The European Journal of International Law Vol. 33 no. 4

The Pitfalls of Ineffective Conceptualization: The Case of the Distinction between Procedure and Substance

Benoit Mayer[*]

Nina Le Bonniec. *La procéduralisation des droits substantiels par la Cour européenne des droits de l'homme: Réflexion sur le contrôle juridictionnel du respect des droits garantis par la Convention européenne des droits de l'homme*. Brussels: Bruylant, 2017. Pp. 681. €134. ISBN: 2802758195.

Ioannis Prezas (ed.). *Substance et procédure en droit international public. Dialectique et influences croisées*. Paris: Pedone, 2019. Pp. 220. €28. ISBN: 2233009010.

Jutta Brunnée. *Procedure and Substance in International Environmental Law*. Leiden: Brill/Nijhoff, 2020. Pp. 236. €18. ISBN: 9789004444379.

Abstract

This review essay explores the distinction that judges and scholars have occasionally made between legal norms that they consider to be procedural and those considered to be substantive in nature. Approaching the issue from different angles, the three books under review all struggle to define procedure and substance as concepts informing a decontextualized distinction among international norms. Overall, they fail to show how this distinction is useful, either to understand what the law is or to account for its evolution. The essay argues that the concepts of 'procedure' and 'substance' hinder the clarity and, often, the soundness of the analysis presented in these books. At times, this ineffective conceptualization is an intellectual detour that hinders the development of more useful distinctions – for instance, between 'principal' and 'accessory' obligations, to determine when the breach of an obligation implies the breach of another obligation. Through this case study focused on recent publications on the distinction between procedure and substance, this essay reflects on the capacity of ineffective concepts to hinder the analysis of international law when their relevance and usefulness is too readily taken for granted.

[*] Associate Professor, Faculty of Law, Chinese University of Hong Kong, Hong Kong. Email: bmayer@cuhk.edu.hk.

1 Introduction

> What is your aim in philosophy? – To show the fly the way out of the fly-bottle.
>
> — Ludwig Wittgenstein, *Philosophical Investigations*[1]

Concepts are essential tools for legal analysis, but some concepts can confuse more than they enlighten; they can trap scholars like flies in a bottle, banging their heads against invisible walls, unable to achieve any insightful conclusions. This review essay uses the general distinction between procedure and substance to illustrate this point. The three books under review unwittingly demonstrate that such a general distinction provides little, if any, insight into either the content of the law or the significance of legal developments in a given field. In at least one instance, these ineffective concepts prevent the development of a more useful alternative.

The distinction between procedure and substance in law can be deployed in various ways. A vague, yet intelligible, meaning is conveyed when a norm is described as 'procedural' or 'substantive' in much the same way as one could describe it as 'new' or 'old', 'general' or 'specific' and 'important', 'innovative' or 'interesting'. Yet a more precise meaning is needed when one seeks to categorize systematically norms as either 'procedural' or 'substantive' – that is, when one presents procedure and substance not just as vague descriptors but, rather, as distinct categories of norms, perhaps even as a dichotomy or *summa divisio* of legal norms or otherwise as qualification that entails distinct consequences.

In this regard, two different distinctions can be made between procedure and substance: one contextual and one general in character. First, a contextual distinction can be drawn between the secondary norms defining a given procedure and the primary norms that the procedure seeks to apply. One could contrast, for instance, international arbitral procedure with the substantive law it applies.[2] This distinction is contingent on the context in which it is deployed: a 'serious departure from a fundamental rule of procedure' in an arbitral procedure can thus become part of the substance in subsequent annulment proceedings.[3] Second, a general distinction (that is, non-procedure specific) may be drawn between norms that are deemed procedural in nature (for example, the filing of a document) and those that are substantive in nature (for example, the realization of a goal). For instance, the International Court of Justice (ICJ) used this distinction to organize its judgments in *Pulp Mills*[4] and *Certain Activities*[5] – in each case, the Court assessed alleged breaches of 'procedural' obligations before considering compliance with 'substantive' ones.

1 L. Wittgenstein, *Philosophical Investigations* (4th edn, 2009), para. 309.

2 Hascher, 'Principes et pratique de procédure dans l'arbitrage commercial international', 279 *Recueil des Cours* (1999) 51.

3 Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1966, 575 UNTS 159, Art. 52(1)(d).

4 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, ICJ Reports (2010) 14.

5 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, 16 December 2015, ICJ Reports (2015) 665.

The first, contextual distinction automatically entails certain consequences. For instance, a court applies the substantive law in force at the time of the facts but the procedural law in force at the time of the proceedings.[6] As such, disagreements about the characterization of a norm as either procedural or substantive in relation to a given procedure reflect genuinely different understandings of the norm. The distinction thus does produce consequences, although these are contingent and not easy to generalize. By contrast, the second distinction is general in nature and potentially of wider relevance. But its implications are not obvious.

This essay focuses on the second, general distinction and interrogates its potential implications by looking at three recent works. Its central thesis is that it is not only difficult to draw a line between what is 'procedural' or 'substantive' by nature, but, more fundamentally, it is unclear why there needs to be a line at all, when no consequences appear to follow from the characterization of a norm, in this abstract sense, as either procedural or substantive. This central thesis is at odds with the approach adopted in the three books under review. All of them draw a general distinction between procedural and substantive norms in different fields of international law, but they do not convincingly explain what is being distinguished from what or why this distinction needs to be made. With regard to the definition of procedure and substance, all authors struggle to explain how procedure and substance can be distinguished in general terms – that is, outside the context of a particular procedure. At times, authors use 'substantive' simply as a synonym of 'important'[7] or fall back on what courts themselves have branded, sometimes inconsistently, as 'procedure' or 'substance'.[8] Ioannis Prezas underlines the 'majestic indeterminacy' of these two categories, although it is unclear what can be 'majestic' about conceptual indeterminacy.[9]

Overall, the books do not demonstrate why a general distinction between substance and procedure needs to be made – that is, what implications it may have. Some of the authors consider, but promptly reject, a theory according to which the breach of a procedural obligation would never entail material reparations.[10] Nina Le Bonniec shows that the European Court of Human Rights (ECtHR) has sometimes ordered compensation for material or moral injury based on the breach of (what she defines as) procedural obligations.[11] In practical terms, a judge would likely prefer to assess whether there is a material injury in the case as issue, in application of the general

[6] See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, para. 58; see also *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Reports (2002) 25, para. 60.

[7] J. Brunnée, *Procedure and Substance in International Environmental Law* (2020), at 205; Lemoine-Schonne, 'Substance et procédure en droit international du climat', in I. Prezas (ed.), *Substance et procédure en droit international public. Dialectique et influences croisées* (2019) 19, at 22.

[8] Brunnée, *supra* note 7, at 83–85; N. Le Bonniec, *La procéduralisation des droits substantiels par la Cour européenne des droits de l'homme: Réflexion sur le contrôle juridictionnel du respect des droits garantis par la Convention européenne des droits de l'homme* (2017), at 45–46.

[9] Prezas, 'Libres propos sur quelques aspects de la dialectique entre procédure et substance devant la Cour Internationale de Justice', in Prezas, *supra* note 7, 89, at 93.

[10] Kerbrat, 'Obligations procédurales et obligations de fond en droit international des dommages transfrontières', in Prezas, *supra* note 7, 7, at 16; Brunnée, *supra* note 7, at 104.

[11] Le Bonniec, *supra* note 8, at 138–141, 308–309.

law on state responsibility, rather than applying a dubious theory based on the questionable characterization of the norm breached as procedural. As none of the authors appears to support this theory, it is not further discussed in this review essay.[12]

Another theory, more influential in the books under review, is that procedural requirements could be considered as 'yardsticks' for assessing a state's compliance with substantive obligations.[13] Yann Kerbrat and Jutta Brunnée use this yardstick theory to criticize the ICJ's decisions in *Pulp Mills* and *Certain Activities*: in their view, the failure of a state to follow certain 'procedural' obligations (for example, to assess a project's potential environmental impact) should have led the Court to conclude that the state had breached its 'substantive' obligation on the prevention of transboundary environmental harm. Yet, as discussed below, the distinction between substance and procedure is immaterial to Kerbrat and Brunnée's critique because (as the authors partly recognize) the breach of a procedural obligation is neither sufficient nor necessary to demonstrate the breach of a substantive obligation. As such, their argument is inconclusive: procedural obligations may or may not be yardsticks; yardsticks may or may not be procedural in nature. Instead of seeking to distinguish substance from procedure, a yardstick theory would be more effective if it was based on an ad hoc distinction between what could be called 'principal' and 'accessory' obligations.

The authors also present other theories in which the general distinction between procedure and substance would help assess the evolution of a treaty regime. For Brunnée, multilateral environmental agreements (MEAs) develop from procedural to more effective substantive norms.[14] In contrast, for Le Bonniec, it is through its 'proceduralization' that European human rights law has become more effective.[15] But, as shown below, there is no rigorous way to assess the proceduralization or substantialization of a treaty regime. Overall, these phenomena provide little, if any, insight into the effectiveness of a treaty regime: both procedural and substantial norms can make treaty regimes more effective. Thus, approaches relying on either proceduralization or substantialization lead to a platitude: treaty regimes evolve with the adoption of new norms that tend to be more detailed and possibly more effective.

This review essay suggests that a general distinction between procedure and substance does not achieve valuable analytical insights. In fact, the proposed distinction appears to distract from more effective conceptual frameworks: one could better understand the relation between principal and accessory obligations if one were not distracted by the distinction between procedure and substance, and *Pulp Mills* and *Certain Activities* might have been decided more convincingly were it not for this ineffective conceptual framing. Likewise, one may be able to think better about the evolution of treaty regimes if one were to consider the clarity, precision or ambition of their norms rather than seeking to determine their procedural or substantive nature.

[12] For a discussion of this theory, see Benoit Mayer, *International Law Obligations on Climate Change Mitigation* (2022), at 212–213.

[13] Brunnée, *supra* note 7, at 117.

[14] *Ibid.*, at 150–204.

[15] Le Bonniec, *supra* note 8, at 213–540.

This review essay further sheds light on our reluctance to look beyond familiar concepts when they reveal themselves as ineffective. While some of the authors in the books under review recognize difficulties in relying on the distinction between procedure and substance, most of them immediately discount these difficulties – for instance, by invoking some idiosyncrasies of their own research question (for example, Marion Lemoine-Schonne in *Substance et procédure*)[16] or by claiming that this distinction had long been made (for example, Le Bonniec).[17] Further, sociological research could help explain why legal scholars get trapped in such ineffective conceptual frameworks.[18] Hypothetical explanations include the fact that authors may be reluctant to question the premises of a research project in which they have already invested considerable time and effort. Moreover, there may be a publication bias in law (like in other disciplines)[19] against negative research results, such as the finding that a conceptual framework is not useful after all.

To explore these themes, section 2 provides a brief preliminary overview of the three books under review. Section 3 shows that these books identify no effective test to drawing a general distinction between procedure and substance. Sections 4 and 5 turn to the potential effects that, as the authors suggest, could be associated with this general distinction. Section 4 shows that the yardstick theory does not apply distinctly to the relation between procedure and substance but, rather, between what could be called 'principal' and 'accessory' obligations. Section 5 shows that the distinction provides no useful insights on the development of treaty regimes either.

2 The Books under Review

This section briefly introduces the three books under review in the order in which they were published.

A *Nina Le Bonniec:* Proceduralization as a Policy of the ECtHR

Le Bonniec's monograph, based on a doctoral dissertation defended at the University of Montpellier in 2015, deploys a general distinction between substance and procedure to analyse the decisions of the ECtHR. Le Bonniec starts with the assumption that the protection of substantive rights (for example the right to life) relies primarily on substantive obligations (for example, the obligation not to kill),[20] but she shows

[16] Lemoine-Schonne, *supra* note 7, at 24.

[17] Le Bonniec, *supra* note 8, at 75.

[18] Another example relates to the concept of 'climate migrants', repeatedly denounced as unsound (climate change affects migratory patterns but does not create a distinct population of migrants) and without basis in migration studies, yet one that continues to haunt legal scholarship. For critical perspectives, see Nicholson, 'Climate Change and the Politics of Causal Reasoning: The Case of Climate Change and Migration', 180 *Geographical Journal* (2014) 151; Mayer, 'Who Are "Climate Refugees"? Academic Engagement in the Post-Truth Era', in S. Behrman and A. Kent (eds), '*Climate Refugees': Beyond the Legal Impasse?* (2018) 89.

[19] See, e.g., Easterbrook *et al.*, 'Publication Bias in Clinical Research', 337 *Lancet* (1991) 867.

[20] Le Bonniec, *supra* note 8, at 35–36, 70.

that judges have also interpreted these rights as implying procedural obligations (for example, the obligations to adopt appropriate criminal legislation and to conduct effective investigations on alleged crimes). Le Bonniec refers to this as the 'proceduralization' of substantive rights.

The first part of the book approaches 'proceduralization' as a 'legal technique' that the ECtHR uses to infer procedural obligations from substantive rights.[21] Le Bonniec shows that the Court has held states responsible for a violation of the European Convention on Human Rights (ECHR) based on their breach of procedural obligations, despite the absence of material harm, or of evidence thereof,[22] or in relation to harm that occurred before the entry into force of the ECHR.[23] She submits that judges have sometimes elected to apply procedural, rather than substantive, obligations to avoid treading on delicate ethical questions – for instance, regarding abortion and euthanasia.[24] The second part interprets the proceduralization of substantive rights as part of a 'much broader jurisprudential policy that tends to serve a particular political project: the harmonization of national laws based on some fundamental procedural guarantees'.[25] Through this 'policy', Le Bonniec suggests that the ECtHR has tried to promote not only a more effective protection of human rights but also a European procedural model of rights protection, and, overall, a 'more balanced application of the principle of subsidiarity'.[26]

This study is comprehensive and well written, despite the complex structure (involving up to nine levels of headings). Yet some of Le Bonniec's assumptions are questionable. Can procedure really be defined so broadly as to include, for instance, the general due diligence obligation of a state to take appropriate measures to prevent the violation of rights?[27] And what supports the repeated assertion that proceduralization is an 'interpretative choice', a 'jurisprudential policy' and the exercise of 'discretionary power' by the ECtHR rather than simply what follows from the application of the law, for instance the rules on treaty interpretation?[28] Le Bonniec's position in this regard is at odds with her own observation that other human rights institutions have adopted a similar interpretation,[29] with her allusions to the Court's deductive reasoning when characterizing procedural obligations as the logical implication of substantive rights[30] and, ultimately, with her acknowledgement of the 'necessary complementarity of material rights with procedural guarantees'.[31]

21 *Ibid.*, at 111–142.
22 *Ibid.*, at 128; Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950, 213 UNTS 222.
23 Le Bonniec, *supra* note 8, at 219–223.
24 *Ibid.*, at 284–293.
25 *Ibid.*, at 53.
26 *Ibid.*, at 341–388, 389–441, 445.
27 *Ibid.*, at 81–84.
28 *Ibid.*, at 54, 211, 334.
29 *Ibid.*, at 143–207. If the ECtHR has gone further than other courts in recognizing procedural obligations, as Le Bonniec suggests, an obvious explanation is that the ECtHR has decided more cases.
30 *Ibid.*, at 70, 203, 397, 404.
31 *Ibid.*, at 264.

Overall, Le Bonniec's reliance on the concept of procedure begs more fundamental questions. As argued below, many of the implications of 'proceduralization' that Le Bonniec posits are not automatically or uniquely attached to procedure.[32] For instance, the ECtHR engages in an expansive interpretation of human rights law in substantive as well as procedural matters.[33] As such, it is unclear what added analytical value there is in focusing on procedural obligations in isolation from substantive ones or, indeed, in distinguishing between the two.

B *Ioannis Prezas:* A Search for Substance and Procedure in Public International Law

Prezas' edited volume is the result of a workshop on substance and procedure in international law organized by the Sorbonne Research Institute for International and European Law in 2016. The first part of the volume explores the general distinction between procedural and substantive obligations, as introduced above, and its application to several fields of public international law. Kerbrat's chapter, on environmental law, presents a sceptical, but insightful, reflection on the usefulness of the distinction between procedural and substantive obligations drawn by the ICJ in *Pulp Mills* and *Certain Activities*. Lemoine-Schonne seeks to apply the distinction between procedure and substance to the climate regime; she observes a 'progressive effacement' of the distinction in this field, while also (somewhat contradictorily) noting the gradual proceduralization of the field.[34] Sabrina Robert-Cuendet discusses the extension of procedural obligations through investor–state arbitration, showing that tribunals tend to apply broad substantial obligations by identifying procedural implications. Saïda El Boudouhi reviews discussions on the proceduralization of trade law but finds little evidence that this phenomenon is taking place.

The second part of the volume turns to the contextual distinction between procedure and substance – that is, the distinction between the secondary norms defining a procedure and the primary norms that this procedure seeks to implement. Prezas' introductory chapter discusses the definitions of procedure and substance and some of the ways in which the two interact. Michel Cosnard sheds a critical light on the finding of the ICJ in *Jurisdictional Immunities* that 'the law of immunity is essentially procedural in nature … and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful'.[35] Evelyne Lagrange compares two types of procedure relating to the implementation of human rights law: the country reviews by treaty bodies and the Universal Periodic Review by the Human Rights Council. In another chapter on human rights law, Despina Sinou looks at the relation between substantive rights and procedural guarantees, in particular, in light

[32] See section 5.B.

[33] See Dothan, 'In Defence of Expansive Interpretation in the European Court of Human Rights', 3 *Cambridge Journal of International and Comparative Law* (2014) 508; W. Kälin and J. Künzli, *The Law of International Human Rights Protection* (2nd edn, 2019), at 34–35.

[34] Lemoine-Schonne, *supra* note 7, at 25, 34.

[35] Cosnard, 'Les immunités internationales entre procedure et substance', in Prezas, *supra* note 7, 123, at 123, quoting *Jurisdictional Immunities*, *supra* note 6, para. 58.

of the jurisprudence of the ECtHR. Lastly, Charlotte Beaucillon provides an overview of procedural aspects of the European Union's common foreign and security policy.

The book contains several important contributions, but, as a whole, it would have benefited from a stronger conceptual framing. Instead of an introduction, a one-page editorial foreword announces 'a theme of counterpointing improvisation'.[36] Thus, leaving aside the title's allusion to a 'dialectic', the book is mainly an unguided exploration of 'the question of the autonomy and complementarity' of substance and procedure.[37] There is no obvious relation between the two parts of the book, where the same words (procedure and substance) are used but with different meanings intended.

C *Jutta Brunnée:* Procedure and Substance in International Environmental Law

Brunnée's monograph is based on her 2019 lecture at The Hague Academy of International Law. It explores various aspects of the distinctions between procedure and substance in international environmental and climate law. Following an introductory chapter, Chapter 2 explores the general distinction between the 'substantive' obligation to exercise due diligence with the view of preventing transboundary environmental harm and its 'procedural' implications. It proceeds in particular through a critical discussion of the ICJ's judgments in *Pulp Mills* and *Certain Activities*. Like Kerbrat in his chapter to Prezas' volume, Brunnée exposes the tension between the Court's holding that states had complied with their substantive obligation of due diligence and its finding that they had breached related procedural obligations. Brunnée argues that the obligation of prevention, interpreted as an obligation to take appropriate measures, 'can be violated by breaches of due diligence obligations [that is, obligations implied by due diligence], including procedural obligations'.[38] She thus presents 'procedural' requirements as 'yardsticks' for assessing a state's compliance with the 'substantive' obligation of prevention.[39]

Chapter 3 highlights 'procedural' aspects of the implementation of international environmental law in relation to long-range and global environmental harm, arguing that 'procedural requirements serve to concretize and operationalize the harm prevention rule'.[40] This thesis is meaningful only insofar as the notion of 'procedural requirements' is clearly defined. Yet the chapter addresses simultaneously the general distinction between substance and procedure and the contextual distinction as applied in adjudication, thus considering as 'procedural' various unrelated requirements. However, this consideration overstretches the notion of 'procedure': it is unclear what a reflection on the relation between environmental impact assessment (EIA) and prevention expanding on Chapter 2 has in common with an analysis of the conditions

[36] Prezas, 'Avant propos', in Prezas, *supra* note 36, 3, at 3.
[37] *Ibid.*, at 3.
[38] Brunnée, *supra* note 7, at 96.
[39] *Ibid.*, at 117; see also discussion in section 4.
[40] *Ibid.*, at 120.

of admissibility of either of these norms in international adjudication, except for the possibility of using the word 'procedure' to describe one term of the equation.[41]

Reverting to the general distinction as introduced above, Chapter 4 discusses the relation between procedure and substance in MEAs. Brunnée outlines her theory according to which an MEA will initially 'be predominantly procedural' before states are persuaded 'to make significant substantive commitments'.[42] Brunnée asserts that 'many' MEAs confirm this theory, although she only mentions three closely related 'examples', which, she acknowledges, are not fully consistent with this theory.[43]

As a whole, the book suffers from the fact that it addresses the two distinctions (general and contextual) between procedure and substance simultaneously, at times within the same chapters and sections. As a result, the book mainly highlights the 'complexities and challenges' of the topic, describing the distinction(s) between substance and procedure as a 'variegated terrain' and a question 'far more complex than one might have imagined'.[44]

3 Defining Procedure and Substance

As is clear from the summary accounts, the three books under review generally build on the postulate that a distinction can be drawn between substance and procedure, including in general terms. However, this claim is only partially made good, and no effective test is offered that would distinguish procedure from substance in a general sense – that is, out of the context of a given procedure.

A *Distinguishing Distinctions*

As the summary accounts also make clear, the three books use the two different distinctions between procedure and substance set out in section 1: one contextual to a particular procedure; the other general. Of these two, the contextual distinction (that is, between the norms defining a procedure and those that the procedure seeks to apply) seems useful and effective.[45] Many domestic courts must follow codes of civil or criminal procedure to implement the substantive norms contained in civil or criminal codes. In private international law, a court may have to apply the substantive law of another jurisdiction as *lex causae* while applying the procedural law of its own jurisdiction as *lex fori*.[46] In public international law, the ICJ relied on this distinction to hold that, as 'jurisdictional clauses are adjectival not substantive in their nature and effect', they do not confer substantive rights to states.[47] Likewise, it was the Court's

[41] *Ibid.*, at 122–124, 134–137.
[42] *Ibid.*, at 156.
[43] *Ibid.*, at 156; see also section 5.A.
[44] *Ibid.*, at 18, 83, 205.
[45] For a definition, see Prezas, 'Libres propos', *supra* note 9, at 91.
[46] See *ibid.*, at 94; Brunnée, *supra* note 7, at 24. See generally R. Garnett, *Substance and Procedure in Private International Law* (2012).
[47] *South West Africa (Ethiopia and Liberia v. South Africa)*, Second Phase, Judgment, 18 July 1966, ICJ Reports (1966) 6, para. 64, cited in Prezas, 'Libres propos', *supra* note 9, at 94.

understanding of the law of state immunity as procedural that led it to conclude that immunity 'cannot exonerate the person to whom it applies from all criminal responsibility',[48] that a court should apply the law on immunity existing at the time of the procedure rather than at the time of the offence[49] and, more controversially, that the *jus cogens* nature of a primary norm does not prevent the application of the secondary norm conferring immunity for breaches of that primary norm.[50]

By contrast, the usefulness and effectiveness of general distinction between 'substance' and 'procedure' is by no means obvious. At first sight, scholarly interest in it may appear similarly justified by some judicial decisions. As Brunnée notes, the ICJ in *Pulp Mills* and *Certain Activities* 'distinguishes between procedural and substantive obligations, organizing its analysis of the parties' conduct around the two categories of obligations'.[51] Yet the structure of a judgment could reflect the list of preliminary questions drafted by the registry on behalf of the president rather than a positive agreement among the members of the court on the relevance of a conceptual framework;[52] the prominence of this distinction in the structure of a judgment does not demonstrate that it directly impacted the way in which the judges approached the case. Similarly, contrary to Le Bonniec's suggestion, the fact that the Council of Europe mentioned 'procedural obligations' in some information notes on the Court's case law does not prove that it has 'officially recognized' the relevance of a general distinction between substance and procedure in law.[53] Authors assert that a general distinction between substance and procedure has 'traditionally' been made[54] and is therefore 'consecrated',[55] but it seems that this distinction has not so frequently been made in the general, decontextualized way that they suggest.[56]

The real problem that arises results from a failure to distinguish. The contextual and general distinctions between 'procedure' and 'substance' have little in common beyond the terms used to describe them. As such, there is no obvious added value in analysing them together. At best, the two narratives coexist without significant interaction. But, even in Prezas' volume, where one part is devoted to the contextual distinction and another to the general one, some confusion arises: Lemoine-Schonne mentions contextual instances of the 'proceduralization' of climate law in a chapter

[48] *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 11 April 2000, ICJ Reports (2002) 25, para. 60.

[49] *Jurisdictional Immunities*, *supra* note 6, para. 58.

[50] *Ibid.*, para. 93; see also Cosnard, *supra* note 35.

[51] Brunnée, *supra* note 7, at 83.

[52] See UN General Assembly, Summary Record, 60th session, 15th meeting, UN Doc. A/C.6/60/SR.15, 28 October 2005, para. 29; Malcolm N. Shaw, *Resenne's Law and Practice of the International Court: 1920–2015*, vol. 3 (5th edn, 2016), at 369; Lando, 'Secret Custom or the Impact of Judicial Deliberations on the Identification of Customary International Law', *Cambridge Law Journal* (forthcoming).

[53] Le Bonniec, *supra* note 8, at 45.

[54] *Ibid.*, at 75.

[55] El Boudouhi, 'Procédure et substance en droit de l'OMC: À la recherche du phénomène de procéduralisation', in Prezas, *supra* note 7, 69, at 69.

[56] Thus, while 15 Hague courses of international law contain the word 'procedure' or some of its variants in their title, all except for Brunnée's point to a contextualized distinction between a particular procedure and the substance applied by this procedure.

otherwise focused on the general distinction,[57] whereas some remarks on this general distinction percolate in Prezas' own chapter despite its apparent focus on a contextualized distinction.[58]

B *An Elusive Dichotomy*

Problems do not stop here, though. Quite apart from the risks of conflation, it is not clear how 'procedure' and 'substance' could be generally distinguished. The three books under review treat the general distinction as a dichotomy, whereby any norm would fall exclusively within one of the two categories.[59] However, these books fail to define a clear test to determine whether a norm is procedural or substantive in nature. Rather, the authors set out a variety of approaches – some of them conflicting, none of them fully convincing. The subsequent paragraphs illustrate this variety, which points to significant definitional uncertainty. No fewer than six different approaches can be distinguished:

(i) Some authors do offer definitions of procedure and substance, but these definitions are exceedingly loose. For instance, Brunnée's definition of 'substance' as '"a fundamental or characteristic part or quality" of a given matter' is unhelpful: in this sense, a 'substantive norm' is little more than a norm that one considers of some importance.[60] And all rules – not just substantive ones – 'set out standards that must be met through States' actions or conduct'.[61] Lemoine-Schonne suggests that a norm is 'substantive' if its 'content sets forth principles, values, objectives, or rights, and requires an adaptation of the obligee's conduct to be realized',[62] but this definition will likely appear under-inclusive if it implies that only general norms can be substantive or over-inclusive if it implies that rights-creating norms cannot be procedural.

(ii) In other places, authors simply avoid defining substance and procedure. Assuming the existence of a dichotomy, one of the two categories could be defined by default – 'any norm that is not substantial would thus fall within the category of procedural norms'[63] and *vice versa*[64] – but this is only helpful if one of the terms is properly defined. Some contributions written in French explain that substantive norms are norms '*de fond*',[65]

[57] Lemoine-Schonne, *supra* note 7, at 44–45.
[58] Prezas, 'Libres propos', *supra* note 9, at 110ff.
[59] See, e.g., Brunnée, *supra* note 7, at 21ff; Lemoine-Schonne, *supra* note 7, at 22; El Boudouhi, *supra* note 55, at 78.
[60] Brunnée, *supra* note 7, at 205, quoting the *Merriam-Webster* dictionary.
[61] *Ibid.*, at 31–32.
[62] Lemoine-Schonne, *supra* note 7, at 22.
[63] *Ibid.*, at 23; see also El Boudouhi, *supra* note 55, at 78.
[64] Prezas, 'Libres propos', *supra* note 9, at 93.
[65] Lemoine-Schonne, *supra* note 7, at 22, 33; Sinou, 'L'intéraction entre garanties substantielles et garanties procédurales en matière de protection des droits fondamentaux: quelques réflections', in Prezas, *supra* note 7, 175, at 176, n. 3, citing J.-F. Akandji-Kombé, *Les obligations positives en vertu de la Convention européenne des droits de l'homme* (2006), at 26.

which is merely a synonym.[66] Le Bonniec discusses at length the definition of 'proceduralization' but only by reference to a concept of 'procedure', which she does not define.[67]

(iii) Another attempt to define substance and procedure focuses on the purpose of the norms: it presents procedure as merely a means to a goal and substance as something worth pursuing for its own sake. Thus, Brunnée suggests that procedural norms are those 'that allow for substantive law to be determined and enforced in practice'.[68] Similarly, Lemoine-Schonne submits that procedural norms describe 'the formalities to complete',[69] whereas substantive ones relate to 'what is expected' of the obligee.[70] A practical issue is that there is no obvious way to determine whether a norm imposes a mere formality or something of intrinsic importance. For instance, a treaty provision protecting public participation in environmental decision-making could be interpreted alternatively as a procedural norm aimed at promoting environmental protection or a substantive norm reflecting the intrinsic value of public participation. More fundamentally, procedural obligations do not always promote the determination or enforcement of substantive norms – EIA, for instance, may promote the realization of non-binding objectives just as well as obligations on environmental quality – whereas some substantive obligations could be viewed as instrumental to other substantive obligations.

(iv) Some other tentative definitions rely on hasty generalizations regarding the time at which an obligation must be fulfilled or its level of specificity. First, some procedures aimed at the prevention of environmental harm take place 'prior to the situation where significant harm … might actually occur',[71] but this characteristic cannot be generalized to all procedural norms.[72] As Le Bonniec points out, procedural obligations may relate to the prevention of human rights violations (*ex ante*) but also to the reparation of such violations (*ex post*).[73] Second, Lemoine-Schonne suggests that principles should be considered as substantive rather than procedural, thus echoing the ICJ's observation that, 'whereas the substantive obligations are frequently worded in broad terms, the procedural obligations are narrower and more specific'.[74] Yet, as Kerbrat notes, 'a substantive

[66] The expression '*obligation substantielle*', used in the books under review, is not generally used by the International Court of Justice (ICJ), which prefers '*obligation de fond*'.

[67] Le Bonniec, *supra* note 8, at 28, 30, 61–111, 333.

[68] Brunnée, *supra* note 7, at 23.

[69] Lemoine-Schonne, *supra* note 7, at 22–23, quoting J. Salmon (ed.), *Dictionnaire de droit international public* (2001), at 886–887.

[70] Lemoine-Schonne, *supra* note 7, at 28.

[71] Brunnée, *supra* note 7, at 76, quoting 'Prevention of Transboundary Harm from Hazardous Activities', 2(2) *ILC Yearbook* (2001) 144, at 148, para. 1 (general commentary).

[72] Kerbrat, *supra* note 10, at 14.

[73] Le Bonniec, *supra* note 8, at 80–86; see also Sinou, *supra* note 65, at 176, citing Akand-Kombé, *supra* note 65, at 17.

[74] Lemoine-Schonne, *supra* note 7, at 26; *Pulp Mills*, *supra* note 4, para. 77.

obligation can very well be specific whereas a procedural obligation can be formulated in general, even vague terms'.[75]

(v) In places, the authors rely on mere assertion to characterize norms as either procedural or substantive. For instance, Brunnée submits that the obligations to 'undertake EIAs and to notify, inform and consult with potentially affected states' are procedural, whereas the due diligence obligation to adopt 'appropriate regulatory and policy measures' is substantive.[76] By contrast, Le Bonniec characterizes as procedural a comparable due diligence obligation to adopt appropriate and sufficient efforts to prevent human rights infringements.[77] Other authors merely provide illustrations of procedural obligations as those 'that guide decision-making processes'[78] or 'that call for the organization … of internal procedures with the view of ensuring the protection of all affected interests'.[79] El Boudouhi acknowledges that, for lack of a definition, the designation of a norm as either procedural or substantive needs to be done 'on a case-by-case basis'.[80]

(vi) Finally, in still other places, authors defer, partly or fully, to judicial pronouncements. In this sense, Brunnée finds that the ICJ gives relatively 'clear-cut answers' to the differentiation between procedure and substance in international law, although she recognizes the court's inconsistencies with regard to the characterization of the EIA requirement, which was treated as mainly substantive in *Pulp Mills*, but purely procedural in *Certain Activities*.[81] Similarly, Le Bonniec relies in part on the 'explicit proceduralization' reflected in the indexing of the ECtHR decisions (which seems to be carried out by the Court's registry),[82] although she finds some 'errors' and 'omissions' and asserts that some cases feature an 'implicit proceduralization'.[83]

Perhaps the main take-away from this summary – apart from highlighting the lack of an agreed general distinction – is that no definition really works. The definitional difficulties should raise doubts about the usefulness of a distinction between substance and procedure. One cannot say anything useful about substance or procedure if one cannot agree first on what substance or procedure is. The authors have largely eluded this question. Even though, for instance, Lemoine-Schonne acknowledges 'the limits of the dichotomy' inasmuch as it applies to climate law, she does

[75] Kerbrat, *supra* note 10, at 10; see also Le Bonniec, *supra* note 8, at 372–387 (classifying procedural obligations in three levels of specificity).

[76] Brunnée, *supra* note 7, at 32–33.

[77] Le Bonniec, *supra* note 8, at 86, 107.

[78] Robert-Cuendet, 'Standards internationaux de protection des investissements et encadrement procédural de l'action de l'État', in Prezas, *supra* note 7, 47, at 49; see also El Boudouhi, *supra* note 55, at 69, citing Cadiet, 'Procédure', in D. Alland and S. Rials (eds), *Dictionnaire de la culture juridique* (2003), at 1217.

[79] El Boudouhi, *supra* note 55, at 70.

[80] *Ibid.*, at 70.

[81] Brunnée, *supra* note 7, at 83–85; see *Pulp Mills*, *supra* note 4, paras 203–219; *Certain Activities*, *supra* note 5, paras 101–105, 146–162.

[82] ECtHR, Rules of Court, 3 June 2022, Rule 104A.

[83] Le Bonniec, *supra* note 8, at 45–46.

not call into question the relevance of the general distinction to 'other domains'.[84] Prezas admits that 'the exact significance of these terms [substance and procedure] remains rather mysterious' but discounts any concerns by contending that lawyers are 'as it were instinctively aware of the existence of two concepts *a priori* distinct'.[85] And even when Brunnée acknowledges the existence of sceptical views (such as Judge Joan Donoghue's suggestion that the distinction is 'not … useful'[86] and Thomas Main's critique of such 'binarist thinking'),[87] she nonetheless asserts the dichotomy's 'mostly uncontroversial nature'.[88] Brunnée discounts as mere 'challenges of line-drawing exercise' what is arguably a more fundamental issue: the lack of a clear understanding of what general characteristics distinguish 'substance' from 'procedure'.[89] In this respect, Kerbrat's iconoclastic chapter stands out: having acknowledged like others the difficulty of handling the distinction, Kerbrat goes on to denounce it as 'flimsy' and unnecessary.[90]

But the point can be taken further: the difficulty of distinguishing procedure and substance in general terms relates to the lack of clear purpose of this distinction. If at least one knew why the distinction needs to be made, one could better understand how it should be made. While not offering a convincing definition, the books under review do take a view on the purpose of generally distinguishing between substance and procedure. They suggest that the general distinction is useful and, in that respect, offer two theories. The first can be labelled the 'yardstick theory': according to it, compliance with a procedural norm could be a yardstick for compliance with a substantive norm. The second theory, already hinted at in section 1, assesses the evolution of treaty regimes and suggests that a general distinction between procedure and substance could help understand how the law changes. The next two sections show that the distinction between substance and procedure does not accomplish either of these purposes.

4 The Yardstick Theory

Several authors propose a theory according to which compliance with a procedural obligation is a yardstick for compliance with a substantive obligation. This approach has, or could have, a number of consequences, which are taken up in the books under review. It first and foremost suggests that the breach of a procedural obligation may imply the breach of a substantive obligation. It may also have consequences for the scope of the obligation of cessation and non-repetition and possibly for remedies. The 'yardstick theory' could justify the exercise of jurisdiction by a court that has

[84] Lemoine-Schonne, *supra* note 7, at 24, 46.
[85] Prezas, 'Avant propos', *supra* note 36, at 3.
[86] *Certain Activities*, *supra* note 5, Separate Opinion of Judge Donoghue, para. 9.
[87] Main, 'The Procedural Foundation of Substantive Law', 87 *Washington University Law Review* (2009) 801.
[88] Brunnée, *supra* note 7, at 17.
[89] *Ibid.*, at 21.
[90] Kerbrat, *supra* note 10, at 11.

jurisdiction only on the application of the substantive obligation, in relation to the claim of a breach of a procedural obligation. Besides, this theory could have political implications, as the finding of the breach of a substantive obligation may be viewed as a stronger rebuke of a state's conduct than the finding of a 'merely' procedural breach.

This section shows that, while the yardstick theory seems convincing, it is not usefully served by the distinction between procedure and substance: whether the breach of a norm evidences the breach of another does not depend on the procedural or substantive nature of these two norms. The yardstick theory would require another conceptual framework – for instance, based on the concepts of 'principal' and 'accessory' obligations.

A *The Yardstick Theory*

The yardstick theory suggests that the violation of a relevant procedural obligation may indicate the breach of a substantive obligation. This theory applies to obligations of conduct (that is, obligations to behave according to the relevant rule rather than to achieve an outcome)[91] – in particular, obligations requiring the state to exercise due diligence with the view of avoiding an adverse outcome, such as the obligations to prevent transboundary environmental harm and to protect human rights. The theory could offer an attractive judicial method to assess compliance with such open-ended standards by breaking them down to a series of easily assessable steps. Brunnée, the main proponent of this theory, notes that states have long submitted, in the course of international judicial proceedings, that the breach of a procedural obligation related to the protection of the environment (for example, to perform an EIA) could constitute evidence of the breach of a substantive obligation of prevention.[92]

In recent judgments on environmental law, the ICJ appeared in places to endorse this reasoning. In *Pulp Mills*, in particular, the Court interpreted the customary obligation of prevention as an obligation for the state 'to use all the means at its disposal to avoid' transboundary environmental harm.[93] It also noted that 'due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised' if a party were to approve a project likely to cause transboundary harm without performing an EIA.[94] The implication seems to be that the failure to perform an EIA would evidence a violation of the obligation of prevention. Yet, in a curious twist, the Court held that procedural obligations had been breached without concluding to a breach of the obligation of prevention.[95]

[91] See Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility', 10 *European Journal of International Law* (*EJIL*) (1999) 371.

[92] Brunnée, *supra* note 7, at 114, citing oral pleadings before the ICJ.

[93] *Pulp Mills*, *supra* note 4, at 101; see also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226, para. 29.

[94] *Pulp Mills*, *supra* note 4, para. 204.

[95] *Ibid.*, para. 282(1)–(2); *Certain Activities*, *supra* note 5, paras 173, 217.

Kerbrat and Brunnée echo criticisms by several members of the Court of the judgment's lack of internal consistency.[96] Kerbrat notes that 'the substantive obligation to prevent transboundary harm relies largely on procedure'. He suggests that 'the breach of a procedural obligation, what is more a deliberate breach, is the manifestation of a violation of the general obligation of due diligence'. Therefore, he submits, 'one must be able to assess the violation of the obligation of due diligence if the procedures allowing compliance with it have not been followed, even if no other state has been harmed as a consequence'.[97] Similarly, Brunnée suggests that relevant procedural obligations should 'help define what it takes to meet the rule's substantive requirements'.[98] Using EIAs as an example, she points out that 'it will often be difficult, if not impossible, to prevent transboundary harm without first understanding the attendant risk'.[99]

A similar theory, in Le Bonniec's analysis, is reflected in the ECtHR's decisions. Le Bonniec recognizes that the Court has characterized procedural obligations as 'distinct and independent' of substantive obligations so that non-compliance with a procedural obligation does not facilitate a finding of the breach of a substantive obligation.[100] Yet she also shows that the Court has qualified the breach of procedural obligations as evidence of the violation of the substantive right – hence, as a violation of the ECHR.[101] In *Ozgur Gundem v. Turkey*, for instance, the Court found that the state had violated the right to freedom of expression on the ground that it had not adopted the adequate procedural measures to prevent and investigate violations of this right, even though the Court did not identify any breach of substantive obligations.[102]

Brunnée suggests that the yardstick theory applies only to customary law.[103] By contrast, Kerbrat argues that the theory should also apply in conventional settings: when a treaty defines a procedural obligation to specify the content of a broad obligation of conduct, the breach of the former should indicate the breach of the latter.[104] Indeed, it is not clear why the breach of specific treaty obligations would not be used as an indication that a state has failed to take appropriate measures to comply with a more general obligation of conduct imposed by the same treaty, another treaty or customary law. For instance, it is generally thought that the content of the general obligation on environmental protection under Article 192 of the United Nations Convention on the Law of the Sea (UNCLOS) 'is informed by the other provisions of Part XII [of the

[96] See *Pulp Mills*, *supra* note 4, Joint Dissenting Opinion Judges Al-Khasawneh and Simma, at 108; *Certain Activities*, *supra* note 5, Separate Opinion of Judge Donoghue, at 782.
[97] Kerbrat, *supra* note 10, at 13–14.
[98] Brunnée, *supra* note 7, at 34.
[99] *Ibid.*, at 33.
[100] Le Bonniec, *supra* note 8, at 88, 307.
[101] *Ibid.*, at 89.
[102] *Ibid.*, at 91, citing ECtHR, *Ozgur Gundem v. Turkey*, Appl. no. 23144/93, Judgment of 16 March 2000, para. 71.
[103] Brunnée, *supra* note 7, at 206.
[104] Kerbrat, *supra* note 10, at 12–13 (Kerbrat's discussion of the *Pulp Mills* case, however, is based on a misreading of Article 1 of the Statute of the River Uruguay: the latter does not create an obligation of conduct, but merely an objective).

convention] and other applicable rules of international law',[105] so that the violation of the latter should be considered as at least an indicium of the breach of the former.

B *Shaky Conceptual Foundations*

As these short excerpts suggest, the yardstick theory reveals the logical connection between different norms, but it is not properly served by the concepts of procedure and substance. There are three main aspects to this, and they are reflected in the authors' discussion of the yardstick theory. First, authors would likely accept that not every procedural obligation is a yardstick for assessing compliance with another obligation. For instance, a procedural obligation could seek to facilitate the realization of a non-binding objective rather than compliance with a substantive obligation. A procedural obligation could also seek to gather information *ex post* rather than promoting compliance with a substantive obligation or the realization of a non-binding objective *ex ante*. In neither of these instances is the failure to comply with the procedure a yardstick for compliance with substantive obligations.

On the other hand, the authors acknowledge that not every yardstick can be characterized as 'procedural'.[106] For instance, a state's commitment to prohibit some polluting activities would likely be considered as substantive, and yet it could be one of the yardsticks that 'serve to concretize and operationalize' the broader obligation of prevention.[107] Likewise, general obligations on climate change mitigation arising from climate treaties or customary law may be interpreted as entailing compliance with more specific commitments that span from procedure (for example, communicating national policies) to substance (for example, implementing them).[108] And the ECtHR appears to treat the breach of any – substantive or procedural – aspect of a right as a violation of the ECHR's general obligation to 'secure to everyone within their jurisdiction the rights and freedoms'.[109] Thus, the procedural nature of a norm is not a necessary condition for it being a yardstick for compliance with another.

These two concerns indicate that the yardstick theory rests on shaky conceptual foundations. Put simply, not every procedural obligation serves as a yardstick, and not every yardstick is procedural. But things do not stop there. Another difficulty with the yardstick theory is that a yardstick is not a gavel: even when a procedural obligation aims at specifying the content of an obligation of conduct, it is doubtful that any breach of the former necessarily entails a violation of the latter. This, too, is recognized

[105] United Nations Convention on the Law of the Sea 1982, 1833 UNTS 3; PCA, *South China Sea (Philippines v. China) – Award*, 12 July 2016, PCA Case no. 2013-19, para. 941; see also ITLOS, *Sub-Regional Fisheries Commission – Advisory Opinion*, 2 April 2015, ITLOS Case no. 21, at 4, paras. 124, 136; Boyle, 'Marine Pollution under the Law of the Sea Convention', 79 *American Journal of International Law* (*AJIL*) (1985) 347, at 353; A. Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* (2017), at 1280.

[106] Kerbrat, *supra* note 10, at 11; El Boudouhi, *supra* note 55, at 85; Brunnée, *supra* note 7, at 76–77.

[107] Brunnée, *supra* note 7, at 120.

[108] United Nations Framework Convention on Climate Change (UNFCCC) 1992, 1771 UNTS 107, Art. 4(1)(b); Paris Agreement on Climate Change, UN Doc. FCCC/CP/2015/L.9/Rev.1, 12 December 2015, Art. 4(2); see also Mayer, *supra* note 12, chs 2–3, 5, 7.

[109] ECHR, *supra* note 22, Art. 1.

by authors, such as Brunnée who acknowledges that the implications of the yardstick theory ultimately 'depend … on the circumstances'.[110] For instance, monitoring polluting activities is an essential first step for states to comply with their obligation of prevention, but it would be a stretch to suggest that a slight delay or a minor omission in a report due under a treaty framework would *ipso facto* demonstrate a breach of the obligation of prevention. Due diligence is to be assessed holistically, or else few states will ever be found in compliance with such an obligation.

All this means that the distinction between procedure and substance does not help to formulate the yardstick theory but, rather, leads to inconclusive statements: procedural obligations may or may not be yardsticks; yardsticks may or may not be procedural obligations; the breach of a yardstick norm may or may not indicate the breach of the other obligation.

C *An Alternative Conceptual Approach*

The point may be looked at from another angle. It may be that the yardstick theory is helpful after all, but that it should be developed on the basis of a different distinction. Rather than relying on the elusive distinction between substance and procedure, a 'refined' yardstick theory could be based on a more adequate conceptual framework, tentatively between what could be called 'principal' and 'accessory' obligations. This is not something pursued in the books under review, but, as it shows that what authors have sought to accomplish with the concepts of substance and procedure can more naturally be accomplished without, this alternative conceptual approach can be briefly sketched out here.

The central change required to salvage the yardstick theory would be to replace 'substantive' with 'principal' obligations and 'procedural' with 'accessory' obligations. Principal obligations are obligations of conduct – for instance, the obligations to take appropriate measures to prevent transboundary environmental harm and to protect human rights. Those are obligations of due diligence, whose implementation often faces the lack of a clear benchmark.[111] Accessory obligations are incidental to the principal obligations as could be determined, in particular, by interpreting the will of states when consenting to the accessory and principal obligations. In contrast to some ancillary duties that are merely implications of legal obligations, accessory obligations are obligations in their own right: their breach entails responsibility independently of the breach of their principal obligation. Seen in that light, the accessory obligation could be seen as a yardstick.

Pursuing the refinement, a further distinction could be drawn, among accessory obligations, between those indicating 'necessary measures' that a state must take to comply with its principal obligation ('essential' accessories) and those relating to 'appropriate measures' that a state is merely expected to take ('non-essential' accessories). Most accessory obligations will likely fall within the second category. The breach of an

[110] Brunnée, *supra* note 7, at 33.

[111] See, e.g., Study Group on Due Diligence in International Law, 'Second Report', 77 *International Law Association Conference Reports* (2016) 1062.

essential accessory offers conclusive evidence of a violation of the principal obligation, whereas the breach of an appropriate accessory is only an indicium of a lack of diligence.[112] Evidence of a pattern of breaches of non-essential accessory obligations could justify a presumption of the breach of the principal obligation, thus, in judicial proceedings, shifting the burden of proof.

By contrast to the general distinction between procedure and substance, this conceptual framework reflects the contextual nature of the yardstick theory: a given obligation may be considered as a principal obligation in relation to one obligation and as an accessory obligation in relation to another. For instance, the obligation to take 'measures to prevent … pollution of the marine environment' under Article 194 of UNCLOS could be considered not only as an accessory of the 'general obligation' of prevention under Article 192 but also as a principal obligation with its own accessories, such as the EIA requirement under Article 206.[113] Overall, this alternative conceptual framework would dispense with the intellectual detour imposed by the characterization of obligations as either procedural or substantive. This would make it possible to think more directly – hence, also more productively – about the situations where the performance of an obligation can be used as a yardstick to assess compliance with another obligation.

Needless to say, more research is needed to develop this alternative conceptual framework. In particular, tests need to be defined, first, to identify accessory and principal obligations; second, to distinguish between essential and non-essential accessories; and, third, to determine when a pattern of breaches of non-essential accessories evidences a breach of the principal obligation. But this research is more promising than any further attempt (such as those undertaken in the books) to impose the yardstick theory onto the elusive substance–procedure divide. The yardstick theory does not fit this divide and offers no ground to insist on a general distinction between substance and procedure in international law.

5 Ambivalent Implications for the Effectiveness of Treaty Regimes

In addition to the yardstick theory, the general distinction between substance and procedure serves another purpose in the books under review. It is said to help understand how the law changes and over time becomes more effective. The two monographs, by Brunnée and Le Bonniec, rely on the distinction to account for the evolution of treaty regimes. Interestingly, they view this evolution very differently. On the one hand, Brunnée suggests that MEAs evolve from procedural to substantive norms: procedural norms facilitate the adoption of substantive ones, which make the treaties more effective. On the other hand, Le Bonniec argues that the definition of procedural

[112] See also Kerbrat, *supra* note 10, at 15 (suggesting that the breach of a procedural obligation could shift the burden of proof).

[113] See *South China Sea*, *supra* note 105, para. 993.

norms by the ECtHR makes European human rights law more detailed – hence, also more effective. In fairness, neither Brunnée nor Le Bonniec claim that they are formulating a theory applicable beyond a specific legal field: as such, their theories are not necessarily incompatible. Yet it is unclear what analytical added value there is in distinguishing between procedure and substance only to reach the conclusion that both proceduralization and substantialization may drive the development of a treaty regime.

The analysis below suggests that each of these two theories focuses only on part of a broader phenomenon. Brunnée shows that substantive norms contribute to the development of MEAs, but she glosses over the fact that the same could be written about procedural norms. Le Bonniec documents how procedural obligations make European human rights law more effective, but substantive ones do that as well. Beyond their somewhat arbitrary focus on either procedure or substance, these theories boil down to a platitude: treaty regimes evolve with the adoption of new norms that tend to be more detailed and possibly more effective than previous norms. Here again, the distinction between procedure and substance appears ineffective. More intuitive as well as more useful factors to assess the evolution of a treaty regime include the clarity, precision and ambition of norms.

A *Brunnée's Theory of Substantialization as Regime Development*

Brunnée outlines a theory of the evolution of MEAs. She suggests that, in a newly adopted MEA, commitments are 'robustly procedural in nature', as parties are reluctant to 'take on specific substantive duties when there is uncertainty about the problem, the best approaches, the attendant costs, or the range of States willing to make significant substantive commitments'.[114] As negotiations continue, parties agree to 'more demanding substantive requirements' that are often framed as 'obligations of result, like obligations to phase out certain substances, or to reduce certain emissions by a specific amount'.[115]

Brunnée suggests that this theory applies to 'many MEAs'.[116] In fact, it seems to apply mainly to the MEAs that follow what Brunnée calls the 'framework–protocol model', which she exemplifies with three treaty regimes on the protection of the atmosphere.[117] In each of these regimes, a framework convention requires states to start monitoring pollution, and a subsequent protocol (or subsequent protocols) define quantified commitments subject to amendments.[118] Brunnée then focuses on the climate regime, suggesting that the theory sheds light on the unordinary nature of the Paris Agreement, in that it involves 'a decisive turn towards procedure'.[119] By

[114] Brunnée, *supra* note 7, at 35, 155–156.
[115] *Ibid.*, at 35.
[116] *Ibid.*, at 157.
[117] *Ibid.* Namely, the regimes established by the Convention on Long-Range Transboundary Air Pollution (CLRTAP) 1979, 2273 UNTS 4; Vienna Convention for the Protection of the Ozone Layer (VCPOL) 1985, 1513 UNTS 293; UNFCCC, *supra* note 108.
[118] Brunnée, *supra* note 7, at 160–162.
[119] *Ibid.*, at 17; Paris Agreement, *supra* note 108.

contrast, Lemoine-Schonne presents the Paris Agreement, not as an exception to the 'substantialization' of MEAs but, rather, as an example of the 'proceduralization' of international climate law.[120]

Even leaving the Paris Agreement aside, Brunnée's theory does not fit easily with any of the three regimes she mentions. Original framework treaties impose not only procedural obligations but also general obligations of due diligence,[121] which Brunnée would qualify as substantive.[122] Brunnée either discounts the importance or denies the existence of these obligations, asserting in particular that the 'substantive commitments' of the United Nations Framework Convention on Climate Change are 'non-binding'.[123] Brunnée may think that this substantive obligation is less effective as it lacks specificity and precision, but others have characterized it as 'the pivotal commitment in the Convention'.[124]

On the other hand, when presenting subsequent protocols as the sources of substantive obligations, Brunnée eludes the importance of their procedural components – for instance, the additional monitoring and reporting requirements they impose[125] or the compliance procedures they establish.[126] Prior to the adoption of the Paris Agreement, Farhana Yamin and Joana Depledge observed that 'the process of strengthening substantive commitments under the [UN]FCCC [regime] has evolved in tandem with the strengthening of procedural commitments'.[127] Where Brunnée sees an archetypical example of substantialization, others see proceduralization at work. This last point relates to a general issue with theories attributing consequences to the substantialization or proceduralization of a field of law. Even if one could rely on a clear definition of procedure and substance, one could not rigorously assess whether these phenomena are taking place. Assuming that the sheer number of norms is relevant, one faces the issue of individuation – counting norms in a field of law is not unlike trying to count the slices of a cake that has not been cut.[128] Opting for a more qualitative approach (for example, identifying the most 'important' obligations) would also rely on highly subjective, even arbitrary, value judgments. Yet a theory associating certain implications

[120] Lemoine-Schonne, *supra* note 7, at 34–45.

[121] CLRTAP, *supra* note 117, Art. 2; VCPOL, *supra* note 117, Art. 2; UNFCCC, *supra* note 108, Art. 4(1)(b).

[122] Brunnée, *supra* note 7, at 32.

[123] *Ibid.*, at 159, 164. But see D. Bodansky, J. Brunnée and L. Rajamani, *International Climate Change Law* (2017), at 131 (describing the same provision as a 'general obligation'). On the general understanding of 'commitments' as obligations in the context of climate treaties, see, e.g., F. Yamin and J. Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (2004), at 14; Bodansky, 'The Paris Climate Change Agreement: A New Hope?', 110 *AJIL* (2016) 288, at 297.

[124] Yamin and Depledge, *supra* note 123, at 95.

[125] Montreal Protocol on Substances That Deplete the Ozone Layer 1987, 1522 UNTS 3, Art. 7; Kyoto Protocol 1997, 2303 UNTS 162, Arts 5, 7–8.

[126] Montreal Protocol, *supra* note 125, Art. 8; Kyoto Protocol, *supra* note 125, Art. 18.

[127] Yamin and Depledge, *supra* note 123, at 75.

[128] See J.W. Harris, *Law and Legal Science: An Inquiry into the Concepts of Legal Rule and Legal System* (1979), at 84, cited in Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End', 31 *EJIL* (2020) 235, at 260. This applies not only in relation to customary law but also in relation to treaty law: Le Bonniec's thesis shows that a unique provision can be interpreted as implying multiple ('substantive' and 'procedural') obligations.

to either proceduralization or substantialization is pointless if one cannot determine which of the two phenomena takes place.

Overall, it is unclear how Brunnée's theory of substantialization as regime development provides a better understanding of the evolution of MEAs. Presenting the architecture of (certain) MEAs in terms of 'proceduralization' does not seem to improve the classical account of the framework–protocol model as one that seeks to define increasingly effective measures, shifting from open-ended obligations of conduct to quantified obligations of result, which are clearer and more precise (which facilitates an assessment of compliance) and whose ambition can progressively be enhanced.[129]

B *Le Bonniec's Theory of Proceduralization as Regime Development*

Le Bonniec proposes a nearly antithetical theory, albeit in a different context. While Brunnée argues that the adoption of substantive obligations may create a more effective legal regime, Le Bonniec contends that the same result can be achieved with the identification of procedural obligations. In particular, Le Bonniec claims that the ECtHR has relied on an expansive interpretation of procedural obligations as a way to broaden the scope and improve the effectiveness of the substantive rights of the ECHR, often thus reducing the national margin of appreciation.[130]

Yet one may question whether the phenomenon that Le Bonniec observes is unique to procedural obligations – a category that, in any case, Le Bonniec defines rather loosely. The Court's tendency to rely on deductive reasoning to identify the obligations that are 'inherent' to a right has just as well led to the identification of substantive obligations not expressly reflected in the text of the convention.[131] And while the identification of implicit procedural obligations allows the Court to find states responsible for breaches of the ECHR, so does the identification of implicit substantive obligations.[132] Any specific obligations relating to the protection of rights in the case law of the ECtHR are implied from Article 1's overarching obligation to 'secure … rights and freedoms'.[133]

If the ECtHR's expansive interpretation of states' obligations is not limited to procedural obligations, it is unclear what added value there is to a study focusing on the latter. Le Bonniec acknowledges, in that regard, that the phenomenon has often been discussed 'within the broader framework of positive obligations'.[134] She rejects the relevance of the distinction between positive and negative obligations as 'pointless' on the ground that no clear consequences follow from it.[135] Le Bonniec submits that proceduralization differs from the identification of positive obligations because

[129] See, e.g., Mayer, 'Construing International Climate Change Law as a Compliance Regime', 7 *Transnational Environmental Law* (2018) 115; Bodansky, Brunnée and Rajamani, *supra* note 123, at 86–90.
[130] Le Bonniec, *supra* note 8, at 44, 50.
[131] *Ibid.*, at 70, 203.
[132] *Ibid.*, at 270.
[133] ECHR, *supra* note 22.
[134] Le Bonniec, *supra* note 8, at 41.
[135] *Ibid.*, at 95–96.

proceduralization has 'a distinct rationale', although she does not define this rationale.[136] While the ECtHR may have reasons to adopt some categories of (mainly) procedural obligations, for instance, to make up for its limited ability to investigate by requiring states to conduct effective investigations by themselves[137] or to reduce its case load by promoting effective national remedies,[138] none of these justifies Le Bonniec's identification of 'proceduralization' as a singular phenomenon.

6 Conclusion

The three books under review take for granted the relevance of a concept – a general, decontextualized dichotomy between procedure and substance – for their analysis. All three run into insurmountable difficulties when attempting, first, to distinguish substance and procedure and, then, to deploy the distinction in a meaningful argument. Several authors develop a theory according to which the breach of a procedural obligation may evidence the breach of a substantive obligation, but they admit that not all procedural obligations are such yardsticks and that not all yardsticks are procedural. The two monographs suggest that the substantialization of MEAs and the proceduralization of European human rights law contribute to making these treaties more effective, but the proceduralization of MEAs and the substantialization of European human rights seem to be having exactly the same effect. These arguments thus amount, respectively, to inconclusive statements (procedural obligations may or may not be yardsticks; yardsticks may or may not be procedural in nature) and platitudes (treaty regimes evolve with the adoption of clearer and more precise norms, whether procedural or substantive).

All of this could be read as a call for greater rigour in works that seek to map out the distinction between substance and procedure in international law. But there is a broader message beyond that. Focusing on three recent works that all use a particular prominent dichotomy, this review essay illustrates that not all concepts are useful. Reliance on ill-fitted concepts can be counterproductive in several ways. First, these concepts seed confusion, leading authors to note the complexity of a topic rather than allowing a better understanding of it. Second, they have a cost of opportunity: researchers' time and efforts would be better spent otherwise. Third, they may prevent the development of more effective alternatives. In particular, this essay has suggested that the yardstick theory would benefit from a simpler conceptual framework contrasting 'principal' and 'accessory' obligations rather than 'substance' and 'procedure'. This alternative conceptual framework might have allowed the ICJ in *Pulp Mills* and *Certain Activities* to better understand the relations between compliance with an EIA requirement and the general obligation of prevention. Concepts are essential tools for analysis, but they are just that: tools. Concepts that serve no goal only risk trapping scholarship in puzzles or, as Wittgenstein put it, fly-bottles.

[136] *Ibid.*, at 43.
[137] *Ibid.*, at 350.
[138] *Ibid.*, at 450.