

Stringent due diligence under customary international law

Customary international law, as the other major source of international law alongside treaties, was just as vital to this Advisory Opinion as the climate change treaties (the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol and the Paris Agreement). Customary international law obligations apply to all States - unlike treaties, to which a State must be party to be bound. For instance, the United States will be bound by customary international law relating to climate change even when its withdrawal from the Paris Agreement takes effect. As the Court put it, "customary obligations are the same for all States and exist independently regardless of whether a State is party to the climate change treaty".¹ This makes the Court's pronouncements on customary international law particularly important. The Court articulated two customary international law duties on States: (i) the duty to prevent significant harm to the environment and (ii) the duty to cooperate for the protection of the environment.

The Court was clear that the duty to prevent significant harm to the environment extends to the climate system, which is an integral and vitally important part of the environment to be protected for present and future generations.² The multifaceted and diffuse nature of human conduct contributing to climate change does not preclude the duty, which arises as a result of the general risk of significant harm,³ some of which has already been caused.⁴ Indicators of such harm presently include temperature rise, sea level rise, negative effects on ecosystems and biodiversity, and extreme weather events.⁵ The risks posed by current activities in the future, including in the long-term, must be taken into account and the probability/foreseeability and magnitude of the risks faced must be considered.⁶ The higher the probability and seriousness of possible harm, the more demanding the standard of conduct attaching to the duty of prevention.⁷ Cumulative effects must also be assessed.⁸ Even "activity that is insignificant in isolation" can give rise to the duty to prevent, although it is the sum of all activities that contribute to anthropogenic greenhouse gas submissions over time...which produces the risk to the climate system.⁹ States must avert this risk through a coordinated and cooperative response.¹⁰

Drawing on prior jurisprudence the Court confirmed that the required standard of conduct for the duty to prevent environmental harm is due diligence: States must "employ all means reasonably available to them, so as to prevent [harm] so far as possible".¹¹ In respect of climate change mitigation the customary international law standard is "stringent" due diligence.¹² Determining what

¹ *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025 [2025] ICJ Reports [315].

² [134] [272-273] [457(3)(B)(a)], citing at [272]: *Trail Smelter (United States of America/Canada)* Decision of 11 March 1941, United Nations, Reports of International Arbitral Awards, Vol. III, p. 1965; *Corfu Channel (United Kingdom v. Albania)* (Merits, Judgment, I.C.J. Reports 1949, p. 22); *Legality of the Threat and Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), p. 242, para. 29; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), p. 56, para. 101; *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)*, Judgment, I.C.J. Reports 2015 (II), p. 706, para. 104).

³ [279].

⁴ [274].

⁵ [268]

⁶ [275]

⁷ [275]

⁸ [276]

⁹ [277]

¹⁰ [277]

¹¹ [135] citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), p. 221, para. 430.

¹² [138].

due diligence requires in a particular situation involves taking into account a number of elements. First, the classic formulation of due diligence in respect of environmental harm calls for appropriate measures. This requires States to put in place a national system, including legislation, administrative procedures and enforcement mechanism necessary to regulate the activities and question, and... exercise adequate vigilance to make such a system function effectively, with a view to achieving the intended objective".¹³ Second, due diligence depends on acquiring and analysing scientific and technological information, and the Court added that States must "actively pursue" the scientific information necessary for them to assess risks,¹⁴ bearing in mind that new knowledge may raise the standard of due diligence required.¹⁵

Third is relevant international rules and standards,¹⁶ and fourth is States' different capabilities. The Court emphasises that a State's capabilities are a factor, although even a less well placed State is obliged to take all the means at its disposal to protect the climate system.¹⁷ Fifth is the precautionary principle or approach,¹⁸ and sixth is the procedural requirement for environmental impact assessment, which is also independently required as a general rule. Environmental impact assessments are important in relation to individual activities that are particularly significant. Possible specific climate related effects must be assessed at the level of proposed individual activities, including to assess their downstream effects.¹⁹ Judges Bhandari and Cleveland tell us this means that the combustion of fossil fuels has to be taken into account in decisions including production, licensing and subsidisation.²⁰ "Fossil fuels are produced in order to be burned", the judges underline.²¹ The Court further indicates that it may be reasonable for States to conduct high-level overview risk assessments of the risks caused by GHG emissions also by way of general procedures covering different forms of activity.²² This is open to interpretation. For instance, a general policy or legal decision to reopen bids for oil and gas exploration nationally might qualify, but equally the Court may have in mind more strategic environmental impact assessments to precede decision-making relating to an even broader range of diverse activities.

The seventh element in determining what due diligence requires is notification and consultation, which will be "particularly warranted when an activity significantly affects collective efforts to reduce harm to the climate system".²³ Examples of situations where due diligence can call for notification and consultation include the implementation of policy changes in relation to the exploitation of resources linked to GHG emissions.²⁴ These pronouncements also appear to have direct relevance for governmental permitting and regulatory decisions in relation to oil and gas exploitation. Like environmental impact assessment, notification and consultation has previously

¹³ [138] [281] citing *Pulp Mills on the River Uruguay* (n 2) and *Climate Change, Advisory Opinion, Request For An Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of the International Tribunal for the Law of the Sea, 21 May 2024 [2024] ITLOS Reports p. 89, para. 235.

¹⁴ [283]

¹⁵ [284].

¹⁶ [287-289]

¹⁷ [290-292].

¹⁸ [293-294]. Also [294] recalling International Tribunal for the Law of the Sea, *Responsibilities and Obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 46, para. 131.

¹⁹ [298].

²⁰ Joint Declaration of Judges Bhandari and Cleveland [11, 17].

²¹ Joint Declaration of Judges Bhandari and Cleveland [14].

²² [298].

²³ [299]

²⁴ [299]

been approached as an independent requirement under customary international law as well as an element of due diligence.

The second customary international law duty discussed by the Court, the duty to cooperate for the protection of the environment, is all the more vital when a shared resource such as the climate system can only be protected through close cooperation.²⁵ Cooperation must be "sustained and continuous" and must take account of the situations of other States.²⁶ While treaties' coordinated implementation forms a principal expression of cooperation, States are not required to conclude treaties – they are however "required to make good faith efforts to arrive at appropriate forms of collective action".²⁷ Collective action in relation to climate change requires agreement on forms of *bona fide* cooperation. Specifically, "international law requires States to cooperate to achieve concrete emission reduction targets or a methodology for determining contributions of individual States," including with respect to the fulfilment of agreed temperature goals.²⁸ This duty applies to *all* States although it varies according to their common but differentiated responsibilities and respective capabilities.²⁹ It is founded on recognition of States' independence, requiring "efforts by States to continuously develop, maintain and implement a collective climate policy that is based on an equitable distribution of burdens".³⁰

Importantly, too, States do not discharge the duty to cooperate in relation to climate change only by concluding and implementing treaties.³¹ There is a bigger picture, including to the point where, the Court indicates, there may be a time when further treaty-based obligations are needed, with the increased urgency of the climate crisis. Here the customary international legal obligations discussed above constitute, in the Court's view, a legal standard for assessing whether climate treaties continue to serve their purpose and whether further collective action has to be undertaken, including adopting further treaty obligations.³²

Readers will appreciate that customary international law and treaty obligations have a separate existence, though the Court is interpreting them harmoniously. Indeed, the Court goes so far as to suggest, in a carefully caveated manner, that "at the present stage, compliance in full and in good faith by a State with the climate change treaties, as interpreted by the Court... suggests that this State substantially complies with the general customary duties to prevent significant environmental harm and to cooperate".³³ How are we to understand this statement? Importantly, in saying this, the Court both leans on and lends weight to the existing treaty regime. Further, this statement enables the Court to give clear guidance to non-party States. For non-parties, the Court "considers that it is possible that a non-party State which cooperates with the community of State parties to the three climate change treaties in a way that is equivalent to that of a State party, may, in certain circumstances, be considered to fulfil its customary obligations through practice that comports with the required conduct of States under the climate change treaties".³⁴ Interestingly the Court suggests that a non-party State not cooperating in such a way will have the full burden of demonstrating that

²⁵ [301-312].

²⁶ [304].

²⁷ [304].

²⁸ [305].

²⁹ [305].

³⁰ [306].

³¹ [304].

³² [308].

³³ [314]. See also Declaration of Judge Nolte [8], reasoning that treaties can be an important means of fulfilling States' customary international law obligations, including because they enable State to coordinate their action in relation to a problem where each State's action may depend on what other States will do.

³⁴ [315]

its policies and practices are in compliance with its customary international law obligations.³⁵ One wonders whether the Court is signalling a potential reversal of the usual adjudicatory burden of proof?³⁶ At the same time, the Court is clear its comments do not mean that customary obligations will be fulfilled simply by compliance with climate change treaties.³⁷

So far as due diligence is concerned, one point worth noting, for those who are interested in the regularity with which international courts and tribunals now distinguish between obligations of conduct and obligations of result, is that in its Paris Agreement analysis the Court implies directly that the standard of performance for *any* obligation of conduct is one of due diligence.³⁸ This is of course without prejudice to the possibility that a heightened due diligence standard may apply, including requirements for “stringent” due diligence as seen in here in the Advisory Opinion and in the *Climate Change, Advisory Opinion* from the International Tribunal for the Law of the Sea. However, the point itself is new. Until now, the jurisprudence has been open to the possibility that there could be a range of standards applying to the range of international law obligations that could be described as obligations of conduct. *Inter alia*, the Court's statement would seem to consolidate due diligence's emerging role as a global regulatory standard, being read widely into international law, including both treaty law and customary international law.³⁹ At the same time, there may be a hint of differing views within the Court on the utility of the ongoing distinction between obligations of conduct and obligations of result. While employing these terms in a predictable fashion throughout the Advisory Opinion, the Court also stated that the distinction is was not necessarily a strict one, as breach of either type of obligation may incur State responsibility,⁴⁰ as well as telling us that such obligations may be connected or interconnected, and may be mutually supportive.⁴¹

³⁵ [315].

³⁶ Caroline E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (Cambridge University Press, 2011) 240-277.

³⁷ *Obligations of States* (n 1) [314].

³⁸ [251-252].

³⁹ Caroline E. Foster, (2021) *Global Regulatory Standards in Environmental and Health Disputes: Regulatory Coherence, Due Regard and Due Diligence* (Oxford University Press, 2021)

⁴⁰ *Obligations of States* (n 1) [207 208]

⁴¹ [204, 228]