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Reflections on the role of due diligence in clarifying State discretionary powers in developing Arctic natural resources

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Research Article

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Abstract

This article argues that the concept of diligence provides a useful role in clarifying (and perhaps narrowing) the discretionary powers of the State with respect to the development of natural resources. The claim has two branches. First, the concept of due diligence plays an important role in bridging the normative gap between the harms caused by private actors and the international law of State responsibility. It is the vehicle by which States can be made to assume responsibility for private developments within their jurisdiction and control that cause harm to other States. Second, the concept of due diligence plays an important role (a "generative role") in teasing out the detailed logical implications of more abstract primary norms such as the duty of prevention. These derivative duties include the duties to make a preliminary assessment of whether the proposed activity may cause a risk of significant transboundary harm: to conduct an environmental impact assessment (EIA) if there is a risk of significant harm and, if the EIA confirms that risk, to notify and consult with respect to possible measures to prevent or mitigate that risk. The article demonstrates both of these claims through an examination of the jurisprudence of the International Court of Justice, the International Tribunal for the Law of the Sea and arbitral awards. Finally, the article applies these claims in the context of possible resource developments in Alaska, British Columbia and Yukon that may have transboundary implications.

Introduction

Much of international environmental law is concerned with exploring and resolving the tension between the freedom of a State to develop its own resources in accordance with its own environmental and developmental policies and its duty to ensure that activities under its jurisdiction or control "do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction" (Duvic-Paoli, 2018; Rio Declaration, 1992, Article 2). Both the freedom to develop and the duty of prevention are undoubtedly part of customary international law (Legality of the Threat or Use of Nuclear Weapons, 1996). But the freedom to develop is not unlimited (International Law Commission (ILC), 2001a). It is limited by the duty of prevention, but it must also be limited by all that is normatively logically entailed in giving practical effect to the duty of prevention. This paper argues that the concept or principle of due diligence plays a crucial normative role in ascertaining that which is logically entailed by the duty of prevention. As such, the concept serves to limit and better define the residual freedom of the State in developing its own resources, whether on land or in the marine environment and whether in the Arctic or other parts of the globe.

The ILC drew attention to the important role of due diligence in its Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (2001a) and the International Court of Justice (ICJ) added weight to that in its *Pulp Mills* decision (2010). Since then, various courts and tribunals have explored the role of due diligence in international environmental law. These decisions include the two Advisory Opinions of the International Tribunal on the Law of the Sea (ITLOS) (the first an Opinion of the Deep Seabed Chamber with respect to the responsibility of sponsoring States with respect to activities in the Area (Responsibilities and Obligations of States, 2011), and the second an Opinion of the full tribunal with respect to illegal, unreported and unregulated (IUU) fishing (IUU Advisory Opinion, 2015)), the Award of the Annex VII arbitral tribunal in the South China Sea Arbitration (South China Sea, 2016), and the decision of the ICJ in the joined cases of *Certain Activities/Construction of a Road* (2015) (Yotova, 2016).

This article examines this jurisprudence with a view to exploring two contributions that the concept of due diligence can make to clarifying (and perhaps narrowing) the discretionary powers of the State with respect to the development of natural resources and the protection of environmental values. The first contribution is to bridge the normative gap between the harms caused by private actors and the international law of state responsibility (Duvic-Paoli,

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2018, p. 201; Matz-Lück & van Doorn, 2017). This claim is neither novel nor especially controversial, but it is well illustrated in some of these decisions and it is of obvious importance given the reality that most resource exploitation activities are actually carried out by private parties and private capital rather than by States (ILC, 2001b). The second contribution that the concept of due diligence can make is to tease out the detailed logical implications of more abstract primary norms such as the duty of prevention. As such, it can act in an interstitial manner (Lowe, 2001) to clarify State obligations and as a result narrow a state's freedom to autointerpret the scope of its responsibilities. I sometimes refer to this as the "generative role" of the concept of due diligence.

While this paper is concerned with the role of due diligence, generally it is useful, given the Arctic context of this special issue, to provide two examples of resource development projects in the Arctic which have the potential to affect a neighbouring State. Both examples involve Canada and the United States. The first example involves the recurring possibility of US federal authorisation of oil and gas exploration activities in an area of Alaska's Arctic coastal plain within the Arctic National Wildlife Refuge (ANWR). This area of ANWR is considered to be critical calving habitat for a herd of migratory barren ground caribou known as the Porcupine Caribou Herd (PCH). The PCH is shared between Alaska (US) and two jurisdictions within Canada (Yukon and Northwest Territories). The herd is of tremendous nutritional and cultural significance for Tribal and Inupiat populations in Alaska and First Nations and Inuvialuit communities in Canada. Indigenous communities in Canada are particularly concerned that exploration (and possible future production activities) in Alaska will threaten the long-term viability of this migratory herd with potentially devastating consequences for these communities. These communities have expressed the concern that both the scoping statement for the environmental impact statement (EIS) and the draft EIS have all but ignored the impact of the proposed activities on the PCH as a shared resource and the impact of any adverse effect on that herd for Indigenous communities in Canada.

A second example involves current and proposed metal mining operations in British Columbia in the watersheds of the so-called "panhandle rivers." These rivers (including the Taku, Stikine, Unuk, Iskut, Alsek and Tatshenshini) rise in the mountains of British Columbia or Yukon and then flow west to the Pacific coast through the "panhandle" of Alaska. Residents of Alaska including southeast Alaska tribes have long been concerned about acid mine drainage from tailings, possible breaches of tailings dams and toxic waste products from these mining activities which might have catastrophic effects on important salmon populations in these rivers and consequential cultural damage.

The paper begins with some general observations on the concept of due diligence and then turns to discuss the two contributions that the concept of due diligence can make to clarifying (and perhaps narrowing) the discretionary powers of the State with respect to the development of natural resources and the protection of environmental values. It concludes by examining the two examples referenced above in light of the concept of due diligence.

General observations on the concept of due diligence

Due diligence is generally conceived of as a standard of care (Stephens & French, 2016). It may be used to assess whether a State is in breach of a primary obligation (Dugard Opinion, 2015, para. 9) and as such is most commonly associated with the assessment of obligations of conduct in the context of the law of state responsibility (ILC, 2001b). The International Law Association's Study Group on due diligence canvassed the historical evolution of the concept in its first report (French & Stephens, 2014). An early example of a reference to the duty of due diligence is the Treaty of Washington between Britain and the United States (1871) and the related Alabama Claims Arbitration (1871). Two other cases are often associated with the development of the concept of due diligence even they did not use the precise term. Thus in the *Corfu Channel Case* the ICJ articulated the obligation of every State "not to allow knowingly its territory to be used for acts contrary to the rights of other States" (Corfu Channel, 1949, p. 22) and concluded that Albania should have taken "all necessary steps" to warn shipping of the danger posed by a minefield that was set within its waters once it became aware of the existence of that minefield (p. 23). Similarly, the *Trail Smelter Arbitration* (1938, 1941) held Canada responsible for permitting "the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."

In none of these three cases was the damage caused directly by the state and one must therefore distinguish for the purposes of attributing responsibility to the state "between the injury caused by the non-state actor and the injury caused by the state" (Barnidge, 2006, p. 81 & 94). This necessitates an inquiry into the steps that the State of origin is obliged to take so as to ensure that it does not permit its territory to be used by a private party in such a way as to cause harm to another. In other words, what does due diligence require of the State of origin?

Reference was made above to the term "obligation of conduct" which adverts to the distinction between a primary obligation of conduct and a primary obligation of result (Responsibilities and Obligations of States, 2011, para. 111). The distinction is important in this context since obligations of result are not (unless specifically so qualified in the expression of the primary norm) due diligence obligations, whereas the term "obligation of conduct" is frequently if not invariably associated with due diligence as a measure of that conduct (Stephens & French, 2016).

In the case of an obligation of result the primary norm requires the State to achieve a particular result whether that be a procedural result or a substantive result. A procedural example of an obligation of result might be where the primary norm stipulates that if a certain event happens, then State A shall notify or inform State B of the event (Pulp Mills, 2010). Another example might be the duty of a State to communicate the outcome of an environmental impact assessment (EIA) to other States under Articles 205 and 206 of the Law of the Sea Convention (LOSC) (1982). A third example might be the duty of a State to ensure that certain information is made available under the terms of Article 9(1) of the OSPAR Convention (Convention for the Protection of the Marine Environment of the North East Atlantic, 1992; Dispute Concerning Access, 2003). A substantive example of an obligation of result might be the obligation of a State under the Kyoto Protocol (1997, Article 3) to meet its quantified emission limitation (QEL) stipulated in Annex B of the Protocol or the duty of a State not to bring a vessel into an unsafe port or anchorage when exercising its powers of enforcement under Article 225 of the LOSC (*M/T San Pedro Pio*, 2019).

In the case of an obligation of conduct the norm focuses on the behaviour expected of the State in order to comply with the norm. This is most obviously the case where the primary norm itself focuses on conduct. An example might be a commitment to use "best efforts" to achieve a certain outcome or, a duty to have

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"due regard" to the interests of another State (South China Sea, 2016) or, as in the case of the *Alabama Claims Arbitration* (1871), the treaty norm may be expressly framed in terms of due diligence (Treaty of Washington, 1871). In all of these cases, the inquiry will inevitably focus on the conduct of the State rather than on whether or not a particular outcome was achieved (Responsibilities and Obligations of States, 2011, para. 110). In most cases, the question of whether a primary norm establishes an obligation of conduct or result will have to be inferred or interpreted (Matz-Lück & van Doorn, 2017, p. 183) from an overall understanding of the nature of the obligation. The decided cases offer some examples.

A tribunal may more readily characterise an obligation as an obligation of conduct if the impugned activity involves private parties rather than the State. In the *Seabed Disputes Chamber, Advisory Opinion* the Chamber characterised the duty of the State with respect to its sponsored contractors as a due diligence obligation of conduct (Responsibilities and Obligations of States, 2011, para. 110). Similarly, in the *South China Sea Award*, the tribunal characterises China's obligations with respect to Chinese flagged fishing vessels as due diligence obligations of conduct that required China inter alia to take effective measures "to prevent the harvesting of species that are recognised internationally as being at risk of extinction and requiring international protection" and to prevent activities "that would affect depleted, threatened, or endangered species indirectly through the destruction of their habitat" (South China Sea, 2016, paras. 956 & 960). The Tribunal found that China was in breach of its due diligence obligations.

There is some evidence from the case law and the literature that the use of certain terms may lead a tribunal to characterise an obligation as an obligation of conduct (Matz-Lück & van Doorn, 2017, p. 183). For example, the *Seabed Disputes Chamber, Advisory Opinion* reasoned that:

> The sponsoring State's obligation "to ensure" is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result. To utilize the terminology current in international law, this obligation may be characterized as an obligation "of conduct" and not "of result," and as an obligation of "due diligence." . . .
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> 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 . . . (Responsibilities and Obligations of States, 2011, paras. 110 & 112)

This is later reiterated by the full Tribunal in its *IUU Fishing Advisory Opinion* (IUU Advisory Opinion, 2015, para. 128). However, I think that this passage suggests that the Chamber does not rely simply on the word "ensure" but on that word as used in the context of a treaty provision that deals with the primary obligations of the State with respect to its contractors. In other words, the characterisation of an obligation as an obligation of conduct or result should not depend on the search for a "magic word" but on the overall context of the obligation (Vienna Convention on the Law of Treaties, 1969 and Judge Ad Hoc Petrig's Separate Opinion in *M/T San Pedro Pio*, (2019).

A tribunal may more readily characterise an obligation as an obligation of conduct where the obligation is framed in general terms. For example, it is hard to imagine that the duty of due regard under Article 58(3) of the LOSC could be anything other than an obligation of conduct since the obligation speaks to conduct and a balancing of interests rather than a particular result (Chagos Award, 2015, para. 519). The same must also be true of the obligation under Article 193 of the LOSC "to protect and preserve the marine environment" (South China Sea, 2016).

Finally, a court or tribunal may characterise as an obligation of conduct simply because it is unrealistic to expect that a State will be able to succeed in meeting an obligation whatever the circumstances. For example, in *Application of the Genocide Convention*, the ICJ observed that:

> the obligation [to prevent genocide] is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. 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 might have contributed to preventing the genocide. In this area the notion of "due diligence", which calls for an assessment *in concreto*, is of critical importance. (Application of the Genocide Convention, 2007)

It is sometimes suggested that States choose obligations of conduct and the accompanying standard of due diligence over obligations of result because such standards afford States autonomy and flexibility in discharging their obligations (Stephens & French, 2016). This is misleading insofar as logically it is an obligation of result that affords a State significant discretion and choice of domestic policies in order to achieve a particular outcome. For example, while the Kyoto Protocol's (1997) QEL obligations constitute an obligation of result, the Protocol is not prescriptive as to how that result is to be attained. Furthermore, obligations of conduct by definition may prescribe particular forms of conduct and particular modes of implementation. For example, the Seabed Disputes Chamber's Advisory Opinion specifically concludes that a sponsoring State must implement some of its obligations through legislation rather than by means of contract (Responsibilities and Obligations of States, 2011, paras. 223–226).

The role of due diligence in bridging the gap between private actors and the State

Under the law of state responsibility, the conduct of private persons is not generally attributable to the State (ILC, 2001b, Chap. II commentary, para. 3). Thus, the fact that a privately operated smelter causes harm to a neighbouring State does not in and of itself engage the responsibility of the source State. The responsibility of the source State is only engaged if the source State breaches its own primary obligation which logically (since it is not itself engaged in the polluting activity) must be something other than the duty not to pollute (Trail Smelter, 1938, 1941). The Seabed Disputes Chamber made this point very clearly in its Advisory Opinion noting that "not every violation of an obligation by a sponsored contractor automatically gives rise to the liability of the sponsoring State. Such liability is limited to the State's failure to meet its obligation to 'ensure' compliance by the sponsored contractor" (Responsibilities and Obligations of States, 2011, para. 109). The role of a due diligence obligation of conduct in this context is to establish

> . . . a mechanism through which the rules of the Convention concerning activities in the Area, although being treaty law and thus binding only on the subjects of international law that have accepted them, become effective for sponsored contractors which find their legal basis in domestic law. (Responsibilities and Obligations of States, 2011, para. 108)

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The Tribunal endorsed this language in its *Advisory Opinion on IUU Fishing* while recognising that "the relationship between sponsoring States and contractors is not entirely comparable to that existing between the flag State and vessels flying its flag which are engaged in fishing activities in the exclusive economic zone of the coastal State" (IUU Advisory Opinion, 2015, para. 125). The Tribunal also emphasised that the violation of the laws of a coastal State by its vessels is not itself attributable to the flag State and therefore does not directly engage its responsibility. Instead, the responsibility of the flag State is engaged if it fails to comply with its due diligence obligations to ensure that its vessels comply with the laws and regulations of the coastal State when fishing within its EEZ and do not otherwise engage in IUU fishing (para. 146).

In each of these decisions, "due diligence" plays a key role in attributing responsibility to the State with respect to the harmful activities of private parties (Duvic-Paoli, 2018, p. 207). It makes the State responsible for that conduct unless it has taken all possible efforts to prevent that harmful activity (Responsibilities and Obligations of States, 2011, para. 189). It bears emphasising that the concept of due diligence is not needed (even with respect to an obligation of conduct) where it is the State itself that engages in the impugned conduct since the conduct in breach of the primary norm can then be attributed directly to the State thereby engaging its responsibility (Berkes, 2018, pp. 440–443; Application of the Genocide Convention, 2007, paras. 380–382). The Award in South China Sea perhaps illustrates this point insofar as the Tribunal found it unnecessary to resort to the concept of due diligence in relation to Philippines' allegations that China was in breach of its environmental obligations under Articles 192, 194(1) and (5) of the LOSC in relation to its construction activities on the seven reefs of the Spratly Islands (South China Sea, 2016). China itself was engaging in those activities, and thus due diligence was not required in order to resolve the problem of attribution for the purposes of State responsibility. Due diligence may still be relevant in cases where the State itself is the principal actor, but in these cases due diligence will play its more conventional role as the standard against which to assess the State's performance of its primary obligations, rather than as a means to ensure the accountability of the State for activities of private parties occurring within its territory or under its control, including vessels flying its flag.

The role of due diligence in teasing out the logical implications of general norms

While it may be true that due diligence is principally conceived of as a standard of care, in my view this is an inadequate statement of the normative significance of the concept of due diligence largely because such a formulation ignores the generative potential of the concept when yoked to a general primary norm such as the duty of prevention. This section of the paper seeks to demonstrate that potential by examining the relevant case law.

There is a legal obligation under customary international law not to cause significant transboundary harm (Legality of the Threat or Use of Nuclear Weapons, 1996; Pulp Mills, 2010). Similarly, Article 192 of the Law of the Sea Convention imposes an obligation on States to protect and preserve the marine environment" (1982). Both propositions are concerned with substance rather than procedure, and both propositions have been characterised in the jurisprudence as incorporating obligations of due diligence (Pulp Mills, 2010, para. 197). The first formulation is negatively framed, the second, positive, but what the formulations have in common is the generality and breadth of their expression (South China Sea, 2016, para. 960). The question for present purposes is what follows, logically, from characterising these general substantive obligations as due diligence obligations?

In examining the case law the analysis begins with the relevant general primary norm under consideration and then scrutinises the judgement or opinion to see the extent to which the court or tribunal uses the concept of due diligence to further specify the duties that flow from the general obligation. In some cases, it may not be necessary for a court or tribunal to engage in that exercise if the implications of these general obligations are further specified in the *lex specialis* applicable to the dispute. Such was the case for the most part in *Pulp Mills* since the Statute of the River Uruguay (1975) addressed such matters as the duty to inform, the duty to notify and the duty to protect and preserve the aquatic environment (Certain Activities/Construction of a Road, 2015, Owada Opinion, para. 18). For that reason, it is more revealing to focus on the subsequent decision of the ICJ in *Certain Activities/Construction of a Road* (2015) in the present context since in that case there was no applicable *lex specialis*. As a result, the Court had to engage with general norms of customary law and consider their application in the context of two projects, Nicaragua's dredging activities and Costa Rica's road construction activities. Throughout, the Court stresses the role of due diligence in making the connection between the duty of prevention and various subsidiary duties: (1) the duty to ascertain whether an EIA was required; (2) the duty to conduct an EIA if there were a risk of significant transboundary harm, and (3) a duty to notify and consult should the EIA confirm that risk.

Certain Activities/Construction of a Road

The Court began its treatment of the issues by quoting from the passage in its decision in *Pulp Mills* (para. 104) dealing with the duty or principle of prevention and went on to say that

> Although the Court's statement in the *Pulp Mills* case refers to industrial activities, the underlying principle applies generally to proposed activities which may have a significant adverse impact in a transboundary context. *Thus, to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment*. (para. 104, 153–154, emphasis added)

At this stage therefore the Court has inferred the existence of a duty to conduct a preliminary evaluation from the duty of prevention.

The parties themselves agreed that if this preliminary evaluation ascertained that there were such a risk, then it followed that the initiating State would have a duty to conduct an EIA (Certain Activities/Construction of a Road, 2015, para. 101). The Court evidently agreed with that for it observed that "*to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm*, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment" (para. 104, emphasis added).

It bears noting that not all are comfortable with the idea that the duty to conduct an EIA can or should be derived from the duty of prevention. Judge Ad Hoc Dugard, for example, in his Separate Opinion prefers to consider the duty to conduct an EIA as an independent obligation. Indeed, he specifically asserts that "It is not an

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obligation dependent on the obligation of a State to exercise due diligence in preventing significant transboundary harm" (Certain Activities/Construction of a Road, 2015; Dugard Opinion, 2015, para. 9). Instead, he sees due diligence serving as the standard of care against which to measure the conduct of an EIA. However, it is not clear to me that this is an either\or proposition. Due diligence may both support and generate the duty to conduct an EIA as well serve as a standard against which to measure the resulting EIA.

In any event, while Judge Ad Hoc Dugard might have had a different view as to the *source* of the duty to conduct an EIA (i.e. he considers it a free-standing duty rather than derivative of the duty of prevention), he takes an approach similar to that advocated here when he seeks to ascertain the content of that primary obligation (i.e. the duty to conduct an EIA). Thus, he emphasises that the rules with respect to the content of an EIA cannot simply be determined by domestic law but instead "there are certain matters inherent in the nature of an environmental impact assessment that must be considered if it is to qualify as an environmental impact assessment *and to satisfy the obligation of due diligence in the preparation of an environmental impact assessment*" (Dugard Opinion, 2015, para. 18, emphasis added). He then proceeds to identify the implications of these two ideas (inherency and due diligence) in some considerable detail (para. 19).

The Court took the next logical step when it observed that if the EIA confirmed a risk of significant transboundary harm then:

> . . . the State planning to undertake the activity is required, *in conformity with its due diligence obligation*, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk. (Certain Activities/Construction of a Road, 2015, para. 104, emphasis added)

While the Court ultimately concluded that Nicaragua was not in breach of these procedural obligations since, in the Court's assessment, there was no risk of significant transboundary harm (para. 105), the important point for present purposes is that the Court's reasoning establishes a series of linked duties premised on the general duty of prevention – and it is the duty of due diligence that welds these links together.

The Court applied the same chain of reasoning to Costa Rica's construction of the road (para. 153) and concluded that there was no evidence that Costa Rica had carried out a preliminary evaluation of whether or not the road construction activity would cause a risk of significant transboundary harm, that in this case the Court's assessment was that there was a risk of significant transboundary harm, that this triggered a duty to conduct an EIA before commencing the construction of the works (paras. 156 & 159) and that Costa Rica had failed to do so and was therefore in breach of its obligation "under general international law" to carry out an EIA (para. 162).

In sum, *Certain Activities/Construction of a Road* is an important illustration of the Court using the concept of due diligence to infer the existence of more specific duties from an accepted general primary obligation of customary international law.

The next three cases also illustrate this approach although in each case the general obligation is articulated in the LOSC rather than in customary law.

Advisory Opinion of the Seabed Disputes Chamber

The first question asked of the Seabed Disputes Chamber pertained to the legal responsibilities (or more accurately the primary obligations) of sponsoring States with respect to activities in the Area (Responsibilities and Obligations of States, 2011). Much as in *Pulp Mills*, the starting point for the Chamber's consideration of these issues was the *lex specialis*. The *lex specialis* in this case consisted of certain provisions of the LOSC which require the sponsoring State: (1) to ensure that the activities of its sponsored contractors are carried out in conformity with Part XI of the LOSC (1982, Article 139(1)); (2) to assist the Authority in securing compliance (Article 153(4)); and (3) to ensure that the duty of the contractor to perform is properly reflected within its legal system (Annex III, Article 4(4)). In addition, the *lex specialis* included the rules, regulations and procedures of the Authority including the terms of standard form contracts (Responsibilities and Obligations of States, 2011, paras. 124–126). What then did the due diligence obligation "to ensure" entail? The Chamber initially provides only limited additional guidance (beyond the treaty texts) in response to the first question. Thus, it emphasises that the standard of due diligence will be higher for riskier activities; what is required by due diligence may change over time in light of new scientific or technical knowledge; measures must be taken within the domestic legal system; and such measures should be reasonably appropriate (paras. 117–120). Later, the Chamber emphasises that where the Authority has adopted regulations or standard form contracts, the obligations of the State will extend to ensuring the observance of the terms of those instruments, including therefore the application of the precautionary approach as required by the Nodules and Sulphides Regulations (paras. 127 & 131).

In these examples, due diligence simply serves as the standard against which to measure the performance of the primary obligation of conduct as detailed in the *lex specialis* (whether found in the treaty text or related instruments) and as construed by the Chamber. The Chamber is not using due diligence to generate additional more specific content for the primary obligation (paras. 124–150). The Chamber perhaps moves beyond this when it discusses the duty to apply "best environmental practices" in the context of the Nodules Regulations. This obligation was expressly incorporated in the Sulphides Regulations and the relevant standard form contract. As such, it was directly binding on the sponsored contractor as a matter of contract law and on the Sponsoring State as part of the duty to ensure compliance. However, there was no similar requirement in the Nodules Regulations. Nevertheless, the Chamber was of the view that:

> The adoption of higher standards in the more recent Sulphides Regulations would seem to indicate that, in light of the advancement in scientific knowledge, member States of the 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.* (para. 136, emphasis added)

In sum, the Chamber relies on an evolving understanding of what due diligence requires to increase the supervisory and domestic implementation obligations of the State. This is also a concrete example of how the content of a due diligence obligation may change over time.

There are perhaps other examples of where due diligence and general international law generates additional normative content to that prescribed in the *lex specialis*. Thus, in the context of the duty to conduct an EIA (largely prescribed by the Authority) the Chamber references the *Pulp Mills* decision (para. 147) and then goes on to say that the Court's language "seems broad enough to cover activities in the Area *even beyond the scope of the Regulations*" (para. 148, emphasis added). In particular, the Chamber considered that the duty to conduct an EIA might be "included in the system of consultations and prior notifications

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set out in article 142" of the LOSC. While the Chamber does not expand on this proposition, it can hardly be read simply as an evolutive "interpretation" of Article 142 but rather as an obligation that is logically inferred from the obligation of due diligence (Matz-Lück & van Doorn, 2017, p. 183).

The Chamber returned to the question of what due diligence might require in its response to the third question posed of the Chamber. This question asked the Chamber for its opinion as to the necessary and appropriate measures that the sponsoring State would need to undertake in order to discharge its primary obligations. Once again, much of the Advisory Opinion is concerned with interpreting the various texts, but the Chamber emphasises that the sponsoring State's obligations must extend beyond the exploration phase covered by the existing regulations (Responsibilities and Obligations of States, 2011, para. 221) and that the duty to put in place the necessary laws, regulations and administrative measures was "a necessary requirement for compliance with the obligation of due diligence of the sponsoring State" (para. 219) and that due diligence further implied a requirement "that such measures should be kept under review so as to ensure that they meet current standards and that the contractor meets its obligations effectively without detriment to the common heritage of mankind" (para. 222). Furthermore, "it is inherent in the 'due diligence' obligation of the sponsoring State to ensure that the obligations of a sponsored contractor are made enforceable" (para. 239).

In sum, due diligence serves two substantive functions in the Chamber's Advisory Opinion. First, it serves as a standard against which to measure the sponsoring State's performance of its primary obligations. And second, due diligence is used to further specify and clarify the contents of those primary duties.

ITLOS Advisory Opinion on IUU Fishing

In its *Advisory Opinion on IUU Fishing*, ITLOS was asked to elaborate upon various provisions in the LOSC dealing with the primary obligations of flag States and coastal States – all as they pertained to IUU fishing (IUU Advisory Opinion, 2015).

The Tribunal noted that flag States have two types of obligations (para. 111). First, there are the "general" obligations of a flag State in *all* of the maritime zones: Articles 91, 92, 94 and Articles 192 and 193. The Tribunal refers to Articles 91, 92 and 94 as "general" obligations because they apply to all maritime areas (and it might be added, all ships). In another sense, these obligations are specific insofar as they are all directed at the *flag* State. By contrast, the environmental obligations under Articles 192 and 194 apply to *all* States. Second, there are two obligations of a flag State that are specific to the EEZ, namely, the duty of due regard under Article 58(3), and the duty under Article 62(4) to comply with the laws and regulations of the coastal State when fishing in the EEZ (South China Sea, 2016, para. 740). The Tribunal seems to have been of the view that all of these obligations were due diligence obligations (IUU Advisory Opinion, 2015, paras. 125–126 & 128–140). Thus, for present purposes, the question is what did due diligence require in the observance of these primary obligations, especially when read together. For an example of reading the provisions together as a coherent whole, consider that in fulfilling its obligations as a flag State under Article 94 the flag State also owes obligations under Article 292 in all marine areas and under Articles 62(4) and 56(2) when its flagged vessels operate within the EEZ of a coastal State.

Article 94 is designed to ensure that flag States effectively exercise jurisdiction and control "in administrative, technical and social matters" with respect to ships flying its flag (LOSC, 1982, Article 94(1)). The Article details some matters including safety and labour issues, but it is silent with respect to environmental and fishing matters (IUU Advisory Opinion, 2015, para. 117). Nevertheless, the Tribunal was of the view that the flag State " . . . in fulfilment of its responsibility to exercise effective jurisdiction and control in administrative matters, must adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities which will *undermine the flag State's responsibilities under the Convention in respect of the conservation and management of marine living resources*" (para. 119, emphasis added).

The italicised language leads the Tribunal directly to Article 192 and the observation that Article 192 imposes on the flag State the duty to ensure that its vessels comply with the coastal State's conservation measures for marine living resources, since those measures "constitute an integral element in the protection and preservation of the marine environment" (para. 120). Article 62(4), reinforced by Article 58(3), imposes the same obligation – with the additional duty to ensure that the State's nationals and vessels comply with the "other terms and conditions" established in the laws and regulations of the coastal State as well as its conservation measures (paras. 122–123 & 134). While it is up to the flag State to determine within its legal system how it will give effect to "the duty to ensure" (para. 138), the flag State must include a requirement that its fishing vessels are properly marked (para. 137) and must have "enforcement mechanisms to monitor and secure compliance with these laws and regulations. Sanctions applicable to involvement in IUU fishing activities must be sufficient to deter violations and to deprive offenders of the benefits accruing from their IUU fishing activities" (para. 138). In sum, this is an obligation "to deploy adequate means, to exercise best possible efforts, to do the utmost" (para. 129). In addition, a flag State must be able to investigate and respond to complaints with respect to allegations of IUU fishing by its vessels and has a duty to report to the complaining State (paras. 118 & 139). The text of Article 94(6) does not explicitly impose an obligation to report to the complaining State, and one can only infer that the Tribunal considered that reporting is part of the overall due diligence obligation of the flag State in exercising its jurisdiction and control.

In his separate opinion Judge Paik was somewhat critical of the efforts of the Tribunal to elaborate on the content of due diligence. Indeed, in his view, "the Opinion simply repeats the obligation of the flag State to take necessary measures to ensure compliance . . . rather than elaborating the content of those measures" (IUU, Advisory Opinion, 2015, Paik Separate Opinion, para. 21). Judge Paik considered that the Tribunal should have looked for practice outside the Convention for assistance. In particular, Judge Paik argued that had it applied a "rule of reference" approach (Van Reenan (1981)) by analogy, the Tribunal might have identified generally accepted international standards as to what might be required of flag States. On the basis of this methodology Judge Paik suggested some additional requirements, although it must be noted that at least some of what Judge Paik considers to be additive is already covered in different parts of the Advisory Opinion (para. 29). Rather than reviewing Judge Paik's proposals in detail, however, I wish to suggest, consistent with the thrust of this article, that one might also think of Judge Paik's search for content, not so much as an application of a rule of reference by analogy, but instead simply as a search for what due diligence logically entails in any particular case.

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The Tribunal also had to address some aspects of the obligations of coastal States, specifically the obligations of coastal States with respect to "shared stocks" and "stocks of common interest" (IUU Advisory Opinion, 2015, para. 175). Much of the discussion in this part of the Advisory Opinion involves the detailed exposition of Articles 61–64 of the Convention and the interaction between those provisions, and, to some extent, Articles 292 and 293. The Tribunal does not make much use of due diligence obligations to offer an expansive reading of these provisions. The Tribunal confirms that the obligation of coastal States that share stocks within their respective EEZs to seek to agree (Article 63(1)) "upon the measures necessary to coordinate and ensure the conservation and development of such stocks" is a due diligence obligation, as is the obligation to cooperate with a view to ensuring the conservation and optimum utilisation of highly migratory species under Article 64(1) (para. 210). But the Tribunal makes little of this characterisation. It observes that "consultations should be meaningful in the sense that substantial effort should be made by all States concerned, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks" and emphasises that coastal States should adopt "effective measures" to prevent the over exploitation of shared stocks (paras. 210–211).

In sum, ITLOS's *IUU Advisory Opinion* offers an important integrated reading of three groups of provisions in the LOSC: the EEZ provisions, the flag State provisions and some of the provisions of Part XII dealing with the protection of the marine environment. The obligation of due diligence once again plays an important role in clarifying the obligations of States by helping to give "substance and meaning" to these provisions and facilitating a coherent and integrative interpretive approach (Stephens & French, 2016).

South China Sea Award

The *South China Sea Award* also had to consider both the obligations of the flag State with respect to its fishing vessels operating within the EEZ of a coastal State as well as the more general environmental obligations of all States under Part XII of the LOSC. With respect to the former, the Award chose to rely more heavily on Article 58(3) than Article 62(4). Whereas ITLOS effectively read Article 62(4) as imposing an obligation on flag States, the Annex VII Tribunal in the *South China Sea Award* read the text of Article 62(4) more literally and concluded that Article 62(4) imposed direct obligations on *private* parties to comply with the laws of the coastal State when fishing within the EEZ (South China Sea, 2016, para. 740). On the other hand, Article 58(3) imposed obligations on States parties with respect to the activities of its flagged vessels within the EEZ of another State. This was the obligation "to have due regard to the rights and duties of the coastal State and [to] comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention" (para. 741). In the Tribunal's view, "anything less than due diligence by a State in preventing its nationals from unlawfully fishing in the exclusive economic zone of another would fall short of the regard due pursuant to Article 58(3) of the Convention" (para. 744). In this case there was ample evidence of the absence of due diligence insofar as Chinese government ships were operating in close coordination with, and indeed escorting, the fishing vessels fishing in the Philippines' EEZ (para. 755). By acting in such a manner, China failed to exercise due diligence and thus breached the obligation of due regard under Article 58(3) (para. 757).

The Annex VII Tribunal also had to consider Philippines' allegations that China was in breach of its obligations under Articles 192 and 194 of the LOSC to protect and preserve the marine environment. The activities complained of included land reclamation activities as well as environmentally harmful fishing practices (including dynamiting and the use of cyanide) and harvesting of endangered species. As already noted, Article 192 of the LOSC establishes the general obligation of all States "to protect and preserve the marine environment" (para. 941). But according to the Tribunal, the content of this positive obligation to protect and preserve could be informed by other applicable rules of international law (para. 941), including "a due diligence obligation to prevent the harvesting of species that are recognised internationally [under the Convention on International Trade in Endangered Species (CITES)] as being at risk of extinction and requiring international protection" (para. 956). The Tribunal further concluded that Article 192 when read in conjunction with Article 194(5)

> . . . 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." Therefore, in addition to preventing the direct harvesting of species recognised internationally as being threatened with extinction, Article 192 extends to the prevention of harms that would affect depleted, threatened, or endangered species indirectly through the destruction of their habitat. (South China Sea, 2016, para. 959)

It is useful to reflect on the normative complexity of the Tribunal's reasoning at this point in the Award. The reasoning begins with the proposition (based on Article 31(3)(c) of the Vienna Convention on the Law of Treaties (1969)) that the open textured language of Article 192 of the LOSC should be read in light of "any relevant rules of international law applicable in the relations between the parties." This takes the Tribunal to CITES. Closely related to this is the proposition that Articles 192 and 194 must be read together and, in particular, that Article 194(5) with its reference to rare or fragile ecosystems and the habitat of depleted, threatened or endangered species must also inform the obligations of all States under Article 192. But that still left the Tribunal with the challenge of discerning what this might mean in concrete terms. CITES on its own could provide little guidance on this point (beyond confirming the critical status of particular species) since the principal obligations of Parties to CITES are to prohibit or regulate *trade* in listed species. CITES does not address directly the harvesting of species or the protection of habitat. Hence, in order to further unpack the content of Articles 192 and 194(5) the Tribunal resorts to the duty of due diligence which in its view requires a flag State to adopt rules and measures to prevent its flagged vessels from engaging in these activities (i.e. harvesting of species internationally recognised as threatened with extinction and destroying the habitat of depleted, threatened or endangered species) and "to maintain a level of vigilance in enforcing those rules and measures" (South China Sea, 2016, paras. 961 & 964). China was in breach of these due diligence obligations. Not only did China turn a blind eye to its flagged vessels engaging in these activities (harvesting of giant clams and sea turtles notwithstanding that this was in breach of Chinese laws) (para. 963), "it provided armed government vessels to protect the fishing boats" (para. 964).

The Tribunal was also of the view that China had a due diligence obligation to ensure that its nationals did not engage in harvesting of marine living resources by using cyanide and explosives, both because this constituted pollution and also because of its destructive effects on the marine environment and fragile ecosystems and

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habitat of endangered species (i.e. a breach of Article 192, 194(2) and 194(5) (para. 970). However, the record in this case did not allow the Tribunal to conclude that China had failed in its due diligence obligations with respect to enforcement and control with respect to dynamite and cyanide fishing (para. 974).

In sum, this *Award*, much like ITLOS' *IUU Advisory Opinion*, offers important lessons in the integrated reading of the LOSC (Duvik-Paoli, 2018, p. 202) and the role that due diligence can play in this exercise. In this case the Tribunal relied less on Article 94 and more on both Article 56(2) (with respect to the EEZ) and Articles 192 and 194. The Tribunal's reading of these last two provisions is especially important since these provisions apply generally to all States and to all marine areas, that is, not just to a particular zone of marine space such as the EEZ or to a particular category of states such as flag States or coastal States. The Tribunal also invokes general instruments of international law such as CITES, but it is the concept of due diligence that helps operationalise the invocation of this instrument.

Application in the context of the Arctic

The introduction to the paper offered two Arctic examples of proposed resource developments within one jurisdiction that might cause environmental and cultural harm within another jurisdiction. The first example involved proposed oil and gas drilling with the ANWR in Alaska that might have serious consequences for the health of the shared PCH and the communities within Canada that depend on that herd (the "PCH example") (see Submission of The Inuvialuit Game Council (IGC) (2019)). The second involved existing and proposed mining operations in British Columbia on a series of "panhandle rivers" that drain in to Alaska (the "panhandle rivers example"). How might what we have discussed here apply in the context of these examples?

The first task is to identify the applicable law. In each case, in addition to the norms of customary international law (the duty of prevention and the freedom to develop (Rio Declaration, 1992, Article 2; Duvic-Paoli, 2018)), there is a relevant bilateral treaty which provides the *lex specialis*. In the case of the PCH example this is the Agreement between the United States and Canada on the Conservation of the PCH (1987) (the PCH Agreement), and in the panhandle rivers case it is the Boundary Waters Treaty (1909) (the BWT) between the United States and Canada. The BWT is much more general than is the PCH Agreement, and thus we might anticipate that the concept of due diligence can be made to do much more work in the case of the BWT than in the case of the PCH Agreement – much as in the different cases of Certain Activities/Construction of a Road (2015) and the Pulp Mills Case (2010).

The principal relevant primary obligation in the case of the BWT is the obligation of both parties (Article IV) not to pollute boundary or transboundary waters on either side of the boundary to the injury of health or property on the other. But, as an older treaty, the BWT has nothing to say about the duty to conduct an EIA, or about the obligation to consult in the event that the EIA identifies the risk of significant harm, either to waters on the other side of the boundary or to a shared resource (salmon). Neither does the BWT make any specific reference to Indigenous peoples or the need to protect the cultural rights of Indigenous communities. In my view the concept of due diligence when coupled with the systemic approach to treaty interpretation required by the Vienna Convention on the Law of Treaties (1969) (McLachlan 2005) effectively requires these gaps to be filled. The argument would be as follows. The duty not to pollute boundary or transboundary waters on either side of the boundary to the injury of health or property on the other is an obligation of conduct and a due diligence obligation. In order to fulfil that due diligence obligation with respect to proposed mining activities in Canada upstream on panhandle rivers, Canada has, at a minimum, the following three duties: (1) a duty to conduct a preliminary investigation to ascertain if the proposed activities pose a risk of significant transboundary harm; (2) in the event that the preliminary investigation reveals such a risk, the duty to conduct an EIA; and (3) if the EIA confirms that risk, the duty to notify and consult in good faith with the United States to determine the appropriate measures to prevent or mitigate that risk (Certain Activities\Construction of a Road, 2015). Due diligence should also inform the nature of the EIA. Thus the EIA should assess impacts in a non-discriminatory manner – whether those impacts will be felt within Canada or within the United States, and the EIA should extend to an assessment of the effect of the project on salmon habitat and spawning grounds within Canada to the extent that these activities would have an impact on the health of that shared resource and its harvest by Indigenous communities and others downstream in the United States (International Joint Commission, 1988, p. 8–9). Furthermore, it might be argued that the EIA should also take account of the obligation of both States under the terms of Article 27 of the International Covenant on Civil and Political Rights (ICCPR, 1966) to take the appropriate measures to ensure that Indigenous communities are not deprived of their access to the material elements of culture necessary to continue their way of life (Poma Poma, 2009). Finally, given that the BWT contains a mechanism to allow for a joint examination of "matters of difference" between them (the Reference procedure of Article IX) then arguably both States have a due diligence and good faith obligation to avail themselves of that mechanism.

The PCH Agreement (1987) is a more modern agreement, and as such it is more specific in its prescription of relevant primary obligations with respect to proposed activities that may affect the health of the PCH. The agreement also makes specific reference to the interests of Indigenous communities. These obligations include (Article 3) the obligation to give effective consideration to the effect of proposed activities on the herd, its habitat and users; the obligation to conduct an impact assessment "consistent with domestic laws"; the obligation to afford the opportunity to consult if an activity is "determined to be likely to cause significant long-term adverse impact" on the PCH or its habitat, before a final decision is made. Article 3 also notes that the EIA obligation should extend to analyzing the effect of proposed activities on the habitat of the PCH and "affected users." In sum, and as suggested above, the concept of due diligence has less work to do here. Nevertheless, the concept may still have interpretive significance and may also be used as a standard against which to measure the discharge of each party's obligations. For example, the case law referenced above suggests that US domestic law cannot be the only standard against which to measure the adequacy of an EIA. Certainly, any EIA must comply with domestic law but if the EIA fails to fully address impacts within Canada that can hardly serve as a due diligence implementation of US obligations (IGC 2019). Similarly, that case law also suggests that the threshold for consultation in the PCH Agreement is too high and it further fails to require that the consultations should be directed at least in part in determining appropriate measures to prevent or mitigate the risk of transboundary harm. Finally, while the Agreement does reference consideration of the effect of activities on the Indigenous communities that use the herd, it fails to reference an appropriate protective standard

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for the consideration of those effects. Thus, a robust application of due diligence can still serve, even in the case of this more detailed agreement, both to further specify obligations and as a prism though which to measure the discharge of those obligations.

Conclusions

This article makes the claim that the concept of diligence can provide a useful role in clarifying (and perhaps narrowing) the discretionary powers of the State with respect to the development of natural resources and the protection of environment values. The claim has two branches. The first is the claim that the concept of due diligence has an important role in bridging the normative gap between the harms caused by private actors and the international law of state responsibility. The second claim is that the concept of due diligence can play an important role (a "generative role") in teasing out the detailed logical implications of more abstract primary norms such as the duty of prevention whether arising from treaty or customary law.

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References

Agreement Between the Government of Canada and the Government of the United States of America on the Conservation of the Porcupine Caribou Herd. U.S.-Can. July 17 (1987). CTS 1987 No 31.

Alabama Claims Arbitration (United States v Great Britain). May 8, 1871, XXIX UNRIAA 125.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment. (2007). ICJ Rep 43.

Barnidge, R. B. (2006). The due diligence principle under international law. *International Community Law Review*, *8*, 81–121.

Berkes, A. (2018). The standard of 'Due Diligence' as a result of interchange between the law of armed conflict and general international law. *Journal of Conflict and Security Law*, *23*(3), 433–460. https://doi.org/10.1093/jcsl/kry022

Boundary Waters Treaty. U.S.-U.K. January 11, 1909. 36 Stat. 2448, T.S. No. 548.

Certain Activities/Construction of a Road (2015), 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) (2015) ICJ Rep 665.

Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom). (2015). Award.

Convention for the Protection of the Marine Environment of the North-East Atlantic. (1992). 32 ILM 1069.

Corfu Channel Case (United Kingdom v Albania). (1949). ICJ Rep 4.

Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ireland v United Kingdom). (2003). Final Award.

Dugard, C. J. R. (2015) Separate Opinion of Judge Ad Hoc Dugard in 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) (ICJ).

Duvic-Paoli, L. (2018). *The Prevention Principle in International Environmental Law*. Cambridge: Cambridge University Press.

French, D., & Stephens, T. (2014). ILA Study Group on Due Diligence in International Law, First Report. International Law Association.

ICCPR (1966). International Covenant on Civil and Political Rights. 999 UNTS 171.

International Joint Commission. (1988). Impacts of a Proposed Coal Mine in the Flathead River Basin. https://ijc.org/sites/default/files/Docket%20110%20Flathead%20Final%20Report%20to%20Gov.pdf

IUU Advisory Opinion. (2015) Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission. (2015). ITLOS Rep 4. Advisory Opinion.

ILC (2001a) Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries. (2001). International Law Commission. A/56/10.

ILC (2001b) Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries. (2001). International Law Commission. A/56/10.

Kyoto Protocol to the United Nations Framework Convention on Climate Change. (1997). 2303 UNTS 162.

Legality of the Threat or Use of Nuclear Weapons. July 8, 1996. ICJ Rep 226. Advisory Opinion.

Lowe, V. (2001). The Politics of Law-Making and the Changing Character of Norm Creation. In M. Byers (ed.), *The role of law in international politics*. Oxford: OUP, 216.

LOSC. (1982). United Nations Convention on the Law of the Sea. December 10, 1982, 1833 UNTS 396.

McLachlan, C. (2005). The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention. *International and Comparative Law Quarterly*, *54*(2), 279–319.

Matz-Lück, N., & van Doorn, E. (2017) Due Diligence Obligations and the Protection of the Marine Environment. *L'Observateur des Nations Unies*, *42*, 169–187.

Poma Poma v Peru (2009). Communication No. 1457/2006, Views of the HumanRights Committee, Adopted 27 March 2009.

Pulp Mills on the River Uruguay (Argentina v. Uruguay). (2010). ICJ Rep 14.

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area. (2011). ITLOS Rep 10. Advisory Opinion.

Rio Declaration on Environment and Development. June 5, 1992. 1720 UNTS 79.

South China Sea Arbitration (Philippines v China). (2016). PCA Case No 2013-19.

Statute of the River Uruguay, 26 February 1975, 1295 UNTS 339.

Stephens, T., & French, D. (2016). *ILA Study Group on Due Diligence in International Law, Second Report*. International Law Association.

Submission of The Inuvialuit Game Council (IGC) (2019). Submission of The Inuvialuit Game Council (IGC), Wildlife Management Advisory Council (North Slope) (WMAC(NS)), Wildlife Management Advisory Council (Northwest Territories) (WMAC(NWT)), and Fisheries Joint Management Committee (FJMC). https://www.pcmb.ca/PDF/EIS/IGC-WMAC(NS)-WMAC(NWT)-FJMC%20submission%20to%20BLM%20March%2012%202019.pdf

The M/T 'San Pedro Pio' Case (Switzerland v. Nigeria). (2019). ITLOS Case no 27.

Trail Smelter Arbitration (United States v. Canada) (1938 and 1941). III UNRIAA 1905-1982.

Treaty of Washington. U.S.-U.K. May 8, 1871. Washington.

Van Reenen, W. (1981). Rules of Reference in the new Convention on the Law of the Sea, in particular in connection with the pollution of the sea by oil from tankers. *Netherlands Yearbook of International Law*, *12*, 3–44. doi: 10.1017/S0167676800002865

Vienna Convention on the Law of Treaties. May 23, 1969, 1155 UNTS 321.

Yotova, R. (2016). The principles of due diligence and prevention in international environmental law. *The Cambridge Law Journal*, *75*(3), 445–448. doi: 10.1017/S0008197316000672