

Due Diligence Obligations to Substantive and Procedural Rules in International Conventions and Cases

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Abstract

The due diligence obligation is a legal requirement that states must fulfill under international law. States must accomplish the foundational objectives of the relevant international conventions. In cases of interstate conflict, international courts or tribunals typically assess whether states have fulfilled their due diligence obligations by adhering to the substantive and procedural procedures and rules in relevant conventions or agreements. These two rules are interconnected in terms of due diligence. Suppose States adhere to these regulations by implementing all necessary steps. In that case, they can achieve the principles and purposes mentioned in the agreed-upon agreements and attain positive results in international conflicts.

Keywords: due diligence, prevention, protection, cooperation, substantive rules, procedural rules

1. Introduction

The term due diligence will not be strange because due diligence obligations can be found in the sources of international law, soft laws, and binding decisions. The origin of due diligence has been triggering in the international arena for more than four centuries. It gradually evolved with various forms and developed in international law. Since ancient times, the notion of due diligence has been widely involved in international affairs. “*Due diligence is a legal obligation of State to exercise all reasonable efforts*” to protect others (Martin, 2003). Due care is an individual’s legal obligation to refrain from negligence towards others (Blackwell, 2008). Each term has a legal obligation to protect others or prevent negligence acts. Due diligence relates to any activity of persons or States and any issue between the States or between the States’ organs and individuals. Therefore, the scope of due diligence is too broad to cover all areas.

According to Article 38(1) of the Statute of the International Court of Justice, the sources of international law are international conventions, international custom, the general principles of law and judicial decisions, and qualified publicists of the various nations (*Charter of United Nations (Adopted 26 June 1945, Entered into Force 24 October 1945), 557 UNTS 143, 1945*). The obligations of due diligence also involve these sources of international law as legal obligations. Frequently, the fulfillment of due diligence obligations is examined using international law and international court decisions. The world’s states are undertaking activities including environmental conservation, investments, trading, and anti-trafficking in persons and others by making bilateral or multilateral agreements. These agreements bind the contracting parties (P.Nanda & Pring, 2013, p. 9). Parties must implement the rights and obligations of concerned treaties or agreements in good faith (*Vienna Convention on the Law of Treaties, (Adopted 23 May 1969, Entered into Force 27 January 1980), 1155 UNTS 331, 1969, art. 26*). The International Court of Justice (ICJ) explored the essence of due diligence in the judgment of “*Pulp Mills on the River Uruguay*,” stating that the *principle of prevention has its origin in the due diligence as a customary rule* (ICJ, 2010). Stephen C. McCaffrey explained that due diligence and all appropriate measures have the same concept (C.McCaffrey, *The Law of International Watercourses*, 2019). Thus, States have to take all appropriate measures, which are due diligence contents, in a particular event. According to taking all appropriate measures, it may have many measures depending on cases or issues between parties. Referred to case decisions, experts’ opinions, and publicists, some prominent legal contents or elements of due diligence are prevention, protection, cooperation, notification,

information, consultation, and environmental impact assessment (EIA) under international law. However, States' responsibility for taking due diligence obligations could not be limited to only these elements because they may have other measures for the relevant issues. Thus, the due diligence obligations to substantive and procedural rules in international conventions and cases will be explored in this Article.

2. Literature Review

Alice Ollion explored that due diligence obligations cannot be a framework for all areas because the due diligence elements are changing on a case-by-case basis (Ollino, 2022, p. 132.). Pemmaraju Sreenivas Rao said that the obligation of prevention can be presumed to be the obligation of due diligence (Rao, 1999, p. 5). The preventative measures for not causing significant harm are included in the content of due diligence (Stephens, (Rapporteur) and French, D. (Chair), 2014, p. 5.). Not causing harm is the basic principle of international water law and substantive rule (M.Tanzi, 2020). International water law provides procedural rules, such as the exchange of information, negotiation, and consultation, and substantive rules, such as preventing detrimental consequences for others (Fitzmaurice, 2020, p. 129). States have to take appropriate measures, such as prevention or protection, to avoid the harmful impact. Procedural conduct such as notification, consultation, negotiation, and alarm are associated with the duty of cooperation (McIntyre, 2007, pp. 221-222). The cooperation is a due diligence obligation of the States (Ollino, 2022, p. 126.). The notification, warning, information, consultation, and the EIA are also due diligence obligations that involve cooperation (Ollino, 2022, p. 224). Cooperation is a procedural rule and a measure for implementing substantive rules (McIntyre, 2007, p. 222). When the States prevent or protect any risk through cooperation, consultation and exchanging information become the measures of cooperation (McIntyre, 2007, p. 222).

In the *case concerning Pulp Mills on the River Uruguay case*, ICJ observed that while procedural rules are more focused and precise, the substantive rules are often expressed in broad terms(*Pulp Mills on the River Uruguay (Argentina v. Uruguay), summary of the Judgment*, 2010, p. 49). In a dispute over the status and use of the waters of the Silala, ICJ considered that to support the substantive obligations, each riparian State is required to cooperate, notify, and consult, which are procedural obligations for the protection of shared resources(*Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment*, 2022, p. 33). If the States failed to adopt

the prevention or protection measures for certain events, it would breach their obligations (Ollino, 2022, p. 113). Protecting the natural environment from significant harm is a substantive rule of international environmental law, and environmental impact assessment (EIA) is a due diligence manner (Kulesza, 2016, p. 103). So, States need to adopt protection measures to fulfill their obligations and take EIA through due diligence obligations under the concerned conventions. Thus, the procedural rules must comply with the concerned conventions' substantive rules, such as obligations to protect or prevent harmful effects (Ollino, 2022, pp. 233-234).

Patricia Wouters explained that substantive rules can be found in the Conventions as legal norms (Wouters, 2013, p.20) and can be attributed to the rule of international law (Wouters, Vinogradov, Allan, et al., 2005, p. 20). Procedural rules relate to the implementation of substantive rules. (Wouters, 2013, pp. 18-20). However, one cannot be better than another (Wouters, 2013, p. 20). Slavko Bogdanovic said that substantive rules played a prominent role in the decisions on water utilization under international law (Bogdanovic, 2000, p. 18). Regarding dispute settlement or evasion of disputes, procedural rules are more important than substantive rules (Bogdanovic, 2000, p. 18). However, the disputes in cases are usually solved based on these two rules of the concerned conventions (Bogdanovic, 2000, p. 18). Therefore, these two rules are essential principles in concerned conventions. By taking appropriate measures, due diligence obligations can fulfill the basic principles of international conventions and solve international disputes based on these two rules.

3. Methodology

The doctrinal legal research methodology, including primary and secondary sources, is used in this paper. This article will explore the legal term due diligence obligation to substantive and procedural rules based on international conventions and case decisions. It does not mean that due diligence obligations can only involve these two sources of international law. Due diligence is also related to customary international law, general principles of law, experts' opinions, and qualified publicists. Among sources of international law (*Statute of International Court of Justice (Adopted 26 June 1945, Entered into Force 24 October 1945), 557 UNTS 143, 1945*), international conventions and judicial decisions will only be discussed in this article, along with substantive and procedural rules.

4. Findings and Discussions

A due diligence obligation is a legal obligation relating to the conduct of States or State responsibility (Ollino, 2022, p. 43). Many international conventions are adopted for different purposes. States have a responsibility to implement the principles of the concerned conventions. States performing due diligence obligations can fulfill the purposes or objectives of international conventions through substantive and procedural rules. The substantive and procedural rules come from the conventions' principles and link to each other. However, their functions exist separately from each other.

The international Courts or tribunals can also consider the due diligence obligation in disputes between parties. The international Courts considered these rules in determining whether conflicting parties have observed them through due diligence obligations. Otherwise, the Courts examined whether any party breached the rules of conventions in a specific situation. Thus, States should adopt due diligence measures to fulfill the purposes of conventions. Subsequently, they can prove their due diligence obligations as fulfillment of their duties if a conflict arises between parties. States can fulfill the purposes of concerned conventions by conducting due diligence obligations through these two rules. States should exercise due diligence obligations for their interests and those of others and for getting positive results in international disputes. It does not mean that it can support or fulfill the purposes or objectives of conventions and the obligations of States in disputes. Nevertheless, due diligence is an essential obligation for contracting parties to fulfill or support the purposes of conventions through substantive and procedural rules.

States have obligations to take due diligence for implementing the primary rules, which are the rights and obligations of concerned treaties (Kaczorowska, 2010, p. 45). Tim Stephens said that a matter of law is a due diligence obligation in international law (Stephens & French, D., 2016, p. 41). The world's States are undertaking measures, including environmental conservation, investments, trading, anti-trafficking in persons, and others by making bilateral or multilateral agreements. When they concluded bilateral agreements in a sector, they did not have many discussions compared with the conclusion of multilateral agreements. Bilateral agreements are only concluded between two States (P.Nanda & Pring, 2013, p. 9). However, more than two parties concluded multilateral agreements and used to discuss many times for getting the consensus. Sometimes, multilateral agreements are called treaties, protocols, Conventions, Covenants, Charters, and Codes (P.Nanda & Pring, 2013, p. 9). They bind the contracting parties (P.Nanda &

Pring, 2013, p. 9). The VCLT provides a clear definition of a treaty as an international agreement between States and govern on them (*Vienna Convention on the Law of Treaties, (Adopted 23 May 1969, Entered into Force 27 January 1980), 1155 UNTS 331, 1969, art. 2(a)*). Regarding the due diligence obligations, many international conventions have usually provided the due diligence elements for achieving the basic principles combined in substantive and procedural rules. While substantive rules mainly focus on preventing transboundary harm or harmful impacts, procedural rules complement substantive rules through cooperation (Ollino, 2022, p. 244). Therefore, these two rules are linked to a specific situation.

The Vienna Convention for the Protection of Ozone Layer provided the appropriate measures for protecting human health and the environment from its adverse effects (“Vienna Convention for the Protection of the Ozone Layer, (Adopted 22 March 1985, Entered into Force 22 September 1988), 1513 UNTS 293,” 1985, art. 2). Protecting human health and the environment is one purpose of this convention and is a general obligation for parties. It is also one of substantive rules of this convention. (“Vienna Convention for the Protection of the Ozone Layer, (Adopted 22 March 1985, Entered into Force 22 September 1988), 1513 UNTS 293,” 1985, art. 2). Parties have to conduct research and share information to fulfill the substantive rules of this convention (“Vienna Convention for the Protection of the Ozone Layer, (Adopted 22 March 1985, Entered into Force 22 September 1988), 1513 UNTS 293,” 1985). These conducting measures are due diligence obligations combined with a cooperation measure, which is a procedural rule. Therefore, to fulfill their duties, States must cooperate with reasonable measures. Furthermore, domestic laws and administration procedures are adopted to prevent adverse effects that directly or indirectly impact ozone layers (“Vienna Convention for the Protection of the Ozone Layer, (Adopted 22 March 1985, Entered into Force 22 September 1988), 1513 UNTS 293,” 1985). States have to adopt appropriate measures in such laws and administrations, including controlling, limiting, mitigating, or combating human activities within or beyond their territories (“Vienna Convention for the Protection of the Ozone Layer, (Adopted 22 March 1985, Entered into Force 22 September 1988), 1513 UNTS 293,” 1985). These measures are due diligence obligations, and they support the substantive rules of the Vienna Convention for protecting the Ozone Layer. Thus, States have to take due diligence obligations individually or jointly to fulfill the purposes of this convention.

In the Convention for the Prevention of Marine Pollution from Land-Based Sources, the prevention of sea pollution is an objective and substantive rule of this Convention (*Convention for*

the prevention of marine pollution from land-based sources, (Adopted 4 June 1974, Entered into Force 6 May 1978), 1546 UNTS 103, 1974, art. 1.). Parties had agreed to take all appropriate steps to prevent the harmful effects on the marine environment caused by manmade disasters (*convention for the prevention of marine pollution from land-based sources, (Adopted 4 June 1974, Entered into Force 6 May 1978), 1546 UNTS 103, 1974, art. 1*). In this Convention, to achieve the main objective, the prevention of sea pollution, States need to fulfill due diligence obligations. The 1979 Convention on Long-Range of Transboundary Air Pollution was intended to protect humans, natural environments, and materials from air pollution (*Convention on Long-Range Transboundary Air Pollution, (Adopted 13 November 1979, Entered into Force 16 March 1983), 1302 UNTS 217, 1979, art. 1*). The Parties have to consider the protection of people and the environment and prevent long-range transboundary air pollution by taking due account (*Convention on Long-Range Transboundary Air Pollution, (Adopted 13 November 1979, Entered into Force 16 March 1983), 1302 UNTS 217, 1979*). Parties to this Convention must prevent pollution through exchanging information, consultation, research, and monitoring (*Convention on Long-Range Transboundary Air Pollution, (Adopted 13 November 1979, Entered into Force 16 March 1983), 1302 UNTS 217, 1979*). Without cooperation and procedural rules between parties, it is impossible to exchange information or consultation (McIntyre, 2007, pp. 221–222). In addition, they have to establish policies and strategies at national and international levels as soon as possible to combat the impacts (*Convention on Long-Range Transboundary Air Pollution, (Adopted 13 November 1979, Entered into Force 16 March 1983), 1302 UNTS 217, 1979*). It can be seen that due diligence obligations have been provided to attain the purposes of the convention through two rules.

The United Nations Convention on the Law of the Sea (UNCLOS) provided for the protection of the marine environment as one of the principles and purposes of this convention (*United Nations Convention on the Law of the Sea, (Adopted 10 December 1982, Entered into Force 16 November 1994), 1833 UNTS 3, 1982*). States have to arrange the necessary measures to protect the marine environment to prevent, reduce, and control the impacts (*United Nations Convention on the Law of the Sea, (Adopted 10 December 1982, Entered into Force 16 November 1994), 1833 UNTS 3, 1982*). They need to take these measures collectively. Moreover, the protection and prevention of the marine environment are expressly provided in UNCLOS as the States' obligations (*United Nations Convention on the Law of the Sea, (Adopted 10 December*

1982, Entered into Force 16 November 1994), 1833 UNTS 3, 1982, art. 192). Article 194 of the UNCLOS states that they have to take necessary measures, including adopting policies. In addition, Article 146 mentions that natural resources and marine environments must be protected and conserved by appropriate rules, regulations, and procedures (*United Nations Convention on the Law of the Sea, (Adopted 10 December 1982, Entered into Force 16 November 1994), 1833 UNTS 3, 1982*). These mean that States have to take due diligence obligations to prevent, reduce, and control the marine environment's pollution to the best of their abilities. Moreover, when enterprises have to conduct their operations, they need to follow the rules and regulations of the UNCLOS and perform with due diligence and efficiency (*United Nations Convention on the Law of the Sea, (Adopted 10 December 1982, Entered into Force 16 November 1994), 1833 UNTS 3, 1982, art. 12 of the Statute of the Enterprises*). Thus, to prevent harmful impacts within and beyond the territories, States must take due diligence obligations through prevention, exchange of information, consultation, cooperation, and other appropriate measures. Conversely, the procedural rules support the substantive rules of convention through due diligence measures. By taking appropriate measures, state parties can support the purposes of concerned conventions.

The Convention on the Protection and Use of Transboundary Watercourses and International Lakes (UNECE Water Convention) on the protection and use of transboundary watercourses and international lakes also provided the obligation of parties to take all appropriate measures to prevent, control, and reduce the transboundary impact (*Convention on the Protection and Use of Transboundary Watercourses and International Lakes, (Adopted 17 March 1992, Entered into Force 6 October 1996), 1936 UNTS 269, 1992*). These Conventions are commended to prevent, control, and reduce transboundary pollution, sustainable water management, conservation of water resources, and environmental protection (*Convention on the Protection and Use of Transboundary Watercourses and International Lakes, (Adopted 17 March 1992, Entered into Force 6 October 1996), 1936 UNTS 269, 1992*). In addition, parties should cooperate with each other to protect and use transboundary waters. To ensure these purposes, States have the responsibility to implement them by taking protection or controlling or mitigation means and cooperation measures (*Convention on the Protection and Use of Transboundary Watercourses and International Lakes, (Adopted 17 March 1992, Entered into Force 6 October 1996), 1936 UNTS 269, 1992*). Convention on the Law of the Non-Navigational Uses of International Watercourses (UN Watercourse Convention) desired to be “a framework for utilization, development,

conservation, management and protection of international watercourses” (Convention on the Law of the Non-Navigational Uses of International Watercourses, (Adopted 21 May 1997, Entered into Force 17 August 2014), 2999 UNTS 77, 1997). This Convention provided protection and prevention of watercourses through all appropriate measures (Convention on the Law of the Non-Navigational Uses of International Watercourses, (Adopted 21 May 1997, Entered into Force 17 August 2014), 2999 UNTS 77, 1997). In addition, the parties must have appropriate measures for preventing, controlling, or mitigating pollution to protect the watercourses and their environment (Convention on the Law of the Non-Navigational Uses of International Watercourses, (Adopted 21 May 1997, Entered into Force 17 August 2014), 2999 UNTS 77, 1997). Under these two global water Conventions, parties have responsibilities to take due diligence for prevention the of significant harm, protection of international watercourses, and cooperation through consultations and other similar forms

In the agreement on cooperation for the sustainable development of the Mekong River Basin, the State parties are responsible for using the water reasonably and equitably within their territories (Commission, 1995). They must exert every effort to avoid, reduce, and mitigate the harmful effects on the environment and cooperate to protect water resources, which is the purpose of this agreement (Mekong River Commission, 1995, arts. 4 and 7). It can be seen that due diligence obligations are provided in these agreements with substantive and procedural rules to attain their expected purposes. Both rules are essential not only to prevent and protect against injuries but also to promote cooperation between State parties.

In the case of a request for an advisory opinion submitted by the Sub-regional Fisheries Commission (SRFC), the ITLOS recognized that the SRFC Member States are obligated to cooperate to maintain living resources to prevent them from over-exploration (*Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), case no.21, 2015, p. 66.*). These measures are provided in the Convention on Determining the Minimal Conditions for Access and Exploration of Marine Resources within the Maritimes Areas under the Jurisdiction of the Member States of the SRFC (Sub-regional fisheries Commission, 2012, art. 2(4) and 25(1)). Moreover, the tribunal explored the duty to collaborate for preservatopm pf national fish within and beyond the EEZ of the SRFC for not over-exploitation of living resources (*Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), case no.21, 2015, p. 66.*). The protection of living resources, the prevention of over-exploitation, and the cooperation

of coastal States are also provided in UNCLOS (*United Nations Convention on the Law of the Sea, (Adopted 10 December 1982, Entered into Force 16 November 1994), 1833 UNTS 3, 1982, arts. 61 and 62*). So, in these cases, the tribunal considered due diligence obligations based on the procedural and substantive rules of the relevant convention.

When determining cases, international Courts and tribunals consider parties' compliance with substantive and procedural rules of concerned treaties. Sometimes, they examined these two rules separately in a certain situation. In the *Pulp Mills* case, Argentina proposed that substantive and procedural rules are interconnected. If one rule had been breached in an event, the other would have also been breached (Ollino, 2022, p. 246). However, the ICJ denied its proposal because these two rules exist independently (Ollino, 2022, pp. 247-248). In addition, it proposed the general principles of international law for protecting the environment (*Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgements, 2010, p. 42*). The Court decided that Uruguay breached the substantive rule (*Pulp Mills on the River Uruguay (Argentina v. Uruguay), summary of the Judgment, 2010*) because of its non-compliance with the 1975 Statute for cooperation between parties through the Administrative Commission of the River Uruguay (CARU) (*Treaty Concerning the Boundary Constituted by the River Uruguay between Argentina and Uruguay (Adopted 7 April 1961) 635 UNTS 91., 1961*). Uruguay failed to inform CARU about the Orion mill, and it breached the procedural rules (*Pulp Mills on the River Uruguay (Argentina v. Uruguay), summary of the Judgment, 2010, p. 57*). Thus, the Court explored that when a State violates the substantive obligations, it cannot be presumed that it has automatically breached the procedural obligations (*Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 2010, p. 49*). Conversely, in the cases of the *San Juan River* between Costa Rica and Nicaragua, the ICJ mentioned the breach of procedural rules for conducting the EIA between the parties. However, the Court did not explore the violation of substantive rules (*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), Summary of the Judgment, 2015*) because both were independent entities. Thus, the ICJ reviewed the cases based on substantive and procedural rules to determine whether States fulfill their due diligence obligations.

The precautionary approach is part of due diligence (*Reports of Judgements, Advisory Opinions and Orders "Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed*

Disputes Chamber), 2011, p. 48) , but there are somewhat different approaches. The precautionary approach includes anticipating events that can have an adverse impact on one's own and others. In the *case concerning the Gabčíkovo-Nagymaros Project* between Hungary and Slovakia, the ICJ argued that parties must know the environment's vulnerability(*Case concerning the Gabčíkovo-Nagymaros project (Hungary/Slovakia), Judgment, 1997, p. 68*). The future generation will suffer environmental impacts if parties do not focus on environmental conservation (*Case concerning the Gabčíkovo-Nagymaros project (Hungary/Slovakia), Judgment, 1997, p. 68*). Therefore, both parties need to take precautionary measures (*Case concerning the Gabčíkovo-Nagymaros project (Hungary/Slovakia), Judgment, 1997, p. 68*). If the States failed to obey the international standards or to adopt all appropriate measures for certain circumstances, it can be said that the failure of States' responsibilities(Ollino, 2022, p. 121). The State of origin is responsible for compensating for any injuries caused to others under the due diligence obligation(Rao, 2003, p. 78).

The substantive and procedural rules are interlinked in conventions and the decisions of international Courts and tribunals. On the other hand, if a state breaches one rule, it cannot be said that another rule will be automatically violated in some situations. Thus, the substantive and procedural rules exist separately because their functions are not the same. States parties should apply both rules to carry out their obligations. States' parties can uphold the basic principles of the agreed-upon conventions if they carry out their due diligence duties. Due to the above studies, the substantive and procedural rules are linked but do not overlap because both have separate identities under international law. Nevertheless, the involvement of due diligence obligations with two rules cannot be separated from international conventions and, in some cases, decisions.

5. Conclusion

Due diligence obligations involve in international conventions and the results of cases' decisions but are not limited to these two sources of international law. Due diligence obligations are vines of substantive and procedural conventional rules and essential components of international disputes. State parties are responsible for fulfilling the principles or objectives of concerned conventions by adopting appropriate measures. When they exercise the prevention and protection measures in a particular situation, they must cooperate by exchanging information, consultation, or other similar forms. Consequently, States can contribute to the substantive and procedural rules of conventions through their due diligence obligations.

Cooperation with good faith intention, protection of the rights of individuals and their properties, and prevention of the natural environment will be presumed to be due diligence obligations. However, it cannot be assumed that all events have been covered by adopting appropriate measures. When they take appropriate measures, they can show they have complied with their responsibilities. International Courts or tribunals are used to examine the due diligence obligations in a case to determine whether the parties fulfilled or breached their obligations under the substantive and procedural rules of the relevant conventions. One of the essential legal obligations for upholding the fundamentals of international conventions is the due diligence obligation. States can achieve positive outcomes in any international conflict if they take the appropriate measures to apply the substantive and procedural rules in the concerned conventions. Thus, States' parties should take the appropriate measures to ensure the principles and substantive and procedural rules of international conventions. Furthermore, they can prove these measures to fulfill their obligations in international cases.

Conflict of Interest

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