ISSN 2464-9724

Maritime Safety and Security Law Journal

2025

Issue 16

Maritime Safety and Security Law Journal

Due Diligence Obligations Under UNCLOS: Navigating the Conduct-Result Dichotomy in the Context of Ocean Climate Change

*Zhonghua CHEN**

Abstract

Under the prevailing consensus that Articles 192 and 194(1)(2) of the United Nations Convention on the Law of the Sea (UNCLOS) constitute due diligence obligations as obligations of conduct, small island states have advocated that in the context of climate change, these provisions should go beyond the due diligence obligations and encompass obligations of result. Some even argue that climate change has transformed the nature of these provisions into obligations of result. This paper, drawing upon the reasoning in the recent advisory opinion and analysing the specific rationales advanced by small island states, maintains that neither the concept of due diligence nor the aforementioned provisions of UNCLOS can be interpreted as containing or transforming into obligations of result. The study emphasizes the critical distinction between the 'standard of compliance' for due diligence obligations and independent obligations of result. It further demonstrates that subsequent procedural obligations under Part XII of UNCLOS, along with other rules such as climate targets established by the Paris Agreement, could contribute to clarifying the 'stringent standard' of due diligence in climate change contexts. Finally, this paper focuses on achieving systemic coordination between procedural obligations and due diligence requirements, aiming to clarify existing controversies in this field.

Key Words: due diligence, obligations of result, COSIS Advisory Opinion, climate change, UNCLOS

First published online: 23 July 2025

1. Introduction

On 21 May 2024, the International Tribunal for the Law of the Sea (ITLOS) delivered a landmark advisory opinion in response to the request submitted by the Commission of Small Island States on Climate Change and International Law (COSIS), interpreting the states' obligations under the UNCLOS in addressing ocean climate change impacts.[1] This seminal opinion marks the first instance in which an international judicial body has authoritatively delineated the legal concept of 'due diligence' obligations, as enshrined in Articles 192 and 194(1)-(2) of UNCLOS, within the context of

* PhD Candidate, Department of European, Public and International Law – Faculty of Law and Criminology – Ghent University, Belgium.

1 ITLOS, *Request for an Advisory Opinion Submitted by The Commission of Small Island States on Climate Change and International Law* (ITLOS Case 31, 21 May 2024).

transboundary climate harms affecting oceanic environment.[2]

While this identification does not come as a surprise, participating states in the proceedings have not reached consensus across all issues concerning this ambiguous concept. A particularly salient point of contention revolves around the nature of obligations under Articles 192 and 194 of UNCLOS.[3] This divergence is epitomized in the conflicting interpretations of whether Articles 192 and 194 impose obligations of conduct, obligations of result, or a hybrid category - a question deliberately left unresolved in the final advisory opinion.[4] Specifically, while there is broad recognition among states that due diligence constitutes an obligation of conduct, certain nations contend that the provisions should concomitantly incorporate obligations of result - or at minimum encompass elements thereof - in the context of escalating climate change challenges.[5] Faced with this doctrinal impasse, the Tribunal articulated its response as follows:

'The Tribunal observes that the obligation under Article 194, paragraph 1, of the Convention, and, in fact, obligations under some other provisions of Part XII, including Article 194, paragraph 2, are formulated in such a way as to prescribe *not only the required conduct of states but also the intended objective or result of such conduct*. Whether this obligation is that of conduct or of result depends on *whether states are required to achieve the intended objective or result*, i.e., prevention, reduction and control of marine pollution. This, in turn, depends essentially upon *the text of the relevant provision and the overall circumstances envisaged by it*. As stated above (see paras. 232 to 236), the Tribunal considers that what is required under Article 194, paragraph 1, is *not to achieve the prevention, reduction and control of marine pollution but to take all necessary measures* to that end'.[6]

The Tribunal's above interpretation leaves at least the following unresolved issues: While acknowledging the persistent controversy over whether due diligence should be strictly equated with obligations of conduct,[7] the Tribunal merely relied on prior jurisprudence to directly conclude that

2 ibid 441.

3 On 11 September 2023, Judge Kittichaisaree posed a question concerning the nature of the obligations to the COSIS, which was responded by the COSIS on 24 September 2023. See COSIS, *Response to Judge Kittichaisaree's Question* (ITLOS case 31, 24 September 2023).

4 *ITLOS Advisory Opinion on Climate Change* (n 1) 237.

5 ibid.

6 ibid 238.

7 International Law Commission (ILC), 'Report of the International Law Commission on the Work of its 75th Session' (29 April-31 May and 1 July-2August 2024) UN Doc A/79/10, Annex 2, 6.

Articles 192 and 194 of UNCLOS constitute obligations of conduct.[8] However, it failed to elucidate questions raised by certain states during the proceedings: whether the severity of climate change could alter the nature of due diligence; as well as whether the two provisions might simultaneously encompass both obligations of conduct and that of result.[9] In addition, the Tribunal failed to directly address a central argument advanced by COSIS: Article 194(1) of UNCLOS imposes a direct and immediate obligation on states to adopt 'all measures objectively necessary' to achieve its intended results - a standard that fundamentally goes beyond the traditional scope of due diligence obligations.[10] While the Netherlands, Australia, and other states nominally contested this interpretation, their responses offered only cursory rebuttals devoid of substantive engagement with its legal premises.[11] Finally, as the Tribunal stated, determining the nature of an obligation requires consideration of the 'overall circumstances'.[12] While it clarified that due diligence provisions do not obligate states to achieve the specific outcomes of preventing, controlling, and reducing marine pollution, it left open whether other 'intended results' linked to climate change - such as the Paris Agreement's 1.5°C target - might impose obligations of result on states.[13]

These lacunae prompted Judge Kittichaisaree, in his declaration, to elaborate on this issue while casting doubt on the utility of the dichotomy itself.[14] Furthermore, the Tribunal's jurisprudential silence on these issues has precipitated their resurgence as pivotal points of contention in the pending climate change advisory opinion proceedings before the International Court of Justice (ICJ).[15] Some states have even argued that the gravity of climate change justifies converting obligations of conduct

8 *ITLOS Advisory Opinion on Climate Change* (n 1) 237.

9 Democratic Republic of Timor-Leste, *Response of the Democratic Republic of Timor-Leste to COSIS's Reply to Judge Kittichaisaree's Question* (ITLOS case 31, 4 October 2023, 7).

10 ibid 10.

11 Australia, *Australian Comments on the Further Responses of COSIS and IUCN* (ITLOS case 31, 2 October 2023, 5); Kingdom of the Netherlands, *Written Comments of the Kingdom of the Netherlands on the Written Responses by COSIS and IUCN to the Question asked by Judge Kittichaisaree* (ITLOS case 31, 16 June 2023, 1); Republic of Latvia, *Comments of the Republic of Latvia on the Written Response by COSIS and IUCN* (ITLOS case 31, 16 June 2023, 7).

12 *ITLOS Advisory Opinion on Climate Change* (n 1) 238.

13 United Nation, Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79 art 2; ibid 137, 140.

14 *ITLOS Advisory Opinion on Climate Change* (Declaration of Judge Kittichaisaree) (n 1) 22.

15 ICJ, 'The General Assembly of the United Nations requests an advisory opinion from the Court on the obligations of States in respect of climate change', Press release 2023/20 <www.icj-cij.org/sites/default/files/case-related/187/187-20230419-PRE-01-00-EN.pdf> accessed 4 March 2025.

into obligations of result,[16] which is contested by other members of the international community.[17] At the same time, the International Law Commission (ILC), during its 2024 session, decided to include 'due diligence in international law' within its long-term program of work.[18] The commission notably observed that 'the legal character, scope and content of the duty of due diligence at international law is not well defined'.[19] This recognition underscores the persistent doctrinal ambiguity surrounding the nature of due diligence - an issue that continues to generate both theoretical contention and practical divergences in state practice.

This article examines whether, despite the widespread recognition of due diligence as a 'variable concept' and its general classification as an obligation of conduct, it can also inherently entail obligations of result.[20] Should the answer be in the negative, the article proceeds to examine whether Articles 192 and 194(1)–(2) of UNCLOS nevertheless support a normative framework capable of accommodating both elements of due diligence and obligations of result. If this question is likewise answered in the negative, the article considers the significance of the arguments advanced by COSIS-particularly the invocation of Article 194's requirement to take "all necessary measures"-in shaping the scope of due diligence obligations incumbent upon parties. To address these issues, the article will first analyse the relationship between obligations of result, due diligence, and 'due diligence' provisions, contextualized within the climate-specific challenges and the unresolved state arguments identified earlier that the Tribunal declined to engage with. Building on these findings, the analysis will then examine how the nature of due diligence shapes its standards of compliance.

2. Due Diligence vs. Obligations of Result: A Doctrinal Analysis under UNCLOS

In terms of Article 192 and Article 194(1)(2) of UNCLOS, three potential doctrinal interpretations emerge: (a) Due diligence obligations under these provisions may inherently incorporate both obligations of conduct and obligations of result; (b) Due diligence obligations are strictly obligations

16 Democratic Republic of the Congo, *Written Statement of the Democratic Republic of the Congo* (ICJ case concerning Obligations of States in respect of Climate Change, 173).

17 *Advisory Opinion, Minutes of the Public Sittings Held from 11 to 25 September 2023*, (ITLOS case 31, 15 February 2024, 441).

18 ILC Report (n 7) 423.

19 ibid Annex 2, 6.

20 ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (ITLOS case 17, Advisory Opinion, 1 February 2011) ITLOS Reports 2011, 43 117; International Law Association (ILA), 'ILA Study Group on Due Diligence in International Law, First Report' (7 March 2014) 17.

of conduct, while Articles 192 and 194(1)(2) of UNCLOS simultaneously impose obligations of result for states; (c) The obligations under these provisions, when framed as due diligence, remain exclusively obligations of conduct, with no independent obligations of result arising from them. Prior to this analysis, it is imperative to clarify three basic legal concepts: 'due diligence', the 'conduct-result dichotomy', and the 'intended objective or result' as frequently mentioned in the *COSIS Advisory Opinion*.

2.1 Defining Key Legal Concepts

2.1.1Due Diligence

Originally emerging from 19th-century state practice and arbitral awards in the context of neutrality law and the protection of aliens and their property,[21] the doctrine of due diligence has been intensively applied in contemporary international environmental law.[22] In the 2011 advisory opinion concerning *responsibilities and obligations of states with respect to activities in the Area* (Area advisory opinion), ITLOS formally incorporated the concept of due diligence into the normative framework of the law of the sea. [23] Through subsequent advisory proceedings, respectively the 2015 Sub-Regional Fisheries Commission advisory opinion (SRFC advisory opinion) and the *COSIS advisory opinion*, the Tribunal has progressively substantiated and clarified its concept.[24] However, as the Tribunal admitted, 'the content of due diligence obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that due diligence is a variable concept.'[25] In general, according to the view of the ILC, it has been understood as 'a duty or standard of care that should be applied to a state's actions on its territory or activities subject to its jurisdiction or control, which harm the rights and interests of other states.'[26]

International judicial bodies have amassed substantial jurisprudence that confirms the nature of due diligence as an obligation of conduct: In the *Pulp Mills Case*, the ICJ illustrates that the obligation

21 *Alabama claims of the United States of America against Great Britain* (1872), 29 RIAA 129; *Frederick Wipperman v. United States of America Venezuela* (1890) The United States and Venezuela Commission 137, 3 Moore, History and Digest 3041.

22 Rumiana Yotova, 'The Principles of Due Diligence and Prevention in International Environmental Law' (2016) 75 The Cambridge Law Journal 445, 446; Jorge E Viñuales, 'Due Diligence in International Environmental Law: A Fine-Grained Cartography' in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (1st ed, Oxford University Press Oxford 2020).

23 ITLOS *Area Advisory Opinion* (n 20) 110.

24 ITLOS, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion, 2 April 2015) ITLOS Reports 2015, 45.

25 ITLOS *Area Advisory Opinion* (n 20) 117.

26 ILC Report (n 7) 155.

to adopt regulatory or administrative measures and to enforce them is an obligation of conduct, both parties are therefore called upon to exercise due diligence.[27] The Tribunal in the *Area advisory opinion* makes it clear that 'the notions of obligations of due diligence and obligations of conduct are connected.' [28]In the SRFC advisory opinion, the Tribunal further indicates that as an obligation 'of conduct' this is a 'due diligence obligation', not an obligation 'of result'.[29] The Tribunals' reasoning in the aforementioned cases not only unequivocally affirms that due diligence constitutes an obligation of conduct under international law, but also clarifies that such obligations cannot inherently subsume obligations of result.

2.1.2 The conduct-result dichotomy

This dichotomy derives from the civil law tradition;[30] it was Roberto Ago, the special rapporteur of the ILC, who sought to introduce this classification into the state responsibility regime.[31] According to the second report on state responsibility released by the ILC, the distinction is 'of fundamental importance in determining how the breach of an international obligation is committed in any particular instance.'[32] The report further points out that the fundamental distinction between these categories of obligations lies in whether it leaves room for states to determine the means to implement the obligation: obligations of conduct prescribe with specificity the means to be employed by States in their implementation, while obligations of result establish exclusively the required outcomes, thereby granting states discretionary autonomy in selecting appropriate implementation methods.[33]

However, this distinction was not incorporated into the final version of the ILC articles on State Responsibility, as states and scholars criticized the dichotomy for being overly rigid and imprecise.[34] More significantly, the ILC deliberately refrained from specifying the content of primary rules under

27 *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14, para 187.

28 ITLOS *Area Advisory Opinion* (n 20) 111.

29 *ITLOS Request for Advisory Opinion by SRFC* (n 24) 129.

30 Pierre-Marie Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility' (1999) 10 European Journal of International Law 371.

31 ibid.

32 ILC, 'Second Report on State responsibility, by Mr. James Crawford, Special Rapporteur' (17 March, 1 and 30 April, 19 July 1999) UN Doc A/CN.4/498 and Add.1-4, 20.

33 ibid.

34 ibid Dupuy (n 30).

international law;[35] it emphasized that the scope and content of any international obligation must be determined through interpretation of the relevant international instrument.[36] It demonstrates that in theory, an international obligation (such as Articles 192 and 194 of UNCLOS) might concomitantly encompass obligations of conduct and obligations of result, with these two categories not being mutually exclusive.[37] The precise normative character of such obligations, however, necessitates a context-specific analysis grounded in the factual and legal particularities of each case.

It is also necessary to mention that the comprehensiveness of this dichotomy has also been called into question. The ILC indicates that the obligations of prevention exist outside this dichotomy,[38] while the case concerning the *Gabčíkovo-Nagymaros Project* mentioned the concept of 'obligations of performance'.[39] Additionally, scholars have proposed more nuanced categorizations of international obligations.[40] However, given that COSIS specifically asserts the relationship between the specific provisions of UNCLOS and obligations of result, the significance of such dichotomies will not be a primary focus in this discussion.

2.1.3 Intended objective or result

This term was explicitly invoked in the *COSIS Advisory Opinion*, where the Tribunal observed that the 'intended objective or result' envisaged under Articles 192 and 194 of UNCLOS is the 'prevention, reduction, and control of marine pollution,'[41] to be achieved through 'taking all necessary measures' - that is, by discharging due diligence obligations.[42] Simultaneously, the Tribunal underscored that Article 194 does not guarantee the realization of such outcomes, particularly in light of the cumulative impacts of climate change.[43] The Tribunal's reasoning crystallizes a critical

35 Rüdiger Wolfrum, 'Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations' in Mahnoush H. Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers 2011) 364.

36 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Transferred to digital printing, Cambridge University Press 2007) 124.

37 ILC Second Report (n 32) 27.

38 ibid.

39 *Case Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* (Judgement) [1997] ICJ Rep 77, para 135.

40 For example, Judge Wolfrum argued that the following types of international obligations should be distinguished: (1) obligations of result; (2) obligations of conduct; (3) goal-oriented obligations; (4) obligations which, in fact, address natural and juridical persons and, finally, (5) international obligations of conduct as well as of result. Rüdiger Wolfrum (n 35) 368.

41 *ITLOS Advisory Opinion on Climate Change* (n 1) 232.

42 ibid 234.

43 ibid 199.

conclusions: The 'intended result' remains intricately linked to due diligence obligations, serving as an integral component of obligations of conduct that inform the required standard of due diligence.[44] Therefore, the 'intended result' under UNCLOS is conceptually distinct from 'obligations of result' in international law, meaning states parties do not incur responsibility solely for failing to achieve the former. As the ICJ has unequivocally affirmed, 'a state does not incur responsibility simply because the desired result is not achieved.'[45] In the context of climate change, distinguishing between 'intended results' and 'obligations of result' holds profound significance:

Firstly, given the cumulative and irreversible impacts of anthropogenic greenhouse gas emissions on marine ecosystems, climate-caused marine pollution cannot be immediately halted.[46] Unlike traditional transboundary harm, climate change implicates all states as both contributors to and victims of marine environmental degradation.[47] If the two concepts are conflated, then in the short term, if marine pollution caused by climate change is neither reduced nor controlled, all states parties would breach their obligations under Articles 192 and 194 of UNCLOS; Secondly, the *COSIS Advisory Opinion* explicitly acknowledges that Article 194 of the UNCLOS incorporates elements of the principle of common but differentiated responsibilities (CBDR), which mandates differentiated obligations for developed and developing states.[48] Equating "intended results" with "obligations of result" would render the CBDR principle inapplicable, since obligations of result focus solely on the ultimate outcome of an obligation, whereas the CBDR principle emphasizes state conduct - such as differing developmental needs, technological capacities among states, and actions like technology transfer.[49] Such an interpretation would disproportionately burden developing states, contravening the equity-centered ethos of CBDR.

However, this merely demonstrates that Articles 192 and 194 of UNCLOS are not exclusively obligations of result, but it does not address COSIS's core argument: that both provisions simultaneously encompass obligations of conduct and obligations of result. A critical examination of

---

44 Machiko Kanetake and Cedric Ryngaert, 'Due Diligence and Corporate Liability of the Defence Industry: Arms Exports, End Use and Corporate Responsibility' (Flemish Peace Institute 2023) 9.

45 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Merits) [2007] ICJ Rep 221.

46 *ITLOS Advisory Opinion on Climate Change* (n 1) 199.

47 Christopher Campbell-Duruflé, 'The Significant Transboundary Harm Prevention Rule and Climate Change: One-Size-Fits-All or One-Size-Fits-None?' in Benoit Mayer and Alexander Zahar (eds), Debating Climate Law (1st edn, Cambridge University Press 2021) 31.

48 *ITLOS Advisory Opinion on Climate Change* (n 1) 229.

49 Response of the Democratic Republic of Timor-Leste to COSIS's Reply to Judge Kittichaisaree's Question <https://itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/questions/Comments_Timor-Leste.pdf>, accessed 9 March 2025, 5.

COSIS's specific rationale for this categorization is therefore necessary.

2.2 Examining COSIS's Core Arguments

The aforementioned view of COSIS primarily based on three grounds: First, given overwhelming scientific evidence demonstrating that current global mitigation efforts remain perilously inadequate to bridge the gap toward climate objectives, 'the traditional presumption of state compliance with international law is being decisively upended in the climate change context.'[50] Second, the obligation under Article 194 of UNCLOS to 'take all measures necessary to ensure' should be interpreted as an obligation entails but also goes beyond due diligence obligations, according to the relevant case law. [51] Finally, the 1.5°C target under the Paris Agreement sets out an obligation of result for states.[52] It is necessary to scrutinize the validity of these three arguments individually.

2.2.1 The existential gravity of climate change

States advocating this position are necessarily premised on the assumption that obligations of result are inherently more stringent than obligations of conduct.[53] However, this foundational premise is far from solid.

Specifically, the case *Certain Activities Carried Out by Nicaragua in the Border Area* (Nicaragua Case) demonstrates that a state may still be held in breach of its obligations of conduct even if the anticipated results have been formally achieved.[54] Notwithstanding the absence of real environmental harm, Costa Rica incurred international responsibility for violating its obligation of conduct by failing to conduct a prior environmental impact assessment (ELA).[55] Furthermore, in the case concerning the *Gabčíkovo-Nagymaros Project*, the ICJ emphasized that 'vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage (transboundary harm).'[56] Although the loss and damage caused by climate change differs significantly from traditional transboundary harm

50 *Written Statement of Congo* (n 16) 173.

51 *Response to Judge Kittichaisaree's Question* (n 3).

52 *Written Statement of Congo* (n 16) 132.

53 Alice Ollino, 'The Nature of Due Diligence Obligations' in Alice Ollino (ed), *Due Diligence Obligations in International Law* (Cambridge University Press 2022) 87; James Crawford, 'Revising the Draft Articles on State Responsibility' (1999) 10 European Journal of International Law 435, 441.

54 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* (Merits) [2015] ICJ Rep 723.

55 ibid.

56 *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* (Judgement) [1997] ICJ Rep 7, 140.

in terms of complexity of causation, global scope, and temporal scale, the Tribunal in the *COSIS advisory opinion* clarified that such distinctions do not preclude the application of obligations related to transboundary harm in the context of climate change.[57] Consequently, the ICJ's aforementioned position applies equally to climate change: regulating conduct must take precedence over the pursuit of results.[58]

In addition, within the regime of climate change, 'obligations of conduct invite more complex considerations at the stage of assessing compliance, but it may also facilitate an early review of compliance before the expiration of the period of commitment.'[59] The evolution of international climate governance from the Kyoto Protocol to the Paris Agreement underscores a critical lesson: while the Kyoto Protocol imposed 'Quantified Emission Limitation and Reduction Commitments' (QELRCs) on Annex I developed countries[60] - obligations widely characterized as obligations of result[61] - its efficacy was fundamentally constrained by the non-participation of key states like Canada, who avoided breach of the obligation by withdrawing from the Protocol before the expiration of the commitment period .[62] This limitation starkly revealed the inherent fragility of a rigid, result-centric framework in addressing the dynamic challenges of climate change.[63] In comparison, according to the Paris Agreement, the national commitments are not negotiated and included in the instrument, as in the Kyoto Protocol, but are to be determined unilaterally by each state.[64] It requires each party to 'pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.'[65] Thus, a state's nationally determined contribution (NDC) creates an obligation of conduct with regard to the target conveyed in NDCs.[66] Based on the outcome of the first Global

57 *ITLOS Advisory Opinion on Climate Change* (n 1) 252.

58 Malgosia Fitzmaurice and others, *Research Handbook on International Environmental Law* (Edward Elgar Publishing 2021) 27.

59 Benoit Mayer, 'Obligations of Conduct in the International Law on Climate Change: A Defence' (2018) 27 Review of European, Comparative & International Environmental Law 130.

60 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162 art 3.

61 Markus Vordermayer-Riemer, *Non-Regression in International Environmental Law: Human Rights Doctrine and the Promises of Comparative International Law* (Intersentia 2020) 287.

62 Benoit Mayer, *The International Law on Climate Change* (1st ed, Cambridge University Press 2018) 39.

63 Amanda M Rosen, 'The Wrong Solution at the Right Time: The Failure of the Kyoto Protocol on Climate Change' (2015) 43 Politics & Policy 30, 41; Bruce Pardy, 'The Kyoto Protocol: Bad News for the Global Environment' (2004) Journal of Environmental Law and Practice, Vol 14, p 27.

64 Robert Falkner, 'The Paris Agreement and the New Logic of International Climate Politics' (2016) 92 International Affairs 1107, III5.

65 Paris Agreement (n 13) art 4(2).

66 Mayer (n 62) 48.

Stocktake in 2023, all parties have submitted their NDCs.[67] This obligation of conduct effectively addresses the shortcomings of the Kyoto Protocol's result-based obligations and has encouraged broad participation from countries around the world. Although the Stocktake also pointed out that the current global greenhouse gas emissions trajectory remains inconsistent with the temperature control goals of the Paris Agreement,[68] this reflects issues related to the concrete and in-depth implementation of conduct-based obligations, rather than calling into question the legitimacy or rationale of the nature of the obligations.[69]

This principle is equally applicable in the maritime context: Among 148 new or updated NDCs recorded in 2024, 56% incorporate coastal and marine nature-based solutions into mitigation or adaptation measures.[70] As articulated in the International Law Association (ILA) Declaration of Legal Principles Relating to Climate Change, states' obligations under the law of the sea must be coordinated with climate change obligations in a 'mutually supportive manner'.[71] Consequently, interpreting states' obligations as obligations of result in light of the severity of climate change would fundamentally undermine this coherence. In conclusion, the proposition that the gravity of climate risks could transmute due diligence obligations into obligations of result is fundamentally untenable.

2.2.2 The interpretation of 'necessary to ensure' in Article 194 of UNCLOS

COSIS posed an interesting argument: while the Tribunal in the *Area Advisory Opinion* conclusively characterized the 'responsibility to ensure' under Article 139(1) of UNCLOS as an obligation of conduct, the phrase 'necessary to ensure' in Article 194(2) warrants a divergent interpretation.[72] This terminology should align with the ICJ's jurisprudence interpreting analogous formulations such as 'all measures necessary to ensure' in the case concerning *the interpretation of the judgement between Mexico and the USA* (Avena Interpretation Judgment) and 'all steps to ensure' in the case concerning *jurisdictional immunities of the state between Germany and Italy* (Jurisdictional

67 COP of the Paris Agreement 'Outcome of the first global stocktake' (13 December 2023) UN Doc FCCC/PA/CMA/2023/L.17, 19.

68 ibid 24.

69 Frauke Röser and others, 'Ambition in the Making: Analysing the Preparation and Implementation Process of the Nationally Determined Contributions under the Paris Agreement' (2020) 20 Climate Policy 415, 417; W Pieter Pauw and Richard JT and Klein, 'Beyond Ambition: Increasing the Transparency, Coherence and Implementability of Nationally Determined Contributions' (2020) 20 Climate Policy 405, 408; Kilian Raiser and others, 'Is the Paris Agreement Effective? A Systematic Map of the Evidence' (2020) 15 Environmental Research Letters 083006, 2.

70 Report of the Secretary-General, 'Oceans and the law of the sea' (2024) UN Doc A/79/340, 37.

71 ILA, 'Declaration of Legal Principles Relating to Climate Change' (2014) Resolution 2/2014, draft art 10.

72 *COSIS's Response* (n 3).

Immunities Judgment).[73] While some may contend that the judicial interpretations in these cases pertain to judgments and orders rather than treaty provisions,[74] precedents exist wherein tribunals have construed a state's treaty-based obligation to 'ensure' as an obligation of result. For instance, in the *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention between Ireland and the United Kingdom* (OSPAR Arbitration), the arbitral tribunal concluded that Article 9(1) of the OSPAR Convention - which requires states parties to 'ensure that their competent authorities are required to make information available to any natural or legal person' - constitutes an obligation of result, thereby mandating the achievement of specific accessibility.[75]

Divergent interpretations of the term 'ensure' in different cases and treaties represent a legitimate and inevitable consequence of international legal practice, as articulated by the ITLOS in the *MOX Plant Case*:

'The application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*.'[76]

Nevertheless, the ICJ in the two judgments invoked by COSIS did not explicitly construe the term 'ensure' as imposing obligations of result. In the *Avena Interpretation Judgment*, the court determined that the United States violated its prior judgment due to specific actions taken against Mr. Medellín, rather than categorizing the obligation to 'ensure' as one of result.[77] In the *Jurisdictional Immunities Judgment*, ICJ interpreted the phrase "all steps to ensure" as imposing an obligation of result in this case because Italy had committed an internationally wrongful act.[78] The court reasoned that, under

---

73 *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* (Merits) [1996] ICJ Rep 3; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Merits) [2012] ICJ Rep 137.

74 In the *Avena Interpretation Judgment*, it is the provisional measures which ordered that the United States of America 'shall take all measures necessary to ensure' that certain individuals are not executed pending judgment on the request for interpretation is requested to be interpreted; in the *Jurisdictional Immunities Judgment*, Germany asked the Court to order Italy 'to take, by means of its own choosing, any and all steps to ensure' that certain Italian judicial decisions infringing Germany's sovereign immunity cease to have effect.

75 Tribunal constituted pursuant to the OSPAR Convention *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ireland v United Kingdom)* (2003) 42 ILM 1118, 137.

76 *The MOX Plant Case (Ireland v. United Kingdom)* (Provisional Measures, Order of 3 December 2001) ITLOS Reports 2001, 51.

77 *Avena Interpretation Judgment* (n 73) 52.

78 *Jurisdictional Immunities Judgment* (n 73) 137.

the rules of state responsibility, Italy was obligated to achieve the specific outcome of ceasing such wrongful conduct.[79] However, climate change does not constitute an internationally wrongful act under current international law.[80] Therefore, the court's interpretation in this case cannot be directly applied to climate-related obligations.[81]

Regarding the *OSPAR Arbitration*, the arbitral tribunal's reasoning hinges on the deliberate use of the term 'to ensure' throughout the OSPAR Convention,[82] which the drafters intentionally employed to highlight the stringency of the obligations imposed.[83] Specifically, Article 9(1) of the OSPAR Convention requires states parties to 'ensure' public access to environmental information - a formulation the Tribunal interpreted as mandating the actual realization of accessibility outcomes rather than mere procedural compliance.[84] The Tribunal concluded that the United Kingdom's establishment of domestic legal mechanisms alone failed to satisfy this standard.[85] The 'intended result' under Article 9 of the OSPAR Convention - namely, information disclosure - constitutes a clear and concrete objective. The achievement of this result holds greater significance than the methods of disclosure and aligns more closely with the spirit of the OSPAR Convention's preamble, which prioritizes the protection of the marine environment in the Northeast Atlantic.[86] In contrast, the 'intended result' under Articles 192 and 194 of UNCLOS constitutes an abstract and indeterminate concept. This interpretive framework cannot be mechanically transposed from obligations of information disclosure to obligations concerning climate change mitigation and the prevention, reduction, and control of marine environmental degradation. As emphasized by the ILC in its report on the identification of customary international law, "it is of course important to consider instances of conduct that are in fact comparable, that is, where the same or similar issues have arisen so that such instances could indeed constitute reliable guides."[87] Clearly, the *OSPAR Arbitration* does not

79 ibid.

80 El Roam says, 'The Point of No Return: The Inadequacy of the Law of State Responsibility in Finding International Responsiblity for the Adverse Effects of Climate Change' (*International Law Blog*, 2 November 2022) <https://internationallaw.blog/2022/11/02/the-point-of-no-return-the-inadequacy-of-the-law-of-state-responsibility-in-finding-international-responsiblity-for-the-adverse-effects-of-climate-change/> accessed 21 March 2025.

81 *Jurisdictional Immunities Judgment* (n 73) 137.

82 *OSPAR Arbitration* (n 75) 131.

83 ibid 133.

84 ibid 137.

85 ibid 135.

86 Convention for the protection of the marine environment of the North-East Atlantic (adopted 22 September 1992, entered into force 3 January 2006) 2354 UNTS 67 (OSPAR Convention) preamble.

87 ILC, 'Report of the International Law Commission on the Work of its 68th Session' (2 May-10 June and 4 July-12August 2016) UN Doc A/71/10, 95.

constitute a comparable instance.

Nevertheless, a critical conclusion emphasized in the *OSPAR Arbitration* holds paramount significance: the phrase 'to ensure' is connected with the standard of compliance for an international obligation.[88] In the COSIS *Advisory Opinion*, the Tribunal admits that the exigencies of climate change do impose stringent due diligence requirements on states under UNCLOS.[89] It is clear that the term 'all measures necessary to ensure' stipulated in Article 194 of UNCLOS concerns the standard of due diligence. [90]

2.2.3 The role of the temperature target under the Paris Agreement

COSIS further points out that Article 194 of UNCLOS mandates states to adopt measures aligned with the best available scientific evidence and international standards, effectively establishing the 1.5°C target under the Paris Agreement as a minimum baseline.[91] Consequently, COSIS concludes that this formulation demonstrates Articles 192 and 194's incorporation of obligations of result.[92] However, this conclusion stems from a jurisprudential fallacy - COSIS erroneously conflates the 'intended results' inherent to due diligence obligations with obligations of result.

Other rules of international law, especially the Paris Agreement, are relevant in interpreting and applying the UNCLOS with respect to ocean climate change issues.[93] As the Tribunal clearly stated, 'relevant international rules and standards are reference points for assessing necessary measures.'[94] COSIS posited the Paris Agreement's 1.5°C climate target as the minimum benchmark for states to fulfil the 'necessary measures' requirement under Article 194 of UNCLOS. However, the Tribunal declined to directly address this linkage, instead emphasizing that the compliance with obligations under the Paris Agreement does not per se satisfy the obligations incumbent on states parties under Article 194 of UNCLOS.[95]

---

88 *OSPAR Arbitration* (n 75) 135.

89 *ITLOS Advisory Opinion on Climate Change* (n 1) 240.

90 Stephen Fietta, Jiries Saadeh and Laura Rees-Evans, 'The South China Sea Award: A Milestone for International Environmental Law, the Duty of Due Diligence and the Litigation of Maritime Environmental Disputes' (2016) 29 Georgetown Environmental Law Review 711, 732.

91 *COSIS's Response* (n 3); Paris Agreement (n 13) art 2.

92 ibid.

93 *ITLOS Advisory Opinion on Climate Change* (n 1) 222.

94 ibid 214.

95 ibid 223.

Even if the COSIS's arguments hold merit, it cannot substantiate the conclusion that 'Article 194 of UNCLOS contains obligations of result.' The 1.5°C temperature target under the Paris Agreement itself cannot be construed as an obligation of result; rather, it also constitutes an 'intended result' that states parties collectively strive to achieve through coordinated action. Crucially, as the ICJ articulated in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, in terms of the obligations requiring collective action, since no single state possesses the capacity to unilaterally achieve objectives dependent on multilateral cooperation, the compliance is assessed based on the reasonableness of a state's efforts rather than the ultimate prevention of the harm itself.[96] Furthermore, the NDCs submitted by states under the Paris Agreement vary widely in form and substance: some adopt quantitative metrics,[97] while others rely on qualitative goals.[98] Certain commitments are conditional,[99] whereas others are unconditional. Given this difference, even if obligations of result were hypothetically imposed, their enforcement would prove impracticable due to the lack of uniform, verifiable benchmarks across diverse national contexts. [100]

In conclusion, whether 'intended results' or 'external results' stipulated in other rules of international law, their function remains uniform: to assist in clarifying the standards of due diligence compliance for states, particularly in operationalizing the 'strength standard' by specifying its substantive requirements. The Paris Agreement's 1.5°C climate target cannot be construed as an obligation of result, nor does it impose an additional obligation of result under Articles 192 and 194 of UNCLOS.

3. Operationalizing Due Diligence: Procedural Obligations and Compliance Standards

As discussed, all the aforementioned elements collectively serve to inform and refine the standards of due diligence within UNCLOS. It is thus imperative to clarify the standards of due diligence enshrined in Articles 192 and 194 of UNCLOS.

---

96 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43, 430.

97 United States' Intended Nationally Determined Contribution (31 March 2015) <www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx> accessed 20 January 2017.

98 India's Intended Nationally Determined Contribution (1 October 2015) <www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx> accessed 20 January 2017.

99 ibid.

100 *Obligations of States in respect of Climate Change* (Annex ZA) 94.

3.1 'Pure conduct obligations' and 'procedural obligations'

The *COSIS Advisory* Opinion referenced a somewhat unusual concept termed 'pure conduct obligations,' a notion raised by Mozambique during the oral proceedings of this case.[101] Mozambique defined this concept as equivalent to 'best efforts' — the standard of due diligence fulfillment under general international law.[102] Mozambique further argued that the compliance standard under Article 194 of UNCLOS must exceed that of 'pure conduct obligations.'[103] The Tribunal subsequently addressed only two points: the standard of due diligence needs to be stringent and the close connection between due diligence and the precautionary approach.[104]

The Tribunal referenced this concept in the context of its final opinion and did not explicitly reject this formulation, suggesting at minimum that the Tribunal does not oppose the concept. If the term 'pure' is interpreted strictly in accordance with the 'ordinary meaning' principle under Article 31 of the Vienna Convention on the Law of Treaties (VCLT),[105] it could be understood as obligations that focus solely on the conduct of the state. By contrast, this implies that Article 194 of the UNCLOS should not be interpreted as limited to state conduct but must also account for some outcomes achieved by the state.

Meanwhile, it is crucial to consistently bear in mind the nature of due diligence as of conduct. Such an interpretation does not inherently conflict with the legal nature. In the *Pulp Mills Case*, the ICJ affirmed that Article 36 of the 1975 Statute establishes an obligation of conduct but further clarified that a state's failure to fulfil procedural obligations (in this case, environmental impact assessment requirements) constitutes a breach of due diligence.[106] In other words, if the state did not achieve the required results stipulated in the procedural obligations, this will serve as evidence that the state failed to meet the due diligence standard.[107] In the *Area Advisory Opinion*, the Tribunal defined these ' procedural obligations' as 'direct obligations'.[108] Regardless of their names, they both refer to a category of obligations that are concrete, specific, and result-driven, aimed at achieving

101 *ITLOS Advisory Opinion on Climate Change* (n 1) 240.

102 *ITLOS Advisory Opinion on Climate Change* (Minutes of the Public Sittings held from 11 to 25 September 2023) 341.

103 ibid.

104 *ITLOS Advisory Opinion on Climate Change* (n 1) 241, 242.

105 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(1).

106 *Pulp Mills Case* (n 27) 187, 204, 206.

107 Rozemarijn Roland Holst, *Change in the Law of the Sea: Context, Mechanisms and Practice* (Brill Nijhoff 2022) 222.

108 ITLOS *Area Advisory Opinion* (n 20) 245.

the 'intended result' under the due diligence obligations. While compliance with such obligations may serve as evidence of a state's fulfilment of due diligence, merely discharging these obligations is insufficient to demonstrate that the state has met the stringent standard of due diligence in the context of climate change.[109]

Unlike the vague concept of due diligence, procedural obligations are identifiable.[110] The ICJ has explicitly stated that substantive obligations and procedural obligations 'complement one another perfectly, enabling the parties to achieve the object of the Statute.'[111] As emphasized by the Tribunal, the manner of fulfilling due diligence obligation is objective rather than subjective,[112] and procedural obligations provide concrete criteria for such objectivity. This also addresses the rationale outlined earlier for identifying COSIS's conflation of legal concepts: the so-called 'obligations of result' imposed on states under Article 194 by COSIS - such as respecting international standards and relying on the best available scientific evidence - are in fact procedural obligations stipulated in subsequent provisions of Part XII of the UNCLOS.

3.2 The procedural obligations and their relationship between due diligence

The Tribunal in the *COSIS Advisory Opinion* indicates that the types of pollution most relevant to ocean climate change are confined to marine pollution caused from land-based sources, vessels and aircraft.[113] UNCLOS itself does not include detailed rules for controlling marine pollution from the above sources.[114] Instead, it creates a system to address the marine pollution by calling on its states parties to adopt international rules and standards for each source, as well as requiring states to legislate to implement such rules and standards and to enforce the legislation.[115] Additionally, Part XII of UNCLOS also establishes global and regional cooperation, technical assistance, and the environmental impact assessment (EIA)

---

109 Elise Johansen, Signe Busch and Ingvild Ulrikke Jakobsen, *The Law of the Sea and Climate Change: Solutions and Constraints* (1st edn, Cambridge University Press 2020) 93.

110 Heike Krieger, Anne Peters and Leonhard Kreuzer, *Due Diligence in the International Legal Order* (1st ed, Oxford University Press Oxford 2020) 45.

111 *Pulp Mills Case* (n 27) 77.

112 *ITLOS Advisory Opinion on Climate Change* (n 1) 243.

113 ibid 265.

114 Alan E Boyle, 'Marine Pollution under the Law of the Sea Convention' (1985) 79 American Journal of International Law 347, 368.

115 Robert Beckman and Zhen Sun, 'The Relationship between UNCLOS and IMO Instruments' (2017) 2 Asia-Pacific Journal of Ocean Law and Policy 201, Robert Beckman and Zhen Sun, 'The Relationship between Unclos and Imo Instruments' (2017 Robin Churchill, Vaughan Lowe, Amy Sander, *The Law of the Sea: Fourth Edition* (Manchester University Press 2022) 990.

regime.[116] In the COSIS Advisory Opinion, the Tribunal recognized all these mechanisms as obligations incumbent on states parties to address the challenges posed by climate change.[117]

Nevertheless, a critical unresolved issue arises here: some scholars argue that while specifying obligations concretizes the abstract due diligence standard, this simultaneously diminishes its normative role in guiding state conduct.[118] Specifically, as the precision of due diligence standards within a legal regime increases, their pivotal influence as behavioral guidelines decrease. When rules are highly prescriptive, states are confined to mere compliance; conversely, it is in areas of discretion or regulatory flexibility that due diligence exerts its most significant influence by disciplining state actions.[119] In fact, this purported paradox is merely superficial. The due diligence obligation, as a conduct-based obligation, is not rendered inflexible by the detailed obligations under Part XII of the UNCLOS. This adaptability manifests in the following dimensions:

3.2.1 Discretionary leeway within procedural obligations

Although sections 2 to 6 of Part XII of the UNCLOS set out various obligations for states parties, these procedural obligations inherently retain significant discretionary leeway for application. In the *South China Sea Arbitration*, the arbitral Tribunal interprets Article 206 of UNCLOS, which relates to the EIA regime, indicating that the obligation to communicate reports of the results of the assessments is absolute, while the terms 'reasonable' and 'as far as practicable' in this provision contain an element of discretion for the state concerned.[120] In addition, in terms of the 'international rules and standards' referred in part XII of UNCLOS, which are usually called 'rules of reference',[121] while states parties retain discretion to select applicable international rules and standards based on specific circumstances, the erroneous or inadequate adoption or implementation of such rules and standards will constitute a breach of their due diligence obligations. For example, In the *Arctic Sunrise Arbitration*, Russia asserted that its boarding, inspection, and seizure of the *Arctic Sunrise* vessel were justified by the ship's alleged dangerous manoeuvring, which it claimed violated relevant international rules and standards. However, the arbitral Tribunal concluded that Russia had

116 Lingjie Kong, 'Environmental Impact Assessment under the United Nations Convention on the Law of the Sea' (2011) 10 Chinese Journal of International Law 651, 655.

117 *ITLOS Advisory Opinion on Climate Change* (n 1) 441.

118 Krieger, Peters and Kreuzer (n 110) 170.

119 ibid 161.

120 *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)* (2016) PCA Case N. 2013-19, 948.

121 Lan Ngoc Nguyen, 'Expanding the Environmental Regulatory Scope of UNCLOS Through the Rule of Reference: Potentials and Limits' (2021) 52 Ocean Development & International Law 419."

erroneously invoked these rules and standards, thereby rendering its actions legally unfounded.[122] Therefore, these procedural obligations do not impose absolute or rigid obligations on states parties. Instead, states must exercise discretion in fulfilling their due diligence obligations to ultimately strive toward achieving the 'intended results' outlined in Articles 192 and 194 of UNCLOS.

3.2.2 The open-endedness of procedural obligations

Another rationale for asserting that the procedural obligations do not diminish the significance of due diligence lies in the fact that, in the context of climate change, the UNCLOS does not prescribe an exhaustive list of specific obligations for states parties. The *COSIS Advisory Opinion* illustrates that the 'rules, standards and practices and procedures encompass a broad range of norms, both binding and non-binding in nature.'[123] This signifies that the rules of reference which states are obligated to consider are inherently non-exhaustive and will continue to evolve in the future alongside scientific advancements and institutional developments.[124] This reality aligns seamlessly with the dynamic nature of due diligence, as articulated by the Tribunal: 'The standard of due diligence may change over time, given that those factors constantly evolve.'[125] Requiring states parties to consider or apply all international rules and standards is neither practical nor feasible. This is not only because such rules and standards are infinite in scope, but also because the very qualification of whether a specific rule or standard meets the threshold of 'generally accepted' under UNCLOS remains inherently contentious.[126] Consequently, states must instead act in good faith to apply these rules and standards to the best of their ability - an approach that inherently reflects the requirements of due diligence.

This characteristic is evident not only in the 'rules of reference' but also in other types of obligations, such as obligations of international cooperation. For instance, in the *Croatia v. Slovenia Arbitration*, the arbitral Tribunal recognized the existence of numerous international treaties and arrangements concerning cooperation between the parties.[127] These treaties aimed to achieve

122 *The Arctic Sunrise Arbitration (Netherlands v. Russia)* (2015) PCA Case N. 2014-02, 301.

123 *ITLOS Advisory Opinion on Climate Change* (n 1) 270.

124 Richard Alan Barnes, 'The Continuing Vitality of UNCLOS' (Social Science Research Network, 15 August 2016) 20 <https://papers.ssrn.com/abstract=2839229> accessed 20 May 2025.

125 *ITLOS Advisory Opinion on Climate Change* (n 1) 239.

126 Jiangtao Qian, Kangjie Sun and Yen-Chiang Chang, 'The Impact of the ITLOS Climate Change Advisory Opinion on the Development of International Law' (2024) 170 Marine Policy 106406.

127 *In the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, Signed on 4 November 2009 (Croatia v. Slovenia)* (2017) PCA Case N.2012-04, 1135.

'intended results', specifically to 'ensure the limitations upon their right to exercise jurisdiction'.[128] Notably, the arbitral Tribunal did not single out any specific treaty or arrangement. Instead, it urged the parties to 'cooperate fully with each other' to guarantee that activities in the disputed area would not contravene the 'intended results of such obligations of cooperation.[129] The Tribunal's approach shifted focus away from cataloging treaty provisions and instead emphasized the overarching significance of these rules in advancing the 'intended results'. The concrete modalities of cooperation were left to the discretion of the states, to be realized through due diligence - a conclusion equally applicable to addressing ocean climate change challenges.

This raises a corollary question concerning the tension between procedural obligations and the standard of due diligence. If a breach of any single procedural obligation were sufficient to constitute a failure of due diligence, then, in light of the non-exhaustive nature of such obligations, states parties would face enduring uncertainty as to whether they have met the required standard.[130] In the *Nicaragua Case*, Nicaragua argued that Costa Rica had violated due diligence obligations by failing to fulfil its duties to conduct an EIA, provide notification, and engage in consultation.[131] The ICJ, after establishing that Costa Rica had indeed failed to perform the EIA, directly concluded that this omission constituted a breach of due diligence.[132] It further held that, as the violation of due diligence had already been confirmed, there was no need to examine whether Costa Rica had complied with the notification and consultation obligations.[133] The court's reasoning may lead to an inference that the failure to fulfil any relevant procedural obligation can constitute a violation of due diligence by the state party. In the context of climate change, this conclusion appears applicable to a heightened standard of due diligence.

In fact, due diligence and procedural obligations do not fall into the aforementioned dilemma. It is important to clarify that both various rules of reference and international cooperation obligations serve to assist in defining the standards for fulfilling due diligence obligations. According to Part XII of UNCLOS, the main types of procedural obligations undertaken by states are clearly defined:

128 ibid.

129 ibid.

130 Jutta Brunnée, *Procedure and Substance in International Environmental Law* (Brill | Nijhoff 2021) 4.

131 *Nicaragua Case* (n 54) 165.

132 *Nicaragua Case* (n 54) 164.

133 ibid 168.

the obligation to conduct EIA,[134] the obligation to cooperate,[135] the obligation to legislate,[136] the obligation to enforce legislation and others.[137] Within the existing legal framework, the core issue is not that states are unable to anticipate new types of obligations but rather how to determine whether they meet the stringent standards of due diligence.

In the case concerning *Whaling in the Antarctic*, the ICJ faced a similar challenge of interpreting an abstract concept. When adjudicating whether Japan's whaling activities fell under the category of 'for purposes of scientific research,' the ICJ held that various factors (such as lack of transparency and the use of lethal research methods) were not central to clarifying this abstract notion.[138] The key lay in the view that 'the evidence...should allow one to understand why that sample size is reasonable in relation to achieving the program's objectives, when compared with other possible sample sizes.'[139] This reasoning remains relevant to interpreting the 'stringent' nature of due diligence, which requires states to clearly justify how the measures adopted - among various rules of reference and relevant considerations - comply with due diligence obligations and demonstrate that all necessary measures have been taken to fulfil the objectives of Articles 192 and 194 of UNCLOS. Crucially, the articulation of a state's decision-making rationale is essential for reconciling due diligence with procedural obligations.

3.2.3 Divergent requirements for the detailed obligations

The obligations under Part XII of UNCLOS impose varying degrees of stringency on states parties.[140] Taking 'rules of reference' as an example: for land-based pollution, states are required to 'take into account' international rules and standards.[141] In contrast, the obligation for vessel-source pollution uses the mandatory term 'shall', demanding stricter compliance.[142]For pollution from or through the atmosphere, the requirement is similar with that of land-based pollution - states need

134 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS), part xii, section 4.

135 ibid part xii, section 2.

136 ibid part xii, section 5.

137 ibid part xii, section 6; *ITLOS Advisory Opinion on Climate Change* (n 1) 441.

138 *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (Judgment) [2014] ICJ Rep 226, 137, 195.

139 ibid 195.

140 Roland Holst (n 107) 252.

141 UNCLOS (n 134) art 207(1).

142 ibid art 211(1).

only to 'take into account' applicable rules and standards.[143]

The *COSIS Advisory Opinion* clarified the term 'taking into account', indicating that states are not required to adopt the rules and standards but they must give 'due consideration' to them in good faith.[144] The term 'due consideration' is highly similar with 'due regard', which is frequently mentioned in UNCLOS.[145] In the *Enrica Lexie Incident*, the arbitral Tribunal defined 'due regard' as 'with the proper care or concern for,' and also defined the meaning of 'regard' as 'attention, care, or consideration given to a thing or person.'[146] The arbitral Tribunal's interpretation of the term 'regard' through the lens of 'consideration' in this case demonstrates their functional interchangeability in certain contexts. Furthermore, in the *Chagos Marine Protected Area Arbitration*, the arbitral Tribunal clarified that phrases such as 'due regard' or 'due consideration' do not establish 'any universal rule of conduct' or impose 'a uniform obligation' on states.[147] Instead, how a state fulfils the requirement to accord 'due consideration' depends on a context-specific balancing of factors, including the nature of the rights, the relative importance, the extent of anticipated impairment, etc.[148]

In respect of climate change, to achieve the 'intended results' of protecting, controlling, and reducing harm to the marine environment, states parties are required to adhere to a high standard of due diligence. It means that the requirement for 'due consideration' - or, equivalently, 'taking into account' international rules and standards - becomes correspondingly more stringent. States must adopt these international rules and standards as comprehensively as possible and in good faith. In line with the Tribunal's conclusion in the *COSIS Advisory Opinion*, the obligation of due diligence 'does not preclude states from adopting more rigorous measures to protect and preserve the marine environment than provided for therein',[149] provided such measures remain consistent with the UNCLOS. Critically, the detailed provisions do not diminish the flexibility inherent in fulfilling due diligence; rather, they coexist with a state's discretion to exceed baseline standards in pursuit of enhanced marine protection. In essence, due diligence and the detailed obligations are not mutually exclusive but can achieve harmonious coexistence within the legal framework of UNCLOS.

143 ibid art 212(1).

144 *ITLOS Advisory Opinion on Climate Change* (n 1) 271.

145 UNCLOS (n 134) arts 27, 39, 56, 58, 60, 66, 79, 87, 142, 148, 161, 162, 163, 167, 234, 267.

146 *Enrica Lexie Incident (Italy v. India)* (2020) PCA Case N.2015-28, 973.

147 *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* (2015) PCA Case N. 2011-03, 519.

148 ibid.

149 *ITLOS Advisory Opinion on Climate Change* (n 1) 440.

4. Conclusion

Despite persistent scepticism surrounding the utility of the conduct-result dichotomy in determining states' obligations under the UNCLOS, the repeated emphasis by states represented by COSIS on the significance of obligations of result in climate change advisory proceedings before ITLOS and the ICJ underscores the contentious nature of this issue and the necessity for doctrinal clarity. Whether it is due diligence itself or Articles 192 and 194(1)(2) of UNCLOS- which ITLOS has identified as 'due diligence provisions'- their legal nature is purely that of obligations of conduct, with no possibility of simultaneously encompassing obligations of result. Neither the existential urgency of climate change nor isolated jurisprudence interpreting analogous provisions as obligations of result can alter this conclusion.

COSIS's misinterpretations largely stem from conflating elements that clarify the standards for fulfilling due diligence with independent obligations. Whether it is the phrase 'all necessary measures to ensure' in Article 194 of UNCLOS, the Paris Agreement's 1.5°C temperature goal, or the procedural obligations under Part XII of the Convention, these provisions serve to clarify the stringent compliance standards for due diligence rather than imposing additional obligations of result. Procedural obligations and due diligence can achieve systemic harmonization, collectively advancing the intended objective of preventing, controlling, and reducing marine pollution. There is no inherent conflict in their application: states must adopt all necessary measures to strive toward the intended outcomes, and the reasoned justification of a state's decision-making process holds particular significance in demonstrating compliance with due diligence obligations.