

# Greenish, but with More Dimensions: A Framework for Identifying Binding Instruments of International Environmental Law\*

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## TABLE OF CONTENTS

Introduction . . . . .	485
I. Binding vs. Soft International Law . . . . .	486
II. The Evolving Nature of International Law . . . . .	489
III. A New Framework for Identifying Binding Law . . . . .	493
A. Consent to be Bound . . . . .	494
B. Obligations to Act . . . . .	495
C. Institutional Mechanism to Monitor Compliance . . . . .	496
D. Consequences for Noncompliance (Sanctions) . . . . .	496
IV. Case Studies . . . . .	497
A. Kimberley Process Certification Scheme . . . . .	497
B. Extractive Industries Transparency Initiative . . . . .	502
V. Toward a Broader View of International Law . . . . .	507
Conclusion . . . . .	512

## INTRODUCTION

International law has become increasingly kaleidoscopic.<sup>1</sup> There is a growing diversity of actors, subjects, objectives, obligations, dynamics, and mechanisms. With these innovations, there are numerous international instruments that do not fit squarely into the traditional taxonomy of international law (consisting of treaty, custom, and general principles<sup>2</sup>) but appear to be binding on states.<sup>3</sup> Notwithstanding their binding character, the assumption appears to be that if an

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\* With acknowledgment to the creative minds at Apple: “My favorite color is . . . well, I don’t know how to say it in your language. It’s sort of greenish, but with more dimensions.” – Siri.

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1. EDITH BROWN WEISS, *ESTABLISHING NORMS IN A KALEIDOSCOPIC WORLD* 52–53 (2018).

2. *See, e.g.*, Statute of the International Court of Justice, art. 38.

3. *See, e.g.*, Sean D. Murphy, *Book Review of Alan Boyle and Christine Chinkin, The Making of International Law*, 104 AM. J. INT’L L. 697 (2010) (“the standard account of the four ‘sources’ of

instrument does not fall within the traditional taxonomy of international law that it is nonbinding or “soft.”<sup>4</sup>

This Article calls for an updating of the conceptualization of international law. The evolving nature of global governance, particularly as it responds to new challenges, compels a reconsideration of what constitutes international environmental law, and by extension, what constitutes international law.<sup>5</sup> There is also a need to transpose our reconceptualization of the taxonomy of international law to the broader context of what constitutes binding international law. Toward that end, we propose a framework for analyzing whether an international instrument is binding, even if it is currently outside the traditional taxonomy of what constitutes international law.

Our analysis focuses on whether a particular instrument may be deemed binding or nonbinding. It builds on the extensive literature analyzing the binding/soft law divide<sup>6</sup> and draws upon observations regarding a range of international instruments and frameworks that are neither treaty nor custom nor general principles. To the extent that a particular instrument may be deemed to be binding, it should be considered international law, even if it does not fit within the traditional taxonomy.

Following a review of the traditional views on binding international law versus “soft law” (in Part I) and the evolving nature of international law (in Part II), we propose (in Part III) a new framework for identifying “binding law” utilizing four criteria: (1) consent to be bound; (2) requirement to fulfill obligations; (3) monitoring by institutional mechanisms, and (4) sanctions for noncompliance. In Part IV, we apply these criteria to two specific examples—the Extractive Industries Transparency Initiative (“EITI”) and the Kimberley Process Certification Scheme (“KPCS”). In Part V, the Article analyzes the relevance of these criteria for international law broadly, and to other international instruments and measures. The Article concludes by highlighting a few unresolved questions.

## I. BINDING VS. SOFT INTERNATIONAL LAW

To determine whether a particular international environmental norm or set of norms is binding, or whether it is merely “soft” law, it is necessary to consider the

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international law seems woefully incomplete and must give way to a much richer explanation of how international legal norms can and do emerge”).

4. See, e.g., LYNNE M. JURGIELEWICZ, *GLOBAL ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: PROSPECTS FOR PROGRESS IN THE LEGAL ORDER* 45–48 (1996). For the purposes of this Article, “international law” refers to binding international law and does not include nonbinding “soft law.”

5. BROWN WEISS, *supra* note 1, at 52–53; JOEL P. TRACHTMAN, *THE FUTURE OF INTERNATIONAL LAW: GLOBAL GOVERNMENT* (2013); CHRISTOPHER C. JOYNER, *INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE* (2005); Sabino Cassese, *Administrative Law without the State? The Challenge of Global Regulation*, 37 N.Y.U. J. INT’L L. & POL. 663 (2005).

6. See, e.g., Barnali Choudhury, *Balancing Soft and Hard Law for Business and Human Rights*, 67 INT’L & COMP. L. Q. 961 (2018); Jon Birger Skjærseth et al., *Soft Law, Hard Law, and Effective Implementation of International Environmental Norms*, 6 GLOBAL ENVTL. POL. 104 (2006).

nature of “binding” and “soft” international law more broadly. Providing a clear definition of the terms binding and soft international law is complicated, especially considering the legal divisions over the use of these terms where even legal positivists cannot agree. For instance, some define the terms through a binding/nonbinding lens, whereas others do not agree on the existence of soft law as law cannot be binding only to a certain degree.<sup>7</sup> Rational institutionalist scholars believe that the term “binding” is misleading, but its use still matters as it highlights that a state is serious in pursuing its international commitments as not doing so entails reputational costs.<sup>8</sup> Constructivist scholars believe that this distinction is an illusion as the effectiveness of efforts to implement international law varies even at the domestic level.<sup>9</sup>

Even in the realm of soft law, scholars have different understandings and approaches to what exactly constitutes soft law. For instance, Ilhami Alkan Olsson makes a distinction between four different approaches to soft law, such as treaty soft law and nonbinding soft law, on the basis of which Olsson calls for a reconsideration of international soft law.<sup>10</sup> It is noteworthy that most distinctions between binding law and soft law focus either on negotiations (intent) or implementation of international law.<sup>11</sup> The absence of clear definitions of the terms “binding” and “soft” law has led scholars, such as Kal Raustiala, to reject the classification as they imply “an ill-defined range of quasi-legal agreements between those agreements that are purely political and those that are legally binding.”<sup>12</sup> This debate was and is still taking place in the context of a general discussion concerning the *raison d’être* of the international legal system, its legitimacy, the reasons for which states comply with the rules, and the ways the system is constantly evolving.<sup>13</sup>

This Article employs the definition of “binding law” provided by Kenneth W. Abbott and Duncan Snidal: “legally binding obligations that are precise (or can

7. Gregory C. Shaffer & Mark A. Pollack, *Hard Versus Soft Law in International Security*, 52 B.C. L. REV. 1147, 1159 (2011).

8. Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 713 (2010).

9. *Id.*

10. Ilhami Alkan Olsson, *Four Competing Approaches to International Soft Law*, 58 SCANDINAVIAN STUD. L. 177 (2013). Despite such attempts, there are many challenges facing the label “soft law” and its position in the international legal order. C. M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L. Q. 850, 850 (1989).

11. Shaffer & Pollack, *supra* note 8, at 715–16.

12. Timothy L. Meyer, *Soft Law as Delegation*, 32 FORDHAM INT’L L.J. 888, 906 (2009).

13. On these points see, Ronald Dworkin, *A New Philosophy for International Law*, 41 PHIL. & PUB. AFF. 1 (2013); Joseph H. H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, 64 ZaöRV. 547 (2004); Mattias Kumm, *The Legitimacy of International Law: A Constitutional Framework of Analysis*, 15 EUROPEAN J. INT’L L. 907 (2004); Christopher A. Thomas, *The Uses and Abuses of Legitimacy in International Law*, 34 OXFORD J. LEGAL STUD. 729 (2014); Adamantia Rachovitsa, *Fragmentation of International Law Revisited: Insights, Good Practices, and Lessons to be Learned from the Case Law of the European Court of Human Rights*, 28 LEIDEN J. INT’L L. 863 (2015).

be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.”<sup>14</sup>

Binding and soft international law have their respective benefits and limitations. For instance, it is argued that the use of binding international law helps “international actors reduce transactions costs, strengthen the credibility of their commitments, expand their available political strategies, and resolve problems of incomplete contracting[.]” but also “restricts actors behaviour and even their sovereignty.”<sup>15</sup> In contrast, the use of soft law “lower[s] ‘sovereignty costs’ on states in sensitive areas; provide[s] greater flexibility for states to cope with uncertainty and learn over time; [and] allow[s] states to be more ambitious and engage in ‘deeper’ cooperation than they would if they had to worry about enforcement.”<sup>16</sup> Some scholars have called for a pragmatic approach in which soft or binding law instruments “should be selected depending on the characteristics of the issue and the negotiating and institutional context in question.”<sup>17</sup> Soft law appears to play several roles: it can be an alternative to binding international law, complement it, or provide means for interpreting and understanding it.<sup>18</sup>

The binding/soft law debate begs the question of why states choose to commit through clear legal obligations in certain cases, yet in other cases decide to use soft law mechanisms,<sup>19</sup> let alone why states often comply with soft law.<sup>20</sup> The need for and benefits of cooperation among states is often emphasized.<sup>21</sup> In fact, the lines between soft and binding law are becoming somewhat blurred as soft law is increasingly used to reach an agreement, particularly concerning sensitive issues.<sup>22</sup> The use of soft law has increased with the emergence of disruptive, new technologies, that are challenging traditional governance frameworks.<sup>23</sup>

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14. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORGANIZATION. 421, 421 (2000). Abbott and Sindal posit that “[t]he realm of ‘soft law’ begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation.” *Id.* at 422.

15. *Id.*

16. Shaffer & Pollack, *supra* note 8, at 719.

17. *Id.* at 721; *see also* Arnold Pronto, *Understanding the Hard/Soft Distinction in International Law*, 48 VAND. J. TRANSNAT’L L. 941 (2015) (arguing that both types of law exist simultaneously where the context and the limits are usually provided by binding laws, whereas the details are left for soft law instruments to fill).

18. Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT’L & COMP. L. Q. 901, 913 (1999).

19. Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 179 (2010).

20. Alexandre Flückiger, *Why Do We Obey Soft Law?*, in REDISCOVERING PUBLIC LAW AND PUBLIC ADMINISTRATION IN COMPARATIVE POLICY ANALYSIS: A TRIBUTE TO PETER KNOEPFEL 45, 45 (Stéphane Nahrath & Frédéric Varone eds., 2009).

21. Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUROPEAN J. INT’L L. 499, 502 (1999).

22. *Id.* at 501.

23. Ryan Hagemann et al., *Soft Law for Hard Problems: The Governance of Emerging Technologies in an Uncertain Future*, 17 COLO. TECH. L.J. 37, 40–42 (2018).

The classification of binding vs. soft international law is not so much a division, but rather represents a spectrum where soft law is located between binding law and politics, and its relevance becomes stronger as the commitments of states weaken and, in many instances, disappear.<sup>24</sup> In that sense, soft law represents a middle of the road strategy between full international law and the complete absence of commitments.<sup>25</sup> In these cases, soft law can be more ambitious and may lead to action by more states.<sup>26</sup>

## II. THE EVOLVING NATURE OF INTERNATIONAL LAW

International law has changed substantially since its early roots. In recent decades, international environmental law has been at the forefront of these changes.<sup>27</sup> This Part explores the drivers of changes in international law and the ultimate changes wrought. In particular, it highlights the rise of a number of international environmental measures, instruments, and frameworks that appear to be binding on states but are not treaties, custom, or general principles of international law—and, as such, fall outside the traditional taxonomy of international environmental law and international law more broadly.

In its modern form, international law was founded on Westphalian sovereignty in which states constitute the core of the international legal system and can choose the degree of their involvement with their consent being paramount.<sup>28</sup> International law has undergone several periods of development, mainly since the 1900s, where the primary focus was regulating matters such as diplomacy and armed conflicts.<sup>29</sup> Before that, there were relatively few treaties and fewer international organizations. Initial efforts to create an international system after the First World War (notably the League of Nations) were largely ineffectual.<sup>30</sup> With the Second World War coming to a close, states created stronger institutions, including the United Nations (“UN”) and the International Bank for Reconstruction and Development. Since then, states have created numerous international instruments and organizations, even as the international scene changed dramatically as a result

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24. Guzman & Meyer, *supra* note 19, at 173.

25. *Id.* at 180.

26. Dinah Shelton, *International Law and ‘Relative Normativity’*, in INTERNATIONAL LAW 141, 168 (Malcolm D. Evans ed., 3d ed. 2010).

27. Marcella David, *International Law and Practice in Times of Change*, 13 WASH. U. GLOBAL STUDIES L. REV. 453 (2014); VED NANDA & GEORGE PRING, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY FOR THE 21ST CENTURY (2d ed. 2013).

28. William W. Burke-White & Anne-Marie Slaughter, *The Future of International Law is Domestic (or, The European Way of Law)*, 47 HARV. INT’L L.J. 327, 328 (2006). On the diversity of consent, see Jutta Brunnée, *Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING (Rüdiger Wolfrum & Volker Röben eds., 2005).

29. BROWN WEISS, *supra* note 1, at 52–53.

30. *Id.*; Michael Smith, *The League of Nations and International Politics*, 2 BRITISH J. OF INT’L STUD. 311 (1976).

of events such as decolonization, the Cold War, and its end.<sup>31</sup> The evolution has continued, with more changes leading to a new international system.<sup>32</sup> Edith Brown Weiss highlights four major factors that contributed to the emergence of the kaleidoscopic world:

the globalization of the economic and financial sectors with effects far beyond national borders; the development and widespread dispersion of information and communications technologies to all regions of the world; the empowering of people from the bottom-up as well as the facilitating of control from the top-down; and the dispersion of dangers whether from disease, climate change or scientific developments in synthetic biology, geoengineering, cyber space, artificial intelligence, or digital currencies.<sup>33</sup>

These factors have both required the international system to evolve and enabled that evolution. In turn, that evolution has challenged traditional framings of international law.

Traditionally, international law comprises binding agreements, customary international law, and general principles of international law,<sup>34</sup> and there is strict separation between public international law and private international law,<sup>35</sup> and between international law and domestic law.<sup>36</sup> These basic tenets are being challenged, with the lines between public international law, private international law, and domestic law becoming increasingly indistinct. Public international law has begun addressing issues that were until recently under the sole competences of private international law (such as employment relationships and family law).<sup>37</sup>

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31. BROWN WEISS, *supra* note 1, at 52–53; Carl Bruch et al., *The Changing Nature of Conflict, Peacebuilding, and Environmental Cooperation*, 49 ENVTL. L. REP. 10134, 10137–41 (2019).

32. BROWN WEISS, *supra* note 1, at 52–53.

33. *Id.* at 54.

34. See Craig Eggett, *The Role of Principles and General Principles in the 'Constitutional Processes' of International Law*, 66 NETH. INT'L L. REV. 197, 202–07 (2019); Anastasios Gourgourinis, *General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System*, 22 EUROPEAN J. INT'L L. 993, 1004–10 (2011); Olufemi Elias & Chin Lim, 'General Principles of Law', 'Soft' Law and the Identification of International Law, 28 N.Y. J. INT'L L. 3, 4 (1997).

35. Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 280–81 (1982); Armin von Bogdandy et al., *From Public International to International Public Law: Translating World Public Opinion into International Public Authority*, 28 EUR. J. INT'L L. 115, 118–19 (2017).

36. Wayne Sandholtz, *How Domestic Courts Use International Law*, 38 FORDHAM. INTL. L. J. 595, 595–97 (2015); Fulvio Maria Palombino, *Compliance with International Judgments: Between Supremacy of International Law and National Fundamental Principles*, 75 ZaöRV. 503, 506–08 (2015); Charles Leben, *Hans Kelsen and the Advancement of International Law*, 9 EUR. J. INT'L L. 287, 292–98 (1998).

37. See generally Alex Mills, *Connecting Public and Private International Law*, in LINKAGES AND BOUNDARIES IN PRIVATE AND PUBLIC INTERNATIONAL LAW 13–31 (Veronica Ruiz Abou-Nigm et al. eds., 2018); ALEX MILLS, *THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW: JUSTICE, PLURALISM AND SUBSIDIARITY IN THE INTERNATIONAL CONSTITUTIONAL ORDERING OF PRIVATE LAW* (2009).



Additionally, private international law has increasingly dealt with topics that were and still are under the competences of governments, such as transnational environmental standards and health and safety regulations.<sup>38</sup> In a growing number of international instruments, private sector actors agree to adhere to guiding principles, such as the Chemical Manufacturers Association's Responsible Care Guiding Principles<sup>39</sup> or the International Chamber of Commerce's Business Charter for Sustainable Development Principles.<sup>40</sup> The lines between international public law and domestic law are also being blurred with, for example, domestic laws being applied extraterritorially.<sup>41</sup>

The modern changes in the international system of environmental governance have greatly affected the development of international law, and the rapid pace of the evolution presents numerous challenges. Although the state remains the main actor at the international and national level, the changes resulting in a new globalized legal system have led to the emergence of other actors, mainly "subnational governments in countries, including cities, transnational networks, informal and ad hoc coalitions, local communities, and, importantly individuals."<sup>42</sup>

With the changes that have occurred and are continuing to occur, many scholars have become concerned with the structure and definitions of international law.<sup>43</sup> These concerns stem in part from the fact that international law has evolved from traditionally being based exclusively on state consent to including other actors and stakeholders.<sup>44</sup> This has led to confusion concerning the role of the state within the modern international legal system.<sup>45</sup> The involvement of multiple actors globally led to the emergence of new questions related to the responsibility of states and non-state actors within international legal systems for actions ranging from pollution to terrorism to trade in environmental contraband.

The numerous pressing challenges and the concomitant desire to move flexibly and rapidly led to another important development: commitments by states that may be binding or nonbinding.<sup>46</sup> These approaches have the benefit of not

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38. BROWN WEISS, *supra* note 1, at 68.

39. *A Global Vision for Responsible Care*, INTERNATIONAL COUNCIL OF CHEMICAL ASSOCIATIONS, <https://perma.cc/94XD-L3CR> (last visited Feb. 18, 2020).

40. *ICC Business Charter for Sustainable Development 2015*, INTERNATIONAL CHAMBER OF COMMERCE, <https://perma.cc/S2Z3-H2N5> (last visited Feb. 18, 2020).

41. BROWN WEISS, *supra* note 1, at 68–71.

42. *Id.* at 51–52.

43. Roozbeh B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 EUROPEAN J. INT'L L. 173, 203 (2010).

44. David Zaring, *Legal Obligation in International Law and International Finance*, 48 CORNELL INT'L L.J. 175, 176 (2015).

45. Roozbeh B. Baker, *Customary International Law: A Reconceptualization*, 41 BROOK. J. INT'L L. 439, 449 (2016); JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 3–20 (2006) (expressing that international law has limits that cannot be overcome); Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 816 (2009) (viewing international law as a threat to democracy).

46. BROWN WEISS, *supra* note 1, at 103.

requiring international consensus before acting. Sometimes, these are common commitments made by a group of like-minded states, such as the Extractive Industries Transparency Initiative (“EITI”) or the Kimberley Process Certification Scheme (“KPCS”)—both of which are discussed below. Sometimes, the commitments are made unilaterally in a broader framework, such as the nationally determined contributions that states made to reduce greenhouse gas emissions pursuant to the Paris Agreement.<sup>47</sup>

There are at least three other classes of international instruments that are binding, or arguably binding, even though they do not fit within the classic taxonomy of international law: decisions of Conferences of the Parties (“COPs”);<sup>48</sup> international standards, such as the ones adopted by the International Organization for Standardization (“ISO”) and the Codex Alimentarius Commission (“Codex”);<sup>49</sup> and declarations of principles.<sup>50</sup> Generally, declarations of principles are nonbinding,<sup>51</sup> but certain declarations—including the 1948 Universal Declaration of Human Rights, the 1972 Stockholm Declaration, and the 1992 Rio Declaration<sup>52</sup>—have come to be seen as both reflecting customary international law and, at times, supporting the development of further customary international law and treaty law.<sup>53</sup> For example, numerous Rio principles—including those related to precaution, public participation, polluter-pays, and common-but-differentiated responsibilities—have been incorporated into domestic legislation and international treaties.<sup>54</sup> Hence, one would wonder whether such instruments

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47. *Id.* at 101–02.

48. See Annecoos Wiersema, *The New International Law-Makers? Conferences of the Parties to The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements*, 31 MICH. J. INT'L. L. 231, 259–64 (2009); *infra* notes 195–200 and accompanying text.

49. ALEXANDRE CHARLES KISS & DINAH SHELTON, A GUIDE TO INTERNATIONAL ENVIRONMENTAL LAW 9–11 (2007); Dario Bevilacqua, *The Codex Alimentarius Commission and its Influence on European and National Food Policy*, 1 EFFL 3, 15–16 (2006).

50. Benedict Kingsbury et al., *The Emergency of Global Administrative Law*, 68 L. & CONTEMPORARY PROBLEMS 15, 15–18 (2005); Hiram Chodosh, *Neither Treaty nor Custom: The Emergence of Declaratory International Law*, 26 TEXAS INT'L L.J. 87, 89–91 (1991); HUMBERTO ZÚÑIGA SCHRODER, HARMONIZATION, EQUIVALENCE AND MUTUAL RECOGNITION OF STANDARDS IN WTO LAW 7–10 (2011).

51. *E.g.*, Declaration of the Rights of the Child adopted in 1959 & Declaration on the Rights of Indigenous Peoples adopted in 2007.

52. United Nations Universal Declaration of Human Rights, adopted in 1948; Declaration of the United Nations Conference on the Human Environment Stockholm, 16 June 1972; Rio Declaration on Environment and Development Rio de Janeiro, 14 June 1992.

53. Virginie Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, 23 EUR. J. INT'L L. 377, 377–400 (2012); Sumudu Atapattu, *International NON-STATE ACTORS, SOFT LAW AND PROTECTIVE REGIMES: FROM THE MARGINS 200*, 200–26 (Cecilia M. Bailliet eds., 2012); Andronico O. Adede, *The Treaty System from Stockholm (1972) to Rio de Janeiro The Treaty System from Stockholm (1972) to Rio de Janeiro (1992)*, 13 PACE. ENVTL. L. REV. 33, 33–48 (1995).

54. Francesco Francioni, *Twenty Five Years on: What is Left of the Rio Declaration on Environment and Development*, 11 INTERCULT. HUM. RIGHTS LAW REV. 15, 15–32 (2016); Carl Bruch & Meg Filbey, *Emerging Global Norms of Public Involvement*, in THE NEW “PUBLIC”: THE GLOBALIZATION OF PUBLIC PARTICIPATION 1, 11 (2002); David A. Wirth, *The Rio Declaration on Environment and Development*:



can still be considered soft law or if they have acquired a new status—or if the status of the declarations remains as before (nonbinding), but they are now aligned with or reflective of international law.

### III. A NEW FRAMEWORK FOR IDENTIFYING BINDING LAW

This Article argues that there are international instruments that are not treaties but are functionally binding and thus constitute binding international law. To ascertain whether a particular international instrument is binding, we propose four criteria: consent to be bound, obligations to act, an institutional mechanism for monitoring compliance, and consequences for noncompliance (sanctions).

It is worth noting that these criteria are not the minimum requirements for a particular instrument or provision to be international law. Some multilateral environmental agreements (“MEAs”) have weak obligations to act (with largely permissive language), not all have institutional mechanisms explicitly charged with monitoring compliance, and sanctions for noncompliance are uncommon in both the agreement and in practice.<sup>55</sup> Yet, few people dispute that MEAs are international law, primarily because the states clearly articulated their consent to be bound both in the instrument and then through their actions (such as depositing their instruments of ratification). Customary international law comprises both consent and obligations to act.<sup>56</sup> It does not create an institutional mechanism for monitoring compliance, but the International Court of Justice does have the ability to hear cases related to customary international law.<sup>57</sup> Consequences for noncompliance with customary international law are relatively modest, comprising responsibility and in theory the possibility of liability.<sup>58</sup>

It is clear that where the traditional taxonomy already recognizes particular sources (for example, treaties or custom), those sources do not need to satisfy

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*Two Steps Forward and One Back, or Vice Versa*, 29 GEORGIA L. REV. 599, 611–13, 634–37, 640–48 (1995).

55. See MALGOSIA FITZMAURICE ET AL., *MULTILATERAL ENVIRONMENTAL TREATIES* (2017); MICHAEL BOTHE, *ENSURING COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS: A DIALOGUE BETWEEN PRACTITIONERS AND ACADEMIA* 247, 247–58 (Ulrich Beyerlin, Peter-Tobias Stoll & Rüdiger Wolfrum eds., 2006); Nele Matz, *Financial and Other Incentives for Complying with MEA*, at 301–18 of the same book; Nordic Council of Ministers Staff, *The Effectiveness of Multilateral Environmental Agreements: A Report from a Nordic Project* (1996).

56. Wiersema, *supra* note 48, at 232–87; see generally Nils Goeteyn & Frank Maes, *Compliance Mechanisms in Multilateral Environmental Agreements: An Effective Way to Improve Compliance?*, 10 CHIN. J. INT. L. 791 (2011).

57. ICJ Statute, art. 38(1)(b); Niels Petersen, *The International Court of Justice and the Judicial Politics of Identifying Customary International Law*, 28 EUR. J. INTL. L. 357, 357–59 (2017); ROBERT KOLB, *THE INTERNATIONAL COURT OF JUSTICE* 65–67 (2013).

58. See generally Pierre-Hugues Verdier & Erik Voeten, *Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory*, 108 AM. J. INT’L L. 389 (2014); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999).

these criteria. The question is how to ascertain whether non-traditional instruments are binding.

Rather than constituting minimum requirements for international law, these criteria should be viewed as sufficient (but not necessary) to conclude that an international instrument is international law. An instrument that meets all criteria should thus be considered international law; and an instrument that meets most or substantially all of the criteria would have a credible claim to being considered binding international law.<sup>59</sup> The following four sections analyze the four criteria proposed for determining whether a particular international instrument (environmental or otherwise) is binding on states, even if it is not a treaty.

#### A. CONSENT TO BE BOUND

Traditionally, the concept of consent to be bound meant that a state decides whether an instrument is binding law; and when the state does not intend (or consent) to be bound, the instrument is soft law.<sup>60</sup> According to the Article 11 of the Vienna Convention of 1969: “The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.”<sup>61</sup> Even though Article 11 provides States with broad freedom in *how* they express consent,<sup>62</sup> it does not, however, clarify *what constitutes* consent as it “does not attempt to provide further elements on the precise nature of the consent to be bound.”<sup>63</sup> Because the Vienna Convention applies expressly to treaties, caution should be exercised regarding its direct application to non-treaty instruments. Nevertheless, analysis of state practice in manifesting consent to be bound to international instruments that are not treaties may look to state practice under the Vienna Convention.<sup>64</sup>

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59. Jasper Krommendijk, *The Domestic Effectiveness of International Human Rights Monitoring in Established Democracies. The Case of the UN Human Rights Treaty Bodies*, 10 REV. INT'L ORGANIZATIONS. 489, 491–92 (2015). Although this Article argues that these four criteria are sufficient, it does not analyze what is considered the necessary minimum for an instrument to be considered binding.

60. Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 583 (2005).

61. Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969, entered into force 27 January 1980, UNTS 18232, art. 11.

62. JAN KLABBERS, *THE CONCEPT OF TREATY IN INTERNATIONAL LAW* 72–73 (1996).

63. Frank Hoffmeister, *Article 11. Means of Expressing Consent to be Bound by a Treaty*, in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 169 (Oliver Dörr & Kirsten Schmalenbach eds., 2d ed. 2018).

64. Some have argued that in the absence of a binding convention, the intent to be bound is a limited one as states are looking to have a commitment that does not entail the legal consequences of a treaty. See, e.g., Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT'L L. 499, 506 (1999); ULF LINDERFALK, *ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* 9–20 (2007).

Consent to be bound by an international instrument that is not a treaty may be discerned by analysis of both form and function comprising, respectively, whether there is express consent to be bound (or an express statement to the contrary) and the functional nature of the instrument. Discerning a formal statement of consent is often straightforward, and a number of instruments contain explicit statements that they are “nonbinding” or “voluntary.”<sup>65</sup> Discerning consent can be complicated, though, by the functional nature of the instrument which may include mandatory provisions, institutional mechanisms for monitoring compliance, and consequences for noncompliance.

Explicit statements regarding consent to be bound must be analyzed in the broader context of the instrument. If an instrument establishes requirements for states to adopt and enforce implementing legislation, states (generally) adhere to those requirements, there are procedures to monitor state compliance, and there are consequences for noncompliance, then the function of sustained state membership and engagement in what appears to be a binding regime can overcome formal statements by states regarding the nature of the instrument. Where states comply as if the obligations were stipulated within binding agreements and create an architecture to ensure compliance, those obligations represent binding law. Simply asserting that up is down does not change gravity, nor does calling an instrument “nonbinding” mean that what is otherwise a binding regime suddenly loses its binding functionalities.

States and scholars often distinguish treaties from “voluntary” instruments.<sup>66</sup> This ignores the fact that states enter into treaties voluntarily; they choose which treaties to join, and which ones not to join; and they decide when to join and when to withdraw. Moreover, this argument often ignores the content of the so-called voluntary instrument that compels states to adopt and implement legislation in order to be a member and has other indicia of being a binding regime. As such, states elect whether to join both treaties and so-called voluntary instruments, but once they do, they must abide by them or risk consequences.

## B. OBLIGATIONS TO ACT

Obligations for states to act is the second criterion for determining whether an international instrument is binding. Scholars often argue that nonbinding legal instruments do not produce any legal obligations, making it easier for states to

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65. *E.g.*, *FAQ*, KIMBERLEY PROCESS, <https://perma.cc/ZF7H-K7JC> (last visited Feb. 6, 2020) (stating that the KP is not an “international organization,” nor is it an “international agreement from a legal perspective”).

66. For example, in the global environmental sphere, Thomas Hickmann identifies three types of voluntary business regulations: “(i) voluntary agreements between business actors and governmental agencies, (ii) partnerships for sustainable development, and (iii) corporate self-commitments to engage in the mitigation of environmental problems.” THOMAS HICKMANN, *RETHINKING AUTHORITY IN GLOBAL CLIMATE GOVERNANCE: HOW TRANSNATIONAL CLIMATE INITIATIVES RELATE TO THE INTERNATIONAL CLIMATE REGIME* 145 (2016).

agree on a (nonbinding) way to address a particular problem or set of problems.<sup>67</sup> This is particularly true for statements of principles, which advance certain policies in a nonbinding manner before states are willing to commit to making them binding.<sup>68</sup>

Although this may be the case for many instruments that are unquestionably nonbinding, a growing number of international instruments establish specific obligations for states (and sometimes non-state actors). These instruments can be at least as effective as treaties in driving states to act.<sup>69</sup> Through these instruments, states commit to adopting new domestic legislation or amending existing legislation, and they often commit to implementing and enforcing that legislation. In fact, some instruments (such as the KPCS)<sup>70</sup> have more explicit and detailed obligations on implementation and enforcement than most MEAs. They may also create new institutions responsible for implementation and/or enforcement. Often, states commit to periodically report on their actions to implement and otherwise adhere to the substantive obligations of the instrument.<sup>71</sup>

### C. INSTITUTIONAL MECHANISM TO MONITOR COMPLIANCE

The third criterion for whether an instrument is binding is whether it creates an institutional mechanism and procedures to monitor compliance, particularly compliance by states. If an instrument is nonbinding, there is little need to monitor compliance. When states create institutions and procedures for monitoring compliance and resolving disputes, it is an indication that there is an expectation of compliance. And if there are consequences for noncompliance—the fourth criterion—the expectation of compliance should be considered a binding requirement. The establishment of a mechanism to monitor compliance as an indicator of binding international law is enhanced when it has operated, and it is further enhanced when determinations of noncompliance lead to state actions to cure the noncompliance or to the application of sanctions.

### D. CONSEQUENCES FOR NONCOMPLIANCE (SANCTIONS)

The fourth and final criterion for ascertaining whether an international instrument is binding is whether there are consequences for noncompliance, particularly

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67. ROSA FREEDMAN, *THE UNITED NATIONS HUMAN RIGHTS COUNCIL: A CRITIQUE AND EARLY ASSESSMENT* 76 (2015).

68. DONALD ROTHWELL, *INTERNATIONAL LAW: CASES AND MATERIALS WITH AUSTRALIAN PERSPECTIVES* 664 (2d ed. 2014).

69. *Cf.* JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW* 201 (2009).

70. *See* Section IV.A below.

71. *E.g.*, Admin. Decision, KPCS Peer Review System (2012) § I, <https://perma.cc/A6T4-Y8RK> (last visited Feb. 6, 2020) [hereinafter Peer Review System] (Participants commit to preparing annual reports detailing the ways in which they are implementing the requirements of the Kimberley Process).

for states.<sup>72</sup> Consequences may include suspension of the state's membership, expulsion, and (in some instances) trade implications.<sup>73</sup> There are also political consequences that can hold significance.<sup>74</sup> These consequences are comparable to consequences for noncompliance with treaties, although lacking both responsibility and liability which can flow from noncompliance with treaties.<sup>75</sup>

#### IV. CASE STUDIES

There are a myriad of international instruments that are not treaties or otherwise traditionally considered binding international law but are in effect binding. This Part examines two prominent examples—the Kimberley Process Certification Scheme (“KPCS”) and the Extractive Industries Transparency Initiative (“EITI”)—in light of the four criteria for identifying binding international law presented in Part III. This analysis concludes that under the four criteria, both the Kimberley Process Certification Scheme and the Extractive Industries Transparency Initiative could credibly be considered binding international law. These criteria are further examined in light of other international instruments in Part V.

##### A. KIMBERLEY PROCESS CERTIFICATION SCHEME

The KPCS was created as an attempt to stop the trade in conflict diamonds—that is, diamonds which financed civil wars and gross violations of human rights<sup>76</sup>—and to ensure that diamond purchases are not funding violence.<sup>77</sup> In 2000, the UN General Assembly adopted a resolution that supported the creation of an international certification scheme for rough diamonds.<sup>78</sup> After negotiations between governments, the diamond industry, and civil society, the KPCS

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72. Sanctions may also be imposed on nonstate actors (such as multinational corporations) that fail to comply. Stephane Brabant, Anna Kirk & Jonathan Proust, *States, Sanctions and Soft Law: An Analysis of Differing Approaches to Business and Human Rights Frameworks*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: IN MEMORIAM THOMAS WÄLDE* 383, 386 (Todd Weiler & Freya Baetens eds., 2011); see also GOLDSMITH & POSNER, *supra* note 45 (law must be backed up with centralized and effective sanctions).

73. Daniel E. Ho, *Compliance and International Soft Law: Why Do Countries Implement the Basel Accord?*, 5 J. INT'L ECON. L. 647, 647–50 (2002).

74. Tadeusz Gruchalla-Wesierski, *A Framework for Understanding “Soft Law”*, 30 MCGILL L.J. 37, 40 (1984).

75. For arguments that states have more limited responsibility in case of noncompliance with non-treaty instruments, see Boyle, *supra* note 18, at 903. “[H]ard law, soft law, and purely political agreements lie on a continuum in terms of their ability to generate compliance.” Andrew T. Guzman & Timothy L. Meyer, *International Common Law: The Soft Law of International Common Law: The Soft Law of International Tribunals*, 9 CHI. J. INT'L L. 515, 519 (2009).

76. For more information on conflict diamonds and other conflict resources, see Mark B. Taylor & Mike Davis, *Taking the Gun out of Extraction: UN Responses to the Role of Natural Resources in Conflicts*, GOVERNANCE, NATURAL RESOURCES, AND POST-CONFLICT PEACEBUILDING 249–76 (Carl Bruch, Carroll Muffett & Sandra S. Nichols eds., 2016).

77. *About*, KIMBERLEY PROCESS, <https://perma.cc/WJW2-VXME> (last visited Feb. 6, 2020).

78. *Id.*

“entered into force” in 2003.<sup>79</sup> The KPCS is open to all countries who are able to implement its requirements, and it currently has fifty-four Participants (that is, participating countries).<sup>80</sup> It covers 99.8% the global trade in rough diamonds.<sup>81</sup> We now consider the KPCS in light of the four criteria: state intent, obligations, monitoring compliance, and consequences for noncompliance.

Analysis of the state intent to be bound is complicated.

There are form-related arguments to conclude that there is explicit state intent *not* to be bound. Commentators have noted that the diamond industry and some states pursued the creation of the KPCS as an alternative to an international treaty.<sup>82</sup> Moreover, the Kimberley Process (“KP”) website states that the KPCS cannot “be considered as an international agreement from a legal perspective, as it is implemented through the national legislation of its participants.”<sup>83</sup> This is a puzzling statement, as most international agreements are implemented through national legislation. Nevertheless, it does manifest an understanding that the KPCS is not a binding international treaty.

Notwithstanding the form-related arguments, the functional considerations of the KPCS indicate that states intended to be bound—and intended the other participating states to be bound—by the KPCS. In order to join the KPCS, a state must meet the minimum requirements (described below) before they apply. The formal application and acceptance process that requires action on a part of the member provides a process by which member states and prospective members intend each member to be bound. Additionally, countries have an incentive to be bound as Participants can only import or export diamonds from other Participants.<sup>84</sup>

Analysis of obligations for states to act is easier but is still not straightforward. The KP website states that the KPCS “imposes extensive *requirements* [] on its

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79. *Id.*

80. *Id.*

81. *Participants*, KIMBERLEY PROCESS, <https://perma.cc/7E24-ABE3> (last visited Feb. 6, 2020).

82. *E.g.*, J. Andrew Grant, *The Kimberley Process at Ten: Reflections on a Decade of Efforts to End the Trade in Conflict Diamonds*, in HIGH-VALUE NATURAL RESOURCES AND PEACEBUILDING 159–79 (Paivi Lujala & Siri A. Rustad eds., 2012); Clive Wright, *The Kimberley Process Certification Scheme: A Model Negotiation?*, in LUJALA & RUSTAD, *supra*, at 181–87; Andrew Bone, *The Kimberley Process Certification Scheme: The Primary Safeguard for the Diamond Industry*, in LUJALA & RUSTAD, *supra*, at 189–94; FRANZISKA BIERI, FROM BLOOD DIAMONDS TO THE KIMBERLEY PROCESS: HOW NGOS CLEANED UP THE GLOBAL DIAMOND INDUSTRY 104–11 (2010); Peter Arthur, *Governance of Natural Resource Management in Africa: Contemporary Perspectives*, in MANAGING AFRICA’S NATURAL RESOURCES: CAPACITIES FOR DEVELOPMENT 39, 46–47 (Kobena T. Hanson, Cristina D’Alessandro & Francis Owusu eds., 2014); Eleanor Fisher & John Childs, *An Ethical Turn in African Mining: Voluntary Regulation Through Fair Trade*, in MINING AND SOCIAL TRANSFORMATION IN AFRICA: MINERALIZING AND DEMOCRATIZING TRENDS IN ARTISANAL PRODUCTION 130, 135–37 (Deborah Fahy Bryceson et al. eds., 2014).

83. *FAQ*, KIMBERLEY PROCESS, <https://perma.cc/ZF7H-K7JC>.

84. *Participants*, KIMBERLEY PROCESS, <https://perma.cc/7E24-ABE3> (last visited Feb. 6, 2020).



members to enable them to certify shipments of rough diamonds . . . .”<sup>85</sup> However, most of the sections in the KPCS Core Document state that “each Participant *should* ensure that . . . .”<sup>86</sup> This nonbinding language is in contrast to the website which uses binding language such as “requirement.” Moreover, the dichotomy between binding and nonbinding language presents itself multiple times within the Core Document. For example, Section II states that Participants *should* ensure that a KP Certificate accompanies each shipment of rough diamonds and that Certificates meet the minimum *requirements* listed in Annex I.<sup>87</sup> Annex I, Part A specifically uses the word “requirement” in listing the criteria for a valid Certificate,<sup>88</sup> which is in contrast to Parts B and C which use nonbinding language of “optional” elements for the Certificates.<sup>89</sup>

Although the presence of both binding and nonbinding language makes it unclear whether the KPCS actually contains requirements, a strong suggestion that it does comes in Section VI, where it states that Participation in the scheme is open on a “global, non-discriminatory basis to all Applicants willing and able to fulfill the *requirements* of that Scheme.”<sup>90</sup> This indicates that even though the word “should” is used throughout the Core Document, the Kimberley Process has real requirements that each Participant must follow in order to become and remain a member.

State action reinforces the argument that the various provisions are obligatory. Participant states have expended time, money, and political will to adopt implementing legislation and regulations, and they have established and empowered institutions responsible for implementation and enforcement. Where states have not adhered to these provisions, there have been consequences (see below).

The KPCS adopted a Peer Review system after the Core Document was agreed upon, which includes an annual reporting requirement. It states that “Participants *are to prepare* information on an annual basis on the way in which they are implementing the *requirements* of the KPCS.”<sup>91</sup> This section indicates that reporting is mandatory, and it once again refers to “requirements” of the KPCS. Therefore, there is strong evidence that the KPCS sets forth binding requirements to act, rather than mere recommendations or guidelines.

The KPCS has established an internal process for monitoring compliance. The Core Document only mentions monitoring briefly. It states that Review Missions

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85. *About*, KIMBERLEY PROCESS, <https://perma.cc/WJW2-VXME> (emphasis added) (last visited Feb. 6, 2020).

86. *See generally* Kimberley Process Certification Scheme Core Document, § II, <https://perma.cc/BY3Z-QS63> (last visited Feb. 6, 2020) [hereinafter Core Document].

87. *Id.*

88. *Id.* at Annex I pt. A.

89. *Id.* at Annex I pts. B and C.

90. *Id.* at § VI ¶ 8 (emphasis added).

91. Peer Review System, *supra* note 71, at § I.

are to be conducted with the consent of the Participant concerned.<sup>92</sup> The KPCS Peer Review System elaborates on the nature of Review Missions. A Review Mission may be recommended for a Participant where there are credible indications of significant noncompliance.<sup>93</sup> These indications of noncompliance can be raised by Participants, who then inform the Chair, who then informs all Participants about the concerns and opens up a dialogue on how to address the issue.<sup>94</sup> Additionally, Participants are free to identify additional verification measures that should be taken, and these could include Review Missions by other Participants where there are credible indications of significant noncompliance with the scheme.<sup>95</sup>

The KPCS has a Working Group on Monitoring (“Working Group”) which conducts the Review Missions.<sup>96</sup> The leaders of the Mission produce a written report on the activities of the Mission, including recommendations to fix any compliance issues.<sup>97</sup> The Participant under review “should” report the steps undertaken to implement the recommendations made in the report to the Working Group.<sup>98</sup> In addition to the Review Mission for potential issues of non-compliance, the KPCS Peer Review System also provides for Review Visits. Review Visits are voluntary visits to conduct an analysis of the elements of a Participant’s Scheme. If issues are identified on a visit, Participants “should” invite and receive a subsequent Review Visit.<sup>99</sup> The Review Visits monitor compliance, whereas the Review Missions focus on specific instances of noncompliance. In conjunction with Review Missions and Review Visits, the Core Document also provides for self-monitoring; Section V provides that Participants should exchange experiences and other relevant information, including self-assessments.<sup>100</sup>

Noncompliance with the minimum requirements or prohibition of trading with non-Participants can result in exclusion from the KPCS. The KPCS has a Participation Committee that oversees the admission of new Participants and

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92. Core Document, *supra* note 86, at § VI(14). Such consent for Review Missions is not uncommon under MEAs. See Gregory Lawrence Rose, Compliance Mechanisms Under Selected Multilateral Environmental Agreements (United Nations Environment Programme 2007); Xueman Wang & Glenn Wisner, *The Implementation and Compliance Regimes Under the Climate Change Convention and Its Kyoto Protocol*, 11 REV. EUR. COMM’Y & INT’L ENVTL. L. 181, 185 (2002) (stating that the Kyoto Protocol monitors compliance with in-depth reviews conducted with prior consent of the party concerned); ZERRIN SAVASAN, PARIS CLIMATE AGREEMENT: A DEAL FOR BETTER COMPLIANCE? (2019); Tseming Yang, *International Treaty Enforcement as a Public Good: Institutional Deterrent Sanctions in International Environmental Agreements*, 27 MICH. J. INT’L L. 1131, 1177–78 (2006).

93. Peer Review System, *supra* note 71, at § III(a).

94. Core Document, *supra* note 86, at § VI(16).

95. *Id.*, at para. 14.

96. Peer Review System, *supra* note 71, at sec. III.

97. *Id.*, at ann. II § 5.

98. *Id.*, at ann. II § 8.

99. *Id.*

100. Core Document, *supra* note 86, at § V pt. c.

monitors the compliance of current Participants with the minimum requirements.<sup>101</sup> The Participation Committee considers information collected by the Working Group on Monitoring to determine whether Participants remain willing and able to meet the KPCS requirements.<sup>102</sup> If the Participation Committee concludes that a Participant country no longer meets the minimum common standards of the certification scheme as required by Section VI (8) of the Core Document, then it may recommend any further action that the Committee believes is appropriate.<sup>103</sup> In 2004, the KPCS excluded the Republic of the Congo after a Review Mission report from the Working Group showed a discrepancy between diamond export and production capacity.<sup>104</sup> The Review Mission found that the Republic of the Congo's system of controls was inadequate and unable to prevent conflict diamonds from entering the legitimate diamond trade.<sup>105</sup>

If a country has been removed from the Scheme, there is a process for readmission. To be readmitted, a country must submit a written application that demonstrates both that they are in compliance with the minimum standards and that the inconsistencies that were the basis for the exclusion from the KPCS have been resolved.<sup>106</sup> Then the Participation Committee decides whether to readmit the country. In 2007, the Republic of the Congo was readmitted to the KPCS three years after being removed.<sup>107</sup>

The process of suspending and readmitting the Republic of the Congo—as well as the broader mechanisms for investigating and deciding on noncompliance and the presence of sanctions for noncompliance—provides strong evidence that the KPCS contains requirements that are binding on participating states.<sup>108</sup>

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101. Admin. Decision, Participation Committee Terms of Reference (2004), <https://perma.cc/M8NG-BS3C> (last visited Feb. 6, 2020). The Participation Committee is composed of no more than twelve members who are submitted by the Participants, civil society Observers, and industry Observers. *Id.* at § 1.1.

102. *Id.*, at § 4.1.

103. *Id.* The minimum common standards of the certification scheme refer to the requirements in Annex I of the Core Document, which lay out detailed requirements for what a certificate must include. Core Document, *supra* note 86, at ann. I.

104. Admin. Decision, Republic of Congo Review Visit (2004), <https://perma.cc/P6KL-WMSW> (last visited Feb. 6, 2020).

105. Global Witness, *The Kimberley Process Gets Some Teeth: The Republic of Congo Is Removed from the Kimberley Process for Failing to Combat the Trade in Conflict Diamonds* (Jul. 9, 2004), <https://perma.cc/VCZ4-NGSJ>.

106. Admin. Decision, Rules and Procedures for Re-Admission of a Former Participant to KP (2008), <https://perma.cc/3M88-NFVU>.

107. *Republic of Congo*, KIMBERLEY PROCESS, <https://perma.cc/7P8D-JLGS> (last visited Mar. 4, 2020) (showing that the Republic of Congo was readmitted in 2007).

108. In addition to the Republic of Congo, the Central African Republic was suspended in 2003 after a coup, and Lebanon was suspended in 2004 after failing to pass KPCS-compliant legislation. See Tim Hughes, *Conflict Diamonds and the Kimberley Process: Mission Accomplished or Mission Impossible?*, 13 S. AFR. J. INT'L AFFAIRS 115, 123 (2006). The KPCS suspended CAR again in 2013 after a coup, partially lifting the ban from regions deemed KPCS-compliant in 2016. Partnership Africa Canada, *From Conflict to Illicit: Mapping the Diamond Trade from Central African Republic to Cameroon* (2016). Cote d'Ivoire voluntarily suspended itself from the KPCS in 2002. Partnership Africa Canada,

Moreover, the fact that no states left the KPCS after the suspension of the Republic of the Congo indicates that the states understood that the KPCS imposed binding requirements on Participants, and that they consented to be bound (if there was any prior question about consent to be bound). Even though the KPCS does not fit into any traditional category of international law, analysis of state consent, obligations, mechanisms for monitoring compliance, and sanctions indicates that the KPCS can accurately be described as binding international law.

#### B. EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE

EITI establishes global standards to “promote the open and accountable management of oil, gas, and mineral resources.”<sup>109</sup> Although it initially focused on payments made by companies to the government related to extractive resources (defined as oil, gas, and minerals), EITI has expanded to provide a much broader range of standards to strengthen public and corporate governance, promote understanding of resource management, and provide necessary data for transparency and accountability in the sector.<sup>110</sup> As of February 2020, fifty-two countries had implemented the EITI Standard, which comprises disclosure requirements and a validation system.<sup>111</sup> Similar to the KPCS, EITI does not fit into a traditional category of international law but contains all of the key elements of binding international law.

The structure and application process of EITI indicates that member countries intend to be bound by the standard. In order to become an EITI implementing member, a country must complete five steps. These steps include government, company, and civil society engagement, as well as creating a multi-stakeholder group and a work plan. A state must also announce an intention to implement the EITI Standard. These steps are also part of the first EITI Requirement of being an EITI implementing country. Countries are aware that being an implementing country comes with certain requirements, and therefore, countries intend to be bound. Additionally, the website states in the Frequently Asked Questions section under “Is the EITI Voluntary?” that once implementation begins, the country is “required” to achieve compliance with the EITI Requirements. As with the vast majority of international law (other than peremptory norms), giving consent is voluntary. However, once given, consent commits a state to adhering to the requirements of the instrument.

EITI imposes obligations on member states to act. In order to be considered an EITI compliant and implementing country, there are eight Requirements under the current (2019) EITI Standard. The EITI Standard “*requires* the disclosure of

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Diamonds without Borders: An Assessment of the Challenges of Implementing and Enforcing the Kimberley Process Certification Scheme (2010).

109. EITI, *Who We Are*, <https://perma.cc/JCR8-SH7H> (last visited Feb. 6, 2020).

110. *Id.*

111. *Id.*

information along the extractive industry value chain from the point of extraction, to how revenues make their way through the government, and how they benefit the public.”<sup>112</sup> The eight EITI Requirements are minimum standards that must be adhered to by each country implementing EITI, but the Standard also contains other non-required measures that implementing countries are encouraged to take.<sup>113</sup>

The first EITI Requirement is that each country must establish a multi-stakeholder group.<sup>114</sup> This group is in charge of overseeing implementation of EITI in the country.<sup>115</sup> Additionally, the government of each implementing country is required to issue a public statement of intention to implement EITI, and each must ensure that there is an enabling environment within the country for company and civil society participation.<sup>116</sup> The second EITI Requirement requires the disclosure of information related to the rules for how the extractive sector is managed.<sup>117</sup> Each country is required to disclose information relating the award and transfer of licenses pertaining to companies covered in EITI reports, and they must also maintain a register of license holders.<sup>118</sup> The third Requirement entails the disclosure of information related to the exploration and production of oil, gas, and mineral resources.<sup>119</sup> Countries must disclose production data, including total production volumes and the value of production by commodity.<sup>120</sup> The fourth Requirement mandates reconciliation of company payments and government revenues from the extractive industries.<sup>121</sup> Countries are also required to publish regular and timely information.<sup>122</sup>

The fifth Requirement necessitates a disclosure of information relating to revenue allocation, and countries must disclose a description of revenues from the extractive industries.<sup>123</sup> The sixth Requirement mandates the disclosure of information relating to social expenditure and the impact of the industry on the economy.<sup>124</sup> The seventh EITI Requirement mandates that the multi-stakeholder

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112. *Id.*

113. Each EITI Requirement contains provisions that have both binding language, such as “must,” “should,” and “required,” and nonbinding language, such as “recommended” or “encouraged.” For example, within Requirement 2 (discussed below), it is also recommended that implementing countries maintain a public register of the beneficial owners of the corporate entities that hold interests in oil, gas, or mining contracts or licenses. Ch. 1, § 3, EITI Requirement 2.5.a, EITI Standard 2019, <https://perma.cc/54QP-M7WN> (last visited Feb. 6, 2020).

114. *Id.*, at EITI Requirement 1.

115. *Id.*

116. *Id.*

117. *Id.*, at EITI Requirement 2.

118. *Id.*

119. *Id.*, at EITI Requirement 3.

120. *Id.*

121. *Id.*, at EITI Requirement 4.

122. *Id.*

123. *Id.*, at EITI Requirement 5.

124. *Id.*, at EITI Requirement 6.

group ensures that the EITI report is actively promoted, publicly accessible, and contributes to the public debate.<sup>125</sup> The group is required to review the outcomes and impact of EITI implementation on natural resource governance.<sup>126</sup> To fulfill these requirements, states adopt implementing laws and create institutions. In the EITI Standard Document, which contains the requirements, there is a discussion about terminology where it makes clear that sections that use terms such as “must,” “should,” and “required” indicate that something is mandatory in order to remain a member.<sup>127</sup>

The EITI Standard—and what implementing countries must do to comply with EITI—has evolved over time. Initially, EITI focused on reporting and reconciling payments made and received related to extractive industries.<sup>128</sup> In 2013, 2016, and 2019, EITI expanded the Standard to introduce, clarify, and refine disclosure requirements.<sup>129</sup> This adaptive approach to obligations of member states is similar to that of the Montreal Protocol,<sup>130</sup> the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”),<sup>131</sup> and the Ramsar Convention on Wetlands of International Significance.<sup>132</sup>

The EITI created a detailed Validation Process to monitor compliance.<sup>133</sup> The first Validation takes place 2.5 years after a country begins implementing EITI.<sup>134</sup> Countries that achieve satisfactory progress are revalidated after three years.<sup>135</sup> If a country does not receive satisfactory progress, the country undergoes a second, third, and fourth validation, each three to eighteen months apart.<sup>136</sup> Before Validation begins, the multi-stakeholder group is encouraged to undertake a self-assessment of the country’s adherence to EITI. The first step in the Validation

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125. *Id.*, at EITI Requirement 7.

126. *Id.*

127. *Id.*, at *Terminology*, § 3.

128. See, e.g., Eddie Rich & T. Negbalee Warner, *Addressing the Roots of Liberia’s Conflict through the Extractive Industries Transparency Initiative*, in LUJALA & RUSTAD, *supra* note 82, at 201–09.

129. EITI, *EITI Launches 2019 EITI Standard*, <https://perma.cc/5RKM-39Y3> (last visited Mar. 3, 2020).

130. Article 2(9) of the Montreal Protocol allows the Meeting of the Parties (“MoP”) to make downward adjustments on production and consumption of controlled substances, which apply to all member states; no further ratification or state action is needed. To date, the MoP has made adjustments to the Protocol nine times: at the second, third, fourth, seventh, ninth, eleventh, nineteenth, and thirtieth MoPs, as well as at the first extraordinary MoP. UNEP, *The Montreal Protocol on Substances that Deplete the Ozone Layer*, <https://perma.cc/ZAS3-HNWX> (last visited Mar. 3, 2020); see also UNEP, *HANDBOOK FOR THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEplete the Ozone Layer* (9th ed. 2012).

131. Convention on International Trade in Endangered Species of Wild Fauna and Flora, arts. XI(3) (b), XV; see also WILLEM WIJNSTEKERS, *THE EVOLUTION OF CITES* 459–73 (9th ed. 2011).

132. Ramsar Convention, art. 7(2); Wiersema, *supra* note 48, at 238–39 (detailing how COP decisions have “modified [the] criteria [for listing wetlands] several times, moving them away from their original focus on waterfowl”).

133. *Overview of Validation*, EITI, <https://perma.cc/LLZ4-4V89> (last visited Feb. 6, 2020).

134. EITI Standard 2019, ch. 1, § 4.

135. *Id.*

136. *Id.*



Process is an initial data collection and stakeholder consultation, which is performed by the EITI International Secretariat.<sup>137</sup> Following the initial assessment, the EITI Board appoints an independent validator.<sup>138</sup> The independent validator assesses whether the initial assessment was carried out in accordance with the Validation Guide.<sup>139</sup> The EITI Board then reviews the assessments and makes a final determination regarding whether the country is meeting the EITI Requirements.<sup>140</sup>

A Validation provides a country with a scorecard.<sup>141</sup> The Validation Scorecard reports the level of compliance with each of the EITI Requirements. Outstanding progress indicates that all aspects of the requirement—including expected, encouraged, and recommended aspects—have been implemented.<sup>142</sup> Satisfactory progress means that all mandatory aspects of the requirement have been implemented.<sup>143</sup> Meaningful progress indicates that significant aspects of the requirement have been implemented.<sup>144</sup> Inadequate progress means that significant aspects have not been implemented, and no progress means that all or nearly all of the aspects of the requirement have not been implemented.<sup>145</sup>

In addition to an assessment of each individual EITI requirement, the Board also conducts an overall assessment with the EITI Standard during each Validation.<sup>146</sup> In the overall assessment, the Board uses the same scale as for the assessment of individual requirements, but it also considers the nature of the requirements that have not been implemented and how close they are to being met, barriers to requirements being met, and good faith efforts being undertaken to meet the requirements.<sup>147</sup>

The EITI Board reserves the right to require a country to undergo a new Validation Process if there are concerns about whether the implementation has fallen below the required standard.<sup>148</sup> Stakeholders may also petition the EITI Board if they believe that a status should be reviewed.<sup>149</sup> If, after a Validation, a country has not made satisfactory progress, the Board will request corrective actions be taken to fully comply before the next Validation.<sup>150</sup>

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137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. Ch. 1, § 4, art. 4, EITI Standard 2019, <https://perma.cc/LX49-CCMP> (last visited Feb. 6, 2020).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at art. 6.

149. *Id.*

150. *Id.*

When it is “manifestly clear” that significant aspects of the EITI requirements are not adhered to, the EITI Board can suspend or delist a country.<sup>151</sup> For example, a country can be suspended or delisted for not meeting the timing requirements for publishing reports or for not achieving compliance with the EITI requirements by deadlines established by the Board.<sup>152</sup> If a country does not publish required information by the deadline, they “will” be suspended.<sup>153</sup> If a Validation finds that a country has made inadequate progress in complying with EITI Requirements, the country is temporarily suspended and will be requested to undertake certain corrective actions.<sup>154</sup> If a Validation finds that a country has made meaningful progress, the Board will request the country to undertake corrective actions, but it will not be suspended. However, if after the subsequent Validation the country does not improve, it will be temporarily suspended and the Board will request corrective actions before the next Validation.<sup>155</sup> A country may also be suspended in cases where political instability or conflict prevent the country from adhering to significant aspects of the EITI requirements.<sup>156</sup> Countries may also voluntarily suspend themselves due to these reasons.<sup>157</sup> The suspension can be lifted at any time when the Board is satisfied that the reasons for the suspension have been addressed.<sup>158</sup>

Delisting a country as an EITI implementing country occurs if the country has been subject to suspension and the reason for suspension was not resolved to the satisfaction of the Board by the established deadline, or if the Board concludes that a country has not made satisfactory progress in implementing the EITI in the established time frame.<sup>159</sup> If there is a suspension in place for more than a year for missing a publishing deadline, a country “will” be delisted.<sup>160</sup> Additionally, if a country is found to have made no progress in the Board’s overall assessment in the Validation, it “will” be delisted.<sup>161</sup> A country may apply for an extension if it

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151. *Id.* at art. 8(a). For a discussion of delisting vis-à-vis suspension, see notes 143–63 and accompanying text.

152. EITI Standard 2019, at art. 8(a).

153. *Id.* at art. 2. Liberia is currently suspended from the EITI for missing a reporting deadline. The 2015–2016 report was due on June 30, 2018. Liberia requested an extension, but the Board decided that they were ineligible for the extension. Therefore, because Liberia missed the deadline, in accordance with Standard, they were suspended. *Liberia Implementation*, EITI, <https://perma.cc/U9YL-JLHK> (last visited Mar. 4, 2020).

154. *Id.*, at art. 6.

155. *Id.*

156. *Id.*, at art. 8(b). The Central African Republic was suspended by the Board in 2013 due to political instability. Because it did not have a recognized government, it was not able to effectively implement EITI. *Central African Republic Implementation*, EITI, <https://perma.cc/8RXZ-T27U> (last visited Mar. 4, 2020).

157. EITI Standard 2019, at art. 8(b).

158. *Id.* at art. 8(c).

159. *Id.* at art. 9.

160. *Id.* at art. 2.

161. *Id.*

is unable to meet any of the established deadlines for compliance.<sup>162</sup>

EITI contains detailed requirements that each implementing country must follow to become and to remain a member. The requirements for countries to act combined with the Validation Process for monitoring compliance and sanctions, such as suspension or delisting, make it clear that although EITI may not fit into a traditional category of binding law, there is a strong argument that it be considered binding international law.

#### V. TOWARD A BROADER VIEW OF INTERNATIONAL LAW

The two case studies examined in the previous Part are illustrative of the complexity of international instruments and measures that have emerged over the past few decades. Although these instruments and measures historically have not been considered international law—and indeed may be termed “voluntary” or “non-legal”—their clear requirements, state implementation, and international monitoring and enforcement of those requirements and implementation indicates the need to reconsider their status within the international legal system.

Instruments that require states to adopt, implement, and enforce domestic implementing legislation or risk sanctions are functionally binding. They are binding because participating states have explicitly or functionally expressed their intent to be bound, are required to fulfill obligations to become and remain participating states, are being monitored by institutional mechanisms, and may be sanctioned for noncompliance. Obligations often include requirements to adopt implementing legislation and regulations, requirements to create or designate institutions to implement the requirements, and actual implementation and enforcement of the requirements in practice.

The case studies described are not unique. There are numerous other international instruments from the environmental sphere and other sectors that do not fit into the traditional dichotomy of binding vs. soft law but nevertheless should—under the criteria advanced in this Article—still be considered binding international law. Although a separate and more full analysis of these instruments is beyond the scope of this Article, herewith we briefly note a few additional international instruments that do not fit within the traditional categorizations of international law, that appear to be functionally binding based on initial application of the four proposed criteria, and thus support a broader view of the taxonomy of international law. It should also be noted that the diversity of international instruments also exhibits a diversity of degrees to which they meet the four criteria proposed by this Article and thus supports a more diverse articulation of the taxonomy of international law.

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162. *Id.* at art. 7. The EITI Board decides whether to grant an extension based on whether the multi-stakeholder group has demonstrated they have been making continuous progress and based on any exceptional circumstances. *Id.*

The Organization of the Petroleum Exporting Countries (“OPEC”) is an inter-governmental organization whose mission is to “coordinate and unify the petroleum policies of its Member Countries and ensure the stabilization of oil markets in order to secure an efficient, economic and regular supply of petroleum to consumers, a steady income to producers and a fair return on capital for those investing in the petroleum industry.”<sup>163</sup> OPEC’s activities are based on a “statute” adopted from the early days and a Declaratory Statement of Petroleum Policy in Member Countries issued in 1968.<sup>164</sup> OPEC’s status was not established by treaty but through a Resolution by the Conference of the Organization in 1965 and amended one year later. Despite that, the statute provides the foundation for all the subsequent resolutions and decisions adopted by the states who are party to OPEC.<sup>165</sup> As such, decisions governing approximately 42% of the world’s crude oil output<sup>166</sup> are made by a body created and governed by a “statute” that has never been considered a treaty.

The European Union (“EU”) adopted the Forest Law Enforcement, Government and Trade (“FLEGT”) initiative adopted to fight illegal logging through international trade.<sup>167</sup> The central component of FLEGT are Voluntary Partnership Agreements (“VPAs”), which are legally binding trade agreements between the EU and timber-producing countries.<sup>168</sup> As of February 2020, six countries have concluded VPAs with the EU, nine countries are negotiating VPAs, and eleven other countries have expressed interest in VPAs.<sup>169</sup> Pursuant to the terms of the VPA, the timber-producing country develops a system to verify that its timber exports are legal, and in exchange, the EU agrees to accept only licensed timber imports from that country.<sup>170</sup> The VPAs are created through a consultation process with stakeholders in both the public and private sectors, and once they are entered into force, they are legally binding on both sides.<sup>171</sup> There are three main components of a VPA. The first is the Legality Assurance System (“LAS”).<sup>172</sup> The LAS must contain a definition of what constitutes “legal timber” based on the laws of the timber-producing country.<sup>173</sup> It must also have a

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163. *Our Mission*, ORG. OF THE PETROLEUM EXPORTING COUNTRIES, <https://perma.cc/9LUY-YEMH> (last visited Feb. 6, 2020).

164. Rilwanu Lukman, *The Role of OPEC in the 21<sup>st</sup> Century*, 3 *WORLD ENERGY* 38, 39 (2000); OPEC Statute, <https://perma.cc/V53J-36XT> (last visited Mar. 3, 2020).

165. Luis E. Cuervo, *OPEC from Myth to Reality*, 30 *HOUS. J. INT’L L.* 433, 556–62 (2008).

166. U.S. ENERGY INFO. ADMIN., *Oil: Crude and Petroleum Products Explained* (Apr. 24, 2019), <https://perma.cc/9XC4-N84A>.

167. *What is FLEGT*, EU FLEGT FACILITY, <https://perma.cc/2BW5-TZJZ> (last visited Feb. 6, 2020).

168. *Voluntary Partnership Agreements*, EU FLEGT FACILITY, <https://perma.cc/6JE6-5KVU> (last visited Feb. 6, 2020).

169. *What is a VPA?*, EU FLEGT FACILITY, <https://perma.cc/R3QJ-35RY> (last visited Mar. 4, 2020).

170. *Id.*

171. *Id.*

172. *What Does a VPA Contain?*, EU FLEGT FACILITY, <https://perma.cc/WF8C-D5MZ> (last visited Feb. 6, 2020).

173. *Id.*

procedure for verifying control of the supply chain and a tool for verification.<sup>174</sup> The second component of the VPA is a framework for monitoring and evaluating implementation, and the third component is a commitment to improving transparency and other aspects of forest governance.<sup>175</sup> As a part of the LAS, the timber-producing country is required to create, implement, and enforce a system that requires “corrective and preventative actions where non-compliances are detected, and for enforcing implementation of that action.”<sup>176</sup> The EU has the right to reject products that do not satisfy this verification process, and countries will not be able to sell timber or illegally forested products to the EU. Like the KP and EITI, FLEGT contains mandatory requirements for its members as well as mechanisms for monitoring compliance and consequences for noncompliance. There is a nuance that merits further analysis: FLEGT has driven the creation of a series of bilateral trade agreements (the VPAs); there is no question that the VPAs are binding international law as they are treaties, but the question whether FLEGT is binding may not be as clear.<sup>177</sup>

Another rich instrument for analysis is the Paris Agreement.<sup>178</sup> There are differing views regarding whether the Paris Agreement is binding.<sup>179</sup> There were long negotiations leading up to the Paris Agreement regarding the form the agreement should take, with the EU and small island developing states seeking a binding legal mandate to replace the Kyoto Protocol, whereas others sought an approach that was less binding and more flexible.<sup>180</sup> More significantly, the Paris Agreement has states party, entered into force after the requisite number of states

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174. *Id.*

175. *Id.*

176. *Legality Assurance Systems: Requirements for Verification*, FLEGT BRIEFING NOTES § 3.4.1, <https://perma.cc/Q22H-XGA5> (last visited Feb. 6, 2020).

177. In short, the question is whether the FLEGT Regulation is binding international law driving subsidiary binding international (bilateral) agreements—à la the Convention on Migratory Species—or it is domestic (EU) legislation or policy that inspires and guides the development of binding international (bilateral) agreements. And if it is the latter, could the norms contained in the FLEGT Regulation (and the various bilateral agreements) become binding international law if enough countries in a region or globally conclude VPAs?

178. United Nations Framework Convention on Climate Change, Paris Agreement, FCCC/CP/2015/L.9 (Dec. 12, 2015) [hereinafter Paris Agreement].

179. See Daniel Bodansky, *The Legal Character of the Paris Agreement*, 25 REV. EUR. COMMUNITY & INTL. ENVTL. L. 142, 142–45 (2016). See generally Sandrine Maljean-Dubois, Thomas Spencer & Matthieu Wemaere, *The Legal Form of the Paris Climate Agreement: A Comprehensive Assessment of Options*, 9 CCLR 68 (2015); Margaretha Wewerinke-Singh & Curtis F.J. Doebbler, *The Paris Agreement: Some Critical Reflections on Process and Substance*, 39 U. NEW SOUTH WALES L.J. 1486 (2016); Radoslav S. Dimitrov, *The Paris Agreement on Climate Change: Behind Closed Doors*, 16 GLOBAL ENVTL. POLITICS 1 (2016).

180. Bodansky, *supra* note 179, at 144; Robert Falkner, *The Paris Agreement and the New Logic of International Climate Politics*, 92 INT’L AFF. 1107, 1120 (2016); Rafael Leal-Arcas & Antonio Morelli, *The Resilience of the Paris Agreement: Negotiating and Implementing the Climate Regime*, 31 GEO. ENVTL. L. REV. 1, 13 (2018). See generally Timothée Ourbak & Alexandre K. Magnan, *The Paris Agreement and Climate Change Negotiations: Small Islands, Big Players*, 18 REGIONAL ENVTL. CHANGE 2201 (2018).

submitted their instruments of ratification, and includes binding requirements (most of these requirements are procedural).<sup>181</sup> Moreover, a state cannot withdraw from the Paris Agreement at will; rather, it must provide one-year's notice before withdrawal takes effect.<sup>182</sup> Considering these various requirements, it is clear that the Paris Agreement should be considered a formal treaty within the framework of the United Nations Framework Convention on Climate Change ("UNFCCC").<sup>183</sup> The main question regarding the binding nature of the Paris Agreement concerns the Nationally Determined Contributions ("NDCs"). The Agreement contains strong procedural obligations relating to the NDCs, requiring Parties to prepare, communicate, and maintain successive NDCs;<sup>184</sup> communicate a successive NDC every five years;<sup>185</sup> and regularly provide information necessary to track progress in implementing and achieving its NDCs.<sup>186</sup> It also states that Parties "shall pursue domestic mitigation measures, with the aim of achieving the objectives of the NDCs."<sup>187</sup> However, there are no obligations to implement or achieve the NDCs. Additionally, the Agreement does not contain any sanctions for noncompliance, nor does it contain mechanisms for monitoring compliance. The Paris Agreement illustrates that an instrument may be a treaty (and thus binding) even if it does not meet some of the criteria that would be required of other initiatives to constitute binding international law.

UN Security Council resolutions adopted under Chapter VII of the UN Charter are generally binding on UN member states,<sup>188</sup> and more than 14% of Security Council resolutions from 1946 through 2016 addressed the environment or natural resources,<sup>189</sup> but what is the nature of the decisions? They are not treaties, nor are they custom, nor are they principles. Security Council Resolutions can establish liability of states for wrongful action (as the Security Council did in response

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181. See Bodansky, *supra* note 179, at 145, Paris Agreement, *supra* note 178, at art. 21; Cinnamon P. Carlarne & J.D. Colavecchio, *Balancing Equity and Effectiveness: The Paris Agreement & the Future of International Climate Change Law*, 27 N.Y.U. ENVTL. L.J. 107, 111–12, 140 (2019); Kayla Clark, *The Paris Agreement: Its Role in International Law and American Jurisprudence*, 8 NOTRE DAME J. INT'L & COMP. L. 107, 108, 112, 121 (2018).

182. Paris Agreement, *supra* note 178, at art. 28.

183. See generally Cara A. Horowitz, *Paris Agreement*, 55 INT'L LEGAL MATERIALS 740 (2017); Lavanya Rajamani, *The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations*, 28 J. ENVTL. L. 337 (2016).

184. Paris Agreement, *supra* note 178, at art. 4.2.

185. *Id.*, at art. 4.3.

186. *Id.*, at art. 13.7.

187. *Id.*, at art. 4.2.

188. UN Charter, arts. 25, 48(1); see also Rosalyn Higgins, *The Advisory Opinion on Namibia: Which UN Resolutions are Binding under Article 25 of the Charter?*, 21 INT'L & COMP. L.Q. 270 (1972); Michael C. Wood, *The Interpretation of Security Council Resolutions*, 2 MAX PLANCK Y.B. U.N. L. 73 (1998).

189. Peter Aldinger, Carl Bruch & Sofia Yazykova, *Revisiting Securitization: An Empirical Analysis of Environment and Natural Resource Provisions in UN Security Council Resolutions, 1946-2016*, in HANDBOOK OF ENVIRONMENTAL CONFLICT AND PEACEBUILDING, 143, 144 (Ashok Swain & Joakim Öjendal eds., 2018).



to Iraq's 1990 invasion of Kuwait),<sup>190</sup> impose sanctions on individuals and countries (as the Security Council has done in numerous instances where people and countries were undermining international peace),<sup>191</sup> and require national legislative action (for example, to fight terrorism).<sup>192</sup> Most commentators conclude that they are a sort of international law pursuant to and subsidiary to treaties.<sup>193</sup> Indeed, even though UN Security Council Resolutions do not explicitly fall within Article 38 of the ICJ Statute, the ICJ has heard arguments regarding Security Council Resolutions and upheld their legality.<sup>194</sup>

Similar issues arise regarding decisions of the COP, which can bind states that ratified the underlying treaty but not the COP decision.<sup>195</sup> Some scholars and courts view COP decisions as soft law or “merely political documents.”<sup>196</sup> However, most scholars and courts take a more nuanced view, differentiating among various types of COP decisions. For example, Annecoos Wiersema distinguishes between “consensus-based activity” (requiring “only consensus by the states parties—not formal consent—to be binding”) and “consent-based activities” (where a state can opt out).<sup>197</sup> Alternatively Jutta Brunée grounds the binding nature of many COP decisions through the formal procedures established by

190. UN Security Council Resolution 687 (1991).

191. See, e.g., Peter Wallensteen & Helena Grusell, *Targeting the Right Individuals? The UN Use of Individual Sanctions*, 18 GLOBAL GOVERNANCE 207 (2012).

192. UN Security Council Resolution 1373 (2001); see also Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901 (2002).

193. E.g., Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175, 179 (2005) (concluding that UN Security Council Resolutions are a form of “secondary treaty (or Charter law)”; see also Christopher M. Bailey, *Women in the Crosshairs: Expanding the Responsibility to Protect to Halt Extreme Gender-Based Violence*, 78 A.F. L. REV. 75, 82 (2018) (noting that the Security Council “is the only body [in the UN Charter] that can issue legally binding obligations that do not fit within one of the sources [of international law]”).

194. E.g., Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARV. INT'L L.J. 1, 18–20, 22–27 (1993) (surveying decisions by the International Court of Justice reviewing Resolutions related to South Africa/Namibia and Libya); see also Vera Gowlland-Debbas, *The Relationship between the International Court of Justice and the Security Council in Light of the Lockerbie Case*, 88 AM. J. INT'L L. 643, 644 (1994); Joy Gordon, *The Sword of Damocles: Revisiting the Question of Whether the United Nations Security Council is Bound by International Law*, 12 CHI. J. INT'L L. 605 (2012) (reviewing an ICJ decision regarding UN Security Council Resolution 713 banning the sale of arms to belligerent parties in the former Yugoslavia).

195. The foundational article in this area is Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623 (2000).

196. See, e.g., Deborah Scott, *Framing and Responding to Scientific Uncertainties: Biofuels and Synthetic Biology at the Convention on Biological Diversity*, 56 JURIMETRICS J. 245, 248 (2016) (“COP Decisions have the status of soft law—formal, but not legally binding”); NRDC v. EPA, 464 F.3d 1, 9–10 (D.C. Cir. 2006) (dismissing COP decisions as merely “political commitments”).

197. Wiersema, *supra* note 48, at 236–38; see also Annecoos Wiersema, *Conferences of the Parties to Multilateral Environmental Agreements: The New International Lawmakers?*, 103 AM. SOC'Y INT'L L. PROC. 74, 74 (2009) (setting forth four axes to evaluate the legal impact of consensus-based COP activity).

the treaty.<sup>198</sup> COP decisions are binding when they affect the substantive scope of the convention, for example by adding species or chemicals covered by a convention—without additional ratification.<sup>199</sup> And a number of other scholars highlight the diverse roles that COP decisions can have in establishing institutions, refining norms and standards, and enforcing the terms of the convention.<sup>200</sup>

Bridging COP decisions, UN Security Council Resolutions, and other international documents and measures, global administrative law does not easily fit into existing categories of international law but is binding (depending on the provision) on international organizations, states, nonstate actors, and individuals.<sup>201</sup> Most scholars ground global administrative law in treaty law, similar to how regulations are grounded in statutes at the national level.<sup>202</sup>

Before concluding this Article, we will consider for a moment, the reasons that states have pursued and continued to pursue these instruments, rather than selecting more traditional means of treaties or clearly nonbinding arrangements. There are several reasons. For example, these instruments allow the participation of additional nonstate actors, most notably NGOs and the private sector. These instruments provide much needed flexibility to states that are willing to comply with the rules, while simultaneously giving a margin to decide the best ways to implement the measures domestically. In some instances, the instruments are attractive because parties want to avoid the UN process, its bureaucracy, and its consensus-based nature that can lead to a least common denominator. In these circumstances, states and others can set higher, more aggressive standards than those that would have been feasible within the context of international negotiations.

## CONCLUSION

Thomas Huxley once commented on “the great tragedy of Science—the slaying of a beautiful hypothesis by an ugly fact—which is so constantly being

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198. Jutta Brunnée, *COPing with Consent: Law-Making Under Multilateral Environmental Agreements*, 15 LEIDEN J. INT'L L. 1, 22 (2002).

199. See *supra* notes 128–32 and accompanying text.

200. E.g., Peter G.G. Davies, *Non-Compliance—A Pivotal or Secondary Function of COP Governance?*, 15 INT'L CMTY. L. REV. 80, 85–86, 93–94 (2013); Feja Lesniewska, *UNFCCC Conference of the Parties: The Key International Forest Law-Makers for Better or for Worse*, in INT'L ENVTL. LAW & GOVERNANCE 116, 116–17, 119 (Fitzmaurice & French eds., 2015); Timothy Meyer, *Collective Decision-Making in International Governance*, 108 AM. J. INT'L L. UNBOUND 30, 35 (2015).

201. See, e.g., Benedict Kingsbury & Megan Donaldson, *Global Administrative Law*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW para. 15 (2015); Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergency of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 21, 29 (2005); Yaroslau Kryvoi, *The Law Applied by International Administrative Tribunals: From Autonomy to Hierarchy*, 47 GEO. WASH. INT'L L. REV. 267, 284–86 (2015) (defining international administrative law); Eleanor D. Kinney, *The Emerging Field of International Administrative Law: Its Content and Potential*, 54 ADMIN. L. REV. 415, 420–22 (2002).

202. Kinney, *supra* note 201, at 422; Kingsbury, Krisch & Stewart, *supra* note 201, at 43 (noting that the treaty-based regulatory regime is one of three types of international regulatory regimes).

enacted under the eyes of philosophers.”<sup>203</sup> In the case of international law, the seventy-five-year-old taxonomy of international law—comprising treaties, custom, and general principles—is increasingly showing its age.

A rapidly growing number and diversity of international measures do not fit within the conventional taxonomy but nevertheless cannot be dismissed as voluntary or soft law. They require states to amend their laws, to implement those laws, and to enforce them. There are sanctions for noncompliance, and these sanctions are at least as substantial as those for noncompliance with most environmental treaties—if not more so. In short, they are binding but often not recognized as binding international law. They are neither fish nor fowl.

Updating the taxonomy of international law and the criteria for discerning whether an international measure is binding international law is long overdue. It may be considered shocking that there has not yet been a rearticulation of what constitutes “international law” in light of the numerous “ugly facts,” including the Kimberley Process, EITI, UN Security Council Resolutions, binding COP decisions, and others. At the same time, it may not be so shocking if one considers that when many of the initiatives first started it was unclear whether they would survive, let alone thrive. With over two decades of experience and the growing diversity of initiatives, it is increasingly clear that the old conceptual framework no longer reflects reality.

This is not to say that soft law is now binding. Or that states are no longer relevant in international law. Or that treaties are artifacts of the twentieth century.

It is past time, though, to revisit our conceptual framework regarding what constitutes binding international law.<sup>204</sup> Particular attention should be paid to the criteria for determining whether a measure is binding international law. This Article has offered four criteria for consideration,<sup>205</sup> which draw upon the existing literature. Analysis of these criteria, though, suggests that meeting them is sufficient, but not necessarily required, to constitute binding international law.<sup>206</sup> The question arises, then, what are the irreducible criteria?

There are three other important questions that are not considered in this Article. First, if the current taxonomy is inadequate, what does the updated

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203. THOMAS H. HUXLEY, *Biogenesis and Abiogenesis*, in COLLECTED ESSAYS 229, 244 (1894).

204. It is promising that the UN International Law Commission has undertaken to reconsider what constitutes customary international law and how it is created. *Analytical Guide to the Work of the International Law Commission*, INT’L LAW COMM’N, <https://perma.cc/WF5D-9TNM> (last visited Apr. 13, 2020).

205. For another set of criteria, see Joost Pauwelyn, *Is It International Law or Not, and Does It Even Matter?*, in INFORMAL INT’L LAWMAKING 131–39 (Joost Pauwelyn, Ramses Wessel & Jan Wouters eds., 2012) (proposing criteria related to form, intent, effect, and substance).

206. Although this Article argues that both the KPCS and EITI meet all four criteria, reasonable minds may disagree regarding whether state consent to be bound has been articulated with sufficient clarity. At the same time, both the KPCS and EITI meet all four criteria either entirely or substantially, raising the question of how much each and every criterion must be met for an instrument to be considered binding.

taxonomy look like? Second, which institutions can apply the new categories of international law? Does the ICJ have competence?<sup>207</sup> In monist states, which do not require implementing legislation for international law to have direct effect,<sup>208</sup> can domestic courts apply and enforce these new categories of international law? Are the new categories *lex lata* when the UN International Law Commission is codifying emerging international law? And, third, are there any differences in the remedies that might be available for the breach of these new categories vis-à-vis treaties or custom? In answering these questions, it will be important to have a more diverse set of voices than those who established the conceptual framework seventy-five years ago—when international law distinguished between “civilized nations” and others.<sup>209</sup>

Our world has become more kaleidoscopic, and so have the norms and institutions by which we organize society globally. It is time that our framework for understanding international law catches up with the reality.

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207. If not, then how does one justify the Court's rulings on UN Security Council Resolutions?

208. See generally J.G. Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. Y.B. INT'L L. 66, 76–77 (1936).

209. Statute of the International Court of Justice, art. 38, ¶ 1(c), Apr. 18, 1946.