The Theory of Due Diligence and the High Seas

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The Theory of Due Diligence and the High Seas

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Summary

Within the last decade, the concept of due diligence has received a sudden popularity. This trend is especially visible in the fields of environmental law and the law of the sea. Yet, due diligence is far from a new concept. Developed within the more general law of State responsibility in the 19th century, due diligence saw frequent uses in the early 20th century's jurisprudence on the protection of foreigners. However, the recent discourse on due diligence seems to have renounced this heritage and has, instead, found a new meaning. This phenomenon creates a confusion which is best represented by the many qualifiers attached to due diligence. Sometimes referred to as a "principle", a "rule", an "obligation", or a "standard", due diligence is surely elusive. In order to bring clarity to this debate, this thesis thoroughly examines the concept of due diligence, its purpose and its mechanisms so as to propose a theory of due diligence in harmony with the general law of State responsibility.

Eventually, we will see that due diligence characterizes certain international obligations. As such, these due diligence obligations form a category of international obligations just as obligations of conduct and obligations of result do. Thus, it appears that due diligence cannot be categorized as an independent obligation in the same vein as general principles of international law or customary law. Instead, the mechanisms of due diligence will only trigger when a specific international obligation can be qualified as an obligation of due diligence. In other words, due diligence simply provides a particular shape to existing international obligations. For instance, the obligation to prevent transboundary harm can be qualified as a due diligence obligation. Thereby, it is not an

absolute obligation focusing solely of the materialization of harm, but an obligation which considers the efforts of States to prevent transboundary harm. It emerges that obligations of due diligence are similar if not almost identical to obligations of conduct. Yet, while obligations of conduct simply give States a freedom of choice regarding the means to fulfill an obligation, due diligence obligations demand States to consider certain international standards related to the obligation in question. In that sense, due diligence obligations can be treated as a stricter subcategory of obligations of conduct since they orient the choices of States towards existing standards.

Another specificity of due diligence relates to the link it creates between the international obligation and private actors. Indeed, due diligence obligations oblige States to transpose the substance of their international obligations within their domestic law so as to make the international regulations virtually applicable to private actors. Thus, when private actors, which are not subject to international law, cause transboundary harm, they are violating domestic law rather than international law. States under whose jurisdictions these private actors have acted may, on the other hand, be responsible for their own negligence for failing to prevent the harm rather than being responsible for the harm itself.

These two characteristics of the concept of due diligence, its relative character and its effect on private actors, translate the purpose of due diligence. Thereby, due diligence will be used to qualify obligations in two types of situations which are not mutually exclusive. First, due diligence will be employed for obligations that are difficult to achieve in each and every case. For instance, while the protection of the environment is a laudable and essential objective, it is unrealistic to demand that States always avert environmental harm. Thereby, the obligation to prevent harm to the environment is not an absolute one but a relative one. It is an obligation of due diligence which requires

States to do their best efforts to prevent environmental harm. Secondly, due diligence will be employed when an international obligation regulates an activity actually involving private actors. Indeed, more and more activities regulated by international law are actually conducted by private actors. It is therefore crucial to envisage mechanisms to circumvent the classic limitations of international law in order to regulate these activities effectively. For that reason, the concept of due diligence is particularly relevant since it obliges States to transpose the substance of international regulations within their domestic law and, ultimately, makes international regulations applicable to private actors.

Considering that the protection of the environment is now playing a central role in most human activities and that most international activities are conducted by private actors; it is easy to perceive the attractiveness of the concept of due diligence in tackling legal conundrums. Yet, making due diligence a useful tool is not without difficulties. In the context of activities conducted by private actors, the utility of due diligence is in fact, highly dependent on the control of States over private actors. Indeed, since States are only required to act within their capabilities, they cannot be responsible of a failure of due diligence if they do not have control over private actors. Surely, States are expected to exercise a relatively high degree of control on their territory but things naturally get complicated for activities conducted in areas beyond national jurisdiction. In such areas, control is difficult to exercise and it is therefore more complex for States to be diligent. While we know that certain obligations applicable to areas beyond national jurisdiction, such as the protection of the environment, are due diligence obligations, their viability is still uncertain. This uncertainty can be compensated by more detailed regulations providing for the modalities of control and the exact role of States with regard to private actors under their jurisdiction. Such has been the case for the seabed beyond national

jurisdiction, *i.e.,* the Area, where the regulations of the International Seabed Authority, applicable to most States through the UNCLOS, play a crucial role. However, for less developed or less centralized regimes such as the high seas' regime, the details of what constitute due diligence and what kind of control is required, remain blur. Considering the environmental emergency surrounding our oceans, these questions need to be solved. Therefore, this thesis also explores the usefulness of due diligence in the context of high sea fisheries and the protection of the marine environment.

To this end, relevant international obligations must first be identified. The United Nations Convention on the Law of the Sea is thus our first source material along with its related instruments: the Fish Stock Agreement and the Compliance Agreement. Other FAO instruments also come into play as they may represent international standards in their respective fields. Regional agreements could also be subjected to our analysis in order to fully address the high seas' regime but such exercise would go beyond the scope of this thesis. On the upside, the methodology used in this dissertation can be used for addressing due diligence obligations in these sectoral regimes. Furthermore, this same methodology may also be relevant to address due diligence in other regimes unrelated to the high seas. Concretely, while the first two chapters of this dissertation address the theory of due diligence, Chapter three seeks international obligations within the high seas' regime, which could qualify as due diligence obligation. This step is obviously crucial as it is a condition *sine qua non* for the application of due diligence. A separate but equally important question is also dealt with in Chapter three, and relates to control. Indeed, in a general manner, due diligence obligations require a certain degree of control from States to be made effective. In areas beyond national jurisdictions, control can be a thorny issue and must be legally framed. In our high seas' context, this issue will mostly involve the

UNCLOS. Finally, Chapter 4 deals with the theoretical consequences for qualifying international obligations as due diligence obligations and its findings can surely be of general relevance. This Chapter also proposes guidelines for applying the concept of due diligence *in concreto* and provides an example with the high seas' regime.

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Acronyms

COFI: Committee on Fisheries (FAO)

DSF: Deep-Sea Fisheries

EEZ: Exclusive Economic Zone

EIA: Environmental Impact Assessment

FAO: Food and Agriculture Organization

FSA: Fish Stock Agreement

GAIRS: Generally Accepted International Rules and Standards

ICJ: International Court of Justice

ILA: International Law Association

ILC: International Law Commission

IMO: International Maritime Organization

IPOA-IUU: International Plan of Action against IUU

ISA: International Seabed Authority

ITLOS: International Tribunal for the Law of the Sea

IUU: Illegal, Unreported, Unregulated (fishing)

LOSC: Law of the Sea Convention

MCS: Monitoring, Control and Surveillance

RFMO/A: Regional Fisheries Management Organization/Agreement

SOLAS: Safety of Life at Sea (convention)

UN: United Nations

UNCED: United Nations Conference on Environment and Development

UNEP: United Nations Environment Programme

UNCLOS: United Nations Convention on the Law of the Sea

UNGA: United Nations General Assembly

VCLT: Vienna Convention on the Law of Treaties

VME: Vulnerable Marine Ecosystem

VMS: Vessel Monitoring System

WWF: World Wildlife Fund

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Introduction

In July 2016, the awaited *South China Sea* award was delivered by an arbitral tribunal constituted under Annex VII of the *United Nations Convention on the Law of the Sea* (UNCLOS)[1]. In the midst of the many issues that the tribunal had to deal with, the recourse to the concept of due diligence as a key factor in the interpretation of Part XII of the UNCLOS on the protection of the environment, was particularly noticeable.[2] By doing so, the *South China Sea* award joins a list of recent judicial decisions putting due diligence at the center of the legal argumentation. This trend seems to be especially vivid in environmental law and the law of the sea and can be traced back to the 2010 decision of the International Court of Justice (ICJ) in the *Pulp Mills* case.[3] It was then continued by the International Tribunal for the Law of the Sea (ITLOS) in 2011 and 2015 with two advisory opinions, *Activities in the Area*[4] and the *SRFC,*[5] and by the ICJ again in 2015

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[1] *United Nations Convention on the Law of the Sea,* 10 December 1982, UNTS vol. 1833 (p. 3), 1884 (p. 3), 1885 (p. 3) (entered into force 16 November 1994) [hereinafter UNCLOS].

[2] *In the Matter of the South China Sea (Philippines v. China),* Award, [2016] PCA, available at <https://pca-cpa.org/en/cases/7/> [hereinafter *South China Sea*] p. 319-417.

[3] *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgement, [2010] ICJ Reports 14 [hereinafter *Pulp Mills*].

[4] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area,* Advisory Opinion, [2011] ITLOS Reports 10 [hereinafter *Activities in the Area*].

[5] *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission,* Advisory Opinion, [2015] ITLOS Reports 4 [hereinafter *SRFC*].

in the *Construction of a Road* case.[6] Surprisingly, these six years of jurisprudence involving three institutions[7] showed a high degree of coherence as each decision recalled the previous ones. These six years of jurisprudence also demonstrate that the concept of due diligence can be applied through different contexts. Starting with a purely transboundary context in the *Pulp Mills* case,[8] the concept was then applied in an area beyond national jurisdiction, *i.e.,* the Area, to foreign Exclusive Economic Zones (EEZ) and arguably to the high seas in the *South China Sea.* Yet, the sudden interest afforded to this concept is curious since due diligence is far from a new theory. After a phase of popularity in the beginning of the last century, due diligence reappeared nearly a century later in 2007 in the *Genocide* case.[9] Nevertheless, looking closer at the concept and modern environmental challenges, it is easy to understand its attractiveness.

1. A Rediscovered Concept

While there is no universally accepted definition of due diligence, it can be said that due diligence characterizes certain obligations and requires a State to use its best efforts to reach a specific objective set by the obligation. These efforts may concern the

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[6] *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),* Judgement, [2015] ICJ Reports 665 [hereinafter *Construction of a Road*].

[7] The ICJ, the ITLOS and the Annex VII Arbitral Tribunal.

[8] And later in the *Construction of a Road* case, *supra* note 6.

[9] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgement, [2007] ICJ Reports 43 [hereinafter *Genocide*] at 430.

acts of the State itself or the acts of private actors within its jurisdiction and control. Thus, while due diligence was mainly used in the protection of foreigners in the last century, it is now a core concept for the prevention of harm to the environment. It this sense, States must "deploy adequate means"[10] to prevent harm to the environment. Clearly, the required "efforts" or "means" are open to interpretation and it is mostly for this reason that the concept of due diligence has become so attractive. Indeed, by creating a space for interpretation, due diligence allows for the intervention of rules originally not contained in the substance of the obligation. This effect is particularly meaningful for framework obligations, of which precise content is often obscure. Naturally, environmental law, a field crowded with vague principles, can put this mechanism to good use in order to flesh out environmental obligations. Perhaps more surprising is its importance for the law of the sea since international conventions already exist. And yet as the ITLOS opinions and the *South China Sea* arbitration have demonstrated, the concept of due diligence can also be influential in this discipline. To explain this phenomenon, a short overview of the UNCLOS is required.

2. A "Constitution for the Ocean" in Search for Content

The UNCLOS is often qualified as a "constitution for the oceans"[11] aiming to

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[10] *Activities in the Area, supra* note 4 at para. 110.

[11] The expression has entered common language following the declaration of Tommy Koh, President of the Third United Nations Conference on the Law of the Sea, at the final session of the Conference in Montego Bay, Jamaica. See Tommy Koh, "A Constitution for the Ocean" in Tommy Koh, *Building a New Legal Order for the Oceans* (Singapore: NUS Press, 2020) 85. See also *South China Sea, supra* note 2 at para. 4.

"settle all issues relating to the law of the sea."[12] It addresses, among other things, the delimitation of maritime zones, the various freedoms of the sea, environmental protection and the exploitation of resources. Naturally, it was impossible for a single instrument to tackle this variety of topics in depths. Not only would such an approach make the instrument too long and incomprehensible, but it is also clearly impossible to anticipate all future developments on the use of the sea. For that reason, the UNCLOS must be considered as a framework treaty which focuses on establishing substantive and broad obligations relying upon the intervention of more detailed regulations established by international organizations and member States on the global, regional or national level.[13]

This "constitutional" effect is nowhere truer than for the protection of the marine environment. Indeed, while Article 192 of the Convention sets the core obligation to "protect and preserve the marine environment," Article 197 encourages States to elaborate complementary rules through cooperation, and Articles 207 to 212 specifically provide for the use of external rules of references usually known as generally agreed international rules and standards (GAIRS). In this context, not all maritime areas are treated equally. Naturally, areas within national jurisdiction are the most regulated and, thus, the most protected. Indeed, in these areas a combination of domestic law and international law provides a strong legal framework where States are free to compensate the insufficiencies of the international regulations. In areas beyond national jurisdiction however, only international instruments apply, which makes these areas particularly exposed to

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[12] *South China Sea, supra* note 2 at para. 4.

[13] Nele Matz-Lück, "Article 311" in Alexander Proelss, ed., *United Nations Convention on the Law of the Sea: A Commentary* (Munich: C.H. Beck, Oxford: Hart, Baden-Baden: Nomos, 2017) 2009.

international regulatory gaps. Therefore, for such areas, treaties are very important and, yet, relying solely on them is far from satisfactory. First, treaties do not fill all the gaps left by the UNCLOS. Second, they are usually not ratified by all the member States of the UNCLOS. For this reason, turning to soft law instruments is equally important, but their inherent non-binding nature, may make their application delicate. This is where the concept of due diligence can be valuable.

3. Due Diligence: A Bridge Between Instruments and Actors

As indicated above, due diligence allows for the intervention of extraneous rules which can define the content of the "diligence". However, only rules qualifying as "international standards" may participate in this definition. The concept of due diligence also varies. As it takes consideration of the subjective situation of the bearer of the obligation, various level of due diligence may coexist with regard to the very same activity. Additionally, due diligence may also vary in time as knowledge, technology and capacity evolve. It is therefore a subtle exercise to define the content of due diligence but one it has the potential to connect international instruments.

Another use of due diligence is to connect private actors with international regulations. It is well known that States and international organizations are the only subjects of international law. Yet, in many cases, private actors are the "ultimate regulatory targets"[14] of international instruments. In a world where more and more activities are privatized, this is hardly surprising. In that context, due diligence obliges

[14] *SFRC,* separate opinion of Judge Paik, para. 14.

States to ensure that their international obligations are respected by individuals in their jurisdiction or control. To do so, States must transpose the substance of international obligations in their domestic law and ensure their enforcement.[15] This effect of due diligence is, however, tempered by the degree of control States exercise over their private actors. Indeed, in a general manner, the concept of due diligence does not ask States to act beyond their capabilities. In relation to control, this indicates that States will not breach their obligations of due diligence when private actors beyond their control violate international law. Effective control is therefore vital for the effectiveness of due diligence obligations.

Thus, while due diligence may be valuable for the legal development of areas beyond national jurisdiction, the necessity of control for the effectiveness of due diligence obligations can actually challenge this idea. Considering again that most activities on high seas are conducted by private actors (be it shipping or fishing), the whole value of due diligence may fall apart. Therefore, this thesis proposes on the one hand to understand the concept of due diligence and its potential for informing the content of the UNCLOS with regards to the high seas; and, on the other hand, to evaluate the challenges to its effectiveness on the high seas.

4. Outline of the Thesis

Due diligence is an old concept, which can be traced back to the genesis of international law itself. Yet, it is often interpreted today independently of its roots and

[15] *Pulp Mills, supra* note 3 at para. 197.

treated as a general principle of international law. As such, for some authors, it seems to have moved from a concept characterizing certain international obligations to a source of law.[16] This process, while not impossible, is however suspicious and a comprehensive analysis of the concept from its early appearance to its modern interpretation may reveal that due diligence is, in fact, simply misunderstood. Consequently, Chapter I will return to the classical theory of due diligence and move forward in time to the work of the International Law Commission (ILC) on State responsibility in order to determine if due diligence has indeed evolved.

Following this background analysis, Chapter II will come back to two particular cases which are very often linked with due diligence, *i.e.,* the *Trail Smelter* arbitration[17] and the *Corfu Channel* case.[18] It will be shown that due diligence is often wrongly identified with the no-harm rule; a misconception which will raise a discussion on the nature of obligations to prevent and on the elements defining the concept of due diligence. Bearing these theoretical elements in mind, Chapter II will then conclude on the potential use of due diligence in the context of the high seas.

Having determined the theory of due diligence, Chapter III will focus on the applicability of the concept on the high seas. To this end, Chapter III will first determine if obligations of due diligence already exist in the legal regime of the high seas and,

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[16] Riccardo Pisillo Mazzeschi, "Le Chemin Etrange de la *Due Diligence*: d'un Concept Mystérieux à un Concept Surévalué" in SFDI, *Le Standard de Due Diligence et la Responsabilité Internationale* (Paris: Pedone, 2018) 323.

[17] *Trail Smelter (United States v. Canada),* Award, [1941] R.I.A.A. vol. 3, 1905 [hereinafter *Trail Smelter*].

[18] *Corfu Channel (United Kingdom v. Albania),* Judgement, [1949] ICJ Reports 4 [hereinafter *Corfu Channel*].

subsequently, treat the issue of control on the high seas.

Finally, Chapter IV will address the informing effect of due diligence. Allegations of law-making will be scrutinized along with the role of judges. Chapter IV will then propose guidelines for the interpretation of due diligence and conclude on its concrete contribution in developing the legal regime of the high seas.

Chapter I: The Development of the General Theory of Due Diligence

When does a State bear responsibility for the actions of private individuals? As a general principle it is well-known that the conduct of private actors is not attributable to the State under international law.[19] Yet, such an answer is unsatisfactory as it may leave victims without any form of reparation when the culprit is beyond reach. For this reason, different forms of responsibility have been developed in order to hold another person, entity or the collectivity responsible for a wrongful act. These forms can be called derivative responsibility[20] or vicarious responsibility[21] but they have one common weakness: they unfairly burden the State. Consequently, another form of responsibility had to be theorized in order to combine the need for a certain level of accountability and the immunity of States regarding acts of individuals. This resulted in the theory of due diligence, and this chapter aims at tracing the roots of this theory and its main evolutions. By conducting such research, this chapter hopes to highlight the purpose of the concept of due diligence, its main attributes, and its application. To this end, the theory of the responsibility of States for acts or private actors will highlight

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[19] Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10 (ILC Yearbook, 2001, vol. 2, Part Two) 30 [hereinafter Draft Articles on State Responsibility] at 47.

[20] *Janes (United States v. Mexico),* Award, [1925] R.I.A.A. vol. 4, 82 [hereinafter *Janes*].

[21] Lassa Oppenheim, *International Law, A Treatise,* 2nd ed. (London: Longmans, Green, and Co, 1905) vol. 2 at 200; While derivative responsibility requires a failure from the States which subsequently becomes responsible for the original harmful act, vicarious responsibility holds the State responsible for *"acts other than its own"* even without a lack of "diligence".

the foundations of due diligence and thereafter its development (Section 1), while the more recent work of the ILC on the law of State responsibility will provide us with the most recent framework in which due diligence intervenes (Section 2). Eventually, the results of this chapter will allow us to have a precise idea of the traditional concept of due diligence for the following analysis.

SECTION 1: The Early Development and Evolution of the Concept of Due Diligence: From Early Theories to the ILC Codification

The expression "due diligence" is somehow a late invention. While it appeared in the *Alabama* claims,[22] it was unseen in some of the most influential cases that followed and that serve today as references for the concept of due diligence, *i.e., the Trail Smelter arbitration, the Corfu Channel case* and the *Gabčíkovo Nagymaros* case.[23] This fact evidences that the phrase "due diligence" is not necessarily imperative to convey the same reasoning. Therefore, it is not surprising to find traces of due diligence throughout history. Accordingly, this section will evidence the original purpose of due diligence and bring to light its historical characteristics which may still be of relevance today. The first subsection will show that due diligence is only one of possible answers to the question of State responsibility for acts of private actors[24] and that the understanding evolved along with the evolution of the European society. The second subsection will retrace the first interventions of due diligence in judicial contexts and illustrate again some aspects of due diligence. Finally, the third subsection will wrap up the main elements subsisting after centuries of evolution.

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[22] *Alabama claims of the United States of America against Great Britain,* Award, [1872] Tribunal of Arbitration Established by Article I of the Treaty of Washington of 8 May 1871, R.I.A.A. vol. 29, 125 [hereinafter *Alabama*].

[23] *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia),* Judgement [1997] ICJ Reports 7 [hereinafter *Gabčíkovo-Nagymaros*].

[24] With the other being collective "strict" responsibility, see subsection 1.1 below.

1. The Theoretical Roots of Due Diligence: The State's Responsibility for Acts of Private Actors

As we have said, the reasoning behind due diligence aimed at finding the State's responsibility for acts of private individuals. The first answer brought to that question was quite simple: a collectivity was responsible for the acts of its individual. A second answer came later with Grotius and changed the origin of the State's responsibility while the last step taken by Anzilotti, objectified the violations of States.

1.1. The Tribal or Collective Concept of Responsibility

Antiquity and the Middle Ages were marked by a collective conception of responsibility. The ancient Roman society as a "system of concentric circles"[25] forming the basic units of the State: the first circle being the family, the second being the House, the third being the tribe and the State being the last circle encompassing all the others. These units could therefore interact with each other instead of individuals and in the Roman world, the interaction between Romans and non-Romans, the last circle, gave birth to *jus gentium.*[26] Naturally, this collectivist understanding of society

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[25] Sir Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas,* 4th ed. (New York: Henry Hold and Company, 1906) at 128.

[26] Which later came to be interpreted as natural law, *Völkerrecht* in German law, *droit des gens* in French law or more generally as public international law. See: Jan Arno Hessbruegge, "The Historical Development of the Doctrines of Attribution and Due Diligence in International Law" (2004) 36 New York University Journal of International Law and Politics

had an impact on responsibility and single units were often found responsible for the actions of one of their individuals.[27] An injured family for example was allowed to ask for compensation to the family of the individual responsible for the injury.

The same legal mechanisms prevailed within medieval Europe. Yet, tribes were often the most common level of interaction as States were too weak to interact instead of their subjects. Thus, had one member of a tribal entity killed or injured a member of another, the latter tribe could ask for retribution from the former tribe. Whether the injury was accidental or voluntary was irrelevant.[28] The retribution could be provided by blood or money. In the later stages of the Middle Age, this strict concept of collective responsibility was first eased with the tribes being able to avoid their collective responsibility by evicting the responsible individual from their community. This individual would become an outlaw or *vogelfrei,* and murdering him would not entail any responsibility. This form of punishment also followed the theory of Gentili. According to him a community could be guilty of a *"sin of omission"*[29] if it failed to *"make good the delinquency of its individual members".*[30] In that sense, the punishment provided by the culprit's tribe served as a primitive form of repression which is sometimes considered today to be part of due diligence in the context of injury

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[27] *Id.,* On an inter State level, the Romans held Illyria responsible for the actions of Illyrian pirates and Greece responsible for the mere fact that one of its citizens had breached the *jus gentium.*

[28] *Id.*

[29] Alberico Gentili, *De Jure Belli Libri Tres,* trans by John C. Rolfe (London: Clarendon Press, 1612) at 104.

[30] *Id.*

to aliens.[31]

1.2. Grotius and the Irresponsibility of States for Acts of Private Actors

With the centralization of the State and the concentration of power in the hands of a single ruler, the theory of responsibility evolved towards the ruler's or sovereign's responsibility. More importantly, the concept of "fault"[32] was introduced. Hence, the strict collective responsibility of tribes was progressively abandoned and a subjective element of "knowledge" was introduced. The first author responsible for such change was Grotius. In his work, *De Jure Belli Ac Pacis,* written for the king of France Louis XIII, Grotius used extensive comparisons with Roman private law to create a theory of responsibility applicable to both individuals and States.[33] His reasoning was simple but groundbreaking. Indeed, by admitting that "neither is a Father responsible for his Children's Crimes, nor a Master for his Servants, nor any other Superior for the Faults of those under his Care",[34] Grotius concluded that "No civil Society, or other publick

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[31] Robert P. Jr. Barnidge, "The Due Diligence Principle Under International Law" (2006) 8 International Community Law Review 81.

[32] In general, "fault" means "the particular subjective and psychological attitude of the actor, which consists in either having willfully determined the effect produced by its behavior or in having failed to take the measures necessary to avoid the injurious event." See Riccardo Pisillo Mazzeschi, "The Due Diligence Rule and the Nature of the International Responsibility of States" (1992) 35 German Yearbook of International Law 9 at 9.

[33] Hugo Grotius, *De Jure Belli Ac Pacis,* trans. by Jean Barbeyracin (Indianapolis: Liberty Fund Inc, 2005) vol. 2, ch. XVII, XXI.

[34] *Id,* ch XXI, II(1).

Body, is accountable for the Faults of its particular Members, unless it has concurred with them, or has been negligent in attending to its Charge".[35]

This conclusion departed with the collective theory of responsibility and paved the way for the modern conception of States' non-responsibility for acts of private actors. Going further, Grotius admitted that two exceptions existed to this rule, the first being complicity and the second being negligence.[36] For Grotius complicity could also take at least two forms[37] formulated in Latin as *Patientia* and *Receptus* or as Toleration and Protection in English.[38] *Patientia* or Toleration occurred when a State or king[39] who had the knowledge of a wrongdoing did not hinder it when in a capacity[40] and obligation of doing so. For that, the State or king could be considered to be the author of the wrongful act.[41] *Receptus,* or Protection, on the other hand occurred when, after having failed to prevent a wrongful act by an individual, the State or king refused to either punish the culprit or extradite him or her when possible.[42] In such a case, the State or king would equally be accountable for the acts of its subjects. Illustrating his reasoning, Grotius took the example of privateers.[43] While being under the orders of the State, at times, privateers could also attack allies without authorizations. In such

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35 *Id.*

36 *Id.*

37 *Id,* Grotius considered that these two forms were the most frequent.

38 *Id,* ch XXI, II(2).

39 *Id,* As stated earlier, this reasoning also applied to private individuals.

40 *Id,* ch XXI, II(4); By "capacity", Grotius also included jurisdiction noting "Knowledge without Authority will not amount to Guilt." See ch XXI, II(4).

41 *Id.*

42 *Id,* ch XXI, III, IV.

43 *Id,* ch XVII, XX(1).

events, the State could not be held responsible for the actions of the privateers since these actions could not be foreseen. Yet, the State was under the obligation to punish or deliver the culprit.

Surprisingly, Grotius' theory of complicity resonates today more with the theory of prevention than complicity. This phenomenon is explained by the background idea that failing to prevent amounted to complicity while today, such failure amounts to a separate wrongdoing. Yet, the theories of Grotius would prove influential on posterior scholars. As stated earlier, from this point in time, States were as a general rule, no longer responsible for the acts of individuals and only certain circumstances would trigger their responsibility. By extensively resorting to analogies with private law, Grotius also introduced the notion of fault in the debate which would later be seen as redundant with due diligence[44] and abandoned by the International Law Commission.[45] Finally, Grotius established that prevention requires both knowledge and jurisdiction and reemphasized[46] the role of punishment following a failure to prevent.

1.3. From Fault to Diligence

The 18th and 19th centuries saw a major shift with the progressive

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[44] Riccardo Pisillo Mazzechi, "Le Chemin Etrange de la Due Diligence: D'un Concept Mystérieux à un Concept Surévalué", *supra* note 16 at 337.

[45] Awalou Ouedraogo, "L'Evolution du Concept de Faute dans la Théorie de la Responsabilité Internationale des Etats" (2008) 21:2 Revue Québécoise de droit international 130 at 159.

[46] As we have seen earlier, punishment was also a characteristic, as a form of exemption, of collective responsibility.

institutionalization of the State. From this point, not only would the king be able to engage the responsibility of the State but so would the different organs and members of its government or administration.[47] This simple redistribution of the capacity to engage the State's responsibility necessarily had consequences on the theory of State responsibility for acts of private actors. It also showed the weaknesses of a notion like "fault"[48] and yet it is not before the beginning of the 20th century that an objective conception of responsibility materialized with Anzilotti, ultimately putting fault aside.

The Italian jurist indeed recognized that the concept of fault was rooted in *jus gentium* or private law relating to physical individuals, and that while the will of the individual is certainly important in private law, the State remains a legal fiction, an abstract entity incapable of formulating a will.[49] Thus, without a will of its own, the fault of the State became for him an absurd concept and could not be a general requirement for finding the responsibility of the State. Instead, the fault should only be

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[47] Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum,* trans. by Joseph H. Drake (Oxford: Clarendon Press, 1934) vol. 2, para. 772; Wolff admits that authorities acting in the limits of their mandates can engage the State.

[48] Emer De Vattel, *The Law of Nations or the Principles of Natural Law* (Indianapolis: Liberty Fund Inc., 2008) at 69. Vattel doubted the analogies made with private law, *ibid.*, "a State or civil society is a subject very different from an individual of the human race… There are cases, therefore, in which the law of Nature does not decide between state and state in the same manner as it would between man and man."

[49] Dionizio Anzilotti, *Cours de Droit International,* trans. by Gilbert Gidel (Paris : Sirey, 1929) vol. 1 at 498: "le dol et la faute, dans le sens propre du mot, expriment des manières d'être de la volonté comme fait psychologique et on ne peut donc en parler qu'en se rapportant à l'individu. Il s'agit, par suite, de voir si l'attitude contraire au droit international, pour être imputable à l'État, doit être l'effet du dol ou de la faute des individus-organes ; en d'autres termes, si le dol ou la faute de ceux-ci est une condition que le droit établit pour que des faits déterminés produisent pour l'État, des conséquences déterminées."

necessary when the norm that is violated expressly mentions it.[50]

This change brought by Anzilotti is not only of obvious importance for the issue of attribution, but also in the broader context for responsibility and due diligence. Indeed, it helped center the discourse on "ability" rather than "fault". This newfound focus on ability disconnected with the concepts of *patientia* and *receptus* introduced by Grotius. It was no more the intent of the sovereign to prevent or not prevent a crime, or the same intent to punish or extradite that mattered the most, but the ability to do so.

Naturally, this theoretical shift required novel research but the foundations were already set by Hall and his *Treatise on International Law.* In his work, Hall started from the assumption according to which contemporary States could not control private persons or even their judicial systems. With that in mind, wrongful acts committed by these actors could not be attributed to States but the States still had to show "diligence"[51] in preventing their wrongdoings or providing reparation.[52] Accordingly, the State should make its "best provision"[53] to "prevent"[54] such wrongdoings and by doing so, it would be exempted from responsibility. Completing this reasoning, Hall considered that the level of "care"[55] should be proportionate with what could be

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[50] *Id.* at 499.

[51] William Edward Hall, *Treatise on International Law,* 3rd ed. (Oxford: Clarendon Press, 1890) at 216.

[52] *Id.,* at 214. According to Hall, the judicial system is in most cases an independent institution and as such, preventing a wrongdoing from it is difficult for the State. Therefore, Hall focuses on the duty of the State to repair the wrongdoing of the judicial system and the prevention of repetition by changing or adopting new domestic laws.

[53] *Id.,* at 217.

[54] *Id.,* p. 214.

[55] *Id.,* p. 216.

expected at the time of the act since no State can be "saddled with responsibility for consequences of unexpected gravity".[56] Besides, Hall emphasized that the specific situation of the State should be considered when judging its efforts.[57] While this may today hint at the economic situation of a State, Hall rather envisaged the political system of the State. In his view, a despotic system has more capabilities to "control"[58] than a less despotic system and therefore what can be asked from a State must vary or it would impair the freedom of States to choose their political system. Yet, as a lower threshold, Hall indicated that deliberate anarchy cannot serve as a reason to show little diligence.[59] Interestingly, when facing the argument that the level of diligence should be proportional to the risk, Hall showed doubt on a such a view since "the true nature of an emergency is often only discovered after it has passed, and no one can say what results may not follow from the most trivial acts of negligence."[60] Such argument still resonates in the modern debate on prevention. Hall also argued that States cannot be expected to have the same level of care within times of war,[61] nor during insurrections since it is "not bound to do more for foreigners than its own subjects and no government compensates its subjects for losses or injuries suffered in the course of civil commotions".[62]

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[56] *Id.,* p. 216.
[57] *Id.,* p. 217.
[58] *Id.,* p. 214.
[59] *Id.,* p. 218.
[60] *Id.,* p. 216.
[61] *Id.,* p. 218.
[62] *Id.,* p. 219.

2. The Early Judicial Practice on Due Diligence

The end of the 19th century and the beginning of the 20th century saw an important number of international incidents going to arbitration. Together, the arbitral awards formed a coherent jurisprudence that largely inspired the work of the ILC on State responsibility.[63] Following mostly wrongs committed either by States institutions or private actors (or both), those arbitral awards gave a detailed understanding of what is expected of a State with regard to the actions of private actors and the obligation to deliver justice (2.2). However, before that, two other cases dealing with sovereignty made a lasting impact on the concept of due diligence, namely the *Caroline* case and the *Alabama* claims (2.1).

2.1. The Caroline Case and the Alabama Claims

The *Caroline* case refers to the correspondence between the governments of the United States and Great Britain following an incident on the territory of the United States and involving British soldiers. This incident took place in 1837 during a rebellion in Canada against the British rule during which British soldiers entered the United States' territory in order to destroy the *Caroline* steamboat which was transporting weapons and ammunitions to the Canadian rebellion. Eventually, the *Caroline* was set

[63] see Third Report on State Responsibility by R. Ago, U.N. Doc. A/CN.4/246 (ILC Yearbook, 1971, vol. 3) 199; Fourth Report on State Responsibility by R. Ago, U.N. Doc. A/CN.4/264 (ILC Yearbook, 1972, vol. 2) 71.

on fire and sent adrift over the Niagara Falls by the British detachment and two US crewmen died.[64]

Following the incident, the government of the United States protested against Great Britain and demanded reparation for "offending" the sovereignty and dignity of the United States.[65] The government of Her Majesty then justified the actions of its soldiers as an act of necessary self-defense.[66] While it is true that this exchange of letters established a base for the doctrine of self-defense that is still remembered today,[67] less attention has been paid to its impact on due diligence in the context of good neighborliness.[68] Yet, when Great Britain accused the US government of either tolerating or failing to prevent the *Caroline* from providing assistance to the Canadian rebellion,[69] the US government dismissed the accusation of countenance and detailed what could be expected from the US government to prevent such incidents. Accordingly, the US government anticipated what Hall later wrote[70] and emphasized the peculiar situation of the United States. Among the elements to consider in order to determine what to expect from the US government, the geography of the border was cited along

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[64] Christopher Greenwood, "The Caroline" (Oxford: Max Planck Encyclopedias of International Law, 2009), at < https://opil.ouplaw.com/home/mpil>. In subsequent footnotes and the bibliography, the references to the entries of this database will be shown by the publishing place, the name of the database, and the year of publication of the entry in question, as shown above, without the repetition of the URL address.

[65] Letter of Dan Webster to Lord Ashburton, Department of State, Washington, 27th July 1842.

[66] Letter of Lord Ashburton to Dan Webster, Washington, 28th July 1842.

[67] Christopher Greenwood, "The Caroline" *supra* note 64.

[68] Joanna Kulesza, *Due Diligence in International Law* (Leiden: Brill Nijhoff, 2016) at 60.

[69] Extract from a note from Dan Webster to Mr. Fox, Washington, 24th April 1841.

[70] Edward W. Hall, *Treatise on International Law, supra* note 51 at 217.

the political regime of the United States which discouraged "the keeping up of large standing armies in time of peace."[71] Thus, it followed that preventing every wrongful acts of citizens on the border would be too much to expect from the United States considering the geography of the border and the political choice to have a minimum army capable of enforcement. On the other hand, what could be expected from the US government was "good faith, a sincere desire to preserve peace and do justice, the use of all proper means of prevention and if offenses cannot, nevertheless, be always prevented, [just punishment]".[72] Later in the note, the US government also admitted that a government cannot be expected to prevent its citizen to join hostilities taking place in other States or civil wars,[73] and it follows with what has been previously said that all it could do is to bring just punishment afterwards.

In conclusion, the *Caroline* case may be considered as contributing to the determination of what is diligent in respect of what can be called today, the obligation of good neighborliness. Yet, it is true that, at the time of the letters, no government based their commentaries on the obligation of good neighborliness or no harm principle. Such considerations concerning what a State ought or ought not to do was seen as part of a general duty of States to demonstrate due diligence. This general duty was often referred to as what could be expected from a "civilized" or "good" government[74] and lacked a substantive treaty or customary base of international law. It followed that States had to show due diligence regarding an undetermined range of issues.

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[71] Extract from note from Dan Webster to Mr Fox, Washington, 24th April 1841.

[72] *Id.*

[73] *Id.*

[74] International Law Association, "Second Report on Due Diligence in International Law" (2016) [hereinafter ILA Second Report] at 9,10.

Following the *Caroline case,* the arbitration of the *Alabama* claims further developed the theory of due diligence in the context of the duty of neutrality of States. It is also important to note that it is the first jurisprudence to mention the phrase "due diligence".[75] With respect to the facts, the *Alabama* claims involved two warships, the *Alabama* and the *Florida,* built in British shipyards for the Confederates, during the American Civil War.[76] Those ships ravaged the merchant fleet of the United States during the conflict[77] and following the end of the war, the United States demanded reparation from Great Britain for having breached its obligation of neutrality.[78] The two governments then formed a commission tasked with resolving the dispute and in 1871, by the adoption of the Treaty of Washington, the commission resorted to solve the Alabama and Florida claims through arbitration.[79] Interestingly, the treaty set within its provisions not only the rules of the tribunal but also the obligations of a neutral government which served as a basis to evaluate Great Britain's responsibility.[80] According to these rules a neutral States is first bound to:

"use due diligence to prevent the fitting out, arming or equipping, within its jurisdiction of any vessel which it has reasonable ground to believe is intended to cruise or

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[75] Robert Kolb, "Reflection on Due Diligence Duties and Cyberspace" (2015) 58 German Yearbook of International Law 113 at 114.

[76] Tom Bingham, "Alabama Arbitration" (Oxford: Max Planck Encyclopedias of International Law, 2006).

[77] Both warships were eventually sunk.

[78] Tom Bingham, "Alabama Arbitration" *supra* note 76.

[79] *Treaty Between the United States and Great Britain,* United States and United Kingdom, 8 May 1871, [hereinafter *Washington Treaty*] Art. I.

[80] *Id.,* Art. VI.

carry on war against a Power with which it is at peace."[81]

Secondly, it shall not permit to belligerents to make use of its ports as a naval base or recruitment base.[82] And thirdly, it should use due diligence to prevent persons within its jurisdiction from violating the two previous obligations.[83] It follows from such articulation that the obligations of due diligence contained in the first and third rules and the obligation of result[84] in the second rule are ultimately linked. Indeed, while the second rule can be considered as an obligation of result regarding the State or its agent, it is by virtue of the third rule, an obligation of due diligence regarding private citizens. In other words, an obligation can be of result in the context of public actors, and, in the same time, of due diligence in the context of private actors.

Following these rules, the then established tribunal decided that Great Britain had violated its due diligence obligation of neutrality.[85] As a primary evidence it was pointed out that the construction of the two warships for the Confederates was made known to the government of Great Britain by diplomatic agents of the United States but Great Britain, ultimately, failed to take action. For its defense, Great Britain argued that it followed its domestic procedures but the tribunal after considering what Great Britain did or omitted, decided that the "insufficiency of the legal means of action which it possessed" cannot justify a failure of due diligence.[86] On the contrary, the

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[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] The obligation of result is indicated by the terms: "A neutral government is bound to".

[85] *Alabama, supra* note 22 at 131.

[86] *Id.*

level of due diligence must be proportional to "the risks to which either of the belligerents may be exposed".[87] As a result, it can be said that the level of diligence required in activities having a potential international effect is to be determined by international standards and by the level of risk. Finally, on the issue of reparation, the tribunal evaluated the reparation proportionally to the damage endured by the United States. It was thus the size of the damage caused by a lack of due diligence that ended up being decisive for assessing the extent of the reparation[88] and not the extent of the omission.

2.2. The Duty to Protect Foreigners, to Apprehend and Punish

The second half of the 19th century and the beginning of the 20th century also saw the development of an important jurisprudence in the context of the protection of aliens and their property and denial of justice. Ending before the Second World War, this period of intense arbitration developed many principles that were used within the negotiations of the Hague Codification Conference of 1930,[89] which in turn inspired the ILC[90] forty years later. Despite the fact that this jurisprudence has been developed by various arbitrators and not a single institution, it shows a surprising degree of coherence. It is for that reason unhelpful to analyze every single one of them. Thus, the

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[87] *Id.*

[88] Joanna Kulesza, *Due Diligence in International Law, supra* note 68 at 63

[89] While the conference failed to agree on a document, its work on State responsibility later inspired the ILC.

[90] Fourth Report on State Responsibility by R. Ago, *supra* note 63.

British claims in Spanish Morocco[91] appears as perhaps the most important case. The *Janes* claims and *Youmans*[92] claims will also be considered in order to confirm the coherence of this jurisprudence but many others can correlate[93].

Between August 1924 and May 1925, a commission lead by Max Huber, judge at the Permanent Court of International Justice, delivered a series of reports concerning the *British claims in the Spanish zone of Morocco*. By that time, it was already a well-established fact that the acts of private individuals could not engage the responsibility of the State.[94] Max Huber added to this principle that a State could not incur responsibility for acts committed by its citizen abroad.[95] This is of importance for the extraterritorial due diligence of States. It indeed means that a State cannot be, as a

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[91] *Affaire des Biens Britanniques au Maroc Espagnol (Royaume-Uni v. Espagne),* Award, [1925] R.I.A.A. vol. 2, 615 [hereinafter *British claims in Spanish Morocco*].

[92] *Janes (*United *States v. Mexico),* Award, [1925] R.I.A.A. vol. 4, 82; *Youmans (United States v. Mexico),* [1926] R.I.A.A. vol. 4, 110 [hereinafter *Youmans*].

[93] The *Ruden, Glen, Cotesworth and Powell, De Brissot and others, Capalleti, Poggioli, Steamer Apure, US-Panama claims, US-Mexico, Denham, John Davis and Son, Adams* and *Sambiaggio* cases are also referred to by authors and the ILC as relevant for the discussion on due diligence. See Joanna Kulesza, *Due Diligence in International Law*, *supra* note 68; Robert P. Jr. Barnidge, "The Due Diligence Principle Under International Law", *supra* note 31; Fourth Report on State Responsibility by R. Ago, *supra* note 63.

[94] In the *Cotesworth and Powell* case, the British-Colombian mixed commission declared: "One nation is not responsible to another for the acts of its individual citizens, except when it approves or ratifies them." *Cotesworth and Powell (United Kingdom v. Peru),* Award, [1871] in Henri La Fontaine, *Pasicrisie Internationale 1794-1900: Histoire Documentaire des Arbitrages Internationaux* (The Hague: Martinus Nijhoff Publishers, 1997); see also the *Ruden (United States v. Peru),* Award, [1870] and *Glen (United States v. Mexico),* Award, [1868] cases in John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* (Washington: Government Printing Office, 1898) vol. 4.

[95] *British claims in Spanish Morocco,* at 636.

general rule, blamed for a lack of due diligence in relation to acts committed by individuals beyond its territorial jurisdiction. According to Huber: *"Responsabilité et souveraineté territoriale se conditionnent réciproquement"*[96] (*i.e.* Responsibility and territorial sovereignty are mutually dependent). This conclusion, based on the jurisprudence of the time,[97] can be explained by two non-exclusive reasons. First, the sovereignty of each State within its territory prevents another from exercising its own sovereignty on it even with regards to its nationals. And second, the absence of territorial sovereignty of a State within the territory of another State, limits its practical ability to control its nationals. Thus, when Huber had to consider the acts of Spanish bandits acting beyond the territory of Spain, he considered that Spain could not be responsible for a failure to prevent the acts[98] but instead could be held responsible for a failure to prosecute them afterwards.[99] Such a conclusion also evidenced the existence of an obligation to punish and apprehend wrongdoers which, according to Huber, required due diligence.[100] However, Huber categorized this as an obligation to prevent denial of justice.[101] It is, therefore, a distinct obligation from the obligation to prevent harm to foreigners and their property. In cases of harm to foreigners, this distinction does not make much difference since the State is responsible for failing to

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[96] *Id.*

[97] *Id.,* "La responsabilité incombant, dans certaines conditions, à un Etat vis-à-vis d'un autre par rapport aux ressortissants de ce dernier, parait avoir été toujours comprise comme limitée aux évènements se produisant sur le territoire de l'Etat responsable. Responsabilité et souveraineté territoriale se conditionnent réciproquement."

[98] *Id.,* at 709.

[99] *Id.*

[100] *Id.,* at 645.

[101] *Id.*

bring justice in any case. Nevertheless, in theory, it can make a difference when an obligation to prosecute is absent.[102] In sum, the obligation to prevent damage does not include the obligation to apprehend and punish in case of failure. Instead a separate obligation to prevent denial of justice exists[103] (and this obligation also requires due diligence).

On the issue of the responsibility of State during insurrection, Huber softened the conclusion of Hall. While he admitted that foreigners could not expect a more favorable treatment than local citizens according to the *diligentia quam in suis*[104] (*i.e.,* care in his own matters) principle, he reached a different conclusion.[105] Huber indeed considered that if a State could not normally be responsible for the damages of war or internal unrest, and consequently, for the acts of its soldiers acting in military necessity to restore order[106], it may have nonetheless been responsible when it showed a manifest lack of vigilance.[107] Thus, while Hall simply rejected the responsibility of States during insurrections, Huber accepted that States could, in principle, be held responsible during insurrections even if a higher level of tolerance had to be given.

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[102] A due diligence obligation to protect the environment may not be accompanied by an obligation to prevent denial of justice. In that case, the inclusion of punishment in the basic concept of due diligence would be substantial.

[103] It can also be an alternative to say that both the obligation to prevent harm and the obligation to prevent denial of justice entail the apprehension and punishment of culprits.

[104] *British claims in Spanish Morocco,* at 644.

[105] Hall first admitted that States ought to treat equally the foreigners in times of insurrection but concluded that since no States compensates its own citizens in those times, States were not bound to compensate foreigners either; see William Edward Hall, *Treatise on International Law, supra* note 51 at 219.

[106] *British claims in Spanish Morocco, supra* note 91 at 645.

[107] *Id.*

Finally, Huber considered that since Spain was only responsible for failing to prosecute the culprits and not for the actual damage that the culprits had done; it could have only been asked to pay reparation for the denial of justice.[108]

Ultimately, the decision of Huber proved decisive for the ILC work on State responsibility and particularly on those provisions treating the acts of private actors.[109] Four principles were drawn from the decision: (1) in case of act injurious to aliens, only the failure of States to prevent such acts or to punish their perpetrators could potentially trigger the responsibility of the State; (2) the act of an individual cannot engage the responsibility of a State; (3) the act of the individual is distinct from the wrongful act of the State; and (4) the reparation must be proportional to the wrongful act of the State rather than the damage caused by the individual.[110]

Another case of importance is the *Janes* claim. The case concerned the murder of Mr. Janes, an American owner of a mine in Mexico, who had been murdered by his former employee. Witnessing the failure to arrest the culprits, the tribunal recognized the responsibility of Mexico for the non-punishment of the murderer.[111] Yet, to reach this conclusion, the tribunal examined two possible theories. The first theory appertained to "presumed complicity".[112] In this theory, a State showing serious lack of diligence in apprehending and/or punishing a culprit could show a "derivative

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[108] *Id.,* at 709.

[109] Antonio Remiro Brotóns, "Spanish Zone of Morocco Claims" (Oxford: Max Planck Encyclopedias of International Law, 2007).

[110] Fourth Report on State Responsibility by R. Ago *supra* note 63.

[111] *Janes, supra* note 92 at 90.

[112] *Id.,* at 87.

liability assuming the character of complicity with the perpetrator himself."[113] As a consequence, the State would be held responsible for the original act itself. However, for the tribunal, such theory should rather apply to non-prevention rather than non-repression.[114] Thus, when the State has knowledge of an incoming wrongful act and shows serious lack of diligence in preventing it, it could be argued that it is showing complicity. The current case, however, did not evidence a possibility for the Mexican government to prevent the murder of Mr. Janes. For that reason, Mexico could only be responsible on the basis of the second theory which pertained to the non-punishment of the murderer. Accordingly, the Mexican government was found responsible for "not having measured up to its duty of diligently prosecuting and properly punishing the offender".[115] In conclusion, the tribunal had to determine the amount of reparation owed by the Mexican government. In order to so, the tribunal struggled between what it felt rightly due to the victim's family and the reasoning it had so far followed. If, in fact, Mexico was responsible for a denial of justice, the reparation should be proportional to such offense and not to the individual's crime. Ultimately, the tribunal used its freedom to determine such amount to cover the personal loss of the victim but insisted that such sum was due solely for the denial of justice.[116]

Following the *Janes* case, the *Youmans* claim concerned again a double allegation of a lack of due diligence, *i.e.,* a failure of prevention and denial of justice, from the Mexican government. In this instance, a mob was attacking three American

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[113] *Id.,* at 86.

[114] *Id.,* at 87.

[115] *Id.,* at 87.

[116] *Id.,* at 90.

citizens in Mexico when the authorities were alerted. Police forces were then dispatched but in an insufficient number and instead of helping the victims, they joined the mob and proceeded to kill the three Americans. Following this incident, Mexico arrested eighteen people but later dropped most charges or reduced the sentences. The Mexican government was thus blamed by the United States in front of the General Claims Commission for a lack of due diligence concerning the improper efforts engaged to prevent the killing of the three victims on the one hand. And, on the other hand, for a lack of due diligence in apprehending and punishing the criminals given that approximatively one thousand people participated in the mob and only eighteen were, improperly, sentenced. Ultimately, the responsibility of Mexico was engaged for its denial of justice, but the US arguments on the lack of due diligence surrounding the murder itself were not followed.[117] Consequently, due diligence was involved only with regards to the failure to pursue and investigate the culprits. The rejection of the due diligence argument on the one hand and its acceptance on the other, shows clearly that the obligation to prevent and the obligation to investigate and pursue culprits are two independent due diligence duties.[118] It remained inconclusive whether these two duties stemmed from the very same obligation to prevent harm to foreigners, or if they stemmed from two separate obligations (prevent on the one side and investigate and punish on the other).

These three cases (and others) confirmed that the obligation to prevent harm to foreigners is of due diligence. The *British claims in Spanish Morocco* showed a key

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[117] The tribunal looked at the murder under the scope of direct attribution to the State.

[118] Riccardo Pisillo Mazzeschi, "The Due Diligence Rule and the Nature of the International Responsibility of States" *supra* note 32.

aspect of due diligence obligations by making clear that a State can only exercise due diligence, regarding its nationals, within its territory.[119] It also showed that the obligation to apprehend and punish requires due diligence, but it remains unclear if such obligation stems from the same obligation to prevent harm to foreigners or from a separate obligation to prevent denial of justice. This ambiguity was maintained in the *Janes* case,[120] whereas the *Youmans* case[121] strongly hinted at the existence of two separate obligations. Besides, the fact that all cases emphasized that compensation and condemnation should be proportional to the wrongful act of the State, may points toward the existence of a separate obligation to prevent denial of justice. Indeed, if the obligation to prevent harm to foreigners also involved preventing denial of justice, a failure to apprehend a culprit would have resulted in a violation of this general obligation to prevent harm to foreigners. With this understanding, the compensation could legitimately be proportional to the general failure to prevent harm to foreigners and not solely to the denial of justice.

Finally, Huber also acknowledged that States can also be responsible for their lack of diligence even in difficult situations such as insurrections. This point is important as it limits the flexibility of due diligence. Automatic exemptions of duties of due diligence should be interpreted very strictly, and this will be particularly important with regards to the differentiation later operated between developed and

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[119] *British claims in Spanish Morocco, supra* note 91 at 636.

[120] Trapped by its own reasoning, the tribunal desperately attempted to adjust the amount of compensation to the physical loss of the Janes family and not solely to the omission of the State.

[121] While ultimately affording compensation for denial of justice only, the tribunal emphasized the lack of due diligence in preventing the original harm to the Youmans brothers.

developing countries.

3. Conclusions

It appears now clearly that the theory of due diligence has been elaborated within the larger theory of responsibility of States for acts of private actors and specifically in the field of harm to foreigners. Within the development of the responsibility of States, the concept of due diligence did not emerge immediately as an obvious answer for the issue of accountability of the State for acts of private actors. As we have seen, collective responsibility or derivative responsibility concepts were proposed and at times, applied. Yet, those different theories and concepts had common elements. The general idea was always to hold someone else or another entity responsible following a harmful act of an individual and while collectivist societies of the Middle-Age endorsed a collective responsibility, absolutist monarchies pointed to the responsibility of their sovereigns. Grotius set the lasting principle of the non-responsibility of States for the acts of individuals as soon as the 17th century and established the responsibility of the State[122] on the basis of its capacity to prevent forbidden acts of individuals.[123] This capacity would require both a permission to act (*i.e.,* jurisdiction) and knowledge of the wrongful act. Grotius also introduced the notion of fault in the elements of a wrongful act. Thereby, a State would not be responsible if it had not committed a fault. This notion was abandoned by Anzilotti who

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[122] Hugo Grotius, *De Jure Belli Ac Pacis, supra* note 33 in ch. XXI, II(1).

[123] *Id.,* ch. XXI, II(2).

considered this analogy with the private law ill-founded.[124]

In the meantime, Hall approached the blameworthiness of the State based on the level of diligence or care[125] that is given to a situation. Hall used the expressions "best provisions"[126] and emphasized on the importance of control. Control also appeared primordial within the *Caroline* case in which the level of control the United States possessed on its border mattered. The specific situation of the State appeared to be relevant in evaluating the level of diligence that could be expected. At the same time, the standard of reference for measures to take by States could not simply be equivalent to the domestic treatment.[127] Thus, while the specific situation of a State has to be taken into account, the behavior of a State also has to be measured by other standards than the domestic treatment. Such reasoning would apply to the due diligence required in the prevention of harm to foreigners, but also in other matters involving due diligence obligations such as the protection of territorial integrity and sovereignty.[128]

The judicial and arbitral jurisprudence of the early 20th century also demonstrated that due diligence obligations over private individuals could only apply within the territory of the State.[129] This territoriality of due diligence deduced from the empirical study of the jurisprudence by Huber seems fitting since States will have difficulty in exercising both their jurisdiction and their control beyond their territory

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[124] Dionizio Anzilotti, *Cours de Droit International, supra* note 49 at 498.

[125] William Edward Hall, *Treatise on International Law, supra* note 51 at 216-219.

[126] *Id.*

[127] *Alabama, supra* note 22 at 129, 131.

[128] See the *Alabama* claims, *supra* note 22, and the *Caroline* case above.

[129] See *British claims in Spanish Morocco, supra* note 91.

and especially within the territory of another State.[130] Finally, the same jurisprudence evidenced that due diligence was required when delivering justice.[131] It shows that States should exercise due diligence with regards to their own activities (in these cases, delivering justice) but it remained unclear if the repressive duty of the State was required by a specific obligation to prevent denial of justice or if obligations to prevent, in general, incorporate an obligation to punish.

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[130] In the case of areas beyond national jurisdiction, the issue of control may prove more problematic than jurisdiction.

[131] See *British claims in Spanish Morocco, supra* note 91, *Janes* and *Youmans* cases, *supra* note 92.

SECTION 2: The Work of the International Law Commission

Following the establishment of the United Nations, the International Law Commission was established to codify international law. With international responsibility among its priority topics, the ILC started its work based on the work of past scholars and judicial practice.[132] Following a dichotomy between unlawful acts and acts not prohibited by international law (dichotomy represented by the terms "responsibility" and "liability"), the commission conducted two separate works both bringing their own input to the theory of due diligence. Thereby, while the work on State responsibility set the place of due diligence in the general framework of the law of State responsibility, the work on liability turned out to detail the content of the due diligence obligation to prevent transboundary harm. The present section will follow this dichotomy.

1. The Work of the ILC on State Responsibility

With the end of the Second World War, a renewed interest and faith in international law notably through the creation of the United Nations saw the light of

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[132] See Second Report on State Responsibility by F. V. Garcia Amador, U.N. Doc. A/CN.4/106 (ILC Yearbook, 1957, vol. 2) 104; Report on State Responsibility by R. Ago, U.N. Doc. A/CN.4/152 (ILC Yearbook, 1963, vol. 2) 227; First Report on State Responsibility by R. Ago, U.N. Doc. A/CN.4/217 (ILC Yearbook, 1969, vol. 2) 125; Second Report on State Responsibility by R. Ago, U.N. Doc. A/CN.4/233 (ILC Yearbook, 1970, vol. 2) 177; Third Report on State Responsibility by R. Ago, 1972, *supra* note 63; Fourth Report on State Responsibility by R. Ago, 1972, *supra* note 63.

day. Hence, in 1949, the UN followed the path started by the League of Nations in an attempt to codify international law[133] and created the ILC. During its first meeting the Commission included State responsibility in the list of fourteen topics of international law selected for codification.[134] Yet, the real work on State responsibility only started in 1953 after a special request from the General Assembly.[135] This impulse resulted in the Commission appointing Garcia-Amador, one of its members, special rapporteur for the topic of State responsibility.[136] Garcia-Amador then proceeded during the following years to write down six reports on the topic, focusing again on the responsibility of States for injuries caused in their territory to aliens or their property.[137] In 1961, after years of discussion, the Commission started to prepare the codification[138] and created a sub-committee on the matter in 1962. With Garcia-Amador no longer a member of the ILC, Roberto Ago was appointed chairman of the sub-committee.[139] The Italian jurist had a decisive impact on the work on State responsibility. He indeed proceeded to rethink the discourse on the topic and focused on three points: (1) the

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[133] Hague Codification Conference of 1930.

[134] Report to the General Assembly, U.N. Doc. A/CN.4/13 (ILC Yearbook, 1949, vol. 1) 277 at 281, para. 16. The Commission made the selection after undertaking a survey of the whole field of international law, in accordance with article 18, paragraph 1, of its Statute.

[135] *Request for the Codification of the Principles of International Law Governing State Responsibility,* GA Res 799(VIII), UN GAOR, 8th Sess., Supp. No. 10, UN Doc. A/2630 (1953) 52.

[136] Report of the ILC Covering the Work of its Seventh Session, U.N. Doc. A/CN.4/94 (ILC Yearbook, 1955, vol. 2) 19 at 42, para. 33.

[137] Report of the ILC on the Work of its Twenty-first Session, U.N. Doc. A/CN.4/220 (ILC Yearbook, 1969, vol. 2) 203 at 229. para, 66.

[138] *Id.,* at 230, para. 69.

[139] *Id.,* at 231, para. 70.

definition of the concept of international State responsibility; (2) the origins of the responsibility (international wrongful act and its objective and subjective components, the various kind of violations, and the circumstances precluding wrongfulness); and (3) the forms of international responsibility (reparations and sanctions) excluding the international responsibility of non-State actors.[140] This focus persisted during the years of Ago and helped advance the debate on the general rules of State responsibility irrespectively of the specific regime of the obligation violated rather than creating specific regimes of responsibility for every specific regime of obligations.[141] The sub-committee also dealt with the importance of the obligations violated and the seriousness of the violation taking into account the legal relationship between the wrongful State and the injured State, but also the wrongful State and the international community as well as the role of reparation and sanction.[142] Ultimately, Ago also brought a ground-breaking distinction between primary and secondary rules of international law with the former including the obligations of international law contained in treaties and customary international law, and the latter including the general regime of State responsibility. With this perspective in mind, only a violation of a primary rule would trigger the application of the secondary rules *i.e.,* the State responsibility regime. Effectively, this also led the commission to make a distinction between the accountability for a violation of an obligation under international law *i.e.,* a primary norm, and accountability for an act not prohibited by international law, thus without a

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[140] *Id.,* at 232, para. 73.

[141] *Id.,* at 233, para. 80.

[142] *Id.,* at 233, para. 81. See also Report of the ILC on the Work of its Twenty-second Session, U.N. Doc. A/CN.4/237 (ILC Yearbook, 1970, vol. 2) 271 at 306, paras. 66-74.

violation of primary norms;[143] the former engaging the State's responsibility and the latter engaging the State's liability. For the first time, the topics of responsibility and liability were treated separately and the commission focused, at least for the time being, on the question of responsibility.

While not without criticism, this last distinction on whether or not an obligation was violated rather than a distinction based on the type of damage, endured in the work of the next Special Rapporteurs,[144] and was present in the final outcome of the work of the ILC on State responsibility. Indeed, the *2001 ILC Draft Articles on State Responsibility for a Wrongful Act* concerns only "wrongful acts" violating international law obligations. The damages caused by acts not prohibited under international law were to be treated under another document.[145]

It is in this context that due diligence was discussed from the very beginning. Garcia Amador in his first draft on State responsibility concerning the injuries caused to aliens and their properties in its territory[146] addressed "the rule of due diligence".[147] It was introduced in the context of the Bikini Atoll nuclear tests and the *Trail Smelter* case and pertained to the existence of responsibility in the absence of any breach of a specific international obligation. In those situations, the special rapporteur said:

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[143] *Id.,* at 233, para. 83 and at 306, para. 66.

[144] Roberto Ago left the ILC in 1978 and was followed by Willem Riphagen the next year, Gaetano Arangio-Ruiz in 1987 and James Crawford in 1997.

[145] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, U.N. Doc. A/56/10 (ILC Yearbook, 2001, vol. 2) 147 [hereinafter Draft Articles on Prevention].

[146] Second Report on State Responsibility by F. V. Garcia Amador, *supra* note 132.

[147] *Id.,* at 122-123.

"There is admittedly no breach or non-performance of a concrete or specific obligation, but there is a breach or non-performance of a general duty which is implicit in the functions of the State from the point of view of both municipal and international law, namely, the duty to ensure that in its territory conditions prevail which guarantee the safety of persons and property. The rule of 'due diligence' is in reality nothing more than an expression of the same idea".[148]

Admittedly, due diligence was connected to a "general duty" rather than a specific obligation under international law, the violation of which triggers a State's responsibility. This reasoning, while unclear on the specific content of the "general duty", creates room to hold a State responsible even when it is impossible to identify the specific international norm that has been infringed. Yet, even if it goes against the intention of the rapporteur, this theory still attached due diligence to an international obligation no matter how vague this obligation could be. In other words, due diligence was not seen as a general duty, rather there existed a general duty to act with due diligence. Under this angle, the content of due diligence was contingent on the definition of this general duty. Therefore, while the rapporteur wanted to emphasize that a lack of due diligence could be evidenced even in the absence of a breach of obligation, in truth it simply replaced the terms "international obligation" with "general duty".

Coming back to breaches of international obligations, Garcia Amador proposed a chapter V dealing with "acts of individuals and internal disturbances"[149]. In

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[148] *Id.,* at 106.

[149] *Id.*

Article 10, the rapporteur held the State responsible for the injuries caused to aliens by private individuals when it has shown negligence in taking the measures that are normally taken to prevent or punish such acts.[150] In other words, the responsibility of a State could be engaged through two cumulative elements: (1) an injury caused to an alien by a private individual; (2) a lack of due diligence from the State to punish or prevent.[151] State responsibility in such cases was not a direct consequence of the injury but rather the consequence of a wrong behavior from the State resulting in an injury.[152] Yet, contrary to previous jurisprudence, the rapporteur proposed to hold the State *in fine* responsible for the injury and not for its own omission.[153] Finally, in order to determine if the attitude of a State in question is evidencing a lack of due diligence, Garcia Amador proposed, like many of his contemporaries, to compare it with the attitude of a "civilized State" which is supposed to refer to an international standard of justice.[154] This would imply that the level of care in respect of aliens should, in some cases, be more favorable than the treatment of national citizens, while in others it should at least be equal depending on how the domestic treatment relates to this international standard.

The next meetings of the ILC on the topic of State responsibility saw an opposition between those in favor of a regime of responsibility focusing on injuries to

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[150] "Article 10 Acts of Private Individuals: The State is responsible for injuries caused to an alien by acts of ordinary private individuals, if the organs or officials of the State were manifestly negligent in taking the measures which are normally taken to prevent or punish such acts". Second Report on State Responsibility by F. V. Garcia Amador, *supra* note 132.

[151] *Id.*

[152] Joanna Kulesza, *Due Diligence in International Law*, *supra* note 68 at 139.

[153] Second Report on State Responsibility by F. V. Garcia Amador, *supra* note 132 at 121.

[154] *Id.,* at 122-128.

aliens and those in favor of establishing general principles. The commission found a compromise in searching for general principles while paying particular attention to the work already done on the field of injuries to aliens.

Thus, the meetings of 1963 started the extrapolation of the principles of due diligence found in case of injuries to aliens to general rules.[155] Furthermore, the meeting of 1969 compiled previous attempts of codification of the law of State responsibility. It is important to note that during these meetings, the commission started to put the notion of fault in question by noticing that involving fault in the field of responsibility, departed with the practice of States and courts.[156] The compilation of previous attempts of codification also brought forward the *Draft Convention on the Responsibility of States for Injuries to Aliens*[157] prepared by the Harvard School of Law in 1961 in which fault is left out of the question of due diligence. Yet, some members believed that the theory of fault was still necessary. For them, fault should have remained an element of State responsibility in order to allow States to avoid responsibility when their conduct was not at fault.[158] The majority however decided to put aside the fault when dealing with State responsibility even if it was "of great interest from a theoretical point of view".[159] From there, due diligence was discussed during the elaboration of the draft articles within the following sessions and the late article 23

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[155] Report of the ILC on the Work of its Fifteenth Session, U.N. Doc. A/CN.4/163 (ILC Yearbook, 1963, vol. 2) 187 at 248.

[156] *Id.,* at 236; The fifteenth session of the ILC in 1963 noticed the "great interest from a theoretical point of view" of fault but also observed its rejection in State and courts practice.

[157] Louis Bruno Sohn & Richard Reeve Baxter, "Draft Convention on the Responsibility of States for Injuries to Aliens" (1961) 55 American Journal of International Law 548.

[158] *Id.,* see the objection of Mr. De Luna and Mr. Gros.

[159] *Id.*

of the draft, labelled *"Breach of an obligation to prevent an event",*[160] was the right opportunity to do so.

Taking into account its previous considerations on responsibility for negligence in the context of injuries to foreigners or omissions,[161] the ILC faced a legitimate issue when addressing the injurious conduct of private individuals. In case of an obligation to prevent, could the State be held responsible in the absence of "damage"?[162] The issue was to conciliate the efforts or the due diligence of the State with the occurrence of a damage. Obviously, in certain cases "the conduct as such was sufficient to constitute a breach of international law".[163] While in other cases, a lack of diligence without any "damage" can occur. In such instances, the State is thus negligent but fortunate enough to not see a "damage" occurring.[164] The conclusion was thus that in case of an obligation to prevent an event, negligent conduct could not by itself be a source of responsibility. It seemed at first that a third criterion of "damage" could be added to the criteria of attribution and breach, which are the traditional elements of responsibility. However, the Commission considered that in the context of obligation to prevent an event, the "damage" is the actual breach of the obligation. Therefore, "damage" and breach would be identical. In other words, the absence of damage should

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[160] Seventh report on State Responsibility by R. Ago, U.N. Doc. A/CN.4/307 (ILC Yearbook, 1978, vol. 1) 31.

[161] Responsibility for omissions was also discussed within the drafting of Article 2 on the conditions for the existence of an internationally wrongful act. Third Report on State Responsibility by R. Ago, *supra* note 63.

[162] Seventh report on State Responsibility by R. Ago, *supra* note 160..

[163] *Id.,* at 32.

[164] *Id.,* at 32. The ILC took the example of a foreign embassy inadequately protected but fortunate enough avoid receiving damage by hostile demonstrators.

show that a State is fulfilling an obligation to prevent and it should not matter if such absence of damage is due to its diligent conduct or sheer luck.[165] With such a framework, due diligence serves to exonerate the State once a breach has been evidenced. By showing that it has acted diligently, a State can escape responsibility for a breach of international law. However, a failure to show due diligence without any breach of international law does not entail responsibility. Following this logic, the ILC proposed the following article:

Article 23: Breach of an international obligation to prevent a given event

When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of the obligation only if, by the conduct adopted, the State does not achieve that result.

This article was ultimately rejected by States but it provided a framework for understanding correctly obligations of prevention.[166] Eventually, the Articles on Responsibility of States for Internationally Wrongful Acts opted for the simplicity by providing a general article 2:

Article 2: Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or an omission: (a) is attributable to the State under international law; and (b) constitutes a breach of

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[165] *Id.,* at 33, para. 4.

[166] James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013) at 230.

an international obligation of a State.[167]

Whether responsibility needs a lack of due diligence to be proved is left to the discretion of the primary obligation in question. In that sense, it is the primary obligation itself that defines the conditions in which it can be violated.

2. The Work of the ILC on State Liability

Within its work on State responsibility, the ILC agreed, as we saw, that the topic of State responsibility should only deal with the consequences of wrongful acts. Yet, it was also recognized that responsibility for lawful acts should also be addressed.[168] Because of its doctrinal difference, it was decided to research this separate issue either after the work on State responsibility had been completed or simultaneously but separately of it.[169] The Decision was ultimately taken to establish a separate committee to study the matter of "International Liability for Injurious Consequences Arising from Acts Not Prohibited by International Law" with Quentin Baxter as special rapporteur.[170] Until 1997, Quentin Baxter and his successors, Julio Barboza and Pemmaraju Sreenivasa Rao, wrote reports on measures to mitigate harm,

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[167] Draft Articles on State Responsibility, Art. 2.

[168] Second Report on State Responsibility by R. Ago, *supra* note 132 at 178.

[169] Report of the ILC on the Work of its Twenty-fifth Session, U.N. Doc. A/9010/REV.1 (ILC Yearbook, 1973, vol. 2) at 169, para. 39.

[170] Report of the ILC on the Work of its Thirtieth Session, U.N. Doc. A/33/10 (ILC Yearbook, 1978, vol. 2) 1 at 6.

restore what was harmed and compensate harm.[171] It thus appeared that the issue of liability was dependent on primary rules of harm prevention and as result the topic was divided once again in two separate issues: the prevention of transboundary damage from hazardous activities and the international liability for loss from transboundary harm arising out of hazardous activities. Following this separation, in 1998, the ILC adopted the *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities* (Draft Articles on Prevention) and submitted it to the UN General Assembly.

The core obligation of this instrument comes with Article 3 on prevention. It states:

> "The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof".

By the terms chosen, it is easy to conclude that the instrument establishes an obligation of due diligence to prevent significant transboundary harm or at the very least to minimize risks.[172] Thus, contrarily to the *Draft Articles on State Responsibility*, this instrument approaches the concept of due diligence under the scope of primary obligations rather than secondary obligations. In that sense, rather than providing rules on the conditions of a breach of due diligence and the consequences of such breach, the Draft Articles on Prevention provide content to the due diligence obligation to prevent

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[171] Attila Tanzi, "Liability for Lawful Acts" (Oxford: Max Planck Encyclopedias of International Law, 2013).

[172] Draft Articles on Prevention, *supra* note 145 at 154, para. 7.

transboundary harm.[173] As this obligation was already part of customary law under the principle *sic utere tuo ut alienum non laedas*[174](*i.e.,* use your own property in such a way that you do not injure other people's), as evidenced by the *Trail Smelter* arbitration and the *Corfu Channel* case, the main contribution of the Draft Articles on Prevention is to details the contents of the obligation. Therefore, while some aspects of the instruments may apply to due diligence in general, most of the proposed measures are limited to the due diligence required in the specific context of the prevention of transboundary harm. With this limited scope in mind, what stands out within this instrument is the confirmation that a due diligence measure should be examined against what is "generally considered to be appropriate and proportional to the degree of risk"[175] and such understanding resembles the conclusions of the *Alabama* case where the tribunal doubted the United Kingdom's argument according to which the standard of reference should be domestic.[176] Following this, the ILC also considers that what is appropriate and proportional can change with time and with the geographical situation.[177] Naturally, these appropriate and proportional measures require the adoption of adequate legal frameworks and proper implementation.[178] This will include measures to prevent but also measures to respond to a failure to prevent such

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[173] Kerryn Anne Brent, "The *Certain Activities* case: What Implications for the No-Harm Rule?" (2017) 20 Asia Pacific Journal of Environmental Law 28, pp. 40-42.

[174] Daniel Barstow Magraw, "Transboundary Harm: The International Law Commission's Study of International Liability" (1986) 80 American Journal of International Law 305.

[175] Draft Articles on Prevention, commentary Art. 3, para. 11.

[176] See *Alabama* claims, *supra* note 22. *S*ee also Draft Articles on Prevention, commentary Art. 3, para. 9

[177] Draft Articles on Prevention, *supra* note 145 at 154, para. 11.

[178] *Id.,* para. 10.

as emergency plans.[179]

Beside these general requirements, due diligence in the context of the prevention of harm also requires regimes of authorizations,[180] assessments[181] and notifications[182] before engaging in risky activities, and cooperation in general.[183] Once again, these requirements are specified in the context of transboundary harm but nothing prevents them from being applied *mutatis mutandis* in other non-transboundary contexts. The inclusion of high seas activities in the scope of the instrument[184] is illustrative in that regards. Indeed, while the Draft Articles on Prevention considers activities on the high seas that have a harmful effect on the territory of another State or in places under its jurisdiction or control,[185] nothing prevents the application of these requirements when an activity presents a risk for the high sea environment itself.

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[179] *Id.* Art. 16.

[180] *Id.,* Art. 6.

[181] *Id.,* Art. 7.

[182] *Id.,* Art. 9.

[183] *Id.,* Art. 4.

[184] *Id.,* at 153, para. 9.

[185] *Id.*

Chapter II: The Contemporary Conception of Due Diligence: Clarification and Constitutive Elements

Having retraced the origins of due diligence and its early interpretation, we have also established that due diligence obligations are not treated differently from any other obligations under the law of State responsibility and thus, enter the normal framework of responsibility. Consequently, due diligence is not a required element in wrongful acts in general, and is required only when the primary obligation establishes it.[186] Therefore, while the drafting of the articles on State responsibility reflected the debate on due diligence, the final version of the draft is unhelpful to determine precisely what due diligence is, what it entails and where to find it. As we have seen, the Draft Articles on Prevention gave a version of due diligence in connection with the obligation to prevent transboundary harm. It appears obvious that this understanding cannot be generalized to every due diligence obligation. Indeed, due diligence obligations envisaged by Grotius or Hall concerned only situations of harm to foreigners. In that context, the provisions on assessment,[187] authorization[188] and notification[189] are mostly if not entirely irrelevant. Similarly, the due diligence obligations identified in the *Alabama* claims and the *Caroline* case concerned neutrality and sovereignty and not environmental hazards. Thus, while the Draft Articles on Prevention are meaningful for environmental law, they do not

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[186] Draft Articles on State Responsibility, Art. 2, para. 3.

[187] Draft Articles on Prevention, *supra* note 145 at Art. 7.

[188] *Id.,* Art. 6.

[189] *Id.,* Art. 8.

encapsulate the whole of the concept of due diligence. In other words, the Draft Articles on Prevention provide details for a very specific due diligence obligation to prevent transboundary harm.

Unfortunately, this specific due diligence obligation is often confused with due diligence in general. In short, this confusion assimilates due diligence with the prevention of "harm"[190] which is understood generously (*i.e.,* encompassing harm to the environment, to the interests, the cyber-infrastructure, or the citizens of a State). Thereby, the International Law Association (ILA) wrote in its final report on due diligence that: "The core content of the due diligence principle was articulated in the Corfu Channel case, namely 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'."[191] However, reducing due diligence to obligations to prevent harm is misconceived even if most due diligence obligations aim at preventing a certain harm.[192] The *Trail Smelter* arbitration and the *Corfu Channel* case, both used as pillars of this theory, have similar elements with due diligence, but stop short of discussing due diligence in any direct way, and cannot constitute evidence for a claim that these cases suggest a theory of due diligence.[193]

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[190] For Takano, due diligence is "the obligation imposed on States to take measures to protect persons or activities inside or beyond their respective territories to prevent harmful events and outcomes." Akiko Takano, "Land-Based Pollution of the Sea and Due Diligence Obligations" (2017) 60 Journal of Law, Policy and Globalization 92; For Schmitt due diligence is a general principle synonymous with the non-harmful use of the territory of the State: Michael N. Schmitt, "In Defense of Due Diligence in Cyberspace" (2015) 125 Yale Law Journal 68.

[191] ILA Second Report at 5.

[192] See also: Leslie-Anne Duvic-Paoli, *The Prevention Principle in International Environmental Law* (Cambridge: Cambridge University Press, 2018) at 203.

[193] Instead, they simply confirm the existence of a customary obligation to prevent

Another point of view sees due diligence as a characteristic of obligations and thus always connects due diligence with specific obligations.[194] In that sense, due diligence needs to be required by an obligation just as the Draft Articles on Responsibility commentary provides:

> "Whether responsibility is "objective" or "subjective" in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence."[195]

It follows that as long as the obligation requires due diligence, due diligence must be exercised even if the obligation does not aim at preventing harm. This conceptualization of due diligence thus contradicts the first theory which sees the prevention of harm as the essence of due diligence. Naturally, proponents of this second theory would rather refer to the law of the sea jurisprudence than the *Trail Smelter* and *Corfu Channel* case and favor the grounded approach of the ITLOS who felt compelled to extract due diligence from the wording of provisions of the UNCLOS before admitting its existence.

Thus, two main views on the scope of due diligence exist. The first limits due diligence to the prevention of harm and the second sees due diligence where a provision

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transboundary harm.

[194] Neil McDonald, "The Role of Due Diligence in International Law" (2019) 68:4 International & Comparative Law Quarterly 1041.

[195] Draft Articles on State Responsibility, Art. 2, para. 3.

requires it. These two opinions are not necessarily opposite on every front, but the second has a wider scope as it does not limit itself to obligations of prevention. Following this dichotomy, another distinction questions the place of due diligence in international law. Is due diligence a principle,[196] a rule,[197] a standard[198] or something else? While the answers may be multiple, there are mainly two understandings that seem to follow the previous dichotomy. Indeed, proponents of the prevention of harm theory will often see due diligence as a principle. Sometimes limited as a principle of environmental law, sometimes seen as a principal of international law in general but with differentiated sectoral applications, this understanding aligns due diligence with other principles such as the precautionary principle. The second understanding that sees due diligence as a characteristic of an obligation naturally sees due diligence as a concept applicable to specific obligations that require it (expressly or not).

These differences in the understanding of due diligence have concrete consequences. Indeed, due diligence puts a special burden on the State vis-à-vis private actors. Thus, whether due diligence is a general principle applicable in every situation or an element of a provision that has to be agreed upon by States, makes a substantial difference. For this reason, a precise comprehension of due diligence is necessary for

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[196] Robert Barnidge sees due diligence as an overarching principle. Robert P. Jr. Barnidge , *Non-State Actors and Terrorism, Applying the Law of State Responsibility and the Due Diligence Principe* (The Hague: T.M.C. Asser Press, 2008) pp. 110, 113.

[197] Second Report on International Responsibility by F. V. García Amador *supra* note 132.

[198] Katja L. H. Samuel, "The Legal Character of Due Diligence: Standards, Obligations, or Both?" (2018) available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264764>; See also Riccardo Pisillo Mazzeschi, "Le Chemin Etrange de la *Due Diligence*: d'un Concept Mystérieux à un Concept Surévalué" *supra* note 16.

every study on due diligence obligations. As we have seen, previous writings and the early jurisprudence on the treatment of foreigners provided us with the elements of an answer. These elements will be involved in our definition of due diligence, including the field of the law of the sea (Section 3). However, a first step concluding on the dichotomy previously stated appears necessary in order to justify the veracity of our definition (Sections 1 and 2).

SECTION 1: The No-Harm Rule Confusion

The no-harm rule[199] is a short-hand reference to the principle whereby a State has a duty to prevent, reduce, and control the risk of environmental harm to other States.[200] As a shortcut expression, it can, however, be misleading. While "no-harm" may appear to indicate that all kind of harm is prohibited, this principle is not as absolute as it seems[201] and some degree of harm is indeed acceptable.[202]

The no-harm rule was consecrated by the Stockholm Declaration in 1972 under principle 21 as the responsibility for States to "ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction"[203] and by the Rio Declaration under principle 2[204] using the same formulation twenty years later. This rule is also sometimes termed as

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[199] Also called preventive principle.

[200] *Trail Smelter,* at 1965; See also Jutta Brunée, *"Sic Utere Tuo Ut Alienum Non Laedas"* (Oxford: Max Planck Encyclopedias of International Law, 2010); Timo Koivurova, "Due Diligence" (Oxford: Max Planck Encyclopedias of International Law, 2010); Kerryn Anne Brent, "The *Certain Activities* case: What Implications for the No-Harm Rule?" *supra* note 173.

[201] Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law & the Environment,* 3rd ed. (Oxford: Oxford University Press, 2009) at 137.

[202] It is usually recognized that the harm must show some significance. See: Jutta Brunée, *"Sic Utere Tuo Ut Alienum Non Laedas", supra* note 200. In return, the notion of "significance" is also hard to define. The Draft Articles on Prevention defines "significant" as *"harm which is not minor or insignificant".* See: Draft Articles on Prevention, *supra* note 145 at 148, para. 4.

[203] Declaration of the United Nations Conference on the Human Environment, in Report of the United Nations Conference on the Human Environment (1973) U.N. Doc. A/CONF.48/14/Rev.1, 3 [hereinafter Stockholm Declaration] Principle 21.

[204] Rio Declaration on Environment and Development, in Report of the United Nations

the *Sic utere tuo ut alienum non laedas (sic utere)* principle[205] and was given customary value in the 1996 *Legality of the Threat or Use of Nuclear Weapons*[206] advisory opinion. Yet, in essence, this rule or principle appeared in the 1940s with the *Trail Smelter* arbitration (1) in 1941, followed by the first ICJ decision in history on the *Corfu Channel* case (2) in 1949.[207] Both cases had similar elements in the reasoning, but they each concerned a different field of international law. Despite this substantial difference, the two cases are often combined together in an effort to demonstrate a specific understanding of due diligence and prevention of harm. Importantly, this particular understanding of due diligence deviates from past interpretations of due diligence. Indeed, as it assimilates due diligence with the no-harm rule, this interpretation reduces the scope of due diligence to an obligation to prevent harm by all necessary means, whereas past interpretations of due diligence applied more broadly to prevention of harm, ensuring neutrality and ensuring proper justice. Yet, this assimilation is only the consequence of a misinterpretation of the two relevant cases.

Conference on Environment and Development (1992) U.N. Doc. A/CONF.151/26 (vol. 1) 3 [hereinafter Rio Declaration] Principle 2.

[205] The *sic utere* principle seems to include all harms to the interests of other States while the no harm rule focuses on environmental harm. See: Jutta Brunée, *"Sic Utere Tuo Ut Alienum Non Laedas" supra* note 200; James Crawford, *Brownlie's Principles of Public International Law,* 9th ed. (Oxford: Oxford University Press, 2019) at 343.

[206] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, [1996] ICJ Reports 226, para. 29: "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.".

[207] Kerryn Anne Brent, "The *Certain Activities* case: What Implications for the No-Harm Rule?" *supra* note 173.

1. The Tale of the *Trail Smelter* Arbitration

"Every discussion of the general international law relating to pollution starts, and most end, with a mention of the Trail Smelter arbitration between the United States and Canada."[208].

The *Trail Smelter* arbitration is often considered as a cornerstone of international environmental law. It is therefore not surprising that the ILA in its section on environmental law within its first due diligence report[209] started by referring to the *Trail Smelter* arbitration.[210] Hence, two main inputs are attributed to the case. Firstly, the *Trail Smelter* arbitration set the rule to prevent transboundary harm in international law, and, secondly, it contributed (more or less according to authors) to the theory of due diligence. In order to address the value of this argument (1.2), a knowledge of the context and facts of the case is necessary (1.1).

1.1. A Straightforward Case of Transboundary Harm

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[208] Alfred P. Rubin, "Pollution by Analogy: The Trail Smelter Arbitration [Abridged]", in Rebecca M. Bratspies & Russell A. Miller eds., *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (New York: Cambridge University Press, 2006) 46.

[209] International Law Association, "First Report on Due Diligence in International Law" (2014) [hereinafter ILA First Report].

[210] *Id.,* at 25.

In 1935, a convention was established between Canada and the United States to settle an old dispute over the harm done by lead and zinc pollution emanating from a smelter in British Columbia on the Canadian side to the state of Washington on the American side. On the basis of this convention, an arbitral tribunal was formed with the underlying goal to balance the interests of both parties rather than a zero-sum game.[211] The closure of the smelter was never envisaged,[212] as such a precedent would be equally worrisome for the US' industry. The arbitration therefore concerned a balance between two economic interests (the smelter on the one side and the farm crops of the other), or at the very least, an economic interest and the protection of the environment. Finally, the convention also assumed the responsibility of Canada in the matter and left to the tribunal the questions of determining the extent of the harm, its mitigation and its compensation.[213]

On the basis of the Convention, the tribunal delivered two decisions settling the dispute. On April 16th 1938, the tribunal rendered the first. It concluded that harm had occurred, and that Canada would have to pay $78, 000 as compensation.[214] The second and final decision of the tribunal, which entered posterity, came on March 11th 1941. By answering the question whether the smelter should be required to refrain from causing harm to the state of Washington in the future and to what extent, the tribunal sorted out a ground-breaking rule:

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[211] *Trail Smelter,* at 1963.

[212] Mark A. Drumbl, "Trail Smelter and the International Law Commission's Work on State Responsibility for International Wrongful Acts and State Liability", in Rebecca M. Bratspies & Russell A. Miller, eds., *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration,* (New York: Cambridge University Press, 2006) 85.

[213] Miller A. Russell, *"Trail Smelter Arbitration"* (Oxford: Max Planck Encyclopedias of International Law, 2007).

[214] *Trail Smelter,* at 1933.

"No State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."[215]

While this statement appeared limited to "injury by fumes", it was later generalized to "damage to the environment" in the Stockholm Declaration[216] and the Rio Declaration and obviously by the ICJ in the *Legality of Nuclear Weapons* case. It is thus clear enough that the *Trail Smelter* arbitration contributed or even originated the no-harm rule. Concerning due diligence however, things are less straightforward.

1.2. The Absence of Due Diligence

Literally speaking, due diligence is absent from the case. No mention is made to the terms but surprisingly it often serves as a reference for due diligence. It is true that the tribunal found the responsibility of Canada for the actions of a private actor (*i.e.,* the operator of the smelter), thus showing similarity with the traditional purpose of the concept of due diligence. But it is uncertain that it did so in virtue of the lack of due diligence by Canada. Indeed, as we have seen, different theories can seek the responsibility of a State following the act of a private actor and due diligence is only but

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[215] *Id.,* at 1965.

[216] Stockholm Declaration, Principle 21; Rio Declaration, Principle 2.

one of these theories.[217] In the case of a failure to demonstrate due diligence, such failure must be proved. It is necessary to demonstrate that the State had knowledge (or ought to have known) of a risk and refrained from acting even when it had the possibility to do so or acted inappropriately. In the *Trail Smelter* arbitration, such demonstration of a wrongful omission from Canada is nowhere to be seen. This is particularly surprising considering that the tribunal referred to Eagleton[218] whose work expressed the very same idea.[219] Indeed, in the work cited by the tribunal, Eagleton says:

"While […] in a few exceptional cases, the state may be held responsible at once for the act of an individual, it is usually necessary to show an illegality on the part of the state. The state cannot be regarded as an absolute guarantor of the proper conduct of all persons within its bounds. Before its responsibility may be engaged, it is necessary to show an illegality of its own; and this involves simply the question of what duties are laid upon the state with regard to individuals within its boundaries by positive international law."[220]

One explanation to the absence of discussion on any wrongful omission by

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[217] As seen in the previous chapter, the strict responsibility of the State for a damage done by one of its citizens was preferred during the antiquity and derivative or vicarious responsibility theories were later theorized by authors.

[218] *Trail Smelter,* at 1963.

[219] Jaye Ellis, "Has International Law Outgrown Trail Smelter", in Rebecca M. Bratspies & Russell A. Miller, eds., *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (New York: Cambridge University Press, 2006) 56.

[220] Clyde Eagleton, *The Responsibility of States in International Law* (New York; New York University Press, 1928) at 77.

Canada in the tribunal's decision might be that Canada already accepted *prima facie* its responsibility for the damage and only questions regarding compensation and mitigation were left to be solved by the tribunal. Regardless, without any justification from the tribunal concerning the origin of responsibility of Canada, it cannot be unequivocally affirmed that the tribunal had the theory of due diligence in mind. In fact, the lack of evidence of wrongdoing can lead to an opposite interpretation pointing towards Canada's strict liability[221] or its duty of result.[222]

In any event, while it is safe to say that the *Trail Smelter* arbitration enshrined the *sic utere tuo ut alienum non laedas* principle, its contribution to due diligence is actually dubious since the signature reasoning of due diligence, that of the knowledge of the risk by the State in question, was absent.

2. <u>The Corfu Channel Overinterpretation</u>

The *Corfu Channel* case (2.1) is "invariably cited as authority for the principle [of due diligence]."[223] Yet, once more, it might be a misconceived reference (2.2).

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[221] Jaye Ellis, "Has International Law Outgrown Trail Smelter" *supra* note 219. Günther Handl, "Trail Smelter in Contemporary International Law, Its Relevance in the Nuclear Energy Context" in Rebecca M. Bratspies & Russell A. Miller, eds., *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration*, New York: Cambridge University Press, 2006) 125.

[222] Kerryn Anne Brent, "The *Certain Activities* case: What Implications for the No-Harm Rule?" *supra* note 173 at 33.

[223] Sarah Heathcote, "State Omissions and Due Diligence, Aspects of Fault, Damage and Contribution to Injury in the Law of State Responsibility" in Karine Bannelier, Theodore Christakis & Sarah Heathcote, eds., *The ICJ and the Evolution of International Law, The Enduring Impact of the Corfu Channel Case,* (New York: Routledge, 2012).

2.1. The Confirmation of the *Sic Utere Tuo Ut Alienum Non Laedas* Principle

The facts of the *Corfu Channel* case are well known to international lawyers. In 1946, two British ships struck mines in the Corfu Channel off the coast of Albania. Following this incident, the British navy, later in the same year, carried out a unilateral mine-sweeping (and evidence gathering) operation which was protested by Albania.[224] The case ended up before the ICJ[225] which had to decide on the responsibility of Albania for failing to inform the British of the danger posed by the minefield in its territorial waters and other questions of innocent passage following the transit of British military vessels and the operation of mine-sweeping.[226] Eventually, the Court found Albania responsible for failing to warn the British vessels of the existence of a minefield based on "well-recognized principles, namely: elementary considerations of humanity, […]; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." [227] This *dictum* confirms the *Trail Smelter* conclusion regarding the *sic utere tuo ut alienum non laedas* principle and makes the *Corfu Channel* decision a key marker for international

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[224] Michael Waibel, *"Corfu Channel* Case*"* (Oxford: Max Planck Encyclopedias of International Law, 2013).

[225] While Albania was not yet a member of the UN, it accepted the ICJ's jurisdiction for this case: See the Special Agreement concluded on March 25th 1948, available at: <https://www.icj-cij.org/files/case-related/1/1495.pdf>.

[226] *Id.*

[227] *Corfu Channel, supra* note 18 at 22.

law.

2.2. The Overinterpretation of the Obligation to Notify

Strictly speaking, according to the Court, the core issue concerning Albania's responsibility related to the existence of an obligation to notify the British vessels of the danger of the minefield. Thus, the question was not whether Albania had exercised due diligence but rather if Albania was required by any legal basis to notify the United Kingdom of the danger.[228] Therefore, the first step for the Court was to determine if Albania had knowledge of the existence of the minefield. After concluding that the laying of mines could not have gone unnoticed by Albanian authorities,[229] the judges recognized that Albania had this knowledge and moved on to the second step of their reasoning concerning the existence of an obligation of notification. This was easily done since the Albanian government even recognized that: "if Albania had been informed of the operation […] and in time to warn the British vessels and shipping in general of the existence of the mines in the Corfu Channel, her responsibility would be involved…"[230] Consequently, the ICJ recognized the existence of such obligation to notify of known dangers and based it on international customary law and especially the obligation of States to not knowingly allow their territory to be used for acts contrary to the rights of other States.[231]

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[228] Michael Waibel, "*Corfu Channel* Case" *supra* note 224.

[229] *Corfu Channel, supra* note 18 at 21.

[230] *Id.,* at 22.

[231] *Id.*

Although this finding is of importance and emphasizes the role of knowledge in the responsibility of a State, it does not necessarily reflect a due diligence reasoning. It is true that the *sic utere* principle thus identified by the Court may fall within what is required by a due diligence obligation, *i.e.,* a State must take all necessary measures to not let its territory be used contrary to the rights of other States. In fact, those who want to see the *Corfu Channel* case as jurisprudence on due diligence may contend that understanding the Court's reasoning as a manifestation of the *sic utere* principle and understanding it as a theory of due diligence would lead to the same result: the due diligence necessary to prevent harm to third States requires the origin State to notify third States of known imminent dangers.

However, it must be emphasized that the sole focus in the *Corfu Channel* case was on the question of notification. The question was narrowly set by the Court as that of a procedural obligation to notify, and the conclusion reached was that if Albania knew of an immediate danger to the British vessels, it should have notified them. Such obligation is an obligation of result, which is not a general characteristic of the due diligence obligation.

As the real contribution of the *Corfu Channel* case being the affirmation of an obligation to notify third States of known dangers, one must be very cautious when affirming that the *Corfu Channel* case had a substantial impact on the theory of due diligence.

Yet, even if we admit that none of the Court's remarks had due diligence in mind, it does not exclude the possibility that the case supports and helps indirectly in the comprehension of due diligence. In fact, the conclusions of the Court on the question of knowledge are, despite being generally valid, relevant for the concept of due diligence

which, as we have seen, involves knowledge. In this respect, the Court declared:

> "It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. […] But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors."[232]

Accordingly, the knowledge of a State of activities (or their authors) is not entirely automatic. It is the circumstances and the specific context of an activity in question that will reveal if a State knew or should have known of it. In the *Corfu Channel* case, the judges considered that the activity of mine-laying by itself could have not gone unnoticed and was therefore known (or should have been known). Thus, depending on the scale and intensity of the activity, the knowledge of the State will be assumed or not assumed. The same reasoning can be transposed to the knowledge of authors of activities. Indeed, depending on their position in the State apparatus, knowledge of their activities will be assumed or not assumed. Without surprise, either the knowledge of the intention of an individual or the knowledge of this activity is required and not both. Eventually, this reasoning on the knowledge of a State of activities on its territory highlights the difficulties surrounding the knowledge of States beyond their territory. In this regard, the *Corfu Channel* case anticipates the higher threshold of scale or intensity that is required to admit the knowledge of a State concerning activities beyond its territory. The same

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[232] *Corfu Channel, supra* note 18 at 18.

reasoning applies to the issue of control.[233] Where the State is not the exclusive sovereign, control cannot be as easily presumed as on its own territory.

Beyond that contribution on the notion of knowledge, the *Corfu Channel* potentially extended the territoriality of the *sic utere* principle to areas beyond national jurisdiction[234] since the Channel was considered as an international strait. However, this conclusion is only related to the no-harm rule and not to due diligence itself. Indeed, in that aspect, the *Corfu Channel* case prepared the ground for the Stockholm Declaration which confirmed the application of the no-harm rule to areas beyond national jurisdiction.[235]

3. Conclusion

The *Trail Smelter* and *Corfu Channel* cases both expressed the existence of an obligation for States to ensure that activities on their territory do not harm the interests or the environment of other States. Extended to areas beyond national jurisdiction with the Stockholm Declaration, the Rio Declaration and the *Legality of Nuclear Weapons* case, this obligation is an obligation of due diligence. Both cases, therefore, helped to determine the existence of a primary obligation which happens to require due diligence. However,

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[233] Sarah Heathcote, "State Omissions and Due Diligence, Aspects of Fault, Damage and Contribution to Injury in the Law of State Responsibility" *supra* note 223.

[234] Karine Bannelier, "Foundational Judgement or Constructive Myth? The Court's Decision as a Precursor to International Environmental Law" in Karine Bannelier, Theodore Christakis & Sarah Heathcote, eds., *The ICJ and the Evolution of International Law, The Enduring Impact of the Corfu Channel Case* (New York: Routledge, 2012) 243.

[235] Stockholm Declaration, Principle 21.

neither the no-harm rule nor the *sic utere* principle should be assimilated with due diligence. As we have seen,[236] the responsibility of a State following the act of a private actor can be justified in different ways. Thus, the simple fact that an arbitral tribunal found Canada responsible for the pollution of one of its companies does not necessarily involve due diligence. Similarly, the responsibility of Albania for failing to notify the United Kingdom of an imminent danger within the Albanian territorial waters simply evidences the existence of an obligation to notify and does not reflect a due diligence reasoning. While comparisons with due diligence are often made, others can equally be made. Thereby, Davis Brown saw the *Corfu Channel* case as an example of vicarious responsibility where the State knowingly acquiesces a harmful act not committed by State organs,[237] while Robert P. Barnidge Jr.[238] and Jaye Ellis[239] sees the *Trail Smelter* case as an example of strict liability. In conclusion, the interpretation given to the concept of due diligence through the *Trail Smelter* and *Corfu Channel* cases analysed in this section are misguided, and these cases do not evidence a substantial change in the theory developed before them in the early cases analysed previously.

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[236] See Chapter 1.

[237] Davis Brown, "Use of Force against Terrorism after September 11th: State Responsibility, Self Defense and Other Responses" (2003) 11 Cordozo Journal of International and Comparative Law 1.

[238] Robert P. Jr. Barnidge, "The Due Diligence Principle Under International Law" *supra* note 31.

[239] Jaye Ellis, "Has International Law Outgrown Trail Smelter, in Transboundary Harm" *supra* note 219.

SECTION 2: Due Diligence: A Label for Various Obligations

The previous section presented the confusion surrounding the no-harm rule and due diligence. As stated earlier, this confused view is not shared by everyone and mostly results from the ex post interpretation of judicial decisions in which due diligence is not directly quoted. Fortunately, another view of due diligence can be proposed and rests on another set of judicial decisions actually referring to the due diligence formula and mostly involving the ICJ and the ITLOS.

Over the course of its existence, the ICJ faced several cases of environmental harm. Yet, even if due diligence is, as we have seen, not a new concept, the judges of the world court only started to refer to it within the last two decades. Beginning with the *Genocide* case, the ICJ established a solid basis in order to understand due diligence in a modern context. Subsequently, due diligence appeared central to the resolution of two cases of transboundary harm and today the concept seems to be an inevitable reference for cases of environmental harm. This recent jurisprudence can be examined from two aspects. Firstly, the *Genocide* case provided an understanding of due diligence general enough to be applied in different instances (1). Secondly, the *Pulp Mills* case and the *Construction of a Road* case focused on the application of due diligence in relation to the no-harm rule (2). This jurisprudence has been followed by the ITLOS and the arbitral tribunal in the *South China Sea* case and therefore serves as a reference in the modern debate on due diligence. Indeed, the *Pulp Mills* case is referred to both in the *Activities in*

the Area[240] and the *SRFC*[241] advisory opinions of the ITLOS and by the South China Sea arbitral tribunal.[242] The *Construction of a Road* case also cited the *Pulp Mills* case while the ITLOS and the *South China Sea* arbitration referred to each other. This interplay between cases and jurisdictions is important as it evidences a degree of consistency in the use of due diligence even through different contexts. However, in order to avoid similar confusions as the one surrounding the no-harm rule, distinctions must be made between what relates to the core elements of due diligence and its specificities in each field of international law. Thus, based on the jurisprudence at hand, the core elements of due diligence must be separated from the specific elements applying to the protection of the environment and the law of the sea.

1. Due Diligence: The General Aspects

Since each case brought to the ICJ or the ITLOS originally deals with a specific factual context, it is sometimes difficult to distinguish the general rule from the specific. The following paragraphs will nevertheless attempt to do so and as often, starting with the general framework appears to be the most logical way. The general framework of due diligence is applicable to all due diligence obligations without concern for their specific fields of law. It relates to the identification of due diligence obligations (1.3), an issue which is particularly vivid regarding obligations to prevent certain events (1.1), the

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[240] *Activities in the Area, supra* note 4 at para. 111.

[241] *SRFC, supra* note 5 at para. 131.

[242] *South China Sea, supra* note 2 at para. 985.

flexibility of due diligence (1.2) and the key mechanisms of due diligence through which it concretely applies (1.4).

1.1. Obligation to Prevent *vs* Obligation of Due diligence

Commenting on the obligation to prevent genocide deriving from Article 1 of the Genocide Convention, the ICJ considered that, as an obligation to prevent an outcome, "the notion of due diligence was of critical importance."[243] This statement is particularly important as it does not identify an obligation to prevent with due diligence in general[244]. Instead, it reminds that obligations to prevent possess a due diligence element. Accordingly, a differentiation between obligations to prevent and due diligence can be made. This point is emphasized by Crawford, who, while recognizing the close relationship between the two, wrote that "a true obligation of prevention is not breached unless the apprehended event occurs, whereas an obligation of due diligence would be breached by a failure to exercise due diligence, even if the apprehended result did not occur."[245] It thus follows that in the case of obligations of prevention, it is the occurrence

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[243] *Genocide, supra* note 9 at para. 430.

[244] Certain authors seem to confuse failures of a procedural obligation with the substantive failure to prevent harm. See: Lada Soljan, "The General Obligation to Prevent Transboundary Harm and its Relation to Four Key Environmental Principles" (1998) 3:2 Austrian Review of International and European Law 209. However, this view does not seem to be shared by the ICJ who makes a distinction between the two. See Jutta Brunnée, "International Environmental Law and Community Interests, Procedural Aspects" in Eyal Benvenisti & Georg Nolte, eds., *Community Interests Across International Law* (Oxford: Oxford University Press, 2018) 151 at 158.

[245] James Crawford, *State Responsibility, The General Part, supra* note 166 at 227.

of the undesired outcome that triggers the responsibility of the State, whereas a strict obligation of due diligence may be breached solely by the failure to act regardless of the outcome.[246] This reasoning follows the letter of Article 14(3) of the Draft Articles on State Responsibility which provides that the breach of an obligation to prevent an event occurs when the event occurs.[247] In the *Genocide* case, the judges recognized that the obligation to prevent genocide could only be breached if genocide actually occurred.[248] Similarly, the *Construction of a Road* case between Nicaragua and Costa Rica, found that while Costa Rica had failed to meet its due diligence obligation by failing to conduct an EIA, it could not be responsible for a breach of the no-harm rule since no significant harm had occurred.[249] Considering the decisive importance of the event subject to prevention, one can legitimately question the necessity of due diligence in the context of obligations of prevention. The answer to this interrogation is also given by the *Genocide* case. The Court said:

"A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which have contributed to preventing the genocide."[250]

Following this reasoning, it appears that in addition to the occurrence of the

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[246] *Id.,* p. 230.

[247] Draft Articles on State Responsibility, Art. 14(3).

[248] *Genocide* case, *supra* note 9 at para. 431.

[249] *Construction of a Road, supra* note 6 at para. 225.

[250] *Genocide* case, *supra* note 9 at para. 430.

undesired outcome, a failure to take "all necessary measures" is necessary to find the responsibility of the State. Thus, if a failure to show due diligence alone is not enough to violate an obligation to prevent, the occurrence of the undesired event is also not enough to find such violation. Instead, the occurrence of the event and a failure of due diligence are two cumulative elements necessary to find a violation of an obligation to prevent an event. This is also clearly shown by the conclusion of the ITLOS in the *Activities in the Area* advisory opinion as it considered that a sponsoring State could only have its responsibility engaged if (1) it failed to carry out its responsibilities under the UNCLOS and (2) a damage occurs[251].

To conclude, while in theory, both the failure of diligence and the occurrence of damage appear as equally important criteria, concretely, the fulfilment of the due diligence element is only examined when an undesired event is alleged to have occurred. On that occasion, if a damage has indeed occurred, due diligence appears as a last resort to avoid international responsibility and thus behave as a form of exemption.[252] It is therefore understandable that States may seek to keep the standards of diligence low enough in order to benefit from this exemption. Hence, the flexibility of due diligence may well be both its strength and its weakness.

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[251] *Activities in the Area, supra* note 4 at para. 242. Importantly, a causal link must connect the two events.

[252] Commenting on this exemption in the context of damage done to the Area: Peter H. Henley, "Minerals and Mechanisms: The Legal Significance of the Notion of the Common Heritage of Mankind in the Advisory Opinion of the Seabed Disputes Chamber" (2011) 12 Melbourne Journal of International Law 373 at 387. See also *Activities in the Area, supra* note 4 at paras. 181, 242.

1.2. A Flexible Concept

From the *Caroline* case,[253] the *Alabama* case[254] and even authors such as Hall[255] and Eagleton,[256] obligations of due diligence have been said to possess a flexible element.[257] The *Genocide* case perpetuated this logic by admitting that "various parameters" varying from States to States must be considered when assessing due diligence.[258] The capacity to influence persons and the legal limits[259] of the State[260] were key elements for assessing the due diligence of the State in the prevention of genocide. Indeed, the specific relation between the State and certain actors varies from case to case and so does the power of the State over them. Such variation is comprised and accepted in the theory of due diligence and therefore the State is not required to act beyond its powers or ability. A similar reasoning goes for the legal limits of the State. As States may have different legal obligations linked to their treaties or their concrete

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[253] In the *Caroline* correspondence, the specificities of the political organization of the United States were invoked as an element to consider when assessing the appropriate measures. See: Extract from note from Dan Webster to Mr Fox, Washington, 24th April 1841.

[254] In the *Alabama* case, the level of due diligence in the context of neutrality was said to be proportional to the risk to which belligerents may be exposed instead of the usual national treatment of similar affairs. See: *Alabama* at 6.

[255] For Hall, the measures States may adopt also differ depending on the political systems of each State. Therefore, setting a single standard of reference would indirectly favor one system to the detriment of others. For that reason, due diligence should vary for each political system. See: William Edward Hall, *Treatise on International Law, supra* note 51 at 217.

[256] Clyde Eagleton, *The Responsibility of States in International Law, supra* note 220.

[257] See Chapter 1, Section 1.

[258] *Genocide* case, *supra* note 9 at para. 430.

[259] Under international law.

[260] *Genocide* case, *supra* note 9 at para. 430.

situations such as geographical particularities, political environment, or even situations of occupation, their actions can be limited in different ways. Thus, once again, the theory of due diligence integrates and accepts such variance and does not require a State to act contrary to its international obligations.

In the *Activities in the Area* advisory opinion, the ITLOS admitted that the requirements of due diligence "may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity."[261] Under this perspective, the flexibility of due diligence appears in regard to the regulated activity. In other words, different activities require different measures and the passage of time as well as the evolution of knowledge and technology also influence these measures. It is thus natural that due diligence, in the context of the prevention of genocide, required different measures than in the context of deep-sea mining.

Ultimately, the flexibility of the concept of due diligence is such that it is fruitless to try to list all its variations. Yet, two types of flexibility can be drawn out. First, due diligence can vary depending on the situation of the State. In that sense, the economic resources of the State, its geographical and political situation and even its specific legal obligations must be considered. Second, due diligence can vary depending on the activity in question. This is where flexibility is at its greatest as almost every different matter may require a different response. As such, it is usually said that what is required is what is

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[261] *Activities in the Area, supra* note 4 at para. 117.

reasonable[262] or adequate.[263]

1.3. The Identification of Due Diligence Duties

As we have seen, obligations to prevent an event possess a due diligence element in them. In fact, it seems that in general, preventing an event means that the State itself is prohibited from committing or encouraging the event but also that the State should prevent all private actors within its jurisdiction or control to commit the event. This obligation is not of result but of conduct, and therefore the State must use due diligence to ensure that private actors within its jurisdiction or control do not commit the undesired event. Thus, without becoming subjects of international law,[264] individuals become targets of international regulations even when it is not expressly written in provisions. Such has been the reasoning in the *Genocide* case where the Court found that the State itself but also other actors should be prevented from committing genocide.

In the *Armed Activities on the Territory of the Congo* case,[265] the Court similarly interpreted provisions of the fourth Geneva Convention on the protection of protected persons in occupied territory.[266] Although Article 33 of this convention simply states:

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[262] Katja L. H. Samuel, "The Legal Character of Due Diligence: Standards, Obligations, or Both?" *supra* note 198.

[263] *Activities in the Area, supra* note 4 at para. 110.

[264] Even if individuals are regulatory targets of international law, they still lack the international legal personality. See: Christian Walter, "Subjects of International Law" (Oxford: Max Planck Encyclopedias of International Law, 2007).

[265] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Judgement, [2005] ICJ Reports 168 [hereinafter *Armed Activities*].

[266] *Id.,* para. 219.

"Pillage is prohibited", the Court saw here an obligation to prevent pillage, targeting States themselves but also private actors.[267] As such, Uganda was under a "duty of vigilance", which is synonymous to due diligence,[268] to prevent pillage in the Congolese territory by both its own military and other non-State actors such as rebel movements, nationals and companies.[269]

Finally, the tribunal in the *South China Sea* arbitration also adopted this view. In that case, China was accused of violating, *inter alia,* Articles 192 and 194 of the UNCLOS[270] which set the obligation to "protect and preserve the marine environment" and the obligation to take measures necessary to prevent, control and reduce pollution. Yet, it was not the actions of Chinese officials that were in question but the actions of Chinese fishermen acting as private actors. Following the same path as the ICJ before it, the tribunal found that Articles 192 and 194 set obligations "not only in relation to activities directly taken by States and their organs, but also in relation to ensuring activities within their jurisdiction and control do not harm the marine environment."[271] Thereupon, the tribunal was able to conclude that Articles 192 and 194 of the UNCLOS require due diligence.[272]

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[267] *Id.,* para. 246-248.

[268] Neil McDonald, "The Role of Due Diligence in International Law" *supra* note 194.

[269] "The Court further observes that the fact that Uganda was the occupying Power in Ituri district extends Uganda's obligation to take appropriate measures to prevent the looring, plundering and exploitation of natural resources in the occupied territory to cover private persons in this district and not only members of Ugandan military forces." *Armed Activities,* para. 248.

[270] *South China Sea, supra* note 2 at para. 894.

[271] *Id.,* para. 944.

[272] *Id.*

From the above, two key elements can be drawn. First, it appears clearly that despite being *a priori* only addressed to States, obligations to prevent may target private actors. Since private actors are not international subjects it is still wrong to say, as the South China Sea tribunal did,[273] that international law itself requires private actors to comply with its measures. It is however, the State's responsibility to ensure private actors' compliance with such measures. In order to do so, transposition of the international measures into domestic law and proper enforcement are necessary.[274] In that sense, a wrongful private actor will solely violate domestic law while the State may be blamed for violating international law by failing to prevent the act of the private actor. The rationale behind this phenomenon has been explained by Judge Paik in the context of Article 58(3) of the UNCLOS, but can be extrapolated generally:

"Although 'States' are direct addresses of the obligation to comply with the laws and regulations of the coastal State, private actors, be they natural or juridical persons, are the ultimate regulatory targets under this provision, as they are the main actors engaging in various activities in the foreign EEZ."[275]

Thus, provisions which address, at first glance, States and only States may apply to private actors through the due diligence of the State when private actors are in fact, by the nature of their activities, the regulatory targets.

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[273] *Id.,* para. 740 "Article 62(4) thus expressly requires Chinese nationals to comply with the licensing and other access procedures of the Philippines... The Convention imposes an obligation directly on *private* parties".

[274] *Id.,* para. 944.

[275] *SRFC, supra* note 5, Separate Opinion of Judge Paik, para. 14.

Secondly, it also appears that, despite a language usually referring to obligations of result such as "obligation to" and "shall", certain provisions actually require due diligence in their application. Since the connection between obligations of conduct and obligations of due diligence has been made by the ITLOS in the *Activities in the Area* advisory opinion,[276] it can be concluded that certain provisions using the language of obligations of result are actually of conduct.

Bearing this last element in mind, the findings[277] of the ITLOS on the expression "to ensure" lose some of their relevance. In the *SRFC* advisory opinion it indeed found that:

> "The expression 'to ensure' is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law."[278]

In other words, the expression "to ensure" refers to duties of due diligence. Surely this finding makes it easier to determine the existence of due diligence obligations when the terms are employed but as we have seen, various obligations also possess a due diligence element without using those terms. Heretofore, we have seen several types of obligations. Obligations to prevent an event may require due diligence[279] as well as

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[276] *Activities in the Area, supra* note 4 at paras. 110, 111.

[277] *Id.,* paras. 110-114.

[278] *Id.,* para. 112.

[279] Here we can refer to the case law on the protection of foreigners or more broadly to the

obligations to protect an interest.[280] We have also seen the complex obligation to prevent denial of justice which in itself can be divided into several obligations.[281] Indeed, the investigation and the apprehension of culprits is the part of the obligation which deserves due diligence, while the trial of arrested culprits is an obligation of result.[282] Consequently, investigating and apprehending also infer duties of due diligence. Last but not least, obligations "to ensure" also refer to due diligence duties but obviously, other expressions may equally refer to due diligence duties with terms like "vigilance" and "reasonable". In conclusion, due diligence duties may be implied in two ways. The easiest one uses a purposely flexible language in the formulation of an obligation such as "ensure", "vigilance", "reasonable" or "adequate". The second one resorts to the object of the obligation. Thereby, obligations to prevent, protect and investigate may[283] refer to a due diligence obligation depending on the nature of the matter they regulate.[284] In the context of this latter category, the object and goal of a treaty and the practice of States will be of crucial importance to determine if certain provisions aim at targeting private actors and States alike or not.

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no-harm rule.

[280] Here we can refer to the protection of the environment or the protection of investment.

[281] Riccardo Pisillo Mazzeschi, "The Due Diligence Rule and the Nature of the International Responsibility of States" *supra* note 32.

[282] *Id.;* The ILA also considered the maintenance of a judicial apparatus, the trial of culprits and redress as obligations of result while confirming that investigation requires due diligence. ILA Second Report at 20.

[283] These types of obligations may also be of result if it is so provided.

[284] Katja Samuel refers to a category of obligation called "PPIPR" for Protection, Prevention, Investigation, Punishment and Redress. Yet, Punishment and Redress resemble more obligations of result once the criterion of proper investigation is met. Katja L. H. Samuel, "The Legal Character of Due Diligence: Standards, Obligations, or Both?" *supra* note 198.

1.4. The Core Mechanisms of Due Diligence

Having seen that due diligence can be found in various provisions, and that it is a highly flexible concept, we now turn to its concrete mechanisms. These mechanisms are required anytime an obligation of due diligence is involved and are subject to the flexibility covered above. The first mechanism is a precondition for the application of due diligence obligations and its control. The second mechanism relates to what due diligence demands once it is triggered.

1.4.1. Control

The first of this mechanism is control. A glimpse of the issue of control appeared in the *British Claims* case where Max Huber recognized that due diligence obligations were, in the context of harm to foreigners, limited to the territory of the State[285] since the capacity of a State was limited to its territory for two reasons. First, within the territory of a second State, the sovereignty of the second State prevents the first State from exercising its own. Second, the absence of territorial sovereignty outside the borders of a State, practically limits its ability to control persons and activities beyond its borders. Control also appeared between the lines of the *Genocide* case. When the ICJ made the fulfilment of due diligence dependant on the "capacity to influence effectively the

[285] *British claims in Spanish Morocco,* at 636.

actions"[286] of a person, it referred to the control of the State over persons. Even clearer, the ITLOS stated in the *Activities in the Area* advisory opinion that "it is inherent in the 'due diligence' obligation of the sponsoring State to ensure that the obligations of a sponsored contractor are made enforceable."[287] Besides, the due diligence obligation to prevent transboundary harm also always refers, in its modern form, to "control" besides jurisdiction. Thereby, in the *Pulp Mills* case, the obligation to "preserve the aquatic environment" concerned all activities within the "jurisdiction and control of each party".[288] The second principle of the Rio Declaration sets the due diligence obligation to prevent damage to the environment by activities within the "jurisdiction or control" of the State.[289] Recently, the *South China Sea* arbitration found that the obligation to ensure that fishing vessels do not pollute the marine environment extended to areas under Chinese jurisdiction and control as the flag State.[290] In conclusion, it appears clearly that control is a necessary precondition to the fulfilment of due diligence obligations. Without control, the State cannot be expected to take diligent measures.

Within the territory of a State, territorial sovereignty provides a presumption of control. For Brownlie, "the State is under a duty to control the activities of private persons

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[286] *Genocide, supra* note 9 at para. 430.

[287] *Activities in the Area, supra* note 4 at para. 239.

[288] *Pulp Mills, supra* note 3 at para. 197. Since the obligation in question was part of a bilateral convention, this specific obligation focused on the territory of the two States. Thus, the tribunal used the expression "jurisdiction and control" rather than "jurisdiction or control" in order to exclude activities beyond the borders of the parties.

[289] Rio Declaration, Principle 2.

[290] *South China Sea, supra* note 2 at para. 971. Here, the use of "jurisdiction and" control does not limit the scope of the due diligence obligation to the territory of China since it is a flag State jurisdiction enforceable beyond Chinese territory.

within its State territory."[291] Jurisprudence has shown that this presumption can be reversed since some activities, events and persons cannot be permanently and effectively controlled by the State. Thereby, the US insisted on the length of its border in the *Caroline* case,[292] and the ICJ looked carefully into the "links of all kinds" between the State and the actors in question in the *Genocide* case.[293] Beyond the territory of the State however, States are not, in principle, required to control private actors.[294] In that case, due diligence cannot be expected beyond the territory of a State. Indeed, in the case of a violation by a private actor beyond the territory of a State, the State always finds refuge in its lack of control to justify its failure of due diligence. Fortunately, control can be required by treaties in areas beyond national jurisdiction and when it is the case, due diligence mechanisms apply normally.[295]

Finally, mention must be made of knowledge. In the early days of the theory of due diligence, control was not a necessary element as most activities were taking place in the territory of the State and control was thus assumed. Instead, knowledge was seen as a necessary element and kings were supposed to prevent harmful acts that they knew of or ought to have known of.[296] The importance of knowledge is seen in the theory of

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[291] Ian Brownlie, *System of the Law of Nations, State Responsibility, Part I* (Oxford: Clarendon Press, 1983) at 165.

[292] Extract from note from Dan Webster to Mr Fox, Washington, 24th April 1841.

[293] *Genocide, supra* note 9 at para. 430.

[294] Ian Brownlie, *System of the Law of Nations, State Responsibility, Part I, supra* note 291 at 165.

[295] *Id.*

[296] See Chapter 1, Section 1.

Grotius,[297] in the *Janes* case,[298] in the *Corfu Channel* case which used the term "knowingly"[299] and most recently the *South China Sea* tribunal connected the capacity of China to fulfil its due diligence obligation to the knowledge of Chinese authorities of the activities of its fishermen.[300] Going further, the requirement to know of a potential harm before taking diligent actions is reflected in the discussion on EIAs. In fact, Article 206 of the UNCLOS disposes that States should conduct EIAs when they have "reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment."[301] Similarly, the *Pulp Mills* and *Construction of a Road* cases both considered that only activities posing a risk must be evaluated through an EIA.[302] Following this reasoning, the Court found that Nicaragua had not breached its due diligence obligation by failing to conduct an EIA since Nicaragua's activity did not pose a risk of significant transboundary harm.[303] In other words, the obligation to conduct an EIA, which is part of the due diligence in the context of the no-harm rule,[304] is only triggered if the State knows beforehand that the activity poses a risk. Concretely this rationale is circular since the State will only know of the risk after the EIA is conducted. Yet, these reasoning in two stages evidences the importance of knowledge in certain due diligence obligations as a precondition of due diligence. In most cases, however,

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[297] Hugo Grotius, *De Jure Belli Ac Pacis, supra* note 33, see ch. XVII, XXI.

[298] *Janes, supra* note 92 at 87.

[299] *Corfu Channel, supra* note 18 at 22.

[300] *South China Sea, supra* note 2 at paras. 754, 755.

[301] UNCLOS, Art. 206.

[302] *Pulp Mills, supra* note 3 at para. 204; *Construction of a Road,* para. 104.

[303] *Construction of a Road, supra* note 6 at para. 105.

[304] *Pulp Mills, supra* note 3 at para. 204.

knowledge is overwritten by control as the control over an activity or an author suffice to trigger due diligence.

1.4.2. Regulation and Enforcement

Once a due diligence obligation is identified and is applicable, that is, when the precondition of control is satisfied, States must behave diligently. On this point, jurisprudence is particularly coherent and insightful. The ICJ considered that due diligence "not only [entails] the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement".[305] In essence, this statement has been followed by the *Activities in the Area* advisory opinion,[306] the *SRFC* advisory opinion[307] and the *South China Sea* arbitration.[308] The ITLOS advisory opinions also qualified obligations of due diligence as obligations to deploy best efforts.[309] Therefore, two elements are identified.

First, due diligence obligations require States to adopt regulations reflecting such obligations. This is a mechanism of transposition ensuring that regulations on the international level which are, strictly speaking, only applicable to States, become concretely applicable to private actors through domestic law. Noticeably, the flexibility of due diligence allows States to choose the regulation of their choice, be it law, decree or other forms, and it also allows them to adapt the content of the regulation to their

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[305] *Pulp Mills, supra* note 3 at para. 197.

[306] *Activities in the Area, supra* note 4 at para. 111.

[307] *SRFC, supra* note 5 at para. 131.

[308] *South China Sea, supra* note 2 at para. 944.

[309] *Activities in the Area, supra* note 4 at para. 110; *SRFC,* para. 129.

particular needs. As such, the domestic regulation does not need to entirely mirror the international obligation, which is most of the time vague, for as long as the essence of the international obligation is preserved.

Additionally, States must properly enforce such regulations in order to make them effective. Again, the modalities of this enforcement depend on the due diligence obligation in question, but certain elements such as knowledge, technology and repetition are common to all due diligence obligations. Thereby, in the case of an obligation to prevent a negative result, a State who knows of a particular situation posing a risk should take action. Likewise, in the case of an obligation to ensure a positive result, a State which knows of a situation of insufficiency should also take action. Otherwise, inaction will be seen as an improper enforcement. The use of new available technology or scientific knowledge must also be applied when possible. Finally, while a failure to take action in one instance may not evidence a lack of due diligence, repetition of this failure may indicate improper enforcement. In an international context, the reporting of the international community, consisting of States and international organizations, is particularly salient to evidence repeated failures.

2. Due Diligence: Specificities of Environmental Law

Due diligence obligations in the context of the law of the sea show strong similarities with due diligence obligations in environmental law. Indeed, due diligence obligations contained in the UNCLOS mostly concern the protection of the marine environment or fisheries. Considering that fisheries are themselves an essential part of the marine environment, the connection between the two is evident. Thus, whether for the

sake of sustainable use or for the protection of the marine environment itself, fisheries regulations often include environmental measures and considerations. For instance, quotas have the double objective to ensure the sustainable use of fisheries as a natural resource and to protect the marine environment, in which fisheries play a vital role. In this context, due diligence obligations in the law of the sea will strongly be impacted by environmental logic (2.1). Furthermore, the law of the sea also provides a fertile ground for the application of environmental principles (2.2).

Needless to say, the general framework surrounding the concept of due diligence equally applies in the specific fields of the law of the sea and the environment. Thereby, one can also find obligations to prevent within environmental law and the most iconic due diligence obligation in international law, the obligation to prevent transboundary harm, is originally an environmental obligation. Due diligence obligations are also identified in the same manner in these fields and they also vary depending on the States and depending on the matter they regulate. Likewise, due diligence obligations in the law of the sea and the environment equally require a degree of control from States to be effective. Finally, these due diligence obligations also call for the adoption of appropriate rules and measures followed by effective implementation.[310]

2.1. The General Content of Due Diligence in Environmental Law

The content of due diligence in both environmental law and the law of the sea in

[310] See also: Leslie-Anne Duvic-Paoli, *The Prevention Principle in International Environmental Law, supra* note 192 at 207.

itself is flexible as there are many kinds of environment. What transpires through jurisprudence is that the undertaking of EIAs is now considered as a requirement of due diligence.[311] Indeed, in order to protect the environment from their activities, States must know of the risks linked to their activities. EIAs, in the best scenario, highlight the existence of such risks and subsequently provide ways to deal with such risks. Therefore, EIAs constitute the starting point for every subsequent measure. However, the content of EIAs is left to the discretion of States. The ICJ refrained from dictating specific rules as to the content and methodology of EIAs and, instead, only asserted that regard must be given to the "nature and magnitude" of each project and that due diligence must be exercised in the conduct of an EIA.[312] Thus, while the opportunity to conduct an EIA is decided by international law, the content of an EIA is decided by domestic law. For that reason, the *South China Sea* tribunal resorted to an examination of Chinese law in order to decide on whether or not the 500-word statement[313] from China could be a sufficient EIA.[314] Finally, the monitoring of a project posing a continuous risk must be constant and not a one-time effort.[315]

Environmental due diligence also requires States to notify other potentially affected States of the risks linked to their activities. The ICJ considered in the *Construction of a Road* case that when an EIA "confirms the existence of a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify […] the potentially affected

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[311] *Pulp Mills, supra* note 3 at para. 204; *Construction of a Road, supra* note 6 at para. 104.

[312] *Pulp Mills, supra* note 3 at para. 205.

[313] *South China Sea, supra* note 2 at para. 904.

[314] *Id.,* para. 990.

[315] *Pulp Mills, supra* note 3 at para. 205; *Construction of a Road, supra* note 6 at para. 161.

State."[316] This notification should, in principle, be followed by consultation between the two States with the aim of preventing or mitigating the risk.[317] This consultation can, alike the monitoring, be a continuous process as transboundary effects are evolving.[318] To ensure fairness, the origin State does not have to obtain a prior agreement from affected States following its notification as this would amount to a right of veto.[319] A difficult balance is therefore present since the origin State is not bound by the consultation with the potentially affected States. However, it is probably a diligence duty to consider the interests of the potentially affected States when proceeding to an activity. Ignoring their recommendations and interests may result in a failure to show due diligence and bears consequences if significant harm occurs. Lastly, the Court also appeared to give importance to the sequence of these obligations and found the obligations to notify and consult contingent to a prior conduct of an EIA.[320]

2.2. The Influence of Environmental Principles on Due Diligence

Following the Rio Declaration in 1992, environmental principles have seen more use in the international arena. Despite the controversies, environmental principles have

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[316] *Construction of a Road, supra* note 6 at para. 104.

[317] *Id.*

[318] Hanqin Xue, *Transboundary Damage in International Law* (Beijing: Cambridge University Press, 2003) at 173.

[319] *Affaire du Lac Lanoux (Espagne v. France),* Award, [1957] R.I.A.A. vol. 12, 281 at 306.

[320] Jutta Brunnée, "International Environmental Law and Community Interests, Procedural Aspects" *supra* note 244 at 158.

been referred to by both international regulations and judicial decisions. Even though their precise scope and position in the hierarchy of norms remain blurry, it is needless to say that they have influenced the practice of international law. In that context, the concept of due diligence may as well be influenced by these principles. Three environmental principles will be of importance in our study: the precautionary principle, the sustainable development and the principle of common but differentiated responsibilities. But before all, it may be useful to precisely state what a principle is and in what way it differs from a regular obligation.

2.2.1. The Nature of a Principle

Often seen as a reference for identifying the sources of international law,[321] the statute of the ICJ provides three categories of sources, among which are the "general principles of law recognised by civilized nations".[322] No exact definition exists regarding general principles but a common understanding can be identified.

As a starting point it must be said that principles are not necessarily general and can be sectoral. Indeed, the principle of sustainable development has little to say about criminal law while being of real importance in environmental and economic law. It is also interesting to note that principles have not been derived from domestic systems as

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[321] Rüdiger Wolfrum, "Sources of International law" (Oxford: Max Planck Encyclopedias of International Law, 2011). It has to be noted that this list is non-exhaustive (for example, unilateral acts are not mentioned) and that the reference to "civilized nations" is nowadays obsolete.

[322] Statute of the International Court of Justice, Art. 38.

originally intended,[323] but were rather drawn from international "considerations"[324] or agreements.[325]

Secondly, principles serve as interpreting tools[326]. Contrary to other rules of law which set specific requirements or conditions, principles set objectives, often drawn from morality, giving a direction without referring to specific obligations.[327] As such, principles help flesh out vague obligations. Thereby, States have to consider the relevant principles when fulfilling their obligations. This process does not automatically remove the vagueness of an obligation but hones the edges of an obligation. Naturally, their impact on other obligation may evolve with time and in that sense, they participate to the progressive development of law.[328] This interpretive role is also particularly helpful when several rules of law are applicable. In that context, principles serve as a compass providing directions for compromising rules. This phenomenon is particularly common with regards to environmental law and economic law.

Thirdly, in their quality of source of law, principles may have a degree of law-making effect. This feature is linked to their interpretive role as interpretation may by itself create new concrete obligations. For instance, an environmental principle may oblige the State to adopt more stringent procedures to protect the environment. Principles may also create rules of law in the absence of custom or treaty. As a matter of fact, this

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[323] Rüdiger Wolfrum, "Sources of International law" *supra* note 321.

[324] *Corfu Channel, supra* note 18 at 22.

[325] The Rio Declaration for example.

[326] Rüdiger Wolfrum, "Sources of International law" *supra* note 321.

[327] Simon Marr, *The Precautionary Principle in the Law of the Sea* (The Hague: Martinus Nijhoff Publishers, 2003) at 12.

[328] Rüdiger Wolfrum, "Sources of International law" *supra* note 321.

was even their original role as the drafters of the ICJ statue sought to avoid *non liquet* decisions.[329] The *Corfu Channel* case illustrated this law-making role when the Court derived the concrete obligation for Albania to notify the United Kingdom of the minefield from "certain general and well-recognized principles".[330]

Finally, principles do not always possess customary value. Despite being sometimes formulated in widespread agreements such as the Stockholm Declaration and the Rio Declaration, it would be premature to consider all principles as customary due to their lack of implementation.[331] However, nothing prevents certain principles from having a regional customary value. Thus, principles follow the same pattern as normal rules of law. They can have customary value, but not necessarily, and even when they do, this value may only be regional. A principle can also have an application limited to a specific legal framework if it has been recognized as applicable to one element (treaty provision, organization). Thereby, the ITLOS recognized that while the precautionary approach is not generally binding, its implementation into the International Seabed Authority (ISA) regulations makes it binding on States regarding the exploitation of deep-sea minerals.[332]

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[329] Carlo Focarelli, *International Law as Social Construct, The Struggle for Global Justice* (Oxford: Oxford University Press, 2012) at 327.

[330] The Court names three different principles: elementary considerations of humanity, freedom of maritime communication and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States. See *Corfu Channel, supra* note 18 at 22.

[331] Meinhard Schröder, "Precautionary Approach/Principle" (Oxford: Max Planck Encyclopedias of International Law, 2014).

[332] *Activities in the Area, supra* note 4 at para. 127.

2.2.2. The Precautionary Principle/Approach

Perhaps the most popular environmental principle, the precautionary principle, is sometimes referred to as the precautionary approach. For some, this difference is made with the aim of reducing its legal character while encouraging flexibility[333] but for most, both expressions are synonymous.[334] Likewise, there is no unique definition of the precautionary principle,[335] but its essence is well represented by the definition provided by Principle 15 of the Rio Declaration:

> "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[336]

Thus, contrary to the logic of prevention which aim to prevent known risks, the precautionary principle aims at dealing with situations of uncertain risks. Consequently, the precautionary principle requires measures at an earlier stage than the preventive logic and permits a lower level of proof to be used for taking measures instead of waiting for irrefutable proofs.[337] This contrast evidences the evolution of environmental law since

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[333] Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment, supra* note 201 at 155.

[334] Meinhard Schröder, "Precautionary Approach/Principle" *supra* note 331.

[335] We can find a different definition of the precautionary principle in, for instance, the Rio Declaration (principle 15), the OSPAR Convention (Art. 2(2a)) and the UN Fish Stock Agreement (Art. 6(2)).

[336] Rio Declaration, Principle 15.

[337] Meinhard Schröder, "Precautionary Approach/Principle" *supra* note 331.

the *Trail Smelter* arbitration,[338] which required damage to be demonstrated by "clear and convincing evidence".[339] Obviously, the principle leaves place for interpretation since the degree of uncertainty triggering the need for precautions is not expressed. States may sometimes have to show that an activity is "probably safe" and at other times that the activity is "definitely safe".[340] Certain variations of the precautionary principle may also add specific elements which can add to this variability. Thereby, Principle 15 only requires from States to apply the precautionary approach "according to their capabilities". Finally, while it has been said that the precautionary principle reverses the burden of proof[341] (thus giving the responsibility to the promoter of an activity to prove the absence of risk), this is, at least, not always the case. This was stated in clear terms in the *Pulp Mills* case where the ICJ considered that "while a precautionary approach may be relevant […], it does not follow that it operates as a reversal of the burden of proof."[342]

Turning to the question of the impact of the precautionary principle on due diligence, it appears that the precautionary principle will particularly influence due diligence obligations to prevent environmental harm. Indeed, while within the classic no harm logic, diligent measures merely need to address "significant" harm or known risks, the precautionary principle imposes on States to take diligent measures even in times of scientific uncertainty.[343] Thereby, measures considered diligent enough for a preventive

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[338] Lada Soljan, "The General Obligation to Prevent Transboundary Harm and its Relation to Four Key Environmental Principles" *supra* note 244.

[339] *Trail Smelter,* at 1965.

[340] *Id.*

[341] Lada Soljan, "The General Obligation to Prevent Transboundary Harm and its Relation to Four Key Environmental Principles" *supra* note 244.

[342] *Pulp Mills, supra* note 3 at para. 164.

[343] Yann Kerbrat, "Le Standard de *Due Diligence,* Catalyseur d'Obligations Conventionnelles

logic may not be sufficient in a precaution logic. Concretely, this will impact the quality of EIAs, quotas, the amount of acceptable pollution and even the use of certain potentially dangerous products.

2.2.3. The Concept of Sustainable Development

Sustainable development is among the principles of the Stockholm Declaration[344] and the Rio Declaration,[345] but it is not always referred to as a principle. It appears more as a desirable set of objectives than a principle. Yet, if we look carefully at it, it also offers an interpretive tool with the potential to influence other norms of international law just like principles. In essence, sustainable development attempts to promote a healthy model of development for both present generations and future generations. To his end, two fields are particularly impacted: the economy and the environment. With both posited on an equal foot, it implies that economic activities should not threaten, beyond a certain threshold, the environment. And in the meantime, the protection of the environment should not impair, beyond what is necessary, the economic development of States. Besides, this double objective must be sought with regards to future generations (inter-generations) and the present generation (intra-generation).[346]

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et Coutumières pour les Etats" in SFDI, ed., *Le Standard de Due Diligence et la Responsabilité Internationale* (Paris: Pedone, 2018) 27 at 37.

[344] Stockholm Declaration, Principle 11.

[345] Rio Declaration, Principle 3.

[346] Ulrich Beyerlin, "Sustainable Development" (Oxford: Max Planck Encyclopedias of International Law, 2013).

Consequently, sustainable development will have an influence on due diligence comparable to the influence of the precautionary principle. It will particularly impact the conduct of EIAs and measures, allowing a degree of pollution considering the natural assimilative capacity of the environment may fail the diligence test once a sustainable point of view is accepted. As such, sustainable development will mostly impact due diligence obligations to prevent certain negative results, but may also toughen positive obligation to achieve certain objectives. Since it also promotes intra-generational equity, sustainable development may also reinforce the diligence requirement to consult and cooperate. Sustainable development has been referred to in the *Gabčíkovo-Nagymaros* case in order to reinforce the evolutive assessment of projects.[347]

2.2.4. The Concept of Common but Differentiated Responsibilities

Once again, the concept of common but differentiated responsibilities may not be called by all a principle despite being listed in the Stockholm[348] and Rio[349] Declarations. Yet, this concept can influence other rules of law just as principles do.[350] In itself, the core idea of common but differentiated responsibilities reflects the intra-generational equity seen in sustainable development.[351] This idea argues that since States are not all, and have not all, contributed to environmental degradation to the same degree,

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[347] *Gabčíkovo-Nagymaros*, para. 140.

[348] Stockholm Declaration, Principle 12.

[349] Rio Declaration, Principle 7.

[350] Ellen Hey, "Common but Differentiated Responsibilities" (Oxford: Max Planck Encyclopedias of International Law, 2011).

[351] *Id.*

their responsibility should be differentiated all the while recognizing that the preservation of the environment is a common responsibility.

Concretely, this principle reinforces the duties of developed States while mitigating the duties of developing States. As such, developed States will have more stringent due diligence duties than their counterparts. In common regimes, this principle also advocates for the transfer of technology, but transfer of financial and human resources can also be envisaged and even be seen as a diligent measure.[352]

Interestingly, we have seen that due diligence already incorporates flexibility. As such, developing States cannot be required to adopt the same measures or achieve the same results as developed States. Therefore, the common but differentiated responsibilities principle simply seems to confirm the differentiation already operated by the concept of due diligence. Yet, it is interesting to notice that in the context of environmental due diligence obligations both versions of differentiation can be mitigated. Indeed, the ITLOS found in the *Activities in the Area* advisory opinion that equality of treatment was preferable for the protection of the marine environment.[353] Similarly, when assessing the due diligence obligation to conduct EIAs in the *Pulp Mills* case, the ICJ followed the examples of European and American regulations rather than the practice of similarly developed States.[354] This logic is also illustrated by the frequent use of the

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[352] Eva Romée van der Marel, "ITLOS issues its Advisory Opinion on IUU Fishing", *The NCLOS Blog* (21 April 2015), available at: < https://site.uit.no/nclos/2015/04/21/itlos-issues-its-advisory-opinion-on-iuu-fishing/>.

[353] *Activities in the Area, supra* note 4 at para. 159.

[354] Yann Kerbrat, "Le Standard de *Due Diligence,* Catalyseur d'Obligations Conventionnelles et Coutumières pour les Etats" *supra* note 343 at 35.

terms "best practices".[355] This phenomenon does not signify that the concept of due diligence loses its inherent flexibility. Rather, it means that as all rules of law (except rules of *jus cogens*), due diligence obligations can be modified by superior considerations. In other words, while normally due diligence obligations adapt themselves to the specific situations of their subjects, in the context of the protection of the environment, a principle of equality of treatment[356] may be applicable to some degree.

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[355] UNCLOS, Art. 194(1).

[356] *Activities in the Area, supra* note 4 at para. 159.

SECTION 3: Definition of Due Diligence and High Sea Prospects

Having analysed in details the different components of the concept of due diligence, we are now able to see that due diligence is a concept characterizing certain international obligations alike a label. In that sense, international obligations can be of result, of conduct or of due diligence. The characteristics of this concept have emerged through various fields of international law and a wide range of judicial decisions. Following our previous interpretations, we are now able to identify the purposes and the key elements of the concept of due diligence. Bearing this in mind, we will then turn to its possible application to the context of the high seas.

1. The Concept of Due Diligence

The concept of due diligence relates to obligations requiring a certain behaviour from the State, assessed with regards to international standards and to the specific situation of the State. They differ from obligations of conduct[357] in that they require the best efforts of the State and incorporate a higher degree of flexibility.[358] Most importantly, due diligence obligations require a degree of control from the State to be successful.

1.1. Purpose

[357] But they can be seen as a subcategory of obligation of conduct.

[358] The difference is subtle but the emphasis on the best effort and flexibility makes the uniqueness of due diligence. For instance, obligations to cooperate may not be seen as due diligence obligations since they do not require best efforts and are not flexible.

Over the centuries, the concept of due diligence has been applied to various issues but its purpose has remained the same. The concept of due diligence seeks to circumvent the irresponsibility of the State for acts of private actors. While it seemed unfair to hold the State fully responsible for all the acts of private actors under its jurisdiction or control, it equally seemed unfair to hold the State unaccountable for all activities happening within its territory or control. In that context, due diligence offers a compromise by asking the State to provide its best efforts in order to prevent wrongful acts within its jurisdiction and control. Consequently, States can sometimes face responsibility following an act of a private actor, if they fail to show due diligence, but not always; *i.e.,* if due diligence has been exercised but the wrongful act happened anyway. In that sense, due diligence positions itself between the classic rule of non-attribution of the acts of private persons to the State,[359] and automatic liability.[360] Due diligence was therefore firstly envisaged in order to extend the reach of international regulations to private individuals through the intermediary of the State.

Yet, the idea of best efforts, inherent to the concept of due diligence, was also particularly fitting regarding the acts of the State itself. Indeed, if States should make their

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[359] Alexander Kees, "Responsibility of States for Private Actors" (Oxford: Max Planck Encyclopedias of International Law, 2011).

[360] The automatic liability of the State following the acts of private persons has been much attenuated since the medieval period. As of today, this form of liability only follows injurious but lawful acts committed by private actors or the State itself. It is called strict liability and is triggered as soon as an injurious event happens, regardless of the diligence of the State. Since this type of liability is particularly strict on the State, it is only operated in specific, highly hazardous fields, such as space exploration and the nuclear industry. See: Attila Tanzi, "Liability for Lawful Acts" *supra* note 171.

best efforts to prevent environmental harm by private actors, it would be absurd if they should not make the same efforts to prevent their own environmental harm.[361] For that reason, the concept of due diligence applies to private activities and State activities alike.

To conclude, it can thus be said that due diligence is particularly relevant in two types of cases. First, it is relevant when the main targets of an international regulation are private actors.[362] In this case, States cannot be expected to always control their private actors and, therefore, they can only be required to make their best efforts.[363] Second, due diligence is relevant for international obligations that are impossible to fulfil in each and every case.[364] With this type of obligation, the problem shifts from the degree of control to the degree of risk. As such, these obligations are indifferent to the private or public character of the activity. Environmental obligations are particularly illustrative.

1.2. Flexibility

It is clearly established that due diligence is a flexible concept. As we have seen, thresholds of diligence will vary according to the specific situations of States. As such,

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[361] Riccardo Pisillo Mazzeschi, "Le Chemin Etrange de la *Due Diligence*: d'un Concept Mystérieux à un Concept Surévalué" *supra* note 16.

[362] Nigel Bankes, "Reflections on the Role of Due Diligence in Clarifying State Discretionary Powers in Developing Arctic Natural Resources" (2020) Polar Record at 3, available at: <https://www.cambridge.org/core/journals/polar-record/article/reflections-on-the-role-of-due-diligence-in-clarifying-state-discretionary-powers-in-developing-arctic-natural-resources/C74F77D7D4A767E7E4565335528E8CAD>.

[363] *Activities in the Area, supra* note 4 at para. 110.

[364] Nigel Bankes, "Reflections on the Role of Due Diligence in Clarifying State Discretionary Powers in Developing Arctic Natural Resources" *supra* note 362 at 3.

States will have a lower threshold of diligence in times of insurrections or war. Similarly, developing States will need to show less efforts than developed States to be considered diligent.[365] Of course, this type of differentiation based on the development of a State can be attenuated for the sake of higher considerations. Thus, an equality of treatment seems to take place in the field of diplomatic protection and environmental protection.

The flexibility of due diligence also appears with regards to the content of the diligence. Indeed, what is considered diligent will vary according to the circumstances of each case. Naturally, this means that the protection of diplomats will require different measures from the protection of the environment. But it also means that, within the protection of the environment itself, diligence will vary. This variance will take into account the natural characteristics of the environment in question, the effects and types of human activities, the scientific data available and various other considerations.

1.3. Content

As already mentioned, the content of due diligence is flexible. In essence, it resorts to what is considered diligent in a particular situation considering the situation of the State. Nevertheless, it generally requires States to adopt proper regulations transposing the substance of their international due diligence obligations while also

[365] This variance in the thresholds of diligence was illustrated by the ICJ in the Nicaragua case: "if the flow of arms is in fact reaching El Salvador without either Honduras or El Salvador or the United States succeeding in preventing it, it would clearly be unreasonable to demand of the Government of Nicaragua a higher degree of diligence than is achieved by even the combined efforts of the other three States." *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States),* Judgement, [1986] ICJ Reports 14, para. 157.

assuring a proper enforcement of those regulations. The content of the regulations will be informed by the knowledge and/or science available but also by international standards[366] when such standards exist. As a consequence of this international standardisation, due diligence measures should not vary exceedingly between States.

Additionally, principles of law may also influence the content of the regulations by making them more strict, as the example of the precautionary principle shows; they may force it to consider to the interests of others, as observed in the balance of interest and common but differentiated responsibilities; or they may even force it to consider the needs of future generations, as observed with sustainable development. Importantly, what is considered diligent at a certain time may not be sufficient at a later point if the evolution of knowledge/science highlights new dangers or more appropriate methods and solutions.

1.4. Identification

Key terms can help identify due diligence obligations in treaties. The ITLOS has particularly insisted on obligations "to ensure" identifying due diligence obligations.[367] Other terms can include "vigilance", "reasonable" or "adequate" or other expressions as long as the language of the obligation implies flexibility. However, other obligations using a stronger and less flexible language can also be seen as due diligence obligations. Article 192 of the UNCLOS specifies that "States have the obligation to protect and preserve the

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[366] The *diligentia quam in suis* has been rejected at first in the *Alabama* case and later by Max Weber in the *British claims*. See also Riccardo Pisillo Mazzeschi, "Le Chemin Etrange de la *Due Diligence*: d'un Concept Mystérieux à un Concept Surévalué" *supra* note 16.

[367] *Activities in the Area, supra* note 4 at para. 110.

marine environment." In such a case, it is the nature of the obligation that will hint at a due diligence obligation. If it is unreasonable to expect the State to always fulfil the obligation successfully, the said obligation must be considered as a due diligence obligation. This effect follows the purpose of due diligence and is particularly true for the category of obligations to prevent events but also for obligations to protect and investigate.

2. Due Diligence in the High Seas

As we have seen, the concept of due diligence is relevant for two types of obligations. It is useful when international regulations aim at targeting private actors (along with States), and where objectives are quasi impossible to achieve in every single case. These two types of obligations can both be found in the law of the sea. Indeed, most activities taking place on the seas and oceans are conducted by private actors. Besides, the protection of the marine environment constitutes a crucial part of the law of the sea and is naturally composed of desirable objectives translated into obligations of conduct rather than obligations of result. It is for these two reasons that the ITLOS has interpreted various obligations of the UNCLOS as due diligence obligations. By doing so, the ITLOS opened the UNCLOS to external standards of reference based on which the diligence of States will be assessed and, therefore, evidenced that due diligence can be a tool for evolutive interpretation. This judicial development has not yet directly concerned the high seas, but shows significant potential for this maritime zone. Indeed, as a development tool, the concept of due diligence can help flesh out a legal framework of the high seas which remains underdeveloped due to its inherent lack of State coverage. Therefore, we will

now proceed to apply the components of due diligence previously identified to the context of the high seas starting with an overview on the state of the oceans in order to illustrate the relevance of the concept.

2.1. Overview of High Seas Fisheries

For millennia, the oceans have served as a source of food, natural resources and as a medium of transportation and communication for humankind. Compared with the immensity of the oceans,[368] human activities have historically, for the most part, been harmless. However, with the rapid industrialisation of the 20th century, the impact of human activities on the oceans has grown to worrying levels. Indeed, technological progress produced increased pollution in the oceans and facilitated overfishing practices. As of today, no area of the marine environment is unaffected by human activities, and this deterioration is not only having critical effects on the quality of the oceans, but also on the planet's climate in general.[369] In that context, international law plays a role of increasing importance. Initially preoccupied with sovereignty issues such as territorial delimitations, the problems of human activities soon attracted the attention of governments. The first major oil spill, the Torrey Canyon incident in 1967, was the catalyst to holding the MARPOL convention in 1973[370] and forming other

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[368] The oceans cover 72% of the surface of the Earth and 64% of the oceans are considered high seas.

[369] James Harrison, *Saving the Oceans Through Law: The International Legal Framework for the Protection of the Marine Environment* (Oxford: Oxford University Press, 2017), p. 1.

[370] The International Convention for the Prevention of Pollution from Ships (MARPOL) superseded the insufficient OILPOIL convention which was more permissive on the

environmentally conscious treaties.[371] The UN Conference on the Human Environment held in Stockholm in 1972 also triggered a series of regional seas programmes[372]. It is, however, only with the adoption of the UNCLOS in 1982 that a comprehensive universal legal framework, regulating all types of activities on the oceans, appeared. Entered into force in 1994, the UNCLOS has the difficult task to tackle numerous issues involving public and private actors alike, and its relevance is profoundly challenging on two intertwined issues: fisheries and the protection of the marine environment.

In 2016, the total number of fishing vessels in the world was estimated at 4.6 million with the largest amount being in Asia.[373] With a catch of 90.6 million tonnes, the capture has been relatively stable since the 1980s.[374] However, the fraction of stocks fished within biologically sustainable levels has decreased from 90 percent in 1974 to 66.9 percent in 2015[375] with 59.9 percent of stocks fished to their maximally sustainable limits and only 7 percent remaining underfished.[376] Therefore, in 2015, 33.1 percent of fish stocks were fished beyond their sustainable limits while 59.9 percent were fished at their maximum capacity. This worrisome observation requires strong actions, especially

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discharge of oil at sea.

[371] Such as the 1969 International Convention on Civil Liability for Oil Pollution Damage, the 1971 International convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage or the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter.

[372] Doris König, "Marine Environment, International Protection" (Oxford: Max Planck Encyclopedias of International Law, 2013).

[373] 3.5 million for Asia. See: FAO, The State of World Fisheries and Aquaculture: Meeting the Sustainable Development Goals (2018) [hereinafter SOFIA 2018] at 35.

[374] *Id.,* at 2.

[375] *Id.,* at 6.

[376] *Id.,* at 40.

if the United Nations' Agenda for Sustainable Development is to meet its 2030 deadline[377]. No improvement can be claimed yet but the situation seems to have stabilized[378]. In this context, it must be recognized that high seas fisheries, which include discrete high seas fish stocks (DHSFS) and deep-sea fisheries along straddling stocks, account for a minor percentage of global capture. With estimates ranging from 3 million tonnes[379] to 10 million tonnes[380] in 2014, high seas fisheries account for 3 to 12 percent of the world capture.[381] Yet, despite this seemingly low percentage, some high sea stocks are particularly vulnerable due to their slow growth.[382] Besides, deep-sea fisheries are often located around marine ecosystems such as seamounts or corals, which are vulnerable to bottom trawl fishing.[383] Beyond fisheries, human activities may also have consequences on the environment of the high seas. Such consequences can impair the quality of the marine environment but also other rights of third States. If indeed, rare species go extinct,

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[377] The Sustainable Development Goals (SDG) set in 2015 include 17 goals among which is the conservation and sustainable use of the oceans, seas and marine resources (Goal 14: Life Below Water).

[378] SOFIA 2018, *supra* note 373 at 40.

[379] This number only accounts for reported catch and is therefore a minimum estimation. Data from Sea Around Us available on: <http://www.seaaroundus.org/data/#/global?chart=catch-chart&dimension=taxon&measure=tonnage&limit=10&subRegion=2>.

[380] Alex D. Rogers *et al,* "The High Seas and Us: Understand the Value of High-Seas Ecosystems" (2014) Global Ocean Commission; available on: <https://www.mpaaction.org/sites/default/files/Rogers%20et%20al_2014_Understanding%20the%20Value%20of%20High-Seas%20Ecosystems.pdf>.

[381] On a total of 91.2 million tonnes. See SOFIA 2018, *supra* note 373 at 4.

[382] Yoshinobu Takei, *Filling Regulatory Gaps in High Seas Fisheries: Discrete High Seas Fish Stocks, Deep-sea Fisheries and Vulnerable Marine Ecosystems* (Leiden: Martinus Nijhoff Publishers, 2013) at 2.

[383] *Id.,* at 3.

it is not only the environment that suffers but also the opportunities of States to find precious genetic resources. Therefore, while our discourse often seems to focus on the protection of the marine environment, it actually covers a range of sub challenges all depending on a healthy marine environment.

Naturally, any action in areas beyond national jurisdiction remains more difficult since they are beyond the coverage of States' laws and enforcement capabilities. Only international law can regulate such areas and the almost universally ratified[384] UNCLOS appears as the most relevant tool. Yet, even under the UNCLOS, the high seas remain dominated by the principle of freedom of the high seas[385] and limits have to be deduced from other general provisions. This will include *inter alia*[386] the obligation to show due regard for the interests of other States (Article 87(2)), the obligation to cooperate in the conservation of the living resources of the high seas (Articles 117-119) and the general obligation to protect the marine environment (Article 192). Obviously, these obligations are vague and require substance to flesh them out. It is also in that role that due diligence fits perfectly.

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[384] 168 parties as of April 2020, see <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en>.

[385] UNCLOS, Art. 87(1). The freedom of the high seas includes at least the freedom of fishing, the freedom of navigation, the freedom of overflight, the freedom to construct artificial installations and the freedom of scientific research. See also Tore Henriksen, "Revisiting the Freedom of Fishing and Legal Obligations on States Not Party to Regional Fisheries Management Organizations" (2009) 40:1 Ocean Development and International Law 80.

[386] Other limits are more explicitly stated such as the prohibition of slavery or piracy but they are only a few.

2.2. The Necessity of Due Diligence

Clearly, the legal regime of the high seas faces two challenges. First, it is a regime regulating mostly private activities. Second, it is composed of relative obligations that cannot be fulfilled in every situation.[387] Therefore, due diligence is extremely relevant for activities on the high seas as it is tailored to answer such situations. Besides, conducting activities on the high seas and monitoring them pose a technological and logistical challenge for States. It follows that technologically advanced States have more capabilities compared with developing States. Therefore, strict obligations of result would produce unfair situations. On the one hand, stringent obligations would only be fulfilled by developed States while leaving developing States with a choice between a high risk of failure or non-participation. On the other hand, weak obligations would satisfy everyone but leave the high seas with weak protection. Thus, considering the variety of technological and logistical capabilities of States, due diligence obligations are a perfect tool to accommodate all States as they weight differently depending on the capacities of States. Similarly, due diligence obligations also show enough flexibility to apply to a wide range of situations. For instance, while the content of the obligation will vary in every context, the obligation to protect the marine environment itself can equally apply to the construction of installations and fishing.

Bearing these elements in mind, due diligence obligations seem perfectly fitted to deal with high seas activities. Yet, as we have seen, due diligence obligations entirely

[387] Both because, States cannot absolutely control private actors and because certain activities possess unforeseeable risks.

rest on the control of States. From the early theories of Grotius to the recent ITLOS jurisprudence, the control of States had to be established in order to even consider the possibility of a State to act with diligence. In that sense, control is a precondition to the relevance of due diligence obligations and while control can be assumed within the territorial jurisdiction of States, it cannot be assumed in the same way beyond the territorial jurisdiction of States. On the contrary, control needs to be established in such areas.

The next chapter will deal with the question of control along the identification of relevant sources of due diligence obligations on the high seas.

CHAPTER III: The Viability of Due Diligence on the High Seas and the Issue of Control

When the Seabed chamber of the ITLOS delivered its *Activities in the Area* advisory opinion, the tribunal proved the applicability of the concept of due diligence to activities in the Area.[388] In the same fashion, the ITLOS applied due diligence in the context of fisheries within foreign EEZ in 2015.[389] While due diligence had been shaped in the context of transboundary harm, these two examples brought a new perspective to due diligence as they concerned activities taking place far away from State territory. The arbitration on the *South China Sea* confirmed such applicability by reaffirming that the protection of the marine environment enshrined in article 192 of the UNCLOS concerned all maritime areas,[390] thus including the high seas, while being at the same time an obligation of due diligence.[391] This common conclusion on the applicability of due diligence in different maritime zones and on different activities must not overshadow the difficulties behind such reasoning. As a matter of fact, the two cases from the ITLOS were advisory opinions and their conclusions were mostly theoretical. The *South China Sea* arbitration addressed concrete facts, but with evidence so overwhelming that the logic of the tribunal was not really put to the test. Therefore, even if it can now be said that due diligence is applicable in such a context, details remain unclear and need to be clarified

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[388] *Activities in the Area, supra* note 4 at paras. 110-111.

[389] *SRFC, supra* note 5 at para. 125.

[390] *South China Sea, supra* note 2 at para. 940.

[391] *Id.,* para. 964.

for the sake of future decisions.

As we have seen, the concept of due diligence places responsibility for negligence on the State under whose jurisdiction and control a harmful activity has taken place. Thus, at the heart of the theory lies the notion of control. Without control over the activity, the State is unable to prevent or regulate it and consequently, the State cannot be held responsible for negligence. In this situation, the State shows inability rather than unwillingness. In some instances, however, control is presumed if the activity in question is taking place in the State's territory. This presumption can be seen in recent cases but in old jurisprudence as well. Indeed, while control was said to be, in theory, a key element of due diligence,[392] it was not often involved in adjudications because it was automatically presumed.[393] On the contrary, control was questioned when the State tried to evade responsibility. Thereby, the United States in the *Caroline* case claimed an absence of control on their border in order to justify their innocence[394]. In the case of transboundary harm, it has been established since the *Trail Smelter* that the State could be held responsible for a lack of due diligence over activities taking place on its territory but neither the *Trail Smelter* tribunal nor the ICJ in the *Pulp Mills* case questioned the control of respectively Canada and Uruguay, respectively, on the activities in question

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[392] See the theories of Grotius and Hall in Chapter 1, Section 1.

[393] The *Janes* and *Youmans* cases, *supra* note 92, did not question the control of Mexico over the places where crimes had taken place while Max Huber implicitly recognized the cruciality of control through his finding on the mutual dependence of responsibility and control. See Chapter 1, Section 1.

[394] Extract from note from Dan Webster to Mr. Fox, Washington, 24th April 1841.

despite affirming that the obligation to prevent harm itself concerned activities under the "jurisdiction and control" of the State.[395] Control was therefore presumed.

In the context of activities taking place far away from the territory of the State however, such control cannot be presumed. Thus, to find an application of the concept of due diligence in such cases, it is vital to determine if a form of control exist. With respect to activities taking place on the high seas, such a question will inevitably raise the issue of the genuine link between the flag State and the vessel.

Consequently, to apply due diligence in the context of the high seas, not only will we have to find obligations possessing a due diligence character (Section 1) but also analyze the issue of control and how it can be required beyond the territorial limits of the State (Section 2). Concerning the existence of due diligence obligations, our focus will be on the UNCLOS and several related instruments as they provide the main legal framework applicable to the high seas but also address the need for effective control.[396] In return, the issue of control will raise the classic problem of the "disingenuousness"[397] of the genuine link.

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[395] *Pulp Mills, supra* note 3 at paras. 193, 197.

[396] The analysis of other sectoral, regional and bilateral agreements would go beyond the scope of this thesis.

[397] Rosemary Rayfuse, "The Anthropocene, Autopoiesis and the Disingenuousness of the Genuine Link: Addressing Enforcement Gaps in the Legal Regime for Areas Beyond National Jurisdiction" in Erik J. Molenaar & Alex G. Oude Elferink, eds., *The International Legal Regime of Areas Beyond National Jurisdiction: Current and Future Developments* (Leiden: Martinus Nijhoff Publishers, 2010) 166.

SECTION 1: Legal Basis of Due Diligence Obligations on the High Seas

In order to identify obligations of due diligence and, in accordance with our previous findings, we can search for key elements of language referring to "obligations of conduct" and for obligations to protect, prevent and investigate.[398]

Concerning obligations of conduct, the *Pulp Mills* case confirmed an existing correlation.[399] This correlation between both has also been confirmed in the ITLOS advisory opinion on the *Activities in the Area.* Indeed, in paragraph 110 of the decision, the special chamber for the seabed pointed out that obligations to ensure "may be characterized as an obligation 'of conduct' and not 'of result', and as an obligation of 'due diligence'."[400] From that point, the chamber examined the provisions of the UNCLOS and was able to draw due diligence obligations out of all the obligations "to ensure" within the related part of the convention.

Concerning obligations to protect, the *South China Sea* arbitration interpreted the obligation to preserve and protect the marine environment contained in Articles 192 and 194 as an obligation requiring to ensure that activities within the jurisdiction and control of the State do not harm the marine environment.[401] In other words, the tribunal translated the obligation to protect as an obligation to ensure and from there was fully able to pursue the jurisprudence of the ITLOS on due diligence.

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[398] On the keys to identify due diligence obligations, see Chapter 2, Section 2.

[399] *Pulp Mills, supra* note 3 at para. 111.

[400] *Activities in the Area, supra* note 4 at para. 110.

[401] *South China Sea, supra* note 2 at para. 944.

Bearing these keys in mind, the UNCLOS itself appears to be the first instrument in which to find due diligence obligations applicable to the high seas. With 320 articles and 9 annexes, the UNCLOS deals more or less with every aspect of the oceans. Yet, some regimes are more developed than others. Indeed, compared with the EEZ regime, the high seas regime is left rather undetailed. Unsurprisingly, this discrimination is the result of a traditional emphasis on the freedom of the high seas[402] combined with the natural interest of States to preserve their coastal rights. Therefore, answering the shortcomings of the high seas' legal regime, several instruments were later adopted mostly under the impulse of the FAO and the IMO. Together, the UNCLOS and those various instruments provide an improved version of the high seas' legal framework. Yet, while the IMO met a reasonable success with the MARPOL convention[403] and the SOLAS convention,[404] the results of the FAO regarding high sea fisheries happens to be more nuanced. With only 43 parties in the Compliance Agreement[405] and 91 parties in

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[402] Tore Henriksen, "Revisiting the Freedom of Fishing and Legal Obligations on States Not Party to Regional Fisheries Management Organizations" *supra* note 385, pp. 80-96; Victor A. M. F. Ventura, "Tackling Illegal, Unregulated and Unreported Fishing: The ITLOS Advisory Opinion on Flag State Responsibility for IUU Fishing and the Principle of Due Diligence" (2015) 12 Brazilian Journal of International Law 50, p. 52-56.

[403] *International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978,* 17 February 1973, UNTS Vol. 1340 (p. 61); As of May 2020, the convention had 158 parties, see <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf>.

[404] *International Convention for the Safety of Life at Sea,* 1 November 1974, UNTS Vol. 1184 (p. 2); As of May 2020, the convention had 165 parties, see <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf>

[405] *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas,* 24 November 1993, UNTS Vol. 2221 (p. 91),

the Fish Stock Agreement (FSA),[406] these instruments can't claim to regulate the whole world fishing fleet. These instruments must therefore be examined in conjunction with the UNCLOS which is still, for many States, the unique framework regulating high sea fisheries.[407] Besides these treaties, the FAO also adopted several soft law instruments concerning high sea fisheries. Despite their non-binding nature, the content of these soft law instruments may be relevant in the definition of due diligence obligations contained within the UNCLOS. Finally, next to the UNCLOS and its related instruments, numerous other regional treaties[408] may as well provide obligations on the high seas but in virtue of Article 311 of the UNCLOS, such agreements are bound to show deference to the constitution of the ocean.

All in all, it appears that even in the presence of a multiplicity of international instruments, the UNCLOS still constitutes a landmark on which all others must converge. Concerning fisheries, the UNCLOS will oftentimes be the sole treaty regulating high sea fisheries as the Compliance Agreement, the FSA and regional agreements may be inapplicable. In any case, where these treaties contain obligations of due diligence, soft law instruments may provide relevant content on the definition of diligence. Going further, it is also possible to detect other due diligence obligations within these non-binding instruments with the potential to inform the content of diligence obligations contained in

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see <https://treaties.un.org/pages/showDetails.aspx?objid=080000028007be1a>

[406] *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks,* 4 August 1995, UNTS Vol. 2167 (p. 3), see <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-7&chapter=21&clang=_en>

[407] See the Annex.

[408] For instance, the constituting agreements of RFMO/As.

treaties in a "Matryoshka" fashion.[409] Thus, in order to understand the extent of due diligence obligations on the high seas, this section will examine the legal framework of the high seas concerning fisheries and the protection of the marine environment. It will comprise the relevant parts of the UNCLOS itself but also the Compliance Agreement and the FSA. The main FAO soft law instruments will also be scrutinized as they may serve as guidance for the determination of diligence as well as contain their own obligations. They comprise the Guidelines for the management of Deep-Sea Fisheries in the High Seas, the IPOA IUU and the Code of conduct for responsible fisheries. Additionally, these instruments also provide key provisions on the precondition of effective control[410] on the high seas. In that respect, the Voluntary Guidelines for Flag State Performance are particularly noticeable.

1. The UNCLOS: A Primordial Framework

As a "Constitution for the oceans",[411] the UNCLOS includes regimes for each and every maritime zone, but also contains provisions applicable regardless of the maritime zones. Thereby, two Parts are of relevance for determining the UNCLOS legal regime applicable on the high seas: Part VII on the high seas (1.1) and Part XII on the protection of the marine environment (1.2). As we will see, these two Parts establish a framework in need of specific content (1.3).

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[409] Yann Kerbat, "Le Standard de Due Diligence, Catalyseur d'Obligations Conventionnelles et Coutumières pour les Etats" *supra* note 343.

[410] See Chapter 2, Section 2.

[411] Tommy Koh, "A Constitution for the Ocean" *supra* note 11.

1.1. The High Seas Regime of the UNCLOS

Within the UNCLOS itself, the regime of the high seas is detailed in Part VII. The first Section of the Part goes from Article 86 to Article 115 and deals with general provisions while the second Section of the Part goes from Article 116 to Article 120 and deals with the conservation and management of living resources.

1.1.1. Section 1: Freedom of the High Seas and Due Regard

As a general segment, this Section deals with numerous issues at once. It geographically delimits the high seas in Article 86, establishes the peaceful use of the high seas in article 88, puts the high seas beyond the reach of sovereignty claims in article 89 and, most importantly, deals with the nationality of ships in Article 91 and the exclusive jurisdiction of the flag State in Article 92. Substance-wise, the first Section of Part VII lays down several customary prohibitions such as *inter alia* the prohibition of human trafficking[412] and the prohibition of piracy.[413] Counterbalancing these few prohibitions, Article 87 recalls the freedom of the high seas with a non-exhaustive list of particular freedoms: freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, freedom to construct installations, freedom of fishing and freedom of scientific research. As an open-ended list, the freedom of the high seas is

[412] UNCLOS, Art. 99.

[413] UNCLOS, Arts. 100, 101, 102, 103.

essentially limited by the obligation to show due regard for the interests of other States contained in the second paragraph of Article 87. While unclear, the due regard limitation refers to a balancing of interests between all States.[414] As expressed by the arbitral tribunal in the *Chagos* award, the expression due regard is not equal to any universal rule of conduct and "the extent of the regard […] will depend upon the nature of the rights [of the impaired State], their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the [acting State]."[415] In other words, the concept of due regard may prohibit behaviours impairing disproportionally the rights of other States. As such, due regards may involve new obligations. Thereby, the South China Sea tribunal, following the *SRFC* opinion, considered that due regards imposed on flag States to prevent unlawful fishing in the EEZ of coastal States,[416] even if this obligation is not written in the UNCLOS. Thus, while the obligation to show due regards itself is unspecified, it may refer to obligations of due diligence such as the obligation to prevent unlawful fishing.[417] Obviously, finding specific obligations fathered by the due regards may be more challenging in the context of the high seas than in the EEZ of coastal States simply because the interests of other States in this area are more difficult to identify. It will therefore prove a difficult exercise to balance the rights of a single State with the interests[418] of the rest of the States. Naturally, these interests must have an anchor in the

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[414] Julia Gaunce, "On the Interpretation of the General Duty of 'Due Regard'" (2018) 32:1 Ocean Yearbook Online 27.

[415] *In the Matter of the Chagos Marine Protected Area (Mauritius v. United Kingdom),* Award [2015] R.I.A.A. vol. 31, 359 [hereinafter *Chagos*] para. 519.

[416] *South China Sea, supra* note 2 at paras. 741-744.

[417] *Id.*

[418] While Article 58(3) of the UNCLOS speaks of the "rights and duties" of the coastal State, Article 87 speaks of the "interests of other States in their exercise of the freedom of the high

Convention in order to create a parallel obligation to respect them through due regards. For instance, the South China Sea tribunal identified the interest of coastal States in the protection of fisheries within the Convention before concluding that due regards demanded the protection of this interest. In the context of the high seas, we can imagine that, while diluted, all States have an interest in healthy fisheries[419] and a healthy marine environment,[420] but also in safe navigation[421] and other matters identified by the convention.[422] Therefore, it can be argued that an excessively damaging behaviour on the high seas may breach the obligation to show due regards to the interests of all other States. In that sense, due regards constitute an open door for future limitations on the freedom of the high seas.

Finally, concerning the substance of Section 1 Part VII of the UNCLOS, Article 94 must also be cited. This article specifies the duties of flag States and therefore is an obvious place to look for substantial obligations of flag States. It appears however, that the UNCLOS limited itself to technical duties and only requires effective jurisdiction and control over administrative, technical and social matters.[423] This limitation seriously impacts paragraph 5, which calls for the application of external instruments under the expression of "generally accepted international regulations, procedures and practices" and which could have been key in the interpretation of the convention. Yet, considering

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seas".

[419] As inferred by Article 116.

[420] As inferred especially by the Part XII.

[421] As inferred by Article 87(1)(a).

[422] Such as the safety of their pipelines and submarine cables (Art. 87(1)(c)) or of their installations (Art. 87(1)(d)).

[423] UNCLOS, Art. 94(1).

the boundaries of this article, these external instruments may only refer to IMO regulations.

1.1.2. Section 2: Conservation of Living Resources of the High Seas

As indicated by its title, the second Section of Part VII deals with the conservation and management of marine living resources of the high seas. As such, it mainly concerns fisheries and must be read bearing in mind Part XII of the convention on the protection of the marine environment in general. This Section is composed of only five articles, but is critical as it set the framework for conservation and cooperation.

The first article of the Section, Article 116, elaborates on the freedom of fishing already enshrined in Article 87(1)(e). It reaffirms the right of every State to fish on the high seas under three conditions:[424] the respect of their treaty obligations, the respect of the rights, duties and interests of coastal States and, the respect of the other provisions of the Section. Naturally, added to this list is the general limitation on all freedoms of the high seas *i.e.,* the obligation to show due regards for the interests of all other States[425]

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[424] While the term "subject" may indicate that the right to fish is conditioned on the respect of other treaty obligations, in practice the exclusive flag State jurisdiction undermines the possibility to prevent vessels from fishing. See Rosemary Rayfuse, "Article 116" in Alexander Proelss, ed., *United Nations Convention on the Law of the Sea: A Commentary* (Munich: C.H. Beck, Hart: Oxford, Nomos: Baden-Baden, 2017) 791 at 793; Rosemary Rayfuse, "The Anthropocene, Autopoiesis and the Disingenuousness of the Genuine Link: Addressing Enforcement Gaps in the Legal Regime for Areas Beyond National Jurisdiction" *supra* note 397 at 172.

[425] Based on Article 87(2).

and the peaceful use of the high seas.[426] The respect of treaty obligations obviously involves the respect of the UNCLOS itself beside the respect of other treaties. As such, this limitation encapsulates the respect of the other provisions of the Section and makes the third limitation, *i.e.,* the obligation to respect the provisions of the Section, redundant. This limitation also means that States must still obey the letter of Part XII when exercising their freedom of fishing and therefore, evolutions in the interpretation of the protection of the marine environment will bear consequences on the freedom of fishing as well. The second limitation focuses on the need to consider the rights, duties and interests of coastal States. It also provides five example cases through the use of the expression *"inter alia",* in which a high seas fishing State should respect the rights of the coastal State. These five cases concern high seas straddling fish stocks,[427] highly migratory species,[428] marine mammals,[429] anadromous species[430] and catadromous species.[431] In fact, these five cases truly constitute a limitation on the freedom of fishing. While in the case of straddling fish stocks and high migratory species, it obliges the fishing State to cooperate[432] with the coastal State(s); in the case of marine mammals the fishing State must obey the

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[426] Based on Article 88.

[427] In other words, stocks occurring within the EEZ of one or more States and within the high seas: Article 63(2).

[428] UNCLOS, Art. 64.

[429] UNCLOS, Art. 65.

[430] Anadromous species spend their lives in the sea but migrate to fresh water to breed; UNCLOS, Art. 66.

[431] Catadromous species spend their lives in fresh water but migrate to the sea to breed; UNCLOS, Art. 67.

[432] While Article 64 on highly migratory species uses the term "cooperate", Article 63(2) uses the expression "seek to agree" but this difference does not seem to be of significance: See Rosemary Rayfuse, "Article 116" *supra* note 424 at 802.

regulations of the coastal State;[433] and in the case of anadromous and catadromous species, fishing on the high seas is even prohibited.[434] Additionally, since these five cases are listed through the expression *"inter alia",* it must be said that other rights, duties and interests of coastal States should be considered. For instance, destructive practices on the high seas endangering the existence of ecosystems located landwards of the EEZ should be forbidden. To conclude, limitations on the freedom of fishing contained in the UNCLOS are non-exhaustive and it is clear that "the Convention is not the last word"[435] on the content and limits of the freedom of fishing.

Moving on to the next articles, Article 117 obliges State to take measures for the conservation of living resources on the high seas. These measures must target their nationals in general and it is not limited to vessels flying their flag. Therefore, Article 117 has the potential to target States where fishing companies are registered as well as flag States. Going further, Article 117 may also pose a burden on the State of nationality of captains of ships engaging in illegal activities. Such application of Article 117 may be daring but can eventually be an effective way to "pierce the corporate veil".[436] Article 117 also provides for cooperation with other States when required, and this obligation is further developed in Article 118. Indeed, Article 118 emphasizes the need for cooperation and even sets the basis for the institutionalisation of cooperation.

However, it is necessary to note that the term "conservation" used in all these

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[433] Which can amount to prohibition.

[434] Both Article 66 and Article 67 allow fishing these species only within the EEZ.

[435] Rosemary Rayfuse, "Article 116" *supra* note 424 at 803.

[436] Rosemary Rayfuse, "Article 117" in Alexander Proelss, ed., *United Nations Convention on the Law of the Sea: A Commentary* (Munich: C.H. Beck, Hart: Oxford, Nomos: Baden-Baden, 2017) 803 at 817.

articles is not clearly defined in the Convention. In order to grasp the meaning of "conservation", Article 119 helps in that it provides content to the notion of conservation. In its first paragraph, the article provides elements to consider when determining the allowable catch of fish and conservation measures with the objective to "maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield." Thereby, States must use the best scientific evidence available and consider the effect of fishing on species associated or dependent on the target fish. Besides, information and data must be shared, therefore the best available scientific evidence should often be at the disposal of every States whether developed or developing. Finally, the maximum sustainable yield must also consider the needs of developing States. Based on its content, conservation appears to be aligned with due diligence obligations and the obligation to conserve living resources of the high seas can be considered as a due diligence obligation.

1.2. The Protection of the Environment of the High Seas Under the UNCLOS

Turning to the rest of the UNCLOS, Part XII of the Convention shows relevance for the high seas as its first article reads: "States have the obligation to protect and preserve the marine environment."[437] As the "marine environment" has been left undefined, it has been accepted that it concerns the marine environment generally and

[437] UNCLOS, Art. 192.

thus applies regardless of the maritime zones.[438] Such obligations towards the marine environment echoes the customary obligation of States on the protection of the environment in general and expressed by the ICJ in the *Legality of the Threat or Use of Nuclear Weapons* opinion. The court indeed recognized the existence of a general obligation for States "to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control".[439]

Thus, States possess, in principle, equivalent environmental obligations in all maritime areas. Yet, it has also been affirmed by the *South China Sea* arbitral tribunal that the obligation contained in Article 192 is an obligation of due diligence in that it requires States to adopt an optimal conduct in order to fulfil the obligation. Through such qualification it results in the obligation to protect and preserve the marine environment. While applicable in every maritime zone, it will have a different weight depending on the maritime zone. Indeed, since the measures required by due diligence directly depend on the degree of jurisdiction and control of a State, it follows that these measures should be more stringent in the territorial sea of the State than on the high seas. In sum, the stringency of the measures required by due diligence will decrease as the degree of jurisdiction and especially control of the State decreases. Indubitably, this rule of proportionality will bear consequences on the protection of the environment.

Following Article 192, Article 194 also set environmental obligations based on due diligence. Accordingly, States shall endeavour to prevent, reduce and control pollution. It includes the use of "best practicable means" in accordance with the

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[438] *South China Sea, supra* note 2 at para. 940

[439] *Legality of Threat or Use of Nuclear Weapons,* para. 29.

capabilities of the State, harmonization of policies, ensuring that pollution from activities under the jurisdiction or control of the State do not spread beyond its territory.[440] Besides, the *South China Sea* arbitration has treated the last paragraph of the article 194 rather independently. Indeed, it has considered that Article 194(5) requires States to adopt due diligence in the protection of rare and fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.[441] In the view of the tribunal, this paragraph must be interpreted in the entirety of Part XII and not just Article 194. With such reasoning, the tribunal joined the *Chagos* jurisprudence in which it was ruled that paragraph 5 evidenced that the whole of Part XII was not limited to the prevention of pollution.[442] Consequently, the tribunal in the *South China Sea* arbitration argued on an independent and general obligation of due diligence to protect and preserve endangered species and habitat (or ecosystems).

1.3. Conclusion

It is clear that the law of the sea convention enshrines the freedom of the high seas, which remains a pillar in this field. Yet, limits on this freedom should not be easily dismissed. While the Convention takes a cautious approach in limiting the freedom of the high seas by using vagueness, this exact vagueness also creates open-ended limitations. Thereby, due regards can mean both nothing and everything at the same time and the absence of a definition for conservation leaves the concept open to evolutive

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[440] UNCLOS, Art. 194(1-2).

[441] *South China Sea, supra* note 2 at para. 945.

[442] *Id.,* referring to *Chagos,* paras. 320, 538.

interpretation taking into account more recent environmental principles such as the ecosystem approach and the precautionary principle.[443] All in all, the freedom of the high seas is limited by obligations to conserve marine living resources, to protect the marine environment and by the duty to cooperate, which is also a corollary of the obligation to show due regards to other States. However, while these obligations can be deduced from the text of the Convention, their content remains undefined. Fortunately, since they can be considered as a due diligence obligation,[444] their content can be moulded and to this end, external instruments are particularly helpful.

2. The Compliance Agreement: Reinforcement of Effective Control

1992 is a landmark for environmental law. The Earth summit in Rio de Janeiro, also called the United Nations Conference on Environment and Development (UNCED) adopted the Agenda 21 aiming at tackling the issues of development and the environment together.[445] In chapter 17, the Agenda focused on the oceans and their living resources and stressed *inter alia* that better enforcement was necessary[446] and to that end, States should "convene, as soon as possible, an intergovernmental conference […] with a view to promoting effective implementation of the provisions of the United Nations".[447]

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[443] Sustainable development seems already considered by Article 119.

[444] At least for the obligation to conserve marine living resources and the obligation to protect the marine environment.

[445] Agenda 21, UNCED, 23 April 1992 [hereinafter Agenda 21] Chapter 1.

[446] Agenda 21, Chapter 17, para. 17.46 (d).

[447] Agenda 21, Chapter 17, para. 17.49.

Additionally, the document also proceeded to stress the importance of the FAO.[448] Coincidentally or not, a Conference on Responsible Fishing held one month earlier in Cancun (Mexico) adopted a declaration tasking the FAO to draft a Code of Conduct on Responsible Fisheries.[449] Following these events, the FAO Committee on Fisheries (COFI) developed a Code of Conduct on Responsible Fisheries,[450] taking into account both the Cancun declaration and Agenda 21. Meanwhile, the COFI developed a secondary instrument which would be, this time, binding on States and also part of the Code. This secondary document would promote compliance with the other measures concerning conservation and management on the high seas. It was adopted on 24 November 1993 and titled the *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* (Compliance Agreement). It has, as of today, 43 parties[451] including the United States which are not parties to the UNCLOS.

2.1. Scope of the Instrument

As indicated by the declaration of Cancun and Agenda 21, the Compliance Agreement aims at achieving compliance with international conservation measures. To this end, it especially targets the practice of reflagging and emphasizes effective

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448 *Id.*

449 Declaration of the International Conference on Responsible Fishing. 6-8 May 1992.

450 First labelled *Code of Conduct on Responsible Fishing.*

451 As of May 2020, See: <https://treaties.un.org/pages/showDetails.aspx?objid=080000028007be1a>.

jurisdiction and control of flag States through proper authorizations, cooperation and transparency.[452] These objectives are important as they provide guidance and a general scope for the interpretation of the rest of the provisions.

More precisely, however, the agreement applies only to "fishing vessels that are used or intended for fishing on the high seas".[453] Yet, according to the article I(a), "fishing vessels" do not include support vessels but only "mother ships and vessels directly engaged in such fishing operation".[454] Furthermore, the agreement allows States to exclude fishing vessels of less than 24 metres in length from the provisions of the agreement.[455] This possibility of exemption, however, is not absolute as it must not undermine the purpose and object of the agreement. As such, industrial fishing cannot escape from the scope of the agreement by abusing this exemption. Also, it is opportune to notice that "fishing vessels" are defined as such through their activity (*i.e.,* fishing) rather than their physical characteristics.

Finally, as this agreement pertains to ensure compliance with "international conservation measures", it defines them as any measure to conserve or manage living marine resources adopted at the global or regional level or by sub-regional fisheries organizations.[456] It is thus, comprehensive.

2.2. Content of the Instrument

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[452] Compliance Agreement, Preamble.

[453] *Id.,* Art. II(1).

[454] *Id.,* Art. I(a).

[455] *Id.,* Art. II(2).

[456] *Id.,* Art I(b).

The general obligation of the Compliance Agreement is stated in Article III. It reads:

"Each Party shall take measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures."[457]

This obligation to ensure is thus an obligation of due diligence as the ITLOS first advisory opinion has shown.[458] The other obligations contained in the agreement are mainly obligations of result and, yet, it is their fulfilment that will indicate if, overall, a State has acted with due diligence or not. Accordingly, States have to duly authorize vessels before fishing on the high seas[459] and require that vessels be properly marked.[460] Regarding transparency, States must ensure that vessels provide them with proper information on their activities[461] and must establish records of fishing vessels registered under their flag.[462] Besides, these records must be shared with the FAO.[463] International cooperation is also required by Article V and is directly connected with the fulfilment of the general obligation to not undermine international conservation measures stated in

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457 *Id.,* Art. III(1a).

458 *Activities in the Area, supra* note 4 at para. 110.

459 Compliance Agreement, Art. III(2).

460 *Id.,* Art. III(6).

461 *Id.,* Art. III(7).

462 *Id.,* Art. IV.

463 *Id.,* Art. VI.

article III. Finally, in order to make the obligations of due diligence more effective, Article III(3) requires States to only authorize vessels fishing on the high seas when it is "satisfied that it is able, taking into account the links that exist between it and the fishing vessel concerned, to exercise effectively its responsibilities." Such obligation is complementary with obligations of due diligence as it obliges States to only allow activities that it can potentially control. It does not amount to turn obligations of due diligence into obligations of result but it prevents States from claiming a lack of control once the authorization has been given.

3. The FSA: A Primary Tool for International Cooperation

Along the High Seas Convention, the first conference on the law of the sea of 1958 also adopted the convention on Fishing and Conservation of the Living Resources of the High Seas.[464] As indicated by its title, the convention had the objective of dealing with high seas fisheries. With only the freedom of the high seas' principle as a starting point, the convention developed a regime of cooperation between States on the conservation of living resources.[465] However, this regime remained vague and contained certain impasses such as the possibility for the coastal State to adopt unilateral measures which would remain in force until stated otherwise by a dispute settlement.[466] Such

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[464] *United Nations Convention on Fishing and Conservation of the Living Resources of the High Seas,* 29 April 1958, UNTS Vol. 559 (p. 285) [hereinafter *Fishing Convention*].

[465] *Fishing Convention,* Art. 1

[466] *Fishing Convention,* Art. 7.

regime, even combined with a compulsory arbitration mechanism,[467] could allow a coastal State to delay fishing operations long enough to deprive a fishing season from profits. With only a few ratifications this convention was the least successful of the four 1958 conventions.

When the UNCLOS entered into force, the 200nm exclusive economic zone was already the norm. The UNCLOS only confirmed the coastal States powers over the economic resources up to that limit. Such a regime geographically covered already most of the viable fisheries of the oceans, but did leave a gap concerning the high seas, which distant water fleets took advantage of. Therefore, in order to answer the problem of vessels fishing just outside the EEZ of coastal States,[468] the 1992 UN Conference on Environment and Development called for the implementation of Article 64 of the UNCLOS providing an obligation of cooperation between States with regards to highly migratory species[469] within and beyond EEZs. This resulted in the adoption on December 4th 1995 of the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (FSA). In essence, the FSA "restricts participation in high seas fisheries to 'those who play by the rules'".[470]

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[467] *Fishing Convention*, Art. 9-11.

[468] Bernard H. Oxman, "Compliance Procedure: Implementation Agreement on Straddling and Highly Migratory Fish Stocks" (Oxford: Max Planck Encyclopedias of International Law, 2019).

[469] Listed in the Annex 1 of the UNCLOS.

[470] Rosemary Rayfuse, "Article 117" *supra* note 436 at 810.

3.1. Scope of the FSA

As it attempts to create a specific regime for straddling species, the agreement applies naturally to both the high seas and areas within national jurisdiction as indicated in Article 3(1) of the instrument. Therefore, the agreement stipulates that its general principles[471] apply *mutatis mutandis* to the areas within national jurisdiction, and Articles 6 and 7 also apply to these areas.[472] Accordingly, States must also apply the precautionary approach in areas within national jurisdiction (article 6) and take measures, in their national jurisdiction, compatible with those taken for the high seas (article 7).

The agreement is also limited to highly migratory fish stocks and straddling fish stocks. The former category is listed in Annex 1 of the UNCLOS and consists of 17 different species with tuna being the prominent one. The latter category is not referred to in the UNCLOS, but Article 63 provides for "stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it" may actually define straddling fish stocks.[473] However, it has been observed that in practice, regional organizations do not necessarily differentiate between these two categories and DHSFS including Deep-Sea Fisheries (DSF)[474] and, therefore, the rules established by the FSA may also apply to those.

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[471] Contained in Article 5.

[472] FSA, Art. 3.

[473] Bernard H. Oxman, "Compliance Procedure: Implementation Agreement on Straddling and Highly Migratory Fish Stocks" *supra* note 468.

[474] Yoshinobu Takei, *Filling Regulatory Gaps in High Seas Fisheries: Discrete High Seas Fish Stocks, Deep-sea Fisheries and Vulnerable Marine Ecosystems, supra* note 382 at 133.

3.2. Content of the FSA

Within that particular scope, the FSA provides for several obligations. First, it develops the duty to cooperate regarding the management of straddling and highly migratory fish stocks in the high seas enshrined in Article 118 of the UNCLOS. Accordingly, States interested in fishing a particular stock (entering either of the categories) should join or cooperate with the appropriate Regional Fishery Management Organisation or Agreement (RFMO/A)[475] or, in the absence of an organisation, establish one.[476] It follows that non-members of RFMO/As and non-cooperating States are prohibited from fishing the stocks covered by such regional agreements.[477] Finally, the FSA also reaffirms the importance of the flag State duties by stipulating that States shall ensure that vessels flying their flag comply with RFMO/As' measures and perhaps more importantly, that States shall authorize vessels fishing only where they are able to exercise effectively their responsibilities in respect of the FSA and the UNCLOS.[478]

It appears clearly that the FSA places RFMO/As at the centre of the management regime of the high seas. Therefore, as the background instrument of RFMO/As, the FSA owns a particular place in the general regime of the high seas.[479] Yet, the rate of ratification of this instrument is much lower than that of the UNCLOS. With 91 States

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[475] FSA, Art. 8(3).

[476] FSA, Art. 8(5).

[477] FSA, Art. 8(4); see Kaare Bangert, *"Fisheries Agreements"* (Oxford: Max Planck Encyclopedias of International Law, 2018).

[478] FSA, Art. 18(2); Article 5(l) also obliges State to "implement" effective control.

[479] David Freestone, "Fisheries, Commissions and Organizations" (Oxford: Max Planck Encyclopedias of International Law, 2010).

parties,[480] the relevance of the FSA for non-members is legitimately raised. As we have seen, the FSA is mainly concerned by RFMO/As, and thus specifies a framework for the functioning of these organisations. Today, most of the Oceans are covered by RFMO/As, and what is lacking is not the establishment of more organisations, but proper implementations of their measures. For that reason, the provisions of the FSA on collaboration with relevant RFMO/As are particularly important and, therefore, the rate of ratification of the FSA matters. Bearing that in mind, circumventing the lack of ratification of the FSA may be possible as it can be said that the obligation of collaboration is already enshrined in the UNCLOS under diverse forms. Articles 63 and 64 oblige States to cooperate directly or through appropriate international organisations on the conservation of straddling fish stocks and highly migratory stocks. Moreover, Articles 117 and 118 also ask States to cooperate in the conservation of the living resources of the high seas and establish regional fisheries management organisations to this end. These obligations mirror those of the FSA. In fact, Article 8(3) of the FSA confirms that the obligation to cooperate pre-exist the FSA. It reads:

> "States fishing for the stocks on the high seas and relevant coastal States <u>shall give effect to their duty to cooperate</u> by becoming members of such organization or participants in such arrangement, or by agreeing to apply the conservation and management measures established by such organization or arrangement."[481] (emphasis added)

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[480] As of May 2020, see <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-7&chapter=21&clang=_en>.

[481] FSA, Art. 8(3).

Considering the close links between the UNCLOS and the FSA, this pre-existing duty (indicated by the expression "give effect") to cooperate may refer to the provisions of the UNCLOS as well as the specific provisions of the FSA. Illustrating this link, Judge Paik resorted to the FSA's version of the duty to cooperate to interpret the UNCLOS' duty to cooperate.[482] Consequently, non-members of the FSA may have to observe a similar obligation to cooperate according to the UNCLOS,[483] and that same obligation might be interpreted in the light of the FSA thus contributing in putting parties and non-parties to the FSA on a more equal foot. Other, more restrictive, interpretations may also be made. Thereby, Hayashi considers that the obligation is only limited to setting or establishing RFMO/As and not participating in them.[484] Yet, it is ultimately difficult to discard the obligation of cooperation set in the UNCLOS as non-consequential and some degree of cooperation aiming at conservation must exist,[485] and the duty of due regards eventually points toward that direction. However, concerning non-parties to either instruments, doubt can be cast on the customary value of the duty to cooperate but the *MOX Plant* case

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[482] *SRFC, supra* note 5, Separate opinion of Judge Paik, para. 36.

[483] Bernard H. Oxman, "Compliance Procedure: Implementation Agreement on Straddling and Highly Migratory Fish Stocks" *supra* note 468; see also Tore Henriksen, "Revisiting the Freedom of Fishing and Legal Obligations on States Not Party to Regional Fisheries Management Organizations" *supra* note 385.

[484] Moritaka Hayashi, "Regional Fisheries Management Organisations and Non-members", in Tafsir Malick Ndiaye and Rudiger Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Leiden: Martinus Nijhoff, 2007) at 762

[485] Whether through RFMOS/As or not; For more details see also Tore Henriksen, "Revisiting the Freedom of Fishing and Legal Obligations on States Not Party to Regional Fisheries Management Organizations" *supra* note 385.

affirmed that the duty to cooperate "is a fundamental principle in the prevention of the marine environment under Part XII of [the UNCLOS] and general international law…"[486] Therefore, at least in the field of environmental protection, the duty to cooperate can be considered as a customary norm. Nevertheless, it is clear that States cannot be forced to join RFMO/As under the duty to cooperate. What it indicates however, is that a certain degree of coherence between measures taken by non-member States and RFMO/As regulations must exist.

4. The Guidelines on Deep-Sea Fisheries

In 2008, following the impulse of the UN General Assembly[487] (UNGA), the FAO adopted International Guidelines for the Management of Deep-Sea Fisheries in the High Seas[488] (DSF Guidelines). Focusing on the protection of Deep-Sea Fisheries (DSF) and vulnerable marine ecosystems (VME), where these DSF are often found, the guidelines are a soft-law instrument imbued by the precautionary approach.

4.1. Scope of the Guidelines

As stated above, the Guidelines aim at protecting both DSF and VMEs. To this

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[486] *MOX Plant (Ireland v. United Kingdom),* Provisional Measures,[2001] ITLOS Reports 95 at para. 82.

[487] *Sustainable fisheries,* UN GAOR, 61st Sess., U.N. Doc. A/RES/61/105 (2007) paras. 76-95.

[488] International Guidelines for the Management of Deep-Sea Fisheries in the High Seas, 29 August 2008, FAO (hereinafter DSF Guidelines).

end, they apply to fisheries in two specific ways. First, the Guidelines apply to all fisheries that include within their total catch, species that can only sustain low rates of exploitation.[489] These species, which are termed as DSF, are further described as having late maturation, slow growth, a long-life expectancy, a low natural mortality rate, intermittent periods of breeding and finally spawning that may not occur every year.[490] Secondly, the Guidelines also apply to fisheries using gears likely to contact the seafloor during their operations.[491] This second criterion aims at protecting VMEs and, indirectly, sedentary species which may fall under the jurisdiction of coastal States.[492] VMEs are also hard to define due to their potential and actual variety so the instrument identifies their characteristics. Thereby, VMEs are vulnerable habitats showing functional or physical fragility and with the potential to be easily disturbed.[493] Furthermore, VMEs have very slow recovery and may even never recover when damaged.[494]

It is also important to note that the Guidelines are, in principle, limited to fisheries beyond national jurisdiction.[495] Nevertheless, States are free to apply them within their waters.[496]

Besides, the Guidelines are to be applied by both States and RFMO/As. In fact,

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[489] DSF Guidelines, para. 8(i).

[490] *Id.*, para. 13.

[491] *Id.*, para. 8(ii).

[492] Chie Kojima, "Sedentary Fisheries" (Oxford: Max Planck Encyclopedias of International Law, 2008).

[493] DSF Guidelines, para. 14, 15.

[494] *Id.*

[495] *Id.,* para. 8.

[496] *Id.,* para. 10.

the instrument encourages the establishment of RFMO/As[497] and often requires States to communicate information and data to their respective RFMO/As, which in turn have to compile them and transfer them to the FAO. Of course, in the absence of RFMO/As, States should communicate the information and data to the FAO directly.[498]

Finally, this instrument must be applied in accordance with the UNCLOS and considered along the FSA, the IPOA-IUU and the Code on Responsible Fisheries in order to fully reach its potential.[499]

4.2. Content of the Instrument

As a soft law instrument, the Guidelines do not set obligations *per se* but instead recommends steps to ensure the appropriate conservation of DSF and VMEs. Meanwhile, they also flesh out several aspects of conservation which are usually open to interpretation. For instance, the threshold of "significant impact" is clearly defined in the context of harm to VMEs[500] and DSF, and the consequences of the precautionary approach are clearly determined.[501] Eventually, the Guidelines provide instructions on governance including its role in data gathering,[502] on the content of EIAs[503] and on enforcement with a

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[497] *Id.,* para. 28.

[498] *Id.,* para. 52

[499] *Id.,* para. 21.

[500] *Id.,* paras. 17-20.

[501] *Id.,* paras. 23, 63-67.

[502] *Id.,* paras. 21-23; The Guidelines do not simply ask for data gathering but also provide specific issues to research (economy, geography, biodiversity, training…).

[503] *Id.,* paras. 47-53.

particular emphasis on the use of electronic and satellite tracking (*i.e.,* Vessel Monitoring System or VMS).[504] Finally, the Guidelines also consider the difficulties of developing States to adopt its measures and therefore requires developed States to assist them through capacity building and notably financial and technical assistance, technology transfer and scientific cooperation.[505]

In conclusion, the FAO Guidelines address numerous aspects of the protection of DSF and VMEs. Considering the due diligence nature of the obligation to protect, these Guidelines may well provide standards on what is considered diligent in the protection of DSF and VMEs. Indeed, from governance to conservation along with enforcement, the instrument takes the opportunity to detail notions and duties that are usually vague such as the "significant impact" threshold and the precautionary approach. Measures on data sharing may also be helpful to diagnose if a State has truly considered the best available science while measures on enforcement provide guidance on whether or not a State has used all the tools at its disposal to prevent violations. Besides, considering that EIAs must generally be conducted with due diligence,[506] the guidance offered by the Guidelines lightens an otherwise obscure requirement.

5. The FAO Code of Conduct for Responsible Fisheries and the International Plan of Action to Prevent, Deter, and Eliminate IUU Fishing

[504] *Id.,* paras. 54-60.

[505] *Id.* paras. 84, 85.

[506] *Pulp Mills, supra* note 3 at para. 205.

Along the Compliance Agreement and the FSA, two non-binding instruments were also envisaged during the UNCED in 1992. The Code of Conduct for Responsible Fisheries (the Code) adopted in 1995, and the International Plan of Action to Prevent, Deter, and Eliminate IUU Fishing (IPOA-IUU) adopted in 2001, were both developed by the FAO and, as part of the UNCLOS strategy of the UNCED,[507] serve as tool boxes for States and RFMO/As to establish their legal framework[508] in accordance with the UNCLOS, the Compliance Agreement and the FSA. As such, both instruments are qualified as "voluntary" and are written in "essay-style"[509] in order to emphasize their non-binding nature and their guidance value. The language is used to draw attention to certain problems[510] and propose solutions left to the voluntary implementation of States.

As non-binding, both instruments indicate with details how States should perform certain obligations. These obligations are not unique to these instruments but rather duplicates of the UNCLOS, the Compliance Agreement and the FSA. The Code of Conduct deals with fisheries management (fishing excess, methods of fishing, conservation, cooperation and even working conditions in particular) while the IPOA-

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[507] Patricia Birnie, "New Approaches to Ensuring Compliance at Sea: the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas" (1999) 8:1 Review of European, Comparative International Environmental Law 48.

[508] Doris König, "Flag of Convenience" (Oxford: Max Planck Encyclopedias of International Law, 2008).

[509] William Edeson, "The International Plan of Action on Illegal Unreported and Unregulated Fishing: The Legal Context of a Non-Legally Binding Instrument" (2001) 16:4 International Journal of Marine and Coastal Law 603.

[510] Gail Lugten, "Soft Law with Hidden Teeth: The Case for a FAO International Plan of Action on Sea Turtles" (2006) 9:2 Journal of International Wildlife Law and Policy 155.

IUU deals with IUU fishing in particular and provides "the closest thing to a definition that is available."[511] Therefore, the Code and the IPOA-IUU can provide specifics on how to properly implement these commonly shared obligations. As an example, the obligation to create records of fishing vessels contained in the Compliance Agreement[512] is detailed to a greater extent in the IPOA-IUU.[513] Perhaps more importantly, both instruments reaffirm the due diligence nature of the obligation to prevent IUU fishing[514] and the complementary idea that States should accept vessels in their register or authorize fishing operations only when they are able to exercise their (due diligence) responsibility to ensure that such vessels do not engage in IUU fishing.[515]

6. The Voluntary Guidelines for Flag State Performance: Filling the "Inability" Gap

Despite the adoption of the previous instruments, the FAO committee on fisheries (COFI) recognized in 2007 the need to develop "criteria for assessing the performance of flag States"[516] especially with regards to IUU fishing.[517] To this end, an expert Workshop on Flag State Responsibilities was convened in Vancouver the next year

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[511] Jens T. Theilen, "What's in a Name: The Illegality of Illegal, Unreported and Unregulated Fishing" (2013) 28:3 International Journal of Marine and Coastal Law 533.

[512] Compliance Agreement, Art. IV.

[513] IPOA-IUU, para. 42.

[514] Code of Conduct for Responsible Fisheries, para. 6.10 ; IPOA-IUU, para. 34.

[515] IPOA-IUU, paras. 35, 41.

[516] FAO Report of the 27th Session of the Committee on Fisheries, FIEL/R830 (2007).

[517] *Id.,* at 14.

and produced a Report and Guidance Document which would serve as a basis for work within the COFI. Eventually, the final document was adopted in 2014 with the understanding that it should be based on existing responsibilities of relevant international instruments and serve as a "gap analysis" tool for a self-assessment by States.[518] As such, the Guidelines add up to the legal framework on the high seas and join the side of the voluntary instruments.

6.1. Scope of the Instrument

The Guidelines apply to fishing activities and fishing related activities taking place in maritime areas beyond national jurisdiction[519] but can also apply to areas within national jurisdiction if the relevant States consent to it. What is important to note is that contrary to the Compliance Agreement, these guidelines also apply to support vessels.[520] Besides, they also apply to chartered vessels operated by a national of a coastal State within the jurisdiction of the coastal State.[521]

6.2. Content of the Instrument

As a soft law instrument, the Guidelines reiterate some obligations contained in

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[518] Karine Erikstein, Judith Swan, "Voluntary Guidelines for Flag State Performance: A New Tool to Conquer IUU Fishing" (2014) 29:1 International Journal of Marine and Coastal Law 116.

[519] FAO Voluntary Guidelines for Flag State Performance, 2015, para. 3.

[520] *Id.,* para. 4.

[521] *Id.,* para. 5.

the UNCLOS, FSA and Compliance Agreement instead of creating new ones. For instance, they reaffirm the obligation to effectively exercise jurisdiction and control over vessels and the obligation to ensure that vessels do not engage in IUU fishing.[522] Yet, their main purpose is to assess the performance of the States regarding their flag State duties and to this end, the Guidelines set a long list of criteria illustrating how a flag State can best fulfil these duties. This list covers *inter alia,* the incorporation of relevant provisions of international law into national legislation,[523] concrete contribution to RFMO/As,[524] the existence of legal frameworks managing sustainable fisheries,[525] information sharing,[526] fishing authorization processes[527] and transparency.[528] Perhaps more innovatively, the Guidelines encourage States to undertake self-assessments in order to identify their deficiencies.[529] Assessments can be conducted by the State itself or by external bodies or other States.[530] These assessments are obviously practical to diagnose needs but at the same time, they also reduce the margin that States have to claim a lack of knowledge regarding fishing activities conducted under their flags. Thereby, a State which has identified deficiencies in monitoring vessels should take extra precautions when awarding authorizations and shouldn't be able to extol a lack of knowledge on the issue of monitoring should an incident occur. In that sense, the assessment is an essential

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[522] *Id.,* para. 2.
[523] *Id.,* paras. 11-13.
[524] *Id.,* paras. 6-10.
[525] *Id.,* paras. 11-13.
[526] *Id.,* paras. 14-28.
[527] *Id.,* paras. 29-30.
[528] *Id.,* para. 17.
[529] *Id.,* para. 44.
[530] *Id.,* para. 46.

step for diligent States. On the contrary, non-diligent States or States of non-compliance may refuse to conduct such assessment as it would cast light on their deficiencies and they would no longer be able to ignore them. As a token of this importance, the Vancouver Workshop also focused on the due process of the assessments.[531] Indeed, for the assessment to truly identify the needs of flag States and cast away their veil of ignorance, it needs to be undertaken seriously and with adapted means. It is for this reason that the Guidelines encourage the recourse to assistance if needed when conducting an assessment, and transparency in the results.[532] Unfortunately, all of these encouragements remain voluntary as the Guidelines are a voluntary instrument. Yet, they may serve as a prerequisite for membership of a RFMO/A[533] or indicate if a State has acted with due diligence or not.

7. Conclusion: The Internal and External Interplay of the UNCLOS

While the UNCLOS remains the most important tool dealing with the law of the sea, it is complemented by other instruments. This is especially the case with regards to the high seas as the basic regime set in the text of the UNCLOS is superficial. Yet, these other instruments should not be entirely dissociated from the UNCLOS. Together, they form an interconnected system referring to each other and covering a wider scope of

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[531] Karine Erikstein, Judith Swan, "Voluntary Guidelines for Flag State Performance: A New Tool to Conquer IUU Fishing" *supra* note 518.

[532] FAO Voluntary Guidelines for Flag State Performance, 2015, para. 45.

[533] Karine Erikstein, Judith Swan, "Voluntary Guidelines for Flag State Performance: A New Tool to Conquer IUU Fishing" *supra* note 518.

issues. This interplay is beneficial for the protection of the environment and high seas fisheries. Thereby, the lack of details within the UNCLOS is filled by the external instruments, and in return the UNCLOS provides a dispute settlement mechanism and general principles that remain applicable should the external instruments leave a gap. Besides, as article 31(3) of the Vienna Convention on the Law of Treaty (VCLT) provides, subsequent agreements between parties can be considered to interpret a treaty. It is thus not surprising that, as it has been said above, the ITLOS can refer to the FSA or the Compliance Agreement in order to interpret notions inscribed in the UNCLOS. In the sense of the VCLT however, such recourse to subsequent treaties requires that parties to a dispute also be parties to the subsequent treaties in question. It is thus unlikely to see such interplay taking place when a party to a dispute is not also a party to the FSA or Compliance Agreement.

Soft law instruments may also be referred to by tribunals to give content or identify the scope of particular notions. This exercise has been conducted by the *South China Sea* tribunal in order to assess the legality of Chinese fishing methods[534] and in the *SRFC* advisory opinion where the ITLOS found inspiration in the binding and non-binding instruments mentioned in this Section to determine flag State duties in foreign EEZs.[535]

Additionally, within the UNCLOS itself, judges and arbitrators have identified an interplay between the different paragraphs, articles and Parts constituting the

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[534] *South China Sea, supra* note 2 at para. 970.

[535] *SRFC, supra* note 5 at paras. 134-140. While the tribunal advanced undercover without mentioning the source of its inspiration, the closeness with the FAO instruments, the Compliance Agreement and the FSA is striking. However, due to the absence of express reference it is unclear if this inspiration came from binding or non-binding instrument or both.

Convention. Such dynamic interpretation has allowed, on the one hand, two arbitral tribunals to extend the protection of the environment based on the article 194(5) to issues other than pollution.[536] And on the other hand, it permitted the ITLOS to find the existence of an obligation to prevent IUU fishing in foreign EEZs. This obligation resulted from the crossbreeding of Articles 58(3), 62(4) and 192 which, taken separately, do not mention IUU fishing.

Indeed, Article 58(3) requires States to have due regard to the rights and duties of coastal States and comply with their regulations. Article 62(4), similarly obliges States to comply with the regulations of coastal States and enumerates a non-exhaustive list of matters that coastal States are allowed to regulate. Finally, Article 192 simply provides for a general obligation to "protect and preserve the marine environment". Combining these provisions, the tribunal concluded on the existence of a due diligence obligation to prevent IUU fishing in foreign EEZs.

This process of deducing new obligations, including due diligence obligations, from the convergence[537] of various provisions of the UNCLOS is truly meaningful to adapt the Convention to new realities. By analogy, a similar reasoning could lead to the same prohibition on the high seas. First, the obligation of Article 192 is directly applicable to the high seas. Second, the obligation to exercise due regards to the rights of coastal States contained in Article 58(3) possesses a mirror obligation in Article 87(2) which is applicable to the high seas. It reads:

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[536] *Chagos,* para. 320; *South China Sea, supra* note 2 at para. 945.

[537] Maria Gavouneli, "Introductory note to *SRFC*" (2015) 54 International Legal Materials 890 at 891.

"These freedoms shall be exercised by all State with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respects to activities in the Area."

While the list of freedoms that are to be exercised with due regards is not exhaustive, it still mentions the freedom of fishing. Thus, an activity of IUU fishing may be considered as impeding the freedom of other States to fish since it will affect their quota, the quality of the stocks and most likely the quality of the marine environment. Lastly, a parallel with Article 62(4) is difficult to draw in the absence of coastal States but the lack of national regulations does not impeach the application of international regulations. These could be RFMO/As' regulations, which are already promoted through the duty of cooperation as seen above, or regulations contained in international instruments such as the ones seen in this Section.

Bearing these parallels in mind, it is possible to envisage a parallel obligation to prevent IUU fishing on the high seas. Advantageously, this obligation could exist solely based on the UNCLOS and be fleshed out by external instruments comparably to the *SRFC* example.

To conclude, it is clear that the legal framework of the high seas contains obligations qualifying as due diligence obligations. Moreover, additional due diligence obligations can still be discovered within the UNCLOS through the interplay of various provisions as the practice of the law of the sea has evidenced. Subsequently, these provisions allow for the intervention of external instruments which can constitute international standards for the sake of due diligence. When all parties to a dispute are also parties to the Compliance Agreement and the FSA, these instruments may apply but, in

that case, the rules of the VCLT on subsequent agreements may be better suited. Yet, concerning non-binding instruments, due diligence serves as a bridge between the text of the UNCLOS and soft law.

SECTION 2: Due Diligence Obligations and Control on the High Seas

Having evidenced the existence of due diligence obligations within the high seas' legal framework, their relevance and enforceability need to be demonstrated. As observed in Chapter II, control constitutes a precondition to the fulfilment of due diligence obligations. Indeed, in order to have a realistic opportunity to prevent a wrongful act on the high seas, States must have a certain level of jurisdiction and control over the violators.[538] For this reason, the need for effective control is frequently reminded by the United Nations General Assembly[539] and emphasized in the Compliance Agreement,[540] the FSA,[541] the FAO Code,[542] the Guidelines on DSF[543] and obviously the Guidelines on Flag State Performance.[544] Yet, within the UNCLOS itself, the issue of control on the high seas is not as clear cut as it may seem. This Section will therefore come back on the thorny problem of control and propose a role to genuine link. Naturally, this problem is only acute concerning control over private vessels. Thus, only a short explanation on the exercise of due diligence on government vessels will be provided (1) before moving to the exercise of due diligence on private vessels (2) and the role of the genuine link (3).

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[538] Rosemary Rayfuse, "The Anthropocene, Autopoiesis and the Disingenuousness of the Genuine Link: Addressing Enforcement Gaps in the Legal Regime for Areas Beyond National Jurisdiction" *supra* note 397 at 174.

[539] For instance: *Sustainable fisheries,* UN GAOR, 62nd Sess., U.N. Doc. A/RES/62/177 (2008); See the different resolutions on : < https://www.un.org/Depts/los/general_assembly/general_assembly_resolutions.htm>.

[540] Compliance Agreement, Preamble.

[541] FSA, Art. 5(1).

[542] Code of Conduct, Art. 6.10.

[543] DSF Guidelines, para. 21.

[544] FAO Voluntary Guidelines for Flag State Performance, para. 31.

1. Due Diligence and State-Owned Vessels

It is usually easily admitted that States have control over their governmental vessels. An obvious link exists between such vessels and the State and simplifies the application of due diligence. In fact, in most cases a State is responsible for its own breach and not for negligence or lack of due diligence. Indeed, if a government vessel engages in an unlawful act, the State is directly responsible without raising the question of due diligence.[545] However, in some instances, the State may be required to exercise due diligence[546] even with regards to its own vessels. As the *Pulp Mills* case has shown, due diligence requires to undertake environment impact assessments when a project poses a risk of transboundary harm.[547] The general logic behind this dictum is that due diligence may require to take certain appropriate procedural steps before engaging in an activity. Thus, it would be absurd if States were expected to ensure that private entities undertake such steps but do not undertake them themselves. For that reason, States can breach their due diligence obligations even through the acts of government vessels if they fail to take the measures which were required by diligence.[548]

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[545] For as long as it is attributable to the State. For instance, Vessels on mutiny do not engage the responsibility of their flag State: Ivan Shearer, "Piracy" (Oxford: Max Planck Encyclopedias of International Law, 2010).

[546] According to the *Pulp Mills* case, due diligence is applicable to "public and private operators" in *Pulp Mills, supra* note 3 at para. 197.

[547] *Id.,* para. 204.

[548] Nigel Bankes, "Reflections on the Role of Due Diligence in Clarifying State Discretionary Powers in Developing Arctic Natural Resources" *supra* note 362 at 4.

2. Due Diligence and Private Vessels

The issue of the flag State responsibility has been around for a long period of time. While the rights of flag States have remained largely unchanged since the convention on the High Seas of 1958, the responsibilities of flag States have grown tremendously. Two factors are behind such expansion, first the insufficiencies of the 1958 convention, and later the UNCLOS, have brought States to include more responsibilities in order to complement the flag State regime. Secondly, as new concerns appeared, in the environmental field especially, new responsibilities on these regards were also added. This history resulted in the current flag State regime. Yet, despite this active legal development, today's regime is far from efficient. The shipping industry still witnesses many deficiencies and incidents[549] while the fishing industry brought international fisheries to the brink of collapse.[550] Facing this reality, the debate has lately moved away from adding more burden on the flag States and seeks to find solutions in better and more effective implementation along complementary controls to assist where flag States fail.[551] Yet, in order to secure the compliance of States and better implementation regarding their due diligence obligations in the high seas over private vessels, the issue of the link between the flag State and the subject vessels has to be dealt with.

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[549] Awni Behnam, Peter Faust, "Twilight of Flag State Control" (2003) 17 Ocean Yearbook 167.

[550] SOFIA 2018, *supra* note 373 at 6.

[551] Camille Goodman, "The Regime of Flag State Responsibility in International Fisheries Law, Effective Fact, Creative Fiction, or Further Work Required" (2009) 23:2 Australian and New Zealand Maritime Law Journal 157.

Concretely, to fulfil a due diligence obligation, a State must be able to do so. Thus, a legal link, but also a factual link, must exist between a flag State and vessels flying its flag. Without a legal link, no legal obligation weights on the State and without the existence of a factual or concrete link, the State is simply unable to fulfil its obligation. Bearing in mind that most international obligations arising in the high seas are obligations of due diligence,[552] the question of "ability" or "opportunity" becomes important. Consequently, while the jurisdiction of the flag States over their vessels does not raise any particular doubts, the issue of the control of flag States does need to be solved in order to secure proper implementation of due diligence obligations.

2.1. The Concept of Flag State

The concept of flag State has developed over centuries. Beyond the symbolic value of the flag,[553] merchants during the Middle-Ages displayed flags indicating their nationality and allegiance in order to benefit from the protection of their liege among other privileges.[554] With the expansion of trade and the affirmation of States during the 17th century, such practice expanded, and flags displayed on vessels coincided more and more with nation States rather than individual patrons.[555] Following the example of

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[552] As we have seen, some obligations are formulated in strict terms using "shall" but with regards to the activities of private actors, these obligations become of due diligence.

[553] Pride, religion, patron or simply for the purpose of distinction

[554] Such as tax relief or privilege on trade

[555] For a detail report of the historical development of flag State, see John Norman Keith Mansell, "An Analysis of flag State Responsibility from an Historical Perspective: Delegation or Derogation?" (2007) PhD thesis, Centre for Maritime Policy, University of Wollongong

England, States increasingly regulated the conditions on which vessels were allowed to fly the national flag. Such conditions became termed as registration, and each State was free to determine the characteristics of registration and thus on which conditions to grant its flag.[556] As of today, the UNCLOS still allows States to almost freely determine their conditions for registration. Article 91(1) requires the existence of a "genuine link" between the vessel and the flag State and mirrors Article 5(1) of the High Seas Convention, and Article 94(1) requires States to undertake a survey of the vessel before registration. Naturally, supplementary conventions concerning all aspects of vessels, from the characteristics of the ships to labour standards onboard, have been adopted by States. It is not a coincidence that this development started after the apparition of the steam engine since this technological revolution also rose the risks of accidents tremendously. The first convention on the Safety of Life at Sea (SOLAS) adopted after the *Titanic* disaster in 1912 is one example.[557] Yet, these conventions do not set obligations for flag States prior to registration. On the contrary, their provisions assume that vessels are properly registered. It is thus up to the flag States, parties to these conventions, to enforce them. These are flag State duties and are addressed in a general manner in Article 94 of the UNCLOS and in details in other instruments. Consequently, in the absence of any elaborate criteria detailing the registration other than the genuine link, it appears that the

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Thesis Collections, available at: < https://ro.uow.edu.au/theses/742/>.

[556] The PCA stated in 1905 that "generally speaking it belongs to every Sovereign to decide to whom he will accord the right to fly its flag and to prescribe the rules governing such grants"; *Affaire des Boutres de Mascate (France v. Great Britain),* Award, [1905] R.I.A.A. vol. 11, 83 at 93.

[557] In total, six SOLAS conventions were negotiated with the last one signed under the aegis of the IMO in London in 1974.

issue of control over those duties depends solely on the solidity of the genuine link between the vessel and the flag State.

2.2. The Genuine Link Criteria: Evidence of Control?

When the International Law Commission started its work in 1948, the legal regime of the high seas was one of the items to be codified.[558] At the outset, the ILC relied on a draft written by the *Institut de Droit International* to approach the issue of registration.[559] The original idea was to follow the tradition of some European States and require a national element in the management of a ship and its activity.[560] Worried of legal loopholes ascribing a supposedly comprehensively detailed draft article,[561] the Netherlands submitted a proposal inspired by the *Nottebohm* case[562] in which criteria of

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[558] Report of the ILC on its Second Session, UN Doc. A/CN.4/34, 1950 (ILC Yearbook ,1950, vol. 2) 364.

[559] Doris König, "Flag of Ships" (Oxford: Max Planck Encyclopedias of International Law, 2009).

[560] The ILC draft articles on the high seas of 1955 proposed an article 5 on the "right to a flag" providing: "Each State may fixe the conditions for the registration of ships in its territory and the right to fly its flag. Nevertheless, for purposes of recognition of a ship's nationality by other States, that a ship must either (1) be the property of the State concerned; or (2) be more than half owned by a) nationals of or persons legally domiciled in the territory of the State concerned and actually resident there, or b) a partnership in which the majority of the partners with personal liability are nationals of or persons legally domiciled in the territory of the State concerned and actually resident there, or c) a joint-stock company formed under the laws of the State concerned and having its registered office in the territory of that State." Report of the ILC Covering the Work of its Seventh Session, *supra* note 136.

[561] Especially with regards to joint companies.

[562] *Nottebohm Case (Liechtenstein v Guatemala)*, Judgement, [1955] ICJ Reports 4.

the link between an individual and a State were described in general terms.[563] Thus, the Netherlands proposed to substitute the earlier ILC's formulation by the expression of genuine link in order to prevent abuses of right. This concept was withheld and included in the 1958 Geneva Convention on the High Seas but in a modified and emptied version. Indeed, the original proposal of the Netherlands, following the ILC proposal, included the possibility for third States to refuse to recognize a ship without a genuine link with its flag State.[564] Such right of unilateral non-recognition in the absence of a genuine link was, eventually, dropped for being too infringing on State sovereignty[565] and suddenly the concept of genuine link which was originally seen as too excessive by the developing States lost its substance. Instead, the genuine link became connected to the effective exercise of jurisdiction and control of the flag State after registration rather than prior to the registration. In the words of Doris König: "the focus of the concept switched from being a prerequisite which was to be met before granting nationality to a ship, to a legal obligation the flag State was to fulfil after having granted a ship the right to fly its flag."[566] This post-registration obligation to exercise jurisdiction and control was further developed in Article 10 of the High Seas Convention but only referred to generally accepted international standards to ensure safety at sea.

Following the High Seas convention, the UNCLOS did not make any substantial change to the registration process. It confirmed the requirement of a genuine link by

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[563] Comments by Governments on the Provisional Articles Concerning the Regime of the Seas and the Draft Articles on the Regime of the Territorial Sea adopted by the Law Commission at its Seventh Session, UN Doc. A/CN.4/99 (ILC Yearbook,1956, vol. 2) 37.

[564] *Id.,*

[565] Doris König, "Flag of Ships" *supra* note 559.

[566] *Id.,*

keeping the same formulations. The only difference came with the separation of the genuine link on the one hand, and the exercise of jurisdiction and control on the other hand, in two distinct articles. Such adjustment confirmed that the exercise of jurisdiction and control is simply a post-registration duty of the flag State and not a condition for the attribution of the flag.

A few years after the adoption of the UNCLOS, another convention specifically drafted on the issue of flagging was adopted. The 1986 United Convention on Conditions for Registration of Ships (UN Registration Convention) was an effort to counter the expansion of open-registries. To this end, the convention aimed at strengthening the genuine link between the vessels and flag States.[567] Its provisions focus on reinforcing the national element in the activity or the manning of vessels,[568] the obligation to have an identifiable owner or company behind the vessel in view of effective enforcement mechanisms,[569] and the requirement to establish a competent maritime administration.[570] Surprisingly, developing States, which were critical towards the genuine link for being too excessive in the first place, turned out to be supporters of this reinforcement of the genuine link. In fact, if at some point, developing States were hoping to attract the merchant fleets of developed countries to their cheaper labour markets, they quickly realized that the existence of open-registries prevented such development.[571] Indeed,

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[567] United Nations Convention on Conditions for Registration of Ships (done 7 February 1986, not yet entered into force) TD/RS/CONF/23; [hereinafter UN Registration Convention] Art. 1.

[568] UN Registration Convention, Art. 7-8-9.

[569] *Id.,* Art. 6.

[570] *Id.,* Art. 5.

[571] Doris König, "Flag of Ships" *supra* note 559.

with the possibility to adopt open-registry flags without the need to register their benefits or even employ nationals of the flag State, shipping companies continued to drive their businesses from the developed countries but under the flag of open-registry States. Developed States registries may have lost major parts of their merchant fleets but their companies kept dominating the market. For that reason, no major maritime State ratified the convention, and to this day only 15 States have ratified it.[572]

The final deliberation on the role of the genuine link as a condition of flagging rather than a consequence came through the ITLOS in the *Saiga case.* Answering Guinea's allegation that Saint Vincent and the Grenadines had no *locus standi* because of a lack of genuine link between the *M/V Saiga,* and Saint Vincent and the Grenadines, and that therefore Guinea was not bound to recognize the nationality of the ship, the ITLOS declared:

> "the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States."[573]

To reach such a conclusion, the ITLOS looked at the drafting history of the High Seas convention and noticed the exclusion of the possibility of unilateral non-recognition

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[572] <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-7&chapter=12&clang=_en>.

[573] *M/V "Saiga" (No 2) (Saint Vincent and the Grenadines v. Guinea),* Judgement, [1999] ITLOS Reports 10, para. 83.

from the text of the convention. Turning to the subsequent practice, the ITLOS also noticed the absence of substantive ratification of the UN Registration convention[574] and therefore deemed that proper registration under national law suffices to justify a genuine link.[575]

Conclusively, it can be said that the genuine link does not have to pre-exist the registration. Its purpose comes afterwards by establishing a permanent link between the State of registration and the vessels. In virtue of the genuine link, the State of registration, becoming the flag State, is entitled and under the duty to exercise its effective jurisdiction and control in administrative, social and technical matters.[576] In other words, the genuine link simply justifies the existence of the duties of the flag State. Eventually, while the registration serves as a justification for the exercise of a flag State's jurisdiction over vessels flying its flag which is vital since the jurisdiction of the flag State is exclusive in the high seas,[577] the genuine link serves a more practical purpose. The existence of a genuine link assumes that the flag States is able to control to some extent (to the extent of the genuine link) its vessels and therefore able to conduct its duties. In that sense, the requirement of a genuine link may be repetitive with the direct obligation to exercise effective control over the vessels also contained in Article 94(1).[578] Yet, this latter obligation is limited to administrative, technical and social matters. This limitation may first appear vague but taken in the context of the entirety of Article 94 it seems that

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[574] Tullio Treves, "Flag of Convenience Before the Law of the Sea Tribunal" (2004) San 6 Diego International Law Journal 179.

[575] Doris König, "Flag of Ships" *supra* note 559.

[576] UNCLOS, Art. 94(1).

[577] *Id.,* Art. 92(1).

[578] *Id.,* Art. 94(1).

effective control of the flag State is only required with regards to the identification, manning, fitting, and crewing of the vessel. Such interpretation may be really disappointing when it comes to activities potentially dangerous for the environment such as fishing. It is perhaps for this reason that the ITLOS in the *SRFC* advisory opinion chose to bypass the natural boundaries of Article 94 to consider that a duty to exercise effective control over fishing activities exist under this article.[579] While this finding seemed justified by the laudable goal to prevent IUU fishing, it is still regrettable since it unnecessarily distorts Article 94.[580] Indeed, the ITLOS could have used the genuine link to justify the requirement of effective control in fishing matters. Besides, compared with the strict wording of Article 94, the genuine link may be even better suited to reflect the variable degree of control inherent to activities taking place all over the globe. On the contrary, Article 94 strictly requires effective control. The inflexible nature of Article 94 may be explained by its focus on subjects that are in practice more easily controllable. Indeed, the condition, equipment and maintenance of ships along with the training of crews can all be verified in ports where the control of States is clearly more evident. Thereby, an argument could be made that while Article 94 strictly requires effective control on subjects easily controllable, the genuine link requires control in general without precising the exact degree of control since it is inherently variable.[581]

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[579] *SRFC, supra* note 5 at para. 117.

[580] Nigel Bankes, "Reflections on the Role of Due Diligence in Clarifying State Discretionary Powers in Developing Arctic Natural Resources" *supra* note 362 at 6.

[581] Awni Behnam, Peter Faust, "Twilight of Flag State Control" *supra* note 549; The authors connect the genuine link with the exercise of control and deplore that while the flag of convenience lack a genuine link to exercise control, other flag States have a genuine link but deliberately do not exercise the control required.

To sum up, the UNCLOS justifies the control of flag States over their vessel through the existence of a genuine link. Establishing a genuine link is an obligation but remains contingent to the context of every activities. As such, whilst the genuine link justifies the existence of a certain degree of control, it does not divulge anything on its density. This density will vary on a case by case basis and will influence the capacity to fulfil due diligence obligations. Bearing this in mind, instruments, posterior to the UNCLOS, have emphasized the importance of control and specified how dense it should be.[582] Article III of the compliance agreement states:

"No Party shall authorize any fishing vessel entitled to fly its flag to be used for fishing on the high seas unless the Party is satisfied that it is able, taking into account the links that exist between it and the fishing vessel concerned, to exercise effectively its responsibilities under this Agreement in respect of that fishing vessel."[583] [emphasis added]

The FSA also states:

"A State shall authorize the use of vessels flying its flag for fishing on the high seas only where it is able to exercise effectively its responsibilities in respect of such vessels under the Convention and this Agreement."[584] [emphasis added]

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[582] Besides the term "control", the Compliance Agreement (Art. III) and the FSA (Art. 18) use the terms "exercise effectively its responsibilities"; the Code of Conduct uses "establish effective mechanisms" (para. 6.10) and the IPOA IUU uses "should ensure, before it registers a fishing vessel, that it can exercise its responsibility" (para. 35).

[583] Compliance Agreement, Art. III(3).

[584] FSA, Art. 18(2).

These two examples show that registration is not sufficient to expect flag States to be able to fulfil their duties towards private vessels. Instead, such ability depends on the links that exists between flag States and vessels. Consequently, a solution has been proposed to ask flag States to assess their ability to control vessels based on their links with them before providing authorization for fishing.

3. Conclusions on the Role of the Genuine Link

Due diligence has always required more than just jurisdiction to be effective. From the protection of foreigners' jurisprudence to the prevention of IUU fishing, States have always been required to control activities taking place under their jurisdiction. However, as noticed by Brownlie, the test of responsibility for acts of private individual is not sovereignty but "that of physical control".[585] Following the necessity of physical control, Brownlie thus assumed that physical control could only be expected in the territory of the State and therefore joined the point made by Max Huber in the *British Claims in Spanish Morocco.*[586] As a consequence, he concluded that "a State is not [in principle] responsible for the delinquencies of vessels flying its flag or otherwise controlled by its nationals".[587] Fortunately, the presumed lack of control beyond

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[585] Ian Brownlie, *System of the Law of Nations, State Responsibility, Part I, supra* note 291 at 165.

[586] see the *British Claims in Spanish Morocco* case.

[587] Ian Brownlie, *System of the Law of Nations, State Responsibility, Part I, supra* note 291 at 165.

territorial borders can be reversed by prescribing express duties to control in conventions.[588] Naturally, this reasoning leads us to the question of control under the UNCLOS.

As seen above, the general requirement of control is less clear in the UNCLOS than in the FSA or the Compliance Agreement. Yet two arguments can be made. First and following the ITLOS, Article 94 can be interpreted broadly and fishing activities can be covered by the "administrative"[589] duties of flag States. Second, it can also be said that the requirement of the genuine link in Article 91(1) actually demands that States establish some control over their vessels. This latter option has the benefit to be more flexible and to revitalize the role of the genuine link. In any case, whichever path is taken, the UNCLOS does indeed clumsily prescribe a duty to control vessels in all maritime areas.

Now, as it is obviously difficult for States to exercise a physical control on their fleet worldwide, remedies have been envisaged. Among them, electronic tracking, reporting of capture figure prominently and constitute diligent step to be taken by flag States. Cooperation can also be done in order to both facilitate capacity building and mutualize monitoring means. In that regard, the Voluntary Guidelines for Flag State Performance are a precious tool. Not only do they provide remedies for weaker control but they also encourage flag States to pre-emptively assess their ability to control vessels. By highlighting inefficiencies of domestic regulations and systems, this kind of assessment procures an opportunity to prevent rather than redress violations. This pre-emptive logic is also present in the Compliance Agreement and the FSA which both

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[588] *Id.*

[589] UNCLOS, Art. 94(1).

require States to only authorize activities where and when they are confident on their ability to control them.[590] In view of their potential contribution for protection the seas, such pre-emptive steps should be encouraged and considered as due diligence requirements. Yet, doing so may go beyond the scope of prevention which normally focuses on known risks. For this reason, the clear recognition of the applicability of the precautionary principle with regards to fisheries under the UNCLOS would be beneficial as it would eventually reinforce the upstream due diligence.

[590] Compliance Agreement, Art. III(3); FSA, Art. 18(2).

Chapter IV: Defining Due Diligence: From Interpretation to Law-Making

The previous chapters have identified and detailed the markers of due diligence. We have seen that it can serve a dual purpose since the best efforts' obligation applies both vis-à-vis the acts of private individuals and the acts of the State itself. Therefore, due diligence is relevant when the object of the regulation is mainly achieved by private actors or when the goal of the regulation is particularly difficult to achieve (or both). Bearing this double aspect of due diligence, means have been proposed to identify rules of due diligence within international law thanks to either the language of an obligation or its purpose. Finally, it has also been observed that they key feature of due diligence resides in its flexibility which can manifest in different ways. First, due diligence obligations do not weight as much on every States and in every situation.[591] Second, the content of what is deemed diligent will vary depending on every concrete context. As a consequence of this flexibility, Chapter 3 showed that control plays a critical role in the fulfillment of due diligence obligations as the severity of the obligation can be said to be proportional to the control of the State. It follows that due diligence obligations in areas beyond national jurisdiction are particularly tricky since States are not normally required to exercise control over their private actors there.[592] Fortunately, it is possible to prescribe duties to

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[591] But as we have seen, the differentiation between States can be reversed by higher imperative such as the protection of a common interest.

[592] Ian Brownlie, *System of the Law of Nations: State Responsibility Part I, supra* note 291 at 163; Günther Handl, "Flag State Responsibility for Illegal, Unreported and Unregulated Fishing in Foreign EEZs" (2014) 44 Environmental Policy and Law 158 at 159.

control private actors by convention[593] and therefore ensure the normal functioning of due diligence obligations in such areas. Concerning the high seas in particular, the obligation to establish a genuine link contained in Article 91(1) of the UNCLOS can be considered as a general obligation to establish effective control over vessels. This conclusion is reinforced by the emphasis given on effective control in both the FSA[594] and the Compliance Agreement[595] and by the UNGA.[596]

One question remains to be answered, and this question concerns the concrete content of due diligence on the high seas. Chapter 3 partially answered it by introducing the legal framework surrounding the high seas through different instruments. Yet, most of these instruments are soft law in nature and neither the Compliance Agreement nor the FSA are satisfyingly ratified. This leaves the UNCLOS as the main legal regime to ensure the well-being of the high seas. Yet again, the Compliance Agreement, the FSA and the soft law instruments will prove relevant to interpret the provisions of the UNCLOS. This process of informing can be done where provisions specifically open their content to "rules of reference" or through due diligence. Indeed, the flexible nature of the content of due diligence may leave enough room for the indirect application of external standards originally set in soft law instruments or subsequent treaties. In fact, the flexibility of due diligence is potentially so large that its content may not be limited to external pre-existing standards but extends to completely new rules. Hence, the concept of due diligence can legitimately be suspected of having a law-making effect. Thereby, before answering any

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593 Ian Brownlie, *System of the Law of Nations: State Responsibility Part I, supra* note 291 at 163.

594 FSA, Art. 5(l), 18(2).

595 Compliance Agreement, Preamble and Art. III(3).

596 *Sustainable fisheries,* UN GAOR, UN Doc A/RES/62/177 *supra* note 539.

further question, a delimitation of this potential law-making effect is required (Section 1). Following this delimitation, the chapter will conclude on the impact of the concept of due diligence on the high seas' UNCLOS legal framework. In so doing, it will be shown how external instruments can flesh out the UNCLOS through due diligence and whether the due diligence concept can develop the UNCLOS even further (Section 2).

SECTION 1: Due Diligence as an Informing Process

It has been said that due diligence creates new obligations.[597] Yet, this law-making effect may have different degrees and may not be as straight forward as it seems. Indeed, the concept of due diligence can either allow for the creation of completely new obligations or call for the application of certain standards already present in international instruments. In both instances however, the law-making effect will be dependent on the interpretation of what is "diligent" in a particular situation. Thereby, judges play an especially important role with regard to due diligence obligations since they are the main actors gifted with the capacity to interpret the law. Other actors such as international organizations may also have a role to play since by their international nature, they are a legitimate fit to develop international standards in parallel to or in conjunction with State practice. In that case, their work may constitute "rules of reference" or "generally accepted international rules and standards" (GAIRS). All things considered, questions can thus be raised on whether it is due diligence itself, judges (1) or international

[597] Yann Kerbrat, "Le Standard de *Due Diligence,* Catalyseur d'Obligations Conventionnelles et Coutumières pour les Etats" *supra* note 343 at 27.

organizations (2) that make law.

1. From Interpretation to Law-Making

As expressed above, due diligence may allow for law-making (1.1) but without the crucial intervention of a judge, the faculty remains a conjecture (1.2).

1.1. The Limited Law-Making Effect of Due Diligence

In order to examine if due diligence possess a law-making effect, it may be wise to look at its record. When due diligence first appeared in the *Alabama* case, its content was defined by the treaty of Washington[598] signed in order to settle the dispute between the United Kingdom and the United States following the involvement of the United Kingdom in the American secession war. In this treaty, due diligence was envisaged in the context of the duties of neutral States and resorted, for neutral States, to prevent shipyards from building vessels for any of the belligerents.[599] It also induced for neutral States the duty to refuse to permit any of the belligerents from using the ports or waters of the neutral State as a base of operation.[600] Accordingly, while the substance of the obligation is to ensure neutrality, the implementation of it goes through several steps such as ensuring that shipyards do not work for either belligerent and that no belligerent can

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[598] Treaty of Washington, [1871] Art. VI.

[599] *Id.*

[600] *Id.*

refit, resupply, recruit or generally operate from the territory of a neutral State. Thus, it can be said that due diligence only relates to the procedural implementation of the substance of the obligation.

Looking at the jurisprudence on the protection of foreigners, similar conclusions can be made. In the late 19th and the early 20th centuries, due diligence was used in order to pinpoint improper State behaviors in preventing or punishing crimes against foreigners.[601] These inefficiencies were therefore related to defects in the procedural aspects of the obligations to prevent and punish crime. Thereby, "lax and inadequate" means to apprehend culprits were seen as non-diligent[602] and unfair difference of treatment between nationals and foreigners (*diligentia quam in suis*) as well.[603] Finally, ostensibly insufficient punishment could also violate the due diligence obligation to punish crime.[604] This jurisprudence shows that insufficiencies in the implementation of an obligation leads to the violation of the obligation in question.

Moving forward to modern jurisprudence, the *Genocide* case considered that due diligence in the context of the prevention of genocide resorted in short to "employ all means reasonably available".[605] While it is hard to envisage procedures to prevent genocide, the Court indubitably focused on the attempts to implement the prohibition rather than the result.

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601 See: ILC Fourth Report by R. Ago on State Responsibilit *supra* note 63; Joanna Kulesza, *Due Diligence in International Law, supra* note 68, pp. 65-85.; Robert P. Barnidge Jr., "The Due Diligence Principle Under International Law" *supra* note 31.

602 *Janes, supra* note 92, para. 4.

603 *British claims in Spanish Morocco,* at 644.

604 *Youmans, supra* note 92 at 115.

605 *Genocide, supra* note 9 at para. 430.

The *Pulp Mills* case is however striking on the relation between procedure and due diligence. Indeed, in order to protect the "ecological balance"[606] of the river Uruguay, the ICJ found that Argentina and Uruguay should adopt and enforce administrative measures either individually or jointly.[607] Furthermore, they should cooperate which implies the use of notifications at every stage of a project having the potential to significantly impact the river.[608] Finally, due diligence also calls for the undertaking of EIAs when a planned activity may affect the quality of the river.[609] All in all, the Court established clearly that the due diligence required for the prevention of transboundary harm implies procedural steps in several regards: cooperation, assessment, enforcement.

These conclusions were expanded in the *Construction of a Road* jurisprudence[610]. In this double case, both Parties, *i.e.,* Nicaragua and Costa Rica, accused the other of environmental transboundary harm. The ICJ took this occasion to specify the sequential order of the procedural steps. The result was that States must first ascertain if there is a risk of significant transboundary harm in order to determine if an EIA is necessary.[611] If a risk is confirmed, States must then engage in an EIA which may prove or disprove the existence of a risk. A confirmed risk by the EIA then leads to the obligation to notify and

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[606] *Statute of the River Uruguay,* Uruguay and Argentina, 26 February 1975, UNTS vol. 1295 (p. 331), Art. 36.

[607] *Pulp Mills, supra* note 3 at para. 187.

[608] *Id.,* paras. 102-122. The Court considers the obligation to notify both the commission established between the Parties and the obligation to notify the other State in ample details.

[609] *Id.,* para. 204.

[610] *Construction of a Road, supra* note 6 at para. 104.

[611] *Id.,* paras. 104, 153, 156; This reasoning is very similar to the EIA system in the UNCLOS Art. 206.

consult in good faith with the potentially affected States.[612] This sequencing was obviously important for the Court since it refused to examine the compliance of Costa Rica with the obligation to notify and consult once it had established that it had already failed at the EIA step.[613] Another point of interest tackled by the tribunal was the origin of the obligation to conduct an EIA. But in this regard, the tribunal was not clear cut and based it both under the umbrella of due diligence[614] and under "general international law"[615] which, according to Judge Dugard[616] and Judge Donoghue,[617] refers to customary international law[618] but for Judge Owada does not. This indecision, which seems to evidence a disagreement between judges[619] and has had consequences and confused commentators.[620] Indeed, while the tribunal found a violation of the obligation to conduct an EIA by Costa Rica,[621] it also concluded that no transboundary damage had

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[612] *Id.,* para. 104, 168.

[613] *Id.,* para. 168.

[614] *Id.,* para. 153.

[615] *Id.,* para. 162.

[616] *Construction of a Road, supra* note 6, Separate Opinion of Judge Dugard, paras. 18, 21.

[617] *Construction of a Road, supra* note 6, Separate Opinion of Judge Donoghue, para. 2.

[618] *Construction of a Road, supra* note 6, Separate Opinion of Judge Dugard, para. 16.

[619] See the opposite views of Judge Dugard, Judge Donoghue and Judge Owada. For Judge Dugard, the obligation to conduct an EIA is an independent obligation under customary law while for Judge Owada it is one requirement of due diligence among others: *Construction of a Road, supra* note 6, Separate Opinion of Judge Dugard, Separate Opinion of Judge Donoghue and Separate Opinion of Judge Owada.

[620] Kerryn Anne Brent, "The *Certain Activities* case: What Implications for the No-Harm Rule?" *supra* note 173; Jutta Brunnée, "Procedure and Substance in International Environmental Law Confused at a Higher Level?" 5:6 ESIL Reflection (2016), available on < https://esil-sedi.eu/post_name-123/>; Leslie-Anne Duvic-Paoli, *The Prevention Principle in International Environmental Law, supra* note 192 at 213.

[621] *Construction of a Road, supra* note 6 at paras. 162, 173.

been proved.[622] As a result, the international responsibility of Costa Rica was not engaged.[623] For proponents of the independence of the obligation to conduct an EIA, this conclusion is surprising as it can be claimed that procedural obligations do not need a substantive damage to be violated. However, if the obligation to conduct an EIA is simply a due diligence requirement of the larger obligation to prevent significant transboundary harm, we have seen that obligations to prevent can only be violated once the damage occurs and a failure of diligence has been observed.[624] With this interpretation, the Court's conclusion on the responsibility of Costa Rica is understandable. Finally, a common mistake would be to associate due diligence with the debate on the meaning of "significant harm". In the case at hand, it is possible to argue that the scope of the obligation to prevent significant transboundary harm has been affected by the facts that the wetlands involved were recognized as protected sites by the Ramsar convention.[625] As result, the threshold of "risk of significant harm" was lower and due diligence obligations triggered when they may not have ordinarily triggered. Yet, the issue of what is "significant" is entirely disconnected with the issue of diligence. The expansion of the scope of the obligation to prevent significant transboundary harm to these wetlands was not a result of the influence of due diligence but rather a consequence of the ambiguity surrounding the substance of the obligation itself, *i.e.,* the meaning of significant harm.[626] To conclude, due diligence once again involved specific procedural obligations such as ascertaining risks, conducting EIAs, notifying and consulting potentially affected States,

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[622] *Id.,* para. 217.

[623] *Id.,* paras. 225, 226.

[624] See Chapter 2, Section 2.

[625] *Construction of a Road, supra* note 6 at para. 155.

[626] On this ambiguity, see ILC Draft Articles on Prevention, Commentary of Article 2.

but it did not extend the scope of prevention and therefore it did not create substantive obligations.

Now, turning to the law of the sea jurisprudence, the *Activities in the Area* advisory opinion also confirms the exclusively procedural role of due diligence. Concerning the diligent duties of sponsoring States with respect to activities in the Area, the tribunal considered, in accordance with *Pulp Mills* lines, that it creates an obligation to adopt "reasonably appropriate"[627] measures and an obligation to enforce them vis-à-vis public and private operators.[628] Going further, the tribunal specified that these measures could take the form of "laws, regulations and administrative measures"[629] which appears to imply that due diligence refers solely to procedural obligations and does not expand the substantive obligations of sponsoring States.[630] The tribunal also made a confusing argument on the precautionary approach which can confirm this point. Trying to secure the widest legal basis as possible, the ITLOS considered that the precautionary approach was applicable to any activities in the Area based on: (1) subsequent practice[631]

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[627] *Activities in the Area, supra* note 4 at para. 120.

[628] *Id.,* para. 115.

[629] *Id.,* para. 223.

[630] On what it can concretely involve for the legislation of States, see the case study of Tim Poisel on the German legislation: Tim Poisel, "Deep Sea Mining: Implications of Seabed Disputes Chamber's Advisory Opinion" (2012) 19 Australian International Law Journal 213, pp. 226-233.

[631] *Id.,* para. 130.

and other relevant rules of international law,[632] (2) the customary value of the principle[633] and (3) its requirement under due diligence.[634] While it is incorrect from the tribunal to say that due diligence itself requires the application of the precautionary approach since, as we have seen in Chapter 2, it is the precautionary approach which influences the threshold of diligence and not the opposite.[635] It is still clear that what the tribunal had in mind was the recourse to stricter procedures. Concretely, the interpretation of due diligence made by the tribunal lead to several obligations directly inspired by the ISA regulations on sulphides and nodules. It is thus important to note that the tribunal expanded the obligations made in these specific regulations, and especially in the more recent sulphides regulations, to mining activities in general as they represent the latest standard of diligence.[636] They include the obligation to adopt "best environmental

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[632] *Id.,* para. 135. The ITLOS considered that the use of the precautionary approach in two instruments of the ISA should be seen as relevant (Art.. 31(3)(c) of the VCLT) for the interpretation of the obligations of sponsoring States under the UNCLOS. See also Jianjun Gao, "The Responsibilities and Obligations of the Sponsoring States Advisory Opinion" (2013) 12 Chinese Journal of International Law 771, pp. 774-776.

[633] *Id.* As shown in Chapter 2, Section 2, the terms precautionary approach and precautionary principle can be used interchangeably (unless otherwise specified) as the French text of the ISA regulations shows. See: *Activities in the Area, supra* note 4 at para. 133.

[634] *Id.,* paras. 131, 132.

[635] If the precautionary approach is involved, diligent measures will have to consider unknown risks whereas with a preventive approach, diligent measures will only need to ensure the prevention of known risks. Therefore, the precautionary approach sets the level of diligence required and compared with the classical preventive approach, calls for a stricter due diligence. Thus, due diligence will involve precautionary measures where the precautionary principle is applicable but not where it is not (humanitarian law for example). For more details, see Chapter 2, Section 2.

[636] See also Günther Handl, "Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area: The International Tribunal of the Law of the Sea's Recent Contribution to International Environmental Law" (2011) 20:2 Review of

practices",[637] the obligation to ensure the existence of guarantees in the event of emergencies,[638] the obligation to have recourse available for compensation,[639] and the obligation to ensure that contractors conduct EIAs.[640] Clearly, all these duties are procedural.

In the *SRFC* advisory opinion, the ITLOS also derived strictly procedural duties for flag States based on their more general due diligence obligation to prevent IUU fishing in the EEZs of coastal States.[641] This process can be compared with the concept of due regards used in the same case. Indeed, while due diligence refers to procedural duties, due regards refers to "the rights and duties of the coastal States".[642] As the rights and duties of coastal States can be substantive as well as procedural, the notion of due regards may well be even more unconstrained than the concept of due diligence.[643] In the *SRFC* advisory opinion, the obligation to show due regards participated to the integration of a new obligation within the body of the UNCLOS *i.e.,* the obligation to prevent IUU fishing in the EEZs of coastal States.[644] Surely, this new obligation is only derived from the

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European Community & International Environmental Law 208; David Freestone, "Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area" (2011) 105 American Journal of International Law 755 at 760; Nigel Bankes, "Reflections on the Role of Due Diligence in Clarifying State Discretionary Powers in Developing Arctic Natural Resources" *supra* note 362 at 5.

[637] *Activities in the Area, supra* note 4 at paras. 136, 137.

[638] *Id.,* para. 138.

[639] *Id.,* paras. 139, 140.

[640] *Id.,* paras. 141-150.

[641] *SRFC, supra* note 5 at paras. 134-140. See also Eva Romée van der Marel, "ITLOS Issues its Advisory Opinion on IUU Fishing" *supra* note 352.

[642] UNCLOS, Art. 58(3).

[643] For more details, see Chapter 3, Section 1.

[644] *SRFC, supra* note 5 at para. 124.

convergence[645] of both the particular need to protect the rights of coastal States implied in the text of the UNCLOS and the general obligation of States to preserve the marine environment. Therefore, it may be argued that this obligation to prevent IUU fishing is only the result of textual interpretation rather than a brand-new obligation but the same conclusion can be made for duties inferred by due diligence. All things being equal, due regards may imply substantive obligations as it did in the *SRFC* advisory opinion while due diligence may only imply procedural obligations.

Finally, the *South China Sea* also gave much importance to the concept of due diligence by stating that the obligation to preserve and protect the marine environment is an obligation of due diligence.[646] However, the innovations of this decision must not all be attributed to due diligence. In fact, the inclusion of the protection of endangered species in the realm of the more general protection of the marine environment is simply due to the open-ended texture of this general obligation. In this context, due diligence simply demands that States ensure this protection but does not define the scope of the protection. Thus, when the tribunal says that "Article 192 [UNCLOS] imposes a due diligence obligation to take those measures 'necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life'"[647] it actually means that due diligence will influence the content of the said "measures". On the contrary, the scope of this obligation[648] is only a consequence of the openness of Article 192.

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[645] Maria Gavouneli, "Introductory note to *SRFC*" *supra* note 537.

[646] *South China Sea, supra* note 2 at paras. 944, 956, 959.

[647] *Id.,* para. 959.

[648] *i.e.,* "rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life."

To conclude, one must be careful when attributing a law-making effect to the concept of due diligence. It is true that it may refer to new procedural obligations but it does not create new substantive obligations. This role can be perfectly assumed by the usual rules of interpretation. Particular attention must also be given to the relation between due diligence and principles of international law, such as the precautionary approach. In and of itself, due diligence cannot call for the application of precautionary measures. Indeed, as has been shown, due diligence only calls for the application of international standards. Thereby, precautionary measures are only inferred by due diligence if they constitute, by themselves, international standards. If that is the case, it can thus be said that the precautionary approach influences due diligence and not the opposite. In the field of environment law, it is clear that tribunals may be tempted to declare the precautionary approach applicable in order to ensure better protection. Yet, they should avoid inconsistencies and clearly establish the customary nature of the principle if they wish to do so[649]. Reversing the roles surely allows them to avoid bringing the evidences of the existence of a custom but clearly constitutes law-making on their parts. This *"économie de la preuve"*[650] can also be witnessed for customary obligations as the ICJ has demonstrated in the *Pulp Mills* and *Construction of a Road* cases with regards to the obligation to conduct EIAs.[651] Therefore, in order to satisfyingly interpret due diligence, Courts should be encouraged to stick with existing standards rather than vague principles or half-baked customs.

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[649] The ITLOS considered that a "trend towards making this approach part of customary law" exists.

[650] Yann Kerbrat, "Le Standard de *Due Diligence,* Catalyseur d'Obligations Conventionnelles et Coutumières pour les Etats" *supra* note 343 at 35.

[651] *Pulp Mills, supra* note 3 at para. 204; *Construction of a Road, supra* note 6 at para. 162.

1.2. The Role of GAIRS

As a "constitution" for the oceans, the UNCLOS naturally established juridical frameworks for many, if not all, kinds of activities conducted on the oceans. Due to this generality, the text of the Convention had to remain general enough in order to be applied as broadly as possible and survive the passage of time. Thus, to compensate the disadvantages of generality and fill the various frameworks it sets with substance, different ways were envisaged to both fill gaps left by the original text and update the text.[652] One of these ways, and perhaps the most obvious one, is the amendment procedure but it has not been used since the entry into force of the Convention in 1994. Another way is the reference to external rules known as Generally Accepted International Standards and Procedures (GAIRS). GAIRS are undefined in the Convention. Therefore, their identification is a difficult exercise. They can represent international practice, customs or rules contained in rather universally ratified treaties. However, limiting the scope of GAIRS to these instruments of international law is practically futile and redundant since they, by themselves, are already applicable to States. Thus, what is required to qualify a rule as GAIRS must necessarily be less strict than that for the formation of customary international law.[653] It has therefore been repeatedly argued that

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[652] Jill Barrett, "The UN Convention on the Law of the Sea: A 'Living' Treaty?" in Jill Barrett & Richard Barnes, eds., *Law of the Sea: UNCLOS as a Living Treaty* (London: The British Institute of International and Comparative Law, 2016) 3.

[653] Tore Henriksen, "Protecting Polar Environments: Coherency in Regulating Arctic Shipping" in Rosemary Rayfuse, ed., *Research Handbook on International Marine Environmental Law* (Cheltenham: Edward Elgar Publishing, 2015) 363 at 377.

GAIRS may involve norms contained in soft law instruments[654] and only few authors still contest it.[655] Surely though, not every soft law instrument may qualify as GAIRS. Only those instruments revealing a certain consensus among relevant States with regards to the activity targeted by GAIRS, may qualify as GAIRS. Besides, it must be said clearly that if GAIRS can refer to soft law instruments, they cannot refer to the soft content[656] of

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[654] Jill Barrett, "The UN Convention on the Law of the Sea: A 'Living' Treaty?" *supra* note 652; Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law & the Environment, supra* note 201 at 389; Jürgen Friedrich, *International Environmental "Soft Law"* (Heidelberg: Springer, 2013) at 200; Douglas Guilfoyle, "Article 94" in Alexander Proelss, ed., *United Nations Convention on the Law of the Sea: A Commentary* (Munich: C.H. Beck, Hart: Oxford, Nomos: Baden-Baden, 2017) 707 at 712; Lene Korseberg, "The Law-Making Effects of the FAO Deep-Sea Fisheries Guidelines" (2018) 67 International and Comparative Law Quarterly 801; Catherine Redgwell, "Treaty Evolution, Adaptation and Change: Is the LOSC 'Enough' to Address Climate Change Impacts on the Marine Environment?" (2019) 34 International Journal of Marine and Coastal Law 440; Catherine Redgwell, "The Never Ending Story: The Role of GAIRS in UNCLOS Implementation in the Offshore Energy Sector", in Jill Barrett & Richard Barnes, eds., *Law of the Sea: UNCLOS as a Living Treaty* (London: The British Institute of International and Comparative Law, 2016) 167; Catherine Redgwell, "Mind the Gap in the GAIRS: The Role of Other Instruments in LOSC Regime Implementation in the Offshore Energy Sector" (2014) 29 International Journal of Marine and Coastal Law 600; Karim M. Saiful, *Prevention of Pollution of the Marine Environment from Vessels: The Potential and Limits of the International Maritime Organization* (N.p.: Springer International Publishing, 2015) at 35; Philomène Verlaan, "Marine Scientific Research: Its Potential Contribution to Achieving Responsible High Seas Governance" (2012) 27 International Journal of Marine and Coastal Law 805.

[655] Nengye Liu, "Protection of the Marine Environment from Offshore Oil and Gas Activities" in Rosemary Rayfuse, ed., *Research Handbook on International Marine Environmental Law* (Cheltenham: Edward Elgar Publishing, 2015) 190 at 197.

[656] Jean D'Aspremont, "Softness in International Law: A Self-Serving Quest for New Legal Materials" (2008) 19:5 European Journal of International Law 1075; Pierre-Marie Dupuy, "Soft Law and the International Law of the Environment" (1991) 12 Michigan Journal of International Law 420 at 429.

international instruments.[657] Indeed, GAIRS must only refer to rules of sufficient precision or else inconsistent interpretations may arise which would go against their very purpose.[658] All in all, although it is not clear if soft law instruments qualifying as GAIRS because of their processes of adoption involving relevant States and stakeholders,[659] or because of their implementation by relevant States,[660] it is clear that what is most likely to be considered as GAIRS are the instruments developed by the IMO and the FAO. Indeed, as UN technical bodies, the instruments developed by these two organizations fulfil both the "representativity" criterion and the "technicality" criterion, and it is for these reasons that their instruments are seen as legally applicable and binding through the LOSC by way of GAIRS.[661]

Having determined which instruments may qualify as GAIRS, it is now opportune to distinguish the two ways in which GAIRS may be called upon when interpreting the UNCLOS. The first and obvious way is indicated by the UNCLOS itself.

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[657] Declarations of principle such as the Rio Declaration are too vague to be considered as GAIRS.

[658] Tore Henriksen, "Protecting Polar Environments: Coherency in Regulating Arctic Shipping" *supra* note 653 at 378.

[659] Jürgen Friedrich, "Legal Challenges of Nonbinding Instruments: The Case of the FAO Code of Conduct for Responsible Fisheries" (2008) 9:11 German Law Journal 1539.

[660] Lene Korseberg, "The Law-Making Effects of the FAO Deep-Sea Fisheries Guidelines" *supra* note 654.

[661] On the FAO Deep-Sea Fisheries Guidelines, see Lene Korseberg, "The Law-Making Effects of the FAO Deep-Sea Fisheries Guidelines" *supra* note 654; On the IMO Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone, see Catherine Redgwell, "The Never Ending Story: The Role of GAIRS in UNCLOS Implementation in the Offshore Energy Sector" *supra* note 654; On the IMO Assessment Framework, see Philomène Verlaan, "Marine Scientific Research: Its Potential Contribution to Achieving Responsible High Seas Governance" *supra* note 654.

Indeed, numerous provisions call for the integration of GAIRS. This process of integration is, however, not always equal and must be calibrated[662] depending on the language of the provision.[663] Thus, while Article 94(5) posits an obligation of result to "conform" to GAIRS, Article 212(1) and Article 207(1) only require States to "take into account" GAIRS in the prevention of pollution from the atmosphere and land-based sources while Articles 208(3), 209(2), 210(6) and 211(2) on the prevention of pollution from the Area, dumping and vessels, require States to take at least equivalent measures to GAIRS through the expressions "shall be no less effective than"[664] and "at least have the same effect".[665]

A second way to involve GAIRS in the interpretation of the UNCLOS comes with the interpretation of due diligence. Indeed, the content of due diligence itself is based on international standards. While there is no definition for what constitute an international standard, it is clear that they must be distinguished from customary international law since they do not require the same strict levels or practice and *opinio juris*.[666] Thereby, GAIRS seem like obvious candidates in order to inform the content of due diligence since they can constitute the aforementioned "international standards".[667] Besides, since GAIRS do

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[662] Jill Barrett, "The UN Convention on the Law of the Sea: A 'Living' Treaty?" *supra* note 652 at 22.

[663] Catherine Redgwell, "Mind the Gap in the GAIRS: The Role of Other Instruments in LOSC Regime Implementation in the Offshore Energy Sector" *supra* note 654 at 607.

[664] UNCLOS, Art. 209(2) and Art. 210(6).

[665] UNCLOS, Art. 211(2).

[666] Pierre-Marie Dupuy, "Soft Law and the International Law of the Environment" *supra* note 656 at 434.

[667] See also Nikolaos Giannopoulos, "Global Environmental Regulation of Offshore Energy Production: Searching for Legal Standards in Ocean Governance" (2019) 28 Review of European, Comparative and International Environmental Law 289; Jürgen Friedrich,

not need to represent customary international law to classify as a due diligence requirement. Due diligence therefore serves as a tool to bring GAIRS under the umbrella of the UNCLOS where provisions are not explicitly calling upon them. Thereby, when the *South China Sea* tribunal had to consider the use of dynamite and cyanide as a fishing practice, it allowed itself to look at the FAO Code of Conduct on Responsible Fisheries in order to assess the legality of such practice.[668] Having found that these practices are explicitly prohibited by the Code,[669] the tribunal concluded that the use of dynamite or cyanide for fishing purposes would breach the due diligence obligation to protect the marine environment.[670] In that case, the mechanisms of due diligence were useful since no provisions explicitly including the recourse to GAIRS seemed applicable.[671] Similarly, after the ITLOS identified the existence of a due diligence obligation weighing on flag States to prevent IUU fishing in the EEZ of coastal States in the *SRFC* advisory opinion, the judges aligned the content of the diligence required with rules contained in various FAO instruments. Contrary to the *South China Sea* tribunal, this exercise was however masked since the judges solely based their findings on the UNCLOS. Yet, several of their findings cannot be found in the UNCLOS but can in fact be found in other instruments. For instance, the ITLOS found that due diligence under Article 94 of the UNCLOS requires flag States to adopt sanctions of sufficient gravity to "deprive offenders of the

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International Environmental "Soft Law" supra note 654 at 172.

[668] *South China Sea, supra* note 2 at para. 970.

[669] Code of Conduct for Responsible Fisheries, Art. 8.4.2.

[670] *South China Sea, supra* note 2 at para. 970.

[671] GAIRS concerning the protection of the environment are mentioned in Part XII, Section 5 of the Convention and concern pollution from land-based source, seabed activities, Area activities, dumping, vessels and the atmosphere. Article 211 on the pollution from vessels could arguably apply but was not used by the tribunal.

benefit accruing from their IUU fishing activities."[672] This precise obligation is nowhere to be seen in Article 94 of the UNCLOS but is almost word for word laid down in the Code of Conduct for Responsible Fisheries and the IPOA-IUU:

Code of Conduct for Responsible Fisheries, Article 8.2.7:

"Sanctions […] should deprive offenders of the benefits accruing from their illegal activities."

IPOA-IUU, Paragraph 21:

"States should ensure that sanctions for IUU fishing […] are of sufficient severity to effectively prevent, deter and eliminate IUU to deprive offenders of the benefits accruing from such fishing."

Similarly, the obligation to adopt an "enforcement mechanism to monitor and secure compliance"[673] is an obligation that is not properly written in the text of the UNCLOS but is clearly stated in the FAO Code[674] and, in a more developed form, in the IPOA-IUU.[675] It is also important to notice that the obligation to adopt proper sanctions is also enshrined in the FSA[676] and the Compliance Agreement,[677] and the obligation to adopt enforcement mechanisms and monitor is contained in the FSA[678] as well. Yet, it would be audacious from the ITLOS to use norms contained in binding agreements to inform the content of the UNCLOS even through due diligence when the parties to the

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672 *SRFC, supra* note 5 at para. 138.

673 *Id.*

674 Code of Conduct for Responsible Fisheries, Art. 6.10.

675 IPOA-IUU, para. 24.

676 FSA, Art. 19(2).

677 Compliance Agreement, Art. III(8).

678 FSA, Art. 18(3)(g).

dispute are not themselves parties to the external binding agreement. This would go against the general rules of consent of the State and beyond the rules of interpretation of the Vienna Convention on the Law of Treaties. Indeed, the extensive interpretation allowed by Article 31(3)(a) and (c) only concerns the use of treaties to which at least the parties to the dispute have adhered to[679] while paragraph (b) concerns subsequent practice which cannot compensate the non-ratification of an instrument.[680]

To conclude, GAIRS can be implied in the interpretation of a convention when the convention itself calls upon them or by way of due diligence. Paradoxically though, it is easier to inform the content of GAIRS and due diligence with non-binding instruments. While the absence of ratification of a treaty clearly discloses the intent of a State to reject its rules, the obscure status of soft law instruments creates a form of tacit acceptance by States. After all, it is known in advance that a non-binding instrument does not need ratification. Therefore, States wishing to oppose its rules can still intervene during the process of its adoption or even *a posteriori* by publicly objecting to it.

2. The Critical Role of the Judge in the Determination of Diligence

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[679] There is still a debate on the need for all the parties to an original convention to adhere to an external treaty in order to use the latter in the interpretation of the former. But it is clear that, at least the parties to a dispute should have all ratified an external treaty in order to allow it to interfere in the interpretation of a convention. See: *European Communities- EC Approval and Marketing of Biotech Products (Complaint by the United States)* (2006), WTO Doc. WT/DS291-293/INTERIM, pp. 299, 300 (Panel Report); Report of the Study Group of the ILC on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law Finalized by Martti Koskenniemi to the General Assembly (2006) U.N. Doc. A/CN.4/L.682, paras. 470-472.

[680] It would seem absurd to apply a poorly ratified treaty through the rule of subsequent practice.

Having seen how the concept of due diligence can develop the content of certain international obligations, we have also noticed that the exercise of identification with regards to the content of the due diligence has always been performed by judges or arbitrators. Indeed, while the content of due diligence can be based on existing instruments or practice, only judges can officialize this connection.[681] Except for exceptional circumstances where it is written down such as in the Washington treaty[682] at the origin of the *Alabama* claims, without the intervention of a judge, the content of due diligence remains undetermined. A State can therefore only presume the content of its due diligence. At best, presumptions of States can turn into practice but only judges have the final say on what constitutes the duty of diligence. This matter of fact, comparable to the determination of customary international law, demonstrates that due diligence is a tool exclusively in the hand of judges and arbitrators.

As such, due diligence should not be mistaken with the rules of interpretation contained in Article 31 of the VCLT. Indeed, as observed above, Article 31(3)(a) and (c) only concern the inclusion of "any subsequent agreement between the parties regarding the interpretation of [a] treaty"[683] and "any relevant rules of international law applicable in the relation between the parties."[684] As rightly noted by the ILC in its report of fragmentation, these rules only refer to "conventional international law".[685] Indeed, it is

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[681] Pierre-Marie Dupuy, "Soft Law and the International Law of the Environment" *supra* note 656 at 434.

[682] *Washington treaty*, Art. VI.

[683] VCLT, Art. 31(3)(a).

[684] *Id.*, Art. 31(3)(c).

[685] ILC, Report of the Study Group on Fragmentation of International Law: Difficulties

clear that "subsequent agreement" refers to treaties. While "relevant rules of international law" could refer to customary law, it would be a truism since customary law is fully applicable in its quality of *lex generalis*[686] independently of the VCLT. Thereby, trying to justify the inclusion of a non-binding instrument in a dispute through the rules of Article 31 would amount to arguing about either its conventional value or its customary value. Obviously, the first option would be absurd and the second option would require evidences of practice and *opinio juris,* which is usually a difficult exercise (a conclusion equally valid for Article 31(3)(b)). Indeed, the rules involved in due diligence are always procedural and often very technical in nature. In that regard, the practice of States, especially in the context of fisheries, is usually obscure. Additionally, due diligence may intervene in fields still developing, such as seabed mining, where it cannot be said that a practice already exists. Finally, if the customary nature of an originally non-binding instrument were to be proven, judges would simply not need due diligence to apply it. Thus, all things considered, it is important to differentiate the mechanisms of due diligence from the general rules of interpretation contained in Article 31 of the VCLT.

In fact, the potential of due diligence obligations does not come from subsequent add-ons but from the obligations themselves. Due diligence follows the concept of "due regards" or "reasonable" in that it is used when law-makers wish to postpone the difficulties ascribing the concrete application of the law.[687] In that sense, law-makers

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Arising from the Diversification and Expansion of International Law, *supra* note 679, para. 470.

[686] *Id.,* para. 462.

[687] Jean J. A. Salmon, "Le Concept de Raisonnable en Droit International Public" in *Mélanges Offerts à Paul Reuter, Le Droit International: Unité et Diversité* (Paris: Pedone, 1981) 447 at 450.

relay the task of determining the concrete effect of the norm to future interpreters.[688] Although both States and lawyers can interpret the law, it is ultimately judicial courts and tribunals that "provide authoritative evidence of what the law is".[689] By doing so, they naturally exercise an influence on the law and in fact, the boundary between saying what the law is, which is an inevitable step for the application of the law, and making the law is thin. Surely, this process is not officially recognized as law-making. The ICJ emphasized its purely interpretative role in the *Legality of the Use or Threat of Nuclear Weapons* by saying that: "It is clear that the Court cannot legislate […] Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons."[690] It therefore appears that by ascertaining and interpreting the applicable law, judges assume the pre-existence of the law presented as self-evident, but in fact "contribute to the processes of law-making".[691] This phenomenon, which is true for interpretation in general, is even bolstered when it comes to the interpretation of due diligence obligations for two reasons. First, due diligence obligations are vague and therefore leave an open door for interpretation. And secondly, due diligence allows easier access to the use of international standards than for example the practice of States and their *opinio juris.* This second element in particular simplifies the task of judges as it allows them to cover the legitimacy of their decisions with the legitimacy of the technical bodies at the origin of the standard.

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[688] *Id.*

[689] Birnie, Boyle & Redgwell, *International Law & the Environment, supra* note 201 at 28.

[690] *Legality of the Use or Threat of Nuclear Weapons,* Advisory Opinion, at 237.

[691] Alan Boyle & Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007) at 272; Kerbrat, "Le Standard de *Due Diligence,* Catalyseur d'Obligations Conventionnelles et Coutumières pour les Etats", *supra* note 343 at 35.

Objectively, States are the ones offering this faculty of interpretation to judges by laying down obligations of due diligence on the one hand, while allowing international organizations established with their consent to develop international standards, usually with their active participation, on the other hand. Of course, this law-making may be less contested in matters of environmental law since it is a topic where States may find political difficulties to claim lesser standards.[692] This accepted mechanism of due diligence is contingent on the use of legitimate international standards by judges, and it falls apart when judges use due diligence to draw new obligations short of written basis. When this occurs, it may well appear as if judges save the efforts of evidencing the existence of a custom.[693]

Finally, some particular attention must be given to due diligence obligations focusing on areas beyond national jurisdiction (ABNJ). These areas can be the Antarctica, outer-space, the Area or the high seas. As we have seen in Chapter 3, Section 1, States possess due diligence obligations on the high seas with the most prominent one being the obligation to protect and preserve the marine environment.[694] These obligations raise a question that is not exclusive to due diligence. If indeed protecting the marine environment of the high seas is an obligation, is it however an obligation *erga omnes?* A negative answer to this question would not directly impede the existence of the obligation, but it would negate the legal interests of States in the protections of the marine environment. Thus, since generally, only States specifically injured by a breach may be

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[692] Alan Boyle & Christine Chinkin, *The Making of International Law, supra* note 691 at 285.
[693] Kerbrat, "Le Standard de *Due Diligence,* Catalyseur d'Obligations Conventionnelles et Coutumières pour les Etats", *supra* note 343 at 35.
[694] UNCLOS, Art. 192.

entitled to bring a claim for responsibility,[695] this lack of legal interest in the protection of the high seas would directly prevent States from acting before the court. This has been exemplified in the *South West Africa* case where the ICJ rejected the claims of Ethiopia and Liberia against South Africa on the motive that: "the applicants cannot be considered to have established any legal right or interest appertaining to them in the subject-matter."[696] Ultimately, the enforcement of the obligation would be unchecked and violations would remain unpunished. Fortunately, the ICJ has also recognized the existence of obligations *erga omnes*, which "by their very nature […] are the concern of all States."[697] The Court also added that: "in view of the importance of the rights involved, all States can be held to have a legal interest in their protections."[698] Following this statement, the ILC included in its *Draft Articles on Responsibility,* the notion of *erga omnes* obligations. Article 48(1) says:

"1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 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."

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[695] Giorgio Gaja, "Standing: International Court of Justice" (Oxford: Max Planck Encyclopedias of International Law, 2018).

[696] *South West Africa, Second Phase (Ethiopia v. South Africa; Liberia v. South Africa),* Judgement, [1966] ICJ Reports 6, para. 99.

[697] *Barcelona Traction, Light and Power Company, Second Phase (Belgium v. Spain),* Judgement, [1970] ICJ Report 3, para. 33.

[698] *Id.*

Thus, while it is true that not every obligation contained in a multilateral instrument can pretend to be *erga omnes* obligations, it is clear that the protection of the marine environment can qualify as one. Indeed, its importance for all States has been illustrated by the multiple UNGA resolutions every year. In addition, the Global Ocean Commission identified in its 2014 report no less than 15 major categories of services in which high seas' ecosystems play a major part in human wellbeing.[699] Concerning the obligation to conserve marine living resources, the importance of this obligation is also clear. Beyond its connection with the marine environment, this obligation is also directly connected with the interests of all States in fisheries, a sector that is not only providing food for populations but also supporting other social aspects. Lastly, ecosystem breakdowns in the high seas will also affect the ecosystems located within national jurisdiction by disrupting natural phenomenon in addition to the food chain.[700] To summarize, it is obvious that not all due diligence obligations qualify as *erga omnes*. Yet, just as for other types of obligations, some of them are. In that case, all States possess a standing in front of the relevant courts and tribunals in order to claim the responsibility of the violator of the obligation. As a perfect example of this possibility, the Seabed Chamber of the ITLOS went as far as to invite States to fill claims before the ITLOS whenever an obligation "relating to [the] preservation of the environment of the high seas

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[699] Alex D. Rogers *et al.* "The High Seas and Us: Understand the Value of High-Seas Ecosystems" *supra* note 380; The 15 majors services are as follows: Seafood, raw materials, genetic resources, medicinal resources, ornamental resources, air purification, climate regulation, waste treatment, biological control, lifecycle maintenance, gene pool protection, recreation and leisure, aesthetic information, inspiration for culture art and design and, information for cognitive development.

[700] For details on the challenges faced by the oceans: Agathe Euzen *et al. The Ocean Revealed* (Paris: CNRS Editions, 2017); On fisheries in particular see SOFIA 2018, *supra* note 373.

and the Area"[701] is breached. More subtly, the *South China Sea* tribunal actually found violations perpetrated by China on several high seas' features.[702] In this case, the tribunal did not bother to differentiate between the Chinese activities taking place within the Philippines' EEZ and outside of it since "the obligations in Part XII apply to all states with respect to the marine environment in all maritime areas."[703]

This only leaves the question of compensation following damage done to a protected global common, such as the high seas, or a protected global interest, such as biodiversity.[704] The ITLOS, again, proposed to simply allow all States to claim compensation.[705] Others have proposed the implementation of a system of "legal guardians" chosen among existing international organizations (UNEP, WWF…) acting for the benefits of all, combined with a "Global Commons Trust Fund" which could constitute the recipient of successful compensation claims.[706] While this proposal seems farfetched, the ITLOS already invited States to establish a trust fund aimed at covering damage done to the Area.[707] Yet, this invitation of the Seabed Chamber concerning the

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[701] *Activities in the Area, supra* note 4 at para. 180.

[702] These features include the Fiery Cross Reef, Subi Reef, Gaven Reef and Cuarteron Reef. *South China Sea, supra* note 2 at paras. 818-820; These features are originally claimed by the Philippines, see the Presidential Decree No. 1596 signed on 11th June 1978, Manila; available on: <www.officialgazette.gov.ph/1978/06/11/presidential-decree-no-1596-s-1978/> but for the sake of the case, the Philippines' claim on these features made for "reason of history, indispensable need, and effective occupation and control" was left aside.

[703] *South China Sea, supra* note 2 at para. 940.

[704] Isabel Feichtner, "Community Interest" (Oxford: Max Planck Encyclopedias of International Law, 2007).

[705] *Activities in the Area, supra* note 4 at para. 180.

[706] Christopher D. Stone, "Defending the Global Commons" in Philippe Sands, ed. *Greening International Law* (London: Earthscan Publications Ltd, 1993) 34.

[707] *Activities in the Area, supra* note 4 at para. 205.

Area, has not been answered by States and surely does not solve the general problem of compensation following *erga omnes* claims in other contexts such as the high seas' context. This thorny issue has been recognized as being difficult by the ILC and beyond the cessation of the wrongful act and guarantees of non-repetition, the Commission could not draw any conclusions out of general international law,[708] which proves that this issue has to be resolved by States themselves.

To conclude, due diligence is another tool in the hand of judges in their task to apply the law, and as such faces the same risks as other tools. Its mechanisms are similar but different than the mechanism of interpretation under Article 31(3) of the VCLT and the determination of customary law. Thereby, it offers unique opportunities to develop a legal framework based on existing international standards rather than practice or subsequent agreements. By basing its content strictly on international standards, courts and tribunals will reinforce the legitimacy of their decisions and favorize the predictability of international law. This is particularly important in order to maintain the interest of States in the judicial resolution of disputes. Due diligence also faces the same limitations as other vague concepts as it needs the intervention of a judge to see its content consecrated. Lastly, due diligence obligations in ABNJ also raise the chronic issue of reparation.

[708]Draft Articles on State Responsibility, Art. 48.

SECTION 2: Shaping the UNCLOS for Modern Challenges

As observed throughout this thesis, legal frameworks within the UNCLOS can be fleshed out through due diligence. This process requires the intervention of judges and, ideally, international standards developed by the IMO and FAO. As mentioned in the previous section, this process has been done to complement the EEZ regime in the *SRFC* advisory opinion. To a lesser extent, is has also been accomplished with regard to the Area regime in the *Activities in the Area* advisory opinion and with regard to the protection of the marine environment in the *South China Sea* arbitration. This Section will thus examine how a similar process could be executed for the UNCLOS' high seas regime (1). Needless to say, the following reasoning applies in a similar fashion to obligations of due diligence contained in the Compliance Agreement and the FSA. However, due to the unique statute of the UNCLOS, the argumentation focuses on this instrument. Thus, following this analysis, we will conclude on whether or not this informing process can be sufficient to fill the gaps left by the UNCLOS and emphasize the role of effective control (2).

1. Informing the UNCLOS Through Due Diligence

While the details of the impact of human activities are still subject to research, the overall issues causing negative impacts are well known. They can be classified in two categories that are often intertwined: pollution and overfishing. As we have seen, these topics are touched upon by numerous instruments ranging from pollution by vessels to

methods of fishing. As a comprehensive study of all potential instruments would go beyond what is necessary to prove the effect of due diligence, this Section will focus on the most pressing matter in the range of the UNCLOS, which is overfishing. That is not to say that pollution is not an urgent issue. Yet, most of the pollution affecting the oceans is actually land-based. The 1992 UNCED Report calculated that 70% of marine pollution was land-based with maritime transport, dumping at sea and atmospheric pollution accounting for 10% each.[709] As of today, the UN Environment Programme considers that 80% of marine pollution is land-based.[710] Thus, considering the light influence of the UNCLOS on land-based sources of pollution,[711] it might be adequate to say that other international frameworks can be better suited to deal with the issue of pollution.

Focusing on high seas' fisheries, we will see that relevant FAO instruments may provide content to the due diligence obligation of States to conserve marine living resources and protect the marine environment (1.2). However, prior to this evaluation, several methodological guidelines must be given (1.1).

1.1. Guidelines on the Informing Process

In order to inform the UNCLOS through due diligence, the following elements

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[709] Report of the United Nations Conference on Environment and Development, *supra* note 204 at 243.

[710] UNEP website, accessible on: < https://www.unenvironment.org/explore-topics/oceans-seas/what-we-do/working-regional-seas/land-based-pollution>.

[711] Strictly speaking, only Article 207 directly tackles land-based pollution. See also Frank Wacht, "Article 207" in Alexander Proelss, ed., *United Nations Convention on the Law of the Sea: A Commentary* (Munich: C.H. Beck, Hart: Oxford, Nomos: Baden-Baden, 2017) 1378.

must be considered: compatibility of object, compatibility of scopes, *lex specialis,* State consent and the potential expansion of the UNCLOS. Besides these elements, precisions must also be given on obligations to cooperate and obligations to promote in order to avoid confusions.

1.1.1. Compatibility of Object

In order to determine the informing potential of due diligence with regards to the UNCLOS it is crucial to find a compatibility between the substantial obligations contained in the Convention and the procedural measures contained in external instruments. This compatibility can be called a compatibility of object. For instance, when the *South China Sea* tribunal made reference to the FAO Code of Conduct for Responsible Fisheries' provision on fishing operation in order to evaluate the legality of using dynamite and cyanide, it did so in the context of UNCLOS, Article 192 on the protection of the marine environment.[712] The compatibility between Article 192 of the UNCLOS on the one hand and Article 8.4.2. of the FAO Code on the other hand is evidenced by their common concern for the protection of the environment. Indeed, beyond the obvious fact that poison and dynamite are highly destructive and non-discriminatory, Article 8.4.1. of the FAO Code even specifies that: "States should ensure that fishing is conducted with due regards to the […] protection of the marine environment". Thus, the connection between the two provisions is clear.

[712] *South China Sea, supra* note 2 at para. 970.

1.1.2. Compatibility of Scopes

Another element to look at is the compatibility of scopes. Indeed, even if the objects of two provisions, such as the protection of the environment is similar, both instruments may apply to different areas. Thus, measures concerning the protection of the environment within national jurisdiction can hardly be considered as international standards regarding areas beyond national jurisdiction. Similarly, measures provided especially for a category of species cannot be equally applied to other species. This compatibility of scopes is especially important for sectoral instruments such as the FSA which applies to straddling fish stocks and highly migratory fish stocks. In the *South China Sea* arbitration, the tribunal was allowed to look within the FAO Code without making a distinction between activities within the Philippines' EEZ and beyond their EEZ since the Code applies to "all fisheries".[713]

1.1.3. Caveat on *lex specialis*

Another key point to consider when assessing the informative value of international instruments for the UNCLOS comes to a *lex specialis* argument. Indeed, specifically designed provisions within the UNCLOS have priority over general obligations of due diligence. For this reason, when considering the obligation to conduct an impact assessment prior to the construction of artificial islands by China, the *South*

[713] FAO Code of Conduct for Responsible Fisheries, Art. 1.3.

China Sea tribunal based its considerations on Article 206 of the UNCLOS[714] rather than on due diligence as the *Pulp Mills* judgement did before it.[715] Similarly, pollution from land-based sources, seabed activities, Area activities, dumping, vessels and from or through the atmosphere must be addressed through Section 5, Part XII of the UNCLOS rather than the general due diligence obligation of Article 192 and doing otherwise would directly contradict the consent of States. Concretely, this focus may not make a substantial difference since Articles 207 to 212 are obligations of conduct involving reference to GAIRS; a process that can most likely be assimilated as due diligence. However, these articles also set different levels of deference towards GAIRS. Thereby, States should only "take into account" GAIRS in the prevention of land-based pollution and atmospheric pollution while they should adopt at least equivalent measures concerning the other sources of pollutions. Certainly, this differentiation between the levels of deference displays the intent of States to have more lenient regimes concerning land-based and atmospheric sources of pollution. Thereby, a due diligence approach of these articles should consider such intent. While it is not clear what exact level of deference the expression "taking into account" involves, it is certain that it does not oblige States to take equivalent measures. However, it is also likely that it obliges States to not act or adopt regulations with the opposite effect of the GAIRS.

1.1.4. State Consent and the Paradox of Soft Law Instruments

[714] *South China Sea, supra* note 2 at para. 911.

[715] *Pulp Mills, supra* note 3 at para. 204.

Paradoxically, the need to respect States' consent makes treaties harder to bring in for the interpretation of due diligence than soft law instruments. As seen in the previous section, by requiring ratification, treaties provide the opportunity to States to declare their intentions not to be bound by them simply through the passive behavior of non-ratification. On the contrary, soft law instruments developed in almost universal agencies do not require ratification and are seen as constituting GAIRS.[716] Obviously, contradictory declarations by States may preclude the effectiveness of these instruments[717] but otherwise a tacit acceptance of these instruments may exist. Consequently, due to their binding nature, it will be difficult to consider the Compliance Agreement and the FSA in the determination of due diligence under the UNCLOS for States that have refused to ratify these treaties.

1.1.5. The Expansion of the UNCLOS: Source of New Due Diligence Obligations

Furthermore, as the *SRFC* advisory opinion has shown, substantial obligations within the UNCLOS may yet be discovered.[718] Additionally, the *Chagos* arbitration extended the scope of Part XII beyond the prevention of pollution.[719] As a result, Part

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[716] *Supra* note 654.

[717] Nengye Liu, "Protection of the Marine Environment from Offshore Oil and Gas Activities" *supra* note 655.

[718] As seen in the previous section, the *SRFC* advisory opinion deduced the existence of an obligation to prevent IUU fishing within coastal States' EEZs, see *SRFC, supra* note 5 at para. 124; Yann Kerbrat, "Le Standard de *Due Diligence,* Catalyseur d'Obligations Conventionnelles et Coutumières pour les Etats" *supra* note 343 at 31.

[719] *Chagos,* para. 320.

XII has become crucial to determine the legality of certain fishing practices as exemplified in the *South China Sea* arbitration.[720] Both of these phenomena *i.e.,* the deduction of new substantial obligations and the expansion in scope of preexisting obligations, may involve new due diligence requirements. Indeed, the finding of the ITLOS in the *SRFC* ultimately resulted in the addition of several diligent duties on the shoulders of flag States[721] and the *South China Sea* tribunal found that failure to take measures against certain methods of fishing was non-diligent.[722] In conclusion, as the UNCLOS expands, new opportunities to call upon due diligence may appear and eventually, the recourse to international standards such as GAIRS may accentuate. As an example, a due diligence obligation to prevent IUU fishing on the high seas may well be among the future findings of the ITLOS through the convergence of Article 87(2) on the obligation to show due regards for the interests of other States, Article 94 on the obligation to exercise effective control and jurisdiction over administrative matters and Articles 117 and 192 on the protection of marine life.

1.1.6. Precisions on Obligations to Cooperate and Obligations to Promote

Finally, some precisions must be given on two types of obligations: obligations of cooperation and obligations of promotion. As seen in Chapter 2, Section 3, obligations to cooperate may not be seen as obligations of due diligence. Essentially, obligations to cooperate ask States to adopt a certain diplomatic conduct. However, they do not push

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[720] *South China Sea, supra* note 2 at para. 945.

[721] *SRFC, supra* note 5 at paras. 134-140.

[722] *South China Sea, supra* note 2 at para. 970.

States to reach a certain result contingent on their practical abilities as due diligence obligations do. Even in the case of obligations to consult, States do not have to wait for a response from the consulted nor do they have to abide by the recommendations of the consulted State.[723] On the other hand, due diligence obligations may require cooperation. This is exemplified by the requirement to notify and consult with neighboring States when a project has the potential to affect them.[724] Consequently, in the context of the UNCLOS, the obligation to cooperate in the conservation and management of living resources contained in Articles 117 and 118 cannot be seen as a due diligence obligation. Concretely, this means that entering RFMO/As is not a due diligence requirement and related provisions within GAIRS or the FSA cannot inform the content of Article 117 and 118. Concerning obligations of promotion, it is true that they can be labelled as due diligence obligations[725] and it is also true that due diligence obligation may require positive actions. However, as we have seen in the previous section, international standards and GAIRS must be of sufficient precisions.[726] Thereby, it is unlikely that provisions related to the promotion of certain objectives contained in international instruments can constitute due diligence requirements. Yet, without being a strict requirement, promoting behaviors may

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[723] See Draft Articles on Prevention, *supra* note 145, Article 9. See also *Construction of a Road, supra* note 6, Separate Opinion of Judge Donoghue, para. 6; Johan G. Lammers, "Prevention of Transboundary Harm from Hazardous Activities: The ILC Draft Articles" (2001) 14 Hague Yearbook of International Law 3 at 14; Hanqin Xue, *Transboundary Damage in International Law, supra* note 318 at 174.

[724] *Construction of a Road, supra* note 6 at para. 104.

[725] Serena Forlati, "L'Objet des Différentes obligations Primaires de Diligence: Prévention, Cessation, Répression…?" in SFDI, ed., *Le Standard de Due Diligence et la Responsabilité Internationale* (Paris: Pedone, 2018) 39.

[726] Tore Henriksen, "Protecting Polar Environments: Coherency in Regulating Arctic Shipping" *supra* note 653.

weight positively in the balance when assessing the overall due diligence of a State.[727]

1.2. Potential Informing Value of the FAO Code, IPOA-IUU and the Guidelines on Deep-Sea Fisheries

Considering all the above elements, the following tables displays the potential informing value of the FAO Code of Conduct for Responsible Fisheries, the IPOA-IUU and the Guidelines on Deep-Sea Fisheries. As pointed out previously, the value of the Compliance Agreement and the FSA is limited to their parties and are therefore not considered here. It must also be noted that the degree of informing will also depend on the preliminary recognition of the applicability of the precautionary principle and the sustainable development principle as well as on the recognition of an obligation to prevent IUU fishing in the high seas. These tables are not comprehensive, and different interpretations of either the UNCLOS or the FAO instruments can lead to different results. As Sir Waldock noted: "the interpretation of documents is to some extent and art, not an exact science."[728]

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[727] Eva Romée van der Marel, "ITLOS issues its Advisory Opinion on IUU Fishing" *supra* note 352.

[728] Third Report on the Law of Treaties, by Sir Humphrey Waldock, U.N. Doc. A/CN.4/167 (ILC Yearbook, 1964, vol. 2) 5 at 54.

FAO Code of Conduct for Responsible Fisheries		
Scope: All Fisheries		
Due Diligence Requirements	**Informing Provisions**	**UNCLOS Informed Provisions**
Prevent overfishing and ensure that the fishing effort is commensurate with the productive capacity of fishery resources and sustainable utilization.	Art. 6.3	Art. 117, 119, 192
Best scientific evidence available to inform conservation decisions.	Art. 6.4, 7.4.1	Art. 117, 119, 192
Selective and environmentally safe gear and fishing practices.	Art. 6.6, 7.2.2, 7.6.9	Art. 117, 192
Prevent excess fishing capacity.	Art. 7.1.8, 7.2.2	Art. 117, 119
Additional meaning to conservation: sustainable use, maximum sustainable yield.	Art. 7.2.1	Art. 117, 119
Additional meaning to EIA: ecosystem approach.	Art. 7.2.3	Art. 206

Domestic fishery management measures should be concerned with the whole stock unit over its entire area of distribution.	Art. 7.3.1	Art. 118, 119, 192
Prohibit the use of dynamite, poison and other comparably destructive fishing practices.	Art. 8.4.2	Art. 192
Reduce discards, ghost fishing and catch of non-target species.	Art. 8.4.4, 8.4.5, 8.4.6, 8.5.1, 8.5.2	Art. 192
Assessment of fishing gear and methods of fishing.	Art. 8.4.7, 8.4.8	Art. 192, 206
Minimize onboard garbage.	Art. 8.7.3	Art. 192, 211
Use of hydrochlorofluorocarbon (HCFC) instead of chlorofluorocarbon (CFC) in the refrigeration systems.	Art. 8.8.3, 8.8.4, 8.8.5	Art. 192, 212
Documentation of fishing operation should be collected.	Art. 8.1.2, 8.1.3, 8.2.1, 8.4.3,	Art. 94
Training of crew on discharge procedures.	Art. 8.7.4	Art. 94, 211
Training of crew on proper running and maintenance of machinery.	Art. 8.8.2	Art. 94, 212
Training of crew on fishing operations.	Art. 6.16, 8.1.7	Art. 94

Safe, healthy and fair working and living conditions.	Art. 6.17, 8.1.5	Art. 94
Dissemination of the law.	Art. 7.1.10	Art. 94
Maintain statistics on catch and fishing effort.	Art. 7.4.4	Art. 94
Authorization schemes.	Art. 7.6.2, 8.2.2	Art. 94
Efficacy of conservation and management measures should be under continuous review.	Art. 7.6.8	Art. 94
Sanction of sufficient severity for violations.	Art. 7.7.2, 8.1.9, 8.2.7	Art. 94
Effective monitoring, control and surveillance (MCS) including the use of observers, inspections and Vessel Monitoring Systems (VMS).	Art. 7.7.3	Art. 94
Keeping Records of fishers and their qualifications.	Art. 8.1.8	Art. 94
Gear marking.	Art. 8.2.4	Art. 94

IPOA-IUU		
Contingent on the recognition of an obligation to prevent IUU fishing on the high seas **Scope: All fisheries**		
Due Diligence Requirement	**Informing Provisions**	**UNCLOS Informed Provisions**
Avoid providing economic support to vessels and companies engaged in IUU fishing.	Para. 23	Art. 94
Undertake effective monitoring, control and surveillance (MCS).	Para. 24	Art. 94
Use of authorization schemes.	Para. 24.1, 44, 45	Art. 94
Maintain records of all vessels.	Para. 24.2	Art. 94
Use of Vessels Monitoring Systems (VMS).	Para. 24.3	Art. 94
Use of observers.	Para. 24.4	Art. 94
Training crew with regards to VMS.	Para. 24.5	Art. 94
MCS data gathering.	Para. 24.9	Art. 94
Use of boarding and inspections.	Para. 24.10	Art. 94

Conditions on fishing authorization delivery.	Para. 46-47.10	Art. 94
Cooperate with RFMO/As' conservation measures or adopt measures consistent with those and ensure that vessels do not undermine such measures.	Para. 79	Art. 87(2), 94, 117, 192

Guidelines for the Management of Deep-Sea Fisheries in the High Seas		
Scope: Deep-Sea Fisheries (DSF) and Vulnerable Marine Ecosystems (VME)		
Due Diligence Requirement	**Informing Provisions**	**UNCLOS Informed Provisions**
Additional meaning to EIA.	Para. 17-20, 47	Art. 206
Use best scientific and technical information available.	Para. 21	Art. 117, 192, 194(5)
Use of selective fishing methods.	Para. 21	Art. 117, 192, 194(5)

Implement effective Monitoring, Control and Surveillance (MCS) systems.	Para. 21	Art. 117, 192, 194(5)
Dissemination of the law.	Para. 21	Art. 94
Low knowledge/low harvest ratio.	Para. 23, 63, 66	Art. 117, 192, 194(5)
Classify VMEs in domestic law.	Para. 42	Art. 192, 194(5)
Additional meaning to EIA.	Para. 47, 73	Art. 206
Adopt specific frameworks for Deep-Sea Fisheries (DSF).	Para. 62, 75, 76, 77, 81, 82, 83	Art. 117, 192, 194(5)
Adopt protocols of encounter with VMEs.	Para. 67, 68	Art. 192, 194(5)
Data gathering on DSF and VME.	Para. 31, 32, 33, 35	Art. 94, 117, 119, 192, 194(5)
Use of observers.	Para. 36, 54, I55	Art. 94
Use of FAO resources.	Para. 36	Art. 94
Maintain and update records of vessels.	Para 56	Art. 94
Implement effective MCS for the conservation of DSF.	Para. 54	Art. 94

2. Gaps and Limits of the Mechanism of Due Diligence for the Informing of the UNCLOS

As we have observed thus far, due diligence is no more than a tool in the toolbox of a judge. To correctly use it, judges need to attach it to a preexisting obligation which serves as a frame. They can then proceed to draw content from international standards so as to fill the frame.[729] Thus, the mechanism of due diligence is only limited by the absence of framing obligation and/or the absence of international standards. Indeed, the absence of the former leaves a judge without any object on which to articulate the mechanism of due diligence, while the absence of the latter leaves the frame of the obligation empty.

Fortunately, the UNCLOS, as a comprehensive framework treaty, provides numerous provisions where due diligence can blossom. Article 192 on the protection and preservation of the marine environment is perhaps the best example as it may, in theory, single-handedly address a vast number of issues affecting the oceans. The law of the sea is also blessed with prolific international instruments developed under the aegis of international institutions such as the IMO and the FAO. While many of these instruments are non-binding, they can still constitute evidence of international standards and be used to give content to the provisions of the UNCLOS. All in all, it appears clearly that gaps left by the mechanism of due diligence are in reality regulatory gaps left by the UNCLOS and international standards. Where those gaps exist, due diligence is powerless to compensate the lack of regulations. Concerning the high seas, the challenges of

[729] See Chapter 2, Section 2.

biodiversity beyond national jurisdiction is an example of a contentious area[730] that due diligence alone cannot address. Surely the obligation to protect the marine environment could be stretched to cover this issue but the absence of agreed international standards would make it difficult for judges to define a diligent content without resorting to unjustified law-making.

The ambiguous value of environmental principles also deserves clarifications. Indeed, while several non-binding instruments clearly call upon the application of the precautionary principle, it is still unclear if this principle applies to the interpretation of the UNCLOS in the first place. Without recognizing the general application of the precautionary principle to activities on the high seas, it is questionable if precautionary measures contained in international standards are compatible with the UNCLOS. Surely, it could be said that the presence of the precautionary principle in several international standards[731] evidences the customary value of the principle but this also amounts to ignoring the fact that international standards do not necessarily represent international practice and *opinio juris*.[732]

Lastly, it is clear that the issue of effective control hinders the effectiveness of due diligence obligations. Effective control appears as a precondition to the effectiveness of any due diligence obligation[733] and as effective control is difficult to achieve beyond

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[730] Tullio Treves, "Principles and Objectives of the Legal Regime Governing Areas Beyond National Jurisdiction" in Erik J. Molenaar & Alex G. Oude Elferink, eds., *The International Legal Regime of Areas Beyond National Jurisdiction: Current and Future Developments* (Leiden: Martinus Nijhoff Publishers, 2010) 7.

[731] DSF Guidelines, para. 22, 65; FAO Code, para. 6.5.

[732] See Chapter 4, Section 1.

[733] See Chapter 2, Section 2.

national jurisdiction, due diligence obligations on the high seas become particularly challenging. This issue is in fact even more problematic than the lack of regulations and efforts to address it have been made by the FAO. Of particular notice are the 2013 Voluntary Guidelines for Flag State Performance which encourage flag States to assess their abilities to control and *in fine* address their inefficiencies. This instrument uses a preemptive logic where States are encouraged to conduct activities only where and when they are confident in their ability to control them. In order to not unfairly disadvantage developing countries, numerous mechanisms are proposed to either compensate the lower ability of these States or build up their ability. The former category revolves around cooperation while the second amounts to capacity building. Following these Guidelines should help States tackle their ineffective control and subsequently, fulfill their various due diligence obligations on the high seas. In fact, in view of the stakes at play, ensuring the effective control on the high seas could be in itself considered as a due diligence obligation.

Conclusion

The concept of due diligence is old yet somehow misunderstood. Often confused with the no-harm rule, due diligence is in fact only a characteristic of this obligation. This misconception is perhaps due to the sudden popularity of due diligence in the environmental field. Indeed, this vision gives too much attention to the *Trail Smelter* arbitration and the *Corfu Channel* case and too little to the early jurisprudence on the protection of foreigners or the more recent *Genocide* case. In fact, due diligence is best described in the words of the ITLOS as an obligation of "best possible efforts".[734] Naturally, "best efforts" can be accomplished in many regards and not solely for the prevention of transboundary harm and are by no means limited to the attitude of States with regards to private actors. Instead, "best efforts" can equally be required for the apprehension of culprits, the investigation of crimes and the protection of interests. This alone shows that due diligence applies beyond prevention. Besides, it also demonstrates that due diligence is not limited to "negative actions". Indeed, all these types of obligation may well require a "positive" behavior from the State. Whereas prevention can arguably be reduced to a negative conduct, investigation, apprehension and even protection most likely demands positive actions be taken by States.

Hence, it appears that the concept of due diligence is broad enough to apply to a wide range of obligations to the point that it can almost always characterize obligations of conduct. In fact, the only difference between obligations of due diligence and obligations of conduct resorts to the emphasis made by the former on achieving a

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[734] *Activities in the Area, supra* note 4 at para. 110.

particular result. This difference is particularly important for obligations of cooperation which do not necessarily aim at a particular result. Besides, it is dubious that States would welcome the use of international standards to gauge cooperation efforts. Beyond obligations to cooperate, an absence of international standards in a field of law, also constitutes a real restraint on the use of due diligence in this field.

Another limit to the effectiveness of due diligence comes from the fact that only judges can characterize an international obligation as a due diligence obligation and subsequently define its content. In the absence of adjudication, due diligence obligations remain vague and subject to the discretionary interpretation of States. Unfortunately, vagueness is common place in international law as it can reflect both the intention to set largely applicable legal frameworks and a deference to other priorities of States.[735] For instance, the obligation to protect the marine environment in Article 192 of the UNCLOS is counterbalanced by the sovereign right to exploit natural resources in Article 193. Therefore, while the vagueness of Article 192 allows it to apply to any maritime area and numerous issues, it also leaves a wide margin of interpretation for States which are then free to exploit their resources with minimum obstruction. In that context, the development of international standards not only provides precisions on the meaning of a due diligence obligation but is also testament to a shift within the aspirations of the international community. The various instruments resulting from the collaboration of States and stakeholders within international agencies may indeed evidence a switch of priorities from an attitude of *laissez-faire* to a real concern for environmental protection. Where

[735] Nikolaos Giannopoulos, "Global Environmental Regulation of Offshore Energy Production: Searching for Legal Standards in Ocean Governance" *supra* note 667 at 293.

such evolution takes place, due diligence appears as a perfect tool to adapt outdated legal regimes.

Another weakness of due diligence is its reliance on effective control, an issue naturally exacerbated on the high seas. The generous flexibility of due diligence surely tends to prevent unfair burdens but it also virtually frees weak States from their international obligations. Attempts to address this issue in the law of the sea have been made by encouraging cooperation and promoting capacity building, but it is evident that States benefiting from low expectations will resist them. For this reason, due diligence appears as only one tool to address the modern challenges of the law of the sea. Other options such as the reinforcement of port States and the use of market incentives must be combined with the refining of flag State duties through due diligence to bring better results.

Finally, a side effect of due diligence must be noticed and welcomed. As has been shown, the requirements involved by the application of due diligence are based on international standards. Easily comparable with GAIRS, these standards do not need to represent the same level of practice and *opinio juris* than customary obligations and are therefore more easily invocable. Thus, as they become enforceable through due diligence, the practice and *opinio juris* of these standards may develop until they ultimately qualify for being independent customary obligations. Ultimately, this independence could be particularly meaningful to circumvent a caveat of the law of State responsibility. Indeed, as we have seen,[736] a violation of an obligation to prevent a damage requires both the realization of the damage and a failure of due diligence. This means that a failure of due

[736] See Chapter 2, Section 2.

diligence alone does not suffice to engage the responsibility of the State.[737] This logic is obviously dangerous for environmental protection since environmental harm can be irreversible. It is also needless to say that it goes against the spirit of the precautionary approach. For that reason, having the central environmental obligation formulated as an obligation to prevent [738] is regrettable. Thereby, making certain due diligence requirements self-sufficient under customary law could truly encourage preemptive actions and eventually favorize environmental protection.[739] Certainly, this process of "customarization" of due diligence requirements is still unclear since even the ICJ seems to have some confusions about the law of State responsibility, but it could be a step forward to the proceduralization of environmental law which would grant better protection than vague substantive preventive obligations.[740]

To conclude, the concept of due diligence should not be underestimated nor overestimated. In the hand of a judge it is a creative tool but the necessity of the judge also proves to be an even greater downside since disputes do not always lead to adjudication. What is perhaps more important is that the emphasis on the concept of due diligence in recent law of the sea and environmental decisions, evidences a trend towards a proceduralization of these fields. In view of the challenges faced by the international

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[737] *Construction of a Road, supra* note 6 at para. 225.

[738] *i.e.,* the no-harm rule.

[739] This "customarization" of due diligence requirements seems to be favored by Judge Dugard: *Construction of a Road, supra* note 6, Separate Opinion of Judge Dugard, para. 9, while Judge Donoghue considers that acting with due diligence is in itself a self-sufficient obligation. *Construction of a Road, supra* note 6, Separate Opinion of Judge Donoghue, para. 9.

[740] Jutta Brunnée, "International Environmental Law and Community Interests, Procedural Aspects" *supra* note 244 at 174.

community, it is indeed time to move beyond the *Trail Smelter* case and sophisticate international law.

Annex

TABLE: High Seas Fisheries Related Instruments' Ratifications

Table Legend:
In ORANGE: top 10 major fishing countries
In YELLOW: top 20 major fishing countries

Overview: 7 of the 20 major producers have ratified 3 instruments. 9 have only ratified 2. 4 have only ratified 1. On the top 5: China (1st) has ratified the UNCLOS; Indonesia (2nd) has ratified the UNCLOS and the FSA; the US (3rd) has ratified the Compliance Agreement and the FSA; Russia (4th) has ratified the UNCLOS and the FSA; and, Peru (5th) has ratified the Compliance Agreement.

STATES	UNCLOS	COMPLIANCE AGREEMENT	FSA
Albania	✓	✓	
Algeria	✓		
Angola	✓	✓	
Antigua and Barbuda	✓		
Argentina	✓	✓	
Armenia	✓		
Australia	✓	✓	✓
Austria	✓		✓
Azerbaijan	✓		
Bahamas	✓		✓
Bahrain	✓		
Bangladesh	✓		✓
Barbados	✓	✓	✓
Belarus	✓		
Belgium	✓		✓
Belize	✓	✓	✓
Benin	✓	✓	✓
Bolivia (Plurinational State of)	✓		
Bosnia and Herzegovina	✓		
Botswana	✓		
Brazil	✓	✓	✓
Brunei Darussalam	✓		
Bulgaria	✓		✓

STATES	UNCLOS	COMPLIANCE AGREEMENT	FSA
Burkina Faso	✓		
Cabo Verde	✓		
Cambodia			✓
Cameroon	✓		
Canada	✓	✓	✓
Cape Verde		✓	
Chad	✓		
Chile	✓	✓	✓
China	✓		
Comoros	✓		
Congo	✓		
Cook Islands	✓	✓	✓
Costa Rica	✓		✓
Côte d'Ivoire	✓		
Croatia	✓		✓
Cuba	✓		
Cyprus	✓	✓	✓
Czech Republic	✓		✓
Democratic Republic of the Congo	✓		
Denmark	✓		✓
Djibouti	✓		
Dominica	✓		
Dominican Republic	✓		
Ecuador	✓		✓
Egypt	✓	✓	
Equatorial Guinea	✓		
Estonia	✓		✓
Eswatini	✓		
European Union	✓	✓	✓
Fiji	✓		✓
Finland	✓		✓
France	✓		✓
Gabon	✓		
Gambia	✓		
Georgia	✓	✓	
Germany	✓		✓
Ghana	✓	✓	✓
Greece	✓		

STATES	UNCLOS	COMPLIANCE AGREEMENT	FSA
Grenada	✓		
Guatemala	✓		
Guinea	✓		✓
Guinea-Bissau	✓		
Guyana	✓		
Haiti	✓		
Honduras	✓		
Hungary	✓		✓
Iceland	✓		
India	✓		✓
Indonesia	✓		✓
Iraq	✓		
Iran			✓
Ireland	✓		✓
Italy	✓		✓
Jamaica	✓		
Japan	✓	✓	✓
Jordan	✓		
Kenya	✓		✓
Kiribati	✓		✓
Kuwait	✓		
Lao People's Democratic Republic	✓		
Latvia	✓		✓
Lebanon	✓		
Lesotho	✓		
Liberia	✓		✓
Lithuania	✓		✓
Luxembourg	✓		✓
Madagascar	✓	✓	
Malawi	✓		
Malaysia	✓		
Maldives	✓		✓
Mali	✓		
Malta	✓		✓
Marshall Islands	✓		✓

STATES	UNCLOS	COMPLIANCE AGREEMENT	FSA
Mauritania	✓		
Mauritius	✓	✓	✓
Mexico	✓	✓	
Micronesia (Federated States of)	✓		✓
Monaco	✓		✓
Mongolia	✓		
Montenegro	✓		
Morocco	✓	✓	✓
Mozambique	✓	✓	✓
Myanmar	✓	✓	
Namibia	✓	✓	✓
Nauru	✓		✓
Nepal	✓		
Netherlands	✓		✓
New Zealand	✓	✓	✓
Nicaragua	✓		
Niger	✓		
Nigeria	✓		✓
Niue	✓		✓
North Macedonia	✓		
Norway	✓	✓	✓
Oman	✓	✓	✓
Pakistan	✓		
Palau	✓		✓
Panama	✓		✓
Papua New Guinea	✓		✓
Paraguay	✓		
Peru		✓	
Philippines	✓	✓	✓
Poland	✓		✓
Portugal	✓		✓
Qatar	✓		
Republic of Korea	✓	✓	✓
Republic of Moldova	✓		
Romania	✓		✓
Russian Federation	✓		✓
Samoa	✓		✓
Sao Tome and Principe	✓		
Saudi Arabia	✓		
Senegal	✓	✓	✓
Serbia	✓		
Seychelles	✓	✓	✓
Sierra Leone	✓	✓	
Singapore	✓		

STATES	UNCLOS	COMPLIANCE AGREEMENT	FSA
Slovakia	✓		✓
Slovenia	✓		✓
Solomon Islands	✓		✓
Somalia	✓		
South Africa	✓		✓
Spain	✓		✓
Sri Lanka	✓	✓	✓
St. Kitts and Nevis	✓	✓	✓
St. Lucia	✓	✓	✓
St. Vincent and the Grenadines	✓		✓
State of Palestine	✓		
Sudan	✓		
Suriname	✓		
Sweden	✓	✓	✓
Switzerland	✓		
Syrian Arab Republic		✓	
Thailand	✓		✓
Timor-Leste	✓		
Togo	✓		
Tonga	✓		✓
Trinidad and Tobago	✓		✓
Tunisia	✓		
Tuvalu	✓		✓
Uganda	✓		

STATES	UNCLOS	COMPLIANCE AGREEMENT	FSA
Ukraine	✓		✓
United Kingdom of Great Britain and Northern Ireland	✓		✓
United Republic of Tanzania	✓	✓	
United States of America		✓	✓
Uruguay	✓	✓	✓
Vanuatu	✓	✓	✓
Viet Nam	✓		✓
Yemen	✓		
Zambia	✓		
Zimbabwe	✓		

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Compliance Agreement Membership:
<https://treaties.un.org/pages/showDetails.aspx?objid=080000028007be1a>

FSA Membership:
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