Resilience of UNCLOS in the Context of the Ocean-Climate Nexus: Reflections on Due Diligence Obligations in the ITLOS Advisory Opinion on Climate Change

Yoshifumi Tanaka*
University of Copenhagen, Copenhagen, Denmark
yoshifumi.tanaka@jur.ku.dk

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* Professor of International Law, with specific focus on the law of the sea, Centre for Private Governance, Faculty of Law, University of Copenhagen, Denmark. I wish to thank Rhona Elizabeth Li for her copy-editing.

DOI 10.17104/0044-2348-2025-3-757 ZaöRV 85 (2025), 757-779

https://doi.org/10.17104/0044-2348-2025-3-757 https://www.inlibra.com/de/page/agb - Open Access - CC BY-SA

Abstract

Facing various challenges associated with climate change, a question arises as to how one can address these newly emerging issues under the United Nations Convention on the Law of the Sea (UNCLOS). There, the resilience of UNCLOS is at issue. An obligation of due diligence articulated by the International Tribunal for the Law of the Sea (ITLOS) in its advisory opinion on climate change provides an insight into this issue. Thus this article examines the resilience of UNCLOS in the particular context of ocean-climate nexus focusing on an obligation of due diligence. It will argue, inter alia that an obligation of due diligence can perform a dual function to enhance the resilience of UNCLOS: an interstitial function to incorporate new environmental norms into UNCLOS and a systemic function that connects the Paris Agreement to UNCLOS.

Keywords

Resilience – UNCLOS – climate change – ocean-climate nexus – ITLOS – advisory opinion

I. Introduction

The UN Convention on the Law of the Sea (UNCLOS or the Convention) currently faces many challenges that were unforeseen at the time of its adoption in 1982.[1] The ocean-climate nexus is a case in point.[2] Climate change can create multiple legal issues, such as interpretation of rules governing baselines due to sea level rise, regulation of geoengineering and reduction of greenhouse gas emissions (GHG) from shipping.[3] The essential question that arises in this regard is how one can adapt UNCLOS to new circum-

1 The United Nations Convention on the Law of the Sea of 10 December 1982, 1833 UNTS 397 was opened for signature 10 December 1982, entered into force 16 November 1994.

2 Generally see Daniel Bodansky, 'The Ocean and Climate Change Law: Exploring the Relationship' in: Richard Barnes and Ronán Long (eds), *Frontiers in International Environmental Law: Oceans and Climate Challenges, Essays in Honour of David Freestone* (Brill/Nijhoff 2021), 316-336.

3 For an overview, see David Freestone and Millicent McCreath, 'Climate Change, the Anthropocene and Ocean Law: Mapping the Issues' in: Jan McDonald, Jeffrey McGee and Richard Barnes (eds), *Research Handbook on Climate Change, Oceans and Coasts* (Edward Elgar 2020), 49-80.

 DOI 10.17104/0044-2348-2025-3-757

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stances facing various challenges associated with climate change without amendments of the Convention.[4] Given that, as Oxman pointedly observed, '[s]tability in the law is not possible without adaptation to new circumstances',[5] the adaptation of UNCLOS into a changing environment due to climate change is of critical importance. There, resilience of UNCLOS matters.

The definition of the concept of resilience varies according to academic disciplines.[6] For the purpose of this article, 'resilience' can be defined as 'a capacity to adapt the existing legal system to a new or changing situation whereby the system continues to function'.[7]

When considering the resilience of UNCLOS, obligations of due diligence are key.[8] Whilst a due diligence obligation may have different meanings depending on the context in which it is used,[9] the International Court of Justice (ICJ), in *Pulp Mills on the River Uruguay*, described that obligation as follows:

> 'It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators.'[10]

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4 Amendments to a treaty are an orthodox way to adapt the treaty into new circumstances. However, it would appear that the amendment procedures set out in Articles 312-316 of UNCLOS are hard to use because of their complexity.

5 Bernard H. Oxman, 'The Fortieth Anniversary of the United Nations Convention on the Law of the Sea', International Law Studies 99 (2022), 865-873 (871).

6 For various definitions of the term 'resilience', see Kate Knuth, 'The Term "Resilience" is Everywhere – But What Does It Really Mean?', at <https://ensia.com/articles/what-is-resilience/>, last access 13 May 2025.

7 Yoshifumi Tanaka, 'Resilience of the UN Convention on the Law of the Sea: Reflections on Three Approaches', Portuguese Yearbook of International Law 1 (2024), 57-94 (58). Murphy deconstructs the term 'resilience' into three different concepts: durability, flexibility, and plasticity. Sean D. Murphy, 'Durability, Flexibility and Plasticity in the UN Convention on the Law of the Sea', IJMCL 39 (2024), 225-251 (227).

8 Due diligence is an old concept that dates back to ancient law. For origins of due diligence, see Samantha Besson, *La* due diligence *en droit international* (Brill/Nijhoff 2021), 35. Generally on due diligence, see also Samantha Besson, *Due Diligence in International Law* (Brill/Nijhoff 2023); Heike Krieger, Anne Peters, and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford University Press 2020); Joanna Kulesza, *Due Diligence in International Law* (Brill/Nijhoff 2016); Alice Ollino, *Due Diligence Obligations in International Law* (Cambridge University Press 2022).

9 Penelope Ridings, 'Due Diligence in International Law', United Nations Report of the International Law Commission, Seventy-fifth Session, A/79/10, 2024, 146-162 (151).

10 ICJ, *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), merits, judgment of 20 April 2010, ICJ Reports 2010, 14 (para. 197).

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Furthermore, the International Tribunal for the Law of the Sea (ITLOS), in its advisory opinion on climate change, considered that the obligation of due diligence 'requires a State to put in place a national system, including legislation, administrative procedures and an enforcement mechanism necessary to regulate the activities in question, and to exercise adequate vigilance to make such a system function efficiently, with a view to achieving the intended objective'.[11] In summary, an obligation of due diligence functions as a rule of conduct that obliges States to take necessary measures.[12]

However, the role of due diligence obligations is not limited to rules of conduct. As will be discussed in section II of this article, such obligations can also serve as a medium for incorporating new scientific/technological knowledge and norms into a treaty. In so doing, due diligence obligations can contribute to adapting a treaty to new situations. In this sense, due diligence obligations can perform an 'interstitial' function.

The role of interstitial norms, such as sustainable development, as the engine to develop international law has been stressed by Lowe.[13] According to Lowe, interstitial norms 'have no independent normative charge of their own'.[14] Thus Lowe seemingly considered that interstitial norms exist in a form distinct from primary norms of international law. However, interstitial norms do not always exist as norms distinguished from primary rules of international law. In appropriate circumstances, it appears that a primary rule

11 ITLOS, Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, advisory opinion of 21 May 2024, para. 235, available at: <https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.5.2024_orig.pdf>, last access 10 July 2025. All documents relating to the advisory opinion, including written statements, are available at: <https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/>, last access 10 July 2025. For a recent commentary of the ITLOS advisory opinion, see David Freestone, Clive Schofield, Richard Barnes and Payam Akhavan, 'Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case 31' IJMCL 39 (2024), 835-846; Benoit Mayer, 'Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law', AJIL 119 (2025), 153-160.

12 ITLOS, 2024 Advisory Opinion (n. 11), para. 233. See also ITLOS, Responsibilities and Obligations of States with Respect to Activities in the Area, advisory opinion of 1 February 2011, ITLOS Reports 2011, 10 (para. 110).

13 See Vaughan Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creating Changing?' in: Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press 2000), 207-226 (212-221).

14 Lowe (n. 13), 216.

 DOI 10.17104/0044-2348-2025-3-757

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of international law, such as a due diligence obligation, can also perform an interstitial function.

Furthermore, as will be discussed in section III of this article, mutual supportiveness between UNCLOS and the Paris Agreement is crucial to strengthen the resilience of UNCLOS in the particular context of the ocean-climate nexus. There, a due diligence obligation serves as a medium that connects the two treaties. In this sense, it can be considered that a due diligence obligation performs a systemic function linking the Paris Agreement to UNCLOS. At the same time, as will be discussed in section IV, care should be taken in noting that a due diligence obligation contains some limitations with regard to its normative ambiguity.

Against that background, this article addresses the resilience of UNCLOS in the particular context of ocean-climate nexus, focusing particularly on due diligence obligations articulated by the ITLOS advisory opinion on climate change. Specifically, this article addresses the following issues:

(1) What is an interstitial role of due diligence obligations in the enhancement of the resilience of UNCLOS?

(2) What is the systemic function of due diligence obligations in ensuring the mutual supportiveness between UNCLOS and the Paris Agreement?

(3) If due diligence obligations are relevant to enhance the resilience of UNCLOS, are there any problems associated with the obligations?

This article is structured as follows. Following the introduction, section II analyses the interstitial function of obligations of due diligence in enhancing the resilience of UNCLOS. Next, section III considers a systemic function of a due diligence obligation. Section IV examines possible problems associated with due diligence obligations. Finally, a conclusion is presented in section V.

II. Interstitial Function of Due Diligence Obligations

1. Obligations of Due Diligence Under UNCLOS

According to ITLOS, Article 194(1) of UNCLOS 'requires States to act with "due diligence" in taking necessary measures to prevent, reduce and control marine pollution'.[15] Likewise ITLOS considered that Article 194(2) provides an obligation of due diligence.[16] Furthermore, in the view

15 ITLOS, *2024 Advisory Opinion* (n. 11), para. 234.

16 ITLOS, *2024 Advisory Opinion* (n. 11), para. 254 and para. 258. This view is in line with *Pulp Mills on the River Uruguay*. ICJ, *Pulp Mills* (n. 10), para. 101. See also Alan Boyle and Catherine Redgwell, *Birnie, Boyle, and Redgwell's International Law and the Environment* (4th edn, Oxford University Press 2021), 163; Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' GYIL 35 (1992), 9-51 (38-41).

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of ITLOS, the obligation to cooperate under Article 197 'is an obligation of conduct which requires States to act with "due diligence"'.[17] ITLOS also took the same view with regard to Article 192, stating that '[t]he obligation of the State, in this instance, is one of due diligence'.[18] In summary, according to ITLOS, due diligence obligations are at the heart of environmental norms relevant to the prevention of anthropogenic GHG emissions under UNCLOS.[19] In this regard, two observations can be made.

The first observation relates to the nature of a due diligence obligation as an obligation of conduct. It is generally understood that an obligation of due diligence is an obligation of conduct, not result. In the words of the International Law Commission (ILC), '[t]he duty of due diligence involved, […], is not intended to guarantee that significant harm be totally prevented, if it is not possible to do so'.[20] ITLOS, in its advisory opinion of 2024, also stressed the nature of an obligation of due diligence as an obligation of conduct.[21] In reality, it would be difficult to completely prevent environmental harms from anthropogenic GHG emissions. Furthermore, anthropogenic GHG can often derive from various sources located in multiple States. In light of the collective nature, establishing causation concerning environmental harms is far more complicated compared with that of bilateral environmental pollution.[22]

17 ITLOS, *2024 Advisory Opinion* (n. 11), para. 309.

18 ITLOS, *2024 Advisory Opinion* (n. 11), para. 396. This view is in line with the *South China Sea* arbitration (merits). PCA Case No. 2013-19, *The South China Sea Arbitral Award* (The Philippines v. The People's Republic of China), merits, award of 12 July 2016, RIAA 33 (2020), 153 (para. 959).

19 Some States and organs also discussed the obligation of due diligence in the context of the protection of the marine environment. Examples include: Written Statement of African Union, Vol. I, 16 June 2023, para. 333; Written Statement of Belize, 16 June 2023, at 19-20, para. 59; Written Statement of the Commission of Small Island States on Climate Change and International Law, Vol. I, 16 June 2023, 77, para. 278 and 119-120, para. 415. See also presentation by Webb, Verbatim Record, ITLOS/PV.23/C31/3/Rev.1, 39; Written Statement by the European Union, 15 June 2023, 10, para. 17. See also presentation by Bruti Liberati, ITLOS/PV.23/C31/14/Rev.1, 37; Written Statement of Latvia, 16 June 2023, 7, para. 14. See also, presentation of Paparinskis, Verbatim Record, ITLOS/PV.23/C31/9/Rev.1,12; Presentation by Okowa (Mozambique), Verbatim Record, ITLOS/PV.23/C31/11/Rev.1, 13; Written Statement of the Republic of Sierra Leone, 16 June 2023, 24-25, para. 50; Written Statement by the Socialist Republic of Vietnam, 16 June 2023, para. 4.4.

20 ILC, 'Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities', ILCYB (2001), Vol. II, Part Two, 154, Art. 3, para. 7.

21 This point was already highlighted by the ITLOS Seabed Disputes Chamber. ITLOS, *Responsibilities and Obligations of States* (n. 12), para. 111. See also Declaration of Judge Kittichaisaree in: ITLOS, *2024 Advisory Opinion* (n. 11), paras 11-24.

22 For the problem of collective causation in the context of climate change, see Nataša Nedeski and André Nollkaemper, 'A Guide to Tackling the Collective Causation Problem in International Climate Change Litigation', EJIL:Talk!, 15 December 2022.

 DOI 10.17104/0044-2348-2025-3-757

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Accordingly, it may be difficult if not impossible to establish responsibility of a particular State for causing environmental harm from anthropogenic GHG emissions. In light of this, it would be relevant to focus on an obligation of conduct of State when invoking State responsibility for anthropogenic GHG emissions.

The second observation concerns the nature of an obligation of due diligence as an obligation *erga omnes*. ITLOS as a full court, in its advisory opinion on climate change, did not refer to the *erga omnes* nature of that obligation. However, the ITLOS Seabed Disputes Chamber noted:

> 'Each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area'.[23]

The reference to '[e]ach State Party' implies that the obligation relating to the preservation of the environment of the high seas and the Area is an obligation *erga omnes partes* which, in light of the obligation under Article 192 to 'protect and preserve the marine environment' applies to the ocean as a whole.[24] The obligation to protect and preserve the marine environment under Article 192 is now generally accepted as reflecting a rule of customary international law.[25] Accordingly, there may be a basis for considering that the due diligence obligation under Article 192 is regarded as an obligation *erga omnes*.[26] This interpretation can affect the *locus standi* of States other than a directly injured State in international adjudication.

Even though it may be too early to draw any general conclusion, jurisprudence of the ICJ seems to hint in the direction that the ICJ would accept the *locus standi* of a not directly injured State in response to a breach of obliga-

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23 ITLOS, *Responsibilities and Obligations of States* (n. 12), para. 180. For an analysis of this paragraph, see Yoshifumi Tanaka, 'Obligations and Liability of Sponsoring States Concerning Activities in the Area: Reflections on the ITLOS Advisory Opinion of 1 February 2011', NILR 60 (2013), 205-230 (226-227).

24 Chandrasekhara Rao and Philippe Gautier, *The International Tribunal for the Law of the Sea: Law, Practice and Procedure* (Edward Elgar 2018), 138, 327; Rachael L. Johnstone, *Offshore Oil and Gas Development in the Arctic Under International Law: Risk and Responsibility* (Brill/Nijhoff 2015), 223.

25 The UN Secretary-General, in the report of 1989, stated that 'articles 192 and 193 are generally regarded as statements of customary international law on the extent of the environmental responsibility of States towards the oceans'. UNGA, *Protection and Preservation of the Marine Environment: Report of the Secretary-General*, of 18 September 1989, para. 29.

26 James Harrison, *Saving the Oceans Through Law: The International Legal Framework for the Protection of the Marine Environment* (Oxford University Press 2017), 24 f.; Yoshifumi Tanaka, 'The Legal Consequences of Obligations *Erga Omnes* in International Law', NILR 68 (2021), 1-33 (5).

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tions *erga omnes (partes)*, if it could establish its jurisdiction.[27] In this regard, the Institut de Droit International declared:

> 'In the event of there being a jurisdictional link between a State alleged to have committed a breach of an obligation *erga omnes* and a State to which the obligation is owed, the latter State has standing to bring a claim to the International Court of Justice or other international judicial institution in relation to a dispute concerning compliance with that obligation.'[28]

Following the Institut, as a matter of theory, all States, including States that are not directly injured, can have *locus standi* to invoke responsibility for a breach of a due diligence obligation to protect the marine environment from anthropogenic GHG emissions before an international court or tribunal, when that court or tribunal can establish its jurisdiction.[29]

2. Interstitial Function of a Due Diligence Obligation in the Enhancement of UNCLOS

a) Incorporation of New Scientific/Technological Knowledge Into UNCLOS

On the basis of the above considerations, we will analyse the functions of a due diligence obligation in enhancing the resilience of UNCLOS. In this regard, the evolutionary nature of the obligation must be stressed.[30] Indeed, ITLOS has repeatedly stressed the evolutionary nature of that obligation. In its advisory opinion of 2011, for example, the Seabed Disputes Chamber of

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27 For example, the ICJ, in its Order of provisional measures in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* between The Gambia and Myanmar, held that 'any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end'. ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), provisional measures, order of 23 January 2020, ICJ Reports 2020, 3, para. 41. See also ICJ, *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), merits, judgment of 20 July 2012, ICJ Reports 2012, 422; ICJ, *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), merits, judgment of 31 March 2014, ICJ Reports 2014, 226.

28 Institut de Droit International, 'Resolution: Obligations *Erga Omnes* in International Law' (Krakow Session 2005), Article 3, at <https://www.idi-iil.org/app/uploads/2017/06/2005_kra_01_en.pdf>, last access 10 July 2025.

29 Relatedly, see also Rao and Gautier (n. 24), 327; Tanaka, 'Legal Consequences' (n. 26), 20-24.

30 Besson, *La* due diligence *en droit international* (n. 8), 138.

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ITLOS stated that the obligation 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'.[31] Referring to the statement, ITLOS as a full court also held that '[t]he standard of due diligence may change over time, given that those factors constantly evolve'.[32] It would seem to follow that the obligation of due diligence is to reflect 'new scientific or technological knowledge'. In light of this, an obligation of due diligence can function as a medium for incorporating new scientific or technological knowledge into UNCLOS. This interstitial function of a due diligence obligation is of particular importance in the protection of the marine environment because, as ITLOS stated, 'measures adopted to prevent pollution of the marine environment may need to change over time to become stricter "in light […] of new scientific or technological knowledge"'.[33]

In this regard, particular attention must be paid to the link between an obligation of due diligence and an obligation to apply best environmental practice (BEP)/best available techniques (BAT). The link between the due diligence obligation and BEP was highlighted by the Seabed Disputes Chamber of ITLOS, stating:

> '[I]n light of the advancement in scientific knowledge, member States of the [International Seabed] Authority have become convinced of the need for sponsoring States to apply "best environmental practices" in general terms so that they may be seen to have become enshrined in the sponsoring States' obligation of due diligence.'[34]

Arguably, the same would apply to the relationship between the obligation of due diligence and BAT.[35]

If a State whose activities have caused serious environmental damage has failed to apply BEP and BAT, it would be difficult to claim that due diligence has been exercised. In this sense, an obligation to apply BEP and BAT and a due diligence obligation are intimately intertwined. Hence, there appears to be some scope to argue that the obligation to apply BEP and BAT is to be incorporated into Part XII of UNCLOS via an obligation of due diligence, even though UNCLOS contains no explicit obligation to apply BEP and

31 ITLOS, *Responsibilities and Obligations of States* (n. 12), 43, para. 117.

32 ITLOS, 2024 *Advisory Opinion* (n. 11), para. 239. See also para. 397.

33 ITLOS, *2024 Advisory Opinion* (n. 11), para. 317. See also ITLOS, *Responsibilities and Obligations of States* (n. 12), para. 117.

34 ITLOS, *Responsibilities and Obligations of States* (n. 12), 42, para. 136.

35 Yoshifumi Tanaka, 'Reflections on Time Elements in the International Law of the Environment', HJIL 73 (2013), 139-175 (163).

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BAT. In so doing, UNCLOS can modernise its environmental norms. It appears that the incorporation of BAT and BEP into UNCLOS can contribute to enhancing the resilience of UNCLOS in the protection of the marine environment.

b) Incorporation of New Environmental Norms Into UNCLOS

An obligation of due diligence can also open the way to incorporate new environmental norms that have developed after the adoption of UNCLOS.[36] The precautionary approach or principle is a case in point.[37] UNCLOS contains no explicit provision concerning the obligation to apply the precautionary approach. Even so, many writers have expressed the view that the provisions of the LOSC must be interpreted in accordance with this approach.[38]

The ITLOS advisory opinion on climate change is innovative in the sense that ITLOS clearly declared the obligation to apply the precautionary approach under UNCLOS. In the words of ITLOS, '[t]he obligation of due diligence is also closely linked with the precautionary approach'.[39] Accordingly, ITLOS continued, 'States must apply the precautionary approach in their exercise of due diligence to prevent, reduce and control marine pollution from anthropogenic GHG emissions'.[40] This statement does seem to suggest that the precautionary approach is to be incorporated into the relevant provisions of UNCLOS via an obligation of due diligence. Following

36 This view was shared by Roland Holst, stating that '[d]ue diligence thereby allows for the incorporation of concepts and principles of environmental law, such as the precautionary principle or rules on EIA, that developed after the Convention entered into force'. Rozemarijn J. Roland Holst, *Change in the Law of the Sea: Context, Mechanisms and Practice* (Brill/Nijhoff 2022), 230. Also argued that 'due diligence offers a gateway to enrich the obligations established under the LOSC [UNCLOS] to protect and preserve the marine environment with environmental principles that do not find explicit mentioning in the text of the Convention'. Nele Matz-Lück and Erik van Doorn, 'Due Diligence Obligations and the Protection of the Marine Environment' L'Observateur des Nations Unies 42 (2017), 177-195 (180).

37 While the terminology of 'the precautionary approach' or 'the precautionary principle' is not unified, on this issue, ITLOS, in its advisory opinion on climate change, used the term 'the precautionary approach'. This article follows the usage of the ITLOS advisory opinion.

38 Aline L. Jaeckel, *The International Seabed Authority and the Precautionary Principle: Balancing Deep Seabed Mineral Mining and Marine Environmental Protection* (Brill/Nijhoff 2017), 135-136.

39 ITLOS, *2024 Advisory Opinion* (n. 11), para. 242. Furthermore, the ICJ, in the 2010 *Pulp Mills on the River Uruguay* case, explicitly stated that 'a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute [of the River Uruguay]'. ICJ, *Pulp Mills* (n. 10), para. 164.

40 ITLOS, *2024 Advisory Opinion* (n. 11), para. 242.

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this approach, the question as to whether the precautionary approach is part of customary international law is no longer at issue.[41]

The interstitial function of a due diligence obligation is significant because it can incorporate new environmental norms into UNCLOS, even if the norms have not been crystallised as rules of customary international law yet. Through its interstitial function, due diligence obligations under UNCLOS can strengthen environmental dimensions of the Convention, thereby enhancing the resilience of the Convention to address multiple environmental challenges, including climate change.

Another example may be the ecosystem approach. UNCLOS contains no explicit provision relating to the application of the ecosystem approach because the importance of that approach was unknown at the time of the adoption of the Convention. Even so, ITLOS held:

> 'Under Articles 61 and 119 of the Convention, States Parties have the specific obligations to take measures necessary to conserve the living marine resources threatened by climate change impacts and ocean acidification. […] This obligation requires the application of the precautionary approach and an ecosystem approach.'[42]

The conservation of living resources and marine life falls within the general obligation to protect and preserve the marine environment under Article 192 of UNCLOS.[43] Hence there appears to be good reasons to argue that States are required to apply the ecosystem approach in their exercise of due diligence to protect the marine environment from anthropogenic GHG emissions. If this is the case, the ecosystem approach is to be incorporated into environmental norms under UNCLOS via an obligation of due diligence under Article 192. The incorporation of the ecosystem approach will enable UNCLOS to address new challenges associated with adverse impacts of climate change on conservation of marine living resources, thereby enhancing the resilience of the Convention.

c) Incorporation of a New Source of Marine Pollution Into an Environmental Impact Assessment

An obligation of due diligence can also serve as a medium to expand the scope of the existing environmental norms. The obligation to conduct an

41 In fact, ITLOS, in its advisory opinion on climate change, did not examine the customary law nature of the precautionary approach. According to ITLOS, the precautionary approach is 'implicit in the very notion of pollution of the marine environment, which encompasses potential deleterious effects'. ITLOS, *2024 Advisory Opinion* (n. 11), para. 213.

42 ITLOS, *2024 Advisory Opinion* (n. 11), para. 441(4)(e). See also para. 418.

43 ITLOS, *2024 Advisory Opinion* (n. 11), para. 409.

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environmental impact assessment (EIA) is a case in point. An EIA is a procedure to predict environmental risks and likely impacts of a proposed project and to integrate environmental concerns into the decision-making process before authorising or funding the project.[44] As the ICJ rightly stated in the *Pulp Mill* case, an EIA 'must be conducted prior to the implementation of a project'.[45] Thus, an EIA is characterised by its ex-ante nature. In light of the irreversible character of damage to the environment,[46] effective implementation of an EIA *before* authorising planned activities is of critical importance in the protection of the environment and the same would hold true of the protection of the marine environment from anthropogenic GHG emissions. Under UNCLOS, the obligation to conduct an EIA is embodied in Article 206. Furthermore, the obligation to conduct a transboundary EIA is generally regarded as a rule of customary international law.[47]

Of particular note is the link between a due diligence obligation and an obligation to conduct an EIA. Indeed, the two obligations are intimately intertwined in the sense that a due diligence obligation cannot be considered fulfilled if an EIA was not carried out.[48] In fact, the ICJ, in *Pulp Mills on the River Uruguay*, held:

> '[D]ue diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the regime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.'[49]

In light of this, it can be considered that an obligation to conduct an EIA provides a legal procedure for effectuating a due diligence obligation in environmental protection.

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44 Boyle and Redgwell (n. 16), 184. For a definition of EIA, see also Convention on Environmental Impact Assessment in a Transboundary Context of 10 September 1997, 1989 UNTS 310, Art. 1, para. vi (Espoo Convention).

45 ICJ, *Pulp Mills* (n. 10), para. 205.

46 ICJ, *Gabcíkovo-Nagymaros Project* (Hungary v. Slovakia), merits, judgment of 25 September 1997, ICJ Reports 1997, 7 (para. 140).

47 ICJ, *Pulp Mills* (n. 10), para. 204; ICJ, *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), merits, judgment of 16 December 2015, ICJ Reports 2015, 665 (para. 104). See also ITLOS, *Responsibilities and Obligations of States* (n. 12), para. 145; ITLOS, *2024 Advisory Opinion* (n. 11), para. 355.

48 Yoshifumi Tanaka, 'Obligation to Conduct an Environmental Impact Assessment (EIA) in International Adjudication: Interaction Between Law and Time', Nord. J. Int'l L. 90 (2021), 86-121 (93).

49 ICJ, *Pulp Mills* (n. 10), para. 204. See also ICJ, *Costa Rica* v. *Nicaragua/Nicaragua* v. *Costa Rica* (n. 47), para. 104.

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Relatedly, ITLOS, in its advisory opinion on climate change, opined that 'Article 206 therefore constitutes a "particular application" of the obligation enunciated in Article 194, paragraph 2',[50] which provides an obligation of due diligence to prevent marine pollution from anthropogenic GHG emissions.[51] If this is the case, one can say that States are obliged to conduct an EIA with regard to planned activities that may cause substantial pollution to the marine environment or significant and harmful changes thereto through anthropogenic GHG emissions in their exercise of the due diligence obligation under UNCLOS. It would seem to follow that the scope of Article 206 is to be expanded to cover anthropogenic GHG emissions through a due diligence obligation reflected in Article 194(2) of UNCLOS. This would contribute to enhancing the resilience of UNCLOS in the particular context of the ocean-climate nexus.

The problem is that Article 206 provides no further precision with regard to the content of an EIA. In this regard, the ICJ, in *Pulp Mills on the River Uruguay*, held that; 'it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment'.[52] Furthermore, the ICJ in *Costa Rica v. Nicaragua/Nicaragua v. Costa Rica* held that 'determination of the content of the environmental impact assessment should be made in light of the specific circumstances of each case'.[53]

However, it is not suggested that States have complete discretion on this matter. As explained earlier, a due diligence obligation 'entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators'.[54] In light of this, it could be argued that States are obliged to legislate municipal law concerning an EIA and enforce it with a certain level of vigilance in order to fulfil an obligation of due diligence.

50 ITLOS, *2024 Advisory Opinion* (n. 11), para. 356.
51 ITLOS, *2024 Advisory Opinion* (n. 11), para. 258.
52 ICJ, *Pulp Mills* (n. 10), para. 205.
53 ICJ *Costa Rica* v. *Nicaragua/Nicaragua* v. *Costa Rica* (n. 47), para. 104.
54 ICJ, *Pulp Mills* (n. 10), para. 197.

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3. Summary

The above discussion can be summarised as follows.

(i) In the view of ITLOS, an obligation of due diligence is at the heart of environmental norms relevant to the prevention of anthropogenic GHG emissions under UNCLOS. Due diligence obligations are embodied in Articles 194(1)(2), 192, and 197 of UNCLOS.

(ii) In light of its evolutionary nature, an obligation of due diligence can flexibly incorporate new scientific/technological knowledge reflected in BEP/BAT into relevant provisions of UNCLOS. The obligation of due diligence can also open the way to incorporate new environmental norms into the Convention that were not explicitly provided for in UNCLOS such as the precautionary approach and an ecosystem approach.

(iii) The obligation to conduct an EIA embodied in Article 206 of UNCLOS constitutes a 'particular application' of a due diligence obligation enunciated in Article 194(2) of the Convention. Under Article 206, State Parties to UNCLOS must conduct an EIA in the prevention of marine pollution from anthropogenic GHG emissions in their exercise of an obligation of due diligence. Accordingly, the scope of the obligation to perform an EIA under Article 206 is to be expanded to cover a new source of marine pollution, that is, anthropogenic GHG emissions, through a due diligence obligation.

(iv) It appears that the interstitial function of due diligence obligations can contribute to strengthening environmental norms of UNCLOS in order to address new challenges associated with climate change, thereby enhancing the resilience of the Convention. As Roland Holst pointedly observed, one can say that due diligence is a key concept that 'enables the evolution of treaty norms in light of subsequent developments, and establishes enforceable accountability, while leaving States flexibility in the implementation of their legal obligations'.[55]

III. Systemic Function of Due Diligence Obligations

The role of a due diligence obligation in enhancing the resilience of UNCLOS is not limited to its interstitial function. A systemic function of due diligence obligations also merits discussion.

55 Roland Holst (n. 36), 229. Relatedly, Proelss has argued that the due diligence-based approach 'constitutes the most promising way to operationalize Part XII UNCLOS'. Alexander Proelss, 'The Contribution of the ITLOS to Strengthening the Regime for the Protection of the Marine Environment' in: Angela Del Vecchio and Roberto Virzo (eds), *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (Springer 2019), 93-105 (104 f.).

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1. Mutual Supportiveness Between UNCLOS and the Paris Agreement via Due Diligence Obligations

When considering this issue, first, it is necessary to examine the relationship between UNCLOS and climate change treaties, including the Paris Agreement.[56] A question that arises in this regard is whether the particular treaties, such as the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, constitutes *lex specialis* in respect of the environmental obligations under UNCLOS.[57] In the view of ITLOS, the answer was 'no'. In the words of the Tribunal:

> 'In the Tribunal's view, the Paris Agreement is not *lex specialis* to the Convention [UNCLOS] and thus, in the present context, *lex specialis derogat legi generali* has no place in the interpretation of the Convention.'[58]

Even though the maxim *lex specialis* is widely accepted, its practical application is not free from difficulties partly because the distinction between 'general' and 'special' rules is not always clear-cut.[59] The relationship between *lex specialis* and other conflict-solution techniques, such as *lex posterior derogate legi priori*, also remains unclear.[60] In any event, it is clear that the scope and aims of climate change treaties, including the Paris Agreement, significantly differ from those of UNCLOS. Accordingly, as ITLOS observed, there appears to be room for the view that the relationship between UNCLOS and the Paris Agreement is not governed by *lex specialis*.

If the relationship between UNCLOS and the Paris Agreement is not governed by *lex specialis*, it is not suggested that there is no normative interaction between the two treaties. Rather, mutual supportiveness between UNCLOS and the Paris Agreement via due diligence obligations merits discussion. For the purpose of this article, mutual supportiveness between treaties refers to 'an interpretative technique that ensures harmonious and systemic interpretation or application of rules of treaties as reinforcing each

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56 For a recent study of this issue, see Bastiaan Ewoud Klerk, 'The ILTOS Advisory Opinion on Climate Change: Revisiting the Relationship Between the United Nations Convention on the Law of the Sea and the Paris Agreement', RECIEL 34 (2025), 181-193.

57 According to the report of the study group of the ILC, *lex specialis* means that 'if a matter is being regulated by a general standard as well as a more specific rule, then the latter should take precedence over the former'. ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006 [Study Group Report], 34-35, para. 56.

58 ITLOS, *2024 Advisory Opinion* (n. 11), para. 224. See also para. 223.

59 ILC, *Study Group Report* (n. 57), para. 58.

60 ILC, *Study Group Report* (n. 57), para. 58.

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other'.[61] In this regard, the systemic interpretation pursuant to Article 31(3)(c) of the Vienna Convention on the Law of Treaties comes into play.[62]

The essence of the systemic interpretation can be found in the statement of the International Court of Justice (ICJ) in the *Namibia* advisory opinion, which stated that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'.[63] An illustrative example is the interpretation of Article 192 by the Annex VII arbitral tribunal in the *South China Sea* arbitral award (Merits).[64] In this case, the Annex VII arbitral tribunal read Article 192 in light of 'the corpus of international law relating to the environment' and 'other applicable international law',[65] in particular, the 1973 Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES).[66] Accordingly, the Annex VII arbitral tribunal held that the general obligation to 'protect and preserve the marine environment' in Article 192 included a 'due diligence obligation to prevent the harvesting of species that are recognised internationally as being at risk of extinction and requiring international protection'.[67] In line with systemic treaty interpretation, CITES informs the content of the due diligence obligation under Article 192 of UNCLOS. It appears that systemic treaty interpretation enhances normative

61 More generally, Pavoni defined 'mutual supportiveness' as a 'principle according to which international law rules, all being part of one and the same legal system, are to be understood and applied as reinforcing each other with a view to fostering harmonization and complementarity, as opposed to conflictual relationship'. Riccardo Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the "WTO-and-Competing-Regime" Debate?' EJIL 21 (2010), 649-679 (650). It appears that the mutual supportiveness between norms is of particular importance in the protection of the environment. Malgosia Fitzmaurice and Olufemi Elias, *Contemporary Issues in the Law of Treaties* (Elven International Publishing 2005), 320.

62 Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331. For a detailed commentary to Article 30, see Alexander Orakhelashvili, '1969 Convention: Article 30' in: Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary*, Vol. 1 (Oxford University Press 2011), 764-800; Seyed-Ali Sadat-Akhavi, *Methods of Resolving Conflicts Between Treaties* (Brill/Nijhoff 2021), 59-84.

63 ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), advisory opinion of 21 June 1971, ICJ Reports 1971, 16 (para. 53).

64 The systemic interpretation in the *South China Sea* arbitration was discussed by: Yoshifumi Tanaka, *The South China Sea Arbitration: Toward an International Legal Order in the Oceans* (Hart Publishing 2019), 135 f.

65 PCA Case No. 2013-19, *The South China Sea Arbitral Award* (n. 18), para. 941 and para. 959.

66 Convention on the International Trade in Endangered Species of Wild Fauna and Flora of 1 July 1975, 993 UNTS 243.

67 PCA Case No. 2013-19, *The South China Sea Arbitral Award* (n. 18), para. 956, para. 959.

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integration; that is, incorporation of a relevant norm set out in a treaty into another treaty, thereby promoting mutual supportiveness of the treaties.

Given that 195 States have become Parties to the Partis Agreement, it may not be unreasonable to consider that the Paris Agreement forms part of 'the corpus of international law relating to the environment' and that the Paris Agreement informs the content of the due diligence obligation set out in Article 192 of UNCLOS. The same would hold true of due diligence obligations embodied in other provisions, such as Articles 194(1)(2) and 197 of UNCLOS.[68]

By applying systemic treaty interpretation, it would appear that the Paris Agreement can inform the content of due diligence obligations embodied in Articles 192, 194(1)(2) and 197 of UNCLOS. There, due diligence obligations can serve as a nexus to link the Paris Agreement to UNCLOS, thereby strengthening the mutual supportiveness of the two treaties.

2. Relationship Between a Breach of the Paris Agreement and an Obligation of Due Diligence Under UNCLOS

An issue that arises in this context is whether due diligence obligations set out as in relevant provisions of UNCLOS, including Article 194(1), would also be breached if a State failed to fulfil the obligations under the Paris Agreement. ITLOS, in its advisory opinion on climate change, did not directly address this question. However, ITLOS stated:

> 'The Tribunal does not consider that the obligation under Article 194, paragraph 1, of the Convention [UNCLOS] would be satisfied simply by complying with the obligations and commitments under the Paris Agreement.'[69]

If compliance with the obligations under the Paris Agreement would be inadequate to satisfy the obligation under Article 194(1) of UNCLOS, it seems logical to argue that a breach of the obligations under the Paris Agreement would breach the obligation under Article 194(1). Even though a further development of the jurisprudence is needed to draw more general conclusions, it may not be unreasonable to consider that in appropriate circumstances, a breach of the Paris Agreement could be a breach of a due

68 Voigt has argued that 'the Paris Agreement needs to be considered as representing generally accepted international rules, when giving effect to Articles 192, 194, 207 and 212'. Christina Voigt, 'The Power of the Paris Agreement in International Climate Litigation', RECIEL 32 (2023), 237-249 (245).

69 ITLOS, *2024 Advisory Opinion* (n. 11), para. 223.

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diligence obligation under UNCLOS. If this is the case, a State can formulate a dispute concerning a breach of the Paris Agreement as a dispute concerning an alleged breach of the due diligence obligation under UNCLOS and trigger the compulsory procedures of international dispute settlement under the Convention.

This interpretation can pave the way for climate change litigation using the UNCLOS compulsory procedures of international dispute settlement.[70] This interpretation would also highlight the role of the dispute settlement procedures under UNCLOS in combatting climate change, thereby enhancing the resilience of UNCLOS dispute settlement procedures. Furthermore, if, as explained earlier, the obligation to protect and preserve the marine environment can be considered as an obligation *erga omnes*, arguably all States, including States other than a directly injured State can have the *locus standi* in response to a breach of the due diligence obligation to prevent GHG emissions under UNCLOS. This interpretation would also open the way for 'public interest litigation'.[71] At the same time, care should be taken in noting that an excessive use of the compulsory procedures of dispute settlement might entail the risk of causing mutations of UNCLOS tribunals from the law of the sea tribunals into climate change tribunals.

3. Summary

The above discussion can be summarised in three points.

(i) According to ITLOS, the relationship between UNCLOS and the Paris Agreement is not governed by *lex specialis*. It would seem to follow that the due diligence obligation under UNCLOS would not be satisfied by complying with the obligations and commitments under the Paris Agreement only.

(ii) The Paris Agreement can inform the content of due diligence obligations set out in Articles 194(1)(2), 192, and 197 of UNCLOS through the systemic treaty interpretation. It would seem to follow that the Paris Agreement indirectly elaborates the content of due diligence obligations under UNCLOS. In this sense, UNCLOS and the Paris Agreement are mutually

70 In this regard, Boyle has argued that 'the LOSC provides a vehicle for compulsory dispute settlement notably lacking in the UNFCCC regime'. Alan Boyle, 'Litigating Climate Change Under Part XII of the LOSC', IJMCL 34 (2019), 458-481 (481). See also Meinhard Doelle, 'Climate Change and the Use of the Dispute Settlement Regime of the Law of the Sea Convention', Ocean Dev. Int. Law 37 (2006), 319-337; Mayer (n. 11), 160.

71 The term 'public interest litigation' was used by Christian J. Tams, 'Individual States as Guardians of Community Interests' in: Ulrich Fastenrath et al. (eds), *From Bilateralism to Community Interest, Essays in Honour of Judge Bruno Simma* (Oxford University Press 2011), 379-405 (383). Tanaka uses the term 'community interest litigation'. Tanaka, *South China Sea Arbitration* (n. 64), 193.

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supportive. There, due diligence obligations can serve as a nexus to integrate elements of the Paris Agreement in UNCLOS.

(iii) Even though it is too early to reach any general conclusion, one cannot preclude the possibility that a breach of the Paris Agreement can constitute a breach of due diligence obligations under UNLCOS at the same time. If this is the case, as a matter of theory, it might be possible for a State to refer a dispute concerning an alleged breach of the due diligence obligation under UNCLOS that also constitutes a breach of the Paris Agreement to UNCLOS' compulsory procedures for international dispute settlement.

IV. Challenges Associated With an Obligation of Due Diligence

The considerations in sections II and III seem to reveal that due diligence obligations can contribute to enhancing the resilience of UNCLOS through their interstitial and systemic functions. However, it cannot pass unnoticed that due diligence obligations contain some issues that needs further consideration.

1. Variable Nature of Standard of the Obligation of Due Diligence

An essential question that arises in this context concerns the variable nature of the standard for due diligence. The standard of due diligence can vary according to the primary rules of international law.[72] Relatedly, ITLOS observed that 'the standard of due diligence is variable, depending upon relevant factors, including risks of harm involved in activities'.[73] Hence, it seems difficult if not impossible to identify an objective standard for due diligence in international law.[74] The absence of an objective standard for due diligence can entail the risk of undermining the normative strength of envi-

72 The ILA's Second Report took the view that 'there is no one single standard of diligence that applies to all primary sources'. ILA Study Group on Due Diligence in International Law, Second Report (Tim Stephens (Rapporteur) and Duncan French (Chair)) (the ILA's Second Report), July 2016, 20.

73 ITLOS, *2024 Advisory Opinion* (n. 11), para. 256.

74 In this regard, McDonald argued that '[t]here is no broad rule of due diligence in international law' and that 'the role of due diligence in international law is determined, on a case-by-case basis, by reference to a rule'. Neil McDonald, 'The Role of Due Diligence in International Law', ICLQ 68 (2019), 1041-1054 (1044). See also, Besson, *La* due diligence *en droit international* (n. 8), 91; Matz-Lück and van Doorn (n. 36), 189-191.

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ronmental norms under UNCLOS. For example, ITLOS stressed that '[t]he standard of due diligence under Article 194, paragraph 1, of the Convention is stringent, given the high risks of serious and irreversible harm to the marine environment from such [GHG] emissions'.[75] According to ITLOS, '[t]he standard of due diligence under Article 194, paragraph 2, can be even more stringent than that under Article 194, paragraph 1, because of the nature of transboundary pollution'.[76] Without an objective standard for due diligence, however, it seems difficult to specify the 'stringent' level of the due diligence obligation under Article 194(1) and (2).

In this context, ITLOS stressed the importance of science, stating that measures under Article 194(1) of UNCLOS 'should be determined *objectively*, taking into account, *inter alia*, the best available science […]'[77] However, the concept of 'the best available science' is not wholly unambiguous and the interpretation of this concept may vary according to States. Furthermore, 'the best available science' can change over time. Thus, the question of how the consideration of 'the best available science' can be transformed to an objective standard for due diligence may seem to need further consideration.

The absence of an objective standard for due diligence can affect the application of new environmental norms incorporated into UNCLOS via due diligence obligations. For example, as discussed elsewhere, the application of the precautionary approach itself does not automatically specify measures that should be taken.[78] If, as ITLOS stated, a 'State must apply the precautionary approach in their exercise of due diligence',[79] it seems difficult if not impossible to properly assess the implementation of the precautionary approach as part of a due diligence obligation without any objective standard for due diligence. The same would be true of the ecosystem approach. In summary, new environmental norms that are incorporated through a due diligence obligation may be compromised by the obligation itself.

2. Principle of Common but Differentiated Responsibilities and Respective Capabilities

In the particular context of the ocean-climate nexus, the establishment of an objective standard for due diligence will become even more difficult due

75 ITLOS, *2024 Advisory Opinion* (n. 11), para. 243.

76 ITLOS, 2024 *Advisory Opinion* (n. 11), para. 258.

77 Emphasis added. ITLOS, *2024 Advisory Opinion* (n. 11), para. 243.

78 Yoshifumi Tanaka, *The International Law of the Sea* (4th edn, Cambridge University Press 2023), 331.

79 ITLOS, *2024 Advisory Opinion* (n. 11), para. 242.

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to the significant differences of States' capabilities and resources. There, the implications of the principle of common but differentiated responsibilities and respective capabilities (CBDRRC) for the due diligence obligation merit discussion.[80]

According to Hey and Paulini, '[t]he concept of common but differentiated responsibilities in international environmental law entails that while pursuing a common goal, […] States take on different obligations, depending on their socio-economic situation and their historical contribution to the environmental problem at stake'.[81] The principle of CBDRRC was enshrined in Principe 7 of the Rio Declaration on Environment and Development.[82] Subsequently, that principle is enshrined in the UN Framework Convention on Climate Change (UNFCCC),[83] the Kyoto Protocol,[84] and the Paris Agreement.[85] Overall, one can say that CBDRRC constitutes a key principle in the UNFCCC and the Paris Agreement.[86]

UNCLOS contains no clear reference to the principle of CBDRRC. Nonetheless, ITLOS considered that the principle is reflected in Article 194 (1) and (2) of UNCLOS.[87] By incorporating the principle of CBDRRC into the due diligence obligations under Article 194(1) and (2), one can better secure the compatibility between climate change treaties and UNCLOS. At the same time, however, the implementation of the obligation of due diligence

80 Further, see Yoshifumi Tanaka, 'Principle of Common but Differentiated Responsibilities and Respective Capabilities in the ITLOS Advisory Opinion on Climate Change: A Critical Assessment', Max Planck UNYB 28 (2024) (forthcoming). It appears that the terminology of the 'concept' or the 'principle' of common but differentiated responsibilities and respective capabilities is not unified. ITLOS, in its advisory opinion of 2024, used the term the 'principle'. This article also uses the term 'the principle'.

81 Ellen Hey and Sophia Paulini, 'Common but Differentiated Responsibility' in: Anne Peters and Rüdiger Wolfrum (eds), *MPEPIL* (online edn, Oxford University Press 2019), para. 1.

82 UN General Assembly, A/CONF.151/26 (Vol. I), 12 August 1992. Principle 7: 'In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities.'

83 UN Framework Convention on Climate Change of 21 March 1994, 1771 UNTS 107, Art. 3.

84 Kyoto Protocol of 16 February 2005, 2303 UNTS 162, Art. 10.

85 Paris Agreement of 4 November 2016, 3156 UNTS 79, Art. 2(2). See also Art. 4(4).

86 This principle has changed from 'common but differentiated responsibilities and respective capabilities' (Article 3 of the UNFCCC) to the principle of 'common but differentiated responsibilities and respective capabilities, in light of different national circumstances' (Preamble of the Paris Agreement). Lavanya Rajamani, *Innovation and Experimentation in the International Climate Change Regime* (Brill/Nijhoff 2020), 219.

87 ITLOS, *2024 Advisory Opinion* (n. 11), para. 229 and para. 249. ITLOS, in its advisory opinion on climate change, did not discuss the principle of CBDRRC in relation to Article 192 of UNCLOS. Even so, the same interpretation would apply to the general obligation to protect and preserve the marine environment set out as in Article 192.

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is to be relativised in accordance with the principle of CBDRRC. It would seem to follow that the application of environmental norms incorporated into UNCLOS via the due diligence obligation, such as the precautionary and ecosystem approaches, will also be relativised in accordance with the principle of CBDRRC.

A major challenge that arises in this context is that the principle of CBDRRC is an extremely vague concept.[88] For example, 'capabilities' remains a vague and variable concept; it may include scientific, technical, economic, and financial capabilities.[89] Actually, capabilities and available resources significantly differ among States. It would seem to follow that the standard of due diligence will also vary significantly. Furthermore, as 'capability' is a generic term, its content may change over time. In light of the variable nature of 'capabilities' of States, adjudicative bodies may face challenges when deciding an alleged breach of due diligence obligations by a State in accordance with the principle of CBDRRC. The same would hold true of deciding an alleged breach of the precautionary and ecosystem approaches as part of the exercise of due diligence obligations.

3. Summary

The above considerations can be summarised in two points.

(i) As due diligence is a variable concept, it is difficult to identify an objective standard of due diligence in international law. In light of the absence of an objective standard, it seems difficult, if not impossible, to objectively assess whether States have complied with a due diligence obligation or whether States have properly applied the precautionary and ecosystem approach in their exercise of due diligence to prevent, reduce and control marine pollution from anthropogenic GHG emissions. Thus new environmental norms that are incorporated through a due diligence obligation can be weakened by the due diligence obligation itself.

(ii) Even though UNCLOS contains no clear reference to the principle of CBDRRC, ITLOS considered that that principle is reflected in Article 194(1) and (2) of UNCLOS. Accordingly, the application of environmental norms and technologies incorporated into UNCLOS via a due diligence obligation are to be relativised in accordance with the principle of CBDRRC.

88 Daniel Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections', Ariz. St. L. J. 49 (2017), 689-712 (696).

89 ITLOS, *2024 Advisory Opinion* (n. 11), para. 225.

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V. Conclusion

This article examined the resilience of UNCLOS focusing particularly on the obligation of due diligence obligations articulated by ITLOS in its advisory opinion on climate change. The above considerations seem to reveal that due diligence obligations can perform a dual function in the enhancement of the resilience of UNCLOS in the particular context of the ocean-climate nexus.

First, due diligence obligations can perform an interstitial function to incorporate new scientific/technological knowledge and environmental norms into treaties. Through its interstitial function, the due diligence obligation can serve as a medium for incorporating new scientific/technological knowledge and environmental norms that were underdeveloped at the time of the adoption of UNCLOS into the Convention. In so doing, a due diligence obligation can serve as an engine for enhancing the resilience of UNCLOS to address new challenges, such as marine pollution from anthropogenic GHG emissions.

Second, due diligence obligations also perform a systemic function that connects the Paris Agreement to UNCLOS. It is argued that the Paris Agreement can inform the content of due diligence obligations embodied in UNCLOS. In this sense, UNCLOS and the Paris Agreement are mutually supportive. The mutual supportiveness of the two instruments is crucial in order to strengthen the resilience of UNCLOS in the prevention of marine pollution from anthropogenic GHG emissions.

Due diligence obligations are not a panacea, however. As discussed earlier, it is difficult, if not impossible, to identify an objective standard for due diligence in light of its variable nature. The level of standard of due diligence may also vary in accordance with the principle of CBDRRC. Thus, caution is required in that the absence of an obligation standard for due diligence can entail the risk of compromising the effective application of environmental norms as part of the exercise of due diligence obligations.

DOI 10.17104/0044-2348-2025-3-757 ZaöRV 85 (2025)

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