6

Standing to Bring Claims for Environmental Harm in Areas beyond National Jurisdiction

6.1 INTRODUCTION

Standing requires a particular claimant to have a sufficient *legal* interest to make a claim, as opposed to *access* to a particular court or tribunal (which is discussed in Chapter 7).[1] Most legal systems, including international law, locate this right in the injury to a material interest protected by law; which is to say an interest that relates to the personal integrity, property or economic interests of the potential claimant. Environmental harm claims often raise collective legal interests due to the shared benefits that environmental resources confer, and legal systems must develop rules determining under what conditions these legal interests may be protected by individual members of the group or collectively by rights holders. Environmental harm claims in areas beyond national jurisdiction (ABNJ) raise paradigmatic issues of standing because of the collective nature of environmental interests in these areas, including who has the right (or obligation) to take the necessary response action to address environmental harm.

Notwithstanding these difficulties, both international law and national law recognize that certain actors have sufficient legal interest to bring claims for environmental damage despite not directly suffering injury or loss.[2] These developments reflect an increasing recognition of the intrinsic value of the environment and shifting conceptions of the environment as a collective good subject to community interests. However, the parameters of the concepts that affirm collective interests in

[1] Standing is an aspect of admissibility of a claim and is separate from the jurisdiction of a court or tribunal to hear the claim. Pok Yin S Chow, 'On Obligations Erga Omnes Partes' (2021) 52 Geo J Int'l L 469, 498.

[2] There is scholarly literature as well as practice that recognizes that 'nature' has rights of standing. See, for example, Christopher D Stone, 'Should Trees Have Standing – Toward Legal Rights for Natural Objects' (1972) 45 S Cal L Rev 450; Peter Burdon and Claire Williams, 'Rights of Nature: A Constructive Analysis' in Douglas Fisher (ed), *Research Handbook on Fundamental Concepts of Environmental Law* (Edward Elgar 2016) 196.

the protection of the environment are nebulous and the scenarios in which they would apply are likely to be contested.

In considering the application of the rules of standing in ABNJ, this chapter explores trends in standing in relation to the environment under international law, civil liability regimes and national law before turning to how the specific regimes governing areas beyond national jurisdiction address the issue of standing. The interest in domestic legal approaches is more conceptual but may inform international practice by analogy and at the level of general principles of law.

6.2 GENERAL APPROACHES TO STANDING FOR ENVIRONMENTAL HARM

6.2.1 *Standing under International Law*

6.2.1.1 States

The rules on standing are closely connected to the nature of the relief sought and are consequently influenced by evolving understandings of the types of harms recognized as compensable by international law.[3] Here it is useful to consider three distinct types of harm in ABNJ that will each trigger unique considerations for standing. First, states or their nationals may suffer direct harm to economic interests in ABNJ. For example, environmental harm could affect the ability of an actor to pursue living or non-living resource exploitation activities in ABNJ for which they have a right to access, for example, when fishing in the high seas is suspended in response to a pollution incident. Such harm relates less to the environment and more to the effects of environmental harm on an activity or resource for which a potential claimant has a property or economic interest. Second, states or actors under their jurisdiction may incur losses from undertaking preventive or reinstatement measures to protect or preserve the environment in ABNJ. These actions may be undertaken where a state feels these measures are necessary to protect maritime zones under their jurisdiction or other sovereign interests or a state or international organization could potentially undertake such actions where the sole purpose is to protect and preserve the environment in ABNJ. In this case, some loss is sustained by the actor taking these preventive or reinstatement measures. Could, for example, a non-state actor that seeks to remove oceans plastics seek damages from states or other actors that are the principal source of that form of pollution?[4] Finally, there are cases where a state or other actors seek compensation for unrestored (and often interim)

[3] For a more detailed discussion on the definition of environmental damage, see Chapter 3.

[4] This is not an abstract scenario as the non-profit organization registered in the Netherlands, The Ocean Cleanup, has been attempting to utilize huge booms to collect plastic in accumulation zones such as the Great Pacific Garbage Patch in ABNJ: see <https://theoceancleanup.com/about/> accessed 1 September 2022.

harm to the environment, what is often described as 'pure environmental loss' or 'environmental damage *per se*'. In this scenario, there is no identifiable actor that has suffered quantifiable harm or loss.[5] This section considers how international law may address the standing of states, international organizations and non-state actors to pursue liability claims for environmental harm in these different contexts.

Standing to bring environmental harm claims against states is generally confined to 'injured states', as reflected in article 42 of the International Law Commission's (ILC) 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ASR).[6] The 'injured state' is the 'state whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act'.[7] Article 42 stipulates that a state is entitled 'as an injured state' to invoke the responsibility of another state if the obligation breached is owed to

(a) that State individually; or
(b) a group of States including that State, or the international community as a whole, and the breach of the obligation
  (i) specially affects that State; or
  (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.[8]

The ASR do not define 'injured state', but specify that an injury 'includes any damages, whether material or moral, caused by the internationally wrongfully act'.[9] The distinction between the circumstances outlined in subparagraphs (a) and (b) relate to the nature of the obligation owed, but both fundamentally require that the invoking state suffer an injury that arises due to the breach of obligation. The more likely situation in ABNJ are breaches of obligations that are owed to a group of states, as most international rules governing aspects of ABNJ tend to be communal not bilateral. However, where a state suffers direct material injury to its interests as a result of environmental harm in ABNJ, it will satisfy the requirements of being specially affected. For example, the commentary to article 42 observes that 'a specially affected state' may arise in the 'case of pollution of the high seas in breach of article 194' of the 1982 UN Convention on the Law of the Sea (UNCLOS) as this 'may particularly impact on one of several States whose beaches may be polluted by

[5] International Law Commission (ILC), 'Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, with Commentaries' (2006) UN Doc A/61/10 (Draft Principles) commentary to principle 2, 67–68, para 14.
[6] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) UN Doc A/56/10 (ASR) art 42, 117.
[7] ibid commentary to principle 42, 116, para 2.
[8] ibid art 42(b)(ii), 117.
[9] ibid art 31(2), 92.

toxic residues or whose coastal fisheries may be closed'.[10] Accordingly, 'independently of any general interest of the States parties to [UNCLOS] in the preservation of the marine environment, those coastal States parties should be considered as injured by the breach'.[11] Injury to the coastal state here is simply an example of a material injury to the legally protected interests of the injured state. Such interests could include rights or interests exercisable in ABNJ, such as damage to a submarine cable or interference with established fishing rights.[12] Article 42 does not require that the harm be suffered exclusively by the injured state, but rather that the nature of the harm is distinct from any communal harm.

The more difficult legal question is how broadly or narrowly the notion of 'specially affected' is to be interpreted. One could conceive of circumstances – for example, an incident of pollution leading to damage to a high seas fish stock which a particular state had traditionally fished, or a state having to take specific response measures to mitigate an incident of pollution on the high seas – that could warrant the designation of a specially affected injured state under the rules of state responsibility.[13] However, this characterization is contingent on the claimant state showing some form of specific loss or damage. Fisheries, for example, are *res communis* and are subject to the freedom of the high seas – a state must establish that even though it did not have sovereign rights over the fisheries resource *per se*, it had a sufficient connection with it in that its loss directly or indirectly harmed it. This may be demonstrated by having a right to harvest certain fishery resources under a fisheries management agreement or acceptance by states of historic reliance on the fishery in question. The acceptance of a claim for standing will, thus, be context dependent and contingent upon the surrounding rights.

The case of a state seeking compensation for undertaking a response action deserves particular attention. The argument is that undertaking a response action, even though it is not required to do so, results in the state suffering damages that are unique. Under the Liability Annex to the 1991 Antarctic Protocol (discussed in Section 6.3.1), states are empowered to take response actions to protect resources in the Antarctic Treaty Area, and there are specific rules that provide for recovery in

[10] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS).

[11] ASR (n 6) commentary to art 42, 119, para 12.

[12] UNCLOS (n 10) art 87 which specifically mentions the freedom of fishing and the freedom to lay submarine cables as high seas freedoms exercisable by all states.

[13] International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (adopted 29 November 1969, entered into force 6 May 1975) 970 UNTS 211 (Intervention Convention) affirms the right of a coastal state to take such measures on the high seas necessary to prevent, mitigate or eliminate danger to its coastline or related interests from oil pollution or the threat thereof after a maritime casualty but only provides that the coastal state is liable to pay compensation for any damage caused by such measures that go beyond what is permitted by the Convention. This has been reflected in UNCLOS (n 10) art 221.

those circumstances.[14] States are not specifically authorized to take response actions in connection with high seas pollution, but a state could potentially rely on articles 192 and 194 of UNCLOS to argue that states are entitled to take positive steps to protect and preserve the environment, including response measures. If the response action is to prevent harm to the acting state's own environment, there is a stronger argument that the state is specially affected and entitled to take reasonable steps to protect harm to its territorial interests.[15] The correct approach is far from clear, and raises issues concerning what have been called 'officious intermeddlers' in domestic legal settings – that is, actors who voluntarily undertake actions for the benefit of others and then seek compensation.[16] The distinction between 'officious' and 'necessitous' intermeddlers has not arisen in international law and some care must be taken to import such concepts. Nonetheless, a robust doctrine of necessitous intervention is consistent with calls by legal scholars to approach the question of 'specially affected' states from a remedial standpoint: Peel, for example, has suggested a liberal approach along the following lines:

> [o]ne possible solution to the difficulties posed in attempting to fit breaches of collective environmental obligations ... within the framework of the category of specially affected States, is to interpret the specially affected requirement broadly to include States with some reasonable nexus to the damage suffered, over and above a general interest in the protection of the environmental resource damaged.[17]

The above discussion focused on when there is some form of material injury but there are also situations where there is no 'injured state' *per se*. In this case, article 48 (1) of the ASR states:

> [a]ny State other than an injured State is entitled to invoke the responsibility of another State ... if (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole.[18]

The ILC's intention was to address those obligations where there may be no injured states to invoke responsibility for a breach, but felt it 'highly desirable' that states

[14] Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty on Liability Arising from Environmental Emergencies (adopted 17 June 2005) (2006) 45 ILM 5 (Liability Annex).

[15] See Intervention Convention (n 13).

[16] John McCamus, 'Necessitous Intervention: The Altruistic Intermeddler and the Law of Restitution' (1979) 11 Ottawa L Rev 297.

[17] Jacqueline Peel, 'New State Responsibility Rules and Compliance with Multilateral Environmental Obligations: Some Case Studies of How the New Rules Might Apply in the International Environmental Context' (2001) 10(1) RECIEL 82, 86. But see Kevin Jon Heller, 'Specially-Affected States and the Formation of Custom' (2018) 112(2) AJIL 191, 223.

[18] ASR (n 6) art 48, 126.

other than an injured state be entitled to take some measures in order 'to protect the community or collective interest at stake'.[19]

Article 48 (1) (a) refers to what has been described in the commentary to this article in the ASR as obligations *erga omnes partes*, that is, obligations owed between a group of states derived from multilateral treaties or customary international law, and established for the protection of a collective interest of the group.[20] It is based on the *SS Wimbledon* case brought by the United Kingdom, France, Italy and Japan for Germany's breach of its obligations under the 1919 Treaty of Versailles when it denied the passage of the United Kingdom registered vessel (chartered by a French company) through the Kiel Canal.[21] The Permanent Court of International Justice (PCIJ) affirmed that both Italy and Japan 'had a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possessed fleets and merchant vessels flying their respective flags'.[22] Notwithstanding the fact that they had not suffered any interference in their pecuniary interests, the Court recognized that they were an 'Interested Power' under article 368 (1) of the Treaty which gave them the right to institute proceedings before it.[23] In effect, the doctrine recognizes that states do not need to wait until they are harmed by a breach of an obligation that is owed to them in order to take legal steps to address the breach.

Article 48 (1) (b) reflects the concept of general obligations *erga omnes* or obligations of a state towards the international community as a whole, as articulated in the *obiter* statement of the International Court of Justice (ICJ) in *Barcelona Traction*:

> ... an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are *erga omnes*.
>
> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,

[19] Priya Urs, 'Obligations *Erga Omnes* and the Question of Standing before the International Court of Justice' (2021) 34(2) LJIL 505, 508; ASR (n 6) commentary to art 48, 127, para 12.

[20] For obligations *erga omnes partes*, two conditions must be met: first, the obligation whose breach has given rise to responsibility must have been owed to a group to which the state invoking responsibility belongs; second, the obligation must have been established for the protection of a collective interest established by a treaty or customary international law: see ASR (n 6) commentary to art 48, 126, para 6.

[21] ibid commentary to art 48, 126, para 7.

[22] *SS Wimbledon* [1923] Permanent Court of International Justice Reports Series A No 1, 15.

[23] ibid.

Advisory Opinion, ICJ Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.[24]

The ASR do not identify which primary obligations are obligations *erga omnes* or *erga omnes partes* under article 48, and there are differing views on what type of obligations are *erga omnes partes* or *erga omnes* owed to the international community as a whole.[25] The lack of consensus surrounding the nature of *erga omnes* has led some to argue that the concept of *erga omnes* remains shrouded in uncertainty.[26] That said, international courts and tribunals have explicitly recognized several examples of *erga omnes* obligations such as prohibitions against aggression, slavery, racial discrimination, genocide,[27] the right to self-determination[28] and the rules of international humanitarian law embodying 'elementary considerations of humanity'.[29] At the same time, these courts and tribunals have not elucidated why these obligations should be considered *erga omnes*, meaning that the identification of such obligations remains opaque.[30] For *erga omnes partes* obligations, the ASR cite examples such as the environment or security of a region and note that they are not limited to arrangements established only in the interests of member states but would

[24] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*; *Second Phase* [1970] ICJ Rep 3 (*Barcelona Traction*) paras 33–34. For references to *erga omnes* obligations prior to *Barcelona Traction*, please see Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon Press 1997) 7–12.

[25] Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005) 119. A case in point is the debate that occurred in the ILC on whether the obligation of states to protect the atmosphere is an obligation *erga omnes*. The commentary to Draft Guideline 3 which set out the due diligence obligation of states to protect the atmosphere noted that it was 'without prejudice to whether or not the obligation to protect the atmosphere is an *erga omnes* obligation in the sense of' article 48 of the ASR (n 6) as it was subject to different views. The commentary went on to note '[w]hile there is support for recognizing that the obligations pertaining to the protection of the atmosphere from transboundary atmospheric pollution of global significance and global atmospheric degradation are obligations erga omnes, there is also support for the view that the legal consequences of such a recognition are not yet fully clear in the context of the present topic'. See ILC, 'Report of the International Law Commission' (70th Session, 30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, 175.

[26] For a discussion on the uncertainty of the concept of *erga omnes* obligations, please see Tams (n 25) 99–116.

[27] *Barcelona Traction* (n 24) para 34; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6, para 71; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Order for Provisional Measures) [2020] ICJ Rep 3 (*The Gambia v Myanmar* case 2020) para 41.

[28] *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90, para 29; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, para 180.

[29] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 155 and 157.

[30] Tams (n 25) 118–119. Arguably, the *Barcelona Traction* case provides some guidance. The court emphasized that to be *erga omnes*, it must protect important values, suggested by the statement 'in view of the importance of the rights involved, all States can be held to have a legal interest of obligations . . . *erga omnes*': *Barcelona Traction* (n 24) para 33.

extend to agreements established by a group of states in some wider common interest, transcending the sphere of bilateral relations of states parties.[31] The commentary does not elaborate on what was meant by collective interest except to say that the principal purpose would be to foster a 'common interest, over and above any interests of the States concerned individually'.[32]

The question of the *erga omnes* status of norms has arisen in relation to ABNJ resources and/or the environment. For example, in the 2014 *Whaling in the Antarctic* case, Australia alleged that Japan had violated the International Convention for the Regulation of Whaling (ICRW) although it had not suffered any direct injury.[33] The Court, without expressly saying so, 'accepted the position that Australia had purported to act in the collective interest and on that basis engaged Japan's responsibility for the breach of obligations *erga omnes partes*'.[34] Similarly, the recognition that the preservation of the marine environment of the high seas was an obligation *erga omnes partes* was implicitly reaffirmed in the 2016 *South China Sea Arbitration*.[35] The Philippines brought, *inter alia*, a claim against China for breaches of its environmental protection obligations under UNCLOS as a result of its island-building activities on features that were located both within the Philippines' exclusive economic zone (EEZ) and in ABNJ.[36] The Tribunal did not question that the Philippines had standing to mount claims under UNCLOS for environmental harm that occurred in ABNJ although *erga omnes / erga omnes partes* obligations were not raised in the pleadings or acknowledged by the Tribunal.[37] The Tribunal found that Part XII obligations on marine environmental protection apply to all maritime areas, both within national jurisdiction and beyond.[38]

More explicitly, the Seabed Disputes Chamber (SDC) of the International Tribunal for the Law of the Sea (ITLOS) in its 2011 Advisory Opinion observed

[31] ASR (n 6) commentary to art 48, 126, para 7.

[32] ibid.

[33] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Judgment) [2014] ICJ Rep 226 (*Whaling in the Antarctic*). During oral proceedings, Australia clarified that it was seeking to 'uphold its collective interest, an interest it shares with all other parties'. Verbatim Record (9 July 2013) CR2013/18, 28, para 19.

[34] Urs (n 19) 514.

[35] *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)* (Award) (2016) Oxford Reports on ICGJ 495 (PCA) (*South China Sea Arbitration*).

[36] Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North) and Subi Reef are located beyond the 200 nautical miles EEZ of the Philippines.

[37] Nilüfer Oral, 'The South China Sea Arbitral Award, Part XII of UNCLOS and the Protection and Preservation of the Marine Environment' in S Jayakumar, Tommy Koh, Robert Beckman, Tara Davenport and Hao Duy Phan (eds), *The South China Sea Arbitration: The Legal Dimension* (Edward Elgar 2018) 223, 242–245. Also see discussion in Yoshifumi Tanaka, 'Reflections on *Locus Standi* in Response to a Breach of Obligations *Erga Omnes Partes*: A Comparative Analysis of the *Whaling in the Antarctic* and *South China Sea* Cases' (2018) 17 LPICT 527, 545–553.

[38] *South China Sea Arbitration* (n 35) para 940.

in the context of damage arising from activities in the Area, that '[e]ach State Party [to UNCLOS] may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to the preservation of the environment of the high seas and in the Area'.[39] It did not distinguish between *erga omnes partes* and *erga omnes*, although they specified that *states parties* were the only actors that could bring a claim on the basis of *erga omnes*, which suggests that obligations to protect the marine environment in UNCLOS are, at minimum, *erga omnes partes* applicable between UNCLOS parties.

There is accordingly a strong argument that the obligations in UNCLOS Part XII are obligations *erga omnes partes* that can be invoked by all UNCLOS states parties without having to demonstrate that they have been specially harmed by that breach.[40] UNCLOS obligations on the protection of the marine environment can certainly be said to be established for the protection of collective interests of UNCLOS states parties.[41] Consistent with the ICJ's finding on *erga omnes partes* in the *Belgium v Senegal* case and *The Gambia v Myanmar* case, many of Part XII's marine environmental obligations can be said to be owed by any state party to all other UNCLOS states parties.[42] Article 192 provides that states have the obligation to protect and preserve the marine environment, which is an obligation owed (at the very minimum) to other UNCLOS states parties. As observed by the *South China Sea* award, Part XII obligations apply to states irrespective of where the alleged harmful activities take place.[43] Moreover, it is salient that UNCLOS gives port states certain enforcement jurisdiction powers over vessel discharge violations that occur outside zones of national jurisdiction which have been said to be 'complementary to and enhancing the *erga omnes* effect of general obligations'.[44] Article 286, which triggers the jurisdiction of an UNCLOS court or tribunal, is drafted in general terms and only requires a dispute concerning the interpretation or application of UNCLOS 'without requiring that the applicant should demonstrate a special

[39] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion of 1 February 2011) International Tribunal for the Law of the Sea (ITLOS) Reports 2011, 10 (*Activities in the Area* Advisory Opinion) para 180.

[40] P Chandrasekhara Rao and Philippe Gautier, *The International Tribunal for the Law of the Sea: Law, Practice and Procedure* (Edward Elgar 2018) 327. See also Rüdiger Wolfrum, 'Purposes and Principles of International Environmental Law' (1990) 33 GYIL 308, 325–326; Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (4th edn, OUP 2021) 145–146, 244; Kathy Leigh, 'Liability for Damage to the Global Commons' (1992) 14 Aust YBIL 129, 147–148; Eirini-Erasmia Fasia, 'No Provision Left Behind – Law of the Sea Convention's Dispute Settlement System and Obligations *Erga Omnes*' (2021) 20 LPICT 519, 530–533; Tanaka, 'Reflections on *Locus Standi*' (n 37) 551; Hanqin Xue, *Transboundary Damage in International Law* (CUP 2003) 237–250.

[41] UNCLOS (n 10) preamble.

[42] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422 (*Belgium v Senegal*); *The Gambia v Myanmar* case (n 27).

[43] *South China Sea Arbitration* (n 35) para 548.

[44] Fasia (n 40) 531.

interest'.[45] In addition, also consistent with the *Belgium v Senegal* case and *The Gambia v Myanmar* case, all UNCLOS states parties have a common interest in compliance with the marine environmental obligations under UNCLOS, given the interrelated nature of the oceans, and the critical role that the oceans play in supporting a myriad of ecosystem services.

Notwithstanding the *erga omnes partes* nature of UNCLOS marine environmental obligations, there remains a lack of clarity on the implications of the designation of UNCLOS marine environmental obligations as *erga omnes partes*. *Barcelona Traction* only acknowledged that every state had a legal interest in the protection of *erga omnes* obligations but did not elaborate on the consequences of this legal interest including whether it amounted to a right of standing. For example, it has been contended that the simple identification of a category of collective interests does not necessarily confer a right of standing on states individually to invoke responsibility for that breach.[46] However, this argument is undermined by ICJ jurisprudence in the *Belgium v Senegal* case, the *Whaling in the Antarctic* case and *The Gambia v Myanmar* case, where the ICJ has either explicitly or implicitly recognized a broad right of standing to enforce obligations *erga omnes partes* arising under multilateral treaties.[47] For example, in its judgment on preliminary objections in *The Gambia v Myanmar* case, the ICJ concluded that due to the 'common interest in compliance with the relevant obligations under the Genocide Convention', any state party is entitled to invoke the responsibility of another state party for an alleged breach of its obligations *erga omnes partes* 'regardless of whether a special interest can be demonstrated'.[48] Moreover, the SDC has also stated that each UNCLOS state party was 'entitled to claim compensation' in the event of damage to the marine environment resulting from activities in the Area which presumes a sufficient legal interest to substantiate standing for such claims.[49]

[45] Tanaka, 'Reflections on *Locus Standi*' (n 37) 551.

[46] See, for example, Judge Xue's dissenting opinion in *Belgium v Senegal* where she noted 'it is one thing that each State party has an interest in the compliance with these obligations, and it is another that every State party has standing to bring a claim against another State for the breach of such obligations in the Court'. She also did not accept the position of the majority that the concept of *erga omnes partes* was necessary in cases where no state would be in the position to make a claim and argued that the non-adjudicatory accountability mechanisms specified in the Convention, such as the Committee against Torture 'are designed to exactly to serve the common interest of the States parties in the compliance with the obligations under the Convention'. See *Belgium v Senegal* (n 42), Judge Xue, Dissenting Opinion, paras 15–17, 19. Judge Xue made similar arguments in *The Gambia v Myanmar* case: See *The Gambia v Myanmar* case (2020) (n 27), Separate Opinion of Judge Xue; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Judgment on Preliminary Objections) (2022) GL No 178, Dissenting Opinion of Judge Xue (*The Gambia v Myanmar* case 2022).

[47] Urs (n 19) 516.

[48] The *Gambia v Myanmar Case* 2022 (n 46) para 108.

[49] *Activities in the Area* Advisory Opinion (n 39) para 180.

Obligations *erga omnes partes* are unlikely to confer sufficient legal interest on states that are not parties to UNCLOS to ground a claim for environmental harm. While it has been suggested that peremptory norms of international law (*jus cogens*) establish obligations *erga omnes*, the breach of which concerns all states,[50] environmental obligations have not as yet been recognized as non-derogable peremptory norms by the international community.[51] On the other hand, other scholars have said that 'certain rules relating to common spaces, in particular common heritage regimes, may produce *erga omnes* obligations independent of whether they have peremptory status'[52] and that the scope of obligations *erga omnes* is wider than *jus cogens*.[53] Another argument that may give some basis for non-states parties to UNCLOS to have standing to bring claims for environmental harm in ABNJ is grounded in the notion that the obligation to protect and preserve the marine environment in article 192 reflects a rule of customary international law and the environmental obligation under article 192 should be regarded as an obligation *erga omnes*.[54] However, the ICJ has only so far affirmed a right of standing in respect of breaches of *obligations erga omnes partes* under multilateral treaties and this 'cannot necessarily be taken to represent the endorsement of a broader right of standing also in respect of obligations *erga omnes* under customary international law'.[55]

Even accepting the characterization of the protection of the marine environment as an *erga omnes partes* obligation that gives rise to rights of standing, there remain several potential obstacles. First, questions arise as to the remedy available to a non-injured state that has standing to bring a claim for environmental harm in ABNJ. Under article 48 (2) of the ASR, a state entitled to invoke responsibility based on *erga omnes* or *erga omnes partes* obligations may claim from the responsible state (a) a cessation of the wrongful act and assurances and guarantees of non-repetition; and (b) performance of the obligation of the reparation in the interest of the injured state or of the beneficiaries of the obligation breached. The remedies for breaches of *erga omnes* obligations under article 48 are more limited than those available to an 'injured state' under article 42 (which include countermeasures). The availability of reparation for a non-injured state will usually depend upon 'the circumstances of the breach, the extent to which the claimant's interests are affected and the nature of the risk to community interests'.[56] The ASR note that the non-injured state is not claiming compensation on its own account and that a claim must be made in the

[50] ILC, 'Report of the International Law Commission' (68th Session, 2 May–10 June and 4 July–12 August 2016) UN Doc A/71/10, paras 103–111.

[51] Birnie and others (n 40) 245.

[52] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) 192, para 3.

[53] Yoshifumi Tanaka, 'The Legal Consequences of Obligations *Erga Omnes* in International Law' (2021) 68(1) NILR 1, 10–11.

[54] ibid 5.

[55] Urs (n 19) 518.

[56] Birnie and others (n 40) 244.

interest of the injured state, if any, or the beneficiaries of the obligation breached.[57] It acknowledges that this aspect 'involves a measure of progressive development, which is justified since it provides a means of protecting the community or collective interest at stake',[58] but that cases where the non-injured state is acting not on behalf of the injured state but on behalf of beneficiaries of the obligations presents greater difficulties which the ASR cannot resolve.[59] For example, if a non-injured state claims compensation for environmental damage to a collective interest, how should this compensation be used? It would not be fair for the non-injured state to use compensation for its own purposes, resulting in a potential windfall gain. This highlights the utility of institutional mechanisms that enable such compensation to be directed into a fund whose purpose is to address environmental harm as is contemplated for both activities in the Area and activities in the Antarctic.[60]

Second, the characterization of an obligation as *erga omnes partes* is not sufficient to overcome jurisdictional rules of an international court or tribunal,[61] thus the state bringing the claim must have access to a particular court or tribunal to enforce claims for environmental harm in the global commons. Tanaka rightly observes 'the availability of a procedure is key in effectuating obligations *erga omnes*'.[62]

Finally, it should be recognized that even if UNCLOS states parties are entitled to bring a claim for environmental harm, there may be disincentives for states to exercise this option. States appear to be more willing to engage in litigation when their individual interests are being impacted.[63] Litigation proceedings can be costly; and may be perceived as too confrontational, risking damage in bilateral relations, particularly if the initiating state has not suffered direct injury and there is no guaranteed outcome. Decisions by governments to initiate proceedings before courts and tribunals 'are influenced by a range of factors, including diplomatic, security and economic concerns; the applicable law; the operation of relevant international organizations; and the level of domestic public interest'.[64] For

[57] ASR (n 6) commentary to art 48, 127, para 11.
[58] ibid commentary to art 48, 127, para 12.
[59] ibid.
[60] See discussion in Section 8.3 and in Chapter 8.
[61] See Chapter 7. In the *East Timor* case between Portugal and Australia, the ICJ recognized that the right to self-determination had *erga omnes* status, but that it could not rule on the lawfulness of the conduct of a state when its judgment would necessitate an evaluation of the lawfulness of the conduct of another state that is not a party to the case, that is, Indonesia. As the ICJ explained, 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things'. *East Timor Case* (n 28) para 29; *Armed Activities Case* (n 27) paras 64, 125 where the ICJ acknowledged that the principles underlying the Genocide Convention have the status of *jus cogens* or create rights and obligations *erga omnes*, but this cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties.
[62] Tanaka, 'The Legal Consequences of Obligations' (n 53) 23.
[63] Fasia (n 40) 534.
[64] Tim Stephens, 'Environmental Litigation by Asia Pacific States at the International Court of Justice' (2021) 21 MJIL 653, 668.

example, civil society groups are said to have played a role in the decision by Australia to bring proceedings against Japan before the ICJ for the latter's whaling activities, coupled with strong domestic political pressure.[65] The initiation of The Gambia's claim against Myanmar was reportedly driven by the Organisation of Islamic Cooperation (OIC), an intergovernmental organization.[66] Having a right of standing does not automatically mean that states will exercise it.

6.2.1.2 International Organizations

There are a variety of international organizations that have mandates that cover areas or activities in ABNJ, for example, various regional fisheries management organizations (RFMOs), regional seas organizations and sectoral organizations, including the International Seabed Authority (ISA).[67] It is conceivable that environmental harm in ABNJ could impact the interests of such international organizations and fall under their relevant mandate. In some cases, international organizations may in principle be better positioned than individual states to pursue a claim, where they have a broad mandate to take steps to protect the commons environment. For example, the windfall concern discussed in Section 6.2.1.1 where non-injured states claim compensation for environmental damage to a collective interest and questions on what can be done with that compensation, may be less problematic for international organizations. The question is whether they would have the capacity and recognized legal interests to bring claims against the responsible parties.

The question of capacity relates to whether the international organization has legal personality and legal capacity to bring claims. Capacity does not necessarily follow from legal personality since international organizations will have unique powers provided for in its constitutive instrument. Where there is no express authority to bring claims, the ability to bring a claim could be justified on the basis of the implied powers doctrine,[68] subject to the caveat that careful attention must be paid to the purposes of the international organization.

[65] Shirley V Scott, 'Australia's Decision to Initiate Whaling in the Antarctic: Winning the Case versus Resolving the Dispute' (2014) 68(1) Aust J Int'l Aff 1.

[66] 'Myanmar Hits Out at Top UN Court over Rohingya Genocide Case' *France 24* (Paris, 21 February 2022) <www.france24.com/en/asia-pacific/20220221-myanmar-hits-out-at-top-un-court-over-rohingya-genocide-case> accessed 1 September 2022.

[67] See, for example, 'Mapping Governance Gaps on the High Seas' (The Pew Charitable Trusts, March 2017) available at <www.pewtrusts.org/-/media/assets/2017/04/highseas_mapping_governance_gaps_on_the_high_seas.pdf> accessed 1 September 2022.

[68] Implied powers refer to powers which are not mentioned explicitly in the constituent instrument but are said to come with explicit powers described in the constituent instrument to give effect to the functions of the international organization. The rationale for implied powers is that it is impossible to spell out in detail in the constituent instrument each and every specific power an international organization will need to perform their functions either now or in the future: See generally, Niels M Blokker, 'International Organizations or Institutions, Implied

The 2011 Draft Articles on the Responsibility of International Organizations (DARIO), (which largely mirror the ASR), affirm that an international organization could invoke the responsibility of another international organization if the obligation breached is owed to that international organization or the international community as a whole and that breach specially affects that international organization.[69] Article 49 of the DARIO entitles

> a State or an international organization other than an injured State or international organization … to invoke the responsibility of another international organization … if the obligation breached is (1) owed to a group of States or international organizations, including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group; (2) owed to the international community as a whole; and (3) owed to the international community as a whole and safeguarding the interest of the international community as a whole underlying the obligation breached is within the functions of the international organization invoking responsibility.[70]

While the DARIO are confined to the right of a state or international organization to invoke the responsibility of another international organization, in principle, an international organization could also invoke the responsibility of a state, where the obligations are owed to the international organization. In the 1949 ICJ Advisory Opinion on *Reparation for Injuries Suffered In the Service of the United Nations*, the ICJ found that, although the United Nations Charter does not expressly confer upon the UN the capacity to include damage to the victim in its claim for reparation, the United Nations has the capacity to bring an international claim against a state (whether a member or non-member) for damage resulting from a breach by that state of its obligations towards the organization as well as to the victim on the basis of its implied powers necessary for the performance of its duties.[71] The commentary in the DARIO notes that legal writings have acknowledged the entitlement of international organizations to invoke responsibility in case of a breach of an obligation owed to the international community *as a whole* by a state but that practice is not very indicative. It goes on to say that '[w]hen international organizations respond to breaches committed by their members, they often act only on the basis of their

Powers' (last updated December 2021) in Anne Peters and Rüdiger Wolfrum (eds), *The Max Planck Encyclopedia of Public International Law* (OUP 2008). Also see the 1949 ICJ Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations* which made the classic observation: '[u]nder international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties'. *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174 (ICJ Advisory Opinion on Reparations) para 182.

[69] ILC, 'Draft Articles on the Responsibility of International Organizations, with Commentaries' (2011) II(2) ILC Yearbook 46 (DARIO).

[70] ibid arts 49(1), (2) and (3), 88–89.

[71] ICJ Advisory Opinion on Reparations (n 68) para 182.

respective rules', and 'it would be difficult to infer from this practice the existence of a general entitlement of international organizations to invoke responsibility' of states.[72]

As a result, to determine whether an international organization has sufficient legal interest to bring claims for environmental harm to specific areas beyond national jurisdiction or resources that fall within their respective mandates, attention must be paid to the specific obligations owed to the international organization and its legal responsibilities. For example, article 137 UNCLOS specifies that the ISA shall act on behalf of 'mankind as a whole', while article 145 places specific obligations on the ISA to ensure effective protection for the marine environment. These provisions indicate that the ISA may have an express legal mandate to pursue certain forms of damage, including reparations for reinstatement.[73] In addition, international organizations that seek compensation for environmental harm will also have to demonstrate how the loss accrues to its own interests, as opposed to those of its members. In this regard, an international organization may be better placed to ensure that any compensation received is used for collective benefit. While international organizations may have the right to mount such claims (subject to rules on access to international courts and tribunals discussed in Chapter 7), they may be unwilling to. Most international organizations are driven by the interests of their member states and any decision to bring a claim against its own member states or non-member states may be limited by procedural rules on decision-making, as well as the broader politics inherent in an international organization.

6.2.1.3 Non-state Actors

Non-state actors (which include corporate entities, non-governmental organizations and individuals), while not traditional subjects of international law, are increasingly playing a critical role in international law. They are, *inter alia*, often granted observer status in intergovernmental organizations, they are consulted during the formation of international regulations, they lobby governments and they serve as *amici curiae* in international litigation.[74] In certain treaty regimes, some non-state actors are recognized as having international legal personality capable of asserting rights against states and international organizations, for example, in international human rights law and international investment law.[75] This possibility is explicitly

[72] DARIO (n 69) commentary to art 49, 90, paras 8–9.

[73] The unique position of the ISA is considered in greater detail in Section 6.3.2.1.

[74] Cymie R Payne, 'Negotiation and Dispute Prevention in Global Cooperative Institutions: International Community Interests, IUU Fishing and the Biodiversity beyond National Jurisdiction Negotiation' (2020) 22 Int C L Rev 428, 436.

[75] Luisa Vierucci, 'NGOs before International Courts and Tribunals' in Pierre-Marie Dupuy and Luisa Vierucci (eds), *NGOs in International Law: Efficiency in Flexibility?* (Edward Elgar 2008) 160. Vierucci notes in the 2008 study that only the European Court of Human Rights, the Inter-American Commission of Human Rights, the African Commission for Human and

contemplated under article 33(2) of the ASR.[76] Thus, it is certainly within the competence of states to confer limited international legal status on non-state actors – the most salient example in ABNJ being the ability conferred on contractors under Part XI of the UNCLOS to bring claims against the ISA under UNCLOS.[77] Apart from certain treaty regimes, however, the ability of non-state actors to bring claims before international courts and tribunals is limited, particularly in connection with claims for environmental harm in ABNJ.

There is, of course, the possibility that states can espouse the claims of non-state actors. Thus, one avenue for claims against states or international organizations whose actions harm the interests of non-state actors in ABNJ – for example in fisheries related claims – is through espousal. There are examples of states espousing claims of non-state actors (including NGOs) although this has been confined to situations where these non-state actors had suffered direct losses.[78]

Undoubtedly, there are policy reasons to recognize the rights of standing of certain non-state actors. Payne observes that it would serve the interests of states to agree that civil society entities should be granted standing so as to 'overcome the problem that although humanity may need the oceans to be protected, individual states may be constrained or merely uninterested in taking action'.[79] One only has to look at the exponential growth in climate change and other environmental-related litigation in national courts, driven in part by frustration at legal and policy failures of governments coupled with recognition in some domestic jurisdictions of broad rights of standing of NGOs and public interest groups, to see that such actors can play a useful role in 'representing' the public interest of present and future generations.[80] The shadow of possible litigation by non-state actors may provide a much-needed impetus to states and international organizations to take steps to ensure that environmental harm in ABNJ is prosecuted and compensated to the extent possible. When victims cannot be identified because damage is to the environment *per se* in ABNJ (for example), NGOs could bring claims for such environmental harm, overcoming the issue of the lack of an 'injured party' and increasing the possibility that damage is compensated. Indeed, the issue of standing for NGOs has been part of the rationale for calls for the establishment of a specialized international court for the environment discussed further in Chapter 7.

At the same time, questions inevitably arise as to which non-state actors, particularly NGOs, may be entitled to represent the interests of the international

Peoples' Rights, the African Court and the European Court of Justice grant legal standing to NGOs to varying degrees (Vierucci, 158).

[76] ASR (n 6) art 33(2), 94; commentary to art 33(2), 95, para 4.

[77] UNCLOS (n 10), art 187 read with art 22 of Annex III.

[78] Payne (n 74) 436 citing *Elettronica Sicula, S.p.A (ELSI) (United States of America v Italy)* (Judgment) [1989] ICJ Rep 15; *Arctic Sunrise Arbitration (Netherlands v Russia)* (Provisional Measures) ITLOS Case No 22 (2013).

[79] Payne (n 74) 437.

[80] See discussion in Section 6.2.3.

community (particularly when that term itself is one that is contested).[81] There would need to be rules in place to ensure that such litigation is genuine and not vexatious and that it does not slow down the administration of claims as has been seen in certain national jurisdictions where broad rights of standing have led to 'immobility and inefficiency in administration as well as the clogging of cases before courts'.[82] In addition, any rules providing standing in such cases would need to address the uses to which any monetary compensation might be put in order to avoid concerns relating to 'windfall' compensation identified above.

6.2.2 *Civil Liability*

Civil liability regimes have generally taken a traditional approach to standing and entitlement to bring claims is contingent on loss or injury being sustained – in other words, the victims must have suffered damage. For example, the 2006 Draft Principles on Allocation of Loss (Draft Principles), which reflects civil liability principles, has defined 'victim' as any natural or legal person or state that suffers damage.[83] Under the civil liability regime established for marine pollution from cargo oil, hazardous and noxious substances and bunker oil, the phrase 'person suffering damage' is used and defines person as 'any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions'.[84] As indicated, victims can include states or governments that have suffered damage or loss or taken reasonable response or preventive measures.[85] The right of states or other sub-state entities to claim for reasonable reinstatement is broadly accepted in civil liability regimes and is reflected in the International Oil Pollution Compensation Funds (IOPC Funds) Claims Manual,

[81] Isabel Feichtner, 'Community Interests' (last updated February 2007) in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Public International Law* (OUP 2008) paras 39–55.

[82] Draft Principles (n 5) commentary to principle 2(f), 71, para 30, footnote 373.

[83] ibid, principle 2(f), 64.

[84] International Convention on Civil Liability for Oil Pollution Damage (adopted 29 November 1969, entered into force 19 June 1975) 973 UNTS 3 (1969 Oil Pollution Liability Convention), amended by the 1992 Protocol to Amend the 1969 International Convention on Civil Liability for Oil Pollution Damage (adopted 27 November 1992, entered into force 30 May 1996) 1956 UNTS 255 (1992 Oil Pollution Liability Convention) art I(2); International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (adopted 3 May 1996) (1996) 35 ILM 1415 (1996 HNS Convention), as amended by the Protocol of 2010 to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (adopted 30 April 2010) (2010 HNS Convention) art I(2); International Convention on Civil Liability for Bunker Oil Pollution Damage (adopted 23 March 2001, entered into force 21 November 2008) 40 ILM 1493 art 1(2).

[85] The Draft Principles noted that after the *Amoco Cadiz* oil spill off the coast of France, the French government also laid claims for recovery of pollution damages and clean-up costs. See Draft Principles (n 5) commentary to principle 2(f), 70, para 29.

which also recognizes the capacity of 'private organizations and public bodies' to bring claims.[86] Some civil liability regimes also recognize that states or competent authorities can bring claims on behalf of individuals that have suffered damage.[87]

Under the 1992 Oil Pollution Liability Convention, claims may be brought for preventive actions in ABNJ, where the preventive measures are taken to prevent or minimize harm to areas subject to state jurisdiction.[88] This limitation indicates the close relationship that the international community currently requires between sovereign interests and standing, and the unwillingness, at this time, to confer on states a right to damages in connection with commons resources.

Were civil liability regimes to be extended to cover environmental harm in ABNJ, their structure makes for an uneasy fit for claims being brought on behalf of the collective interest. Claims of direct economic losses suffered because of environmental damage in ABNJ, whether made by private or public parties, are analogous to the losses suffered in territorial areas. However, the recognition of the right of states to claim reasonable reinstatement costs under existing rules is rooted in the state's interests in the coastal environment in maritime zones under sovereignty or national jurisdiction. The state's more attenuated claims to have legal rights in, and responsibilities for, the environment in ABNJ would require clarity on the nature of these uncertain rights. The close connection between standing and damage presents further obstacles to the extension of civil liability regimes to the environment of ABNJ, given the current non-recognition of pure environmental losses in those regimes. Even the notion of 'reasonable' reinstatement, which anchors the right to claim for clean-up is highly uncertain given the lack of clear standards for reasonable actions in response to pollution incidents in ABNJ. From the perspective of insurers as well as the administrators of compensation funds, focusing on parties that have actually suffered damage avoids the uncertainty of complex questions of assessing and quantifying pure environmental damage, as well as a potential slew of claims from governments, environmental organizations and individuals all claiming to act on behalf of 'the environment'.[89]

6.2.3 *National Law*

Most jurisdictions generally require that claimants have a sufficient direct interest in the outcome of the action to confer standing. Claims for environmental harm

[86] International Oil Pollution Compensation Funds (IOPC Funds), *Claims Manual* (IOPC Funds 2019) para 2.1.2.

[87] See, for example, the Convention on Third Party Liability in the Field of Nuclear Energy (adopted 29 July 1960, entered into force 1 April 1968) 956 UNTS 251 art 13(g) which recognizes that 'any State may bring an action on behalf of persons who have suffered nuclear damage, who are nationals of that State or have their domicile or residence in its territory, and who have consented thereto'.

[88] 1992 Oil Pollution Liability Convention (n 84) art II(b).

[89] Emanuela Orlando, 'From Domestic to Global? Recent Trends in Environmental Liability from a Multi-level and Comparative Law Perspective' (2015) 24 RECIEL 289, 296.

within national borders have traditionally been based on the private law of the tort or delict and were limited by the requirement that the private plaintiff suffered damage or injury.[90] While there may be other obstacles relating to jurisdiction or choice of law questions for claims brought in domestic courts for harms suffered in ABNJ, where the harm relates to a direct, private interest of the type usually recognized by national courts, standing is not likely to be an obstacle. A private property or economic interest retains its essential character regardless of its location inside or outside the state. As with the international law on standing, the more vexing cases relate to claims identified as being rooted in collective rights, such as environmental reinstatement and prevention measures and pure environmental losses.

Standing in these latter types of claims is typically linked to questions of resource ownership and to the state's regulatory authority over the environment. In the case of publicly owned lands or resources, the state's basic rights of standing follow the foundational rule that entities who have suffered material injury to a legally protected interest will have standing to sue. This basic rule, however, raises questions about the precise nature of the state's interest in natural resources. Does ownership only provide the state with the right to protect its economic interests or do its rights include the ability to secure remedies for the loss of non-economic elements, the benefit of which accrue to the public generally?

Certain doctrines developed in the national context affirm that states or their competent authorities have standing to bring claims for environmental harm that encompasses both economic and non-economic interests. For example, the doctrine of *parens patriae* suggests that the state should act to protect common resources because of its ownership over the resources and its role as protector of these common interests.[91] The state has standing to bring a suit on behalf of its citizens in order to protect its quasi-sovereign interests, provided that it has an interest of its own, separate and distinct from the interests of particular private parties, and that a significant number of the state's inhabitants are threatened or will be adversely impacted by the acts of the defendants.[92] While the majority of *parens patriae* suits seek injunctive relief, such suits could also cover a claim for damages, based on either the state's role as guardian of the entity or the state's quasi-sovereign interest in the general welfare of its residents.[93] States have also successfully used the *parens patriae* doctrine to bring claims for cross-border pollution on the basis that the state has articulated an interest apart from the interest of private parties; the state has

[90] Monique Evans, '*Parens Patriae* and Public Trust: Litigating Environmental Harm *Per Se*' (2016) 12(1) MJSDL 1, 6.

[91] Deborah G Musiker, Tom France and Lisa A Hallenbeck, 'The Public Trust and *Parens Patriae* Doctrines: Protecting Wildlife in Uncertain Political Times' (1995) 16 Pub Land L Rev 87, 101.

[92] Edward HP Brans, *Liability for Damage to Public Natural Resources: Standing, Damage and Damage Assessment* (Kluwer Law 2001) 55.

[93] *British Columbia v Canadian Forest Products Ltd* 2004 SCC 38, para 63. See also Musiker and others (n 91) 102; Brans (n 92) 56–57.

expressed a quasi-sovereign interest; and the state has alleged an injury to a sufficiently substantial segment of the population.[94]

A related concept is the public trust doctrine.[95] While it has been interpreted differently by various courts (principally in the United States) and given both narrow and expansive interpretations,[96] the doctrine essentially posits that it is the government or state that holds the resource interest (which covers navigable waters, tidelands, the land beneath these waters and the living resources therein) on behalf of beneficiaries, which are usually the public at large (including present and future generations).[97] The designation of resources as public trust resources may place certain obligations on the state or government as trustee, including the obligation to act in the best interest of the beneficiaries, to take into account the public trust nature of the resource when allocating or using such resources, to continually supervise the use of such resource and revisit decisions in light of changing knowledge and needs.[98] While the public trust doctrine has been typically used to challenge the decisions of public authorities, courts in the United States have recognized the state 'has not only the right but also the affirmative fiduciary obligation to … seek compensation for any diminution in that trust corpus'.[99] In certain instances, courts have utilized the public trust doctrine to find that the state had standing to bring suit as *parens patriae*, which have led some scholars to argue that 'parens patriae doctrine essentially provides a mechanism for the state to fulfil its public trust obligations'.[100] The public trust doctrine is not explicitly a right of

[94] *Alfred L Snapp & Son, Inc v Puerto Rico ex rel Barez* (1982) 458 US 592. See also Evans (n 90) 9. For civil law approach to *parens patriae*, see the French Civil Code, art 538.

[95] While the public trust doctrine was said to have first been articulated in the 1892 US Supreme Court decision of *Illinois Central Railroad v Illinois* where the court acknowledged that the state had title to land under Lake Michigan but that it is title held in trust for the people of the state, it became entrenched in United States through the publication of Joseph Sax's seminal article in the Michigan Law Review in 1969 (Joseph L Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1969) 68 Mich L Rev 571). See also Michael C Blumm and Rachel D Guthrie, 'Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision' (2012) 45 UC Davis L Rev 741, 750.

[96] Derek Tarver, '"Hunnuh Mus Tek Cyare da Root fa Heal da Tree": Saving the South Carolina Lowcountry from Overdevelopment through Judicial Application of a Modern Public Trust' (2017) 68 S C L Rev 1047, 1054.

[97] Mary Turnipseed, Raphael Sagarin, Peter Barnes, Michael C Blumm, Patrick Parenteau and Peter H Sand, 'Reinvigorating the Public Trust Doctrine: Expert Opinion on the Potential of Public Trust Mandate in US and International Environmental Law' (2010) 52(5) Environment: Science and Policy for Sustainable Development 7, 7; Catherine Redgwell, *Intergenerational Trusts and Environmental Protection* (Manchester UP 1999) 47.

[98] See, for example, *National Audubon Society v Superior Court of Alpine County* (1983) 33 Cal 3d 419; *Re Water Use Permit Applications* (2002) 9 P 3d 409, 450.

[99] See, for example, *Selma Pressure Treating Co v Osmose Wood Preserving Co* 271 Cal Rptr 596, 606 (Cal Ct App 1990), citing *State v Jersey Central Power & Light Co* (1975) 336 1A 2d 750, 759 (NJ App Div 1975).

[100] Musiker and others (n 91) 107.

standing (as opposed to *parens patriae*) but provides legal justification for a state's pursuit of claims for harm to the environment and natural resources.

Given the reliance on ownership or regulatory authority to ground public authority standing, it is questionable whether doctrines such as *parens patriae* and the public trust can provide the legal justification for standing of states to initiate claims in their national courts or foreign national courts for environmental harm in ABNJ. The doctrines have their foundations in notions of state sovereignty that are antithetical to the 'commons' status of ABNJ. Moreover, while there have been attempts to declare certain global resources in ABNJ as subject to trustee obligations, it is still far from established that states have general trustee obligations in relation to the environment in ABNJ.[101] Nonetheless, the ideas that animate the notion of public trusteeship may provide a useful leverage point to expand the ability of individual states and domestic courts to hold polluters responsible. In particular, the idea that states have specific responsibilities to preserve and protect the marine environment is well-established and may fortify claims, for example, of necessitous interventions in response to marine pollution.[102] A state could argue in some instances that reinstatement measures taken in ABNJ are not voluntary, but are based on legal duties, entitling states to recover those costs from responsible parties.[103] In this regard, an UNCLOS state party is unlikely to be able to rely upon the *erga omnes partes* nature of marine environmental obligations to bring a claim for environmental harm in ABNJ in its own national courts. The doctrine of *erga omnes* operates between states in relation to the invocation of state responsibility, which is distinct from the question before a domestic court concerning liability in tort or delict.

Apart from states having standing for environmental harm claims under national law, a recent trend in national jurisdiction has been the recognition of standing of non-state actors such as NGOs and public interest groups for environmental damage in national courts. Underlying this conferral of standing is the notion that a public trust in environmental resources confers both rights and responsibilities on states. As a public trustee, the state has both the ability to pursue remedies on behalf of the broader community of interest holders, but also may be understood to owe obligations to manage environmental resources in the interests of beneficiaries. This latter argument has been prominent in climate change litigation in both the Global North and South and has become an essential component of strategic climate change

[101] There have been multiple proposals to apply the public trust doctrine and/or trusteeship to Antarctica; the Amazon rainforest, to all genetic resources or biological resources, to regional seas, to oceans in general, to the atmosphere as a whole, to the global commons or the global environment: See generally Peter H Sand, 'The Rise of Public Trusteeship in International Environmental Law' (2014) 44(1) EPL 210.

[102] See discussion in Section 6.2.1.

[103] For a fuller examination of the potential role of the doctrine of public trusteeship, see Klaus Bosselmann, *Earth Governance: Trusteeship of the Global Commons* (Edward Elgar 2015).

action by certain NGOs to highlight the failure of governments and private actors to live up to their climate change obligations under relevant national and international climate change legal frameworks.[104] For example, in *Juliana v United States*, the plaintiffs sought a declaration that their constitutional and public trust rights were violated by governmental non-action on climate and an order requiring the federal government to develop a plan to reduce its greenhouse gas emissions. The court of first instance refused to dismiss the claim and relied in part on the climate impacts in the ocean and its status as a trust resource.[105] The *Juliana* case echoes some of the successful arguments made in the *Urgenda* case, where the Dutch government was required to take further steps to address climate change, based in part on the duty of the Dutch government to protect rights under the European Convention on Human Rights.[106] The reasoning behind this ruling was subsequently extended to Royal Dutch Shell, on the basis that as a large emitter, it too owed obligations to mitigate its emissions in line with global commitments.[107]

It is important to note that these cases draw on the potential for *government inaction* to contravene fundamental rights held by the claimants. As such, the cases can rely on a broader basis for standing that goes to the ability of litigants to pursue legal actions in vindication of their human rights. Where the claims are pursued by public interest groups on behalf of a class of claimants, the claimants take advantage of national jurisdictions that have broad rights of standing either embedded in their constitutions or civil procedures or a climate conscious judiciary that is broadly interpreting rights of standing to include NGOs and public interest groups.[108] In other jurisdictions, the applicable rules on standing afforded to individuals, NGOs and other public interest groups may be carefully circumscribed in national legislation[109] and will be subject to more intense scrutiny by courts.[110]

[104] See, for example, Joseph Regalia, 'The Public Trust Doctrine and the Climate Crisis: Panacea or Platitude?' (2021) 11(1) MJEAL 1; Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113(4) AJIL 679.

[105] *Juliana v United States* 217 F Supp 3d 1224 (D Or 2016), overruled on standing grounds, *Juliana v United States* 947 F 3d 1159 (9th Cir 2020).

[106] *Urgenda Foundation v State of the Netherlands*, The Hague Court of Appeal (Decision of 9 October 2018) Case No 200.178.245/01.

[107] *Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell*, District Court The Hague (Judgment of 26 May 2021) Case No C/09/571932.

[108] United Nations Environment Programme, 'Environmental Courts and Tribunals 2021: A Guide for Policymakers' (2021) 34–35 <www.unep.org/resources/publication/environmental-courts-and-tribunals-2021-guide-policy-makers> accessed 11 October 2022.

[109] See discussion in Brans (n 92) 35–62 and 358–360. Also see Blumm and Guthrie which highlight various jurisdictions which confer standing on NGOs on the basis of the public trust doctrine: Blumm and Guthrie (n 95).

[110] For example, standing has been a central issue in climate change litigation in certain jurisdictions, with courts interpreting and applying relevant statutes to determine whether a particular plaintiff has standing. In *Urgenda Foundation v State of Netherlands*, the Hague District Court held that Urgenda had standing on its own behalf, due to Dutch law which allows non-governmental organizations to bring a court action to protect the general interests or collective

The remedies sought in these cases tend to be public law remedies, typically seeking government actions in line with climate commitments, not compensation for harm. Claims for compensation in the climate context raise complex issues concerning attribution, but also potentially raise questions regarding the standing of litigants to pursue compensation for harm to collective legal interests.[111] There are examples of jurisdictions that have specific environmental regulations which recognize the right of NGOs to bring civil claims directly against polluters for liability for environmental damage, either for direct damage they have suffered in terms of actual clean-up costs they have taken, or for pure ecological damage. In France, NGOs can claim direct damages covering 'material damages' incurred in clean-up and restorative costs and 'moral damages' on the basis that failure to respect environmental legislation by operators undermines the efforts made by NGOs to protect the environment.[112] NGOs can also claim for 'purely ecological damage' even though they have not suffered damage.[113] Similarly in Portugal, NGOs can sue the operator directly through the civil *actio popularis* to obtain the restoration of the environment, including compensation for direct costs incurred for clean-up.[114]

While no state has extended these rights to ABNJ, these domestic legal developments signal the emergence of a greater judicial willingness to allow the beneficiaries of common resources to hold those who threaten them to account. The legal interests being recognized in these cases are often connected to abridgement of human rights, which are located with the litigants. Analogous arguments could potentially be made in light of recognition of the critical role of oceans and the potential for irreversible and large-scale damage. While the approaches to date have been centred on public law remedies, compensation claims have a clear public

interests for other person but, partly for practical reasons, the 886 individual claimants involved in the suit were not granted standing separate from that of Urgenda. Michael Burger and Justin Gundlach, 'The Status of Climate Change Litigation: A Global Review' (Report, United Nations Environment Programme, May 2017) <https://climate.law.columbia.edu/content/climate-change-litigation> 28–29, accessed 1 September 2022.

[111] Much of the climate change litigation has been confined to pure mitigation and adaptation cases. There are relatively few cases that concern the remediation or compensation for harm caused by climate change and the outcome of these cases is either unsuccessful or still pending, although there have been calls for more efforts to use climate change litigation to pursue loss and damage: See generally Patrick Toussaint, 'Loss and Damage and Climate Litigation: The Case for Greater Interlinkage' (2022) 30(1) RECIEL 16.

[112] Ordonnance n° 2000-914 du 18 septembre 2000 relative à la partie Législative du code de l'environnement. See also discussion in Elena Fasoli, 'The Possibilities for Nongovernmental Organizations Promoting Environmental Protection to Claim Damages in Relation to the Environment in France, Italy, the Netherlands and Portugal' (2017) 26(1) RECIEL 30, 34; Pierre Bentata and Michael Faure, 'The Role of ENGOs in Environmental Litigation: A French Case Study' (2015) 25 EPG 459, 461.

[113] For example, in one case, an NGO was able to claim a sum of money for dead birds caused by an oil spill equivalent to the necessary costs for the nesting and breeding of replacement birds: Cour de cassation, criminelle, Chambre criminelle, 25 septembre 2012, n° 10-82.938.

[114] See discussion in Fasoli (n 112) 35–36.

purpose, in protecting and restoring the environment, that makes the extension of these types of legal claims in ABNJ a logical direction.

A final approach to standing to make environmental claims that is gaining greater traction in domestic legal systems is conferring rights of standing on the environment or features of the environment directly. The idea, mapped out by Christopher Stone in his seminal paper, 'Should Trees Have Standing – Toward Legal Rights For Natural Objects',[115] challenges the legal orthodoxy that rights holders are a limited class (noting the expansion of entities that have been accepted as having legal rights), and arguing that natural features are worthy as being considered rights holders. In an advisory opinion, the Inter-American Court of Human Rights has also stated that the right to a healthy environment protects components of the environment as legal interests in their own right even in the absence of a risk to humans.[116] The idea of rights of nature has been taken up in recent years by a number of domestic jurisdictions in relation to specific natural features, such as rivers and forests,[117] or nature writ large.[118] The approach to date has focused on public law approaches that provide representatives of natural features to implement protective measures and in some cases to provide access to courts to uphold the rights of natural entities.[119] The extension of rights of nature to ABNJ is consistent with the ecocentric ethos that these laws capture, and is to some degree reflected in existing international legal instruments, such as the Convention on Biological Diversity that, although fundamentally anthropocentric in approach, recognizes the 'intrinsic

[115] Stone (n 2).

[116] *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No 23 (15 November 2017) para 62 ('The Court considers it important to stress that, as an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right. In this regard, the Court notes a tendency, not only in court judgments, but also in Constitutions, to recognize legal personality and, consequently, rights to nature').

[117] For example, see Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (NZ) <www.legislation.govt.nz/act/public/2017/0007/latest/whole.html> accessed 1 September 2022; and Te Urewera Act 2014 (NZ) <www.legislation.govt.nz/act/public/2014/0051/latest/whole.html> accessed 1 September 2022.

[118] Ley de Derechos de la Madre Tierra, Ley Nº 071, Ley de 21 de Diciembre de 2010 (Bolivia) <https://bolivia.infoleyes.com/norma/2689/ley-de-derecho%20s-de-la-madre-tierra-071> accessed 1 September 2022, and also <www.worldfuturefund.org/Projects/Indicators/motherearthbolivia.html> accessed 1 September 2022.

[119] Harriet Harden-Davies, Fran Humphries, Michelle Maloney, Glen Wright, Kristina Gjerde and Marjo Vierros, 'Rights of Nature: Perspectives for Global Ocean Stewardship' (2020) 122 Mar Pol'y 104059 (noting over twenty cases have been taken in Ecuador's courts that have asserted the rights of nature).

value' of ecological features.[120] There would be legal challenges in extending this approach, including defining the boundaries of natural features that may be right holders and identifying the appropriate entity to represent the interests of ABNJ natural features.[121] However, like the emerging approaches in trusteeship, the rights of nature may push states to develop approaches to standing that provide greater emphasis on the non-instrumental values of ABNJ resources.

6.3 RULES OF STANDING IN SPECIFIC REGIMES IN ABNJ

6.3.1 *Antarctic*

6.3.1.1 States

Any attempt to bring a claim for environmental harm in the Antarctic Treaty area by the seven states (Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom) that have made claims to the Antarctic continent, including maritime claims, may face objections on the basis that these claims have not been accepted by the international community and are held in abeyance by the 1959 Antarctic Treaty.[122] In the *Whaling in the Antarctic* case, even though Australia acknowledged that some of Japan's whaling activities fell in waters over which Australia claims sovereign rights and jurisdiction, it maintained that it brought the claim under the 1946 International Convention for the Regulation of Whaling in order to 'uphold its collective interest, an interest it shares with all other parties'.[123] Australia deliberately avoided any mention of its Antarctic Treaty claim. These states may feel that to assert a claim may have political consequences or be a de facto breach of 'sovereign neutrality' in article IV of the Antarctic Treaty.[124]

A stronger claim as an injured state may be made by the Antarctic Treaty Consultative Parties (ATCPs), whose activities are directly impacted by environmental harm.[125] For example, were an incident to adversely affect a state's tourism

[120] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79, 31 ILM 818 (1992) preamble.

[121] See Harden-Davies and others (n 119) discussing a proposal to create a representative council that could advocate for the interests of the ocean.

[122] Both France and Australia have proclaimed an exclusive economic zone (EEZ) off their Antarctic territories and all seven states have either submitted preliminary information, partial submissions or full submissions on the outer limits of their continental shelves beyond 200 nautical miles before the Commission on the Limits of the Continental Shelf (CLCS): See Karen Scott and David VanderZwaag, 'Polar Oceans and Law of the Sea' in Donald Rothwell, Alex Oude Elferink, Karen Scott and Tim Stephens (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 724, 738–739.

[123] Presentation by Henry Burmester, Verbatim Record, CR 2013/18, 9 July 2013, 28, para 19.

[124] Martijn Wilder, 'The Settlement of Disputes under the Protocol on Environmental Protection to the Antarctic Treaty' (1995) 31(179) Polar Rec 399, 405.

[125] See Chapter 1 for an overview of the arrangements in the Antarctic.

or research activities in the Antarctic, these interests would be sufficient to support standing to make a claim against the responsible state or private actor. As the obligations are owed to a group of states, the argument here is that they are specially affected by the environmental harm in question.[126] A further possibility would include claims for damage that arise where a state undertakes response measures. Such a claim is supported by article 15 of the 1991 Antarctic Protocol, where each state party has agreed to respond to environmental emergencies in the Antarctic Treaty Area by providing for prompt and effective response action to such emergencies, even if they or their operators did not cause it. It is anticipated that these types of claims will be addressed through the Liability Annex, discussed below, but claims can still be made outside the procedures under the Liability Annex. It should be noted, however, that at the Final Act of the Eleventh Antarctic Treaty Special Consultative Meeting where the 1991 Antarctic Protocol was adopted, the ATCPs agreed that the arbitral tribunal established under the Protocol would not make determinations on damages relating to liability arising from activities taking place in the Antarctic Treaty area until a binding legal regime had entered into force through an Annex pursuant to article 16 of the 1991 Antarctic Protocol (while the Liability Annex has been concluded, it has not entered into force yet).[127]

The more complex question is whether parties to the 1959 Antarctic Treaty and 1991 Antarctic Protocol can bring a claim for environmental harm based on *erga omnes partes* even if they have not suffered harm directly. The obligations under the 1959 Antarctic Treaty and 1991 Antarctic Protocol clearly meet the characteristics of obligations *erga omnes partes* set out in the ASR of 'agreements established by a group of states in some wider common interest and which transcend the sphere of bilateral relations of States parties'.[128] Both the 1959 Antarctic Treaty and 1991 Antarctic Protocol have been established to 'foster a common interest, over and above any interests of the States concerned individually'.[129] Both instruments recognize the need to protect Antarctica in the interest of mankind as a whole, and article 15 of the Antarctic Protocol requires each party to respond to environmental emergencies even if their operators did not cause it.[130] The challenges in relying on *erga omnes partes* outlined in Section 6.2.1.1 would apply equally to environmental

[126] See discussion in Section 6.2.1.1.
[127] Final Session of the Eleventh Antarctic Treaty Special Consultative Meeting, 32.
[128] ASR (n 6) commentary to art 48, 126, para 7.
[129] ibid.
[130] The Antarctic Treaty (adopted 1 December 1959, entered into force 23 June 1961) 402 UNTS 71 (1959 Antarctic Treaty), preamble; Protocol on Environmental Protection to the Antarctic Treaty (adopted 4 October 1991, entered into force 14 January 1998) (1991) 30 ILM 1461 (1991 Antarctic Protocol) preamble. An example (although prior to the 1991 Protocol) is the *Bahia Paraiso* incident where an Argentine government ship caused extensive oil pollution. The Argentine government initially refused to accept any responsibility but contracted a Netherlands team to clean-up the oil pollution and the United States, which had the closest base to the spill, was the first state to act to limit the spill. Wilder (n 124) 404.

harm claims in Antarctica, including overcoming the limitations in remedies and concerns about windfall gains in the absence of a fund or other mechanism.

The Liability Annex, which is not in force, addresses liability only arising from environmental emergencies.[131] It requires both state operators and non-state operators to take prompt and effective response action to environmental emergencies arising from the activities of that operator and allows other states parties to step in if the state and non-state operator fail to take action, provided certain conditions are met, including notification to the party of the operator and the Antarctic Secretariat that such response action will be undertaken.[132] The Liability Annex addresses a number of ambiguities surrounding who may bring claims and under what conditions.

There is a distinction between which parties have standing to bring claims depending on the status of the actor that is responsible for the environmental emergency. If the state operator fails to take such response action, it is either strictly liable to the state party that did take the response action under article 6 (1) of the Liability Annex ('liability for reimbursement costs'), or if no other party took action, the state operator is strictly liable to pay the costs of the response action into a fund established under the Liability Annex under article 6 (2) ('liability for payment of costs of response action into fund').[133] The determination of liability of the state for reimbursement costs to another state party for response action undertaken by it is decided by state-to state dispute settlement mechanisms including any enquiry procedures and the dispute settlement procedures provided for in articles 18, 19 and 20 of the 1991 Antarctic Protocol. The only actors which have 'standing' in this regard are other states parties who have incurred costs, consistent with traditional understandings of standing being based on the 'injured party'.

Regarding liability of state operators for payment of the costs of response action into the fund, the identification of the state which has the requisite standing to initiate proceedings is less straightforward. There is no injured state *per se* and the negotiating states 'thought it undesirable to allow all other [States] Parties the simultaneous ability to bring dispute settlement actions against the responsible State operator'.[134] Therefore, rather than identifying the state who could invoke dispute settlement procedures, the Liability Annex leaves the settlement of disputes to the Antarctic Treaty Consultative Meeting (ATCMs).[135] The amount of the costs of the response action is to be approved by a decision of the ATCM with advice of the Committee on Environmental Protection where appropriate.[136] Given the

[131] Liability Annex (n 14).
[132] ibid art 5.
[133] ibid art 6(2)(a).
[134] Michael Johnson, 'Liability for Environmental Damage in Antarctica: The Adoption of Annex VI to the Antarctic Environmental Protocol' (2006) 19(1) Geo Int'l Envtl L Rev 33, 48.
[135] See Chapter 1 for an overview of the governance arrangements in the Antarctic.
[136] Liability Annex (n 14) art 7(5)(b).

voting rules of the ATCM, there is the possibility that an ATCP can block a decision related to its own liability.[137] However, if a dispute remains unresolved, the dispute can go to the dispute settlement mechanism in articles 18, 19 and 20 of the 1991 Antarctic Protocol, although the Liability Annex still does not identify which state would have standing to invoke the dispute settlement mechanism.[138]

Regarding claims against non-state operators, the issue of which actor has standing to bring an action depends on whether it is an action for liability for reimbursement costs or if it is an action for liability for payment of costs of response action into the fund. With regard to liability for reimbursement costs, the only actor that can bring a claim against the non-state operator is the state party which has taken response action.[139] The forum where such action could be taken was subject to debate and ultimately, two options were given.[140] First, a state party can bring an action in the country where the non-state operator is incorporated or has its principal place of business or his habitual place of residence.[141] Second, if this fails, then states parties can bring an action in the courts of the state party that authorized the activity.[142]

With regard to actions for payment of the costs of response actions into the fund, it was also not immediately clear which actor would be the plaintiff to bring a claim and therefore the issue of standing is not explicitly addressed.[143] Instead, states parties only have an obligation to ensure that there is a domestic law mechanism that exists for the enforcement of the liability of the non-state operator to ensure that it pays the costs of response actions into the fund (either directly or via the party of the non-state operator).[144] It leaves it to the domestic mechanism to determine which actor has standing, but appears to imply that only states parties would be able to bring claims.[145] To avoid the issue of multiplicity of proceedings, a consultation process was included which obliged states parties to consult amongst themselves as to which party should take enforcement action.[146]

[137] ibid art 7(5)(a).
[138] ibid art 7(5)(a). Johnson notes that dispute settlement mechanisms in the 1991 Antarctic Protocol were included late in negotiations, and this may be why the issue of the state which could invoke dispute settlement mechanisms was not elaborated on, but that it should be possible for the ATCM to determine how the mechanism will be invoked. See Johnson (n 134) 49.
[139] Liability Annex (n 14) art 7(1).
[140] This will be discussed further in Chapter 7.
[141] Liability Annex (n 14) art 7(1).
[142] ibid art 7(2).
[143] Johnson (n 134) 48.
[144] Liability Annex (n 14) art 7(3).
[145] Johnson (n 134) 48. See art 7(3) of the Liability Annex (n 14) which states 'where there are multiple *Parties* that are capable of enforcing Article 7(2)(b)' against non-state operators.
[146] Liability Annex (n 14) art 7(3).

6.3.1.2 International Organizations

Institutional governance under the 1959 Antarctic Treaty System is carried out primarily through the ATCPs via the ATCMs.[147] The ATCM is a treaty body with responsibilities to define the general policy for the comprehensive protection of the Antarctic environment and dependent and associated ecosystems under the 1991 Antarctic Protocol.[148] While the ATCM clearly has a strong mandate to protect and preserve the environment of Antarctica, including ensuring that environmental harm is addressed, it lacks international legal personality to make legal claims. The ATCM would not fall within the definition of an international organization under the DARIO,[149] and there is nothing in either the 1959 Antarctic Treaty or the 1991 Antarctic Protocol that suggests the parties intended the ATCM to be able to bring claims on behalf of the parties. For example, the dispute settlement procedures in the 1959 Antarctic Treaty and 1991 Antarctic Protocol are confined to states parties to these instruments and the ATCM has no role in deciding officially whether or not claims are brought pursuant to these instruments.[150] The Committee on Environmental Protection, (established under the 1991 Antarctic Protocol) provides recommendations to the ATCM on the implementation of the Protocol and has a range of functions related to the protection of the environment but is similarly constrained.[151] Thus, neither the ATCM nor the Committee on Environmental Protection would be able to initiate claims for environmental harm suffered in the Antarctic Treaty Area.

The only institutional body with legal personality and legal capacity is the Commission on the Conservation of Antarctic Marine Living Resources (CCAMLR Commission), an international organization created under the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), whose mandate includes 'prevention of changes or minimization of the risk of changes in the marine ecosystem which are not potentially reversible'.[152] Its legal capacity is limited to actions 'as may be necessary to perform its function and achieve the purposes of the Convention'.[153] However, the functions of the Commission are administrative and do not disclose any explicit or implied powers to pursue claims on behalf of the parties nor does it have the authority to respond directly to environmental incidents.[154] Dispute settlement procedures in CCAMLR

[147] See Chapter 1 for an overview of the governance arrangements in the Antarctic.
[148] 1991 Antarctic Protocol (n 130) art 10.
[149] DARIO (n 69) art 2.
[150] 1959 Antarctic Treaty (n 130) art XI; 1991 Antarctic Protocol (n 130) arts 18, 19 and 20.
[151] 1991 Antarctic Protocol (n 130) arts 11 and 12.
[152] Convention on the Conservation of Antarctic Marine Living Resources (adopted 20 May 1980, entered into force 7 April 1982) 1329 UNTS 47 (CCAMLR) arts II(3)(a) and (c).
[153] ibid art VIII.
[154] ibid art IX.

are confined to states parties and based on consent of both parties, limiting the ability of the CCAMLR Commission to bring claims for environmental harm.

Regarding the Liability Annex, as mentioned in Section 6.3.1.1, while the ATCM is not empowered to initiate claims against state or non-state operators for liability relating to environmental emergencies, it does have a role to play in relation to the liability of state operators for payment of the costs of the response action into the fund. The amount of the costs of the response action is to be approved by a decision of the ATCM with advice of the Committee on Environmental Protection where appropriate,[155] and while an ATCP can block a decision related to its own liability,[156] unresolved disputes will be subject to the dispute settlement mechanism in articles 18, 19 and 20 of the 1991 Antarctic Protocol.[157]

6.3.1.3 Non-state Actors

Non-state actors (including non-state operators or NGOs) are not conferred explicit rights of standing under the 1991 Antarctic Protocol or the Liability Annex to bring claims either for direct harm/losses they have suffered or for environmental harm. While the Liability Annex envisages that there is a mechanism in place under the domestic law of the party for the enforcement of the liability of non-state operators for the costs of response action that they failed to take, it appears that only states are entitled to bring claims against non-state operators.[158]

6.3.2 *Deep Seabed*

The issue of standing for environmental harm caused by activities in the Area was addressed by the SDC in its Advisory Opinion, where it noted:

> Neither the Convention nor the relevant Regulations (regulation 30 of the Nodules Regulations and regulation 30 of the Sulphides Regulations) specifies what constitutes compensable damage, or which subject may be entitled to claim compensation. It may be envisaged that the damage in question would include damage to the Area and its resources constituting the common heritage of mankind and damage to the marine environment. Subjects entitled to claim compensation may include the Authority, entities engaged in deep seabed mining, other users of the sea, and coastal States.
>
> No provision of the Convention can be read explicitly entitling the Authority to make such a claim. It may, however, be argued that such entitlement is implicit in article 137, paragraph 2 of the Convention, which States that the Authority shall act

[155] Liability Annex (n 14) art 7(5)(b).
[156] ibid art 7(5)(a).
[157] ibid art 7(5)(a).
[158] Johnson (n 134) 48 and accompanying text to (n 145).

> on "on behalf" of mankind. Each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to the preservation of the environment of the high seas and in the Area. In support of this view, reference may be made to article 48 of the ILC Articles on State Responsibility . . .[159]

The SDC uses somewhat equivocal language, suggesting there is still some uncertainty as to which actors will have the requisite standing to bring a claim for harm to the marine environment in the Area. As such, it may be helpful to address the basis of standing for both the ISA, states and non-state actors, including contractors.

6.3.2.1 The ISA

Unlike the ATCM, the ISA has international legal personality and 'such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes'.[160] The ISA has extensive explicit powers to administer the resources of the Area, as well as implied powers that are necessary for the ISA to carry out its functions.[161] Express powers include the ability of the ISA Council to initiate proceedings on behalf of the ISA.[162]

The SDC identified the source of the ISA's standing as article 137(2) of UNCLOS, which provides that 'all rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act'. This provision, which is unique in international law, establishes the *res communis* nature of the resources of the Area, and vests those rights in 'mankind as a whole'. The term 'vests' has a proprietary connotation, and the structure of the provision creates a trust-like relationship. The legal interest created in article 137 is not unlike the *parens patriae* powers of a state, whereby the state has the authority to represent the communal interests of its citizenry. The shared nature of common heritage resources necessitates that there is some entity to protect the interests of the beneficiaries. Article 137 identifies the ISA as that entity. What article 137(2) does not specify is whether this provision would entitle the ISA to claim compensation for damage to common heritage of humankind (CHH) resources (i.e. polymetallic nodules, polymetallic sulphides and cobalt-rich crusts or CHH resources) or damage to the marine environment or both.

A narrow interpretation is that article 137 (2) would only be the legal basis for the ISA claiming for damage to CHH resources. This reading reflects the specific reference to the 'resources' of the Area in article 137, which are defined as the *in situ* mineral resources of the seabed. In other words, the right of standing should be restricted to the shared resources. The SDC appears to differentiate between

[159] *Activities in the Area* Advisory Opinion (n 39) paras 179–180.
[160] UNCLOS (n 10) art 176.
[161] ibid art 157.
[162] ibid art 162(2)(u).

damage to 'the common heritage of mankind' and 'damage to the marine environment'. Moreover, the marine environment in ABNJ is not subject to the common heritage of humankind principle.[163]

On the other hand, it is not clear whether compensable damage to CHH resources and compensable damage to the marine environment can be meaningfully separated.[164] The obligation to protect the marine environment in article 145 also includes 'natural resources of the Area'. Damage to the marine environment may result in damage to the resources subject to the CHH principle and vice versa. It therefore may be difficult to separate compensable damage to the marine environment from damage to CHH resources. It would be conceivable for the ISA to rely on article 137 (2) of UNCLOS to bring a claim for damage to CHH resources which may arguably be easier to quantify, and which would still result in compensation for damage to the marine environment.[165] In addition, UNCLOS states that 'the *Area* and its resources are the common heritage of mankind (emphasis added)',[166] which would at least encompass the marine environment of the seabed. The broad definition of marine environment in the Exploration Regulations and current Draft Exploitation Regulations (DER) would encompass CHH resources.[167]

The basis of the ISA's standing to bring claims for environmental damage should not be restricted to article 137(2), but rather ought to be understood in light of the other provisions addressing the role and functions of the ISA. A further foundation for the ISA's standing to bring claims for damage to the marine environment is its obligations relating to the protection of the marine environment, particularly article 145 which provides:

> Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To this end the Authority shall adopt appropriate rules, regulations and procedures for *inter alia*:
>
> (a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as

[163] See discussion in Tara Davenport, 'Responsibility and Liability for Damage Arising Out of Activities in the Area: Potential Claimants and Possible Fora' (Legal Working Group on Liability for Environmental Harm from Activities in the Area, Liability Issues for Deep Seabed Mining Series, Paper No 5, February 2019) 4–9.

[164] See discussion in Chapter 3.

[165] For example, it may be possible to determine the value of common heritage of mankind resources on the basis of the market value of the resource in questions, that is, polymetallic nodules, polymetallic sulphides and cobalt-rich crusts, as noted in Chapter 3.

[166] UNCLOS (n 10) art 136.

[167] See, for example, International Seabed Authority (ISA), 'Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area' (13 July 2000) Doc No ISBA/6/A/18 (PMN) reg 1(3)(c); ISA, 'Draft Regulations on Exploitation of Mineral Resources in the Area' (2019) ISBA/25/C/WP.1 (DER) schedule 1.

drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities.

(b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.

This provision 'assigns the primary responsibility for preventing environmental harm resulting from mining activities in the Area to the ISA' and affords the ISA 'a general and far-reaching environmental mandate'.[168] A purposive interpretation of article 145 is that an essential component of the ISA's obligation to protect and preserve the marine environment is its ability to initiate claims against actors that have caused environmental harm arising from activities in the Area. This entitlement is essential to deter wrongful activities and incentivize greater care by the relevant actors. Further, UNCLOS recognizes that the ISA 'shall have the right to take at any time any measures provided for under [Part XI] to ensure compliance with its provisions and the exercise of the functions of control and regulation assigned to it thereunder or under any contract'.[169] This, read together with the ISA's incidental powers that are necessary for the exercise of those powers and functions with respect to activities in the Area, suggests that the ISA has the legal authority to initiate proceedings for harm to the marine environment as part of its measures to ensure compliance with the provisions on the protection of the marine environment.[170]

It is also relevant that under the Exploration Regulations, the Council has the authority to issue measures in response to an emergency (on the recommendation of the Council) and if the Contractor fails to comply with these measures, the Council shall take by itself or through arrangements with others on its behalf, such practical measures necessary to prevent harm to the marine environment.[171]

The ISA does not face barriers relating to access to courts and tribunals – it has access to the dispute settlement mechanisms under section 5 of Part XI of UNCLOS, although its access to domestic courts will depend on the relevant national procedures.[172] The issue of what to do with any compensation that is received from legal proceedings is also surmountable in that the SDC in its 2011 Advisory Opinion recommended the establishment of a trust fund and this is envisaged in the current DER which contain provisions on the establishment of the Environmental Compensation Fund (see discussion in Chapter 8).[173] Any compensation received by the ISA can be directed to this fund. The DER state that one of

[168] Aline L Jaeckel, *The International Seabed Authority and the Precautionary Principle: Balancing Deep Seabed Mineral Mining and Marine Environmental Protection* (Brill 2017) 123–124.
[169] UNCLOS (n 10) art 153(5).
[170] ibid art 157(2).
[171] PMN Regulations (n 167) reg 33(7).
[172] See discussion in Chapter 7.
[173] *Activities in the Area* Advisory Opinion (n 39) para 205; DER (n 167) regs 54–56.

the sources of the Fund will consist of amounts recovered by the ISA as a result of legal proceedings in respect of a violation of the exploitation contract.[174]

While the ISA would seem the most logical actor to initiate proceedings given its mandate to organize, carry out and control 'activities on the Area' on behalf of humankind, there is no guarantee that it will do so. It is conceivable that the Legal and Technical Commission (LTC) could recommend not initiating proceedings and/or the Council could veto a decision to institute proceedings for a claim for damage to the marine environment before the SDC,[175] leading to a situation where damage remains uncompensated. Under UNCLOS, the decision to initiate proceedings requires a consensus in the Council at first, failing which a decision shall be taken by a two-thirds majority of members present and voting, provided that such decisions are not opposed by a majority in any of the voting chambers.[176] This potentially means that states with a direct interest in mining or states with an interest in revenue-sharing can potentially block a decision, even if it is contrary to the benefit of humankind.[177] Another issue is that the ISA *itself* may also be responsible for damage to the marine environment, or there may be multiple parties responsible for the environmental harm. If the ISA engaged in wrongful acts that contributed to damage to the marine environment, it may have fewer incentives to pursue claims against other responsible parties.

6.3.2.2 States

The standing of states in relation to deep seabed mining will depend upon the nature of the harm suffered. Most straightforwardly, there will be states whose economics interests are affected by environmental harm from deep seabed mining. This could take a number of forms, such as interference with a state's direct interest in deep seabed mining or other established resource rights, such as fisheries, as well as a sponsoring state who has sponsored a contractor which has had to stop activities and/or suffered damage to CHH resources in their contract area as a result of another contractor's activities and has resultantly lost a potential stream of revenue. As observed by the SDC, coastal states would also be entitled to bring claims for damage to the marine environment, presumably on the basis that coastal states have

[174] DER (n 167) reg 56(c).

[175] The LTC recommends to the Council that proceedings be instituted on behalf of the ISA before the SDC: UNCLOS (n 10) art 165(i). The Council has the power to institute proceedings on behalf of the ISA before the SDC for cases of non-compliance: UNCLOS (n 10) art 162(2)(u).

[176] Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (adopted 28 July 1994, entered into force 28 July 1996) 1836 UNTS 3 (1994 Implementation Agreement) Annex, section 3(5).

[177] For a discussion of the inherent tensions in the mandate of the ISA, see Richard Collins and Duncan French 'A Guardian of Universal Interest or Increasingly Out of Its Depth? The International Seabed Authority Turns 25' (2019) Int Organ Law Review 1.

suffered damage to the marine environment in areas under national jurisdiction (for example, in the EEZ or continental shelf).[178] While the coastal state has sufficient legal interest to bring a claim as it has sustained direct injury, it only has access to the SDC for claims against the sponsoring State,[179] the ISA[180] and state contractors,[181] but not against non-state contractors and their ability to bring proceedings against any of these actors in national courts will depend on the applicable procedures of the relevant national court.[182]

The ability of states to recover for restoration of environmental resources in ABNJ is less certain. Unlike the Antarctic Liability Annex, there is no clear authority for states to unilaterally undertake restoration actions and recover from the responsible party. In these instances, states would need to argue that they are acting under a general obligation to protect the environment as found in Part XII of UNCLOS,[183] and by incurring restoration costs are specially affected. However, these states would still need to overcome the obstacles associated with differentiating between officious and necessitous interventions.[184] In the case of deep seabed mining, this question is further complicated by the presence of the ISA, which has the ability (and possibly obligation) to make emergency orders, in the face of environmental incidents, which undermines the argument that a unilateral clean-up by a state is necessary.

As indicated by the SDC, the alternative basis for standing lies in the doctrine of *erga omnes* obligations.[185] The SDC does not elaborate on its reasoning, but as noted, the *erga omnes* nature of obligations to protect the marine environment is supported (albeit implicitly) in the *Whaling in the Antarctic* case and *South China Sea Arbitration*.[186] There remains a windfall gain problem, which suggests that a litigant should not be able to keep the compensation for its own uses and it is even questionable whether that state party should have full discretion on what to do with the funds. A potential solution would be a fund mechanism (as is the case under the Antarctic Liability Annex) that is collectively managed for the benefit of the affected environment. Claims based on *erga omnes* obligations would be limited to claims against other states, as the obligations flow from common membership in the UNCLOS.

Finally, non-states parties to UNCLOS, which could include other users of the sea or coastal states as identified by the SDC above, may also suffer direct losses arising from damage to the marine environment as a result of activities in the Area (for example, the costs of reasonable preventive or response measures), but

[178] *Activities in the Area* Advisory Opinion (n 39) para 179.
[179] UNCLOS (n 10) art 187(a).
[180] ibid art 187(b).
[181] ibid art 187(a).
[182] See discussion in Chapter 7.
[183] UNCLOS (n 10) arts 192 and 209.
[184] See discussion in Section 6.2.1.1.
[185] *Activities in the Area* Advisory Opinion (n 39) para 180.
[186] See discussion in Section 6.2.1.1.

non-parties will not have any access to UNCLOS dispute settlement. Their ability to bring proceedings against any of these actors in national courts will depend on the applicable procedures of the relevant national court.[187]

6.3.2.3 Non-state Actors (Including Contractors)

It is possible that contractors may incur direct costs because of an incident (which can be attributable to another contractor, sponsoring state or the ISA) and which can be classified as harm to the marine environment, for example, the costs of reasonable response or preventive measures or the cost of assessing the damage. Contractors may also suffer damage to CHH resources which fall within their contract area. To the extent that the contractor has suffered direct injury, it will have sufficient legal interest against the ISA and the sponsoring state based on its contractual rights to exploit seabed resources (and access to the dispute settlement procedures in section 5 of Part XI of UNCLOS). Other non-state actors operating in the Area (including other users of the sea) may also incur direct losses because of activities in the Area, but have no access to dispute settlement procedures in section 5 of Part XI of UNCLOS. While recognition of the specific interests in question will then be a matter for the domestic courts, there is no principled barrier to domestic courts to recognizing legal interests (such as rights to exploit marine living resources) that relate to ABNJ.[188]

A thornier question, in the context of activities in the Area, is whether non-state actors including international organizations and non-governmental organizations have standing to bring claims for environmental harm when they have not suffered direct damage. It is a complex question because the 'Area and its resources are the common heritage of mankind' and governance of the exploration and exploitation of CHH resources are carried out for the benefit of mankind as a whole.[189] While it has been argued that humankind has emerged as a subject of international law given its frequent invocation in various fields,[190] there is still considerable debate on its parameters.[191] During the negotiations of Part XI of UNCLOS, there were some attempts to confine the concept of 'mankind' to just states parties but this did not get strong support and was considered to be contrary to the 1970 Declaration of Principles.[192] It has also been held by the ICJ that 'mankind necessarily entails both

[187] See discussion in Chapter 7.
[188] This is further elaborated upon in Chapter 7.
[189] UNCLOS (n 10) arts 136 and 140(1).
[190] Antônio Augusto Cançado Trindade, *International Law for Humankind: Toward a New Jus Gentium* (Martinus Nijhoff 2005) 287.
[191] Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (Martinus Nijhoff 1998) 70–76.
[192] ED Brown, *The Area beyond the Limits of National Jurisdiction: Sea-Bed Energy and Mineral Resources and Law of the Sea* (Martinus Nijhoff 1986) vol II 3.29. Although note that article 82, which obliges the coastal state to make payments or contributions for exploitation of the

present and future generations'.[193] It is clear that humankind extends beyond states. In recognition of this, the DER have defined 'stakeholder' as 'a natural or juristic person or an association of persons with an interest of any kind in, or who may be affected by, the proposed or existing Exploitation Activities under a Plan of Work in the Area, or who has relevant information or expertise'.[194] The ISA recognizes that these 'stakeholders' have an interest in the administration of the CHH and are, at the very least, entitled to participate in the policy making of the ISA.[195]

Do such non-state actors have sufficient legal interest to bring claims for environmental harm in ABNJ from activities in the Area considering the harm done to collective interests? An argument could be made that such NGOs or equivalent bodies have standing given the intrinsic relationship between CHH resources and the marine environment (the preservation for future generations is said to be an essential component of the CHH principle) and the protection of the marine environment from activities in the Area is also for the benefit of the collective interests of humankind.[196] Recognition of the rights of NGOs in domestic courts to represent public interests are statutory creations, but the competence of a state to extend standing to areas outside of its territory is doubtful. In addition, there may be questions of the basis and legitimacy of a claim by an NGO to represent the interests of humankind as a whole.[197]

6.3.3 *High Seas*

The question of which actor has standing for environmental harm in the high seas will largely be determined by the default rules, which already have been discussed in Section 6.2. Nonetheless, it is useful to consider in more depth the specific aspects of the legal regimes governing the high seas that may influence questions of standing.

outer continental shelf which are to be distributed by the Authority on the basis of equitable sharing criteria, only specifies that the Authority shall distribute them to States Parties (rather than mankind as a whole).

[193] See, for example, *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7, para 140.

[194] DER (n 167) schedule 1.

[195] For example, in the context of developing the Exploitation Regulations, the ISA has recognized the need to develop an effective 'communications and engagement strategy' for the ISA to ensure active stakeholder participation in the development of a minerals code (see Kristian Telicki, 'Developing a Communications and Engagement Strategy for the International Seabed Authority to Ensure Active Stakeholder Participation in the Development of a Minerals Exploitation Code' (2016) ISA Discussion Paper No 3. The ISA conducted a series of 'stakeholder surveys' in 2014, 2015, 2016 and 2017, in which it received submissions for various actors, including IOs, NGOs and individuals.

[196] See Section 6.2.1.3.

[197] ibid.

There are a variety of international organizations that have mandates in the high seas, for example, various RFMOs, regional seas organizations and sectoral organizations.[198] It is conceivable that environmental harm in the high seas could impact the interests of such international organizations and fall under their relevant mandate. In such cases, standing is dependent on two key factors. First, whether the constitutive instrument endows the international organization with international legal personality and capacity to bring international claims. Second, whether the mandate and powers conferred on the institution provide either a direct legal interest in the high seas environment or responsibilities that would include incidental powers to pursue compensation – the most salient of these, perhaps, being the ability to take response measures to protect the marine environment. Applying these factors to the existing institutions governing the high seas, there are no institutions, except for the ISA, discussed above, that would appear to have standing to pursue claims for environmental harm in the high seas. Many of the institutional structures, such as regional seas commissions, do not have separate legal personality and are intended to function as coordinating bodies for state-led activities. Even where institutions have legal personality, as is the case with some RFMOs,[199] the mandate of the body concerned (for example, as described in relation to the CCAMLR Commission) does not disclose an intention to provide these institutions with legal interests in resources or the authority to initiate response measures. The institutional structures established under the newly agreed upon agreement on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (2023 BBNJ Agreement),[200] consisting of a conference of parties, a scientific and technical body, clearing-house mechanisms and a secretariat, are similarly constrained.[201] In earlier discussions leading up to the 2023 BBNJ Agreement, there were suggestions that states parties should seek compensation from private entities for environmentally harmful activities involving biodiversity beyond national jurisdiction.[202] There was also mention of obtaining guidance from 'conventional regimes

[198] See, for example, 'Mapping Governance Gaps on the High Seas' (The Pew Charitable Trusts, March 2017) available at <www.pewtrusts.org/-/media/assets/2017/04/highseas_mapping_governance_gaps_on_the_high_seas.pdf> accessed 1 September 2022.

[199] On the legal status and degree of institutionalization of regional fisheries management organizations and arrangements, see James Harrison, 'Key Challenges Relating to the Governance of Regional Fisheries' in Richard Caddell and Erik J Molenaar (eds), *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart Publishing 2019) 79–102. Harrison notes that 'it is more important to consider the detailed functioning of an organization or arrangement, rather than its formal designation or status'.

[200] Draft agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, Advance, Unedited text, 4 March 2023 ('BBNJ Agreement'), Part VI.

[201] David S Berry, 'Unity or Fragmentation in the Deep Blue: Choices in Institutional Design for Marine Biological Diversity in Areas beyond National Jurisdiction' (2021) 8 Front Mar Sci 1, 7–11.

[202] Chair of Preparatory Committee, 'Chair's Non-Paper on Elements of a Draft Text of an International Legally Binding Instrument under the United Nations Convention on the Law

addressing liability', which could refer to the civil liability conventions adopted under the International Maritime Organization. The International Union for Conservation of Nature (IUCN) put forward the most detailed proposal on responsibility and liability which entailed a recognition that states, and competent international organizations, are entitled to invoke the responsibility of another state that has breached its obligations and that redress of environmental damage shall prioritize recovery of ecological integrity as determined by the use of best available science.[203] Ultimately, as explained in Chapter 1, responsibility and liability for environmental damage under the 2023 BBNJ Agreement is only addressed in the preamble which affirmed that states are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment and may be liable in accordance with international law.

In light of the absence of institutions with standing to pursue environmental claims for harm to the high seas, it would fall to states or non-state actors to bring such claims. International instruments addressing rights in the high seas, principally UNCLOS,[204] determine the nature of the interests that may be protected, but do not advance the rules on standing which are determined by the general approaches discussed above.

6.4 CONCLUSIONS

The essence of determinations of standing is which interests are recognized as worthy of legal protection and who may prosecute those interests. As these questions relate to environmental harm in ABNJ, there is little doubt in both international and domestic law that environmental resources are worthy of legal protection. The UNCLOS and the Antarctic Protocol not only identify the centrality of environmental interests, they identify responsibility and liability as key approaches to protecting those interests. The challenge lies with the second question, and in particular, with the question of who may pursue communal legal interests. There are, of course, private interests (whether of states or non-state actors) that are subject to harm in ANBJ, but for the most part the challenge here relates to access to courts, not standing.

International institutions or organizations can play a direct and indirect role in ensuring that recognized environmental interests in ABNJ can be protected. The

of the Sea and the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction' (28 February 2017) 111 Part X.

[203] International Union for Conservation of Nature (IUCN), 'Submission by IUCN following the Second Session of the Preparatory Committee on the Development of an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction' (5 December 2016) <www.un.org/depts/los/biodiversity/prepcom_files/rolling_comp/IUCN.pdf > accessed 1 September 2022.

[204] UNCLOS (n 10) art 87.

direct role is exemplified by the ISA, which maintains a trust-like role in relation to the common heritage of humankind that provides it with a sufficient legal interest to pursue claims. The role of the ATCM is more indirect. It does not have the capacity to bring claims in its own right, but facilitates claims by states through the maintenance of a fund and by acting as a decision-making body in relation to determining the costs of a response action to be paid into the fund. In both cases, the international institution plays an important role in representing the community interest. The absence of any institutional structure in relation to the high seas (and the absence of ratification of the Antarctic Liability Annex) illustrates the limited willingness of states to concede these roles to institutions.

The standing of states to pursue claims for harm to communal interests is complicated by two areas of ambiguity. First, it is unclear under what conditions a state can undertake response measures unilaterally and seek compensation from the responsible entity. We have argued that international law ought to recognize that the obligation of states to preserve and protect the environment in ABNJ includes the ability to undertake responsible response measures. This remains, of course, an untested proposition. Second, the implications of many obligations concerning the commons environment having an *erga omnes partes* or *erga omnes* character appears to provide a clear basis for standing, but the form of reparations under these conditions may be constrained. The ILC's indication that reparations may be sought 'in the interest . . . of the beneficiaries of the obligation breached' provides a basis for claiming damages that is broadly consistent with the idea of *erga omnes* obligations. The problem of windfall gains remains a concern.

Finally, we note that both international organizations and states are likely to be imperfect guardians of the commons environment. This has certainly been the case in relation to many domestic and international environmental issues and has led to a profusion of innovative approaches to standing with domestic legal systems. While approaches based in trusteeship or the extension of rights to natural objects remain confined to domestic legal systems, the trajectory of the approach is towards broad and remedial rules of standing, which has growing relevance for the global commons.