Transnational Environmental Law (2024) 1–22
doi:10.1017/S2047102524000207

TEL CAMBRIDGE UNIVERSITY PRESS

Due Regard for Future Generations? The No Harm Rule and Sovereignty in the Advisory Opinions on Climate Change[Ψ]

Caroline E. Foster

Faculty of Law, University of Auckland, Auckland (New Zealand)
Email: c.foster@auckland.ac.nz

Abstract

States have long been understood to have an obligation to protect the international legal rights and interests of others, consistent with the maxim *sic utere tuo ut alienum non laedas* (use what is yours in such a manner as not to injure that of another). As the world's population becomes more interdependent, this no harm obligation becomes more significant. Further, as knowledge increases about the consequences of human activity for the climate and the environment, the no harm obligation takes on greater relevance vis-à-vis the interests of the Earth's future populations. Future generations' legal interests have been recognized in the context of sustainable development and through the principle of intergenerational equity. The no harm rule requires that these interests be properly considered and addressed appropriately, commensurate with what is at stake. At a minimum, this may require avoidance of 'manifestly excessive adverse impacts'.

Keywords: Future generations; Prevention of harm; *Sic utere tuo ut alienum non laedas*; Intergenerational equity; Manifestly excessive adverse impacts; Unreasonableness

1. Introduction

The obligation of every state not knowingly to allow its territory to be used for acts contrary to the rights and interests of others is well established.[1] In the *Corfu Channel* case, the International Court of Justice (ICJ) held that 'a state must not permit the use of its territory for purposes injurious to the interests of other states in a manner contrary to international law'.[2] In *Island of Palmas* it was likewise held to follow from

Ψ This contribution is part of a collection of articles growing out of the ELTE-Aarhus Joint Workshop on 'Future Generations Litigation', held at the ELTE University in Budapest (Hungary) on 8–9 June 2023.

1 United Nations (UN) Secretary-General, 'Survey of International Law in relation to the Work of the International Law Commission', 10 Feb. 1949, UN Doc. A/CN .4/Rev.1, para. 57 (referring to 'the rule that a State must not permit the use of its territory for purposes injurious to the interests of other States in a manner contrary to international law').

2 *Corfu Channel (United Kingdom of Great Britain and Northern Ireland* v. *Albania)*, Judgment, 9 Apr. 1949, *ICJ Reports* (1949), pp. 4–37.

© The Author(s), 2024. Published by Cambridge University Press. This is an Open Access article, distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivatives licence (http://creativecommons.org/licenses/by-nc-nd/4.0), which permits non-commercial re-use, distribution, and reproduction in any medium, provided that no alterations are made and the original article is properly cited. The written permission of Cambridge University Press must be obtained prior to any commercial use and/or adaptation of the article.

https://doi.org/10.1017/S2047102524000207 Published online by Cambridge University Press

the concept of territorial sovereignty that states must protect other states' rights within their territories.[3]

The *Corfu Channel* no harm rule and the *sic utere tuo ut alienum non laedas* principle (use what is yours in such a manner as not to injure that of another) address how sovereigns must act in relation to the legal rights and interests of other states and their populations. When it comes to state conduct in relation to environmental harm, including anthropogenic climate change, do the *Corfu Channel* no harm rule and the *sic utere tuo ut alienum non laedas* principle mean that states may have to consider and respect the interests also of future populations? The Institut de Droit International has suggested that:

> [e]very state, when intervening on the basis of decisions taken in the exercise of its sovereignty in fields of activity where the effects of such decisions on the environment are clear, has the responsibility to ensure that activities within its jurisdiction or under its control do not cause damage which may affect the lives of the present and *future* generations.[4]

When we say that the *sic utere tuo* principle and the no harm rule require respect for the international legal interests of others, it seems reasonable that this requires conduct respecting the interests of others not only in the immediate present but also in terms of how our actions today will affect these interests in the future. Moreover, it could be argued that international law requires the interests of future generations to be given distinct respect considering in particular the unique threats posed by climate change.[5] The unique character of climate change, the severity of global disruption and suffering that it has begun to cause, the sudden and unpredictable aspects of its impact, together with the valuable opportunity available to states now to prevent long-lasting damage at scale are all relevant.

Although it is generally the rights and interests of other states that have been held to be protected by the no harm rule, there are several further reasons why the rule can also be regarded as requiring distinct consideration for the interests of future generations in the climate context. Firstly, at the level of principle, the core idea of the *sic utere tuo*

3 *Arbitral Award Rendered in Conformity with the Special Agreement Concluded on January 23, 1925 between the United States of America and the Netherlands relating to the Arbitration of Differences Respecting Sovereignty over the Island of Palmas (or Miangas)*, 2 *Reports of International Arbitral Awards* (*RIAA*) (1928), pp. 829–71, at 839. For commentary on the no harm rule as the other face of sovereignty see L.-A. Duvic-Paoli, *The Prevention Principle in International Environmental Law* (Cambridge University Press, 2018), p. 16, and in the context of preventing environmental harm pp. 50–1.

4 Institut de Droit International, 'Procedures for the Adoption and Implementation of Rules in the Field of Environment (Rapporteur F. Paolillo)', adopted at the Strasbourg Session, 4 Sept. 1997, Art. 6.1, available at: https://www.idi-iil.org/app/uploads/2017/06/1997_str_04_en.pdf (emphasis added).

5 Just as in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports* (1996), pp. 226–67, para. 29 (in which the ICJ remarked on the need to take into account the unique characteristics of nuclear weapons: 'in order correctly to apply to the present case the Charter law on the use of force and the law applicable in armed conflict, in particular humanitarian law, it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to *generations to come*' (emphasis added)).

https://doi.org/10.1017/S2047102524000207 Published online by Cambridge University Press

maxim is to respect the rights and interests 'of others'. Future generations can be argued to be such an 'other' or 'others' in the context of anthropogenic climate change. Future populations stand to experience the most severe harmful effects of cumulative greenhouse gas (GHG) emissions today and in the future. The physical harm that is being caused to the climate system increases relative to the period of time over which emissions continue without the necessary abatement, as does the unpredictability of the effects of climate change within the natural world. At the same time, the emissions reduction burden on future generations continues to grow, because the concentration of GHGs in the atmosphere is reversible only with prolonged effort over time. The evolving law on cooperation and the respect for others that duties of cooperation may entail may not be of direct assistance in relation to the interests of future populations who have not yet come into being and with whom cooperation is not possible.[6]

Secondly, future generations have specific international legal interests, which have been accepted within international law for some time. The theory of intergenerational equity is part of conventional international environmental law wisdom.[7] Commonly, it is regarded as inherent in the concept of sustainable development.[8] Brown Weiss, the intellectual progenitor of the theory, expressly observed that this opens the possibility that decisions 'deserve to be scrutinized from the point of view of their impact on future generations'.[9] Such interests may only be soft law interests, but arguably it is not necessary that they be hard law interests in order to ground an application of the *sic utere tuo* principle: they are nonetheless legally relevant interests.

Further, the no harm rule is a corollary of sovereignty and constrains the conduct of a responsible sovereign. Given this, might the ICJ remarks on the reasonable exercise of sovereignty, and how this may require states to avoid manifestly excessive adverse effects on the interests of others,[10] offer an indicium for establishing whether state conduct shows due regard for future generations' interests? If a state pursues a course of conduct that will not avoid manifestly excessive adverse impacts, this would seem to indicate a lack of due regard.

Section 1 of this article has introduced the article's enquiry. Section 2 assesses the applicability of the *sic utere tuo* principle and the no harm obligation in respect of future populations by looking into the concepts of sustainable development and intergenerational equity. Section 3 addresses the concept of due regard as an emerging global regulatory standard, how it may apply as an aspect of the *sic utere tuo* principle

---

6 N. Craik, 'The Duty to Cooperate in International Environmental Law: Constraining State Discretion through Due Respect' (2019) 30(1) *Yearbook of International Environmental Law*, pp. 1–23, at 22.

7 *Whaling in the Antarctic (Australia* v. *Japan; New Zealand Intervening)*, Judgment, 31 Mar. 2014, *ICJ Reports* (2014), Separate Opinion of Judge Cançado Trindade, pp. 348–82, para. 47.

8 A. Boyle, C. Redgwell & P. Birnie, *Birnie, Boyle and Redgwell's International Law and the Environment* (Oxford University Press, 4th edn, 2021), p. 122.

9 E. Brown Weiss, 'Our Rights and Obligations to Future Generations for the Environment' (1990) 84(1) *American Journal of International Law*, pp. 198–207, at 206. See also the classic work, E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational, 1989).

10 See, e.g., *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, Judgment, 13 July 2009, *ICJ Reports* (2009), pp. 213–72; see also further cases, discussed below.

https://doi.org/10.1017/S2047102524000207 Published online by Cambridge University Press

and the no harm obligation, and what due regard may require. This includes an examination of the cases decided by international courts and tribunals indicating that the good faith exercise of sovereignty avoids manifestly excessive adverse effects on the legal rights and interests of others. It also includes a discussion of how due regard sits with states' customary international environmental law obligations of notification, consultation, and environmental impact assessment. Section 4 turns to the requests for an advisory opinion on climate change put to the ICJ,[11] the International Tribunal for the Law of the Sea (ITLOS),[12] and the Inter-American Court of Human Rights (IACtHR).[13] There is scope for all three advisory opinions, and that of the ICJ in particular, to help in setting the stage for important developments in law and policy on the problem of future populations' interests in international law, including through the *sic utere tuo* principle and the no harm obligation.

2. Intergenerational Equity

International law recognizes the legal interests of future generations, *inter alia* and in a general way, through the principle of sustainable development and the theory of intergenerational equity. These legal interests arguably belong to 'others' in the sense embraced by the *sic utere tuo* principle and for the purposes of applying the no harm obligation.

The 1972 Stockholm Declaration formally recognized a responsibility to future generations in Principle 1.[14] As expressed in 1987 in the Brundtland Report, 'Our Common Future', sustainable development is development that 'meets the needs of the present, without compromising the ability of future generations to meet their own needs'.[15] The core elements of sustainable development are commonly understood

[11] UN General Assembly (UNGA), 'Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in respect of Climate Change', 1 Mar. 2023, UN Doc A/77/L.58.

[12] 'Request for Advisory Opinion submitted to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law', 12 Dec. 2022.

[13] 'Request for an Advisory Opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile', 9 Jan. 2023.

[14] Declaration of the UN Conference on the Human Environment, adopted by the UN Conference on Environment and Development, Stockholm (Sweden), 5–16 June 1972, UN Doc. A/Conf.48/14/Rev. 1, available at: http://www.un-documents.net/aconf48-14r1.pdf. See also, on an integrated approach to development, Principle 13. The idea that environmental policies 'should be integrated with development planning' had featured centrally in the 1971 Founex Report by a group of experts convened by Conference Secretary-General Maurice Strong, prior to the 1972 Stockholm Conference: 'The Founex Report on Development and Environment', Founex (Switzerland), 4–12 June 1971, available at: https://www.mauricestrong.net/index.php?option=com_content&view=article&id=149&Itemid=75. See also V. Barral & P. Dupuy, 'Principle 4: Sustainable Development through Integration', in J.E. Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, 2015), pp. 157–8; UNGA Resolution 37/7, 'World Charter for Nature', 28 Oct. 1982, UN Doc. A/37/51.

[15] UNGA, 'Report of the World Commission on Environment and Development: Our Common Future', 4 Aug. 1987, UN Doc. A/42/427, para. 27. See also H.C. Bugge, '1987–2007: "Our Common Future" Revisited', in H.C. Bugge & C. Voigt (eds), *Sustainable Development in International and National Law* (Europa Law, 2008), pp. 3–20.

https://doi.org/10.1017/S2047102524000207 Published online by Cambridge University Press

to include integration of environmental protection and economic development, the right to development, sustainable utilization and conservation of natural resources, *intergenerational equity*, intra-generational equity, and procedural elements including environmental impact assessment, public participation in environmental decision making, and access to information.[16] The 1992 Rio Declaration held that '[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'.[17] Importantly, too, Principle 27 of the Rio Declaration and Chapter 39 of Agenda 21 called for further development of the law in the field of sustainable development.[18] The ICJ endorsed the principle of sustainable development in the 1997 *Gabčikovo-Nagymaros Project (Hungary* v. *Slovakia)* case:

> Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when states contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of *sustainable development*.[19]

With the adoption of the United Nations (UN) Sustainable Development Goals (SDGs) in 2015, following on the heels of the Millenium Development Goals (MDGs), sustainable development has blossomed into a highly faceted kaleidoscopic concept.

Boyle and Redgwell identify the core point: 'While recognising that the right to pursue economic development is an attribute of a state's sovereignty over its own natural resources and territory, it cannot lawfully be exercised without regard for the detrimental impact on human rights or the environment'.[20] Similarly, remarks of leading authorities show that the principle of sustainable development strongly suggests that states must have due regard for the interests of future generations. Judge Weeramantry used the language of 'due regard' for environmental considerations in envisaging the implementation of the principle of sustainable development, observing

[16] P. Sands et al., *Principles of International Environmental Law* (Cambridge University Press, 4th edn, 2018), p. 219 (emphasis added). On the procedural elements see Boyle, Redgwell & Birnie, n. 8 above, pp. 117–24.

[17] Rio Declaration on Environment and Development, adopted by the UN Conference on Environment and Development, Rio de Janeiro (Brazil), 3–14 June 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I; Principle 3. For commentary see C. Molinari, 'Principle 3: From a Right to Development to Intergenerational Equity', in Viñuales, n. 14 above, pp. 139–56, 141–3.

[18] Boyle, Redgwell & Birnie, n. 8 above, p. 125.

[19] *Gabčikovo-Nagymaros Project (Hungary* v. *Slovakia*), Judgment, 25 Sept. 1997, *ICJ Reports* (1997), pp. 7–84, para. 140 (emphasis added).

[20] Boyle, Redgwell & Birnie, n. 8 above, p. 116.

https://doi.org/10.1017/S2047102524000207 Published online by Cambridge University Press

that the components of the principle come from 'well-established areas of international law – human rights, state responsibility, environmental law, economic and industrial law, equity, territorial sovereignty, abuse of rights, good neighbourliness'.[21] Sands and his co-authors state that sustainable development reflects a range of procedural and substantive commitments and obligations – including 'the need *to take into consideration* the needs of present and future generations'.[22] Even Lowe, sceptical of the normative force of sustainable development, indicates that 'to the extent that international law obliges States to take decisions having regard to the interests of future generations, decisions made in avowed disregard of these interests might be held to be invalid'.[23] Lowe also appears to allow for the practical normative effect of sustainable development when he observes that the concept of sustainable development plainly precludes the possibility of a tribunal deciding a case by upholding a property owner's unfettered right to utilize property in a particular way 'without any regard for the serious and irreversible harm caused by that particular use'.[24]

Sands and co-authors have suggested that sustainable development 'has entered the corpus of customary international law',[25] but this has yet to be formally established. The force of the commitments that sustainable development entails in respect of future generations' legal interests would be increased if sustainable development were to receive such recognition. However, this article takes the position that, regardless of whether the principle of sustainable development and the theory of intergenerational equity are soft law or hard law, they embody international law's consistent recognition of the interests of future generations. This recognition provides an anchor for the broader application of the *sic utere tuo* principle.

3. Due Regard

In the light of their recognized legal interests, this article considers the application of the *sic utere tuo* principle and the no harm obligation vis-à-vis future generations, investigating whether and how the concept of due regard may serve as a vehicle for their respect. Section 3.1 reviews the use of the concept of due regard in international law to date and examines its status as an emerging global regulatory standard.[26]

21 *Gabčikovo-Nagymaros Project*, n. 19 above, Separate Opinion of Judge Weeramantry, pp. 88–119, at 95; see also pp. 89, 98, 104 at footnote, 107.

22 Sands et al., n. 16 above, p. 229 (emphasis added).

23 V. Lowe, 'Sustainable Development and Unsustainable Arguments', in A. Boyle & D. Freestone (eds), *International Law and Sustainable Development* (Oxford University Press, 1999), pp. 19–39, at 29, specifically footnote 12.

24 Lowe, n. 23 above, p. 34. See also Boyle, Redgwell & Birnie, n. 8 above, pp. 1, 7, as per text accompanying n. 8 above.

25 Sands et al., n. 16 above, p. 219 (citing P. Sands, 'International Courts and the Application of the Concept of Sustainable Development' (1999) 3 *Max Planck Yearbook of United Nations Law*, pp. 389–407). See Molinari, n. 17 above, p. 146.

26 C.E. Foster, *Global Regulatory Standards in Environmental and Health Disputes: Regulatory Coherence, Due Regard and Due Diligence* (Oxford University Press, 2021). This book investigates three emerging global regulatory standards: due regard, due diligence, and coherent relationships between regulatory measures and their objectives.

https://doi.org/10.1017/S2047102524000207 Published online by Cambridge University Press

Section 3.2 discusses how, if due regard were accepted as an aspect of the no harm obligation and the *sic utere tuo* principle, it might operate alongside states' customary international environmental law obligations of due diligence, as well as those of notification, consultation, and environmental impact assessment. Section 3.3 then considers what due regard may require both procedurally and substantively where future generations' legal interests are implicated in the context of the no harm obligation and the *sic utere tuo* principle. This part examines the international cases indicating that the good faith exercise of sovereignty will avoid manifestly excessive adverse effects on the legal rights and interests of others.

3.1. Due Regard as an Emerging Global Regulatory Standard

The concept of due regard appears to be an emerging global regulatory standard.[27] International courts and tribunals have found international legal rules to call for due regard in a range of cases across many different fields of international law, including world trade law and international investment law. The Appellate Body of the World Trade Organization (WTO) made it clear early in its jurisprudence that measures falling within the exceptions found in Article XX of the 1994 General Agreement on Tariffs and Trade (GATT)[28] must be applied reasonably, with *due regard* both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.[29] The chapeau to Article XX GATT has been clearly identified both as an expression of the principle of good faith[30] and as a tool to prevent abuse of the exceptions specified in the subparagraphs to Article XX.[31] Failure to have regard for a measure's cost to others,[32] or to provide them with an opportunity to be heard,[33] may undermine a respondent's Article XX defences.[34] Certain recent regional trade negotiations have since made explicit a requirement to consider the costs, benefits, and distributional impacts of proposed new regulations.[35] Due regard is further referenced in international investment treaty law. Perhaps understandably, investment arbitral tribunals referencing due regard have tended to couch the need for host states to

[27] Ibid.

[28] Marrakesh (Morocco), 15 Apr. 1994, in force 1 Jan. 1995, available at: http://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm.

[29] *United States – Standards for Reformulated and Conventional Gasoline*, WTO Appellate Body Report, WTO Doc. WT/DS2/AB/R, 29 Apr. 1996, p. 22 (emphasis added) (*US – Gasoline*). See also *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Appellate Body Report, WTO Doc. WT/DS58/AB/R, 12 Oct. 1998, paras 150–1 (*US – Shrimp*). See also S. Shlomo-Agon & E. Benvenisti, 'The Law of Strangers: The Form and Substance of Other-Regarding International Adjudication' (2018) 68 *University of Toronto Law Journal*, pp. 598–660.

[30] *US – Shrimp*, n. 29 above, para. 158. See also *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO Appellate Body Report, WTO Doc. WT/DS332/AB/R, 3 Dec. 2007, para. 215.

[31] *US – Shrimp*, n. 29 above, para. 158; *US – Gasoline*, n. 29 above, p. 22.

[32] *US – Gasoline*, n. 29 above, p. 3.

[33] *US – Shrimp*, n. 29 above, para. 180.

[34] Foster, n. 26 above, pp. 330–1.

[35] Consider the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Santiago (Chile), 8 Mar. 2018, in force 30 Dec. 2018, Art. 25.5.2, available at: https://www.iilj.org/wp-content/uploads/2018/03/CPTPP-consolidated.pdf.

https://doi.org/10.1017/S2047102524000207 Published online by Cambridge University Press

give due consideration to the burdens that their intended measures will impose in terms of their effects on 'investments'.[36]

Due regard has a long history in the law of watercourses and the law of the sea. Classically, the Tribunal in the *Lac Lanoux* arbitration held that:

> [a]ccording to the rules of good faith, the upstream State is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own.[37]

In the context of the UN Convention on the Law of the Sea (UNCLOS),[38] the language of due regard was settled during the negotiations on the legal regime for the high seas rather than referencing due consideration as a tool for balancing states' competing interests.[39] The ITLOS ruling in *Chagos Marine Protected Area Arbitration (Republic of Mauritius* v. *United Kingdom)* provides a recent articulation of what both good faith (as a rule of international law applying under Article 2(3) UNCLOS, covering the territorial sea) and due regard (as applicable under UNCLOS in the exclusive economic zone (EEZ)) may equally require in practice.[40] The ITLOS considered that the ordinary meaning of 'due regard' in UNCLOS called for the United Kingdom (UK) to have such regard for the rights of Mauritius as is called for 'by the circumstances and by the nature of those rights'.[41] The Tribunal identified factors influencing the level of regard required, which included 'the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the [UK], and the availability of alternative approaches'.[42] However, the Tribunal declined to find any 'universal rule of conduct' or uniform obligation in this formulation.[43] Due regard has been carried through in the text of the new Implementing Agreement under UNCLOS on the

[36] *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc.* v. *Argentine Republic*, International Centre for Settlement of Investment Disputes (ICSID), Case No. ARB/02/1, Decision on Liability, 3 Oct. 2006, paras 158, 162, available at: https://www.italaw.com/cases/621. See also *Methanex Corporation* v. *United States*, Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits, 3 Aug. 2005, Part III, Chapter A, paras 13–6, available at: https://www.italaw.com/cases/documents/696. See further Foster, n. 26 above, pp. 258–62.

[37] *Lake Lanoux Arbitration (France* v. *Spain)*, 16 Nov. 1957, 12 *RIAA* (1957), pp. 281–317, para. 22. Instancing due regard beyond water law, but also in the interstate arbitral setting, see *Arbitration between the Republic of Croatia and the Republic of Slovenia*, Final Award, 29 June 2007, Permanent Court of Arbitration (PCA), Case No. 2012-04, paras 1122, 1134, available at: https://pca-cpa.org/en/cases/3.

[38] Montego Bay (Jamaica), 10 Dec. 1982, in force 16 Nov. 1994, available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm.

[39] J. Gaunce, 'On the Interpretation of the General Duty of "Due Regard"' (2018) 32(1) *Ocean Yearbook Online*, pp. 27–59. See UNCLOS, n. 38 above, Arts 87(2), 56(2), 58(3).

[40] *Chagos Marine Protected Area Arbitration (Republic of Mauritius* v. *United Kingdom)*, Award, 18 Mar. 2015, PCA Case No. 2011-03, available at: https://pca-cpa.org/en/cases/11 (*Chagos MPA*).

[41] Ibid., para. 519.

[42] Ibid.

[43] Ibid.

https://doi.org/10.1017/S2047102524000207 Published online by Cambridge University Press

Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (BBNJ Agreement).[44]

Due regard is found also in a range of further international legal contexts, including space law, where due regard for the interests of future generations is expressly referenced in the text of the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Treaty),[45] according to which '[d]ue regard shall be paid to the interests of present and future generations'.[46] Due regard also featured in the ICJ's reasoning in *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening)*.[47] Like the Moon Treaty, the International Convention for the Regulation of Whaling (ICRW)[48] explicitly identifies future generations' interests. As referenced in the Court's judgment, the first preambular paragraph to the ICRW refers to '[r]ecognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks'.[49] The *Whaling in the Antarctic* judgment turned on the Court's identification of the requirement for a reasonable relationship between the design and implementation of a scientific whaling programme and its objectives.[50] In determining whether such a relationship existed, the Court held, *inter alia*, that a permitting state had a duty to cooperate with the International Whaling Commission (IWC) and its Scientific Committee and to give due regard to its recommendations calling for assessment of the feasibility of non-lethal scientific research methods.[51] Although the interests of future generations were not central to the case, in this respect it is as though the IWC acted as a conduit for the interests both of the parties to the Convention and of future generations.

The notion of due regard serves a variety of functions in the cases canvassed above. As a legal standard, it frequently provides international courts and tribunals with a steady but flexible reference point in situations where the applicable international legal rules are relatively broad and unspecific, helping to enable the law's consistent

44 New York, NY (United States (US)), 19 June 2023, not yet in force, Arts 11(3), 22(5), 44(4), available at: https://www.un.org/depts/los/bbnj.htm.

45 New York, NY (US), 5 Dec. 1979, in force 11 July 1984, available at: https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/intromoon-agreement.html.

46 Moon Treaty, ibid., Art. 4. See also ibid., Arts 2 and 15(3). For use of the concept of due regard see also Art. IX of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty), adopted 19 Dec. 1966, entry into force 10 Oct. 1967, available at: https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/intro-outerspacetreaty.html; Principle 6 of the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, London (United Kingdom (UK)), Moscow (Russia), Washington, DC (US), 27 Jan. 1967, in force 10 Oct. 1967, available at: https://treaties.un.org/doc/Publication/UNTS/Volume%20610/volume-610-I-8843-English.pdf; Principle IV of UNGA Resolution 41/65, 'Principles relating to Remote Sensing of the Earth from Outer Space', 3 Dec. 1986, UN Doc. A/RES/41/65, available at: https://www.unoosa.org/pdf/gares/ARES_41_65E.pdf.

47 *Whaling in the Antarctic*, n. 7 above, Judgment, pp. 226–300.

48 Washington, DC (US), 2 Dec. 1946, in force 10 Nov. 1948, available at: https://iwc.int/convention.

49 *Whaling in the Antarctic*, n. 7 above, Judgment, p. 251, para. 56.

50 Exemplifying the emerging global regulatory standard of regulatory coherence, which requires coherent relationships between measures and their objectives, see Foster, n. 26 above, pp. 24–6, 51–87, 129–31, 135–275.

51 *Whaling in the Antarctic*, n. 7 above, Judgment, paras 83, 137, 144.

https://doi.org/10.1017/S2047102524000207 Published online by Cambridge University Press

application across diverse situations.[52] Due regard facilitates the concurrent existence of legal rights and interests that are in tension with one another. The cases appear to be informed both by the principle of good faith, as mentioned above, and the abuse of rights doctrine that traditionally applies in certain situations where concurrently existing legal rights and interests are to be reconciled. The abuse of rights doctrine has long been considered as a means by which adjudicators may convert absolute rights into less absolute or 'relative' rights in the light of others' interests.[53] However, the terminology of 'abuse of rights' may be unpalatable because of the connotations of the term 'abuse'.[54] The due regard rubric is a potentially more positive and constructive avenue, perhaps employed together with the notion of the good faith exercise of sovereignty.

3.2. Relationship of Due Regard with the Rules of Customary International Environmental Law

As an emerging global regulatory standard appearing across diverse fields of international law, including those considered in Section 3.1, due regard is a concept of broad application. In terms of the role it is playing in the evolution of international law, the concept may be helping to operationalize good faith and avoidance of the abuse of rights as general principles of law. By pointing to practical means by which states can conduct themselves consistently with these principles, the concept of due regard may help in fitting international law for a new era of global physical and intertemporal interdependence. As seen in Section 3.1, the concept has a good pedigree, and accordingly offers a doctrinal legal tool of potentially considerable significance for the development of international law. Further, the concept of due regard has a deep theoretical appeal, resonating with contemporary 'other-regarding' theories of sovereignty.[55]

The applicability of the concept of due regard is not limited to situations calling for action to prevent harm, and it may apply in many contexts where a sovereign must act with respect for the interests of others in terms of reconciling these with its own. This can be seen in how the concept has featured in the various settings of water law, oceans law, and international trade policy decision making, as well as legal and policy decisions affecting international investment. One wonders about other types of situation too, for instance, whether due regard could be required if a state unexpectedly were to have to make a decision affecting populations other than its own in a remote location or under severe time pressure, making consultation impossible. Examples could include situations potentially arising at the human-artificial intelligence interface,

[52] Foster, n. 26 above, pp. 4–5.

[53] G. Schwarzenberger, 'The Principle of Good Faith', in The Hague Academy of International Law (ed.), *Collected Courses of the Hague Academy of International Law*, Vol. 87 (Nijhoff, 1955), pp. 320–24. See also H. Lauterpacht, *The Function of Law in the International Community* (Clarendon Press, 1933), Ch. XIV.

[54] J. Paulsson, *The Unruly Notion of Abuse of Rights* (Cambridge University Press, 2020).

[55] E. Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107(2) *American Journal of International Law*, pp. 295–333.

https://doi.org/10.1017/S2047102524000207 Published online by Cambridge University Press

in space or in various places cut off from communication. Further, the concept of due regard may apply not only in relation to the conduct of sovereigns, but also other entities exercising public authority, including intergovernmental organizations. It may be that international regulatory bodies are expected to give due consideration to the proposals and interests of member states. For example, the Review Panel established under Article 17 and Annex II of the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (SPRFMO) in 2018[56] recommended deliberative and specific discussion of the interests of certain states, in this instance developing states.[57]

Accordingly, due regard contrasts with the concept of due diligence, itself also an emerging global regulatory standard.[58] Due regard requires states actively to consider the effects of their decisions and conduct on others, and to act in ways that take these into account. Due diligence is a standard that requires states to make their best possible efforts under obligations to prevent harm from activities within their jurisdiction or control. For instance, the due diligence standard attaches to the customary international environmental law obligation to prevent harm to the environment of other states and areas beyond national jurisdiction recognized by the ICJ in the 1996 *Nuclear Weapons* advisory opinion.[59] The standard of due diligence has a link of its own back to the no harm rule. The customary international law obligation to prevent harm to the environment evolved out of the broader *sic utere tuo* principle and the no harm rule.[60] The ICJ has observed that the customary international law obligation for states to prevent environmental harm from activities under their jurisdiction or control 'has its origins' in the due diligence that is owed by every state in respect of the rights and interests of others.[61] The due diligence standard is also

[56] Auckland (New Zealand), adopted 14 Nov. 2009, in force 24 Aug. 2012, available at: https://treaties.un.org/doc/Publication/UNTS/Volume%202899/v2899.pdf.

[57] Proceedings conducted by the Review Panel established under the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean with regard to the Objection by the Republic of Ecuador to a Decision of the Commission of the South Pacific Regional Fisheries Management Organisation (CMM 01-2018), Findings and Recommendations of the Review Panel, 5 June 2018, PCA Case No. 2018-13, paras 124–5, available at: https://pca-cpa.org/en/cases/156; as envisaged by New Zealand at para. 75. For discussion see Foster, n. 26 above, p. 98.

[58] Foster, ibid.

[59] N. 5 above, para. 29 ('The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment'), iterated in the *Gabčikovo-Nagymaros Project*, n. 19 above, para. 53, and in *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Judgment, 20 Apr. 2010, *ICJ Reports* (2010), pp. 14–107, para. 101. See also *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, 16 Dec. 2015, *ICJ Reports* (2015), pp. 665–742, para. 118. See also, previously, *Trail Smelter Arbitration (United States* v. *Canada)*, Award of Arbitral Tribunal, 16 Apr. 1938, 3 *RIAA* (1941), pp. 1905–82, at 1911–37; Stockholm Declaration, n. 14 above, Principle 21; Rio Declaration, n. 17 above, Principle 2.

[60] M.N. Shaw, *International Law* (Cambridge University Press, 8th edn, 2017), pp. 645–7; Sands et al., n. 16 above, p. 207.

[61] *Pulp Mills*, n. 59 above, para. 101 (where the Court points 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).

https://doi.org/10.1017/S2047102524000207 Published online by Cambridge University Press

commonly applied in respect of other preventive obligations in international environmental law, the law of the sea, and beyond.[62]

Due regard and due diligence may come to bear on a situation simultaneously, and also in combination with other global regulatory standards. Although they may overlap, requirements for due regard will not replace due diligence. However, the due regard and due diligence standards may be mutually informing. Analytical procedures required by either may be useful for determining compliance with the other. Equally, compliance with the freestanding customary international environmental law obligations of notification, consultation, and environmental impact assessment, as well as obligations of cooperation where they may apply, could go a considerable way in helping a state to fulfil requirements to have due regard for the interests of others.

Taking into account all these points, due regard can be understood as more than the 'temporal' dimension of due diligence.[63] In addition, it bears considering that, while due diligence obligations are often understood as obligations of conduct, the due regard standard may involve an obligation of result. That is to say, more than best efforts to afford due regard might be required. A state or other entity subject to a due regard obligation will potentially have to be able to show that it has engaged in appropriate analytical processes and that it has reached decisional outcomes consistent with practical respect for the interests of others, not only that it has exerted itself to these ends.

3.3. *What Due Regard May Require under the* Sic Utere Tuo *Principle and the No Harm Obligation*

There has been little adjudicatory elaboration of what due regard may require procedurally or substantively, apart from in the *Chagos Marine Protected Area* arbitration in the law of the sea setting.[64] Procedurally, due regard calls for respect for the interests of others in the form of appropriate analysis and evaluation of a situation, with suitable representation for those interests in decision making depending on the context. Substantively, the term 'regard' implies also a respect for the interests at stake that takes practical form, that is grounded in their meaningful consideration, weights these interests accordingly, and adopts policies and pathways forward to reflect this.[65] Regard that is 'due' will correlate with these factors. In the context of the *sic utere tuo* principle and the no harm obligation, and perhaps beyond, it may also be possible that there is a minimum substantive dimension to due regard. The no harm obligation is understood in international law as a corollary of sovereignty, and there are indications

[62] Foster, n. 26 above, pp. 89–131. See, more broadly, A. Peters, 'The Rise of Due Diligence as a Structural Change of the International Legal Order', Keynote Address to the 9th Annual Cambridge International Law (CILJ) Conference, webinar 30 Apr. 2020, available at: https://www.youtube.com/watch?v=hjWg1-2VYd4. See also, more broadly, H. Krieger, A. Peters & L. Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford University Press, 2020).

[63] Cf. C. Voigt, 'The Power of the Paris Agreement and International Climate' (2023) 32(2) *Review of European, Comparative and International Environmental Law*, pp. 237–49.

[64] *Chagos MPA*, n. 40 above.

[65] Foster, n. 26 above, pp. 27–8, 89–99, 323–37.

https://doi.org/10.1017/S2047102524000207 Published online by Cambridge University Press

that sovereignty in an interdependent world may require the avoidance of manifestly excessive adverse impacts for others.

The view that sovereignty may be less absolute than in previous periods has been on the horizon since at least the mid-20th century.[66] This perspective resonates through a number of ICJ decisions, with supporting authority from international arbitral decisions.[67] The notion that the proper exercise of sovereignty will avoid manifestly excessive adverse effects can be glimpsed, in particular, in decisions of the ICJ. This avoidance of the 'manifestly excessive adverse effects' test might be of assistance in helping to identify situations in which a state has failed to have due regard for the interests of future generations and acted inconsistently with the no harm rule and the *sic utere tuo* principle. While neither this ICJ practice nor international arbitral practice specifically relates to the no harm rule, the practice does provide insight into the current evolution of sovereignty in international law, including where the exercise of sovereignty will affect the interests of others.

International Court of Justice

The ICJ judgment in the dispute over navigational and related rights between Costa Rica and Nicaragua in 2009 concerned the exercise of Nicaragua's sovereignty, which was subject to bilateral treaty commitments in respect of Costa Rica's navigational rights. The Court required that Nicaraguan regulation (i) should not render impossible or substantially impede the exercise of Costa Rica's right of free navigation; (ii) should have a legitimate purpose (such as safety of navigation, crime prevention, public safety, and border control, or environmental protection); (iii) should not be discriminatory; and (iv) should not be unreasonable, which the Court said would mean that its negative impact on the exercise of the right in question must not be manifestly excessive.[68] It appears that the Court may have considered these characteristics to represent the essence of the territorial sovereign's regulation-making power, as the Court stated explicitly in relation to Nicaragua's obligation to notify the adoption of regulations.[69]

Relatedly, we could mention here the 2015 decision of the UNCLOS Annex VII Tribunal in the *Arctic Sunrise Case (Kingdom of the Netherlands* v. *Russian Federation)*,[70] which referred to criteria that it envisaged would govern the appropriateness of the exercise of a coastal state's regulatory powers to protect its sovereign rights. Specifically, the Tribunal referred to reasonableness, necessity, and proportionality, as referenced in the pleadings of the Netherlands, though there was no call to apply these criteria in the circumstances of the case.[71] There remains scope for reservation about the application of the idea of proportionality testing referred to by the

[66] Foreshadowing this trajectory in international legal development; see P. Allott, 'Power Sharing in the Law of the Sea' (1983) 77(1) *American Journal of International Law*, pp. 1–30.

[67] As discussed in the next section.

[68] *Costa Rica* v. *Nicaragua*, n. 10 above, paras 13, 89.

[69] Ibid., para. 96.

[70] *The Arctic Sunrise Arbitration* (*Kingdom of the Netherlands* v. *Russian Federation*), Arbitral Award on the Merits, 14 Aug. 2015, PCA Case No. 2014-02, available at: https://pca-cpa.org/en/cases/21.

[71] Ibid., para. 191. See also Foster, n. 26 above, pp. 67–8.

https://doi.org/10.1017/S2047102524000207 Published online by Cambridge University Press

Netherlands. As an international legal tool, proportionality intrudes into sovereignty more directly and overtly than due regard.[72] Proportionality may rather be a concept to be reserved for application, with the consent of the parties and informed agreement of their citizenry, in the context of regional integration, as in the European Union, or in human rights law, as appropriate.[73]

Moving away from the question of proportionality, one question arising is whether the requirement cast in these cases as the avoidance of unreasonableness applies only when a state is exercising a discretionary power under a treaty. In the 2020 case of *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*,[74] the ICJ emphasized that it has 'repeatedly stated that, where a state possesses a discretionary power under a treaty, such a power must be exercised reasonably and in good faith'.[75] This is consistent with Bin Cheng's work on general principles of law: 'Where the right confers upon its owner a discretionary power, this must be exercised honestly, sincerely, reasonably, in conformity with the spirit of the law and with due regard to the interests of others'.[76] Bin Cheng's text is ambiguous as to whether the same principles apply also where a state is exercising its rights under general international law.[77] There are indications that they may apply. Indeed, we can question whether many of the cases reviewed above really concern discretionary powers under a treaty or rather, more broadly, simply the exercise of the sovereignty naturally enjoyed by states, and in some cases reserved from the scope of a treaty.

If the cases reviewed actually concern the exercise of sovereignty rather than of discretionary powers under treaties, then the Court's dicta on the ways in which the states in question were required to act may apply generally in respect of sovereign conduct, and not only where states exercise discretionary powers under treaties. This seems to be the case in *Navigational Rights*, as considered above. The same appears to be the position in respect of the *Whaling in the Antarctic* case. Annex VIII of the IRCW[78] is worded in such a way as to preserve the sovereign freedom of a state party to engage in permitted scientific whaling. Specifically, Article VIII(1) ICRW is worded as a savings clause:

> *Notwithstanding anything contained in this Convention* any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and

[72] Foster, n. 26 above, pp. 247–75; 323–37.

[73] See further C.E. Foster, 'Why Due Regard is More Appropriate than Proportionality Testing in International Investment Law' (2022) 23(3) *Journal of World Trade and Investment*, pp. 388–416.

[74] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, Judgment, 11 Dec. 2020, *ICJ Reports* (2020), pp. 300–39.

[75] Ibid., para. 73 (citing *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America)*, Judgment, 27 Aug. 1952, *ICJ Reports* (1952), pp. 176–214, at 212; and *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*, Judgment, 4 June 2008, *ICJ Reports* (2008), pp 177–247, para. 145).

[76] B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens, 1953), p. 136.

[77] Ibid., pp. 130–1.

[78] N. 48 above.

https://doi.org/10.1017/S2047102524000207 Published online by Cambridge University Press

> subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.[79]

The relevant powers in *Immunities and Criminal Proceedings* similarly appear not so much as discretionary powers under a treaty but powers or freedoms that exist independently of the treaties concerned, flowing from territorial sovereignty and a state's governmental capacity as sovereign. The specific point at issue in the *Immunities* case was the power of a receiving state to object to a sending state's designation of the premises of its diplomatic mission.[80] Article 2 of the Vienna Convention on the Law of Treaties (VCLT)[81] provides that the establishment of diplomatic relations between states and of permanent diplomatic missions is to take place by mutual consent. Yet, so far as the receiving state is concerned, it could be argued that this provision merely safeguards the sovereign power that a territorial state has, in any event, over its own territory. Consistent with this, the Court concluded that, provided any objection to the designation of a mission was communicated in a timely manner, and was not arbitrary or discriminatory, a property would not acquire the status of a mission. Thus, *Navigational Rights*, *Whaling*, and *Immunities* are all cases where it would appear that it is sovereign freedom that has been exercised rather than a discretionary power of a state under a treaty. It is true that in the *Navigational Rights* and *Immunities* cases, sovereign freedom is being exercised in relation to legal interests protected by a legal right accepted as belonging to another.

In the 2023 case *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)*[82] Iran successfully challenged United States (US) sanctions. This case differs a little from the cases above. Here there was a treaty provision expressly committing the two governments to 'refrain from applying unreasonable or discriminatory measures that would impair the acquired rights and interests' of the other party's nationals and companies.[83] However, the *Certain Iranian Assets* case is important for another reason. The parties' Treaty of Amity involved an express commitment to refrain from unreasonable conduct,[84] and the ICJ found that 'a measure is unreasonable if its adverse impact is manifestly excessive in relation to the purpose pursued',[85] also requiring this to be a legitimate public purpose.[86] The relevant US legislation and its

[79] Emphasis added. Note that Art. XX GATT (n. 28 above) is also worded as a savings clause.

[80] *Immunities and Criminal Proceedings*, n. 74 above, para. 73.

[81] Vienna (Austria), 23 May 1969, in force 27 Jan 1980, available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf.

[82] *Costa Rica* v. *Nicaragua*, n. 10 above, and *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America*), Judgment, 30 Mar. 2023, available at: https://www.icj-cij.org/case/164.

[83] Art. IV(1), second clause, of the parties' Treaty of Amity, Economic Relations and Consular Rights, Tehran (Iran), 15 Aug. 1955, in force 16 June 1957, available at: https://treaties.un.org/pages/showdetails.aspx?objid=0800000280142196.

[84] Ibid., Art. VI(1).

[85] *Certain Iranian Assets*, n. 82 above, para. 149.

[86] Ibid., para. 147.

https://doi.org/10.1017/S2047102524000207 Published online by Cambridge University Press

application failed this test.[87] The case is significant in the context of this article's enquiry because it employs the term 'not manifestly excessive', which was the phrase used by the ICJ in *Navigational Rights* to describe limits on a sovereign's regulation-making power. There may be a pattern emerging here in how the Court articulates the unreasonable exercise of sovereignty in matters that may affect the rights and interests of others.

International arbitral decisions

Three arbitral awards also support the idea that the good faith exercise of sovereignty will respect certain limitations in the light of the interests of others. The *North Atlantic Coast Fisheries* arbitration of 1910 addressed a dispute over the extent of British regulatory authority over fisheries off the coast of Canada and Newfoundland,[88] in which the parties' bilateral treaty of 1818 had provided that 'the inhabitants of the United States shall have forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind'.[89] The Tribunal was clear that the right to make regulations for these fisheries, without the consent of the US, was inherent in the sovereignty of Great Britain, even though the exercise of this regulatory power was limited by the parties' bilateral treaty.[90] The treaty grant of fishing rights by the UK to US fishermen was understood to subject them to the fisheries regulation of Great Britain, Canada, or Newfoundland. This holding was subject to the British good faith obligation to ensure these regulations were reasonable.

The Tribunal considered that regulations would be reasonable if they were appropriate or necessary for the protection and preservation of the fisheries, or desirable or necessary on grounds of public order and morals without unnecessarily interfering with the fishery itself, and in either case equitable and fair as between local and American fishermen.[91] The Tribunal took into account specific concessions in these terms made by Great Britain in the parties' special agreement and in the presentation of its case.[92] It is interesting to see, some decades later, echoes of similar thinking in the decision of the UNCLOS Annex VII Tribunal in the *South China Sea Arbitration (Republic of the Philippines* v. *People's Republic of China)*, holding that respect for the vested traditional or artisanal fishing rights of foreign nationals would not restrict coastal states from reasonable regulation,[93] and that regulation might be 'necessary for conservation and to restrict environmentally harmful practices'.[94]

[87] Ibid., para. 156.
[88] *North Atlantic Coast Fisheries Case (Great Britain* v. *United States)*, Award of the Tribunal, 7 Sept. 1910, PCA Case No. 1909-01, available at: https://pca-cpa.org/en/cases/74.
[89] Convention Respecting Fisheries, Boundary, and the Restoration of Slaves (United Kingdom of Great Britain and Ireland–United States of America), 20 Oct. 1818, in force 30 Jan. 1819, Art. 1, available at: https://avalon.law.yale.edu/19th_century/conv1818.asp.
[90] *North Atlantic Coast Fisheries*, n. 88 above, p. 16.
[91] Ibid.
[92] Ibid.
[93] *South China Sea Arbitration (Republic of the Philippines* v. *People's Republic of China)*, Award of the Tribunal, 12 July 2016, PCA Case No. 2013-19, paras 414 and 809, available at: https://pca-cpa.org/en/cases/7 (citing *North Atlantic Coast Fisheries*, n. 88 above).
[94] *South China Sea Arbitration*, ibid., para. 809.

https://doi.org/10.1017/S2047102524000207 Published online by Cambridge University Press

Further, in the marine context, the arbitral tribunal in the 1986 *Dispute concerning Filleting within the Gulf of St Lawrence ('La Bretagne')* (*Canada* v. *France*) held that states with shared interests in resources may find themselves in relations of *voisinage*, calling for reasonable or *due regard* for the interests of others.[95] In this case, the Tribunal was applying a 1972 agreement between France and Canada providing access to the Canadian fishing zone for vessels registered in St Pierre and Miquelon.[96] Addressing whether Canada could, in the future, adopt and apply regulations to implement a filleting prohibition on these vessels, the Tribunal found that Canadian regulatory powers were subject to a requirement of reasonableness. The Tribunal stated: 'Like the exercise of any authority, the exercise of a regulatory authority is always subject to the rule of reasonableness invoked by the [ICJ] in the *Barcelona Traction* case',[97] citing the ICJ *Barcelona Traction* dictum: 'The Court considers that, in the field of diplomatic protection as in all of the fields of international law, it is necessary that the law be applied reasonably'.[98] The Tribunal also observed that a principle of reasonableness had been laid down in the 1910 *North Atlantic Coast Fisheries* case, viewing the formula articulated in that case as a guide to the reasonableness of regulation.[99]

Finally, the 2005 *Iron Rhine* arbitration is another case where a treaty between the parties was applicable, yet the Tribunal recognized that its pronouncements related to the underlying territorial sovereignty of the Netherlands rather than a discretion conferred by the treaty.[100] The case is significant also because it represented a high watermark of adjudicatory engagement with the substantive reconciliation of rights in a sustainable development context.[101] The case concerned Belgium's right of transit across the Netherlands derived from the 1839 Treaty between Belgium and the Netherlands relative to the Separation of their Respective Territories.[102] The Tribunal considered that Belgium's rights were 'without prejudice to the exclusive rights of sovereignty over the territory which would be crossed by the road or canal in question', observing also that the Netherlands had 'forfeited no more sovereignty than that which was necessary for the track to be built and to operate to allow a

[95] *Dispute concerning Filleting within the Gulf of St Lawrence ('La Bretagne')* (*Canada* v. *France*), Decision, 17 July 1986, (1990) 82 *International Law Reports*, pp. 590–670 (*Canada* v. *France*) (emphasis added).

[96] Agreement between Canada and France on Their Mutual Fishing Relations, Ottawa (Canada), 27 Mar. 1972, in force 27 Mar. 1972, available at: https://treaties.un.org/doc/Publication/UNTS/Volume%20862/volume-862-I-12353-English.pdf.

[97] *Canada* v. *France*, n. 95 above, p. 631.

[98] *Barcelona Traction, Light and Power Company Ltd (Belgium* v. *Spain)*, Judgment, 5 Feb. 1970, *ICJ Reports* (1970), pp. 3–53, at 48, para. 93.

[99] *North Atlantic Coast Fisheries*, n. 88 above.

[100] *Arbitration regarding the Iron Rhine ('IJzeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Award of the Tribunal, 24 May 2005, PCA Case No. 2003-02, available at: https://pca-cpa.org/en/cases/1 (*Iron Rhine Arbitration*).

[101] See Boyle, Redgwell & Birnie, n. 8 above, p. 227; see also V. Barral & P.-M. Dupuy, 'Principle 4: Sustainable Development through Integration', in Viñuales, n. 14 above, pp. 157–80, at 173. See also *Indus Waters Kishenganga Arbitration (Islamic Republic of Pakistan* v. *Republic of India)*, Final Award, 20 Dec. 2013, PCA Case No. 2011-01, available at: https://pca-cpa.org/en/cases/20.

[102] London (UK), 19 Apr. 1839, in force 8 June 1839, available at: https://verdragenbank.overheid.nl/en/Treaty/Details/001258.html.

https://doi.org/10.1017/S2047102524000207 Published online by Cambridge University Press

commercial connection from Belgium to Germany' across Dutch territory, and retained the power to establish health and safety standards and environmental standards in the case.[103] It was open to the Netherlands to apply its national law in a non-discriminatory fashion, unless this would amount to a denial of Belgium's transit right or render its exercise unreasonably difficult.[104] The Netherlands was not obliged to consult Belgium when designating a national park or nature reserve, although it might have been desirable on the basis of good neighbourliness to consult with Belgium at the time of designation, had the Netherlands had reason to assume Belgium would propose a reactivation.[105]

Taken as a whole, the cases reviewed above appear to demonstrate that sovereignty as an international legal concept in the contemporary world is indeed less absolute than once supposed. The idea that sovereignty must not be exercised unreasonably is becoming more prevalent, and the ICJ is indicating that, in assessing reasonableness, a requirement is that the adverse effects be 'not manifestly excessive'. The articulation in these cases of in-built constraints on sovereignty aligns with the restriction on the exercise of sovereignty that is expressed in the no harm rule, and also in the doctrine of abuse of rights. ICJ dicta to the effect that states are to avoid manifestly excessive adverse impacts may be relevant in considering whether a state's conduct is consistent with due regard for the interests of both present and future generations. Pursuing a course of conduct that will have manifestly excessive adverse impacts could indicate a failure in due regard.

In summary, Section 3 of this article has identified a basis on which the concept of due regard may help to operationalize the application of the *sic utere tuo* principle and the obligation of no harm in respect of future generations' interests. A widely appearing international legal standard, due regard has been employed previously in many settings, including in conjunction with the general principle of good faith. Due regard has an important emerging role within the systemic development of international law in a world of increasing interdependence among states' populations. It also lends itself well to settings where future populations are dependent in crucial ways on today's decision making, including where sovereign acts and omissions may be injurious to future generations' interests.

Due regard has a broader and more fundamental role in international law than the due diligence standard attaching to various preventive obligations, and may apply simultaneously with these and other requirements of customary international environmental law. It has both procedural and substantive components, requiring the analysis and evaluation of a situation in the light of others' interests. It requires outcomes reflecting a meaningful consideration of these interests. There may also be a substantive floor, requiring the exercise of sovereign power to avoid manifestly adverse impacts on the interests of others. With time, it can be expected that the substantive dimensions of

[103] *Iron Rhine Arbitration*, n. 100, para. 87.
[104] Ibid., para. 204.
[105] Ibid., para. 95.

https://doi.org/10.1017/S2047102524000207 Published online by Cambridge University Press

due regard will be elucidated in specific concrete contexts, in processes initiated by various actors.

This reasoning potentially has direct relevance for the requests for advisory opinions on climate change presently before the ICJ, ITLOS, and IACtHR. The customary international law no harm obligation is relevant to each of these requests, and it is clear that future generations' interests demand attention.

4. Requests to the ICJ, ITLOS, and IACtHR for Advisory Opinions on Climate Change

The March 2023 UN General Assembly (UNGA) Request to the ICJ for an Advisory Opinion on Climate Change asks the Court to address the interests of both present and future generations in respect of protection of the climate system and the environment:

> Having particular regard to the Charter of the United Nations, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment, and the duty to protect and preserve the marine environment,
>
> (1) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for *present and future generations*;
> (2) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
> (a) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
> (b) Peoples and individuals of the *present and future generations* affected by the adverse effects of climate change?[106]

These references to 'present and future generations' are underpinned by the first sentence of Article 3(1) of the UN Framework Convention on Climate Change (UNFCCC):[107]

> The Parties should protect the climate system for the benefit of *present and future generations* of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.[108]

[106] UNGA, n. 11 above (emphasis added).
[107] New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: https://unfccc.int.
[108] Ibid., Art. 3(1) (emphasis added). See also UNFCCC, Preamble, Recitals 11 and 23. Note previously UNGA Resolution 43/53 on the Protection of Global Climate for Present and Future Generations, 6 Dec. 1988, UN Doc. A/RES/43/53.

https://doi.org/10.1017/S2047102524000207 Published online by Cambridge University Press

The Paris Agreement[109] also includes a preambular reference to intergenerational equity,[110] as well as many references to sustainable development, including framing its core objectives with reference to sustainable development in Article 2(1).[111] The right to a healthy and sustainable environment is referenced in the Preamble to the UNGA Request for an ICJ Advisory Opinion, as is the 2030 Agenda for Sustainable Development.[112] Further, the International Law Commission's 2021 Draft Guidelines on the Protection of the Atmosphere[113] envisage that '[t]he atmosphere should be utilized in an equitable and reasonable manner, *taking fully into account the interests* of present and future generations'.[114]

There is considerable scope for the ICJ to pronounce on the legal interests of future generations, whether as an aspect of the *sic utere tuo* principle and the no harm obligation or indeed otherwise, including through the specific customary international law on prevention of harm to the environment and international human rights law.

The terms of the UNGA request to the ICJ reflect the ambit of the Court's jurisdiction.[115] The request made to the ITLOS by the Commission of Small Island States on Climate Change is narrower in ambit and origin.[116] The questions are confined to the obligations of parties to UNCLOS, with a specific focus on obligations under Part XII UNCLOS in respect of pollution and the marine environment. However, as part of general international law, the no harm obligation and the *sic utere tuo* principle are relevant here too, as is the specific customary international law on prevention of harm to the environment of other states and areas beyond national jurisdiction. This means that a requirement to have due regard for the interests of future generations is implicitly embraced, and is within the scope of the request to the ITLOS.

The request to the IACtHR by Chile and Colombia[117] focuses on human rights, as protected through the Inter-American human rights system in the context of the climate emergency.[118] There are six clusters of questions addressing respectively duties of prevention; the right to life; the rights of children, young people and future generations;[119]

---

[109] Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

[110] Ibid., Preamble, Recital 11.

[111] Ibid., Art. 2(1); see also Preamble, Recitals 8 and 16.

[112] UNGA, n. 11 above, Preamble, para. 2 ('Recalling its resolution 77/165 of 14 December 2022 and all its other resolutions and decisions relating to the protection of the global climate for present and future generations of humankind, and its resolution 76/300 of 28 July 2022 on the human right to a clean, healthy and sustainable environment'); and Preamble, para. 3 ('Recalling also its resolution 70/1 of 25 September 2015 entitled "Transforming our World: The 2030 Agenda for Sustainable Development"').

[113] International Law Commission, 'Draft Guidelines on the Protection of the Atmosphere, with Commentaries Thereto', 2021, UN Doc. A/76/10, Guideline 6.

[114] Ibid., Preamble and Guideline 6 on the equitable and reasonable utilization of the atmosphere (emphasis added). The commentary advises that the phrase 'the interests of' was employed to signal the need to take into account 'a balancing of interests to ensure sustenance for the Earth's living organisms'.

[115] As well as the outcomes of the campaign led by Vanuatu that led to the request for the advisory opinion, mediated through negotiations among the UN membership.

[116] N. 12 above.

[117] N. 13 above.

[118] American Convention on Human Rights, San José (Costa Rica), 22 Nov. 1969, in force 18 July 1978, available at: http://www.cidh.org/basicos/English/Basic3.American%20Convention.htm.

[119] N. 13 above, paras 1, 6.

https://doi.org/10.1017/S2047102524000207 Published online by Cambridge University Press

access to justice and consultation; the rights of women, Indigenous peoples and Afro-descendent communities; and common but differentiated obligations and responsibilities. The specific reference in the request to future generations also effectively invites the IACtHR to consider the relevance of the no harm rule and the *sic utere tuo* principle, as well as the specific customary international law on prevention of environmental harm, as already addressed previously by the IACtHR in the human rights context in its 2017 advisory opinion on environment and human rights.[120] Due regard for future generations, therefore, also arises within the scope of this request. Also to be borne in mind is the UN Committee on the Rights of the Child (CRC) General Comment No. 26 of 2023: 'States bear the responsibility for foreseeable environment-related threats arising as a result of their acts or omissions now, the full implications of which may not manifest for years or even decades'.[121]

Thus, in each of the advisory opinion requests, there is scope for the relevant court or tribunal to consider expressly how the *sic utere tuo* principle, the no harm obligation, and the customary international law obligation to prevent harm to the environment of other states and areas beyond national jurisdiction may call for states to have due regard for the interests of future generations in the climate context.

5. Conclusion

Scholars and practitioners recognize that humankind 'has a responsibility for the future'.[122] However, more can be done to determine what international law says about putting this responsibility into practice. Requests presently before international courts and tribunals for advisory opinions on climate change provide a valuable opportunity to consider the matter. The legal interests of future generations are clearly recognized in the principle of sustainable development and the theory of intergenerational equity, as well as in the UNFCCC, but this only takes us so far. Seeking to further the debate, this article considers the operationalization of the *sic utere tuo ut alienum non laedas* principle and the *Corfu Channel* no harm rule as they may apply in respect of future generations through the emerging global regulatory standard of due regard.

Due regard is already part of international law's conceptual lexicon and there is considerable doctrinal support for reference to this concept. The concept is employed in various contexts where international law must reconcile competing interests, as seen in the law on watercourses, the law of the sea, trade and investment law, and diverse fields including space law.[123] The no harm rule and the *sic utere tuo* principle also

---

[120] *Medio Ambiente y Derechos Humanos (Obligaciones estatales en relaceón con el medio ambiente en el marco de la protección y garantía de los derechos a la vida y a la integridad personal – interpretación y alcance de los artículos 4.1 y 5.1, en relaceón con los artículos 1.1 y 2 de la convención americana sobre derechos humanos)*, IACtHR, Advisory Opinion OC-23/17, 15 Nov. 2017, Environment and Human Rights.

[121] UN CRC, 'General Comment No. 26 (2023) on Children's Rights and the Environment, with a Special Focus on Climate Change', 22 August 2023, UN Doc. CRC/C/GC/26, para. 11.

[122] Boyle, Redgwell & Birnie, n. 8 above, p. 122. See likewise A. Boyle & D. Freestone, 'Introduction', in Boyle & Freestone, n. 23 above, pp. 1–18, at 13.

[123] Foster, n. 26 above.

https://doi.org/10.1017/S2047102524000207 Published online by Cambridge University Press

imply due regard for the interests of others. Due regard has both procedural and substantive dimensions. These potentially include a floor: the due regard standard may not be met when a state does not refrain from conduct that would have manifestly excessive adverse effects.

Strands of contemporary moral philosophy on climate change emphasize the idea that actively considering the interests of future generations alongside those of our own will help us to give them their due. Mulgan makes the idea of attempting a justification to future persons of our present-day decisions more real. He writes a hypothetical dialogue between contemporary persons and inhabitants of a possible broken future world in which human-induced climate change has rendered life precarious and resources are insufficient to meet everyone's basic needs.[124] This reveals challenges in justifying ourselves to these future persons. There is, of course, no guarantee that international law can provide yardsticks that would gauge precisely when we might come near to achieving a justification. However, the international legal concept of due regard may hold promise as an international legal standard of conduct prompting engagement with the problems before us in increasingly appropriate ways.

Acknowledgements: Thank you to participants in the 'Future Generations Litigation and Transformative Changes in Environmental Governance' workshop held on 8–9 June 2023 at ELTE University Law School in Budapest (Hungary), and relevant panels at the 2023 Conferences of the European Society of International Law, International Union for the Conservation of Nature, and the Australian and New Zealand Society of International Law. Thanks also to Auckland Law Faculty colleagues Isabella Wensley and Tim Mulgan for their input, as well as the reviewers for *TEL*.

Funding statement: Thank you to the University of Auckland for internal funding assisting with this research.

Competing interests: The author declares none. The author assisted the International Union for the Conservation of Nature with its Written Statement, submitted to the International Court of Justice on 19 March 2024, in the proceedings relating to the Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in respect of Climate Change.

[124] T. Mulgan, 'Answering to Future People: Responsibility for Climate Change in a Breaking World' (2018) 35(3) *Journal of Applied Philosophy*, pp. 532–48, at 533–5 (drawing on S. Darwall, *The Second-Person Standpoint* (Harvard University Press, 2009)). See also T. Mulgan, *Ethics for a Broken World: Imagining Philosophy after Catastrophe* (Routledge, 2011).

Cite this article: C.E. Foster, 'Due Regard for Future Generations? The No Harm Rule and Sovereignty in the Advisory Opinions on Climate Change' (2024) *Transnational Environmental Law*, pp. 1–22. https://doi.org/10.1017/S2047102524000207

https://doi.org/10.1017/S2047102524000207 Published online by Cambridge University Press