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Kaden Pradhan
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Foreword

We are thrilled to present the Summer Issue of Volume 11 of the Cambridge Law Review. This Issue offers a series of novel, timely, and intellectually stimulating articles across a range of legal topics, and it has been profoundly rewarding to see the hard work of all involved come to fruition. Our deepest appreciation to the Editorial Board, whose diligence has been exemplary, and the Managing Editors: Kai Zhen Tek, Liam McCauley, and Alldon Garren Tan. Without their many hours of work and toil, it would have been impossible to bring the Issue to this level of quality. They have been indispensable members of the CLR community, and a genuine joy to work with. Our gratitude also goes to the authors, who tolerated our exacting and onerous review process in order that their articles could progress to be powerful and significant contributions to their respective fields.

Of those articles, the first presented in this Issue is 'Shadow Banking Rewritten in Code: The Future Beyond MiCAR in Regulating Centralised Crypto-Asset Lending and Borrowing' by Kornranut Junwerasatien. Kornranut charts the development of centralised loan services in the 'decentralised' finance space and explores the ways in which traditional regulatory approaches might be brought to bear on crypto-asset lending and borrowing. They use MiCAR as a vehicle to elucidate the twin prudential and conduct arms conventionally associated with financial regulation, and ask whether MiCAR offers adequate legal coverage, concluding – as with many such matters – 'yes' in some respects and 'no' in others.

This is followed by Adam Choudhury's article, 'The Legal Architecture of Environmental Justice: Incorporating the Aarhus Convention through the Environmental Rights Bill'. Adam notes that the UK is in a particularly poor position with respect to its implementation of the Aarhus Convention, a key treaty on procedural environmental rights, and that both traditional doctrines and recent legal developments -- particularly in the arenas of standing, criminalisation, and costs -- prevent sufficient access to environmental justice. Adam evaluates the Environmental Rights Bill, a civil society initiative, as a potentially more just alternative through the lens of critical environmental justice theory.

In the next article, 'Brexit and the Erosion of the UK's Territorial Constitution: Legislative Consent, Intergovernmental Relations, and Policy Divergence in an Uncodified, Asymmetric State', Darryn Nyatanga problematises Brexit as a fulcrum of constitutional erosion, arguing that it has introduced significant instability into the UK's territorial constitution in myriad ways. Devolution issues feature prominently in the analysis, and Darryn offers some fascinating insights into the ways in which these arrangements have come under strain as a result of leaving the European Union. The article is a valuable contribution at the intersection of law and constitutional theory.

Finally, in 'Climate Impact Assessments: Mapping Their Evolving Obligations in International Law', Dhruv Singal queries whether a novel obligation is emerging at custom for States to conduct Climate Impact Assessments, as distinct from the more traditional Environmental Impact Assessment. They chart State practice and *opinio juris* in support of their argument that such a norm is crystallising. Additionally, material from the trio of recent Advisory Opinions is deployed to bolster the analysis. Dhruv also provides some thoughts on doctrinal interstices, including as to the relevant thresholds and *erga omnes* character.

We have been deeply privileged to work on this Issue, and struck by the commitment that both the Board and the authors have shown to advancing meaningful legal dialogue and research. We very much look forward to beginning the process afresh for the next Issue, and to advancing the CLR's position as a unique and prestigious publication.

Kaden Pradhan & Thomas Loke Zhih Hahn
Co-Editors-in-Chief
University of Cambridge
16 June 2026

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Shadow Banking Rewritten in Code: The Future Beyond MiCAR in Regulating Centralised Crypto-Asset Lending and Borrowing

Kornranut Junwerasatien*

ABSTRACT

The most recent crypto winter, sometimes regarded as the crypto industry's Lehman moment, highlights the problems associated with unregulated lending and borrowing platforms such as Celsius, Voyager, and BlockFi. These centralised entities, while built on differing technological infrastructures, perform functions comparable to those of non-bank financial intermediaries (NBFIs) in traditional financial markets and are exposed to similar intermediation risks. This paper examines these parallels, identifies the risks arising from centralised crypto lending and borrowing activities, and proposes regulatory recommendations from both prudential and conduct perspectives to prevent a recurrence of such catastrophic downturns. The paper aims to contribute to the broader discussion on regulatory approaches to decentralised finance (DeFi) by focusing specifically on the regulation of lending and borrowing activities facilitated by centralised platforms. The main finding is that the very existence of these platforms within the DeFi ecosystem paradoxically reintroduces a regulatory entry point which can draw upon traditional financial regulation addressing intermediation risks. The analysis finds that, while more targeted mitigants may be implemented, MiCAR nonetheless provides strong coverage in relation to conduct rules. However, MiCAR's prudential framework is highly insufficient for addressing the risks associated with lending and borrowing activities.

Keywords: EU financial regulation, MiCAR, crypto lending, crypto borrowing

I. INTRODUCTION

Founded on the ideology of cyber-libertarianism,[1] decentralised finance (DeFi), which encompasses underlying technologies such as distributed ledgers and cryptocurrencies, seeks to replicate certain functions of the traditional financial system in an open and permissionless manner.[2] When considered through Lessig's four modalities of regulation, namely law,

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[1] Paolo Tasca and Riccardo Piselli, 'The Blockchain Paradox' in Philipp Hacker and others (eds), *Regulating Blockchain* (OUP 2019) 27.

[2] European Banking Authority (EBA) and European Securities and Markets Authority (ESMA), 'Joint Report on Recent Developments in Crypto-Assets under Article 142 of MiCAR' ESMA75-453128700-1391 EBA/Rep/2025/01

norms, markets, and architecture,[3] DeFi places significant reliance on architecture or software code. According to Lessig, these four modalities regulate individuals by constraining their choices within a set of permissible actions. This reliance on code in DeFi reflects a cyber-libertarian effort to bypass traditional legal frameworks and human intermediaries by encoding rules into the architecture.

Unlike the traditional financial system, which requires a degree of trust in the administration and safeguarding of the system, distributed ledger technology (DLT) operates on the principle of cryptographic proof rather than trust.[4] To establish this trust-less system, the architecture of DLT is designed to maintain multiple copies of the ledger across various locations using intercommunicating systems or nodes on a computer network. This ensures the ledger's content is resistant to loss, destruction, invalidation, corruption, or tampering through forged transactions.[5]

A blockchain, an essential component of cryptocurrencies such as Bitcoin and Ethereum,[6] is a well-known example of DLT which chains together blocks of data to form the distributed ledger.[7] Consensus mechanisms such as Proof of Work and Proof of Stake are employed to validate transactions and add new blocks to the chain,[8] replacing the role of a centralised validator.[9] With the use of one-way cryptographic hash functions, the blockchain serves as an immutable log, as each block contains transaction data and a hash pointer to the previous block.[10] This pointer, a hash digest of the preceding block, verifies that the block's content has not been altered.[11]

(2025), para 10; European Commission (EC) 'European Financial Stability and Integration Review' SWD(2022)93, 43.

3 Lawrence Lessig, 'What Things Regulate', *Code: Version 2.0* (Basic Books 2006) 124–25.

4 Matthew Levine, 'The Only Crypto Story You Need' *Bloomberg* (31 October 2022) <https://www.bloomberg.com/features/2022-the-crypto-story/> accessed 20 July 2025; Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System* (2008) 1.

5 Claudio Di Ciccio, 'Blockchain and Distributed Ledger Technologies' in Sabrina Leo and Ida Claudia Panetta (eds), *The Role of Distributed Ledger Technology in Banking* (Cambridge University Press 2023) 15.

6 ibid 11.

7 Sabrina Leo and Andrea Delle Foglie, 'The Integration of Distributed Ledger Technology in Banking' in Ida Claudia Panetta and Sabrina Leo (eds), *The Role of Distributed Ledger Technology in Banking* (Cambridge University Press 2023) 36.

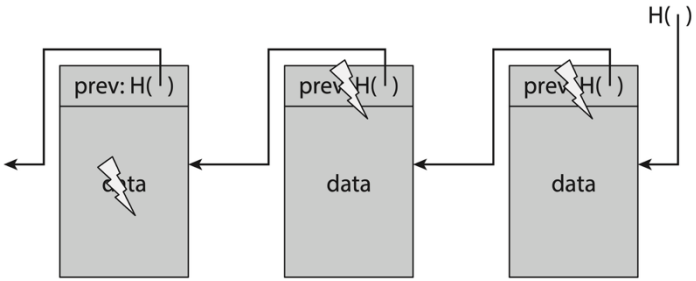
8 Ciccio (n 5) 18–19.

9 Marco Dell'Erba, 'The Underlying Complexities within the Line of Disruption', *Technology in Financial Markets* (OUP 2024) 59.

10 ibid; Arvind Narayanan and others, 'Introduction to Cryptography and Cryptocurrencies', *Bitcoin and Cryptocurrency Technologies* (Princeton University Press 2016) 11–12.

11 Narayanan and others (n 10) 11–12.

Figure 1: Block Chain as a Tamper-Evident Log[12]



In theory, the underlying technological architecture of DeFi should both directly influence individual behaviour and indirectly affect the other modalities of regulation.[13] As financial products, services, arrangements, and activities in DeFi are developed on the basis of DLT,[14] the libertarian ideology of eliminating central authorities[15] is, in principle, expected to encourage market participants to engage with the cryptoeconomy[16] in a decentralised manner.

Nevertheless, nearly two decades after the introduction of the first[17] public blockchain, the Bitcoin blockchain, a contradictory reality has emerged in the cryptoeconomy. Centralised crypto service providers have filled the void left by the absence of intermediaries. One notable limitation of DLT is its complexity, which requires users to adopt and learn unfamiliar technologies.[18] Recent FCA findings, for example, show that only 8% of UK consumers who reported holding crypto-assets used decentralised exchanges to acquire them, compared to 73% who used centralised exchanges.[19]

As the cryptoeconomy matures, there has been an increasing number of lending and yield-enhancement products.[20] The aforementioned centralisation trend is also evident in the context of lending and borrowing. While similar services are available in decentralised forms,[21] the average retail user typically opts for centralised platforms, which are generally more user-friendly, offer customer support, and do not demand technical expertise.[22] Furthermore, providers such as Celsius, Voyager, and BlockFi attracted users by offering access to, inter alia,

[12] ibid 12. This diagram illustrates the tamper-evident nature of a blockchain. Each block contains a hash digest of the preceding block; consequently, any alteration (represented by the lightning bolt) to the data within a block will result in a different hash value. This change propagates through all subsequent blocks, creating a detectable discrepancy within the chain.

[13] cf Tasca and Piselli (n 1) 29 ("Blockchain code, like the law, not only modifies individual behaviour directly, but it also does so indirectly; it conditions other modalities, which, in turn, condition it").

[14] Dell'Erba (n 9) 60.

[15] Levine (n 4) ("A new financial system with transparent and irreversible transactions, with no special power for governments or big banks, had an appeal").

[16] Dell'Erba (n 9) 59.

[17] EC (n 2) 43.

[18] Leo and Foglie (n 7) 40.

[19] YouGov on behalf of the Financial Conduct Authority (FCA) 'Cryptoassets consumer research 2025 (Wave 6)' (December 2025), 33–34; cf FCA 'Regulating Cryptoasset Activities' DP25/1 (May 2025), para 7.2.

[20] Henri Arslanian, 'Crypto Ecosystem Enablers', *The Book of Crypto* (Springer International Publishing 2022) 366.

[21] FCA (n 19) para 7.2.

[22] Arslanian (n 20) 367.

high-yield financial products.[23] For instance, Celsius once promised annual returns of up to 18%.[24]

These entities perform economic functions that are equivalent to those of traditional financial intermediaries.[25] Since crypto lending and borrowing occur outside regular banking regulation systems and safety nets, such activities fall within the scope of shadow banking[26] or non-bank financial intermediation.[27] As a result, the terms "imitation banks"[28] and "non-bank financial intermediaries" (NBFIs)[29] are often used to describe these providers. It is well understood that there is no risk-free way to conduct bank-like activities[30] as such entities are by construction vulnerable to runs.[31] This vulnerability, combined with specific risks in the crypto lending and borrowing business model, contributed to the "Lehman moment" for the crypto industry[32] or the so-called "crypto winter" of 2022-23,[33] during which several major crypto lending platforms, including Celsius, Voyager, and BlockFi, filed for bankruptcy.[34] Collectively, these three companies owed nearly USD 22 billion to over 2 million customers at the time of filing.[35]

Recognising the parallels between the functions of these centralised service providers and those of NBFIs in traditional markets, this paper argues that regulatory tools designed to address traditional intermediation risks can be effectively transposed to mitigate risks arising from crypto lending and borrowing service providers. The central aim of this paper is to contribute to the broader discussion concerning the appropriate scope of regulation in DeFi, specifically, whether centralised crypto lending and borrowing activities fall within the existing regulatory perimeter and, if not, how they should be regulated.

Chapter II examines the business model of centralised crypto lending and borrowing and identifies characteristics of shadow banking. It then assesses the regulatory gaps in the current EU framework for the cryptoeconomy, the Markets in Crypto-Assets Regulation (MiCAR).[36] Building on these identified similarities and regulatory shortcomings, Chapter III outlines primary risks arising from the absence of regulation from both prudential and

[23] Radhika Patel and Jonathan D Rose, 'A Retrospective on the Crypto Runs of 2022' [2023] Chicago Fed Letter 1; FCA (n 19) para 4.3.

[24] Kadhim Shubber and Joshua Oliver, 'Inside Celsius: How One of Crypto's Biggest Lenders Ground to a Halt' *Financial Times* (13 July 2022) <https://www.ft.com/content/4fa06516-119b-4722-946b-944e38b02f45> accessed 20 July 2025.

[25] FCA (n 19) para 3.2; cf Financial Stability Board (FSB), Global Regulatory Framework for Crypto-Asset Activities (2023) 3.

[26] EC 'Communication on Shadow Banking' COM(2013)614, 3.

[27] FSB 'Global Monitoring Report on Non-Bank Financial Intermediation' (2024), 3.

[28] Todd Phillips and Matthew A Bruckner, 'Consumer Shadow Banks' (2024) 35 Stanford Law & Policy Review 226, 254.

[29] Financial Stability Institute (FSI) 'Safeguarding the Financial System's Spare Tyre: Regulating Non-Bank Retail Lenders in the Digital Era' FSI Insights on Policy Implementation No 56 (2024), 1.

[30] Phillips and Bruckner (n 28) 233–34.

[31] Francesca Arnaboldi, 'Deposit Guarantee Schemes', *Deposit Guarantee Schemes* (Palgrave Macmillan 2014) 52.

[32] Dirk Zetzsche, Julia Sinnig and Areti Nikolakopoulou, 'Crypto Custody' (2024) 19 Capital Markets Law Journal 207, 208.

[33] Ilya Kokorin, 'The Anatomy of Crypto Failures and Investor Protection under MiCAR' (2023) 18 Capital Markets Law Journal 500, 525.

[34] Patel and Rose (n 23) 2.

[35] Calculated based on the number of customers with positive claims: Celsius (542,333; USD 13.44 billion), Voyager (975,521; USD 6.98 billion), and BlockFi (599,766; USD 1.41 billion). Each may have had additional customers without positive claims at the time of filing. See ibid 2–3.

[36] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 [2023] OJ L150/40 (MiCAR).

conduct perspectives. Finally, Chapter IV proposes corresponding regulatory solutions in areas where transposition is both feasible and necessary, grounded in MiCAR's fundamental frameworks and baseline principles. These recommendations reflect the understanding that, in this particular domain, the cryptoeconomy is not unique and inherits vulnerabilities and structural issues long associated with traditional finance.

II. Context and Regulatory Landscape

A. Centralised crypto-asset lending and borrowing service providers

As briefly mentioned in the introduction, there are both decentralised and centralised approaches through which clients can engage in crypto lending and borrowing within DeFi. In the context of centralised shadow banking, two types of non-bank financial intermediation exist: platforms may act either as auxiliaries or as intermediaries. As auxiliaries, platforms function as off-balance-sheet online marketplaces that enable lenders to transact directly with borrowers in a peer-to-peer manner, while, as intermediaries, platforms use their own balance sheets to originate loans.[37] The latter forms the primary focus of this paper as it was the principal form of intermediation that contributed to the downturn during the most recent crypto winter.

For the purposes of the following discussion, it is useful to outline the basic business model of crypto lending and borrowing. In crypto-asset lending, a service provider (lender) transfers ownership of crypto-assets to a user (borrower) against collateral, with an obligation to return equivalent value plus any agreed interest.[38] Conversely, in crypto-asset borrowing, a user (lender) lends assets to the service provider (borrower), who commits to return the equivalent amount, often with an additional yield, on a future date or upon a trigger event.[39]

Platforms such as Celsius, Voyager, and BlockFi operated by borrowing crypto-assets from both retail and institutional sources and deploying them through unsecured loans, high-risk investments, or on exchanges.[40] The platforms then used the fees generated from these loans, along with other sources of profit, to fund their operations and pay interest.[41] For instance, Celsius offered both the "Borrow Service" and the "Earn Service," which it clarified in its terms of use as follows:

> your Celsius account is not a bank account,... terms such as "account", "account balance," "withdraw"... with the Earn Service and the Borrow Service... used... as terms of convenience only in referring to users' borrowing or lending of digital assets...[42]

[37] FSB (n 27) 17 Box 2-1.
[38] FCA (n 19) para 4.1; EBA and ESMA (n 2) para 142.
[39] FCA (n 19) para 4.1; EBA and ESMA (n 2) para 157.
[40] Emilios Avgouleas and Alexandros Seretakis, 'How Should Crypto Lending Be Regulated Under EU Law?' (2023) 24 European Business Organization Law Review 421, 427; Kokorin (n 33) 516.
[41] Gary Gorton and Jeffery Zhang, 'Bank Runs During Crypto Winter' (2024) 14 Harvard Business Law Review 297, 305; Phillips and Bruckner (n 28) 228.
[42] 'Terms of Use' (*Celsius*, 29 September 2022) Section 2 <https://web.archive.org/web/20250224212718/https://celsius.network/terms-of-use> accessed 20 July 2025.

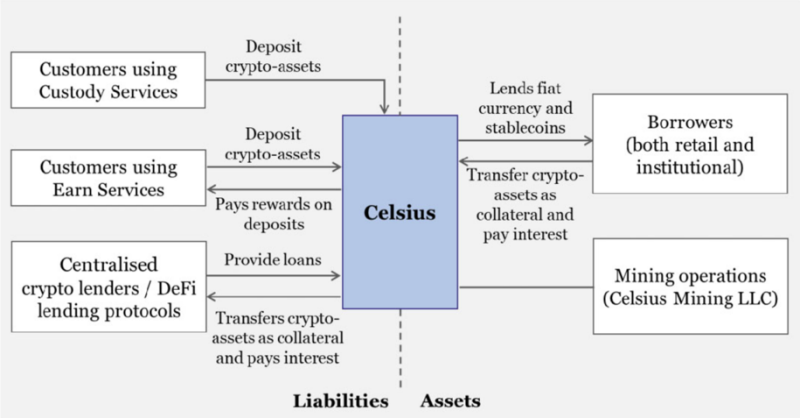
For its crypto-asset lending activity or the "Borrow Service" and its crypto-asset borrowing activity or the "Earn Service," Celsius required ownership rights over both the collateralised crypto-assets and the borrowed crypto-assets, respectively, with clients required to:

> grant Celsius... all right and title..., including ownership rights,... to pledge, re-pledge, hypothecate, rehypothecate, sell, lend, or... invest... in Celsius' full discretion.[43]

And with respect to the "Earn Service," clients:

> earn a financing fee... referred to as "Rewards,"... in exchange for entering into open-ended loans...[44]

Figure 2: Business Model of Celsius[45]



B. CENTRALISED SERVICE PROVIDERS AS NON-BANK FINANCIAL INTERMEDIARIES

Considering the economic function of traditional banks, their core business model of on-balance sheet intermediation[46] is based on three functions: maturity transformation, liquidity transformation, and credit transformation.[47] Maturity transformation occurs when banks convert short-term liabilities, such as the short-term deposits of retail customers and money market instruments, into medium- and long-term loans.[48] In doing so, they are able to offer depositors a share of the higher returns generated by long-term investments.[49] Liquidity

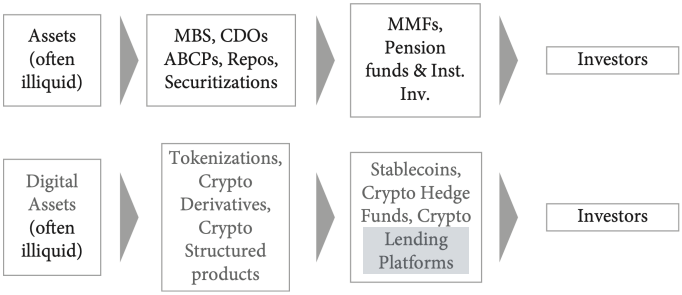
[43] ibid Section 13.
[44] ibid Section 4(D).
[45] Kokorin (n 33) 516.
[46] Dirk Zetzsche and Jannik Woxholth (eds), 'Cryptoasset Regulation in the System of EU Financial Law', *The EU Law on Crypto-Assets: A Guide to European FinTech Regulation* (Cambridge University Press 2025) 32.
[47] John Armour and others, 'Theory of Banking', *Principles of Financial Regulation* (OUP 2016) 277.
[48] Dell'Erba (n 9) 39.
[49] Armour and others (n 47) 278.

transformation refers to the process by which banks use the liquid assets of depositors to invest in illiquid assets. This is made possible through the law of large numbers, which allows banks to predict aggregate withdrawal behaviour across a large pool of depositors, and the principles of fractional reserve banking, under which only a fraction of deposits is held as reserves while the remainder is lent out.[50] Credit transformation involves the conversion of low-risk deposits into individually high-risk investments in a manner designed to minimise overall risk. Banks achieve this by screening and monitoring the quality of their investments, diversifying them both sectorally and geographically, and holding sufficient capital to absorb potential losses.[51]

Shadow banking or non-bank financial intermediation[52] broadly refers to credit intermediation involving entities and activities outside the regular banking system[53]—that is, financial intermediaries that engage in maturity, liquidity, and credit transformation without access to central bank liquidity or public sector credit guarantees.[54] Finance companies in traditional markets, for example, originate loans but are not classified as banks because they are largely funded by wholesale money markets rather than deposits.[55]

As seen from the discussed business model, centralised crypto lending and borrowing involves attracting crypto-assets from various sources—including borrowing—and lending credit to third parties on their own account.[56] Consequently, these platforms engage in maturity, liquidity, and credit transformation outside the conventional banking system, thereby qualifying as NBFIs.[57] For instance, from the lending perspective, they function in a manner similar to traditional finance companies. Moreover, due to functional similarities, scholars have recognised that this emerging form of crypto shadow banking parallels traditional shadow banking, as both indirectly connect borrowers with investors in capital markets.[58]

Figure 3: Traditional Shadow Banking Vs Crypto Shadow Banking[59]



50 ibid 277.
51 ibid 278.
52 FSB 'Global Monitoring Report on Non-Bank Financial Intermediation' (2018) 3 Box 1-1 ("change in terminology is intended to emphasise the forward-looking aspect… not affect the substance or coverage…").
53 John Armour and others, 'Market-Based Credit Intermediation: Shadow Banks and Systemic Risk', *Principles of Financial Regulation* (OUP 2016) 445.
54 Steven Schwarcz, 'Regulating Shadow Banking' (2012) 31 Review of Banking & Financial Law 619, 621.
55 Patricia Jackson, 'Shadow Banking and New Lending Channels: Past and Future' in Morten Balling and Ernest Gnan (eds), *The European Money and Finance Forum* (SUERF 2013) 380; Armour and others, (n 53) 446.
56 Kokorin (n 33) 522.
57 Avgouleas and Seretakis (n 40) 426. See also Phillips and Bruckner (n 28) 236; Kokorin (n 33) 522.
58 Marco Dell'Erba, 'Disrupting Shadow Banking or Crypto Shadow Banking', *Technology in Financial Markets* (OUP 2024) 313.
59 ibid.

C. MARKETS IN CRYPTO-ASSETS REGULATION'S SCOPE AND REGULATORY GAPS

For platforms to be regulated under MiCAR, they must qualify as a crypto-asset service provider (CASP), defined as 'a legal person or other undertaking whose occupation or business is the provision of one or more crypto-asset services'.[60] The exhaustive list of crypto-asset services includes, for example, custody, exchange, advice, and transfer services,[61] which broadly encompasses two categories: crypto trading services; and brokerage, investment advice, and asset management services.[62]

Once qualified as CASPs, platforms become subject specifically to the provisions of Title V of MiCAR, which includes, inter alia, licensing and authorisation requirements, as well as specific conditions for certain services. Under this activity-focused approach, even if a crypto-asset lacks an issuer such as Bitcoin or Ethereum, platforms engaged in the listed activities still fall within the scope of MiCAR as CASPs.[63]

However, if an activity is not included in the list of crypto-asset services, particularly lending and borrowing, it does not fall within the scope of MiCAR. While such activities may be regulated under other frameworks, relying on alternative rules introduces legal uncertainty and creates a significant regulatory gap. Corroborating this, a joint EBA-ESMA survey found that only 5 out of 37 national competent authorities[64] reported that crypto lending and/or borrowing activities are subject to some level of regulation within their jurisdiction. Even among this small minority, the rules are often narrow in scope; for example, one indicates that a consumer credit provider registration requirement applies if the loan is denominated in official currency.[65]

Compared to existing frameworks in the US and the UK, the EU's MiCAR can be seen as a trailblazer in introducing a comprehensive regulatory regime for crypto-assets.[66] While the US and UK rely on applying existing laws or standards to crypto-assets, MiCAR represents a dedicated legislative framework for the sector. However, its current scope still expressly does 'not address the lending and borrowing of crypto-assets... [as] the feasibility and necessity of regulating such activities should be further assessed'.[67]

It is true that several platforms may qualify as CASPs by virtue of their involvement in other listed activities beyond lending and borrowing. As noted in the aforementioned EBA-ESMA survey, 11 entities offering lending and/or borrowing services were also engaged in other regulated crypto-asset services, such as asset management or exchange services.[68] Consequently, certain general requirements applicable to all CASPs under Chapter 2 of Title V, such as fiduciary duties[69] and governance obligations,[70] may also be applicable to some aspects

60 MiCAR, Article 3(15).
61 MiCAR, Article 3(16).
62 Dirk Zetzsche and Jannik Woxholth (eds), 'Regulation of Cryptoasset Service Providers (Title V MiCA)', *The EU Law on Crypto-Assets: A Guide to European FinTech Regulation* (Cambridge University Press 2025) 96.
63 MiCAR, Recital 22; ibid 102.
64 16 out of 37 identified crypto lending and/or borrowing providers. See, EBA and ESMA (n 2) para 183.
65 EBA and ESMA (n 2) para 186.
66 Giovanna Massarotto, 'Call for a Global Crypto-Assets Regulatory Framework: Lessons from the US, Europe, and the UK' in Paolo Tasca and Reena Aggarwal (eds), *Digital Assets: Pricing, Allocation and Regulation* (Cambridge University Press 2025) 152.
67 MiCAR, Recital 94. See eg Kokorin (n 33) 517.
68 EBA and ESMA (n 2) para 184.
69 MiCAR, Articles 66 and 72.
70 MiCAR, Articles 68, 69, and 71.

of lending and borrowing. Nevertheless, due to the particular nature of lending and borrowing, these general requirements may require adaptation when applied to such activities.[71]

Furthermore, Chapter 3 of Title V also provides specific regulatory conditions tailored to the risk profile of each listed activity. In the absence of general consideration and specific rules designed for lending and borrowing, this activity-based[72] framework risks undercapturing the full range of risks involved, particularly in areas not overlapping with other regulated services.

III. Risks Posed by Crypto-asset Lending and Borrowing

This chapter examines the risks inherent in the centralised business model of crypto lending and borrowing. While the cryptoeconomy possesses distinct characteristics, the risks identified broadly mirror the intermediation risks of NBFIs in traditional financial markets,[73] particularly from a prudential and conduct perspective. For each category, the causes and nature of the risk are explored, with reference to documented cases that contributed to the 2022-23 crypto winter. While economic downturns are inevitable, analysing documented failures provides a necessary blueprint for addressing the regulatory challenges of future crises.[74]

A. Prudential Perspective

(i) Drivers of Prudential Risks

Prudential risks generally arise when a financial firm assumes risks that threaten its financial health and its ability to meet obligations to investors and counterparties.[75] At their core, these are risks of a firm becoming financially unsound and unable to fulfil its market commitments.[76] For on-balance-sheet intermediation, the primary concern is eventually the potential insolvency of the financial entity itself.[77]

The principal driver that leads these firms to assume excessive risk, pushing them towards insolvency, is moral hazard. Moral hazard occurs when the agent (platform) has an incentive to exert less effort than the principal (client) would deem optimal due to the principal's inability to fully monitor the agent's behaviour.[78] As a consequence, the agent may not bear the full burden of the negative outcomes arising from their decisions.[79] When a service provider's accountability diminishes, it tends to adopt riskier practices, particularly in the absence of adequate regulation.

71 MiCAR, Article 71 and Annex IV.
72 Zetzsche and Woxholth (n 63) 95.
73 See eg FSI (n 29) paras 24–25; FCA (n 19) para 3.2.
74 See eg Hyman P Minsky, *Stabilizing an Unstable Economy* (McGraw-Hill 1986) 110–12 ("Unless we understand what it is that leads to economic and financial instability, we cannot prescribe—make policy—to modify or eliminate it".).
75 Eric Pan, 'Organizing Regional Systems' in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (OUP 2015) 191.
76 ibid 190.
77 Zetzsche and Woxholth (n 46) 32.
78 Nicholas Gregory Mankiw and Mark P Taylor, 'Information and Behavioural Economics', *Economics* (6th edn, Cengage 2023) 405.
79 ibid.

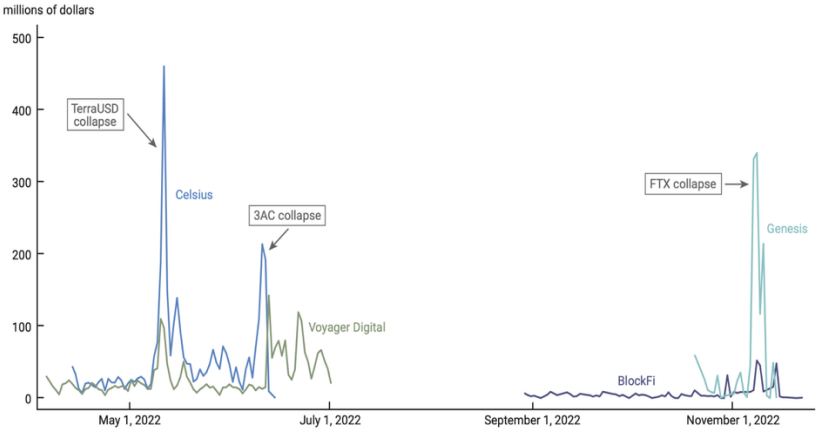
This situation is exacerbated when these intermediaries perform maturity transformation,[80] an inherently unstable practice when left unregulated or poorly supervised.[81] Maturity transformation relies on a confidence trick: clients must believe both that (a) the entity is financially sound and capable of honouring its obligations, and (b) other clients will not simultaneously call in loans beyond customary levels.[82] If confidence is shaken, this fragile equilibrium collapses, incentivising first movers.[83] The phenomenon of first-mover advantage refers to clients rushing to exit positions to avoid incurring losses that might be borne by others.[84] This dynamic contributes to the self-fulfilling nature of runs and ensuing liquidity problems. The root cause often lies in a maturity mismatch—that is, the misalignment between short-term liabilities and long-term assets—which creates acute liquidity risk that can rapidly escalate into insolvency risk.[85]

Regulation, in essence, seeks to establish the necessary conditions for this confidence trick through the provision of conditions which centralised crypto lending and borrowing service providers currently lack.[86] Furthermore, the absence of appropriate regulation allows maturity, liquidity, and credit transformation to be increasingly conducted through networks outside the regulatory perimeter. The proliferation of such shadow banking networks, in both traditional and crypto contexts, tends to increase structural complexity and, as a direct consequence, heighten legal uncertainty within financial regulation.[87]

In the traditional financial system, NBFIs engaged in credit intermediation involving maturity and liquidity transformation are inherently susceptible to runs in the absence of regulatory frameworks. For instance, collective investment vehicles (CIVs), including funds and accounts established for pooling client assets, are vulnerable to sudden redemption pressures if investors perceive a shift in risk exposure.[88] This vulnerability is not unique to traditional finance. A similar pattern is evident in the cryptoeconomy as well, particularly among crypto lending and borrowing platforms, which perform comparable economic functions. These platforms, inter alia, use short-term client funds to finance illiquid, high-risk positions. This run dynamic materialised during the most recent crypto winter, affecting platforms such as Celsius, Voyager, and BlockFi, as examined further in the following chapter.

[80] See eg Gorton and Zhang (n 41) 332 ("if an entity is borrowing short and lending long, it is in the business of maturity transformation".).
[81] Phillips and Bruckner (n 28) 236.
[82] Armour and others, (n 47) 278; cf Anil K Kashyap, Raghuram Rajan and Jeremy C Stein, 'Banks as Liquidity Providers: An Explanation for the Coexistence of Lending and Deposit-Taking' (2002) 57 Journal of Finance 33, 34–35.
[83] Armour and others, (n 47) 278.
[84] Patel and Rose (n 23) 5.
[85] Kokorin (n 33) 522.
[86] Phillips and Bruckner (n 28) 237.
[87] Dell'Erba (n 9) 41–42.
[88] FSB 'Global Shadow Banking Monitoring Report' (2015), 20–21.

Figure 4: Customer Fund Withdrawals 90 Days Prior to Bankruptcy[89]



(a) Liquidity risk

Liquidity risk, often inherent in maturity transformation processes, is the risk that a firm will be unable to meet its short-term cash flow obligations.[90] In the case of centralised lending and borrowing platforms, their business model relies on lending or investing the borrowed crypto-assets into illiquid and often risky investments in an attempt to generate the high returns promised to customers. A recent FCA discussion paper found that such platforms frequently hold high proportions of illiquid assets or maintain insufficient liquidity on their balance sheets.[91]

In the events leading up to the most recent crypto winter, these illiquid and risky investments included loans to the hedge fund Three Arrows Capital and stakes in the Anchor Protocol.[92] Three Arrows Capital, a crypto-asset hedge fund, used high levels of leverage to engage in large directional trades.[93] The Anchor Protocol, a decentralised borrowing and lending application built on the Terra blockchain, subsidised and fixed annual returns for lenders at 20%, rather than allowing returns to be determined by market borrowing demand.[94] Such reinvestments and onward lending of assets also created interconnected obligations, which made it difficult for these firms to meet their liabilities during periods of market stress.[95]

89 Patel and Rose (n 23) 4.
90 Peter Mülbert, 'Managing Risk in the Financial System' in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (OUP 2015) 369.
91 FCA (n 19) para 4.8.
92 Patel and Rose (n 23) 5.
93 Douglas W Arner and others, 'The Financialisation of Crypto' (2024) 53 Computer Law & Security Review 105970-1, 105970-7.
94 George Steer and Scott Chipolina, 'The Terra/Luna Hall of Shame' (*Financial Times*, 25 May 2022) <https://www.ft.com/content/40c06a4f-3586-40be-b5ad-b836b5dcdc0d> accessed 20 July 2025; Levine (n 4).
95 FCA (n 19) para 4.8.

(b) Excessive leverage

Leverage, typically measured as the ratio of total borrowed capital to equity,[96] is a mechanism through which both returns and risks are amplified.[97] In the cryptoeconomy, it is common for platforms to borrow crypto-assets, lend them out, and then use the proceeds to seek further borrowing.[98] This cycle contributes significantly to the accumulation of leverage in the market.[99] The practice of rehypothecation, whereby collateral pledged is reused to secure more loans, exacerbates the situation. This practice, often permitted under the platforms' terms and conditions,[100] creates collateral chains that increase systemic fragility and contagion risk.[101]

The now-bankrupt service providers were characterised by particularly high leverage ratios during the crypto winter. Celsius operated at a leverage ratio of 19-to-1, while Voyager's was 23-to-1. In practical terms, this means that Celsius and Voyager held debt (mostly funds borrowed from users) 19 and 23 times the value of their equity, respectively.[102] This level of leverage is highly risky, as even a modest decline in asset values—5.3% for Celsius or 4.3% for Voyager—was sufficient to render them insolvent.[103]

(c) Concentration risk

Concentration risk refers to the potential for loss arising from excessive exposure to a single counterparty or to multiple counterparties that share common characteristics such as belonging to the same corporate group, operating within the same industry or geographic region, or being linked to a specific class of assets.[104]

This risk was particularly evident during the most recent crypto winter. A common factor contributing to the downturn was the significant exposure many service providers had to the aforementioned crypto hedge fund Three Arrows Capital.[105] The fund borrowed from over 20 institutions, making it a single point of failure and a substantial source of contagion across the sector.[106] Specifically, Three Arrows Capital received loans amounting to approximately USD 75 million from Celsius, USD 1 billion from BlockFi, and more than USD 600 million from Voyager.[107] In Voyager's case, the exposure was especially acute: Three Arrows Capital was its largest borrower, accounting for roughly 58% of total loan obligations, a clear example of an overly concentrated loan book and poor risk diversification.[108]

96 Kern Alexander, 'The Role of Capital in Supporting Banking Stability' in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (OUP 2015) 352 Footnote 46; Phillips and Bruckner (n 28) 244 Footnote 89.
97 Levine (n 4).
98 EBA and ESMA (n 2) para 196.
99 ibid.
100 See eg Celsius Terms (n 43).
101 EBA and ESMA (n 2) para 197.
102 Levine (n 4).
103 Phillips and Bruckner (n 28) 244.
104 Mülbert (n 91) 369–70.
105 Patel and Rose (n 23) 4.
106 Arner and others (n 94) 105970-7.
107 Patel and Rose (n 23) 4.
108 Kokorin (n 33) 515; Gorton and Zhang (n 41) 312–13.

Figure 5: Voyager's Loan Counterparty[109]

Company	Borrowing Rate	Outstanding Amount (thousands)
Alameda Research Ltd.	1% - 11.5%	$376,784
Three Arrows Capital	3% - 10%	$654,195
Genesis Global Capital	4% - 13.5%	$17,556
Wintermute Trading Ltd.	1% - 14%	$27,342
Galaxy Digital LLC	1% - 30%	$34,427
Tai Mo Shan Limited	10%	$13,779
Other	4% - 8%	$751
Total		**$1,124,825**

(d) Credit risk

As lending and borrowing platforms engage in credit transformation, credit risk is another major concern. It arises when borrowers default on their obligations to repay principal or interest,[110] stemming from both on- and off-balance sheet exposures such as loans, investments, and trading activities.[111] Despite acting as credit intermediaries, these platforms often fail to perform creditworthiness assessments, neglecting to evaluate borrowers' financial situations, repayment capacity, or risk tolerance, thereby increasing the risk of borrower default.[112]

The recent crypto downturn again illustrates this point. Voyager's more than USD 600 million in loans to Three Arrows Capital were unsecured.[113] Similarly, Celsius' loans to the same fund were not collateralised.[114] The widespread willingness of crypto firms to assume such credit risk can largely be attributed to Three Arrows Capital's reputation at the time as one of the most prominent and well-known hedge funds in the crypto sector. For many platforms, lending to such a high-profile firm was seen as a form of endorsement that could enhance credibility in the eyes of other clients.[115] This instance of inadequate creditworthiness assessment, involving the extension of unsecured credit based solely on perceived reputation, significantly heightened credit risk and later complicated the process of recovering funds. According to investigative reports from the bankruptcy proceedings, many clients of Voyager and Celsius expressed surprise upon learning that the loans made by both companies were not collateralised.[116]

109 Declaration of Stephen Ehrlich in Support of Chapter 11 Petitions and First Day Motions, *In re Voyager Digital Holdings Inc*, No 22-10943 (Bankr SDNY 2022), para 29.
110 Mülbert (n 91) 369.
111 Basel Committee on Banking Supervision (BCBS) 'The Basel Framework' (2024), Principle 17 BCP40.39 Footnote 42.
112 EBA and ESMA (n 2) para 201; FCA (n 19) para 4.8.
113 Levine (n 4).
114 Patel and Rose (n 23) 4.
115 Levine (n 4).
116 Patel and Rose (n 23) 4.

B. CONDUCT PERSPECTIVE

(i) Drivers of Conduct Risks

Conduct risks mainly arise from asymmetric information, a classic manifestation of the principal-agent problem, where two parties have access to different information.[117] This imbalance creates incentives for the informed party (platform) to withhold or distort relevant information, to the detriment of the less-informed party (client).[118] While such principal-agent failures are not exclusive to NBFIs, the nature of NBFIs combined with the technological complexity underpinning their operations can significantly magnify the problem.[119] This is particularly evident in the cryptoeconomy, where complex technological architecture such as DLT is involved. As retail customers tend to be less knowledgeable and more vulnerable to information asymmetries,[120] many may lack a full understanding of both the technical aspects of crypto and their financial implications, limiting their ability to identify and manage associated risks.[121]

In markets with high information asymmetry, resources may not be allocated efficiently,[122] leading to adverse selection, a situation where uninformed customers transact with parties they would otherwise avoid if they had full knowledge.[123] The 2007 financial crisis exemplifies this dynamic: investment banks packaged high-risk mortgage assets into complex financial products and many clients, unaware of the underlying risk, were left exposed to substantial losses.[124] Similar patterns of adverse selection were observed during the latest crypto winter.[125] As revealed in bankruptcy proceedings, a client in Celsius' bankruptcy filings remarked:

> I initially signed up with Celsius due to... advertising campaigns, weekly AMAs, website, and interviews... all adamant that our funds are used in over-collateralized loans... Celsius has failed to properly disclose the investments... they were not purely using over-collateralized loans...[126]

This highlights one of the key reasons why regulators cannot rely solely on the assumption of market self-correction. Such an assumption suggests that regulatory intervention is unnecessary on the basis that the financial system is inherently stable and efficient. Instability is instead attributed to exogenous shocks.[127] However, markets can and are often irrational. As argued by Minsky, rather than existing in a state of self-equilibrium,[128] the financial system is inherently unstable and becomes increasingly fragile during periods of sustained prosperity.[129]

117 Mankiw and Taylor (n 79) 404.
118 ibid.
119 Schwarcz (n 54) 635.
120 FCA (n 19) para 3.2.
121 Arner and others (n 94) 105970-11; Pan (n 76) 191.
122 Mankiw and Taylor (n 79) 409.
123 ibid 405.
124 ibid 406.
125 Phillips and Bruckner (n 28) 230.
126 Memorandum of Jason Pukalo, *In re Celsius Network LLC*, Docket No 90, No 22-10964 (Bankr SDNY 2022), para 2.
127 Savvas Zachariadis, 'Why Has Minsky's Economic Theory Been Ignored?' (2026) The Economic and Labour Relations Review 1, 9–10.
128 Nicholas Gregory Mankiw and Mark P Taylor, 'Economic Shocks' *Economics* (6th edn, Cengage 2023) 734.
129 Minsky (n 75) 194–96. See also Zachariadis (n 128) 3–4.

Indeed, leading up to the 2007 financial crisis, the belief in efficient, self-correcting markets contributed to the relaxation or removal of regulatory constraints.[130] A notable consequence of this deregulation was the expansion of access to mortgage credit for a broader segment of the population.[131] This, coupled with the so-called "Great Moderation", a period of relative economic stability prior to the crisis,[132] pushed the market towards instability and speculative behaviour, often described as "animal spirits" or "irrational exuberance".[133] This weakening of market discipline was reflected in both over-optimistic borrowing and the willingness of lenders to extend credit.[134] Ultimately, the subprime lending practices and securitisation, whereby mortgage-backed assets were pooled and sold to investors,[135] precipitated the crisis.

As observed in the traditional financial system, particularly during 2007, crises can be exacerbated by a failure of regulatory intervention.[136] In the cryptoeconomy, the 2022–23 downturn, discussed in the following chapter, can similarly be attributed to a lack of regulatory frameworks. Therefore, the lack of regulation in both traditional and crypto contexts, whether due to an absence of regulatory intent or the challenges of addressing disruptive innovation, can lead to unintended consequences, particularly given that markets are not always rational.

(ii) Nature of Conduct Risks

(a) Consumer protection risk

One of the most significant concerns in the current crypto lending and borrowing model is the heightened consumer protection risk stemming from poor consumer understanding.[137] This risk may arise due to either the absence of clear and accessible information or, more worryingly, deliberately misleading advertising practices.

Information made available to consumers is often fragmented, unstructured, and disseminated through private, unregulated channels, making it difficult for the average user to fully comprehend the opportunities presented or the risks involved.[138] This contributes directly to the adverse selection effects associated with information asymmetry. This challenge was explicitly identified by the joint EBA-ESMA report, which highlighted significant ambiguity in disclosure across several critical areas, including: (a) pricing and fees, (b) interest rates, (c) changes to collateral requirements, including margin calls, (d) collateral management, particularly regarding rehypothecation rights,[139] and (e) users' rights and obligations in cases of dispute or insolvency.[140]

Even where relevant information is disclosed, such documentation is frequently drafted in sophisticated language.[141] Moreover, the tone of these documents may be misleadingly reassuring, giving consumers a false sense of security. While platforms may assert that

130 Mankiw and Taylor (n 129) 732.
131 ibid 730.
132 ibid.
133 ibid 734.
134 Minsky (n 75) 233–35. See also Zachariadis (n 128) 4–5.
135 Orkun Akseli, 'Vulnerability and Access to Low Cost Credit' in James Devenney and Mel Kenny (eds), *Consumer Credit, Debt and Investment in Europe* (Cambridge University Press 2012) 7.
136 Mankiw and Taylor (n 129) 734–35.
137 EBA and ESMA (n 2) para 188; FCA (n 19) para 4.8.
138 Arner and others (n 94) 105970-11.
139 See eg Celsius Terms (n 43).
140 EBA and ESMA (n 2) para 187.
141 ibid.

customer assets will be treated in a certain way, they often do not account for how those assets may be treated under the law, particularly in the event of bankruptcy.[142]

Furthermore, deliberate or negligent misrepresentation in advertising has been a recurring issue. Confusion about the level of risk posed by these novel financial products can easily arise, particularly when crypto-asset loans are linked to fiat-denominated credit cards, which may create the misleading impression that these are conventional products, further obscuring the actual level of risk involved.[143]

Several documented instances illustrate these concerns. Prior to the 2022–23 crypto winter, Voyager falsely made representations that it was FDIC-insured, prompting a cease and desist order from US regulators.[144] Another example is Alex Mashinsky, co-founder and CEO of Celsius, who used marketing campaigns to portray the platform as safer and more rewarding than traditional financial products.[145] Later sentenced to 12 years for fraud and market manipulation,[146] he once claimed:

> It's the traditional financial system that's ripping people off... Somebody is lying... Either the bank is lying or Celsius is lying.[147]

(b) Conflicts of interest

A further area of concern is the conflict of interest arising from the use of platforms' own native tokens within their services. This is analogous to the well-documented issue of crypto exchanges listing and promoting their own tokens.[148] Similarly, lending and borrowing platforms often integrate their proprietary tokens into their service offerings—using them as interest payments (for lending services) or as collateral (for borrowing services), and offering preferential treatment to incentivise their use.[149] For example, Celsius, the issuer and largest holder of CEL tokens, offered its highest interest rates to clients who chose to receive their interest payments in CEL.[150]

Because these tokens are issued and controlled by the platform itself, there exists a clear incentive and capacity for platforms to artificially drive demand by offering favourable terms and managing token supply.[151] Through this dual control and potential for market manipulation,[152] platforms are able to offer inflated yields to lenders while misleading investors

142 Adam J Levitin, 'Not Your Keys, Not Your Coins' (2023) 101 Texas Law Review 877, 901.
143 FCA (n 19) para 4.8.
144 Federal Deposit Insurance Corporation and Board of Governors of the Federal Reserve System 'Joint Letter Regarding Potential Violations of Section 18(a)(4) of the Federal Deposit Insurance Act' (2022), para 4. See also Avgouleas and Seretakis (n 40) 429; Patel and Rose (n 23) 5.
145 Gorton and Zhang (n 41) 299; Levine (n 4).
146 George Steer, 'Crypto Lenders Dial Up Risk with "Microfinance on Steroids"' (*Financial Times*, 27 July 2025) <https://www.ft.com/content/c531a2bc-d258-431b-855c-2a6aaf230661> accessed 31 July 2025.
147 Zeke Faux and Joe Light, 'Celsius's 18% Yields on Crypto Are Tempting—and Drawing Scrutiny' *Bloomberg* (27 January 2022) <https://www.bloomberg.com/news/articles/2022-01-27/celsius-s-18-yields-on-crypto-are-tempting-and-drawing-scrutiny> accessed 20 July 2025.
148 Marco Dell'Erba, 'Enhancing Disruption', *Technology in Financial Markets* (OUP 2024) 173 ("such as the scandal involving Bitfinex and its stablecoin, Tether...").
149 FCA (n 19) para 4.25.
150 Arthur E Wilmarth, 'We Must Protect Investors and Our Banking System from the Crypto Industry' (2023) 101 Washington University Law Review 235, 261.
151 ibid 262; FCA (n 19) paras 4.3, 4.25.
152 cf Dell'Erba, 'Enhancing Disruption' (n 149) 173.

into believing that the token's value reflects genuine market forces.[153] The inherent link between native tokens and platforms' internal ecosystems creates a feedback loop, where borrowers pledge tokens with low and highly volatile intrinsic value as collateral, increasing the risk of cascading failures in the event of a price collapse.[154]

(c) Operational risk

Operational risk, the risk of loss resulting from inadequate or failed internal processes, people, and systems, or from external events,[155] takes on slightly more unique dimensions within the cryptoeconomy due to the complexity of the underlying technological architecture.[156] Nonetheless, at its core, the risk fundamentally stems from fraud and theft risks—including the hacking of centralised entities, theft of users' private keys, fraudulent schemes, and scams—as well as cyber risks—such as hacking and phishing[157]—akin to the classic agency risks found in traditional finance.[158]

This is a particular concern for clients of lending and borrowing service providers due to the significant consequences involved. Clients are required to transfer both legal and beneficial ownership of their crypto-assets, whether they are being lent or used as collateral, to the service provider.[159] As a result, the client no longer retains *in rem* rights over the transferred crypto-assets but rather holds an *in personam* unsecured claim against the platform.[160] In the event of a failure from operational risk combined with a lack of adequate dispute resolution and recourse mechanisms,[161] these clients are treated as unsecured creditors, significantly increasing their legal risk in recovering funds.[162]

(d) Money laundering and terrorist financing risk

Although not a direct catalyst of the most recent crypto winter, money laundering and terrorist financing risk has long been identified as a significant concern within the cryptoeconomy. These concerns have been pronounced since the advent of DeFi which, particularly in its early stages, was characterised as a zone of near-complete legal and regulatory absence.[163]

The root of this risk lies in the fundamental technological architecture of DeFi. As previously noted in the context of DLT such as blockchain, ownership and transfers are recorded in a decentralised manner. However, the owners are not identified by name on the ledger but rather by an alphanumeric string representing their public address, commonly referred to as a crypto-asset wallet.[164] While these wallets are not anonymous, they offer a

153 FCA (n 19) para 4.26.
154 EBA and ESMA (n 2) para 198.
155 cf Basel Framework, Principle 25 BCP40.56 Footnote 69.
156 EBA and ESMA (n 2) para 54.
157 ibid para 192.
158 Arner and others (n 94) 105970-8; Georgios Dimitropoulos, 'Global Currencies and Domestic Regulation' in Philipp Hacker and others (eds), *Regulating Blockchain* (OUP 2019) 129.
159 FCA (n 19) para 4.8. See eg Celsius Terms (n 43).
160 Kokorin (n 33) 504–05.
161 EBA and ESMA (n 2) para 190.
162 FCA (n 19) para 4.8; Kokorin (n 33) 507.
163 Levine (n 4).
164 Dimitropoulos (n 159) 128.

pseudo-identity.[165] This pseudonymous nature of wallet addresses, particularly when combined with the absence of mandatory identity verification requirements,[166] raises concerns about the potential misuse of crypto lending and borrowing platforms for illicit purposes, including money laundering, tax evasion, and terrorist financing.[167]

IV. REGULATORY SOLUTIONS

Building on the risks identified in the previous chapter, this chapter seeks to propose regulatory solutions that address those risks while acknowledging the existing framework of MiCAR. Although the analysis focuses on MiCAR, it may be of broader relevance to other jurisdictions seeking to regulate centralised crypto lending and borrowing, as the proposed recommendations can also be applied beyond the EU context. The use of MiCAR's baseline principles allows this chapter to concentrate on the specific issue of crypto-asset lending and borrowing without the need to restate general regulatory provisions—such as definitions or the licensing and authorisation process—that apply across all CASPs. Each category is presented alongside an overview of the current MiCAR framework in the corresponding area.

A. ADDRESSING PRUDENTIAL RISKS

(i) Current MiCAR Landscape

Due to the scope of the listed crypto-asset services under MiCAR, CASPs are, for the most part, off-balance-sheet intermediaries akin to investment firms or fund managers.[168] As such, the prudential requirements under MiCAR are generally less focused on protecting against contractual obligations.[169]

The existing prudential requirements for CASPs under Title V are limited in scope and include detailed conditions that apply only to providers of specific services. Examples include liquidity thresholds and capital requirements. Liquidity thresholds are mandated only for CASPs operating as trading platforms.[170] While capital requirements apply to all CASPs, the minimum thresholds vary depending on the type of service provided,[171] ranging from EUR 50,000 (e.g. for providers of transfer services) to EUR 150,000 (e.g. for operators of trading platforms).[172]

(ii) Regulatory Recommendations

The primary objective of prudential regulation is to mitigate prudential risk by imposing rules on what entities can and cannot do, thereby protecting their balance sheets from

165 Arvind Narayanan and others, 'Bitcoin and Anonymity', *Bitcoin and Cryptocurrency Technologies* (Princeton University Press 2016) 139 ("You don't need to use your real name… but... anyone can look up all… transactions that involved a given address…").
166 EBA and ESMA (n 2) para 193 Box 5.
167 Avgouleas and Seretakis (n 40) 430.
168 Zetzsche and Woxholth (n 63) 112.
169 ibid.
170 MiCAR, Article 76(1)(f).
171 MiCAR, Article 67(1).
172 MiCAR, Annex IV.

excessive risk-taking and ultimately ensuring a strong balance sheet.[173] In traditional financial markets, a commonly suggested approach to regulating NBFIs is to extend the perimeter of prudential regulation to such entities.[174]

A similar approach may be adopted in the cryptoeconomy. From a supervisory perspective, regulation should be based on the economic function performed by the service rather than the underlying technology. Technology does not alter the fundamental rights and obligations involved in financial relationships.[175] Nonetheless, rather than extending existing rules, a separately inspired set of rules appears more appropriate, as the cryptoeconomy possesses its own unique characteristics.[176] In line with the FSB's recommendation for crypto-asset activities, the principle of "same activity, same risk, same regulation",[177] the following recommendations outline prudential regulatory measures appropriate for centralised crypto lending and borrowing.

(a) Liquidity requirement

A regulatory framework requiring centralised crypto lending and borrowing platforms to maintain sufficient liquidity to withstand a range of stress events should be implemented.[178] To achieve this, a platform must establish metrics to forecast its prospective cash inflows against its outflows as well as the liquidity value of its assets.[179] This requirement is critical, as demonstrated by the most recent crypto winter, where liquidity shortfalls were a significant contributing factor to the collapse of several platforms. The liquidity threshold should therefore be calibrated to reflect the liquidity risk profile specific to each platform.[180] In addition to maintaining sufficient liquid assets to fund ongoing business operations, platforms should also take into account a reasonable estimate of the liquid assets required to facilitate an orderly wind-down without causing material harm.[181]

Liquidity stress tests should be conducted, and their results should be used to adjust and enhance platforms' liquidity risk management strategies.[182] Platforms should be able to execute these strategies, as the basic liquid asset requirement typically captures only liabilities due within a short timeframe.[183] For instance, the recent UK FCA consultation paper suggests that platforms should assess their liquidity needs over a rolling 90-day period and consider funding needs over a forward-looking 12-month horizon.[184] These measures would help ensure that platforms maintain enough liquid assets to meet their obligations to users, thereby reducing potential runs.[185]

173 Zetzsche and Woxholth (n 46) 32.
174 See eg Mülbert (n 91) 398; Gorton and Zhang (n 41) 332–33.
175 Gorton and Zhang (n 41) 332; Avgouleas and Seretakis (n 40) 432; Elizabeth McCaul, 'Mind the Gap' (*European Central Bank*, 5 April 2023) <https://www.bankingsupervision.europa.eu/press/blog/2023/html/ssm.blog230405~03fd3d664f.en.html> accessed 20 July 2025.
176 Kokorin (n 33) 522 ("similarities do not per se justify an extension... Yet… the present-day regulation of financial intermediaries… inspiration for… the regulation of crypto lenders".).
177 FSB (n 25) 3.
178 cf Basel Framework, Principle 24 BCP40.55(3).
179 cf BCBS 'Principles for Sound Liquidity Risk Management and Supervision' (2008) principle 5 para 26.
180 cf Basel Framework, Principle 24 BCP40.55(1).
181 FCA 'A Prudential Regime for Cryptoasset Firms' CP25/42 (December 2025), para 4.53.
182 cf Basel Framework, Principle 24 BCP40.55(7).
183 FCA 'A Prudential Regime for Cryptoasset Firms' CP25/15 (May 2025), para 5.9.
184 FCA (n 182) paras 4.58–4.59.
185 Avgouleas and Seretakis (n 40) 433.

(b) Own funds requirements

A key prudential safeguard for lending and borrowing activities is the establishment of appropriate own funds requirements, intended to ensure that capital is permanently available to absorb losses on a going concern basis, thereby enhancing the resilience of the platform.[186] In practice, this includes requirements relating to capital adequacy, minimum capital levels, and leverage ratios.

MiCAR already lays the groundwork regarding the form of such capital: it must consist of high-quality own funds aligned with the Capital Requirements Regulation's Common Equity Tier 1 definitions[187] and/or a compliant insurance policy.[188] However, as noted, the amount of capital currently required under MiCAR depends on the type of crypto-asset service offered.[189] Since lending and borrowing are not yet included among regulated activities, the existing permanent minimum requirements designed for largely off-balance-sheet intermediaries are significantly low, with the highest threshold set at EUR 150,000. This threshold is arguably inappropriate for on-balance-sheet businesses[190] like crypto lending and borrowing platforms, as these firms carry intermediation risks directly on their balance sheets. The FCA consultation paper, for example, proposes that firms dealing as principals, including those offering lending and borrowing products,[191] should operate with a permanent minimum level of own funds of GBP 750,000 (around EUR 860,000) at all times.[192]

There should also be a capital requirement that is risk-weighted to reflect the capacity to absorb potential losses. Without risk sensitivity, firms would be incentivised to engage in riskier lending, as they would not be required to hold proportionately more capital for riskier exposures. By recognising risk differentials, the framework would promote more prudent lending.[193] As illustrated by the case of Celsius and Voyager, unsecured loans, being inherently riskier, would attract a higher capital charge under a properly calibrated risk-weighting methodology.[194] In addition, risk factors could take into account counterparty type. Taking the FCA consultation paper as an example, it proposes a risk factor of 83.33% for retail clients, but only 1.6% for central governments, public sector entities, and other compliant firms.[195] By addressing potential balance sheet deficits, such a mitigant would contribute to financial stability and reduce the likelihood of bankruptcy.[196]

Given that the valuation of crypto-assets is characterised by high volatility,[197] one potential concern is the prudential compliance risk arising from fluctuating thresholds.[198] In

186 cf Basel Framework, Principle 16 BCP40.37(1); John Armour and others, 'Capital Regulation', *Principles of Financial Regulation* (OUP 2016) 290–91.
187 Regulation (EU) No 575/2013 [2013] of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 OJ L176 (CRR), Articles 26–30.
188 MiCAR, Article 67(4).
189 MiCAR, Article 67(1) and Annex IV.
190 Zetzsche and Woxholth (n 63) 122.
191 FCA (n 182) para 2.1.
192 ibid para 3.4 table 3.
193 Alexander (n 97) 337; Armour and others, 'Capital Regulation' (n 187) 299; Phillips and Bruckner (n 28) 238.
194 cf Armour and others, 'Capital Regulation' (n 187) 300.
195 FCA (n 182) para 3.59.
196 Avgouleas and Seretakis (n 40) 432.
197 ibid 245.
198 cf Iris HY Chiu, 'Prudential Regulation Policy Responses to Financial Technological Innovations: The Future for Banks and Crypto-Finance?' in Marco Bodellini, Gabriella Gimigliano and Dalvinder Singh (eds), *Commercial Banking in Transition* (Springer International Publishing 2024) 64–65.

particular, the value of required capital may become insufficient following market devaluation. To address this issue, significant volatility adjustments should be introduced. For example, the FCA proposal applies a 0% adjustment to authorised qualifying stablecoins, while a 100% adjustment is applied to Category B crypto-assets,[199] namely those with low levels of market maturity, liquidity, and resilience.[200]

To supplement risk-based capital requirements, non-risk-based measures should also be introduced to constrain the build-up of leverage.[201] Risk-weighted requirements alone may not fully reflect portfolio risk.[202] A leverage ratio requirement, which measures the maximum potential loss that can be absorbed by equity, can serve as a backstop and stabilising complement. The leverage ratio, unlike risk-weighted assets, is unaffected by changes in the economic cycle. It functions as a hard limit on the total size of a firm's balance sheet relative to its equity, regardless of how safe those assets are perceived to be. Once a platform's total exposure reaches this cap, it is prohibited from extending new credit or acquiring further assets. This provides a vital backstop by neutralising the tendency for firms to underestimate the risk of their own portfolios to lower their capital requirements.[203] For reference, the leverage ratio for banks under Basel III, even when calculated on total assets relative to Tier 1 capital, is capped at 33-to-1.[204] Against this benchmark, the ratios of 19-to-1 for Celsius and 23-to-1 for Voyager, calculated solely on borrowed capital relative to equity, appear notably high.[205] This is particularly the case considering that these platforms operate without the host of additional prudential standards[206] and safety nets available to banks, such as deposit insurance or access to a lender of last resort.[207]

(c) Large exposure limits

The experience of the most recent crypto winter, particularly the case of Three Arrows Capital, highlights the urgent need for prudential limits on credit, market, and other risk exposures to single counterparties or groups of connected counterparties.[208] These large exposure limits should take into account sectoral, geographical, and currency concentrations, with acceptable levels aligned to the service provider's risk profile and capital strength.[209] For example, Voyager's exposure to Three Arrows Capital amounted to 58% of its total loan obligations, a level that clearly exceeded any reasonable concentration threshold.[210] For reference, under the Basel standards applicable to non-global systemically important banks, the aggregate exposure must not exceed 25% of Tier 1 capital at all times.[211]

199 FCA (n 182) para 3.61.
200 ibid para 3.48.
201 cf Basel Framework, Principle 16 BCP40.37(7)
202 Alexander (n 97) 336.
203 cf Basel Framework, LEV20.1; ibid 352–53; Kokorin (n 33) 515. Also cf Gorton and Zhang (n 41) 326.
204 Basel Framework, LEV20.7.
205 Levine (n 4).
206 Phillips and Bruckner (n 28) 244.
207 This exclusion is arguably justified as extending safety nets could heighten moral hazard. See Avgouleas and Seretakis (n 40) 432–33. Moreover, see also Jackson (n 55) 380 ("taking deposits from the public… would have required a banking license...").
208 cf Basel Framework, Principle 19 BCP40.43.
209 cf ibid BCP40.44(3)(4).
210 Kokorin (n 33) 515.
211 Basel Framework, LEX20.1. See also Alexander (n 97) 352 Footnote 46.

In contrast to the risk-weighted capital requirements discussed earlier, large exposure limits should be calculated based on the maximum possible loss resulting from a counterparty's default, including all claims and transactions,[212] actual and potential exposures, as well as contingent liabilities. This ensures the provider's true exposure to concentration risk is accurately reflected.[213]

(d) Credit risk management

While different channels deploy different risk mitigants, with banks generally possessing more developed credit assessment mechanisms, NBFIs in traditional markets still rely on alternative mechanisms and mitigants.[214] For instance, traditional finance companies are heavily dependent on collateral[215] and are less likely than banks to extend credit without it.[216]

Similarly, centralised crypto lending and borrowing platforms must adopt sound credit risk management frameworks to avoid repeating the mistakes seen in the Voyager and Celsius cases, where large unsecured loans were issued without proper assessments.[217] To establish a well-controlled credit risk environment, there should be clearly defined policies, procedures, and criteria for screening and monitoring credit risk. The screening process, when approving new exposures as well as renewals and refinancing, should involve a thorough understanding of the borrower's financial situation, risk profile, and repayment capacity.[218] Meanwhile, monitoring should include regular reassessments of the borrower's ability and willingness to meet their obligations, as well as oversight of contractual terms, collateral sufficiency and other credit risk mitigants.[219]

Nevertheless, from a forward-looking perspective, assuming a mature cryptoeconomy characterised by self-sustaining economic activity and endogenous growth, a potential concern is that overregulation may undermine financial accessibility. Excessive regulation may constrain the efficient functioning of the supply side of the economy.[220] Lessons can be drawn from the response of financial institutions following the 2007 financial crisis, where financiers and banks adopted a markedly more cautious approach to lending, often to the detriment of small and medium sized borrowers.[221] Credit was increasingly extended on a secured basis, frequently accompanied by higher interest rates reflecting perceived default risk, thereby raising the overall cost of borrowing.[222] This contraction in credit availability contributed, at least in part, to an economic slowdown in the UK and elsewhere.[223]

It is important to note, however, that such outcomes were not solely attributable to post-crisis regulatory frameworks, but rather to the preceding absence of adequate regulation, which facilitated irrational exuberance in the first place. The key implication, therefore, is the need to avoid regulatory overcorrection. Credit risk management frameworks that are overly

212 cf Basel Framework, Principle 19 BCP40.44(6).
213 cf ibid BCP40.44(2) Footnote 54.
214 Jackson (n 55) 407.
215 ibid 406.
216 ibid 381.
217 FSB and International Monetary Fund (IMF), 'Synthesis Paper: Policies for Crypto-Assets' (2023) Annex 2 Recommendation 5.
218 cf Basel Framework, Principle 17 BCP40.40(3)(b).
219 cf ibid BCP40.40(3)(c).
220 Mankiw and Taylor (n 129) 732.
221 Akseli (n 136) 9.
222 ibid 5.
223 ibid 9.

stringent may unduly restrict access to credit. Accordingly, regulatory approaches to screening and monitoring should promote prudent lending practices while ensuring that retail consumers and SMEs retain access to affordable credit within the cryptoeconomy.

B. ADDRESSING CONDUCT RISKS

(i) Current MiCAR Landscape

In contrast to the prudential aspect of regulation, conduct regulation under MiCAR receives greater emphasis, given its closer relevance to off-balance sheet intermediaries, which currently characterise the general state of CASPs.[224] While many have expressed satisfaction with the inclusion of strong governance principles, such as requirements for external audits,[225] MiCAR does not currently apply to non-CASPs offering only lending and borrowing services and, where it does apply, more targeted rules may still be needed. Such targeted rules are, in certain respects, consistent with regulatory approaches applied to high-risk investment products, in relation to the heightened risk profile of crypto-asset lending and borrowing services.[226]

(ii) Regulatory Recommendations

(a) Fiduciary duties

MiCAR establishes that CASPs must act as fiduciaries. Under Chapter 2 of Title V, all CASPs are required to act honestly, fairly, and professionally,[227] in accordance with the principle that the interests of clients take precedence unless clients have been fully informed and have explicitly consented to being treated otherwise.[228] This obligation includes providing clients with fair, clear, and not misleading information;[229] issuing warnings on associated risks;[230] and prominently disclosing policies on pricing, costs, and fees via their websites.[231]

Should lending and borrowing services be brought within the scope of regulated activities, these fiduciary obligations would similarly apply. However, given the complexity of crypto lending and borrowing as well as the nature of how such services have often been advertised, as evidenced during the latest crypto winter, more specific provisions could be introduced under Chapter 3 of Title V.

These provisions should include, first and foremost, the most fundamental regulatory tool for addressing information asymmetry: the disclosure requirement. Providers of lending and borrowing services should be obliged to disclose comprehensive, clear, and transparent information concerning their financial products.[232] Particularly in the case of retail clients, this information should be presented in a standardised key features document.[233] This document should highlight crucial details that are frequently ambiguous, as identified in the joint EBA-

[224] Zetzsche and Woxholth (n 63) 112.
[225] McCaul (n 176).
[226] FCA 'Regulating Cryptoasset Activities' CP25/40 (December 2025), paras 5.13 and 5.18.
[227] MiCAR, Article 66(1).
[228] Zetzsche, Sinnig and Nikolakopoulou (n 32) 217.
[229] MiCAR, Article 66(2).
[230] MiCAR, Article 66(3).
[231] MiCAR, Article 66(4).
[232] FSB and IMF (n 218) Annex 2 Recommendation 7.
[233] FCA (n 19) paras 4.19–4.22.

ESMA report,[234] including, for instance, fees, interest rates, product risks, loan term lengths, and the transfer of ownership of assets. Regulation should focus on standardising disclosure formats and ensuring the quality of such information.[235]

However, while disclosure remains a critical regulatory tool, it is not sufficient in isolation to address conduct risks. Its effectiveness relies on the "Efficient Markets Hypothesis", which presumes that markets are informationally efficient and self-correcting.[236] This assumption in turn depends on a sufficient number of rational actors within the market to counterbalance the irrational ones.[237] Yet, in reality, market participants often exhibit herd behaviour, imitating others rather than making individual, rational assessments based on available information.[238]

This problem is further compounded when key financial concepts, such as margin calls[239] and automatic collateral top-ups,[240] are difficult for retail customers to understand. Given the volatility of crypto-asset prices, which affects collateral value,[241] and the perception of over-collateralisation as capital-inefficient and unattractive,[242] margin calls to maintain the loan-to-value (LTV) ratio are more likely to occur.[243] If the consumer fails to meet a margin call, the provider may liquidate part or all of the collateral to restore the LTV ratio or automatically withdraw assets from the consumer's wallet.[244]

Therefore, in addition to disclosure, further safeguards are needed to ensure that consumers, particularly retail clients, understand and properly analyse the information provided. Appropriateness tests should be introduced to assess whether a client possesses sufficient knowledge and experience to understand the associated risks.[245] These tests should assess comprehension of key elements such as interest rates, fees, asset ownership implications, and mechanics including margin calls.[246] Platforms should be required to ensure that retail consumers complete these tests before entering into any contractual agreement for crypto-asset lending or borrowing.[247] Such tests are comparable to those applied to firms offering complex investment and insurance products, as reflected in the suitability and appropriateness assessments under the EU's Markets in Financial Instruments Directive[248] and the UK's Conduct of Business Sourcebook.[249]

234 See (n 128) (a)–(e).
235 Arner and others (n 94) 105970-11.
236 Mankiw and Taylor (n 129) 732.
237 ibid 733.
238 ibid.
239 Margin calls are requests by a platform for a borrower to restore the required collateral level when the value of pledged collateral falls and the LTV ratio exceeds a predetermined threshold. The borrower must typically either deposit additional collateral or repay part of the loan, otherwise the platform may liquidate the collateral.
240 Automatic collateral top-ups are mechanisms to automatically add additional collateral from a borrower's other platform wallets when the LTV ratio exceeds a predetermined threshold, reducing the likelihood of liquidation.
241 Dimitropoulos (n 159) 129; EBA and ESMA (n 2) para 191.
242 Levine (n 4).
243 FCA (n 19) para 4.8.
244 ibid.
245 cf Pan (n 76) 165; cf the potential applicability in the context of execution, placing, reception, and transmission of crypto-assets see MiCAR, Article 140(2)(p).
246 FCA (n 19) para 4.24.
247 FCA (n 227) para 5.24.
248 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on Markets in Financial Instruments and Amending Directive 2002/92/EC and Directive 2011/61/EU (Recast) [2014] L 173/350 (MiFID II), Article 25(3).
249 FCA 'Conduct of Business Sourcebook (COBS)' (2026), COBS 10 and COBS 10A.

In parallel, platforms should be required to obtain explicit consent from clients before entering into any crypto lending or borrowing arrangement.[250] Moreover, in the event of any significant amendments to contractual terms[251] or prior to the activation of automatic collateral top-ups,[252] further consent should be expressly obtained from the client.

(b) Conflicts management

Chapter 2 of Title V includes provisions requiring all CASPs to identify, prevent, manage, and disclose conflicts of interest.[253] Additionally, CASPs must disclose such conflicts, along with the steps taken to mitigate them, in a prominent location on their website.[254] According to MiCAR's Regulatory Technical Standards on Conflicts of Interest, conflicts potentially detrimental to clients include situations where a CASP:

> (a) is likely to make a financial gain, avoid a financial loss, or receive another benefit, at the expense of the client;
>
> (b) has an interest in the outcome of a crypto-asset service provided to the client... which is distinct from the client's interest in that outcome;[255] ...

If lending and borrowing platforms were to be classified as CASPs, the aforementioned standards would also apply to them. Specifically, in relation to the practice of incentivising consumers to buy and hold a platform's native tokens through favourable lending and borrowing terms, such conduct would constitute a conflict of interest under the aforementioned provisions and should therefore be prohibited.[256]

While the general provisions on conflicts of interest may be applied, the use of proprietary tokens in lending and borrowing services is, in itself, sufficient to generate undesirable conduct risks. Beyond the acute conflict of interest, concerns arise regarding price manipulation and self-reinforcing feedback loops. Given their control over the supply of such tokens, including the ability to mint or burn them, these platforms can readily manipulate the market.[257] Furthermore, the intrinsic value of a platform-native token is contingent upon the stability of the platform's own ecosystem. If native tokens are accepted as collateral, the value of the collateral backing the platform's loans, during a crisis, evaporates at the exact moment the platform requires that collateral to remain solvent.[258] Consequently, it would be appropriate to introduce dedicated provisions under Chapter 3 of Title V to prohibit the use of platform-native tokens in crypto lending and borrowing.[259] Indeed, a regulatory approach similar to the

250 FCA (n 19) para 4.23; see eg FCA Draft Handbook (December 2025) Cryptoasset Trading Platforms, Transparency And Records Instrument 202X (December 2025), Article 10.3.
251 FCA (n 19) para 4.23.
252 ibid para 4.18.
253 MiCAR, Article 72(1).
254 MiCAR, Article 72(2).
255 Commission Delegated Regulation (EU) 2025/1142 of 27 February 2025 supplementing Regulation (EU) 2023/1114 of the European Parliament and of the Council with regard to regulatory technical standards specifying the requirements for policies and procedures on conflicts of interest for crypto-asset service providers and the details and methodology for the content of disclosures on conflicts of interest [2025] OJ L 2025/1142, Article 3.
256 cf FCA (n 19) paras 4.25–4.26.
257 cf Dell'Erba, 'Enhancing Disruption' (n 149) 173.
258 EBA and ESMA (n 2) para 198.
259 FCA (n 227) para 5.31; FCA (n 19) para 4.27.

Volcker Rule,[260] which imposes restrictions by limiting the scope of activities a financial institution may undertake to reduce risky activities, could prove beneficial.[261]

Regarding such a ban, some may argue it could stifle innovation. However, it is important to emphasise that this restriction is limited to the use of proprietary tokens within lending and borrowing activities, rather than a blanket ban on native tokens altogether. In this narrow context of centralised lending and borrowing, these platforms are not introducing fundamentally new financial products or services, but are rather replicating traditional ones.[262] The recent downturn demonstrated that their business models were characterised more by regulatory arbitrage, excessive risk-taking, and weak corporate governance, than by true innovation.[263] Moreover, providing legal certainty through a clear, future-proof framework can attract serious developers and institutional investors, ultimately encouraging responsible innovation.[264]

(c) Corporate governance

Clear and sound governance frameworks are essential to prevent internal failures and mitigate losses resulting from external events.[265] In the context of the cryptoeconomy, a key distinction from traditional corporate governance lies in the emphasis on the technological expertise used for crypto-related activities.[266]

In this regard, MiCAR provides commendable coverage for all CASPs under Chapter 2 of Title V, supported by extensive guidelines issued by the EBA and ESMA. These include, for instance, fit and proper requirements applicable to executives and shareholders.[267] MiCAR also imposes fit and proper requirements on relevant personnel, mandating that individuals involved in the provision of crypto-asset services possess the necessary knowledge, skills, and expertise.[268] Moreover, MiCAR mandates stringent requirements for CASPs to ensure operational continuity and regularity, including the establishment of resilient and secure ICT systems and a business continuity policy adherent to the Digital Operational Resilience Act (DORA).[269]

In order for lending and borrowing platforms to be brought within the scope of these comprehensive governance requirements, it is necessary for such platforms to be classified as

260 The Volcker Rule, a regulatory measure introduced under the Dodd–Frank Act in the US following the 2007–08 financial crisis, was designed to limit banks' exposure to the risky activities of private funds. It, therefore, inter alia, prohibits proprietary trading.

261 cf on exchange platforms and ICO tokens see Dell'Erba (n 58) 352.

262 cf Hilary Allen, 'DeFi: Shadow Banking 2.0?' (2023) 64 William & Mary Law Review 919, 924–25.

263 ibid ("This approach will admittedly limit innovation in the DeFi ecosystem, but not all innovation is good innovation. If the risks of innovation outweigh any possible benefits it might deliver, then preventing that innovation is good public policy".); Avgouleas and Seretakis (n 40) 434.

264 Dirk Zetzsche and Jannik Woxholth (eds), 'Introduction' *The EU Law on Crypto-Assets: A Guide to European FinTech Regulation* (Cambridge University Press 2025) 8–10.

265 cf Basel Framework, Principle 25 BCP40.56 Footnote 69.

266 Zetzsche and Woxholth (n 63) 115; McCaul (n 176).

267 MiCAR, Article 68(1)–(4). See also EBA and ESMA Guidelines on the Suitability Assessment of Members of Management Body of Issuers of Asset-Referenced Tokens and of Crypto-Asset Service Providers, and Guidelines on the Suitability Assessment of Shareholders and Members, Whether Direct or Indirect, With Qualifying Holdings in Issuers of Asset-Referenced Tokens and in Crypto-Asset Service Providers' EBA/GL/2024/09 ESMA75-453128700-10 (2024).

268 MiCAR, Article 68(5).

269 MiCAR, Article 68(7)–(8). See also ESMA 'Draft Technical Standards specifying certain requirements of the MiCA — second package' ESMA75-453128700-1229 (2024).

CASPs under MiCAR, which could be achieved by including lending and borrowing among the list of regulated crypto-asset services.

(d) Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) obligations

Given the well-known association between crypto-assets and illicit value transfers,[270] MiCAR provides a comprehensive regulatory framework addressing various aspects of AML/CTF, covering both corporate governance and transactional dimensions.

Regarding the corporate governance aspect, in comparison to other EU law,[271] MiCAR extends its fit and proper test for executives and shareholders under Chapter 2 of Title V to place greater emphasis on AML/CTF measures[272] by requiring that they have not been convicted of offences relating to money laundering or terrorist financing.[273]

From a transactional dimension, all categories of CASPs are classified as obliged entities under AMLD.[274] As such, they are required to identify, assess, and manage money laundering and terrorism financing risks associated with their business activities in accordance with AMLD provisions.[275]

Accordingly, in line with other regulatory responses on the conduct side, it would be highly beneficial to include lending and borrowing platforms within the scope of CASPs, thereby subjecting them to these robust AML/CTF obligations. This inclusion would address the existing inconsistency whereby CASPs offering lending and borrowing as ancillary services are subject to AML/CTF rules, while non-CASPs offering only lending and borrowing services remain outside the scope of such obligations.[276]

V. Conclusion

Levine offers a cohesive characterisation of the crypto-assets financial system:

> In some ways it looks a lot like a copy of the traditional financial system. In other ways it looks totally different. In some ways it's a streamlined and modernized and innovative evolution of the traditional system. In other ways it's a chaotic and stupid devolution of the traditional system, a version of traditional finance that unlearned important historic lessons...[277]

270 Dimitropoulos (n 159) 128–29.

271 For MiCAR Article 86(1) cf CRD Article 91(1), MiFID Article 9(4), AIFMD Article 8(1)(c), and UCITSD Article 7(1)(b); for MiCAR Article 86(2) cf EMD Article 9(1)(b), MiFID Article 10(1), AIFMD Article 8(1)(d), and UCITSD Article 8(1).

272 Zetzsche and Woxholth (n 63) 114.

273 MiCAR, Article 68(1)–(2).

274 Directive (EU) 2024/1640 of the European Parliament and of the Council of 31 May 2024 on the mechanisms to be put in place by Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Directive (EU) 2019/1937, and amending and repealing Directive (EU) 2015/849 [2024] OJ 2024/1640 (AMLD), Article 3(2)(g).

275 EBA and ESMA (n 2) para 195 Box 6.

276 ibid.

277 Levine (n 4). See also Arner and others (n 94) 105970-2; Gorton and Zhang (n 41) 311; Avgouleas and Seretakis (n 40) 432; Dimitropoulos (n 159) 129.

This characterisation resonates particularly well when applied to crypto lending and borrowing service providers. As discussed in Chapter II, these centralised entities exhibit notable parallels with traditional NBFIs, including their roles in maturity, liquidity, and credit transformation. They also present familiar intermediation risks, as evidenced during the most recent crypto winter. In Chapter III, these risks were explored through both prudential and conduct lenses. The findings reveal that lending and borrowing platforms currently exist in a state of devolution, replicating the risk-laden behaviours of traditional finance without the associated oversight. The resulting downturn demonstrated that these entities are not immune to the classic failures traditionally associated with financial intermediation.

Returning to Lessig's four modalities of regulation,[278] although DeFi emphasises architectural or code-based control, largely resistant to the direct effects of the law,[279] the presence of centralised intermediaries paradoxically reintroduces a point of regulatory entry. These centralised service providers reintroduce institutional layers that legal regulation is well equipped to address. Thus, in the context of crypto lending and borrowing platforms, there remains a viable path to building regulatory guardrails around these entities. Chapter IV provided regulatory recommendations anchored in the existing principles of MiCAR. While the regulation currently lacks a prudential regulatory framework tailored to lending and borrowing activities—such as liquidity requirements, capital adequacy standards, large exposure limits, and credit risk management—it nonetheless offers a commendable conduct framework. This includes obligations around fiduciary duties, conflict of interest management, corporate governance, and AML/CTF. Still, further targeted conduct measures are warranted. These include the introduction of standardised key features documents, appropriateness tests, consent obligations, and restrictions on the use of platform-native tokens in lending and borrowing.

Following the catastrophic market downturn, several firms withdrew their products, leaving crypto lending and borrowing a relatively small segment of the overall crypto market.[280] Nevertheless, with Bitcoin reaching new highs and the current US administration adopting a generally more favourable stance towards crypto-assets, crypto lending and borrowing appear to be regaining traction.[281] Although DeFi was initially conceived as a radically novel financial paradigm, the emergence of intermediaries, particularly in the domain of lending and borrowing, undermines this premise by reintroducing classical financial intermediation risks. Regulatory tools honed over decades in traditional finance have proved effective in addressing such risks. Thus, if regulation is to be introduced for crypto lending and borrowing platforms, the most effective path forward lies in drawing inspiration from traditional financial regulation, adapted appropriately for the cryptoeconomy.

[278] Lessig (n 3) 124–25.
[279] Tasca and Piselli (n 1) 35.
[280] FCA (n 19) para 4.5; EBA and ESMA (n 2) paras 183–86.
[281] Steer (n 147).

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The Legal Architecture of Environmental Justice: Incorporating the Aarhus Convention through the Environmental Rights Bill

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ABSTRACT

This article has two central objectives: to evaluate (i) the implementation of the Aarhus Convention into domestic law and (ii) the effectiveness of the potential incorporation of the Aarhus Convention through the proposed Environmental Rights Bill. The UK has ratified the Aarhus Convention, but it is only empowered in part through the matrix of retained EU law; there remains little substantive or procedural direct incorporation. The politico-legal framework arguably positions the UK in a state of non-compliance with the Convention which has resulted in complaints to the Aarhus Convention Compliance Committee. Communicants have alleged that (i) there is no effective framework to review the substantive legality of a decision which impacts the environment, (ii) there is no effective framework for public participation in the drafting of rules which may significantly affect the environment, (iii) there is no adequate framework to protect claimants from prohibitive costs, and (iv) environmental defenders face persecution for attempting to secure the right to a healthy environment. Applying a critical environmental justice lens, this article argues that full and effective implementation of the Aarhus Convention is necessary, and the proposed Environmental Rights Bill would empower the Aarhus Convention domestically, effectively strengthening environmental rights, democracy, and stewardship.

Keywords: Aarhus Convention, public participation, environmental judicial review, standing, costs.

I. INTRODUCTION

In the UK, air pollution is linked to 64,000 premature deaths annually.[1] No rivers are free from chemical contamination, often combining the worst of sewage, agricultural runoff, and plastic pollution.[2] The UK is one of the most nature-depleted countries in the world,[3] and the

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[1] Environment, Food and Rural Affairs Committee, *Air Quality and Coronavirus* (HC 2019–21, 468).

[2] Environmental Audit Committee, *Water Quality in Rivers* (HC 2021–22, 74).

[3] Environmental Audit Committee, *Biodiversity in the UK: Boom or Bust?* (HC 2021–22, 136).

Planning and Infrastructure Act 2025 (PIA 2025) threatens to further erode protections for nature.[4] The Government is not on track to meet its environmental commitments.[5] It ordinarily takes sustained civil society mobilisation to prevent the expansion of fossil fuel extraction.[6] The UK is a party to the Paris Agreement, which established the target of limiting global mean temperatures to 1.5°C above pre-industrial levels, yet 2024 was the hottest year on record, with global mean temperatures 1.6°C above pre-industrial levels,[7] and the UK will need to do more to meet its nationally determined commitments to reduce greenhouse gas emissions.[8]

In a landmark ruling on the 3rd July 2025, the Inter-American Court of Human Rights unanimously held that a climate emergency exists, and, by a 5-2 majority, recognised a right to a healthy climate and corollary duties on State parties.[9] On the 23rd July 2025, the International Court of Justice handed down an advisory opinion on climate change (the 'ICJ Advisory Opinion'), ruling, *inter alia*, that States have legally binding obligations under customary international law to mitigate their greenhouse gas emissions, and that breach of these duties can trigger State responsibility.[10]

In the light of the existential threat posed by the climate crisis to people and planet, and evolving obligations on States in that regard, this article has two central objectives: to critically evaluate (i) the implementation of the Aarhus Convention into domestic law and (ii) the effectiveness of the potential incorporation of the Aarhus Convention through the proposed Environmental Rights Bill.

A. THE AARHUS CONVENTION AND THE ENVIRONMENTAL RIGHTS BILL

The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the 'Convention'), to which the UK is a signatory, provides procedural rights through three pillars, namely access to environmental information,[11] public participation in environmental decision-making,[12] and access to justice in environmental matters.[13] Scholars suggest that Article 1 of the Convention (the objective being to 'to contribute to the protection of the right of every person of present and future

[4] 'OEP Welcomes Proposed Amendments to the Planning and Infrastructure Bill' (OEP, 17 July 2025) <https://www.theoep.org.uk/report/oep-welcomes-proposed-amendments-planning-and-infrastructure-bill> accessed 6 April 2026. The letter states: 'We are clear that even after the material amendments the Government proposes, the Bill would, in some respects, lower environmental protection on the face of the law'.

[5] Office for Environmental Protection, *Progress in Improving the Natural Environment in England 2024/2025* (2026).

[6] By way of example, see: *R (Finch) v Surrey County Council & Ors* [2024] UKSC 20; *South Lakes Action Against Climate Change v Secretary of State for Levelling Up, Housing & Communities & West Cumbria Mining Ltd* [2024] EWHC 2349 (Admin).

[7] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS No 54113; '2024 Was the Warmest Year on Record, Copernicus Data Show' (ECMWF, 10 January 2025) <https://www.ecmwf.int/en/about/media-centre/news/2025/2024-was-warmest-year-record-copernicus-data-show> accessed 26 April 2026. Note that the limit relates to a 20-year average.

[8] Climate Change Committee, *Progress in Reducing Emissions – 2025 Report to Parliament* (2025).

[9] *Climate Emergency and Human Rights*, Advisory Opinion OC-32/25, Inter-American Court of Human Rights (May 2025) [813]; [298-316].

[10] *Obligations of States in respect of Climate Change* (Advisory Opinion) 2025 <https://www.icj-cij.org/case/187> accessed 26/7/25 (the 'ICJ Advisory Opinion').

[11] Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (the 'Aarhus Convention'). Any articles refer to the Aarhus Convention unless otherwise stated.

[12] Aarhus Convention (n 11) arts 6, 7, 8.

[13] ibid art 9.

generations to live in an environment adequate to his or her health and well-being') could encode a substantive right to a healthy environment.[14] Although this right would primarily take effect as a moral claim, owing to its ambiguity, it would also guide the construction of the Convention's procedural rights. Treaties should be interpreted in the light of their object and purpose.[15] Moreover, a 'living instrument' approach may be appropriate for environmental human rights treaties because of their importance and so that they can respond to rapidly changing times and developing legal problems.[16] The Aarhus Convention Compliance Committee (ACCC) is an arm of United Nations Economic Commission for Europe (UNECE), and is the authority responsible for maintaining compliance amongst the Convention's 47 signatories.[17]

Barritt offers a framework for the Convention's purposive construction; she identifies environmental democracy, environmental rights, and environmental stewardship as the Convention's purposes, and suggests that the Convention should be interpreted in the light of them.[18] Kelleher notes that amongst these purposes is executive accountability in environmental matters.[19] In theory, the objectives of the Convention could be mapped to the pillars of critical environmental justice (CEJ),[20] including intersectionality,[21] multi-scalarity,[22] a deeper engagement with the embeddedness of social inequality, reckoning with the need for transformative, rather than reformist, approaches to change,[23] and the adoption of more extensively participatory methods, which are inclusive of both human and non-human actors[24] and necessary for the production of sustainable and resilient futures.[25] This article focuses on the Aarhus Convention because of its ambition. Moreover, the Convention recognises that environmental problems require special legal solutions. In the face of climate emergency and ecological degradation, the Convention, through proper incorporation, can strengthen the foundations of environmental rights, environmental democracy, and environmental stewardship, which are integral to an effective strategy to address exigent environmental challenges.

The Environmental Rights Bill (ERB), as proposed by Wildlife-Countryside Link and drafted by David Wolfe KC and Kate Cook of Matrix Chambers, enshrines the Convention

[14] D R Boyd, 'Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' in J H Knox and R Pejan (eds), *The Human Right to a Healthy Environment* (Cambridge University Press 2018) 18, 23.

[15] E Barritt, *The Foundations of the Aarhus Convention: Environmental Democracy, Rights and Stewardship* (Hart Publishing 2020) 154.

[16] ibid 25; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(2) provides that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' (emphasis added).

[17] 'Mission' (UNECE) <https://unece.org/mission> accessed 16 July 2025.

[18] Barritt (n 15) 21-38.

[19] O Kelleher, 'Systemic Climate Change Litigation, Standing Rules and the Aarhus Convention: A Purposive Approach' (2022) 34 Journal of Environmental Law 107, 110.

[20] D N Pellow, *What is Critical Environmental Justice?* (2nd edn, Polity Press 2025).

[21] P Mohai, D Pellow, and J T Roberts, 'Environmental Justice' (2009) 34 Annual Review of Environment and Resources 405–430; N Seymour, *Strange Natures: Futurity, Empathy, and the Queer Ecological Imagination* (University of Illinois Press 2013); K Best, C Adams and J Vickery, *Animals and Women: Feminist Theoretical Explorations* (Duke University Press 2007).

[22] A Herod, *Scale* (Routledge 2011); J Sze, 'Scale' in J Adamson, W A Gleason and D N Pellow (eds), *Keywords for Environmental Studies* (New York University Press 2016) 178–84.

[23] M Smith, *Against Ecological Sovereignty: Ethics, Biopolitics, and Saving the Natural World* (University of Minnesota Press 2011).

[24] Pellow (n 20) 30-34 discusses human and more-than-human indispensability.

[25] ibid 19.

into law. It does so by conferring a right of access to environmental information (Part 2), a right to public participation in environmental decision-making (Part 3), and a right of access to environmental justice (Part 4).[26] The ERB also enshrines a fundamental right to a clean, healthy, and sustainable environment for everyone, including the public's right to secure this right without fear of penalisation, persecution, or harassment (Part 1).[27] The ERB envisages a framework for a system of guarantees that is distinct from, but complementary to, the protections afforded under the Human Rights Act 1998. This is because there are only limited environmental protections arising under it, and the Aarhus Convention provides for specific mechanisms through three procedural pillars which require their own legislative solutions.[28] The ERB is a civil society initiative and the Bill has not been introduced into Parliament, but this article argues that the ERB would be an effective measure, if introduced, to bring the UK into compliance with the Convention and mitigate environmental harm.

Adopting a socio-legal methodology,[29] this article contributes to the literature by evaluating the need for incorporating the Convention in the UK and the effectiveness of the ERB as the proposed means. It also touches on environmental obligations in the light of critical advisory opinions from various apex courts, and responds to recent ACCC correspondence with potential ramifications for environmental law in the UK.

B. THE POLITICO-LEGAL FRAMEWORK

The UK operates under a dualist framework which separates international and domestic law. To give international law domestic legal effect, Parliament must incorporate international legal principles through statute, or the interpretation of an international legal instrument must be relevant to the application of domestic law.[30] Despite being a signatory to the Convention, the Convention only enjoys partial incorporation in the UK, mostly through the matrix of retained EU legislation post-Brexit.[31] There is no statutory reference to the procedural rights provided by the Convention. When the UK exited the EU, the Convention's procedural rights did not enjoy full incorporation into EU law. It is notable that the public participation pillar of the Convention was expressly incorporated only in part into EU law pre-Brexit,[32] mainly by Directive 2003/35/EC which focuses on Article 7 of the Convention, and the ACCC has since found that the UK has failed to implement Article 8, which requires a system of effective public participation in the drafting of rules which may significantly affect the environment.[33] Arguably, more should have been and should still be done by the EU to fully implement the Convention into EU law.[34]

[26] 'Environmental Rights Bill' (Wildlife and Countryside Link, September 2024) <https://www.wcl.org.uk/environmentalrightsbill.asp> accessed 3 July 2025. Any clauses refer to the Environmental Rights Bill, unless otherwise stated.
[27] Aarhus Convention (n 11) arts 1, 3(8).
[28] Environmental Rights Bill (n 26) [75].
[29] R Banakar and M Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005).
[30] *Occidental Exploration Production Co v Republic of Ecuador* [2005] EWCA Civ 1116, [2006] QB 432.
[31] Aarhus Convention (n 11); Freedom of Information Act 2000 s 74; Environmental Information Regulations 2004 (SI 2004/3391); Retained EU Law (Revocation and Reform) Act 2023; Civil Procedure Rules 1998, Part 45 Section VII; see also James Maurici KC, 'The Status of the Aarhus Convention in English Law in 2023' (Landmark Chambers, 2023) <https://www.landmarkchambers.co.uk/news-and-cases/5-the-status-of-the-aarhus-convention-in-english-law-in-2023> accessed 14 July 2025.
[32] A Lidbetter and N Depani, 'The Aarhus Convention and Judicial Review' (2014) 19 Judicial Review 30.
[33] UNECE, 'Findings and Recommendations with Regard to Communication ACCC/C/2017/150 Concerning Compliance by the United Kingdom' (3 October 2025) (ACCC/C/2017/150).
[34] Commission, 'Aarhus Convention Implementation Report' COM (2025) 4316 Final.

The primary mechanism of access to justice or executive accountability in the UK is judicial review (JR). The themes discussed below emerge from recent complaints of non-compliance with the Convention, the Convention's purposes, and domestic legal norms.[35] Recent non-compliance complaints concerning the UK include the lack of substantive review in JR,[36] a failure to properly implement a system of effective public participation in the drafting of rules,[37] prohibitive costs for bringing a JR challenge,[38] and the treatment of environmental defenders.[39]

It is important that there is a robust mechanism to review the substantive and procedural legality of executive decisions in order to preserve the rule of law and prevent the misapplication of executive authority. There are, conceptually, three heads of challenge under which a JR may proceed: illegality, irrationality, and procedural impropriety. Illegality may involve a challenge to a decision where the decision-maker has misunderstood a legal instrument which they were required to apply,[40] or where a decision-maker has taken a decision outside of their powers.[41] Irrationality, through *Wednesbury* review,[42] may involve a challenge to a decision which is so unreasonable or has been made so unreasonably such that no reasonable decision-maker could have reached that decision or made it in that way.[43] Procedural impropriety may, for instance, involve a challenge to a decision where a public-authority has induced a legitimate expectation, by way of clear representation, that it will take a decision in a particular way in accordance with a certain instrument, and then it has not done so accordingly.[44]

Scientific uncertainty presents difficulties for *Wednesbury* review;[45] the courts are inclined to defer to expert decision-makers on matters of scientific uncertainty.[46] It is for the judiciary to review the decision-maker's interpretation of the law, but it does not step into the shoes of the decision-maker and render its own decision because it lacks the scientific expertise or democratic mandate to do so. Clause 14 ERB would require that the Secretary of State propose to establish environmental tribunals which could undertake merits review by being

35 Barritt (n 15).

36 UNECE, 'Communication to the Aarhus Convention Compliance Committee submitted by Royal Society for the Protection of Birds, Friends of the Earth (England, Wales and Northern Ireland), Friends of the Earth Scotland, and Leigh Day Solicitors' (7 December 2017) (ACCC/C/2017/156).

37 ACCC/C/2017/150 (n 33).

38 UNECE, 'Findings and Recommendations with Regard to Communication ACCC/C/2008/33 Concerning Compliance by the United Kingdom' (14 February 2011) (ECE/MP.PP/C.1/2010/6/Add.3).

39 M Forst, 'Letter to His Excellency Mr David Lammy MP, Secretary of State for Foreign, Commonwealth and Development Affairs of the United Kingdom' (29 January 2025) (Annex 7 to Referral ACCC/SR/R/2025/1, United Kingdom).

40 *Hopkins Homes Ltd v Secretary of State for Communities and Local Government & Anor* [2017] UKSC 37.

41 For example, pursuant to *R (Bridgerow Limited) v Cheshire West and Chester Borough Council* [2014] EWHC 1187 (Admin), a local authority will act unlawfully where it has adopted a scheme of delegation, and it has not taken a decision in accordance with the adopted scheme.

42 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

43 *Tesco Stores Ltd v Secretary of State for the Environment & Anor* [1995] 1 WLR 759; 2 All ER 636.

44 *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) is an example in the environmental context.

45 C Caine and R Broadbent, 'The Scrutiny of Scientific Evidence by UK Courts in Environmental Decisions: Legality, the Fact-Law Distinction, and (Sometimes) Self-Limiting Review' in M Eliantonio, E Lees and T Paloniitty (eds), *EU Environmental Principles and Scientific Uncertainty before National Courts – The Case of the Habitats Directive* (Bloomsbury, 2023) ch 5, 97–118.

46 *R (Plan B Earth) v Secretary of State for Transport* [2019] EWHC 1070 (Admin).

equipped with members which have not only legal, but scientific and local expertise as well, tackling complaints of non-compliance.[47]

Civil society should be able to contribute to the production of the law and challenge its application where it creates injustice. Yet studies suggest that there are hostile politico-legal opportunity structures for Non-Governmental Organisations (NGOs) in the UK.[48] This article argues that there is no clear, transparent, or consistent framework which enables civil society to meaningfully contribute to the production of rules which may have a significant effect on the environment. This is demonstrated by (1) the drafting of the legislation for the UK to exit the European Union, where no draft text was published in advance, precluding meaningful public comment and response, and (2) this Government's insistence on pushing the PIA 2025 through Parliament, draft text of which was also not published before introduction into Parliament, and which achieved royal assent despite it being the view of experts and members of civil society that it would reduce the levels of environmental protection on the face of the law, arguably with little benefit.[49]

The 'loser pays' system in the UK exposes claimants to the risk of prohibitive costs which can have a chilling effect on NGO legal mobilisation.[50] Cost Capping Orders in public interest proceedings do not apply to environmental litigation, which are covered instead by CPR r.46.[51] Holgate LJ in the Court of Appeal recently recalibrated the scope of Aarhus costs protection under Article 9(3), restricting protection to cases where legal provisions of national law relating to the environment, and its protection or regulation, are contravened; previously, non-planning statute concerning, for example, the regulation of trade, which required that regard was had to a material consideration which was environmental in effect, such as the Paris Agreement, could engage Article 9(3).[52] The ERB proposes to strengthen the Environmental Costs Protection Regime (ECPR) by imposing costs on the public authority if a public authority fails to act in accordance with the right to a healthy environment or where a party

47 Caine and Broadbent (n 45) 115.

48 L Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK' (2012) 46 Law & Society Review 523–556.

49 ACCC/C/2017/150 (United Kingdom) (n 33); Chartered Institute of Ecology and Environmental Management (CIEEM), 'Comment on the Planning and Infrastructure Bill 2025' (18 March 2025) <https://cieem.net/wp-content/uploads/2025/03/CIEEM-Comment-on-Planning-and-Infrastructure-Bill-2025-FINAL.pdf> accessed 1 August 2025; CIEEM, 'The Planning and Infrastructure Act 2025 Is Here – But the Fight for Nature Is Far from Over' (18 December 2025) <https://cieem.net/the-planning-and-infrastructure-act-2025-is-here-but-the-fight-for-nature-is-far-from-over/> accessed 6 April 2026: 'Environmental experts, senior lawyers and former regulators repeatedly warned that the reforms would reduce levels of environmental protection, with one prominent barrister describing them as a "licence to kill nature". Concerns were also raised about new limits on judicial review, further constraining the ability to challenge environmentally damaging decisions. To add to this, the Act is highly unlikely to speed up housebuilding as many other factors hold up construction'.

50 L Vanhala, 'Is Legal Mobilisation for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organisations in the United Kingdom, France, Finland, and Italy' (2018) 51(3) Comparative Political Studies 380-412.

51 Cost Capping Orders made pursuant to ss 88-90 Criminal Justice and Courts Act 2015; The Environmental Costs Protection Regime (ECPR) incorporates Article 9(4), which prohibits 'prohibitively expensive' litigation costs, limiting costs exposure to £5,000 for individuals, £10,000 for organisations, and £35,000 for defendants. Article 9(1) of the Convention covers environmental information cases, and Article 9(2) of the Convention covers environmental impact assessment cases. Article 9(3) broadly purports to cover all acts or omissions which 'contravene … national law relating to the environment'. See *Venn v SSCLG* [2015] 1 WLR 2328; and *Austin v Miller Argent (South Wales) Limited* [2015] 1 WLR 62 for a discussion on the traditional construction of these articles.

52 *HM Treasury & Anor v Global Feedback Limited* [2025] EWCA Civ 624 [132]-[150].

argues that a putative challenger should not be granted permission to challenge an environmental decision and then permission is subsequently granted.[53]

Purposively, protections for environmental defenders securing the right to a healthy environment exist on the continuum of public participation—in the sense that environmental defence and protest, even where they take the form of direct action, are manifestations of such participation—and are thus within the scope of the Convention.[54] Clause 5 ERB provides express protections for environmental defenders. Critical for environmental stewardship, relaxed standing rules generally permit NGOs to challenge decisions by way of JR. The ERB could be strengthened by including express provisions which replicate Articles 9(2) and 2(5) of the Convention which, together, may permit a wider, 'inclusive' interpretation of standing by enabling those likely to be affected by a decision which causes harm to nature to challenge it.[55]

This article shall address the main issues which emerge from the politico-legal framework, recent complaints of non-compliance, and the Convention's purposes. Those themes are: the review of substantive legality in environmental decisions (Chapter II), civil society mobilisation under the Aarhus Convention (Chapter III), and environmental stewardship empowering people and nature (Chapter IV).

II. Review of Substantive Legality in Environmental Decisions

The right to challenge the legality of a decision made by a public body protects people from the abuse of executive power, safeguards the rights and freedoms of individuals, and upholds the rule of law. Civil society must be able to rely upon JR to hold the executive to account because there is no other remedy of last resort. Article 9(2) of the Convention requires '...access to a review procedure...to challenge the substantive and procedural legality of any decision'.[56] This section shall consider how this right applies in practice domestically, particularly when faced with scientific uncertainty, and how the courts should apply the precautionary principle. It will then evaluate the effectiveness of environmental tribunals as would be proposed by Clause 14 ERB.[57]

A. Calibrating the Standard of Substantive Legal Review in Environmental Cases

There ought to be an effective review procedure for the substantive legality of environmental decisions taken by the Executive. Owing to the lack of such a procedure, the Royal Society for the Protection of Birds, Friends of the Earth, and Leigh Day Solicitors submitted a complaint to the ACCC alleging non-compliance with Articles 3(1) and 9(2)-(4) in 2017.[58] The communicants contended that the failure to ensure that the courts undertake effective

53 Environmental Rights Bill (n 26) cl 13(5), (6).
54 UNECE, 'Letter to the United Kingdom Concerning Compliance with Article 3(8) of the Convention' (26 February 2024) (ACCC/C/2023/200).
55 Kelleher (n 19).
56 Aarhus Convention (n 11) art 9(2).
57 Environmental Rights Bill (n 26) cl 14.
58 ACCC/C/2017/156 (n 36).

review of the substantive legality of environmental decisions made by public bodies gave rise to non-compliance with the aforementioned articles of the Convention.[59]

The primary procedure, and indeed often the only appropriate procedure in most environmental cases, for the review of the substantive legality of environmental decisions is *Wednesbury* review.[60] This establishes a very high standard of unreasonableness which,[61] per Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service,* requires that a decision must be 'So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'.[62] The intensity of scrutiny is calibrated by the context of the claim;[63] human rights cases typically attract an 'anxious scrutiny' standard.[64] Some environmental proceedings do engage human rights issues, as demonstrated by *Verein KlimaSeniorinnen Schweiz v Switzerland,*[65] *Öneryıldız v Turkey,*[66] and *Tatar v Romania.*[67]

In *R (Fighting Dirty) v EA & SSEFRA,*[68] where it was undisputed that human rights were not engaged, Fordham J noted that the contextually variable intensity of 'scrutiny' in reasonableness review could mean that in practice, either JR exercises careful scrutiny in that it *does* more and conducts a closer examination of the decision; or that it *needs* more by requiring stronger reasons of the public authority to justify its decision as reasonable.

Environmental JR has recently attracted a low intensity of scrutiny owing either to the scientific uncertainty which often surrounds the core issues,[69] or to the political judgement required in balancing the social, economic, and environmental factors which typically undergird the decision matrix;[70] the court does not have the expertise or authority to deal with either.[71] For example, in *Friends of the Earth,* the High Court was tasked with reviewing a problem with long-term, evaluative, and predictive elements in the polycentric context of climate change.[72] There were manifold social, economic, environmental, and technological matters of judgement which the court acknowledged it had no real competence or expertise in, whereas such expertise was, conversely, available to the Secretary of State.[73] Sheldon J concluded that, as a consequence, the court should apply a low intensity of scrutiny. In *Packham,* the subject of review concerned HS2 and climate change. The Court of Appeal determined that since the decision incorporated political judgement about matters of national macroeconomic policy, a low intensity of scrutiny was appropriate.[74]

59 ibid.
60 *Associated Provincial Picture Houses* (n 42).
61 L Drummond, F McCartney and A Poole, *A Practical Guide to Public Law Litigation in Scotland* (W Green, 2020), pp 63-65.
62 *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1984] UKHL 9, [1985] AC 374, 410.
63 *R (Justice for Health Ltd) v Secretary of State for Health* [2016] EWHC 2338 (Admin) [186].
64 *R v Ministry of Defence ex parte Smith* [1996] QB 517 as per Lord Bingham MR: 'the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above'.
65 (2024) 79 EHRR 1.
66 (2005) 41 EHRR 20.
67 App no 67021/01 (ECtHR, 27 January 2009).
68 [2024] EWHC 2029 (Admin) [30] (the Court's emphasis).
69 *Friends of the Earth & Ors v Secretary of State for Energy Security and Net Zero* [2024] EWHC 995 (Admin) [112], [141].
70 *R (Packham) v Secretary of State for Transport & Anor* [2020] EWCA Civ 1004 [48-52].
71 *Fighting Dirty* (n 68) [30]-[34].
72 *Friends of the Earth* (n 69) [141].
73 ibid.
74 *Packham* (n 70) [48].

In *Fighting Dirty,* Fordham J rejected the suggestion that Aarhus Convention claims, where provisions of national law which relate to the environment are contravened, would attract a heightened standard of review by default,[75] maintaining the position that the standard of review should be calibrated by context.[76] Fordham J accepted that environmental issues could attract a higher intensity of scrutiny, but confirmed that the 'political, policy-laden, complex or predictive quality of the decision' can point to a lower intensity of scrutiny.[77] Correspondingly, Fordham J held in *Fighting Dirty* that careful scrutiny ought to be applied, and so a close look into the decision-making process was consequently appropriate, but the Court did not *need* more by way of stronger reasons, meaning that the latitude which the decision-maker was afforded was not narrowed.[78] As such, environmental decision-makers will continue to be shielded from the regular standard of scrutiny because environmental decisions typically involve matters of political judgement and / or scientific uncertainty; consequently, the latitude which is conferred to the decision-maker will usually be wider.

The courts are already limited to the jurisdiction of *Wednesbury* unreasonableness to review the substantive legality of a decision in most environmental cases. *Fighting Dirty* emphasises the state of non-compliance with the Convention by accepting that environmental cases will continue to be subject to a low intensity of scrutiny.[79] Therefore paradoxically, larger development projects where environmental impacts are greater but more uncertain will be subject to a lower standard of review than smaller projects with lesser but more certain environmental impacts. This deepens the impact of the lack of a dedicated substantive review procedure, because when the prism of *Wednesbury* irrationality is applied in environmental cases, the prism itself becomes opaque when heightened scrutiny is needed most.

B. APPLYING THE PRECAUTIONARY PRINCIPLE

Public authorities should be required to have regard to the precautionary principle so that scientific uncertainty is not used as a reason to fail to take proportionate steps, such as applying a more anxious standard of scrutiny in *Wednesbury* review, to prevent serious and irreparable harm to nature. In the ICJ Advisory Opinion,[80] the Court considered the application of the precautionary principle; it followed Principle 15 of the Rio Declaration which states that where 'there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'.[81] The Court concluded that the precautionary principle functions as an applicable guiding principle for the interpretation and application of the relevant legal rules and parties' obligations under climate change treaties.[82] Applying Principle 15, the Court further opined that 'States should not refrain from or delay taking actions of prevention in the face

[75] *Fighting Dirty* (n 68) [30-31], and [34].
[76] Fordham J in *Fighting Dirty* (n 68) following *R (Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114, [2013] JPL 1027, [2013] 2 WLUK 655; applying *R (McMorn) v Natural England* [2015] EWHC 3297 (Admin), [2016] PTSR 750, [2015] 11 WLUK 312.
[77] *Fighting Dirty* (n 68) [34(1)].
[78] *Fighting Dirty* (n 68) [30], [35]; ACCC/C/2017/156 (n 36), Letter from Communicants.
[79] *Plan B Earth Ltd* (n 46) [273], so as to not trespass into the 'forbidden territory' of merits review.
[80] ICJ Advisory Opinion (n 10) [158], [180].
[81] 'Rio Declaration on Environment and Development' (1992) UN Doc A/CONF.151/26 (Vol I) (the 'Rio Declaration'), Principle 15.
[82] ICJ Advisory Opinion (n 10) [180].

of scientific uncertainty'.[83] The Court followed the International Tribunal on the Law of the Sea Advisory Opinion in this connection, and considered that '... the precautionary approach or principle, where applicable, guides States in the determination of the required standard of conduct in fulfilling their customary duty to prevent significant harm'.[84]

Domestic courts should be required to apply the precautionary principle in their reasoning where the impugned decision might cause serious and irreversible harm to nature and its features. The position of Fordham J in *Fighting Dirty*,[85] explained above, appears to contravene the precautionary principle. When reviewing decisions made in situations of scientific uncertainty, courts should *need more* by way of stronger reasons to justify the decision as reasonable, in line with the anxious scrutiny standard.[86] This approach could empower JR to deal better with substantive legality in environmental decision-making as decision-makers would rightly be afforded less latitude in environmental cases which require precautionary decisions, bringing the UK into closer into compliance with Articles 9(2)-(4) of the Convention, short of transforming the way public law principles have been applied traditionally in JR regarding merits review. It is a strength of the ERB that its formulation of the right to a healthy environment envisages due regard to the precautionary principle.[87] Given that the ERB provides that it would be unlawful for a public authority 'to act in a way which is incompatible with securing the right to a clean, healthy and sustainable environment',[88] Fordham J would have been bound to have due regard to the precautionary principle because the ERB would require that due regard is had to it when having regard to the need to secure the right to a healthy environment.[89] It may accordingly be possible for a putative applicant to challenge a decision where it relies on scientific uncertainty as a reason for adopting a standard of review that is too low.

Developments likely to have significant environmental impacts currently require an environmental impact assessment (EIA).[90] Although an EIA does not prohibit developments that could significantly harm the environment, it ensures that a development's environmental consequences are exposed to public scrutiny and materially considered during the decision-making process. Indeed, as Lord Legatt noted in *Finch*, 'You can only care about what you know about'.[91]

The law applies the precautionary principle to protect endangered species through protected sites or European sites known as Special Protection Areas and Special Areas of Conservation. These sites are empowered by the Conservation of Habitats and Species Regulations 2017 (the Habitats Regulations), which implements the Habitats Directive,[92] and which requires that the relevant authority carries out an assessment, and is satisfied that, beyond all reasonable scientific doubt, the proposed development will have no adverse effects

[83] ibid [293].
[84] ibid [294], applying *Responsibilities and Obligations of States Sponsoring Persons and Entities* (Advisory Opinion, 1 February 2011) ITLOS Reports 2011, 46, [131].
[85] *Fighting Dirty* (n 68).
[86] *Smith* (n 64).
[87] Environmental Rights Bill (n 26) cl 1(8)(e)a.
[88] ibid cl 1(2).
[89] ibid cl 1(8)(e)a.
[90] Town and Country Planning (Environmental Impact Assessment) Regulations 2017, SI 2017/571.
[91] *Finch* (n 6) [21].
[92] European Council Directive 92/43/EEC.

on the integrity of a protected site.[93] EIAs are a crucial component of our environmental law because they are the primary mechanism by which the law can be engaged to prevent serious and irreparable harm to nature's most valuable features.

Part III of the PIA 2025 erodes the precautionary principle, scraps the need for EIAs in some circumstances, and replaces the existing system with environmental delivery plans (EDPs) and nature restoration levies (NRLs) which purport to compensate for environmental harm through a centralised and strategic mechanism.[94] Natural England are now the responsible authority for preparing EDPs subject to approval by the Secretary of State. EDPs will identify which features of the environment would be impacted by development and present strategies to address harm. Although, the PIA 2025 provides that the Secretary of State may only make an EDP which passes the 'overall improvement test',[95] which it will pass if, by the EDP end date, the effect of the conservation measures will materially outweigh the negative effects of the EDP development on the conservation status of each identified environmental feature.[96]

This marks a departure from the precautionary standard established by the Habitats Regulations. Section 72 PIA 2025 goes one step further, and allows developers of developments to which an EDP applies to apply to Natural England to pay a NRL which would require that the decision-maker *disregard* the environmental impact of development on a protected feature of a protected site, equivalent to a licence for the disturbance of a protected species under the Habitats Regulations.[97] Moreover, the PIA 2025 does not require that NRL be spent at any particular time or in any particularly way during the EDP;[98] and as such, where there is no requirement to spend before development begins or ends, harm may, to use the language of the Rio Declaration, become 'serious or irreversible'.[99] Disregarding the precautionary principle by providing that some amount of money may be capable of rationalising serious and irreparable harm to nature constitutes a serious threat to the mitigation hierarchy that is so crucial to the effective conservation of nature's most valuable features, and consequently also, to environmental justice, particularly in the light of the low intensity of scrutiny EDPs will typically be subject to, following *Fighting Dirty*.[100] This emphasises the importance of public authorities being required to have due regard to the precautionary principle.

93 Conservation of Habitats and Species Regulations 2017, SI 2017/1012 (the 'Habitats Regulations'), reg 63; Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij* [2005] All ER (EC) 353.

94 Planning and Infrastructure Act 2025.

95 ibid s 65(3).

96 ibid s 65(4).

97 Habitats Regulations (n 93), reg 55.

98 The Planning and Infrastructure Act 2025 s 77 only requires that Natural England spend the levy on conservation measures which relate to the 'environmental feature' to which the NRL is charged.

99 Rio Declaration (n 81) Principle 15; see Office for Environmental Protection, 'OEP Gives Advice to Government on the Planning and Infrastructure Bill' (2 May 2025) (the 'OEP Advice') <https://www.theoep.org.uk/report/oep-gives-advice-government-planning-and-infrastructure-bill> accessed 9 July 2025, which states: 'The bill is silent as to when conservation measures must be implemented and by when they must be effective. This gives rise to the possibility of significant impacts on the conservation status of protected species or sites arising before the successful implementation of conservation measures. This is not present under existing environmental law (regulation 63 of the Habitats Regulations 2017).'

100 *Fighting Dirty* (n 68).

C. ENVIRONMENTAL TRIBUNALS

Environmental tribunals could provide an effective avenue for substantive legal review. There is a tension between increasing the avenues of challenge to decisions which relate to the environment, particularly in the planning context, and delivering important developments such as affordable housing and renewable energy infrastructure.[101] However, with protections for the environment in 'regression',[102] this moment constitutes a critical opportunity to provide an alternative to JR which offers a cost-effective, efficient, and rigorous procedure for substantive legal review in environmental matters. This is especially important in the environmental context where the highly technical, political, and scientifically uncertain nature of environmental decisions can be hard to reconcile with the separation of powers because it could be said that such matters are properly for the executive which is often better equipped with the necessary scientific expertise and democratic mandate. Clause 14 ERB would require that the Secretary of State propose to implement a system of local environmental tribunals with a view to enforcing the right of access to justice.[103] The purpose of environmental tribunals could be twofold: to (i) address complaints against public authorities and (ii) provide an avenue for the merits review of decisions with environmental impacts.[104] Where complaints would be brought to an environmental tribunal, they may be brought on procedural or substantive grounds. Tribunals can make decisions *de novo* on points of fact and law; moreover, they can, and often must, exercise judgement on what the 'right' decision might have been.[105] Tribunals can accordingly 'stand in the shoes of the decision-maker' when reviewing a decision, allowing for merits review in a quasi-judicial environment.[106] For example, social security tribunals in the UK are regularly required to grapple with the effects of a particular health condition on a person's functional capacity in order to determine what level of benefits would have been appropriate.[107]

Environmental tribunals in their various forms have already proliferated across the globe in domestic contexts with manifold actors advocating for their wider rollout.[108] An environmental tribunal could enrol members with legal and scientific expertise so that it can legally review matters of science without prejudice to the separation of powers.[109] In JR, despite the Civil Procedure Rules (CPR) enabling the courts to hear evidence from witnesses and experts on relevant scientific information, precedent has developed which means that courts rarely examine evidence from witnesses,[110] especially when that evidence relates to matters of science,[111] and only to inform the basis upon which the decision under challenge has been

101 Charles Banner KC, *Review of Legal Challenges to Nationally Significant Infrastructure Projects* (Ministry of Housing, Communities and Local Government, 2024) (the 'Banner Review').
102 OEP Advice (n 99).
103 Environmental Rights Bill (n 26) cl 14(1).
104 ibid cl 14(1)(a-b) (emphasis added).
105 Robert Thomas, 'UK Tribunals: Structure, History, Constitutional Status, and Practice' in Susan Thomson, Matthew Groves and Greg Weeks (eds), *Administrative Tribunals in the Common Law World* (Hart Publishing 2024) 177–204.
106 Caine and Broadbent (n 45) discuss how tribunals, administrative courts, and planning courts differently navigate the fact-law distinction.
107 *MH v Secretary of State for Work and Pensions* [2018] AACR 12.
108 J M Angstadt, 'Can Domestic Environmental Courts Implement International Environmental Law? A Framework for Institutional Analysis' (2023) 12(2) Transnational Environmental Law 318, 319
109 B Christman, 'Why Scotland Needs an Environmental Court or Tribunal' (Environmental Rights Centre for Scotland, October 2021) 18-21.
110 *O'Reilly v Mackman* [1983] 2 AC 237 (HL) [282].
111 *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649 [36].

made.[112] This is to protect the court from the temptation that it may 'substitute its own view of the facts for that of the decision-making body upon whom the exclusive jurisdiction to determine facts has been conferred by Parliament'.[113] By contrast, tribunals often hear detailed evidence from expert witnesses on matters of scientific uncertainty, and environmental tribunals empowered by the ERB could utilise this power to provide a cost-effective method of scrutinising the substantive legality of environmental decisions made by public bodies, because by (i) being equipped with specialist expertise, they may be able to come to a view more efficiently; (ii) being able to review the merits of a decision, legalistic challenges may not be necessary for a challenge to be successful; and (iii) being free from the extensive procedural requirements of JR, costs may be accordingly saved. This would bring the UK into closer compliance with Articles 9(2)-(4) of the Convention.

Environmental tribunals would be partly administrative and partly judicial, diluting a 'pure' conception of the separation of powers and fragmenting administrative review. However, as Warnock notes, it is the changing, complex, scientifically uncertain, and polycentric nature of environmental problems that 'require different legal solutions'.[114] Environmental tribunals would enjoy more legitimacy than a purely judicial procedure of review by way of their increased capacity to address the inherent scientific uncertainty, knowledge requirements, and policy-laden nature of environmental problems.[115]

Tribunals may fairly be criticised for being unable to effectively engage civil society in the co-production of environmental decisions. Although it is not impossible to envision a tribunal situated in every relevant locality, equipped with locally elected members, this may still risk privileging certain voices in decision-making fora over others. Nonetheless, being able to challenge the substantive legality of a decision which impacts the environment is critical to the idea of environmental democracy because it at least enables civil society to engage in the production of environmental outcomes by facilitating a challenge to be brought to decisions which would otherwise go unreviewed, ultimately also empowering environmental stewardship.[116] It addresses CEJ by enabling substantive, legal, and bottom-up challenges to decisions which have impacts that reach beyond the legal and towards the socio-ecological. Environmental tribunals may be capable of rendering judgment on the merits without revolutionising the application of public law principles because they are capable of being equipped with legal, scientific, and local expertise. Therefore, the ERB proposes an important and effective solution to the issue of providing an avenue for the review of the substantive legality of environmental decisions.

III. Civil Society Mobilisation under the Aarhus Convention

Civil society should be able to meaningfully engage in the production of legal rules which may significantly affect the environment because public participation in the production of legal rules generally produces better results by improving the environmental standard of

112 *R (Transport Action Network Ltd) v Secretary of State for Transport* [2021] EWHC 568 (Admin) [81].
113 *O'Reilly* (n 110) [282].
114 C Warnock, *Environmental Courts and Tribunals* (Hart 2020) 82
115 ibid.
116 According to Barritt (n 15), this is amongst the purposes of the Aarhus Convention.

governance outputs.[117] Participation is particularly effective where there is a high intensity of communication and some delegated decision-making power to participants.[118] Articles 8(a)-(c) require, in fixed time-frames sufficient for effective participation, that draft rules, which 'may' have a significant effect on the environment, should be published in advance, the public should be given the opportunity to consult or comment, and the outcomes of that consultation 'should be taken into account as far as possible'.[119]

Civil society should be empowered to challenge decisions where the unlawful application of those legal rules creates injustice. Inaccessibility to JR can undermine the rule of law and reduce executive accountability. Article 9(4) states that review procedures must provide 'adequate and effective' relief that is 'fair, equitable, timely and not prohibitively expensive'.[120]

This chapter shall address the absence of legal procedures which enable public participation in the drafting of rules which may have significant environmental consequences, before reviewing the effectiveness of Clauses 11 and 12 ERB at implementing Article 8 of the Convention. It will also address how the courts have applied Article 9 in relation to costs, and then it will evaluate the effectiveness of Clauses 13(5)-(6) ERB in supporting access to justice in environmental matters.

A. IMPROVING PUBLIC PARTICIPATION IN ENVIRONMENTAL RULE-MAKING

There should be a framework which enables civil society to contribute consistently and effectively to the production of rules which may significantly affect the environment. In 2017, Friends of the Earth submitted a complaint of non-compliance to the ACCC that the preparation of draft legislation to withdraw the UK from the European Union, the 'Withdrawal Bill', breached Article 8; that preparation of subsequent legislation would breach Article 8; and that the UK breached Article 3(1) by failing to implement Article 8 effectively through a clear, transparent, and consistent framework.[121] In its draft findings released on the 7th July 2025, the ACCC held that the UK had breached Article 8 during preparation of the Withdrawal Bill by the Department for Exiting the European Union.[122] Beyond Brexit, the ACCC found that the UK breached Article 3(1) by failing to take the necessary legislative, regulatory, or other measures to establish and maintain a consistent framework to promote effective public participation during the preparation of draft legislation that may have a significant effect on the environment, even though there is no requirement to establish those measures in legally binding form.[123] In the UK, the Cabinet Office published guidance called the 'Consultation Principles' which outlined the requirements of any putative consultation.[124] The Government published documentary guidance for officials called 'Judge Over Your Shoulder: A Guide to Good Decision-Making', which summarises the relevant common-law

117 N W Jager, J Newig, E Challies, and E Kochskamper, 'Pathways to Implementation: Evidence on How Participation in Environmental Governance Impacts on Environmental Outcomes' (2020) 30(3) Journal of Public Administration Research and Theory 383.
118 ibid.
119 Aarhus Convention (n 11) art 8.
120 Aarhus Convention (n 11) arts 9(1)-(3) refer to review procedures for decisions which relate to the environment to challenge substantive and procedural legality.
121 ACCC/C/2017/150 (n 33) [2].
122 The Public Authority responsible for drafting up the legislation to leave the European Union.
123 ACCC/C/2017/150 (n 33), applying ACCC/C/2014/120 (Slovakia), ECE/MP.PP/C.1/2021/19, [74]-[77].
124 ibid [18].

rules.[125] The constitutional framework in the UK does not preclude participation in the drafting of legislation, but no effective duty to consult or enable comment during the drafting of legislation is imposed.[126] The ACCC found that the existing rules do not constitute a transparent, consistent, or clear framework to implement Article 8, as elucidated by the preparation of the Withdrawal Bill. If draft findings are approved by the Parties at the Meeting of the Parties, the findings become binding as a matter of international law as the correct interpretation of the Convention. However, in its unincorporated state, such matters become relevant considerations which are afforded 'respect' only and are not binding upon domestic courts.[127] At the Eighth Session of the Meeting of the Parties to the Aarhus Convention in November 2025 (Eighth Ordinary Session), the UK refused to endorse the findings of the ACCC on the Withdrawal Bill in ACCC/C/2017/150 (United Kingdom), setting a dangerous precedent for compliance with the Convention; endorsement by the other Parties to the Convention has been postponed until the next Meeting of the Parties in late 2029.

I contend that the passage of the PIA 2025 also breached Article 8 of the Convention. Part III received backlash throughout its passage through Parliament from environmental NGOs, industry representatives, sector and business leaders, and notably, the Office for Environmental Protection (OEP).[128] Although amendments have improved the position since the introduction of the Planning and Infrastructure Bill (PIB) into Parliament, critics remain concerned about the impact of EDPs and NRLs on the mitigation hierarchy, that funding has already been increasingly stretched recently for Natural England in particular who may lack the resources to prepare EDPs effectively, and that in any event, this upheaval of our existing rules will be 'highly unlikely to speed up housebuilding'.[129] In addition, Wild Justice launched a legal challenge, pursuant to section 20 Environment Act 2021, against the Secretary of State's comment that the bill would not reduce the level of environmental protection, citing in particular the removal of the precautionary standard applied in the Habitats Regulations; although, the High Court has since determined that the claim was not justiciable due to parliamentary privilege protecting the comments made by the Secretary of State as statements made in the context of a legislative function.[130]

To engage Article 8, the ACCC affirmed that it need merely be demonstrated that the draft legislation 'may' have a significant effect on the environment.[131] Taken together, the OEP's assessment, opinions of senior barristers, and belief by critical players in civil society that 'there is no conceivable way that the bill would not result in a weakening of the levels of

125 ibid [19].

126 *R (Better Streets for Kensington and Chelsea) v RBKC* [2023] EWHC 536 (Admin).

127 *Walton v The Scottish Ministers* [2012] UKSC 44 [100].

128 Justin Adams and others, 'Joint Statement: Pause to Bad Law' (2025) <https://www.rskwilding.com/wp-content/uploads/2025/05/joint-statement_-pause-to-bad-law-%E2%80%93-a-call-for-meaningful-consultation-on-the-planning-and-infrastructure-bill-1-3.pdf> accessed 26 April 2026; and OEP (n 4) which noted that the provisions of the PIB with amendments would still 'lower environmental protection on the face of the law'.

129 CIEEM (n 49); British Ecological Society, 'What Does the Planning and Infrastructure Act Mean for Ecology?' (2026) <https://www.britishecologicalsociety.org/content/what-does-the-planning-and-infrastructure-act-mean-for-ecology/> accessed 7 April 2026.

130 Wild Justice, 'Wild Justice Starts Legal Proceedings against Government's Controversial Planning and Infrastructure Bill' (12 May 2025) <https://wildjustice.org.uk/general/wild-justice-starts-legal-proceedings-against-governments-controversial-planning-and-infrastructure-bill> accessed 1 August 2025; Francis Taylor Building, 'Challenge to Planning and Infrastructure Bill Statement Not Justiciable, High Court Rules' (2025) <https://www.ftbchambers.co.uk/news/news-view/challenge-to-planning-and-infrastructure-bill-statement-not-justiciable-high-court-rules> accessed 12 December 2025.

131 ACCC/C/2017/150 (n 33) [89].

environmental protection',[132] suggest that the PIB meets the bar that it 'may' have a significant effect on the environment, and therefore engages Article 8. The consultation focused on the 'Planning Reform Working Paper' only, which was not a draft text of the legislation, like the White Paper that was published for the Withdrawal Bill, which pursuant to ACCC/C/2017/150 (United Kingdom) contravenes Article 8.[133] The government published its impact assessment on the PIB without asking the OEP for advice,[134] and before the conclusion of the consultation, rendering civil society engagement with the drafting of legislation tokenistic.[135] In the light of the absence of 'meaningful inclusions', this suggests that the consultation was not 'taken into account as far as possible' which would further contravene Article 8.[136] The drafting of the PIB demonstrates that there remains no consistent or effective framework for consultation or comment on draft legislation, and that Article 8 has not been properly implemented pursuant to the requirements of Article 3(1). Perhaps one reason why the UK went against the grain of precedent and chose not to endorse the findings of the ACCC on the drafting of the Withdrawal Bill at the Eighth Ordinary Session was because it would leave the PIA 2025 open to challenge for breach of its obligations under international law, however inconsequential any putative breach might be. Ultimately, the impacts of the failure to effectively consult in the drafting process will be felt by developers, who lack certainty about the EDP provisions in the PIA 2025, by nature and biodiversity, due to the regression in protections, and by communities that are connected with and dependent upon nature.

Clause 11 ERB proposes a solution: implementing Article 8. Clause 11(2) provides:

> Before proposals for a relevant legal provision are introduced into Parliament a draft of the proposed text must be published by a prescribed means alongside an invitation for public comment on the proposal while all options remain open and allowing sufficient time frames for the public to consult a draft and comment so as to ensure effective public participation.

Clause 11 therefore proposes to create legal obligations which require draft text of legal provisions be published for comment prior to introduction into Parliament. This is because Article 2(2) provides an exception for bodies acting in a legislative capacity; thus, upon introduction into Parliament, Article 8 obligations can no longer be discharged.[137] Once a bill is left in the hands of the legislature, there is no duty on ministers to consult civil society or respond to concerns from constituents, although the House of Lords retains an important scrutineering role.[138]

Environmental matters are often scientifically uncertain and involve technical matters which require experience and expertise to engage with. As a consequence, it could be argued

132 Wild Justice (n 130).
133 ACCC/C/2017/150 (n 33).
134 Despite this being its statutory role as designated by the Environment Act 2021 ss 28-30.
135 CIEEM, 'Comment on the Planning and Infrastructure Bill 2025' (2025) <https://cieem.net/wp-content/uploads/2025/03/CIEEM-Comment-on-Planning-and-Infrastructure-Bill-2025-FINAL.pdf> accessed 1 August 2025; notably: 'It is evident that the broad consensus of concern raised by a wide range of environmental professionals, professional bodies, NGOs, learned societies and developers in response to the Planning Reform Working Paper have been entirely disregarded in the Bill drafting process'.
136 Wild Justice (n 130).
137 ACCC/C/2017/150 (United Kingdom) (n 33) [86]: 'Once the draft is submitted to the body or institution with legislative capacity and that body commences its deliberations on the draft, the exception in article 2(2) excluding 'bodies acting in a legislative capacity' from the scope of the Convention will apply'.
138 ibid.

that lower levels of participation are appropriate in environmental matters. Moreover, rigorous public participation in the drafting of legal rules will, if done properly, take time, and potentially slow the passage of legislation needed to address urgent problems promptly, thereby limiting the executive's ability to produce effective solutions to pressing challenges. Nevertheless, Heffron and Haynes found that amongst stakeholders, public participation in the formation of environmental legislation is considered 'by all as too low'.[139] Improving engagement with civil society from the outset will produce better rules which will likely be subject to fewer challenges. Environmental problems require urgent and highly effective solutions which address challenges immediately and fully. Properly engaging civil society at the drafting stage offers a critical opportunity to produce better rules from the outset, potentially mitigating the need for further and more extensive rules as environmental problems become increasingly hard to solve.

Implementing Article 8 through Clause 11 could ensure that civil society can meaningfully engage in the bottom-up production of rules which affect the environment, moving closer to satisfying the transformative objects of CEJ. Legislation which empowers civil society to co-produce and continually negotiate the rules which impact the environment is a step towards an ecological politics that can be more than simply reformist and can become expansively participatory.[140] It develops the foundations of environmental democracy upon which the Convention itself is premised.

B. AVOIDING PROHIBITIVE COSTS IN ENVIRONMENTAL JUDICIAL REVIEW

Prohibitive costs should not stifle proportionate challenges to executive decisions. At the 29th Meeting of the Parties in 2010, the ACCC found the UK not to comply with Article 9(4) because the UK failed to ensure that costs were not prohibitively expensive, and establish binding rules from the legislature or the judiciary to this effect.[141] The ECPR did evolve in an effort to become consistent with international law, but research has shown that hostile politico-legal opportunity structures persist.[142] The current ECPR still may have a chilling effect on smaller NGO mobilisation in particular.[143] In practice, well-established and well-funded environmental NGOs have paradoxically mobilised to bring several legal challenges.[144] With the restricted ambit of Aarhus costs protections following *Global Feedback,*[145] costs will be more frequently prohibitive and JR increasingly inaccessible.

On the 18-20th October 2021, Decision VII/8s confirmed that several elements of the ECPR remain prohibitively expensive and are in need of reform, and the UK has failed to discharge its obligations under Article 9(4).[146] It is fair to say that since the implementation of

139 R J Heffron and P Haynes, 'Challenges to the Aarhus Convention: Public Participation in the Energy Planning Process in the United Kingdom' (2014) 10 Journal of Contemporary European Research 243, with perspectives from national and intranational governance, legal, academic, non-public sector practitioner, public sector practitioner, and local governance stakeholders.

140 Smith (n 23) offers a biopolitical analysis against ecological sovereignty and towards a radical ecological politics that emerges bottom up, through human and more-than-human agents.

141 ECE/MP.PP/C.1/2010/6/Add.3 (n 34) [141]-[142].

142 ECPR (n 51); Vanhala (n 48).

143 Vanhala (n 48) 540.

144 Vanhala (n 50).

145 *Global Feedback* (n 52).

146 UNECE, 'Decision VII/8s Concerning Compliance by the United Kingdom' (2021) ECE/MP.PP/2021/2/Add.1.

Aarhus costs protections into the civil procedure rules, the number of environmental challenges has increased.[147] The Banner Review, an independent review into whether unmeritorious legal challenges to development consent orders were causing undue delay to the delivery of nationally significant infrastructure projects, was prompted by a government concern for the consequent detriment to the public interest.[148] In this context, it was considered that there was 'no case for amending the rules in relation to costs caps in order to reduce the number of challenges to NSIPs'.[149] In addition, James Maurici KC considered that there was 'little justification' for providing yet further costs protections to claimants as existing rules may be said to 'go too far'.[150] Nonetheless, following *Global Feedback,*[151] on the 29th May 2025, Sarah Sackman KC MP, in her position as Minister of State in the Ministry of Justice, wrote to the ACCC outlining the Government's proposed response to ACCC recommendations.[152] Decision VII/8s detailed a number of specific concerns which bring the UK into non-compliance with Articles 9(4) and 3(1) of the Convention, and suggested that the UK should extend the scope of the ECPR, clarify the extent of liability for parties in adverse costs if losing, amend the way that the ECPR functions, and improve the way that time limits for JR work in planning decisions.[153] The letter proposed amendments to the ECPR which appeared to take the UK's obligations under the Convention more seriously. It was suggested that the UK is to follow, or has since demonstrated that it has followed, 13 of the 14 recommendations made by the ACCC.[154] *Inter alia*, private nuisance claims *could* be covered by the ECPR, there could be a revision of CPR r.46.27 to expressly note that the Aarhus costs caps can be revised downward and that variation downward should be considered for each party, that the CPR could expressly mention that the court can award costs on an indemnity basis following an unsuccessful challenge to the position that a claim is an Aarhus claim, and that costs protections may be awarded to interveners.[155] Since, in its Report to the Meeting of the Parties on decision VII/8s, the ACCC considered that, whilst appreciating the engagement of the UK, these proposals did not yet satisfy many of its recommendations in Decision VII/8s.[156] The report also recalled its findings in ACCC/C/2011/63 (Austria), where the ACCC made clear that Article 9(3) of the Convention covered 'any law that relates to the environment', including law under any policy; the ACCC accordingly invited the UK to explain why regulations under challenge due to their alleged significant impacts on the environment would not constitute 'national law relating to the environment' for Article 9(3) purposes.[157] However, the UK refused to endorse the ACCC's findings in this report at the Eighth Ordinary Session.[158] Accordingly, it is likely

147 J Maurici KC, 'Ten Reasons Why Labour Will Fail to Build 1.5 Million New Homes (Revisited): What Else Can Be Done to Help Deliver This Goal?' (Landmark Chambers, 2025) [74].

148 Banner Review (n 101) [3].

149 ibid, see Recommendation 1.

150 Maurici (n 147) [76].

151 *Global Feedback* (n 52).

152 Sarah Sackman, 'Letter to Fiona Marshall, Legal Officer and Secretary to the Aarhus Convention Compliance Committee: UK Compliance with the Aarhus Convention' (29 May 2025).

153 ECE/MP.PP/2021/2/Add.1 (n 146).

154 By inviting the Civil Procedure Rules Committee to amend the CPR.

155 Sackman (n 152).

156 UNECE, 'Report of the Compliance Committee on Decision VII/8s of the Meeting of the Parties Concerning Compliance by the United Kingdom' (2025) ECE/MP.PP/2025/66.

157 ibid [74]-[75]; UNECE, 'Findings and Recommendations of the Aarhus Convention Compliance Committee with Regard to Communication ACCC/C/2011/63 (Austria)' (2014) ECE/MP.PP/C.1/2014/3 [52].

158 UNECE, 'Report of the Eighth Session of the Meeting of the Parties' (17 March 2026) ECE/MP.PP/2025/2/Add.1; and see 'Communication to the Aarhus Convention Compliance Committee Concerning Compliance by the United Kingdom of Great Britain and Northern Ireland with Articles 3(1) and 8 of the

that little thought will be given to those reforms proposed by Sarah Sackman KC, at least until the approach of the next meeting of the parties. One reason why the UK refused to endorse the findings of the ACCC at the Eighth Ordinary Session may be because doing so could place additional pressure on the Government to make provisions for further costs protections which could be thought to prejudice its housebuilding agenda. Moreover, with *Global Feedback* due to be heard on appeal to the Supreme Court, greater 'respect', however substantial, may be required to be given to ACCC/C/2011/63 (Austria), which is plainly inconsistent with the reasoning of Holgate LJ in the Court of Appeal.

The ERB approaches costs differently. Clause 13(5) ERB provides that where a court considers that a public authority has 'not acted in accordance with the obligation in section 1' in an environmental case, then costs will be awarded against that authority.[159] This places adverse costs against public authorities where a court considers that public authority has not had due regard to '... the right to a clean, healthy and sustainable environment'.[160] Expanding on what that right means in practice, the ERB lists a number of principles of international law which that public authority must have due regard to, including, amongst others, the precautionary principle, the principle of non-regression, and the best available science principle.[161] The meaning of the right to a healthy environment is also taken to include clean air, clean water, biodiversity and green spaces, living soil, resilience and reduction of vulnerability, and early warning systems for environmental disasters.[162] By requiring that public authorities have due regard to the right to a healthy environment, or risk adverse costs themselves, the ERB expands costs protections and simultaneously improves environmental decision-making as the impacts of a decision on the physical environment will often be material, and further be taken into account at least for fear of adverse costs, where they otherwise might not be considered.

Clause 13(6) ERB also provides that adverse costs reasonable for securing permission will be awarded against the public authority if it should argue that a claim should fail at permission stage, and then the Claimant acquires that permission.[163] This could meaningfully improve access to justice by materially reducing the risk of exposure to adverse costs because bringing an application for JR is a 'frontloaded' procedure with substantial costs arising at the pre-permission stage.[164] This would strengthen environmental democracy by empowering civil society to play a more active role in holding the executive to account to produce best outcomes for people and nature.

Ostensibly, this risk of adverse costs may stifle the decision-making of smaller local authorities with limited resources. However, such a risk is proportionate in the environmental context for three reasons. First, there is a significant inequality of arms between putative claimants and public authorities. Second, decisions which cause irreparable harm to nature require early and preventative action which similarly might be stifled by a fear of adverse costs for a putative claimant. Third, there are difficulties in identifying the model litigant, and so it is in

Convention (ACCC/C/2017/150): Letter from the Party Concerned' (30 October 2025) <https://unece.org/sites/default/files/2025-10/frPartyC150_30.10.2025.pdf> accessed 7 April 2026, for the UK's reasons as to why it refused to endorse the findings of the ACCC.

159 Environmental Rights Bill (n 26) cl 13(5).

160 ibid cl 1(1).

161 ibid cl 1(8)(e) a-f

162 ibid cl 1(8)(f) a-f.

163 ibid cl 13(6).

164 UNECE, 'Findings on Communication ACCC/C/2015/131 United Kingdom' (26 July 2021) ACCC/C/2015/131 [140].

the interests of justice that rules are more relaxed so that a challenge can be brought. In any event, adversarial costs remain which still presents risk of prohibitive costs exposure for putative claimants. Overall, taken together with the establishment of environmental tribunals which themselves could provide a cost-effective avenue to challenge the legality of executive decisions, these measures would produce an effective framework improving access to justice in line with the transformative and participatory objects of CEJ.

IV. Environmental Stewardship Empowering People and Nature

Civil society will typically have to launch its legal challenges through NGOs as the relevant actors with sufficient resources, experience with the legal process, and standing. NGOs purport to act in the best interests of society, but they can unintentionally reproduce sub-altern,[165] techno-scientific,[166] and top-down epistemic hierarchies, thus concretising material exclusions.[167] Robust protections for environmental defenders are crucial to ensure that civil society mobilises in a way that is expansively participatory, preserves the rule of law, and strengthens environmental democracy.[168] To do so, the law should recognise human and non-human actors as indispensable to the production of legal outcomes.[169] This Section shall consider how effectively the Convention protects environmental defenders in the UK, and will critically evaluate the proposed protections in Clause 5 ERB. It will then consider whether an inclusive interpretation of standing should be adopted, and how the ERB could be improved.

A. Strengthening protections for environmental defenders

In the UK, securing the right to a clean, healthy, and sustainable environment remains just an 'aspiration', but it should be central to our environmental law.[170] The recent recognition of this right by the highest of international courts, as 'a pre-condition for the enjoyment of many human rights',[171] emphasises the importance of considering the absence of this right domestically.[172] Article 1, taken together with Article 3(8), protects those taking action to secure

165 F Sultana, 'The Unbearable Heaviness of Climate Coloniality' (2022) Political Geography 99, 102638.

166 C Abbot and M Lee, 'NGOs Shaping Public Participation Through Law: The Aarhus Convention and Legal Mobilisation' (2024) 36 Journal of Environmental Law 85-106.

167 I Kapoor, 'Participatory Development, Complicity and Desire' (2005) 26(8) Third World Quarterly 1203.

168 GC No. 37 of the Human Rights Committee on the right of peaceful assembly, CCPR/C/GC/37 [1]: the human right of peaceful assembly: '… constitutes the very foundation of a system of participatory governance based on democracy, human rights, the rule of law and pluralism'.

169 Pellow (n 20) on non-human indispensability.

170 Foreign Office, *Declaration upon Signature and Ratification of the Aarhus Convention* (Cm 6586, 2005). The declaration reads: 'The United Kingdom understands the references in article 1 and the seventh preambular paragraph of this Convention to the "right" of every person "to live in an environment adequate to his or her health and well-being" to express an aspiration which motivated the negotiation of this Convention, and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under article 1 are limited to the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention'.

171 ICJ Advisory Opinion (n 10) [393].

172 Environmental Rights Bill (n 26) Overview, [41]; note that 101 States have incorporated this right into domestic legislation already, 19 of 27 EU States have enshrined this right into their constitutions, and 17 into their domestic law.

the right to a healthy environment against penalisation, persecution, and harassment.[173] In the eyes of the Convention, an environmental defender is defined broadly, as 'any person exercising his or her rights in conformity with the provisions of the Convention'.[174] Environmental protest is, by consensus at the Meeting of the Parties, protected by the Convention as a form of public participation in environmental decision-making.[175] A rapid response mechanism for the protection of environmental defenders was adopted on the 21st October 2021, establishing the role of the UN Special Rapporteur on Environmental Defenders Under the Aarhus Convention by consensus.[176]

There are three separate complaints across 2023-2024 concerning environmental defenders in the UK which are discussed in a letter sent on 29th January 2025 from the Special Rapporteur. Notably, ACSR/C/2024/26 (United Kingdom) relates to the imposition of a four-year sentence on one Mr. Shaw for 'participating in a Zoom call to discuss peaceful environmental protest', albeit a protest which would concern the criminal act of intentionally scaling gantries on the M25 which would create the risk of or cause serious harm to the public and thereby causing a public nuisance.[177] Some consider that serious sentences for protests by Just Stop Oil activists were perfectly 'just' consequences for the contravention of criminal law without contrition.[178] The Special Rapporteur, on the other hand, considered that the sentence was '... not only utterly unacceptable from a social standpoint, it also clearly falls far short of the requirement that any sanction imposed on persons exercising their rights under the Convention is reasonable, proportional and serves a legitimate purpose'.[179]

The UK responded in a letter dated 18th March 2025, emphasising the position in its interpretive declaration on ratification, that Article 1 confers no additional rights beyond those set out in the three procedural pillars of the Convention, and that under Article 3(8), there 'is no right to civil disobedience set out in the Convention'.[180] The Court of Appeal has since handed down judgment on the reduction in sentencing of Mr. Shaw in *R v Hallam & Ors.*[181] The Court of Appeal reduced Mr. Shaw's sentence by one year from four years to a maximum of three years, in line with the reduction for Mr. Hallam, 'in the light of his conscientious motivation', and the need to have an assessment on the proportionality of interference with his human rights.[182] The Special Rapporteur noted that, with Mr. Shaw having spent 113 days on remand in prison already, '... the only reasonable and legitimate response will be to order [his] immediate release from prison and declare that his sentence has been served'.[183] The

173 Aarhus Convention (n 11) art 3(8).

174 UNECE, 'Decision VII/9 on a Rapid Response Mechanism to Deal with Cases Related to Article 3(8) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Meeting of the Parties to the Aarhus Convention, Addendum to the Report of the Seventh Session' (2021) ECE/MP.PP/2021/2/Add.1, preambular para: 'Recognizing that an "environmental defender" is any person exercising his or her rights in conformity with the provisions of the Convention'.

175 UNECE, 'Decision VI/8c Concerning Compliance by Belarus' (2018) ECE/MP.PP/2017/2/Add.1 [4].

176 At the meeting of the parties on the 23rd-24th June 2022. Despite challenges to the re-election of the Special Rapporteur, Michel Forst, at the Eighth Ordinary Session, the Meeting of the Parties re-elected him.

177 Forst (n 39); Police, Crime, Sentencing and Courts Act 2022, s 78.

178 T Dowson, 'The Just Stop Oil Sentences Were Just' (*The Critic*, 22 July 2024) The Critic <https://the-critic.co.uk/the-just-stop-oil-sentences-were-just/> accessed 26 April 2026.

179 Forst (n 39), following UNECE, 'The Compliance Committee's Findings on Communication ACCC/C/2014/102 (Belarus)' (24 July 2017) ECE/MP.PP/C.1/2017/19 [69].

180 M Creagh, 'Letter to Ms. Tatiana Molcean, Executive Secretary of the United Nations Economic Commission for Europe' (14 October 2024).

181 [2025] EWCA Crim 199, [2025] 1 WLR 1164 [88]-[89].

182 ibid [88].

183 Forst (n 39).

Special Rapporteur also urged the Government to compensate Mr. Shaw for any material and non-material harm suffered whilst in prison.[184] The Court in *Hallam* considered what weight, if any, to afford to the opinion of the Special Rapporteur:

> In our judgment, it would not have been appropriate for the sentencing judges to have had regard to the Aarhus Convention or the views of the UN Special Rapporteur. The Aarhus Convention is not incorporated into English law. That is sufficient, in itself, to decide the point. However, we also agree with the Crown's submission that article 3(8) of the Aarhus Convention did not apply to the appellants' activities.[185]

The Court opined that Article 3(8) did not apply to the appellants' activities because they were 'not penalised for exercising their rights *in conformity* with' the Convention, because these were criminal offences at issue, meaning that the appellants were not environmental defenders within the meaning of the Convention.[186] Although many of the complaints to the Special Rapporteur are ongoing, the application of the Convention in *Hallam* demonstrates that the Convention in its unincorporated state does not protect all activists in pursuit of Article 1 from penalisation. The threat of non-compliance with the Convention will rarely, if ever, be sufficient to guide judicial determination in line with the Convention's objectives.

Clause 5 ERB incorporates express protections for environmental defenders. It provides that a person (A) 'penalises, persecutes or harasses another person (B)' if A subjects B to a detriment because B 'does a protected act', or A 'believes that B has done, or may do, a protected act'.[187] Clause 5(2) ERB protects any action taken in relation to Parts 1-4 ERB, giving evidence in connection with proceedings under the ERB, and any other thing in connection with the ERB.[188] It could be argued that Clause 5 ERB may have protected Mr. Shaw from penalisation because 'it is unlawful for a public authority to act in a way which is incompatible with securing the right to a clean, healthy and sustainable environment for everyone'.[189] However, if the relevant public body, 'issues an emergency statement confirming the temporary suspension of the duty for a limited period in a case of public emergency', although the bar for that emergency is high,[190] no such protection from penalisation would be afforded. Although the ambit of actions protected under the ERB is wide, protecting 'any (other) thing for the purposes of or in connection with this Act',[191] a similar argument could be brought to that which was concluded in *Hallam,* that a court could not properly consider an action as done 'for the purposes of or in connection with' the ERB where that action plainly contravenes domestic criminal law. In addition, even if one were to accept that Mr. Shaw's actions were in pursuit of the right to a healthy environment, as the plan proposed the unsafe, criminal act of scaling M25 gantries, posing a danger to themselves and the public in the process, an emergency statement could have arguably been issued and the ERB would not have consequently

184 ibid.
185 *Hallam* (n 181) (emphasis added).
186 ibid [50].
187 Environmental Rights Bill (n 26) cl 5.
188 ibid; cl 5 also excludes the giving of false information from protection; and applies 'whether the person subjected to a detriment is an individual or an organisation'.
189 ibid cl 1(2); footnote 28 notes with regard to 'act compatibly', that this takes 'the same approach as the HRA does to Convention rights'.
190 ibid cl 1(3)(b); a public emergency could include: 'a serious threat to public health or safety and where there is no alternative to the suspension in order to protect human life, health and or the environment'.
191 ibid cl 5(1)(c).

afforded Mr. Shaw protection from penalisation. Nonetheless, Clause 1(4) ERB could have then required that the Court have due regard to the need to secure the right to a healthy environment.[192] Arguably, the Court in *Hallam* applied this principle to some extent, taking into account 'conscientious motivation' to offer Mr. Shaw an, albeit limited, sentence reduction.[193] Clause 1(8) ERB could place Mr. Shaw's conscientious motivation on a spectrum of putative mitigation, depending on the importance of securing, for example, 'the right to clean water' at a time where access to clean water is particularly poor.[194]

The ERB provides meaningful protections for environmental defenders which support civil disobedience that is safe, peaceful, and non-violent. Where criminal activities such as criminal damage and assault plainly contravene domestic criminal law, activists would not be protected from penalisation entirely but may see their sentences reduced in line with the need to secure the right to a healthy environment. Ultimately, these strengthened protections in the ERB may, (i) require protections from penalisation for certain criminalised activities such as forms of aggravated trespass, implicitly modifying the scope of domestic criminal law; (ii) be taken into account in the drafting of legislation which seeks to impose unduly onerous restrictions on environmental protest; and (iii) fairly require that courts have due regard to the extent of conscientious motivation that the need of securing the right to a healthy environment contextually suggests when determining the extent to which the hypothetical defendant's sentence would be reduced. Requiring public bodies to have due regard to the equality principle would involve States ensuring equal and effective protection in relation to the right to a healthy environment and States taking additional measures to protect the rights of those must vulnerable to environmental harms.[195] This could further progress an intersectional justice that aligns with the objects of CEJ, especially protecting those most impacted by climate injustice to take direct action, because such equality would not be dependent upon the composition of the particular court that hears a putative challenge, but instead the very state of unequal harm and vulnerability to climate harm would confer material weight in its own right in decision-making.[196]

Protections under the ERB would not therefore be entirely limited to non-criminal matters as they may be under the Convention. Although, the ERB could not, it is thought, protect actors from penalisation entirely where they have plainly contravened domestic criminal law. Criminalised matters may be more amenable to protections from penalisation where they are safe and necessary, and it is thought that they would also need to be proportionate to the need to secure the right to a healthy environment. In any event, a court would be required to have due regard to the contextual need to secure this right when determining how it exercises its sentencing discretion. This is, it is argued, a proportionate and necessary measure when taking into account the magnitude of environmental harms, and how these harms will be lived, experienced, and suffered deeply and unequally amongst communities and nature. Empowering civil society to negotiate environmental outcomes by taking direct action speaks

192 ibid cl 1(4).
193 *Hallam* (n 181).
194 Environmental Rights bill (n 26) cl 1(8)(f)b.
195 ibid cl 1(8)(e)c; United Nations Human Rights Council, 'Framework Principles on Human Rights and the Environment' (2018) A/HRC/37/59. Pursuant to Principle 3, 'States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment' and Principle 14, 'States should take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities'.
196 Mohai, Pellow, and Roberts (n 19).

directly to the requirement by CEJ of participation to be inclusive by empowering bottom-up mobilisation.[197]

B. TOWARDS INCLUSIVE STANDING

Standing should be afforded an inclusive interpretation in environmental matters because the special nature of environmental problems can make it challenging to identify the model litigant. A court will not grant permission for JR unless it considers that the applicant has 'sufficient interest in the matter to which the application relates',[198] meaning that they are directly and personally affected by the outcome of the decision.[199] The courts arguably take a relaxed approach to standing, and claims will rarely fail on this point.[200] The responsible pressure or campaign group may have standing,[201] taking into account some of the following factors: the merits of the underlying claim, the particular legislative context, the impact on the claimant, the gravity of the allegations or findings, the availability of other appropriate claimants, and the position of the actual claimant.[202] For example, in *Greenpeace*, an NGO was afforded standing because, *inter alia,* it had a genuine concern for the environment, it was an entirely responsible and respected body, there were 2,500 local supporters of the applicant, and those that the applicant represented may not otherwise have been able to bring a challenge to the decision, nor could other putative applicants command similar experience or expertise.[203] However, 'an aggregate of individuals each of whom has no interest cannot of itself have an interest'.[204]

Following *Aireborough*,[205] issues of wider public policy such as the environment and the Aarhus Convention may be relevant in determining standing, although they are unlikely to be an overwhelming factor. As noted by Burton J in *Grierson*,[206] there is a connection between the strength of the claim and the extent of the claimant's interest; consequently, the stronger the case on its merits, the more likely the courts are to be favourable towards the claimant's standing.[207] Lord Hope noted in *Axa General Insurance*[208] that the primary test is to ensure that one is 'directly' affected by a decision, and that in itself is sufficient qualification on 'affected' to enable the court to 'distinguish the mere busybody'. Crucially, Lord Reed opined in *Walton* that:

> ... there may also be cases in which any individual, simply as a citizen, will have sufficient interest ... The rule of law would not be maintained if, because everyone was

197 Pellow (n 20) 30-34.
198 Senior Courts Act 1981 s 31(3).
199 *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.
200 F Foster and A Mills, 'Judicial Review—Sufficient Interest (Standing) in Environmental Matters' (LexisNexis Practice Note, updated 2025) accessed 4 August 2025.
201 *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1995] 1 All ER 611.
202 *R (Good Law Project) v Secretary of State for Health and Social Care* [2022] EWHC 2468 (TCC) [501].
203 *R v Inspectorate of Pollution & Anor ex parte Greenpeace Ltd (No 2)* [1994] 4 All ER 329.
204 *National Federation* (n 199) as per Lord Wilberforce.
205 *Aireborough Neighbourhood Development Forum v Leeds City Council* [2020] EWHC 45 (Admin).
206 *R (Grierson) v Ofcom & Atlantic Broadcasting Ltd* [2005] EWHC 1899 (Admin).
207 Foster and Mills (n 200).
208 *AXA General Insurance Ltd & Ors v HM Advocate & Ors* [2011] UKSC 46; [2012] 1 AC 868; 2011 SLT 1061, as per Lord Hope at [63].

equally affected by an unlawful act, no-one was able to bring proceedings to challenge it.[209]

Cases which involve environmental harm often have diffuse impacts which manifest slowly and over time.[210] If the law were to require that claimants demonstrate that they are particularly affected by climate harm, access to justice could be excluded for those who need it most because the 'core victims of climate injustice' are subalternised, or 'othered', in Western legal systems.[211] The Irish Supreme Court held in *Friends of the Irish Environment*[212] that NGOs must demonstrate sufficient interest *and* rights impairment, and should the UK Supreme Court apply the rules of the Convention in a similar way, standing could prove to be a barrier for the enforcement of environmental rights and access to justice in environmental matters.

The courts' approach to standing has narrowed such that public interest standing may be limited where an alternative capable challenger exists. In both *Millard & Connolly* and *Bateman,*[213] the Courts were prepared to treat standing as limited to the individual designated by statute only, else the Courts risked offending the intent of the relevant statutory scheme.[214] Since then, the Good Law Project have been denied standing in the public procurement context because statute envisaged that the 'obvious and "natural" claimants would be the economic operators whose interests are the subject of the [Public Contracts Regulations 2015]'.[215] The Court considered that this did not mean that any other person could not be afforded standing.[216] Most recently, the Good Law Project were denied standing because a sincere interest did not amount to a sufficient interest, and there were already three individual Claimants that were before the Court who were directly and personally affected by the guidance under challenge.[217] In any event, the ERB does not identify specific claimants, and so standing would not be restricted in this way.

Kelleher contends that it is not essential to re-write standing rules or stretch them to breaking point; for those 'core victims', including nature, to access justice, Parties to the Convention need only take their access to justice obligations seriously.[218] Article 9(2) stipulates that 'the public concerned' must have access to a procedure of review for substantive and procedural legality. 'The public concerned' as defined by Article 2(5) includes 'the public affected or likely to be affected by or having an interest in environmental decision-making;' and NGOs 'promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest'.[219] Guided by the Convention's preambular objective of

209 *Walton* (n 127) [94].
210 Kelleher (n 19).
211 A Grear, 'Towards Climate Justice: A Critical Reflection on Legal Subjectivity and Climate Injustice: Warning Signals, Patterns of Hierarchies, Directions for Future Law and Policy' (2014) 5 Journal of Human Rights and the Environment 103, 117.
212 *Friends of the Irish Environment CLG v Government of Ireland* [2020] IESC 49 [6.46].
213 *R v Brimingham CC, ex parte Millard & Connolly* (1994) 26 HLR 551, 559 (QB); *R (Bateman) v Legal Aid Board* [1992] 1 WLR 711 (QB)
214 J Bell, *The Anatomy of Administrative Law* (Hart Publishing 2020).
215 *Good Law Project* (n 203) [509].
216 ibid [510].
217 *R (Good Law Project & Ors) v Equality and Human Rights Commission* [2026] EWHC 279 (Admin) [15]-[16], applying the reasoning in *R (Good Law Project) v Prime Minister* [2022] EWHC 298 (Admin) at [31] and [54]-[59].
218 Kelleher (n 19).
219 ibid (my emphasis); Aarhus Convention (n 11) art 2(5) is inclusive of 'non-governmental organizations promoting environmental protection and meeting any requirements under national law'.

environmental stewardship,[220] the consequence of adopting a purposive construction is that standing is likely afforded an inclusive interpretation, which would permit members of present generations to represent nature or members of future generations to challenge decisions which threaten to cause harm to nature.[221] A purposive interpretation of Articles 9(3)-(4) also supports the notion that States should exercise restraint in adopting strict criteria on standing.[222] It might be said that inclusive rules on standing risk transforming JR into a forum to facilitate redress for non-legal, political complaints.[223] However, it is especially important in the environmental context that standing is afforded an inclusive interpretation because it is particularly difficult to identify the model litigant. It may be that the only and best placed applicant to bring a vital challenge is a group such as Greenpeace or, alternatively, an individual solely by way of their being a citizen that is dependent upon nature at risk.

A more faithful approach to Article 9 of the Convention could have led to a different result in *Friends of the Irish Environment.*[224] The ruling has been criticised for failing to consider the gravity of the climate crisis, the threat posed to the rights considered, and the nature of the rights engaged.[225] If, by way of Clause 1 ERB, courts had to have regard to the gravity of the need to secure the right to a healthy environment for present and future generations, acknowledge difficulties in identifying the model litigant, and recognise the 'inequality of arms' and the immense 'toll' taking a case against the State brings,[226] they may decide an inclusive standing is the best construction of the law. Although, as the ACCC noted in ACCC/C/2005/11 (Belgium), 'Parties are not obligated to establish a system of popular action (actio popularis) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment'.[227] It is right that there should be limits on standing generally, and it is not argued that the ERB should include an express right of actio popularis, for fear of disproportionately widening the floodgates.

However, environmental claims should be subject to special rules. Decisions which relate to a State's climate mitigation policies affect everyone, and are unconfined even by borders. Nature cannot speak for itself, but serious and irreparable harm might percolate into communities before a preventative challenge may be brought. Inclusive standing could ensure that the core victims of environmental injustice, whose voices do not ordinarily ring loud in policymaking fora, may see their harms remedied. Members of local communities that are connected with and dependent upon nature and its features may be able to bring a challenge, whether together or separately, where there is a threat of serious or irreversible of harm to nature without needing to demonstrate specific harm to or rights impairment of those putative

220 In its very first preambular paragraph, the Aarhus Convention (n 11) recalls Principle 1 of the Stockholm Declaration on the Human Environment, which as Kelleher (n 19) 112 recalls, signals a commitment to environmental stewardship as it states that humanity 'bears a solemn responsibility to protect and improve the environment for present and future generations'.

221 Barritt (n 15) 22; Kelleher (n 19) 112.

222 ibid (n 17) 112; ACCC/C/2008/32 (European Union) (Part I) [77]–[78]; ACCC/C/2006/18 (Denmark) [29]-[30].

223 Ivan Hare, 'Due Reprocess – Thorp, Sellafield and Greenpeace' (1995) 54(1) Cambridge Law Journal 1; Ministry of Justice, *Judicial Review – Proposals for Further Reform: The Government Response* (Cm 8811, 2014) [32]; in the Banner Review (n 101), Recommendation 2 states that 'there is no convincing case for amending the rules in relation to standing to reduce the number of challenges to NSIPs'.

224 *Friends of the Irish Environment* (n 212).

225 V Adelmant, P Alston, and M Blainey, 'Human Rights and Climate Change Litigation: One Step Forward, Two Steps Backwards in the Irish Supreme Court' (2021) Journal of Human Rights Practice 1, 7.

226 Kelleher (n 19) 126.

227 UNECE, 'Findings and Recommendations with Regard to Communication ACCC/C/2005/11 Concerning Compliance by Belgium' (28 July 2006) ACCC/C/2005/11 [35].

citizens or groups, strengthening environmental stewardship. Those members that are interconnected with and dependent upon nature and its features will be well placed to discern the existence of a threat to those features. Civil society coalitions could work together to mobilise techno-scientific expertise, legal experience, and local knowledge to best discern when a challenge should be brought.

Ultimately, it is crucial that the law (i) is informed by the unique spatio-temporal dynamics of climate change and environmental harms, (ii) is intersectional in that it protects the core victims of environmental injustice, and (iii) recognises the entanglement of nature and humanity as interdependent and interconnected participants, equivalently indispensable to the production of legal outcomes and the safeguarding of our collective futures.[228] Therefore, the ERB would be improved by including a provision mirroring Article 2(5) of the Convention (on the definition of the 'public concerned') and by placing emphasis on wording to the effect of affording standing to those 'likely to be affected' by or 'having an interest in' environmental decisions.

V. Conclusion

The UK's implementation of the Convention has given rise to cases of non-compliance concerning, *inter alia*, the lack of substantive review procedure, a failure to implement effective public participation mechanisms into the drafting of legal rules, prohibitive costs, and the hostile treatment, persecution, and penalisation of environmental defenders. Compliance mechanisms are slow to respond, and there is no certainty that those mechanisms will lead to executive action or legislative change. As shown by its engagement with the Special Rapporteur, the UK continues to turn itself away from the need to secure the right to a clean, healthy, and sustainable environment. Until domestic law commits to guaranteeing that right, the procedural pillars of the Convention may not enjoy the purposive construction which could enable them to take proper power and effect real change. This is especially crucial in the absence of full and effective incorporation. The current state of need for robust mechanisms to protect against the regression of protections for nature, especially in the face of uproar from civil society, is elucidated by the accelerated passage of the PIA 2025 from drafting to readings in Parliament. A more faithful, CEJ-aligned implementation of the Aarhus Convention is needed to respond to the 'existential' crisis that climate change presents, which 'imperils all forms of life and the very health of our planet'.[229]

Neither the Convention nor the ERB are perfect. An expansive conception of environmental justice would view communities as interdependent and interconnected with nature, afford the core victims of climate injustice sovereignty, and empower the solidarity of others.[230] The conventional anthropocentric focus of international rights mechanisms limits the potential for rights-based actions which are emancipatory for core victims in a broadly nature-inclusive manner. Legislation should provide robust rights-protection provisions that develop the foundations of inclusive standing for those that need it most, which neither the Convention nor the ERB afford.

[228] Pellow (n 20) 31: '… both human and more-than-human – must be viewed not as expendable but rather *indispensable* to our collective futures'.
[229] ICJ Advisory Opinion (n 10) [456]: '… the questions posed by the General Assembly represent more than a legal problem: they concern an existential problem of planetary proportions that imperils all forms of life and the very health of our planet'.
[230] Pellow (n 20) 30-34.

Nonetheless, the ERB implements the Aarhus Convention in effective and novel ways which are concomitant with many of the objects of CEJ. Environmental NGOs arguably under-utilise the Convention's middle pillar of public participation, although current obligations requiring participation appear thin.[231] The recent ACCC/C/2017/150 (United Kingdom) findings, although presently lacking endorsement by the UK, have shown that the ACCC is receptive to challenges on these grounds, and the treatment of consultation for the PIA 2025 has demonstrated that greater focus on the middle pillar is urgently needed. Implementing Article 8 through Clause 11 ERB could strengthen environmental democracy and develop the foundations of a progressive ecological politics capable of being expansively participatory. Clauses 13(5)-(6) enshrine meaningful costs protections for prospective litigants which reduces exposure to risk of prohibitive adverse costs, particularly pre-permission, which will assist the Convention in achieving its objective of executive accountability by improving access to justice. Enshrining the fundamental right to a healthy environment for present and future generations empowers the Convention's procedural pillars with a purposive foundation. Through Clauses 1 and 5, the ERB inspires environmental stewardship by protecting environmental defenders. Clause 14 and the deployment of local environmental tribunals could improve access to justice by facilitating merits review on a low-cost basis, tackling scientific uncertainty head-on.

The objectives of the Convention are nothing short of revolutionary insofar as they align with the objects of CEJ. Without proper implementation, the Convention's progressive potential can only reliably be aspirational. The existential nature of the climate crisis requires nothing short of the proper implementation of environmental rights and a legal framework which considers nature indispensable to the negotiation of our collective futures. Civil society should find hope in empowering the Convention through the ERB, and rally the executive to transform this aspiration into mechanisms which empower the subjects of the law to protect sustainable futures for people and nature.

[231] Abbot and Lee (n 166).

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Brexit and the Erosion of the UK's Territorial Constitution: Legislative Consent, Intergovernmental Relations, and Policy Divergence in an Uncodified, Asymmetric State

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ABSTRACT

Brexit has operated not only as a political rupture but as an acute stress test for the United Kingdom's uncodified and asymmetric territorial constitution. This article argues that withdrawal from the European Union has accelerated a process of constitutional erosion, whereby the political conventions and informal mechanisms sustaining devolution have been progressively weakened through repeated breaches, institutional distrust, and unmanaged policy divergence. In the absence of entrenched legal safeguards, the stability of the territorial settlement has always rested on voluntary political restraint - most notably the Sewel Convention - and on cooperative intergovernmental practice. By dismantling the EU's shared legal framework, Brexit exposed the fragility of these arrangements and magnified vulnerabilities that had long remained dormant. Conceptually, the analysis adapts theories of constitutional erosion and unsettlement - typically applied to federal or codified systems - to the UK's framework of political conventions and asymmetrical autonomy. Empirically, it examines Scotland, Northern Ireland, and Wales, tracing how divergent constitutional designs and political contexts mediated similar destabilising pressures. The article concludes by evaluating the Labour government's recent reform efforts and their limited potential to stabilise the territorial constitution absent more fundamental restructuring.

Keywords: Brexit, UK constitution, Devolution, Sewel Convention, Intergovernmental relations, Constitutional erosion.

I. INTRODUCTION

Constitutional erosion is often associated with what Huq and Ginsburg term authoritarian reversion. A rapid collapse in which incumbents deliberately dismantle institutional checks and rewrite the political rules in their favour. Yet, as they also show, erosion can take the form of constitutional retrogression. A slower and more incremental process that unfolds even in

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democratic states, particularly those lacking codified constitutional safeguards, where the constraints on central authority rest on political rather than legal foundations.[1] This article examines such a process in the United Kingdom's territorial constitution, tracing how the withdrawal from the European Union transformed long-dormant vulnerabilities into active strains.

The UK's devolution settlement is distinctive in comparison. It is asymmetric, granting markedly different powers to Scotland, Wales, and Northern Ireland, and it is uncodified, subsisting within a constitutional order defined by parliamentary sovereignty.[2] Stability has relied less on entrenched legal guarantees than on conventions, above all, the Sewel Convention, and on informal channels of intergovernmental cooperation. EU membership provided a stabilising external framework: common rules limited the scope for internal divergence, and contentious regulatory questions were frequently resolved within a European rather than a domestic arena.[3]

Brexit removed that stabilising layer, subjecting the territorial constitution to an unprecedented stress test. In doing so, it revealed the limits of relying on voluntary political norms in the absence of legal entrenchment.[4] This article contends that Brexit has acted as an accelerant of constitutional erosion through three interlocking mechanisms: the normalisation of side–stepping the Sewel convention, the exposure of structural weaknesses in intergovernmental relations, and the proliferation of unmanaged policy divergence within the UK internal market.

The analysis unfolds in two key stages. First, it develops a conceptual framework that links constitutional erosion to the UK literature on 'constitutional unsettlement,' a condition in which there is no longer a shared agreement on the basic terms of constitutional order.[5] This framework draws on comparative scholarship on plurinational and federal systems, while recognising the distinctiveness of an uncodified settlement dependent on political self-restraint.

Not all scholars regard the absence of constitutional entrenchment as inherently destabilising. Some have argued that the flexibility of the United Kingdom's uncodified constitutional order may itself constitute a source of resilience, allowing political institutions to adapt pragmatically to changing circumstances without the rigidity associated with formal constitutional structures.[6] This article does not deny the adaptive capacity of the UK's political constitution. Rather, it argues that the Brexit process exposes the limits of such flexibility when the political conventions and cooperative practices that previously mediated territorial relations are repeatedly disregarded.

[1] Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 UCLA Law Review 78.
[2] Alan Trench, *Devolution and Power in the United Kingdom* (Manchester University Press 2007).
[3] See generally: Michael Keating, *State And Nation In The United Kingdom* (OUP 2021) 145 -147 (on EU law as a framework mitigating asymmetrical tensions). See also: A. Glencross, 'Managing Differentiated Disintegration: Insights from Comparative Federalism on Post-Brexit EU–UK Relations' (2020) 23 British Journal of Politics and International Relations 593.
[4] Anthony Glencross, 'Managing Differentiated Disintegration: Insights from Comparative Federalism on Post-Brexit EU–UK Relations' (2020) 23 British Journal of Politics and International Relations 593.
[5] Neil Walker, 'Our Constitutional Unsettlement' (2014) 173 PL 529.
[6] See for example, Mark Elliott, *The Constitutional Foundations of Judicial Review: Issues of Constitutional Legitimacy* (Hart Publishing 2001); Mark Elliott and Robert Thomas, *Public Law* (5th edn, OUP 2024).

Second, the article examines the post-Brexit experience of Scotland, Northern Ireland, and Wales, each of which has confronted the same destabilising forces but responded in constitutionally distinctive ways.

By drawing these threads together, the article illuminates both the distinctive features of the UK case and its implications for wider debates on sustaining multi-level governance in states where constitutional stability relies on the continued observance of political norms. In this respect, the argument also resonates with wider scholarly assessments of Brexit as a moment of profound constitutional disruption within the United Kingdom.[7] It considers not only the ways in which Brexit has reshaped the UK's territorial constitution, but also what its aftermath discloses about the inherent vulnerabilities of uncodified, asymmetrical governance arrangements in an era of political forces pulling the state apart.

The article is structured as follows. Section 2 develops a conceptual framework that situates the UK's territorial constitution within the broader comparative literature on constitutional erosion. Section 3 explains the pre-Brexit constitutional settlement, highlighting the stabilising functions of conventions, intergovernmental relations, and EU membership. Section 4 offers three detailed territorial case studies of the UK's devolved jurisdictions, each concluding with an analysis of its constitutional implications. Section 5 identifies the overarching mechanisms driving constitutional destabilisation. Section 6 considers Labour's 'reset' reforms and assesses their ability to address constitutional erosion. The article concludes by placing the UK's experience in comparative context and reflecting on the challenges of stabilising multi-level governance in constitutional systems predicated on voluntary political norms.

II. Conceptual Framework: Territorial Constitutions and Constitutional Erosion

A. Territorial constitutions and political constitutionalism

A territorial constitution comprises the rules, institutions, and practices through which a state distributes public authority across its constituent units. These arrangements encompass both formal competences and the procedures for resolving disputes, adapting to change, and maintaining the integrity of the political community. In classical federal systems such as the United States, Canada, or Germany, these territorial distributions of power are entrenched in a codified constitution, safeguarded against unilateral amendment by the centre, and enforced by an independent judiciary. Such systems typically combine judicial review with amendment procedures requiring sub-state consent, providing a form of legal insurance against central encroachment even in times of political strain.[8]

The United Kingdom's territorial constitution differs fundamentally from this model. It operates within an uncodified constitutional order in which parliamentary sovereignty remains the organising legal principle.[9] Devolved legislatures, therefore, exercise authority

[7] Claudio Martinelli, *Brexit and the British Constitution* (Routledge 2025); Martin Loughlin, 'Brexit and the British Constitution' in Thomas Jaeger, Matthias Lehmann, Alexander Somek and Michael Waibel (eds), *Consolidating Brexit: The Future of EU/UK Cooperation* (Jan Sramek Verlag 2023) 265–83.

[8] Ronald Watts, *Comparing Federal Systems in The 1990s* (McGill-Queen's University Press 1996). See also USA Constitution article V; Canada Constitution Act 1982, s 38; German Basic Law art. 79(3).

[9] Roger Masterman and Colin Murray, *Constitutional And Administrative Law* (3rd edn, Pearson Education Limited 2022) 131.

through statutes that may, in principle, be amended or repealed unilaterally by the UK Parliament. The practical stability of territorial governance has historically depended less upon legally entrenched guarantees than upon political conventions and cooperative practices.[10]

Central to this political constitution of territory is the Sewel Convention, which provides that Westminster will "not normally" legislate on devolved matters without the consent of the relevant devolved legislature.[11] Alongside Sewel, intergovernmental relations (IGR) have functioned as a mechanism for consultation, coordination, and dispute management between the UK Government and the devolved administrations.[12] Neither mechanism is legally enforceable; their effectiveness has depended largely upon political self-restraint and mutual trust between constitutional actors.[13]

Not all constitutional scholars regard this reliance on political norms as a structural weakness. Mark Elliott has argued that the flexibility of the United Kingdom's uncodified constitution can itself serve as a source of resilience, enabling institutions to adapt pragmatically to political change without the rigidity associated with entrenched constitutional frameworks.[14] Situated within the broader tradition of political constitutionalism, Elliott emphasises the capacity of parliamentary accountability, constitutional conventions, and political culture to restrain the exercise of central authority without the need for formally entrenched constitutional limits. From this perspective, constitutional stability is maintained not through rigid legal constraints but through the continued observance of institutional practices and political accountability mechanisms.[15]

This article does not deny the adaptive capacity of the UK's political constitution. However, Elliott's account implicitly assumes that the conventions and practices underpinning the territorial constitution will continue to command a shared commitment among constitutional actors. Where such norms lose their constraining force, the flexibility of the political constitution may cease to function as a stabilising mechanism and instead expose territorial arrangements to unilateral central intervention. In such circumstances, constitutional change may occur not through formal amendment but through the gradual erosion of the political norms that previously structured relations between Westminster and the devolved institutions.[16]

The Brexit process illustrates this dynamic with particular clarity. The repeated sidelining of legislative consent and the growing marginalisation of cooperative intergovernmental mechanisms demonstrate how constitutional arrangements dependent upon political restraint may become vulnerable when that restraint weakens. In this sense, Brexit reveals the limits of

[10] Paul Anderson, 'Spain and the United Kingdom: Between Unitary State Tradition and Federalization' in Soeren Keil and Sabine Kropp (eds), *Emerging Federal Structures in the Post-Cold War Era* (Palgrave Macmillan 2022) 49–72.

[11] Scotland Act 2016, s 1 and the Wales Act 2017, s 1. See also: *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [148].

[12] Council of the Nations and Regions, *Report* (PolicyWise, October 2024) <www.policywise.org.uk/sites/www.policywise.org.uk/files/The%20Council%20of%20the%20Nations%20and%20Regions%20Report.pdf> accessed 09 March 2026.

[13] Nick Barber, *The United Kingdom Constitution: An Introduction* (OUP 2021) ch 18. See also *Miller* (n 11) [148].

[14] Elliott (n 6); Elliott and Thomas (n 6).

[15] Mark Elliott, 'The British Constitution, Devolution And "Doublethink"' <https://publiclawforeveryone.com/2012/09/13/the-british-constitution-devolution-and-doublethink/> accessed 10 March 2026. See also Martin Loughlin and Stephen Tierney 'The Shibboleth of Sovereignty' (2018) 81 MLR 989.

[16] JAG Griffith, 'The Political Constitution' (1979) 42 Modern Law Review 1-21; Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22 OJLS 157.

relying exclusively on political constitutionalism to sustain territorial governance within an uncodified constitutional order.

B. CONSTITUTIONAL EROSION

The concept of constitutional erosion provides a useful analytical lens for examining how constitutional orders may weaken without formal institutional collapse. Huq and Ginsburg distinguish between two broad modes of constitutional erosion.[17] The first, authoritarian reversion, is a rapid and often visible collapse of democratic institutions, typically marked by the centralisation of power in the executive and the dismantling of electoral or judicial safeguards.[18] The second, constitutional retrogression, is more gradual and far less overt; it involves a series of individually defensible changes that, taken cumulatively, weaken institutional constraints and alter the competitive political order without necessarily breaching formal legality. Retrogression proceeds incrementally, often under the guise of legitimate reform, but its end result is a substantial reduction in the effective checks on governmental authority.[19]

While this framework was originally developed with codified constitutional systems in mind, it has particular relevance for political constitutions such as that of the United Kingdom. In such systems, constitutional safeguards often depend upon informal norms rather than entrenched legal rules. Erosion may therefore manifest not through formal constitutional amendment but through the gradual weakening of conventions, institutional practices, and cooperative relationships between governing actors.[20]

In the context of the UK's territorial constitution, erosion may occur through several mechanisms. These include the repeated bypassing of legislative consent conventions, the marginalisation of intergovernmental coordination mechanisms, and the expansion of unilateral central authority into policy domains previously governed through shared frameworks. Each of these developments may be legally permissible within a system grounded in parliamentary sovereignty. Yet their cumulative effect may nevertheless alter the practical balance of authority within the territorial constitution.[21]

C. CONSTITUTIONAL UNSETTLEMENT

The concept of constitutional unsettlement provides a complementary framework for understanding the broader political consequences of such erosion. Neil Walker introduced the concept to describe a distinctive phase in the United Kingdom's constitutional development in which fundamental questions about the distribution and legitimacy of constitutional authority remain persistently contested.[22]

Walker distinguishes between a settled constitution, an unsettled constitution, and a constitutional unsettlement. A settled constitution reflects a broadly shared understanding of

[17] Huq and Ginsburg (n 1) 78.
[18] Nancy Bermeo, 'On Democratic Backsliding' (2016) 27 Journal of Democracy 5-19; Huq and Ginsburg (n 1).
[19] Huq and Ginsburg (n 1). See also David Landau, 'Abusive Constitutionalism' (2013) 47 UC Davis Law Review 189, 194–198.
[20] Huq and Ginsburg (n 1).
[21] See for example: *Miller* (n 11) [146]–[151] (Lord Neuberger on the Sewel Convention's non-legal status). Further example includes Westminster's bypassing of the Sewel Convention for many Brexit related pieces of legislation including the UK Internal Market Act 2020.
[22] Walker (n 5).

institutional authority and constitutional rules. An unsettled constitution represents a transitional phase during which those arrangements are contested but where a new equilibrium is anticipated. Constitutional unsettlement, by contrast, describes a condition in which contestation itself becomes enduring. Foundational questions regarding sovereignty, territorial authority, and constitutional legitimacy remain unresolved.[23]

In such conditions, constitutional actors may no longer share a common understanding of the rules governing political authority. Disagreements extend beyond policy outcomes to encompass the processes through which constitutional decisions should be made and the institutions entitled to make them. This environment increases the likelihood that constitutional conventions will be contested or disregarded, thereby accelerating processes of constitutional erosion.[24]

D. BREXIT AND THE INTERACTION BETWEEN EROSION AND UNSETTLEMENT

Brexit intensified these dynamics within the UK's territorial constitution. Devolution had already introduced plural constitutional narratives concerning sovereignty, autonomy, and the distribution of authority within the state.[25] EU membership had partially mediated these tensions by providing a shared legal framework that structured regulatory governance across the UK.[26]

The withdrawal from the European Union removed this stabilising framework and forced constitutional disputes back into domestic political institutions. In doing so, it exposed the fragility of constitutional arrangements that relied heavily upon political restraint rather than legally enforceable safeguards.[27]

This article therefore treats constitutional erosion and constitutional unsettlement as analytically distinct but mutually reinforcing phenomena. Erosion describes the weakening of institutional norms and practices that sustain a constitutional order. Unsettlement captures the broader political condition that emerges when those stabilising norms lose their constraining force. The Brexit process illustrates how these dynamics can interact within an uncodified territorial constitution, producing a gradual but cumulative destabilisation of the constitutional order.

[23] ibid.

[24] For example, see the persistence of constitutional contestation in Scotland following the 2014 independence referendum, where a 'No' vote did not settle the territorial question and the Scotland Act 1998 remained in force, but political debate over the Union's legitimacy intensified: Keating (n 3). A parallel can be drawn with Catalonia, where the 2010 judgment of the Spanish Constitutional Court on the 2006 Statute of Autonomy triggered sustained disputes over autonomy and self-determination, without any formal rupture of the 1978 Constitution: José Joaquín Fdez-Allés, 'Spanish Constitutional Jurisprudence: Secession in Catalonia' (2018) 13 *Journal of Comparative Law* 179.

[25] See the Scottish and Welsh Governments' challenges to the European Union (Withdrawal) Act 2018 in relation to retained EU law, culminating in *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64.

[26] Masterman and Murray (n 9). See also: Vernon Bogdanor, Beyond Brexit: Towards A British Constitution (IB Tauris 2019) 234.

[27] Keating (n 3); Chris McCorkindale, 'Legislative Consent, Constitutional Convention, and Constitutional Ill-Health' (2024) 75(1) NILQ 83.

III. THE PRE-BREXIT TERRITORIAL CONSTITUTION

Devolution refers to the decentralisation of certain powers and responsibilities from the central or national authority to the constituent units.[28] It is an ambiguous concept in that it both dispenses power (allowing for autonomy at the constituent level) and retains sovereignty at the centre (the power is reversible; thus, the State remains de jure unitary). Thus, devolution is often used as a solution to address regional disparities, promote local decision-making, and accommodate the diverse needs and preferences of different parts of the state.[29]

The territorial constitution that emerged following the devolution reforms of the late 1990s established a distinctive system of multi-level governance within the UK.[30] Scotland, Wales, and Northern Ireland each acquired legislative institutions and varying degrees of policy autonomy, producing what is widely described as an asymmetric model of devolution.[31] While the Scotland Act 1998 created a legislature with primary law-making powers across a broad range of domestic policy areas, Wales initially received more limited administrative competences before gradually acquiring primary legislative authority through subsequent reforms.[32] Northern Ireland's institutions were established through the Belfast/Good Friday Agreement, embedding devolution within a wider constitutional settlement designed to manage deeply contested political identities.

Despite these institutional differences, the territorial constitution operated within a common structural framework. Devolved authority was exercised through statutes enacted by the UK Parliament, reflecting the continuing centrality of parliamentary sovereignty within the UK's uncodified constitutional order. Devolution therefore did not entail a formal division of sovereignty but rather the delegation of legislative authority within a system that remained legally unitary.[33]

In practice, however, the stability of this arrangement depended upon a series of political and institutional mechanisms that limited the practical exercise of Westminster's formal supremacy. Three stabilising features were particularly significant: the Sewel Convention, cooperative intergovernmental relations, and the regulatory framework provided by EU membership.

As mentioned, the Sewel Convention provided that Westminster would "not normally" legislate on devolved matters without the consent of the relevant devolved legislature. Although recognised in statute through provisions inserted into the Scotland Act and Government of Wales Act,[34] the convention retained its political rather than legal character. As the Supreme Court confirmed in *Miller*, the convention "plays an important role in facilitating

[28] Trench (n 2) ch 1.
[29] Stephen Tierney, 'Federalism in a Unitary State: A Paradox too far?' (2009) 19 Regional & Federal Studies 237, 238.
[30] Scotland Act 1998, Government of Wales Act 1998 and Northern Ireland Act 1998.
[31] Trench (n 2) 8; A. W Bradley, K. D Ewing and Christopher Knight, *Constitutional and Administrative Law* (Pearson Education 2014) 36.
[32] See for example: Wales Act 2017, and Richard Rawlings 'The Welsh way' in Jeffrey Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, OUP 2019) ch 11.
[33] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915). See also: Mark Elliott, 'Devolution, Federalism And A New Constitution For The UK' at <http://blogs.lse.ac.uk/constitutionuk/2014/01/08/devolution-federalism-and-a-new-constitution-for-the-uk> accessed 11 May 2026.
[34] Scotland Act 2016, s 1 and the Wales Act 2017, s 1.

harmonious relationships" between the UK Parliament and the devolved legislatures, but remains non-justiciable.[35]

Prior to Brexit, the Sewel Convention functioned relatively smoothly as an established element of the UK's constitutional practice. Legislative consent motions were routinely sought by the UK Government and, in the vast majority of cases, granted by the devolved legislatures, often with little political controversy.[36] Disagreements were rare and typically resolved through informal negotiation between ministers and officials, reflecting a shared commitment to cooperative intergovernmental relations.[37] The convention was not perceived as a significant constraint on Westminster, but rather as a procedural norm that reinforced mutual respect between the central and devolved institutions. In this period, legislative consent operated as a largely technical mechanism to manage overlapping competences, rather than as a focal point for constitutional or political dispute.[38]

Alongside Sewel, intergovernmental relations functioned as a mechanism for coordinating policy across different levels of government. The Joint Ministerial Committee and related forums were designed to facilitate consultation and resolve disputes between the UK Government and the devolved administrations.[39] Although these structures were often criticised as under-institutionalised and dominated by the centre, they nevertheless provided an important venue through which territorial disagreements could be managed through negotiation rather than unilateral decision-making.[40]

A third stabilising factor was the United Kingdom's membership of the European Union. EU law structured regulatory governance across a wide range of policy areas that were otherwise devolved domestically.[41] Common European regulatory frameworks, therefore, limited the scope for policy divergence within the UK while simultaneously providing a shared legal reference point for resolving regulatory conflicts.[42] In effect, EU membership externalised a significant proportion of the coordination that might otherwise have required domestic constitutional negotiation.

Taken together, these mechanisms helped sustain a workable territorial constitution despite the absence of entrenched constitutional safeguards. Legislative consent provided a political restraint on Westminster's legislative supremacy, intergovernmental relations offered a forum for negotiation between territorial executives, and EU law supplied a common

[35] *Miller* (n 11) [148].

[36] Institute for Government, *Presumed Consent? The Role of Scotland, Wales and Northern Ireland in the Brexit Process* (11 August 2016) <https://www.instituteforgovernment.org.uk/article/comment/presumed-consent-role-scotland-wales-and-northern-ireland-brexit-process> accessed 11 May 2026.

[37] From 1997 until the end of the Gordon Brown Government, IGR were largely cordial, facilitated by Labour's control of the UK, Welsh, and Scottish Governments and conducted primarily through informal channels. Relations gradually deteriorated after 2010, when each administration was led by a different party, and were further strained following the 2016 Brexit referendum, which significantly increased political disputes.

[38] Nicola McEwen, "The Sewel Convention and Brexit" (*The Constitution Unit Blog*, 7 April 2020) <https://constitution-unit.com/2020/04/07/the-sewel-convention-and-brexit> accessed 11 May 2026.

[39] See for example: Memorandum of Understanding between the UK Government and the Devolved Administrations (2013) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf> accessed 11 May 2026.

[40] Nicola McEwen and others, 'Intergovernmental Relations in the UK: Time for a Radical Overhaul?' (2020) 91 Political Quarterly 632.

[41] In fields such as agriculture, environmental protection, and consumer regulation, EU law imposed common rules that applied uniformly across all parts of the UK.

[42] European Communities Act 1972, s 2(4); see also *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151, which affirmed the constitutional significance of EU law's supremacy.

regulatory framework that reduced the likelihood of internal policy conflict. The stability of the pre-Brexit territorial constitution, therefore, depended less on formal legal entrenchment than on the continued observance of political norms and cooperative governance practices.

It is precisely these stabilising mechanisms that came under increasing strain following the United Kingdom's withdrawal from the European Union. Brexit did not formally alter the legal foundations of devolution, but it disrupted the political and institutional practices that had previously mitigated the tensions inherent in an uncodified and asymmetric territorial settlement. The following sections examine how these pressures manifested across the devolved jurisdictions.

IV. Brexit as a Stress Test – Territorial Case Studies

The removal of the European Union's common legal and regulatory framework exposed the United Kingdom's territorial constitution to stresses it was never designed to absorb. Without this external stabilizing layer, disputes over competence, market access, and constitutional authority were forced back into domestic structures defined by parliamentary sovereignty and non-binding political conventions. Consequently, Brexit transformed long-dormant vulnerabilities into active strains, testing the limits of a settlement predicated on voluntary political restraint.

The following analysis focuses on pivotal legislative and institutional episodes in Scotland, Northern Ireland, and Wales to illustrate how constitutional tensions became visible in the post-Brexit era. By tracing disputes over legislative consent, the adaptation of intergovernmental relations, and the management of regulatory divergence, these case studies reveal a differentiated but systemic pattern of constitutional erosion. Taken together, they demonstrate how the repeated breach of formerly integral norms has led to a state of permanent constitutional unsettlement across the UK's asymmetric settlement.

A. Scotland

(i) The Limits of the Sewel Convention

Scotland's experience of Brexit is perhaps the clearest demonstration of the constitutional erosion that followed the removal of EU membership. The most visible rupture concerned the operation of the Sewel Convention. Prior to 2016, the withholding of consent was rare, and bypass was regarded as constitutionally exceptional.[43] That pattern shifted decisively with Brexit process. The Scottish Parliament withheld consent for a series of key statutes central to the withdrawal process – the European Union (Withdrawal) Act 2018, the European Union (Withdrawal Agreement) Act 2020, the United Kingdom Internal Market Act 2020, and the Subsidy Control Act 2022 – on the basis that they altered devolved competences without agreement.[44] Westminster nevertheless legislated in each case.

[43] Institute for Government (n 36)
[44] 'Brexit' (*Gov.scot*, 2020) at <https://www.gov.scot/brexit> accessed 11 May 2026.

The UK Government defended its approach by arguing that Brexit constituted "not normal – [but] unique" circumstances.[45] This argument was rooted in section 28(8) of the Scotland Act 1998 (as amended by the Scotland Act 2016), which provides that:

> "But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament".

For the Government, the words "it is recognised" confirmed the continued sovereignty of Westminster, leaving it to Parliament alone to decide what counted as "not normal". Lord Keen, then Advocate General for Scotland, made this position explicit:

> "The words 'it is recognised' ... reflect the continued Sovereignty of the United Kingdom Parliament and that it is for Parliament to determine when a circumstance may be considered not normal".[46]

In practice, this meant that the UK Government only clarified its stance once it became clear that devolved legislatures would not give consent. The result was that repeated bypasses not only normalised override but also weakened the remaining political force of the Sewel Convention.[47]

The deeper constitutional significance lies in the dismantling of Sewel's ambiguous status as a safeguard. The Supreme Court in the *R (Miller)* case confirmed that the Convention had no legal effect.[48] What emerged after 2016 was therefore not merely the affirmation of its non-justiciability, but the progressive political hollowing out of the Convention itself. The phrase "not normally" became a dead letter as repeated bypasses exposed the limits of the convention's force. This development raised a broader constitutional question: whether statutory recognition of political conventions in a constitution without entrenchment offers genuine protection, or whether, by highlighting their non-binding character, it accelerates their erosion. In Scotland, the political understanding of Sewel as a democratic safeguard was thus directly at odds with the legal interpretation of it as a merely declaratory provision.[49]

(ii) Judicial Limits of Devolved Autonomy: The Continuity Bill

The Continuity Bill litigation further underscored the fragility of devolved law-making under parliamentary sovereignty.[50] The Bill, passed by the Scottish Parliament in 2018, sought

[45] 'Michael Gove MP, Chancellor Of The Duchy Of Lancaster, Update On The EU (Withdrawal Agreement) Bill Statement' (*Parliament.uk*, 2020) <https://questions-statements.Parliament.uk/written-statements/detail/2020-01-23/HCWS60> accessed 30 September 2020.
[46] HL Deb 21 March 2016, vol 769.
[47] Nicola McEwen, 'Brexit: What Next?' (*The UK in a Changing Europe*, 2020) at <https://ukandeu.ac.uk/wp-content/uploads/2020/02/Brexit-what-next-report.pdf> accessed 11 May 2026.
[48] *Miller* (n 11) [151].
[49] Aileen McHarg, '' Constitutional Change and Territorial Consent: The Miller Case And The Sewel Convention' in Mark Elliott, Jack Williams and Alison Young (eds) *The UK Constitution after Miller* (Hart Publishing 2018) ch 7.
[50] *Reference by the Attorney General and the Advocate General for Scotland – UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64.

to preserve EU law within devolved competence after Brexit. The UK Government immediately referred the legislation to the Supreme Court under section 33 of the Scotland Act 1998.

In its ruling, the Court held that significant provisions fell outside competence because they were inconsistent with the subsequently enacted EU Withdrawal Act 2018.[51] The judgment made clear that devolved legislation, even if intra vires when passed, could be rendered void by subsequent Westminster enactment. This confirmed an asymmetry at the heart of the territorial constitution. While devolution provides meaningful legislative authority, that authority ultimately remains contingent upon the continuing tolerance of the sovereign Parliament.

(iii) Intergovernmental Relations and Institutional Asymmetry

The structural flaws of the JMC - previously noted as a product of its non-statutory nature - became a critical bottleneck during Brexit. As the stakes of coordination rose, the absence of formal accountability and binding procedures shifted from a theoretical weakness to a functional failure. Brexit did not just expose these institutional gaps; it magnified them, proving that a body grounded solely in political goodwill could not withstand the pressures of constitutional divorce.[52]

Disputes over repatriated competences, particularly in policy areas such as agriculture, environment, and trade regulation, could not be resolved through any binding arbitral mechanism. Outcomes therefore depended largely on the political discretion of the UK Government, which, as both participant in and ultimate arbiter of the process, enjoyed a structurally dominant position.[53]

These tensions produced a political backlash. By 2019, Scottish ministers had withdrawn from certain JMC meetings, declaring the process ineffective and increasingly unwilling to legitimise it through participation.[54] The Scottish Government instead advocated the development of binding common frameworks to regulate repatriated competences, presenting these as a cooperative mechanism for managing divergence within devolved areas.

However, the introduction of the United Kingdom Internal Market Act 2020 (UKIMA) effectively sidelined this approach.[55] Despite categorical opposition from the Scottish Government and the withholding of legislative consent by the Scottish Parliament, the Act was enacted unilaterally. As Chris McCorkindale observes, the episode represented one

[51] Some of the key inconsistencies the Court found within the Scottish Bill and thus deemed to amount to a modification of the EU Withdrawal Act 2018 were the retention of the EU Charter as law (s 5), the preservation of the Francovich principle (s 8(2)) and the need for Scottish Ministerial consent on UK Ministerial secondary legislation that applies to Scotland (s 17).

[52] Paul Anderson, 'Plurinationalism, Devolution And Intergovernmental Relations In The United Kingdom' in Yonatan Fessha, Karl Kossler, and Francesco Palermo (eds), *Intergovernmental Relations in Divided Societies* (Palgrave Macmillan 2022) 97-100.

[53] Richard Rawlings, 'Brexit and the Territorial Constitution: Devolution, Reregulation and Intergovernmental Relations' (2020) 36(1) PL 64.

[54] In response to these tensions, a joint review of IGR was launched in 2018, culminating in the replacement of the JMC framework in early 2022 with a more elaborate three-tier structure. See: *Review of Intergovernmental Relations* (*HM Government*, January 2022) <https://www.gov.uk/government/publications/the-review-of-intergovernmental-relations> accessed 11 May 2026.

[55] The Labour Government has in recent times renewed emphasis on Common Frameworks over strict reliance on UKIMA enforcement. See: Thomas Horsley, 'Reforming the UK Internal Market: The UK Government's Response to the Review of the United Kingdom Internal Market Act 2020' (*UK Constitutional Law Blog*, 21 July 2025) <https://ukconstitutionallaw.org/2025/07/21/thomas-horsley-reforming-the-uk-internal-market-the-uk-governments-response-to-the-review-of-the-united-kingdom-internal-market-act-2020/> accessed 11 May 2026.

of the most striking instances of constitutional ill-health during the Brexit process, reinforcing perceptions that meaningful influence had been removed from devolved institutions.[56]

Although subsequent reforms to intergovernmental relations have been introduced - first under the Conservative Government [57]and more recently under the Labour Government [58] - these reforms remain grounded in political agreement and ultimately preserve the structural dominance of the UK Government.[59]

In contrast, many federal systems embed intergovernmental mechanisms within law. In Canada, the division of powers under the Constitution Act 1867 is constitutionally entrenched and disputes are adjudicated by the Supreme Court.[60] In Germany, the Bundesrat provides Länder governments with a constitutionally guaranteed role in federal legislation.[61] The UK's reliance on informal and politically mediated intergovernmentalism therefore stands in marked contrast to these legally structured federal arrangements.

(iv) Regulatory Divergence and the Internal Market

Policy divergence provides a further vivid illustration of the constitutional consequences of Brexit for Scotland. The Scottish Government committed itself to maintaining alignment with EU standards in fields such as environmental regulation, food labelling, and the banning of single-use plastics, presenting this both as a substantive policy preference and as part of a broader political project of European orientation.[62]

Yet UKIMA curtailed the effect of such divergence. By enshrining the market access principles of mutual recognition and non-discrimination, the Act requires that goods lawfully produced in any part of the UK must be admitted elsewhere, regardless of local regulatory standards.[63]

Although the devolved legislatures retain competence to legislate in these fields, the practical enforceability of higher Scottish standards is compromised: Scottish legislation remains formally valid, but is effectively disapplied in respect of incoming goods from England and other jurisdictions. The Act's exemptions offer limited protection; they are narrowly defined through an exhaustive list of 'excluded' areas - such as certain environmental and public health measures - which are interpreted strictly to favour market fluidity. Furthermore, these protections are centrally administered, as the power to amend or expand the list of exclusions (under ss 10 and 17) rests solely with UK Ministers, allowing the UK Government to unilaterally determine the boundaries of devolved regulatory autonomy.[64]

56 McCorkindale (n 27).

57 *Review of Intergovernmental Relations* (HM Government, January 2022) <https://www.gov.uk/government/publications/the-review-of-intergovernmental-relations> accessed 28 June 2025.

58 The Council of the Nations and Regions Report (*PolicyWise*, October 2024) <http://www.policywise.org.uk/sites/www.policywise.org.uk/files/The%20Council%20of%20the%20Nations%20and%20Regions%20Report.pdf> accessed 11 May 2026.

59 Nicola McEwen, 'Still Better Together? Purpose And Power In Intergovernmental Councils In The UK' (2017) 27 Regional and Federal Studies 667.

60 Constitution Act 1982 (Canada) ss 38–49; see also A. Heard, *Canadian Constitutional Conventions* (OUP 2012).

61 Basic Law for the Federal Republic of Germany (1949) articles 70–77; see also: Arthur Gunlicks, *The Länder And German Federalism* (Manchester University Press 2003).

62 European Union (Continuity) (Scotland) Act 2021, s 1(1).

63 UKIMA, ss 2-3 on mutual recognition and ss. 5-6 on non-discrimination for goods; ss 17-20 and ss 21-23 for equivalent provisions on services.

64 McCorkindale (n 27).

From Edinburgh's perspective, this amounted to a form of backdoor recentralisation.[65] Not only was the Act imposed without Scottish consent (bypassing the Sewel Convention), but its substantive design also subordinated devolved autonomy to the requirements of the UK internal market. The point is not merely political: in legal terms, the Act created a new statutory hierarchy in which devolved legislation can be neutralised not by express repeal but by systemic displacement. This mechanism departs from the previous model of devolution, where divergence within devolved competence was accepted and managed, and instead reasserts a centralised conception of uniformity grounded in the economic unity of the UK.[66]

(v) Constitutional Implications

The constitutional significance of UKIMA is profound. Its effect is not to invalidate devolved law but to hollow out its practical authority. This demonstrates how legally permissible exercises of Westminster sovereignty can destabilise the balance of authority underpinning the territorial constitution, rendering devolved autonomy conditional and contingent. More broadly, it exemplifies the phenomenon of constitutional erosion without formal rupture: devolved competence remains intact in law yet is functionally constrained to the point of ineffectiveness.

Taken together, these developments exemplify the three mechanisms of constitutional erosion identified earlier. First, the repeated disregard of Sewel normalised override and stripped the convention of symbolic force. Second, the collapse of trust in intergovernmental machinery hollowed out one of the few mechanisms available for cooperative resolution. Third, the imposition of UKIMA and the limits revealed by the Continuity Bill demonstrated how central authority could pre-empt or neutralise devolved initiatives.

In Scotland, these erosive processes interacted with an existing constitutional agenda – independence – amplifying their significance.[67] What in another constitutional context might have led to institutional reform or recalibration here reinforced arguments for secession, deepening the state of constitutional unsettlement.[68] Scotland thus illustrates not only the vulnerabilities of the UK's territorial constitution but also the ways in which Brexit has transformed political contestation into constitutional fracture.[69]

65 'UK Internal Market White Paper : Initial Assessment By The Scottish Government' (*Gov.scot*, 2020) at <https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2020/08/uk-internal-market/documents/uk-internal-market-initial-response/uk-internal-market-initial-response/govscot%3Adocument/UK%2Binternal%2Bmarket%2Binitial%2Bresponse.pdf> accessed 11 May 2026.

66 Thomas Horsley and Jo Hunt, 'Brexit and the UK Internal Market Act 2020: Domestic Constitutional Dislocation and the Reimagination of Internal Trade' (2024) 75(1) NILQ 19; see also Thomas Horsley, 'Constitutional Reform by Legal Transplantation: The United Kingdom Internal Market Act 2020' (2022) 42 OJLS 1143.

67 Klaus Stolz, 'Scotland, Brexit, And The Broken Promise Of Democracy' in Guderjan Marius, Mackay Hugh and Stedman Gesa (eds) *Contested Britain: Brexit, Austerity and Agency* (Policy Press 2020) ch 13.

68 This dynamic was evident in the two major waves of devolutionary reform: the first, led by the SNP Government and culminating in the Scotland Act 2012, and the second, negotiated between Edinburgh and London to avoid constitutional crisis, which concluded in the Scotland Act 2016. See: Aileen McHarg, 'Devolution In Scotland' in Jeffery Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2019).

69 While Brexit was an exceptional catalyst, the resulting constitutional fracture appears structural rather than episodic. The shift from a "consensual" to a "hierarchical" model of unionism- evidenced by the formalisation of Westminster's power to bypass devolved consent and the introduction of permanent market-access constraints - suggests a durable realignment of the territorial constitution. Rather than a one-off deviation, these developments have established a new "constitutional baseline" where devolved autonomy is legally subordinate to centralising mechanisms, ensuring that the vulnerabilities exposed by Brexit will persist as a defining feature of the UK's internal governance.

B. NORTHERN IRELAND

(i) Treaty Foundations and Constitutional Fragility

Northern Ireland represents the sharpest stress test of the UK's territorial constitution in the Brexit era. Unlike Scotland or Wales, its devolved arrangements are inseparable from the 1998 Good Friday Agreement (GFA), itself an international treaty. The Northern Ireland Act 1998 gave domestic effect to the GFA's three interlocking strands: power-sharing within devolved institutions at Stormont, North-South cooperation through cross-border bodies, and East-West cooperation via the British-Irish Council. This multi-layered settlement rested on assumptions of dual EU membership.[70] The single market and customs union eliminated the physical border on the island of Ireland, thereby easing a historically fraught site of contestation and supporting the functioning of the GFA's institutions in the aftermath of the Troubles.[71]

Brexit destabilised this equilibrium. By removing the shared EU legal framework, it reopened the border question and, with it, the fragile balance on which the territorial settlement depends.[72] Northern Ireland thus became not only a site of competence and authority disputes, as in Scotland and Wales, but also a theatre in which international law, domestic law, and political identity clashed directly.

(ii) Parliamentary Sovereignty and the Limits of Treaty-Based Guarantees

The reliance on international treaty guarantees within a constitution still formally anchored in parliamentary sovereignty generated profound legal tensions. The GFA is unusual because it combines an international obligation with domestic statutory incorporation.[73] While the NI Act 1998 entrenched key institutional commitments, Parliament remained legally free to legislate inconsistently with them.

Brexit exposed the fragility of that arrangement. Westminster enacted the EU (Withdrawal Agreement) Act 2020, giving domestic effect to the Protocol on Ireland/Northern Ireland, without the legislative consent of Stormont.[74] This illustrated that even treaty-based territorial commitments could not bind Parliament in law.[75]

[70] Brice Dickson, 'Devolution in Northern Ireland' in Jeffery Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, OUP 2019).

[71] Katy Hayward and Mary Murphy, 'The EU's Influence On The Peace Process And Agreement In Northern Ireland In Light Of Brexit' (2018) 17 Ethnopolitics 276.

[72] David Phinnemore, 'Northern Ireland: A 'Place Between' In UK–EU Relations' (2021) 25 European Foreign Affairs Review 631; Cathy Gormley-Heenan and Arthur Aughey, 'Northern Ireland And Brexit: Three Effects On 'The Border In The Mind'' (2017) 19 British Journal of Politics and International Relations 497.

[73] Comparable examples of statutory incorporation of international obligations include the European Communities Act 1972 (repealed by the EU (Withdrawal) Act 2018), the Human Rights Act 1998, and the EU (Withdrawal Agreement) Act 2020. None, however, combine treaty obligations with constitutional settlement in the manner of the Northern Ireland Act 1998.

[74] Emma Dellow-Perry and Raymond McCaffrey, 'Legislative Consent Motions' (*Niassembly.gov.uk*, 2020) at <http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2017-2022/2020/procedures/5920.pdf> accessed 11 May 2026.

[75] Other treaty-based incorporations display similar fragility: the European Communities Act 1972 (repealed), the Human Rights Act 1998 (implementing the ECHR but permitting incompatible legislation: s.4), the Geneva Conventions Act 1957, the Extradition Act 2003, and the United Nations Act 1946. In each case, international obligations bind domestically only through statute, and Parliament remains free to legislate inconsistently or repeal them.

The constitutional significance of this override was heightened by the suspension of devolved institutions in Northern Ireland from 2017 to 2020, and again between 2022 and 2024.[76] In the absence of a functioning Assembly, the very safeguards that the Sewel Convention was designed to provide were unavailable. This created a profound democratic vacuum: while the suspension of Stormont left devolved governance inert, Westminster's continued use of the legislative override without the possibility of securing local consent further entrenched the normalisation of central intervention.

(iii) The Protocol, Windsor Framework, and Legal Asymmetry

The Northern Ireland Protocol, and later the Windsor Framework, entrenched Northern Ireland's differentiation from the rest of the UK. By keeping Northern Ireland aligned with significant areas of EU law, the Protocol avoided a hard land border and legally safeguarded key elements of the GFA.[77]

However, the arrangement simultaneously imposed regulatory and customs barriers in the Irish Sea, prompting unionist parties to denounce it as an internal UK trade border and a dilution of Northern Ireland's constitutional status.[78] Nationalist parties, by contrast, regarded the arrangement as a pragmatic mechanism to protect all-island integration and preserve the peace settlement.[79]

The Windsor Framework sought to reduce frictions through 'green lane' and 'red lane' systems for goods and introduced the Stormont brake, allowing the Assembly to block certain new EU measures.[80] Yet these adjustments left intact the core asymmetry: by virtue of section 7A of the EU (Withdrawal) Act 2018, EU law continues to apply in Northern Ireland with supremacy over inconsistent domestic provisions. The Supreme Court in *Allister* reaffirmed that Parliament had lawfully enacted this regime, emphasising the continued orthodoxy of parliamentary sovereignty. In doing so, the Court acknowledged that the Acts of Union and the NI Act 1998 are constitutional statutes of great significance, but confirmed that even such statutes may be impliedly modified by subsequent legislation.[81]

The effect has been to sharpen both institutional distrust and constitutional unsettlement. Intergovernmental mechanisms were ill-equipped to manage these disputes: many of the most contentious questions were refracted through UK-EU negotiations, leaving devolved

[76] The 2017–2020 suspension followed the resignation of deputy First Minister Martin McGuinness amid the Renewable Heat Incentive controversy and the subsequent breakdown in Executive relations. The 2022–2024 collapse stemmed from the DUP's withdrawal in protest at the Protocol on Ireland/Northern Ireland and its operation.

[77] C R G Murray, 'From Oven-Ready to Indigestible: the Protocol on Ireland/Northern Ireland' (2022) NILQ 73(S2) 8-36.

[78] See, for example, *In the matter of an application by JR 181(3) for Judicial Review* [2022] NIQB 16, where the High Court quashed the DUP DAERA Minister's order halting checks required under the Protocol, a move taken in express opposition to its operation.

[79] Cathy Gormley-Heenan and Arthur Aughey, 'Northern Ireland And Brexit: Three Effects On 'The Border In The Mind'' (2017) 19(3) British Journal of Politics and International Relations 497.

[80] The Windsor Framework introduces a green-lane/red-lane system to reduce checks on goods moving from GB into NI. Those staying in NI go through a simplified green lane, while goods destined for the EU are routed via a more stringent red lane. Additionally, it creates the Stormont Brake, allowing 30 MLAs from at least two political parties to trigger a process enabling the Northern Ireland Assembly to pause or oppose new EU-derived legislation applying under the Protocol. See: Tobias Lock, Mary Dobbs & Karen Lynch Shally, "The Windsor Framework – Guarantees, Gaps and Governance" (2024) NILQ 75(3) 433–42.

[81] *Re James Hugh Allister & Ors* [2023] UKSC 5 [66]-[68].

voices marginalised.[82] Even the 2022 reforms to intergovernmental relations preserved the UK Government as the final arbiter of disputes, while Northern Ireland's constitutional fate was effectively decided in talks between London, Brussels, and Dublin. The overlay of international obligations thus hollowed out domestic mechanisms of resolution, reinforcing perceptions of marginalisation within the Union.

(iv) Divergence and Constitutional Unsettlement

The practical consequence has been the emergence of a structural divergence between Northern Ireland and Great Britain. Goods regulation, agri-food standards, and customs processes now operate under two distinct legal regimes, aligning Northern Ireland more closely with the EU than with the rest of the UK.

These frictions have become politically charged evidence of inequality: for unionists, a breach of equal citizenship and a sign of constitutional downgrading; for nationalists, proof of the feasibility of all-island integration.[83]

Divergence has entrenched political polarisation and highlighted the fragility of a territorial constitution underpinned more by political bargains than by entrenched legal safeguards.

Northern Ireland, therefore, exemplifies compounded constitutional erosion. Override has become normalised in a context where devolved institutions were absent or unstable; distrust has been exacerbated by the prioritisation of international obligations over internal consent; and managed divergence has entrenched asymmetry in ways that intensify, rather than alleviate, polarisation.

Unlike Scotland, where constitutional erosion feeds into a single alternative project of independence, in Northern Ireland, it has deepened the binary contest between Union and reunification.[84] Brexit has thus transformed political disagreement into constitutional unsettlement of a profound and enduring kind.

C. WALES

(i) From 'Good Unionism' to Radical Reformism

Wales entered the Brexit process in a constitutionally distinct position compared to Scotland and Northern Ireland. Although the Welsh Government adopted a pro-Remain

[82] These contentious questions specifically concerned the unique regulatory and fiscal frictions facing Northern Ireland, including the application of EU State Aid rules to UK-wide tax measures, the alignment of VAT and excise duties on a dual-regime basis, and the technical criteria for 'at risk' goods crossing the Irish Sea. Because these issues were resolved via international treaty rather than domestic intergovernmental channels, the Northern Ireland Executive was effectively excluded from the core decision-making processes that reshaped its own regulatory environment. See also: David Phinnemore, 'The Protocol On Ireland/ Northern Ireland: A Flexible And Imaginative Solution For The Unique Circumstances On The Island Of Ireland?' in Martin Westlake (ed) *Outside the EU: Options for Britain* (Agenda Publishing 2020) 163-176.

[83] John Garry and others, 'The Future Of Northern Ireland: Border Anxieties And Support For Irish Reunification Under Varieties Of Ukexit' (2021) 55 Regional Studies 1517.

[84] Murray (n 77).

stance during the 2016 referendum, a majority of the Welsh electorate voted to leave the EU (52.5%).[85]

This alignment with the UK-wide result, in contrast to the clear 'Remain' majorities in Scotland and Northern Ireland, created a complex strategic environment for Cardiff. On one hand, the 'Leave' mandate weakened the Welsh Government's bargaining leverage in negotiations with Westminster, as it could not frame Brexit as an external constitutional imposition.[86] On the other hand, the subsequent centralising response from the UK government catalysed a period of constitutional activism that marked a sharp departure from the historical norms of Welsh devolution.[87]

Historically, Welsh devolution had been characterised by incrementalism and a deferential, cooperative approach. This 'good unionist' disposition meant that constitutional reforms - from the Government of Wales Acts of 1998 and 2006, to the reserved powers model in the Wales Act 2017 - were secured largely through negotiation and consensus, reflecting an acceptance of the sovereignty of Westminster as the ultimate constitutional arbiter. However, the Brexit process acted as a catalyst for a sharp departure from this tradition, giving rise to period of constitutional unsettlement often described as the "awakening of the Welsh dragon".[88]

(ii) The Collapse of Deferential Unionism

The passage of the European Union (Withdrawal) Act 2018 marked the first major constitutional flashpoint of the Brexit process for Wales. At the heart of the controversy was the UK Government's initial approach to the allocation of competences returning from Brussels. From the outset, the UK adopted a conferred powers model: powers repatriated from the EU would, by default, return to Westminster unless and until they were deliberately devolved. This approach was justified in functional terms - as a means of preserving the integrity of the UK internal market, ensuring legal continuity, and maintaining a free hand for negotiating international trade agreements.[89] This approach was formalised in the EU Withdrawal Bill introduced in 2017 (Clause 11).[90] In response to the perceived 'power grab,' the Welsh Government advanced its own Continuity legislation – the Law derived from the European Union (Wales) Act 2018. The act sought to empower Welsh Ministers to amend retained EU law through secondary legislation and, most controversially, to create mechanisms that

85 'Brexit Results, By Nation' (*Statista*, 2016) <https://www.statista.com/statistics/568701/brexit-results-by-nation> accessed 11 May 2026.

86 Jo Hunt and Rachel Minto, 'Between Intergovernmental Relations and Paradiplomacy: Wales and the Brexit of the Regions' (2017) 19 The British Journal of Politics and International Relations 647.

87 Rawlings (n 32).

88 Darryn Nyatanga, 'Welsh Independence: Can Brexit Awaken The Sleeping Dragon?' (*LSE Brexit*, 2020) at <https://blogs.lse.ac.uk/brexit/2020/06/04/welsh-independence-can-brexit-awaken-the-sleeping-dragon/> accessed 11 May 2026. See also: Jonathan Bradbury, 'Welsh Devolution and The Union: Reform Debates After Brexit' (2021) 92 Political Quarterly 125.

89 Stephen Tierney, 'The Territorial Constitution and the Brexit Process' (2019) 72 Current Legal Problems 59.

90 Clause 11 dealt with the constitutional question of competence allocation. Under the existing settlement, the Government of Wales Act 2006, s 108(6)(c), the Scotland Act 1998, s 29(2)(d), the Northern Ireland Act 1998, s 6(2)(d) prohibited devolved legislatures from enacting provisions incompatible with EU law. Clause 11 proposed to replace that constraint with a prohibition on modifying the new category of retained EU law, with any release of competence dependent on the exercise of ministerial discretion at the centre. In effect, all EU-derived powers - including those falling within devolved fields such as agriculture, fisheries, environment, and aspects of justice and transport -would initially be re-reserved to Westminster, to be devolved only if and when Whitehall so determined through secondary legislation.

would allow Welsh Ministers to veto certain retained EU law measures adopted by UK Ministers where these applied to devolved fields.

The UK Government's immediate response was to refer the legislation to the Supreme Court to test its legislative competence. At the same time, in a bid to secure legislative consent for the EU Withdrawal Bill, ministers tabled a series of amendments to Clause 11. These amendments represented a partial retreat: competences falling within devolved fields would now, by default, return to the devolved level, with limited powers temporarily "frozen" at the centre to facilitate the design of common UK-wide frameworks.[91] In the end, the Welsh Government accepted the revised settlement, repealing its Continuity Act in the process. For Wales, the episode marked a pivotal shift from deference to assertiveness. While the Welsh Government chose pragmatism in repealing its Continuity Act, it simultaneously reframed its constitutional position, advancing proposals for a reconstituted Union grounded in parity of esteem and legally entrenched safeguards. This episode thus became an early inflection point in the post-Brexit erosion of the UK's territorial constitution, signalling the limits of political constitutionalism in managing territorial pluralism.

(iii) The Institutionalisation of Override

The subsequent imposition of the UK Internal Market Act marked another decisive shift. This was not merely an episodic disagreement but a structural realignment of power. By proceeding despite the Senedd's formal withholding of legislative consent, Westminster demonstrated that the Sewel Convention - despite its statutory recognition - offered no legal protection against the normalisation of central intervention.

The effect was doubly corrosive. First, the mutual recognition and non-discrimination principles in UKIMA created a permanent regulatory ceiling, where Welsh standards (for example, on single-use plastics or food safety) could be effectively neutralised by lower standards elsewhere in the UK.[92] Second, it eroded the incentive for the very cooperative Common Frameworks that Wales had championed. Cardiff had invested heavily in these frameworks as a consensual alternative to central regulation, only to see them bypassed by the UK Government when political stakes were highest.[93] This revealed a chronic constitutional instability where the centre reserves the right to act unilaterally whenever consensus proves inconvenient.

(iv) A New Constitutional Baseline and the Federal Vision

Brexit prompted a strategic reorientation of Welsh constitutional discourse - moving it closer to a quasi-federalist critique of the British state as a means of resolving this unsettlement. Through successive White Papers, the Welsh Government articulated a coherent programme for radical constitutional reform.[94] These proposals called for a reimagining of the

[91] EU (Withdrawal) Act 2018, s 12.

[92] Horsley and Hunt (n 66); Horsley (n 66).

[93] The Welsh Government in their opposition to UKIMA, lodged a legal challenge against it. This marked the first time that a devolved Government had initiated legal proceedings against the UK Government, to challenge a piece of Westminster legislation. Nonetheless, the Welsh Government's legal challenge failed on the grounds of prematurity. See: *The Counsel General for Wales, R (on the application of) v The Secretary of State for Business Energy and Industrial Strategy* [2021] EWHC 950 (Admin).

[94] See for example: 'Brexit And Devolution' (*Gov.Wales*, 2017) at <https://beta.gov.wales/sites/default/files/2017-06/170615-brexit%20and%20devolution%20%28en%29.pdf>; 'Reforming Our Union: Shared Governance in the

Union as a voluntary partnership of equals, underpinned by shared sovereignty and entrenched legal protections for devolved competence. Recommendations included replacing the ineffective Joint Ministerial Committee with a statutory UK Council of Ministers governed by parity of esteem; codifying or replacing the Sewel Convention with binding legal guarantees; and embedding devolved participation in the negotiation of international agreements affecting devolved areas. Notably, this constitutional agenda stopped short of advocating independence, but it nonetheless challenged core orthodoxies of the UK constitution by seeking to constrain parliamentary sovereignty and move towards a quasi-federal model.[95]

The distinctiveness of the Welsh position lies in its attempt to reconcile a unionist commitment with demands for deeper autonomy. While Scotland has leveraged constitutional tensions to advance independence and Northern Ireland's debates remain polarised around the Union and reunification, Wales has framed Brexit as an opportunity to reform the Union rather than exit it. Yet, the legal and political feasibility of this vision is limited.

The UK Labour Government has sought to "reset" devolved relations, most notably through reforms to the IGR framework by the creation of the Council of the Nations and Regions. Ultimately, however, these reforms fall short of Welsh Labour's proposals for deeper constitutional change, including a formal redefinition of sovereignty.[96] The Welsh experience suggests that the UK's territorial constitution has shifted into a state of permanent unsettlement, where the formal continuity of the law masks a profound and perhaps irreversible hollowing out of devolved autonomy.

V. Cross-cutting Analysis: Mechanisms of Constitutional Erosion

The territorial case studies reveal divergent political trajectories but a shared, systemic pattern of constitutional erosion.[97] Brexit did not produce a discrete rupture in the UK's territorial constitution; rather, it acted as a catalyst, accelerating latent vulnerabilities within an uncodified, asymmetric settlement that depends on political norms rather than enforceable legal constraints.[98] Across Scotland, Northern Ireland, and Wales, common mechanisms of erosion have emerged, though they have been refracted through the distinct constitutional and political contexts of each jurisdiction.

UK' (*Gov.wales*, 2019) at <https://gov.wales/sites/default/files/publications/2019-10/reforming-our-Union-shared-governance-in-the-uk.pdf>; 'Reforming Our Union: Shared Governance In The UK - June 2021' (*Gov.Wales*, 2021) at <http://gov.wales> accessed 11 May 2026.

95 More recently, the Welsh Government has expressed clear support for the findings of the Independent Commission on the Constitutional Future of Wales, which emphasised a need for significant steps to strengthen devolution, including greater fiscal autonomy, the devolution of powers over justice, and policing, and legally enforceable intergovernmental mechanisms to safeguard Wales's position within the Union. See: Independent Commission on the Constitutional Future of Wales, Final Report (*Welsh Government*, 2024) <https://www.gov.wales/sites/default/files/publications/2024-07/independent-commission-on-the-constitutional-future-of-wales-final-report.pdf> accessed 11 May 2026.

96 *Miller* (n 11) [151].

97 Huq and Ginsburg (n 1).

98 Michael Keating, 'Brexit and the Nations' (2018) 90 Political Quarterly 167.

A. THE NORMALISATION OF THE 'SEWEL BYPASS'

The most striking mechanism of constitutional erosion has been the normalisation of the bypassing of the Sewel Convention. Since 2018, each devolved legislature has fruitlessly withheld consent for key Brexit-related legislation. Bypasses of the Sewel Convention were rare before 2016, but the post-Brexit period marks a qualitative shift.[99] A routine disregard for Sewell has undermined the political salience of consent, transforming a once meaningful constraint into a hollow formality. The repeated exercise of unilateral legislative authority has sent a clear signal that devolved consent, though desirable, is neither constitutionally required nor politically decisive.[100]

In an uncodified system, a convention that is repeatedly breached without political consequence ceases to perform its stabilising function. This suggests that the flexibility of the British constitution - often defended by scholars such as Mark Elliott as a source of resilience - has instead facilitated a form of executive unilateralism that leaves the territorial settlement inherently fragile.[101] When the centre abandons its commitment to self-restraint, the lack of legal entrenchment transforms political constitutionalism into a vehicle for central dominance.

B. INSTITUTIONAL ATROPHY AND ADAPTIVE CENTRALISM

A second mechanism is the failure of IGR to adapt to a high-stakes, post-EU environment. The UK has practised a form of adaptive centralism: implementing minor procedural adjustments to the intergovernmental framework while strictly maintaining the legal and political hierarchy of Westminster. This has resulted in a pervasive institutional atrophy where the mechanisms of coordination are increasingly perceived by devolved actors as instruments of central management rather than forums for genuine negotiation.[102]

This is particularly acute in the context of Northern Ireland, where the complexities of the Windsor Framework have seen key regulatory decisions refracted through UK–EU bargaining. This international overlay effectively marginalises the devolved Executive, creating a democratic deficit where Northern Irish institutions are spectators to the regulation of their own internal market. This reinforces the process of erosion: by establishing new consultative structures that lack binding dispute-resolution powers, the centre maintains a veneer of cooperation while hollowing out the substance of devolved participation. The result is a deepening of institutional distrust that renders the settlement less governable.

C. SYMBOLIC DIVERGENCE AND THE REGULATORY CEILING

Policy divergence, once the hallmark of successful devolution, has been transformed into a site of constitutional strain. In Scotland and Wales, the pursuit of distinct regulatory standards has been neutralised by the regulatory ceiling established by the principles of mutual recognition in the UK Internal Market Act 2020.

99 Institute for Government (n 36).
100 *Miller* (n 11) [146]–[151].
101 Elliot (n 6); Elliott and Thomas (n 6).
102 McEwen and others (n 40) 632–40.

These dynamics have produced a state of 'symbolic divergence,' where the enactment of devolved legislation reflects the distinct values of a local electorate but remains unenforceable because the centre has reclaimed the practical power to govern the domestic market. This hollowing out of competence does not merely cause policy friction; it actively destabilises the territorial bargain by demonstrating that devolved autonomy is now legally subordinate to the demands of a UK internal market as defined by Westminster.

D. THE SLIPSTREAM OF CONSTITUTIONAL UNSETTLEMENT

The cumulative effect of these mechanisms is a state of permanent constitutional unsettlement. The question arises as to whether this process of erosion is reversible. While the current administration has sought a 'reset' of relations through improved rhetoric and the creation of new consultative bodies, these measures address the symptoms rather than the structural causes of the fracture.[103] They remain grounded in political grace rather than legal right.

In comparative territorial theory, systems that fail to adapt to such pressures often move into a slipstream of gradual disintegration. The UK's current trajectory suggests that the informal constitution has been stretched beyond its elastic limit.[104] Without a fundamental recalibration of the relationship between law and politics - specifically a move toward legally entrenched safeguards that Westminster continues to resist - the territorial constitution will remain in a state of chronic instability. The 'rules of the game' are now permanently contested, and the vulnerabilities exposed by Brexit have become a defining, and perhaps irreversible, feature of the modern British state.

As Martin Loughlin suggests, the failure to consider the consequences of a centralised, Anglo-centric approach has exposed the severe drawbacks of the UK's system of government.[105] By prioritising a singular vision of parliamentary sovereignty over the requirements of territorial pluralism, Brexit has not only accelerated the erosion of the 1998 settlement but has made radical outcomes – such as the independence of Scotland or the reunification of Ireland - increasingly plausible. The slipstream of erosion leads toward a constitutional destination where the Union, as currently constituted, may no longer be sustainable.

VI. LABOUR'S RESET: ADDRESSING, BUT NOT RESOLVING, CONSTITUTIONAL EROSION

The post-Brexit period has laid bare the structural fragility of the UK's territorial constitution. As the cross-cutting analysis makes clear, the normalisation of bypassing the Sewel Convention, institutional distrust in intergovernmental relations, and the re-centralisation of regulatory authority under the UK Internal Market Act 2020 have collectively eroded the political norms that once mediated legal centralisation. These developments have underscored the absence of entrenched constitutional limits, revealing a settlement in which devolution operates at the pleasure of Westminster, with little recourse to enforceable legal remedies. The

[103] See the Labour Government's proposals to 'reset' devolved relations: Labour Party, *Change: Labour Party Manifesto 2024* (13 June 2024) at <https://labour.org.uk/change/serving-the-country> accessed 11 May 2026.
[104] Watts (n 8).
[105] Loughlin (n 7).

result is a model in which constitutional stability depends on political restraint - restraint that has been steadily diminishing since 2016.

A. THE COUNCIL OF THE NATIONS AND REGIONS: PROCEDURAL VERSUS STRUCTURAL INNOVATION

Labour's entry into office in 2024 has brought what it terms a "reset" of devolution, combining a commitment to institutional cooperation with an avoidance of radical reform.[106] The most visible innovation has been the creation of the Council of the Nations and Regions. This forum, bringing together the Prime Minister, devolved leaders, and English metro mayors, seeks to remedy the deficiencies of the ad hoc, often reactive, arrangements that predominated in the post-Brexit period. The Council operates as a forum for policy coordination in areas of shared competence, and incorporates a nascent dispute resolution function, serving as an early-warning mechanism for intergovernmental tensions and providing a structured environment within which disagreements may be ventilated and, where possible, resolved consensually. This function is reinforced by the establishment of a permanent secretariat, mandated to provide continuity, manage agendas, and monitor the implementation of agreements.[107]

However, viewed through the lens of constitutional erosion, the Council represents a procedural improvement rather than a structural fix. It possesses no statutory footing; its existence and influence remain entirely dependent on the political will of the centre. This lack of legal entrenchment means that the Council does not resolve the underlying institutional atrophy. While it may lower the political temperature, it fails to provide the parity of esteem or the legally binding mechanisms required to shield devolved autonomy from future unilateral override.

B. REFORMING UKIMA: THE LIMITS OF ADAPTIVE CENTRALISM

The 2025 reforms to UKIMA mark a second significant shift, aimed at softening the regulatory ceiling that has stifled devolved policy divergence. By elevating Common Frameworks as the primary mechanism for managing regulatory divergence and by introducing a minimum economic impact test before market access principles can override devolved policies, these reforms have marginally rebalanced the relationship between the centre and the devolved administrations. In practice, they have increased the scope for negotiation and technical collaboration in areas such as environmental standards and agricultural policy, reducing the perception - especially acute in Scotland and Wales - that market rules function as a blunt instrument of recentralisation. The introduction of a joint referral process to the Office for the Internal Market (OIM) has also provided a procedural avenue for devolved voices in internal market disputes, though the process remains advisory and lacks binding force.[108]

106 Labour Party, *Change: Labour Party Manifesto 2024* (13 June 2024) at <https://labour.org.uk/change/serving-the-country> accessed 11 May 2026.

107 The Council of the Nations and Regions Report (n 58).

108 UK Government, *Response to the Review of the United Kingdom Internal Market Act 2020 and Public Consultation* (Department for Business and Trade, January 2025) at <https://assets.publishing.service.gov.uk/media/686fa10e2cfe301b5fb679d0/uk-government-response-to-the-review-of-the-united-kingdom-internal-market-act-2020-and-public-consultation.pdf> accessed 11 May 2026.

However, these changes leave the core pathology of the Act untouched. The UKIMA reforms do not repeal the principle of central override; they merely add a layer of procedural complexity to its exercise. This is a classic example of adaptive centralism: minor technical adjustments that preserve the legal hierarchy while attempting to restore a veneer of cooperative legitimacy. For Scotland and Wales, the market access principles remain a latent threat to their regulatory autonomy, illustrating that the reset has altered the conduct of centralisation without dismantling its legal architecture.

C. THE SLIPSTREAM OF EROSION: WHY PROCEDURAL RESETS FAIL

In England, Labour's reset has been accompanied by a rapid expansion of local and regional devolution. The 2025 English Devolution and Community Empowerment Bill demonstrates a willingness to extend decentralisation within England, though it also highlights the asymmetry of the UK's territorial architecture: the empowerment of English regions contrasts sharply with the absence of equivalent structural reforms for Scotland, Wales, and Northern Ireland. This highlights the central tension of the Labour reset: the gap between incrementalism and the radical reform proposals advocated by the Brown Commission or the Independent Commission on the Constitutional Future of Wales.[109]

These commissions argued for a quasi-federal architecture, justiciable intergovernmental mechanisms, and a legally enforceable consent principle. Such proposals recognise that the UK is in a slipstream of constitutional erosion where informal norms no longer suffice.

The result of a constitutional moment best characterised as a partial reset without structural repair. Labour's reforms have reduced the immediate friction and fostered a more collaborative tone, but the deeper vulnerabilities - legal centralisation and the fragility of political norms - remain unaddressed.

VII. CONCLUSION

Brexit has laid bare the structural fragility of the United Kingdom's territorial constitution. The collective experiences of Scotland, Northern Ireland, and Wales reveal a sustained process of constitutional erosion, in which the political conventions and cooperative practices that once mediated the relationship between law and politics have progressively withered. In an uncodified and asymmetric order where legal authority remains concentrated in Westminster and devolved autonomy relies on voluntary restraint, withdrawal from the European Union acted as the catalyst that activated long-dormant vulnerabilities.

This trajectory of decay transcends mere political disagreement or institutional strain. It exposes a fundamental paradox: a system grounded in absolute parliamentary sovereignty, even when tempered by norms like the Sewel Convention, lacks the robust safeguards required to sustain multi-level governance during periods of acute contestation. The

[109] Labour Party, *A New Britain: Renewing our Democracy and Rebuilding our Economy. Report of the Commission on the UK's Future* (December 2022) at <https://labour.org.uk/wp-content/uploads/2022/12/Commission-on-the-UKs-Future.pdf>; Independent Commission on the Constitutional Future of Wales, *Final Report* (Welsh Government, 2024) at <https://www.gov.wales/sites/default/files/publications/2024-07/independent-commission-on-the-constitutional-future-of-wales-final-report.pdf> accessed 11 May 2026.

normalisation of the 'Sewel bypass', the degradation of intergovernmental trust, and the centralisation of market regulation have effectively hollowed out the practical autonomy of devolved nations. Consequently, while the UK's territorial constitution remains doctrinally unitary, it has become politically plural and increasingly contested.

Labour's current programme of reform, from the establishment of the Council of the Nations and Regions to modest adjustments to UKIMA, represents a pragmatic attempt to stabilise the territorial order without altering its core legal architecture. However, these measures address the symptoms rather than the structural cause of the fracture. By remaining grounded in political grace rather than legal right, they fail to arrest the slipstream of erosion. As this article has argued, procedural innovations cannot substitute for structural repair; without a willingness to move toward justiciable constraints on Westminster's sovereignty, the UK remains caught in a state of permanent constitutional unsettlement.

The implications for comparative constitutional theory are significant. The UK's experience demonstrates that erosion can occur without a formal breach of rules, precisely because the absence of enforceable constraints renders the settlement more pervasive and harder to contest. It confirms that the resilience of a territorial settlement depends less on legal continuity than on the durability of shared political understandings. When those understandings collapse, as they have in the post-Brexit decade, legal continuity becomes a mask for institutional fragmentation.

Ultimately, the UK faces a choice between radical restructuring or continued decline. As Martin Loughlin has observed, the prioritisation of an Anglo-centric vision of sovereignty has exposed the severe drawbacks of an over-centralised system. Without a fundamental recalibration of the relationship between law and politics – one that recognises the limits of informal constitutionalism in a plural state – the centrifugal pressures unleashed by Brexit will continue to unsettle the Union. The instability of the post-Brexit constitution suggests that the erosion of the 1998 settlement may not be a temporary phase, but the beginning of a transformative and perhaps final chapter for the United Kingdom.

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Climate Impact Assessments: Mapping Their Evolving Obligations in International Law

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ABSTRACT

While the obligation to conduct an Environmental Impact Assessment (EIA) has been recognised under general international law, it is disputed whether States are obligated to account for climate change in their EIAs. This paper calls this "an obligation to conduct a Climate Impact Assessment" (CIA), and examines its emergence as a distinct legal obligation under international law. It situates CIAs within the framework of customary international law (CIL), demonstrating how State practice and opinio juris have converged to provide a strong basis for a duty to assess the climate-related consequences of anthropogenic greenhouse gas emissions. Drawing on domestic legal practice, treaty provisions, multilateral processes, submissions by international actors to the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS), and the Advisory Opinions on Climate Change from the ICJ, ITLOS, and the Inter-American Court of Human Rights, the paper identifies the points of convergence in the recognition of the norm. It also maps the doctrinal gaps that remain, including the determination of "significance" thresholds for CIAs, the treatment of indirect, and extraterritorial emissions, and the consequences flowing from the *erga omnes* framing of CIAs. The paper concludes that while the precise contours of this obligation continue to evolve, an EIA that ignores climate impacts is increasingly difficult to reconcile with the due diligence standard required by international law.

Keywords: Environmental Impact Assessment, climate change, Climate Impact Assessment, climate litigation, greenhouse gas emissions.

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I. INTRODUCTION

> "When incontrovertible scientific evidence speaks of pollution of the environment on a scale that spans hundreds of generations, this Court would fail in its trust if it did not take serious note of the ways in which the distant future is protected by present law".
>
> – Judge Christopher Weeramantry, *Legality of the Nuclear Weapons Case*[1]

In January 2010, the Federated States of Micronesia, spread in the Pacific Ocean, addressed a formal communication to the Czech Republic, in Europe, objecting to the proposed modernization of the Prunéřov II lignite-fired power plant.[2] The objection was unusual not because of the project's location, but because of the grounds invoked: Micronesia contended that the plant's greenhouse gas emissions could have adverse transboundary climate effects on its own territory.

Although an Environmental Impact Assessment (EIA) had been conducted in accordance with Czech and European Union law, it did not account for the project's contribution in terms of anthropogenic Greenhouse Gas Emissions (GHG Emissions). Micronesia therefore requested that the EIA process be reopened to include a fuller assessment of other impacts, including *climate* impacts, and of alternatives that could reduce the negative effects of the modernization project.[3] Notably, the Czech Minister of Environment initially ordered an independent review,[4] but the subsequent administration approved the original EIA without evaluating the project's transboundary or climate-related impacts.[5]

The incident did not culminate in any formal adjudication, nor did the Czech government explicitly acknowledge that its actions responded to Micronesia's request. Scholars have nonetheless linked the exchange to the broader question of whether Climate Impact Assessments (CIAs) are emerging as a distinct legal obligation under international law.[6]

Even without a transboundary context, a similar tension has been seen across domestic fora. For instance, in 2020, after exhausting all domestic remedies, two NGOs, Greenpeace Nordic and Young Friends of the Earth (Nature and Youth), along with six individuals, brought an application before the European Court of Human Rights against Norway, challenging the government's decision to issue new oil and gas exploration licenses in the Arctic (Barents Sea).[7] The applicants alleged that the Norwegian authorities failed to assess the "total

[1] Dissenting Opinion of Judge Weeramantry, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [456].

[2] Letter from the Director of the Office of Environment & Emergency Management of the Federated States of Micronesia to the Director-General of the Directorate of Technical Protection of Environment of the Ministry of the Environment of the Czech Republic (4 January 2010).

[3] ibid.

[4] Czech Ministry of the Environment, 'The Ministry of the Environment Will Have the Refurbishment of the Prunérov Coal-fired Power Plant Assessed by an Independent International Team' (Press Release, 1 February 2010).

[5] Czech Ministry of the Environment, 'The Ministry of the Environment Has Issued an Affirmative Statement on Comprehensive Refurbishment of the Prunérov II Power Plant' (Press Release, 30 April 2010).

[6] Rosemary Rayfuse and Shirley Scott, *International Law in the Era of Climate Change* (Edward Elgar, 2012) 336.

[7] *Greenpeace Nordic & Young Friends of the Earth Norway v The Norwegian State, Supreme Court of Norway*, HR-2020-2472-P, Decision of 22 December 2020; 'Greenpeace Nordic and Others v. Norway' (*The Climate Litigation Database*) <https://www.climatecasechart.com/document/greenpeace-nordic-and-others-v-norway_0687> accessed 15 November 2025.

climate effects"[8] of these activities, including exported emissions, thereby violating their rights under the European Convention on Human Rights.[9] In doing so, they invoked an emerging international law obligation to integrate climate considerations into EIAs, arguing that the omission of such analysis breached both procedural and substantive due diligence duties.

Together, such incidents raise a question about the scope of the obligation to conduct an EIA. While there is well-established consensus about the existence of the obligation in CIL to undertake an EIA,[10] where significant adverse impact to the environment is foreseeable,[11] this does not resolve the question: "what is the margin of appreciation or discretion that States enjoy in the conduct of an EIA?"[12] In customary international law (CIL), a distinction is sometimes made between the "existence" and the "content" of a rule, reflecting the fact that there may be a situation where it is "accepted that the rule exists, but its precise content remains disputed".[13] This uncertainty surrounds the obligation to conduct an EIA, and questions remain as to whether this obligation includes "substantive contents" including the obligation to conduct consultation with affected populace (public participation), the protection of biodiversity, and the adoption of an ecosystem-based approach.[14]

This paper focuses on one emerging dimension within that broader content inquiry: the obligation to account for *climate impacts* as part of its environmental assessment. It refers to this practice as "Climate Impact Assessment". CIAs are not a distinct procedural regime separate from EIAs. Rather, it refers to the consideration of climate-related factors, such as GHG emissions, lifecycle impacts, and compatibility with carbon budgets, within the conduct of an EIA itself. In other words, CIA represents a dimension of what a legally adequate environmental assessment must address when climate effects are reasonably foreseeable.

The core issue which this article examines is whether the integration of climate considerations into impact assessment has evolved from a matter of policy discretion into a rule of CIL. At this juncture, it is important to mention that the *extent* of such integration depends upon context,[15] jurisdiction[16] and further development of this obligation. However, the present paper argues that an increasing number of judicial and quasi-judicial bodies have begun to scrutinise EIAs that fail to account for climate impacts. The question, therefore, is not whether States must conduct a separate "climate assessment", but whether the emerging practice points

[8] ibid.

[9] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 4 November 1950, entered into force on 3 September 1953) 213 UNTS 222.

[10] *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Merits) [2010] ICJ Rep 55 (*Pulp Mills*), at [204]-[205].

[11] ibid.

[12] Diane Desierto, 'Evidence but not Empiricism? Environmental Impact Assessments at the International Court of Justice in 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)', (*EJIL Talk*, 26 February 2016) <https://www.ejiltalk.org/evidence-but-not-empiricism-environmental-impact-assessments-at-the-international-court-of-justice-in-certain-activities-carried-out-by-nicaragua-in-the-border-area-costa-rica-v-nicaragua-and-con/> accessed on 15 November, 2025.

[13] Draft Conclusions on the Identification of Customary International Law, UN Doc A/73/10, Yearbook of the International Law Commission, 2018, Volume II, Part Two.

[14] PW Birnie, AE Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, OUP, 1992) 172-173.

[15] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicar.)* and *Construction of a Road in Costa Rica along the San Juan River (Nicar. v Costa Rica)*, Judgment, 2015 ICJ Rep 665 (Dec. 16, 2015), at [104]. See also Chapter II.

[16] While the Global South jurisdictions have only begun to take climate harms into account into EIA procedures, Global North jurisdictions have advanced to dealing with questions such as accounting for downstream emissions, suggesting a diversity of practice. *See generally* Benoit Mayer, 'Climate Effects in Environmental Impact Assessment' (2025) 14(2) Transnational Environmental Law 342-64.

toward a norm under which an EIA that ignores climate impacts may struggle to satisfy the due diligence requirements of CIL.

This paper conducts this enquiry through a 5-part structure. Chapter II briefly summarises the legal underpinnings of the obligation to conduct an EIA, and examines the extent to which international law prescribes the "contents" of this obligation. Existing literature provides important documentation of domestic State practice integrating climate considerations into EIAs.[17] Chapter III builds upon and extends this foundation by compiling evidence from recent treaty documents, and State submissions to international fora, demonstrating that the evidentiary base for both State practice and *opinio juris* is considerably richer and more geographically diverse than earlier analyses have recognised. Chapter IV examines the contributions of the three Advisory Opinions (AOs) by the International Court of Justice (ICJ), International Tribunal for the Law of the Sea (ITLOS), and the Inter-American Court of Human Rights (IACtHR), in highlighting this obligation as a core procedural duty, under the broader substantive duty to prevent climate-related harm. Chapter V lastly looks at the objections to the acceptance of CIA as an international obligation, and examines the conceptual limits of this obligation, and the existing questions which remain despite limited legal clarity by the AOs.

II. Does the Obligation to Conduct an EIA under International Law Have Any Substantive Content?

An EIA is "a procedure that evaluates the likely impact of a proposed activity on the environment".[18] EIAs have widely been adopted as a tool of environmental management in various jurisdictions with different degrees of enthusiasm and varying levels of sophistication.[19] The objective of an EIA is to provide decision-makers, such as legislators, public authorities, private corporates, and even the general public with information about the possible effects of an activity over the environment.[20] Thus, EIAs are used in both pre-decisional (to decide whether to proceed with the activity) and post-decisional contexts (to monitor, observe and mitigate the harms that may be caused).[21] While EIAs aid "informed decision-making", this does not mean that they are the final determinants of whether a project should proceed or even of how it should be regulated. The information contained in and conveyed through an EIA is usually weighed against other considerations, for instance, economic development.[22]

EIAs developed as national tools for environmental management,[23] starting with the U.S.,[24] Canada,[25] the European Union,[26] and China.[27] But soon the assumption that they were

[17] Benoit Mayer, 'Climate Assessment as an Emerging Obligation under Customary International Law' (2019) 68(2) International & Comparative Law Quarterly.
[18] Convention on Environmental Impact Assessment in a Transboundary Context (adopted 25 February 1991, entered into force 10 September 1997) 1989 UNTS 309 (Espoo Convention) art 1(vi); United Nations Environment Programme, Goals and Principles of Environmental Impact Assessment (16 January 1987) Preamble.
[19] See generally Chris Wood, *EIA: A Comparative Review* (2nd edn, Routledge 2013).
[20] Peter Wathern, *Environmental Impact Assessment: Theory and Practice* (Routledge 1998) 6–7.
[21] ibid.
[22] Wood (n 19).
[23] Nicholas Robinson, 'International Trends in Environmental Impact Assessment' (1991–92) 19 Boston College Environmental Affairs Law Review 591 at 597.
[24] National Environmental Policy Act 1969 Pub L No 91–190, 83 Stat 852 (US).
[25] Environmental Assessment Act 1992 SC 1992, c 37 (Canada).
[26] Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Oxford: Hart Publishing 2011).
[27] Environmental Impact Assessment Law of the People's Republic of China, adopted on 28 October 2002.

only proliferating in developed nations was broken by a slew of developing nations which established legislations mandating an EIA.[28] EIAs gained an international status, especially after the 1972 U.N. Conference on the Human Environment that culminated in the Stockholm Declaration,[29] which emphasises upon "rational planning" as a tool to reconcile development and environmental needs.[30] A more express acknowledgement of the duty to conduct an EIA was to be found in the Rio Declaration of 1992's Principle 17, which stipulates that an EIA "as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority".[31]

The "globalisation of EIA commitments" cannot simply be described as a transnationalisation of domestic environmental policy.[32] In fact, both the international and domestic settings have been influenced by a constellation of principles in International Environmental Law including the duty to prevent transboundary harm,[33] the principle of non-discrimination between citizens and non-citizens,[34] the duty to cooperate with other States to preserve natural environment[35] and the principle of sustainable development.[36]

Thus, there emerged a growing recognition in international law of the obligation to conduct an EIA in cases of significant adverse impact on the environment.[37] However, the degree of specificity with respect to which this obligation must be carried out still evades clarity.

Unlike several EIA guidelines,[38] the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) and UNEP's EIA Goals and Principles are one of the few international instruments which provide specific requirements for what an EIA should include.[39] They call for a detailed description of the proposed activity, an assessment of its potential impacts, proposed mitigation measures, possible alternatives, and any uncertainties in the available data.[40] However, these are only regional treaty regimes,[41] or

[28] B. Sadler, *Environmental Assessment in a Changing World: Final Report of the International Study of the Effectiveness of Environmental Assessment* (Ottawa: Canadian Environmental Assessment Agency, 1996).
[29] Stockholm Declaration on the Human Environment, UN Doc A/CONF. 48/14/Rev. 1 (1973).
[30] ibid Principle 14.
[31] Rio Declaration on Environment and Development (adopted on 13 June 1992), 31 ILM 874, Principle 17.
[32] Birnie (n 14) 164-5.
[33] UNEP Principles on Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, 17 ILM 1094, UN Doc UNEP/IG.12/2 (1978), Principle 4.
[34] ibid.
[35] Cooperation between States in the Field of the Environment, G.A. Res. 2995 (XXVII), UNGAOR 27th Sess., Supplement No. 30 (1972), [2].
[36] Agenda 21, Report of the UN Conference on Environment and Development (1992) UN Doc A/CONF 151/26/Rev 1.
[37] Beyerlin (n 26); Separate Opinion of Vice-President Weeramantry, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* [1997] ICJ Rep 7 [111]-[112]; *Pulp Mills* (n 10) [204]-[205]; *Certain Activities* (n 15) [104], [153]-[155].
[38] See for example Rio Declaration (n 31); United Nations Framework Convention on Climate Change (adopted on 9 May 1992, entered into force 21 March 1994) UNTS 1771 (UNFCCC) art 206; The Convention on Biological Diversity (adopted on 22 May 1992, entered into force on 29 December 1993) UNTS 1760 (CBD) art 14.
[39] Birnie (n 14) 173 .
[40] UNEP (n 33) Principle 4; Espoo Convention (n 18) art 4(1) and appendix II.
[41] Established under the auspices of UN Economic Commission for Europe, the Espoo Convention is open primarily to UNECE Member States, though it is now open to accession by non-UNECE States as well. See Convention on Environmental Impact Assessment in a Transboundary Context (adopted 25 February 1991, entered into force 10 September 1997) 1989 UNTS 309.

soft-law guidelines.[42] In contrast, widely-accepted instruments like the International Law Commission's 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities only stipulate that an EIA must consider the possible effects on people, property, and the environment of other States, leaving the details for individual States to decide.[43] But then, do States have absolute discretion in determining the contents of an EIA?

In a few cases of alleged significant transboundary harm, the ICJ has had to confront this question where the contents of the EIA conducted were challenged. In the *Pulp Mills* case, the ICJ noted that:

> "[I]t is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment".[44]

This was cited approvingly in the *Case concerning the Construction of Road (Nicaragua/Costa Rica)*,[45] noting that the specific circumstances of the case are determinative of the content of the EIA. This line of reasoning gives credence to the argument that the contents of an EIA can be judicially reviewed and are not left to State discretion. This is so because while States retain latitude to determine the specific content of an EIA, that determination must be exercised in accordance with due diligence, which provides grounds for judicial scrutiny.[46]

A few international instruments do recommend States to incorporate specific elements in the contents of an EIA, but these provisions are mostly framed in a non-binding manner, retaining policy discretion of the State. Illustratively, Article 14 of the Convention on Biological Diversity[47] stipulates that parties shall "introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects, and where appropriate allow for public participation in such procedure". However, the duties to consider biodiversity impacts and to conduct public consultation have been interpreted as non-binding obligations at best, because of the open-textured drafting of the provision.[48] Similarly, under the U.N. Framework Convention on Climate Change (UNFCCC), there is a duty to take climate considerations into account while conducting an EIA, to the extent feasible.[49] But it has been drafted such that States retain a margin of discretion in its implementation.

In this context, the logical next step is to examine how the EIA framework has evolved to accommodate the unique nature of climate risks.

42 See generally Adrian Bradbook and Richard Ottinger, 'Energy Law and Sustainable Development' (2003) IUCN Environmental Policy and Law Paper No 47, <https://portals.iucn.org/library/efiles/documents/EPLP-047.pdf> accessed on 10 May 2026.

43 Commentary on the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, 2001 in Report of the International Law Commission on the Work of its Fifty-Third Session [2006], 2 Yearbook of the International Law Commission 2, UN Doc A/56/10, 2006 at 405, [7]-[8].

44 *Pulp Mills* (n 10) [204]-[205].

45 *Certain Activities* (n 15) [104].

46 Kerryn Brent, 'The Certain Activities Case: What Implications for the "No-Harm Rule"?', (2017) 20(1) Asia Pacific Journal of Environmental Law, 28-56.

47 CBD (n 38) art 14.

48 Lyle Glowka, *A Guide to the Convention on the Biological Diversity* (International Union for Conservation of Nature, 1994).

49 UNFCCC (n 38).

III. Custom in the Making: Tracing State Practice and Opinio Juris on Climate Impact Assessments

There exists a sharp debate as to whether, in situations involving a risk of significant harm to the climate from anthropogenic emissions, there is a norm under CIL that requires the inclusion of climate harms into EIAs. Notable contributions to this debate have been made by Benoit Mayer[50] and Alexander Zahar,[51] among others.[52] This chapter argues that when the evidentiary base extends beyond domestic practice to encompass the legal position taken by States an international fora, including multilateral treaty-drafting processes and international tribunals, the case for an emergent norm of CIA under CIL is considerably stronger than existing analyses have recognised.

For a norm to crystallise into customary international law, it must be evidenced by both consistent State practice (*usus*) and a sense of legal obligation (*opinio juris*).[53] This chapter looks at domestic legal practice, treaty provisions, multilateral processes, and the catena of submissions made by States before international judicial fora to provide evidence for the *usus* and the *opinio juris* for the norm to conduct CIAs. In identifying this evidentiary base, this article follows the methodology set out in the ILC's Draft Conclusions on Identification of Customary International Law, which affirms the relevance of such sources.[54]

A. Domestic Legal Practice: Legislative, Judicial & Administrative Prescriptions

The most immediate evidence of State practice lies in the domestic legal systems of States themselves: through legislation, judicial decisions, and administrative guidelines. Existing legal scholarship, principally by Mayer, has documented aspects of this record, but the picture is considerably richer, and has been developed substantially in recent years.

First, this includes legislative and regulatory practice from the United States,[55] Canada,[56] and the European Union.[57] Subsequently, this trend has been consolidated, and reiterated with similar practice emerging across the globe. For instance, in 2021, the South Korean Government promulgated the Carbon Neutrality & Green Growth Act, which introduces the concept of a Climate Change Impact Assessment in cases of a project emitting a massive amount of GHG emissions.[58] Similarly, the Department for Energy Security & Net Zero in the U.K., has recently developed Guidelines for "assessing effects of downstream scope-3

50 Benoit Mayer, 'The Emergence of Climate Assessment as a Customary Law Obligation' in Benoit Mayer and Alexander Zahar (eds), *Debating Climate Law* (CUP 2021).

51 Alexander Zahar, 'Environmental Impact Assessment for Greenhouse Gas Emissions Is Pie in the Sky' in Benoit Mayer and Alexander Zahar (eds), *Debating Climate Law* (CUP 2021).

52 Jacqueline Peel, 'Environmental Impact Assessments and Climate Change' in Daniel A Farber and Marjan Peeters (eds), *Climate Change Law* (Elgar 2016) 350.

53 *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Judgment) [1985] ICJ Rep 13 (June 3).

54 Draft Conclusions (n 13).

55 CEQ, 'Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews', 81 Fed Reg 51866 (5 August 2016).

56 Ministry of the Environment and Climate Change, Considering Climate Change in the Environmental Assessment Process (2017) https://www.ontario.ca/page/considering-climate-change environmental-assessment-process accessed 15 November 2025 (Ontario).

57 EU Commission, *Guidance on Integrating Climate Change and Biodiversity into Environmental Impact Assessment* (2013) <http://ec.europa.eu/environment/EIA/pdf/EIA%20Guidance.pdf> accessed 16 November 2025.

58 The Framework Act on Carbon Neutrality and Green Growth for Coping with Climate Crisis, 2021, art 23.

emissions" on climate, expanding the ambit of the EIA Directive as implemented.[59] In 2024, Queensland and New South Wales in Australia also constituted guidelines on accounting for GHG emissions in EIAs for proposed and modified projects.[60] These changes show a conscious change in policy: governments have incorporated climate assessment directly into national processes rather than relying on the judgment of the courts. In the Global South, explicit legislative incorporation of climate considerations into EIA frameworks remains limited. One example is India, where the EIA Notification of 2006 mandates a project proponent for construction or area development projects to divulge information relating to the project's contribution to atmospheric concentration of gases, and likely impacts of the proposed construction of "heat islands".[61]

Second, the judicial record reinforces this trajectory. National courts across a range of jurisdictions, including the U.S.A.,[62] the U.K.,[63] Norway,[64] Austria,[65] New Zealand,[66] South Africa,[67] Australia,[68] India[69] have grappled with the integration of climate harms into existing EIA frameworks. This trend is further reinforced by recent decisions, such as those in Colombia, where the Constitutional Court clarified in 2024 that EIAs must expressly include climate change impacts within their evaluative scope.[70] While grounded in domestic law, the judgment is significant in our context because it reflects how courts are adapting older EIA frameworks to contemporary obligations. This is also the case with the U.K. Supreme Court's decision in *Finch*,[71] where it was held that the EIA conducted for a proposed oil well was legally inadequate because it excluded downstream, or "Scope-3," emissions: the greenhouse gases released when the oil, once refined, would ultimately be burned.[72] By insisting that the assessment extend beyond the narrow frame of operational emissions, the Court underscored that the legitimacy of decision-making hinges on a "systematic and comprehensive" evaluation of all significant effects.[73]

In India, the National Green Tribunal has observed in a public interest litigation, *Ridhima Pandey v. Union of India*, that the existing EIA framework already encompasses climate change considerations.[74] This position is under challenge before the Supreme Court,

[59] Department for Energy Security, 'Environmental Impact Assessment (EIA) – Assessing Effects of Downstream Scope 3 Emissions on Climate' (June 2025) <https://assets.publishing.service.gov.uk/media/6853fa3d1203c00468ba2b15/Supplementary_guidance_-_Effects_of_Scope_3_Emissions.pdf> accessed 15 November 2025.

[60] 'NSW and QLD join WA in developing tougher guidelines to assess the greenhouse gas emissions of projects' (HSF Kramer, 13 June 2024 <https://www.hsfkramer.com/notes/energy/2024-posts/NSW-and-QLD-join-WA-in-developing-tougher-guidelines-to-assess-the-greenhouse-gas-emissions-of-projects> accessed 17 November 2025.

[61] Ministry of Environment, Forests and Climate Change (India), Environmental Impact Assessment Notification 2006 (14th September 2006), SO 1533(E), Appendix II, Form-1 A [51].

[62] *Center for Biological Diversity v National Highway Traffic Safety Administration*, 538 F.3d 1172 (9th Cir. 2008).

[63] *Barbone and Ross (on behalf of Stop Stansted Expansion) v Secretary of State for Transport* [2009] EWHC 463.

[64] *Greenpeace Nordic & Young Friends of the Earth Norway v The Norwegian State, Supreme Court of Norway*, HR-2020-2472-P, Decision of 22 December 2020.

[65] Verfassungsgerichtshof [Constitutional Court], E 875/2017 and E 886/2017 (2 August 2017).

[66] *Greenpeace New Zealand v Northland Regional Council* [2007] NZRMA 87.

[67] *Earthlife Africa Johannesburg v Minister of Environmental Affairs* (case 65662/2016) [2017] ZAGPPHC 58, [2017] 2 ALL SA 519 (GP) (8 March).

[68] *Australian Conservation Foundation v Latrobe City Council* (2004) 140 LGERA 100, pp 43-47.

[69] *Ridhima Pandey v Union of India* 2019 SCC OnLine NGT 843.

[70] Republic of Colombia, Constitutional Court, Order No. D-15.447 (Jan. 12, 2024).

[71] *R (on the application of Finch) v Surrey County* Council [2024] UKSC 20 (*Finch*).

[72] ibid [83]-[92], [174].

[73] ibid [62].

[74] *Ridhima Pandey* (n 69).

which in 2025 has sought the government's response on the need for clearer, more comprehensive guidelines across projects.[75] Collectively, these reflect a mosaic of decisions which in different capacities reflect a converging picture: interpreting existing domestic and international instruments to integrate climate harm in it.

Even where courts or legislators have been silent, administrative practice has moved in a similar direction. In China, neither the 2002 Environmental Assessment Law nor its regulations expressly refer to climate change.[76] Yet guidance from the Ministry of Environmental Protection has instructed technical reviewers to assess the feasibility of emission reduction measures and to treat carbon dioxide as an air pollutant in strategic assessments.[77] While coverage remains uneven, studies suggest that roughly one-fifth of Chinese Strategic Environmental Assessments (SEAs) already include some appraisal of GHG emissions. This is practice evolving in fact, if not yet in law.

B. TREATY PROVISIONS & MULTILATERAL PROCESSES

Domestic practice does not exist in isolation. It both reflects and reinforces a parallel development at the international level, where treaty frameworks and multilateral processes have progressively embedded climate assessment within the architecture of environmental due diligence. This dimension of the evidentiary record has received less systematic attention than domestic practice,[78] but it is in several respects more probative, particularly for *opinio juris*. Notably, the UNFCCC,[79] the Paris Agreement,[80] and the Sustainable Development Goals,[81] collectively point to an expectation that States incorporate climate dimensions into planning.

Parallel developments in other treaty regimes strengthen this trajectory. The Espoo Convention, though primarily focused on localised cross-border impacts, has gradually opened the door to climate considerations.[82] Guidance adopted under the Convention[83] and subsequent practice by UNECE Member States[84] highlight climate change as an important aspect under EIAs. The Kiev Protocol on Strategic Environmental Assessment took this one step further, explicitly framing SEAs as a tool for integrating climate mitigation and adaptation into national and regional plans.[85] These processes, reinforced by panel discussions[86] and

75 *Ridhima Pandey v. Union of India*, 2025 SCC OnLine SC 3115.
76 Environmental Assessment Act, 2002 (China).
77 Technical Guidelines for Strategic Environmental Assessment: General principles, HJ 130-2014 (2014), A6.
78 Mayer (n 50); Zahar (n 51).
79 UNFCCC (n 38).
80 Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79.
81 United Nations General Assembly, "Transforming Our World: The 2030 Agenda for Sustainable Development, A/RES/70/1" (25 September 2015).
82 Espoo Convention (n 18).
83 UNECE, 'Guidance on the Practical Application of the Espoo Convention' (2006) UN Doc ECE/MP.EIA/8, para 26.
84 UNECE, 'Report of the Meeting of the Parties to the Convention on its seventh session and of the Meeting of the Parties to the Convention serving as the Meeting of the Parties to the Protocol on its third session' (2017) UN Doc ECE/MP.EIA/23–ECE/MP.EIA/SEA/7, [53]-[62].
85 Kiev Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary context (adopted 21 May 2003, entered into force 11 July 2010) 2685 UNTS 140.
86 UNECE, 'Information on panel discussion on the role of the Protocol and the Convention in addressing climate change' (2017) UN Doc ECE/MP.EIA/2017/INF.10.

workplans at UNECE meetings,[87] indicate that States increasingly treat climate assessments as a necessary part of due diligence. Though these are regional treaty regimes, they reinforce the broader evidentiary record that States increasingly regard climate impact assessment as a component of their due diligence obligations, even if the precise scope of those obligations continue to vary across jurisdictions.

Broader environmental treaties also lend support. Article 206 of UNCLOS obliges States to evaluate activities likely to cause substantial pollution of the marine environment: an obligation that has been read by the ITLOS to encompass emissions contributing to ocean warming and acidification.[88] Similarly, provisions under the Convention on Biological Diversity such as Article 14(1)(a),[89] which call for assessments of activities with adverse impacts on ecosystems as a whole, have been considered to include impacts from gaseous emissions.[90] Together, these overlapping treaty regimes provide evidence that States are beginning to regard climate impact assessment as a legal duty, edging closer to *opinio juris* at the global level.

Treaties may offer evidence of CIL, even when a treaty is not yet in force.[91] As the ILC has emphasised, provisions in widely supported treaties may reflect or crystallise customary norms if they embody principles that States regard as legally binding.[92] The Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ),[93] which has been adopted by 193 UN Member States, and ratified by 88, offers such an instance. Its text obliges future State Parties to ensure that *cumulative impacts* are assessed and evaluated whenever an environmental impact assessment is conducted. Crucially, the BBNJ text defines cumulative impacts to include:

> "[T]he combined and incremental impacts resulting from different activities ... or from the repetition of similar activities over time, and the consequences of climate change, ocean acidification and related impacts".[94] (emphasis added)

What makes the BBNJ text particularly significant for CIA is not only the inclusion of climate-related harms in its definition, but also the way States have invoked it in international fora. Submissions to the ICJ & ITLOS by countries such as Norway,[95] Belize,[96] and

87 'Minsk Declaration', in UNECE, 'Decisions and the Declaration adopted jointly by the Meetings of the Parties to the Convention and the Protocol' (2017) UN Doc ECE/MP.EIA/23.Add.1 ECE/MP.EIA/SEA/7.Add.1.

88 United Nations Convention on the Law of the Sea (adopted on 10 December 1982, entered into force on 16 November 1994) 1833 UNTS 397 (UNCLOS) art 206; International Tribunal for the Law of the Sea, Advisory Opinion on Climate Change (21 May 2024) Case No 31, [352]-[353].

89 CBD (n 38) art. 14.

90 Glowka (n 48); *see also* CBD Secretariat, 'COP Decision VIII/28: Impact assessment: Voluntary guidelines on biodiversity-inclusive impact assessment' (2006) UNEP/CBD/COP/8/27/Add.2.

91 Draft Conclusions (n 13) Conclusion 11.

92 ibid.

93 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 (adopted on 19 June 2023, entered into force on 19 September 2025) (BBNJ Agreement).

94 ibid art. 6.

95 Written Statement of Kingdom of Norway (Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change, ITLOS, 2024) https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-5-Norway_01.pdf accessed 16 November 2025.

96 Written Statement of Belize (Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change, ICJ, 24 March 2022) <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240321-wri-09-00-en.pdf> accessed 18 November 2025.

members of the European Union[97] expressly referenced the BBNJ Agreement to argue that CIAs are embedded within the due diligence obligation under international law. This demonstrates that States view the BBNJ provisions not as aspirational, but as reflective of a broader customary duty.

C. SUBMISSIONS MADE TO INTERNATIONAL COURTS AND TRIBUNALS

The submissions made by States in the advisory opinion proceedings before the ICJ and ITLOS constitute a particularly significant, and underutilised, source of both State practice and *opinio juris*. As for *opinio juris,* the decisive criterion is whether a State frames its position as one of convenience or as one of legal obligation.[98] When a pleading asserts that "international law requires" or "the principle is binding upon all States," it moves the immediate proceedings and reflects a genuine claim of law.[99] In disputes such as *Pulp Mills on the River Uruguay*[100] and the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*,[101] States repeatedly argued that they were legally bound by the "no-harm principle".[102] Even where the factual or procedural outcome did not turn on that point, the consistency of States framing the principle as a matter of law has strengthened its status as customary law.

Not all submissions are equal: many pleadings are tailored narrowly to litigation strategy, and the ICJ itself is cautious in attributing broader legal meaning to every claim advanced in court.[103] Yet when States consistently anchor their arguments in a conviction of legal necessity, the cumulative record of such submissions is a powerful source of *opinio juris*.

At the same time, such pleadings are not confined to the domain of *opinio juris* alone. As forms of official statements made on the international plane, including claims advanced before international courts and tribunals, they may also constitute a species of State practice.[104] Contemporary understandings of practice recognise that executive conduct encompasses not only material acts "on the ground," but also formal expressions of position in legal proceedings, alongside legislative, administrative, and treaty-related conduct. In this sense, submissions before international courts form part of the broader spectrum of State conduct through which legal norms are articulated, defended, and operationalised. The Court, in turn, reads these pleadings in conjunction with other materials, such as General Assembly resolutions, domestic legislation, and actual State conduct, to assess whether they form part of a sufficiently general and consistent recognition of legal obligation.[105]

In the case of the ICJ and ITLOS AOs, the breadth of participation, spanning Small Island Developing States (SIDS), African and Asian States, European countries, regional

97 Written Statement of Europe (Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change, ITLOS, 2024) <https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-9-EU.pdf> accessed 16 November 2025.
98 Draft Conclusions (n 13) Conclusion 10.
99 ibid Conclusion 13.
100 *Pulp Mills* (n 10).
101 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.
102 Brent (n 46).
103 KJ Heller, 'Specially-Affected States and the Formation of Custom' (2018) 112(2) American Journal of International Law 191-243.
104 Draft Conclusions (n 13) Conclusion 6.
105 ibid.

organisations, and NGOs,[106] demonstrates a striking convergence around CIAs as a core component of the duty of prevention.

At the ICJ, unlike the IACtHR, the questions submitted by the UNGA did not explicitly concern the obligation to integrate climate harms into EIAs. However, more than 25 nations made submissions on CIAs, in different capacities. Most nations rooted this obligation in CIL, as a part of the broader duty of prevention in environmental law, drawing attention to the standard of due diligence that has to be exercised in preventing harms from anthropogenic GHG emissions. They further emphasised on the need for cooperation between the State, through sharing of information, undertaking of CIAs and the duty to consult and notify with concerned States. This includes Burkina Faso, Chile, COSIS, Costa Rica, Egypt, France, Gambia, Ghana, Kenya, Mexico, Namibia, Nepal, Seychelles, South Korea, Thailand, and Vanuatu, among others.[107]

Most States, including Belize, Bangladesh, Kenya, and Vanuatu, consider this to be a continuous obligation of monitoring climate harm, verifying the harm caused, checking how mitigation measures are actually working, and updating the approach as conditions change.[108] Below, we look at some interesting insights from these submissions, beyond the largely consistent convergence on the existence of the duty.

Some States grounded the duty to conduct CIA in existing treaty regimes. Mauritius linked CIAs to obligations under the UNFCCC and Paris Agreement, urging their expansion to cover Scope-3 emissions.[109] Similarly, Timor Leste noted that Article 14(1)(a) of the CBD requires parties to undertake EIAs for minimization of significant adverse impact on the biological diversity, which could be linked to broader climate harms.[110]

Other States developed complementary doctrinal moves. Albania insisted that the impossibility of precise attribution does not dilute the necessity of EIAs.[111] Instead, EIAs should be adapted to capture transboundary and extraterritorial GHG harms, ensuring that diffuse causation does not become a loophole.[112] The Netherlands went further, asserting that causal certainty is unnecessary and it suffices that an activity may cause significant harm

106 Marie-Claire Cordonier Segger and Markus Gehring, 'Climate Justice through International Courts and Tribunals: Advisory Opinions in the International Tribunal on the Law of the Sea (ITLOS), the Inter-American Court of Human Rights (IACtHR) and the International Court of Justice (ICJ)' (2025) Cambridge Law Research Paper Series No 4/2025.

107 Written Statements of States: Burkina Faso, Chile, COSIS, Costa Rica, Egypt, France, Gambia, Ghana, Kenya, Mexico, Namibia, Nepal, Seychelles, South Korea, Thailand, and Vanuatu (Request for an Advisory Opinion on the Obligations of States in respect of Climate Change, ICJ, 2024) <https://www.icj-cij.org/case/187> accessed 18 November 2025.

108 Written Statements of States: Belize, Bangladesh, Kenya and Vanuatu (Request for an Advisory Opinion on the Obligations of States in respect of Climate Change, ICJ, 2024) <https://www.icj-cij.org/case/187> accessed 18 November 2025.

109 Written Statement of Mauritius (Request for an Advisory Opinion on the Obligations of States in respect of Climate Change, ICJ, 22 March 2024) <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-21-00-en.pdf> accessed 18 November 2025.

110 Written Statement of Timor-Leste (Request for an Advisory Opinion on the Obligations of States in respect of Climate Change, ICJ, 22 March 2024) <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-44-00-en.pdf> accessed 18 November 2025.

111 Written Statement of Albania (Request for an Advisory Opinion on the Obligations of States in respect of Climate Change, ICJ, 21 March 2024) <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240321-wri-07-00-en.pdf> accessed 18 November 2025.

112 ibid.

through lifecycle emissions.[113] Namibia introduced a forward-looking element, urging EIAs to quantify GHG emissions and serve as tools for guiding national energy transition planning.[114] Similarly, Sierra Leone proposed minimum content requirements: quantification of GHGs, assessment of social and environmental impacts, and continuous review throughout a project's lifecycle.[115]

Belize's submission is distinctive because it pushes the conversation on CIAs well beyond the usual project-level focus. Instead of treating greenhouse gas emissions as a standalone issue, it argues that they must be considered in relation to three wider contexts: the State's past emissions, its projected future emissions, and the overall global emissions trajectory that determines how much carbon space remains.[116] By framing EIAs this way, Belize links the duty to prevent harm directly to the reality of climate thresholds, making the assessment not just about a single project but about a State's role in the global effort to stay within safe limits.

Other contributions by international organisations pushed the boundaries even further. The IUCN argued that EIAs must cover the global impacts of fossil fuel extraction and export, and that such duties are owed to the international community as a whole, thereby extending the prevention principle to scope-3 emissions and *erga omnes* obligations.[117] The African Union broadened the terrain by calling for strategic impact assessments of policies, such as oil and gas licensing, ensuring that climate is integrated not only at the project level but also in policymaking.[118]

Even in the ITLOS AO proceedings,[119] several States emphasised the role of EIAs in addressing climate-related harms. The Democratic Republic of Congo highlighted the general

113 Written Statement of Netherlands (Request for an Advisory Opinion on the Obligations of States in respect of Climate Change, ICJ, 22 March 2024) <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240321-wri-14-00-en.pdf> accessed 18 November 2025.

114 Written Statement of Namibia (Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change, ICJ, 19 March 2024) <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240319-wri-06-00-en.pdf> accessed 18 November 2025.

115 Written Statement of Sierra Leone (Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change, ICJ, 15 March 2024) <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240315-wri-02-00-en.pdf> accessed 18 November 2025.

116 Written Statement of Belize (Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change, ICJ, 24 March 2022) <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240321-wri-09-00-en.pdf> accessed 18 November 2025.

117 Written Statement of International Union for Conservation of Nature (IUCN) (Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change, ICJ, 19 March 2024) <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240319-wri-02-00-en.pdf> accessed 18 November 2025.

118 Written Statement of African Union (Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change, ICJ, 22 March 2024) <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-10-00-en.pdf> accessed 18 November 2025.

119 Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change, ITLOS, 2024.

relevance of CIAs,[120] while New Zealand,[121] Norway,[122] and the European Union[123] each drew attention to the new BBNJ Agreement, particularly its requirement to assess "cumulative impacts".[124] The EU[125] further stressed that ocean acidification, driven by carbon dioxide emissions, must be integrated into EIAs under UNCLOS Article 206.[126] Mauritius, in turn, linked UNCLOS obligations on publicity and reporting to the transparency framework of the Paris Agreement, underscoring that assessments of greenhouse gas emissions should be made publicly available and improved to include metrics that capture both ocean acidification and broader climate impacts, as well as Scope-3 emissions where they are most significant.[127]

These treaty frameworks and State submissions collectively reveal that CIAs are no longer framed as optional good practice, but as an obligation articulated in terms of due diligence.

D. ADDRESSING OBJECTIONS

Existing analyses of State practice on CIA have largely drawn on domestic sources, and have acknowledged that the *opinio juris* base remains thin.[128] On this basis, some authors have criticised these conclusions, and suggested that there is a lack of general, and sufficient practice.[129]

This section departs from that approach in two significant ways: first, it adopts a broader conception of State practice, that is not limited to domestic conduct, but encompasses a State's international legal position, including its participation in treaty negotiations, and its submissions before international courts and tribunals. When we take into account the position of States at multilateral negotiations of widely-accepted treaties like the UNFCCC, the Paris Agreement, and the BBNJ Treaty, as well as the numerous submissions made in front of international tribunals, the evidentiary base widens, and reveals a broader convergence.

Second, this is not confined to specific regions, but spans all major geographic groupings, including North America, Latin America, Europe, Africa, Asia, and the Pacific Island countries. While the precise formulation of obligations may vary across jurisdictions: there is

120 Written Statement of Democratic Republic of the Congo (Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change, ITLOS, 2024) <https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-1-RD_Congo_translation_ITLOS.pdf> accessed 16 November 2025.

121 Written Statement of New Zealand (Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change, ITLOS, 2024) <https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-3-New_Zealand.pdf> accessed 16 November 2025.

122 Written Statement of Kingdom of Norway (Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change, ITLOS, 2024) <https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-5-Norway_01.pdf> accessed 16 November 2025.

123 Written Statement of European Union (Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change, ITLOS, 2024) <https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-9-EU.pdf> accessed 16 November 2025.

124 BBNJ Agreement (n 93).

125 European Union (n 123).

126 UNCLOS (n 88) art 206.

127 Written Statement of Republic of Mauritius (Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change, ITLOS, 2024) <https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-12-Mauritius.pdf> accessed 16 November 2025.

128 Mayer (n 50).

129 Zahar (n 51); Peel (n 52).

convergence on a common principle: that climate-related harms ought to be assessed as part of decision-making processes.

It is conceded that the picture is far from uniform. For instance, a great number of States have not addressed EIAs in their submissions at all. Three States have, in fact, argued against the duty of CIA. The United States took an extreme stance by refuting the existence of the general duty under CIL to conduct an EIA in all instances of a risk of significant transboundary harm,[130] which is contrary to existing jurisprudence as elaborated in Chapter II. On the other hand, Australia and Kuwait,[131] echoed a general concerns of certain States,[132] by contending that the obligations of States with respect to climate is limited to the specialised treaty regime, including the UNFCCC and the Paris Agreement, and it cannot be said that CIL has developed on this subject (the *lex specialis* argument).[133] Further, Australia noted that the broader principle of prevention has only been applied in the context of transboundary cases, and its logic must not be extended to consequences of climate change, which are more diffuse.

However, the criticism that identified practice is insufficiently widespread or general must be treated with caution. The threshold for a norm to be considered CIL is not that of universality, but of sufficiently widespread and representative practice.[134] In *Military and Paramilitary Activities in and against Nicaragua*, the ICJ noted that the conduct of States need not be in "rigorous conformity" with the rule, but must be generally consistent.[135] Even if there is a breach of such consistency, it does not prevent a general practice from being established.[136]

In this context, the absence of express engagement by certain States cannot be equated with a lack of support for the norm. A significant number of States did not address climate impact assessment in their submissions, not as a matter of opposition, but because the questions before the Court did not explicitly require them to do so.[137] Similarly, divergence by a few States also does not undermine the formation of a custom. The existence of a limited number of States contesting the norm does not negate the presence of sufficiently general practice.[138] The obligation to conduct an EIA itself provides a clear illustration: despite sustained resistance from the United States, the ICJ has affirmed the existence of such an obligation under CIL.[139]

In any case, the arguments provided by Australia or Kuwait do not pass muster upon legal scrutiny. First, the *lex specialis* argument is a manifestation of the anxiety of some States

130 Written Statement of United States of America (Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change, ICJ, 22 March 2024) <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-06-00-en.pdf> accessed 18 November 2025.

131 Written Statement of Australia (Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change, ICJ, 26 March 2024) <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240326-wri-02-00-en.pdf> accessed 18 November 2025; Kuwait, Written Statement (Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change, ICJ, 22 March 2024) <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-14-00-en.pdf> accessed 18 November 2025.

132 Certain States invoked the *lex specialis* principle specialised climate treaties like the UNFCCC should govern exclusively or primarily state obligations in respect of climate change, thereby limiting or excluding the application of other rules of international law (such as human-rights law, law of the sea, customary international law) in this field. See Obligations of States in respect of Climate Change (Request for Advisory Opinion), Advisory Opinion, ICJ, 23 July 2025 <https://www.icj-cij.org/case/187> (ICJ AO), [410]-[414].

133 Australia (n 131) [4.11].

134 Draft Conclusions (n 13) Conclusion 8, 137.

135 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 98 [186].

136 Draft Conclusions (n 13) Conclusion 8, 137-138.

137 UNGA Res 77/276 (29 March 2023) UN Doc A/RES/77/276.

138 Draft Conclusions (n 13) Conclusion 8, 137.

139 Chapter II.

to characterise climate treaties as carefully negotiated, consent-based regimes built on flexibility that may allow them to circumvent promises.[140] However, as recognised by Marko Milanovic, *lex specialis* "is nothing more than a sub-species of harmonious interpretation, a method of norm conflict avoidance".[141] This understanding has fed into the ICJ's holding where it notes that the principle of *lex specialis* applies in cases of inconsistency between rules, and where several rules coexist on a subject, they should be interpreted to give rise to a single set of compatible obligations.[142] Such systemic integration clarifies that CIAs do not impose any inconsistent or additional substantive obligations beyond the treaty regime, but merely supplement, and operationalise the existing commitments under the UNFCCC, or the Paris Agreement.[143]

Second, the contention that the principle of prevention is confined to classical transboundary harm situations fails to appreciate its evolutionary character.[144] The diffuse, and cumulative nature of climate change may complicate attribution, but it does not negate the risk of the harm. Affirming this, the ICJ squarely noted that the causation of damage is not a prerequisite for the determination of State obligations, and responsibility, and it is only a legal concept that facilitates the determination of reparations.[145]

Perhaps a more scathing critique of the obligation to conduct CIA comes from Alexander Zahar who characterises it as an "illogical procedure" or "senseless".[146] He advances three principal objections to the acceptance of CIA as a legal obligation. First, CIAs cannot function like conventional EIAs because no individual project's emissions produce any tangible climate effect, leaving CIA to assess emissions alone. He argues that this substitution renders the exercise incoherent.[147] Second, this leads to what he calls a "Zenonian paradox": without a principled stopping point, CIA must be triggered for every project, from a coal mine to a streetlight, threatening to paralyse economic development entirely.[148] Third, he invokes the Market Substitution Postulate to argue that CIA is not merely incoherent but functionally futile, because fossil fuels respond to global demand rather than local supply decisions, no court can know whether approving or denying a project will alter total global emissions at all.[149]

None of these objections withstand scrutiny. First, the charge of "senselessness" is, at its core, a policy objection, and it does not engage with whether States have recognised and

140 Amirabbas Kiani, 'From 'Nuclear Weapons' to 'Climate Change': The ICJ's Approach to the *lex specialis* Maxim' (*Opinio juris*, 7 November 2025) accessed 20 March 2026.

141 Milanovic, Marko, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law', *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford, 2011); Milanovic's reading, that the *lex specialis* rule is akin to harmonious interpretation, rather than a simple rule of exclusion, is persuasive because of reasons that are internal to the logic of the rule. The exclusionary reading, that a specific regime entirely displaces general international law, would mean that any State party to a specialised treaty is insulated from the operation of customary international law in that domain entirely. The International Law Commission's work on fragmentation of international law confirms that even where *lex specialis* applies, it does not affect a wholesale displacement of general law but operates at the level of the specific rule in conflict. General international law, including the obligation to conduct CIAs, continues to apply to State Parties to climate treaties; the only question *lex specialis* could legitimately resolve is whether a specific treaty provision prevails over a specific conflicting rule of general law, and no such conflict has been demonstrated here. *See also* ILC, 'Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law' (18 July 2006) UN Doc A/CN.4/L.702.

142 ICJ AO (n 132) [165].

143 Kiani (n 140).

144 Brent (n 47).

145 ICJ AO (n 132) [433].

146 Zahar (n 51) 298.

147 ibid 299-301.

148 ibid.

149 ibid 302-305.

applied the obligation, which they have, as elaborated above. Second, and more fundamentally, Zahar's incoherence argument rests on a misapplication of the evidentiary standard: the operative question in CIL is not whether harm is immediately measurable, but whether significant adverse impact is reasonably foreseeable.[150] Given the unambiguous scientific consensus on cumulative emissions, that standard is readily satisfied, as elaborated upon in Chapter V.

Third, the Zenonian paradox only holds if CIA operates without any significance threshold, or benchmark, which no serious position claims. In practice, CIAs are triggered by a combination of thresholds, sectoral standards or benchmarks,[151] and a streetlight cannot trigger CIA, unless the emissions meet the prescribed thresholds. Finally, the Market Substitution Postulate is self-defeating within a due diligence framework: epistemic uncertainty about the downstream consequences of a project approval is precisely the reason rigorous assessment is required as a matter of precaution, not a justification for abandoning it. A State cannot discharge its CIL obligations by pointing to what another jurisdiction might do instead.

These objections, whether directed at the sufficiency of State practice, the *lex specialis* argument, or the procedural coherence of CIA itself, do not displace the emergent norm. The weight of the obligation is perhaps better gauged by its reception before international courts and tribunals, to which this paper now turns.

IV. The Judicial Chorus: Advisory Opinions of International Courts

The past few years witnessed a wave of requests for AOs, seeking clarity on State's responsibility for GHG emissions and climate change. These requests were framed in relation to human rights, protection of the oceans, and broader questions of State responsibility. AOs are legal opinions made at the request of authorised States or organizations, that are not binding and do not stem from specific disputes between nations.[152] They have nonetheless come to be seen as authoritative pronouncements of law.[153] The role of these opinions is to fill the gap for a fragmented legal framework and to provide clarity where there is ambiguity in international law.[154]

The AOs, recently delivered by ITLOS, IACtHR and ICJ, mark a turning point for how international law engages with climate change. Their influence is heightened by the unusually broad participation of States, international organizations, and civil society in the proceedings that preceded them, giving the opinions strong legitimacy and global resonance. For instance, the UNGA Resolution seeking ICJ's AO was drafted by 18 States, and voted in favour for by 130 States.[155] In addition, the opinions bring equity concerns to the fore, providing SIDS, and other climate-vulnerable States with possible legal bases for pressing claims

150 Draft Articles on Prevention of Transboundary Harm (n 43) 157-158.
151 Chapter V.B.
152 International Court of Justice, *Advisory Jurisdiction*, <https://www.icj-cij.org/advisory-jurisdiction> accessed 4 October 2025.
153 Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, OUP, 2012).
154 ibid.
155 United Nations General Assembly (n 137).

against major emitters from the Global North or for strengthening their position in negotiations over compensation and assistance.[156]

A common thread across these AOs is the treatment of EIAs as a core element in mitigating climate change. While none of the opinions speaks in identical terms, each engages, directly or indirectly, with the idea that EIAs must capture GHG emissions and their consequences beyond the national boundaries of a State.

A. THE INTERNATIONAL COURT OF JUSTICE

In 2023, the UNGA through Resolution 77/276 invoked the advisory jurisdiction of the ICJ to seek clarification on two carefully drafted questions concerning: *first*, the obligations of States under international law to protect climate system from anthropogenic emissions, and *second*, the legal consequences for acts and omissions that cause significant harm to the climate as an ecosystem, with respect to vulnerable States (like SIDS), and peoples of present and future generations.[157] The resolution was the culmination of a long-drawn campaign by Vanuatu and a coalition of SIDS, which was later sponsored by about 130 nations.[158]

The ICJ in its opinion, acknowledged the "urgent and existential threat posed by climate change"[159] and identified the most directly relevant applicable law, including treaty law and CIL.[160] Under CIL, the Court recognised the existence of twin duties, to prevent significant environmental harm[161] and to cooperate for the protection of the environment.[162] Consistent with its earlier jurisprudence,[163] the ICJ clarified that the standard for preventing significant harm is the duty of due diligence: a standard that is inherently flexible and evolves in proportion to the degree of risk in a given case, taking into account the circumstances, available technology and the different capabilities of States. Within this duty to exercise due diligence, the Court situates the procedural obligation to conduct an EIA.

Significantly, the Court extends this duty in the context of climate change. It expressly recognises that "risks posed by climate change have certain features that may affect the appropriateness of certain forms of environment risk assessment".[164] By doing so, the Court departs from a strictly transboundary framing of EIAs, as the duty is not confined to situations of significant adverse cross-border impacts, but is instead anchored in a general obligation to assess risks of significant harm to the climate and ecosystems as a whole.[165] The diffuse and global nature of climate harm therefore shifts the trigger for assessment from harm to another State to the broader risk of climate-related harm to the global environment.[166]

156 Antoine De Spiegeleir, 'Sea-Level Rise Reaches the Hague' (*Verfassungsblog*, 4 August 2025) <https://verfassungsblog.de/law-of-the-sea-in-the-icjs-climate-change-advisory-opinion/> accessed 4 October 2025.
157 ibid.
158 Cordonier Segger & Gehring (n 106).
159 ICJ AO (n 132) [73].
160 ibid [114].
161 ibid [271].
162 ibid.
163 *Pulp Mills* (n 10).
164 ICJ AO (n 132) [298].
165 ibid.
166 Federica Paddeu and Miles Jackson, 'State Responsibility in the ICJ's Advisory Opinion on Climate Change' (*EJIL:Talk!*, 25 July 2025) <https://www.ejiltalk.org/state-responsibility-in-the-icjs-advisory-opinion-on-climate-change/> accessed 4 October 2025.

As noted in *Pulp Mills*[167] and *Certain Activities*,[168] the States retain discretion and a margin of appreciation to determine its domestic legislation or project authorization process to determine the specific content of the EIAs. Yet, the ICJ's opinion sets important minimum thresholds and guardrails, as EIAs must be informed by "best available science",[169] systematic in their approach, and oriented specifically to climate effects.

The Court allows that States may reasonably adopt generalised procedures (such as sectoral reviews or economy-wide mechanisms), but it simultaneously insists on specific, project-level assessments where "particularly significant proposed individual activities" are likely to contribute substantially to GHG emissions.[170] In this way, the obligation remains judicially enforceable. A State that authorises large-scale projects without any meaningful assessment of their GHG risks would not meet the due diligence standard, even if it claimed reliance on general procedures.

That said, the ICJ's AO has not escaped criticism. Judge Yusuf's Separate Opinion notes that the Court failed to settle on a definite characterisation of the precautionary principle, which is the foundational norm for any impact assessments.[171] Further, Vice President Sebutinde's concern regarding the marginalisation of the principle of common but differentiated responsibilities compounds this: a due diligence standard that ignores the relative asymmetry between high-emitting States, and vulnerable SIDS risks abandoning meaningful enforcement of the obligation.[172] More broadly, as Judge Bhandari notes, the Court's preference for abstract propositions over concrete consequences leaves little practical relief to the injured, and specially affected States.[173] These compel us to be cautious about the transformative potential of the AO.

B. THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

In December 2022, the COSIS made up of six States from the Caribbean and Pacific, asked ITLOS for an AO.[174] Their request was framed around a straightforward but pressing question: what do the environmental obligations in UNCLOS actually require States to do in the face of climate change?[175] It sought clarity on present and ongoing duties, particularly as GHG emissions drive ocean warming, sea-level rise, and acidification.[176]

The request had two clear aims. First, to confirm that the harmful effects of climate change on the oceans qualify as "pollution of the marine environment" within the meaning of

167 *Pulp Mills* (n 10).
168 *Certain Activities* (n 15) [104].
169 ICJ AO (n 132) [298].
170 ibid.
171 Separate Opinion of Judge Yusuf, Obligations of States in respect of Climate Change (Request for Advisory Opinion), Advisory Opinion, ICJ, 23 July 2025 <https://www.icj-cij.org/case/187> accessed 10 May 2026 [49].
172 Separate Opinion of Vice-President Sebutinde, Obligations of States in respect of Climate Change (Request for Advisory Opinion), Advisory Opinion, ICJ, 23 July 2025 <https://www.icj-cij.org/case/187> accessed 10 May 2026 [11].
173 Separate Opinion of Judge Bhandari, Obligations of States in respect of Climate Change (Request for Advisory Opinion), Advisory Opinion, ICJ, 23 July 2025 <https://www.icj-cij.org/case/187> accessed 10 May 2026.
174 'International Law (Request for an Advisory Opinion of 12 December 2022)' (*ITLOS*, 12 December 2022) <https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf> accessed 2 October 2025.
175 Constantinos Yiallourides and Surya Deva, 'A Commentary on ITLOS' Advisory Opinion on Climate Change' (*British Institute of International and Comparative Law*, 24 May 2024) <https://www.biicl.org/blog/77/a-commentary-on-itlos-advisory-opinion-on-climate-change> accessed 4 October 2025.
176 Request by COSIS (n 174).

Part XII of UNCLOS. Second, to spell out the specific legal responsibilities that flow from that recognition.[177] More than 50 States, international organisations, and civil society groups joined the proceedings with written and oral submissions.[178] Many of them stressed that UNCLOS could not be read as frozen in time in 1982, but had to be interpreted against today's science and the very real threats climate change poses to the marine environment.[179]

In its AO, ITLOS explicitly recognised that GHG emissions fall within the scope of "pollution of the marine environment" under UNCLOS.[180] More than just semantics, it brought climate change directly within the framework of Part XII obligations.[181] Crucially, ITLOS clarified that the general duty of prevention, coupled with the due diligence standard, obliges States to integrate climate-related considerations into their environmental impact assessments.[182]

The ITLOS AO treats the EIA obligation under Article 206 of UNCLOS as "crucial"[183] to the protection of the marine environment and places it squarely within CIL. The Court underlined that the obligation reflects a general rule of international law, consistent with earlier jurisprudence,[184] thereby moving EIAs from a treaty-based duty to a broadly binding norm.

The Tribunal clarified the operational content of the duty. It must be carried out prior to the implementation of a project,[185] and it applies equally to activities planned by States and private entities under their jurisdiction or control.[186] The notion of "jurisdiction or control" was interpreted broadly: it extends to land-based projects as well as marine activities, and to any space where the State exercises competence under international law.[187] Importantly, the threshold that triggers an assessment arises where there are "reasonable grounds for believing"[188] that an activity may cause substantial pollution or significant harmful change. ITLOS insisted that this standard is an objective one, grounded in facts and scientific knowledge, and that the harm in question can be potential rather than actual.[189]

When turning to climate change specifically, ITLOS was forthright, that whatever threshold is adopted for triggering an EIA, it is effectively always met when an activity contributes to anthropogenic GHG emissions. Since such emissions, by their very nature, have significant adverse effects on the marine environment, the obligation to assess is automatically engaged.[190] This recognition effectively raises the baseline expectations on States when authorizing emissions-generating projects, pushing them to embed climate considerations into project design, approval, and monitoring.

177 ibid.
178 ibid.
179 Mauritius (n 109).
180 *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Advisory Opinion) ITLOS Reports 2024, 31 <https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_corr.pdf> accessed 10 May 2026.
181 UNCLOS (n 88) Part XII.
182 ITLOS AO (n 180) [352]-[353].
183 ibid.
184 ibid.
185 ibid [358].
186 ibid.
187 ibid [360].
188 ibid [361].
189 ibid.
190 ibid [360]-[365].

Finally, the Tribunal stressed the informational function of EIAs. One of the most effective means of protecting the marine environment, it observed, lies in sharing information and scientific results about risks.[191] This goes with the idea that EIAs are not merely internal exercises for States, but part of a wider architecture of cooperation and transparency. In the context of climate change, this means assessments should provide data on emissions, anticipated climate impacts, and mitigation measures, enabling other States and stakeholders to understand and respond to transboundary risks.

Taken together, ITLOS's opinion re-imagines the assessment obligation as a seminal legal tool for climate integration. It does so by lowering the threshold for triggering an assessment, embedding precaution, widening the scope to cumulative and socio-economic impacts, treating GHG emissions as inherently assessment-worthy, and tying the process to information-sharing duties.

C. THE INTER-AMERICAN COURT OF HUMAN RIGHTS

In January 2023, Chile and Columbia filed a request for an AO on the obligations of States to respond to the "climate emergency" under international human rights law. The request recognised the disproportionate impact of climate change across the international community, especially on the communities which are vulnerable owing to their geography, climatic conditions and socio-economic status.[192] The request sought to clarify the relationship between climate change and human rights, and particularly to expand on specific obligations under the Inter-American Convention on Human Rights.[193]

The Court's opinion delivered in July 2025 noted that the climate crisis directly undermines a wide spectrum of rights, particularly those of vulnerable groups such as Indigenous peoples, Afro-descendant communities, rural populations, and children, whose protection requires heightened diligence.[194] It further held that this duty extends across all 34 member States of the Organization of American States, including Canada and the United States, framing climate protection as a shared legal responsibility.[195]

The Inter-American Court emphasises that an EIA becomes mandatory whenever a project poses a risk of significant environmental harm, and this threshold explicitly extends to impacts on the climate system.[196] A central innovation is the Court's requirement that projects generating significant GHG emissions must undergo a distinct CIA. This is not subsumed within a general EIA but must exist as a separate, identifiable section. By doing so, the Court

191 ibid [367].

192 Request for an Advisory Opinion on the Climate Emergency and Human Rights, submitted by the Republic of Colombia and the Republic of Chile, IACtHR OC-1/23 (9 January 2023) <https://corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf> accessed 3 October 2025.

193 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

194 José Daniel Rodríguez Orúe, 'Inter-American Court Says Countries Must Prevent Climate Harms' (*Human Rights Watch*, 7 July 2025) <https://www.hrw.org/news/2025/07/07/inter-american-court-says-countries-must-prevent-climate-harms> accessed 4 October 2025.

195 ibid.

196 *Climate Emergency and Human Rights*, Advisory Opinion OC-32/25, Inter-American Court of Human Rights (May 2025) [2].

ensures that climate impacts are not diluted within broader environmental considerations but receive targeted analysis.[197]

The Court further clarifies that such assessments cannot be left entirely to the discretion of the State, but must adhere to a minimum degree of structure. This includes clearly defining the scope of activities and impacts to be assessed, establishing a structured procedure for conducting climate impact evaluations, allocating responsibilities among project proponents and regulatory authorities, ensuring that the results meaningfully inform decision-making, and providing mechanisms to secure compliance with the assessment process.[198]

The Court highlights continuous monitoring of the climate effects as an ongoing obligation. Assessments must not only precede project approval but also establish mechanisms for continuous evaluation. This includes quantifying emissions, updating methodologies as science evolves, and verifying whether mitigation measures perform as intended.[199] In this respect, the Court embeds adaptability into the assessment process.

Equally, the Court insists on the involvement of affected groups, including indigenous communities, and respect for their knowledge systems.[200] By requiring public participation, the Court aligns the technical process of assessment with broader rights-based obligations.

The standard of State responsibility is elevated through what the Court terms "enhanced due diligence". In this regard, they "must take into account the best available science or knowledge, the mitigation strategy and goal that they must have previously defined, and the irreversible nature of the climate impacts".[201] This creates a layered threshold: the higher the potential harm, the stricter the obligations of assessment and oversight.

Importantly, the Court also warns against superficial compliance or "greenwashing".[202] It recognises the need for assessments to be carried out by technically competent, independent entities, and for regulatory frameworks to incorporate good practices drawn from comparative experience. This is designed to prevent assessments from mere paper writs without any effective disclosures.

Taken together, these elements reframe climate-sensitive EIAs as a structured legal tool, which can serve to tie project-level decision-making to the States' international commitments on climate change. The Court's approach does not eliminate the practical challenges of measurement and enforcement, but it removes any doubt that States have a binding duty to integrate climate impacts directly into the assessment process.

V. Convergence and Blind-spots of Climate Impact Assessments

Across the three AOs, there is a clear reiteration that EIAs are no longer a marginal administrative step but a core instrument of States' duty of prevention and due diligence, even in the climate context. Each tribunal insists assessments must be continuous, scientifically informed, and sensitive to cumulative and transboundary effects.

Yet the courts differ in emphasis and specificity. The ICJ frames EIAs within a flexible duty of due diligence: EIA obligations extend beyond classic transboundary cases and should

197 ibid [359].
198 ibid [361].
199 ibid.
200 ibid [362].
201 ibid [363].
202 ibid [360].

respond to the scale of climate risk, but States retain a margin of discretion as to how they implement assessments domestically.[203] ITLOS is more doctrinally assertive as it treats the assessment obligation under Article 206 of UNCLOS as reflective of CIL, applies it broadly to activities under a State's "jurisdiction or control" (including private projects), and signals that contributions to GHG emissions will generally trigger the duty.[204] The IACtHR is the most prescriptive: it expressly demands a separate, identifiable climate-impact section in assessments, detailed procedural rules, continuous monitoring, and enhanced due diligence.[205] However, it must be noted that the Inter-American Court's formulation is regionally focused and its findings are directed at OAS membership and carry the greatest immediate legal force in that regional system.[206]

There is meaningful convergence in substance. All three courts: (a) accept that EIAs must account for GHG emissions and cumulative effects; (b) insist on the role of the best available science and the precautionary approach; (c) require EIAs to be undertaken prior to authorisation and to include monitoring; and (d) treat transparency, information-sharing and stakeholder participation as central to the assessment regime. These commonalities provide powerful momentum toward recognising CIAs as part of customary due diligence.

But the AOs leave open some doctrinal blind-spots, which will determine how the norm crystallises in practice.

A. Determination of "Significant" Adverse Effect

First, there is uncertainty as to the determination of the threshold: the question of what counts as *significant* GHG emissions. This determination is central to the entire CIA process as it is firstly, the trigger for a comprehensive assessment, and secondly, useful in deciding on the merits of the project itself.[207] As noted by the ILC, the term "significant" depends on the factual context, and the "period in which such determination is made".[208] Therefore, this threshold is both contextual and continuously evolving. However, for the obligation to conduct a CIA to be concrete, there must be some objectivity with respect to this determination.

There is a deeper conceptual objection raised by Zahar, which he calls the "Achilles' heel" of the CIA obligation.[209] He argues that CIA fundamentally conflates two distinct concepts: a project's GHG emissions and its climate impacts. According to him, the trigger for an EIA (of which the CIA is a part) is an "impact" which is a detectable, localised or attributable harm, while CIA shifts the trigger to the "emissions" which are merely the *cause* of the impact, rather than the impact itself.[210] He suggests that since no individual project produces a detectable climate impact, a CIA has nothing legally cognisable to assess, and that substituting an "emissions test" for what must have an "impact test" renders the entire exercise incoherent.[211]

[203] ICJ AO (n 140) [298], citing *Pulp Mills* (n 10).
[204] ITLOS AO (n 180) [352]-[353].
[205] IACtHR AO (n 196) [361].
[206] ibid [2].
[207] Draft Articles on Prevention of Transboundary Harm (n 43) 405, [7]-[8].
[208] ibid.
[209] Zahar (n 51) 307.
[210] ibid.
[211] ibid 308.

This objection, however, conflates an epistemic limitation with a normative conclusion. The absence of a detectable marginal impact from a project does not imply that there are no environmental effects: it only reflects the limits of causal attribution at a particular *scale* of observation. The question is not whether harm is immediately and epistemologically measurable, but whether significant adverse impact is reasonably foreseeable. On that standard, climate effects are readily foreseeable given the unambiguous scientific consensus on cumulative emissions, even if they resist individual attribution.[212] A different interpretation would exonerate those projects from legal scrutiny, which are likely to contribute to structural and cumulative harms. This would run counter to the duty of due diligence.[213]

Normatively, "detectability" must move beyond human-centred spatial and temporal frames of measuring impacts locally or immediately. The threat of climate change is inherently geographically displaced and temporally delayed, and manifests through complex environmental systems, rather than locally evaluable causal chains.[214] The ICJ's rejection of the requirement of strict causation for State responsibility is an acknowledgement of this.[215]

But the question persists: what role do emissions play if they cannot stand in for impacts? Emissions are better understood not as a proxy for climate harm, but as an indicator of whether a project's authorisation is consistent with the State's existing mitigation obligations: its NDCs, carbon budgets, and CIL due diligence standard. The relevant question is therefore not whether the project will damage the climate, but whether it can be authorised without contradicting obligations the State is already bound by. This reorientation is reflected in how States have increasingly applied CIA in domestic practice.[216]

That said, Zahar's analysis exposes a genuine tension in CIA methodology: if the significance threshold is not constructed with sufficient rigour, CIAs risk becoming a performative accounting exercise. This tension is well-illustrated by two polar approaches. An inclusionary approach would treat any contribution to cumulative global harm as significant, capturing the systemic nature of climate change. The risk with the inclusionary approach it leads to imposition of the CIA obligation even on minor projects, which may amount to overregulation. Contrarily, an exclusionary approach, which restricts "significance" to individually large impacts, would risk ignoring the cumulative nature of climate harm.[217]

Neither pole is satisfactory on its own, and the determination of "significance" is better understood as an exercise involving multiple criteria. Thresholds of magnitude, such as projects falling within certain kilotons of CO_2 emissions, provide for an objective assessment, and are already employed in instruments such as the European Investment Bank's Carbon Footprint Methodologies.[218] However, their downside is that they overlook other indirect harms, that may be caused by the project which are not necessarily reflected in those indicators.[219] It may be prudent to supplement these thresholds with other criteria, such as lifecycle emission

212 Hoesung Lee and others, 'Climate Change 2023 Synthesis Report—Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change' (*IPCC*, 2023) <https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf> accessed on 23 February 2026.

213 ICJ AO (n 132) [298].

214 IPCC (n 212).

215 ICJ AO (n 132) [433].

216 Chapter III.A.

217 Mayer (n 50).

218 See for example European Investment Bank, 'EIB Project Carbon Footprint Methodologies' (January 2023) Version 11.3.

219 John Glasson, 'Principles and Purposes of Standards and Thresholds in the EIA Process' in Michael Schmidt and others (eds) *Standards and Thresholds for Impact Assessment: Environmental Protection in the European Union* (Springer 2008).

profiles, the project's relative efficiency to industry norms, and sector-specific thresholds. Similarly, benchmarks may also help contextualise a project's emissions by comparing them to empirically observed data, projected emissions, or sectoral standards.[220] Economic valuations, such as measurement of the "social cost of carbon" by the U.S. Interagency Working Group, is one tool that helps governments translate emissions into a monetary figure that can be compared with other costs and benefits.[221] The difficulty comes in putting a price on global climate harm, that often involves value-laden judgements, such as how to treat long term damage.[222]

Therefore, the significance threshold sits at the intersection of a factual, and a legal assessment, and is undergoing development through domestic practices, and institutional standards. Despite this indeterminacy, the emerging practice supports the recognition that an EIA which takes no account of climate impacts at all is increasingly difficult to reconcile with the CIL obligation of due diligence.

B. INDIRECT IMPACTS: DOWNSTREAM EMISSIONS & EXTRATERRITORIALITY

A second question that arises is: what are the limits of the climate impacts that are to be accounted for by EIAs? Should EIAs account for indirect effects such as downstream or Scope-3 emissions? For instance, should an EIA for a project related to fossil-fuel extraction or transport, include indirect emissions from the eventual combustion of those fuels, even if it is carried out by other entities?

This proposition is supported by the ITLOS AO which noted that "cumulative impacts" must be accounted for,[223] as well as domestic cases like the *Finch* case,[224] where the UK Supreme Court affirmed that there existed the "strongest possible form of causal connection" between oil extraction and downstream emissions related to fuel combustion. Similarly, while dealing with a legal challenge to an EIA conducted for three oil and gas extraction projects, the European Free Trade Association's Court's AO E-18/24 noted that a project proponent cannot defer or fragment impact assessment obligations across stages or linked activities, especially where cumulative or indirect effects from downstream emissions must be evaluated from the outset.[225] Further, as noted in Chapter III.B(ii), some States like Mauritius have also asserted that Scope-3 emissions must be accounted for in CIAs.[226]

The joint declaration of Judges Bhandari and Cleveland in the ICJ's Climate Change Advisory Opinion reinforces this position, affirming that obligations under the Paris Agreement and CIL due diligence require States to account for foreseeable downstream consequences of fossil fuel production, including Scope-3 emissions from combustion abroad.[227]

220 *DinéCitizens Against Ruining Our Environment v Haaland* (10th Cir 2023) 59 F.4th 1016 (10th Cir 2023) 1041–1042.
221 IWG-SCGHG, 'Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide: Interim Estimates under Executive Order 13990' (2021) <https://www.energy.gov/sites/default/files/ 2024-06/129.%20Interagency%20Working%20Group%20on%20Social%20Cost%20of%20Greenhou
se%20Gases%2C%20Social%20Cost%20of%20Carbon.pdf> accessed 17 November 2025.
222 See generally W Nordhaus, 'Climate Change: The Ultimate Challenge for Economics' (2019) 109(6) American Economic Review.
223 ITLOS AO (n 180) [365].
224 *Finch* (n 71).
225 *The Norwegian State v Greenpeace Nordic, Nature and Youth Norway*, E-18/24.
226 Mauritius (n 140).
227 Joint Declaration of Judge Bhandari and Judge Cleveland, Obligations of States in respect of Climate Change (Request for Advisory Opinion), Advisory Opinion, ICJ, 23 July 2025 <https://www.icj-cij.org/case/187> accessed 10 May 2026 [11]-[17].

Citing *Finch*, the declaration reasons that a producing State cannot disclaim responsibility for consequences it knows with virtual certainty will follow from extraction.[228]

However, there is considerable divergence on this practice. Both governments of the U.K. and Norway had resisted the integration of Scope-3 emissions in the *Finch* case and AO E-18/24, respectively.[229] Notably, Norway argued, as have some authors,[230] that the downstream emissions were too remote and uncertain, could lead to potential double-counting, and that their "net effect" is linked to the "global market" (the market substitution argument).[231] On these lines, in May 2025, the US Supreme Court held that the National Environmental Policy Act (NEPA) does not require agencies to assess downstream impacts, because NEPA is limited to the effects of the project under review, and proximate causal control, and not of not of other future, geographically separate, or subsequent projects even if factually foreseeable.[232] Ireland's Supreme Court has similarly declined to impose a requirement to assess upstream, indirect environmental impacts in project-specific EIAs.[233] In a case concerning the approval of a cheese factory, the Court upheld the planning authority's decision not to analyse upstream dairy-sector emissions, reasoning that such consequences were too remote and non-site-specific to fall within the legal scope of project-level assessment.

Even though the legal contours of this requirement remain unsettled, in any case, the core purpose of an EIA is better served when significant indirect climate impacts are identified and explained, to facilitate decision-makers to mitigate foreseeable harms. The concern that accounting for Scope-3 emissions risks double-counting is largely misconceived in this context. This is so because the purpose of including such emissions in a CIA is not to allocate responsibility for them, but to inform decision-making at the point of project authorisation, which is a governance function distinct from the attribution exercises conducted under reporting frameworks such as the UNFCCC. In fact, including such emissions is especially important as Scope-3 emissions comprise nearly 80% of total emissions for oil and about 85% for gas, mainly due to the carbon released when these fuels are ultimately burned.[234]

A related complication comes from the question whether indirect climate harms should be accounted for, if they emanate outside the State where the project is taking place, i.e., should extraterritorial downstream emissions be accounted for? Under the *Lotus* principle, international law allows a State to regulate activities within its territory even when the resulting effects unfold in foreign territory.[235] Climate treaties like the UNFCCC or the Paris Agreement do not restrict mitigation action to domestic emissions alone.

However, courts have differed on this question. For instance, the Federal Court of Australia held that Scope-3 emissions, especially those occurring overseas, are only indirect consequences of the project and therefore need not be assessed as direct impacts under the

228 ibid [16].

229 *Finch* (n 71) [179]; Written Observations by the Kingdom of Norway in *The Norwegian State v Greenpeace Nordic, Nature and Youth Norway* <https://eftacourt.int/wp-content/uploads/2025/05/07_Government-of-Norway_written-observations_original.pdf?x78003> accessed 17 November 2025.

230 Guy Dwyer, 'Market Substitution in the Context of Climate Litigation' (2022) 12(1) Climate Law 1.

231 Nicolar Holoffe, 'Environmental Impact Assessment and Climate Litigation : Reflections on EFTA Court Case E-18/24 (2025)' (*World's Youth for Climate Justice*) <https://www.wy4cj.org/legal-blog/environmental-impact-assessment-and-climate-litigation-reflections-on-efta-court-case-e-1824-2025> accessed 17 November 2025.

232 *Seven County Infrastructure Coalition v Eagle County* 145 S. Ct. 1497 (2025) 23-975.

233 *An Taisce v An Bord Pleanála & Ors* [2022] IESC 8.

234 'Emissions from Oil and Gas Operations in Net Zero Transitions' (International Energy Agency, 2023) <https://iea.blob.core.windows.net/assets/2f65984e-73ee-40ba-a4d5-bb2e2c94cecb/EmissionsfromOilandGasOperationinNetZeroTransitions.pdf> accessed 18 November 2025.

235 *The Case of the SS Lotus (France v Turkey)* (Judgment) PCIJ Rep Series A No 10.

law.[236] Similarly, the Norwegian Supreme Court has also noted that, "when it comes to greenhouse gas emissions from combustion abroad after Norwegian petroleum export, [...] the clear principle is that each State is responsible for combustion on its own territory".[237]

Nevertheless, as noted above, the *Finch* case and AO E-18/2024 emphasise that indirect effects, including cumulative and transboundary impacts, even those occurring far from the project site, must be assessed in an EIA whenever they are significant and likely. This is because the function of an EIA is to assess foreseeable impacts, not to attribute causal responsibility for the purposes of liability. Territoriality is relevant to the regulatory jurisdiction which a State exercises over a project, but it does not logically limit the geographic scope of the impacts that project may foreseeably generate. An authorising authority must therefore account for downstream emissions wherever they occur, since it is the act of authorisation, and not the location of combustion, that determines whether those emissions come into existence at all.

C. AN ERGA OMNES OBLIGATION & THE CONSEQUENCES THEREOF

Noting that climate change is the "common concern of mankind",[238] all the three AOs considered in this paper depart from a transboundary framing of an EIA, towards one rooted in the *erga omnes* obligation of climate change mitigation.[239] This framing has profound implications and warrants important questions in the context of CIAs.

First, if the duty to conduct a CIA is an *erga omnes* obligation, its breach could be invoked in front of an international judicial forum, by *any* State under CIL, or by all parties under a treaty, without having to justify their standing in the vocabulary of a "legal injury".[240]

Second, this point may be extended to ask whether an *erga omnes* interest entitle *any* State to demand disclosure, consultation, or participation in another State's CIA process? Traditionally, notification and consultation duties have been grounded in bilateral contexts, as in the *Certain Activities* case where the Court linked such duties to due diligence and noted that where the EIA reflected a risk of significant transboundary harm, the State planning to undertake the activity was required to notify and consult the potentially affected States in good faith.[241] The challenge is whether this bilateral architecture can evolve into a multilateral participation framework justified by the global nature of climate risk.

Article 32 of the BBNJ Agreement provides a workable and globally-accepted model in the context of harm to marine biodiversity: where Parties are obliged to ensure "*public notification*" and participation "*by all States, in particular adjacent costal States and any other States adjacent to the activity when they are potentially most affected States and stakeholders...*".[242] The stakeholders include indigenous persons, local communities, civil society and

[236] *Australian Conservation Foundation Inc. v Minister for the Environment* (2016) (FCA 1042).
[237] *Nature and Youth Norway, Greenpeace Nordic & Ors. v The State*, HR-2020-2472-P.
[238] ICJ AO (n 132) [440], quoting from the preambular paragraphs of the UNFCCC and the Paris Agreement.
[239] ICJ AO (n 132) [296]-[297]; ITLOS AO (n 180) [248]; IACtHR (n 190) [358].
[240] Icarus Chan, 'Further Legal Consequences of Obligations Erga Omnes (Partes) in the ICJ Climate Change Advisory Opinion: Duty of Non-Recognition and Article 62 Intervention' (*EJIL: Talk!*, 28 October 2025) <https://www.ejiltalk.org/further-legal-consequences-of-obligations-erga-omnes-partes-in-the-icj-climate-change-advisory-opinion-duty-of-non-recognition-and-article-62-intervention/> accessed 18 November 2025.
[241] *Certain Activities* (n 15) [104].
[242] BBNJ (n 93) art 32.

the scientific community.[243] This formulation suggests that as the governance of environmental commons develops, there could be a global participatory model where all potentially affected States and stakeholders could acquire procedural standing in cases of significant impact to the climate. State practice and jurisprudence is yet to develop on what institutional form would such a norm eventually take.

Third, the transboundary framing of CIAs naturally raises the question of what duties third States bear when another State fails to adequately assess climate impacts. In its 2024 AO on the Occupied Palestinian Territory (OPT), the ICJ held that the breach of *erga omnes* obligations triggers duties of non-recognition, non-assistance, and cooperation to end the wrongful situation.[244] However, as Judge Tladi observes in his declaration to the Climate Change AO, although the Court characterises States' climate-related obligations as *erga omnes*, it does not clarify whether these secondary duties also attach.[245] If the Court's 2024 reasoning were applied consistently, recognition of a CIA duty as *erga omnes* would imply that third States cannot treat authorisations issued without a proper CIA as legally valid, may not support such projects financially or technologically, and must cooperate to prevent or phase out such activities.

The Court's silence on this is striking as climate change represents not only a global harm but the archetype of a collective-action problem where the duties of third-States are indispensable. One explanation may be that the 2024 OPT Opinion dealt with breaches of *jus cogens* norms, such as the right to self-determination, which are necessarily *erga omnes*, whereas the CIA obligation, has not (yet) been recognised as *jus cogens*.[246] In any case, this question still demands clarity.

Fourth, there is a general concern about the distinction between "injured" and "non-injured States" in the context of harms from climate change, and the remedial consequences that flow from it. The ICJ notes that injured or specially affected States may claim full reparation in their own right, while non-injured States are limited to claiming cessation, guarantees of non-repetition, and reparation on behalf of the beneficiaries of the obligation.[247] This distinction, which is based on Articles 42 and 48 of the ILC's Articles on State Responsibility, is doctrinally uncontroversial in the abstract, but it creates problems when applied in the context of climate change.[248] This is so because the availability of reparations becomes dependent on which States count as injured, or specially affected, which is a question that the Court conspicuously declines to answer.

The UNGA Resolution sought to place this question directly before the Court, asking about the legal consequences *with respect to* SIDS, and other States "injured or specially affected" by climate change, as well as peoples and future generations. The Court's response to Question (b)(i) is most notable for what it withholds. It declines to determine the

243 ibid.

244 Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion (July 19, 2024) <https://www.icj-cij.org/case/186> accessed 18 November 2025.

245 Declaration of Judge Tladi, Obligations of States in respect of Climate Change (Request for Advisory Opinion), Advisory Opinion, ICJ, 23 July 2025 <https://www.icj-cij.org/case/187> accessed 10 May 2026.

246 Kamal Nambiar, 'A Reappraisal of the ICJ's Treatment of Erga Omnes Obligations' (Jindal Forum for International and Economic Laws, 10 November 2025) <https://jindalforinteconlaws.in/2025/11/10/a-reappraisal-of-the-icjs-treatment-of-erga-omnes-obligations/> accessed 18 November 2025; Chan (n 240).

247 ICJ AO (n 132) [443].

248 International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) UN Doc A/56/10, arts 42, 48.

responsibility of specific States,[249] and posits that the rule of State responsibility "do not differ depending on the category or status of an injured State" such that specially affected States are entitled to the same remedies as other injured States.[250] This statement tells us what remedies follow from the category, but says nothing about which States fall into it, or how injury is to be established in the first place. In the context of climate change, the question of how injury is assessed is not a peripheral detail: it is the central one.

Judge Yusuf, in his separate opinion, criticises this as a missed historic opportunity.[251] The Court had before it both the scientific evidence, including the IPCC's consistent finding that vulnerable communities who have contributed least to climate change are disproportionately affected,[252] and the doctrinal tools to operationalise the distinction. Article 42(b) of the ARSIWA provides that a State is entitled to invoke responsibility as an injured State where an *erga omnes* obligation is breached in a way that "specially affects" it.[253] The ILC's own commentary illustrates this with high seas pollution that particularly impacts coastal States,[254] which is a scenario that maps closely onto the SIDS situation. SIDS are not merely affected by the breach of an *erga omnes* climate obligation: they are affected in a way that distinguishes them categorically from the generality of States to which the obligation is owed, both in the existential magnitude of the harm, and their negligible contribution to causing it.[255] The Court had a clear basis on which to say so. It chose not to.

Beyond the Court's evasion, however, a genuine doctrinal difficulty remains: defining injury, and special effects in the climate context is hard even with the best available tools. Climate harm is simultaneously universal, and radically unequal: every State is affected, but the *extent* of harm varies enormously. The criterion of being "specially affected" is inherently comparative: affected more than whom, and measured by what? Should this be determined by physical vulnerability, economic dependence, historical contribution to emissions, or some combination? These are questions the ILC did not design Article 42(b) to answer, and the Court's silence means they remain open. SIDS are the clearest case, as their territorial existence is directly threatened, but the category could plausibly extend to States facing climate-driven desertification, freshwater collapse, or the destruction of climate-dependent agricultural systems. Without criteria, the boundary of the category is indeterminate, and the remedial distinction the Court relies upon cannot be applied.

It remains unclear what remedies are available where a State fails to conduct a legally adequate CIA. In principle, this turns on the injured/specially affected distinction: a State against whom the CIA obligation has been breached could claim reparation if it qualifies as injured or specially affected, but is limited to cessation and non-repetition if it does not. The Court establishes that this distinction governs remedies, but declines to say which States fall on which side of it, leaving the remedial consequences of a failure to conduct a CIA without a workable answer.

249 The Court notes that causation, and apportionment would require an in concreto assessment which they considered to be beyond the scope of the AO, see ICJ AO (n 132) [107]-[110].
250 ibid.
251 Yusuf (n 273).
252 Lee (n 212).
253 Draft Articles on State Responsibility (n 248).
254 International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) UN Doc A/56/10, commentary to art 42, 119 [12].
255 Yusuf (n 273).

Ultimately, the three AOs signal a convergence on the crystallisation of the duty to integrate climate harms into EIAs, but the precise contours of this norm are yet to be chiselled by future treaty practice, judicial decisions and State practice.

VI. CONCLUSION

> "If our existence is to mean anything, then we must act in the interest of all of our people who are dependent on us... And if we don't, we will allow the path of greed and selfishness to sow the seeds of our common destruction".
>
> – Mia Mottley, Prime Minister of Barbados at UNFCCC COP26, Glasgow, United Kingdom (2021)[256]

This paper has traced the evolution of EIAs into the realm of CIAs, showing how international law is beginning to recognise the distinct and global nature of climate-related harm. EIAs, once limited to transboundary environmental effects, are now being reconfigured to capture GHG emissions, cumulative impacts, and the systemic risks posed to the climate. Through the lens of CIL, the twin pillars of *usus* and *opinio juris* reveal that States are no longer merely experimenting with climate assessments; rather, there is an emerging recognition that CIAs constitute a binding element of due diligence.

The AOs examined here demonstrate both convergence and gaps. Some convergence has obtained in the procedural and substantive contours of CIAs, as they must be rooted in science and continuous processes. Yet significant questions remain open: precisely how thresholds of significance are determined, how emissions are quantified, whether CIAs must account for indirect and extraterritorial emissions, and what are the implications of the *erga omnes* framing of this obligation. These unresolved issues do not weaken the emerging norm; rather, they delineate the terrain for the next phase of development.

Ultimately, the rise of CIAs marks a turning point in international law: from reacting to environmental harm after it occurs, to governing climate risks before they unfold. In this shift, assessments are more than just procedural checkboxes; they have become a part of the very substance of the duty to protect the planet, matching the scale and urgency of the climate crisis itself.

[256] Mia Mottley, 'Speech: Mia Mottley, Prime Minister of Barbados at the Opening of the #COP26 World Leaders Summit' (*UN Climate Change*, 1 November 2021) <https://www.youtube.com/watch?v=PN6THYZ4ngM> accessed 4 October 2025).