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The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements

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THE NEW INTERNATIONAL LAW-MAKERS?

CONFERENCES OF THE PARTIES TO MULTILATERAL ENVIRONMENTAL AGREEMENTS

ANNECOOS WIERSEMA*

ABSTRACT

What do Conferences of the Parties (COPs) to multilateral environmental agreements contribute to international legal obligation? Much of the activity of COPs does not require the consent of every state party to the treaty to come into effect and does not provide for any form of opt-out for dissenting states; nevertheless, COPs frequently pass agreements that alter the application and scope of their treaties. This article discusses the significance of this activity – what I term consensus-based COP activity – for our understanding of the international legal system and its touchstone of state consent. Conventional categories for the sources of international law are inadequate to capture the significance of this activity. It does not fit within the traditional sources of hard international law – treaty and custom. Yet relying by default on the usual classification 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.

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This article argues that the problem lies in the question we are asking. Instead of asking whether COP activity is really law, we should be asking what the relationship is between 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 consensus-based COP activity in international legal obligation. 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 deepening and thickening them. In turn, reframing the question also allows us to explore questions about adaptability, sectoral fragmentation, and accountability in the international legal system.
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I. 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 for international law: the activity of Conferences of the Parties to multilateral environmental agreements. Some of this activity – such as formal amendments to a treaty or protocol – requires the consent of a state party before it will be binding on 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 Conferences of the Parties (COPs) does not require the consent of every state party to the treaty 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 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. It does not fit within the traditional sources of hard international law – treaty and custom. Yet relying by

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default on the usual classification 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 the question on whether COP activity is really law is the wrong question. Instead, we should be asking what the relationship is between 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 deepening and 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 COP activity also offers opportunities to better manage this sectoral fragmentation.

The article begins, in Section II, by exploring the kinds of activity that result from consensus-based decision-making at COPs, using representative examples from a few key multilateral environmental agreements. Section III 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 for consensus-based COP activity. Neither of these approaches is satisfactory because both are 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. Section III concludes, therefore, 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. Section IV 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.

Finally, in Section V, the last part of the article addresses what this new picture of the significance of consensus-based COP activity adds to discussions about fragmentation and accountability in the international legal system.

It is less important that we answer the question of whether COP activity is hard or soft international law, than that we understand the role consensus-based COP activity currently plays and the implications of that role for states’ international legal obligations and the international legal system as a whole. The article argues that consensus-based COP activity contributes to international legal obligation by deepening and thickening the obligations of the parties to the underlying treaty. In doing so, it contributes to our understanding of fragmentation in that legal system and ways to manage that fragmentation.

II. CONSENSUS-BASED COP ACTIVITY

A. Defining Consensus-Based COP Activity

Multilateral environmental agreements (MEAs) are a dominant force in international environmental law. They 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.\footnote{See Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 933.} A state that has consented to be bound by an MEA that is in force is, under international law, bound to comply with it.\footnote{This principle – known as “pacta sunt servanda” – is elaborated in Article 26 of the Vienna Convention on the Law of Treaties, which states that “[e]very treaty in force is binding upon the parties to it and must be performed in good faith.” Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCT]. See also ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 179-180 (2d ed. 2007) (describing the principle of “pacta sunt servanda” as “the fundamental principle of the law of treaties”).}

However, the picture of a binding MEA as an expression of the consent of the states parties to it 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.\footnote{“It is in this continuous process of treaty development that 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.” Reweaving the Fabric, supra note 1, at 106.}

To operate on an ongoing basis, these MEAs generally establish an institution known as a Conference of the Parties – a COP – made up of representatives of the states parties to the MEA who meet regularly – every year, or every other year, or every few years. These COPs are the supreme body of the treaty.\footnote{Churchill and Ulfstein, supra note 1, at 631.} Some COPs allow non-party states, non-governmental organizations (NGOs), and other non-parties to observe and sometimes participate in discussions and negotiations. However, the voting members of the COP are representatives of the states that are parties to the treaty, with one vote per state.

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 will require the consent of a
state before it can be bound by them. Even if ratification is not required, these activities allow for some kind of opt-out, ensuring that a state that does not wish to be bound will not be. Examples include formal amendments to the treaty text, amendments to appendices or annexes, and the conclusion of protocols – new treaties – under a framework convention.

The second category of activities is the focus of this article. This activity requires only consensus by the states parties to be binding – not ratification or formal consent – 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 will then bind all states parties whether or not they voted in favor of the resolution or decision.⁶

This activity – which I term consensus-based COP activity – is a significant force in international environmental law. A review of COP resolutions and decisions shows that, using a consensus-based approach, COPs perform a range of activities that result in resolutions and decisions without which the treaty cannot be adequately understood.

B. Exploring the Range of Consensus-Based COP Activity

Using a consensus-based decision-making process, COPs interpret treaty obligations, develop rules, modalities, and procedures for implementation of particular provisions of the treaty, provide guidance to the parties about implementation, consider compliance and dispute

⁶ Use of the terms “resolutions” and “decisions” is dependent on the terminology used by a particular treaty, although in some treaties, the terms signify different kinds of activities. See infra text accompanying notes 87-90.
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 the sense
that it affects the obligations the parties have undertaken to comply with as they implement the
treaty.\(^7\) Other resolutions and decisions address only the internal operation of the treaty in the
sense that they only address the parties’ activity at the COP or the activity of subsidiary bodies to
the COP.\(^8\) Yet even these can have an effect on the substantive obligations of the parties. To
better understand the relationship of consensus-based COP activity to the parties’ underlying
treaty obligations, the following sections distinguish between activity that affects the external
obligations of the parties and activity that affects the internal obligations of the parties.

1. **Effects on External Obligations**

   Activity that addresses the external obligations of the parties may do so directly or
indirectly, affecting the substantive obligations the parties have undertaken to comply with as
they implement the treaty. Although direct changes to the parties’ external obligations are often

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\(^7\) 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 148, 149 [hereinafter Ulfstein, *Comment*].

\(^8\) *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 and Ulfstein, *supra* note 1, at 631-643 (discussing the internal powers of MEAs and their decision-making powers relating to the parties’ substantive obligations as two separate categories of activity).
made through consent-based COP activity,sometimes changes are made with consensus-based COP activity.

Under the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), 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. Failing consensus, these adjustments can be made by a two-thirds majority vote of the parties present at voting at the COP. The adjustments are binding on all parties, regardless of whether they voted in favor of them.

Under the Ramsar Convention on Wetlands of International Importance (Ramsar Convention), it is the parties’ responsibility to designate wetlands of international importance for listing on the convention’s List of Wetlands of International Importance. The treaty text itself contains only a sparse set of criteria to guide this listing. Even so, the Ramsar COPs have modified the criteria for listing several times, moving them away from an original focus on waterfowl – the primary impetus for many states’ support of the treaty. The criteria now include references to a wetlands’ relationship to major river basins or coastal systems and

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9 See, e.g., Convention on International Trade in Endangered Species of Wild Flora and Fauna art. XV, Mar. 3, 1973, 27 U.S.T. 1087 (setting out the procedures for amendments to Appendices I and II of the treaty and allowing for reservations to those amendments) [hereinafter CITES].
11 Id. art. 2(9)(a). Article 2(9) was added through amendments to the Protocol in 1990. Ulfstein, Comment, supra note 7, at 147.
12 Montreal Protocol, supra note 10, art. 2(9)(c).
13 Id. art. 2(9)(d).
15 See id. art. 2(2).
supplement earlier criteria based on numbers of waterbirds with criteria based on fish and other species of wetland dependent, non-avian animals.\textsuperscript{17} Thus, the criteria the parties are meant to apply to listing decisions have been extensively elaborated and have changed over the years.\textsuperscript{18}

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),\textsuperscript{19} the parties adopted Decision II/12, which would have banned the transport of hazardous wastes from OECD countries to non-OECD countries.\textsuperscript{20} 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.\textsuperscript{21}

\begin{flushright}
\textsuperscript{17} 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 and B (COP 9, 2005), and X.20 (COP 10, 2008), available at http://www.ramsar.org/key_guide_list2009_e.pdf.
\textsuperscript{18} M.J. Bowman, The Ramsar Convention Comes of Age § 7 (1995), http://ramsar.org/key_law_bowman.htm (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., Additional Guidance for Identifying and Designating Under-Represented Wetland Types as Wetlands of International Importance, Res. VIII.11, 8th Meeting of the Conference of the Parties to the Ramsar Convention (Nov. 18-26, 2002), available at http://www.ramsar.org/res/key_res_viii_11_e.pdf.
\textsuperscript{21} 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 the treaty). See also Günther 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, 130-136 (describing other examples of activity by COPs that have led to disputes among the parties to the treaty about that activity’s legal status) [hereinafter Handl, Comment].
\end{flushright}
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.  

Although the Ramsar Convention’s overall approach is primarily to rely on exhortations, rather than strong substantive requirements, the Ramsar Convention COPs have still spent significant time defining those terms of the treaty that inform the external, substantive obligations of the parties. They have done this using resolutions adopted by 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.” The parties are also to “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.” 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.’ In addition, seventeen handbooks providing guidance to domestic managers of wetlands about how to implement the wise use of wetlands have been prepared by

22 See Churchill and Ulfstein, supra note 1, at 641 (discussing the role COPs play in the interpretation of agreements).
23 Ramsar Convention, supra note 14, art. 3(1).
24 Id. art. 3(2).
the Secretariat to the Convention, as authorized by the COP.\textsuperscript{26} 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.”\textsuperscript{27} 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.\textsuperscript{28}

2. Effects on Internal Obligations

Other COP resolutions and decisions address only the internal operation of the treaty – for example, criteria to be used when parties at the COP are voting at the COP on formal amendments to the treaty. 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.\textsuperscript{29}

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

\begin{itemize}
\item \textsuperscript{27} Id.
\item \textsuperscript{28} See Annecoos Wiersema, A Train Without Tracks: Re-Thinking the Place of Law and Goals in Environmental and Natural Resources Law, 38 ENVTL. L. 1239, 1291 (2008).
\item \textsuperscript{29} 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. Although in some instances 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 and Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements 268-269 (1995).
\end{itemize}
treaty’s intended protection of internationally traded species. Amendment of these two appendices is subject to a consent-based procedure. However, the criteria used for listing decisions by the parties are the product of consensus-based COP resolutions. The most recent criteria include an elaborate set of both biological and trade criteria for listing. 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.

These criteria are addressed to the parties to be applied both in proposals for listing and in their votes on listing. Although they do not directly alter the parties’ external obligations under the treaty, the terms of the criteria inevitably shape the way the convention is considered by the parties to apply to particular species. This is particularly 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

30 CITES, supra note 9, arts. II-IV. CITES also provides for a third appendix, Appendix III. 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.

31 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, and XXIII.

32 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.

33 Criteria for Amendment of Appendices I and II, Conf. 9.24 (Rev. CoP14), 9th Meeting of the Conference of the Parties to CITES (Nov. 7-18, 1994), amended at the 14th Meeting of the Conference of the Parties to CITES (Jun. 3-15, 2007), available at http://www.cites.org/eng/res/all/09/E09-24R14.pdf [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.


35 See CITES Criteria, supra note 33. See also CITES, supra note 9, art. XV.
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 elephants and a significant trade review process.\(^{37}\)

The Kyoto Protocol on Climate Change provides a similar example.\(^{38}\) At its core, the Kyoto Protocol is an emissions trading scheme. Parties with fixed emissions limits can implement 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.\(^{39}\) In 2001, the COP to the Kyoto Protocol’s framework convention – the United Nations Framework Convention on Climate Change\(^ {40}\) – adopted a set of decisions that addressed implementation of these flexible mechanisms.\(^ {41}\) More recently, the

\(^{36}\) See, e.g., *Criteria for Amendment of Appendices I and II*, CoP12 Doc 58 Annex 5a, 12\(^{th}\) Meeting of the Conference of the Parties to CITES (Nov. 3-15, 2002), at 1, 4, 5, available at http://www.cites.org/eng/cop/12/doc/E12-58-A5a.pdf (recording the comments of Australia, Great Britain, Norway, and New Zealand in response to proposed amendments to the criteria at the 12\(^{th}\) Meeting of the Conference of the Parties to CITES).


\(^{39}\) Id. arts. 6, 12, and 17.


Kyoto Protocol’s COP-equivalent – the Conference of the Parties to the UNFCCC acting as meeting of the parties to the Kyoto Protocol\(^\text{42}\) – has agreed to decisions that address the availability of emission credits for small-scale afforestation and reforestation projects.\(^\text{43}\) 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 not, thereby, directly affected. However, by determining criteria for the issuance of credits, this COP activity affects how the parties can meet their overall substantive obligations under the treaty of reducing 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

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\(^{42}\) The Kyoto Protocol specifies that the Conference of the Parties 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, \textit{supra} note 38, art. 13(1).

Montreal Protocol, and the Kyoto Protocol’s COPs have all done so in one form or another. These resolutions or decisions take the form of procedural obligations that do not affect the substance of the parties’ commitments and 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, thereby contributing an external effect. 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 providing extensive guidelines and commentary on those reports. Because procedural mechanisms and shaming lie at the heart of the Ramsar Convention’s means of effecting protection for international wetlands, 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

\[\text{\textsuperscript{44} See Gerhard Loibl, Reporting and Information Systems in International Environmental Agreements as a Means for Dispute Prevention – The Role of “International Institutions,” 5 NON-ST. ACTORS & INT’L L. 1, 3-12 (2005) (describing the reporting requirements established by COPs of a number of different environmental agreements); Jutta Brunnée, The Kyoto Protocol: Testing Ground for Compliance Theories?, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (HEIDELBERG J. INT’L L.) 255 (2003).}\n
\[\text{\textsuperscript{45} Reweaving the Fabric, supra note 1, at 111; Ulfstein, Comment, supra note 7, at 148. COPs also frequently implement financing provisions, producing a similar dynamic between internal and external effects on the parties’ implementation.}\n
\[\text{\textsuperscript{46} See Bowman, supra note 18, § 98 (noting that the first Conference of the Parties to the Ramsar Convention called upon all parties to submit reports to the Bureau at least six months prior to the holding of each meeting of the Conference of the Parties). See also, e.g., Submission of Information on Sites Designated for the Ramsar List of Wetlands of International Importance, Res. VI.13, 6\textsuperscript{th} Meeting of the Conference of the Parties to the Ramsar Convention (Mar. 19-27, 1996), available at http://www.ramsar.org/res/key_res_vi.13e.pdf; Enhancing the Information on Wetlands of International Importance (Ramsar Sites), Res. VIII.13, 8\textsuperscript{th} Meeting of the Conference of the Parties to the Ramsar Convention (Nov. 18-26, 2002), available at http://www.ramsar.org/res/key_res_viii_13_e.pdf.}\]
develop interpretations or propose technical specifications. Some of this subsidiary activity will be subject to consent-based procedures before it can come into effect, binding only on those states agreeing 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.47

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. They are tightly connected with the original treaty and enrich it by deepening and thickening the parties’ obligations. They deepen the obligations by contributing to implementation and effectiveness. They thicken the obligations by adding to the text of the original treaty through interpretation and guidance.

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.

47 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., CITES Strategic Vision: 2008-2013, Conf. 14.2, 14th Meeting of the Conference of the Parties to CITES, (Jun. 3-15, 2007), available at http://www.cites.org/eng/res/14/14-02.shtml (addressing the parties, the Secretariat, and the Standing Committee).
This recognition of the effects of consensus-based COP activity does not, however, tell us how we should regard the activity’s legal status or its place in schemas of international legal obligation.

While COP activity has occasionally 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.\(^\text{48}\) Two notable exceptions include the seminal article by Churchill and Ulfstein in 2000 and the compelling work of Jutta Brunnée.\(^\text{49}\)

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.\(^\text{50}\) 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 if such activity has substantive implications for the parties.\(^\text{51}\)

Focusing on examples from the UNFCCC and the Kyoto Protocol, Jutta Brunnée’s work delves into the implications of COP activity on our understanding of international law as the product of consent by states.\(^\text{52}\) She argues that the recognition that COPs are engaged in what


\(^{49}\) See supra note 1.

\(^{50}\) Churchill and Ulfstein, *supra* note 1, at 631-643, 655, 658.

\(^{51}\) *Id.* at 641-642.

\(^{52}\) See *Reweaving the Fabric*, *supra* note 1; *COPing with Consent*, *supra* note 1.
she terms ‘de facto law-making’ forces us to question our traditional view of international legal obligation.\textsuperscript{53}

The following section 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.

III. 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.\textsuperscript{54} If so, we could argue that consensus-based COP activity could give rise to hard law and not just soft law obligations. As we shall see, consensus-based COP activity does not fit easily into either category.

Generally, a treaty is understood to be an agreement between states that is intended to create obligations for those states under international law.\textsuperscript{55} Although it is arguable, as discussed below, that 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 the ability to stretch this to a finding that the parties have created a new international legal agreement is tenuous at best. Some

\textsuperscript{53} Reweaving the Fabric, supra note 1.

\textsuperscript{54} Statute of the International Court of Justice, supra note 2, 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.

\textsuperscript{55} See AUST, supra note 3, at 16, 20 (expanding on the definition of a treaty under the Vienna Convention on the Law of Treaties art. 2(1)(a), recognized as customary international law, and the International Law Commission’s Commentary to the Treaty). See also Aegean Sea Continental Shelf Case, ICJ Reports (1978), 3, at 39-44.
The commentators have speculated that consensus-based COP activity could amount to a subsequent agreement by the parties. Such agreements are recognized as relevant to the interpretation of the original provisions of a treaty under rules for interpretation of treaties. However, this does not automatically mean that this interpretive device would then automatically elevate the activity to being seen as hard international law warranting it being called a treaty or agreement.

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 reflections on intent and consent. As interpreted by most commentators, customary international law allows for legal rules to emerge on the basis of broad consensus rather than a requirement of each state’s consent and for those rules to be binding and applicable to all states. 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. Under this approach, some commentators are willing to recognize the possibility that declarations emanating from a United Nations sponsored conference or the terms of resolutions from the United Nations General Assembly can give rise to customary international law. However, not all such activity can give rise to customary international law. Its legal status is dependent on

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56 See, e.g., Churchill and Ulfstein, supra note 1, at 641.
57 VCT, supra note 3, art. 31(3)(a).
60 Roberts, supra note 58, at 758; Charney, supra note 59, at 537.
61 Roberts, supra note 58, at 758; Charney, supra note 59, at 537, 544-545.
factors such as the degree of consent by states and the nature of the activity. In short, whether the parties understand the activity to have legal relevance.

What is the parties’ understanding when they pass resolutions or decisions at COPs? Is it analogous to the product of a United Nations sponsored conference or a United Nations Resolution? The problem with both categories of sources of international law – treaties and custom – is that they provide a framework that does not fit the particular situation we are dealing with in this article. Standards for whether an agreement amounts to a treaty binding under international law or whether a declaration by a United Nations sponsored conference or resolution by the General Assembly of the United Nations 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 in an inquiry as to 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 consensus-based COP activity is inextricably bound up with the underlying treaty obligations of the parties. This is true whether they are external or internal in their focus. New allocations for ozone-depleting substances under the Montreal Protocol, for example, or criteria for listing of species or wetlands hold little meaning without reference to the parties’ underlying treaty obligations.

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62 Roberts, supra note 58, at 758.
64 Ulfstein seems to acknowledge this when he discusses the Kyoto Protocol. See Ulfstein, Comment, supra note 7, at 148.
The exception to this interdependence highlights the rule. The Basel Convention’s decision banning the transport of waste from OECD to non-OECD countries could exist as a stand-alone legal rule.\textsuperscript{65} The decision is easily susceptible to a question of whether it was intended to be legally binding, either 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 it formed or was close to forming new hard international law.\textsuperscript{66} 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 was to pass an official amendment to the treaty at the next Conference of the Parties along the same terms as the contentious decision.\textsuperscript{67} 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.\textsuperscript{68}

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.\textsuperscript{69} This is because most consensus-based COP activity cannot, as a factual matter, 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.

\textsuperscript{65} See Decision II/12, \textit{supra} note 20.
\textsuperscript{66} The parties adopted Decision II/12 by consensus. Concerns about the provisions legal status were raised subsequently by some parties. See Werksman, \textit{supra} note 21; FITZMAURICE AND ELIAS, \textit{supra} note 48, at 258.
\textsuperscript{68} Decision III/1 is not yet in force. It will enter into force once it has been ratified by three-fourths of the states parties that have accepted the amendment, and will only enter into force for those parties that have ratified it. See Basel Convention, \textit{supra} note 19, art. 17(5).
\textsuperscript{69} Cf. Handl, \textit{Comment}, \textit{supra} note 21, (describing examples where the legal status of COP activity and similar activity in MEAs has been the subject of disagreement).
activity without fearing a new set of independent legal obligations. Although vigorous debate sometimes surrounds resolutions and decisions, these resolutions and decisions do not give rise to new legal obligations that could be assessed independently of the original treaty.

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

The traditional categories of sources of international law have their exceptions or flexible approaches and over the years, some commentators have sought to move away from rigid categorizations of how we should locate international legal obligation. Thus, one way to resolve the problem of a too-rigid framework that is unworkable for consensus-based COP activity is to focus instead on certain attributes of that activity that represent 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 Koskenniemi describes it, it is the constant struggle between concreteness and normativity; between apology and utopia.

Thus, 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

70 See Aust, supra note 3, at 16 (warning that the law of treaties is extremely flexible and can accommodate departures from normal practice); Roberts, supra note 58 (demonstrating the wide range of views as to what makes up customary international law).


axes that focus on attributes such as consent, intent, and effect.\(^ {73}\) Each of these axes could then be used to provide a window into how we should understand its legal status.

First, consensus-based COP activity can 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. Finally, fourth, consensus-based activity could be discussed according to its effect on the obligations and implementation of the treaty by the parties, perhaps distinguishing between external and internal effects.

1. **Axis I: 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 for the activity in question and the degree of consent achieved. In most instances, resolutions and decisions are passed by consensus. In the absence of consensus, the treaty will provide for a majority or super-majority vote. This consensus-based COP activity will then be binding on all parties, even if they did not agree to the provision or vote in favor of it.

It is unclear whether consensus itself means unanimity.\(^ {74}\) Whether or not we equate consensus with unanimity in evaluating COP activity, a resolution or decision passed by

\(^ {73}\) See *Reweaving the Fabric*, supra note 1, at 110-113 (discussing different frameworks through which to view COP activity in the climate change regime: authorization, language, and institutional law).

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.\footnote{It should be noted that it will not always be possible to identify the parties who voted for or against a particular provision due to the sometime use of secret ballots. However, parties will often reveal their preferences in debates and might attach explanatory documents clarifying their position. This can happen even where a measure is passed by consensus.}

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

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. Another, different axis along which COP activity could be evaluated, then, is the degree of general or specific authority pursuant to which a COP is acting.\footnote{See Uulfstein, supra note 7, 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).}

In the treaty article specifically creating a Conference of the Parties, most treaties provide COPs with general authority to perform tasks that will enhance the implementation and the effectiveness of the treaty. Thus, CITES authorizes its COP to “review the implementation of the present Convention” and “where appropriate, make recommendations for improving the effectiveness” of the Convention.”\footnote{CITES, supra note 9, art. XI(3).} Similar language is contained in other MEAs.\footnote{See Ramsar Convention, supra note 14, art. 6; UNFCCC, supra note 40, art. 7; Kyoto Protocol, supra note 38, art. 13.}
This general authorizing provision for the COP 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.”

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. 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 with a number of specific activities, including provisions for financial mechanisms and parties’ reports.

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 serving as the Meeting of the Parties. The Conference of the Parties serving as the Meeting of the Parties.

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79 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, which require a two thirds majority vote of the parties present and voting, but allow for reservations. Id. art. XI(3)(b), XVI, XVII, and XXIII. This is, therefore, a consent-based activity rather than a consensus-based activity. See also Ramsar Convention, supra note 14, art. 6.

80 See supra note 11 and accompanying text; Reweaving the Fabric, supra note 1, at 110. “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.”

81 UNFCCC, supra note 40, art. 11.

82 Id. art. 12. The COP is the supreme body of the treaty. Id. art. 7. It is given an explicit mandate to direct the Secretariat and other subsidiary bodies’ activity. Id. arts. 8-10.
meeting of the parties is specifically authorized by the Protocol to develop guidelines, modalities, procedures, rules, and guidelines for key provisions of the Protocol, its flexible mechanisms of Joint Implementation, the Clean Development Mechanism, and an overall emissions trading scheme. As discussed in Section II above, it 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. Here, one might also differentiate between the form of authorization, so that generally authorized activities could be perceived as less directly authorized and therefore of a lesser legal status than activity that is specifically authorized. 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.

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83 Kyoto Protocol, supra 38, arts. 6, 12, & 17. “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.” Reweaving the Fabric, supra note 1, at 110-111.

84 Ulfstein, Comment, supra note 7.

85 Churchill and Ulfstein, supra note 1.
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, conveying different intentions and expectations about the degree of obligatory and legal force contained in the resolution or decision.\(^{86}\)

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, decisions, recommendations, and notifications. Of these four categories of activity, resolutions have the most overtly normative role, since they are used to provide long-standing guidance on the treaty.\(^{87}\) By contrast, COP decisions are used for instructions to subsidiary bodies, to be implemented by a specified time;\(^{88}\) recommendations are used for the results of deliberations on implementation and effectiveness of the treaty;\(^{89}\) notifications are used for information and reports to be communicated to the parties.\(^{90}\)

Second, and more importantly, even activity that takes the form with the most normative force – such as resolutions in CITES or decisions under the Basel Convention – can vary significantly in the language they use. For example, CITES Resolution 14.8, on Periodic Review of the Appendices, uses “shall,” “should,” “are encouraged,” and “must” in different parts of the Resolution.\(^{91}\) By contrast, CITES Resolution 14.4 regarding cooperation between CITES and

\(^{86}\) *Reweaving the Fabric, supra* note 1, at 111.


\(^{88}\) *Id.*

\(^{89}\) *Id.*

\(^{90}\) *Notifications to the Parties, at* http://www.cites.org/eng/notif/index.shtml.

\(^{91}\) *See Periodic Review of the Appendices, Conf. 14.8, 14\(^{th}\) Meeting of the Conference of the Parties to CITES (Jun. 3-15, 2007), available at* http://www.cites.org/eng/res/14/14-08.shtml.
the International Tropical Timber Organization uses the terms “urges,” “encourages,” and “recommends.”92 Much of the Basel Convention’s COP activity uses the term “requests” and “invites” when addressing the parties.93

Sometimes the difference in use of term seems to track whether or not the COP is addressing the 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, when more forceful language is used.94 The Basel Convention tends to reserve its more forceful language for directives to its subsidiary bodies.95 This is 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.96

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 the domestic agencies and parties implementing the treaty.97

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”

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94 See, e.g., Cooperation between CITES and ITTO regarding Trade in Tropical Timber, supra note 92 (using the term “directs” when addressing the Secretariat, as opposed to terms like “urges,” “recommends,” and “encourages” when addressing the parties directly).
95 Id. at 2.
96 CITES Criteria, supra note 33.
97 See, e.g., supra note 26.
have a harder legal status than those that simply “urge” the parties to act. These latter would be regarded as soft law or reflecting political, rather than legal, commitments.

4. **Axis 4: Effect in Implementation**

A fourth axis along which we could evaluate consensus-based COP activity’s legal status is that of effect. Do the parties implement these COP resolutions and decisions or act with regard to them as if they were legally binding? On the one hand, this could be taken as evidence of *opinio juris*. On the other hand, it could be seen as simply a determination of legal status on the basis of actual implementation.\(^98\)

For this inquiry, the discussion of Section II 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.\(^99\) Following this axis as a measure of legal status, we might also determine that external effects are more legally significant than internal effects, with the mix of internal and external effects falling 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 measuring the international legal status of consensus-based COP activity. Following consent-based models of varying strictness, a determination of legal status could focus on the degree of

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\(^98\) This raises several difficulties for international legal obligation as a whole, discussed further below.

\(^99\) Although Brunnée 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. *Reweaving the Fabric*, supra note 1. Cf. Ulfstein, *Comment*, supra note 7.
consent achieved, or the level of authorization for the COP activity that represents consent for
delegated rule-making. Still within a consent-based model, albeit a less strict one, one might
focus on the intent expressed by the parties as to the legal status of the resolution or decision.
Moving away from a consent-based model, we could evaluate legal status by reference to the
effect of the COP activity on the parties.

First, any temptation to use a single axis to determine legal status should be avoided.
While each axis offers some insight into the 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.100

Take, for example, Axis 2, the level of authorization for COP activity contained in the
treaty. This axis simply provides us with information about whether the COP itself has acted
within the scope of its powers. It does not provide us with information about the normative force
of the activity. While Ulfstein argues in favor of the legally binding status of authorized COP
activity, absent authorization, he argues that such activity has legally binding status only within
the internal operation of the treaty.101

The reverse scenario could also arise. While a COP resolution that is inconsistent with
the authorization under the treaty might be ultra vires when viewed according to the law of
international organizations, it might nevertheless be determined to be hard law by virtue of a
level of consent and demonstration of intent by the parties voting. The fact that the Basel

100 See The Politics of International Law, supra note 72; FROM APOLOGY TO UTOPIA, supra note 72.
101 Ulfstein, Comment, supra note 7.
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 on intent alone as expressed by the language of the COP resolution or decision is also insufficient. If a COP resolution phrased in obligatory language, such as “shall,” can be regarded as hard law or at least almost hard law simply on the basis of language, this might suggest that COP activity could stand alone as an independent provision. However, the substance of most COP activity rarely stands separate from the underlying treaty. The criteria for listing species under CITES, for example, written using mandatory terminology, cannot stand separately from the underlying treaty, its listing procedure.

The same problem applies to relying only on the first axis, consent. 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.

Finally, reliance on effect alone threatens to undermine the value of legal obligation completely in favor of a realist view of international relations. Or, to put it in Koskenniemi’s terms, an apologist perspective of international law. Even those who are more inclined towards a

broad reading of intent might shy away from a reading of intent that relies only on effect for a
determination of the legal status of an instrument.

Each of these axes is insufficient alone to answer the question of whether COP activity
should be regarded as hard international law, because each one highlights one aspect of the
sources of international law while negating or ignoring others. And each one could find that a
particular COP resolution or decision was hard international law in a way that misunderstands
the nature of COP activity.

The simple response is to point out that all axes should be relevant to a determination of
the legal status of consensus-based COP activity. So what happens when we put all the axes
together and try to apply them? The mix of forms 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 an independent, stand-alone normative
statement.

Each one serves the particular context of COP activity. Consent is consent to the COP
activity’s effect on the underlying treaty, whether direct consent or delegated consent. The intent
is directed specifically at how the parties and subsidiary organs implement and interpret the
treaty provisions. And effects are related to the effect of the COP activity on the original parties’
obligations. Combining all axes together 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 deepens or thickens the original treaty obligations and when it is intended to deepen and
thicken those obligations. It deepens the obligations by contributing to effectiveness and compliance. It thickens the obligations by elaborating on the framework provided by the text of the treaty through interpretations and guidance. This can happen even if a COP resolution is couched in non-mandatory terms, or when it affects only the internal obligations of the parties, or when it is only generally authorized.

One way to understand this is using the framework proposed by Abbott et al. in their discussion of legalization. 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. 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.” Although the authors are primarily focused on dispute resolution in their discussion of delegation, 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 legalization of the parties’ original treaty obligations.

Even if we do not follow the specific framework proposed by Abbott et al., the approach highlights the fact that COP activity should be viewed in relation to the party’s underlying treaty obligations. It is inseparable from them. The four axes are, then, helpful because analyzing

103 Legalization, supra note 102.
104 Id. at 401.
105 Id. at 401-402.
106 Id. at 401.
107 See id. at 415.
consensus-based COP activity according to all four axes gives us a picture of the complexity of
consensus-based COP activity. At the same time, the axes demonstrate that attempts to analyze
COP activity according to conventional standards for finding legal obligation are fraught with
difficulty.

When we ask whether this consensus-based COP activity is hard international law, we
become caught in a set of questions that are far removed from the context of parties’ decision-
making at treaty 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 classing consensus-based COP activity
as soft law proves any more helpful for understanding this activity’s role in the international
legal system.

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

If consensus-based COP activity is not hard law – or rarely hard law – can we simply
refer to it as soft law and move on? Perhaps to avoid some of the problems of the determinations
above, or in acknowledgement that standard tests for finding hard international law do not fit
with consensus-based COP activity, commentators generally refer to the consensus-based
resolutions and decisions of COPs as soft law. This section argues that despite some initial
appeal to the term soft law for this kind of activity, it is ultimately unhelpful for a full
understanding of the relationship of consensus-based COP activity to the parties’ substantive
legal obligations under the underlying treaty.
Much activity in the international system that could not be classed as international law under traditional categories appears to have normative implications, including legally normative implications. 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 overthrows 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.108

The category of soft law can include a focus on either form or substance. Thus, 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.”109 These are instruments that do not meet the formal requirements of a treaty and cannot be considered law under traditional categories. Examples include General Assembly resolutions and declarations. In international environmental law, the Stockholm and Rio Declarations could all fall within the category of soft law.110

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 to be soft law.\textsuperscript{111}

If these instruments do not meet the formal requirements to be classified as international
law, why would they be termed law at all, even if it is only soft law? Commentators frequently
focus on the significance of the so-called soft law instrument for hard law. Thus, soft law may
contribute to the development of hard law, actually becoming hard law over time,\textsuperscript{112} providing a
framework for a subsequent treaty,\textsuperscript{113} or as an authoritative statement of the views of states that
might then serve as evidence, at the very least, of customary international law or that might
crystallize, in whole or in part, into customary international law.\textsuperscript{114}

Dupuy notes that soft law “can help to define the standards corresponding to what is
nowadays to be expected from a ‘well-governed State’ without having been necessarily
consecrated as an in-force customary norm.”\textsuperscript{115} Soft law instruments can have an impact on
national legislatures and national legislation.\textsuperscript{116} International standards based on soft law are
available for use by international and municipal judges or arbitrators, and can be of use in every-
day inter-state diplomacy.\textsuperscript{117}

Thus, for Dupuy, the reason to take soft law seriously as a form of law in international
relations is its indirect effect on and its relationship to more traditionally recognized hard law.

\textsuperscript{111} Christine Chinkin, \textit{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); Dupuy, supra note 108, at 430.
\textsuperscript{112} Dupuy, supra note 108, at 433. \textit{See also} Alan E. Boyle, \textit{Some Reflections on the Relationship of
\textsuperscript{113} See Jennings, supra note 71.
\textsuperscript{114} Chinkin, supra note 111, at 132.
\textsuperscript{115} Dupuy, supra note 108, at 434.
\textsuperscript{116} Id. at 434.
\textsuperscript{117} Id. at 434-435.
“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.”118 Or, as Klabbers, a critic of the term puts it, “[t]he 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.”119

The work of COPs is generally considered to fit easily within this category of soft law. Indeed, Boyle, writing about treaties and soft law, seems to be clearly referring to the activities of COPs within his explanation of soft law’s role. He argues that “although these instruments may not be legally binding, their interaction with related treaties may transform their legal status into something more.”120 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.121 Other commentators also generally refer to consensus-based COP activity as soft law, usually in passing before moving on to discuss in more depth the substance of the activity in question.122

118 Id. at 435. These instruments remain classified as soft law rather than hard 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).
119 Jan Klabbers, 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, “[s]oft 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 112, at 903.
120 Id. at 905.
121 Supra note 1, at 641.
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 that the concept of soft law lacks a coherent theoretical underpinning, lacks support in state practice, or threatens the integrity of the international legal system as a system of laws.

Critics of the notion of soft law frequently focus on the binary aspects of legal obligation. Something is either law or not law. 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. Even those who acknowledge that it may not always be easy to distinguish between what is law and 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.

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

123 Klabbers, supra note 119, at 168.
124 Id.; Raustiala, supra note 102, at 587.
125 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 “[t]hose 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.
126 Raustiala, supra note 102, at 586. “I claim that legality is best understood as a binary, rather than a continuous, attribute.” Id. Cf. Chinkin, supra note 111, at 32 (describing categories of hard and soft law as lying within a continuum that itself is constantly evolving).
128 Raustiala, supra note 102, at 590.
129 Weil, supra note 125, at 417-8.
equivalent to the law they must apply.\textsuperscript{130} 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.”\textsuperscript{131}

These criticisms tell us two important lessons when considering how we should think about consensus-based COP activity. First, they 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. Soft law is still not law and proponents focus on its status as not being hard law, even if they are unwilling to see it as non-law. What is otherwise a binary classification of legal obligation thereby becomes a tripartite classification.

Yet this tripartite classification 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 deepen and thicken the treaty obligations, it is no longer possible to argue that the treaty obligation stands at a hierarchically superior position than the COP obligation. They are inextricably intertwined.

Some commentators seem to touch on this recognition 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 Article 31(3)(a) of the Vienna Convention on the Law of Treaties.\textsuperscript{132} This is discussed in more detail in Section V below. However, this does not mean that the status of COP activity is thereby changed from soft law to hard law. Yet,

\begin{footnotesize}
\begin{enumerate}
\item Klabbers, supra note 119, at 172-177.
\item Id. at 179.
\item VCT, supra note 3, art. 31(3)(a).
\end{enumerate}
\end{footnotesize}
following Klabbers, once a court is willing to use COP activity to interpret the underlying treaty obligation, it would be incoherent to suggest that the COP activity remains as soft law.

However, this 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 obligation. This does not, however, reflect the practice of parties to treaties. Where consensus-based COP activity deepens and thickens the underlying treaty obligation, it does so without ever forming the subject of dispute resolution. Both external and internal decision-making shape the expectations and obligations of the parties in relation to each other under that treaty regime.

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 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. 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 GA resolutions and declarations of UN-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 deepens, or thickens, or both, 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 formal 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?

IV. 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 relation that COP activity has to underlying treaty obligations, using all of the four axes with reference to the COP context.

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 removed from the underlying treaty obligations of the parties that it will not be subject to this
different approach. 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 can be considered hard law, reframing the question allows for a more nuanced approach to international legal obligation and a more careful inquiry into what the parties intend. The 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.

Two different court cases highlight the different results that ensue from reframing the question we ask about consensus-based COP activity. Both cases, one from the United States and the other from the Netherlands, addressed 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 turned at least in part on the characterization of this COP activity as binding or not binding on the parties. Each case took a different approach. Although this difference is attributable at least in part 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. **NRDC v. EPA**

In 2006, the Court of Appeals for the DC 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 that Deplete the Ozone Layer that had changed a number of provisions applicable to the states parties’ production of methyl bromide. 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. The changes had been made by decision of the Montreal Protocol’s Conference of the Parties.

The US had incorporated the treaty into US law through the Clean Air Act, and had made specific provision for automatic incorporation of formal adjustments and amendments to the Protocol. The Clean Air Act said nothing, however, about COP activity that did not fall into either of those categories.

In the initial briefing, only the petitioner – the NRDC – spent any time on the legal status of the COP decisions. 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.

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134 *Id.* at 5.
135 *Id.* at 4-5.
136 *See* 42 U.S.C. § 7671.
137 NRDC v. EPA, *supra* note 133, at 8.
Although both parties agreed that the decisions did not count as formal adjustments, both parties 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, not on the legal status of those decisions.\textsuperscript{139}

The DC 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.\textsuperscript{140} In its decision, the Court concentrated its argument on the fact that the incorporating statute within the US 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 the constitutional requirements of the US that would not allow automatic incorporation of the new provisions,\textsuperscript{141} 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 practice of the parties, unless there were ambiguity in the original agreement. 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.\textsuperscript{142}

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

\textsuperscript{139} Final Opening Brief for Petitioner, NRDC v. EPA, 464 F.3d 1 (D.C. Cir. 2006); Final Brief for the Respondent, NRDC v. EPA, 464 F.3d 1 (D.C. Cir. 2006); Final Reply Brief for Petitioner, NRDC v. EPA, 464 F.3d 1 (D.C. Cir. 2006).

\textsuperscript{140} See NRDC v. EPA, supra note 133, at 5; Supplemental Brief for Petitioner, NRDC v. EPA, 464 F.3d 1 (D.C. Cir. 2006); Supplemental Brief for the Respondent, NRDC v. EPA, 464 F.3d 1 (D.C. Cir. 2006).

\textsuperscript{141} NRDC v. EPA, supra note 133, at 8-9.

\textsuperscript{142} Id. at 9.
mechanisms against the United States.\textsuperscript{143} 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.

The two different ways of asking the question about COP activity’s legal status suggest a reason for this outcome. Focusing on the original obligation and its ambiguity or lack thereof 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 separate 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 the hierarchical status of the modifications when 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 in a higher hierarchical position that a subsequent modification agreed to by consensus of the parties.

However, had the Court been willing to frame the question differently, a different conclusion could have ensued. If the court 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. This is because focusing on the relationship between the two instruments takes away the necessity of determining a hierarchy among the different legal norms – or a choice of axis along which to test legality. This, in turn, might have negated the constitutional arguments for finding that the modifications had not been incorporated into US

\textsuperscript{143} \textit{Id.} at 10.
law, because it would have treated the COP activity as inextricably bound up with the original commitments of the US under the Montreal Protocol, incorporated into US law through legislation.  

Primarily, the decision of the DC Court suggests that when COP activity is judged according to the straight question of whether it is law, there is little room for seeing 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

In 2007, the Netherlands Crown issued an opinion with regard to obligations under the Ramsar Convention that took a very different approach to COP resolutions. 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 Convention because it had failed to complete environmental impact assessments (EIAs). The text of the Ramsar Convention does not require these kinds of assessments explicitly. However, COPs to the Ramsar Convention had elaborated on the wise use obligations of the parties to the

144 The Court’s own example of what it regarded as 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.


146 I am reliant on Verschuuren’s translation of his case law annotation for a window into the Crown’s reasoning in this case. Verschuuren, *supra* note 145.
Convention and had concluded recommendations and resolutions that included an obligation to perform EIAs. The Crown drew on these COP resolutions and recommendations in its decision.\footnote{Id. at 2-3.}

The Crown stated that these resolutions and recommendations added to the duties laid down in the Convention itself and were particularly important because the treaty text itself was so sparse.\footnote{Id. at 2.} The Crown referred to the Vienna Convention on the Law of Treaties’ 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. The Crown also noted that the resolutions and recommendations had been adopted by unanimous vote in which The Netherlands had participated.\footnote{Id. at 2.} The Crown concluded that the resolutions and recommendations regarding environmental impact assessments were therefore binding on the Netherlands. Accordingly, a failure to perform EIAs as required by these resolutions and recommendations amounted to a failure to comply with the Ramsar Convention itself.

While the Dutch legal system recognizes international law as automatically incorporated into its own domestic legal system, this alone cannot explain the difference in outcome from the US Court in NRDC v. EPA. Had the Dutch Crown viewed the COP resolutions and recommendations as merely political commitments, as the US 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 not, and would then have had to rank them hierarchically.\textsuperscript{150}

Yet, the Crown does not appear to have approached the question this way. Instead, it seems to have asked what the resolutions were intended to contribute to the legal obligations of the parties under the original treaty.\textsuperscript{151} 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.

The Crown was, implicitly, asking not whether the resolutions were law, but 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.\textsuperscript{152} And they were able to do this without having to answer to whether these resolutions could stand alone outside of their connection to the wise use obligation of the Ramsar Convention.

\textsuperscript{150} This is not only attributable to a difference in the original obligation allowing the tribunal to apply the Vienna Convention’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.
\textsuperscript{151} 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.” \textit{Id.} at 2. \textit{See also supra} note 150.
\textsuperscript{152} \textit{Id.} at 2-3. It could be argued that the difference between the two courts lay in their emphasis on different axes for testing legal status: intent, as expressed by form, versus consent, as expressed by equating consensus with unanimity. However, this 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.
V. 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 deepens and 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 deep and thick legal obligations that are adaptable, shifting over time as the parties develop them through the COPs and its 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. Adaptibility

Relying on consensus-based decision-making 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. This in turn allows for the development of regimes that can respond to changes in scientific knowledge, or even provide for processes to manage uncertainty, without the need for everyone to begin anew with a new treaty. 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 Section II 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 Ramsar Convention and CITES draw on changes in 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 also respond not only to changes in scientific knowledge, but 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 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.

The role of COPs is not limited to technical and scientific activities. 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 the 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 hold the parties to.

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, the COPs allow for the treaty’s obligations to infiltrate national boundaries, so that they can be more easily applied at the local level. This ability to move beyond the international scale is consistent with the multiple, nested scales of management required for sound environmental protection.153 If, as Gardner and Connolly have found, the one thing that US 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.154

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 upwards. It does this by allowing for more participation by

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153 See Bradley C. Karkkainen, Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism, 21 VA. ENVTL. L.J. 189 (2002); Wiersema, supra note 28, at 1251.
NGOs, scientists, and other private parties and, more importantly, by relying on those groups for information that in turn feeds into the possibilities for responding to that information described above. Consensus-based COP activity affects the level of participation of non-governmental organizations\textsuperscript{155} (NGOs) and private individuals, such as scientists and academics in international law-making.\textsuperscript{156} Resolutions and decisions generally provide for more avenues for participation by NGOs and technical and scientific individuals, particularly because resolutions are frequently based on the work of technical bodies, with input from NGOs. Sometimes NGOs work in close partnership with a treaty, tracking information and providing data to the Secretariat and the parties.\textsuperscript{157} Thus, when consensus-based COP activity shapes the obligations of the parties, those obligations of the parties 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. 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

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\textsuperscript{155} The Ramsar Convention has five international organization partners, three of which are NGOs. See http://www.ramsar.org/index_mou.htm. Some of these NGOs provide assistance to the parties.

\textsuperscript{156} For example, the Ramsar Convention’s Scientific and Technical Review Panel includes 17 members: a representative for each of the geographical regions; a representative for each of the Panel’s priority work areas; an a representative for each of the Convention’s International Organization Partners. See http://www.ramsar.org/about/about_strp.htm. [Note also the composition of the Plants and Animals Committees under CITES; and subsidiary bodies under the Montreal Protocol; the Kyoto Protocol and UNFCCC; and the Basel Convention].

\textsuperscript{157} Traffic, for example, contributes information to the CITES Secretariat about illegal traffic in species listed under the Convention. The Ramsar Convention’s authorizing provision for its COP includes the 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, \textit{supra} note 14, art. 7(1).
adaptability does, however, also come with other consequences, which may not be wholly positive for the international legal system.

B. Fragmentation

1. Sectoral Fragmentation\textsuperscript{158}

As COPs become increasingly focused on deepening and 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) itself 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.\textsuperscript{159} The ILC was careful to stress that fragmentation was not an unmitigated evil – the Study Group had changed its name from one that talked about risks to one that talked about difficulties.\textsuperscript{160}


The ILC’s final report focused on difficulties related to the work of tribunals faced with conflicts between different rules. This focus on tribunals is consistent with the heavy focus on fragmentation in the dispute resolution setting, although the ILC’s report went further than some commentators, observing that these conflicts arise not only as a result of an increasing number of tribunals but also as a result of different kinds of fragmentation. However, 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. Although dispute resolution approaches can, as we shall see, play a role in managing this fragmentation, dispute resolution is not the only means of managing it.

If we recognize the contribution to states parties’ international legal obligations that COP activity makes, then our picture of fragmentation begins to look more like this picture. COP activity and the deepening and 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

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issue areas. For example, the climate change regime under the Kyoto Protocol, with its Clean Development Mechanism, does not adequately take into account concerns about biodiversity protection. 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 and increases the likelihood of increasingly self-referential legal systems.

2. Opportunities for Addressing Fragmentation in Dispute Resolution Settings

Reframing the question about the nature of COP activity is not just a question of providing a window into fragmentation, however. It also provides us with ways to manage that fragmentation. This is because reframing the question takes us away from questions about hierarchy of legal norms and provides for a different approach to understanding parties’ legal obligations.\(^{162}\) This in turn has implications for how we manage fragmentation.

The two court cases discussed in Section IV above suggest different ways to treat COP activity. This in turn has implications for 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 Vienna Convention on the Law of Treaties (VCT), which appear to have played a small role in the two court decisions.

\(^{162}\) *Id.* at 1003, arguing that hierarchical schemes to address fragmentation have a “minimal chance of success” and also misunderstand the cause of norm collision.
In its provisions on interpretation, generally regarded as reflecting customary international law, the Vienna Convention on the Law of Treaties Article 31 states that in interpreting a treaty,

(3) There shall be taken into account, as well as context,
   (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.\textsuperscript{163}

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); Article 31(3) was not hierarchically inferior to the context of the treaty.\textsuperscript{164} The order, the ILC stated, followed logic, rather than any hierarchy:

[I]t is only logic that suggests that the elements in paragraph 3 – a subsequent agreement 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 suggest 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.\textsuperscript{165}

‘Subsequent agreement’ under Article 31(3)(a) does not refer to a treaty as such, but only 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.”\textsuperscript{166}

\textsuperscript{163} VCT, \textit{supra} note 3, art. 31(3).
\textsuperscript{164} Cf. L\textsc{ord} M\textsc{c}N\textsc{air}, \textsc{t}he\textsc{ }\textsc{L}aw\textsc{ of }\textsc{T}reaties 429 (1961) (regarding the possibility of reference to subsequent agreement and practice as something applicable only in the case of ambiguity).
\textsuperscript{166} Id. at 221.
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.”\textsuperscript{167} Its value “varies according as it shows the common understanding of the parties as to the meaning of the terms.”\textsuperscript{168} 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. The Commission considered that the phrase “the understanding of the parties” necessarily meant “the parties as a whole.” 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.”\textsuperscript{169}

The ILC spent almost no ink elaborating Article 31(3)(c), and this provision is addressed further below.

Commentators have periodically suggested that the provisions of the VCT on subsequent agreements might be used to allow for COP resolutions and decisions to be relevant to a dispute resolution body interpreting a treaty.\textsuperscript{170} This would not automatically change the status of 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 device, it will be hard for that tribunal to use COP activity to override an existing treaty obligation.\textsuperscript{171}

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

\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id. at 222.
\textsuperscript{170} See, e.g., Churchill and Ulfstein, supra note 1, at 641.
\textsuperscript{171} Klabbers, supra note 119, at 172-177.
step of determining that COP activity is actually hard law fitting within traditional categories of international law.

This is because the VCT’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 decision-making even without a declaration that it is hard international law.

This alone does not, however, implicate fragmentation. For this we need to stretch a little beyond current practice. In the dispute resolution context, seeing COP activity in this way 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. This might in turn allow tribunals to look beyond their own treaty’s activities where the same issue is addressed in multiple fora.

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 to determine the status of the precautionary principle in international law, before concluding that the principle had not yet gained legal status. 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. This would, in turn, change 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 engage in a more searching inquiry into the way original obligations have been shaped by subsequent agreement.
This is a far-reaching notion. Even if the VCT 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.\textsuperscript{172} 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 the 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.

The potential for this opportunity to limit systemic fragmentation might be expanded further by reference to Article 31(3)(c) of the VCT, 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. 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.

Arguably, Article 31(3)(c) allows for a tribunal to look beyond its own regime to apply general international law. 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 could have important implications.\textsuperscript{173} Where COP activity is seen as contributing to the legal obligations of the parties and shaping them, this in turn makes it more likely that they can be seen as part of the body of general international law. This is not true, of course, of very

\textsuperscript{172} See ILC, \textit{Fragmentation}, supra note 159.
\textsuperscript{173} \textit{Id.} at 91-97.
technical or specific COP resolutions or decisions, such as allowances for methyl bromide under the Montreal Protocol. But it could be true of interpretations and similar developments under a treaty.

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 a tribunal’s hands.

3. Opportunities to Address 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. 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.

A tribunal is bound to apply a certain set of laws. Thus, although in some instances, the VCT’s interpretive provisions might allow for a review of other regimes’ activity, as suggested in the example of the WTO, this will not always be true. In addition, tribunals in different

174 “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 (2003).

175 ILC, Fragmentation, supra note 159, at 17; Fischer-Lescano and Teubner, supra note 158, at 1021-1022, 1030.

176 See McLachlan, supra note 174, 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
regimes are more likely to feel bound by hierarchies related to jurisdiction and competence, even if the hierarchical status of COP activity is changed.\textsuperscript{177}

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.

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 deeper and thicker obligations incurred by them and their counterparts 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. 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.\textsuperscript{178} Thus, it is not only a tribunal that can be cognizant of another treaty’s interpretation of a term like the precautionary principle; it is also the representatives of states parties that can be cognizant.

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 resolution setting, parties have a tremendous opportunity to become

\begin{footnotes}
\item[177] “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.” McLachlan, supra note 174, at 318.\item[178] 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.” Fishcer-Lescano and Teubner, supra note 158, at 1004. See also id. at 1017-1019, 1045-1046.\end{footnotes}
aware of the possibilities of cooperation and collaboration, borrowing and learning across different sectoral regimes. This could, in turn, create opportunities for productive learning and development, with a continued deepening and thickening of 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 for accountability. There is no guarantee that COPs will use their power responsibly, working to manage fragmentation in productive ways.

Consensus-based COP activities diminish the role of state consent. The opportunities that COP activity provides for adaptability and managing fragmentation do not change this fact. Increasing delegation can lead to serious concerns about displacement of the state’s role in determining the content of international law. 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 provision for opt-out by a state.

180 See Reweaving the Fabric, supra note 1; COPing with Consent, supra note 1.
181 Paulus, supra note 179.
182 This has been a particular concern in the literature on international organizations. See, e.g., José E. Alvarez, Governing the World: International Organizations as Lawmakers, 31 SUFFOLK TRANSNAT’L L. REV. 591 (2008).
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 related, 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. Development concerns may, for example, gradually shift the focus of some environmental treaties away from their original protective position.

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

183 Wiersema, supra note 28, at 1291-1294.
Further, the activity of COPs is at least as visible as treaty texts, at least in the environmental setting. MEAs have highly accessible websites, with the results of COP activity easily available, including reports of meetings and the supporting documentation for particular resolutions and decisions. Reports of meetings by subsidiary bodies are also posted on these websites. In addition, the non-profit newsletter, the Earth Negotiations Bulletin 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 surrounding this activity. These are all available on the internet and are usually accessible through the website of the relevant MEA. To the extent that information is one means of managing accountability concerns, this accessibility should help.

Finally, the question posed in this article – what relationship does COP activity have 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 Section II, 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 has not deepened or thickened the obligations of the parties under the original treaty, but has materially altered it. 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. Its legal status can then be treated differently from that of other consensus-based COP activity.

When COPs attempt to create new stand-alone provisions through consensus-based activities, this should not be regarded as equivalent to consensus-based COP activity that
deepens and thickens the original treaty obligations. 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 to 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 is proposing that we take consensus-based COP activity seriously simply because this better reflects the reality of how a treaty operates, rather than because the parties actually intended to create new legally normative obligations. As discussed in Section III above, this could be seen as an apologist position that negates the value of international law.\textsuperscript{184}

However, the combination of axes and the way this article poses the question about the role of consensus-based COP activity allows for intent to be one part of the equation in 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. 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 did 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.

\textsuperscript{184} See supra note 102.
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 just as certainly intended to affect how the parties are to understand their international legal obligations under the 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 intended only 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.

VI. Conclusion

Conferences of the Parties to multilateral environmental agreements add to the thickness and depth of states parties’ international legal obligations with 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 the 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.
Using conventional approaches for determining the sources of international law, this COP activity would rarely be classified as hard international law. Indeed, these 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 we should begin asking is not whether COP activity is international law. The question, rather, should be what the relationship of COP activity is to the parties’ underlying treaty obligations. Reframing the question in this way provides us, and tribunals, 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 provides the potential for ways in which we can 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 provides the better approach.