Via Email

August 28, 2025

Asian Development Bank
Attn: ADB Member State Shareholders
Attn: Mr. Masato Kanda, President; Priyantha Wijayatunga, Senior Director, Energy Sector Office
6 ADB Avenue, Mandaluyong City 1550,
Metro Manila, Philippines
ADB Member States' emails below; civilsociety@adb.org; pwijayatunga@adb.org

Re: Substantive and Remaining Procedural Deficiencies in the Energy Policy Review Process that Violate ADB's and its Member States' Obligations Under International Law

Dear Asian Development Bank (ADB) Member State Shareholders, Mr. President Kanda, Mr. Wijayatunga and to Whom it May Concern at ADB:

On behalf of Bank Climate Advocates (BCA) and the undersigned Civil Society Organizations (CSOs), we are writing to follow up on our July 24, 2025 letter concerning the ADB Energy Policy[1] Review (hereinafter "Review") process to express our deep concern about the substantive deficiencies in the Review, and the remaining uncured procedural deficiencies that have adverse implications for ADB's and its member states' accountability, adherence to the rule of law, and environmental and social impacts.

In addition to addressing our fellow CSOs' concerns and requests,[2] we request ADB and its member states' take action to cure the following substantive and procedural defects in the Review, that unless corrected, will violate ADB's and its Member States' harm prevention, human rights, and due diligence obligations under international law, and result in avoidable harms to communities all around the world, and especially those ADB is supposed to benefit:

[1] 2021 Energy Policy of the Asian Development Bank – Supporting Low-Carbon Transition in Asia and the Pacific, June 2023 (hereinafter "Energy Policy", "2021 Energy Policy", or "Policy").
[2] We hereby incorporate NGO Forum on ADB's and Big Shift Global's Energy Policy Review comments with requests for corrective action by reference.

1. **ADB's failure to assess and address the Energy Policy's consistency with ADB's and its member states' much changed climate change obligations under international law since the Policy was adopted in 2021;**

2. **ADB's failure to conduct a Strategic Environmental Assessment (SEA) for (a) the Energy Policy amendments and also (b) the entire Energy Policy's consistency with ADB's and its member states' climate change obligations under international law; and**

3. **ADB's failure to circulate the full proposed text for the Energy Policy amendments for a reasonable public review and comment period prior to their adoption.**

As ADB's August 8, 2025 response indicates, at the root of all these problems – at least on ADB's end - is perhaps that ADB does not acknowledge that as international organization, it has obligations under international law. As detailed in Appendix A, and our July 24, 2025 letter, it is not only ADB's member states that have these legal obligations that apply to their acts, omissions, or votes at ADB – ADB has these obligations under international law as well when it makes decisions on policies, plans, or investments, financial support, and guarantees.

Analysis of Substantive and Procedural Defects in the Review, that Unless Corrected, will Violate ADB's and its Member States' Harm Prevention, Human Rights, and Due Diligence Obligations Under International Law

1. **ADB's failure to assess and address the Energy Policy's (hereinafter "Policy"), plus its contemplated amendments', consistency with ADB's and its member states' much changed climate change obligations under international law that have evolved with the accelerated climate crisis since the Policy was adopted in 2021**.

   ADB's Energy Policy Review is impermissibly being conducted without re-assessing its and its member states' climate change obligations under international law, and making adjustments to the Policy to adhere to these obligations for two reasons.

   A. **ADB's and its Member States' separate and distinct obligations to adhere to ADB's board adopted policy requirements have been triggered.** In addition to ADB's and its member states' climate change legal obligations under international law, ADB and its member states have separate and independent obligations under international law to adhere to, and ensure adherence to, ADB's board adopted policy requirements.

      In addition to other sources of international law, international organizations' obligations are also derived from their own constituent instruments, board adopted rules, and board declarations. According to the International Law Commission (ILC), an international organization's board adopted rules (or policies) can impose obligations on it.[3] ILC DARIO Article 10 provides that

[3] Kerr, B. P. (2020), Regulating the Environmental Integrity of Carbon Offsets for Aviation: the International Civil Aviation Organization's Additionality Rule as International Law. *Carbon and Climate Law Review*, 14 (4) (hereinafter "Kerr, ICAO") at 4, and fn. 24, 25 (providing "The ILC DARIO Articles, Article 2, subparagraph (b) defines rules of an organization as 'the constituent instruments, decisions, resolutions and other acts of the organization adopted in accordance with those instruments, and established practice of the organization; citing ILC DARIO Articles, Art. 2., 10); Baine P. Kerr, 'Clear skies or turbulence ahead? The international civil aviation organization's obligation to mitigate climate change' (2020) 16(1) Utrecht Law Review (hereinafter "Kerr, Clear Skies") at 153.

there 'is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.'[4] Specifically applied to international organizations like ADB, scholars have found such international organizations' (and thus ADB's) board adopted policies should be binding rules of conduct in domestic court.[5] Further, ADB's member states are required to act to ensure ADB adheres to its board adopted policy requirements, and could be held responsible for ADB's failures to do so on grounds that they are failing to supervise ADB and ensure that it is following its own rules.[6]

The 2021 Energy Policy is board adopted. It also contains a commitment in 2025 that requires ADB and its directors to assess alignment with a just, low-carbon transition in a 2025 Energy Policy review.[7] Thus, during the 2025 Review and before any Policy amendments are adopted, ADB and its Member States are required to assess the consistency of the entire Policy, any contemplated amendments, and the Policy's prohibitions and permissions to invest in certain energy infrastructure, with ADB's and its member states' much changed climate change obligations under international law that have evolved with the accelerated climate crisis since the Policy was adopted in 2021.

In sum, ADB is in a position to assess its climate change legal obligations and because it has the mandate to do so during this Review under a board adopted policy, ADB has a positive obligation under international law to assess its entire Energy Policy, and any contemplated amendments, with its current climate change obligations under international law. Failure to do so would constitute committing an internationally wrongful omission, for which ADB, and its member states due to their duty to ensure ADB adheres to its board adopted policy requirements, could be held responsible in a court of law.

B. The 2025 Review mandated by the Energy Policy is open, and since 2021 when ADB and its member states committed to assessing alignment with a just, low-carbon transition in the Review,[8] climate change obligations of states and climate science have advanced significantly.

The Intergovernmental Panel on Climate Change (IPCC) and International Energy Agency (IEA) now confirm that new fossil gas projects, including liquefied natural gas (LNG), are incompatible with limiting warming to 1.5°C.[9] Recent advisory opinions from three international bodies—the

[4] Kerr, ICAO at 4, and fn. 25 citing ILC DARIO Articles, Art. 10.
[5] Kerr, B. (2022). Mitigating the Risk of Failure: Legal Accountability for International Carbon Markets. Utrecht Law Review, 18(2), 145-161 (hereinafter "Kerr, Legal Accountability Int. Carbon Markets") at 152, and fn. 61citing Clemens Treichl and August Reinisch, 'Domestic Jurisdiction over International Financial Institutions for Injuries to Project-Affected Individuals: The Case of Jam v International Finance Corporation' (2019) 16 International Organizations Law Review at 133; Kerr, Erga Omnes Obligation at 121 -122, and fn. 11 citing Alexander Orakhelashvili, 'The World Bank Inspection Panel in Context: Institutional Aspects of the Accountability of International Organizations', 2 International Organizations Law Review 57 (2005) at 71-72.
[6] See, e.g., Kristina Daugirdas, Member States' Due Diligence Obligations to Supervise International Organisations,' in Due Diligence in the International Legal Order 59 (Heike Krieger et al. eds., 2021).
[7] See ADB 2021 Energy Policy at page 37 and Section VI.: Implementation Arrangement.
[8] *Id*.
[9] See IPCC, 2023: Summary for Policymakers. In: 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 [Core Writing Team, H. Lee and J. Romero (eds.)] IPCC, Geneva, Switzerland, ¶ 1-34, and finding B.5.3 at page 19, doi: 10.59327/IPCC/AR6-9789291691647.001; IEA (2023), Net Zero Roadmap: A Global Pathway to Keep the 1.5°C Goal in Reach, IEA, Paris, page 16 (available at: www.iea.org/reports/net-zero-roadmap-a-global-pathway-to-keep-the-15-0c-goal-in-reach); See IEA (2023), World Energy Outlook 2023, IEA, Paris, page 139, <https://www.iea.org/reports/world-

International Tribunal for the Law of the Sea, the Inter-American Court of Human Rights, and the International Court of Justice—affirm that public banks like ADB, and their member state shareholders when acting at them, must avoid actions and policies contributing to climate harm, including various types of fossil fuel financing the 2021 Energy Policy permits.

Further evidencing ADB's Energy Policy must be assessed for consistency with international climate change legal obligations is that five years ago, a foundational premise ADB relied on for adoption of its 2021 Energy Policy – ADB's opinion that the Policy was consistent with the Paris Agreement's "plan to keep global warming below 2 degrees Celsius" - is now scientifically and legally obsolete. See the finding in the ADB Strategy 2030 finding that ADB's 2021 Energy Policy relies on to define Paris Alignment.[10] Best available science produced by the IPCCC evidences that the Paris Agreement alignment now requires measures to keep global warming below 1.5°C, not 2°C.[11]

Because of these developments in states' climate change legal obligations and updates in global warming trajectories based on new best available climate change science, and because the Energy Policy is formally open for review, ADB and its member states have a heightened duty to re-assess, its and its member states' climate change obligations under international law and meet any such new or additional obligations **now** - during the Review and before any Policy updates at the Review's conclusion.

ADB's and its member states' requirements to assess the Energy Policy's consistency with their climate change obligations under international law, and to make amendments to it to meet these obligations, can be found in Appendices A and C. These harm prevention and due diligence obligations also require ADB to make this assessment and corresponding contemplated amendments publicly available for review and comment. *Id*.; *see also*, Appendix B, Section B.

In assessing the Energy Policy's adequacy on these grounds, ADB and its member states must also analyze the Policy's consistency with the July 23, 2025 International Court of Justice Climate Advisory Opinion[12] and May 21, 2024 International Tribunal on the Law of the Sea Climate Advisory Opinion[13] that establish (a) that the Energy Policy's allowance of various types of fossil fuel financing needs to be revisited based on best available current climate change science, and (b) ADB's and its member states' duties to take all necessary measures and use of all means at its disposal that are as far-reaching and efficacious as possible to prevent and reduce GHG emissions.

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energy-outlook-2023>; see also, Climate Analytics, 1.5°C national pathway explorer (this tool highlights the ambition gap between existing unconditional and conditional NDC targets (excl. LULUCF) and 1.5°C pathways for all countries), available at https://1p5ndc-pathways.climateanalytics.org.

[10] ADB. 2018. Strategy 2030: Achieving a Prosperous, Inclusive, Resilient, and Sustainable Asia and the Pacific. Manila (ADB Strategy 2030) at page 6; 2021 Energy Policy at page 1 and Introduction providing " The 2021 Energy Policy is an update to the 2009 Energy Policy to guide ADB's energy sector operations. It focuses on energy operations that are optimally aligned with ADB's Strategy 2030[] and the global commitments that Strategy 2030 supports, including the SDGs, the related Financing for Development Agenda,[] and the Paris Agreement[] on climate change (Paris Agreement); See also 2021 Energy Policy at pages 10, 12, 16, vii, ix.

[11] IPCC, 2023: 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 [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland.

[12] July 23, 2025 Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change (2025 ICJ Climate Advisory Opinion) (available here).

[13] May 21, 2024 International Tribunal on the Law of the Sea Advisory Opinion in response to the Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (2024 ITLOS Climate Advisory Opinion) (available here).

Specifically, we draw ADB and its member states in their roles in acting at ADB, to the following various legal obligations that have emerged and been crystalized from the ICJ and ITLOS Climate Advisory Opinions:

(1) The "[f]ailure of a State to take appropriate action to protect the climate system from GHG emissions — including through fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies — may constitute an internationally wrongful act which is attributable to that State"… and that "that the internationally wrongful act in question is not the emission of GHGs per se, but the breach of conventional and customary obligations identified under question *(a)* pertaining to the protection of the climate system from significant harm resulting from anthropogenic emissions of such gases. 2025 ICJ Climate Advisory Opinion at pp. 427.

(2) the standard of due diligence for preventing significant harm to the climate system is: stringent; requires consistency with and use of best available science; use of all means at its disposal to prevent avoidable climate change harms; forward-looking, "entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control," and requires States to continuously update their rules and measures in light of evolving science regulate public and private actors over whom they exercise jurisdiction or control, including through policy making and public finance and investment decision-making. 2025 ICJ Climate Advisory Opinion at pps.138, 208, 282;[14]

(3) that states must take "all necessary measures" to prevent, reduce and control anthropogenic GHG emissions, acting on the basis of the best available science and applying the precautionary approach. See 2024 ITLOS Climate Advisory Opinion at pps 243 and 250, and see also pps. 189, 197, 199, 202, 223, 226.

(4) Article 192 of the Law of the Sea requires States parties to take measures 'as far-reaching and efficacious as possible' to protect and preserve the marine environment and 'to prevent or reduce the deleterious effects of climate change and ocean acidification on the marine environment'. Law of the Sea Article 192; 2025 ICJ Climate Advisory Opinion at at pp. 343. These 'necessary measures' should be assessed objectively, based on the best available science found in the works of the IPCC which reflect scientific consensus and reflected in the global temperature goal and timeline for emission pathways in the Paris Agreement. 2024 ITLOS Climate Advisory Opinion at pps. 208, 215.

(5) As far as climate change is concerned, such appropriate rules and measures include, but are not limited to, regulatory mitigation mechanisms that are designed to achieve the deep, rapid, and sustained reductions of GHG emissions that are necessary for the prevention of significant harm to the climate system.…These rules and measures must regulate the conduct of public and private operators within the States' jurisdiction or control and be accompanied by effective enforcement and monitoring mechanisms to ensure their implementation. 2025 ICJ Climate Advisory Opinion at pp 282.

[14] See 2025 ICJ Climate Advisory Opinion at pp 208: "the Court finds it useful here to note that, in the case of an obligation of conduct, a State acts wrongfully if it fails to use all means at its disposal to bring about the objective envisaged under the obligation, but will not act wrongfully if it takes all measures at its disposal with a view to fulfilling the obligation even if the desired objective is ultimately not achieved. In the case of an obligation of result, a State acts wrongfully if it fails to bring about the result required under the obligation."

In light of the ICJ and ITLOS Opinions, and Global Stocktake, ADB and its member state shareholders are clearly under a duty of conduct to amend its Energy Policy to require a prohibition on financing new coal, oil, gas production and power plants and associated infrastructure, and LNG infrastructure, absent a demonstration—supported by the best available science—that the activity is compatible with a 1.5°C pathway, avoids lock-in and stranded-asset risks, and does not undermine the rights of those most exposed to climate harms. These obligations also clearly require that ADB's Energy Policy is further amended to set a stringent presumption against financing any of these new fossil fuel supplies and unabated fossil power plants and infrastructure, while heightening disclosure and analysis justification requirements (including GHG emissions alternatives analysis requirements) to align with best available science and practiced methods for any of these contemplated or potentially allowed investments, including for residual gas infrastructure claimed to be transitional.

Importantly, ADB's member states must not aid or assist, direct or control, or use ADB to circumvent its own obligations by supporting an Energy Policy not aligned with ADB's or its member state's climate obligations; must act based on the well know science and knowledge of climate change science now in the hands of all States; and must not act to approve an Energy Policy that be legally impermissible under international law if adopted by a Member State itself.

2. ADB's Failure to Conduct a Strategic Environmental Assessment (SEA) for both the Contemplated Energy Policy Amendments and also the Entire Energy Policy's Consistency with ADB's and its Member States' Climate Change Obligations Under International Law:

A. ADB's and its Member States Procedural Obligations Under International Law Require that a SEA is Conducted for Each of the Contemplated Energy Policy Amendments

ADB's August 8, 2025 response to the legal analysis in our July 24, 2025 letter - that simply states a SEA is not required because ADB does not have a policy requiring a SEA for plans or policies- entirely fails to acknowledge or address ADB's and its member states' obligation under international law to conduct a SEA. It also seemingly conflates an Environmental and Social Impact Assessment (ESIA) for a specific project with a SEA, or mistakenly indicates a SEA is not important or required because down the road, producing just a ESIA for each project and the project meeting ADB's Environmental and Social Safeguards legally suffices. ADB could not be more mistaken about the purpose and need for a SEA, and its and its members states' legal obligations to produce one for the contemplated Energy Policy amendments and the Review.

ADB's contemplated amendments to its Energy Policy for the first time allows ADB to finance, and sets the framework for ADB to finance and support: (1) nuclear energy infrastructure, (2) the co-firing of green hydrogen, biofuels, and ammonia in existing coal and gas plants, (3) to allow carbon, capture, utilization and storage (CCUS) in depleted oil and gas wells; (4) to stimulate investments in existing upstream oil and gas fields to reduce methane leakages and routine gas flaring; and (5) to expanding its Energy Transition Mechanism—originally meant to retire coal—to include decommissioning of oil and gas plants.

All of these amendments pose multiple severe environmental and social impacts, and all but for those pertaining to nuclear infrastructure, risk worsening the climate crisis, including through prolonging and supporting fossil fuel production and the life of fossil fuel power plants.[15]

Because, each of these amendments on their own open up the door and set the framework (albeit without necessary and appropriate guardrails) for ADB to finance and support new types of energy projects, and pose significant risks of adverse environmental impacts, ADB and its member states are required to address and bring themselves into compliance with their customary international law, Kyiv Protocol,[16] and Espoo Convention[17] due diligence and harm prevention obligations to:

a. Conduct a SEA analyzing, disclosing, and supporting findings and mitigation for the environmental and social impacts and risks of the contemplated amendments, and

b. Release the SEA for public review, consultation, and comment for a reasonable amount of time prior to adoption of the amendments.

The legal analysis in Appendix B expounding on the analysis in our April 24, 2025 letter, details why ADB's and its member states' procedural obligations under customary international law, the Espoo Convention, and the Kyiv Protocol require this SEA process, and why their substantive harm prevention, human rights, and due diligence obligations under customary international law require it as well. It makes clear that a SEA is required for each of these amendments, including the amendment lifting its nuclear financing prohibition that allows and sets an unbound framework for ADB to finance and provide support for (including technical assistance for) nuclear energy infrastructure.

Further, in response to ADB's position in its August 8, 2025 response and subsequent video conference consultations asserting that unlike its member states, ADB does not accept it has treaty obligations to conduct a SEA, the analysis in Appendices A and B further detail ADB's duties under customary international law to conduct a SEA for the Policy amendments. In sum, this analysis demonstrates that the common SEA practice and requirement in treaties, within international organizations, and in state legislation around the world has cemented that a SEA is a de facto customary international obligation applicable to ADB for its significant strategic decisions in plans, policies, and programs with a potential for transboundary impact. For example, see (a) Kyiv Protocol Article 4(2), (b) the European Union's (EU's) SEA Directive (2001/42/EC) setting a clear and binding procedure for EU member states to conduct SEAs for plans and programs likely to have significant environmental effects, (c) The United Nations Environment Programme SEA Guidelines representing a widespread consensus among states and international organizations that emphasize that a SEA should be applied to policies, plans, and programs, and (d) state practice where the obligation to conduct a SEA for plans, policies, and programs has been integrated into legislation of numerous states – including: Canada, Germany, France, Spain, Denmark, the UK, Scotland, Rwanda, and United States. See Appendix B, Section A. *post*.

[15] For details of these impacts, see our July 24, 2025 comments along with the Energy Policy Review comments submitted by NGO Forum on ADB, Big Shift Global, and Urgewald.
[16] Protocol on Pollutant Release and Transfer Registers, Kiev, 21 May 2003, 2685 UNTS 140, entered into force 29 October 2009 (hereinafter "Kyiv Protocol")
[17] Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, Finland, 25 February 1991, in force 10 September 1997, Doc. ECE/1250 (hereinafter "Espoo Convention").

ADB's initial reactions that an SEA is not required for the contemplated amendments because the Energy Policy is called a "policy" or because the amendments compromise a very small portion of the Policy's text – misses the mark, and a key fact. **When ADB and its Member States evaluate their obligations under international law to conduct a SEA for the amendments, reality cannot just be ignored - each of the above contemplated Policy amendments, regardless of how many or few lines they takes up in the Policy, constitute a plan, not a policy, under international law**. This is critical to acknowledge because (1) the Kyiv Protocol, which is engrained as customary international law for SEAs, very clearly sets forth that SEAs are required for plans and (2) the Kyiv Protocol's unambiguous language evidences the contemplated amendments, including those lifting the prohibition on and affirmatively allowing ADB to invest in and provide support (including technical assistance) for nuclear energy infrastructure, constitute such plans for which SEAs are required. The Kyiv Protocol explicitly provides:

> A strategic environmental assessment shall be carried out for ***plans*** and programmes ***which are prepared for*** agriculture, forestry, fisheries, ***energy,*** industry including mining, …, ***and which set the framework for future development consent for projects*** listed in annex I and any other project listed in annex II that requires an environmental impact assessment under national legislation.

Kyiv Protocol at Article 4 (2) (emphasis added). The Kyiv Protocol Annex I and II lists, include but are not limited to, all projects the contemplated Policy amendments listed above authorize, including: all aspects and components of nuclear energy production and infrastructure, major mining, industrial installations for the production of electricity and for carrying gas, deep drillings, underground storage of combustible gases; and pipelines for transport of gas or oil. Kyiv Protocol, Annex I-II at 16-23.

For example, Under Section 4(2) of the Kyiv Protocol, the contemplated Energy Policy amendments for nuclear energy at least constitute a plan because they constitute an energy plan which sets the framework for future permission for ADB to invest in and provide financial support (including technical support) for specific nuclear energy projects and nuclear projects are listed in Annex 1 and 2 of the Protocol.

While we acknowledge that the Energy Policy is in part a policy that establishes the strategic vision and high-level strategy, certain critical aspects of it, including the contemplated amendments highlighted above, are each a de facto plan because they function in a way that provides ADB with explicit permission[18] and a framework to invest in specific energy infrastructure for the first time. In other words, these amendments constitute a plan under international law because they effectively give the "permission" for ADB staff to consider and pursue certain types of investments. They further are plans requiring a SEA not only because they provide eligibility criteria that make ADB's investments and support an option in the first place, but because they will influence more detailed sectoral programmes, sectoral guidance notes, and Country Partnership Strategies (as noted, the contemplated guardrails in the Energy Policy are impermissibly boundless for nuclear and for the other aforementioned contemplated Policy amendments).

[18] If ADB were to first or simultaneously amend its prohibited investment activities list in its Environmental and Social Framework to allow for ADB financing and support for these investments, including for instance by lifting the prohibition on investing in nuclear, an SEA would be required for such a board amendment under these sources of international law.

Notably, as our legal analysis in Appendix B details, even if the contemplated Energy Policy amendments are considered a policy under the Espoo Convention, Kyiv Protocol, and or customary international law, which they are not, the requirement to perform a SEA and release it for public review before amendment approval under international law still applies. This is because an SEA is appropriate under the Espoo Convention, Kyiv Protocol, and customary international considering (a) the likelihood of significant environmental impacts from each of the contemplated Energy Policy amendments and (b) the purpose of SEAs to provide the public with an opportunity to inform and help prevent adverse environmental impacts. See Espoo Agreement Article 2 (7); See Kyiv Protocol Article 15 (1)-(3).

B. A SEA is Also Required to Assess the Consistency of the Entire 2021 Energy Policy and Contemplated Amendments with ADB's and its Member States' Substantive Climate Change Obligations Under International Law

In addition to ADB's and its member state's climate change legal obligations under international law, ADB and its member states have separate and independent obligations under international law to adhere to ADB's board adopted policy requirements. See Section 1.A, *ante.* Thus, because the 2021 Energy Policy is board adopted, and contains a commitment in 2025 that requires ADB and its directors to assess alignment with a just, low-carbon transition in the 2025 Energy Policy review,[19] the SEA or a SEA equivalent for the Energy Policy Review must go further than just assessing the impacts of contemplated amendments ADB staff proposes. It must assess the consistency of the entire Energy Policy, including its prohibition and permissions to invest in certain energy infrastructure, with ADB's and its member states' much changed climate change obligations under international law that have evolved with the accelerated climate crisis since the Policy was adopted in 2021. Independently, ADB's and its member state's climate change legal obligations under international law require the same analysis. See Section 1.B, *ante*.

C. Example of a Comparable Process to ADB's Energy Policy Review that Required a SEA Further Evidencing Why a SEA is Needed.

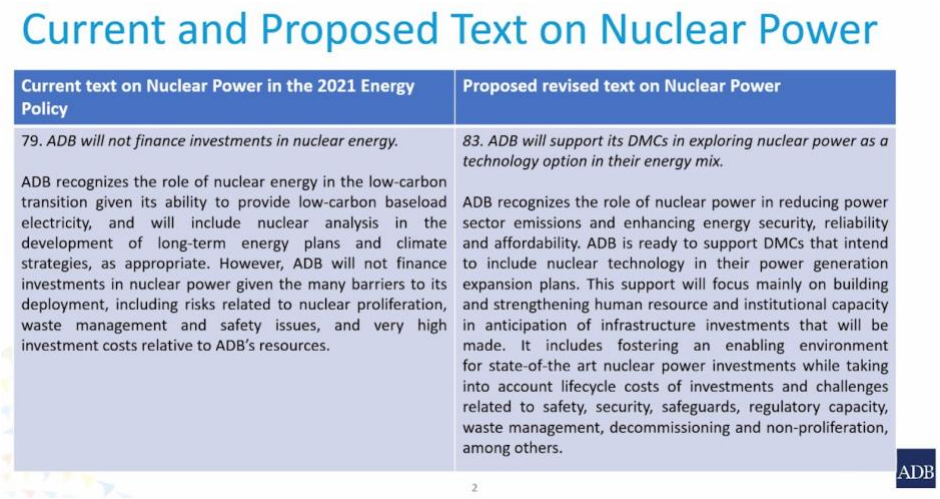
A SEA is a proactive decision support tool applied at an early strategic stage, such as during the preparation of policies, plans and programmes, to avoid or mitigate any expected significant negative environmental impacts arising from these policies, plans and programmes, and, importantly, to enhance their positive environmental outcomes. It requires extensive and supported studies, public comment, and consultation with affected communities and experts to inform expected impacts and to assist with the adoption of necessary overarching mitigation and avoidance criteria. As a result of the SEA process, the mitigation and avoidance criteria developed and adopted are then applied to program and each project to minimize and avoid impacts.

In a rush, ADB is charging forward without any environmental review, meaningful consultation from the public and communities that have or will be affected by the SEA amendments (including those already impacted by nuclear energy), or conditions / restrictions in the amendments that provide fundamental environmental protections for all contemplated related investments going forward. As evidence a SEA is badly needed, (1) ADB has yet to conduct any studies documenting the foreseeable environmental and social impacts of its contemplated amendments, which could likely preclude ADB from permitting many investments the amendments would authorize, including those in nuclear energy infrastructure, and (2) the contemplated Policy amendments have

[19] 2021 Energy Policy at page 37 and Section VI.: Implementation Arrangement.

no guardrails - would be informed by and developed during the SEA process - setting the overarching conditions and requirements that must be met for ADB to consider pursuing the new investments the amendments would authorize. For instance, ADB's contemplated amendments, removing the prohibition on ADB financing nuclear energy, and allowing for investments in nuclear energy and financial support for nuclear energy infrastructure, lack any technical screening criteria and stringent requirements that nuclear energy projects must meet to be eligible for ADB financing or support. See Table 1 for contemplated amendments.

Table 1



Current and Proposed Text on Nuclear Power

Current text on Nuclear Power in the 2021 Energy Policy	Proposed revised text on Nuclear Power
79. *ADB will not finance investments in nuclear energy.* ADB recognizes the role of nuclear energy in the low-carbon transition given its ability to provide low-carbon baseload electricity, and will include nuclear analysis in the development of long-term energy plans and climate strategies, as appropriate. However, ADB will not finance investments in nuclear power given the many barriers to its deployment, including risks related to nuclear proliferation, waste management and safety issues, and very high investment costs relative to ADB's resources.	*83. ADB will support its DMCs in exploring nuclear power as a technology option in their energy mix.* ADB recognizes the role of nuclear power in reducing power sector emissions and enhancing energy security, reliability and affordability. ADB is ready to support DMCs that intend to include nuclear technology in their power generation expansion plans. This support will focus mainly on building and strengthening human resource and institutional capacity in anticipation of infrastructure investments that will be made. It includes fostering an enabling environment for state-of-the art nuclear power investments while taking into account lifecycle costs of investments and challenges related to safety, security, safeguards, regulatory capacity, waste management, decommissioning and non-proliferation, among others.

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As such, the contemplated Policy amendments would allow ADB to begin financing and enabling nuclear energy infrastructure without conditions that provide overarching baseline protections to communities.

In response to Mr. Wijayatunga and ADB staff queries as to what a SEA could even look like for nuclear or any of the Policy amendments, we find it instructive and helpful not only to highlight the importance and utility of a SEA - which is widely explained in readily available literature, studies, and sources of law such as the Kyiv Protocol - but to direct ADB to an example of a SEA equivalent analysis and process that could be helpful: that for the adoption of The Complementary Climate Delegated Act (2022) to the EU Taxonomy for Sustainable Activities (EU Taxonomy Climate Delegated Act) that provides that stringent protective criteria must be met for nuclear projects to be considered transitional activity/green investment and thus eligible for green funds.[20]

Although we disagree with many of the outcomes, and do not think many including the eligibility of nuclear for funds as long as protective conditions are met would translate to ADB's financing activities, the process for the EU Taxonomy Climate Delegated Act arguably met the EU's and its member states' customary international law, Espoo Convention, and Kyiv Protocol procedural requirements to conduct a SEA and release the SEA type documents to the public for review and comment prior to adoption.

Like the contemplated Energy Policy amendments listed above, the EU Taxonomy Climate Delegated Act in relevant part constitutes a plan requiring a SEA or SEA equivalent because it is a strategic document that sets the criteria for what can be considered a green investment, and thus eligible for certain green funds. While a formal SEA was not conducted, the development of the EU Taxonomy Climate Delegated Act, including the decision to classify nuclear energy as a

[20] Available at: https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/eu-taxonomy-sustainable-activities_en

transitional activity, involved (a) extensive scientific analysis and technical study[21] on nuclear energy's environmental impacts and whether it could meet a do no significant harm criteria that mirrored a SEA's contents and (b) broad public consultation on this analysis and study with Member States, financial institutions, NGOs, affected communities, and the public. The final decision was then based on the SEA that informed the EU whether nuclear energy's contribution to climate goals outweighed its potential environmental risks and what baseline protective criteria must be met for nuclear projects to be eligible for green funds. As a result of the SEA and ensuing public review and comment on the SEA and its supporting studies and analysis, the EU adopted requirements that must be met before a state or company could receive green funds for nuclear energy projects. These include requirements for waste management and waste management plans,[22] safety standards,[23] meeting the Do No Significant Harm principle to not significantly harm any of the other five objectives of the taxonomy (e.g., sustainable use of water, pollution prevention, etc.), and transparency requirements mandating that companies involved in nuclear activities adhere to specific disclosure requirements.

3. **Failures to circulate the full proposed text for the Energy Policy amendments for a reasonable public review and comment period prior to adoption of any amendments.** While ADB's response and limited corrective actions provide more time for public comment and releases limited additional information about the contemplated Policy amendments, ADB is still failing to address and bring ADB and its Member State shareholders into compliance with, their obligations under international law to formally release a complete draft of the Energy Policy Update, incorporating all contemplated additions and amendments with precise proposed language, for public review and comment. Meaningful public participation is impossible without access to the specific text under consideration. Moreover, failure to provide a full draft of Energy Policy Update for public review violate the Article 7 and 6 Aarhus Convention requirements for public participation in plans and policies relating to the environment.[24] These failures are also inconsistent with Principle 10 of the Rio Declaration on Environment and Development (1992) that provides that the public shall have "appropriate access to information concerning the environment... and the opportunity to participate in decision-making processes." Thus, without the public being given the opportunity to review the Amended Energy Policy that ADB contemplates will be before its member states for adoption, not only will the public will be precluded from a genuine opportunity to participate and comment. ADB and its member states will be violating international law.

Conclusion and Requests:

[21] The core of this strategic assessment was a technical report prepared by the Joint Research Centre, the European Commission's science and knowledge service that provided a scientific and evidence-based assessment of nuclear energy's impacts, particularly focusing on radioactive waste management, long term waste disposal, nuclear safety, water consumption of nuclear power, and environmental and social impacts such as on biodiversity, land use, and nuclear proliferation.

[22] The requirements for waste management include a member state having an operational, detailed plan for a disposal facility for high-level radioactive waste by 2050. The plan must show that the long-term disposal of waste does not cause significant harm to the environment. The act also prohibits the export of radioactive waste for disposal in non-EU countries.

[23] Such safety standards include, new nuclear power plants and upgrades to existing ones must use the "best-available existing technologies" (Generation III+), and construction permits for new plants must be obtained before 2045. Additionally, existing and new plants must switch to accident-tolerant fuel by 2025.

[24] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, Denmark, UNECE (1998) (hereinafter "Aarhus Convention"); The "Aarhus Convention: An Implementation Guide" clarifies that "appropriate practical provisions" for participation generally include making relevant information available. The more complete the information provided, the more effective the public participation can be. Not providing the full text of a policy would severely limit the public's ability to provide meaningful comments.

ADB's failures to assess and address the Policy's consistency with ADB's and its member states' much changed climate change obligations under international law during the Policy's review period; to produce and release a SEA for public review prior to adoption of amendments for the contemplated Policy amendments and that assesses the Policy consistency with ADB's and its member state's climate change obligations; and to circulate the amendments for public review a reasonable time prior to adoption – severely compromises the legality and integrity of the ADB's Energy Policy Review process. Should ADB proceed in sending the amended Energy Policy to its board for approval in early October without curing these failures, it would violate ADB's and its member states' obligation under international law, and result in an updated Policy that fails to adequately address environmental and social risks or leverage opportunities for truly sustainable development.

We thus urge the ADB Board of Directors and its Member State Shareholders to immediately:

1. **Conduct and publicly release a comprehensive and fully supported SEA covering the contemplated amendments to the Energy Policy allowing for ADB to invest in nuclear energy infrastructure; the co-firing of green hydrogen, biofuels, and ammonia in existing coal and gas plants, CCUS storage in depleted oil and gas wells; to reduce methane leakages and routine gas flaring in existing upstream oil and gas fields; and to expand its Energy Transition Mechanism—originally meant to retire coal—to include oil and gas plants.**

2. **As part of the Review and its SEA, re-assess ADB's and its member states' climate change obligations under international law, release this assessment for public review and comment prior to adoption of any Policy amendments, and propose adjustments to the Policy to adhere to these obligations.**

3. **Initiate an official, adequately publicized period for written public comments on the full draft of the proposed amended Energy Policy and its SEA, ensuring sufficient time (a minimum of 60 days, given the policy's complexity and regional significance) for all stakeholders to meaningfully review and comment.**

ADB, and each of its member states, must meet their procedural and substantive due diligence and harm prevention obligations not only to prevent avoidable harms to communities and maintain accountability, but to avoid risks that come with being held to account in various courts of law. As ADB and many of its member states should well be aware, it is not just member states that can be brought into court for their decisions at ADB to approve a plan or policy, or fail to ensure sufficient ones are in place that meets harm prevention and due diligence procedural and substantive obligations. As, *Jam v. IFC* demonstrated,[25] multilateral development banks like ADB can be held to account too.

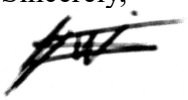
ADB's credibility as a multilateral development bank committed to sustainable development and good governance hinges on its adherence to principles of transparency, accountability, and genuine public participation. We trust that you will take our concerns seriously and implement immediate steps to rectify our identified shortcomings in the Review that pose substantial risk to the environment and communities ADB is supposed to be benefiting.

Considering the gravity of the matter, we respectfully request that ADB respond in full to our concerns and requests in this letter in writing by September 15, 2025. We look forward to your timely response and

[25] *Jam v International Finance Corp*, 586 US 273 (2019).

engagement with us on these issues. Please confirm receipt of this submission, let us know if we can provide any additional information.

Sincerely,



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Appendix A: ADB's and its Member States' Climate Change Due Diligence and Harm Prevention Obligations Under International Law

I. ADB's Member States' General Obligations Under International Law

International law has long provided that if a state breaches an obligation established by a treaty or customary international law it can be held responsible in international tribunals or applicable domestic courts.[26] Courts have found that "when member States participate in [an] international organization's decision-making processes, they are [ ] carrying out state acts that have to comport with their international obligations."[27] The International Court of Justice made this finding in *FYROM v. Greece*.[28] In a dictum in *Southern Bluefin Tuna*, the International Tribunal for the Law of the Sea also found it could examine state conduct within an international organization to determine compliance with its legal obligations.[29] "[These courts and] the European Court of Human Rights indicate that when states make decisions within an international organization, they must adhere to their human rights obligations and substantive obligations related to the organization's area of competence." [30] Scholars in the field have come to similar conclusions. Barros persuasively applies those cases to the governing boards of international financial institutions, arguing that member states have due diligence obligations to take all measures to ensure that they know about risks to human rights before approving loans, mitigate those risks when making decisions, and ensure that loans already issued conform to their human rights conditions."[31] Kerr and Barros also point out that the Articles on State Responsibility—which were applied by the International Court of Justice in *FYROM v. Greece*— indicate that the conduct of state representatives when decision-making at international organizations can be attributed to a state and independently assessed. [32]

II. ADB's General Obligations Under International Law

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[26] Kerr, ICAO at 3; Kerr, Legal Accountability Int. Carbon Markets, at 152, 157-159 (Section 3.2); For examples, see fns. 34-39, 45, *post* and 14-27 *ante;* Kerr, All Necessary Measures at 9-10; Kerr, Erga Omnes Obligation; Baine P. Kerr, Binding the International Maritime Organization to the United Nations Convention on the Law of the Sea, 19 INT'L ORG. L. REV. 391 (2022) (hereinafter "Kerr, IMO").

[27] Baine P. Kerr, All Necessary Measures: Climate Law for International Shipping, Virginia Journal of International Law, 64 Va. J. Int'l L. 523 (2024) at 523-570 (available at: https://www.vjil.org/all-necessary-measures-climate-law-for-international-shipping) (hereinafter "Kerr, All Necessary Measures") at 558-559, and fn. 257; Ana Sofia Barros & Cedric Ryngaert, The Position of Member States in (Autonomous) Institutional Decision-Making, 11 INT'L ORG. L. REV. 53 (2014) (hereinafter "Barros & Ryngaert") at 53, 55.

[28] Kerr, All Necessary Measures at 558, and fn. 258; Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece), Judgment, 2011 I.C.J. Rep. 644 (Dec. 5) [hereinafter FYROM].

[29] Kerr, All Necessary Measures at 558-559, and fn. 264; Southern Bluefin Tuna (N.Z. v. Japan; Austl. v. Japan), Cases Nos. 3 and 4, Order of Aug. 27, 1999, ITLOS Reports 1999 [hereinafter Southern Bluefin Tuna], ¶ 50; See, Moritaka Hayashi, The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the International Tribunal for the Law of the Sea, 13 TULANE ENV. L. J. 361 (2000).

[30] Kerr, All Necessary Measures at 529-530, 559-560, and fn. 32; FYROM, Southern Bluefin Tuna at ¶ 50, Gasparini v. Italy and Belgium, App. No. 10750/03, (May 19, 2009), https://hudoc.echr.coe.int/eng?i=001-92899; Perez v. Germany, App. No. 15521/08 (Jan. 6, 2015), https://hudoc.echr.coe.int/eng?i=001-151049; Klausecker v. Germany, App. No. 415/07 (Jan. 6, 2015), https://hudoc.echr.coe.int/eng?i=001-151029).

[31] Kerr, All Necessary Measures at 560-561, and fn. 279; Ana Sofia Barros, Governance as Responsibility: Member States as Human Rights Protectors in International Financial Institutions (2019) (hereinafter "Barros") at Chapter III; *see also* Pasquale De Sena, International Monetary Fund, World Bank and Respect for Human Rights: A Critical Point of View, 20(1) ITALIAN Y.B. INT'L. L. 247, 257 (2010).

[32] Kerr, All Necessary Measures at 560-561, and fn. 282; Barros at 94.

International organizations,[33] including the ADB, can also be held responsible for breaching their obligations, including those established by a treaty or customary international law.[34] This has happened numerous times, in various domestic courts.[35] The ILC DARIO Articles[36] provide a structural roadmap for evaluating an organization's obligation established by a treaty or customary international law. International Law Commission, 'Draft Articles on the Responsibility of International Organizations with commentaries,' Yearbook of the International Law Commission (2011), vol. II, Part Two, UN Doc. A/66/10 (hereinafter "ILC DARIO Articles").[37] ILC DARIO Article 10 provides that there 'is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.'[38] See also, ILC DARIO Article 10 paragraph 2 providing that international organization's international legal obligations "may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order." In addition, "the ICJ found long ago that international organizations are bound by 'obligations incumbent upon them under general rules of international law."[39]

And in regards to treaty obligations, even in the absence of an express textual indication that an international organization is bound by a treaty's obligations, an international organization is transitively bound to the same treaty obligations as their members, in a way that avoids or resolves treaty conflicts between organizations and their member states.[40] Thus, for example, the ADB itself must adhere to its member states' obligations under Article 4 of the UNFCCC to reduce or limit GHG emissions and their obligation under Articles 2 and 3 of the Paris Agreement to take ambitious efforts to hold global warming to less than 1.5°C.

[33] An 'international organization' is 'an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.' Kerr, Clear Skies at 104, fn. 25 (citing Chicago Convention, note 11, Art. 64).
[34] Kerr, ICAO at 3, and fn. 23 (citing Jan Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act,' (2017) 28(4) European Journal of International Law, 1137).
[35] Kerr, B. (2022). Mitigating the Risk of Failure: Legal Accountability for International Carbon Markets. Utrecht Law Review, 18(2), 145-161 (hereinafter "Kerr, Legal Accountability Int. Carbon Markets") at 152, fn. 57 and 58 (citing August Reinisch, *International Organizations Before National Courts* (2nd edn, Cambridge 2009) 28, notes 124-130 (listing and discussing cases), and fn. 61 (citing *Jam v International Finance Corp*, 586 US __ (2019) 5-6; Clemens Treichl and August Reinisch, 'Domestic Jurisdiction over International Financial Institutions for Injuries to Project-Affected Individuals: The Case of Jam v International Finance Corporation' (2019) 16 International Organizations Law Review 133).
[36] International Law Commission, 'Draft Articles on the Responsibility of International Organizations with commentaries,' Yearbook of the International Law Commission (2011), vol. II, Part Two, UN Doc. A/66/10 (hereinafter "ILC DARIO Articles").
[37] Kerr, ICAO at 3.
[38] Kerr, ICAO at 4; ILC DARIO Articles, Art. 10.
[39] Kerr, Clear Skies at 112, and fn. 134 (citing *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, I.C.J. Reports 1980, p. 73, para. 37. *Reparation for Injuries*, note 50, 174).
[40] Kerr, Clear Skies at 112, and fn. 138 (citing K. Daugirdas, 'How and Why International Law Binds International Organizations,' (2016) 57 Harvard International Law Journal, 137, 350, 364; citing F. Megret & F. Hoffman, 'The UN as a Human Rights Violator-some Reflections on the United Nations Changing Human Rights Responsibilities,' (2003) 25 Human Rights Quarterly, 318 (arguing that United Nations should be transitively bound by their member states' treaty obligations), <https://www.jstor.org/stable/20069667>; O. De Shutter, 'Human Rights and the Rise of International Organizations: The Logic of Sliding Scales in the Law of International Responsibility,' (2009) (CRIDHO Working Papers Faculte de Droit de L'Universite Catholique de Louvain), 10 (discussing functional succession theory), https://ssrn.com/abstract=2446913); see *also*, Kerr, Clear Skies at 113, and fn. 145 (citing Daugirdas, note 137, 368; Megret, note 138, 318).

Appendix B: Legal Analysis as to Why ADB and also its Member States are Required to Secure a SEA that is Released for Public Review Prior to Adoption of the Energy Policy Amendments Under International Law

International law mandates that policies and plans likely to have significant environmental effects undergo appropriate Strategic Environmental Assessment (SEA) and that this assessment, and relevant information to support it, be disclosed for public review.

It is readily apparent that the amendments ADB has in mind for its Energy Policy Update are likely to have significant environmental and social impacts that necessitate thorough public review and robust environmental impact and harm prevention analysis. For example:

- **Contemplated Amendment to Remove the Ban on ADB Investing in Nuclear Power:** The proposed removal of the prohibition on financing investments in nuclear power is a monumental shift for ADB's energy policy. Nuclear power involves complex, long-term environmental and safety concerns, including radioactive waste management, accident risks, and security implications. Such a significant policy change demands the most extensive SEA analysis thoroughly supported by study that identifies procedures and criteria ADB would use prior to considering nuclear power for investment. Furthermore, a transparent public consultation process that provides for opportunity to review a SEA is needed to address significant public concerns and to best ensure the highest standards of safety and sustainability.

- **Contemplated Addition to Stimulate ADB Investments in Methane Leakages and Routine Gas Flaring Reduction:** While methane reduction is important to meeting the 1.5°C warming limitation objective, an amendment to ADB's Energy Policy to stimulate investments in existing upstream oil and gas fields for this purpose requires stringent public scrutiny, and careful study and policy controls. There is a risk that such investments could prolong the lifespan of fossil fuel infrastructure or legitimize continued fossil fuel extraction, rather than accelerating a just transition away from it. Detailed SEA analysis outlining and supporting the criteria for ADB investments in methane leakages and gas flaring reduction informed by public comment is essential to ensure these investments succeed in contributing to decarbonization without creating new lock-in effects.

- **Contemplated Amendment to Promote ADB Support for Co-Firing in Coal and Gas Power Plants:** The cost, benefits, and criteria governing any co-firing with alternative less GHG intensive fuels, including biofuels, green ammonia, green hydrogen, in existing coal and gas power plants requires careful and supported SEA analysis. While presented as an emission reduction measure, the environmental integrity of these technologies (e.g., sustainability of biofuel feedstocks, lifecycle emissions of green ammonia/hydrogen production) and their effectiveness in reducing greenhouse gas emissions requires rigorous, independent SEA analyses and public review. In particular, policy language and requirements that ensure any co-firing with clean fuels does not extend the lifetime of fossil fuel power plants must contain clear and verifiable criteria to prevent the perpetuation of fossil fuel emissions.

- **Contemplated Carbon, Capture, Utilization and Storage (CCUS) Amendments:** While extending the prohibition of CCUS coupled with enhanced oil recovery to include enhanced gas recovery is a positive step, an amendment to the Energy Policy promoting and allowing ADB investments in the use of depleted oil and gas wells for CO2 storage in CCUS projects requires extensive SEA analysis that examines the environmental criteria and standards ADB will require be met. Such an SEA that is vetted through public comment must thoroughly analyze these ADB

criteria and standards, along with the long-term safety, permanence, and potential leakage risks of CO2 storage, as well as the overall energy intensity and effectiveness of CCUS in achieving genuine decarbonization.

- **Contemplated Addition to Stimulate ADB Investments in Critical Minerals and Clean Energy Technology Manufacturing:** Amending the Energy Policy to advance ADB's investments in this area, while seemingly aligned with energy transition, carries significant environmental and social risks related to mining, processing, and manufacturing. These activities can lead to habitat destruction, water pollution, human rights abuses, and labor issues. Without a detailed SEA and public review and consultation on the specific safeguards and operational approaches, this could undermine the very sustainability goals the Policy aims to achieve.

For all the above reasons, a full and supported SEA (or equivalent) is required under for at least these, if not all, of ADB's contemplated Energy Policy amendments for ADB and its member states to satisfy their procedural and substantive harm prevention obligations under international law, which specifically include the following:

A. Procedural SEA Obligations

i. Espoo Convention and Kyiv Protocol Obligations

The Espoo Convention and its Kyiv Protocol require that ADB and most of its European member states, ensure a full SEA (or equivalent) is conducted that provides a full and supported environmental impact and mitigation analysis of the amendments to the Energy Policy, and that this SEA and its supporting studies are released to the public for review and comment before adoption of the Policy amendments. See Protocol on Strategic Environmental Assessment (SEA Protocol), 2003 (hereinafter "Kyiv Protocol") at Articles 4 (2) and 2(7) (see analysis of these articles, *post*); See also, Espoo Convention Article 2 paragraphs 7 and 6, Article 3 paragraphs 4, 8, Article 4 paragraph 2.[41] These treaties are instruments of international law that are binding on its signatories, which include 35 European States, including those which are ADB shareholders.

While the Kyiv Protocol distinguishes between plans and programs on the one hand and legislation and policies on the other, it is our submission that ADB's adoption of its Amended Energy Policy with its contemplated amendments constitutes a plan or program within the Kyiv Protocol's meaning. This is because the Kyiv Protocol describes exactly what ADB's contemplated amendments to its Energy Policy constitute – ***an energy plan which sets the framework for future permission for ADB to invest in specific energy projects, including for nuclear energy projects***. It provides:

> A strategic environmental assessment shall be carried out for plans and programmes which are prepared for agriculture, forestry, fisheries, ***energy,*** industry including mining, …, ***and which set the framework for future development consent for projects*** listed in annex I and any other project listed in annex II that requires an environmental impact assessment under national legislation.

[41] The member states of the UN Economic Commission for Europe that are party to the Espoo Convention comprise of 56 States located in Europe, Northern America and Central Asia).

Kyiv Protocol at Article 4 (2) (emphasis added). The Kyiv Protocol Annex I list, includes but is not limited to, the following projects ADB's amended Energy Policy would enable consent for ADB to invest in and or guarantee:

> Thermal power stations and other combustion installations with a heat output of 300 megawatts or more and nuclear power stations and other nuclear reactors; Installations solely designed for the production or enrichment of nuclear fuels, for the reprocessing of irradiated nuclear fuels or for the storage, disposal and processing of radioactive waste; Large-diameter oil and gas pipelines; Major mining, on-site extraction and processing of metal ores or coal; and Major storage facilities for petroleum, petrochemical and chemical products.

and the Kyiv Protocol Annex II list, includes but is not limited to, the following projects ADB's Amended Energy Policy would enable consent for ADB to invest in and or guarantee:

> Nuclear power stations and other nuclear reactors; Industrial installations for the production of electricity, steam and hot water; Industrial installations for carrying gas, steam and hot water; deep drillings; underground storage of combustible gases; Quarries, open cast mining; underground mining; Extraction of minerals by marine or fluvial dredging; Pipelines for transport of gas or oil...

Kyiv Protocol, Annex I-II at 16-23. The Kyiv Protocol further provides that after providing public notice to inform the screening of the plan's environmental impacts, if a state determines that a SEA is not required because it deems the plan not likely to have a significant environmental impact, it must timely notify the public and for its reasons. Kyiv Protocol at Article 5 (1)(4). ***We note ADB has not provided any such notification***.

And even if the Amended Energy Policy is considered a policy under the Espoo Convention and or Kyiv Protocol, these treaties still require a SEA (or equivalent) to be conducted for, and provided to the public in advance of, the Energy Policy Update approval. This because it is *appropriate* considering (a) the likelihood of significant environmental impacts from the contemplated Energy Policy amendments and (b) the purpose of SEAs to provide the public with an opportunity to inform and help prevent adverse environmental impacts. See Section II, *ante*, detailing likely environmental impacts; See Espoo Agreement Article 2 (7) providing:

> Environmental impact assessments as required by this Convention shall, as a minimum requirement, be undertaken at the project level of the proposed activity. To the extent *appropriate*, the Parties shall endeavour to apply the principles of environmental impact assessment to policies, plans and programmes.

(emphasis added). See Kyiv Protocol Article 15 (1)-(3) providing that States, "[c]onsidering the *appropriate* principles and elements of this Protocol"… and "taking into account the need for transparency in decision-making," "shall endeavor to ensure … environmental concerns are considered and integrated to the extent appropriate in the preparation of its proposals for policies…that are likely to have significant effects on the environment"… " (emphasis added) combined with the Preamble to the Kyiv Protocol providing:

> Recognizing that strategic environmental assessment should have an important role in the preparation and adoption of plans, programmes, and, *to the extent appropriate*, policies and legislation, and that the wider application of the principles of environmental impact assessment

to plans, programmes, policies and legislation will further strengthen the systematic analysis of their significant environmental effects

(emphasis added). See also Preamble to Kyiv Protocol "Acknowledging the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998" …and… "Conscious, therefore, of the importance of providing for public participation in strategic environmental assessment."

ii. Customary International Law SEA Procedural Obligations

The procedural Espoo Convention and Kyiv Protocol environmental impact assessment obligations also are well established customary international law that applies to all states in their decision making at ADB, and to ADB as an international organization. See Appendix A detailing ADB's obligations, and separately its member states obligations when making policy decisions at ADB.

While the obligation under customary international law to conduct an environmental and social impact assessment (ESIA) for activities with a risk of significant transboundary harm traditionally applied to specific projects,[42] the extension of the ESIA obligation to strategic-level documents or SEAs under customary international law is now firmly established. It reflects the recognition that decisions made at a high, strategic level can have far greater environmental consequences than single projects. This shift is primarily driven by international jurisprudence governing transboudary harm prevention,[43] due diligence, and human rights obligations,[44] and the widespread adoption of SEA laws and principles in national and international practice and laws beyond just the Kyiv Protocol treaty, including:

- **EU's SEA Directive (2001/42/EC),** which sets out a clear and binding procedure for EU member states to conduct SEAs for plans and programs likely to have significant environmental effects;
- **The United Nations Environment Programme (UNEP) SEA Guidelines**, which represent a widespread consensus among states and international organizations that emphasize that a SEA should be applied to policies, plans, and programs.
- **State Practice:** The obligation to conduct a SEA for plans, policies, and programs has been integrated into legislation of numerous states, which further cements this obligation as one which is required under customary international law. Many countries, including Germany, France, Spain, Denmark, the UK, Scotland, Rwanda now have legal frameworks that require SEA for a wide range of strategic plans and policies, from national energy policies to regional development plans.[45] In addition, countries like

[42] See "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), ICJ Rep 253 (2015) (holding when a State activity carries risk of transboundary environmental harm, and ESIA is required); Case Concerning Pulp Mills on the River Uruguay (Arg. v. Uruguay), 2010 I.C.J. 14 (Apr. 20) (underscoring the importance of the procedural obligation to conduct an ESIA for activities that might cause significant transboundary harm, as an integral part of the duty of due diligence to prevent environmental damage);) Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), I.C.J. 7 (Sept. 25, 1997).

[43] While the ICJ Pulp Mills (Argentina v. Uruguay) case addressed a specific project and thus a ESIA, the Court's ruling established a foundational principle with broader implications for strategic documents or SEAs: that the obligation to conduct an environmental assessment to decisions made before a specific project begins - a practice that is the core of an SEA for plans policies, and programs is a requirement of general customary international law for activities with a risk of significant transboundary harm.

[44] See Section 1.B, *ante*; see Appendix C, Section C *post*, and Appendix B, Section B., *post*.

[45] For Scotland's SEA law see Environmental Assessment (Scotland) Act 2005 requiring SEAs for a broad range of public plans, including energy strategies and policies. For instance, the Scottish Government has conducted SEAs on its

Canada[46] have SEA Directives that require federal departments and agencies to conduct an SEA for any policy, plan, or program submitted to Cabinet for approval that may have important environmental effects. And the United States' National Environmental Policy Act is interpreted to require the production of functionally similar SEA type programmatic assessments for various plans and policies.

The common SEA practice and requirement in treaties, within international organization, and in state legislation around the world reinforces that an SEA is not just a good idea – it is a de facto customary international obligation for significant strategic decisions in plans, policies, and programs with a potential for transboundary impact. It is not thus only a global trend toward integrating environmental considerations at an early, strategic stage of planning, rather than only at the project level, to help avoid or mitigate potential negative impacts more effectively. It is a legal requirement that ADB must meet for the amendments identified in Section B above that it is contemplating that constitute plans under international law. See also, Appendix B, Section A.i.

B. Substantive Due Diligence SEA / ESIA Obligations

Sources of law that apply to the ADB's and its member states' due diligence obligations are customary international law, informed by principles such as harm prevention and the precautionary approach, and human rights treaties.[47] "Customary international principles require that states take all necessary measures to prevent transboundary harm, and exercise precaution when making decisions that pose a risk of harm to the environment."[48] For instance, [u]nder the harm prevention principle, states are required to 'take all appropriate measures to prevent significant transboundary harm or at any event minimize the risk thereof' from activities in its territory or arising under its jurisdiction or control." [49] This principle overlaps with others, including the "responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond

National Energy Strategy and its plans for a "Just Transition" to a low-carbon economy; For Germany's SEA law, see Act on the Assessment of Environmental Impacts (Gesetz über die Umweltverträglichkeitsprüfung – UVPG); For Rwanda's SEA law, see (Ministerial Order No. 002/2021 of 08/02/2021); for Denmark's SEA law, see Environmental Assessment Act (Lov om miljøvurdering af planer og programmer); for the UK's SEA law, see The Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633); for Spain's SEA Law, see Law 21/2013, of 9 December, on Environmental Assessment (Ley de evaluación ambiental); for France's SEA law, see Code de l'environnement (Environmental Code).

[46] See Canadian Cabinet Directive on the Strategic Environmental Assessment of Policy, Plan and Program Proposals

[47] See Appendix A, Sections I-II; Ana Sofia Barros, Governance as Responsibility: Member States as Human Rights Protectors in International Financial Institutions (2019) (hereinafter "Barros") at Chapter/Section III; Baine P. Kerr, All Necessary Measures: Climate Law for International Shipping, Virginia Journal of International Law, 64 Va. J. Int'l L. 523 (2024) (available at: https://www.vjil.org/all-necessary-measures-climate-law-for-international-shipping) (hereinafter "Kerr, All Necessary Measures") at 525-527 and note 16 (detailing state's requirements under customary international law); Jose Viñuales, Due Diligence in International Environmental Law: a Fine-Grained Cartography, in Due Diligence in the International Legal Order, 113 (Heike Krieger et al. eds., 2021) (hereinafter "Viñuales"); Benoit Mayer, Interpreting States' General Obligations on Climate Change Mitigation: a Methodological Review, 28 RECIEL 107 (2019); Benoit Mayer Climate Change Mitigation as an Obligation under Customary International Law, 48(1) YALE J. INT'L L. 105, 130-131 (2023)); Kerr, All Necessary Measures at 560-561, and fn. 279.

[48] Kerr, All Necessary Measures at 527, and fn. 17; Viñuales at 113; *see also*, Benoit Mayer, Interpreting States' General Obligations on Climate Change Mitigation: a Methodological Review, 28 RECIEL 107 (2019); Benoit Mayer, Climate Change Mitigation as an Obligation under Customary International Law, 48(1) YALE J. INT'L L. 105, 130-131 (2023).

[49] Kerr, All Necessary Measures at 541, and fn.120; United Nations, International Law Commission (ILC), Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, A/RES/56/82, (Dec. 12, 2001), at art. 3, commentary to art. 3, ¶ 18; Viñuales at 124.

national jurisdiction"—articulated in the Rio Declaration— and the requirement that states take precautionary measures even in the absence of scientific certainty as to significant harm."[50]

Human rights law continues to evolve to encompass protection of the environment,[51] and it is firmly established "[c]limate change is one of the greatest threats to human rights."[52] The UN General Assembly recognized the right to a clean, healthy, and sustainable environment as a human right in 2022.[53] Moreover, "human rights treaties guarantee rights to life and property—rights that international and domestic courts have found implicate a positive obligation to reduce environmental risks, including risks of harm from climate change."[54] "Cases from the International Court of Justice, the International Tribunal for the Law of the Sea, and the European Court of Human Rights indicate that when states make decisions within an international organization, they must adhere to their human rights due diligence obligations and substantive obligations related to the organization's area of competence."[55] As directly related to climate change impacts, "recent opinions from human rights treaty bodies have adopted a risk-based test for when human rights due diligence obligations apply to climate change: if it is reasonably foreseeable that an activity under a state's jurisdiction or control will

[50] Kerr, All Necessary Measures at 541, and fn. 121; Viñuales at 116-117 (citing Rep. of the UN Conf. on Envir. and Devel., Rio Declaration on Environment and Development, A/ CONF.151/ 26 (1992); Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, Case No. 17, 2011 ITLOS Rep. 10, ¶¶ 125-135.
[51] Kerr, All Necessary Measures at 550.
[52] The United Nations Environment Programme (UNEP) - "[c]limate change is one of the greatest threats to human rights of our generation posing a serious risk to the fundamental rights to life, health, food and an adequate standard of living of individuals and communities across the world."
[53] Kerr, All Necessary Measures at 550, and fn. 188; G.A. Res. 76/300, The Human Right to a Clean, Healthy and Sustainable Environment, at 3 (July 28, 2022).
[54] Kerr, All Necessary Measures at 527, and fn. 20; Case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland, App. No. 53600/20, ¶¶ 573–74 (Apr. 9, 2024), https://hudoc.echr.coe.int/eng?i=001-233206 (holding that Switzerland is required to quantify GHG emissions limitations through a carbon budget and implement reduction measures); Budayeva v. Russia, App. No. 15339/02, ¶ 116, 133 (Mar. 20, 2008), https://hudoc.echr.coe.int/eng?i=001-85436 (holding that states have a positive obligation to protect life and property from environmental risks). The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda (Urgenda) [2019] Dutch Supreme Court 19/00135 (Engels); *See also*, Jaqueline Peel & Harri Osofsky A Rights Turn in Climate Change Litigation, 7(1) TRANSNAT'L ENVTL. L. 37, 48 (2018) (discussing case law); Siobhan McInerney-Lankford, Climate Change and Human Rights: an Introduction to Legal Issues, 33 HARVARD ENVTL. L. REV. 431, 433 (2009). Other courts have recognized the right to a healthy environment as an autonomous right. *See, e.g.*, The Environment and Human Rights (Arts. 4(1) and 5(1) American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶¶ 62–63, 101–03 (Nov. 15, 2017) [hereinafter Colombia Advisory Opinion].
[55] Kerr, All Necessary Measures at 529, and fn. 32 (citing numerous cases and scholarly articles in support).

cause a risk of climate harm, the state must diligently prevent it within the limits of its capacity." [56] [57] [58]

In sum, "[d]ue diligence requires states to 'employ all means reasonably available to them' to prevent a violation 'so far as possible'."[59] The types of conduct that could breach a due diligence obligation include action, inaction, or deficient action.[60] Cases from the International Court of Justice, the International Tribunal for the Law of the Sea,[61] and the European Court of Human Rights indicate that when participating in the governing boards of international financial institutions, member states have due diligence obligations to take all measures to ensure that they know about risks to human rights before approving policies governing and directing their investments and to mitigate those risks their policies could pose. [62] The same reasoning applies to states' decision-making within the ADB. Accepting that ADB member states are bound by their human rights obligations when acting as decision-makers within the ADB, they are therefore under an obligation of conduct to do all they can in that role to make sure the ADB's policies decisions, and actions or inactions, uphold human rights.[63]

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[56] Kerr, All Necessary Measures at 527, and fn. 21 (citing UN Human Rights Committee, 'Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019,' UN Doc. CCPR/C/135/D/3624/2019 (Sept. 22, 2022), ¶ 8.13; UN Committee on the Rights of the Child, 'Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 104/2019,' No. CRC/C/88/D/104/2019 ¶ 10.5-.7 (Oct. 8, 2021); *see* Case Comment, Committee on the Rights of the Child Extends Jurisdiction over Transboundary Harms; Enshrines New Test, *Saachi v. Argentina*, 135(7) HARVARD L. REV. 1981 (2022); Federica Violi, The Function of the Triad 'Territory,' 'Jurisdiction,' and 'Control' in Due Diligence Obligations, in Due Diligence in the International Legal Order 75 (Heike Krieger et al. eds., 2021) at 81-82 (in Colombia Advisory Opinion, supra note 20 "court equated jurisdiction with causality and ultimately with imputability, thus altering the vertical understanding of human rights jurisdiction, and eventually risk proximity.")).

[57] See European Court of Human Rights case *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (judgement available here); the May 21, 2024 International Tribunal on the Law of the Sea Advisory Opinion in response to the Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (2024 ITLOS Climate Advisory Opinion) (available here); the May 29, 2025 Inter-American Court of Human Rights, Advisory Opinion on the Climate Emergency and Human Rights, OC-32/2025 (IACHR Climate Advisory Opinion) (available here); and the July 23, 2025 Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change (ICJ 2025 Climate Advisory Opinion) (available here); *See also*, Kerr, All Necessary Measures at 550, and fn. 189.

[58] International Obligations Governing the Activities of Export Credit Agencies in Connection with the Continued Financing of Fossil Fuel-Related Projects and Activities, Legal Opinion, Kate Cook and Jorge E. Viñuales, March 24, 2021, available at: https://priceofoil.org/2021/05/04/eca-legal-opinion/ (hereinafter "Cook and Viñuales") at ¶¶ 47, 132-146, and fn. 182 (citing Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24, paragraph 50).

[59] Kerr, All Necessary Measures at 556-557, and fn. 244; Case Concerning the Application on the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 430 (Feb. 26, 2007); SRFC Advisory Opinion, supra note 203, ¶ 129; John Dugard & Annemarieke Vermeer-Künzli, The Elusive Allocation of Responsibility to Informal Organizations: the Case of the Quartet on the Middle East in Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie, 265 (Maurizio Ragazzi ed., 2013); *see also* Barros at 158, n. 916.

[60] Kerr, All Necessary Measures at 556, and fn. 245 (citing Barros at 121-122, 124, 195).

[61] Recently, the 2024 ITLOS Climate Advisory Opinion reinforced the concept of "stringent due diligence" for states in preventing environmental harm, which implicitly requires robust assessment and public input. Without a comprehensive SEA and supporting documentation, the public cannot adequately assess and help inform the potential ramifications of the proposed amendments to ADB's Energy Policy, severely hindering their ability to provide informed comments needed to prevent and mitigate adverse policy impacts.

[62] Kerr, All Necessary Measures at 560-561, and fn. 279; Barros at Chapter/Section III; see also Pasquale De Sena, International Monetary Fund, World Bank and Respect for Human Rights: A Critical Point of View, 20(1) ITALIAN Y.B. INT'L. L. 247, 257 (2010).

[63] See fns. 20-23, 25-26; Kerr, All Necessary Measures at 546-550; Cook and Viñuales at ¶¶ 47, 132-146, and fn. 182 (citing Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017,

Applying the harm prevention principle and precautionary principle yields the same due diligence obligations.[64]

Accordingly, in light of the environmental and social risks and impacts from ADB's financing activities, customary international principles and human rights law impose an equivalent obligation mandating that the ADB and its member states use best available and practiced methods, and take all measures, to diligently account for, prevent, and mitigate environmental and social harms. **This means that ADB and its member states must ensure ADB diligently assesses and prevents the risk of climate harm from ADB's Energy Policy Update to extent of their capacities prior to approval of ADB's Energy Policy Update in a manner that meets the best reasonably available and practiced standard – and this standard is conducting a full and supported SEA for all proposed Energy Policy amendments that may have an adverse effect on the environment.**

"As with other international environmental obligations, the required degree of diligence differs based on states' development and individual circumstances."[65] Thus, like in the context of transboundary harm from hazardous activities, a highly developed or technologically advanced state has a greater scope of diligent conduct than other states.[66] This further supports that ADB and its Global North Member States must use their best efforts, and best available practiced methods, to ensure that environmental and social impacts from ADB's Energy Policy Update are fully assessed, avoided, and mitigated to the furthest extent feasible prior to ADB's adoption of the Energy Policy Update.

Accordingly, as a central component of satisfying their respective due diligence obligations to prevent harm under international law, ADB and its member states have a duty to conduct a thorough and supported SEA evaluating and supporting harm avoidance measures for all amendments to ADB's Energy Policy Update prior to its adoption. ***And as a central part of this SEA, ADB must allow for public review and comment.*** This is because for quite some time, it has been universally accepted that at the minimum, the opportunity for public review of a policy and its SEA well prior to policy approval is a fundamental element of SEA process for programs, plans, and policies around the world.[67] This is demonstrated by the inclusion of public disclosure, and opportunity for public review of, a policy or plan and its environmental impact analysis well prior to plan, programme, or policy approvals in the vast majority of countries' environmental and social impact assessment laws and within international organizations.[68]

As documented in 2018 United Nations Environment Programme (UNEP) Report with examples from states around the world,

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E/C.12/GC/24, paragraph 50; Ana Sofia Barros, Member States and the International Legal (Dis)order Accounting for the notion of Responsible Governance, International Organizations and Member State Responsibility, Critical Perspectives, Brill Nijhoff 2017, Chapter 4 at 66-71).

[64] Kerr, All Necessary Measures at 541, 561-562; Cook and Viñuales at ¶¶ 41, 44, 46, 47, 48 (PDF at 29-34).

[65] Kerr, All Necessary Measures at 529, and fn. 29; Viñuales at 125-126; Jaqueline Peel, Climate Change, in Shared Responsibility, 1033, 1041-1044 (Andre Nollkaemper, ed., 2018) (failure to stop, reduce or regulate emitting activities could be basis for finding state did not discharge due diligence obligation of harm prevention).

[66] Kerr, All Necessary Measures at 529, and fn. 30; United Nations, International Law Commission (ILC), Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, A/ RES/ 56/ 82, 12 December 2001, commentary to art. 3, ¶18; Cook and Viñuales at ¶47.

[67] See e.g., UNEP, *Assessing Environmental Impacts: A Global Review of Legislation* (2018) (hereinafter "UNEP EIA Report") at Chapter 1 Sections 1.4-1.5 at 3-8, Chapter 3. EIA systems – Legal and institutional frameworks for EIAs, Section 3.2.3 Public participation at 50-66; Chapter 4. SEA systems – Legal and institutional frameworks for SEAs, Section 4.2.3 Public participation at 99-103.

[68] *Id*.

There is a wide consensus that public participation constitutes a fundamental element of EIAs – or in fact even that EIA is not an EIA without public participation. It is also widely recognized that public participation is not only a goal in itself, but that it is a key to accurate and effective environmental assessments…Due to the fact that public participation is considered an integral part of the EIA process, all countries have enacted some kind of legal measure for public participation in EIAs…. The review stage of the EIA process, i.e. the review of the EIA report prior to the decision on whether a project can go ahead taking environmental considerations into account, is a key element of the EIA process. The objective is to verify whether the information provided is sufficient and adequately presented so as to form a sound basis for decision-making. Public participation, comments from the public on the EIA report are an integral part of the review process in many countries…

As in the case of EIAs, public participation is a fundamental element of the SEA process. It serves the same objective, but at a higher level of decision-making, thus defining the parameters for development, for example in a sector or geographical area [citation omitted]. The need to ensure that not only the most relevant environmental information is available and considered in the final decision-making and implementation, but also that divergent interests, aims and perspectives of a range of stakeholders are adequately taken into account, illustrates the key importance of making SEA a collaborative process which should prominently incorporate public participation mechanisms [citation omitted]…Most SEA legislation requires public participation "only" at the assessment and/ or review stage, thus when an SEA is being developed to assess the environmental impact of a draft plan, programme or policy, and prior to final decision-making of the competent authority. Thereby, the most widely used mechanism is the opportunity to submit comments following publication of relevant documents, despite the widely acknowledged limitations of this approach…[69]

While the UNEP Report documents that there is no general agreement in laws or the literature on what constitutes good practice in relation to public participation in SEAs, it finds most legislation in Global North and South states around the world make it mandatory to publicly publish information on disclosing new policies or policy amendments that may have a significant impact on the environment when the policy is being considered, to make the draft SEA reports publicly available, and to provide the opportunity to submit comments on the SEA reports and the policy well prior to project approval.[70]

[69] *Id*.
[70] *Id*.

Appendix C: Asian Development Bank's (ADB's) and its Member States' Climate Change Due Diligence and Harm Prevention Obligations Under the Paris Agreement, and Human rights and Customary International Law

A. Summary / Overview

ADB, and also its member state shareholders, have obligations under international law that that they can be held accountable to in international tribunals and domestic courts. See Appendix A, Sections I, II, *ante*.

As it pertains to climate change, the obligations under international law that ADB and its member states must adhere, include their due diligence[71] and harm prevention obligations arising under the Paris Agreement, Law of the Sea, human rights treaties, and customary international law. Because the projects with GHG emissions ADB enables by providing financing and guarantees pose a severe risk of climate harm, these due diligence obligations require ADB and its member states to ensure that ADB's change impacts, and measures to avoid them, to be assessed and implemented prior to financing and guarantee approvals using best reasonably available and practiced methods.[72] Those methods include the processes required and practices performed under the National Environmental Policy Act (NEPA) in the United States applicable to quantifying GHG emissions, assessing their impacts, and analyzing alternatives and feasible avoidance and other mitigation measures because these methods are frequently and routinely practiced and implemented.[73] They also prohibit investments in, or financing of or guarantees for, fossil fuel projects that would cause or contribute to the 1.5°C global warming limitation objective in the Paris Agreement to be exceed.

Wealthier countries from the Global North states have a higher standard of due diligence than states with less capacity. These significant financial resources are also available to ADB, which as an independent public institution, has its own unique due diligence obligations separate from its member states. ADB and its Global North Member States thus have the duty, capabilities, and control - independent of ADB's clients – to fully assess (or secure an independent entity with expertise to assess) and demand alternatives or measures to prevent harm from climate change when its clients may not have the resources to. ADB can address these harms through ensuring adequate due diligence prior to financing and guarantee approval, which respects client capacity and principles of "common but differentiated responsibilities" at the project assessment and implementation stages. This is because adequate due diligence will ensure that alternatives and mitigation measures to avoid GHG emissions and their impacts are *economically and technically feasible.*

A more detailed overview of ADB's due diligence obligations under the Paris Agreement, Law of the Sea, human rights treaties, and customary international law with supporting citations is provided below in Sections B-C, and in the main text of this letter in Section I.B.

[71] Due diligence is defined as the care that a reasonable person exercises to avoid harm to other persons or their property. See Merriam Webster Dictionary definition of due diligence, available at: https://www.merriam-webster.com/dictionary/due%20diligence.

[72] As detailed in this Appendix C, ADB's due diligence obligations extend beyond adequate study prior to project approvals to prevent its financing and guarantees from causing or contributing to climate change harms. They also include ADB taking substantive measures, such ceasing all direct and indirect financing and guarantees for fossil fuels projects that the IPCC and IEA have shown will cause the 1.5°C warming limitation objective to be exceeded. See fn. 9, *ante*.

[73] See Interim U.S. Council of Environmental Quality (CEQ) NEPA guidance effective January 8, 2023 for GHG emissions and climate change assessments, alternatives analysis and mitigation in environmental impact statements, available at: https://www.regulations.gov/document/CEQ-2022-0005-0001 (last visited April 29, 2025).

B. ADB's and its Member States' Climate Change Due Diligence and Harm Prevention Obligations under the Paris Agreement

i. ADB's and its Member States' Due Diligence Obligations under the Paris Agreement

As detailed in Sections I. and II. above, ADB and its Members States party to the Paris Agreement, are obliged under international law to adhere to the Paris Agreement's requirements. See Section I-II., *ante*.

Paris Agreement Article 2(1)(a) provides an objective of the Agreement is to "hol[d] the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change." Article 2(1)(c) expressly provides for "making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development" as an aim of the Agreement.

The temperature goals set out in the Paris Agreement, including as applied to finance flows, are universally binding norms for the behavior of international organizations and their member states.[74] They do not permit members state parties to follow different, less ambitious goals.[75] "Finance flows which are inconsistent with Article 2(1)(c) are by definition those which undermine the goals of the Paris Agreement," including the warming limitation objectives in Article 2(1)(a).[76] Thus, the language of Article 2 reflecting the object and purpose of the Paris Agreement, together with the object and purpose of the UNFCCC which the Paris Agreement supports, requires that all relevant finance flows are assessed for Article 2(1)(a) and (c) consistency, including those most likely to be inconsistent with Article 2's temperature goals.[77] As applied to ADB, the consistency of finance flows (including, but not limited to loans, equity investments, and guarantees)[78] with the Article 2 pathways can only be assessed effectively if, prior to ADB's financing and guarantee approvals, a project's scope 1, 2 and 3 emissions and their impacts are fully quantified and taken into account, GHG/climate change alternatives analysis is conducted, and mitigation measures are assessed and implemented that can avoid and minimize a project's GHG emissions to the furthest extent economically and technically feasible.[79]

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[74] International Obligations Governing the Activities of Export Credit Agencies in Connection with the Continued Financing of Fossil Fuel-Related Projects and Activities, Legal Opinion, Kate Cook and Jorge E. Viñuales, March 24, 2021, available at: https://priceofoil.org/2021/05/04/eca-legal-opinion/ ("Cook and Viñuales") at ¶¶ 60, 70-72, 85, 265(h); See, e.g. World Bank Group, The World Bank Group's Approach to Paris Alignment, Washington, D.C., March 16, 2023 (http://documents. worldbank.org/curated /en/099658203162320142/IDU1598309ef195cc148fd195421981d12bf8bf6; 2018 MDBs' Joint Declaration, The MDBs' alignment approach to the objectives of the Paris Agreement: working together to catalyse low-emissions and climate-resilient development at 1 (https://thedocs. worldbank.org/en/doc/78414 15438063 48331-0020022018/original/JointDeclarationMDBsAlignment ApproachtoParisAgreementCOP24Final.pdf).

[75] Cook and Viñuales at ¶60

[76] Cook and Viñuales at ¶70

[77] Cook and Viñuales at ¶72

[78] Guarantees qualify as finance flows – they are a blended finance tool and involve an outflow of funds of an amount due on a loan, equity, or other instrument in the event of non-payment by the obligor. See Garbacz W., D. Vilalta and L. Moller (2021), "The role of guarantees in blended finance", OECD Development Co-operation Working Papers, No 97 OECD Publishing, Paris.

[79] *Id*.; See *also*, Cook and Viñuales at ¶108

Article 3 further requires specific assessment of all relevant finance flows. It requires Parties "to *undertake and communicate ambitious efforts*," including in regards to finance, with a view to achieving the Article 2 purposes.[80] Article 4 (1) provides "[i]n order to achieve the long-term temperature goal set out in Article 2, Parties aim … to undertake rapid reductions [in GHG emissions] thereafter in accordance with *best available science*."

State parties are required to implement the Paris Agreement in good faith, [81] which means that action which directly threatens, undermines, or frustrates the achievement of the Article 2 goals – namely the prevention of dangerous climate change - exceeds the margin of discretion allowed by the Paris Agreement.[82] It follows from Article 2 of the Paris Agreement, as read with Articles 3, 4 and 9 in particular that (1) States, as an aspect of their requisite good faith implementation, have an obligation of due diligence that encompasses undertaking *ambitious efforts* in regards to financial flows to meet the Paris Agreement's objectives.[83] Furthermore, these efforts must be informed by *best available science* to assess whether finance flows, including those for which ADB is responsible, are consistent with the global carbon budget.[84] This not only means ADB must ensure best reasonably available commonly practiced science, such as the methods used under NEPA, are used – prior to financing and guarantee approval for each project - to quantify a project's scope 1, 2 and 3 emissions and their impacts, conduct a GHG/climate change alternatives analysis, and assess the mitigation measures that can avoid and minimize a project's GHG emissions to the furthest extent economically and technically feasible. It also means prior to financing and guarantee approvals, ADB must actually ensure alternatives and mitigation measures are adopted to avoid GHG emissions that good faith due diligence shows to be economically and technically feasible and that allows for achievement of the project purpose. Thus, for a hypothetical example – not taking into consideration that ADB's Paris Methodology, Energy Policy, and Environmental and Social Framework should prohibit financing and guarantees for fossil fuel energy infrastructure anyway for the reasons in the text of this letter and this Section III - in the context of contemplating financing or guaranteeing fossil fuel energy projects, such as a natural gas plant that would emit very large quantities of GHG emissions no matter the plant's configuration, efficiency, or mitigation measures, if an alternatives analysis shows it would be technically and economically feasible for renewable energy infrastructure to meet a region's energy demand, the Paris Agreement requires ADB abandon financing and guarantees for a contemplated fossil fuel project and facilitate financing and guarantees to enable renewable energy options instead.

Article 4(3) further provides "[e]ach Party's successive nationally determined contribution will represent a *progression* beyond the Party's then current nationally determined contribution and reflect its *highest possible ambition*, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances." "The standards of "highest possible ambition" and "progression" (Articles 3, 4(1) and (3) of the Paris Agreement), as these relate to the current production gap and global

[80] Cook and Viñuales at ¶ 75.
[81] Cook and Viñuales at ¶ 79 (providing there is a "general duty to implement the Paris Agreement in good faith, as reflected in Article 26 of the Vienna Convention on the Law of Treaties (VCLT) 135 and under customary international law").
[82] Cook and Viñuales at ¶ 80.
[83] Paris Agreement, Article 3; Cook and Viñuales at ¶¶ 75, 76, 103-105.
[84] Paris Agreement, Article 4(1); Cook and Viñuales at ¶¶ 103-105; Cook and Viñuales at ¶110 (providing "due diligence must entail acting in proportion to the scale of the risk posed by the conduct assessed, having regard to the best available science…This means that assessment of the risks posed by an investment/project should take account of all the risks posed.").

carbon budget, should [] inform due diligence." [85] This further supports that prior to ADB approving financing and or a guarantee for a project, ADB must ensure a project's scope 1, 2 and 3 emissions and their impacts must be taken into account, a robust and supported GHG/climate change alternatives analysis is conducted in line with best reasonably available methods, and alternatives and mitigation measures are assessed and committed to that can avoid and minimize a project's GHG emissions to the furthest extent economically and technically feasible.

Article 9(5) requires that developed country Parties are to biennially communicate indicative quantitative and qualitative information related to Article 9, paragraphs 1 and 3, of the Paris Agreement.[86] "Article 9(5) therefore entails not only a duty to report on the provision of support[,] but also to account for finance flows which run counter to the goal set out in Article 2(1)(c)." [87] It follows Article 9 also requires quantification and reporting of a project's scope 1, 2 and 3 emissions, and assessing and reporting on the studied and actually implemented alternatives mitigation measures that could avoid and minimize a project's GHG emissions to the furthest extent economically and technically feasible.

Article 13 establishes a transparency framework, one purpose of which is to: "provide a clear understanding of climate change action in the light of the objective of the Convention as set out in its Article 2, including clarity and tracking of progress towards achieving Parties' individual nationally determined contributions under Article 4." [88] "A good faith interpretation of this obligation entails transparency in relation to finance flows which are inconsistent with the Article 2(1)(c) pathway and Article 2 goals as well as finance flows which are consistent with it." [89] It follows Article 13 also requires quantification and reporting of a project's scope 1, 2 and 3 emissions, and assessing and reporting on the studied and actually implemented alternatives mitigation measures that could avoid and minimize a project's GHG emissions to the furthest extent economically and technically feasible.

The due diligence "duties arising from Article 2(1)(c) of the Paris Agreement and related provisions, including from Articles 2(1)(a), 3, 4, 9, and 13 as detailed above, should be considered in the context of the leverage that States have to align public finance with low greenhouse gas emissions and climate-resilient development through their contributions to and regulation of a range of bodies including MDBs and DFIs." [90] It is clear that this duty of due diligence applies to ADB and its Global North members states, as they possess ample financial resources to satisfy it. That these due diligence responsibilities fall on ADB and its Global North Member states, is consistent with Article 2(2) of the Paris Agreement requiring the Agreement to "be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances." [91] ADB and its Global North Member States securing such diligence is also consistent with Article 3's objective for "[t]he efforts of all

[85] Cook and Viñuales at ¶ 104.
[86] Cook and Viñuales at ¶ 98.
[87] Cook and Viñuales at ¶ 100.
[88] Paris Agreement, Article 13(5).
[89] Cook and Viñuales at ¶¶ 113-114.
[90] Cook and Viñuales at ¶¶ 78-79.
[91] Cook and Viñuales at ¶¶ 56-57.

Parties [to] represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of th[e] Agreement." [92]

ii. ADB's and its Member States' Obligations under the Paris Agreement to stop financing and guarantees for all upstream, midstream, and downstream fossil fuel projects.

As required by the Paris Agreement and customary international law that ADB and its Global North member state shareholders are obliged to adhere to,[93] ADB's Energy Policy, Paris Methodology, and Environmental and Social Framework must explicitly prohibit financing and guarantees for all upstream, midstream, and downstream fossil fuel projects. These requirements are fully established by the analysis by Cook and Viñuales, and detailed in OCI's and BCA's December 18, 2023 OCI drafted Amicus brief to the Inter-American Court of Human Rights regarding the request from Chile and Columbia for an advisory opinion regarding "*Climate Emergency and Human Rights*", which the undersigned incorporate by reference.[94] In summary, Cook and Viñuales demonstrate that:

> On the basis of the best available scientific evidence, and taking into account the current emission and production gaps and the associated risk of overshoot of the Paris Agreement's temperature goals, ADB financing and guarantee activities which support new or existing fossil-fuel related projects/activities are in principle inconsistent with the pathways set out in Paris Agreement Article 2(1)(c), the temperature goals laid down in Article 2(1)(a) of the Paris Agreement, the mitigation requirements under Article 4 of the Paris Agreement, and international human rights law. Furthermore, providing financing or guarantees for projects that lock-in fossil fuel-related emissions or that may use up a significant part of the remaining carbon budget, are inconsistent with the progressive and ambitious approach for nationally determined contributions and long-term strategies laid down in the Paris Agreement.

Cook and Viñuales, including at paragraph 265; Cook and Viñuales further establish that ADB has a duty for its financing and guarantee activities to result in enhanced deployment of renewable energy. In summary, they demonstrate that:

> In the light of the language of Articles 2 and 9 in particular, it is also clear that ADB and it shareholder State parties to the Paris Agreement should seek to ensure that ADB's finance flows address the climate goals and the poverty goals of developing States in an integrated way, including the need to ensure universal access to sustainable energy in developing countries, in particular in Africa, through the "enhanced deployment" of renewable energy, as indicated in the preamble to UNFCCC Decision 1/CP.21 adopting the Paris Agreement.

Id. As such, ADB's Paris Methodology must include provisions that specify prioritization of financing for renewable energy projects to meet energy demands.

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[92] Cook and Viñuales at ¶¶ 56-57, 75.

[93] Appendix A, Sections I – II, *ante*, detail how both ADB and its Members State shareholders are obliged under international law to adhere to the Paris Agreement's requirements, human rights treaties, and customary international law.

[94] International Obligations Governing the Activities of Export Credit Agencies in Connection with the Continued Financing of Fossil Fuel-Related Projects and Activities, Legal Opinion, Kate Cook and Jorge E. Viñuales, March 24, 2021, available at: https://priceofoil.org/2021/05/04/eca-legal-opinion/ (hereinafter "Cook and Viñuales"); The analysis in Appendix A, Sections I – II, *ante*, makes it clear that Cook's and Viñuales' opinion applies beyond export credit agencies to international organizations like ADB, and its Member State shareholders.

C. ADB's and its Member States' Climate Change Due Diligence and Harm Prevention Obligations under Customary International Law and Human Rights Treaties

In addition to the Paris Agreement, other sources of law that apply to ADB's and its member states' climate change due diligence obligations prior to financing approval are customary international law, informed by principles such as harm prevention and the precautionary approach, and human rights treaties.[95] As the ICJ confirmed in its July 24, 2024 Climate Advisory Opinion, ADB's and its member states' obligations under international are not fulfilled simply by complying with obligations under the climate change treaties – ADB and its member states' must independently comply with their climate change obligations under international law even when those impose more stringent requirements. (ICJ 2025 Climate Advisory Opinion at paragraphs 314, 171 and 420).

"Customary international principles require that states take all necessary measures to prevent transboundary harm, and exercise precaution when making decisions that pose a risk of harm to the environment."[96] For instance, [u]nder the harm prevention principle, states are required to 'take all appropriate measures to prevent significant transboundary harm or at any event minimize the risk thereof' from activities in its territory or arising under its jurisdiction or control." [97] This principle overlaps with others, including the "responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond national jurisdiction"—articulated in the Rio Declaration—and the requirement that states take precautionary measures even in the absence of scientific certainty as to significant harm."[98] The cumulative climate impacts from the significant GHG emissions resulting from ADB's financing and guarantee activities cross those risk thresholds, as climate change poses a risk of significant harm. This is because "assuming an approximately linear relation between GHG concentrations in the atmosphere and the severity of climate change, even very small cuts in global emissions can achieve significant global harm-prevention (or risk-reduction) benefits."[99] Accordingly, harm prevention and precautionary customary principles clearly apply to climate change.[100] This means, international environmental principles require that the 1.5°C warming limitation objective must guide ADB's and its member states in their actions related to the climate impacts of ADB's financing and guarantee activities, and ADB must take all necessary measures to ensure that its financing and guarantee activities do not cause or contribute to exceedance of the 1.5°C warming objective.

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[95] See Appendix A, Sections I-II, *ante*; Barros, Section III; Kerr, All Necessary Measures at 525-527 and note 16 (detailing state's requirements under customary international law); Jose Viñuales, Due Diligence in International Environmental Law: a Fine-Grained Cartography, in Due Diligence in the International Legal Order, 113 (Heike Krieger et al. eds., 2021) (hereinafter "Viñuales"); Benoit Mayer, Interpreting States' General Obligations on Climate Change Mitigation: a Methodological Review, 28 RECIEL 107 (2019); Benoit Mayer Climate Change Mitigation as an Obligation under Customary International Law, 48(1) YALE J. INT'L L. 105, 130-131 (2023)); *see also*, fns. 6, 7, *ante* (Kerr, All Necessary Measures at 560-561, and fns. 279, 282).

[96] Kerr, All Necessary Measures at 527, and fn. 17; Viñuales at 113; *see also*, Benoit Mayer, Interpreting States' General Obligations on Climate Change Mitigation: a Methodological Review, 28 RECIEL 107 (2019); Benoit Mayer, Climate Change Mitigation as an Obligation under Customary International Law, 48(1) YALE J. INT'L L. 105, 130-131 (2023).

[97] Kerr, All Necessary Measures at 541, and fn.120; United Nations, International Law Commission (ILC), Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, A/RES/56/82, (Dec. 12, 2001), at art. 3, commentary to art. 3, ¶ 18; Viñuales at 124.

[98] Kerr, All Necessary Measures at 541, and fn. 121; Viñuales at 116-117 (citing Rep. of the UN Conf. on Envir. and Devel., Rio Declaration on Environment and Development, A/ CONF.151/ 26 (1992); Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, Case No. 17, 2011 ITLOS Rep. 10, ¶¶ 125-135.

[99] Kerr, All Necessary Measures at 541, and fn. 122; Benoit Mayer Climate Change Mitigation as an Obligation under Customary International Law, 48(1) YALE J. INT'L L. 105 (2023) at 134.

[100] Kerr, All Necessary Measures at 541, and fn. 123.

Human rights law continues to evolve to encompass protection of the environment,[101] and it is firmly established "[c]limate change is one of the greatest threats to human rights."[102] The UN General Assembly recognized the right to a clean, healthy, and sustainable environment as a human right in 2022.[103] Moreover, "human rights treaties guarantee rights to life and property—rights that international and domestic courts have found implicate a positive obligation to reduce environmental risks, including risks of harm from climate change."[104] "Cases from the International Court of Justice, the International Tribunal for the Law of the Sea, and the European Court of Human Rights indicate that when states make decisions within an international organization, they must adhere to their human rights due diligence obligations and substantive obligations related to the organization's area of competence."[105]

As directly related to climate change impacts, "recent opinions from human rights treaty bodies have adopted a risk-based test for when human rights due diligence obligations apply to climate change: if it is reasonably foreseeable that an activity under a state's jurisdiction or control will cause a risk of climate harm, the state must diligently prevent it within the limits of its capacity." [106] [107] [108]

"Due diligence requires states to 'employ all means reasonably available to them' to prevent a violation 'so far as possible'."[109] The types of conduct that could breach a due diligence obligation include action,

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[101] Kerr, All Necessary Measures at 550.

[102] The United Nations Environment Programme (UNEP) - "[c]limate change is one of the greatest threats to human rights of our generation posing a serious risk to the fundamental rights to life, health, food and an adequate standard of living of individuals and communities across the world."

[103] Kerr, All Necessary Measures at 550, and fn. 188; G.A. Res. 76/300, The Human Right to a Clean, Healthy and Sustainable Environment, at 3 (July 28, 2022).

[104] Kerr, All Necessary Measures at 527, and fn. 20; Case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland, App. No. 53600/20, ¶¶ 573–74 (Apr. 9, 2024), https://hudoc.echr.coe.int/eng?i=001-233206 (holding that Switzerland is required to quantify GHG emissions limitations through a carbon budget and implement reduction measures); Budayeva v. Russia, App. No. 15339/02, ¶ 116, 133 (Mar. 20, 2008), https://hudoc.echr.coe.int/eng?i=001-85436 (holding that states have a positive obligation to protect life and property from environmental risks). The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda (Urgenda) [2019] Dutch Supreme Court 19/00135 (Engels); *See also*, Jaqueline Peel & Harri Osofsky A Rights Turn in Climate Change Litigation, 7(1) TRANSNAT'L ENVTL. L. 37, 48 (2018) (discussing case law); Siobhan McInerney-Lankford, Climate Change and Human Rights: an Introduction to Legal Issues, 33 HARVARD ENVTL. L. REV. 431, 433 (2009). Other courts have recognized the right to a healthy environment as an autonomous right. *See, e.g.*, The Environment and Human Rights (Arts. 4(1) and 5(1) American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶¶ 62–63, 101–03 (Nov. 15, 2017) [hereinafter Colombia Advisory Opinion].

[105] Kerr, All Necessary Measures at 529, and fn. 32 (citing numerous cases and scholarly articles in support).

[106] Kerr, All Necessary Measures at 527, and fn. 21 (citing UN Human Rights Committee, 'Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019,' UN Doc. CCPR/C/135/D/3624/2019 (Sept. 22, 2022), ¶ 8.13; UN Committee on the Rights of the Child, 'Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 104/2019,' No. CRC/C/88/D/104/2019 ¶ 10.5-.7 (Oct. 8, 2021); *see* Case Comment, Committee on the Rights of the Child Extends Jurisdiction over Transboundary Harms; Enshrines New Test, *Saachi v. Argentina*, 135(7) HARVARD L. REV. 1981 (2022); Federica Violi, The Function of the Triad 'Territory,' 'Jurisdiction,' and 'Control' in Due Diligence Obligations, in Due Diligence in the International Legal Order 75 (Heike Krieger et al. eds., 2021) at 81-82 (in Colombia Advisory Opinion, supra note 20 "court equated jurisdiction with causality and ultimately with imputability, thus altering the vertical understanding of human rights jurisdiction, and eventually risk proximity.")).

[107] See European Court of Human Rights case *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (judgement available here); 2025 ICJ Climate Advisory Opinion (available here); 2024 ITLOS Climate Advisory Opinion (available here); 2025 IACHR Climate Advisory Opinion (available here); *See* Kerr, All Necessary Measures at 550, and fn. 189.

[108] Cook and Viñuales at ¶¶ 47, 132-146, and fn. 182 (citing Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24, paragraph 50).

[109] Kerr, All Necessary Measures at 556-557, and fn. 244; Case Concerning the Application on the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 430 (Feb. 26, 2007); SRFC Advisory Opinion, supra note 203, ¶ 129; John Dugard & Annemarieke Vermeer-Künzli, The

inaction, or deficient action.[110] Cases from the International Court of Justice, the International Tribunal for the Law of the Sea, and the European Court of Human Rights indicate that when participating in the governing boards of international financial institutions, "member states have due diligence obligations to take all measures to ensure that they know about risks to human rights before approving loans, mitigate those risks when making decisions, and ensure that loans already issued conform to their human rights conditions." [111] The same reasoning applies to states' climate decision-making within ADB. Accepting that climate change harms human rights,[112] and ADB member states are bound by their human rights obligations under customary international law and treaties when acting as decision-makers within ADB, they are therefore under an obligation of conduct to do all they can in that role to make sure ADB's climate decisions, and actions or inactions, in enacting policies and approving financing and guarantees, uphold human rights.[113] Applying the harm prevention principle and precautionary principle yields the same due diligence obligations.[114]

Accordingly, in light of the climate risks and impacts from ADB's financing and guarantee activities, customary international principles and human rights law impose an equivalent obligation mandating that ADB and its member states use best available and practiced methods, and take all measures, to diligently account for, prevent, and mitigate the GHG emissions. This means that ADB and its member states must require that ADB's Energy Policy, Environmental and Social Framework, and Paris Methodology mandate ADB ensures it diligently assesses and prevent the risk of climate harm from ADB investments to extent of its capacities prior to financing and guarantee approvals that meets the best reasonably available and practiced standard. This also necessarily means that ADB's due diligence obligations extend beyond adequate study prior to project approvals to prevent its financing and guarantees from causing or contributing to climate change harms. They also include ADB taking substantive measures, such ceasing all direct and indirect financing for fossil fuels projects that the IPCC and IEA have shown will cause the 1.5°C warming limitation objective to be exceeded.[115]

"As with other international environmental obligations, the required degree of diligence differs based on states' development and individual circumstances."[116] Thus, like in the context of transboundary harm from hazardous activities, a highly developed or technologically advanced state has a greater scope of diligent conduct than other states.[117] This means, ADB and its Global North Member States must use their best efforts, and best available practiced methods, to ensure that GHG emissions and their impacts from each

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Elusive Allocation of Responsibility to Informal Organizations: the Case of the Quartet on the Middle East in Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie, 265 (Maurizio Ragazzi ed., 2013); *see also* Barros at 158, n. 916.

[110] Kerr, All Necessary Measures at 556, and fn. 245 (citing Barros at 121-122, 124, 195).

[111] Kerr, All Necessary Measures at 560-561, and fn. 279; Barros at Chapter III; see also Pasquale De Sena, International Monetary Fund, World Bank and Respect for Human Rights: A Critical Point of View, 20(1) ITALIAN Y.B. INT'L. L. 247, 257 (2010).

[112] Kerr, All Necessary Measures at 546-550.

[113] See fns. 109-112, 114-117; Cook and Viñuales at ¶¶ 47, 132-146, and fn. 182 (citing Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24, paragraph 50; Ana Sofia Barros, Member States and the International Legal (Dis)order Accounting for the notion of Responsible Governance, International Organizations and Member State Responsibility, Critical Perspectives, Brill Nijhoff 2017, Chapter 4 at 66-71).

[114] Kerr, All Necessary Measures at 541, 561-562; Cook and Viñuales at ¶¶ 41, 44, 46, 47, 48 (PDF at 29-34).

[115] See fn. 9, *ante*..

[116] Kerr, All Necessary Measures at 529, and fn. 29; Viñuales at 125-126; Jaqueline Peel, Climate Change, in Shared Responsibility, 1033, 1041-1044 (Andre Nollkaemper, ed., 2018) (failure to stop, reduce or regulate emitting activities could be basis for finding state did not discharge due diligence obligation of harm prevention).

[117] Kerr, All Necessary Measures at 529, and fn. 30; United Nations, International Law Commission (ILC), Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, A/ RES/ 56/ 82, 12 December 2001, commentary to art. 3, ¶18; Cook and Viñuales at ¶47.

project ADB finances and or guarantees are fully assessed, avoided, and mitigated to the furthest extent technically and economically feasible prior to ADB financing and guarantee approvals. It also means, assuming that climate measures do not burden least developed countries or small island developing states and otherwise account for equitable principles, ADB and its Member States are obliged to use their influence to push its clients to adopt a high level of ambition and effective measures that are consistent with the best available and used GHG emissions and mitigation methodologies and technological developments.[118] Considering ADB itself is required to commit the resources to ensure that for each project: Scope 1, 2, and 3 GHG emissions are fully quantified, that an adequate GHG / climate change alternatives analysis is conducted, and that a mitigation for GHG emissions is implemented that avoids and eliminates GHG emissions as far as feasible, such a diligence obligation accounts for equitable principles and the right to develop.

Accordingly, ADB and its member states have a due diligence obligation to account for, prevent, and reduce GHG emissions from its financing and guarantee activities beyond what is required by any climate treaty.[119] As supported by Kerr, to the extent the risk of harm posed by climate change is not adequately addressed by the climate regime (e.g. the Paris Agreement, see Section III.B., *ante*), ADB's general obligations imposed by human rights treaties and customary law demand that ADB and its member states do more.[120]

[118] Kerr, All Necessary Measures at 529-530; Kerr, Erga Omnes Obligation; Baine P. Kerr, Binding the International Maritime Organization to the United Nations Convention on the Law of the Sea, 19 INT'L ORG. L. REV. 391 (2022).
[119] See Kerr, All Necessary Measures at 526, and fn. 15; Neil McDonald, The Role of Due Diligence in International Law, 68 INT'L & COMP. L.Q. 1041 (2019).
[120] Kerr, All Necessary Measures at 529-529, and fn. 27 (citing Natalie Dobson, Extraterritoriality and Climate Change Jurisdiction: Exploring EU Climate Protection Under International Law, 30 (2021); Jaqueline Peel, Climate Change, in Shared Responsibility 1041-1044 (Andre Nollkaemper, ed., 2018) (failure to stop, reduce or regulate emitting activities could be basis for finding state did not discharge due diligence obligation of harm prevention); Rozemarijn J. Roland Holst, Taking the Current When it Serves: Prospects and challenges for an ITLOS Advisory Opinion on Oceans and Climate Change' RECIEL (2022), 7 ("as long as intended NDCs fall short of Paris Agreement temperature goal, can be argued that due diligence under LOSC obliges states to do more.").