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## Due Regard for Future Generations? The Obligation to Prevent Significant Environmental Harm and Sovereignty in the ICJ Advisory Opinion on Climate Change

Caroline Foster

European University Institute

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## Abstract

Future generations stand to experience significant harm as a result of human-induced climate change. This raises serious questions of intergenerational equity, which states should consider in order to give effect to the law on sustainable development. Is it possible to argue further that a requirement of due regard for future generations is an aspect of states' customary international law obligation to prevent significant harm to the environment of other states and areas beyond national jurisdiction? The argument for due regard is strengthened when we consider that the specific obligation to prevent significant environmental harm is grounded in the more general Corfu Channel no-harm rule and the maxim sic utere tuo ut alienum non laedas, which address how sovereigns must act vis-à-vis the legal rights and interests of others. As to the substantive outcomes that are to be expected from a practice of due regard for future generations, it may be that international law calls for sovereignty to be exercised reasonably and in ways that avoid manifestly excessive adverse effects on the interests of others. Contemporary moral philosophy brings weight to the proposal for recognizing states' obligations of due regard for future generations in states' climate change related decision-making.

## Keywords

Future Generations, Intergenerational Equity, Prevention, sic utere tuo ut alienum non laedas, Sovereignty, Good Faith, Reasonableness, Abuse of Rights, Advisory Opinion on Climate Change, International Court of Justice

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### 1. Introduction

International law increasingly frequently requires states to have "due regard" for the legal interests of others, calling for them actively to consider how their conduct will affect the rights and interests of populations elsewhere.[1] When it comes to states' conduct in relation to anthropogenic climate change, must they also have due regard for the interests of future populations, who are elsewhere in time?

Future generations stand to experience the most severe harmful effects of cumulative greenhouse gas emissions today and in the future. The physical harm that is being caused to the climate system and the environment 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 placed on future generations if they are successfully to combat climate change continues to grow steeply, because the concentration of greenhouse gasses in the atmosphere is reversible only with prolonged effort over time. This burden will directly impact future generations' economic lives and wellbeing.

This situation raises serious questions of intergenerational equity, which states should consider in order to give effect to the law on sustainable development. Drawing on the emerging global regulatory standard of due regard, is it possible further to argue that a requirement of due regard for future generations is an aspect of states' customary international

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

law obligation to prevent significant harm to the environment of other states and areas beyond national jurisdiction? The argument for due regard is strengthened when we consider that the specific obligation to prevent enrironmental harm is grounded in the more general *Corfu Channel* no-harm rule and the maxim *sic utere tuo ut alienum non laedas* (use what is yours in such a manner as not to injure that of another), which address how sovereigns must act vis-à-vis the legal rights and interests of others.[2] As to the substantive outcomes that are to be expected from a practice of due regard for the interests of future generations, it may be that international law requires sovereignty to be exercised reasonably, avoiding manifestly excessive adverse effects on the interests of others. Whether or not this is the case, the argument for due regard to the interests of future generations remains persuasive.

The article's enquiry departs from the observation that future populations' legal interests have been accepted within international law, under the theory of intergenerational equity found within the principle of sustainable development, even if only as soft-law. Commonly regarded as inherent in the concept of sustainable development,[3] the theory of intergenerational equity is part of conventional international environmental law wisdom.[4] Intellectual progenitor of the theory Edith Brown Weiss famously argued that each generation is entitled to at least the level of planetary health enjoyed by the first generation. She also expressly observed that "[t]his opens the possibility that these decisions to *deserve to be* scrutinized from the point of view of their impact on future generations.[5] The article accordingly investigates whether, given the significance of the harm that is being caused for the future in the context of climate change, future populations' international legal interests may require due regard in contemporary governmental conduct, and must be factored into actively into states' decision-making.

Leading writers have taken up the theme that government decision-making processes may be examined to see if due regard is being paid to the interests of future generations and the environment. Telling us that international law recognises the principle or concept of sustainable development, Sands, Peel, Fabra and Mackenzie go on to say 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".[6] Although addressing sustainable development more broadly, rather than future generations and intergenerational equity specifically, Birnie, Boyle and Redgwell write that the precedents suggest that international law requires development decisions "to be *the outcome of a process* which promotes sustainable development and respects international obligations of

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[2] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* [1949] ICJ Rep 4.

[3] Alan Boyle, Catherine Redgwell and Patricia Birnie *Birnie, Boyle and Redgwell's International Law and the Environment* (4th ed, Oxford University Press, 2021) 122.

[4] Separate Opinion of Judge Cancado Trindade, *Whaling in the Antarctic (Australia v Japan; New Zealand intervening),* Judgment of 31 March 2014 [2014] ICJ Rep 226, para 47 adding that intergenerational equity is also reflected in a range of contemporary more general public international instruments.

[5] Edith Brown Weiss "Our Rights and Obligations to Future Generations for the Environment" (1990) 84 AJIL 198, 206, emphasis added. See also the classic work, Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (The UN University; Transnational Publishers Inc. 1989). .

[6] Philippe Sands, Jacqueline Peel, Adriana Fabra, Ruth MacKenzie, *Principles of International Environmental Law* (Cambridge University Press, 2018) 229, emphasis added.

environmental protection".[7] They consider that the *Gabčikovo-Nagymaros Project* and *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* cases implicitly support an interpretation of the law that makes "the process of decision-making the key legal test of sustainable development".[8] This article now considers specifically whether states have reached a point, taking into account the severe threats posed by anthropogenic climate change,[9] where it is clear that sovereign freedoms must be exercised in ways that more actively take into account future populations' legal interests. The article then asks whether states may, where due regard is lacking, be indulging in conduct lacking sufficiently in good faith, and potentially constituting an abuse of the rights of the sovereign. The article also takes into account trends in the international legal articulation of sovereignty, as expressed particularly by the International Court of Justice (ICJ).[10]

Part I has introduced the article's main themes. Part II of the article examines the theory of intergenerational equity and the status of sustainable development as sources of future populations' legal interests relevant for today's governmental decision-making. Part III asks whether requirements of due regard for the future could be articulated in the context of the request for an Advisory Opinion on Climate Change presently before the International Court of Justice (ICJ), with reference also to the requests before the International Tribunal for the Law of the Sea (ITLOS) and the Inter-American Court of Human Rights (IACtHR). Pursuing this enquiry, Part IV considers the potential for building directly on previous international cases employing due regard as an emerging global regulatory standard where there are competing international legal rights and interests among currently living populations. This Part also explains how recognition of a hard law requirement of due regard for future generations in the context of climate change may ultimately be grounded in the *Corfu Channel* no-harm principle and the maxim *sic utere tuo ut alienum non laedas* underpinning the customary international law obligation to prevent significant environmental harm. As to substantive guidance for states' practice of due regard, Part V examines cases casting new light on the inherent character of sovereignty both in the ICJ and in international arbitration, potentially requiring sovereignty to be exercised reasonably so as to avoid manifestly excessive adverse effects on the legal rights and interests of others. If this is so, then due regard would want to be performed in a way that helped facilitate this outcome. Part VI closes by looking at how contemporary moral philosophy brings weight to the idea that states should have due regard for future generations. Part VII concludes.

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[7] Boyle, Redgwell and Birnie (n 4) (emphasis added). Alan Boyle and David Freestone 'Introduction" in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press, 1999) 1, 7.

[8] Boyle, Redgwell and Birnie (n 4), 129 citing *Gabčikovo-Nagymaros Project* (*Hungary v Slovakia*) Judgment of 25 September 1997 [1997] ICJ Rep 7 and *Pulp Mills on the River Uruguay (Argentina v Uruguay)* Judgment of 20 April 2010 [2010] ICJ Rep 14 [204].

[9] Just as in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Reports 226 [36] where the Court 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.

[10] See e.g. *Dispute regarding Navigational and Related Rights* (*Costa Rica v Nicaragua*) Judgment of 13 July 2009 [2009] ICJ Rep 213 and further cases, discussed below.

In sum, the article finds that the obligation of due regard for future generations is implicit in the obligation to prevent harm to the environment of other states and areas beyond national jurisdiction. This obligation has its roots in the due diligence that is owed by every state in respect of the rights and interests of others as recognised in *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*.[11] The requirement for good faith in the exercise of sovereignty so as to avoid an abuse of the rights of the sovereign is an important legal basis for the requirement of due regard for the interests of future generations.

## 2. Intergenerational Equity and Sustainable Development

The theory of intergenerational equity, and states' well-iterated international legal commitment to sustainable development, provide a valuable starting point for the idea that states might be required to have due regard for future populations' interests. This is because the theory of intergenerational equity and the principle of sustainable development embody legal recognition of the interests of future populations. Where there are legal interests good faith more readily finds purchase, and the exercise of sovereignty may have to be channelled accordingly.

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".[12] The elements of sustainable development are commonly understood to include integration of environmental protection and economic development,[13] the right to development, sustainable utilisation and conservation of natural resources,[14] inter-generational equity,[15] intra-generational equity,[16] and procedural elements including environmental impact assessment, public participation in environmental decision-making and access to information.[17] The 1972 Stockholm Declaration formally recognised a responsibility to future generations in Principle 1, and an integrated approach to development in Principle 13.[18] However the close relationships between environment, and

[11] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* (n 3) 22; *Alabama Claims Arbitration* (1872) Moore, I International Arbitrations; and see *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (n 9) at [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. 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 of 16 December 2015 [2015] ICJ Rep 665 [118].

[12] World Commission on Environment and Development, *Our Common Future* 1987, [27]. Hans Christian Bugge, "1987-2007: "Our Common Future" Revisited" in Hans Christian Bugge & Christina Voigt (Eds.) *Sustainable Development in International and National Law* (Europa Law Publishing, 2008) 3.

[13] Boyle, Redgwell and Birnie (n 4) 117-124; Philippe Sands, Jacqueline Peel, Adriana Fabra, Ruth MacKenzie, *Principles of International Environmental Law* (Cambridge University Press, 2018) 219.

[14] Boyle, Redgwell and Birnie (n 4) 117-124; Sands, Peel, Fabra and MacKenzie (n 7) 219.

[15] Boyle, Redgwell and Birnie (n 4) 117-124; Sands, Peel, Fabra and MacKenzie (n 7) 219.

[16] Boyle, Redgwell and Birnie (n 4) 117-124; Sands, Peel, Fabra and MacKenzie (n 7) 219.

[17] Boyle, Redgwell and Birnie (n 4) 117-124.

[18] Principles 1 and 13 Stockholm Declaration, Stockholm Declaration of the United Nations Conference on the Human Environment UN Doc A/CONF/48/14/REV1. See also the 1982 United Nations World Charter for Nature, UNGA Res 37/7, 37 UNGAOR Suppl (No 51) 17, UN Doc A/37/51 (1982). 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

economic and social development were still to be the subject of debate.[19] At the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro in 1992 the G77 and China argued strongly that the right to development was an inalienable right.[20] The matter was reconciled through a Nordic compromise proposal for reference to the environmental needs of present and future generations in Principle 3 of the Rio Declaration: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." [21] Principle 3 has come to be considered "the principal statement of the concept of intergenerational equity at international law".[22] The Rio Declaration went on to make a commitment to an integrated approach to development in Principle 4. The result is that Principles 3 and 4 of the Rio Declaration combined "reflect a commitment to moving environmental considerations and objectives from the periphery of international relations to its economic core".[23] Accompanying the Rio Declaration, Agenda 21 includes preambular reference to the need for a global partnership for sustainable development, and was directed in large part to helping achieve this.[24] Importantly, too, Principle 27 of the Rio Declaration[25] and chapter 39 of Agenda 21 called for the further development of the law in the field of sustainable development.[26] With the adoption of the United Nations Sustainable Development Goals (SDGs) in 2015, following on the heels of the Millenium Development Goals (MDGs), sustainable development has blossomed into a highly faceted, even kaleidoscopic concept - and with this has gained a new momentum.

The ICJ endorsed the principle of sustainable development in the 1997 *Gabčikovo-Nagymaros Project* (*Hungary v Slovakia*) case, observing: [27]

"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

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Strong prior to the United Nations Conference on the Human Environment in Stockholm. *The Founex Report on Development and Environment,* Founex, Switzerland, 4-12 June 1971. Virginie Barral and Pierre-Marie Dupuy "Principle 4: Sustainable Development through Integration" in Jorge E. Viñuales (Ed) *The Rio Declaration on Environment and Development: A Commentary*. (Oxford University Press, 2015) 157, 158.

[19] Virginie Barral and Pierre-Marie Dupuy (n 19) 158.

[20] Sands, Peel, Fabra and MacKenzie (n 7) 224.

[21] Declaration of the UN Conference on Environment and Development UN Doc A/CONF/151/26/Rev1.For commentary, *Claire Molinari, "*Principle 3: From a Right to Development to Intergenenerational Equity" *in* Viñuales (n 189) 139, 141-143.

[22] *Molinari (n 22)* 155, see also at 144. Principle 3 is found also in the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in 1993.

[23] Sands, Peel, Fabra and MacKenzie (n 7) 55, as cited by *Molinari (n 22)* 154.

[24] See Boyle and Freestone "Introduction" (n 7) 5.

[25] Principle 27: states and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.

[26] Boyle, Redgwell and Birnie (n 4) 125.

[27] *Gabčikovo-Nagymaros Project* (*Hungary v Slovakia*) (n 9) [140]. Emphasis added.

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*."

As Vaughan Lowe has remarked, the Court's reasoning and the way the Court approached its conclusions in the *Gabčikovo-Nagymaros* case "is of great interest and likely to prove to be of enormous influence".[28] However Lowe took the view that there is no hard law obligation of sustainable development in customary international law or elsewhere. Neither did he view sustainable development as being of such a character as to constrain a state's conduct as a soft law norm, due to the indeterminacy of its meaning and scope.[29] Lowe did recognise the normativity of sustainable development in international law in other respects, and that it may play a part in judicial reasoning, helping generate coherence in international law and supporting the findings of international courts and tribunals.[30] Nonetheless, according to Lowe sustainable development affords the principle of intergenerational equity no rights to bite on, and the principle of intergenerational equity is itself in normative terms a chimera.[31] He accordingly suggested that "inter-generational equity can scarcely be more than a weak injunction to take into account the interests of future generations when engaging in, or permitting others to engage in, present activities."[32] By contrast, Sands has argued that sustainable development "has entered the corpus of customary international law".[33] Contrastingly, and significantly for present purposes, Boyle and Redgwell take the essential point as being that "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".[34]

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[28] Vaughan Lowe, "Sustainable Development and Unsustainable Arguments" in Boyle and Freestone, *International Law and Sustainable Development* (n 7) 19.

[29] Lowe (n 29) 24, 29–31 citing *North Sea Continental Shelf cases* (Federal Republic of Germany/Netherlands) (Federal Republic of Germany/Denmark) [1968] ICJ Rep 14. Contemplating the status of the equidistance principle in maritime boundary delimitation the Court commented that for the norm to have passed from treaty law into the general corpus of international law it "would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law".

[30] Lowe (n 29) 31ff. The point is not necessarily confined to judicial decision-making, however the chapter Lowe was writing here focused on judicial decision-making.

[31] Cf Dissenting Opinion of Judge Weeramantry *Legality of the Threat or Use of Nuclear Weapons* (n 10) [455], regarding the principle of protecting the natural environment for future generations as a binding state obligation.

[32] Lowe (n 29) 28-29.

[33] Sands, Peel, Fabra and MacKenzie (n 7) 219 citing P Sands, "International Courts and the Application of the Concept of Sustainable Development" (1999) 3 *Yearbook of UN Law* 389. See *Molinari (n 22)* 146. See also Separate Opinion of Judge Weeramantry in *Gabčikovo-Nagymaros Project* (*Hungary v Slovakia*) (n 9) 104. Interestingly, Judge Weeramantry uses the language of due regard in envisaging the implementation of the principle of sustainable development and observing that the principle's components 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".

[34] Boyle, Redgwell and Birnie (n 4) 116.

This article admits as law the international legal interests of future generations acknowledged through the principle of sustainable development, even if only as soft law. This approach could help explain Lowe's important supplementary remark that intergenerational equity's "weak injunction" to take account into account the interests of future generations "might entail some legal consequences".[35] Lowe admitted for instance 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".[36] He also appeared to allow the normative procedural force of sustainable development when he subsequently considered 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 utilise property in a particular way "without any *regard for* the serious and irreversible harm caused by that particular use".[37] There is a clear commonality here with the views of Boyle and Redgwell. These observations boost the idea that in light of the need to mitigate climate change states' legislative and policy decision making today may have to have due regard for the interests of future generations, as a matter of law.

The next part of this article considers the potential for employing the concept of due regard for the interests of future populations in the request for an Advisory Opinion on climate change presently before the ICJ. The theory of intergenerational equity is relevant in all three of the current requests before international courts and tribunals for advisory opinions on climate change. However it is the General Assembly's request to the ICJ that specifically asks about the protection of the climate system and environment "for present and future generations".

## 3. The Request to the ICJ for an Advisory Opinion on Climate Change

The requests for advisory opinions on climate change before the ICJ, ITLOS and IACtHR have arisen in distinct legal and political contexts. The March 2023 UN General Assembly's request for an advisory opinion from the ICJ on the obligations of states in respect of climate change embraces international human rights law, international climate change law international environmental law, and the law on state responsibility.[38] The request also takes a specific interest in the legal consequences of conduct that has caused significant harm with respect in particular to small island developing states as well as adversely affected peoples and individuals of the present and future generations. The breadth of the request reflects the ambit of the Court's jurisdiction as well as the outcomes of the campaign led by Vanuatu that led to the request for the advisory opinion, mediated through negotiations with 193 UN Member states.

The request made to the ITLOS is narrower in ambit and origin. The questions are confined to the obligations of parties to the UN Convention on the Law of the Sea (UNCLOS) 1982, with a specific focus on obligations under Part XII of UNCLOS in respect of pollution and the marine environment.[39] The questions have been submitted to ITLOS by the Commission of Small Island

states on Climate Change and International Law established in 2021 with the purpose of

[35] Lowe (n 29) 29 and Lowe's footnote 12.
[36] Lowe (n 29) 29 and Lowe's footnote 12, emphasis added.
[37] Lowe (n 29) 34, emphasis added.
[38] Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in respect of Climate Change UN Doc A/77/L.58 J.
[39] Request for Advisory Opinion of 12 December 2022.

submitting such a request to ITLOS. Contrastingly, the request to the IACtHR by Chile and Colombia naturally focuses on human rights as protected through the Inter-American Human Rights System in the context of the climate emergency.[40] This request is broadly elaborated. There are six clusters of questions dealing respectively with duties of prevention; the right to life; the rights of children, young people, and future generations; access to justice and consultation; the rights of women, indigenous people and Afro-descendent communities; and common but differentiated obligations and responsibilities.

The International Court of Justice is especially well placed to address the question of general international law's accommodation of the interests of future generations and what this may demand of states. The UN General Assembly's March 2022 request for an advisory opinion on climate change expressly requests the Court's views on states' international law obligations to ensure the protection of the climate system and other parts of the environment from anthropogenic omissions of greenhouse gases for states and "for present and future generations".[41] This reference to present and future generations is underpinned by the first sentence of Article 3(1) of the United Nations Framework Convention on Climate Change:

"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." [42]

The Paris Agreement includes a preambular reference to intergenerational equity,[43] as well as many references to sustainable development, including framing its core objectives with reference to sustainable development in Article 2(1).[44] The General Assembly's request does not ask the Court specifically to address either sustainable development or intergenerational equity. However the right to a healthy and sustainable environment is referenced in the preamble to the request, as is the 2030 Agenda for Sustainable Development.[45] The Resolution's preamble also refers to sustainable development, though seemingly less as an obligation to engage in sustainable conduct and more in the sense that sustainable development is under threat due to the effects of climate change.[46]

The General Assembly's request to the ICJ directly references equity, echoing Article 3(1) of the UNFCCC, as do, partially, the Paris Agreement's preamble and Article 2(2). This reference to equity enhances the invitation to the Court to consider the matter of fairness among currently

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[40] 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 January 2023. See also references to future generations in this request, 1 and 6.

[41] Request for an Advisory Opinion of the International Court of Justice (n 39).

[42] United Nations Framework Convention on Climate Change: Article 3(1), emphasis added. Note previously General Assembly Resolution 43/53 of 6 December 1988 on the protection of global climate for present and future generations.

[43] Preambular paragraph 11, Paris Agreement.

[44] Article 2(1), Paris Agreement. See also preambular paragraphs 8 and 16.

[45] Request for an Advisory Opinion of the International Court of Justice (n 39) preambular 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"; Request for an Advisory Opinion of the International Court of Justice (n 39) para 3, "Recalling also its resolution 70/1 of 25 September 2015 entitled "Transforming our World: the 2030 Agenda for Sustainable Development"".

[46] Request for an Advisory Opinion of the International Court of Justice (n 39) preambular para 8.

living populations and future generations. Thus there are multiple reasons to believe the Court will have cause to address the matter of how states today are taking into account the interests of future populations.

## 4. Applying the Due Regard Standard to take into account Future Generations' Legal Interests

The concept of due regard may be considered an emerging global regulatory standard.[47] The idea of due regard developed through the law of watercourses and the law of the sea, catering to contemporary populations' interdependence. The concept is also embedded in world trade law and appears in international investment law and in a range of further international legal contexts including space law.[48] Due regard has been an important feature of riparian law for some time, with the Tribunal in the *Lac Lanoux* arbitration holding that:

'according 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'.[49]

In the United Nations Convention on the Law of the Sea (UNCLOS) regime, the language of due regard was settled upon during the negotiations on the legal regime for the high seas as a tool for balancing states' competing interests, in preference to concepts of due consideration.[50] Due regard has naturally been carried through in the text of the new Implementing Agreement to UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (the BBNJ Agreement).[51]

The *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) of UNCLOS which deals with the territorial sea) and due regard (as applicable in the EEZ) may equally require in practice. The Tribunal considered that the ordinary meaning of 'due regard' in the United Nations Convention on the Law of the Sea called for the United Kingdom to have such regard for the rights of Mauritius as is called for by the

[47] Foster (n 2), addressing due regard in the law of watercourses, law of the sea, trade and investment law. The research in this book, published in 2021, investigates three emerging global regulatory standards: due regard, due diligence in the prevention of harm and requirements for coherent relationships between regulatory measures and their objectives.

[48] Treaty on Principles Governing the Activities of states in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Article IX; Agreement Governing the Activities of states on the Moon and Other Celestial Bodies, Aricles 2 and 15(3); Declaration of Legal Principles Governing the Activities of states in the Exploration and Use of Outer Space, Principle 6; and Principles Relating to Remote Sensing of the Earth from Outer Space, principle IV.

[49] *Lake Lanoux Arbitration (France v Spain)* (1957) 24 ILR 101, [22], emphasis added.

[50] Julia Gaunce, 'On the Interpretation of the General Duty of "Due Regard" ' (2018) 32(1) *Ocean Yearbook Online* 27. See United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 307, art 87(2), arts 56(2), 58(3).

[51] Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction A/CONF.232/2023/4 19 June 2023. Art 11(3), 22(5) and 44(4).

circumstances and by the nature of those rights'.[52] The Tribunal identified factors influencing the 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 United Kingdom, and the availability of alternative approaches'.[53] This formulation may provide one reference point in considering how due regard could be employed as a tool for taking into consideration the interests of future populations.

We can also see due regard operating in World Trade Organisation law as a sophisticated juridical response to contemporary populations' interdependence. The WTO Appellate Body made it clear early in its jurisprudence that measures falling within the exceptions found in Article XX of the General Agreement on Tariffs and Trade 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.[54] The chapeau to Article XX has been clearly identified both as an expression of the principle of good faith[55] and as a tool to prevent abuse of the exceptions specified in Article XX's subparagraphs.[56] The chapeau is there to mark out and ensure an equilibrium of rights among WTO Members,[57] including WTO Members' economic interests in free trade and their individual and common interests in the right to regulate. In the WTO, failure to have regard for a measure's cost to others[58] or to provide them with an opportunity to be heard[59] may undermine a respondent's Article XX defences.[60] Certain recent regional trade negotiations have since made explicit the requirement to consider the costs, benefits and distribution impacts of proposed new regulations.[61]
Due regard is further referenced in international investment treaty law. This is a field which has been characterised by an intense level of discussion on the interpretation of legal rules to

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[52] C*hagos Marine Protected Area Arbitration* (*Republic of Mauritius v United Kingdom*) (Award) (2015) 162 ILR [519].

[53] C*hagos Marine Protected Area Arbitration* (*Republic of Mauritius v United Kingdom*) (n 52) [519]. However the Tribunal declined to find any 'universal rule of conduct' or uniform obligation in this formulation.

[54] *United States—Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body (29 April 1996) WT/ DS2/ AB/ R, WT/ DS4/ AB/ R, DSR 1996:I, 322, emphasis added. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body (12 October 1998) WT/ DS58/ AB/ R, DSR 1998:VII, 2755 [150]— [151].

[55] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body (n 55) [158]. See also *Brazil—Measures Affecting Imports of Retreaded Tyres,* Report of the Appellate Body (3 December 2007) WT/ DS332/ AB/ R, DSR 2007:IV, 1527, [215].

[56] *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (n 55) [158]; *United States—Standards for Reformulated and Conventional Gasoline* (n 55) 22. As the Appellate Body understood it, the abuse of rights doctrine is one application of the good faith principle, requiring the reasonable exercise of a right, wherever it impinges on a WTO Member's treaty commitments. Ibid, [158], Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens and Sons, Ltd. 1953) ch 4, 125.

[57] The Appellate Body has explained that '[t]he location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body (n 55) [159].

[58] *United States—Standards for Reformulated and Conventional Gasoline* (n 55) 3.

[59] *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (n 55).

[60] Foster (n 2) 330-331.

[61] Consider the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (signed 8 March 2018, entered into force 30 December 2018) Art 25.5.2.

achieve appropriate rights-balancing. This is perhaps because, exceptionally, private parties are making use of far-reaching entitlements under the relevant treaties to take arbitral proceedings against host states. The presence of private actors adds a sharp edge to the debate over states' freedom to regulate in the national and international public interest. Investment agreements should be understood primarily as balancing the interests of the populations of the states concluding them.[62] Perhaps understandably however, investment arbitral tribunals referencing due regard have tended to couch the need for host states to give due consideration to the burdens that their intended measures will impose in terms of their effects on "investments".[63]

The function being served by the notion of due regard in the cases canvassed above is to facilitate 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 and by the abuse of rights doctrine. 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.[64] In the situations under contemplation in this article, the exercise of the rights associated with states' sovereignty is in tension with future populations' legal interests as recognised in the theory of intergenerational equity and the principle of sustainable development. As seen above, these interests are acknowledged in the UNFCCC as well as in the language of the UN General Assembly's request to the International Court of Justice for an advisory opinion on climate change.

However, viewing particular situations as inferring the potential abuse of rights may be unpalatable due to the connotations of the term "abuse".[65] There are more positive ways of approaching the matter and the due regard rubric is a potentially valuable avenue in this respect. Due regard has featured previously in the Court's reasoning in *Whaling in the Antarctic* (*Australia v Japan: New Zealand intervening*).[66] Together with the UNFCCC,[67] the International Convention for the Regulation of Whaling is one of the few treaties to record future generations' interests in the subject matter regulated, although the Court referred to future

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[62] Foster (n 2) 258-262; Caroline Foster "Why Due Regard is More Appropriate than Proportionality Testing in International Investment Law" (2022) 23(3) *Journal of World Investment and Trade* 388.

[63] *LG&E Energy Corp, LG&E Capital Corp, LG&E International INC v Argentine Republic* ICSID Case No ARB/ 02/ 1, Decision on Liability, 3 October 2006 [158], [162]. See also *Methanex Corporation v United States* UNCITRAL, Final Award on Jurisdiction and Merits, 3 August 2005 (J William Rowley, W Michael Reisman and VV Veeder), Part III, Chapter A, [13]– [16].

[64] Georg Schwarzenberger "The Principle of Good Faith" in *Collected Courses of the Hague Academy of International Law Vol 87* (Nijhoff, 1955) 320-324. See also Hersch Lauterpacht, *The Function of Law in the International Community* (Clarendon Press, 1933) ch. XIV. Hersch Lauterpacht *The Function of Law in the International Community* (Clarendon Press, Oxford 1933) ch. XIV.

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

[66] *Whaling in the Antarctic (Australia v Japan; New Zealand intervening* (n 5).

[67] Above. See also UNFCCC preambular paras eleven and twenty-three:

"Recalling the provisions of General Assembly resolution 44/228 of 22 December 1989 on the United Nations Conference on Environment and Development, and resolutions 43/53 of 6 December 1988, 44/207 of 22 December 1989, 45/212 of 21 December 1990 and 46/169 of 19 December 1991 on protection of global climate for present and future generations of mankind," "Determined to protect the climate system for present and future generations,".

generations only indirectly as the phrase appears in the Convention's preamble.[68] The Court's judgment in the *Whaling in the Antarctic* case turned on the Court's identification of the requirement for a reasonable relationship between the design and implementation of a scientific whaling program and its objectives. 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.[69] In this respect it is as though the IWC acted as a conduit for the interests of the parties, the global community and future generations.

Returning, though, to the field of customary international law, can it be argued that, when it comes to climate change, due regard for future generations is called for as an aspect of states' obligation to prevent significant harm to the environment of other states and areas beyond national jurisdiction? The duty on a state to prevent environmental harm from activities under its jurisdiction or control was declared by the International Court of Justice declared in the *Nuclear Weapons Advisory Opinion*, referring to:[70]

"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".

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[68] International Convention for the Regulation of Whaling (opened for signature 2 December 1946, entered into force 10 November 1948) 161 UNTS 72. As referenced in the Court's Judgment at para [56], International Convention for the Regulation of Whaling (n 68) first preambular paragraph "Recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks". See also the Agreement Governing the Activities of states on the Moon and Other Celestial Bodies, Article 4, providing expressly that "Due regard shall be paid to the interests of present and future generations".

[69] *Whaling in the Antarctic (Australia v Japan; New Zealand intervening* (n 5) [83], [137], [144].

[70] *Nuclear Weapons Advisory Opinion* (n 10) [29], iterated in the *Gabčíkovo-Nagymaros* case (n 9) [53] and *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (n 9) [101]. See also previously the 'Declaration of the United Nations Conference on the Human Environment' UN Conference on the Human Environment (Stockholm 5-16 June 1972) (16 June 1972) UN Doc A/CONF.48/14, Principle 21:

"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction";

and the

'Rio Declaration on Environment and Development' UN Conference on Environment and Development (Rio de Janeiro 3-14 June 1992) UN Doc A/CONF.151/26, Principle 2:

"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction."

The textbooks similarly declare the law, drawing on the *Trail Smelter Arbitration*, where it was determined that no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another. [71]

The basis for an argument requiring due regard for future generations is strengthened when we take into account that the specific obligation to prevent environmental harm is based in the more general *"*no-harm" rule and the maxim *sic utere tuo ut alienum non laedas*, which deal with how sovereigns must act vis-à-vis the legal rights and interests of others. In *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* the Court 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".[72] In *Island of Palmas* it was likewise held to follow from the concept of territorial sovereignty that states will protect others' rights within their territories.[73] The obligation of every state not to allow knowingly its territory to be used for acts contrary to the rights and interests of others is well recognised. [74]

In a setting where it is the legal interests of future generations that stand to be affected by the injurious use of states' territory and insufficient regulation of the actors and activities under a state's jurisdiction and control, the question is one of how states should appropriately conduct themselves in this context. This requires first and foremost that states take fully into account future generations' interests alongside those of present generations. As the Institut de Droit International has set out:

"Every 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". [75]
This is as envisaged in the International Law Commission's 2021 Draft Guidelines on the Protection of the Atmosphere: [76]

"The atmosphere should be utilized in an equitable and reasonable manner, *taking fully into account the interests* of present and future generations."

The International Law Commission's Draft Guidelines also refer to due regard in relation to a particular outcome: the equitable and reasonable use of the atmosphere. The subject of outcomes is considered in the following part of this article, Part V. Part V will deal with

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[71] *Trail Smelter Arbitration (United States/Canada)* [1939] 33 AJIL 182; [1941] 35 AJIL 684.
[72] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* (n 3).
[73] *Island of Palmas (The Netherlands/United States of America)* [1928] 2 RIAA 829, 839.
[74] See also UN Secretary-General, Survey of International Law in relation to the Work of the ILC A/CN .4/Rev.1 (1949), para 57: "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".
[75] Institut de Droit International 1997 Procedures for the Adoption and Implementation of Rules In the Field of Environment, Article 6.1.
[76] 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". Draft Guidelines on the Protection of the Atmosphere, with Commentaries Thereto, 2021, 22-23

substantive developments in the international law on sovereignty. These developments may condition the giving of due regard by providing guidance on what is to be expected as an outcome of such regard, and thus informing the due regard process. This Part will investigate the possibility that sovereignty itself may be undergoing evolution, such that it must be exercised reasonably. In giving due regard to future generations' legal interests, it may be the case that states are obliged to refrain from conduct that is unreasonable in light of these interests, in the sense that it would have manifestly excessive adverse effects for future generations. This would apply in relation to anthropogenic greenhouse gas emissions.

## 5. Reasonableness in the exercise of sovereignty

The view that sovereignty may be less absolute than in previous centuries has been on the horizon since at least mid 20th century. As Schwarzenberger observed as long ago as 1955, rather than evanescing into a notion of bygone days, sovereignty today may be a concept with new and not always pleasing content.[77] Perhaps contemporary sovereignty is even to be understood as a bundle of powers subject to certain disciplinary constraints.[78] These perspectives resonate through a number of ICJ decisions, with supporting authority from a number of international arbitral decisions.

### *a. International Court of Justice*

The ICJ's judgment in *Dispute Regarding Navigational and Related Rights* (*Costa Rica v Nicaragua*) 2009 seems to illustrate the idea that contemporary sovereignty is subject to inbuilt constraints. This case 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 ought not to render impossible or substantially impede the exercise of Costa Rica's right of free navigation; that this regulation have a legitimate purpose, such as safety of navigation, crime prevention and public safety and border control or environmental protection; that it not be discriminatory; and that it 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.[79] It appears the Court may have considered these characteristics to represent the essence of the territorial sovereign's regulation-making power.[80] We could also refer to the Annex VII UNCLOS Tribunal decision in the Arctic Sunrise Case *(Kingdom of the Netherlands v. Russian Federation)* 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, and as referenced in the pleadings of The Netherlands, though there was no call to apply these criteria in the circumstances of the case.[81] There is in any event scope for

[77] Schwarzenberger "(n 65) 314.
[78] Foreshadowing this trajectory in international legal development, Philip Allott "Power Sharing in the Law of the Sea" (1983) 77(1) *AJIL* 1.
[79] *Dispute Regarding Navigational and Related Rights* (*Costa Rica v Nicaragua*) (n 11) [13], [89].
[80] As the Court stated explicitly in relation to Nicaragua's obligation to notify the adoption of regulations, *Navigational Rights* (n 11) 96.
[81] *The Arctic Sunrise Arbitration* (*Kingdom of the Netherlands v Russian Federation*) (Award on the Merits) (14 August 2015) PCA Case No 2014- 02 171 ILR 1.

reservation about the application of the relatively intrusive idea of proportionality testing referred to by the Netherlands. 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.[82]

Turning to the criterion of reasonableness, one question arising is whether the requirement for reasonableness appearing in these cases applies only when states are exercising a discretionary power under a treaty. In *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* 2020[83] the Court emphasised 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".[84] This is consistent with Bin Cheng's well known 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".[85] It is possible Bin Cheng saw the same principles as applying also where a state is exercising its rights under general international law,[86] but this is difficult to ascertain.[87]

However, we can question whether many of the cases here are really dealing with discretionary powers under a treaty, or rather more broadly simply with the exercise of the sovereignty naturally enjoyed by states and in some cases reserved from the scope of a treaty. The latter seems to be the case in *Navigational Rights*, as addressed above. The same appears to be the case in respect of *Whaling in the Antarctic*. Annex VIII of the Whaling Convention is worded in such a way as to preserve the sovereign freedom of a state party to engage in permitted scientific whaling.[88] The relevant powers in *Immunities and Criminal Proceedings* likewise appear not so much as discretionary powers under a treaty, but powers or freedoms existing 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 a receiving state's power to object to a sending state's designation of the premises of its

[82] Foster (n 2) 247-275; 323-337.

[83] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* Judgment of 11 December 2020, ICJ Reports 2020, 300.

[84] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* (n 84) [73] citing *Rights of Nationals of the United States of America in Morocco (France v. United States of America),* Judgment of 27 August 1952, ICJ Reports 1952, p. 212; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008 ICJ Reports 2008, 229, [145].

[85] Bin Cheng, (n 57) 136.

[86] Bin Cheng (n 57), 129–132.

[87] Bin Cheng (n 57), 130-131.

[88] Article VIII(1) is worded as a savings clause (like Article XX of the GATT): "*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 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." Emphasis added.

diplomatic mission.[89] Article 2 of the Vienna Convention 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. 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 *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 relation to climate change, the legal interests at issue are the accepted interests belonging to future generations.

The situation was a little different in *Certain Iranian Assets (Islamic Republic of Iran v. United states of America)* 2023,[90] in which Iran successfully challenged US sanctions. In this case there was a treaty provision expressly committing the parties to "refrain from applying unreasonable or discriminatory measures that would impair the acquired rights and interests" of the other party's nationals and companies.[91] 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, and the Court found that "a measure is unreasonable if its adverse impact is manifestly excessive in relation to the purpose pursued",[92] also requiring this to be a legitimate public purpose.[93] The relevant US legislation and its application failed this test.[94] The case is signficant in the context of this article's enquiry because it offers an understanding of what is meant by "not manifestly excessive", which was the same phrase employed by the Court 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 requirements for the exercise of sovereignty in matters that may affect others' rights and interests.

### *b. International arbitral decisions*

Three arbitral awards also support the idea that sovereignty may be inherently subject to certain limitations, including in relation to the good faith exercise of sovereign power. 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, 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'.[95] The Tribunal was clear that the right to make regulations for these fisheries,

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[89] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* (n 84) [73].
[90] *Dispute Regarding Navigational and Related Rights* (*Costa Rica v Nicaragua*) (n 11), and *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* Judgment of 30 March 2023.
[91] Article IV(1) of the parties' 1955 Treaty of Amity, Economic Relations and Consular Rights, second clause.
[92] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* (n 91) [149].
[93] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* (n 91) [147].
[94] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* (n 91) [156].
[95] *North Atlantic Coast Fisheries Case* (*Great Britain v United States*) (7 September 1910) (1910) Scott Hague Court Rep 141; Convention Respecting Fisheries, Boundary, and the Restoration of

without the consent of the US, was inherent to the sovereignty of Great Britain, although the exercise of this regulatory power was limited by the parties' bilateral treaty. The treaty grant of fishing rights by the United Kingdom 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.[96] 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.[97] 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 artesanal fishing rights of foreign nationals would not restrict coastal states from reasonable regulation,[98] and that regulation might be 'necessary for conservation and to restrict environmentally harmful practices'.[99]

Also in the oceans context the arbitral tribunal in the *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.[100] In that 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. Addressing whether Canada could in the future adopt and apply regulations implementing 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 International Court of Justice in the *Barcelona Traction* case.[101]

Finally, the *Iron Rhine* arbitration is another case where a treaty between the parties was applicable yet the Tribunal recognised that its pronouncements related to the Netherlands' underlying territorial sovereignty rather than a discretion conferred by the treaty. The case is

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Slaves (United Kingdom of Great Britain and Ireland–United States of America) (signed 20 October 1818, entered into force 30 January 1819) 8 Stat 248, TS 112, art 1.

[96] *North Atlantic Coast Fisheries Case* (*Great Britain v United States*) (n 96) 171.

[97] *North Atlantic Coast Fisheries Case* (*Great Britain v United States*) (n 96) 143, 171.

[98] *South China Sea Arbitration (Republic of the Philippines v People's Republic of China)* (Award of 12 July 2016) PCA Case No 2013- 19 170 ILR 1 [414], [809] citing *North Atlantic Coast Fisheries Case* (*Great Britain v United States*) (n 96).

[99] *South China Sea Arbitration (Republic of the Philippines v People's Republic of China)* (n 99) [809].

[100] *Dispute Concerning Filleting within the Gulf of St Lawrence ('La Bretagne')* (*Canada v France*) (Award) 82 ILR 590, emphasis added.

[101] *Dispute Concerning Filleting within the Gulf of St Lawrence ('La Bretagne')* (*Canada v France*) (n 101) 631. The Tribunal quoted the ICJ's *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". *Barcelona Traction, Light and Power Company, Ltd* (*Belgium v Spain*) (Judgment) [1970] ICJ Rep 3, 48, [93]. The Tribunal also observed that 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. See above.

significant also because it represented a high watermark of adjudicatory engagement with the substantive reconciliation of rights in a sustainable development context.[102] 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.[103] 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 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.[104] 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.[105] 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.[106]

Taken as a whole, the cases reviewed above appear to demonstrate that sovereignty as an international legal concept in the contemporary world is a less absolute form of authority than once supposed. The idea that sovereignty must be exercised reasonably is becoming more prevalent, and the ICJ is indicating that in assessing reasonableness a requirement is that the adverse effects be "not manifestly excessive". However, whether or not we consider sovereignty to be evolving in the way inferred above, an obligation to have due regard for the legal interests of future generations can still be understood to inhere in the obligation to prevent significant environmental harm. Further, the impetus towards recognising a due regard obligation derives momentum from fields of scholarship beyond international law.

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[102] *Arbitration Regarding the Iron Rhine ('Ijzeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (Award) (2005) 140 ILR 1; Boyle, Redgwell and Birnie (n 4) 227; wee also Virginie Barral and Pierre-Marie Dupuy (n 19) 173. It appears that the parties had informally agreed, prior to the dispute, that the costs of reactivation of the Iron Rhine railway were to be subject to careful balancing rather than being born by either party on its own, as a reflection 'of their equally legitimate needs'. See Freya Baetens, "The Iron Rhine Case: On the Right Track to Sustainable Development?" in Marie-Claire Cordonier Segger and HE Judge CG Weeramantry (eds), *Sustainable Development Principles in the Decisions of International Courts* (Routlege, 2017). See also *Indus Waters Kishenganga Arbitration* (*Islamic Republic of Pakistan v Republic of India*) (Final Award) (20 December 2013) PCA Case No 2011- 01 157 ILR 362.

[103] 1839 Treaty Between Belgium and the Netherlands Relative to the Separation of their Respective Territories (Belgium–Netherlands) (signed 19 April 1839) 88 CTS 427.

[104] *Arbitration Regarding the Iron Rhine ('Ijzeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (n 103) [87]

[105] *Arbitration Regarding the Iron Rhine ('Ijzeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (n 103) [204].

[106] *Arbitration Regarding the Iron Rhine ('Ijzeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (n 103) [95].

## 6. Moral Philosophy

Recognition of an international legal requirement to have due regard for the future appears to be underpinned by moral obligations to future people, with insights from the field of psychology assisting. A starting point is that, as Garrett Hardin, author of the *Tragedy of the Commons* published in *Science* in 1986, remarked in 1972 "The morality of an act is a function of the state of the system at the time the act is performed.107 As advised in the 2019 report of the Working Group on the 'Anthropocene', a sub-body of the Subcommission on Quaternary Stratigraphy, Earth has entered the Anthropocene epoch. Human activity for the first time in history is affecting and influencing the Earth's physical systems.[108] We are undeniably in a relationship with the future individually and collectively that we have never been in before, and it is apparant that we have *enough* knowledge, now, in respect of forthcoming global environmental harm, to generate moral or ethical responsibilities.

Making sufficient progress in articulating this moral duty has been a challenge. Reading the Stanford Encyclopedia of Philosophy in 2023 suggests that, too often, there is still a focus on the problem that it is not known specifically who future persons will be and that we have limited and uncertain knowledge of their living conditions.[109] Addressing whether and how we can have obligations to future generations has been a challenge for moral philosophy largely because we can not have direct relations with them: the types of mutual dependence that we might usually point to between persons are absent (as are the politics). This makes it difficult to employ traditional contractarian reasoning. The repertoire of ways in which the issue of future generations' well-being can be approached has been in need of expansion.

Samuel Scheffler suggested in 2018 that a philosophical answer to the question "why worry about future generations?" rests on interconnected reasons of love, reasons of valuation, reasons of interest and reasons of dependence (referred to by Schleffler as reasons of reciprocity) among generations.[110] Reasons of love involve our distress at the thought humanity may be harmed or destroyed. Reasons of valuation are the result of our valuation of attributes of humanity such as "beautiful singing or graceful dancing or intimate friendship or warm family celebrations or hilarious jokes or gestures of kindness or displays of solidarity".[111] Reasons of interest are attached to human satisfaction from engaging in conduct that will

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[107] Hardin*, Exploring New Ethics for Survival* (Viking, 1972) cited in Hardin, "Who Cares for Posterity?" in Ernest Partridge (ed) *Responsibilities to Future Generations: Environmental Ethics* (Prometheus Books, 1981) 221, 231.

[108] Working Group on the 'Anthropocene' | Subcommission on Quaternary Stratigraphy (released May 2019).The Working Group (AWG) was established under the auspices of the International Commission on Stratigraphy (ICS) which is part of the International Union of Geological Sciences (IUGS)'. The Working Group advised that Earth entered the Anthropocene epoch around the year 1950. See http://quaternary.stratigraphy.org/working-groups/anthropocene/

[109] See for instance Lukas Meyer, "Intergenerational Justice" *Stanford Encyclopedia of Philosophy*, *First published Thu Apr 3, 2003; substantive revision Tue May 4, 2021.* See previously for instance Gregory Kavka, 'The Futurity Problem" in Partridge (n 108) 109, Galen K. Pletcher, 'The Rights of Future Generations" in Partridge 167. Occasionally international lawyers have taken a similar tack. Consider d'Amato's arguments against the theory of intergenerational equity. Anthony D'Amato "Do We Owe a Duty to Future Generations to Preserve the Global Environment?" (1990) 84(1) *AJIL* 190, and see response by Brown Weiss 1990 (n 6).

[110] Samuel Scheffler, *Why Worry About Future Generations?* (Oxford University Press, 2018), Chapters Two and Three.

[111] Scheffler (n 111).

continue to benefit others even beyond our own lifetimes. Reasons of dependence posit that we are dependent on future generations for the value of our own lives, at least in part. Previous writers have made some similar points. Knowing that we are affecting earth systems, and needing to engage in conduct with effects transcending our present existence,[112] are factors that may combine in a way that create psychological reasons prompting rational and self-interested persons to care about the future. Our identities are rooted in the past, and continue into the future: we do and should regard the future as part of ourselves.[113] On Scheffler's and associated approaches our reasons to care about the future are rooted in "our actual attachments as flesh-and-blood human beings".[114]

Contrastingly the standard utilitarian or consequentialist view is that there can exist objective, moral reasons to care about future generations based on an understanding that the history of the world may be so much better if future generations survive and flourish.[115] A central challenge, which faces both consequentialists and non-consequentialists, and which also faces international law, is how to reconcile this insight with the need to look after and promote the interests of present-day persons. Addressing how to balance intra-generational and inter-generational justice is no easy philosophical task.[116] The challenge has become acute with the knowledge that, particularly in the face of human-induced climate change, future generations might be worse off because we have looked after our own interests.[117]

Philosophers' work on the topic of future generations has an increasing resonance with the development of international law, including the idea of due regard. In the novel work "Answering to Future People: Responsibility for Climate Change in a Breaking World" world-leading consequentialist New Zealand philosopher Tim Mulgan builds on the idea that human beings' moral decisions may have to be justifiable to the individuals who will be affected.[118] Mulgan presents a hypothetical dialogue between contemporary persons and inhabitants of a possible broken future world where human-induced climate change has

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[112] Ernest Partridge suggested that psychologically healthy human beings' basic need for self-transcendence generates reasons to care about our impact upon the living conditions of both our contemporaries and successor generations. Ernest Partridge "Why Care about the Future?" in Partridge (n 108) 204.

[113] A. De-Shalit, *Why Posterity Matters: Environmental Policies and Future Generations* (Routledge 1995) 15-16.

[114] Schleffer (n 111) 135. Hilary Greaves describes Schleffler's work as reflecting a primarily prudential (self-interested) approach to the question. Hilary Greaves, "Scheffler, Samuel. Why Worry About Future Generations? Oxford: Oxford University Press, 2018" (2019) 130(1) *Ethics* 136.

[115] Greaves (n 115) 140.

[116] As Mulgan says, moral and political theorists have still largely to explore the tensions between intergenerational and intragenerational justice. Tim Mulgan, *Future People: A Moderate Consequentialist Account of our Obligatiosn to Future Generations* (Clarendon Press, 2006) 356.

[117] Tim Mulgan, "Replies to Critics" *Philosophy and Public Issues (New Series)* 4 (2014): 58–92, 61.

[118] Tim Mulgan "Answering to Future People: Responsibility for Climate Change in a Breaking World" (2017) 34(2) *J.Applied Phil*. 532, 533-535. Drawing on the work of Stephen Darwall, *The Second-Person Standpoint* (Harvard University Press, 2009). See previously, Tim Mulgan *Ethics for a Broken World: Imagining Philosophy After Catastrophe* (Routledge, 2011) in which Mulgan conducts a thought experiment in which the reader teaches today's European and American philosophies to future students living in a world broken by catastrophic climate change, prompting reflection on these philosophies' temporal and cultural myopia.

rendered life precarious and resources are insufficient to meet everyone's basic needs. [119] He reasons that if we are able to justify our decisions to future people this will be a sign that we have balanced intra-generational and inter-generational obligations appropriately.[120] Simultaneously, the process of justification will help generate the motivation and "felt urgency" usually attaching to fulfilment of obligations to contemporaries.[121] Mulgan's dialogue conveys the harshness with which reasonable people in credible futures might in fact judge us. Readers are likely to agree that such processes of justification will help trigger conservationist motivations.[122] The device Mulgan has employed is also strikingly resonant with this article's contemplation that we acknowledge an international legal requirement of due regard for future generations.

Mulgan leaves to linger the implication that justificatory dialogues in which future persons' interests and perspectives are presented to contemporary decision-makers could possibly also help achieve the appropriate substantive, objective balancing of obligations across generations.[123] It does seem likely there will be a greater chance of achieving this where decision-makers actively contemplate, consider, and formulate justifications for their own conduct in response to reasonable future persons' possible arguments about their interests. Indeed, it is for this type of reason that international environmental law has come to include many of its procedural obligations. The probability of better substantive outcomes has led to the development of a range of procedural obligations in international environmental law, including obligations of prior notification and environmental impact assessment.[124] The same implication undergirds the proposition that international law requires due regard for future generations. This is reinforced by the essential point, as Boyle and Redgwell put it in 2021, "that mankind has a responsibility for the future, and that this is an inherent component of sustainable development is incontrovertible, however expressed".[125]

## 7. Conclusion

The legal interests of future generations are clearly recognised in the principle of sustainable development and the theory of intergenerational equity, as well as in the UNFCCC. There is good reason for relevant rules of international law to be understood as requiring due regard for these legal interests. Leading authors tell us that the intergenerational dimension of sustainable development requires states to employ appropriate decision-making processes, where the environment and future generations' interests are taken into account: that they be given due regard. Due regard is an emerging global regulatory standard, seen in the law on watercourses, the law of the sea, trade and investment law, and diverse fields including space law.

In the context of anthropogenic climate change the obligation to prevent significant harm to the environment of other states and areas beyond national jurisdiction embraces a requirement of

[119] Mulgan "Answering to Future People" (n 119); see also Mulgan, *Ethics for a Broken World* (n 119).
[120] Mulgan "Answering to Future People" (n 119) 533.
[121] Mulgan "Answering to Future People" (n 119) 533-534.
[122] Mulgan "Answering to Future People" (n 119) 546.
[123] Mulgan "Answering to Future People" (n 119) 535
[124] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (n 9) [71]-[79].
[125] Boyle, Redgwell and Birnie (n 4) 122. See likewise previously, Alan Boyle and David Freestone 'Introduction" (n 7) 13.

due regard for future generations. As a hard law requirement this obligation is ultimately grounded in the no-harm rule reflected in the *Corfu Channel* case and the maxim *sic utere tuo ut alienum non laedas* which call for states when exercising their sovereignty to respect the rights and interests of others. There is further a good argument that in giving due regard to future generations' legal interests, states are obliged to refrain from conduct that is unreasonable in light of these interests, in the sense that it would have manifestly excessive adverse effects for future generations.