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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".
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> – 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), Inter--ational 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, ex--licit 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 <u>consequences of climate change, ocean acidification and related impacts</u>".[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 cus--omary 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 or-

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.

ganisations, 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 stand-alone 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": with--ut 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 en--orcement 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 ensures that climate impacts are not diluted within broader environmental considerations but receive targeted analysis.[197]

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].
197 ibid [359].

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 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

198 ibid [361].
199 ibid.
200 ibid [362].
201 ibid [363].
202 ibid [360].
203 ICJ AO (n 140) [298], citing *Pulp Mills* (n 10).

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]

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*

[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.

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 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

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).

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%20So--ial%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 responsi-

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.

bility 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).