



Via Email

October 3, 2025

Asian Development Bank (ADB)

Attn: Mr. Masato Kanda, President; Nianshan Zhang, Head, Office of Safeguards (OSFG); Bruce K. Dunn, Director, Policy & Technical Services, OSFG; Takako Morita, Principal Safeguards Specialist

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Re: Climate Change Comments on Draft Environmental and Social Standards (ESSs) Guidance Notes

Dear Mr. President Kanda, Mr. Zhang, Mr. Dunn, Ms. Morita, and to Whom it May Concern at ADB:

Thank you for the opportunity to comment on the ESSs Guidance Notes. Bank Climate Advocates (BCA) writes to respectfully request ADB improve its Draft ESSs Guidance Notes prior to their publication by ADB staff as provided in our requests in Sections I.-VI. below. The edits we suggest in these requests are necessary to ensure the ADB staff approved Guidance Notes (1) are consistent with the requirements in the Board adopted ESSs and (2) fulfill their role in best ensuring adequate ESS implementation. Achieving these outcomes are critical to enabling ADB to meet its obligations under international law to adhere to, and ADB's member states to meet their obligations under international law to ensure ADB adheres to, ADB's Board adopted policies.¹

Another reason to improve the ESS Guidance notes as we request is that the 2025 International Court of Justice (ICJ) and 2024 International Tribunal on Law of the Sea (ITLOS) Advisory Opinions² recently crystalized ADB's and its member states' stringent climate change due diligence obligations under international law that must be met prior to ADB's financing and guarantee decisions. While recognizing ADB's ESSs, Paris Methodologies,³ Common Principles for Climate Mitigation Finance Tracking,⁴ and Energy Policy⁵ must be amended to reflect ADB's and its member states' obligations under international

¹ See Appendix B, *post*, detailing ADB's and its member states independent obligations under international law to adhere to, and ensure adherence to, ADB's board adopted policy requirements; See Appendix A, *post*, detailing ADB's and its Member States' general obligations under customary international law and treaties;

² July 23, 2025 Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change (ICJ Advisory Opinion) ([available here](#)); May 21, 2024 International Tribunal on the Law of the Sea Advisory Opinion in response to the Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (ITLOS Advisory Opinion) ([available here](#)).

³ ADB's Paris Methodology is the ADB adopted "Joint MDB Methodological Principles for Assessment of Paris Agreement Alignment of New operations" June 2023.

⁴ ADB has adopted the Multilateral Development Bank Joint "Common Principles for Climate Mitigation Finance Tracking" December 5, 2023.

⁵ 2021 Energy Policy of the Asian Development Bank – Supporting Low-Carbon Transition in Asia and the Pacific, June 2023 (hereinafter "Energy Policy", "2021 Energy Policy", or "Policy").

law, nonetheless, we note that improving the Guidance Notes as we request will help ADB and its member states come closer to meeting these obligations.⁶

And lastly, ADB should agree to our requests that apply to specific Guidance Notes that change the ESS or make new substantive requirements not found in the ESS. This is important to prevent causing ADB and its members states to violate international law. In particular, our requests below draw ADB's attention to two Guidance Notes components that if maintained, will in effect, change the climate change requirements of the ESS:

(1) GN8.1, which allows for an exception to ESS9's requirement to avoid GHG emissions as far as feasible if a proposed investment is consistent with a host country's NDCs, LTS, or other plans; and

(2) GN9.2, which sets a threshold of 20,000 estimated tons of CO₂-eq/year for when a client must disclose estimated scope 1, 2, and 3 emissions to stakeholders and ADB for purposes of public review.

As detailed in Sections III.B.a and IV.F, both of these new substantive provisions, if enacted, will violate ADB's and its member states' stringent climate change due diligence obligations under international law set forth in the ICJ and ITLOS Advisory Opinions. Further, GH8.1 would weaken the GHG emissions avoidance and mitigation requirements in ESS 9. If it remains, it will thus cause ADB and its member states to violate their requirements under international law to ensure ADB adherence to its Board Adopted policies.⁷ For the reasons detailed in Sections III.B.a and IV.F, we thus request (1) removal of GN8.1 in its entirety, and (2) for the GHG emissions threshold for public disclosure prior to ADB's financing decisions in GN9.2 to be substantially lowered to 500 tons CO₂-eq/year.⁸

Requests for Improvements to ESSs Guidance Notes:

- I. ESF Requirement for ADB to Ensure Adequate ESF Implementation and Client Adherence to the ESF.** Section II (objectives) paragraph 2 of the ESP provides that "ADB requires borrowers/clients to apply and implement ten Environmental and Social Standards, (ESSs), as set out in para. 6 (the ESSs), proportionate to the nature and scale of a project's E&S risks and impacts." ESP Section IV (ADB Responsibilities) at paragraph 13 further provides, "ADB will only finance projects that are expected to meet the requirements of the ESSs in a manner and within a time frame acceptable to ADB and as set out in the ESCP/ESAP." Together, these requirements provide ADB is responsible for ensuring client adherence to the ESSs. This should be highlighted in the Guidance Notes, along with a statement that ADB will not approve support for a project unless the client meets the ESS requirements prior to ADB financing decisions. ADB should also specify that it will not allow for impermissible deferral of meeting the requirements in the ESSs, including in regards to impact assessments prior to ADB financing decisions (see Section II., *post*).

⁶ See Appendix A, *post*, detailing ADB's and its Member States' general obligations under customary international law and treaties.

⁷ See Appendix B, *post*, detailing ADB's and its member states independent obligations under international law to adhere to, and ensure adherence to, ADB's board adopted policy requirements.

⁸ We are not requesting this lower threshold of 500 tons CO₂-eq/year be applied to ongoing monitoring and reporting of project GHG emissions after financing decisions.

II. Protection Against Deferral of GHG Emissions Quantification, Alternatives Analysis, and Mitigation to After Project Financing Decisions. ESP paragraph 38 and ESS 1 paragraph 41 should prevent the deferral of GHG emissions impact assessments and mitigation until after project financing. We read these provisions to provide ADB is not permitted to allow deferral of, and a client is not permitted to defer, GHG emission impact assessment and mitigation to a specified time after project financing “if the level of E&S risks and impacts of the activity to be assessed during project implementation is not likely to change the E&S conclusions for the project, and does not compromise the overall E&S readiness of a project.” Considering the climate crisis, it seems that the language in ADB’s ESP does not permit such deferral, but for those investments with facially de-minimis emissions well under 500 tons CO₂-eq/yr. Detailing this in the Guidance Notes is important to ensure ADB and its client know the GHG assessments in ESS1 and 9 must be conducted before ADB financing decisions.

Further, we note the ICJ Advisory Opinion has made it clear that deferral of complete climate change and GHG emissions environmental impact assessments until after project financing decisions violates ADB’s and its Member States’ climate change due diligence obligations under international law. ICJ Advisory Opinion at pp. 362 providing: “Additionally, the Court has considered that such assessments must be conducted before the activity is carried out and this includes the renewal or updating of assessments in the case of new stages, or the extension or modification of projects and activities. See ICJ Advisory Opinion at pps. 358-363.

III. GHG Emissions Alternatives Analysis & Mitigation Requirements Prior to Financing Decisions

A. Inclusion of Project Alternatives to Avoid GHG Emissions in the Alternatives Analysis: the explicit language in ESS9 paragraph 8 requires that:

- i. GHG alternatives analysis prior to financing decisions include the alternatives and mitigation measures that would avoid GHG emissions, in addition to other measures that minimize GHG emissions as far as feasible;
- ii. The economic and technical feasibility of alternatives and mitigation measures to avoid and minimize GHG emissions as far as possible must be analyzed and set forth in full in the alternatives analysis and supported with analysis and study.
- iii. The alternatives analysis must examine ways to avoid GHGs from all sources, and with all avoidance and mitigation measures, not just the measures or alternatives listed in ESS 9 paragraph 8.

In addition to making sure the Guidance Notes capture these fundamental requirements, the Guidance Notes should be improved as follows:

- a. Draft GN 8.2 should be updated to reflect the requirement that the economic and technical feasibility of alternatives and mitigation measures to avoid and minimize GHG emissions as far as possible must be analyzed and set forth in full in the alternatives analysis and supported with analysis and study. It should also specifically highlight the need to conduct and present study that details and evidences the extent to which avoiding and minimizing GHG emissions is

economically and technically feasible. This is also consistent with the requirements of ESS 1 paragraph 33.

- b. The Guidance Notes for ESS9 paragraph 8 should mention that the alternatives analysis requirements for ESS 1 in Draft GN 33.1 – GN 33.2 and GN 27.1 and 27.2 apply to GHG emissions and must be met to ensure ESS9 paragraph 8’s alternatives and mitigation requirements are adhered to. Without conducting this analysis as the ESS requires, alternatives and mitigation to avoid and minimize GHG emission as far as economically and technically feasible will not be achieved.

B. Requirement to Implement Alternatives that Avoid GHGs: Because ESS9 paragraph 8 requires implementation of economically and technically feasible measures in the alternatives analysis to minimize GHGs, this requires that ADB ensure that the client chooses, adopts, and implements feasible alternatives and measures from the alternatives analysis that *avoids* GHG emissions as far as feasible. As such, the ESS Draft Guidance Notes must be corrected as follows:

- a. **As indicated by our red-strike through, GN.8.1 must be deleted in its entirety, as it is a Guidance Note that contains provisions undermining and scaling back the protections and due diligence in the Board adopted ESS, and is entirely inconsistent with ESS9 paragraph 8. Draft GN8.1 provides:**

~~GN8.1. The ESS9 objective relating to "minimizing absolute and relative GHG emissions attributable to a project" will be interpreted with flexibility based on the nationally determined contributions (NDC) of the host country in which the project is developed and/or relevant industry standards or benchmarks.⁵ The "minimization" of emissions depends on the technically and financially feasible alternatives that can deliver the expected development results in a manner that is not inconsistent with the sector decarbonization pathway as stated in the NDC, long-term low-emission development strategy, or other related national climate strategies, roadmaps, and plans, as well as relevant industry standards and benchmarks.~~

Nothing in the ESS provides that the GHG minimization requirements in the ESS can be overridden and weakened by a NDC, LTS, or other plan in a country in which the investment is located. Thus, if the language in GN8.1 remains, it will cause ADB and its member states to violate their requirements under international law to ensure ADB adherence to its Board Adopted policies.⁹

Further, the content in Draft GN8.1 runs afoul of ADB’s and its member states’ due diligence climate change obligations under international law – which are independent from the country’s obligations where an investment is located. The ICJ Advisory Opinion defines states’ stringent climate due diligence obligations, and substantially narrows the legal space for a states’ deference to another country’s NDC, LTS, or plans to meet its own climate obligations. The Court confirmed that Parties’ obligations of conduct under the Paris Agreement and customary international law require them to

⁹ See Appendix B, *post*, detailing ADB’s and its member states independent obligations under international law to adhere to, and ensure adherence to, ADB’s board adopted policy requirements.

adopt and implement measures that, taken together, are capable of achieving the long-term temperature goal, and that these obligations are informed by the best available science, including at present the IPCC's AR6. It stresses that due diligence in the climate context is stringent, forward-looking, **and requires States to regulate public and private actors over whom they exercise jurisdiction or control**, including through public finance, policy making and investment decision-making. ICJ Advisory Opinion at pps.138, 208, 282;¹⁰ ITLOS Advisory Opinion at pps 243 and 250, and see also pps. 189, 197, 199, 202, 223, 226.

This stringent standard of due diligence for preventing significant harm to the climate system further requires consistency with and use of best available science, methods, and all means at a state's disposal to assess and prevent avoidable climate change harms; "entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control," and requires States to continuously update their rules and measures in light of evolving science. ICJ Advisory Opinion at pps.138, 208, 282; ITLOS Advisory Opinion at pps 243 and 250, and see also pps. 189, 197, 199, 202, 223, 226. "[S]uch appropriate rules and measures include, but are not limited to, regulatory mitigation mechanisms that are designed to achieve the deep, rapid, and sustained reductions of GHG emissions that are necessary for the prevention of significant harm to the climate system. ICJ Advisory Opinion at pp 282.

This is consistent with Article 192 of the Law of the Sea, which requires States to take all necessary measures that are 'as far-reaching and efficacious as possible' to protect and preserve the marine environment and 'to prevent or reduce the deleterious effects of climate change and ocean acidification on the marine environment'. Law of the Sea Article 192. The same conclusion follows from the ITLOS Advisory Opinion, which held that:

Anthropogenic GHG emissions constitute "pollution of the marine environment" and that States must take "all necessary measures" to prevent, reduce and control such pollution, acting on the basis of the best available science and applying the precautionary approach; and that

These 'necessary measures' should be assessed objectively, based on the best available science found in the works of the IPCC which reflect scientific consensus and reflected in the global temperature goal and timeline for emission pathways in the Paris Agreement. *Id.*

ITLOS Advisory Opinion at pps. 208, 215; ICJ Advisory Opinion at pp. 343. Thus, ADB's member states cannot satisfy their due diligence obligations by relying on a host State NDC or plan that is not, ex ante, consistent with 1.5°C.

¹⁰ See 2025 ICJ Climate Advisory Opinion at pp 208: "the Court finds it useful here to note that, in the case of an obligation of conduct, a State acts wrongfully if it fails to use all means at its disposal to bring about the objective envisaged under the obligation, but will not act wrongfully if it takes all measures at its disposal with a view to fulfilling the obligation even if the desired objective is ultimately not achieved. In the case of an obligation of result, a State acts wrongfully if it fails to bring about the result required under the obligation."

As detailed in Appendix A, these state obligations implicate ADB directly (as international organization with its own legal personality and internal rules) and, independently, its member States when they act through ADB. We further highlight that the International Law Commission's Articles on the Responsibility of International Organizations (ARIO) provide that a State incurs responsibility if it aids or assists an international organization in the commission of an internationally wrongful act (Art. 58), if it directs and controls such an act (Art. 59), and if it circumvents its own international obligations by causing the organization to commit the act (Art. 61). Read together with the Articles on State Responsibility—especially Articles 16–18 on aid/assistance, direction/control and coercion—these rules mean that ADB member states cannot insulate themselves from climate-law obligations by voting for, financing or otherwise enabling ADB operations that foreseeably undermine the 1.5 °C objective or breach human-rights and environmental obligations.

In sum, as clarified by the ICJ, ADB and its member States have due diligence and harm prevention obligations grounded in the UNFCCC, Paris Agreement, human rights treaties, UNCLOS, and customary international law that require them to ensure that each financed project is aligned with a 1.5°C consistent pathway on the basis of the best available science and avoids GHG emissions as far as possible using best available methods and all necessary measures. Deference to host country NDC, LTS or other national plan is not sufficient where those instruments are not themselves consistent with 1.5°C. As such, GN.8.1 must be deleted in its entirety, as it contains provisions undermining and scaling back the climate change due diligence protections in the Board adopted ESS that require a client to adopt alternatives and mitigation measures that avoid GHG emissions as far as economically and technically feasible.

- b. GN8.2 and GN8.3 must be improved to delete and replace language that suggests it is acceptable to implement measures that do not meet the ESS9 standard to avoid and minimize GHG emissions as far as economically feasible. These adjustments should include, but not be limited to:
 - i. GN8.2 – add this text in blue and delete the strikethrough text in red, as this sentence suggests not applying renewables and improving energy efficiency as far as feasible suffices: “(ii) improved energy efficiency of industrial process ~~or~~ and the application of renewables to meet ~~part~~ as much as economically and technically feasible of the electricity/heat requirement in that industrial process to ~~reduce~~ minimize emissions;
 - ii. GN8.2 – at the minimum delete this text in red strike through, and considering replacing it with text in blue: ~~In all circumstances, minimization does not imply an expectation of decreasing a project's absolute emissions to zero, which is unlikely.~~ In all circumstances, minimization under the ESS requires avoiding GHG emissions as far as possible through feasible alternatives and avoidance/mitigation measures.
 - iii. GN8.3. This sentence is misleading, unnecessary, and undermines the GHG minimization protections in ESS9 paragraph 8, and thus should be struck:

~~Minimization of emissions attributable to a project does not necessarily mean that a project will achieve emissions reduction.~~

C. Quantification of GHG Emissions for the Proposed Project and Each Alternative: ESS9 paragraph 15 requires the GHG alternatives analysis meet the quality control requirement also set forth in ESS 1¹¹ to “support the analysis of impacts and identification of GHG reduction [] measures.” This requires the generation of data needed to determine which feasible alternatives will result in the least GHG emissions. As such, the ESS9 Guidance Notes must be updated to specify that: Scope 1, 2, and 3 GHG emissions must be quantified for the proposed project and each alternative to gauge the relative efficacy of alternatives and other GHG reduction measures to be assessed. The quantification of Scope 1, 2, and 3 GHG emissions for all alternatives in the alternatives and mitigation measures in the alternatives analysis is a staple of GHG emissions alternatives analysis, and is required to meet the stringent due diligence obligations set forth in the ICJ Advisory Opinion which requires use of best available and practiced methods. It is surely a best available and practiced method, as it is required and routinely practiced to comply with the US National Environmental Policy Act.¹²

In addition, we note that fn. 10 of ESS9 provides that the “Guidelines for Estimating Greenhouse Gas Emissions of ADB Projects is under review...The updated version will be referenced here after it is approved.” Because these Guidelines were adopted in 2017, they are out of date and should not be used or relied upon to implement ESS9 until new Guidelines are adopted. As such, Fn. 10 should be updated to specify as such, and moreover, once the new Guidelines have gone through review, they should be circulated to the public for meaningful review and comment as the ESS9 Guidance Notes utilizes them for a method ADB deems acceptable for GHG emissions quantification under draft GN 9.1.

D. Robust GHG Emissions Alternatives Analysis Early in the Design Cycle so as to Meaningfully Shape Projects: ESS9 paragraph 8 requires the alternatives analysis and proposed selection of GHG mitigation occur during concept design, rather than just during project preparation and design phases. The ESS Guidance Notes should reflect this by providing that GHG emissions alternatives be evaluated and feasible avoidance / mitigation measures be proposed, earlier in the project design, rather than later when a project may already be formulated and ADB is reluctant to impose changes.

E. Disclosure of GHG Emissions Alternatives and Mitigation Analysis for Stakeholder Check: ESS9 paragraph 15 requires the GHG emissions alternatives and mitigation analysis be part of or annexed to the *E&S assessment* undertaken for the project. ESS10 paragraphs 16, 17 and 18 require client disclosure of the E&S assessment and management documents, including the GHG impact, alternatives analysis, and mitigation measures, prior to ADB financing decisions. Combined with ADB’s duties to disclose *E&S assessments*, these requirements mandate ADB and client disclosure of GHG alternatives and mitigation analysis for the proposed project and each alternative and mitigation measure to stakeholders and project-

¹¹ ESS 1 paragraph 33 requires that for all alternatives analysis, that “[f]or each of the alternatives, the E&S risks and impacts are quantified to the extent possible.”

¹² See Interim U.S. Council of Environmental Quality NEPA guidance effective Jan. 8, 2023 for GHG emissions and climate change assessments, alternatives analysis and mitigation in environmental impact statements, available at: <https://www.regulations.gov/document/CEQ-2022-0005-0001> (visited April 29, 2025).

affected persons.¹³ The Guidance Notes for ESS9 paragraph 15, which currently contains no guidance, should be updated to detail these requirements. This also will provide a critical check to ensure the adequacy of the alternatives and mitigation analysis, and that avoidance of GHG emissions is achieved as far as economically and technically feasible.

F. Additional ADB Check on Sufficiency of Alternatives Analysis and Mitigation: ESS9 paragraph 8 requires ADB to review and provide input on the GHG alternatives analysis and selection of GHG avoidance measures. In addition to ADB's explicit duty in its Environmental and Social Framework to ensure client adherence to the ESSs, this should provide an important additional check for ADB to specifically ensure the adequacy of GHG alternatives analysis and mitigation. The Guidance Notes should thus highlight this requirement.

G. Scope of Measures that Must Be Examined in an Alternatives Analysis to Minimize GHGs: The list of mitigation measures in ESS9 paragraph 8 required to be examined in an alternatives analysis, and thus implemented if economically and technically feasible, include but are not limited to 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. As such the Guidance Note for ESS9 paragraph 8 should specify that the GHG emissions alternatives and mitigation measures that shall be considered are not limited to the list of such alternatives and measures listed explicitly in ESS9 paragraph 8.

H. Requirements for Mitigation Measures to Minimize GHGs and a Multitude of Environmental/Social Impacts: ESS1 specifies that good international practice (GIP) for mitigation measures the ESS requires be implemented for various impacts, may be different than those measures in the World Bank Group Environmental, Health, and Safety Guidelines (EHSg) that ADB admitted was outdated in its written responses to ESF comments. The ESF definition of GIP, and the ESF more broadly, reflects this and also specifies that the EHSgs are not the only source of standards to define GIP for mitigation of all environmental impacts. The Guidance Notes must be explicitly clear about this and detail ways to identify GIP mitigation measures and technologies other than listed in the EHSg to evaluate efficiency enhancements and pollution/GHG emissions reduction measures.

IV. GHG Emissions Quantification Requirements Prior to Project Financing Decisions

A. Guidance on Quantification of Scope 1, 2, and 3 Emissions: ADB ESF requires ADB to consider good international practice (GIP) when ADB advises a client on the methodologies and practices to use for a GHG emissions quantification assessment. This requirement should be used to further ensure a client uses proper measures to estimate Scope 1, 2, and 3 emissions

¹³ ESP paragraphs 52 and further specify ADB's duties to require client disclosure and for ADB to disclose on its website: "52. Disclosure of E&S assessment and management documents and ESCP/ESAP prepared by a borrower/client and submitted to ADB for disclosure in accordance with ESS1 and ESS10, and any other assessments or management documents prepared under the E&S Policy will be governed by ADB's Access to Information Policy. ADB will require a borrower/client to provide these E&S assessment and management documents to ADB in a timely manner to allow ADB to disclose them on its website as provided in para 53.... 53. ADB will disclose a draft, or final if available, **E&S assessment and management documents** and ESCP/ESAP for *High Risk*, *Substantial Risk*, and *Moderate Risk* projects as early as possible in project preparation and no later than project appraisal or final credit approval."

and to ensure major sources of emissions are not missed entirely, and the Guidance Notes should highlight this. For instance, many LNG and gas pipeline projects underestimate or miss Scope 1 leakage emissions, and most livestock projects often exclude very high Scope 1 methane emissions from manure and Scope 3 emissions from cereals used to feed livestock.

- B. Quantification of Scope 3 GHG Emissions:** ADB ESF requires ADB to consider good international practice (GIP) when ADB advises a client on the methodologies and practices to use for a GHG emissions quantification assessment. Not considering this language, the ESS requires the client to quantify Scope 3 emissions where relevant and where data is available. It thus removes considerable leeway clients would have had to ignore scope 3 emissions. The Guidance Notes should clarify this upfront client duty, that comes before ADB must use GIP to further advise a client on the methodologies and practices to use for a GHG emissions quantification assessment in the event the client has not used GIP.

Of Note, the ICJ Advisory Opinion confirms that a climate specific EIA, with a Scope 3 emissions assessment, is a climate change due diligence requirement under international law. 2025 ICJ Advisory Opinion at 347, 358-362. In parallel, the European Court of Human Rights in *Klima Seniorinnen v. Switzerland* held that Article 8 of the ECHR encompasses a right to effective protection from the serious adverse effects of climate change and faulted inadequate risk assessment that excludes Scope 3 emissions. And in *Finch v. Surrey County Council* [2024] UKSC 20, the UK Supreme Court held that EIAs for oil extraction must assess downstream (Scope 3) emissions where reasonably estimable—an articulation of principle that, while domestic, is entirely consonant with international due diligence requirements and the ICJ Advisory Opinion’s emphasis on cumulative and transboundary risks.

- C. See also, Section III. C. above for Scope 1, 2, and 3 GHG Emissions Quantification Requirements in an Alternatives Analysis.** The Guidance Notes should reflect that these quantification requirements are required as part of the alternatives analysis.
- D. The Guidance Notes must specify that the threshold in ESS9 paragraph 9 for providing GHG emissions figures to ADB for public disclosure must be based on the sum of estimated Scope 1, 2, and 3 GHG emissions per year.** Without this clarification, a client may improperly not provide GHG figures to ADB for purposes of public disclosure if those figures omit estimates of significant Scope 3 emissions.
- E. The Guidance Notes do not limit estimations of Scope 1, 2, and 3 GHG Emissions, and provision of these estimates to ADB to instances where estimated GHG emissions are expected to exceed the threshold ADB sets for public disclosure of GHG emissions estimates in ESS9 paragraph 9.** Because ESS9 paragraph 9 only limits provision of GHG emissions figures to ADB for purposes of public disclosure, the Guidance Notes must clarify that regardless of whether the client provides GHG emissions estimates to stakeholders or ADB for the purposes of public disclosure, it must provide its full GHG emissions estimates with supporting analysis to ADB so ADB can ensure, using GIP, that all of the Scope 1, 2, and 3 emissions have been properly estimated prior to financing approvals.
- F. ESS9 Paragraph 9 Threshold for Client Disclosure of GHG Emissions to ADB for Public Review:** The threshold of 20,000 tons CO₂-eq/yr. is way too high and out of line with the stringent Climate Change due diligence obligations clarified by the ICJ in its Advisory Opinion.

The ICJ Advisory Opinion confirms that states' obligations of conduct under the Paris Agreement and customary international law require them to adopt and implement measures that, taken together, are capable of achieving the long-term temperature goal, and that these obligations are informed by the best available science, including at present the IPCC's AR6. It stresses that due diligence in the climate context is stringent, forward-looking, **and requires States to regulate public and private actors over whom they exercise jurisdiction or control**, including through public finance, policy making and investment decision-making. 2025 ICJ Advisory Opinion at pps.138, 208, 282;¹⁴ ITLOS Advisory Opinion at pps 243 and 250, and see also pps. 189, 197, 199, 202, 223, 226.

This stringent standard of due diligence for preventing significant harm to the climate system further requires consistency with and use of best available science, methods, and all means at a state's disposal to assess and prevent avoidable climate change harms; it affirms the need for climate-specific environmental impact assessment; "entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control," and requires States to continuously update their rules and measures in light of evolving science. 2025 ICJ Climate Advisory Opinion at pps.138, 208, 282; ITLOS Advisory Opinion at pps 243 and 250, and see also pps. 189, 197, 199, 202, 223, 226, 230, 321, 347, 358-362. "[S]uch appropriate rules and measures include, but are not limited to, regulatory mitigation mechanisms that are designed to achieve the deep, rapid, and sustained reductions of GHG emissions that are necessary for the prevention of significant harm to the climate system. ICJ Advisory Opinion at pp 282.

This is consistent with Article 192 of the Law of the Sea, which requires States to take all necessary measures that are 'as far-reaching and efficacious as possible' to protect and preserve the marine environment and 'to prevent or reduce the deleterious effects of climate change and ocean acidification on the marine environment'. Law of the Sea Article 192. The same conclusion follows from the ITLOS Advisory Opinion, which held that anthropogenic GHG emissions constitute "pollution of the marine environment" and that States must take "all necessary measures" to prevent, reduce and control such pollution, acting on the basis of the best available science and applying the precautionary approach. ITLOS Climate Advisory Opinion at pps. 208, 215; ICJ Advisory Opinion at pp. 343. These 'necessary measures' should be assessed objectively, based on the best available science found in the works of the IPCC which reflect scientific consensus and reflected in the global temperature goal and timeline for emission pathways in the Paris Agreement. *Id.*

In sum, as clarified by the ICJ, ADB and its member States have due diligence and harm prevention obligations grounded in the UNFCCC and Paris Agreement, human rights treaties, UNCLOS, and customary international law—**that require them to use all means at their disposal and all necessary measures ensure that each financed project is aligned with a 1.5 °C consistent pathway on the basis of the best available science and with use of best available methods and all necessary measures.** Without requiring disclosure of a contemplated investment's Scope 1, 2 and 3 GHG emissions estimates to the public and stakeholders for public review except when a de-minimus amount of emissions (such as less than 500 tons CO₂-eq/yr.) is certain, ADB and its member states will be violating the their

¹⁴ See fn. 10, *ante*.

stringent climate change due diligence and environmental assessment obligations under international law. This is because ADB will be in effect eliminating one of the most critical components of due diligence – the environmental review component that allows informed public and stakeholders to check to make sure that all GHG emissions are fully and properly quantified. Without such assurances that GHG emissions are properly estimated for each investment, ADB will not be able to avoid emissions as far as feasible for each investment, which is necessary to ensure each financed project is aligned with a 1.5 °C consistent pathway on the basis of best available science and with use of best available methods and all necessary measures.

G. Disclosure of GHG Emissions Estimates for Stakeholder Review and Quality Check:

While ESS9 paragraph 9 only provides for client disclosure of its project's GHG emissions estimates to stakeholders and to ADB for purposes of public disclosure when an emissions threshold set by ADB management and adjusted over time is exceeded, ESS9 paragraph 15 requires: (i) the GHG alternatives analysis include quantification of Scope 1, 2, and 3 GHG emissions for the proposed project and each alternative, and (ii) for alternatives analysis to be part of or annexed to the E&S assessment undertaken for the project. In addition, ESS10 paragraphs 16, 17 and 18 requires client disclosure of GHG emissions alternatives, and also disclosure of the E&S assessment and management documents containing the GHG emissions alternatives analysis, prior to financing decisions. Combined with ADB's duties to disclose *E&S assessments*, all these requirements require ADB and client disclosure of GHG alternatives analysis for the proposed project and each alternative to stakeholders and project-affected persons, even if contained only in the downloadable E&S assessment and management documents, instead of in a summary of impacts. The Guidance Notes should clarify this.

V. The Guidance Notes for ESS9 pp 12's Climate Risk Assessment requirements must also detail that a Cumulative Climate Change Impact and Societal Cost of Carbon Analysis is Required.

In relevant part, ESS9 pp 12 provides: "The borrower/client will undertake a climate risk assessment to: (i) establish the climate risk context of a project; (ii) assess the direct and indirect climate risks to a project and the potential for the project to generate increased climate change vulnerability and/or exposure of project-affected persons."

To understand the climate risk of a project and assess potential for the project to generate increased climate change vulnerability and/or exposure of project-affected persons as specified in ESS9 paragraph 12, the following analyses are necessary:

- (1) a cumulative impacts analysis meeting a best available methods standard, and that at least compares (i) the contemplated project's lifecycle emissions plus reasonably foreseeable cumulative committed global emissions with (ii) a Paris-aligned (1.5 degree C) remaining global carbon budget; and
- (2) for the proposed project and all alternatives - full quantification of Scope 1, 2, and 3 GHG emissions estimates accompanied by best available social cost of GHG emissions estimates with monetary figures of the societal cost from incremental metric ton of GHG emissions including from physical damages (e.g., sea-level rise, infrastructure damage, human health effects, etc.)

As such, the Guidance Notes must specify they are required. Without these analysis, assessing the GHG emissions impacts on project-affected persons will be absent critical due diligence.

Further, to meet the stringent climate due diligence legal obligations in the ICJ Advisory Opinion, these analyses must be conducted and should be rigorously supported by technical analysis that is disclosed for public review and comment. See ICJ Advisory Opinion at pp. 362 for Cumulative Impact Assessment Requirement; See also the stringent due diligence requirements set forth in the ICJ Advisory Opinion more broadly in Section IV.F, *ante*.

VI. Amount of Time for Public Review of GHG Emissions Impact Analysis and Mitigation Prior to Financing Decisions

- A. ESP paragraph 53 requires ADB to disclose the full environmental and social impact assessment (ESIA) for high-risk Projects 120 days prior before Board consideration of the proposed project for sovereign operations and at least 60 days before Board consideration of the proposed project for non-sovereign operations. The Guidance Notes should clarify these requirements.
- B. For high, substantial and moderate risk projects, ESP paragraph 53 and ESS10 paragraph 18 provides for disclosure of E&S assessment and management documents, including the full ESIA for high risk projects,¹⁵ no later than just prior to ADB's project appraisal or final credit approval and "as early as possible in project preparation." This language along with the ESP paragraph 6, 11, 51 and 52, and ESS10 paragraph 15, requirements for ADB and clients to *timely* disclose E&S assessment and management documents, requires ADB to disclose such E&S documents as far in advance before board approval as possible and for at least as much time as ADB's board has for review prior to its approval. The Guidance Notes should clarify these requirements, in addition to the requirement to disclose the full environmental and social impact assessment (ESIA) for high-risk Projects 120 days prior before Board consideration.

VII. GHG Emissions Reductions for ADB's Financial Intermediary (FI) Investments:

- A. **Climate Change and GHG Emissions Impact Analysis, and Mitigation Requirements, and Need for Guidance Notes Details on Classification of F-2 investments:** The ESF requirements for GHG emissions quantification, alternatives analysis, and mitigation for direct investments and guarantees above, also apply to FI investments with significant GHG emissions. Paragraphs 62, 67, and 73 of the Environmental and Social Requirements for Financing Modalities and Products requires that FI higher risk transactions (FI-1 investments and substantial risk, but not moderate, F-2 investments) meet the requirements of the ESS applicable to GHG emissions quantification, alternatives analysis, and mitigation prior to FI financing, and that all such ESS analysis is also disclosed to ADB and for public review prior to FI financing decision. See also Paragraph 62 defining "higher risk transactions". The Guidance Notes should highlight and clarify these requirements. **Further, because moderate F-2 investments, but not substantial risk F-2 investments, are excluded from these requirements, it is essential the Guidance Notes provides that considering the climate crisis and stringent due diligence requirements crystalized by the ICJ and ITLOS Advisory Opinions, that any FI-2 investment that will result in net or any GHG emissions**

¹⁵ See ESF definitions, and ESS 1 Annex 1 definitions, for the definition of E&S assessment and management documents, which includes, but is not limited to, a full ESIA.

other than de-minimis (e.g. under 500 ton CO₂-eq/year), should at least be classified as a substantial risk F-2 investment.

B. Disclosure of GHG Emissions Impact Analysis and Mitigation for Public Review Prior to FI Financing Decisions: The ESF requires public and stakeholder disclosure of the draft (or final if available) E&S assessment documentation, which necessarily includes the GHG emissions quantification estimates, alternatives analysis, and mitigation measures for each of an FI's higher risk transaction (FI-1 investments and substantial risk F-2 investments) prior to the FI's financing decisions.¹⁶ See The Environmental and Social Requirements for Financing Modalities and Products paragraphs 66, 67, 76, and 62. Reflection of this substantial protection in the ESF Guidance Notes is necessary to ascertain and help ensure an FI's adherence to the ESF climate change protections before an FI invests with ADB funds.

C. The Guidance Notes Must Specify that the Relevant Requirements of the ESS that a FI Must Meet for a Higher Risk Transaction, include all Climate Change and GHG ESS requirements. Paragraphs 62 and 73 provide that FIs must meet the requirements of the relevant ESSs. Considering the climate crisis and the stringent due diligence requirements set forth in the ICJ Advisory Opinion detailing the requirements to conduct GHG impact assessments prior to financing decisions and to prevent avoidable GHG emissions, the Guidance Notes must specify that the relevant requirements of the ESS include GHG emissions alternatives analysis in ESS1 and the climate change requirements in ESS9 when it is estimated that any amount of absolute GHG emissions over a de-minimis amount (e.g. over 500 tons of Scope 1, 2, plus 3 CO₂-eq/yr) are estimated to occur.

VIII. The ESS9 Guidance Notes Annex Must List The National Environmental Policy Act as an Example of Good International Practice to help Guide Climate change requirements under ESS9.

The ESS9 Annex provides “The following are potentially useful sources for good international practices that may be useful to a borrower/client for climate change requirements under ESS9” and “the resources listed here do not necessarily represent the views of ADB and may be updated from time to time.” We are puzzled why ADB would omit including the National Environmental Policy Act (NEPA) GHG Impact Assessment Guidelines¹⁷ (NEPA Guidelines) as a source for good international practices that may be useful to a borrower/client in meeting the climate change requirements under ESS9.

¹⁶ The Environmental and Social Requirements for Financing Modalities and Products paragraph 67 language specifies the FI must provide this E&S assessment documentation to ADB for review prior to financing decisions, but only provides ADB must disclose the assessments without specifying the timing of such disclosure. This leaves the reader to have to deduct from the totality of the policy and ESP that ADB is required to disclose these documents prior to financing decisions. However, ADB's responses to draft ESF comments in September 2024 prior to ESF adoption highlights that the FI must provide, and that ADB's intent is for the public to be provided with, these assessment documents prior to FI financing decisions. This is because as ADB's responses to comments correctly detail, ESS9's and 10's requirements for early disclosure of GHG impact assessments to stakeholders, apply to FIs and must be embedded in FI's environmental and social management systems. ADB's responses to comments signal further guidance will be provided in formal management guidance in providing “[f]urther guidance can be considered in the guidance document.” See: Key Stakeholder Feedback on ADB's Draft Environmental and Social Framework September 2024 at pages 144, 148-150.

¹⁷ Interim U.S. Council of Environmental Quality (CEQ) NEPA guidance effective January 8, 2023 for GHG emissions and climate change assessments, alternatives analysis and mitigation in environmental impact statements (available at: <https://www.regulations.gov/document/CEQ-2022-0005-0001>).

The NEPA Guidelines set forth best processes, methods, and practices routinely required and performed under NEPA in the United States prior to US government approvals for quantifying GHG emissions, assessing their impacts, and analyzing GHG emissions alternatives and feasible avoidance and other mitigation measures. Is ADB's omission because it considers NEPA's requirements for climate change and GHG impact assessments an example of reasonably best available and practiced methods standard instead of good international industry practice?

As set forth in the ICJ and ITLOS Advisory Opinions, not only must ADB and its member states require a best available and practiced standard for performance of climate change impact and alternatives analysis prior to ADB financing decisions for ADB and its member states to adhere to their due diligence obligations under international law. Implementation of NEPA's requirements for GHG emissions and climate change impact, mitigation, and alternatives assessments would also help prevent ADB's directly and indirectly financed projects from imparting climate change harms, and help ADB significantly reduce the occasions remedial action is required as a result of its financing activities. And further, why wouldn't ADB encourage its clients to look at NEPA or best practices to ensure a robust GHG quantification, impact, and alternatives/mitigation analysis to help its clients fully meet ESS9's requirements?

As such, ADB should include the NEPA Guidelines in the Appendix to ESS9 as a good international practice to review that may be useful for a borrower/client in meeting its climate change requirements under ESS9.

Sincerely,



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

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

International law has long provided that if a state breaches an obligation established by a treaty or customary international law it can be held responsible in international tribunals or applicable domestic courts.¹⁸ Courts have found that “when member States participate in [an] international organization’s decision-making processes, they are [] carrying out state acts that have to comport with their international obligations.”¹⁹ The International Court of Justice made this finding in *FYROM v. Greece*.²⁰ In a dictum in *Southern Bluefin Tuna*, the International Tribunal for the Law of the Sea also found it could examine state conduct within an international organization to determine compliance with its legal obligations.²¹ “[These courts and] the European Court of Human Rights indicate that when states make decisions within an international organization, they must adhere to their human rights obligations and substantive obligations related to the organization’s area of competence.”²² Scholars in the field have come to similar conclusions. Barros persuasively applies those cases to the governing boards of international financial institutions, arguing that member states have due diligence obligations to take all measures to ensure that they know about risks to human rights before approving loans, mitigate those risks when making

¹⁸ Kerr, B. P. (2020), Regulating the Environmental Integrity of Carbon Offsets for Aviation: the International Civil Aviation Organization’s Additionality Rule as International Law. *Carbon and Climate Law Review*, 14 (4) (hereinafter “Kerr, ICAO”) at 3; Kerr, B. (2022). Mitigating the Risk of Failure: Legal Accountability for International Carbon Markets. *Utrecht Law Review*, 18(2), 145-161 (hereinafter “Kerr, Legal Accountability Int. Carbon Markets”) at 152, 157-159 (Section 3.2); For examples, see fns. 19-23, *post*; Baine P. Kerr, All Necessary Measures: Climate Law for International Shipping, *Virginia Journal of International Law*, 64 Va. J. Int’l L. 523 (2024) (available at: <https://www.vjil.org/all-necessary-measures-climate-law-for-international-shipping>) (hereinafter “Kerr, All Necessary Measures”) at 527 and fn. 20, 529, 523-570; Case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland, App. No. 53600/20, ¶¶ 573–74 (Apr. 9, 2024), <https://hudoc.echr.coe.int/eng?i=001-233206> (holding that Switzerland is required to quantify GHG emissions limitations through a carbon budget and implement reduction measures); Budayeva v. Russia, App. No. 15339/02, ¶ 116, 133 (Mar. 20, 2008), <https://hudoc.echr.coe.int/eng?i=001-85436> (holding that states have a positive obligation to protect life and property from environmental risks). The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda (Urgenda) [2019] Dutch Supreme Court 19/00135 (Engels); See also, Jaqueline Peel & Harri Osofsky A Rights Turn in Climate Change Litigation, 7(1) TRANSNAT’L ENVTL. L. 37, 48 (2018) (discussing case law); Siobhan McInerney-Lankford, Climate Change and Human Rights: an Introduction to Legal Issues, 33 HARVARD ENVTL. L. REV. 431, 433 (2009). Other courts have recognized the right to a healthy environment as an autonomous right. See, e.g., The Environment and Human Rights (Arts. 4(1) and 5(1) American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶¶ 62–63, 101–03 (Nov. 15, 2017) [hereinafter Colombia Advisory Opinion]; Kerr, B. (2021). Bridging the Climate and Maritime Legal Regimes: The IMO’s 2018 Climate Strategy as an Erga Omnes Obligation. *Climate Law*, (hereinafter “Kerr, Erga Omnes Obligation” 11(2), 119-156; Baine P. Kerr, Binding the International Maritime Organization to the United Nations Convention on the Law of the Sea, 19 INT’L ORG. L. REV. 391 (2022) (hereinafter “Kerr, IMO”).

¹⁹ Kerr, All Necessary Measures at 558-559, and fn. 257; Ana Sofia Barros & Cedric Ryngaert, The Position of Member States in (Autonomous) Institutional Decision-Making, 11 INT’L ORG. L. REV. 53 (2014) (hereinafter “Barros & Ryngaert”) at 53, 55.

²⁰ Kerr, All Necessary Measures at 558, and fn. 258; Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece), Judgment, 2011 I.C.J. Rep. 644 (Dec. 5) [hereinafter FYROM].

²¹ Kerr, All Necessary Measures at 558-559, and fn. 264; Southern Bluefin Tuna (N.Z. v. Japan; Austl. v. Japan), Cases Nos. 3 and 4, Order of Aug. 27, 1999, ITLOS Reports 1999 [hereinafter Southern Bluefin Tuna], ¶ 50; See, Moritaka Hayashi, The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the International Tribunal for the Law of the Sea, 13 TULANE ENV. L. J. 361 (2000).

²² Kerr, All Necessary Measures at 529-530, 559-560, and fn. 32; FYROM, Southern Bluefin Tuna at ¶ 50, Gasparini v. Italy and Belgium, App. No. 10750/03, (May 19, 2009), <https://hudoc.echr.coe.int/eng?i=001-92899>; Perez v. Germany, App. No. 15521/08 (Jan. 6, 2015), <https://hudoc.echr.coe.int/eng?i=001-151049>; Klausecker v. Germany, App. No. 415/07 (Jan. 6, 2015), <https://hudoc.echr.coe.int/eng?i=001-151029>.

decisions, and ensure that loans already issued conform to their human rights conditions.”²³ Kerr and Barros also point out that the Articles on State Responsibility—which were applied by the International Court of Justice in *FYROM v. Greece*—indicate that the conduct of state representatives when decision-making at international organizations can be attributed to a state and independently assessed.²⁴

II. ADB’s General Obligations Under International Law

International organizations,²⁵ including the ADB, can also be held responsible for breaching their obligations, including those established by a treaty or customary international law.²⁶ This has happened numerous times, in various domestic courts.²⁷ The ILC DARIO Articles²⁸ provide a structural roadmap for evaluating an organization’s obligation established by a treaty or customary international law.

International Law Commission, ‘Draft Articles on the Responsibility of International Organizations with commentaries,’ Yearbook of the International Law Commission (2011), vol. II, Part Two, UN Doc. A/66/10 (hereinafter “ILC DARIO Articles”).²⁹ ILC DARIO Article 10 provides that there ‘is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.’³⁰ See also, ILC DARIO Article 10 paragraph 2 providing that international organization’s international legal obligations “may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order.” In addition, “the ICJ found long ago that international organizations are bound by ‘obligations incumbent upon them under general rules of international law.’”³¹

And in regards to treaty obligations, even in the absence of an express textual indication that an international organization is bound by a treaty’s obligations, an international organization is transitively bound to the same treaty obligations as their members, in a way that avoids or resolves treaty conflicts between organizations and their member states.³² Thus, for example, the ADB itself must adhere to its

²³ Kerr, All Necessary Measures at 560-561, and fn. 279; Ana Sofia Barros, Governance as Responsibility: Member States as Human Rights Protectors in International Financial Institutions (2019) (hereinafter “Barros”) at Chapter III; see also Pasquale De Sena, International Monetary Fund, World Bank and Respect for Human Rights: A Critical Point of View, 20(1) ITALIAN Y.B. INT’L. L. 247, 257 (2010).

²⁴ Kerr, All Necessary Measures at 560-561, and fn. 282; Barros at 94.

²⁵ An ‘international organization’ is ‘an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.’ Baine P. Kerr, ‘Clear skies or turbulence ahead? The international civil aviation organization’s obligation to mitigate climate change’ (2020) 16(1) Utrecht Law Review (hereinafter “Kerr, Clear Skies”) at 104, fn. 25 (citing Chicago Convention, note 11, Art. 64).

²⁶ Kerr, ICAO at 3, and fn. 23 (citing Jan Klabbbers, ‘Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act,’ (2017) 28(4) European Journal of International Law, 1137).

²⁷ Kerr, Legal Accountability Int. Carbon Markets at 152, fn. 57 and 58 (citing August Reinisch, *International Organizations Before National Courts* (2nd edn, Cambridge 2009) 28, notes 124-130 (listing and discussing cases), and fn. 61 (citing *Jam v International Finance Corp*, 586 US __ (2019) 5-6; Clemens Treichl and August Reinisch, ‘Domestic Jurisdiction over International Financial Institutions for Injuries to Project-Affected Individuals: The Case of *Jam v International Finance Corporation*’ (2019) 16 International Organizations Law Review 133).

²⁸ International Law Commission, ‘Draft Articles on the Responsibility of International Organizations with commentaries,’ Yearbook of the International Law Commission (2011), vol. II, Part Two, UN Doc. A/66/10 (hereinafter “ILC DARIO Articles”).

²⁹ Kerr, ICAO at 3.

³⁰ Kerr, ICAO at 4; ILC DARIO Articles, Art. 10.

³¹ Kerr, Clear Skies at 112, and fn. 134 (citing *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, I.C.J. Reports 1980, p. 73, para. 37. *Reparation for Injuries*, note 50, 174).

³² Kerr, Clear Skies at 112, and fn. 138 (citing K. Daugirdas, ‘How and Why International Law Binds International Organizations,’ (2016) 57 Harvard International Law Journal, 137, 350, 364; citing F. Megret & F. Hoffman, ‘The UN as a Human Rights Violator-some Reflections on the United Nations Changing Human Rights Responsibilities,’ (2003) 25 Human Rights Quarterly, 318 (arguing that United Nations should be transitively bound by their member states’ treaty obligations), <<https://www.jstor.org/stable/20069667>>; O. De Shutter, ‘Human Rights and the Rise of International Organizations: The

member states' obligations under Article 4 of the UNFCCC to reduce or limit GHG emissions and their obligation under Articles 2 and 3 of the Paris Agreement to take ambitious efforts to hold global warming to less than 1.5°C.

Logic of Sliding Scales in the Law of International Responsibility,' (2009) (CRIDHO Working Papers Faculte de Droit de L'Universite Catholique de Louvain), 10 (discussing functional succession theory), <https://ssrn.com/abstract=2446913>); see *also*, Kerr, *Clear Skies* at 113, and fn. 145 (citing Daugirdas, note 137, 368; Megret, note 138, 318).

Appendix B: ADB and its Member States Respectively Have Obligations Under International Law to Adhere to, and Ensure Compliance with, ADB's Board Adopted Policy Requirements

In addition to other sources of international law, international organizations' obligations are also derived from their own constituent instruments, board adopted rules, and board declarations. According to the International Law Commission (ILC), an international organization's board adopted rules (or policies) can impose obligations on it.³³ ILC DARIO Article 10 provides that there 'is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.'³⁴ Specifically applied to international organizations like ADB, scholars have found such international organizations' (and thus ADB's) board adopted policies should be binding rules of conduct in domestic court.³⁵ Further, ADB's member states are required to act to ensure ADB adheres to its board adopted policy requirements, and could be held responsible for ADB's failures to do so on grounds that they are failing to supervise ADB and ensure that it is following its own rules.³⁶

ADB's Environmental and Social Framework (ESF),³⁷ which includes the ESS, is board adopted. Thus, ADB and its Member States are required to ensure the Guidance Notes that ADB adopts and implements are consistent with, and are sufficient to best ensure implementation of, ADB's ESSS and entire ESF. Failure to do so would constitute committing an internationally wrongful omission, for which ADB, and its member states due to their duty to ensure ADB adheres to its board adopted policy requirements, could be held responsible in a court of law.

³³ Kerr, ICAO at 4, and fn. 24, 25 (providing "The ILC DARIO Articles, Article 2, subparagraph (b) defines rules of an organization as 'the constituent instruments, decisions, resolutions and other acts of the organization adopted in accordance with those instruments, and established practice of the organization; citing ILC DARIO Articles, Art. 2., 10); Kerr, Clear Skies at 153.

³⁴ Kerr, ICAO at 4, and fn. 25 citing ILC DARIO Articles, Art. 10.

³⁵ Kerr, Legal Accountability Int. Carbon Markets at 152, and fn. 61 citing Clemens Treichl and August Reinisch, 'Domestic Jurisdiction over International Financial Institutions for Injuries to Project-Affected Individuals: The Case of Jam v International Finance Corporation' (2019) 16 International Organizations Law Review at 133; Kerr, Erga Omnes Obligation at 121 -122, and fn. 11 citing Alexander Orakhelashvili, 'The World Bank Inspection Panel in Context: Institutional Aspects of the Accountability of International Organizations', 2 International Organizations Law Review 57 (2005) at 71-72.

³⁶ See, e.g., Kristina Daugirdas, Member States' Due Diligence Obligations to Supervise International Organisations,' in Due Diligence in the International Legal Order 59 (Heike Krieger et al. eds., 2021).

³⁷ ADB Environmental and Social Framework, December 2024