March 3, 2026

European Investment Bank (EIB)
Attn: President Nadia Calviño, n.calvino@eib.org, president@eib.org, secr@eib.org, civilsociety@eib.org
Attn: EIB Board of Directors; EIB General Counsel, j.fernandezmartin@eib.org, legal@eib.org
98-100 Boulevard Konrad Adenauer, L-2950 Luxembourg
EIB Member State Directors, and EIB Climate, Energy, and Safeguards Directors (see below)

**Re: New Independent Opinion by Authoritative Scholars Detailing EIB's Member States' and EIB's Climate Change Legal Obligations - Need to Overhaul EIB's Suite of Climate Policies**

Dear President Calviño, EIB Member States, General Counsel José María Fernández Martín, and To Everyone it May Concern at EIB:

On behalf of Bank Climate Advocates (BCA) and the undersigned Civil Society Organizations (CSOs), please see attached the November 7, 2025 independent legal opinion from scholars Dr. Johanna Aleria P. Lorenzo and Dr. Jolene Lin detailing IFC's, IBRD's and their member states' climate change obligations under international law and their failures to meet them (hereinafter "Scholars' Opinion" or "Opinion").

The Opinion was reviewed by academics and legal practitioners around the world with applicable expertise who are part of the Climate Research Forum.[1] It authoritatively underscores that if each of EIB's member states and/or EIB[2] desire to meet their own climate change obligations under international law,

[1] For information about the Climate Research Forum, see: https://www.smithschool.ox.ac.uk/research/climate-research-forum.
[2] The Opinion directly addresses the climate change legal obligations of EIB's Member States when acting at EIB and supervising its operations. While it also directly addresses the climate change legal obligations of three multilateral

EIB's suite of policies applicable to climate change – including its Paris Alignment Methodologies,[3] 2022 Environmental and Social Sustainability Framework (ESF), Energy Sector Orientation, Climate Bank Roadmap Phase 2 2026-2030, Excluded Group Activities / prohibited investments list, and Climate Action and Environmental Sustainability List of eligible sectors and eligibility criteria (Eligibility List) ("Policies") – must all be amended to meet the Opinion's findings.

In 2024 and 2025, the International Court of Justice (ICJ), Inter-American Court of Human Rights (IACtHR), and International Tribunal for the Law of the Sea (ITLOS) landmark Climate Change Advisory Opinions crystalized states climate change obligations in regulating public and private actors over whom they exercise jurisdiction or control, including through policy making and public finance and investment decision-making. See 2025 ICJ Climate Advisory Opinion at pps.138, 208, 282, 343, 427. But at EIB, there seems to be a common disregard and/or lack of awareness that EIB's member states have and must each meet their own climate change obligations under customary international law and treaties in adopting EIB policies, in voting to approve EIB investments, and in ensuring adequate EIB policies and operations on an ongoing basis. As seen in our advocacy across MDBs/International Financial Institutions (IFIs), many European MDB member states express they are unaware they have climate or any legal obligations pertaining to MDB policies or when making their financing approvals at MDBs. Others are aware, but their capitals have yet to conduct legal analysis or evaluate legal risks.

Key verbatim findings from the Scholars' Opinion that are especially relevant to EIB and its member states meeting their legal obligations across the suite of EIB Policies applicable to climate change are provided by category in Appendix A. In sum, the Scholars' Opinion authoritatively and independently demonstrates the following key takeaways BCA and Civil Society have been conveying for quite some time as applied to all of EIB's activities, including its direct and financial intermediary (FI) investments, guarantees, trade finance, advisory services, technical assistance, and development policy lending:[4]

(1) that each EIB member state has its own stringent climate change due diligence obligations under customary international law and the Paris Agreement, UNFCCC, the Law of the Sea, and/or human rights treaties that apply not only to the adoption of polices and their amendments at EIB, but also on an ongoing basis to EIB's financing and guarantee decisions, supervision of its investments, and proactively in ensuring the legal adequacy of its policies and operations;

(2) that EIB is bound by these same climate obligations under customary international law, and further must meet its Board adopted policy requirements; and

development banks (MDBs) – the International Finance Corporation (IFC), International Bank for Reconstruction and Development (IBRD), and Asian Development Bank (ADB), the Opinion's analysis also applies to EIB, as EIB is a MDB and EIB's constitutive treaty (also referred to as constitutive instrument, charter, or articles of agreement) is sufficiently similar to IFC's, IBRD's, or ADB's for all relevant purposes.

[3] See EIB's 2023 "Paris Alignment Framework - Low Carbon Version 1.1", the 2023 "Joint MDB Methodological Principles for Assessment of Paris Agreement Alignment of New Operations" (including for: "Direct Investment Lending Operations", "Intermediated financing", "General Corporate Purpose Financing", "Policy-based Lending Operations", and "List of Activities Considered Universally Aligned with the Paris Agreement's Mitigation Goals or Not Aligned with the Mitigation Goals") and the October 2022 "The EIB GroupPATH Framework Version 1.1" (combined hereinafter "Paris Alignment Methodologies").

[4] See e.g., BCA and 25 CSOs' December 11, 2023 climate request to the IFC Compliance Advisor Ombudsman; BCA and 16 CSOs' March 14, 2024 ADB Environmental and Social Safeguard comments; BCA's June 6, 2024 EBRD Paris Methodology Comments; and BCA and 28 CSOs' January 17, 2025 letter to IFC.

(3) that EIB's policies, including its Paris Alignment Methodologies, ESF, Energy Sector Orientation, Eligibility List, Climate Bank Roadmap Phase 2 2026-2030, and Excluded Group Activities, fall severely short of EIB's and its member states' climate change due diligence obligations for the following core reasons:

a. They fail to mandate the use of a "best available science" standard which requires ensuring best available science, including best available methods, are used for and applied to: (i) quantifying Scope 1, 2, and 3 GHG emissions and in conducting GHG emissions community impact, cumulative impact, alternatives, and mitigation analysis prior to financing and guarantee decisions; (ii) providing public review and opportunity to comment on these figures and analyses; (iii) avoiding financing of fossil fuel projects wherever possible and where renewables can meet energy demand even at higher costs; (iv) avoiding financing projects which extend the life of fossil fuels and its infrastructure, such as Carbon Capture and Storage (CCS) or 'hydrogen ready' pipelines; and (v) for all projects, avoiding of GHG emissions as far as the alternatives and mitigation analysis demonstrates is feasible.

b. To determine whether an investment or guarantee is permissible or Paris aligned, EIB's Policies allow EIB to defer to the countries' desires, discretion, and plans (e.g. Nationally Determined Contributions (NDCs) or Long-Term Strategies (LTS)) where EIB's contemplated investments are located, instead of ensuring the investment is consistent with EIB's and its member states' climate change obligations under international law;

c. They fail to exclude financing and support for projects that extend the life of fossil fuels and that can increase fossil fuel use (including carbon-capture and storage and carbon-capture, utilization, and storage (CCUS)), and fail to preclude its Financial Intermediary (FI) financing from resulting in upstream, midstream, and downstream natural gas and other fossil fuel projects;[5] [6] and

d. They do not include legally sufficient climate change due diligence requirements that requires use of the "best available science" standard for any financing or guarantees of projects that may prolong the life of, incentivize, subsidize, and or lock a country into fossil fuel extraction, production, and consumption;

**Conclusion and Requests:**

**EIB Must Address the Climate Crisis:** As EIB may be aware, approximately 3.3–3.6 billion people that live in contexts highly vulnerable to climate change are already suffering from the worst impacts of global warming, such as more frequent and severe heat waves, wildfires, supercharged storms, atmospheric rivers, and extended droughts.[7] And things will get worse. Global warming is

[5] As detailed in "Behind the EIB's Green Curtains: A Review of the Climate Bank Roadmap" (Counter Balance, June 2025), EIB still finances and supports projects that extend the life of fossil fuels and that can increase fossil fuel use (e.g. EIB allows for financing of hydrogen production projects that use fossil fuels, and for carbon capture and storage and CCUS projects for fossil fuel emissions), provides financing for companies expanding their fossil fuel activities, and provides financing for financial intermediaries that financing fossil fuels, including the largest global fossil banks).

[6] The Scholars' Opinion provides EIB's and its member states' climate change due diligence obligations include prohibiting EIB from financing or guaranteeing upstream, midstream, and downstream natural gas and other fossil fuel projects. EIB's policies currently meet this obligation only for EIB's direct investments and guarantees.

[7] Synthesis Report of the IPCC Sixth Assessment Report (AR6), March 2023, Summary for Policy Makers at 5-6, 12-13 (available at: www.ipcc.ch/report/ar6/syr/).

expected to increase at least through 2040 mainly due to increased cumulative greenhouse gas (GHG) emissions in nearly all considered scenarios and modelled pathways. And on the world's current trajectory of GHG emissions, the global temperature will increase by up to 2.9°C by 2100.[8] This is more than the previously envisaged 1.5°C, which has been considered a critical threshold for limiting the most severe effects of climate change.[9] According to the Intergovernmental Panel on Climate Change, this temperature rise will have devastating effects not only on ecosystems but also on human health and well-being, water, agriculture, cities, settlements, and infrastructure.[10] People living in the Global South, and economically, politically, and socially marginalized people living in poverty, and who deal with the lasting effects of racial injustice and inequality, are likely to be hit hardest. The world and its most marginalized people cannot handle further significant GHG emissions, and especially ones that the EIB can and has the duty to avoid.

**Requests:** Considering the climate crisis and EIB's and its member states' legal obligations to prevent and not contribute to or worsen it, our overarching request is for EIB and its member states to take this opportunity to secure a suite of climate Policies that aligns EIB's pre and post financing climate change due diligence with the "best available science" standard and that puts an immediate halt to EIB's support for fossil fuel projects and associated infrastructure, consistent with international law obligations, including those detailed in the Scholars' Opinion.

Specifically, we urge EIB and its member state shareholders to immediately without delay or a long drawn-out process:

1. **Assess EIB's and its member states' climate change obligations under international law, release this assessment for public review and comment, and propose and adopt adjustments to EIB's suite of Policies applicable to climate change that meet EIB's and its member states' climate change obligations detailed in the Scholars' Opinion;**

2. **As consistent with the Scholars' Opinion, build the following due diligence requirements based on a "best available science" standard into EIB's policies applicable to climate change - including in its Paris Alignment Methodologies, ESF, Energy Sector Orientation, Climate Bank Roadmap Phase 2 2026-2030, Eligibility List, and Excluded Group Activities - (a) require the use of "best available science", including best available methods, prior to financing and guarantee decisions for: Scope 1, 2, and 3 GHG emissions quantification, analyses of GHG emissions cumulative impacts and affected community impacts (including: in calculating the societal cost of carbon for each ton of GHG's emitted, and in assessing environmental and human rights impacts, and impacts on the rights of Indigenous Peoples), and GHG emissions alternatives and mitigation analyses; (b) provide public review and sufficient opportunity to comment on these analyses prior to financing decisions; (c) require**

[8] See United Nations 2023 Gap Report at: https://www.unep.org/resources/emissions-gap-report-2023.
[9] IPCC (Intergovernmental Panel on Climate Change). 2018. Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty, Cambridge: Cambridge University Press; UN (United Nations). 2021. "Nationally Determined Contributions under the Paris Agreement." Synthesis Report by the Secretariat, Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement, Third Session, Glasgow, October 31–November 12; UNEP (United Nations Environment Programme). 2021. Emissions Gap Report 2021: The Heat Is On—A World of Climate Promises Not Yet Delivered. Nairobi: UNEP.
[10] IPCC. 2022. "Summary for Policymakers." In *Climate Change 2022: Impacts, Adaptation and Vulnerability.* Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge: Cambridge University Press.

**avoiding financing of fossil fuel projects wherever possible and where renewables - fully consistent with respect for human rights - can meet energy demand even at higher financial costs; (d) for all other projects, requiring avoidance of GHG emissions as far as the alternatives and mitigation analysis – that uses "best available science" including best available methods, - demonstrates is feasible, and (e) ensure these requirements apply across all of EIB's financing activities and guarantees, including to its financial intermediary (FI) clients,[11] advisory services, technical assistance, guarantees, trade finance, and development policy lending;**

3. **As consistent with the Scholars' Opinion, amend its Paris Methodologies and all Policies to remove EIB's ability to defer to the countries' desires, discretion, and plans (e.g. Nationally Determined Contributions (NDCs) or Long-Term Strategies (LTS)) where EIB's contemplated investments are located, instead of ensuring the investment is consistent with EIB's and its member states' climate change obligations.** This is critical not only in EIB and its member states meeting their own climate change obligations, but in ensuring each EIB investment and EIB's portfolio are consistent with the 1.5°C warming objective. The sum of all NDCs and LTS – which are currently are putting the world on a 2.9°C warming trajectory - fall far short of this goal needed to save the world from global warming;[12]

4. **As consistent with the Scholars' Opinion:**

   **(a) expand EIB's Excluded Group Activities/prohibited investment activities list, Eligibility List, and non-universally aligned Paris Alignment Methodologies list, or otherwise amend EIB's policies to:**

   **(i) categorically exclude financing and guarantees for: upstream, midstream, and downstream natural gas and other fossil fuel projects whether or not there is an emissions ceiling or a condition that emissions have to be abated; projects with captive fossil fuel power plants; projects that rely on fossil fuels (including, hydrogen energy projects that use fossil fuels to generate hydrogen); and projects that prolong the life of, incentivize, subsidize, or lock a country into fossil fuel extraction, production, and consumption, including carbon-capture and storage and CCUS;**

   **(ii) prohibit FI clients from using EIB funds to finance or support these projects in Request (4)(a)(i) above;**

   **(iii) exclude financing for FIs that have not committed to stop investing in up, mid, and downstream fossil fuel projects, and whose portfolios, plans, and activities are not aligned with 1.5°C; and**

[11] EIB's climate change due diligence requirements for FI clients, especially in its ESF and Paris Methodologies, is especially lacking. Further, EIB's PATH Framework Version 1.1 has a complete lack of climate criteria for FIs, which only have to comply with reporting on their financed emissions. The PATH Framework is further problematic in that it does not ask FIs to reduce or phase out financed emissions and the methodologies and standards for reporting financed emissions contain many loopholes.

[12] See United Nations 2023 Gap Report at: https://www.unep.org/resources/emissions-gap-report-2023.

**(iv) exclude financing for corporations who are still pursuing up, mid, and downstream fossil fuel projects, and whose portfolios, plans, and activities are not aligned with 1.5°C.**

**(b) do not to vote to approve any new policies that would allow financing for projects listed in Request (4)(a)(i) above;**

**(c) vote against approving: financing for any new projects listed in Request (4)(a)(i) above; financing for a FI unless the FI is prohibited from using the financing for the projects listed in Request (4)(a)(i) above; financing for FIs that have not committed to stop investing in up, mid, and downstream fossil fuel projects, and whose portfolios, plans, and activities are not aligned with 1.5°C; and financing for corporations who are still pursuing up, mid, and downstream fossil fuel projects, and whose portfolios, plans, and activities are not aligned with 1.5°C.**

**Further, we note these actions are consistent with the pledges (as signatories to the Glasgow Statement[13]) and or domestic policies of 14 EIB Member States, and EIB's pledge as a signatory to the Glasgow Statement, to end international finance for fossil fuels;**

5. **As consistent with the Scholars' Opinion, build legally sufficient climate change due diligence requirements around any financing for fossil fuel projects that (a) may be allowed (such as for those allowed in truly exceptional circumstances where "best available science", including best available methods, conclusively demonstrate renewables cannot meet energy demand even at higher costs) or (b) may prolong the life of, incentivize, subsidize, and or lock a country into fossil fuel extraction, production, and consumption; and**

6. **Initiate an official, adequately publicized period for written public comments on the full draft of any policy amendments, ensuring sufficient time for all stakeholders to meaningfully review and comment.**

EIB, and each of its member states, must meet their due diligence and harm prevention obligations not only to prevent avoidable harms to communities and maintain accountability, but to avoid financial remedial and reputational risks that come with being held to account in various courts of law. As EIB and many of its member states should well be aware, it is not just member states that can be brought into a domestic court for their decisions at EIB to approve an investment, plan or policy, or for failures to ensure sufficient policies and plans are in place, that meets their harm prevention and due diligence procedural and substantive obligations. As, *Jam v. IFC* demonstrated,[14] multilateral development banks like EIB can be held to account too.

Considering the gravity of the matter, we respectfully request that EIB, its member states, and in particular EIB's member states from high income industrialized countries that have heightened climate change due diligence and harm prevention obligations, take immediate action(s) consistent with our above six requests. We further request that any climate finance or energy project outside the EU should be made for

[13] 14 EIB member states (14 countries) that represent close to 89% of the voting power at EIB, by signing the Glasgow Statement (or "Statement on International Public Support for the Clean Energy Transition") pledged to end new public finance for unabated fossil fuels by the end of 2022 and or have policies to end overseas support for fossil fuels.
[14] *Jam v International Finance Corp*, 586 US 273 (2019).

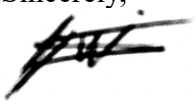
the public sector or local companies (not European multinationals), prioritize local value add, not overburden Southern countries with more debt, be co-constructed with impacted communities.

In addition, we respectfully request that EIB's member states, Climate Directors, Energy Directors, ESF directors, and General Counsel grant our forthcoming meeting requests to discuss the Scholars' Opinion and next steps. We would also more than welcome such a meeting with President Calviño if she is so inclined.

And lastly, by April 3, 2026 and after thorough consideration, we ask for EIB's - and also its individual member states' - written responses to the Scholars' Opinion and requests in this letter.

Thank you for your consideration. We look forward to your timely response and engagement with us on these issues. Please confirm receipt of this submission, and let us know if we can provide any additional information.

Sincerely,



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# Appendix A: Key Findings from Scholars' Opinion

Key verbatim findings from the Scholars' Legal Opinion, that are especially relevant to EIB (as an IFI/MDB) and its member states meeting their legal obligations across the suite of EIB Policies applicable to climate change, include the following:

**International Law Governing States' Conduct as Members of IFIs in Ensuring Adequate Climate Change Policies and When Voting on Whether to Approve an IFIs Financing and Guarantees**

(98) States are subject to treaty law—the UNFCCC, Kyoto Protocol, Paris Agreement [Law of the Sea]—and customary international law in their conduct as Members of IFIs. States must fulfill the obligations under both these sources of law.

(99) The ICJ, ITLOS, and Inter-American Court of Human Rights (IACtHR) advisory opinions provide an additional normative context for the international obligations of States generally, and the Major Shareholders in particular, under climate law. These advisory opinions cover not only the direct GHG emissions produced through State actions, but also all acts or omissions of States that result in the climate system and other parts of the environment being adversely affected by anthropogenic GHG emissions, such as the ongoing production, consumption, licensing, and subsidizing of fossil fuels.

(100) The international legal obligations interpreted and clarified in these advisory opinions are therefore applicable to development projects under the purview of IFIs that produce GHG emissions. These advisory opinions clarify the international legal obligations of Member States, especially Major Shareholders who have greater historical responsibility for anthropogenic GHG emissions, greater capacity to provide climate finance, and greater voting/decision-making power in IFIs that support development projects.

(104) All member States (whether voting via a lone representative or in a constituency), particularly but not limited to Major Shareholders, should exercise this [voting] power for the purpose of ensuring that the IFIs' operations are consistent with their and the IFIs' respective international climate law obligations.

(163) Pursuant to their own treaty- and custom-based obligations, therefore, Major Shareholders, in particular, should independently evaluate the risks of harm to the climate system posed by the IFIs' operations and avoid voting in favor of development projects that undermine climate change mitigation and/or adaptation.

(3)(b)(ii) Member States are also bound by the customary legal obligations to prevent significant harm to the environment with due diligence and to cooperate. The different elements constituting the harm prevention duty, including the variable standard of due diligence, must take into account the best available science. In the context of climate change, the stringency of such standard requires States to, among others, assess the probability and seriousness of harm in the light of new scientific or technical knowledge, as well as adopt and implement appropriate rules and measures designed to reduce GHG emissions that cause significant harm to the climate system.

(104) A State's failure 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

licenses or the provision of fossil fuel subsidies—may constitute an internationally wrongful act which is attributable to that State.

(2) member States of IFIs, particularly Major Shareholders, have obligations both under treaty and customary international law, to exercise their voting powers such that development projects dependent on fossil fuels are not financed while those aimed at a clean and just energy transition are supported.

(168) The Major Shareholders' due diligence conduct involves ensuring that the MDBs are not financing development projects that are likely to cause or exacerbate climate change and related harms.

(118) a State voting in favor of a fossil fuel project (or against a policy enhancing support for renewable energy projects) could be deemed to aid or assist the IFI—who also bears climate change obligations under customary international law—in committing an internationally wrongful act within the meaning of draft ARIO Article 58. An alternative application of this rule involves aid or assistance given by one Paris Agreement State party to another State party, which is also a member of the IFI. Otherwise stated, a Major Shareholder potentially incurs responsibility for aiding or assisting a borrowing State that breaches the obligation to mitigate climate change by undertaking an IFI-supported fossil fuel project.

(170) Under international law, the Major Shareholders—not accidentally, also major emitters—are especially obliged to ensure that their voting power is exercised towards the rejection of fossil fuel-based development projects and the promotion of alternative energy options that not only emit the least amount of GHGs but are also suitable to the development needs of borrowing States. IFIs' member States are further required not to finance new fossil fuel related projects or increase financing of existing ones, to prevent adverse human rights impacts on the right to life and the right to health.

(127) [Law of the Sea obligations:] These obligations entail reducing anthropogenic GHG emissions, in line with obligations of Parties to the Paris Agreement and which have a detrimental effect on the marine environment. Member States of IFI should therefore restrain from voting in favor of fossil fuel projects, to fulfill these aforementioned obligations. The broad interpretation of 'all necessary measures' in Article 194, paragraph 1 by ITLOS necessitates that these measures include Major Shareholders restraining from voting in favor of fossil fuel-based projects.

(136) To perform their climate change obligations under international law, they must avoid financing new fossil fuel projects, unless the best available science demonstrates that a given project does not lock-in the borrowing State (or any other country) to a carbon-based development pathway and can contribute to the 1.5°C goal.

## International Law Governing IFIs' Conduct as International Organizations Requires IFIs' Policies, Financing Activities, and Guarantees to Meet Stringent Climate Change Due Diligence Requirements

(2) IFIs have the obligation under customary international law, as well as their respective constituent instruments, to avoid supporting development projects that result in high greenhouse gas (GHG) emissions and pose climate risks. That they have voluntarily committed to align their operations with the objectives of the Paris Agreement reinforces this point.

(43) (171) the most relevant international legal obligation applicable to IFIs—with respect to their support of development projects posing risks of climate harm—is the customary duty to exercise due diligence in order to prevent significant harm… Complying with this duty requires IFIs to undertake appropriate measures that minimize, if not eliminate, the risk of harm to the climate system arising from the development projects they finance.

(32) IFIs must rely on and/or incorporate the best available science—as reported by the IPCC—in formulating the safeguard policies' risk classification system applied to different development projects and, as expounded below, in determining the list of universally (non-) Paris-aligned projects. More concretely, there should be stricter requirements for, if not an outright prohibition of, fossil fuel-dependent energy projects, since current scientific knowledge shows that '[m]itigation includes [] reducing GHG emissions through measures such as transitioning away from fossil fuels'.

## IFIs are Bound by International Law to Adhere to their Own Board Adopted Policy Requirements

(60) IFIs are also subject to climate-related international obligations based on their environmental and social policies, which they are mandated to follow under their constituent instruments.

(79) the IFIs have bound themselves (and their borrowers/clients) to certain sustainability standards. More specifically, insofar as the safeguard policies are deemed to interpret the treaty-based development mandates of IFIs, the latter's approval of a project that fails to meet the safeguards requirements can be considered a violation of an IFI's obligations under its constituent instrument.

(97) Besides being bound by the customary harm prevention duty, therefore, MDBs have treaty-based obligations to prevent harms to the climate and other parts of the natural environment arising from their operations.

## The "Best Available Science" Standard Applies to IFIs' GHG Emissions Quantification, Impact and Cumulative Impact Assessments, and Alternatives Analysis Prior to IFIs' Financing Decisions

(55) exercise of due diligence also entails using the methods based on best reasonably available science to conduct an alternatives analysis—that encompasses GHGs quantification and impact assessment—as well as enabling timely and meaningful public review by disclosing the results of such analysis.

(3)(c) An in-depth evaluation the MDB Paris Methodologies shows inadequacies potentially leading to the IFIs' and Member States' non-fulfillment of their international legal obligations. In addition to overly giving credence to the borrowing States' NDCs, which may not contain decarbonization pathways aligned with the 1.5°C temperature goal, these Methodologies do not adopt the essential 'best available science' standard in their quantification of GHG emissions and assessment of alternatives.

(161) Considering that bearers of the customary harm prevention duty must 'assess the possible cumulative effects of their acts and planned activities under their jurisdiction or control', evaluation of projects' Paris-alignment under the MDB Paris Methodologies should take into account the remaining global carbon budget, as established by the IPCC, among others.

(167) In implementation of the more stringent diligence due from IFIs, the MDB Paris Methodologies should include assessment of Scope 3 emissions, which are indirect emissions associated with the extraction and production of purchased materials, fuels and services, including transport in vehicles. These Scope 3 emissions represent the greatest amount of emissions and cutting them is crucial for keeping within then 1.5°C threshold. The inclusion of Scope 3 emissions in EIA assessments is also increasingly well established in domestic law. …. Where the inclusion of Scope 3 emissions in the EIA could entail additional costs, the IFI should either perform the more rigorous assessment or assist the borrower in undertaking the same.

**Legal Inadequacies of the Joint MDB Methodological Principles for Assessment of Paris Agreement Alignment of New Operations – Direct Investment Lending Operations' (Joint Methodological Principles)** (EIB uses these Paris Methodologies)

(3)(c) An in-depth evaluation the MDB Paris Methodologies shows inadequacies potentially leading to the IFIs' and Member States' non-fulfillment of their international legal obligations. In addition to overly giving credence to the borrowing States' NDCs, which may not contain decarbonization pathways aligned with the 1.5°C temperature goal, these Methodologies do not adopt the essential 'best available science' standard in their quantification of GHG emissions and assessment of alternatives.

(158)-(159) activities in the universally non-aligned list 'are deemed to undermine the mitigation goals of the Paris Agreement for all intents and purposes under all circumstances and in all countries'….Given the best available science, the universally non-aligned list is too limited in its coverage. Activities involving the use and extraction of coal and peat are included, but extraction, production, and consumption of other fossil fuels such as petroleum (crude oil) are not, even though these activities undermine climate change mitigation. The list of universally non-aligned activities should be expanded to include petroleum and other fossil fuels, to create a stringent presumption against financing new fossil fuel projects, since the IPCC and the International Energy Agency (IEA) have determined that 'continued installation of unabated fossil fuel infrastructure will "lock-in" GHG emissions' and that new upstream oil and gas projects are unnecessary to achieving the collective temperature goal.

(161) As international economic organizations, MDBs consider both scientific and economic data to assess if the proposed project will help the country's low-carbon development. However, the methodologies' undue emphasis on alignment with a country's NDCs or long-term strategies (LTSs), coupled with the fact that the borrower takes the lead in providing information to the MDB, would probably fall short of compliance with the Paris Agreement's objectives, especially the temperature goal, as most NDCs and LTSs are currently not aligned with the necessary decarbonization pathways to fall within the 1.5°C threshold. Considering that bearers of the customary harm prevention duty must 'assess the possible cumulative effects of their acts and planned activities under their jurisdiction or control', evaluation of projects' Paris-alignment under the MDB Paris Methodologies should take into account the remaining global carbon budget, as established by the IPCC, among others. Under exceptional (region-specific) circumstances, MDBs and/or the Major Shareholders may need to prioritize climate considerations over economic factors by insisting support for less carbon-intensive alternatives even when they may have higher costs and/or potential obstacles regarding technical feasibility.

(162) The discretion States have to determine their development pathways is circumscribed by their international legal obligations, interpreted in the light of the country ownership principle in

development finance that has partly similar implications as the climate regime's CBDR-RC principle. The MDB Paris Methodologies' recognition of State discretion should not mean that MDBs must defer to borrowing States' NDCs, LTSs , or other national plans. Rather, the measures appropriate and necessary for IFIs to undertake as part of their customary preventive obligation include independently evaluating the risks of harm posed by IFI-supported operations to the climate system. Further, the IFIs must avoid financing development projects that undermine climate change mitigation and/or adaptation, lest such financial support causes breach of international legal obligations on the IFIs' part, of borrowing countries, or of other member States such as the Major Shareholders.

(164) In their current version, the MDB Paris Methodologies can be found inconsistent with the IFIs' customary obligation to diligently prevent harm to the climate system, because contrary to the best available scientific information, these instruments permit the possibility of funding fossil-fuel (oil and gas) projects. Granted, by evaluating the carbon intensity of operations to be financed by the MDBs, as well as the energy transition risks of development projects, the MDB Paris Methodologies serve as the climate risk and impact assessment necessitated by the customary rule. However, these methodologies' level of comprehensiveness does not seem commensurate with the stringency of due diligence required in the climate change context and with IFIs' considerable resources that translate to greater harm preventive capacity.

(55) exercise of due diligence also entails using the methods based on best reasonably available science to conduct an alternatives analysis—that encompasses GHGs quantification and impact assessment—as well as enabling timely and meaningful public review by disclosing the results of such analysis.

(165) The Joint Methodological Principles provide that the MDBs' expert judgment will be 'based on available information … and they are likely to be revised in the future, reflecting the evolving body of scientific and economic information available to the MDBs and their clients'. This statement, however, does not clearly make it mandatory for MDBs to use the best available science in assessing the Paris alignment of a project. Where the MDB Paris Methodologies also appear to fall short concerns the public disclosure of evaluations and meaningful consultation with stakeholders, including concerned civil society organizations.

(167) In implementation of the more stringent diligence due from IFIs, the MDB Paris Methodologies should include assessment of Scope 3 emissions, which are indirect emissions associated with the extraction and production of purchased materials, fuels and services, including transport in vehicles. These Scope 3 emissions represent the greatest amount of emissions and cutting them is crucial for keeping within then 1.5°C threshold. The inclusion of Scope 3 emissions in EIA assessments is also increasingly well established in domestic law. …. Where the inclusion of Scope 3 emissions in the EIA could entail additional costs, the IFI should either perform the more rigorous assessment or assist the borrower in undertaking the same.

(169) To conclude, because they do not rely on the best available science, which provides evidence for including in MDBs' universally non-aligned list such projects that use or depend on other fossil fuels (e.g. petroleum) besides coal, the MDB Paris Alignment Methodologies are potentially inconsistent with the respective climate-related customary obligations of IFIs and member States. Major Shareholders that rely on these methodologies in their decision making also risk violating their treaty-based climate obligations, including to provide climate finance that supports mitigation and adaptation.

(172) without correcting these methodologies' failures to rely on the best available science and to enhance support for less carbon-intensive alternative projects, the IFIs and the Major Shareholders are not acting with the requisite stringent due diligence in the context of climate change.

LEGAL OPINION

07 November 2025

# INTERNATIONAL LEGAL OBLIGATIONS OF MULTILATERAL DEVELOPMENT BANKS AND THEIR MEMBER STATES IN RELATION TO CLIMATE CHANGE

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| List of Acronyms | |
|---|---|
| **ADB** | Asian Development Bank |
| **ARIO** | Articles on the Responsibility of International Organisations |
| **BCA** | Bank Climate Advocates |
| **CBDR-RC** | Common but differentiated responsibilities and respective capacities |
| **CCS** | Carbon capture and storage |
| **CESCR** | Committee on Economic, Social and Cultural Rights |
| **CMA** | Conference of the Parties serving as the meeting of the Parties to the Paris Agreement |
| **COP** | Conference of the Parties to the UNFCCC |
| **CRF** | Climate Research Finance group of the University of Oxford |
| **EIA** | Environmental Impact Assessment |
| **EMP** | Environmental Management Plan |
| **ESCP** | Environmental and Social Commitment Plan |
| **ESF** | Environmental and Social Framework |
| **ESS** | Environmental and Social Standard |
| **FI** | Financial intermediary |
| **GHG** | Greenhouse gas |
| **IACtHR** | Inter-American Court of Human Rights |
| **IBRD** | International Bank for Reconstruction and Development |
| **ICJ** | International Court of Justice |

| | |
|---|---|
| **IEA** | International Energy Agency |
| **IFC** | International Finance Corporation |
| **IFI** | International Financial Institution |
| **ILC** | International Law Commission |
| **IO** | International Organisation |
| **IPCC** | Intergovernmental Panel on Climate Change |
| **IPF** | Investment Project Financing |
| **ITLOS** | International Tribunal for the Law of the Sea |
| **KP** | Kyoto Protocol |
| **LTS** | Long-term strategy |
| **MDB** | Multilateral Development Bank |
| **NDC** | Nationally Determined Contribution |
| **PA** | Paris Agreement |
| **UNCLOS** | United Nations Convention on the Law of the Sea |
| **UNFCCC** | United Nations Framework Convention on Climate Change |
| **UNGA** | United Nations General Assembly |
| **WB** | World Bank |
| **WBG** | World Bank Group |
| **WHO** | World Health Organization |

## I. Purpose and Scope of the Legal Opinion and Overview

(1) Further to the request of Bank Climate Advocates (BCA) and in relation to its research project funded by the Climate Research Forum (CRF)[1], this Legal Opinion identifies and explains the international legal obligations of international financial institutions (IFIs)[2] and of their member States, specifically the Major Shareholders,[3] in relation to the financing of development projects that pose significant risks of climate change and of climate change-related harms. The Opinion is based on our knowledge and experience of international law. It is prepared in our personal capacity and reflects our professional opinion as experts in this area. It does not reflect the views of any of the organizations with which we are affiliated. Members of the CRF, who include scholars in different disciplines from around the world, reviewed and provided comments on the draft of this Opinion.

(2) This Legal Opinion explains two main points. First, IFIs have the obligation under customary international law, as well as their respective constituent instruments, to avoid supporting development projects that result in high greenhouse gas (GHG) emissions and pose climate risks. That they have voluntarily committed to align their operations with the objectives of the Paris Agreement reinforces this point. Second, member States of IFIs, particularly Major Shareholders, have obligations both under treaty and customary international law, to exercise their voting powers such that development projects dependent on fossil fuels are not financed while those aimed at a clean and just energy transition are supported. The fact that Major Shareholders are also the biggest emitters bolsters this proposition. It bears emphasizing that IFIs and member States, donor and borrower alike, are subject to international legal obligations separately. The fulfilment or non-fulfilment of such obligations by one party thus does not necessarily absolve or implicate the other party in terms of their own obligations.

(3) The Opinion is structured as follows:

- (a) Section II: IFIs are subject to international legal obligations that require them to support development projects oriented at climate change mitigation and adaptation.
  - (i) IFIs are bound by customary international law to diligently prevent significant harm to the environment.
  - (ii) IFIs are bound by obligations under their constituent instruments, including the safeguard policies they have formulated. Further, to the extent that IFIs have formulated specific policies and procedures (examined in Section IV) committing to align their operations with the objectives of the Paris Agreement, IFIs bear some indirect obligations under said treaty.
- (b) Section III: Member States of IFIs are subject to their own international legal obligations in their financial contributions and in exercising their voting powers. They should refrain from supporting development projects that do not lead to decarbonization.
  - (i) Member States are bound by their obligations under the UN Framework Convention for Climate Change (UNFCCC), the Kyoto Protocol (KP), the Paris Agreement (PA), and the UN Convention on the Law of the Sea (UNCLOS).

[1] University of Oxford, Smith School of Entrerprise & Environment, https://www.smithschool.ox.ac.uk/research/climate-research-forum.
[2] Although the IFI category is larger, the terms 'international financial institutions' and 'multilateral development banks' (MDBs) are interchangeably used here.
[3] *Infra,* para 11.

(ii) Member States are also bound by the customary legal obligations to prevent significant harm to the environment with due diligence and to cooperate. The different elements constituting the harm prevention duty, including the variable standard of due diligence, must take into account the best available science. In the context of climate change, the stringency of such standard requires States to, among others, assess the probability and seriousness of harm in the light of new scientific or technical knowledge, as well as adopt and implement appropriate rules and measures designed to reduce GHG emissions that cause significant harm to the climate system.

(c) Section IV: An in-depth evaluation the MDB Paris Methodologies shows inadequacies potentially leading to the IFIs' and Member States' non-fulfillment of their international legal obligations. In addition to overly giving credence to the borrowing States' NDCs, which may not contain decarbonization pathways aligned with the 1.5°C temperature goal, these Methodologies do not adopt the essential 'best available science' standard in their quantification of GHG emissions and assessment of alternatives.

(4) This Legal Opinion discusses the international legal obligations of IFIs (Section II) before those of Major Shareholders (Section III), to highlight that it addresses States' international legal obligations, mainly in relation to their conduct as member States of IFIs.

(5) With respect to BCA's query regarding the permissibility in the development finance context 'for a MDB and its member states to defer to' a borrowing country's climate ambitions and plans, this Legal Opinion finds that while the borrower has some sovereign discretion in determining its development pathway and may invoke the common but differentiated responsibilities and respective capacities (CBDR-RC) principle in its plans, the MDBs and the Major Shareholders are required to decline funding development projects that are inconsistent with their respective climate commitments. While IFIs have a development mandate, they are also subject to climate-related obligations. Similarly, in preparing their development plans, borrowing States must ensure that they are also acting consistently with their Paris Agreement and other international legal obligations.

(6) In addition, although voting decisions at the IFIs may be based on a number of factors, including the development goals and impacts of a particular project and the development finance priorities of borrowing States, member States' voting power (including power exercised through constituencies of multiple countries) must be exercised in accordance with international legal obligations that apply to States in general. This Legal Opinion does not purport to give an evaluation of each and every State, Major Shareholder or otherwise, as it is not feasible to delve into the specific international legal obligations they are subject to based on the treaties that they are party to, and into their domestic considerations.

## A. Applicable law

(7) The international legal obligations of IFIs, as international organizations (IOs), generally derive from their respective constituent instruments (i.e. the Articles of Agreement), the treaties to which they are parties, and customary international law. Given BCA's inquiry and the fact that the MDBs under study are not parties to any of the multilateral environmental agreements, the customary duty to prevent significant environmental harm with due diligence is most relevant. This Legal Opinion thus closely examines the interpretation of this customary norm by international courts and tribunals, including those within the law of the sea regime, which has codified this norm.

(8) Besides being bound by the customary duties to diligently prevent harm and to cooperate, member States of IFIs also bear obligations and rights under the treaties constituting the IFIs. Additionally, most, if not all, of them have obligations under the climate change treaties, such as the Paris Agreement, whose provisions are thus at the core of the present analysis. To the extent that UNCLOS provisions inform the climate obligations of States, particularly the Major Shareholders, their elaboration by relevant adjudicative bodies is included in this Legal Opinion.

### B. Subjects

(9) The IFIs examined in this Legal Opinion are the International Bank for Reconstruction and Development (IBRD), the International Finance Corporation (IFC or Corporation), and the Asian Development Bank (ADB). The choice is informed by the size of these IFIs' lending portfolios and their shareholding distribution that favors non-borrowing member States.[4] Taken together, the three comprise more than half of the total global development financing.[5] The IBRD and the IFC, two of five agencies constituting the World Bank Group (WBG), are separately analyzed to cover both the sovereign and the private sector aspects of development finance. Apart from their direct financial support for certain carbon-intensive projects and financing of financial intermediaries (FIs), MDBs' activities influence the investment decisions of private entities, who are significant—if not currently the predominant—sources of climate finance as well.

(10) Moreover, the selection intends to broaden the geographical range of the analysis. The ADB's mandate pertains to Asia-Pacific, a region that is highly vulnerable to the impacts of climate change including sea level rise and extreme weather events. In the legal and policy literature, the role of the ADB in addressing climate change and its legal obligations to align its lending activities with climate change objectives has been understudied. This Legal Opinion therefore also seeks to fill this gap in scholarship and practice.

(11) The 'Major Shareholders' referred to in the Research Question are States holding the largest number of shares of the MDBs' capital stock, thereby wielding the highest voting power within the decision-making bodies.[6] At the WBG, they appoint and are represented by a single Executive Director—a feature that partly makes it easier, albeit not conclusively, to associate a vote with one State that might have given instructions.[7] Although comprising

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[4] In contrast to its regional counterparts, the African Development Bank (AfDB) and the Inter-American Development Bank (IDB), the ADB's top shareholders are non-borrowing member States, namely, US and Japan—holding approximately 15% each.

[5] See OECD Multilateral Development Finance 2024.

[6] Considerations of geographical distribution informed this illustrative list. The top five countries, by voting power, in each of the MDBs under study are as follows: IBRD (as of 01 July 2025): US, Japan, China, Germany, France/UK; IFC (as of 31 July 2025): US, Japan, Germany, France/UK, India; ADB (as of 30 April 2025): US/ Japan, China, India, Australia. See IBRD, 'Subscriptions and Voting Power of Member Countries', 01 July 2025, available: https://thedocs.worldbank.org/en/doc/a16374a6cee037e274c5e932bf9f88c6-0330032021/original/IBRDCountryVotingTable.pdf (accessed 20 August 2025); IFC, 'Subscriptions and Voting Power of Member Countries', 31 July 2025, available: https://thedocs.worldbank.org/en/doc/c80cbb3c6ece4fa9d06109541cef7d34-0330032021/original/IFCCountryVotingTable.pdf (accessed 20 August 2025); ADB, 'Information Statement', 24 April 2025, available: https://www.adb.org/sites/default/files/institutional-document/417506/information-statement-2025.pdf (accessed 20 August 2025).

[7] See IBRD, 'Voting Power of Executive Directors', 01 July 2025, available: https://thedocs.worldbank.org/en/doc/1da86cb968275b94ab30b3d454882208-0330032021/original/IBRDEDsVotingTable.pdf (accessed 20 August 2025); IFC, 'Voting Power of Directors', 31 July 2025, available: https://thedocs.worldbank.org/en/doc/acff11167280c724a8f7d9158164919a-0330032021/original/IFCEDsVotingTable.pdf (accessed 20 August 2025).

mostly of developed country members, such as United States, Germany, and Japan, the top shareholders also include emerging economies, i.e. China and India.

(12) The Major Shareholders' higher voting power signifies enhanced influence in the institutional decisions, meaning, the votes they cast or withhold have a greater likelihood of determining a given decision. As one human rights treaty monitoring body put it, some of these States have a 'great leverage' that they should use to shape the IFIs' decisions, particularly vis-à-vis borrowing States.[8] In this regard, to the extent that their actions within MDBs relate to their climate mitigation and climate finance obligations, a greater degree of care is expected of them when voting. Importantly, all Member States, regardless of their shareholdings, should exercise their voting power in the context of their respective international legal obligations. Member States with greater financial resources would be subject to more stringent standards in the exercise of the obligation to diligently prevent harm.

(13) The Legal Opinion consistently considers IFIs and the member States, including Major Shareholders, as separate and distinct international legal persons. However, it examines the interaction of the respective legal obligations of these subjects of international law, in the context of the IFIs' financing operations. Moreover, since the Major Shareholders can significantly influence the IFIs' decision-making about projects eligible for support, the Legal Opinion explains the implications of such influence for the concerned States' fulfilment of their own treaty and customary law obligations relating to climate change.

## II. International Law Governing the Conduct of IFIs as International Organizations

(14) As subjects of international law, IFIs qua IOs 'are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties'.[9] That custom binds IOs finds basis in the International Court of Justice (ICJ) *WHO-Egypt* advisory opinion, wherein 'general rules of international law' has been understood as referring to customary international law[10].

(15) The customary norm highly applicable to the climate impacts of IFIs' operations, particularly their support for certain types of development projects, and thus most pertinent to answer BCA's inquiry, is the duty to prevent harm to the environment with due diligence. Further, the treaty indisputably binding on an IFI is its own Charter or Articles of Agreement, which MDBs have interpreted in an evolutionary way to address climate-related issues.

### A. Customary Duty to Prevent Significant Environmental Harm with Due Diligence

[8] CESCR Concluding Observations on the sixth periodic report of Germany (27 November 2018).
[9] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73 [*hereafter,* 'WHO-Egypt'], para 37.
[10] See Catherine Brölmann, 'Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, [1980] ICJ Rep 73' in Cedric Ryngaert and others (eds), *Judicial Decisions on the Law of International Organizations* (Oxford University Press 2016).

(16) The duty to prevent significant transboundary environmental harm finds basis in customary international law.[11] It is also codified in several treaties[12] and other international legal instruments[13]. It requires States to 'take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof'.[14] As an obligation of conduct, the rule's focus is on the activities and behavior expected of the duty-bearer. In other words, determining compliance with this obligation entails an assessment vis-à-vis a standard of conduct which, in this case, is due diligence.[15] To be clear, therefore, harm prevention is the obligation, while due diligence represents the benchmark for fulfilling the obligation. It is not the occurrence of harm that determines compliance, but the duty-bearer's act of undertaking all necessary and appropriate measures to prevent such harm.[16]

(17) Significantly, the applicability of the customary harm prevention rule to IFIs is yet to be tested. This issue concerns the broader and more fundamental question about which particular norms of customary international law are suitable for IOs, given their differences with States, specifically regarding their autonomy and (territorial) jurisdiction. To respond to this question, two related points should be emphasized. First, the ICJ in its *WHO-Egypt* advisory opinion did not qualify the applicability of customary norms to IOs. The draft Articles on the Responsibility of International Organizations (ARIO) likewise did not specify that only certain customary norms create binding obligations on IOs.[17] Indeed, the International Law Commission (ILC) reiterated its commentary to the draft ARIO that international 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'.[18] Second, there exists at least one concrete example wherein the harm prevention duty, in its codified form, applies to certain IOs.[19] This example illustrates that there appears to be no doctrinal or even practical obstacle to imposing on IOs this particular customary legal obligation.

### i. Scope

(18) That 'accumulation of GHG emissions in the atmosphere is causing significant harm to the climate system and other parts of the environment' is undeniable, according to the ICJ, which enumerated phenomena such as 'rising temperature levels, sea level rise, negative

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[11] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [*hereafter,* 'Legality of Nuclear Weapons'], para 29; *Case Concerning Pulp Mills on the River Uruguay, Argentina v Uruguay* (Merits) [2010] ICJ Rep 14 [*hereafter,* 'Pulp Mills'], para 101; *Obligations of States in Respect of Climate Change* (Advisory Opinion) [*hereafter,* 'ICJ AO Climate Change'], 23 July 2025, paras 132-139, 272-300.

[12] See e.g. UNCLOS, Arts 145(a), 207-212; Convention on the Law of the Non-Navigational Uses of International Watercourses (1997), in force 17 August 2014, Art 7; Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992), in force 6 October 1996, Arts 2 and 3; Convention on the Prevention of Marine Pollution from Land-Based Sources (1974), in force 6 May 1978,

[13] Stockholm Declaration, Principle 21: 'States have … the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.' See also Rio Declaration, Principle 2.

[14] ILC, 'Draft articles on the Prevention of Transboundary Harm from Hazardous Activities' (2001) A/56/10 [*hereafter,* 'ILC Prevention Articles'], Art 3.

[15] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) [2011] ITLOS Rep 10 [*hereafter,* 'The Area AO'], para 111: 'The notions of obligations "of due diligence" and obligations "of conduct" are connected.'

[16] Pulp Mills (n 11) para 187. See also ILC, 'Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries' (2001) [*hereafter,* 'ILC Commentary to Prevention Articles'], Art 3, para 7.

[17] ILC, 'Draft articles on the responsibility of international organizations' (2011) A/66/10 [*hereafter,* ARIO], Art 10(1).

[18] ILC, 'Draft articles on the responsibility of international organizations, with commentaries' (2011) [*hereafter,* 'ILC Commentary to ARIO'], Art 10, para 2.

[19] See discussion in para 39 below re: UNCLOS Art 139 and relevant case law.

effects on ecosystems and biological diversity, and extreme weather events' to illustrate this fact.[20] Accordingly, these adverse effects far exceed the threshold of 'something more than "detectable"'[21] harms.

(19) Potential contestations regarding other elements of the harm prevention rule are addressed in the succeeding paragraphs.

### a. Location of harm: climate system as global commons

(20) Although the ICJ has so far only interpreted and applied the harm prevention duty in the context of bilateral disputes and cross-border harms, it has recently clarified in no uncertain terms that the duty also applies 'in the context of climate change' and to other 'global environmental concerns'.[22] In its 2025 Advisory Opinion on the *Obligations of States in Respect of Climate Change,* the Court expressly affirmed that the customary duty 'also applies with respect to the climate system and other parts of the environment', citing its earlier Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*.[23] Indeed, the Court pronounced in the latter that 'the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment'.[24]

(21) Other international tribunals have likewise considered the norm—both in its customary and conventional formulations—in relation to harms occurring in, or inflicted on, areas beyond national jurisdiction. In its advisory opinion on activities conducted in the Area, for example, the International Tribunal for the Law of the Sea (ITLOS) Seabed Disputes Chamber relied on the ICJ's application of the customary international law requiring environmental impact assessments: 'The Court's reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court's references to "shared resources" may also apply to resources that are the common heritage of mankind.'[25] This articulation also finds support in Stockholm Principle 21, which covers prevention of 'damage to the environment of other States or of *areas beyond the limits of national jurisdiction*'.[26]

(22) The potential climate impacts of IFI-supported development projects therefore qualify as harm within the meaning of the customary preventive rule. Development projects' emission of carbon and other GHGs can be considered as causing significant harm to areas beyond national jurisdiction, if not the global commons. As seen below, the IFIs do acknowledge climate change and its impacts to constitute transboundary and/or global harms.

### b. Conduct posing risk of significant harm: direct and indirect contribution to GHG emissions

(23) The type of activities covered by the customary harm prevention duty has yet to become a disputed issue before the ICJ, since the decided contentious cases mainly involved cross-border air or water pollution. The Court has nevertheless opined that, in ascertaining States' international legal obligations 'in respect of activities that adversely affect the climate system',

[20] ICJ AO Climate Change, para 278.
[21] See ILC Commentary to Prevention Articles (n 16) Art 2, para 4.
[22] ICJ AO Climate Change, paras 134, 139.
[23] ICJ AO Climate Change, para 134. See also para 273.
[24] Legality Nuclear Weapons (n 11), para 29.
[25] The Area AO (n 15) para 148.
[26] Emphasis added. See also Rio Principle 2.

the relevant conduct 'is not limited to conduct that, itself, directly results in GHG emissions, but rather comprises all actions or omissions of States which result in the climate system and other parts of the environment being adversely affected by anthropogenic GHG emissions'.[27] The Court further stated that the breadth of its inquiry is justified by the fact that the climate system as a whole, which is the object of the protective obligation, has been defined in broad terms by the Intergovernmental Panel on Climate Change (IPCC).[28] In particular, the ICJ relied on IPCC reports to appreciate the 'severe and far-reaching' impacts of climate change on 'both natural ecosystems and human populations'.[29] It thus concluded that the relevant international legal rules cover 'all actions or omissions of States, and of non-State actors within their jurisdiction or effective control, that result in the climate system and other parts of the environment being adversely affected by anthropogenic GHG emissions'.[30]

(24) The wide range of conduct covered by the customary obligation is also justified by the fact that the obligation covers not only immediate adverse impacts but also harms that may occur or become perceptible in the long-term.[31]

(25) In identifying the conduct covered by the preventive duty, the concept of risk is crucial. An activity's risk level depends on various factors, including the 'nature and magnitude of [a] project'[32], its 'scale and impact'[33], its 'specific context and the manner of operation'[34], and the 'materials used in the activity'[35]. The ILC explained that the notion of 'risk of causing significant transboundary harm'—which sets the threshold for triggering the prevention obligation—'refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact'.[36] Simply put, risk assessment for purposes of determining the applicability of the harm prevention rule entails examining the seriousness of the damage and the likelihood of such damage occurring due to the activity to be undertaken.

(26) Significantly, the emergence of 'new scientific or technological knowledge'[37] also affects the riskiness of a given activity. Most relevant here is the ICJ's recent pronouncement about the role of scientific developments in informing States and the international community about the sources, nature, and consequences of anthropogenic climate change, and the consequent need for States' conduct to rely on 'best available science'. As the Court stated:

> [T]he specific character of the risk of significant harm to the climate system is indisputably established. *The best available science, as presented by the IPCC, confirms that cumulative GHG emissions are the primary source of risks arising from anthropogenic climate change.* All States contribute to that risk, albeit to significantly differing degrees, and all States are affected by the cumulative effects of GHG emissions, depending on their respective situations. Climate change therefore poses a quintessentially universal risk to all States. This risk is of a general and

[27] ICJ AO Climate Change, para 94.
[28] ICJ AO Climate Change, paras 95-96.
[29] ICJ AO Climate Change, paras 73-74
[30] ICJ AO Climate Change, para 95.
[31] ICJ AO Climate Change, para 275.
[32] *Certain Activities Carried Out by Nicaragua in the Border Area*, Costa Rica v Nicaragua (Merits) [2015] ICJ Rep 665 [*hereafter,* 'Certain Activities'], para 155.
[33] *South China Sea Arbitration,* Philippines v China (Award), PCA Case No 2013-19 [*hereafter,* 'South China Sea Award'], 12 July 2016, para 988.
[34] ILC Commentary to Prevention Articles (n 16) Art 1, para 4.
[35] ibid. Art 3, para 11 (emphasis added).
[36] ibid. Art 2, para 2.
[37] The Area AO (n 15) para 117. See also ILC Commentary to Prevention Articles (n 16) Art 3, para 11.

> urgent character, requiring the identification of a corresponding general standard of conduct, to be applied subject to the principle of common but differentiated responsibilities and respective capacities.[38]

(27) Regarding potential harms to the climate system, both the ICJ and the ITLOS confirmed that an activity within one State's jurisdiction or control cannot be assessed in isolation from the activities of other States and of non-State actors within their jurisdiction or control. Indeed, in the context of anthropogenic GHG emissions, it is more appropriate to evaluate the possible environmental harms caused by the interaction of various activities of several actors.[39] Citing the ITLOS' advisory opinion, the ICJ held that the customary harm prevention duty covers 'the cumulative effect of different acts undertaken by various States and by private actors subject to their respective jurisdiction or control'.[40] The Court thereby required States to assess such potential cumulative effects, 'even if it is difficult in such situations to identify a specific share of responsibility of any particular State'.[41] It emphatically concluded:

> [T]he diffuse and multifaceted nature of *various forms of conduct which contribute to anthropogenic climate change* does not preclude the application of the duty to prevent significant harm to the climate system and other parts of the environment. This duty arises as a result of the general risk of significant harm to which States contribute, in markedly different ways, through the activities undertaken within their jurisdiction or control.[42]

(28) The judicial pronouncements above imply that each duty-bearer must perform a risk assessment not only of its own conduct (including of entities within a duty-bearer's jurisdiction or control), but also of such conduct's interaction with the acts or omissions of others. Therefore, an IFI and a Major Shareholder are distinctly obliged to evaluate its potential climate impact vis-à-vis the specific development project that it is funding. Although the borrowing State is already required under the status quo to undertake an environmental impact assessment (EIA) for its proposed development project, the concerned MDB and each of its member States need to perform their own EIAs to verify and/or supplement the borrower's.

(29) In the situation that this Legal Opinion analyzes, one can anticipate an argument that the IFI and/or the Major Shareholder is merely contributing to or *indirectly* causing climate change, because it is the development project, which the borrower State is undertaking, that emits the GHGs and thus *directly* causes harm to the climate system. In essence, this hypothetical argument challenges the idea that IFIs' financing activities per se pose a risk of causing significant harm.

(30) To rebut, although financing activities may not in and of themselves result in GHG emissions and cause harm, they contribute to or enable development projects that do emit GHGs, which cause climate change. Otherwise stated, the act of providing loans and/or grants must be assessed in relation to the activities that such funds are supporting. Indeed, the Court held that the relevant conduct to evaluate against international legal obligations relating to climate change 'include activities such as licensing and subsidizing of fossil fuels'[43]

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[38] ICJ AO Climate Change, para 137 (emphasis added).
[39] *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (Advisory Opinion) [*hereafter,* 'ITLOS AO Climate Change'], 21 May 2024, para 365.
[40] ICJ AO Climate Change, para 276.
[41] ibid.
[42] ICJ AO Climate Change, para 279 (emphasis added).
[43] ICJ AO Climate Change, para 94.

that resemble what IFIs do when funding fossil fuel-based development projects. Accordingly, IFIs should protect the climate system and other parts of the environment from GHG emissions by limiting financial assistance (including through guarantees), or entirely declining support, for projects that extract or rely on fossil fuels and lack clear decarbonization pathways for the borrowing State.

(31) The IFIs' provision of loans and grants, as well as their support to FIs, should be examined, not only on an individual project level, but also from an aggregate perspective. Under this perspective, the IFIs' operations as a whole are assessed for their systemic importance as a source of substantial funds that enable the pursuit of certain types of development projects known to pose climate change risks. Otherwise stated, the IFIs' act of financing development projects can pose a risk of significant environmental harm, because in the absence of their support, many developing countries would not be able to pursue such environmentally risky development projects. Moreover, as mentioned, IFIs' financial and technical assistance, including in the form of guarantees and investments in FIs, can determine the carbon intensity of projects and considerably shape many countries' development pathways.

(32) Based on the foregoing, IFIs must rely on and/or incorporate the best available science—as reported by the IPCC—in formulating the safeguard policies' risk classification system applied to different development projects and, as expounded below, in determining the list of universally (non-) Paris-aligned projects. More concretely, there should be stricter requirements for, if not an outright prohibition of, fossil fuel-dependent energy projects, since current scientific knowledge shows that '[m]itigation includes [] reducing GHG emissions through measures such as transitioning away from fossil fuels'[44].

(33) As elaborated below, the notion of 'best available science' is also relevant in determining the diligence due from an actor, meaning, the 'appropriate measures' that a duty-bearer should undertake to prevent harm.

### c. Jurisdiction or control: Knowledge and capabilities

(34) The existence of territorial jurisdiction or control over the activity posing the risk of significant harm is not indispensable to the application of the customary harm prevention duty to IFIs qua IOs. Instead, only knowledge of harm and means to prevent harm on the part of the duty-bearer are required. Initially, the harm prevention rule was based on the *sic utere tuo* principle that informed the *Trail Smelter* arbitration, which the ICJ in turn cited in *Corfu Channel*[45]. The seminal *Trail Smelter* arbitration laid down a territory-centered statement of the preventive rule:

> [N]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[46]

(35) Despite the ICJ's reliance on these early formulations, its reasoning in *Corfu Channel*—that the State's knowledge of the risk of harm cannot automatically be assumed from the fact that the activity posing such risk happened inside its territory[47]—means that the harm

[44] ICJ AO Climate Change, para 85.
[45] *The Corfu Channel Case*, United Kingdom v Albania (Merits) [1949] ICJ Rep 4 [*hereafter,* 'Corfu Channel']. See also Pulp Mills (n 11) para 101.
[46] *Trail Smelter case* (United States/Canada), 11 March 1941 Award, UNRIAA vol III pp. 1905-1982, p. 1965.
[47] Corfu Channel (n 45) p. 18.

prevention rule permits looking not only at legal but also factual links to trigger the obligation. In *Corfu Channel,* what the Court sought to determine for purposes of establishing responsibility (for the harm caused by the mines) is the State's knowledge of the potentially harmful activities rather than its mere control of territory. The rationale is that a State cannot be expected to prevent, with due diligence, a potential harm that it does not know of. Framed otherwise, it is knowing the existence of risk, rather than territorial jurisdiction or control per se, that obliges an actor to prevent harm or minimize the risk thereof. Indeed, according to the ICJ, the fact that respondent actually knew of the potential harms within its territory prompts Albania's 'obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.[48]

(36) Therefore, knowledge about potential harm from one's conduct and the capability to prevent such harm are central to determining the diligence due from an actor who is obliged to protect the environment or to prevent environmental harms. Otherwise stated, the obligation to prevent becomes relevant to a subject of international law who is in a position to foresee a harm and possesses the means appropriate or necessary to thereby prevent such harm. This reading of 'jurisdiction or control' can be further justified by the fact that the customary harm prevention duty is premised on the idea that States typically have the authority and means to oversee or supervise the activities occurring within their territory.

(37) Both jurisdiction and control can thus be construed to represent an actor's ability to know about potentially harmful activities and to do something about them. Indeed, the ILC clarified that '[t]he expression "jurisdiction" is intended to cover [] activities over which, under international law, a State is authorized to exercise its competence and authority'.[49] On the other hand, the term 'control' contemplates 'situations in which a State is exercising *de facto* jurisdiction'.[50]

(38) Interpreting 'jurisdiction or control' as not exclusively pertaining to territorial connections permits the application of the harm prevention duty and its concomitant standard of conduct to entities like IOs, which have no territory but nevertheless exercise jurisdiction or control over the activities they perform within their legal mandates or functional scope. In the IFIs' case, these authorized activities generally pertain to provision of loans, grants, guarantees, or advisory services and to investments in funds and financial institutions. Additionally, IFIs are authorized to impose certain conditions (e.g. safeguard policies) to ensure that such financial and technical assistance serves sustainable development purposes.

(39) Further strengthening this interpretation is the jurisprudence on UNCLOS Article 139, which imposes on international organizations 'the responsibility to ensure that [their] activities in the Area' are in conformity with various provisions concerning the Area, including its protection.[51] Even more relevantly, UNCLOS Article 139 provides that 'damage caused by the failure of … [an] international organization to carry out its responsibilities under this Part shall entail liability'.[52] These provisions show that it is possible for IOs to bear a legal obligation similar to the customary harm prevention duty. Notably, they must be read in conjunction with UNCLOS Annex IX that governs IOs' participation in the Convention. Relying on the Article concerning responsibility and liability, the ITLOS clarified that an IO's international responsibility 'is linked to its competence'.[53] The Tribunal

[48] ibid. p. 22.
[49] ILC Commentary to Prevention Articles (n 16) Art 1, para 9.
[50] ibid. Art 1, para 12.
[51] UNCLOS art 139(1).
[52] UNCLOS art 139(2).
[53] *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)* (Advisory Opinion), 2 April 2015, para 168.

further stated that when compliance with the obligation of an IO 'depends on the conduct of its Member States', that IO 'may be held liable if a Member State fails to comply with such obligation and the organization did not meet its obligation of "due diligence"'.[54] To emphasize, the foregoing provisions and pronouncements under the law of the sea regime lend support to the proposition that it is legally possible and acceptable for IOs to assume duties requiring the exercise of due diligence in order to prevent transboundary harm, where these IOs can influence or shape the activities (of member States) that could cause environmental harm.

(40) Moreover, although the proposals were ultimately rejected, some country delegations to the Preparatory Committee of the Rio Conference submitted reformulations of Stockholm Principle 21 extending the duty of harm prevention to international organizations.[55] Lastly, it bears noting that the capabilities-based reading of 'jurisdiction or control' also aligns with the United Nations General Assembly (UNGA) World Charter for Nature, Principle 21 of which provides, 'States and, *to the extent they are able,* other public authorities, *international organizations*, individuals, groups and corporations shall … [e]nsure that activities within their jurisdictions or control do not cause damage to the natural systems located within other States or in areas beyond the limits of national jurisdiction'.

(41) In the context of development project financing, IFIs are in a position of authority—in part due to their financial influence and years of experience—to determine and specify measures that their borrowers/clients need to do to prevent environmental and climate change-related harms arising from the projects the latter are pursuing. The IFIs can be seen to exercise some authority, through the safeguard policies' requirements, over the project-related activities. They are even tasked under these policies to monitor the borrowers' fulfilment of such requirements throughout the project cycle.

(42) In sum, the element pertaining to the existence of jurisdiction or control can be understood to include situations and relationships wherein an entity has the legal competence and/or factual capacity to stop or influence the pursuit of potentially harmful activities. For IFIs, who have vast financial resources and are legally mandated to provide financing and support for sustainable development purposes, they can sanction, prohibit, or limit entire projects or some activities therein that pose risks of climate change and related harms. As the provider of funds, they can dictate or influence the types of activities involved in a given project and/or the manner by which these activities are carried out. More simply put, MDB financing and support make it possible for certain activities, which pose risk of transboundary environmental harm, to be undertaken.

(43) To conclude this section, the most relevant international legal obligation applicable to IFIs—with respect to their support of development projects posing risks of climate harm—is the customary duty to exercise due diligence in order to prevent significant harm. Invoking this norm is not without controversy. However, assuming certain scope-related challenges can be overcome through the abovementioned propositions, IFIs are required under international law to undertake 'all appropriate measures' to fulfil its preventive obligation. The next section explains what types of measures are considered appropriate—i.e. what diligence is due—for climate-risky development projects funded by IFIs. It further analyzes whether the IFIs' existing policies comply with the customary obligation.

[54] ibid. para 168. See also para 172.
[55] See Leslie-Anne Duvic-Paoli, *The Prevention Principle in International Environmental Law* (Cambridge University Press 2018) 118, 314.

### ii. Content

(44) As mentioned, the harm prevention duty is an obligation of conduct. To act with due diligence not only means adopting appropriate rules and measures, but also entails enforcing them with 'a certain level of vigilance'.[56] As the ICJ explained in *Pulp Mills*, satisfying this standard of conduct additionally involves exercising 'administrative control' over third parties, including by monitoring their activities.[57] Citing the Court's jurisprudence, the ITLOS Seabed Disputes Chamber likewise interpreted the obligation 'to ensure' (in UNCLOS Article 139) as requiring the deployment of adequate means and exercising best possible efforts, for the purpose of obtaining the prescribed result.[58] The adequacy and appropriateness of measures undertaken can be evaluated against established international standards, when they exist.[59]

(45) Among the relevant factors that determine the diligence due from duty-bearers, per the ILC, are 'the size of the operation; its location, special climate conditions, [and] materials used in the activity'.[60] States are obliged to use all means at their disposal to prevent significant harm to the climate system and other parts of the environment, taking into account the CBDR-RC principle, where the degree of care expected of a State with a well-developed economy and human and material resources and with highly evolved systems and structures of governance is different from States which are not so well placed.[61]

(46) Further, States should diligently and adequately inform itself of the degree of hazard involved in a given activity within its jurisdiction or control, since '[t]he higher the degree of [foreseeable] harm the greater would be the duty of care required to prevent it'.[62] What diligence is due from duty-bearers thus differs depending on the riskiness of the activities involved.

(47) Stressing the urgency and gravity of climate change, the ICJ 'recognize[d] that the standard of due diligence for preventing significant harm to the climate system is stringent' and 'a heightened degree of vigilance and prevention is required'.[63] It then provided examples of 'rules and measures' that are necessary to prevent climate change, namely, 'regulatory mitigation mechanisms that are designed to achieve [] deep, rapid, and sustained reductions of GHG emissions', coupled with 'effective enforcement and monitoring mechanisms to ensure their implementation'.[64]

(48) Due diligence could also vary across time, particularly given scientific developments or new technological knowledge.[65] Indeed, the due diligence standard 'requires States to actively pursue the scientific information necessary for them to assess the probability and seriousness of harm'[66] and to utilize 'readily available technologies'[67]—both in conformity with the CBDR-RC principle. The ICJ stated that due diligence 'calls for an assessment in concreto'

[56] Pulp Mills (n 11) paras 101, 197.
[57] ibid. para 197.
[58] The Area AO (n 15) para 110.
[59] ILC Commentary to Prevention Articles (n 16) Art 3, para 4.
[60] ibid. Art 3, para 11.
[61] ICJ AO Climate Change, paras 290-291.
[62] ILC Commentary to Prevention Articles (n 16) Art 3, para 18.
[63] ICJ AO Climate Change, para 138.
[64] ICJ AO Climate Change, para 282.
[65] ILC Commentary to Prevention Articles (n 16) Art 3, para 11; The Area AO (n 15) para 117.
[66] ICJ AO Climate Change, para 283.
[67] ICJ AO Climate Change, para 286.

and may vary depending on the circumstances of the State in question and its capacity to influence the salient acts or events.[68]

(49) Indeed, the capacity of duty-bearers—to inform itself of the risks of harm arising from their activities and to undertake appropriate measures to prevent harm—is an important variable in determining compliance with the due diligence standard. As the Court particularly held relative to climate change and related harms, the 'multifactorial and evolutive character of the due diligence standard' means that its requirements intensify 'as States develop economically and their capacity increases'.[69]

(50) The factors in determining the diligence due from MDBs in their financing activities can thus be analytically divided into (a) project-specific features and (b) MDBs' capabilities. Regarding the former, included in the determination are a project site's magnitude, its location (e.g. in a biodiverse region; the natural habitat of some endangered species; or an indigenous peoples' land), and the type of activities and the materials used therein. The MDBs' capabilities are a function of their financial resources and their experience-based knowledge—both of which reasonably also enhance their ability to access and act upon scientific developments.

(51) Their formulation of the safeguard policies contributes to satisfying the IFIs' customary obligation to diligently prevent harms caused by their financing of development projects. To emphasize, however, IFIs should additionally exercise due diligence in implementing such policies. In other words, they should also ensure, including through further financial and/or technical assistance, that borrowers are performing the requirements under the environmental and social policies.

### a. Impact assessment

(52) One of the well-established means of satisfying the due diligence standard concomitant to the harm prevention duty is the conduct of EIAs. Because of States' wide acceptance of the practice of conducting environmental assessments as part of their obligation to protect and preserve the environment, such practice, according to the ICJ, 'may now be considered a requirement under general international law … where there is a risk that a proposed industrial activity may have a significant adverse impact in a transboundary context'.[70] In one case, the Court held that the EIA requirement applies to all activities, not just those of an industrial nature, that potentially have a significant transboundary impact.[71] It further specified that an EIA should be conducted not only before implementing a project but also throughout the project's life to continuously monitor its effects on the environment.[72] Under the jurisprudence in the law of the sea regime, conducting an EIA has likewise been characterized as 'a direct obligation under the [UNCLOS] and a general obligation under customary international law'.[73] Similarly, echoing Rio Principle 17, the ILC Prevention Articles require that a State's authorization of an activity shall be 'based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment'.[74]

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[68] ICJ AO Climate Change, para 247.
[69] ICJ AO Climate Change, para 292
[70] Pulp Mills (n 11) para 204.
[71] Certain Activities (n 32) para 104.
[72] ibid. at para 161.
[73] South China Sea Award (n 33) para 948 (citations omitted).
[74] ILC Prevention Articles (n 14) Art 7. See also Convention on Environmental Impact Assessment in a Transboundary Context.

(53) Among the common requirements under the IFIs' safeguard policies is the conduct of an EIA (or EIA equivalent). Based on the EIA findings, the borrower needs to undertake preventive or mitigatory measures that are likewise prescribed, albeit in a generic manner, by the safeguard policies. For example, under the World Bank's ESS 1, the borrower is tasked to develop and implement an Environmental and Social Commitment Plan (ESCP), wherein the 'measures and actions required for the project to achieve compliance with the ESSs over a specified timeframe' are laid down.[75] The ESCP should also contain relevant management tools 'that the Borrower will use to develop and implement the agreed measures and actions'.[76]

(54) As explained below, although under the safeguard policies the actor tasked to perform the EIA is the borrowing State or private entity, the imposition of such a requirement is part of the IFIs' due diligence in preventing environmental harms arising from development projects. For the IFIs to remain compliant with their preventive duty, they must also monitor the borrowers' fulfilment of the requirement to continuously assess the potential harms arising during project implementation. Moreover, the IFIs should periodically verify that preventive or mitigatory measures are in place and being properly carried out. For this purpose, the IFIs need to carefully review the regular reports that the borrowing State or private entity is also required to submit under the safeguard policies.

(55) Significantly, since IFIs are themselves bound by the customary duty to diligently prevent significant environmental harm, and considering their considerably greater resources (relative to most borrowing States), IFIs should independently perform their own project-specific climate risk assessment that estimates Scope 1 and 2 emissions—extending to Scope 3 when reasonable. Their exercise of due diligence also entails using the methods based on best reasonably available science to conduct an alternatives analysis—that encompasses GHGs quantification and impact assessment—as well as enabling timely and meaningful public review by disclosing the results of such analysis.

### b. Notification, consultation, and cooperation

(56) Also among the 'appropriate measures' that a duty-bearer should undertake, following an EIA that demonstrates a project's risk of causing significant environmental harm, is timely notifying such risk to the State(s) likely to be harmed.[77] Such notification shall be accompanied by a consultation in good faith between/among the States concerned, 'where that is necessary to determine the appropriate measures to prevent or mitigate [the] risk'.[78]

(57) The three main stakeholders in development projects are the IFI, the borrower, and the affected communities. The IFI seeks to fulfil its customary harm prevention duty, by mandating in its safeguard policies that borrowers notify and consult potentially affected parties. It bears stressing, however, that the compliance with these notification and consultation (stakeholder engagement) requirements is reported by the borrowing State or private actor to the IFI, for the purpose of informing the latter's decision-making.[79]

(58) The duty to cooperate is a customary obligation distinct from but closely related to the harm prevention duty, especially in the context of climate change, since there is a 'need to reach a

[75] WB ESS1, para 36. It is further stated that '[t]he ESCP will be agreed with the Bank and will form part of the legal agreement'.
[76] WB ESS 1, para 41
[77] ILC Prevention Articles, Art 8(1). See also UNCLOS Art 206; South China Sea Award (n 33) para 948.
[78] Certain Activities (n 32) para 104. See also para 106.
[79] See WB ESS 1, para 51

collective temperature goal' and 'the climate system [] is a resource shared by all States'.[80] The ICJ likewise explained that while the customary harm prevention duty requires States 'to make individual contributions to collective efforts', performing such obligation must 'as far as possible, be fulfilled in co-operation with other States'.[81] Concretely, the Court suggested that cooperation could be achieved through 'treaties and their coordinated forms of implementation'.[82]

(59) Most relevantly for this Legal Opinion, actions done through or with IOs generally constitute 'sustained and continuous forms of co-operation'.[83] In particular, as elaborated in the next section, States can cooperate towards regulating GHG emissions within the auspices of IFIs, by determining the appropriate measures to prevent development projects from contributing to climate change. Further, if IFIs qua IOs were deemed to be independently bound by the customary duty to cooperate, their performance of this duty, as well as the customary obligation to prevent significant environmental harm, potentially requires them to work with member States in 'continuously develop[ing], maintain[ing] and implement[ing] a collective climate policy that is based on an equitable distribution of burdens and in accordance with the principle of common but differentiated responsibilities and respective capabilities'[84].

### B. Constituent instruments

(60) IFIs are also subject to climate-related international obligations based on their environmental and social policies, which they are mandated to follow under their constituent instruments. The treaties creating IOs are often referred to as 'constituent instruments' or 'constitutive treaties'. In the case of the MDBs under study, the constituent instruments of the IBRD and the IFC are both labeled 'Articles of Agreement', whereas that of the ADB is traditionally called 'Charter'[85]. Constituent instruments do not only vest IFIs with international legal personality but also provide their obligations under international law.

(61) Significantly, these instruments also grant the IFIs the authority to interpret their own charters.[86] While their treaty obligations do not expressly cover environmental concerns such as climate change, IFIs have interpreted their own Articles of Agreement to expand their mandates and incorporate therein 'non-economic' concerns such as environmental and human rights protection. Given their wide discretion in defining and implementing their mandates, MDBs have moved towards funding projects not only with economic growth in mind but sustainable development goals and climate change issues as well.

(62) Pursuant to their interpretive authority, MDBs have formulated environmental and social policies ('safeguards'), some of which expressly include climate change-related commitments. The IFC refers to similar safeguard policies as 'Performance Standards on Environmental and Social Sustainability'. The safeguard policies interestingly incorporate language alluding to an apparent harm prevention rule in the IFIs' operations. Further, the World Bank itself has characterized its duties in this regard as one of due diligence.

[80] ICJ AO Climate Change, paras 301-302; 305.
[81] ICJ AO Climate Change, para 304. See also para 308.
[82] ICJ AO Climate Change, para 304.
[83] ibid.
[84] ICJ AO Climate Change, para 306.
[85] The formal name, however, is 'Agreement Establishing the Asian Development Bank'.
[86] IBRD AA, Art IX; IFC AA, Art VIII; ADB Charter, Art 60.

### i. Purposes and Functions

(63) The purposes of IFIs, read in conjunction with their authorized functions, form the legal mandates of these IOs. The IFIs' climate-related international obligations should be understood in relation to these treaty-based legal mandates.

(64) In general, IFIs serve the purpose[87] of encouraging the economic growth and development of member States by providing various financial instruments—such as loans, grants, equity investments, and guarantees—to support specific development projects[88]. They are legally required by their constituent instruments to allocate the IFIs' resources to development projects 'for the benefit of members'[89] and to meet members' requests for assistance 'in the coordination of their development policies and plans'[90].

(65) Within the WBG, support for public and private entities is divided, albeit not very strictly, between the IBRD and the IFC. The IBRD can only deal with members through their government bodies[91], but it 'may guarantee, participate in, or make loans to any member or any political sub-division thereof and any business, industrial and agricultural enterprise in the territories of a member'[92]. Similarly, the ADB is authorized to 'provide or facilitate financing' to any public or political bodies of its members, 'any entity or enterprise operating in the territory of a member', and even 'international or regional agencies or entities concerned with economic development of the [Asia-Pacific] region'.[93] The Corporation is intended to supplement the Bank's efforts of promoting economic development by assisting productive private enterprises in member States, especially emerging economies, with the use of guarantees, equity investments, and trade finance.[94] Additionally, the IFC is obliged ('shall') to 'seek to stimulate, and to help create conditions conducive to, the flow of private capital, domestic and foreign, into productive investment in member countries'.[95]

(66) The constituent instruments only broadly state the functions that IFIs shall perform in order to fulfil their purposes, which are also framed in a generic manner and with terms—such as 'development'—that leave quite significant room for interpretation. The breadth and malleability of their legal mandates have enabled the IFIs to autonomously and flexibly shape their operations, in response to shifts in global trends and the changing development needs of their member States.

(67) Consequently, although the constituent instruments do not explicitly include environmental and social impacts of development projects among the factors to be considered in their operations, IFIs have formulated rules to address such adverse effects. As discussed, complementing these rules is the duty under customary international law to diligently prevent significant harm to the environment.

### ii. Policymaking and Projects Approval

[87] IBRD AA, Art I; IFC AA, Art I; ADB Charter, Arts 1 and 2.
[88] IBRD AA, Art III, Sec 4(vii); ADB Charter, Art 14(i). The ADB may also lend to national development banks, which may then 'finance specific development projects whose individual financing requirements are not, in the opinion of the Bank, large enough to warrant the direct supervision of the Bank'.
[89] IBRD AA, Art III, Sec 1(a). See also ADB Charter, Art 2(ii).
[90] ADB Charter, Art 2(iii).
[91] See IBRD AA, Art III, Sec 2.
[92] IBRD AA, Art III, Sec 4.
[93] ADB Charter, Art 11.
[94] IFC AA, Art I, in rel Art III.
[95] IFC AA, Art I(iii).

(68) Compared to other IOs with a 'one State, one vote' system, IFIs have a distinctive decision-making structure. A member State's voting power consists of its basic votes and share (proportional) votes.[96] All members have an equal number of basic votes, but their share or proportional votes differ based on the number of shares in the Bank's or Corporation's capital stock that they hold.[97] Hence, rich, non-borrowing member States have the greatest number of votes. This weighted voting structure makes the existence of Major Shareholders (or more colloquially a 'veto power' in the case of the United States) possible. Although the Major Shareholders' legal obligations under the IFIs' constitutive treaties do not differ from those of other member States, isolating this group for analysis is justified by the fact that their votes heavily determine not only the IFIs' selection of projects but also the conditions imposed for approval.

(69) This sub-section explains in greater detail how IFIs, through the Board of Governors and the Board of Executive Directors ('Executive Board'), decide on the policies and on financial commitments for specific projects. The roles of Management and staff in the MDBs' operations will also be discussed, given their more direct involvement during the project cycle.

(70) The IFIs' powers are vested in Board of Governors who make decisions, including those about policies and specific investments, through majority voting.[98] For instance, the ADB may only invest in the equity capital of an institution or enterprise with the approval of 'a majority of the total number of Governors, representing a majority of the total voting power of the members'.[99] At the IBRD and the IFC, the chairperson at any meeting has the discretion to 'ascertain the sense of the meeting in lieu of a formal vote', except when a Governor requests that a formal vote be required.[100]

(71) The Board of Governors may delegate powers to the Executive Board. Excluded from these delegable powers are those pertaining to membership such as admission and suspension, changes in the authorized capital stock, formal comprehensive cooperation agreements with other IOs, permanent suspension of the Bank's or Corporation's operations and distribution of its assets, distribution of net income (declaration of dividends), and appeals from interpretations of the constituent instrument.[101] In the case of the IFC and the ADB, the list of the Board of Governors' non-delegable powers also explicitly includes amending the constituent instrument.

(72) More pertinently to this Legal Opinion, the IFIs' Board of Governors—'and the Executive Directors to the extent authorized'—are permitted to 'adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Bank [Corporation]'.[102] A bit differently, the same decision-makers in the ADB 'may establish such subsidiary bodies as may be necessary or appropriate to conduct the business of the Bank'[103]. In any event, it is in the exercise of these powers that the IFIs have formulated the safeguard policies (discussed below) and created the independent accountability mechanisms.

(73) The Executive Board, being responsible for the conduct of general operations, reviews and approves the details of development projects, including the financial assistance

[96] IBRD AA, Art V, Sec 3(a); IFC AA, Art IV, Sec 3(a); ADB Charter, Art 33(1).
[97] ibid.
[98] IBRD AA, Art V, Sec 3(b); IFC AA, Art IV, Sec 3(b); ADB Charter, Art 33(2) and (3).
[99] ADB Charter, Art 11(iii).
[100] IBRD By-Laws (2021), Sec 10; IFC By-Laws (2021), Sec 9.
[101] IBRD AA, Art V, Sec 2(a) and (b); IFC AA, Art IV, Sec 2(a) and (c); ADB Charter, Art 28(1) and (2).
[102] IBRD AA, Art V, Sec 2(f); IFC AA, Art IV, Sec 2(h).
[103] ADB Charter, Art 29(4).

corresponding thereto.[104] In their approval decisions, the Directors are required to consider the conditions set out in the Articles of Agreement. These conditions all essentially pertain to the economic viability, and the development potential of a project, given the surrounding market environment.[105] The ADB Charter explicitly provides that the Executive Board's 'decisions concerning loans, guarantees, investments in equity capital, borrowing by the Bank, furnishing of technical assistance and other operations' shall be taken pursuant to the Board of Governors' general directions.[106]

(74) Decision-making at the IFIs heavily relies on discretion, the exercise of which is guided or constrained by too few clear and explicit substantive requirements in the constituent instruments, especially ones pertaining to non-economic considerations or even to international legal obligations. Nevertheless, as explained below, the IFIs have bound themselves (and their borrowers/clients) to certain sustainability standards, i.e. the safeguard policies, to take into account the environmental and social dimensions of a development project and to address project-related harms.

(75) Indeed, before the project approval phase, the borrowing State or corporation receiving financing extensively engages with MDB management and staff to prepare the documents and conduct the technical, economic, social, and environmental assessments needed for the project, which the borrower itself identifies and proposes. At the IFC, the procedure is essentially similar, except that it is a company or entrepreneur who submits an investment proposal, and interacts with the IFC management and staff.

(76) Projects or investments approved by the IBRD, the IFC, and the ADB require the borrower, whether a member State or a private sector entity, to comply with the MDBs' respective environmental and social policies/standards, which the next sub-section briefly discusses.

### iii. Environmental and Social Policies

(77) The safeguard policies significantly shape how projects supported by IFIs are designed and implemented. Their shared objective is to ensure the economic, social, and environmental sustainability of development projects. Framed differently, safeguard policies aim to ensure that IFI-supported development projects do not cause harm to people and the environment. They accordingly provide detailed procedures that need to be performed by borrowers so that IFIs approve the project proposals and continue disbursing the funds throughout the project cycle.

(78) The safeguard policies elaborate the IFIs' development-oriented legal mandates. While the status of safeguards as sources of international legal obligations in and of themselves is unsettled at the moment, these policies can be said to operationalize the IFIs' legal mandates under their constitutive treaties. As mentioned, the formulation of the safeguard policies derives from the IFIs' broader, and more sustainability-focused, interpretation of 'development', which lies at the core of their purposes. The safeguards thus provide normative standards that are derived from the MDBs' 'constitutional' (treaty-based) obligations and against which their conduct, including project-related decisions, can be evaluated.

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[104] IBRD AA, Art V, Sec 4(a); IFC AA, Art IV, Sec 4(a); ADB Charter, Art 31. See also World Bank Group Corporate Secretariat, Board Manual (December 2021), Part I(1) 'Roles and Responsibilities of Executive Directors'; WBG, 'World Bank Project Cycle' (n.d.) available: https://projects.worldbank.org/en/projects-operations/products-and-services/brief/projectcycle (accessed: 27 June 2025).
[105] See IBRD AA, Art III, Sec 4; IFC AA, Art III, Sec 3; ADB Charter, Art 11.
[106] ADB Charter, Art 31(ii).

(79) More specifically, insofar as the safeguard policies are deemed to interpret the treaty-based development mandates of IFIs, the latter's approval of a project that fails to meet the safeguards requirements can be considered a violation of an IFI's obligations under its constituent instrument. Likewise, if any of the required measures of an ongoing or periodic nature is not met during the project cycle, the MDB is obliged not to continue disbursing funds for such development project.

(80) Alternatively, the safeguard policies can be treated as the IFIs' conduct that can be evaluated for consistency with the IFIs' obligations under customary international law. In II.A. above, this Legal Opinion assesses whether these policies are appropriate for IFIs to comply with the customary duty to diligently prevent environmental harm, specifically climate change: as IFIs are obliged to diligently ensure that borrowers fulfill these requirements, the Board of Governors and/or the Executive Board must ascertain compliance with the safeguard policies in exercising their powers to approve or continue funding projects.

(81) The safeguard policies provide specific requirements for the environmental and social sustainability of development projects. The IFC, for instance, commits to 'only finance investment activities that are expected to meet the requirements of the Performance Standards within a reasonable period of time'.[107] Similarly, the ADB deems it a responsibility to 'only finance projects that are expected to meet the requirements of the ESSs in a manner and within a time frame acceptable to ADB'.[108] Further, the Bank declares that it 'will [neither] finance activities on the Prohibited Investment List' nor 'support projects that are found to be noncompliant with the host country's applicable laws, including those laws implementing host country obligations under international instruments'.[109]

(82) Across all MDBs, the conduct of an environmental (and social) impact assessment is required for all development projects.[110] The results of such assessment, in turn, inform the decisions and next steps to be taken by the IFIs, in close coordination with the borrowing State or the private entity, in IFC's case. Parenthetically, there also exist safeguard policies concerning involuntary resettlement[111] and indigenous peoples[112].

(83) Uniquely, apart from an EIA, the ADB can also require a borrowing State or private entity to conduct a climate risk assessment, if the Bank's climate screening process shows that 'a project has risk of climate change impacts and/or risk of increasing climate exposure or vulnerability of project-affected persons'.[113] With the goal of '[m]inimiz[ing] absolute and relative GHG emissions attributable to a project', the ADB's Environmental and Social Standard (ESS) on climate change further requires the borrower to 'consider alternative measures including adoption of energy efficiency, lower-carbon energy sources and energy inputs, renewable energy, alternative project locations, conservation of high-carbon value resources, reduction of fugitive emissions, or other GHG management practices such as use of best-available low-carbon technologies and equipment' and to minimize absolute and relative GHG emissions in the project by integrating technically and financially feasible measures. [114] Such consideration of alternatives should be made in written form and shared transparently.

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[107] IFC Policy on Environmental and Social Sustainability, para 22. See also WB Environmental and Social Policy for Investment Project Financing, para 7.
[108] ADB ESF, 'Environmental and Social Policy', para 13.
[109] ibid.
[110] WB ESS 1; IFC PS 1; ADB ESS 1.
[111] WB ESS 5; IFC PS 5; ADB ESS 5.
[112] WB ESS 7; IFC PS 7; ADB ESS 7.
[113] ADB ESS 9, para 5.
[114] ADB ESS 9, para 8.

(84) Complementing the EIA, and as part of exercising its due diligence, the IFC requires the client to 'consider alternatives and implement technically and financially feasible and cost-effective options to reduce project-related GHG emissions' throughout the project life-cycle.[115] Moreover, the client is required to quantify direct and indirect emissions (i.e. 'associated with the off-site production of energy used by the project'), if a project is 'expected to or currently produce more than 25,000 tonnes of $CO_2$-equivalent annually'.[116] Other IFC Performance Standards, such as those concerning community health[117], also allude to climate change issues.

(85) Overall, the safeguards' approach is to identify the potential harms caused by a development project to certain local communities and/or various components of the natural environment, so that measures can be adopted to avoid or mitigate such harms. The safeguard policies are thus, for the IFIs, potentially a viable means to comply with their customary harm prevention duty. Notably, the configuration of actors and their corresponding tasks within the IFIs' safeguards framework do not fall neatly into the typical and known situations wherein the customary harm prevention rule has been applied. Nevertheless, it remains possible to apply the customary harm prevention rule to the IFIs' support for development projects, by examining whether they have diligently ascertained, ensured, and monitored the borrowers' compliance with the environmental and social policies.

(86) In this regard, the World Bank makes the connection somewhat more explicit by characterizing its own responsibility for the development projects' environmental and social sustainability as one of due diligence:

> The Bank will conduct environmental and social due diligence of all projects proposed for support through Investment Project Financing. *The purpose of the environmental and social due diligence is to assist the Bank in deciding whether to provide support for the proposed project* and, if so, the way in which environmental and social risks and impacts will be addressed in the assessment, development and implementation of the project.[118]

(87) Such due diligence is underpinned by the IBRD's commitment 'to support[] Borrowers in the development and implementation of projects that are environmentally and socially sustainable, and to enhanc[e] the capacity of Borrowers' environmental and social frameworks to assess and manage the environmental and social risks and impacts of projects'.[119] Hence, the World Bank further specifies that its 'due diligence responsibilities' include 'reviewing the information provided by the Borrower relating to the environmental and social risks and impacts of the projects, and requesting additional and relevant information where there are gaps that prevent the Bank from completing its due diligence' and assisting the Borrower in taking 'appropriate measures … to address environmental and social risks and impacts'.[120]

(88) The World Bank's framing of its duty in due diligence terms assumes greater significance, given that the measures specified in the safeguard policies are in fact for a third party, i.e. the borrowing State, to implement.[121] The same is true for the IFC and the ADB, although

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[115] IFC PS 3, para 7.
[116] IFC PS 3, para 8.
[117] See IFC Performance Standard 4 (Community Health, Safety, and Security), paras 1 and 8.
[118] World Bank, *Environmental and Social Framework* (2017), 'World Bank Environmental and Social Policy', para 30 (emphasis added).
[119] ibid. at para 2. See also para 3 re: human rights.
[120] ibid. at para 32.
[121] See World Bank, *Environmental and Social Framework* (2017), 'World Bank Environmental and Social Policy', para 32

these IFIs do not employ the language of due diligence. Instead, the ADB previously required the borrower/client to prepare an environmental management plan (EMP), explaining in its 2009 Safeguard Policy Statement, that the plan's level of detail and the prioritization of measures should consider 'mitigation of potential adverse impacts to the level of "no significant harm to third parties"'.[122] This explanation seemingly alludes to the no-harm rule, which may be considered a precursor or a variant of the customary harm prevention duty. Parenthetically, this statement is not reiterated in the most recent version of ADB's 2024 Environmental and Social Framework (ESF), which very closely resembles the World Bank's.

(89) Significantly, some of the IFIs' safeguard policies contain explicit references to climate change concerns. Most important to discuss in this respect is the ADB's climate change-specific ESS[123], which begins with a recognition that GHG emissions affect traditional development concerns:

> Effects of greenhouse gases (GHG) emissions, compounded by a reduction of the planet's carbon sinks, are altering the physical and biological environment and *severely impacting economies, livelihoods, food security, health conditions, and the quality of life* of communities and individuals, disproportionately affecting disadvantaged or vulnerable communities.[124]

(90) This understanding is backed by an equally remarkable vision statement, affirming that environmental and social sustainability 'is a cornerstone of inclusive and sustainable economic growth and poverty reduction in Asia and the Pacific'[125] and expressing ADB's belief that 'the achievement of international commitments, including the Sustainable Development Goals and related Financing for Development agenda [and] the Paris Agreement on climate change … will depend critically on the success of the region in matching the vision'[126].

(91) To the extent that it inspired and thus resembles the ADB's ESF, the World Bank's framework likewise deserves to be closely examined, since it does not only contain a 'commit[ment] to environmental sustainability, including stronger collective action to support climate change mitigation and adaptation', but also a quite revealing explanation of how the Bank views its role relative to climate change and development:

> These strategies recognize that all economies, particularly developing ones, still need to grow, but they need to do so sustainably, so that income-producing opportunities are not pursued in ways that limit or close off opportunities for future generations. It recognizes that *climate change is affecting the nature and location of projects,* and that *World Bank-financed projects should reduce their impact on the climate by choosing alternatives with lower carbon emissions. The World Bank works on climate change because it is a fundamental threat to development in our lifetime.* The World Bank is committed to supporting its client countries to manage their economies, to decarbonize and invest in resilience, while ending poverty and boosting shared prosperity.[127]

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[122] ADB Safeguard Policy Statement, Safeguard Requirements 1: Environment, para 12.
[123] None of the other MDBs have an entire safeguard policy dedicated to or exclusively addressing climate change.
[124] ADB ESS 9, para 1 (emphasis added).
[125] ADB ESF, 'Vision', para 2.
[126] ADB ESF, 'Vision', para 1.
[127] World Bank, *Environmental and Social Framework* (2017), 'A Vision for Sustainable Development', para 2 (emphasis added).

(92) This vision statement is followed by the World Bank's specification that the project-related environmental and social risks and impacts that it 'will take into account in its due diligence' include 'those related to climate change and other transboundary or global risks and impacts'.[128] Correspondingly, borrowers from the IBRD have to consider in their environmental and social assessment 'potentially significant project-related transboundary and global risks and impacts, such as impacts from effluents and emissions, increased use or contamination of international waterways, emissions of short- and long-lived climate pollutants, climate change mitigation, adaptation and resilience issues, and impacts on threatened or depleted migratory species and their habitats'.[129]

(93) Likewise, the IFC elaborates the contents of its Performance Standard concerning the environmental (and social) risks and impacts assessment in this wise:

> The [risks and impacts identification] process will consider all relevant environmental and social risks and impacts of the project, including the issues identified in Performance Standards 2 through 8, and those who are likely to be affected by such risks and impacts. The [] process *will consider the emissions of greenhouse gases, the relevant risks associated with a changing climate and the adaptation opportunities, and potential transboundary effects,* such as pollution of air, or use or pollution of international waterways.[130]

(94) In the same vein, the ADB requires the borrower/client to identify and take into account, as part of the EIA, 'environmental risks and impacts, such as pollution to air, water, and soil; threats to the protection, conservation, and maintenance of natural and critical habitats and biodiversity … and climate change mitigation and adaptation'.[131] The ADB seems to have an extensive and nuanced strategy regarding climate change that is elaborated in its Climate Change Action Plan, which is mentioned in the ESF:

> In 2023, ADB approved its Climate Change Action Plan, which sets out prioritized intervention areas and enhanced actions rooted in ADB's commitment to provide support (i) *aligned with borrower/client priorities, capacities, climate change adaptation needs, and climate change mitigation potential,* and (ii) guided by the principles of equitable and socially inclusive transformation … ADB's Energy Policy (2021) promotes *low-carbon transition while (i) supporting universal access to reliable, affordable, and clean energy, which is essential to inclusive social and economic development*; and (ii) ensuring a just transition.[132]

(95) The foregoing references to climate change and to due diligence in the safeguard policies serve as the normative background for this Legal Opinion's examination in Section IV of the current MDB Paris alignment efforts.

(96) It lastly bears emphasizing that the ADB is the only one among the IFIs under study to include in its ESF a list of activities that it is prohibited from investing in.[133] The list appears to be exhaustive, but open to revisions/updates. It is highly relevant here, as it includes

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[128] World Bank, *Environmental and Social Framework* (2017), 'World Bank Environmental and Social Policy', para 4(a)(iii).
[129] WB ESS 1, para 35.
[130] IFC Performance Standard 1 (Assessment and Management of Environmental and Social Risks and Impacts), para 7 (emphasis added).
[131] ADB ESS 1, para 26(a). See also ADB ESS 1, para 36 [includes 'climate change mitigation, adaptation and resilience issues' among the 'potentially significant project-related transboundary and global risks and impacts' to be considered in the environmental and social assessment].
[132] ADB ESF, 'Vision', para 7 (emphasis added).
[133] ADB ESF, 'Prohibited Investment Activities List'.

certain energy-related projects that are known to have high GHG emissions. Specifically, among the activities that 'do not qualify for Asian Development Bank financing' are: 'new coal-fired power generation and coal-fired heating plants; coal mining, processing, storage or transportation; upstream or midstream oil projects; and natural gas exploration or drilling'.[134] Such a list is important, because it places a more concrete and verifiable limit to the ADB's discretion regarding the types of projects it can finance. A similar list for the other MDBs would thus be useful as well.

(97) In sum, environmental concerns have been gradually incorporated into the IFIs' legal mandates. Through an evolutionary treaty interpretation of its development mandate, the World Bank—later emulated by other IFIs—formulated environmental and social policies or 'safeguards' aimed at ensuring that 'non-economic' concerns relating to development projects are taken into account in the project design, appraisal, approval, and implementation. Besides being bound by the customary harm prevention duty, therefore, MDBs have treaty-based obligations to prevent harms to the climate and other parts of the natural environment arising from their operations.

## III. International Law Governing States' Conduct as Members of IFIs

(98) The protection of the global climate is not territorially limited; hence, the determination of States' obligations should pertain to the climate system as a whole.[135] States are subject to treaty law—the UNFCCC, Kyoto Protocol, Paris Agreement—and customary international law in their conduct as Members of IFIs. States must fulfill the obligations under both these sources of law.

(99) The ICJ, ITLOS, and Inter-American Court of Human Rights (IACtHR) advisory opinions provide an additional normative context for the international obligations of States generally, and the Major Shareholders in particular, under climate law. These advisory opinions cover not only the direct GHG emissions produced through State actions, but also all acts or omissions of States that result in the climate system and other parts of the environment being adversely affected by anthropogenic GHG emissions, such as the ongoing production, consumption, licensing, and subsidizing of fossil fuels.[136]

(100) The international legal obligations interpreted and clarified in these advisory opinions are therefore applicable to development projects under the purview of IFIs that produce GHG emissions. These advisory opinions clarify the international legal obligations of Member States, especially Major Shareholders who have greater historical responsibility for anthropogenic GHG emissions, greater capacity to provide climate finance, and greater voting/decision-making power in IFIs that support development projects.

(101) The foregoing jurisprudential guidance affirms the key role of the principle of systemic integration in ascertaining, and clarifying the scope of, States' obligations regarding a specific topic variously addressed by different international legal rules. The principle is especially salient to the case of climate change, which is caused by several human activities that are regulated under diverse areas of international law. It accordingly also directs this Legal Opinion's approach.

(102) The interpretive principle of systemic integration[137] is apposite to understanding IFI Member States' obligations, which involve different areas of law, e.g. climate law, human rights law,

[134] ADB ESF, 'Prohibited Investment Activities List', paras ix-xiv (citing the ADB's 2021 Energy Policy).
[135] ICJ AO Climate Change, para 96.
[136] ICJ AO Climate Change, paras 94 and 427.
[137] VCLT Art 31(3)(c).

and the law of the sea. In addressing the issue of the climate change treaties' purported *lex specialis* character, the ICJ cited the ILC Study Group's work on the fragmentation of international law to state that 'it is a generally accepted principle that, when several rules bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations'.[138] The ITLOS, addressing the question of UNCLOS States Parties' climate-related obligations, similarly relied on the importance of 'coordination and harmonization between the [UNCLOS] and external rules … to clarify, and to inform the meaning of, the provisions of the Convention and to ensure that the Convention serves as a living instrument'.[139]

(103) As with IFIs' customary obligation to evaluate the potential climate impact of a specific development project to be financed, member States also must diligently evaluate and mitigate the climate impact of a project in exercising its voting rights. For both actors, such risk assessment is one among several appropriate measures they must undertake to prevent or minimize significant harm to the climate system and other parts of the environment.

(104) A State's failure 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 licenses or the provision of fossil fuel subsidies—may constitute an internationally wrongful act which is attributable to that State.[140] Through the voting procedure in IFIs, member States determine the financial and technical support to development projects, investments made in and through FIs, and the permissible emissions from such activities. All member States (whether voting via a lone representative or in a constituency), particularly but not limited to Major Shareholders, should exercise this power for the purpose of ensuring that the IFIs' operations are consistent with their and the IFIs' respective international climate law obligations. To reiterate, due to their voting power, Major Shareholders—through their representatives before the Board of Governors and the Executive Board—can meaningfully determine the IFIs' policies and approve specific projects. Their obligations include not interfering with the operationalization of IFIs' Paris alignment policies.

### A. UNFCCC, Kyoto Protocol and Paris Agreement

(105) To recall, this Legal Opinion focuses on the Major Shareholders' financial contributions to the IFIs' capital stock that can be used for development projects that pursue climate mitigation and/or adaptation. It broadly analyzes Major Shareholders' conduct in relation to, and within, the IFIs for consistency with their international climate law obligations. This section examines these various obligations under the UNFCCC, Kyoto Protocol and the Paris Agreement including, inter alia, the obligation of States to make finance flows consistent with a pathway towards low GHG emissions and climate-resilient development.[141]

(106) The UNFCCC serves a foundational purpose and emphasizes the objective of achieving the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.[142] The Kyoto Protocol and the Paris Agreement both pursue the object of the UNFCCC and translate

[138] ICJ AO Climate Change, para 165.
[139] ITLOS AO Climate Change, para 130.
[140] ICJ AO Climate Change, para 427.
[141] PA, Art 2(1)(c).
[142] ICJ AO Climate Change, paras 116 and 120.

basic principles and general obligations into a set of specific interrelated obligations, to give expression to a broad practical approach of States to the problem of climate change.[143]

(107) Mitigation lies at the heart of the UNFCCC's objective, and States' obligations therein seek to achieve this objective in two ways: (1) limiting anthropogenic GHG emissions by sources; and (2) preserving and enhancing sinks and reservoirs of GHG emissions (Article 4(2)(a)).[144] States have the obligation to, inter alia, formulate, implement, publish and regularly update national and where, appropriate, regional programmes to mitigate climate change by addressing anthropogenic GHG emissions (Article 4(1)).[145] This obligation of conduct requires States to use all measures at their disposal with a view to fulfilling the obligation.[146]

(108) Further, developed country parties are obliged to take the lead in combating climate change and the adverse effects thereof, including by assisting developing country parties in meeting their UNFCCC commitments through provision of financing.[147] Conjunctively reading Articles 2 and 9(1) of the Paris Agreement, one of the means by which all States Parties can achieve the objective of 'strengthen[ing] the global response to the threat of climate change' is by aligning finance flows to 'a pathway towards low greenhouse gas emissions and climate-resilient development'. The amount or level of financial support to be provided must be interpreted in line with the abovementioned collective temperature goal.[148] It should also be evaluated based on 'the capacity of developed States and the needs of developing States'.[149]

(109) The Cancun Agreements reflect the Conference of Parties' (COP) decision that, 'in accordance with the relevant provisions of the Convention, scaled-up, new and additional, predictable and adequate funding shall be provided to developing country Parties, taking into account the urgent and immediate needs of developing countries that are particularly vulnerable to the adverse effects of climate change'.[150] In the same COP meeting, it was agreed that climate finance may come from various wide-ranging sources: 'public and private, bilateral and multilateral, including alternative sources'.[151]

(110) More recently, the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA) reiterated that 'enhanced support for developing country Parties will allow for higher ambition in their actions', called on the MDBs 'to further scale up investments in climate action and [called] for a continued increase in the scale, and effectiveness of, and simplified access to, climate finance, including in the form of grants and other highly concessional forms of finance'.[152]

(111) Financial contributions made by Major Shareholders to MDBs could thus count towards climate finance due from developed country Parties. The Cancun Agreements also provide a basis for evaluating these financial contributions' consistency with the Major Shareholders' climate law obligations, both regarding the provision of climate finance and the consistency of those finance flows with decreased or decreasing GHG emissions.

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[143] ICJ AO Climate Change, para 120.
[144] ICJ AO Climate Change, para 200.
[145] ICJ AO Climate Change, para 201.
[146] ICJ AO Climate Change, para 208.
[147] UNFCC, art 3(1) in rel ICJ AO Climate Change, paras 179 and 218.
[148] ICJ AO Climate Change, para 265.
[149] ibid.
[150] The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, Decision 1/CP.16 (2011), para 97
[151] ibid. at para 99
[152] Decision 1/CMA.5 'Outcome of the first global stocktake' (2023) [*hereafter,* CMA Global Stocktake Decision], paras 73 and 83.

(112) Further, the ICJ affirmed that developed States parties are legally required to support developing States parties in the latter's mitigation and adaptation obligations through financial resources, technology transfers, and capacity-building actions—all of which also 'reflect [the customary] duty to co-operate'.[153] IFIs' member States, especially Major Shareholders, even if they are not party to the Kyoto Protocol or the Paris Agreement, are therefore obliged to financially support development projects aimed at mitigating and/or adapting to climate change. Conversely, they must refrain from funding and voting in favor of projects that contribute to harmful GHG emissions.

(113) In ascertaining the conduct that could breach the international legal obligations concerning climate change, the ICJ stressed that '[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'.[154] The IACtHR likewise opined that States must prevent their actions or omissions from becoming direct or indirect obstacles to the effective fulfillment of their mitigation goals or to the development and progressive updating of their mitigation strategies.[155]

(114) As explained above, the Major Shareholders contribute a relatively sizeable amount of money to the IFIs' funds, which are, in turn, used to support the developing member countries' projects. A number of these development projects, particularly those in the energy sector, are known to have substantial carbon emissions and carry a risk of 'locking in' certain States to a high-GHG emissions development pathway.[156]

(115) This situation thus raises the question, 'To what extent can and should States use their majority position to ensure that their financial contribution in the IFIs is consistent with these States' obligation to make finance flows consistent with a pathway towards low GHG emissions and climate-resilient development?'. The Legal Opinion recommends at least two courses of action for the Major Shareholders: (a) to refrain from voting against IFI policies that are designed to align development projects with the Paris Agreement; (b) to actively shape and endorse the IFIs' Paris alignment efforts. The recommendation is premised on the separate international legal personality of IFIs and member States, as well as the Major Shareholders' special position to ensure that IFIs' conduct do not cause member States (both donors and borrowers) to violate their respective climate-related obligations under international law. These courses of action mainly derive from developed countries' obligation to provide climate finance, and on all States' duty to pursue ambitious mitigation measures through nationally determined contributions (NDCs).

(116) The NDCs must reflect countries' highest possible ambition and their common but differentiated responsibilities and respective capabilities, in light of different national circumstances.[157] A country's NDC must 'be capable of making an adequate contribution to the achievement of the [1.5°C] temperature goal'[158] and 'informed by the outcomes of the global stocktake'[159]. The ICJ noted that '1.5°C has become the scientifically based consensus

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[153] ICJ AO Climate Change, para 227. See also para 264.
[154] ICJ AO Climate Change, para 427.
[155] *Climate Emergency and Human Rights,* Inter-American Court of Human Rights Advisory Opinion AO-32/25, 29 May 2025 [*hereafter,* 'IACtHR AO Climate Change'], para 343.
[156] See generally Petr Kjell Wright, with Priti Darooka, Maya Quirino, Mayang Azurin, and Brex Arevalo, *A safe pair of hands? How the multilateral development banks fail to live up to expectations on climate finance* (Recourse, November 2024); Mark Moreno Pascual, with Alison Doig, Ceren Temizyurek and Nezir Sinani, *Lost in Transition: Analysis of the World Bank's Renewable Energy Investments since Paris* (Recourse, September 2023).
[157] PA, art 4(3). See also ICJ AO Climate Change, paras 245 to 249.
[158] ICJ AO Climate Change, para 242.
[159] PA, Art 14(9).

target under the Paris Agreement'[160], and such 'temperature goal provid[es] a means for achieving' the climate treaties' object and purpose, i.e. stabilizing GHGs in the atmosphere. States parties are meant to realize this overall objective through the global peaking of emissions as soon as possible and rapid reductions thereafter.[161] States parties therefore cannot backslide on their NDCs and engage in activities that undermine mitigation efforts, their own or others'. Neither should they support, e.g. through financing, such activities.

(117) Taking into account the enhanced due diligence standard for climate change, States have a duty to ensure coherence between both their domestic and international commitments, and their climate change mitigation obligations.[162] They must therefore adopt measures that enable coherent international action in all areas and that contribute to the realization of their mitigation strategy, in particular with regard to their foreign investment, financing and international trade.[163] Member States of IFIs, particularly Major Shareholders that are developed States with greater capacity for mitigation, are therefore obliged to ensure that financing flows in IFIs contribute to climate change mitigation.

(118) The foregoing climate law obligations and member States' conduct within IFIs should also be understood in the context of the law of State responsibility. In particular, a State voting in favor of a fossil fuel project (or against a policy enhancing support for renewable energy projects) could be deemed to aid or assist the IFI—who also bears climate change obligations under customary international law—in committing an internationally wrongful act within the meaning of draft ARIO Article 58.[164] An alternative application of this rule involves aid or assistance given by one Paris Agreement State party to another State party, which is also a member of the IFI.[165] Otherwise stated, a Major Shareholder potentially incurs responsibility for aiding or assisting a borrowing State that breaches the obligation to mitigate climate change by undertaking an IFI-supported fossil fuel project.

(119) In sum, States parties to climate change treaties—whose purpose is stabilizing GHG concentrations in the atmosphere to prevent harms to the climate system—have assumed mitigation, adaptation, and finance obligations that they are required to fulfil with different degrees and in various contexts, including membership in IFIs.

### B. Human Rights Law

(120) Besides affirming that the core human rights treaties and the human rights recognized under customary international law are directly relevant to the question of States' international legal obligations concerning climate change, the ICJ explained that climate change has adverse effects on the enjoyment of human rights, and concluded that, in order for States to comply with their human rights obligations, they 'must take measures to protect the climate system and other parts of the environment', such as 'the regulation of the activities of private actors'.[166] The Court's interpretation—demonstrating the principle of systemic

[160] ICJ AO Climate Change, para 224.
[161] PA, Art 4(1).
[162] IACtHR AO Climate Change, para 344.
[163] ibid.
[164] See also ILC, 'Articles on Responsibility of States for Internationally Wrong Acts' (2001) A/56/10 [*hereafter,* 'ARSIWA'], Art 16. This proposition presupposes that the IFI is breaching its own obligation under customary international law by funding a fossil fuel project and that the member State knows the circumstances of such internationally wrongful act.
[165] See ILC Commentary to ARIO (n 18) Art 58, para 2: '[A] nuclear-weapon State party to the Treaty on the Non-Proliferation of Nuclear Weapons would have to refrain from assisting a non-nuclear-weapon State in the acquisition of nuclear weapons, and the same would seem to apply to assistance given to an international organization of which some non-nuclear-weapon States are members.'
[166] ICJ AO Climate Change, para 403.

integration[167]—can be applied by analogy to the requirement for States to ensure that their participation in IFIs does not contribute to harms to the climate system that could, in turn, adversely affect the enjoyment of human rights.

(121) A clean, healthy and sustainable environment is a precondition for the enjoyment of many human rights, such as the right to life, the right to health and the right to an adequate standard of living, including access to water, food and housing.[168] States' human rights obligations thus include preventing violations of the right to a healthy environment.

(122) In July 2022, the UN General Assembly recognized that a clean, healthy and sustainable environment is a human right.[169] This recognition followed the earlier UN Human Rights Council resolution acknowledging the right.[170] The right to a healthy environment is also recognized in several State constitutions (e.g. India, the Philippines). In its landmark decision of 2020, the IACtHR held that Argentina had violated the right of the Lhaka Honhat indigenous groups to a healthy environment due to the lack of effective measures to stop activities harmful to them.[171]

(123) The IACtHR has characterized the current situation as a climate emergency which incrementally affects and seriously threatens humanity, especially the most vulnerable people, and States have the obligation to respond to the climate emergency.[172] To comply with the obligation to respect human rights in the context of the climate emergency, the IACtHR opined that 'States must refrain from any behavior that generates a setback, slows down or truncates the outcome of measures necessary to protect human rights in the face of the impacts of climate change'[173] and also 'must refrain from adopting regressive measures'.[174] In fulfilling this obligation, two elements are useful: (1) the concept of the carbon budget, where there is a maximum amount of 420 Gigatons of carbon dioxide that can be accumulated in the atmosphere to keep warming below 1.5°C (at 66% probability); and (2) the urgency of mitigation as seen in the emissions gap, where emissions continuing at the current rate will result in a 66% chance that the temperature increase will be a maximum of 3.1°C for this 21st century. Mitigation measures that address these elements must therefore be scaled up.[175]

(124) Further, the right to a healthy environment has been interpreted in the light of best available science 'as giving rise to an obligation of fossil fuel phaseout, to avoid significant, foreseeable harm to the climate system and to ensure a non-toxic environment'.[176] Such a fossil fuel phaseout obligation likewise elaborates 'States' duty to respect, protect and fulfil the right to

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[167] ICJ AO Climate Change, para 404: 'States must therefore take their obligations under international human rights law into account when implementing their obligations under their climate change treaties and other relevant environmental treaties and under customary international law, just as they must take their obligations under the climate change treaties and other relevant environmental treaties and under customary international law into account when implementing their human rights obligations.'
[168] ICJ AO Climate Change, para 393.
[169] UNGA, The human right to a clean, healthy and sustainable environment, Res 76/300 (28 July 2022) UN Doc A/RES/76/300.
[170] UNHRC, The human right to a clean, healthy and sustainable environment, Res 48/13 (8 October 2021) UN Doc A/HRC/RES/48/13.
[171] *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) v Argentina* (Judgment on the Merits, reparations and costs) Inter-American Court of Human Rights Series C No 400 (6 February 2020).
[172] IACtHR AO Climate Change, paras 181-183.
[173] IACtHR AO Climate Change, para 221.
[174] IACtHR AO Climate Change, para 222.
[175] IACtHR AO Climate Change, para 194.
[176] Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, Elisa Morgera, *The imperative of defossilizing our economies,* A/HRC/59/42 (15 May 2025) [*hereafter*, The imperative of defossilizing our economies], paras 12-13 (citations omitted).

life, by taking appropriate measures to address' environmental degradation that not only directly threatens the right to life but also prevents the enjoyment of the right to life with dignity.[177] To prevent adverse human rights impacts on the right to life and the right to health, '[d]eveloped States should demonstrate leadership by [r]ejecting any other expansion of fossil fuel infrastructure'.[178] In this context, the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment has also expressly called on IFIs to 'eliminate financing for fossil fuel projects'.[179]

(125) At this juncture, it is likewise important to highlight that the Committee on Economic Social and Cultural Rights (CESCR) has enjoined States parties, which are in a position to do so, to 'make every effort to *exercise [their] great leverage to ensure* that [the conduct of] all international financial institutions of which it is a State member … do not lead borrowing States to violate their obligations under the Covenant'.[180] More explicitly, albeit not referring to the State's role within IFIs, the CESCR has recommended that China '[s]uspend permissions to construct coal-fired power plants and *pause ongoing financing for construction*, including in the State party and abroad'.[181] Another recommendation by the CESCR to this State Party is to '[e]nsure that business entities … domiciled under the State party's jurisdiction and those acting abroad … as well as institutions that provide financing, are held accountable for their violations of economic, social and cultural rights, paying particular attention to … environmental impacts and expropriation in the context of real estate and infrastructure projects'.[182]

(126) Following these observations, the Major Shareholders' obligation to protect human rights from the adverse effects of climate change entails that they wield their voting power within MDBs to ensure that the latter's conduct does not contribute to, or indeed exacerbate, climate change. It bears clarifying that all States, both in the global North and South, bears the aforementioned fossil fuel phaseout obligation, which is 'a precondition for the emergence of a healthier economic model at the nexus of biodiversity, water and food, health and climate change, that fully aligns the right to development with all substantive elements of the right to a healthy environment'.[183] Nevertheless, in accordance with CBDR-RC, it is the developed countries who should immediately take defossilization measures and '[p]rioritize international financial, capacity-building and technological support to other countries to defossilize, in accordance with their maximum available resources'.[184]

### C. UNCLOS

(127) Under UNCLOS, States have the obligation to protect and preserve the marine environment (Article 192) and have the sovereign right to exploit their natural resources but are

[177] ibid. para 44.
[178] Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/74/161 (15 July 2019) [*hereafter,* 'Right to a healthy environment'], para 78(c).
[179] ibid. para 79.
[180] CESCR Concluding Observations on the sixth periodic report of Germany (27 November 2018), para 17 (emphasis added). See also CESCR Concluding Observations on the second period report of Japan (24 September 2001), para 37.
[181] CESCR Concluding Observations on the third periodic report of China, including Hong Kong, China, and Macao, China (22 March 2023), para 25(d).
[182] ibid. para 18(c).
[183] The imperative of defossilizing our economies (n 176) para 49.
[184] ibid. para 62.

constrained by their duty to protect and preserve the natural environment (Article 193).[185] States also have the obligation to prevent, reduce and control marine pollution. [186] These obligations entail reducing anthropogenic GHG emissions, in line with obligations of Parties to the Paris Agreement and which have a detrimental effect on the marine environment. Member States of IFI should therefore restrain from voting in favor of fossil fuel projects, to fulfill these aforementioned obligations.

(128) ITLOS had referenced the Paris Agreement as a relevant rule of international law applicable alongside UNCLOS, though UNCLOS and the Paris Agreement are separate agreements with separate sets of obligations and the Paris Agreement thus does not limit UNCLOS.[187] This follows from Article 293(1), which mandates ITLOS to apply UNCLOS and 'other rules of international law not incompatible with [UNCLOS]', [188] as well as Article 237 of UNCLOS, which deems that specific obligations assumed by States in other conventions should be carried out in a manner consistent with UNCLOS. In doing so, ITLOS was ensuring the coordination and harmonization between UNCLOS and external rules to 'clarify, and inform the meaning, of the provisions of UNCLOS and to ensure that [UNCLOS] serves as a living instrument'.[189] In particular, ITLOS referred to the goals of the Paris Agreement, namely: (1) the temperature goal of limiting the temperature increase to 1.5°C above pre-industrial levels as defined in Article 2(1)(a) of the Paris Agreement;[190] and (2) making finance flows consistent with a pathway towards low GHG emissions and climate-resilient development as per Article 2(1)(c).[191] The Tribunal also referred to Article 4(1) which provides that Parties aim to reach global peaking of GHG emissions as soon as possible and undertake rapid reductions thereafter in accordance with the best available science.[192]

(129) The key provision for the prevention, reduction and control of marine pollution is Article 194 of UNCLOS, which requires States, *inter alia*, to, individually or jointly, take all necessary measures to prevent, reduce and control pollution of the marine environment from "any source" and to endeavor to harmonize their policies.[193] Such measures include those designed to minimize to the fullest possible extent, the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping. (Article 194, paragraph 3), which are commonly known as mitigation measures in the context of climate change.[194] Prevention also applies to pollution that has not yet occurred, namely, future or potential pollution.[195] States have an obligation of conduct to make their best efforts to achieve the prevention, reduction and control of marine pollution.[196] They are to act with 'due diligence', putting in face a national system, including legislation, administrative procedures and an enforcement mechanism necessary to regulate activities concerning marine pollution, and to exercise adequate vigilance, such as by monitoring operators, to make such a system function efficiently, with a view of achieving the intended objective.[197] This applies for activities within the jurisdiction or

[185] See ITLOS AO Climate Change, para 187.
[186] ITLOS AO Climate Change, para 189.
[187] ITLOS AO Climate Change, para 223.
[188] ITLOS AO Climate Change, para 126.
[189] ITLOS AO Climate Change, para 130.
[190] ITLOS AO Climate Change, para 72.
[191] ITLOS AO Climate Change, para 76.
[192] ITLOS AO Climate Change, para 73.
[193] ITLOS AO Climate Change, para 189.
[194] ITLOS AO Climate Change, para 205.
[195] ITLOS AO Climate Change, para 198.
[196] ITLOS AO Climate Change, para 223.
[197] ITLOS AO Climate Change, para 235.

control of States.[198] The due diligence standard is stringent because of the high risks of serious and irreversible harm to the environment from anthropogenic GHG emissions.[199] Where there is transboundary pollution affecting the environment of other States, the standard of due diligence can be even more stringent.[200] Moreover, while planned activities may not be environmentally significant if taken in isolation, they may produce significant effects if evaluated in interaction with other activities.[201]

(130) In respect of marine pollution, ITLOS noted that GHGs such as carbon dioxide are introduced into the marine environment as they dissolve into seawater and mix into the deep ocean.[202] Based on IPCC findings, which are regarded as authoritative assessments of scientific knowledge on climate change without challenge,[203] the oceanic uptake of carbon dioxide has resulted in the acidification of the ocean which affects a wide range of organismal functions, such as the corrosion of calcified exoskeletons for species that build that their shells and structures out of mineral carbonates.[204] Greenhouse gases also trap heat within the atmosphere, resulting in ocean warming and sea level rise.[205] In addition, coastal blue carbon ecosystems have the capability to mitigate climate change. These ecosystems, such as mangroves, salt marshes and seagrasses have the capacity to sequester carbon dioxide and build stocks of carbon in biomass and organic rich soils.[206]

(131) Specifically for pollution from land-based sources, under Article 207 of UNCLOS, states have the obligations to adopt national legislation, to take other necessary measures, and to endeavor to establish international rules, standards and practices and procedures to prevent, reduce and control marine pollution from land-based sources.[207] States are required to make every effort in good faith to establish global and regional rules, standards and recommended practices and procedures to regulate pollution from land-based sources (Article 207, paragraph 4).[208] ITLOS advised that the interpretation of Article 207 should be consistent with the interpretation in Article 194.[209]

(132) The broad interpretation of 'all necessary measures' in Article 194, paragraph 1 by ITLOS necessitates that these measures include Major Shareholders restraining from voting in favor of fossil fuel-based projects. ITLOS advised that 'necessary' should be understood broadly as the scope of the obligation under Article 194 refers to 'all measures and 'any' source and is therefore expansive, inclusive of all measures that make it *possible* to achieve the prevention, reduction and control of marine pollution.[210] The ICJ agreed with ITLOS that Article 192 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'.[211] These 'necessary measures' should be assessed objectively, based on the best available science found in the works of the IPCC which reflect scientific consensus[212] and reflected in

198 ITLOS AO Climate Change, para 242.
199 ITLOS AO Climate Change, para 241.
200 ITLOS AO Climate Change, para 256.
201 ITLOS AO Climate Change, para 365.
202 ITLOS AO Climate Change, para 172.
203 ITLOS AO Climate Change, para 51.
204 ITLOS AO Climate Change, para 61.
205 ITLOS AO Climate Change, paras 172 and 175.
206 ITLOS AO Climate Change, para 56.
207 ITLOS AO Climate Change, para 267.
208 ITLOS AO Climate Change, para 273.
209 ITLOS AO Climate Change, paras 265 and 272.
210 ITLOS AO Climate Change, para 203.
211 ICJ AO Climate Change, para 343.
212 ITLOS AO Climate Change, para 208.

the global temperature goal and timeline for emission pathways in the Paris Agreement,[213] international rules and standards relating to climate change and other factors such as the available means and capabilities of the State concerned.[214] A precautionary approach must be taken when determining such necessary measures.[215]

(133) Further, ITLOS opined that the reference to the word 'jointly' and the requirement for States to endeavor to harmonize their policies in Article 194 indicate the importance of cooperation and joint actions in addressing pollution of the marine environment.[216] In respect of Article 207, paragraph 4, States are required to participate in processes under international agreements with a view to strengthening the global response to the threat of climate change, to prevent, reduce and control marine pollution from anthropogenic GHG emissions.[217] Central to these obligations is the duty to cooperate. ITLOS cited IPCC's finding that 'effective mitigation will not be achieved if individual agents advance their own interests independently' and 'collective responses, including international cooperation, are therefore required to effectively mitigate GHG emissions and address other climate change issues'.[218] Given that Article 197 enshrines the duty to cooperate and aims at developing a common regulatory framework for the protection and preservation of the marine environment, cooperation in the formulation and elaboration of international rules, standards and recommended practices and procedures is among the joint measures contemplated in Article 194, paragraph 1.[219] States are required to fulfill this obligation of conduct to cooperate by acting with due diligence and in good faith.[220]

### D. Custom

(134) States are subject to (1) the customary duty to prevent significant harm to the environment; and (2) the customary duty to cooperate for the protection of the environment.[221] The ICJ clarified that these customary obligations are not fulfilled simply by complying with States' obligations under the climate change treaties.[222] It elaborated that the duty to cooperate is distinct yet intrinsically linked to the duty to prevent significant harm to the environment, because uncoordinated individual efforts by States may not lead to a meaningful result.[223] It also highlighted that 'sustainable development is furthered through close and continuous co-operation in the context of climate change'.[224]

(135) In analyzing whether a State has conformed to the customary harm prevention duty, the pertinent question is whether it exercised due diligence—by adopting appropriate measures and securing compliance therewith—to prevent the risk of harm. In the context of climate change, these 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'.[225] Due diligence must be conducted even more stringently and with a precautionary approach given the irreversibility

[213] ITLOS AO Climate Change, para 215.
[214] ITLOS AO Climate Change, para 207.
[215] ITLOS AO Climate Change, para 213.
[216] ITLOS AO Climate Change, paras 201 and 202.
[217] ITLOS AO Climate Change, para 273.
[218] ITLOS AO Climate Change, para 297.
[219] ITLOS AO Climate Change, para 301.
[220] ITLOS AO Climate Change, para 309.
[221] ICJ AO Climate Change, para 271.
[222] ICJ AO Climate Change, para 341.
[223] ICJ AO Climate Change, para 141.
[224] ICJ AO Climate Change, para 303.
[225] ICJ AO Climate Change, para 282.

of climate change and related harms.[226] The ICJ stressed that a heightened degree of vigilance and prevention is required to fulfill the standard of due diligence.[227]

(136) As explained above, States, particularly the Major Shareholders, can influence the activities of MDBs, which are public actors, due to the latter's decision-making structure based on a weighted voting system. Accordingly, the appropriate measures that member States must undertake to fulfil their preventive obligation include ensuring that the MDBs (i) have rules and procedures in place to fully assess the potential climate risks of the development projects being financed and avoid or mitigate them as far as feasible, and/or (ii) do not finance projects that are known to pose risks of climate change. To perform their climate change obligations under international law, they must avoid financing new fossil fuel projects, unless the best available science demonstrates that a given project does not lock-in the borrowing State (or any other country) to a carbon-based development pathway and can contribute to the 1.5°C goal. The more stringent diligence due from Major Shareholders thus entails, among others, conducting their own EIA or climate risk assessment before voting on MDB policies and specific projects.

(137) Further, as part of their due diligence, 'States need to pursue technical co-operation and knowledge-sharing initiatives'.[228] The contents of the obligation to cooperate in good faith can be derived from treaties or international agreements. For example, under Article 27 of UNCLOS, the duty to cooperate includes the obligation to endeavor to establish global and regional rules, standards and recommended practices and procedures to regulate pollution from land-based sources.[229] In the *WHO-Egypt* advisory opinion, the ICJ considered the provisions of the host agreement for a regional WHO headquarters concerning the agreement's revision, termination or denunciation, for 'certain general indications of what the mutual obligations of organizations and host States to cooperate in good faith may involve'.[230] The Court advised that 'the paramount consideration both for the [WHO] and the host State in every case must be their clear obligation to cooperate in good faith to promote the objectives of the Organization as expressed in its Constitution'.[231]

(138) The obligation of member States, including Major Shareholders, to cooperate in good faith thus involves ensuring that the IFIs' safeguard policies are implemented in practice. To recall, the safeguard policies—which are derived from the MDBs' treaty-based or constitutional obligations as explained above—have the objectives to attain certain sustainability standards and ensure that the IFI and the borrower/client take into account the environmental and social dimensions of a development project. In exercising their vote on development projects, Major Shareholders have the obligation to cooperate in good faith by promoting these objectives and approving only projects that are, at a minimum, aligned with these safeguard policies. The duty to cooperate additionally means that member States must assess the development projects' environmental and social impacts when deciding whether or not to finance.

(139) Significantly, in the context of climate change, the obligation to cooperate implies, among others, extending economic assistance to the least developed countries to contribute to the just transition.[232] As the IPCC stressed, '[t]he large majority of emission modelling studies

[226] ITLOS AO Climate Change, paras 213 and 241.
[227] ICJ AO Climate Change, para 138.
[228] ICJ AO Climate Change, para 285
[229] IACtHR AO Climate Change, paras 267 and 273.
[230] WHO-Egypt (n 9) para 46.
[231] ibid. para 49.
[232] IACtHR AO Climate Change, para 264.

assume significant international cooperation to secure financial flows and address inequality and poverty issues in pathways limiting global warming'.[233]

(140) Good faith cooperation also entails taking into account the guidance provided by COP decisions pertaining to financial transfers, technology transfers, and capacity-building.[234] In this regard, the CMA called on States parties to contribute to specific global efforts that include '[t]ransitioning away from fossil fuels in energy systems, in a just, orderly and equitable manner … in keeping with science' and '[p]hasing out inefficient fossil fuel subsidies that do not address energy poverty or energy transitions, as soon as possible'.[235] Further, States should 'expeditiously implement the [World Bank's vision of a world free of poverty on a liveable planet] and continue to significantly scale up the provision of climate finance in particular through grants and concessional instruments'.[236] Indeed, the obligation to cooperate requires wealthy States to 'contribute their fair share towards the costs of mitigation and adaptation in low-income countries' by extending grants, not loans, since it is unjust 'to force poor countries to pay for the costs of responding to climate change when wealthy countries caused the problem'.[237]

(141) It is therefore crucial that member States, acting within IFIs, provide finance in accordance with Paris Agreement objectives and contribute to a just transition as opposed to perpetuating significant harm to the environment. Given that MDBs extend financial assistance for borrowing States to access often costly low-carbon technologies and use these alternatives for their development projects, Major Shareholders should view their key role in the IFIs as an opportunity to undertake and enhance such cooperative efforts.

## IV. Legality of IFIs' Paris Alignment Efforts under International Law

(142) This section analyzes the consistency of the MDBs' current climate change-related efforts with their and their member States' respective international legal obligations, which have been detailed in the two preceding sections. It particularly examines the MDBs' pledges to align new investments with the Paris Agreement, as embodied in the 'World Bank Paris Alignment Method for Investment Project Financing' (WB PA Method) and the 'Joint MDB Methodological Principles for Assessment of Paris Agreement Alignment of New Operations – Direct Investment Lending Operations' (Joint Methodological Principles) (collectively, the 'MDB Paris Alignment Methodologies').

(143) It bears highlighting at the outset that this Legal Opinion does not examine specific projects that any of the IFIs have assessed for Paris Alignment and approved. Neither does the examination extend to reports about the manner of their methodologies' implementation. Instead, the analysis focuses on the text of the MDB Paris Alignment Methodologies, which are instruments attributable to the MDBs, and points out aspects of these methodologies that are likely to contravene the IFIs' development-oriented legal mandates and preventive obligations under customary international law.[238] Member States' conduct vis-à-vis the methodologies, on the other hand, concerns the potential use of these instruments in their project-related decision-making.

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[233] IPCC, *AR6 Synthesis Report: Climate Change 2023* [*hereafter,* 'IPCC AR6'], Section 4, p. 112.
[234] ICJ AO Climate Change, para 218.
[235] CMA Global Stocktake Decision (n 152) para 28.
[236] ibid. para 95.
[237] Right to a healthy environment (n 176) para 68.
[238] The recommendations concerning the methodologies are deliberately kept at a generic and partly abstract level. These recommendations are based on a legal analysis rather than a technical/climate-scientific study.

(144) The MDB Paris Alignment Methodologies provide a means to evaluate the interaction between the conduct of at least two different actors—the MDB providing financial assistance and the State implementing a development project or voting in favor thereof—and the combined impacts of those activities on the climate system. However, the issue of joint, several, or shared responsibility—among IFIs and between an IFI and a member State—though crucial and deserves further study, is left aside for present purposes.

(145) To recall, the central issue under the customary harm prevention rule concerns the necessary and appropriate measures that duty-bearers should undertake, as part of their due diligence, to prevent transboundary harm or harm to areas beyond national jurisdiction. In the context of climate change and the GHG emissions associated with IFI-supported development projects, the risk assessment entails taking into account the best available science as well as the principles of equity and CBDR-RC. In this respect, the MDB Paris Methodologies are most probably insufficient to identify and prevent the risks of adverse impacts to the climate system arising from development projects, given the apparent lack of reliance on the best available science in the classification and assessment of projects. If member States were to decide/vote solely based on the IFIs' findings using these methodologies, they may also be deemed to act contrary to their customary obligation.

(146) As mentioned, the IFIs' development-oriented mandate is now understood as referring to 'sustainable development', which essentially means that economic growth cannot compromise environmental integrity and social welfare. The reference to 'sustainable development' in PA Article 2(1) can be interpreted to mean that climate action, on the one hand, and developmental pursuits and poverty eradication, on the other, have to be balanced. Such a balancing act should then be informed by equity and the CBDR-RC principle, as PA Article 2(2) prescribes.

(147) The MDBs' fulfilment of their sustainable development-oriented legal mandates thus entails strengthening efforts to respond to the threat of climate change while ensuring that the borrowing States' expressed development needs are supported. The MDB Paris Methodologies consider not only the significantly lower historical contributions of developing countries to climate change but also their limited economic capacities to deploy lower-carbon alternatives.

(148) The WB PA Method, together with the Joint Methodological Principles, is likely one of the ways that the World Bank perceives itself as fulfilling its mandate. This potential argument is further scrutinized below, especially regarding the question of how, if at all, a sustainability-oriented mandate sets clear or determinable constraints to the types of development projects that IFIs can support.

(149) The March 2023 WB PA Method is a document detailing how the Bank will assess the alignment of its investment project financing (IPF) operations 'with the goals of the Paris Agreement'.[239] It takes 'Paris Alignment' to mean 'that new financing flows and guarantees provided by the WBG will be consistent with the objectives of the Paris Agreement and a country's pathway towards low greenhouse gas (GHG) emissions and climate-resilient development'.[240] The standard, against which the 'new financing flows' are evaluated, has two elements: (a) the Paris Agreement objectives and (b) the borrowing State's performance of its own climate obligations. The difficulty with such a formulation is that these elements could themselves conflict with each other, meaning, a country's development pathway might be inconsistent with the object and purpose of the Paris Agreement.

[239] WB PA Method, para 1.
[240] WB PA Method, para 4.

(150) Perhaps foreseeing this difficulty, the World Bank qualifies its commitment to the Paris Agreement's objectives by contextualizing its assessment in its 'Twin Goals'—ending extreme poverty and boosting shared prosperity—whilst taking into account 'among other things, equity concerns and the principle of common but differentiated responsibilities and respective capacities, in light of countries' different national circumstances'.[241] The latter is clearly derived from PA Article 2(2). The Bank thus voluntarily subjects its conduct, i.e. new financing flows, to parts of the Paris Agreement even if it is not a party thereto.

(151) Expounding the WB PA Method, several IFIs, including the WBG and the ADB, prepared the June 2023 Joint Methodological Principles 'to inform [] the Paris Alignment assessments of their new financing operations'[242] and to 'facilitate consistency among them as they develop their own methods'[243]. The Joint Methodological Principles read like a technical document or guidance note that divides the assessment into two building blocks: mitigation goals (BB1) and adaptation and climate-resilience goals (BB2). BB1 is divided into an assessment based on (i) uniform criteria and (ii) specific criteria considering national or sectoral circumstances.

(152) In slight contrast, the WB PA Method assesses, as a first step, the consistency of an operation with the country's climate strategies. The next two steps then involve assessing and managing mitigation and adaptation risks. At the first step, the World Bank staff and management must ensure that the funded operations do not 'hinder the achievement of the [borrowing] country's climate strategies'; if it is not possible to revise the project design (or even the objectives) to ensure consistency with such commitments, 'the operation should not be supported by the WB'.[244]

(153) The second step, arguably the most crucial, involves an assessment of the operation's consistency with the PA's mitigation goals. It is guided by a question concerning the probability of the operation adversely impacting the country's low-GHG-emissions pathways. In assessing mitigation risk, it is not only the nature of the activities comprising a project that matters. Other considerations include '(i) the country's development context, including economy-wide and sector-wide low-GHG emissions and climate-resilient pathways, and institutional capacity alongside (ii) the impact of the proposed operation on GHG emissions and carbon sinks in the specific project context'.[245]

(154) The World Bank's ESF can also be relevant in addressing '[p]roject level impacts that could increase existing vulnerability to climate hazards'.[246] Additionally, the development projects that are deemed Paris-aligned would likely still be subjected to an EIA or EIA equivalent pursuant to the safeguard policies.[247] The requirements concomitant to the EIA, such as stakeholder consultation, are intended to lead to the adoption of project scope adjustments and other necessary measures to avoid or mitigate the identified potential harms. If these requirements are not met, the Bank must refuse to fund (or discontinue funding) a given development project. To implement the necessary preventive or mitigatory measures, the borrowing State may request further technical and/or financial assistance from the Bank,

[241] ibid.
[242] AfDB, ADB, AIIB, CEB, EBRD, EIB, IDBG, IsDB, NDB and WBG, *Joint MDB Methodological Principles for Assessment of Paris Alignment of New Operations: Direct Investment Lending Operations* (June 2023), Preface, p. 4 [*hereafter,* 'Methodological Principles'].
[243] Methodological Principles, p. 5.
[244] WB PA Method, para 16.
[245] WB PA Method, para 22.
[246] WB PA Method, para 41.
[247] See WB PA Method, para 12.

who should extend such assistance as part of the necessary measures it must take to prevent climate change and related harms.

(155) Reinforcing these ESF requirements, the WB PA Method necessitates that risk mitigation measures be undertaken in order to consider an operation Paris-aligned and thereby eligible for financial support. The Joint Methodological Principles likewise scrutinize the measures put in place—by the borrowing State—to address or manage any material physical climate risks posed by an operation.

(156) Alignment and non-alignment are separately described and treated through a list of seemingly non-exhaustive scenarios. An aligned operation would have any of the following characteristics: (i) active contribution to decarbonization through GHG emissions reduction or increasing sinks; (ii) little impact on decarbonization due to having negligible GHG emissions; or (iii) 'generates GHG emissions but is in line with the country's long-term decarbonization pathway and has a low risk of locking in carbon-intensive patterns'.[248] Significantly, the 'list of universally aligned activities' possess either of the first two characteristics, and an activity found in such list is deemed to pass the second step.

(157) A further check is required, however, if (i) the project's 'economic feasibility depends on external fossil fuel exploitation, processing, or transport activities'; (ii) its 'viability depends on fossil fuel subsidies'; and (iii) it relies 'significantly on the direct utilization of fossil fuels'.[249]

(158) On the other hand, activities in the universally non-aligned list 'are deemed to undermine the mitigation goals of the Paris Agreement for all intents and purposes under all circumstances and in all countries'.[250] Only two (2) activities are listed thus far: '(i) electric power generation from coal and peat, and (ii) activities directly supporting coal and peat extraction'.[251] Similarly, the Joint Methodological Principles employ a list of universally aligned activities and another list of universally non-aligned activities. To receive funding under the Joint Methodological Principles, all activities need to be aligned with the Paris Agreement objectives.[252]

(159) Given the best available science, the universally non-aligned list is too limited in its coverage. Activities involving the use and extraction of coal and peat are included, but extraction, production, and consumption of other fossil fuels such as petroleum (crude oil) are not, even though these activities undermine climate change mitigation. The list of universally non-aligned activities should be expanded to include petroleum and other fossil fuels, to create a stringent presumption against financing new fossil fuel projects, since the IPCC and the International Energy Agency (IEA) have determined that 'continued installation of unabated fossil fuel infrastructure will "lock-in" GHG emissions' and that new upstream oil and gas projects are unnecessary to achieving the collective temperature goal.[253] Moreover, the MDB Paris Methodologies should be clear and explicit about whether and how the universally non-aligned list is updated to keep abreast of new scientific evidence and technological changes.

(160) Indeed, MDBs, instead of only regarding them as materials that 'could also inform the assessment'[254], should seriously consider up-to-date scientific studies, particularly of the

[248] WB PA Method, para 18.
[249] WB PA Method, para 25.
[250] WB PA Method, para 26.
[251] ibid.
[252] See WB PA Method, para 9: 'Non-aligned operations cannot be financed by the WB.'
[253] IPCC AR6 (n 233) Section 4, p 95; IEA, *Net Zero Roadmap: A Global Pathway to Keep the 1.5°C Goal in Reach* (2023) [*hereafter,* 'IEA Net Zero Roadmap'], 16, 105.
[254] Joint Methodological Principles, para 7.

IPCC, in their decision-making. They should also undertake robust and transparent analyses regarding alternative low-GHG development pathways. These analyses should further be open to public review and comment.

(161) As international economic organizations, MDBs consider both scientific and economic data to assess if the proposed project will help the country's low-carbon development. However, the methodologies' undue emphasis on alignment with a country's NDCs or long-term strategies (LTSs), coupled with the fact that the borrower takes the lead in providing information to the MDB, would probably fall short of compliance with the Paris Agreement's objectives, especially the temperature goal, as most NDCs and LTSs are currently not aligned with the necessary decarbonization pathways to fall within the 1.5°C threshold. Considering that bearers of the customary harm prevention duty must 'assess the possible cumulative effects of their acts and planned activities under their jurisdiction or control'[255], evaluation of projects' Paris-alignment under the MDB Paris Methodologies should take into account the remaining global carbon budget, as established by the IPCC, among others.[256] Under exceptional (region-specific) circumstances, MDBs and/or the Major Shareholders may need to prioritize climate considerations over economic factors by insisting support for less carbon-intensive alternatives even when they may have higher costs and/or potential obstacles regarding technical feasibility.[257]

(162) The discretion States have to determine their development pathways is circumscribed by their international legal obligations, interpreted in the light of the country ownership principle in development finance that has partly similar implications as the climate regime's CBDR-RC principle.[258] The MDB Paris Methodologies' recognition of State discretion should not mean that MDBs must defer to borrowing States' NDCs, LTSs , or other national plans. Rather, the measures appropriate and necessary for IFIs to undertake as part of *their* customary preventive obligation include independently evaluating the risks of harm posed by IFI-supported operations to the climate system. Further, the IFIs must avoid financing development projects that undermine climate change mitigation and/or adaptation, lest such financial support causes breach of international legal obligations on the IFIs' part, of borrowing countries, or of other member States such as the Major Shareholders.

(163) The outcomes of Paris alignment evaluations are 'included in the documentation of each WBG financing operation proposed for Board approval': The 'summary of the Paris Agreement Assessment … explains the assessment and reduction of adaptation and mitigation risks of the given operation'.[259] This point is important to reiterate and highlight the role of member States in MDBs' decision-making about the development projects supported by these institutions. Pursuant to their own treaty- and custom-based obligations, therefore, Major Shareholders, in particular, should independently evaluate the risks of harm to the climate system posed by the IFIs' operations and avoid voting in favor of development projects that undermine climate change mitigation and/or adaptation.

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[255] See ICJ AO Climate Change, para 276 in rel para 367.
[256] See IPCC AR6 (n 233) Section 3, pp 82-83. See also Pierre Friedlingstein, et al., 'Global Carbon Budget 2024', 17 Earth System Science Data 965 (2025).
[257] See IPCC AR6 (n 233) Section 4.5.1 ('mitigation potentials and mitigation costs of individual technologies in a specific context or region may differ greatly from the provided estimates') and 4.8.2 ('large variations in the modelled effects of mitigation on GDP across regions').
[258] To the extent that countries' development plans implicate their NDCs, the ICJ's pronouncement—that in preparing their NDCs the PA States parties' discretion is not unfettered—applies here.
[259] WBG, *The World Bank Group's Approach to Paris Alignment* (2023) p. 4 [hereinafter, *WBG PA Approach*], available: https://documents.worldbank.org/en/publication/documents-reports/documentdetail/099658203162320142 (accessed 12 June 2025).

(164) In their current version, the MDB Paris Methodologies can be found inconsistent with the IFIs' customary obligation to diligently prevent harm to the climate system, because contrary to the best available scientific information, these instruments permit the possibility of funding fossil-fuel (oil and gas) projects. Granted, by evaluating the carbon intensity of operations to be financed by the MDBs, as well as the energy transition risks of development projects, the MDB Paris Methodologies serve as the climate risk and impact assessment necessitated by the customary rule. However, these methodologies' level of comprehensiveness does not seem commensurate with the stringency of due diligence required in the climate change context and with IFIs' considerable resources that translate to greater harm preventive capacity.

(165) The Joint Methodological Principles provide that the MDBs' expert judgment will be 'based on available information … and they are likely to be revised in the future, reflecting the evolving body of scientific and economic information available to the MDBs and their clients'.[260] This statement, however, does not clearly make it mandatory for MDBs to use the best available science in assessing the Paris alignment of a project. Where the MDB Paris Methodologies also appear to fall short concerns the public disclosure of evaluations and meaningful consultation with stakeholders, including concerned civil society organizations.

(166) The ICJ made it clear that EIAs and the determination of significant harm to the environment must take into account the best available science, which is currently to be found in the IPCC reports, and that any specific harm or risk of harm must be assessed in each individual situation or case.[261] In this respect, the IEA has found that demand for fossil fuels can be met without approving new, long lead time upstream conventional oil and gas projects, new coal mines or mine lifetime extensions, in its net zero emissions by 2050 scenario.[262] A massive and sustained increase in clean energy investment alongside this decline would be crucial to avoid any damaging price spikes or supply guts.[263] The IPCC stated that global coal consumption without carbon capture and storage (CCS) needs to be largely eliminated by 2040–2050 to limit warming to 1.5°C (>50%) and new investments in coal-fired electricity without CCS are inconsistent with limiting warming to 2°C.[264] In this regard, the Methodologies ought to make clear reference to the need to use the best available science as well.

(167) In implementation of the more stringent diligence due from IFIs, the MDB Paris Methodologies should include assessment of Scope 3 emissions, which are indirect emissions associated with the extraction and production of purchased materials, fuels and services, including transport in vehicles. These Scope 3 emissions represent the greatest amount of emissions and cutting them is crucial for keeping within then 1.5°C threshold. The inclusion of Scope 3 emissions in EIA assessments is also increasingly well established in domestic law.[265] It bears reiterating though that, under the current safeguards frameworks,

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[260] Joint Methodological Principles, para 5.
[261] ICJ AO Climate Change, paras 278 and 298.
[262] IEA Net Zero Roadmap (n 253) 75.
[263] ibid. 16, 44.
[264] Clarke, L., Y.-M. Wei, A. De La Vega Navarro, A. Garg, A.N. Hahmann, S. Khennas, I.M.L. Azevedo, A. Löschel, A.K. Singh, L. Steg, G. Strbac, K. Wada, 2022: Energy Systems. In IPCC, 2022: Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [P.R. Shukla, J. Skea, R. Slade, A. Al Khourdajie, R. van Diemen, D. McCollum, M. Pathak, S. Some, P. Vyas, R. Fradera, M. Belkacemi, A. Hasija, G. Lisboa, S. Luz, J. Malley, (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA. doi: 10.1017/9781009157926.008. , 6.7.4 Fossil Fuels in a Low-carbon Transition.
[265] See, for instance, Supreme Court case R (Finch) v Surrey County Council & others [2024] UKSC 20; Greenpeace Nordic v The Norwegian Government represented by the Ministry of Energy (Oslo District Court, No. 23-099330TVI-TOSL/05, 18 January 2021); The Norwegian State, represented by the Ministry of Energy v Greenpeace

it is the borrowing State (not the IFI) that is obliged to conduct EIAs for development projects. Where the inclusion of Scope 3 emissions in the EIA could entail additional costs, the IFI should either perform the more rigorous assessment or assist the borrower in undertaking the same.

(168) As for the Major Shareholders, considering their decisive roles within the IFIs, as well as their advanced capabilities to access these scientific developments, they are legally obliged to take the lead in ensuring that the MDB Paris Alignment Methodologies are rigorous and regularly updated. As part of their own customary duty to diligently prevent harm to the climate system, these States should exercise their voting power to ensure that MDBs' assessments of development projects eligible for financing are based on the best available science and the CBDR-RC principle. The Major Shareholders' due diligence conduct involves ensuring that the MDBs are not financing development projects that are likely to cause or exacerbate climate change and related harms.

(169) To conclude, because they do not rely on the best available science, which provides evidence for including in MDBs' universally non-aligned list such projects that use or depend on other fossil fuels (e.g. petroleum) besides coal, the MDB Paris Alignment Methodologies are potentially inconsistent with the respective climate-related customary obligations of IFIs and member States. Major Shareholders that rely on these methodologies in their decision-making also risk violating their treaty-based climate obligations, including to provide climate finance that supports mitigation and adaptation.

## V. Conclusion

(170) The UNFCCC, the Kyoto Protocol, and the Paris Agreement are the primary sources of member States', specifically the Major Shareholders', international legal obligations concerning the climate-related impacts of their participation within IFIs. The interpretations by the ICJ and other international tribunals of obligations relating to climate change under international human rights law and law of the sea complement these sources. Under international law, the Major Shareholders—not accidentally, also major emitters—are especially obliged to ensure that their voting power is exercised towards the rejection of fossil fuel-based development projects and the promotion of alternative energy options that not only emit the least amount of GHGs but are also suitable to the development needs of borrowing States. IFIs' member States are further required not to finance new fossil fuel-related projects or increase financing of existing ones, to prevent adverse human rights impacts on the right to life and the right to health.

(171) MDBs have discrete climate-related obligations under international law. The most viable legal basis of such obligations is the customary duty to diligently prevent harm to the global commons. Complying with this duty requires IFIs to undertake appropriate measures that minimize, if not eliminate, the risk of harm to the climate system arising from the development projects they finance. Moreover, their sustainable development-oriented legal mandates require IFIs to support the mitigation and adaptation efforts of their members, especially the developing States.

(172) The MDB Paris Methodologies are a plausible tool for IFIs and member States to satisfy their respective climate change obligations under customary and conventional international

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Nordic (EFTA Court, Case E-18/24, 21 May 2025); Gloucester Resources Ltd v Minister for Planning [2019] NSWLEC 7, (2019) 234 LGERA 257; Waratah Coal Pty Ltd v Youth Verdict Ltd (No 6) [2022] QLC 21; Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd [2025] NSWCA 163.

law. However, without correcting these methodologies' failures to rely on the best available science and to enhance support for less carbon-intensive alternative projects, the IFIs and the Major Shareholders are not acting with the requisite stringent due diligence in the context of climate change. Despite these actors' capabilities, therefore, they potentially fall short of undertaking the appropriate measures needed to fulfil their international legal obligations relating to climate change.