UNDERSTANDING STRINGENT DUE DILIGENCE IN THE ITLOS ADVISORY OPINION ON CLIMATE CHANGE

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In May 2024, at the request of the Commission of Small Island States on Climate Change and International Law (COSIS), the International Tribunal for the Law of the Sea (ITLOS) issued a landmark advisory opinion on climate change under international law. Although an advisory opinion in general is not legally binding, it provides authoritative statements of international law that assist in the compliance of international obligations.[1]

ITLOS unanimously determined that State Parties to the United Nations Convention on the Law of the Sea (UNCLOS) have specific obligations to take all necessary measures to prevent, reduce, and control marine pollution from anthropogenic greenhouse gas (GHG) emissions.[2] It also found that State Parties have specific obligations to take all measures necessary to ensure that anthropogenic GHG emissions under their jurisdiction or control do not cause damage to other States and their environment, and that pollution from such emissions under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights.[3] Moreover, it held that State Parties have a specific obligation to protect and preserve the marine environment from climate change impacts and ocean acidification, which may call for measures to restore marine habitats and ecosystems.[4]

ITLOS noted that these obligations are ones of due diligence, and the standard of due diligence is "stringent," given the high risks of serious and irreversible harm to the marine environment due to climate change.[5] However, it does not clarify what "stringent" due diligence means. This unsettled standard needs to be addressed since it will impact establishing the claims of State responsibility for anthropogenic GHG emissions, climate change impacts, and ocean acidification due to failure to comply with the due diligence obligations. Therefore, this Comment provides an initial understanding of stringent due diligence by referencing the precautionary approach and the International Law Commission's (ILC's) Draft Articles on Prevention of Transboundary Harm From Hazardous Activities (Draft Articles on Prevention).

Part I illustrates the background of the ITLOS advisory opinion, including the process of COSIS' request, the issue of jurisdictional admissibility, and the relevance of climate change to the marine environment and marine pollution. Part II explores the ITLOS advisory opinion with respect to Articles 192 and 194 of UNCLOS, which ITLOS interpreted as having a stringent due diligence nature. It also emphasizes the necessity of addressing the meaning of "stringent due diligence," as this standard may play a crucial role in establishing a claim of State responsibility for anthropogenic GHG emissions, climate change impacts, and ocean acidification due to failure to comply with the due diligence obligations. Part III suggests two possible understandings of stringent due diligence, by borrowing

1. *See* Interpretation of Peace Treaties With Bulgaria, Hungary, and Romania, Advisory Opinion, 1950 I.C.J. 65, 71 (Mar. 30) ("The Court's reply is only for an advisory character: as such it has no binding force."); *see also* Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives), Case No. 28, Judgment of Jan. 28, 2021, para. 202, https://itlos.org/fileadmin/itlos/documents/cases/28/published/C28_PO_Judgment_20210128.pdf ("[I]t is equally recognized that an advisory opinion entails an authoritative statement of international law on the question with which it deals."); Environment and Human Rights, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, para. 24 (Nov. 15, 2017):

> The Court reiterates . . . that the task of interpretation it performs in the exercise of its advisory function not only clarifies the meaning, purpose and reasons for international human rights norms, but also, above all, assists [Organization of American States] Member States and organs to comply fully and effectively with their relevant international obligations, and to define and implement public policies to protect human rights.

2. *See* Request for Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, Advisory Opinion of May 21, 2024, para. 441(3)(b), https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf [hereinafter ITLOS Advisory Opinion on Climate Change]; *see also* United Nations Framework Convention on Climate Change art. 1, para. 5, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107 [hereinafter UNFCCC] (defining "greenhouse gas" as those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation).
3. *See* ITLOS Advisory Opinion on Climate Change, *supra* note 2, para. 441(3)(d).
4. *See id.* para. 441(4)(b).
5. *See id.* paras. 441(3)(c), (d), (4)(c).

ideas from the precautionary approach and the ILC's Draft Articles on Prevention. Part IV concludes.

I. Background

Growing concern over the threat of climate change prompted small island States to seek an advisory opinion from ITLOS on their specific obligations under UNCLOS in relation to climate change. Despite the issue of jurisdictional admissibility, ITLOS affirmed its jurisdiction to give the advisory opinion on legal questions requested by COSIS. Moreover, it noted that anthropogenic GHG emissions, the main cause of climate change, have had adverse effects on the marine environment, and held that they fall under the definition of "pollution of the marine environment" under UNCLOS.

A. The Process of COSIS' Request

Compared to developed and wealthy countries, some countries are particularly vulnerable to the adverse effects of climate change. These countries encompass low-lying and other small island countries, low-lying coastal countries, arid and semiarid areas or areas liable to floods, drought, and desertification, and developing countries with fragile mountainous ecosystems.[6] In response to the existential threat posed by climate change and inaction on the international stage, COSIS was established under the Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (COSIS Establishment Agreement) on the eve of the 26th session of the Conference of the Parties (COP26) to the United Nations Framework Convention on Climate Change (UNFCCC).[7]

Article 1(3) of the COSIS Establishment Agreement mandates COSIS "to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, including, but not limited to, the obligations of States relating to the protection and preservation of the marine environment."[8] Article 2(2) of the Agreement recognizes the fundamental importance of oceans as sinks and reservoirs of GHGs and the direct relevance of the marine environment to the adverse effects of climate change on small island States, and authorizes COSIS "to request an advisory opinion from the [ITLOS] on any legal question within the scope of the [UNCLOS], consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules."[9] In this context, on December 12, 2022, the co-chairs of COSIS, representing COSIS, officially submitted a request for an advisory opinion from ITLOS with the following questions:

> What are the specific obligations of State Parties to the [UNCLOS], including under Part XII:
>
> (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
>
> (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?[10]

After submitting the request, some State Parties to UNCLOS, such as China and India, challenged ITLOS' jurisdiction, while the majority advocated for ITLOS to exercise its authority in this critical matter, given the existential stakes.[11] Moreover, disagreements among State Parties surfaced about whether the scope of the questions should expand to the issue of compensation or remedy for damage, and what other rules of international law should be taken into account by ITLOS to interpret State obligations on climate change under UNCLOS.[12] State Parties also took different approaches to the substantive content of their due diligence obligations, and COSIS, Mauritius, and Belize notably argued that the standard of due diligence is required to be stringent due to the heightened risks posed by climate change.[13]

B. Jurisdictional Admissibility

Compared to other international courts and tribunals that have advisory and contentious jurisdictions, ITLOS' advisory jurisdiction has not been expressly provided for in the Statute of the Tribunal annexed to UNCLOS and UNCLOS itself, except for the advisory jurisdiction of the Seabed Disputes Chamber of ITLOS.[14] Instead, ITLOS found the legal basis for its power to render advisory opinions when addressing the Request for an Advi-

6. *See* Philippe Cullet, *Liability and Redress for Human-Induced Global Warming: Towards an International Regime*, 43 Stan. J. Int'l L. 99, 119 (2007).
7. *See* COSIS, *About COSIS*, https://www.cosis-ccil.org/about (last visited Sept. 23, 2024); *see also* COSIS, *Members*, https://www.cosis-ccil.org/organization/members (last visited Sept. 23, 2024) (Antigua and Barbuda, Tuvalu, Palau, Niue, Vanuatu, St. Lucia, St. Vincent and the Grenadines, St. Kitts and Nevis).
8. Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law art. 1, para. 3, Oct. 31, 2021, https://treaties.un.org/doc/Publication/UNTS/No%20Volume/56940/Part/I-56940-08000002805c2ace.pdf.
9. *Id*. art. 2, para. 2.
10. COSIS, Request for Advisory Opinion (Dec. 12, 2022), https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf.
11. *See* Joie Chowdhury, *At Historic ITLOS Hearings, States Stake Out Positions on Climate Duties and Ocean Protection*, Ctr. for Int'l Env't L. (Sept. 28, 2023), https://www.ciel.org/at-historic-itlos-hearings-states-stake-out-positions-on-climate-duties-and-ocean-protection/.
12. *See id*.
13. *See id*.
14. *See* Pierre Clement Mingozzi, *The Contribution of ITLOS to Fight Climate Change: Prospects and Challenges of the COSIS Request for an Advisory Opinion*, 3 Italian Rev. Int'l & Compar. L. 306, 310 (2023); *see also* UNCLOS art. 191, Dec. 10, 1982, 1833 U.N.T.S. 397 ("The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities.").

sory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC).

In the SRFC advisory opinion, ITLOS interpreted the term "matters" in Article 21 of the ITLOS Statute[15] to encompass something more than only "disputes," thereby including advisory opinions if specifically provided for in any other agreement that confers jurisdiction on the tribunal.[16] It further clarified that "[w]hen the 'other agreement' confers advisory jurisdiction on the Tribunal, the Tribunal then is rendered competent to exercise such jurisdiction with regard to 'all matters' specifically provided for in the 'other agreement.'"[17] Thus, it concluded that "Article 21 and the 'other agreement' conferring jurisdiction on the Tribunal are interconnected and constitute the substantive legal basis of the advisory jurisdiction of the Tribunal."[18]

In addition, ITLOS established the prerequisites that need to be satisfied before exercising its advisory jurisdiction in Article 138 of its Rules as follows:

1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the [UNCLOS] specifically provides for the submission to the Tribunal of a request for such an opinion.
2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.[19]

The elements of these prerequisites are (1) an international agreement related to the purpose of UNCLOS specially providing for the submission to ITLOS of a request for such an advisory opinion; (2) the transmission of the request to ITLOS by a body authorized by or in accordance with the agreement; and (3) a legal question. A legal question, the third element, relates to the nature of the request. ITLOS stated that a legal question arises when it is framed in terms of law and raising problems of international law, and it is by its very nature susceptible of a reply based on law.[20]

At the request of COSIS, ITLOS considered whether it has jurisdiction to give an advisory opinion on the questions. ITLOS found that the three elements of the prerequisites had been satisfied. To begin with, the COSIS Establishment Agreement, an international agreement, is related to one of the purposes of UNCLOS, which is the protection and preservation of the marine environment and specifically detailed in Part XII of UNCLOS. The Agreement reflects this through the recognition of the need to address the adverse effects that GHG emissions have on the marine environment in its preamble, as well as in the mandate of COSIS to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, including, but not limited to, the obligations of States relating to the protection and preservation of the marine environment.[21]

As stated above, the COSIS Establishment Agreement established COSIS with international legal personality and authorized it, through Article 2(2), to request advisory opinions from ITLOS on any legal questions within the scope of UNCLOS, consistent with Article 21 of the ITLOS Statute and Article 138 of the ITLOS Rules.[22] Next, COSIS unanimously decided to submit to ITLOS a request for an advisory opinion on the questions, and its co-chairs subsequently transmitted it to ITLOS.[23] Last, the requested questions are framed in terms of law, requiring the interpretation of the relevant provisions of UNCLOS, and the COSIS Establishment Agreement, as well as the identification of other relevant rules of international law, thereby having a legal nature.[24]

Along with these prerequisites, ITLOS assessed, pursuant to Article 21 of the ITLOS Statute, whether the legal questions constituted "matters" that fall within the framework of the COSIS Establishment Agreement.[25] It noted that the legal questions have a sufficient connection with the purpose of the COSIS Establishment Agreement, which is to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, in particular the protection and preservation of the marine environment, as outlined in Article 2(1), and this connection is enough for the questions to be directly relevant to "matters" that fall within the framework of the COSIS Establishment Agreement.[26] Therefore, it concluded that it has jurisdiction to give the advisory opinion requested by COSIS.[27]

ITLOS, in the SRFC advisory opinion, interpreted the phrase in Article 138 of the ITLOS Rule, "the Tribunal may give an advisory opinion," as indicating that it has a discretionary power to refuse to give an advisory opinion even if the conditions of jurisdiction are satisfied.[28] It also stated that a request for an advisory opinion should not be refused except for compelling reasons.[29] Given that some State Parties to UNCLOS, such as China and India, chal-

15. *See* Statute of the International Tribunal for the Law of the Sea art. 21, Dec. 10, 1982, 1833 U.N.T.S. 561 ("The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.").
16. *See* Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Case No. 21, Advisory Opinion of Apr. 2, 2015, 2015 ITLOS Rep. 4, para. 56 [hereinafter Request by SRFC].
17. *Id.* para. 58.
18. *Id.*
19. Rules of the Tribunal art. 138, paras. 1, 2, Oct. 28, 1997, https://www.itlos.org/fileadmin/itlos/documents/basic_texts/ITLOS_8_25.03.21.pdf.
20. *See* Request by SRFC, *supra* note 16, para. 65.
21. *See* ITLOS Advisory Opinion on Climate Change, *supra* note 2, paras. 96-98.
22. *See id.* paras. 99-100.
23. *See id.* para. 101.
24. *See id.* paras.103-104.
25. *See id.* para. 105.
26. *See id.* paras. 106-108.
27. *See id.* para. 109.
28. *See* Request by SRFC, *supra* note 16, para. 71.
29. *See id.*

lenged ITLOS' jurisdiction, ITLOS considered whether there were any compelling reasons for it to exercise its discretion to decline to give an advisory opinion. It noted that the lack of consent from those States not party to the COSIS Establishment Agreement is not relevant to ITLOS' discretionary power to refuse to give a nonbinding advisory opinion.[30] Further, it observed that a vast majority of the State Parties supported the advisory opinion to be issued.[31]

C. *Relevance of Climate Change to the Marine Environment and Marine Pollution*

Climate change is a concern not only for COSIS, but also for the entire world.[32] Article 1(2) of the UNFCCC defines "climate change" as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods."[33] The term "climate change" is often used interchangeably with the term "global warming," but the former encompasses the latter, which refers only to "the Earth's rising surface temperature."[34] That is, global warming is one aspect of climate change.

The report of the Intergovernmental Panel on Climate Change (IPCC), which ITLOS relied upon, affirmed that increases in the atmospheric concentrations of GHGs, such as carbon dioxide, methane, and nitrous oxide, resulting from human activities are the main cause of climate change and global warming since they trap infrared radiation near the earth's surface.[35] It observed that the ocean contributes to regulating the climate system by storing the trapped heat and excess carbon dioxide in the atmosphere; however, it then stated that the accumulation of GHGs in the atmosphere has had numerous effects on the ocean, including sea-level rise, increasing ocean heat content and marine heat waves, ocean deoxygenation, and ocean acidification, thereby posing significant threats to small island and low-lying coast countries, species and ecosystems, and humans.[36]

ITLOS addressed whether anthropogenic GHG emissions into the atmosphere fall under the definition of "pollution of the marine environment" under Article 1(1)(4) of UNCLOS[37]:

> "[P]ollution of the marine environment" means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.[38]

In accordance with this definition, ITLOS concluded that anthropogenic GHG emissions into the atmosphere satisfy three elements of the pollution of the marine environment: (1) a substance or energy, (2) being introduced by humans, directly or indirectly, into the marine environment, and (3) resulting in or being likely to result in deleterious effects. First of all, GHG itself is a substance in a form like air, and it can produce heat, a form of energy, by trapping infrared radiation near the earth's surface.[39]

Next, as the name suggests, anthropogenic GHG emissions are produced "by man."[40] Additionally, given the general and ordinary meaning of the terms, carbon dioxide and heat energy are directly or indirectly introduced into the marine environment, as the ocean takes up and stores them.[41] Lastly, anthropogenic GHG emissions cause adverse impacts of climate change—ocean warming and sea-level rise—and ocean acidification, resulting or being likely to result in multiple deleterious effects on the marine environment and beyond.[42]

II. ITLOS' Advisory Opinion on the Legal Questions

ITLOS interpreted that the nature of Articles 192 and 194 of UNCLOS is stringent due diligence. While ITLOS seems to heighten the level of due diligence by using the term "stringent," it does not clarify what this means. Understanding stringent due diligence is crucial because ITLOS suggested that a responsibility claim can be established when there is a failure to enforce obligations under these two articles of UNCLOS.

A. *ITLOS' Interpretation of Articles 192 and 194 of UNCLOS*

ITLOS responded to the requested question (a) by interpreting Article 194(1) and (2) of UNCLOS and applying them to anthropogenic GHG emissions causing pollution of the marine environment. Article 194(1) provides:

> States shall take, individual or jointly as appropriate, all measures consistent with [UNCLOS] that are necessary

30. *See* ITLOS Advisory Opinion on Climate Change, *supra* note 2, para. 114.
31. *See id*. para. 115.
32. *See* G.A. Res. 43/53, para. 1 (Dec. 6, 1988) (recognizing that climate change is a common concern of mankind, since climate is an essential condition that sustains life on earth).
33. UNFCCC, *supra* note 2, art. 1, para. 2.
34. Caitlyn Kennedy & Rebecca Lindsey, *What's the Difference Between Global Warming and Climate Change?*, Climate.gov (June 17, 2015), https://www.climate.gov/news-features/climate-qa/whats-difference-between-global-warming-and-climate-change.
35. *See* IPCC, The Physical Science Basis 506, 515 (2021); *see also* ITLOS Advisory Opinion on Climate Change, *supra* note 2, para. 54.
36. *See* ITLOS Advisory Opinion on Climate Change, *supra* note 2, paras. 55-66.
37. *See id*. para. 159.
38. UNCLOS, *supra* note 14, art. 1, para. 1(4).
39. *See* ITLOS Advisory Opinion on Climate Change, *supra* note 2, paras. 164, 172.
40. *See id*. para. 165.
41. *See id*. para. 172.
42. *See id*. paras. 175, 178.

> to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.[43]

In relation to anthropogenic GHG emissions, ITLOS concluded that "States Parties to the [UNCLOS] have the specific obligations to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions and to endeavour to harmonize their policies in this connection."[44]

It also clarified that the measures should be determined objectively, considering the best available science and, particularly, the global goal of limiting the temperature increase to 1.5 degrees Celsius (ºC) above pre-industrial levels and the timeline for emission pathways to achieve that goal set by the UNFCCC and the Paris Agreement, while the scope and content of necessary measures may vary in accordance with the means available to State Parties and their capabilities.[45] Meanwhile, ITLOS acknowledged that the nature of this obligation is due diligence.[46] Further, given that anthropogenic GHG emissions pose a high risk in terms of foreseeability and severity of harm to the marine environment, it emphasized that the standard of due diligence is stringent.[47]

Article 194(2) of UNCLOS provides:

> States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with [UNCLOS].[48]

ITLOS applied this provision to anthropogenic GHG-emitting activities. Thus, it reiterated that UNCLOS imposes on State Parties

> the specific obligation to take all measures necessary to ensure that anthropogenic GHG emissions under their jurisdiction or control do not cause damage to other States and their environment, and that pollution from such emissions under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights.[49]

Also, it emphasized that the standard of due diligence can be even more stringent than that under Article 194(1) because of the nature of transboundary pollution affecting the environment of other States.[50]

ITLOS responded to the broader requested question (b) by interpreting Article 192 of UNCLOS, which provides that "States have the obligation to protect and preserve the marine environment."[51] It understood this general obligation as containing two elements: (1) the obligation to protect the marine environment, which is linked to the duty to prevent or at least mitigate environmental harm, and (2) the obligation to preserve the marine environment, which may include restoring marine habitats and ecosystems when the environment is degraded.[52] Therefore, it concluded that this general obligation can be invoked to combat any form of degradation of the marine environment, including climate change impacts—ocean warming and sea-level rise—and ocean acidification, and to require restoring marine habitats and ecosystems when the marine environment is degraded.[53] Moreover, to fulfill the obligation to protect and preserve the marine environment, ITLOS held that State Parties are required to take measures as far-reaching and efficacious as possible to prevent or reduce climate change impacts and ocean acidification on the marine environment.[54]

In addition, it recognized that this obligation is one of due diligence and emphasized that the standard of due diligence is stringent, given the high risks of serious and irreversible harm to the marine environment by climate change impacts and ocean acidification.[55] ITLOS seems to heighten the level of due diligence by using the term "stringent"; however, it does not clarify what "stringent" due diligence means.

B. *Prospect for Stringent Due Diligence on Future Liability and Responsibility Claims*

Responsibility in environmental cases will arise when there is a failure of the enforcement of international obligations under either customary international law or treaty concerning the protection of the environment and the prevention of transboundary harm.[56] Article 235 of UNCLOS specifies responsibility and liability for environmental damage within the regime:

1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.
2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine envi-

43. UNCLOS, *supra* note 14, art. 194, para. 1.
44. ITLOS Advisory Opinion on Climate Change, *supra* note 2, para. 243.
45. *See id.*
46. *See id.*
47. *See id.* para. 241.
48. UNCLOS, *supra* note 14, art. 194, para. 2.
49. *See* ITLOS Advisory Opinion on Climate Change, *supra* note 2, para. 258.
50. *See id.* para. 256.
51. UNCLOS, *supra* note 14, art. 192.
52. *See* ITLOS Advisory Opinion on Climate Change, *supra* note 2, paras. 385-386.
53. *See id.* para. 400.
54. *See id.* para. 399.
55. *See id.* paras. 399-400.
56. *See* Patricia Birnie et al., International Law & the Environment 214 (3d ed. 2009).

ronment by natural or juridical persons under their jurisdiction.

3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.[57]

The terms "responsibility" and "liability" have different meanings in paragraphs 1 and 3. The Seabed Disputes Chamber of ITLOS, in its advisory opinion Responsibilities and Obligations of States With Respect to Activities in the Area, interpreted the term "responsibility" as the primary obligation, whereas the term "liability" is the secondary obligation, namely the consequences of a breach of the primary obligation under Article 235(1) of UNCLOS.[58] However, it observed the use of the terms "responsibility and liability" together in Article 235(3) and interpreted the term "responsibility" as having the same meaning as in the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles on Responsibility).[59] Regardless of these usages, this Comment assumes that the term "responsibility" is concerned with unlawful acts under international law, consistent with its meaning in the ILC's Draft Articles on Responsibility.

In the present advisory opinion, ITLOS confined the scope of the issue to primary obligations, excluding the issues of responsibility and legal consequences arising from the breach of obligations.[60] But it suggested that a responsibility claim can still be established. For example, ITLOS mentioned that if a State fails to comply with the stringent due diligence obligation under Article 194(1) of UNCLOS, international responsibility would be engaged for that State.[61] Additionally, it implied that where the marine environment has been degraded, the claim requiring the restoration of marine habitats and ecosystems may be invoked under Article 192 of UNCLOS.[62] Thus, it is necessary to understand stringent due diligence, which will be a basis for a responsibility claim due to failure to comply with the obligations.

57. UNCLOS, *supra* note 14, art. 235.
58. *See* Responsibilities and Obligations of States With Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, 2011 ITLOS Rep. 10, para. 66 [hereinafter ITLOS Advisory Opinion on Responsibilities and Obligations of States].
59. *See id*. para. 67.
60. *See* ITLOS Advisory Opinion on Climate Change, *supra* note 2, para. 148.
61. *See id*. para. 223.
62. *See id*. para. 400.

III. Insights Into Stringent Due Diligence

The dictionary meaning of "stringent" is "marked by rigor, strictness, or severity especially with regard to rule or standard."[63] It appears that ITLOS intended to emphasize a heightened level of due diligence by using this term, but it does not clarify what stringent due diligence means. Given the strictness implied by the term, State Parties to UNCLOS having stringent due diligence obligations may be required to take all necessary measures to prevent marine pollution from anthropogenic GHG emissions, and to protect the marine environment from climate change impacts and ocean acidification, even if scientific evidence as to the probability and severity of the effects of causal activities is insufficient, and even if the activities are not prohibited by international law.

A. *Concept of Due Diligence*

The question of how "due diligence" should be defined remains unsettled. However, it is generally understood as "an obligation of conduct on the part of a subject of law."[64] In other words, a due diligence obligation requires States to endeavor to reach the result set out in the obligation, even if the result itself is not guaranteed.[65] This general concept has been confirmed by the Seabed Disputes Chamber of ITLOS in its advisory opinion Responsibilities and Obligations of States With Respect to Activities in the Area, as it clarified that the obligation under Article 139(1) of UNCLOS[66] may be characterized as an obligation of conduct and not of result and as an obligation of due diligence.[67] Thus, it is an obligation to deploy adequate means, exercise the best possible efforts, do the utmost, and obtain the intended result.[68]

Due diligence is perceived as an international minimum standard that evaluates a State's conduct by comparing it to what a reasonable or good government would do in a specific situation.[69] Therefore, its requirements are context-specific, making it challenging to establish uniform requirements for all countries.[70] The Seabed Disputes Chamber of ITLOS in its advisory opinion Responsibilities and Obligations of States With Respect to Activities in the Area also explained this variable characteristic of due diligence:

63. Merriam-Webster Dictionary, *Stringent*, https://www.merriam-webster.com/dictionary/stringent (last visited Sept. 23, 2024).
64. Timo Koivurova & Krittika Singh, *Due Diligence* ¶ 1, Max Planck Encyclopedia Pub. Int'l L. (database updated Aug. 2022).
65. *See id*. para. 2.
66. UNCLOS, *supra* note 14, art. 139, para. 1:
> States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part.
67. *See* ITLOS Advisory Opinion on Responsibilities and Obligations of States, *supra* note 58, para. 110.
68. *See id*.
69. *See* Koivurova & Singh, *supra* note 64, para. 5.
70. *See id*.

> 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. It 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. It may also change in relation to the risks involved in the activity. . . . The standard of due diligence has to be more severe for the riskier activities.[71]

In the present advisory opinion, ITLOS reiterated the concept of due diligence. It viewed an obligation under Article 194(1) of UNCLOS as an obligation of conduct, requiring States to act with due diligence in taking all necessary measures to prevent, reduce, and control marine pollution from anthropogenic GHG emissions, without guaranteeing that result.[72]

In addition, ITLOS determined that, although its implementation may vary according to States' capabilities and available resources, the standard of due diligence obligation needs to be stringent—more severe than in other situations—because anthropogenic GHG emissions pose a high risk in terms of foreseeability and severity of harm to the marine environment, based on the best available science.[73] Similarly reasoning from these concepts and the character of due diligence, ITLOS further concluded that obligations under Articles 194(2) and 192 of UNCLOS are ones of due diligence[74]; however, the standard of due diligence obligation under Article 194(2) can be even more stringent due to the nature of transboundary pollution that affects the environment of other States.[75]

B. *Stringent Due Diligence and the Precautionary Approach*

The precautionary approach, as the United States and some other countries prefer to call it, aims to guide the development and application of an international environment where there is scientific uncertainty,[76] and is reflected in Principle 15 of the Rio Declaration on Environment and Development (Rio Declaration) as follows: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[77]

This language of Principle 15 of the Rio Declaration has attracted broad support, while the precautionary approach has been adopted in many treaties since before the Rio Declaration, though not always with the same precise formulation.[78] However, the legal status of the precautionary approach as customary international law is controversial because international courts and tribunals have not sufficiently recognized it.[79]

In light of the purpose of the precautionary approach, which is to protect the environment, it shares a notable similarity with the preventive principle. Both are concerned with taking anticipatory actions to avoid environmental harm before it occurs.[80] Therefore, the distinction between them has often depended on whether or not they include the avoidance of known harm as well as known risks of harm.[81] On the other hand, it has not always been sharply identified.[82] Yet, as the precautionary approach demands action to ward off potential hazards "in spite of" scientific uncertainty, it can be seen as an expanded version of the preventive principle, effectively comprising the preventive principle and representing the most developed form of prevention.[83] From the regulatory perspective, the precautionary approach is stricter than the preventive principle when it comes to taking measures to prevent environmental degradation.

Article 194(1) of UNCLOS reflects the preventive principle,[84] which originated from due diligence. For instance, the International Court of Justice, in the case *Pulp Mills on the River Uruguay*, pointed out that "the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory."[85] Meanwhile, although ITLOS did not describe the meaning of "stringent due diligence," it stated that the obligation of due diligence under Article 194(1) of UNCLOS is closely linked with the precautionary approach,[86] which is stricter than the preventive principle. Therefore, according to ITLOS, States would not meet their obligation of due diligence to prevent, reduce, and

71. ITLOS Advisory Opinion on Responsibilities and Obligations of States, *supra* note 58, para. 117.
72. *See* ITLOS Advisory Opinion on Climate Change, *supra* note 2, paras. 233-234, 238.
73. *See id.* para. 241.
74. *See id.* paras. 254, 399.
75. *See id.* para. 256.
76. *See* Philippe Sands, Principles of International Environmental Law 267-68 (2d ed. 2003).
77. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, princ. 15, U.N. Doc. A/CONF.151/26/Rev.1(Vol. I), annex I (Aug. 12, 1992).
78. *See* Sands, *supra* note 76, at 268.
79. *See id.* at 279. *But see* ITLOS Advisory Opinion on Responsibilities and Obligations of States, *supra* note 58, para. 135 (stating that the Seabed Disputes Chamber of ITLOS viewed the trend of incorporating the precautionary approach into a growing number of international treaties and other instruments as evidence that the approach may become part of customary international law).
80. *See* David Hunter et al., International Environmental Law and Policy 459 (6th ed. 2021).
81. *See* Arie Trouwborst, *Prevention, Precaution, Logic, and Law: The Relationship Between the Precautionary Principle and the Preventive Principle in International Law and Associated Questions*, 2 Erasmus L. Rev. 105, 119 (2009).
82. *See id.* at 120.
83. *See id.* at 121, 124; *see also* Hunter et al., *supra* note 80, at 460 ("The [approach] is not in conflict with science-based decision making.").
84. *See* Sands, *supra* note 76, at 248.
85. Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, para. 101 (Apr. 20).
86. *See* ITLOS Advisory Opinion on Climate Change, *supra* note 2, para. 242.

control marine pollution from anthropogenic GHG emissions if they disregarded or did not adequately account for the risks involved in the activities under their jurisdiction or control, even if scientific evidence as to the probability and severity of harm to the marine environment of such activities were insufficient.[87]

ITLOS did not explicitly specify that Articles 194(2) and 192 of UNCLOS are also closely linked with the precautionary approach. However, the same reasoning can be applied to understand stringent due diligence under those articles. Article 194(2) reflects the duty not to cause transboundary harm, which is now widely accepted as customary international law.[88] Comparing the duty not to cause transboundary harm with the preventive principle and the precautionary approach, the former is rooted in respecting State sovereignty, whereas the latter two seek to minimize environmental damage as an objective in itself.[89] Nevertheless, the preventive principle and the precautionary approach may encompass the duty not to cause transboundary harm, because their applications extend not only to transboundary harm but also to environmental damage within a State's own jurisdiction.[90]

In other words, the precautionary approach is a broader concept than the duty not to cause transboundary harm and can serve as a basis for understanding stringent due diligence under Article 194(2) of UNCLOS. Moreover, ITLOS implies that the obligations to prevent, reduce, and control pollution of the marine environment under Article 194 of UNCLOS constitute the main component of the obligation to protect and preserve the marine environment under Article 192.[91] Thus, implementing stringent due diligence obligations under Article 194 based on the precautionary approach may also satisfy the stringent due diligence obligation under Article 192.

Ultimately, State Parties having stringent due diligence obligations may be required to take all necessary measures to prevent marine pollution from anthropogenic GHG emissions, and to protect the marine environment from climate change impacts and ocean acidification, even if scientific evidence as to the probability and severity of the effects of causal activities is insufficient.

C. *Stringent Due Diligence and ILC's Draft Articles on Prevention*

Recommended by the United Nations General Assembly, ILC undertook the study on the topic of international liability for injurious consequences arising out of acts not prohibited by international law in the late 1970s.[92] This topic is intended to be established in the form of strict liability, which does not require an unlawful act and can be established based solely on a finding of causation leading to damage, and to be separated from the topic of State responsibility for internationally wrongful acts.[93]

The initial draft articles and commentaries prepared by the ILC Working Group were related to the principle of prevention and liability for compensation or other relief.[94] However, these issues were later separated into distinct documents, and ILC first adopted the final text of a draft preamble and articles on prevention of transboundary harm from hazardous activities, with commentaries.[95] Since it is originally rooted in strict liability, the articles in ILC's Draft Articles on Prevention also apply to "activities not prohibited by international law which involves a risk of causing significant transboundary harm through their physical consequences."[96]

ILC's Draft Articles on Prevention address the duties of prevention that have a nature of due diligence. Article 3 articulates that "[t]he state of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof."[97] The commentary clarifies that this obligation to take preventive or minimization measures is one of due diligence and relates to the conduct of the State of origin, which does not guarantee the total prevention of significant harm but requires the State to exert its best possible efforts to minimize the risk.[98]

It further explains that due diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures, in a timely fashion, to address them.[99] Additionally, the commentaries indicate that the standard of due diligence is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance and may change over time with technological changes and scientific developments, or in consideration of the economic level of States.[100]

The meaning of "stringent due diligence" emphasized by ITLOS can be inferred by drawing on the ideas of strictness and the preventive principle reflected in ILC's Draft Articles on Prevention. Hence, State Parties having stringent due diligence obligations may be required to take all necessary measures to prevent marine pollution from anthropogenic GHG emissions, and to protect the marine environment from climate change impacts and ocean acid-

87. *See id.*
88. *See* Sands, *supra* note 76, at 244-45.
89. *See id.* at 246.
90. *See id.*; *see also* Trouwborst, *supra* note 81, at 112.
91. *See* ITLOS Advisory Opinion on Climate Change, *supra* note 2, para. 188.
92. *See, e.g.*, G.A. Res. 3071 (XXVIII), para. 3(c) (Nov. 30, 1973); G.A. Res. 3315 (XXIX), para. 4(a) (Dec. 14, 1974); G.A. Res. 3495 (XXX), para. 4(b) (Dec. 15, 1975); G.A. Res. 31/97, para. 4(b) (Dec. 15, 1976); G.A. Res. 32/151, para. 7 (Dec. 19, 1977).
93. *See* Riccardo Pisillo Mazzeschi, *Forms of International Responsibility for Environmental Harm*, *in* International Responsibility for Environmental Harm 15, 16-17 (Francesco Francioni & Tullio Scovazzi eds., Graham & Trotman 1991).
94. *See* International Law Commission, Report on the Work of Its Forty-Eighth Session, U.N. Doc. A/51/10, paras. 98-99, at 78 (1996).
95. *See* International Law Commission, Report on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, paras. 91-92, at 145 (2001).
96. *Id.* art. 1, at 149.
97. *Id.* art. 3, at 153.
98. *See id.* cmt. 7, at 154.
99. *See id.* cmt. 10, at 154.
100. *See id.* cmts. 11, 13, at 154-55.

ification, even if the causal activities are not prohibited by international law.

IV. Conclusion

ITLOS interpreted the nature of Articles 192 and 194 of UNCLOS as stringent due diligence. While ITLOS seems to heighten the level of due diligence by using the term "stringent," it does not clarify what this means. Understanding stringent due diligence is crucial because ITLOS suggested that a responsibility claim can be established when there is a failure to enforce obligations under these two articles of UNCLOS. Given the strictness implied by the term "stringent," State Parties to UNCLOS having stringent due diligence obligations may be required to take all necessary measures to prevent marine pollution from anthropogenic GHG emissions, and to protect the marine environment from climate change impacts and ocean acidification, even if scientific evidence as to the probability and severity of the effects of causal activities is insufficient, and even if the activities are not prohibited by international law.