

# Oxford Public International Law



## Due Diligence

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## A. Concept

**1** Due diligence is an obligation of conduct on the part of a subject of law (→ *Subjects of International Law*). Normally, the criterion applied in assessing whether a subject has met due diligence is that of the responsible citizen or responsible government. Failure on a subject's part to comply with the standard triggers its responsibility.

**2** Due diligence can best be viewed as a concept that lies at the interface between primary rules of conduct and secondary rules of → *State responsibility*. It is part of the subjective component of State responsibility, but its content varies between different primary rule-sets in international law. Due diligence has traditionally been invoked (and still is) in situations where it establishes the legal responsibility of a State in connection with the behaviour of private actors that cannot be attributed directly to the State. The obligation of due diligence in these cases stems from a State's exclusive power over certain areas and entities. International law does not expect a State to prevent all private action under its control and jurisdiction that causes harm to others, but lays down an obligation for the State to take appropriate steps to ensure that private persons will not cause such harm. These are for States obligations of conduct, that is, obligations to endeavour to reach the result set out in the obligation. A breach of these obligations consists not in failing to achieve the desired result but in failing to take the necessary, diligent steps towards that end.

**3** Even if the traditional/classical notion of due diligence (these terms are used interchangeably in this entry) still dominates the discourse on due diligence, it is equally clear that the proliferation of primary norms dramatically expands the relevance of due diligence. These developments include broad and indeterminate multilateral treaty provisions, which have yet to find firm authoritative expression in the practice of international law; or which relate to new and emerging activities and issues, which States have not yet been able to regulate. In terms of the latter, scholars have raised the possibility of whether there is an underlying due diligence principle (such as the one suggested by the → *International Court of Justice [ICJ]* in the → *Corfu Channel Case*: 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' [*Merits*] at 22) in international law that could provide some guidance on what States are expected to do in terms of new activities. One of the goals of this short entry is to map out those fields of international law where due diligence considerations play a clear and explicit role, as demonstrated by court pronouncements and/or authoritative instruments.

**4** The legal status of due diligence has been a matter of some debate, as it has been defined in different ways, as eg a principle of → *customary international law*, a general principle of law (→ *General Principles of Law*), or a standard or concept of law. The difficulty with treating due diligence as a general principle of law or a standard is that it is very general in nature, making it difficult to perceive it as an obligation (even a general one) that can guide behaviour. In addition, due diligence is always ancillary to the more specific primary rules, which it complements, thereby being best perceived as a concept, such as → *good faith (bona fide)* or good neighbourliness, that inheres in the structure of international law.

**5** As a general concept, the contours of due diligence are difficult to precisely identify. As the → *International Tribunal for the Law of the Sea (ITLOS)* stated, it is a variable concept, the content of which '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' (*Responsibilities and Obligations of States with respect to Activities in the Area [Advisory Opinion]* para. 117). Due diligence is perceived as an international minimum standard providing a test whereby a State's conduct is compared to what a 'reasonable' or 'good' government would do in a specific situation. Since the principle is an international minimum standard, its requirements are context-specific, requiring different measures in different circumstances. Nevertheless, some basic criteria have emerged that will assist a decision-maker in determining whether a State has acted diligently in different areas of international law.

## B. Historical Evolution

### 1. Early Efforts

**6** Due diligence obligations were most explicitly recognized in international law during the nineteenth and early twentieth centuries, in the fields of the law of neutrality (→ *Neutrality, Concept and General Rules*) and the treatment of → *aliens*, but due diligence obligations were manifest also in some early → *human rights* and international humanitarian law treaties (→ *Humanitarian Law, International*).

**7** The first clear application—in inter-State arbitration—of a principle of due diligence was the → *Alabama Arbitration* of 1872 between the United States ('US') and the United Kingdom ('UK') over the alleged failure of the UK to fulfil its duty of neutrality during the → *American Civil War* (1861–65) (*Alabama Claims of the United States of America against Great Britain [United States v Great Britain]*). The Confederate States of America had commissioned a number of → *warships*, including the *Alabama*, from private companies operating in the UK, a neutral State; the warships eventually caused damage to US shipping. Essentially, the question was whether the UK had acted with due diligence when it allowed a private company to construct the *Alabama* and arm it within the territory of the UK. The standard was defined in Art. 6 Treaty between Great Britain and the United States of America for the Amicable Settlement of all Causes of Difference between the Two Countries ([signed 8 May 1871, entered into force 17 June 1871] [1870–71] 61 BSP 40), by which the US claims were submitted to → *arbitration*. The parties interpreted the requirements of due diligence in contrasting ways. The UK adopted a restrictive interpretation of the principle whereby a lack of due diligence meant:

a failure to use, for the prevention of an act which the government was bound to endeavour to prevent, such care as governments ordinarily employ in their domestic concerns, and may reasonably be expected to exert in matters of international interest and obligation (*Case Presented on the Part of the Government of Her Britannic Majesty in Papers relating to Foreign Relations of the United States 1872* [United States Government Printing Office Washington 1872] part 2 vol I, 206, 412).

In essence, the UK defined due diligence from the domestic perspective: if its domestic system worked as defined in its legislation, then it had fulfilled its due diligence obligations. The US put forward the position that a neutral State had to exercise active diligence, that is, diligence commensurate with the emergency or with the magnitude of the consequences of the failure of due diligence. In its 1872 award, the Arbitral Tribunal accepted the view of the US, stating that diligence has to be exercised in exact proportion to the risks and that a government could not justify its failure to exercise due diligence by pleading insufficiency of the legal means of action which it possessed (*Alabama Arbitration* at 129 and 131). The *Alabama Arbitration* also had an impact on later codification of obligations of neutral States.

**8** Due diligence was prominent in → *State practice* and case law related to State responsibility for the damage caused to aliens by private persons in peacetime and during domestic disturbances. Gradually, the due diligence obligation of States to prevent and repress the harmful activities to private individuals was so widely recognized that it led to increasing efforts at codification (→ *Codification and Progressive Development of International Law*).

**9** These developments triggered work between the world wars by non-governmental expert bodies and the League of Nations' Committee of Experts for the Progressive Codification of International Law (→ *History of International Law, World War I to World War II*; → *League of Nations*), which prepared the topic for the 1930 Hague Conference for the Codification of International Law ('Hague Codification Conference'). Even though the Hague Codification Conference failed to finalize the codification process, the process established that a State could be held responsible if it was manifestly negligent, ie failed to exercise due diligence in trying to prevent, redress, or punish the damage to the alien.

## **2. Codification of State Responsibility and the Role of Due Diligence**

**10** The approach taken by the Hague Codification Conference, largely based on due diligence and its role in defining what was expected of States as regards foreigners in their territories, was continued in the United Nations → *International Law Commission (ILC)* State responsibility project until 1963 under its first special rapporteur Francisco V García-Amador, but no progress was made with respect to codification. With the appointment of a new special rapporteur, Roberto Ago, to deal with the issue in 1963, the project of Responsibility of States for Internationally Wrongful Acts ('State Responsibility Project') changed direction significantly: it undertook to define general secondary rules that specified the consequences of breaching a primary rule of international law, ie a rule that prescribed a standard of

conduct. This change in focus had a significant impact on the way in which the subjective element of State responsibility was dealt with in that project. As there was controversy over whether international law contained an additional requirement of fault for a State to be deemed to have committed a wrongful act, it was only understandable that the State Responsibility Project, in time, shifted due diligence considerations (which seemed to be linked to a kind of 'fault' or subjective considerations) to the level of primary rules and thus away from the original remit of the project. In order to find common ground for codification in an area as important as State responsibility, it became essential for the project to restrict its focus to fairly uncontroversial issues. This new orientation took hold only gradually, however, and due diligence emerged on several occasions when the State Responsibility Project tried to assign primary norms to various categories. Even in 1999, two years before the UN ILC Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') were adopted, due diligence was discussed by the ILC under the heading 'Obligations of Conduct and Obligations of Result' (UN ILC 'Report of the International Law Commission on the Work of its Fifty-First Session [3 May–23 July 1999]' [1999] UNYBILC vol II part II at 59).

**11** Yet, by the time the ILC adopted the Articles on State Responsibility in 2001, all subjective elements of State responsibility, such as due diligence, had ostensibly been eliminated. The Commentary to Art. 2 ARSIWA described the situation in rather strong terms:

Whether responsibility is 'objective' or 'subjective' in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation (UN ILC 'Report of the International Law Commission on the Work of its Fifty-Third Session [23 April–1 June and 2 July–10 August 2001]' [2001] UNYBILC vol II part II at 34).

**12** The State Responsibility Project took a clear stance on what constitutes an internationally wrongful act: an act or omission that is attributable to the State and constitutes a breach of the international obligations of that State. On the one hand, the ARSIWA do not prejudice the question whether an additional element of lack of diligence is required before the primary norm in question can be considered breached; on the other hand, they fail to cover explicitly those situations to which due diligence traditionally applied, where the State is expected to prevent wrongful behaviour by mainly private actors that cannot be attributed to a State. While Chapter II ARSIWA, 'Attribution of Conduct to a State', makes it clear that private conduct can only under limited circumstances be attributed to a State, the Commentary to Chapter II ARSIWA clarifies that in some cases responsibility may still attach to the State:

But the different rules of attribution stated in chapter II have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example, a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it (at 39).

**13** Here the Commentary had to take note of the → *United States Diplomatic and Consular Staff in Tehran Case (United States of America v Iran)*, the first phase of which held that the attack on the US embassy by Iranian revolutionary militants in November 1979 could not be attributed to the government as these were private actions (and these acts had not yet been approved by the Iranian authorities). Nevertheless, the ICJ concluded that due to their lack of diligence, the Iranian authorities had failed to protect the US embassy from an attack by private persons, and this manifest negligence triggered responsibility on the part of the Iranian government (paras 61, 63).

**14** Due diligence served as an important concept in the work of the ILC in a parallel project that commenced at the end of the 1970s: International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law ('Liability Project'; → *Liability for Lawful Acts*). The original focus of the Liability Project—direct State liability for lawful activities—posed fundamental problems from the outset and the Liability Project eventually found itself in a paradoxical situation: while its focus was liability, its first outcome was the UN ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities ('Preventive Draft Articles'; → *Hazardous Substances, Transboundary Impacts*;

→ *Hazardous Wastes, Transboundary Impacts*). The ILC followed this up with the UN ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, which attempt to provide victims of physical damage some form of → *compensation* even in cases where due diligence has been observed (see Principle 4 (2) [‘Such liability should not require proof of fault.’] and paras 12–13 of the Commentary thereto [UN Doc A/61/10 at 151–52]).

## C. Due Diligence in Current International Law

### 1. A State’s Due Diligence Obligations in Different Areas of International Law

#### (a) *International Investment Law*

15 As was mentioned above, due diligence has historically played a significant role in the law related to the treatment of aliens. These early developments in international law still inform the developing international investment law, which is nowadays much influenced by bilateral investment treaties and the practice of investment tribunals (→ *Investments, International Protection*; → *Investments, Bilateral Treaties*; → *International Investment Arbitration*; → *Investment Disputes*). The core duty of a State in modern investment law is → *full protection and security* (‘FPS’), which requires the host State to act diligently (an obligation of conduct) to protect the foreign investment, in particular, to protect the foreign investment from the acts of private actors and to act with due diligence to establish and implement some form of legal responsibility for the wrongful acts. The level of development and stability within the host State can also influence how a host State’s due diligence is evaluated. As these are State obligations with respect to the treatment of private actors, they require only diligent behaviour of the host State, as, for instance, explained in *Lauder v Czech Republic*:

The Arbitral Tribunal is of the opinion that the Treaty obliges the Parties to exercise such due diligence in the protection of foreign investment as reasonable under the circumstances. However, the Treaty does not oblige the Parties to protect foreign investment against any possible loss of value caused by persons whose acts could not be attributed to the State. Such protection would indeed amount to strict liability, which can not be imposed to a State absent any specific provision in the Treaty (*Lauder v Czech Republic* para. 308, with further reference to R Dolzer and M Stevens *Bilateral Investment Treaties* [Nijhoff The Hague 1995] at 61).

16 → *Fair and equitable treatment* (‘FET’) is another standard in international investment law where due diligence has played a role in the decisions of investment tribunals. → *Legitimate expectations* of a foreign investor define how the tribunals have defined FET requirements of a host State. The FET duty of the host State is an obligation of due diligence, encouraging that State to ensure that when it amends its laws and changes its practices, it acts with due diligence vis-à-vis the legitimate expectations of foreign investors. But the foreign investor also has an obligation of due diligence to make sure that it is aware of the risks when entering the host State—the factual, legal, and nowadays also human rights risks, the last stemming from the developments in business human rights due diligence (UN HRCouncil Open-ended Intergovernmental Working Group [‘OEIGWG’] ‘Third Revised Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises’ [2021] [‘Third Revised Draft of the Legally Binding Instrument’]). The investor cannot be guaranteed protection of rights under the bilateral investment treaty if they fail to conduct due diligence. The foreign investor can also be held accountable if they act against the general public interests of the host State. A host State can, eg under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, make a counter-claim against the foreign investor (→ *Counterclaim: Investment Arbitration*).

#### (b) *Human Rights Law*

17 Human rights are sometimes also violated by persons other than States, and in these cases, a State has a duty of due diligence—within its jurisdiction—to take appropriate steps to prevent human rights violations from happening and also to punish the perpetrators. The → *Human Rights Committee* (‘HRC’) General Comment No 31 (2004) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant (ie the → *International Covenant on Civil and Political Rights* [1966] [‘ICCPR’]) notes

that States have positive obligations to ensure Covenant rights will be discharged by protecting individuals against their violation, not only by its agents but also by acts committed by private persons or entities. The failure to ensure Covenant rights would give rise to violations by States parties ‘as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities’ (para. 8).

**18** In the context of business activities there is the General Comment No 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, issued by the Committee on Economic, Social and Cultural Rights (→ *International Covenant on Economic, Social and Cultural Rights [1966]* (‘ICESCR’); → *Committee on Economic, Social and Cultural Rights [CESCR]*). According to the General Comment, due diligence obligations of States to protect require States to take several types of actions to ensure that private business actors do not cause violations of economic, social, and cultural rights. This requires States to take manifold actions to prevent potential violations of rights by companies and also to provide victims of such company abuses with access to effective remedies. This due diligence obligation also entails a duty for States to ‘adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights’ (para. 16). The traditional due diligence of companies, which is a voluntary established business practice, is seen by the Committee as something required of States to ensure that companies do not violate human rights. It also encourages States to ‘adopt measures such as imposing due diligence requirements to prevent abuses of Covenant rights in a business entity’s supply chain’ (ibid). Human rights impact assessments are also encouraged, in particular in relation to → *indigenous peoples* (ibid para. 17).

**19** The Comment also expounds on the emergent extraterritorial obligation to protect. This requires States to ‘take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control’, in particular in those instances where no domestic remedies are available to victims (para. 30).

**20** There is currently an ongoing negotiation process to regulate the activities of transnational corporations and other business enterprises that envisages obligations on States to enact domestic legislation (or take other measures) for protection of human rights by businesses. Under the draft instrument (Third Revised Draft of the Legally Binding Instrument [2021]), States parties are to require business enterprises to undertake human rights due diligence (Art. 6.3).

**21** Another distinct area where due diligence has been specifically fleshed out is the case of violence against women. The → *Council of Europe (COE) Convention on Preventing and Combating Violence against Women and Domestic Violence* explicitly uses the term ‘due diligence’ in its Art. 5. It requires parties to ‘take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors’.

### **(c) International Humanitarian Law**

**22** The classical notion of due diligence—that it establishes legal responsibility of States for wrongful behaviour by mainly private action—is also at work under international humanitarian law (‘IHL’). Most clearly this comes through from Common Art. 1 of the Geneva Conventions, which requires ‘[t]he High Contracting Parties [to] undertake to respect and to ensure respect for the present Convention in all circumstances’. The States parties are thus obligated to respect the conventions with respect to their own → *armed forces*, but also to ‘ensure respect’ for them by other actors. According to the ICRC Commentary on the First Geneva Convention (2016), States’ duty to ensure respect ‘extends to the whole of the population over which they exercise authority, i.e. also to private persons whose conduct is not attributable to the State’, and this is referred to as ‘a general duty of due diligence’ (para. 150; → *International Committee of the Red Cross [ICRC]*). This same duty extends also to States as occupying powers under Art. 43 1907 Hague Regulations concerning the Laws and Customs of War on Land. This was upheld by the ICJ in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (paras 178–79; → *Armed Activities on the Territory of the Congo Cases*).

**23** In addition to ensuring respect internally or over territory or persons under their control, there is also an ‘external’ component of the duty to ensure respect, according to which States have to ensure respect of

IHL by others, as noted by the ICJ in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ('*Wall Advisory Opinion*'): '[i]t follows from [Common Art. 1] that every State Party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with' (para. 158; → *Israeli Wall Advisory Opinion [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory]*).

**24** Overall, the nature of the obligation under Common Art. 1 is understood by the ICRC Commentary on the First Geneva Convention (2016) to be 'an obligation of means, whose content depends on the specific circumstances, in particular the foreseeability of the violations and the State's knowledge thereof, the gravity of the breach, the means reasonably available to the State and the degree of influence it exercises over the private persons' (ICRC Commentary [2016] para. 150).

**25** There are also complementary due diligence obligations laid out for States that are described as negative ('may neither encourage, nor aid or assist in violations of the Conventions' [ibid para. 154]) or positive ('must do everything reasonably in their power to prevent and bring such violations to an end' [ibid]), of which many are listed in the ICRC Commentary. For instance, those relating to the education and training of personnel which can be seen as flowing from the duty to ensure respect, or various obligations under the law relating to the protection of civilians or law of targeting and the conduct of hostilities. There are duties to take precautions to protect cultural property and even the environment during armed conflict (→ *Cultural Property, Protection in Armed Conflict*; → *Environment, Protection in Armed Conflict*).

**26** These general due diligence obligations to ensure respect nowadays also cover non-international armed conflicts, including those involving non-State armed groups, under Common Art. 3 Geneva Conventions and the corresponding customary international law (→ *Armed Conflict, Non-International*; → *Armed Conflict, International*). Even if international organizations are not parties to the international humanitarian law conventions, they have due diligence obligations under customary humanitarian law, and thus the duty to respect and ensure respect under Common Art. 1 applies to them (ICRC Commentary to Art. 1 para. 139). They are required to ensure respect for international humanitarian law by others in the external component, in particular 'where the organization has mandated the use of armed force in the first place, or engages in operations in support of other Parties to the conflict' (para. 142). In the *Wall Advisory Opinion* discussed above, the ICJ noted the obligation of all States to ensure respect of international humanitarian law by Israel, and that of the United Nations to act (paras 158–60). There is also support for the view that there are due diligence obligations for individuals, in terms of command responsibility for commanders, to ensure respect for international humanitarian law by armed forces or persons under their control and individual criminal responsibility for breach of such duties (Art. 87 (1) Additional Protocol I; → *Geneva Conventions Additional Protocol I [1977]*).

**27** Closely related are also obligations under Art. I 1948 Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention'), which states that '[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish'. The ICJ clarified that this duty to prevent → *genocide* is a due diligence obligation. According to the Court, it is an obligation of conduct, which does not require the State to succeed in preventing the commission of genocide but to employ all means reasonably available to it. The Court also made it clear that a State incurs responsibility when it has manifestly failed to take all measures to prevent genocide—those that were under its power and which could have contributed to preventing genocide. In assessing whether due diligence has been breached in preventing genocide, the ICJ placed emphasis on whether the State in question has the capacity to influence the action of persons likely to commit or already committing genocide, and it also stressed that this capacity varies greatly between States. The Court also stated that in evaluating the capacity of a State to influence a non-State actor, it would consider the geographical remoteness of the scene of the events as well as the strength of the political links between the State and the main actor of the events (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case [Bosnia and Herzegovina v Serbia and Montenegro]* para. 430).

#### **(d) International Environmental Law**

**28** Due diligence has also been fleshed out in cases of potential or ongoing transboundary pollution between States. The so-called principle of harm prevention has developed to govern these situations. This principle has been stated in numerous international treaties and other instruments eg in Principle 2 Rio Declaration on Environment and Development (→ *Stockholm Declaration [1972]* and *Rio Declaration [1992]*), which the ICJ considered to have entered the body of international law in *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* ('*Nuclear Weapons Advisory Opinion*'). Principle 2 Rio Declaration provides:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

**29** This principle, as the ICJ stated in → *Pulp Mills on the River Uruguay (Argentina v Uruguay)* ('*Pulp Mills*'), has 'its origins in the due diligence that is required of a State in its territory' (para. 101). The Court referred to the dictum in the *Corfu Channel* case of 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' (at 22), but similar considerations can be argued to have influenced the way the arbitrators evaluated the transboundary pollution caused to the US by the smelter in Trail, British Columbia, Canada, as early as 1941. Even if much of the *Trail Smelter* dispute was resolved via the arbitral agreement between the two countries, the second decision of the Arbitral Tribunal has clearly influenced how the rules relating to transboundary damage were later evaluated in international law. The Tribunal pronounced that: 'no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence' (*Trail Smelter [Decision of 11 March 1941] [United States v Canada] [1941]* 3 RIAA 1938, at 1965). This dictum of the Tribunal is quoted as the due diligence required of a State to prevent harm to another State. The duty 'not to cause significant harm' is a due diligence obligation of prevention, rather than an absolute prohibition on transboundary harm. A State is not responsible for all conduct in its territory, but rather it is expected to take reasonable steps to prevent harm. However, if harm does occur, reparation could be due provided that the harm caused is significant and that it has resulted from a failure of the State to act diligently (see quote above). The Tribunal also quoted Eagleton: '[a] State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction' (at 1963, with further reference). It further held, 'the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington' (at 1966).

**30** The ICJ has clarified the requirements of due diligence in these situations of transboundary physical harm, in particular in *Pulp Mills* and in the joined cases *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)* ('*Certain Activities*'; → *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]*). In *Pulp Mills* the ICJ stated that due diligence requires a State 'to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State' (para. 101). The Court also stated that due diligence requires:

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, to safeguard the rights of the other party (ibid para. 197).

The ICJ fleshed out the customary law procedural obligations relating to a State's due diligence in *Certain Activities*, in more specific terms than in *Pulp Mills*. The Court first stated that a State needs, in order to exercise its due diligence to prevent significant transboundary environmental harm, to 'ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment' (*Certain Activities* para. 104). According to the Court, if such risk is found and an → *environmental impact assessment* affirms that there is such a risk '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' (ibid). Importantly, the Court stated in *Pulp Mills* that due diligence governs the way an environmental impact assessment is undertaken and that the origin State needs to monitor the actual effects on the environment after the operations have begun (para. 205).

**31** There has been active scholarly debate on what the ICJ meant by separating procedural and substantive norms in *Pulp Mills* and *Certain Activities*. Some suggest that this means that the ICJ operates on the basis of two separate primary norms of harm prevention: a duty to prevent harm and a duty not to cause harm. The first is breached by violating due diligence but the latter is breached only when there is a failure of due diligence and significant transboundary harm can be demonstrated. It can be suggested, at least in *Certain Activities*, that the Court did find a failure of Costa Rica to perform an adequate environmental impact assessment, but it did not find that it would have caused significant transboundary harm, each of which issues it treated separately (para. 217). Judge Donoghue in her separate opinion (*Certain Activities* [2015] ICJ Rep 782) argued that the distinction between procedural and material norms is not useful, given that due diligence governs all stages of the project—an approach that accords better with the traditional notion of harm prevention. For her, the harm prevention principle is rooted in a State's due diligence—an obligation of conduct—and can engage a State's responsibility in the planning stage, even in the absence of material damage to a potentially affected State. In a similar vein, if material harm to the territory of the affected State can be demonstrated, this is also a breach of the State of origin's due diligence obligation 'but the reparations due to the affected State must also address the material damage caused to the affected State' (*Separate Opinion* para. 9). Scholarly discussion on this issue is ongoing and of relevance to the understanding of due diligence in these situations.

**32** In these cases of transboundary harm between States, all States have in principle a similar level of due diligence, although the level of due diligence obligation may be mitigated for developing States in some exceptional cases. Even in these cases the obligation of due diligence remains—only its content varies. There are clearly heightened due diligence obligations required of States with respect to projects that involve extra-hazardous activities or based on the gravity of risk, and with respect to those projects that are fully under the control of the State of origin. There is ongoing scholarly discussion on due diligence obligations relating to environmental protection in the commons. Scholars have taken note of the initial use of due diligence in international environmental law as a means to protect sovereign interests and consider its application for protecting the environment itself.

### **(e) International Law of the Sea**

**33** Recent developments in the → *law of the sea* as regards due diligence were largely induced by two advisory opinions of the ITLOS and the award in the → *South China Sea Arbitration (Philippines v China)*. A common theme for these decisions is the way in which they identify due diligence obligations of States for non-State action, in line with the classical notion of due diligence.

**34** In *Responsibilities and Obligations of States with respect to Activities in the Area* (2011) ('*Seabed Disputes Chamber Advisory Opinion*') and *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (2015) ('*SRFC Advisory Opinion*'), due diligence obligations of States were considered for activities beyond their area of national jurisdiction.

**35** The *Seabed Disputes Chamber Advisory Opinion* evaluated the nature of due diligence obligations in the context of responsibilities and obligations of States parties to the United Nations Convention on the Law of the Sea ('UNCLOS') with respect to the sponsorship of activities in the Area. The Seabed Disputes Chamber ('SDC'; → *Seabed Disputes Chamber: International Tribunal for the Law of the Sea [ITLOS]*) considered the meaning of the expression 'responsibility to ensure' referred to in Art. 139 UNCLOS and noted that States parties have a due diligence obligation to ensure compliance by a sponsored contractor with the terms of the Convention and related instruments as well as their contractual obligations.

**36** On the content of the due diligence obligation, the SDC noted that due diligence is a variable concept, and obligations may thus have to change in relation to time and risks involved in the activity (para. 117). It also noted some 'direct obligations' of States that are independent of the due diligence obligation or responsibility to ensure, but which can be seen as relevant factors in meeting the due diligence obligation. Some of these, for instance the obligations to apply a precautionary approach (→ *Precautionary Approach/Principle*), best environmental practices, and the obligation to conduct an environmental impact assessment, are in line with recent developments in international environmental law

(→ *Environment, International Protection*). Importantly for due diligence, the SDC mentioned these in the list of indicative topics that could be legislated under ‘necessary measures’ to be taken by States to meet their due diligence obligations.

**37** In the *SRFC Advisory Opinion*, the ITLOS considered due diligence in the context of obligations of the flag State to prevent illegal, unreported, and unregulated fishing (‘IUU fishing’) in the exclusive economic zones (‘EEZs’) of the SRFC Member States (→ *Exclusive Economic Zone*; see also → *Flag of Ships*). The Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission ([adopted 8 June 2012, entered into force 16 September 2012] available at <<https://www.itlos.org/en/main/jurisdiction/international-agreements-conferring-jurisdiction-on-the-tribunal/>> [accessed 5 May 2022]; ‘MCA Convention’) applies in the maritime areas, including EEZs, of the SRFC States. As UNCLOS does not directly address IUU fishing, the Tribunal considered the question of flag State responsibility for IUU fishing in light of general and specific obligations of flag States for the conservation and management of marine living resources under the UNCLOS, fisheries access agreements, and the regional instrument (the MCA Convention). The Tribunal stated that while it is the coastal States that have primary responsibility for the conservation and management of living resources in the EEZ, the flag States (not party to the MCA Convention) also have the ‘responsibility to ensure’ that vessels flying their flag do not conduct IUU fishing activities within the EEZs of the SRFC Member States (*SRFC Advisory Opinion* para. 124). According to ITLOS, the flag State has ‘responsibility to ensure’ (Arts 58 (3) and 62 (4) UNCLOS) that vessels flying its flag comply with the laws and regulations enacted by the coastal State.

**38** This obligation of the flag State ‘to ensure’ vessels flying its flag do not conduct IUU fishing is an ‘obligation of conduct’. In other words, as stated in the *Seabed Disputes Chamber Advisory Opinion*, this is an obligation ‘to deploy adequate means, to exercise best possible efforts, to do the utmost’ to prevent IUU fishing by ships flying its flag (*Seabed Disputes Chamber Advisory Opinion* para. 110). Consequently, this is not an obligation of the flag State to achieve compliance by fishing vessels (→ *Fishing Boats*) flying its flag in each case. The flag State is under ‘the due diligence obligation’ to take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag (*SRFC Advisory Opinion* para. 129)—and it also extends to an international organization such as the European Union (‘EU’) with respect to the fishing vessels from the EU Member States.

**39** In the *South China Sea Arbitration (Philippines v China)* award, the Tribunal examined the due diligence obligations of flag States with respect to IUU fishing, this time the conduct of fishing vessels flying the flag of → *China* in the context of the Philippines’ allegation that these vessels unlawfully fished in its EEZ. In line with the *SRFC Advisory Opinion*, the Tribunal noted that due diligence needs to be exercised by the flag State in preventing its nationals from unlawfully fishing in the EEZ of another State, as otherwise this would also fall short of due regard as required in Art. 58 (3) UNCLOS (*South China Sea Arbitration* paras 743 and 744).

**40** The Award also considered due diligence in the context of UNCLOS provisions relating to the protection of the marine environment (→ *Marine Environment, International Protection*). Philippines argued that China had failed its due diligence in terms of protecting the marine environment, in particular endangered species and ecosystems (→ *Endangered Species, International Protection*). Here the Tribunal relied on the earlier pronouncements of due diligence by the ICJ and ITLOS and stated that due diligence is an obligation of conduct (not of result) and that it requires from the flag State not only the adoption of appropriate rules and measures but also ‘vigilance in their enforcement and the exercise of administrative control’ (para. 944, with further references). The Tribunal considered that Art. 192 UNCLOS includes a due diligence obligation to prevent the harvesting of species that are internationally recognized as being at risk of extinction, also reading this against the background of Art. 194 (5) UNCLOS and other applicable international law (paras 956 and 959). The Tribunal concluded that China had breached its due diligence obligations under Arts 192 and 194 (5) UNCLOS by being aware of, tolerating, and failing to prevent the actions of its fishermen in the harvesting of endangered species on a significant scale and the destruction of coral reef ecosystems (para. 964). The Tribunal further noted that China’s obligation to ensure that its fishing vessels do not take measures to pollute the marine environment is one of due diligence, and hence there is need to address whether there is sufficient evidence to demonstrate that (para. 971).

## D. Evaluation

**41** The development of general juridical concepts such as due diligence is a slow process. The *Alabama Arbitration* award of 1872 is still quoted as a relevant precedent in the two most recent ILC codification efforts, where the due diligence concept has been given additional content. Since general juridical notions potentially apply to a wide variety of human activities, their scope and content must remain fairly abstract and context-dependent. Due diligence, together with other general juridical notions, performs an important task in the international legal system in that it applies to new situations where no specific regulation exists. For this reason, there is currently discussion as to how due diligence covers, eg, cyberattacks or pandemics, or even how it applies to emerging situations in classical areas of international law such as the law of the sea, for instance to manage IUU fishing, which is in need of regulation in different ocean areas.

**42** The use of due diligence has expanded rapidly during the last 20 years. There is an increasing realization of the need to specify different types of primary norms that exist in international law. This may well be caused by the decision of the ILC to purify secondary norms of State responsibility from considerations of due diligence, the result of which we can see today in various scholarly suggestions as to the scope and nature of due diligence. Another reason for the active scholarly discussion of due diligence is its increasing use in international legal practice, which serves to elaborate on the substantive content of primary norms.

**43** Due diligence has been used by courts and tribunals to provide unity to a scattered set of primary norms (eg duty to ensure respect in international humanitarian law), or to amplify the legal effect of already existing rule-sets (eg rules related to the responsibility of States over the contractors on the deep seabed/the Area [→ *International Seabed Area*], or provisions relating to environmental protection). It is also arguable that some provisions of international treaties that have been seen as merely hortatory (eg Art. I Genocide Convention), can be shown to be legal principles with a substantive content that can be violated. There are now scholarly suggestions that many broad and indeterminate obligations are due diligence obligations, for instance obligations of 'progressive realization' under Art. 2 (1) ICESCR. It remains to be seen how these scholarly suggestions will find their way into authoritative practices of international law.

**44** The cases reviewed above show the continued importance of due diligence in determining legal responsibility in traditional situations: responsibility of a State for violations of international law by private persons under its exclusive jurisdiction and control. Due diligence tends to have the effect that States become responsible for the actions of → *non-State actors*, at least from the perspective of international law. In a globalizing world, where non-State actors have increasing powers, it is a valid but difficult question whether legal responsibility could be allocated directly to non-State actors. This is especially a relevant question in the context of business activities, as many multinational corporations wield economic and political powers all over the world. There are now, for example, ongoing inter-State negotiations to think creatively about how to establish legal responsibility for business actors, eg through the emerging frameworks of human rights impact assessments or due diligence based on domestic legislation to be undertaken by States.

**45** Due diligence obligations are also emerging for non-State actors. Under international humanitarian law non-State actors and international organizations have obligations of due diligence for violations of IHL in areas under their control. Under the law of the sea, the *SRFC Advisory Opinion* already introduced due diligence obligations for an international organization and this is likely to carry over to the → *International Seabed Authority (ISA)* and to be disseminated further to other fields of international law.

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