We have entered an era... in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare... International environmental law will need to proceed beyond weighing... rights and obligations... within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.¹

I. Introduction

International law as traditionally conceived—public international law—was designed to govern the relations of sovereign states.² Even today, the structure and processes of international law remain anchored in these “Westphalian” foundations. Since there is no single, central lawmaking authority that could legislate in the collective interest, shared understandings must emerge from inter-state interactions, deliberations, and negotiations. Through their involvement in the international arena, other actors—individuals, nongovernmental organizations (NGOs), business entities, or international institutions—may help shape these understandings. But, on the standard account, they become legally binding only when there is sufficient consensus among states to generate a rule of customary international law, or when states agree to be bound by a treaty.

According to some observers, this international law must, by definition, fail in realizing the common interests of humanity since it orders a “world fit for governments”—an “unsociety ruled by a collective of self-conceived sovereigns whose authority is derived neither from the totality of international society nor from the

¹ I thank Anne van Aaken, Samantha Besson, Jacob Katz Cogan, Monika Hakimi, Lawrence Helfer, Karen Knop, and Christian Tams for their incisive comments on an earlier draft. They have helped me sharpen the argument laid out in the chapter. Any errors remain my own.
³ The first two paragraphs draw on Jutta Brunnée, Common Areas, Common Heritage and Common Concern, in The Oxford Handbook of International Environmental Law 550 (Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds., 2008).
people but from the intermediating state-systems.” Most academic commentators, however, while noting the challenges inherent in the inter-state structure of international law, have tended to also to find evidence that this structure is being adjusted and expanded to promote the “greater interest of humanity.” Wolfgang Friedmann famously observed that an emerging international law of cooperation had begun to significantly modify the classical law of coexistence of states. Bruno Simma traced the shifts in international law from bilateralism to community interest. Ellen Hey posited the emergence of an “international public law,” through which “common-interest normative patterns” are woven across the traditional “inter-state normative patterns.”

International environmental law provides especially good terrain for assessing to what extent the law “has in fact evolved from a bilateral, consent-based legal system to one that has adopted multilateral features in the sense of collectively protecting common goods,” and through what “modalities” any such changes have occurred. Questions about community interests, and hence obligations designed to further their protection, are at the heart of the field. It is well worth asking, then, whether contemporary international environmental law lives up to the yardstick set out by Judge Christopher Weeramantry some twenty years ago in his separate opinion in the Gabčíkovo-Nagymaros case. This chapter focuses on the procedural dimensions of international environmental law’s evolution toward the protection of “community” interests. Before delving into this topic, several interrelated definitional issues must be settled to delineate the scope of the inquiry.

An initial question concerns who is included in the notion of “community.” For the purposes of this chapter, I do not enter into the thorny debates about whether the oft-invoked “international community” actually exists in any meaningful sense, and, if so, whether in legal terms it includes only states and, perhaps, the intergovernmental organizations through which they pursue collective goals, or indeed humanity as a whole. I use the term “community” simply as a shorthand for what this chapter is concerned with: Instances in which international law addresses environment-related interests shared by a group of states or even all states and, generally speaking, by non-state actors (international institutions, non-governmental organizations (NGOs), business entities, and individuals) as well. It also is worth noting that non-state actors are not merely affected by environmental degradation or resource scarcity, but very often directly contribute to these

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5 See Bruno Simma, From Bilateralism to Community Interest in International Law, 221 Recueil des Cours 250 (1994).
6 Ellen Hey, Teaching International Law 7 (2003).
8 See also Eyal Benvenisti, Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders, 107 Am. J. Int’l L. 295, 300–01 (2013) (positioning his trusteeship concept between statist and globalist approaches and emphasizing that it does not presuppose the existence of an “international community”).
9 For a comprehensive analysis, see Andreas Paulus, Die Internationale Gemeinschaft im Völkerrecht [The International Community in International Law] (2001).
10 See Gabčikovo-Nagymaros Project, supra note 1, separate opinion of Vice-President Weeramantry.
Indeed, one of the characteristics of international environmental concerns is the fact that they are caused primarily by non-state actor conduct. This feature highlights one of the challenges international environmental law must confront: In many respects, states are only the intermediaries—when they take on “community obligations,” the attendant task more often than not is to influence the conduct of non-state actors.

A closely related yet distinct question is what counts as a community “interest.” Are there particular features that demarcate an issue as a matter of concern for all states, as well as non-state actors? One might be inclined to say that environmental issues, by definition, are of concern to all actors and require “other-regarding” conduct. Such a broad definition, however, would mean that the entirety of international environmental law deals with community interests, including the substantive and procedural rules that are triggered only when the sovereign rights of individual states are affected. Hence, because this volume is meant to grapple with concerns that transcend this “bilateral” framework, a more narrow conception of community interests is needed for this chapter.

At the factual level, community interests usually involve matters that require collective action, that is, environmental problems that cannot be solved unless several or even all states and other actors coordinate their actions. For example, it is impossible to effectively combat global climate change unless states, and non-state actors, cooperate to reduce greenhouse gas concentrations in the atmosphere. Similarly, ocean pollution or overfishing generally can only be curbed if relevant actors work together, even if at times the cooperation of only one actor can make all the difference.

The flipside of the collective action imperative is that addressing the underlying concerns provides benefits shared by all. Such shared benefits accrue most obviously from dealing with global issues such as climate change. But the common benefit feature highlights that community interests in protection can also relate to certain resources, such as biological diversity or forests, located within the jurisdiction of individual states.

From a legal standpoint, community interests involve situations in which no single state is in a position to demand a particular approach. For example, in community interest situations, states will typically find it difficult to prove significant harm to their territories, or to trace such harm back to the conduct of specific states. Therefore, a collective response is required not just for factual reasons, but also to avoid the legal constraints that individual states would face in attempting to defend a community interest by invoking the responsibility of another state under general international law, assuming they were willing to do so. Furthermore, to protect areas or resources that

13 On the notion of “other-regarding” considerations, see Benvenisti, supra note 8, passim.
15 In Whaling in the Antarctic, Australia and New Zealand, as parties to the 1946 International Convention for the Regulating of Whaling, Dec. 2, 1946, 161 U.N.T.S 72 [hereinafter Whaling Convention], were able to act in the common interest of all treaty parties. See Whaling in the Antarctic
lie beyond the jurisdiction of individual states, states must collaborate, for example on the basis of a treaty regime, because all states have access to the commons but no state is legally entitled under general international law to impose a particular approach to their use or protection. With certain variations, the same applies to those resources within the jurisdiction of states from which collective benefits derive. Needless to say, if international law imposes constraints on states in dealing with community interests, it has traditionally made it virtually impossible for most non-state actors to do so.

Having delineated what kinds of environmental issues implicate community interests, it remains to be determined what counts as a "procedural" matter in international environmental law. At first blush, this question seems straightforward. After all, international environmental lawyers routinely distinguish between "substantive" and "procedural" obligations. Substantive rules set out standards that must be met through states' conduct, ranging from the general customary obligation not to cause serious transboundary environmental harm to specific emission or performance standards imposed by treaties. By contrast, procedural obligations include the duties to notify, warn, inform, or consult states potentially affected by transboundary impacts, to undertake (transboundary) environmental impact assessments (EIAs), and to monitor or report performance of treaty commitments as specified by the treaty.

However, drawing a neat conceptual distinction between substance and procedure is more difficult than it may first appear. The boundaries between the two are permeable and, indeed, substance and procedure tend to be in a symbiotic relationship. Substance typically frames the circumstances in which procedure operates, and the purposes that it is to serve. In turn, procedure has the potential to reinforce and develop, and to give concrete meaning and effect to, substance. International environmental law provides particularly vivid illustrations of this interplay, both in the rules of general international law and in the treaty-based regimes through which most community interest issues are addressed today.

I begin by exploring the close conceptual and practical connections between procedural and substantive obligations in international environmental law, focusing on efforts to flesh out the standard of due diligence that is at the core of the harm prevention obligation in customary law. The due diligence standard, in turn, has emerged as a potential bridge between harm prevention and the duty to take precautionary

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measures, including to avert harm to the global commons. However, recent decisions of the International Court of Justice (ICJ) suggest that the specifics of the connections between procedure and substance may be less well settled than one may have assumed. Furthermore, while the procedural dimensions of the transboundary harm framework are being progressively refined in the context of inter-state disputes, their development in relation to community interests is held back by the relative dearth of state practice and the uncertain status of relevant substantive obligations in general international law.

Against the backdrop of this assessment, the significance of treaty-based efforts to address community interest issues can be appreciated. Under the auspices of multilateral environmental agreements (MEAs), international practice has been able to transcend the gaps and constraints of the customary law framework. I survey the rich array of procedural approaches to promoting and protecting community interests that has evolved in this setting, including lawmaking, implementation and oversight, and compliance and dispute settlement processes, as well as the range of ways in which non-state actors can be involved in these processes. I pay special attention to the global climate regime that has evolved under the umbrella of the UN Framework Convention on Climate Change (UNFCCC), including through the Paris Agreement adopted in December 2015. The climate regime is particularly well suited to highlighting the diversity and promise of procedural international environmental law.

I conclude by suggesting that, both under general international law and in the context of treaty-based regimes, the procedural dimensions of international environmental law hold the key to its ability to serve community interests. As this chapter will illustrate, procedure can promote the protection of community interests in concrete ways. For example, procedural requirements can step into the breach when substantive requirements lack specificity or when states are reluctant to invoke them. In the context of treaty-based regimes, procedural elements play crucial roles when participants hold divergent positions, work toward shared understandings of community interests and collective action, or work to develop, apply, or revise substantive requirements. But the procedural aspects of international environmental law also are important in their own right. In all of its guises, procedure serves to enable, guide, and at times even compel interaction between states and other international actors, including non-state actors. In so doing, robust procedural norms and practices contribute to the

legitimacy and resilience of international law, a contribution that is particularly important in the context of efforts to advance community interests.

II. Substantive and Procedural Obligations in Customary International Environmental Law: The Duty to Prevent Environmental Harm

International environmental law remains grounded in concepts meant to balance competing sovereign interests. Under the foundational “no harm” rule, states’ rights to use their territories and resources are limited by the obligation to avoid significant transboundary harm, but neighboring states must tolerate harm that remains below that threshold. States’ duties to prevent transboundary harm caused by activities undertaken in their territories has since been affirmed and fleshed out through a series of MEAs and other international instruments, and several judicial decisions. According to Principle 21 of the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, states have “the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” The phrasing of Principle 21, affirmed in the 1992 Rio Declaration on Environment and Development, suggests that the harm prevention rule applies also to global commons, such as the high seas or the Earth’s atmosphere.

The ICJ first confirmed in its 1996 Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons that “the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.” The Court reiterated this conclusion in its 1997 decision in the Gabčíkovo-Nagymaros case and its 2010 decision in the Pulp Mills case, both of which revolved around inter-state impacts. In the Pulp Mills case, the ICJ elaborated on the procedural obligations that attach to the no harm rule, sketching out a framework upon which it built in its 2015 decisions in Costa Rica v. Nicaragua/Nicaragua v. Costa Rica, which also involved transboundary impacts.

23 See Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 829, 839 (1928) (holding that “[t]erritorial sovereignty . . . has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability . . . ”).
26 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 242 ¶ 29 (July 8) [emphasis added].
27 Gabčíkovo-Nagymaros Project, supra note 1, ¶ 53; Pulp Mills, supra note 17, ¶ 101.
the substance–procedure framework that emerges from the case law on inter-state impacts and then explore its application to community obligations.

A. The substance–procedure framework

In the *Pulp Mills* case, Argentina alleged that Uruguay had breached both substantive and procedural obligations under an agreement pertaining to the River Uruguay. In the course of its decision, the ICJ engaged at length with the relationship between procedural duties, including a new EIA requirement “under general international law,” and the substantive obligation to prevent significant transboundary harm under customary law.

The ICJ emphasized that procedural obligations have a separate existence—they can be violated, for example, even when significant transboundary harm does not ultimately occur. At the same time, the substantive obligation does not impose an absolute harm prevention duty. Rather, it demands that states meet the requirements of due diligence in their efforts to prevent significant transboundary impacts. In satisfying these requirements, states must ensure “not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators.” Furthermore, due diligence requires appropriate procedural steps to avert transboundary impacts, such as conducting an EIA and notifying, informing, or consulting potentially affected states. However, the ICJ did not hold that a failure to meet a procedural requirement necessarily implies a violation of the harm prevention duty, as Argentina had argued. The Court’s decision is ambiguous to the extent that its comments on this point focused on the interpretation of the treaty between the parties, while elsewhere in the judgment it clearly connected procedural duties and due diligence.

This ambiguity carried over to the Court’s handling of the interconnected disputes regarding sovereignty over territory and various activities near a boundary river between Costa Rica and Nicaragua. In its decision on Costa Rica’s complaint concerning Nicaraguan dredging, the ICJ observed that “to fulfil its obligation to exercise due diligence in preventing significant transboundary harm, a State must... ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment.” The Court also held that, if

29 *Pulp Mills*, supra note 17, ¶ 204.  
30 *id.* ¶¶ 77–79.  
31 *id.* ¶¶ 78–79.  
33 *Pulp Mills*, supra note 17, ¶ 101.  
34 *id.* ¶ 197.  
35 *id.* ¶ 204.  
36 *id.* ¶¶ 72, 73–74.  
the assessment confirms the risk, due diligence may require the state planning the activity “to notify and consult in good faith with the potentially affected State.” Then, however, the Court opined that, given the absence of the requisite risk, “Nicaragua was not under an obligation to carry out an environmental impact assessment . . . [and so also] was not required to notify, or consult with, Costa Rica” regarding its plans. This conclusion might be explained by the Court’s view that, on the facts of the Costa Rica v. Nicaragua case, none of the procedural or due diligence requirements had been triggered. But the Court’s assessment of Nicaragua’s complaint concerning Costa Rica’s road building suggests there may be more to its approach.

In the Nicaragua v. Costa Rica case, the ICJ found that the road building plans did trigger the obligation to undertake an EIA, an obligation that Costa Rica had failed to discharge. The Court then concluded that there was no need to examine whether Costa Rica had a duty to notify or consult, since it had “not complied with its obligation under general international law to perform an environmental impact assessment prior to the construction of the road.” It is unclear whether the Court considered states’ procedural duties to be strictly sequential, with notification and consultation being contingent upon a prior finding of risk through an EIA, or whether it considered that the failure to conduct an EIA had already established a failure to act diligently. As in the Pulp Mills case, however, the ICJ concluded that, absent evidence of significant transboundary harm, there was no violation of the “no harm” rule.

Strongly worded separate opinions on the procedure–substance question hint at just how much the Court wrestled with the relationship between the two. “In the planning phase [of a project],” wrote Judge Donoghue in her Opinion, “a failure to exercise due diligence to prevent significant transboundary harm can engage the responsibility of the State of origin even in the absence of material damage to potentially affected States.” In emphasising the importance of due diligence throughout all phases of a given project, Judge Donoghue added forcefully that she did “not find it useful to draw distinctions between ‘procedural’ and ‘substantive’ obligations, as the Court has done.” It is important to note, however, that Judge Donoghue questioned whether the obligation to conduct an EIA had in fact emerged as an independent procedural obligation at customary law. Accordingly, she chose to read the Court’s description of it as a “general obligation” as referring to its grounding in due diligence requirements.

Judge Dugard’s separate opinion reached the opposite conclusion: The term “general obligation” had to be understood as denoting “a rule of customary international law requiring an environmental impact assessment to be carried out where there is activity to determine the parameters of the initial assessment, or whether there are “objective, empirical, or scientific criteria under international law for determining the existence” of such a risk),

41 Id. ¶¶ 153–62. 42 Id. ¶ 168.
43 Id. ¶ 104. The ICJ’s “sequenced” approach mirrors that outlined by the ILC, Prevention, supra note 32, arts. 7–8. See also Int’l L. Ass’n (ILA), Legal Principles Relating to Climate Change princs. 7A, 7Bm and commentary (2014), http://www ila-hq.org/en/committees/index.cfm/cid/1029.
45 Id. separate opinion of Judge Donoghue, ¶ 9. 46 Id. 47 Id. ¶ 13.
a risk of transboundary harm.” He found that this duty was independent from the obligation to take diligent steps to prevent transboundary harm, as well as subject to a due diligence standard of its own, which served to determine its scope. Judge Dugard shared Judge Donoghue’s dissatisfaction with the Court’s failure to distinguish between breaches of the harm prevention obligation and of the obligation not to cause transboundary harm. However, according to the judge, treating the due diligence obligation as the source of the EIA obligation risked allowing a state to argue in hindsight that, in the absence of proven harm at the time of the proceedings, “no duty of due diligence arose at the time the project was planned.” In Dugard’s view, the ICJ adopted “[t]his backward looking approach” in its judgment. Assessing the EIA obligation separately, he added, would help avoid the shortfalls of that approach, notably by clarifying that the threshold for triggering the obligation “is not the high standard for determining whether significant transboundary harm has been caused but the lower standard of risk assessment.”

All in all, it appears as if the ICJ distinguishes between the duty to take diligent steps to prevent significant transboundary harm, which it then deals with under the rubric of separate procedural obligations, and the duty to take diligent steps not to cause harm, which it considers cannot be violated simply by a failure to act diligently. While the latter conclusion is clearly correct, it stands to reason that violations of procedural obligations do breach the harm prevention duty, even if no transboundary harm results from that breach. At any rate, the separate opinions suggest that the substance–procedure framework of international environmental law, as well as the legal status of the EIA obligation, may be less settled than it might appear at first glance.

B. Substance, procedure, and community obligations

Notwithstanding the ambiguities highlighted by the recent ICJ case law, the substance–procedure framework revolving around the no harm rule could be a potentially powerful tool in protecting the “commons.” Rather than having to prove, for example, that

48 Id. separate opinion of Judge Dugard, ¶ 16. For the same reading, see ITLOS, Responsibilities, supra note 18, ¶ 147.
49 ITLOS, Responsibilities, supra note 18, ¶ 9. See also Pulp Mills, supra note 17, ¶ 204.
51 Id. ¶ 10 (emphasis in the original); see also id. ¶ 19.
a given state’s greenhouse gas emissions have caused or will cause specific harmful impacts, such as sea level rise, concerned states could focus on the preventive dimension of the no harm rule, holding the emitting state to its procedural duties. The emphasis would shift from a relatively amorphous “negative” duty to avoid harm to a “positive” duty to take concrete steps to protect the environment, including the substantive steps a state may have to take to meet its due diligence obligation once risks are revealed. Furthermore, an initial finding of risk through an EIA would not only specify the triggers of the duties to notify and consult, but also reinforce the proposition that international law requires states “not merely to notify what is known but to know what needs to be notified.”

The intervention of the Federated States of Micronesia in the environmental assessment of the plan to modernize a large coal-fired power plant in the Czech Republic, the Prunéřov II plant, provides a good illustration of the potential strengths of a procedural approach. In a letter to the Czech Ministry of the Environment, Micronesia asserted that the project’s environmental impacts could affect its territory and requested that a transboundary environmental impact assessment be undertaken in accordance with Czech law. It further asserted that the planned modernizations failed to meet applicable best available technology (BAT) standards, an argument also advanced by several environmental organizations. The Ministry ordered a third-party assessment of the modernization project, which concluded that the project did not meet the BAT standards and that additional CO$_2$ would be emitted by Prunéřov II as a result. While the Ministry nonetheless approved the modernization, it asked the proponent power company to propose “compensation measures” at its other power plants to offset the excess emissions.

Although the Prunéřov II episode involved a state arguing on its own behalf, it illustrates how procedural obligations might assist arguments based on community interests. While the Czech authorities did not acknowledge a legal obligation to offset the project’s climate impact, or indeed the Micronesian request, it is perhaps no coincidence that the ICJ’s *Pulp Mills* judgment was released around the same time as the Czech Ministry of the Environment made its decision. Micronesia’s intervention

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54 See Duncan French, *Trail Smelter (United States of America/Canada)* (1938 and 1941), in *Landmark Cases in Public International Law* 159, 180 (Eirik Bjorke & Cameron Miles eds., 2017).
55 See *Pulp Mills*, supra note 17, ¶¶ 187, 197 (adoption of appropriate rules and measures, vigilance in their enforcement, and exercise of administrative control over public and private operators).
56 *Birnie, Boyle & Redgwell*, supra note 17, at 169.
62 See *Pulp Mills*, supra note 17.
highlights the potential “bite” of the due diligence requirements that attach to the obligation to prevent harm and the obligation to conduct assessments of transboundary impacts, even in the absence of clear evidence of present or future harm—indeed, the emissions of one power plant could hardly be said to cause sea level rise or other climate impacts.63

But could a similar argument be deployed to protect the global commons? At first glance, the answer would seem to be yes. After all, the applicability of the no harm rule to areas beyond national jurisdiction or control has been confirmed through international instruments and ICJ decisions, and the no harm rule, in turn, entails procedural obligations. And yet, efforts to bring procedural obligations to bear in a commons context will face two types of obstacles. An initial difficulty stems from the underlying substantive law, notably the question whether any customary law on community interests exists to which procedural obligations could attach in the first place. Assuming the substantive foundation exists, a second difficulty concerns whether the procedural obligations that arise in the inter-state context are in fact equally applicable to community interests.

Unfortunately, the substantive norms that would enable the procedural argument to be made remain underdeveloped. To be sure, various concepts have emerged to express community concerns. The idea that certain environmental problems are the “common concern” of humankind and that all states have “common but differentiated responsibilities” to cooperate in addressing them has gained some currency.64 In addition, the precautionary principle and the notions of sustainable development and intergenerational equity have emerged to address the growing complexity and intergenerational dimensions of environmental degradation.65 Each of these concepts has come to be reflected and, to varying degrees, fleshed out in the context of treaty regimes. But, it would be difficult to show that community concern norms have general effect as customary law.66 Even in relation to the no harm rule, there is strikingly little direct practice on who would be entitled to invoke the rule in respect of harm to areas beyond national jurisdiction or control.67 Yes, states are obligated to prevent harm to the commons; but is that obligation owed erga omnes, such that “all States can be held to have a legal interest” in compliance with it?68

63 Even if modernized as planned, Prunéřov II would be one of the largest sources of CO₂ emissions in Europe. See Malkin, supra note 60.
64 See Brunnée, supra note 2.
66 For example, that is the conclusion of the ILC’s Drafting Committee on the Protection of the Atmosphere with respect to the notion of “common concern.” See Int’l Law Comm’n, Protection of the Atmosphere 10 (June 2, 2015), http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2015_dc_chairman_statement_atmosphere.pdf&lang=EF (noting that the committee opted instead to describe the protection of the atmosphere as a “pressing concern of the international community as a whole.”).
67 See Brunnée, supra note 2, at 555–56.
68 Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3, 32 (Feb. 5); but see id. at 47 (¶ 91) (requiring a concrete treaty mechanism to provide standing). For an in-depth treatment of the case and the legal issues raised by erga omnes obligations more generally, see Christian J. Tams, Enforcing Obligations Erga Omnes in International Law (2005).
For many commentators, the right of each state to invoke responsibility for violations is inherent in the very concept of obligations *erga omnes*. This view finds support in the advisory opinion of the International Tribunal for the Law of the Sea (ITLOS)’s Seabed Chamber on responsibilities in the Area. According to the Law of the Sea Convention (UNCLOS), the “Area and its resources are the common heritage of mankind.” The Chamber, noting that the International Seabed Authority was tasked with acting on behalf of “mankind as a whole,” observed that each “State Party may also be entitled to claim compensation [for harm to the Area] in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and the Area.” It supported this observation by referring to Article 48 of the ILC Draft Articles on State Responsibility, which envisage circumstances in which states other than those directly injured could invoke another state’s responsibility for breaches of obligations owed *erga omnes*, or *erga omnes partes*.

The ICJ has not pronounced itself on the *erga omnes* dimensions of the no harm rule. To be fair, the Court’s recent case load has provided little opportunity to engage the issue, and the one earlier case that might have done so—the 1973 Nuclear Tests case (*New Zealand v. France*)—did not reach the merits phase. In its application for interim measures against nuclear testing in the South Pacific, New Zealand invoked, inter alia, France’s violation of the rights of all members of the international community to be free from nuclear fallout and contamination of the high seas and atmosphere. But, given France’s unilateral declaration that it would end testing, the ICJ never decided the merits of the case. Various separate or dissenting opinions showed the judges were divided on the standing issue. Some noted that while “the existence of a so-called actio popularis in international law is a matter of controversy,” it “may be considered as capable of rational legal argument and a proper subject of litigation.” For others, the applicant states had “no legal title... to act as spokesman for the international community.”

Some four decades later, the scope for cases invoking the harm prevention rule in relation to a global environmental concern still seems limited, or at least states

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**References**

69 For an overview, see Brunnée, *supra* note 2.


71 ITLOS, Responsibilities, *supra* note 18, ¶ 180 (referring to UNCLOS, *supra* note 70, art. 137(2)).


choose not to argue cases on that basis.\textsuperscript{76} A case in point is Palau’s 2011 attempt to mobilize support for an ICJ advisory opinion in the climate change context, which was limited to states’ “legal responsibility to ensure that any activities on their territory that emit greenhouse gases \textit{do not harm other States}.”\textsuperscript{77} Presumably, Palau’s assessment was that a question focused on inter-state harm stood on stronger legal ground than one relating to harm to the commons. In any case, pursuant to Article 96 of the UN Charter, the most likely path to an Advisory Opinion would be a request by the General Assembly, requiring the support of a majority of its members. While some states appeared supportive, others were concerned about interference with the negotiations under the auspices of the UNFCCC.\textsuperscript{78}

What, then, of the question whether, assuming the requisite substantive law foundation exists, the procedural obligations that attach to the no harm rule in an inter-state context apply equally to community obligations? It would seem only logical that this should be so.\textsuperscript{79} Alas, here too the practice pertaining to customary international law is surprisingly thin and the ICJ, for its part, has been exceedingly cautious.

Although the Court had previously confirmed that states’ duties to prevent environmental harm extend to the commons, it chose in the \textit{Costa Rica v. Nicaragua/ Nicaragua v. Costa Rica} cases to quote only those parts of its earlier articulation of the no harm rule that focus on inter-state transboundary harm.\textsuperscript{80} While this restraint might be explained by the inter-state nature of the disputes, that feature did not prevent the Court in the earlier \textit{Gabcíkovo-Nagymaros} and \textit{Pulp Mills} cases from restating the no harm rule in more expansive terms.\textsuperscript{81} It is quite possible, therefore, that the Court sought to limit the implications of its observations on procedural duties for situations involving community obligations. Such a narrow approach would be in line with the ILC’s Harm Prevention articles,\textsuperscript{82} which focus only on transboundary harm, rather than environmental harm as such,\textsuperscript{83} and on which the Court appeared to rely.

A further aspect of its most recent decision concerning the no harm rule suggests reluctance on the part of the ICJ to apply procedural rules, and specifically the EIA obligation, to collective environmental interests. As pointed out by Judge Dugard in his separate opinion, the Court failed to give close consideration to the risks posed by Nicaragua’s activities to wetlands located within Costa Rica, but protected under the Ramsar Convention as of “international importance.”\textsuperscript{84} The ICJ concluded, wrongly

\textsuperscript{76} See the Prunéřov II episode, \textit{supra} notes 57–63 and accompanying text; Rebecca Elizabeth Jacobs, \textit{Treading Deep Waters: Substantive Law Issues in Tuvalu’s Threat to Sue the United States in the International Court of Justice}, 14 PAC. RIM L. & POL’Y J. 103 (2005).


\textsuperscript{79} See, e.g., Birnie, Boyle & Redgwell, \textit{supra} note 17, at 178.


\textsuperscript{81} See \textit{Gabčíkovo-Nagymaros Project}, \textit{supra} note 1, ¶ 53; Pulp Mills, \textit{supra} note 17, ¶ 101 (Apr. 20); and accompanying text in \textit{supra} note 27.

\textsuperscript{82} See ILC, \textit{Prevention}, \textit{supra} note 32.

\textsuperscript{83} See Dupuy and Viñuales, \textit{supra} note 16, at 57.

\textsuperscript{84} Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 2, 1971, 996 U.N.T.S. 245.
in Judge Dugard’s view, that no EIA was required of Nicaragua given the absence of risk of significant transboundary harm. Aside from disagreeing with this conclusion on the facts, Judge Dugard took the Court to task for failing to heed its own earlier assessment that the presence of a Ramsar-protected wetland “heightens the risk of significant damage because it denotes that the receiving environment is particularly sensitive.” In Dugard’s view, the “Court should have held that in a Ramsar-designated wetland there was a lower threshold of risk,” triggering an obligation on the part of Nicaragua to consider the potential impact of its planned activities on the wetland in Costa Rica.

It is again the 2012 Advisory Opinion of the ITLOS Seabed Chamber that brightens the otherwise rather bleak picture. Although the opinion was concerned with deep seabed operations under the auspices of a treaty regime, it invoked due diligence requirements under general international law. The opinion, released in the year after the ICJ’s Pulp Mills decision, built on that case in a number of ways. It highlighted the contextual nature of the due diligence standard, which the Chamber held may change over time and in view of the risks involved in a given activity. The requirement of due diligence furthermore served as a bridge between the duty to prevent environmental harm and the proposition that, even in the absence of “full scientific certainty,” states must take precautionary measures to “prevent environmental degradation.” The Chamber observed that, separate and apart from its status in the seabed regime and under customary law, “the precautionary approach is also an integral part of the general obligation of due diligence.”

According to the ITLOS Chamber, this obligation requires states “to take all appropriate measures to prevent damage . . . [and] applies in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks.” The Chamber concluded that a state “would not meet its obligation of due diligence if it disregarded those risks.” While this perspective seems sensible in many respects, it remains to be seen whether its sliding scale approach to prevention and precaution will be embraced by international practice. Although the Chamber may well have spelled out what the ICJ merely alluded to in its Gabčíkovo-Nagymaros and Pulp Mills decisions, the ICJ did not engage with the Chamber’s opinion in its discussion of the EIA obligation in Costa Rica v. Nicaragua/Nicaragua v. Costa Rica v. Nicaragua/Nicaragua v. Costa Rica, supra note 17, separate opinion of Judge Dugard, ¶¶ 29–34.

86 Id. ¶ 34 (quoting ¶ 155 of judgment). See also Costa Rica v. Nicaragua/Nicaragua v. Costa Rica, supra note 17, ¶ 105.
87 Id. ¶ 32. 88 ITLOS, Responsibilities, supra note 18, ¶¶ 147–49. 89 Id. ¶¶ 115, 117.
89 See Rio Declaration, supra note 25, princ. 15.
90 ITLOS, Responsibilities, supra note 18, ¶ 131. 91 Id.
92 See, e.g., Int’l L. Ass’n (ILA), supra note 43, princs. 7A & 7B, and commentary.
93 In both decisions, the ICJ noted that: “in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage and of the limitations inherent in the very mechanism of reparation of this type of damage.” See Gabčíkovo-Nagymaros Project, supra note 1, ¶ 140. See also Pulp Mills, supra note 17, ¶ 185.
Either way, for present purposes, the most important implication of this “sliding scale” approach to prevention and precaution is the increased importance that it accords to procedural obligations, including in particular EIA obligations.\(^98\)

### III. International Environmental Regimes: Institutionalizing Collective Interests

Notwithstanding the uncertainties surveyed above, the recognition of a duty to protect areas beyond national jurisdiction from environmental harm and the emergence of concepts such as common heritage, common concern, common but differentiated responsibilities, precaution or sustainable development have helped international law evolve to better reflect community interests. The impact of this substantive evolution, however, has been felt primarily in the development of treaty-based regimes, which have been relied upon to step into the conceptual gaps in general international law and to transcend the constraints that have kept its practice predominantly bilateral.

Such regimes have served to enshrine community interest concepts in relation to specific geographic areas or specific environmental concerns. For example, in endorsing the harm prevention rule, several agreements focus on impacts beyond areas of national jurisdiction. The Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol are two examples, the Law of the Sea Convention is another.\(^99\) The latter contains only environmental protection obligations pertaining to the high seas and,\(^100\) as already noted, it designates the deep seabed and its resources to be "the common heritage of humankind."\(^101\) Furthermore, notwithstanding the fact that the status of the concept of common concern at customary law remains uncertain,\(^102\) MEAs have designated particular issues, such as the loss of biological diversity and climate change, as common concerns of humankind.\(^103\) Over time, such treaty practice could reinforce community interest concepts at general international law.\(^104\) For the time being, however, their main impact has been to frame environmental regimes and help shape their evolution and implementation.

For example, the UNFCCC preamble elaborates on the proposition that climate change is a common concern by acknowledging that its global nature “calls for the widest possible cooperation by all countries . . . in accordance with their common but differentiated responsibilities and respective capabilities.”\(^105\) This common concern/...
responsibility framework provides the normative anchor for the climate regime and accounts for its global scope. The underlying understanding is reflected not only in the regime’s universal membership, but also in the fact that its global approach has proven resilient even in the face of the challenges of collective decisionmaking. In short, there is a widely shared sense that an international legal response to climate change must involve states that are emitters of greenhouse gases as well as states that contribute little to the problem, or stand to be victims of climate-related harms. The differentiation dimension of the common responsibility frame, too, has been instrumental in guiding the evolution of the regime. Since the inception of the climate regime, parties have debated how responsibilities should be differentiated. Gradually, the regime’s approach shifted from a stark South-North differentiation, as reflected in the Kyoto Protocol, to the much more nuanced and dynamic differentiation that underpins the 2015 Paris Agreement.

A key feature of community concern regimes is that they are not one-off contracts between states, but rather open-ended “sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge.” The adoption of the underlying treaty thus marks not the endpoint of the international legal process but its beginning. MEAs typically establish treaty-bodies for ongoing exchange and negotiation among parties, supported by treaty secretariats that provide an array of administrative services. They enable long-term interaction among regime participants and help constitute the “communities” that remain elusive in the customary law context but that are crucial to the legal enterprise of addressing common environmental concerns. In this institutionalization of community interests, procedural requirements play central roles in facilitating the evolution of the regime and the emergence of deeper substantive understandings.

As we have seen, in the customary law context, procedural obligations are tied closely to the harm prevention obligation and its due diligence requirements. MEAs also give pride of place to information exchange, consultation, and environmental assessment duties, tailoring them to the features of the concern at hand. But in the context of MEAs a much more extensive set of procedural elements, including an array of lawmaking and standard-setting processes, as well as compliance and dispute settlement processes, has taken hold. Furthermore, MEAs provide scope for non-state actors to benefit from or be involved in this range of procedural features. I consider each of these dimensions below.

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108 See Stephen D. Krasner, Structural Causes and Consequences: Regimes as Intervening Variables, 36 Int’l Org. 185, 186 (1982) (providing a still influential, general definition of regimes that is salient also in the context of community interests).
A. Information exchange and scientific assessment processes

Notification, provision of information, assessment, and consultation provide the necessary foundation for any effective effort to address a given concern, as well as for subsequent efforts to monitor the performance of both the regime and individual parties. All MEAs, therefore, require parties to cooperate in relation to research and scientific assessments and to report on their implementation of treaty requirements. Typically, MEAs also enshrine detailed procedural requirements, such as guidelines on how to measure performance, or on what kind of information is to be reported in what manner. The Kyoto Protocol provides a good illustration, as does the 2015 Paris Agreement, which places strong emphasis on measurement, reporting, and verification (MRV) requirements, even if some of the details remain to be developed by the parties. The Paris Agreement’s MRV regime, which is focused on individual parties’ performance, will be complemented by a “global stock-take,” which is intended to assess “collective progress towards achieving the purpose of [the] Agreement and its long-term goals.”

One important advantage of treaty-based procedural requirements is that their “triggers,” scope and content can be specified and nuanced far more than is possible under the general due diligence framework.

In addition to procedural requirements imposed on individual parties, many environmental regimes establish or collaborate with international scientific and other expert forums, providing a more cooperative setting for information exchange and scientific assessment than tends to be available in strictly inter-state contexts. For example, the UNFCCC established a permanent Subsidiary Body for Scientific and Technological Advice, but the regime also draws upon the expertise of the Intergovernmental Panel on Climate Change (IPCC), which operates under the auspices of the World Meteorological Organization and the United Nations Environment Programme. Expert forums such as these are important in building consensus around the nature of community interests and the collective action that is required to address them. Their role in strengthening a regime’s “common interest patterns” is an iterative one. Once decisions on the general thrust of collective action are taken, the expert bodies support the elaboration, refinement, or adjustment of regulatory strategies. In the climate regime, for example, the IPCC has been instrumental in bringing about acceptance of the need to keep global warming to “well below 2°C” and to pursue efforts to limit it to “1.5°C above pre-industrial levels,” and hence in concretizing,...

110 See, e.g., Vienna Convention, supra note 99, art. 3 (Research and Systematic Observation) and art. 5 (Transmission of Information).
111 See, e.g., Kyoto Protocol, supra note 106, arts. 5, 7. For a detailed analysis, see Anke Herold, Experiences with Articles 5, 7, and 8 Defining the Monitoring, Reporting and Verification System Under the Kyoto Protocol, in Promoting Compliance in an Evolving Climate Regime 122 (Jutta Brunnée, Meinhard Doelle & Lavanya Rajamani eds., 2012).
112 See Paris Agreement, supra note 21, art. 13.
113 Id. art. 13.13. 114 Id. art. 14.
115 UNFCCC, supra note 20, art. 9.
116 See Birnie, Boyle & Redgwell, supra note 17, at 337.
117 Hey, supra note 6.
118 See Paris Agreement, supra note 21, art. 2.1(a).
through the Paris Agreement, the parties’ understanding of the regime’s objective to avert dangerous climate change.\textsuperscript{119}

\textbf{B. Lawmaking processes}

At customary law, states’ obligations to engage with other states concerning potential environmental impacts of their activities may require consultation, but do not extend to a duty to negotiate.\textsuperscript{120} MEAs, it could be argued, do entail a duty for parties to engage in ongoing negotiations aimed at developing the regime as needed to meet its objective. In practice, in any case, MEAs do provide iterated, institutionalized opportunities for negotiation and lawmaking.

The lawmaking processes and further development of an MEA are usually in the hands of a plenary body, such as a Conference of the Parties (COP). The spectrum of opinions on the role of COPs is wide.\textsuperscript{121} Some commentators observed the emergence of issue-specific global legislatures.\textsuperscript{122} Others have argued that COPs increasingly resemble international organizations.\textsuperscript{123} For yet others, a COP is a diplomatic conference,\textsuperscript{124} albeit one that facilitates continuous processes and interlocking engagements between technical experts, policymakers, and lawyers. Be that as it may, COPs and their subsidiary bodies have come to be central venues for international standard-setting activities around community interests.

Treaty-based lawmaking is of particular importance in this context because it settles the basic questions of who is entitled to set standards for the collective and on what terms. Community interest treaties enshrine the background assumption that standard-setting is a collective enterprise, enabling all states to participate in shaping, and deciding upon, responses to the concern. MEAs also allow for the tailoring of lawmaking processes so as to strike a balance between the protection of state sovereignty through consent requirements and the need for timely collective action.\textsuperscript{125} To be sure, much regime development still occurs through ordinary consent-based processes. Hence, when an agreement is amended, or when an additional treaty, such as a protocol, is adopted, individual states are bound only when they consent to these instruments. But the “edges of consent” have softened.\textsuperscript{126} Under many agreements, especially when technical issues are involved, regulatory approaches can be adjusted

\textsuperscript{119} UNFCCC, \textit{supra} note 20, art. 2. See also Brunnée & Toope, \textit{supra} note 22, at 146–51 (tracing the meandering path toward agreement on the temperature goal).

\textsuperscript{120} See the range of procedural duties set out in ILC, \textit{Prevention, supra} note 32.


\textsuperscript{125} Simma, \textit{supra} note 5, at 325.
with effect for all parties, except for those that explicitly opt out.\textsuperscript{127} Perhaps more significantly, much regulatory detail is adopted through decisions of plenary bodies, without subsequent formal consent by individual states. In most cases, the resulting standards will not be legally binding, although they may well contain mandatory language. For example, under the UNFCCC and its Kyoto Protocol, provisions on central treaty matters, ranging from inventory and monitoring requirements to the protocol’s mechanisms for trading of emission units or reduction credits, were adopted in this way.\textsuperscript{128} The Paris Agreement envisages a similar approach for the adoption of standards concerning key matters such as the communication of and accounting for parties’ nationally determined contributions, and “common modalities, procedures and guidelines” for monitoring and reviewing parties’ commitments.\textsuperscript{129}

As the slow evolution of the climate regime illustrates, even formally nonbinding standards are subject to difficult negotiations.\textsuperscript{130} Nonetheless, on balance, soft regulatory processes allow speedier regime development and adjustment than processes that involve subsequent ratification by individual states. Equally important is that they facilitate agreement upon collective action and adoption of standards applicable to all parties—an important feature for efforts to address community interests.\textsuperscript{131}

The 2015 climate negotiations in Paris highlighted an increasing willingness of states to combine a range of approaches to maximize the potential for and scope of collective standard-setting. The Paris “Outcome” consists of the Paris Agreement—a treaty—and a COP decision, which adopts the treaty text and supplements it in many key respects.\textsuperscript{132} The most experimental aspect of the Outcome is that, instead of enshrining binding emission reduction commitments, it relies on non-legally binding, “nationally determined contributions” (NDCs) by parties. The Paris Agreement will obligate all parties to “prepare, communicate and maintain successive” NDCs, and will impose related procedural requirements, such as the ones related to performance assessment discussed above.\textsuperscript{133} But the NDCs themselves are “housed” outside of the agreement—they are to be communicated to the UNFCCC secretariat and will be published on the UNFCCC website.\textsuperscript{134} As it turns out, this blend of lawmaking and standard-setting approaches has shown more potential to achieve collective climate action than the binding emission reduction regime enshrined in the Kyoto Protocol.\textsuperscript{135}

\textsuperscript{127} See also Anne van Aaken, \textit{Behavioral Law and Economics}, 55 Harv. Int’l L. J. 421 passim (2014) (exploring the benefits of opt-out mechanisms and other treaty design features across issue areas).

\textsuperscript{128} See Brunnée, \textit{supra} note 125, at 23–31.

\textsuperscript{129} See Paris Agreement, \textit{supra} note 21, e.g. arts. 4.8, 4.9, 4.13, 13.13.

\textsuperscript{130} See Brunnée & Toope, \textit{supra} note 22, ch. 4 (reviewing, inter alia, the negotiation of the “Marrakesh Accords,” a package of COP decisions that fleshed out key aspects of the Kyoto Protocol, and of the “Copenhagen Accord,” a political agreement that foreshadowed many aspects of the Paris Agreement).

\textsuperscript{131} See generally Scott Barrett, \textit{Collective Action to Avoid Catastrophe: When Countries Succeed, When They Fail, and Why}, 7 Global Pol’y 40 (2016) (exploring the challenges of collective action from a game theoretical perspective).


\textsuperscript{133} Paris Agreement, \textit{supra} note 21, art. 4.2.

\textsuperscript{134} See Report COP-21, \textit{supra} note 21, at 2, ¶¶ 13–14.

\textsuperscript{135} Whereas the Kyoto Protocol subjected only a small number of parties accounting for a small share of global emissions to reduction commitments, as of February 4, 2016, the Paris Outcome had generated NDCs representing 188 countries and accounting for close to 98.7% of global carbon emissions. See
It is too soon to know whether or not this mixed approach will spread to other international environmental issues. Climate change, after all, is the most complex of all community concerns, posing collective action challenges that do not necessarily find counterparts in other contexts. It also is not clear at this stage whether the example of the climate regime heralds the retreat from formal lawmaking processes that some observers have detected. However, at least in the climate context, the Paris Outcome signals a change in the role of formally binding treaty law, which now appears to be to enshrine the goals, principles and, not least, procedures that serve to anchor and support substantive commitments.

C. Compliance and dispute settlement

Another key feature of community interest regimes is their approach to compliance and dispute settlement. As noted in Section II of this chapter, customary international law provides only limited options for invoking and compelling compliance with collective interest norms. Furthermore, because community interests by definition raise polycentric issues, they do not easily lend themselves to traditional, bilateral dispute settlement. At any rate, and further to the constraints highlighted in the discussion of the harm prevention obligation, options for judicial dispute settlement, for example by the ICJ, are generally constrained by the requirement that all parties must accept the court’s jurisdiction.

A different approach is taken under Part XV of the UNCLOS. Any party to the convention can unilaterally bring environmental disputes, including disputes relating to the high seas, before the ITLOS, the ICJ, or an arbitral tribunal. The relevant court or tribunal is empowered to prescribe provisional measures to forestall serious harm to the marine environment pending its final decision. ITLOS has done so in a case concerning high seas resources: The dispute between Australia and New Zealand, on the one hand, and Japan, on the other, regarding the conservation and management of southern bluefin tuna. Finally, where parties agree to bring a dispute before the ITLOS, “entities other than States Parties” can join the proceedings. It would


137 This shift has been characterized by some as a move to “orchestration” rather than regulation. See Antto Vihma & Harro van Asselt, Great Expectations: Understanding Why the UN Climate Talks Seem to Fail (2012), http://www.fiiia.fi/en/publication/270/great_expectations/.
138 See Gabčikovo-Nagymaros Project, supra note 1, separate opinion of Vice-President Weeramantry, at C(c) (pointing to the additional problems that flow from the fact that the court’s procedures, focused as they are upon disputes between specific state parties, are ill-suited to doing “justice to rights and obligations of an erga omnes character”). See generally Lon Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 395 (1978).
140 UNCLOS, supra note 70, arts. 287–88. Id. art. 290.
appear, then, that the ITLOS Statute recognizes in at least a limited manner that the "community" interested in the protection of the marine environment may also include private parties, NGOs, or international organizations.\footnote{Birnie, Boyle & Redgwell, supra note 17, at 251–52. Greater scope for such community interest actions to protect the environment exists under the auspices of regional human rights regimes. See, e.g., James Thuo Gathii, Saving the Serengeti: Africa’s New International Judicial Environmentalism, 16 Chi. J. INT’L L. 386, 406–14 (2016).}

However, the UNCLOS is not representative of community interest regimes. In MEAs, compulsory dispute settlement is rare,\footnote{Birnie, Boyle & Redgwell, supra note 17, at 258.} partly because of states’ reluctance to resort to it and partly because it may not satisfactorily address the community interests underlying the agreement. To be sure, sometimes enforcement action by individual states can serve to address a community interest. For example, in Whaling in the Antarctic, Australia (New Zealand intervening) brought an action against Japan, taking advantage of the fact that both states had accepted the jurisdiction of the ICJ under Article 36(2) of the ICJ Statute.\footnote{See ICJ Statute, supra note 139.} Australia argued that, as a party to the Whaling Convention, it was acting in the common interest of all treaty parties in “safeguarding for future generations the great natural resources represented by the whale stocks,”\footnote{See Whaling Convention, supra note 15, pmbl.} not as an injured state.\footnote{See Whaling Pleadings, supra note 15, at 28, ¶ 19 (Burmester).} Although Japan challenged the jurisdiction of the Court and countered the case on the merits, it did not question Australia’s standing to bring the case.\footnote{See Malgosia Fitzmaurice, Whaling and International Law 110–11 (2015).} More often than not, however, addressing the community concern animating an agreement requires the greatest possible degree of compliance by the widest possible range of parties, rather than finding that an individual party has breached its obligations. MEAs, therefore, have seen the emergence of procedures that assess parties’ compliance with their treaty commitments and provide for a range of measures to facilitate or compel compliance.

Facilitation of compliance has been the primary objective of the majority of these compliance procedures. The procedure under the Montreal Protocol neatly encapsulates the facilitative approach, aimed, as it is, at "securing an amicable solution . . . on the basis of respect for the provisions of the Protocol."\footnote{See U.N.E.P., Tenth Meeting of the Parties to the Montreal Protocol, U.N.E.P. Doc. OzL.Pro10/9, Annex II: Non-Compliance Procedure, ¶ 8 (1998) [hereinafter Montreal Protocol NCP].} This cooperative approach recognizes the fact that, in the context of ozone depletion, non-complying parties are most likely to be states with genuine capacity limitations. But the treaty setting also makes it possible to tailor the noncompliance regime to the underlying collective concern, and the needs of the parties involved. For example, under the Kyoto Protocol only developed countries and transition countries had emission reduction commitments.\footnote{See Kyoto Protocol, supra note 106, art. 3.1, annex B.} Therefore, capacity building and financial assistance were less appropriate in promoting compliance. Moreover, the Kyoto Protocol regime had certain unique features, such as its emissions trading mechanisms, which necessitated a tougher approach to compliance. The Kyoto Protocol’s compliance procedure, thus, explicitly declared its goals to “facilitate, promote and enforce compliance” with the
In turn, the Paris Agreement, given its reliance on nationally determined, rather than internationally negotiated, emission reduction commitments, returns to a “mechanism to facilitate implementation . . . and promote compliance.” It is to consist of a committee that is “expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive” and that is to be attentive to “the respective national capabilities and circumstances of Parties.”

MEA compliance procedures can generally be triggered by any state party, including by a state regarding its own performance. Yet there is also evidence of subtle movement toward a common interest pattern. For example, under the Montreal Protocol procedure, the treaty’s Secretariat can and does trigger the procedure. The Kyoto Protocol procedure, by contrast, had an automatic trigger—whenever an expert review process revealed questions about a party’s implementation of its commitments. While both procedures thus allow for a form of collective-interest trigger, they remain anchored in inter-state foundations. The triggers for and other terms of the compliance mechanism for the Paris Agreement are to be adopted by the parties at their first meeting.

D. Involvement of non-state actors: broadening the “community”?

As noted in the introduction to this chapter, one of international environmental law’s key features is the fact that most environmental concerns are caused by and affect actors other than states. Customary law’s harm prevention framework, however, is focused almost entirely on states. Even where it does contemplate community interests or protection of areas beyond national jurisdiction, the main puzzle has been whether and in what circumstances states could invoke attendant community obligations. International environmental agreements, once again, have provided the legal setting for a more inclusive approach to environmental concerns. Indeed, two agreements, the 1991 Espoo Convention on Transboundary Environmental Impact Assessment and the 1998 Aarhus Convention on Public Participation and Access to Justice, provide significant avenues of public involvement, with the Aarhus Convention being entirely devoted to citizen access. However, both are concerned with transboundary environmental impacts rather than common environmental concerns.

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153 Id. art. 15.2.

154 See Montreal Protocol NCP, supra note 150, ¶ 3.

155 See Kyoto Protocol NCP, supra note 152, ¶ VI.1.

156 See infra notes 159–70 and accompanying text, on non-state involvement.

157 See Paris Agreement, supra note 21, art. 15.3.

158 Yet, states may be required to inform the public likely to be affected by a potential transboundary impact and provide equal access to administrative and judicial procedures. See ILC, Prevention, supra note 32, arts. 13, 15; Craik, supra note 53, at 146–50.

In the latter context, the Paris Agreement offers the most comprehensive articulation yet of whose interests are engaged, albeit without granting non-state actors specific rights or status under the climate regime. Its preamble acknowledges that:

climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.\footnote{Paris Agreement, \textit{supra} note 21, pmbl.}

While the Paris Agreement’s explicit acknowledgement of a wide range of non-state stakeholders is nonetheless unusual, at a procedural level, MEAs have long been accessible to non-state actors, including international organizations, NGOs, or business entities.

An important first dimension of accessibility concerns information about a regime’s standard-setting and performance-monitoring activities. Although transparency through public availability of documents and data may seem ordinary today, it is worth noting that contemporary practice represents a significant departure from the previous practice of closed and strictly \textit{inter partes} proceedings.\footnote{See Brunnée & Hey, \textit{supra} note 11.} The impact of shifting attitudes has been amplified by technology—treaty websites now enable non-state actors to access not only legal documents and meeting reports, but also scientific and technical information, including that compiled pursuant to parties’ procedural obligations under the regime. Hence, although under the terms of most MEAs, the obligations as such are owed only to fellow treaty parties, in practical terms the beneficiaries are the diverse members of a much larger “community.”

In addition to such “remote” access to information about the practice of the regime and its parties, as well as to webcasts of plenary sessions, MEAs generally also provide direct access to meetings of the parties. Third states, intergovernmental organizations and NGOs can obtain observer status at COP meetings, distribute information or policy papers, meet with official delegations, or report on negotiations.\footnote{On the challenges, see \textit{id.} at 35–36.} In a formal sense, decisionmaking remains entirely in the hands of states, and key negotiating sessions will typically be restricted to state delegations. But non-state actors do have considerable opportunities to provide input into lawmaking processes or even help shape their outcomes.\footnote{\textit{Id.} at 30–37.}

“factual and technical information” relevant to the compliance review, have access to meetings of the compliance bodies unless parties object and have access to the findings of the compliance body. But NGOs were not to be able to trigger the procedure or make formal submissions. In this respect, the Paris Agreement follows suit. None of the three performance assessment processes (MRV, global stock-take, compliance mechanism) it establishes envisages direct non-state actor involvement. Thus, with respect to compliance, the “international community” in the climate change regime remains primarily one of states. However, outside of the climate regime, nongovernmental organizations have been increasingly active, compiling rigorous and widely respected performance assessments. While not concerned with compliance per se, these assessments did measure states’ intended nationally determined contributions in the lead-up to the Paris Agreement against the yardstick of the climate regime’s objective and taking into account the principle of common but differentiated responsibilities. In this way, non-state actors have assumed a role that has been politically and, in the absence of formal emissions commitments under the Paris Agreement, legally difficult for the inter-state regime to take on.

IV. Conclusion

The picture of the procedural aspects of international environmental law that emerges from this chapter is a mixed one, especially at customary law. The experience in the transboundary context suggests that procedural obligations have great potential to strengthen the preventive aspects of the harm prevention rule, as well as to flesh out—or support, depending on one’s reading of the ICJ case law—its due diligence standard. Procedural obligations can also serve useful purposes when states, or judges, are reluctant to entertain substantive arguments, or find it difficult to establish that environmental harm has been, or is being, caused by another state. Violations of procedural obligations are more easily established and, by holding states to their procedural duties, they can sometimes be prompted to correct harmful conduct, or at least to take more effective preventive measures going forward. Unfortunately, in relation to community interests, the operation of procedural rules is constrained by the dearth of international practice and the continued struggle with the substance of community obligations and the legal effects of *erga omnes* norms.

Treaty-based approaches have proven much better suited to addressing community interests, overcoming some of the constraints of general international law. Treaties serve to recognize particular environmental issues as common concerns, and to establish long-term regimes that can adapt and grow as parties’ understanding of the underlying environmental problem and appropriate response action evolves. MEAs all have significant procedural elements and one of their advantages is precisely that they enable parties to tailor these elements to the features of the community interests

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167 *Id.* ¶ IX.2.
168 *Id.* ¶ VIII.7.
169 See *supra* notes 112–14, 151–56, and accompanying text.
at hand. Today, MEAs also routinely involve actors other than states, better reflecting the much broader international community contributing to and affected by most environmental concerns.

Overall, community interest regimes have proven to be both resilient and adaptable, in part because they place such strong emphasis on procedural elements and employ an increasingly diverse range of formal lawmaking and informal standard-setting approaches. Has the price for this resilience been a relative absence of substance? It is difficult to provide a definite answer to this question, in part because, rather than merely camouflaging the absence of substance, procedure serves its own, crucial functions. Precisely because agreement on substantive obligations, however desirable, cannot be pulled out of thin air but must be cultivated, procedural requirements play important facilitating and bridging roles. Successful community interest regimes, such as the Vienna Convention and its Montreal Protocol, underscore this point. What is more, some environmental concerns are so complex (number of actors, uncertainties, multidimensional, evolving nature of the problem) that it may not only be difficult but perhaps even undesirable to formally enshrine substantive obligations,\footnote{See Jutta Brunnée, The Rule of International (Environmental) Law and Complex Problems? (unpublished manuscript) (on file with author).} not least because adapting them when needed would entail potentially time-consuming amendment processes. Hence, the Paris Agreement may well strike the right balance between procedure and substance in the global response to climate change.

Do the procedural aspects of international environmental law look beyond the interests of individual states and to the “greater interests of humanity and planetary welfare”?\footnote{Gabčíkovo-Nagymaros Project, supra note 1, separate opinion of Vice-President Weeramantry, at C(c).} The answer is a qualified yes. Regardless of how important substantive rules may be in a given situation, strong procedural elements are indispensable to the law’s capacity to serve community interests. As this chapter has illustrated, procedure can promote the protection of community interests both directly and indirectly, by promoting, guiding and even compelling interaction.