others addressing legal linkages. See, e.g., Cinnamon Pinon Carlarne, *Good Climate Governance: Only a Fragmented System of International Law Away?*, 30 *Law & Pol'y* 450, 469 (2008); Chambers, *supra* note 194; Sebastian Oberthur & Thomas Gehring, *Conceptual Foundations of Institutional Interaction*, in *Institutional Interaction in Global Environmental Governance: Synergy and Conflict Among International and EU Policies* 19 (Thomas Gehring & Sebastian Oberthur eds., 2006) [hereinafter *Institutional Interaction*]; Van Asselt, *supra* note 216.

<sup>227</sup> Although Fischer-Lescano and Teubner do not hold out much hope for combating legal fragmentation, they do argue that a "weak normative compatibility of the fragments might be achieved," provided that conflicts law can work to "effect a loose coupling of colliding units." Fischer-Lescano & Teubner, *supra* note 187, at 1004; see also *id.* at 1017-19, 1045-46.

<sup>228</sup> Chambers, *supra* note 194, at 247; Van Asselt et al., *supra* note 194, at 432.

<sup>229</sup> See Thomas Gehring & Sebastian Oberthur, *Comparative Empirical Analysis and Ideal Types of Institutional Interaction*, in *Institutional Interaction*, *supra* note 226, at 307, 327-31 (discussing cognitive interaction as a means of institutional interaction); Van Asselt, *supra* note 216, at 8 (noting that questions of interaction among treaties are more likely to be dealt with through COP decisions than by amendment to those treaties).

<sup>230</sup> See Andreas L. Paulus, *Commentary to Andreas Fischer-Lescano & Gunther Teubner: The Legitimacy of International Law*

sibly, working to manage fragmentation in productive ways.

Consensus-based COP activities diminish the role of state consent.<sup>231</sup> The opportunities that COP activity provides for adaptability and for managing fragmentation do not change this fact.<sup>232</sup> Increasing delegation can lead to serious concerns about displacement of the state's role in determining the content of international law.<sup>233</sup> This is exacerbated when we recognize that this activity is consensus-based, without provision for express consent by a state to be bound by it and without the possibility of opting out.

**[\*284]** Even if we temporarily shelve concerns about the diminishment of the role of consent as a requirement for international legal obligation, this loss of control by the state has several potential consequences. First, it is possible that the very same forces that work towards integration can also lead to a takeover by a particular sectoral regime. Only if all systems are working in the same integrative manner can we be sure that environmental matters will not be taken over by trade concerns, or vice versa.

Second, and relatedly, COP activity may shift the parties' obligations away from what was originally intended by the parties to the treaty. In some cases, this can be a beneficial development, where, for example, the treaty is now responding to increasing scientific knowledge. It could be said that shifts to a more ecologically sound approach in the Ramsar Convention as a result of COP activity are a valuable response to new scientific information.

In other cases, however, COP activity may - incrementally or overtly - shift the direction of the treaty away from its original goal because other forces are crowding the mission of the original treaty.<sup>234</sup> Development concerns may, for example, gradually shift the focus of some environmental treaties away from their original protective position.

However, we should not believe that more state control would, by itself, avoid these possibilities. After all, the voting members of the COPs are the representatives to the treaty's states parties. We are not, therefore, talking about a shift of control entirely away from states and to private actors, dispute resolution bodies, or NGOs. To the extent that a majority of states parties can agree on shifts in the direction of the treaty, this can be taken as at least partial acceptance of those shifts.

Further, the activity of COPs is at least as visible as treaty texts, at least in the environmental setting. MEAs have highly accessible websites and the results of COP activity are easily available - including reports of meetings, supporting documentation for particular resolutions and decisions,<sup>235</sup> and reports of meetings by subsidiary bodies. In addition, the Earth Negotiations Bulletin (ENB), a non-profit newsletter, has now become a mainstay of MEA COPs and meetings of subsidiary bodies, providing daily updates of the activity of the parties and the discussions **[\*285]** surrounding this activity.<sup>236</sup> These are all available on the internet and relevant MEAs frequently also provide direct links to Bulletins covering their meetings.<sup>237</sup> Thus, to the extent that information is one means of managing accountability concerns, this accessibility should help.<sup>238</sup>

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and the Role of the State, [25 Mich. J. Int'l L. 1047, 1048-49, 1054 \(2004\)](#) (discussing the "democratic deficit" of regional and international institutions and concerns about the legitimacy of law-making by functionally differentiated legal regimes).

<sup>231</sup> See generally Brunnee, *Reweaving the Fabric*, supra note 1; Brunnee, *COPing with Consent*, supra note 1.

<sup>232</sup> Paulus, supra note 230, at 1054 (arguing that the criteria to determine whether decisions are legitimate should not be based on the functional quality of the decision, but should be general).

<sup>233</sup> This has been a particular concern in the literature on international organizations. See, e.g., Jose E. Alvarez, *Governing the World: International Organizations as Lawmakers*, [31 Suffolk Transnat'l L. Rev. 591 \(2008\)](#).

<sup>234</sup> Wiersema, *Train Without Tracks*, supra note 33, at 1291-94.

<sup>235</sup> See, e.g., Basel Convention, <http://www.basel.int> (last visited Oct. 25, 2009); CITES, <http://www.cites.org> (last visited Oct. 25, 2009); UNFCCC, <http://unfccc.int/2860.php> (last visited Oct. 25, 2009); Kyoto Protocol, [http://unfccc.int/kyoto\\_protocol/items/2830.php](http://unfccc.int/kyoto_protocol/items/2830.php) (last visited Oct. 25, 2009) (including the Kyoto Protocol's framework agreement); Montreal Protocol, <http://ozone.unep.org> (last visited Oct. 25, 2009); Ramsar Convention, <http://www.ramsar.org> (last visited Oct. 25, 2009).

<sup>236</sup> See Earth Negotiations Bulletin, <http://www.iisd.ca/enbvol/enb-background.htm> (last visited Sept. 9, 2009) (discussing the origins and role of the Earth Negotiations Bulletin). See generally International Institute for Sustainable Development - Reporting Services (IISD RS), <http://www.iisd.ca> (last visited Nov. 11, 2009) (providing links to bulletins and other reporting services).

<sup>237</sup> See, e.g., CITES, <http://www.cites.org/eng/cop/index.shtml> (providing links to Earth Negotiations Bulletin coverage of its COPs) (last visited Oct. 25, 2009).

<sup>238</sup> See Joseph W. Dellapenna, *Law in a Shrinking World: The Interaction of Science and Technology with International Law*,

Finally, the question posed in this Article - that is, what relationship COP activity has with the parties' original treaty obligations - provides some check on just how far parties will be able to change the terms of the treaty through consensus-based activity. As we saw in Part I, the Basel Convention's decision to ban the export of waste from OECD countries to non-OECD countries went beyond the terms of the original treaty. It also raised serious disputes about the legality of the provision. Where COP activity goes too far beyond the scope of the original treaty, the shock to the original obligations is too severe. At this point, the COP activity does not thicken the original obligations of the parties, but materially alters them. At that point, it can no longer be said that the COP activity is inextricably bound up with the provisions of the treaty. Rather, it appears more akin to a stand-alone norm whose legal status can be evaluated according to the traditional criteria for finding international law. Thus asking the question about the legality of COP activity by focusing on its relationship to the underlying treaty obligations ensures that there are some limits on the drift that can occur, even if some drift is likely.

One final concern must be addressed. International lawyers may be concerned that this Article proposes that we take consensus-based COP activity seriously simply because doing so better reflects the reality of how a treaty operates rather than because parties actually intend to create new legally normative obligations. As discussed in Part II, this could be seen as an apologist position that negates the value of international law.<sup>239</sup>

However, the combination of the axes discussed in Part II and the way this Article poses the question about the role of consensus-based [\*286] COP activity allows intent to be one factor in the equation for determining the significance of a particular COP resolution or decision. Not all COP activity will have the same significance and not all COP activity should be treated the same, but intent can be one factor in the determination.

Indeed, parties spend a great deal of energy negotiating the resolutions and decisions of COPs, using them to make statements about their own priorities and the obligations they have committed to under the underlying treaty. As parties negotiate, sometimes in hard-fought ways, about the terms of a COP resolution that interprets or supplements a treaty, can it really be said that they do not intend it to have any impact on international legal obligation? If that were true, then COP activity would be less than soft law. It would exist in an increasingly narrow, specialized world of political activity without legal effect.

To suggest that this activity is not intended to have any effect on these states' treaty obligations belies the real story of what this COP activity is intended to do. It is almost certainly not intended to stand alone as new law. However, it is almost certainly intended to affect how the parties are to understand their international legal obligations under a treaty. This is a particular form of intent that both negates COP activity's status as hard international law under traditional categories and elevates its status beyond simply soft law or non-law.

It is true, however, that most consensus-based COP activity is almost certainly only intended to have legal effect within the treaty regime. This may limit the opportunities for dealing with fragmentation through treaty interpretation, to be sure. But to the extent that parties are willing to reach out beyond their own treaty regime to the work of COPs of other MEAs, especially beyond the dispute resolution context, even treaty-specific legal effects could have broader implications for managing the risks of an increasingly sectorally fragmented international legal system.

## Conclusion

Conferences of the Parties to multilateral environmental agreements add to the thickness of states parties' international legal obligations through resolutions and decisions that interpret, offer guidance, and monitor effectiveness and compliance. In many cases, COP activity has substantially enhanced the substance of the core obligations of parties to an underlying treaty. And this activity is done by consensus of the parties, without provision for opt-out.

COP activity does not create new stand-alone law. Nor, however, does it lack any implication for existing hard law.

[\*287] Using conventional approaches for determining the sources of international law, this COP activity would

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[88 Ky. L.J. 809, 852 \(2000\)](#) (observing that states can easily keep abreast of negotiations due to modern communications technology).

<sup>239</sup> See Abbot et al., *Legalization*, supra note 116, at 412; Raustiala, supra note 116, at 589; Ulfstein, *Comment*, supra note 16, at 149.

rarely be classified as hard international law. Indeed, conventional approaches fail to capture the particular role that consensus-based COP activity plays in international legal obligation because they fail to capture this activity's tight relationship with the underlying treaty obligations of the parties.

Perhaps as a result, this COP activity is almost invariably treated as soft law by commentators, with little more analysis. However, placing the activity of COPs into this category of normative obligation between hard law and non-law creates a hierarchical tripartite structure of hard law, soft law, and non-law that does not accurately reflect the relationship of consensus-based COP activity to the states parties' underlying legal obligations.

To reflect this relationship, the question is not whether COP activity is international law. The question we should begin asking, rather, is what the relationship of COP activity is to the parties' underlying treaty obligations. Reframing the question in this way provides us with a way to explore more accurately the role of COP activity for international legal obligation.

Reframing the question also has implications for how we understand fragmentation in the international legal system. We begin to see a picture of increasingly specialized regimes, adding to sectoral fragmentation. This in turn raises concerns about increasingly self-referential regimes becoming unresponsive to the work of other regimes both within their own field of environmental law, and outside it.

However, reframing the question also suggests potential ways to manage that fragmentation, both through treaty interpretation rules for dispute resolution bodies and beyond the dispute resolution context in the ongoing activity of the parties to international treaties. This management is not without risks - particularly for accountability - but when paired against the risks of fragmentation, it is the better approach.

Consensus-based COP activity is a significant source of international legal obligation. When evaluated according to axes that draw on consent, authority, intent, and effect, and when judged by its relationship to states parties' obligations under the original treaty, the legal significance of COP activity becomes clearer. This in turn gives us a more accurate picture of the international legal system and international legal obligation today.