



June 6, 2024

European Bank for Reconstruction and Development  
Attn: Ms. Odile Renaud-Basso, President  
Attn: EBRD Board of Directors, EBRD Climate Directors and Management  
Five Bank Street  
London, E14 4BG, United Kingdom  
ParisAlignmentMethodology@ebrd.com; mckeem@ebrd.com;

**Re: Comments on the European Bank for Reconstruction and Development (EBRD) March 2024 Methodology to Determine the Paris Agreement Alignment of EBRD Investments.**

Dear Ms. Renaud-Basso and To Everyone it May Concern at the European Bank for Reconstruction and Development (EBRD):

Thank you for the opportunity to comment on EBRD’s March 2024 draft methodology to determine the Paris Agreement Alignment of EBRD investments (Draft Paris Methodology). Bank Climate Advocates (BCA) submits the following comments and requests for improvements on the Draft Paris Methodology.

**Overarching Comments**

**EBRD’s Draft Paris Methodology Must Be Improved As Detailed in the 10 Sections of Specific Comments Below to Address the Climate Crisis:** As EBRD may be aware, approximately 3.3–3.6 billion people that live in contexts that are 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.<sup>1</sup> And things will get worse. Global warming is expected to increase at least through 2040 mainly due to increased cumulative greenhouse gas (GHG) emissions in nearly all considered scenarios and modelled pathways.<sup>2</sup> The world’s current trajectory of GHG emissions will result in global temperature increases up to 2.7°C by 2100.<sup>3</sup> 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.<sup>4</sup> According to the Intergovernmental

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<sup>1</sup> 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/](http://www.ipcc.ch/report/ar6/syr/)); See Appendix A for summary of current and expected climate change harms projected by the IPCC.

<sup>2</sup> *Id.*; See Appendix A for summary of current and expected climate change harms.

<sup>3</sup> World Bank. 2023. Creating an Enabling Environment for Private Sector Climate Action: An Evaluation of World Bank Group Support, Fiscal Years 2013–22. Independent Evaluation Group. Washington, DC: World Bank at 1.

<sup>4</sup> 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

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.<sup>5</sup> People living in the Global South, economically, politically, and socially marginalized people living in poverty, and those 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 climate change caused by further significant GHG emissions—especially emissions that the EBRD can and must avoid.

### Specific Comments

#### **1.) EBRD’s Draft Paris Methodology Fails to Consider, and is Inconsistent with, EBRD’s Separate and Distinct Duties under the Paris Agreement as an International Organization for its Actions to Not Cause or Contribute to Exceedance of the 1.5°C Warming Limitation Objective.**

Paris Agreement Article 2(1)(a) provides an objective of the Agreement is to “hol[d] the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.” Article 2(1)(c) expressly provides for “making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development” as an aim of the Agreement. “Finance flows which are inconsistent with Article 2(1)(c) are by definition those which undermine the goals of the Paris Agreement,” including the warming limitation objectives in Article 2(1)(a).<sup>6</sup> The temperature goals set out in the Paris Agreement, including as applied to finance flows, are universally binding norms for the behavior of international organizations and their member states that govern them.<sup>7</sup> They do not permit international organizations, nor members State parties in their acts directing them, to follow different, less ambitious goals.<sup>8 9</sup>

Thus, the language of Article 2 reflecting the object and purpose of the Paris Agreement, together with the object and purpose of the UNFCCC which the Paris Agreement supports, requires that EBRD’s finance flows meet, and are assessed for, Article 2(1)(a) and (c) consistency, including Article 2’s temperature goals.<sup>10</sup>

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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.

<sup>5</sup> 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.

<sup>6</sup> International Obligations Governing the Activities of Export Credit Agencies in Connection with the Continued Financing of Fossil Fuel-Related Projects and Activities, Legal Opinion, Kate Cook and Jorge E. Viñuales, March 24, 2021, available at: <https://priceofoil.org/2021/05/04/eca-legal-opinion/> (“Cook and Viñuales”) at ¶70, 265

<sup>7</sup> Cook and Viñuales at ¶¶ 60, 70-72, 85, 265(h); See, e.g. World Bank Group, The World Bank Group’s Approach to Paris Alignment, Washington, D.C., March 16, 2023 (<http://documents.worldbank.org/curated/en/099658203162320142/IDU1598309ef195cc148fd195421981d12bf8bf6>; 2018 MDBs’ Joint Declaration, The MDBs’ alignment approach to the objectives of the Paris Agreement: working together to catalyse low-emissions and climate-resilient development at 1 (<https://thedocs.worldbank.org/en/doc/784141543806348331-0020022018/original/JointDeclarationMDBsAlignmentApproachtoParisAgreementCOP24Final.pdf>).

<sup>8</sup> Appendix B, *ante*, details how both the EBRD and its Members State shareholders are obliged under international law to adhere to the Paris Agreement’s requirements and customary international law.

<sup>9</sup> Cook and Viñuales at ¶60

<sup>10</sup> Cook and Viñuales at ¶¶72, 265

However, EBRD's Draft Paris Methodology fails to consider and is inconsistent with these duties under the Paris Agreement. Instead, it improperly relies on the aspects of the Paris Agreement that apply only to individual State parties to gauge its alignment. An example of this is that despite Nationally Determined Contributions (NDCs) not applying to financing flows or actions of International Organizations like EBRD, the Draft Paris Methodology relies on the NDCs of countries where its investments are located to assess whether a project EBRD finances is aligned with the Paris Agreement, instead of whether the project EBRD is contemplating for financing will cause or contribute to exceedance of 1.5°C warming limitation objective. This result is that the Draft Paris Methodology falls short of EBRD's obligations to align its financing flows with the Paris Agreement's 1.5°C warming limitation objective: the science is clear that meeting NDCs will not result in limiting global warming to 1.5°C or a 2°C.<sup>11</sup> EBRD's Paris Methodology thus must be reformulated based on EBRD's independent obligations to make its finance flows consistent with the 1.5°C warming limitation objective.

Considering the science is clear that any new investments in fossil fuels would cause the 1.5°C warming limitation objective to be exceeded, for EBRD and its Member States governing EBRD to adhere to their Paris Agreement obligations, EBRD's Paris Methodology must explicitly prohibit financing of and guarantees/insurance for all upstream, midstream, and downstream fossil fuel projects.<sup>12</sup> In addition, to meet its Paris Agreement obligations to make its finance flows consistent with the 1.5°C warming limitation objective, EBRD's Paris Methodology must be amended to meet the Paris Agreement's due diligence requirements, in addition to those imposed by international law, to assess and avoid GHG emissions and their impacts.<sup>13</sup> This includes a requirement for EBRD, prior to each financing decision, to ensure full and adequate assessment of a project's Scope 1, 2, and 3 GHG emissions, an adequate GHG emissions and climate change alternatives analysis that meets a best reasonably available and practiced methods standard, and adoption of measures and alternatives that avoid GHG emissions as far as economically and technically feasible.<sup>14</sup>

As detailed in Appendix B below, both the EBRD and its Members State shareholders in their governance and actions directing EBRD are obliged under international law to adhere to the Paris

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<sup>11</sup> See Climate Analytics (2023). 2030 targets aligned to 1.5°C at pages 4, 7 (available at <https://climateanalytics.org/publications/2030-targets-aligned-to-15c-evidence-from-the-latest-global-pathways>); Climate Analytics 1.5°C National Pathway Explorer (2024) (available at: <https://1p5ndc-pathways.climateanalytics.org/>); See NDC Partnership (available at and providing: <https://ndcpartnership.org/knowledge-portal/climate-toolbox/15deg-national-pathway-explorer> and providing "The Paris Agreement saw 184 governments put forward 2030 pledges and targets to begin to cut carbon emissions to limit warming to the agreed goal of 1.5°C (called Nationally Determined Contributions or NDCs). These targets are not yet sufficient to reach this goal. At the moment they put the world on a path to approximately 2.4°C of warming"); See Rogelj, J., et al., 2018: Mitigation Pathways Compatible with 1.5°C in the Context of Sustainable Development. In: 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 University Press, Cambridge, UK and New York, NY, USA, pp. 93-174. <https://doi.org/10.1017/9781009157940.004>.

<sup>12</sup> On the basis of the best available scientific evidence, and taking into account the current emission and production gaps and the associated risk of overshoot of the Paris Agreement's temperature goals, EBRD financing and guarantee activities which support new or existing fossil-fuel related projects/activities are in principle inconsistent with the pathways set out in Paris Agreement Article 2(1)(c), the temperature goals laid down in Article 2(1)(a) of the Paris Agreement, the mitigation requirements under Article 4 of the Paris Agreement, and international human rights law. Cook and Viñuales at ¶265.

<sup>13</sup> See Appendixes B-D, *post*.

<sup>14</sup> See Appendix D, *post*.

Agreement's requirements. Should EBRD disagree that it has independent obligations to make its finance flows consistent with the 1.5°C warming limitation objective, and maintain that a country's NDCs can excuse EBRD's financing flows from meeting the 1.5°C warming limitation objective, we request that it provide legal analysis supporting that position. Further, part of this analysis must address why EBRD does not consider the analysis and findings in Cook and Viñuales regarding Export Credit Agencies' (ECA) Paris Agreement obligations to not finance fossil fuel projects to apply to EBRD and its individual Member States in their acts directing and governing EBRD (Cook and Viñuales, attached as Exhibit 1).<sup>15</sup>

## **2.) EBRD's Draft Paris Methodology Must Address EBRD's and its Member State's Human Rights Obligations to Prevent Climate Change Harms and Those Under Customary International Law and the United Nations Convention on the Law of the Sea, which Go Above and Beyond its Paris Agreement Obligations.**

The aspects of the Draft Paris Methodology relating to GHG emissions and climate change impacts quantification and harm prevention must be greatly improved due to evolving international law in relation to EBRD's financing of GHG emissions. In the Paris Methodology EBRD adopts, in addition to specifically addressing the rapidly changing legal framework and obligations around climate change risk mitigation and harm prevention from Paris Agreement, the Paris Methodology must also address the legally binding obligations set forth in litigation at the national and international courts, which establish that human rights law, customary international law pertaining to harm prevention and the precautionary principle, and the United Nations Convention on the Law of the Sea mandate that EBRD and its Member States not finance projects that would cause or contribute to exceedance of the 1.5°C degree warming limitation objective.<sup>16</sup>

Accordingly, in addition to addressing and explaining how the Paris Methodology EBRD adopts is in line with EBRD's and its members state shareholder's climate obligations under international law prior to financing decisions as detailed in Appendix B and D, EBRD must also ensure that, and explain how, the Paris Methodology it adopts is in line with EBRD's and its members state shareholder's obligations as set forth in the European Court of Human Rights case *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* ([judgement available here](#)),<sup>17</sup> the International Tribunal on the Law of the Sea May 21, 2024 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 ([advisory opinion available here](#)),<sup>18</sup> and also in any decisions issued by the Inter-American Court of Human Rights (IACtHR)<sup>19</sup> and International Court of Justice before the

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<sup>15</sup> As detailed in Appendix B below, both the EBRD and its Members State shareholders in their governance and actions directing EBRD are obliged under international law to adhere to the Paris Agreement's requirements.

<sup>16</sup> This includes EBRD's and its Member State's obligations to set forth provisions in its Paris Methodology that would prevent EBRD from funding fossil fuel projects and ensuring adequate assessments and mitigation to avoid GHG emissions as far as feasible for each project EBRD finances. See Appendices A-D.

<sup>17</sup> On April 9, 2024, the European Court of Human Rights ruled that Switzerland had failed to act in time and in an appropriate and consistent manner to devise, develop and implement relevant legislation and measures to mitigate the effects of climate change.

<sup>18</sup> The applicant in this case is the Commission on Small Island States on Climate Change and International Law, which requested an Advisory Opinion from the Tribunal in December 2022 ([link to proceedings available here](#)).

<sup>19</sup> In January 2023, Colombia and Chile requested, under Article 64(1) of the American Convention on Human Rights, an Advisory Opinion from the IACtHR in order to clarify the scope of States' obligations in responding to the climate emergency within the framework of international human rights ([link to proceedings available here](#)).

EBRD adopts its Paris Methodology.<sup>20</sup> Because EBRD's and its member states' international obligations to prevent climate harms differ from those under the Paris Agreement, EBRD must explain how the Paris Methodology it adopts meets these obligations, as well as those established by the Paris Agreement.

**3.) EBRD's Paris Methodology must explicitly prohibit financing of and guarantees / insurance for all upstream, midstream, and downstream fossil fuel projects.**

As provided in the Oil Change International (OCI) and BCA from the December 18, 2023 Amicus Curiae brief drafted by OCI and submitted by OCI and BCA to the Inter-American Court of Human Rights regarding the request from Chile and Columbia for an advisory opinion regarding "*Climate Emergency and Human Rights*" ("Climate Emergency Amicus to Inter-American Court of Human Rights"):

Fossil fuels are the biggest single source of GHGs, accounting for 91% of CO<sub>2</sub> emissions globally in 2022.<sup>21</sup> Under scenarios where global warming is limited to 1.5°C, [no new investments will be made in oil, gas, and coal production, and there will also be no further investment in LNG infrastructure]...<sup>22</sup> The Intergovernmental Panel on Climate Change's (IPCC's) recent synthesis report warned that, "*projected CO<sub>2</sub> emissions from existing fossil fuel infrastructure without additional abatement would exceed the remaining carbon budget for 1.5°C.*"<sup>23</sup> The International Energy Agency (IEA) concludes that in scenarios that maintain a 50% chance to limit global heating to 1.5°C, there are no further investments in new oil, gas and coal production.<sup>24</sup> In addition, [IEA finds that] no further LNG infrastructure investments are required in such scenarios, and even under construction LNG projects exceed what is compatible with 1.5°C.<sup>25</sup> According to the IEA's NZE there is *no need* for production and infrastructure expansion given forecasted clean energy expansion and fossil fuel demand reduction... At current rates of carbon pollution, the world will exhaust the 1.5°C budget in just seven years.<sup>26</sup> Recent analysis from Climate Analytics finds that fossil fuel production and use (oil, gas, and coal combined) must fall by 40% by 2030.<sup>27</sup> The same analysis shows that fossil fuels can be replaced with better, safer alternatives, ramping up wind and solar energy

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<sup>20</sup> The request for an Advisory Opinion was made by the UN General Assembly in March 2023, following a huge diplomatic effort spearheaded by Vanuatu and inspired by the vision of students in the Pacific Islands ([link to proceedings available here](#)).

<sup>21</sup> Dr. Zeke Hausfather, Prof. Pierre Friedlingstein. "Analysis: Global CO<sub>2</sub> emissions from fossil fuels hit record high in 2022" 11 Nov. 2022. Carbon Brief (available at: [www.carbonbrief.org/analysis-global-co2-emissions-from-fossil-fuels-hit-record-high-in-2022/#:~:text=Global%20carbon%20dioxide%20emissions%20from,by%20the%20Global%20Carbon%20Project](http://www.carbonbrief.org/analysis-global-co2-emissions-from-fossil-fuels-hit-record-high-in-2022/#:~:text=Global%20carbon%20dioxide%20emissions%20from,by%20the%20Global%20Carbon%20Project)).

<sup>22</sup> See fns. 23 and 24, *post*.

<sup>23</sup> IPCC, 2023: Summary for Policymakers. In: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, pp. 1-34, doi: 10.59327/IPCC/AR6-9789291691647.001

<sup>24</sup> IEA (2023), Net Zero Roadmap: A Global Pathway to Keep the 1.5 °C Goal in Reach, IEA, Paris, p. 16 (available at: [www.iea.org/reports/net-zero-roadmap-a-global-pathway-to-keep-the-15-0c-goal-in-reach](http://www.iea.org/reports/net-zero-roadmap-a-global-pathway-to-keep-the-15-0c-goal-in-reach)).

<sup>25</sup> IEA (2023), World Energy Outlook 2023, IEA, Paris, p. 139 (available at: <https://www.iea.org/reports/world-energy-outlook-2023>).

<sup>26</sup> Pierre Friedlingstein et al, "Global Carbon Budget 2023," Earth Syst. Sci. Data, 15 (2023), 5301–5369 (available at: <https://doi.org/10.5194/essd-15-5301-2023>).

<sup>27</sup> Climate Analytics (2023). 2030 targets aligned to 1.5°C (available at <https://climateanalytics.org/publications/2030-targets-aligned-to-15c-evidence-from-the-latest-global-pathways>).

deployment five-fold, to 1.5 terawatt (TW) per year by 2030, while using energy more efficiently and fairly, including curbing overconsumption by the world's wealthiest countries.<sup>28</sup>

Climate Emergency Amicus to Inter-American Court of Human Rights at 3-5 (attached as Exhibit 2).

As such, EBRD's Draft Paris Methodology must go further than its limited fossil fuel prohibitions, and explicitly prohibit financing of and guarantees/insurance for *all* upstream, midstream, and downstream fossil fuel projects and fossil fuels, including via its direct investments, financial intermediary investments, trade finance, advisory services, and captive power plants that are part of financed projects (an example of a captive power plant is a natural gas or coal plant powering a cement or other facility, development, activities, or operation). Without doing so, EBRD's financing activities cannot be aligned with the 1.5°C global warming limitation objective. Furthermore, as detailed in Appendix B and C below, such prohibitions are necessary for the EBRD and its shareholders to adhere to the Paris Agreement and their other international legal obligations to prevent EBRD's activities from causing or contributing to climate change harms.

**In furtherance of these positions and those below, we request the following in regards to EBRD's "Not Aligned List" in Annex 2 of the Draft Paris Methodology (Not Aligned List):**

(a) the Not Aligned List must explicitly include financing of and guarantees/insurance for *all* upstream, midstream, and downstream fossil fuel projects. In addition, it must provide EBRD will not finance projects that are functionally related to fossil fuels. Projects functionally related to fossil fuels means (i) associated facilities that are dedicated to enable the extraction, mining and or use of fossil fuels or (ii) projects that would not be carried out without dedicated fossil fuel-based power supply;

(b) in addition to providing that the Not Aligned List applies to EBRD's direct and financial intermediary investments, it must also apply to EBRD's guarantees, advisory services and or technical assistance, recipients of trade and short-term finance, and all activities of EBRD. This is critical to ensuring effective implementation of the Not Aligned List and the alignment of EBRD's activities with the 1.5°C degree warming limitation objective.

**4.) EBRD's Draft Paris Methodology must prioritize and facilitate the financing of renewable energy projects in a just and equitable way to meet energy demand throughout the Global South as a needed compliment to its prohibition on the financing of fossil fuel energy projects.**

As detailed in the Climate Emergency Amicus to Inter-American Court of Human Rights:

Protecting a livable climate and environment will require a fast and fair phase out of existing fossil fuel production alongside a fast and fair ramp up of energy efficiency and renewable energy solutions globally... Recent analysis from Climate Analytics ... shows that fossil fuels can be replaced with better, safer alternatives, ramping up wind and solar energy deployment five-fold, to 1.5 terawatt (TW) per year by 2030, while using energy more efficiently and fairly, including curbing overconsumption by the world's wealthiest countries...<sup>29</sup>

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<sup>28</sup> See fn. 27, *ante*, Climate Analytics, "2030 Targets."

<sup>29</sup> See fn. 27, *ante*, Climate Analytics, "2030 Targets."

A fair phase-out must be guided by principles of justice and equity to leave no one behind. Not all fossil fuel producing countries have the same degree of dependence on fossil fuel revenues and ability to plan and implement economic diversification and just transition strategies, nor the same level of historical responsibility for driving climate pollution and exploitative models of resource extraction.<sup>30</sup> As over 150 economists detailed ahead of the 2023 “Summit for a New Financing Pact,” wealthy countries have no shortage of resources to pay their fair share to support a global fossil fuel phase-out. Wealth taxes, Global South debt cancellation, and defunding fossil fuels are three key levers that could raise over \$3 trillion per year in public funds for these efforts.<sup>31</sup> The phase-out of fossil fuels must be guided not only by economic capacity and historical responsibility, but also by environmental justice and respect for Indigenous sovereignty, prioritizing the need to end extraction practices that destroy health and livelihoods, or violate the rights of Indigenous Peoples to free, prior and informed consent. The energy transition must also ensure universal access to healthy, safe energy and protect workers and communities, while ensuring labor rights, decent work, and the clean-up of local environments.

Climate Emergency Amicus to Inter-American Court of Human Rights at 5-6 (attached as Exhibit 2).

In addition to climate change policy and human rights justifications, EBRD’s and its member state’s obligations under international law provide compelling reasons for EBRD’s Paris Methodology to explicitly prioritize and facilitate financing of just and equitable renewable energy projects. The Paris Agreement requires that EBRD and its member states party to the Paris Agreement ensure that EBRD’s finance flows address the climate and the poverty goals of developing States in an integrated way, including by ensuring universal access to sustainable energy through the “enhanced deployment” of renewable energy. Paris Agreement Articles 2, 9; preamble to UNFCCC Decision 1/CP.21 adopting the Paris Agreement; see Appendix C, *post*. As such, the Paris Methodology must include provisions that result in prioritization of financing for just and equitable renewable energy projects needed to meet energy demand throughout the Global South.

##### **5.) The Draft Paris Methodology Impermissibly Fails to Provide Opportunity for Public Disclosure, Review and Input of EBRD’s Paris Methodology Analysis and Alignment Findings**

For EBRD and its Member States to adhere to their obligations under international law, including European Union law and the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998), the Paris Methodology must require full public disclosure, at least 120 days prior to project financing decisions, of the analysis conducted and results obtained from any Paris Methodology analysis or implementation.

For quite some time, it has been universally accepted that at the minimum, the opportunity for public review of a project and its environmental and social impact assessments prior to project approval is a central practiced component of an environmental assessment.<sup>32</sup> This is demonstrated by the

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<sup>30</sup> Greg Muttitt and Sivan Kartha, “Equity, climate justice and fossil fuel extraction: principles for a managed phase out,” *Climate Policy* 20, no. 8 (2020): 1024-1042 (available at: <https://www.tandfonline.com/doi/abs/10.1080/14693062.2020.1763900>).

<sup>31</sup> “Letter: Global North leaders must redirect trillions from fossils, debt, and the 1% to address global crises,” *Oil Change International*, June 19 2023 (available at: <https://priceofoil.org/2023/06/19/open-letter-globalnorth-governments-can-redirect-trillions-in-fossil-debt-and-superrich-harms-to-fix-global-crises-the-paris-summit-must-be-aboutbuilding-the-roadmap-to-do-so/>).

<sup>32</sup> See e.g., UNEP, *Assessing Environmental Impacts: A Global Review of Legislation* (2018) (hereinafter “UNEP EIA Report”) at Chapter 3. EIA systems – Legal and institutional frameworks for EIAs, Section 3.2.3 Public participation at 50-66.

inclusion of public disclosure, and opportunity for public review of, a project and its environmental impact analysis well prior to project approvals in the vast majority of countries' environmental and social impact assessment laws and within international organizations.<sup>33</sup> As documented in 2018 United Nations Environment Programme (UNEP) Report with examples from states around the world:

*There is a wide consensus that public participation constitutes a fundamental element of EIAs – or in fact even that EIA is not an EIA without public participation. It is also widely recognized that public participation is not only a goal in itself, but that it is a key to accurate and effective environmental assessments... Due to the fact that public participation is considered an integral part of the EIA process, all countries have enacted some kind of legal measure for public participation in EIAs.... The review stage of the EIA process, i.e. the review of the EIA report prior to the decision on whether a project can go ahead taking environmental considerations into account, is a key element of the EIA process. The objective is to verify whether the information provided is sufficient and adequately presented so as to form a sound basis for decision-making. Public participation, comments from the public on the EIA report are an integral part of the review process in many countries.<sup>34</sup>*

While the UNEP Report documents that there is no general agreement in laws or the literature on what constitutes good practice in relation to public participation in Environmental Impact Assessments (EIAs), it finds most legislation in Global North and South states around the world make it mandatory to publicly publish information on disclosing a project when an application is submitted or the project is being considered, to make the draft EIA reports publicly available, and to provide the opportunity to submit comments on the EIA reports and project well prior to project approval.<sup>35</sup> In addition to being included in the U.S. National Environmental Policy Act (NEPA) and EU's EIA Directive (both included as examples of guidance for good international industry practice and best international practice for developing environmental as social impact assessment and studies in IFC's Guidance Notes to IFC Performance Standard 1),<sup>36</sup> these requirements are commonplace in international environmental treaties.<sup>37</sup>

Specifically, the Paris Methodology must require EBRD to publicly disclose the full analysis and results from implementation of the Paris Methodology, including a Project's GHG Emissions, GHG Alternatives Analysis, GHG Mitigation Hierarchy Analysis, and GHG Mitigation Measures/Proposed Adopted Mitigation Hierarchy, 120 Days Prior to Financing Decisions if a Project's Scope 1, 2, and 3 Emissions are Estimated to Exceed (a) 20,000 tCO<sub>2</sub>-eq over a project's lifecycle (not just over 20,000 or

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<sup>33</sup> See UNEP EIA Report at 50-66.

<sup>34</sup> UNEP EIA Report at 50-51, 65-66.

<sup>35</sup> UNEP EIA Report at 50, 53, 55, 60-61.

<sup>36</sup> IFC's Guidance Notes: Performance Standards, Guidance Note 1 at GN23, 25, 58 at 10-11, 19, 49 (updated June 14, 2021) (directing readers to the Guidance Note 1 bibliography listing (1) NEPA and (2) EU's Environmental Impact Assessment (EIA) Directive (European Commission, 2011, Environmental Impact Assessment, Directorate-General for the Environment, European Commission, Brussels, available at: <http://ec.europa.eu/environment/eia/eia-support.htm>).

<sup>37</sup> See 'Espoo' Convention on Environmental Impact Assessment in a Transboundary Context (adopted 25 February 1991, entered into force 10 September 1997) 1989 UNTS 309 (The member states of the UN Economic Commission for Europe that are party to this treaty comprise of 56 States located in Europe, Northern America and Central Asia); Protocol on Environmental Protection to the Antarctic Treaty, Annex I arts 3.2, 3.3, 3.6, 6; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1988 (Aarhus Convention), Art. 6 (see also Art. 1, 3, 5); Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Escazú, Costa Rica, 4 March 2018 (Escazú Agreement), Art. 7 (see also Art. 1, 5, 6).



25,000 tCO<sub>2</sub>-eq per year), (b) 500 absolute tons of carbon dioxide equivalent per year, or (c) 500 absolute tons of carbon dioxide equivalent during project construction. Including a construction threshold is important as well, as some projects may have significant GHG emissions during the construction stage that are feasible to avoid.

Considering the climate crisis, where limiting global warming to 1.5°C is critical for the future of the planet and its inhabitants, we feel this approach is appropriate as it includes all EBRD financed projects except those with a very limited GHG emissions impact; is needed to determine **if EBRD's cumulative investments overall, not just for an isolated project**, are aligned with the 1.5°C warming limitation objective – as it is necessary for EBRD and the public to measure the carbon footprint of EBRD's investments; and is needed to achieve avoidance of GHG emissions for each project as far as economically and technically feasible, which requires quantification and disclosure of a project's true total Scope 1, 2 and 3 GHG emissions amounts in the first instance. In addition, these thresholds are necessary to ensure the public and EBRD are aware of projects that will emit significant GHG emissions, and as a necessary step to ensure avoidance of these emissions prior to project financing decisions. And further, although their threshold amounts are outdated and set too high considering the climate crisis, the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) have had a disclosure requirement of 25,000 tCO<sub>2</sub>-eq over a project's life cycle (rather than tCO<sub>2</sub>-eq per year) in place since 2012 as standard practice all DFIs need to at least replicate to adhere to their due diligence obligations under international law to assess and prevent climate change risks and harms.<sup>38</sup>

These improvements must be made because they are necessary to allow affected communities and the concerned public to be informed and consulted, and to provide the review and input necessary for EBRD to adhere to its due diligence obligations under international law (See Appendix B and D, *post*). Good international industry practice and EBRD's due diligence obligations under international law to implement best reasonably available and practiced methods for environmental and social impact assessments, requires public disclosure of impact assessments and providing a minimum and sufficient amount of time for public review and comment.

Even IFC's outdated Access to Information Policy, falling well short of IFC's due diligence obligations under international law, requires the IFC to publicly disclose environmental and social impact assessments at least 60 days prior to financing decisions for Category A projects and 30 days prior to financing approvals for Category B and C, Trade Finance, Advisory Services, and Financial Intermediary projects.<sup>39</sup> And in addition, IFC's 2012 Access to Information Policy applicable to IFC and MIGA, plainly states that prior to project financing, a project's GHG emissions must be publicly disclosed when these amounts will exceed 25,000 tCO<sub>2</sub>-eq over a project's life cycle, not just per year. IFC Access to Info Policy at ¶31(a)(v). Disclosure and implementing feasible measures to avoid as far as possible estimated GHG emissions at this threshold is standard practice all MDBs, that EBRD needs to at least replicate to adhere to its due diligence obligations under international law to assess and prevent climate change risks and harms.

**In addition, EBRD's Paris Methodology must make clear that the confidentiality, deliberative privileged, and commercial sensitivity provisions in the EBRD's Draft Access to Information**

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<sup>38</sup> IFC's Access to Info Policy plainly states that prior to project financing, a project's GHG emissions must be publicly disclosed when these amounts will exceed 25,000 tCO<sub>2</sub>-eq over a project's life cycle, not just per year. IFC Access to Info Policy at ¶ 31 (a)(v).

<sup>39</sup> IFC Access to Information Policy (2012) at ¶ 34.

**Policy (AIP) do not allow EBRD to not publicly disclose the full GHG emissions and climate change impact and mitigation analysis, alternatives analysis, and mitigation measures, and all supporting studies, for each project the EBRD finances or guarantees 120 days prior to financing decisions.** This is because the components of a GHG impact and mitigation analysis, routinely and fully disclosed to the public for review as required by environmental assessment laws all over the world,<sup>40</sup> should not be shielded from public disclosure.

We bring this to EBRD's attention and make this request, because impermissibly, a trend at IFC is that contrary to IFC's disclosure requirements, IFC management frequently cites the commercial sensitivity and confidentiality provisions of its Access to Information Policy (2012) to excuse not disclosing certain GHG emissions analysis and mitigation measures.<sup>41</sup> EBRD's Paris Methodology, ESP, AIP and DAIP do not seemingly intend to allow for, and should not allow for, withholding of this information central to implementation of the ESP.

EBRD should have no supportable basis to justifiably claim that any of the Exceptions to Disclosure found in the AIP, including in regards to commercial sensitivity, deliberative privilege, and confidentiality, shields disclosure of its Paris Methodology analysis and findings. And more generally, for EBRD to ensure its own accountability and to allow the concerned public and stakeholders to address a situation where the EBRD does claim any sort of confidentiality provisions as a basis for non-disclosure for analysis or mitigation pertaining to any environmental and social impacts, the ESP must require EBRD to publicly disclose a full and supported justification for the non-disclosure.

Disclosure of GHG emissions impact analysis and mitigation, including all supporting studies and documents with GHG emissions and mitigation analysis, sufficiently prior to financing approval provides the opportunity for public review and input that has long been established as a key element to meeting a good international industry practice standard at the risks and impacts assessment stage. Moreover, it is critical to EBRD meeting its due diligence obligations under international law and ensuring projects it finances adequately quantify, assess the impacts of, and mitigate GHG emissions. Such public disclosure has also been accepted by other DFIs as central to informed decision making, important to managing environmental, social, and governance risks, and "fundamental to fulfilling [their] development mandate[s]." See, e.g., IFC Access to Information Policy at ¶¶ 3, 8, E&S Policy at ¶¶ 13, 14. It is a necessary check to best ensure a project meets the ESP's requirements and thus avoids or mitigates a project's GHG emissions as far as economically and technically feasible. *Id.*

**6.) The Draft Paris Methodology should clarify the relation of the Environmental and Social Policy (ESP), draft 2024 Access to Information Policy (AIP), and draft Directive on Access to Information (DAIP) to the Paris Methodologies.**

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<sup>40</sup> See fn. 32, *ante*.

<sup>41</sup> We observe this occurs mainly in the context of when the GHG impact assessment information initially posted on the IFC data portal contains facially inadequate GHG emissions analysis or mitigation, and or when a contemplated project will have significant GHG emissions, and at the request of the public or IFC directors, IFC management conducts or secures supplemental analysis from the client, its staff, or its own consultants. Conversation with IFC Management, member state directors, and member state agencies that provide direction to directors, reveals this supplemental analysis still falls well short of what the IFC's board adopted policies and its due diligence obligations under international law require. This further highlights the need for and importance of disclosure prior to project financing.

Draft Paris Methodology Annex 1 A1.3 provides:

*EBRD processes linked to a project's Paris alignment, taking place before project signing and as part of project monitoring include: a. Environmental and Social Policy. The Bank's Environmental and Social Policy guides project-level due-diligence, management, monitoring and reporting.<sup>82</sup> The environmental and social assessment of a project provides important environmental information relevant to Paris alignment (such as the environmental management systems of the financial intermediary client or the level of GHG emissions from the investment or from client operations). The environmental and social requirements of financial intermediaries are captured in Performance Requirement.*

Draft Paris Methodology at Annex 1, A1.3. However, Annex 1 A1.3 fails to detail when the Draft Paris Methodology analysis will take place in relation to the ESP's GHG emissions analysis and mitigation requirements. In addition, the draft Paris Methodology impermissibly fails to specify when the Paris Methodology analysis and findings will be publicly disclosed, and further fails to set forth any requirement to disclose these findings and analysis with sufficient time and opportunity for public review and comment. As detailed above, for EBRD and its Member States to adhere to their obligations under international law, including European Union law and the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998), the Paris Methodology must require full public disclosure, at least 120 days prior to project financing decisions, of the analysis conducted and results obtained from any Paris Methodology analysis and mitigation. Further, EBRD must implement and secure adherence to its ESP, DAIP, AIP and Paris Methodology together, and as early in project development as possible, to align its finance flows with the 1.5°C warming limitation objective and to help avoid the need for project re-design or substantial project design modifications required to meet EBRD's climate obligations.

**7.) The Specific Assessment<sup>42</sup> Used to Determine a Project's Paris Alignment is Insufficient to Align EBRD's Financing Flows with the Paris Agreement and the 1.5°C Warming Limitation Objective for at Least 5 Reasons.**

**(a) First, As detailed above, EBRD's obligations to align its finance flows with the 1.5°C warming limitation objective requires it to replace NDCs and LTSs as factors that determine EBRD's Paris alignment, with a standard that determines whether the project EBRD is contemplating for financing, independently and cumulatively with all of EBRD's projects it finances, will cause or contribute to exceedance of the 1.5°C objective.**

**(b) Second, the economic viability test should not rely on a shadow carbon price for its economic assessment, but instead should at least use the social cost of carbon. Valued at**

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<sup>42</sup> Section 2.10 of the Draft Paris Methodology provides: "The "specific assessment" will draw on a range of different and interrelated analytical tools: (1) a review against NDCs and the LTSs and other policy plans underpinning them; (2) a review against LCPs, including benchmarks and criteria derived from them; (3) the application of carbon lock-in tests; and (4) for projects with significant GHG emissions, an economic viability test, based on an economic assessment using a shadow carbon price. All of the outputs of these reviews and tests will be considered together in determining a project's alignment and set out in the relevant project documentation."

\$131 per ton Co<sub>2</sub>-eq in 2025 and \$179 per ton Co<sub>2</sub>-eq in 2030 in the Draft Paris Methodology, the shadow carbon price entirely fails to capture the harms to communities local to a project and communities all over the world from each ton of GHGs emitted. The shadow price of carbon cannot and should not be used in lieu of a cost of carbon that can more accurately inform EBRD's Paris Alignment determination. Instead, a social cost of carbon, valued at \$1,056 per ton Co<sub>2</sub>-eq in 2024,<sup>43</sup> should be used. This is because it requires estimating the impacts of climate change, including on human health and the environment, as measured by the amount of damage done and the cost to remedy it. Notably, the \$1,056 per ton Co<sub>2</sub>-eq 2024 value for the social cost of carbon measures the cost on a global scale, capturing the interconnected nature of the impact of heatwaves, storms, floods and other worsening climate impacts that damage crop yields, reduce worker productivity and reduce capital investment. While EBRD's Paris Methodology should ensure that at least the \$1,056 per ton Co<sub>2</sub>-eq 2024 value is used, to measure the true social cost of carbon for each project, the EBRD should implement a method that will also reveal the likely higher social cost per ton of carbon emitted to the country and communities where a contemplated investment is located.

- (c) **Third, the Economic Viability test is flawed because it fails to require a comparison to the lowest carbon emitting project alternatives that are economically and technically feasible – it only requires comparison to “lower” carbon alternatives.** Without comparison to the lowest carbon emitting feasible project alternatives, EBRD can't determine the true social costs of the project compared to the least carbon intensive feasible alternative.

Allowing for comparison to just “lower” carbon alternatives could allow use of GHG intensive sources of energy such as natural gas to power a project, even in the instances where renewables are economically and technically feasible. Thus, “lower” carbon alternatives must be removed, or in the alternative changed to “lowest carbon alternatives” so not to negate feasible renewable energy sources from being considered and adopted. Moreover, this adjustment is needed for EBRD to align its financing flows with the 1.5°C warming limitation objective, and for EBRD and its Global North Member States to meet their climate change due diligence and harm prevention requirements under international law. See Appendices B and D, *post*.

- (d) **Fourth, the Specific assessment is flawed because it is missing requirements to (a) quantify and disclose each project's absolute Scope 1, 2, and 3 GHG emissions, (b) to conduct a GHG emissions and climate change impact alternatives analysis in line with best reasonably available and practiced methods such as NEPA, and (c) require adoption of a GHG mitigation hierarchy for the project that, through selection of alternatives and commitment to implement mitigation measures, avoids and minimizes GHG emissions as far as economically and technically feasible.**

- (i) **The Paris Methodology Specific Assessment Must Require Quantifying, Factoring in, and Disclosing Each Project's Full and Quantifiable Absolute GHG Emissions, Including Scope 3 GHG Emissions.** The Paris Methodology requiring full quantification and disclosure of absolute GHG emissions for each contemplated project is needed to determine whether the projects EBRD finances individually and or cumulatively cause or contribute to exceedance of the 1.5°C warming limitation objective. EBRD's and its Global

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<sup>43</sup> Bilal, Adrien & Känzig, Diego The Macroeconomic Impact of Climate Change: Global vs. Local Temperature, National Bureau of Economic Research, Working Paper 32450, DOI 10.3386/w32450, Issue Date May 2024, Available at: [https://www.nber.org/papers/w32450?utm\\_campaign=ntwh&utm\\_medium=email&utm\\_source=ntwg1](https://www.nber.org/papers/w32450?utm_campaign=ntwh&utm_medium=email&utm_source=ntwg1)

North shareholder’s due diligence obligations under the Paris Agreement, human rights treaties, and customary international law to assess and prevent harm require the EBRD ensure that prior to project financing decisions, the full scope of a project’s climate change impacts are assessed and disclosed. See Appendixes B-D, *post*.

Including Scope 3 emissions in this analysis is necessary to gage the alignment of EBRD’s project specific and cumulative finance flows with the 1.5°C warming limitation objective. It is further consistent with good international industry practice and best reasonably available and practiced methods for environmental and social impact assessments, as it is required and performed regularly under NEPA in the United States, and in many jurisdictions across the world. However, the Draft Methodology specifically and impermissibly excludes the requirement to quantify scope 3 emissions and to use scope 3 emissions in the economic viability analysis.<sup>44</sup>

The notion that scope 3 emissions should not be required to be calculated because they are hard to calculate and out of client control, may have been closer to true 10-15 years ago, but not anymore given current practices regularly implemented around the globe. Further, some clients chose to contract out activities with significant GHG emissions like construction and retaining contractors or fleets for shipping. Not only is information obtainable that would allow for quantification of these Scope 3 emissions, but for EBRD’s individual project and cumulative financing flows to come into alignment with the 1.5°C warming limitation objective, it must also require that these emissions be avoided when economically and technically feasible as well.<sup>45</sup> To do so, these emissions must be quantified in the first instance prior to financing approvals. Furthermore, quantification of a project’s Scope 1, 2, and 3 emissions prior to project financing is needed to determine whether the EBRD must disclose and require ongoing monitoring and reporting of a project’s GHG emissions (needed to determine whether a project’s estimated GHG emission will cross over the ESP public disclosure and continuous monitoring/reporting thresholds), and to determine the carbon footprint and Paris alignment of EBRD’s cumulative financing activities – especially in the instance where EBRD’s ongoing GHG monitoring and reporting requirements do not apply.

As such, the Paris Methodologies must be amended to require EBRD to ensure not only that Scope 1 and 2 GHG emissions are quantified and disclosed for each project over its lifecycle prior to financing approval, but to clarify that quantification of Scope 3 emissions over a project’s lifecycle

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<sup>44</sup> Draft Paris Methodology Annex 3, A.3.4 provides: “*Scope 3 GHG emissions (those related to the upstream or downstream impact of the investment) will generally not be included [in the Economic Viability Test] as there is no agreed methodology for these types of impact and there is a risk of double-counting.*”; Draft Paris Methodology page 21 at fn. 33 provides: “*To determine whether emissions are significant, the Bank, in line with its EBRD GHG protocol for assessment of GHG emissions and as set out in its Environmental and Social Policy, will consider Scope 1 (direct) and Scope 2 (indirect or electricity) GHG emissions. Scope 3 GHG emissions (those related to the upstream and/or downstream impacts of the project) will generally not be included, as there is no agreed methodology for these types of impact and there is a risk of double-counting. However, as the EBRD also considers the upstream and downstream impact of its projects, Scope 3 GHG emissions may be taken into consideration for some projects where these are particularly relevant (for example, energy pipelines and roads).*”

<sup>45</sup> See judgement in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (2024), at paragraph 280 page 126 providing: “[i]t would therefore be difficult, if not impossible, to discuss Switzerland’s responsibility for the effects of its GHG emissions on the applicants’ rights without taking into account the emissions generated through the import of goods and their consumption or, as the applicants labelled them, “embedded emissions.””([judgement available here](#))

is mandatory as well. As such we request the following language be included in the Paris Methodology to specify when Scope 3 GHG emissions must be quantified:

**Scope 3 emissions must be quantified, where feasible. Where feasible means as consistent with best available commonly practiced methods for quantifying GHG Scope 1, 2, and 3 emissions and when information is obtainable that would allow GHG emissions to be quantified.**

This modification in red respects client capacity, and principles of common but differentiated responsibilities, as if the client does not have the expertise, capacity, or resources to conduct this analysis, EBRD through its due diligence obligations and tremendous financial resources it is disposal, could conduct this analysis or retain consultants to do so. In the alternative, EBRD could loan the client funds to secure this analysis. This loan could be forgiven if the project is not ultimately pursued, or if the project is pursued, included in the total amount of financing provided.

**(ii) The Paris Methodology Specific Assessment Must Require Conducting, Factoring in, and Disclosing a GHG emissions and climate change impact alternatives analysis in line with best reasonably available and practiced methods such as NEPA.**

For EBRD and its Member States adhere to their harm prevention and due diligence obligations under the Paris Agreement, human rights treaties, the Law of the Sea, and customary international law, EBRD Member States must ensure the Paris Methodology it adopts does not result in the projects EBRD finances to individually or cumulatively cause or contribute to exceedance of the 1.5°C warming limitation objective. See Appendices B-D, *post*. Essential to doing so is EBRD's Paris Methodology requiring that a GHG emissions alternatives analysis, in line with best reasonably available and practiced methods, is conducted and used in the Specific Assessment as a critical factor to determine whether a project is Paris aligned. This is because, properly performed, a GHG alternatives analysis will result in providing EBRD with information that (a) details economically and technically feasible alternatives and mitigation measures that can achieve a project's purpose while avoiding GHG emissions as far as possible, and that (b) informs EBRD of the feasible alternatives and mitigation measures that must be adopted as part of the project to align EBRD's finances flows with the 1.5°C warming limitation objective.

Such a best reasonably available and practiced method is the GHG emissions and climate change alternatives analysis required by NEPA, which also constitutes good international industry practice (GIP).<sup>46</sup> Accordingly, the Draft Paris Methodology must be amended to include the requirement to

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<sup>46</sup> 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>) (NEPA GHG Guidance); *See also* NEPA Implementing Regulations Revisions Phase 2, 89 FR 35442-35577, agency docket number CEQ-2023-0003 (published May 1, 2024; effective July 1, 2024) (these updated NEPA Regulations do not impact the still in effect January 8, 2023 NEPA GHG Guidance detailing how to properly implement the provisions of NEPA and the NEPA Regulations that apply to GHG emissions and climate change impact assessments, alternatives analysis, and mitigation analysis in environmental impact statements and analyses, available at [https://www.regulations.gov/document/CEQ\\_FRDOC\\_0001-0036](https://www.regulations.gov/document/CEQ_FRDOC_0001-0036); *See* IFC's Guidance Notes: Performance Standards, Guidance Note 1 at GN23, 25, 58 at 10-11, 19, 49 (Updated June 14, 2021) (directing readers to the Guidance Note 1 bibliography listing NEPA for further guidance on GIP and best international practice for developing environmental and social impact assessments and studies).

conduct a GHG emissions alternatives analysis to inform Paris alignment that, at a minimum, adopts NEPA's requirements, which include, but are not limited to, the following accompanied by analysis/study sufficient to support findings:

*(1) for energy projects - comparison of the proposed energy project to a no project alternative and all renewables options with a thorough assessment of the energy demand to be met and whether and which renewable and other clean energy options could be used to provide this demand; for all other projects with GHG emissions, comparison of the contemplated project to a no project alternative and other feasible project alternatives that can avoid or minimize/significantly reduce GHG emissions and climate change impacts; (2) technical and economic feasibility analysis for all renewable energy sources; (3) full quantification of scope 1, 2, and 3 GHG emissions for the proposed project over its lifetime in comparison to all feasible alternatives that can avoid or minimize/significantly reduce GHG emissions; (4) for the proposed project and all alternatives, 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.); (5) full analysis of mitigation measures to reduce GHG emissions to the greatest extent economically and technically feasible; (6) an explanation of how the proposed action and alternatives would help meet or detract from achieving relevant climate action goals and commitments that looks beyond NDCs to limiting warming to 1.5°C; and (7) analysis, after affected community engagement, to explain the real-world effect, including those that will be experienced locally and disproportionately by vulnerable communities, associated with GHG emissions from the proposed project that contribute to climate change (e.g. from sea-level rise, fire, drought, health impacts, etc.).*

NEPA's GHG emissions and climate change alternatives analysis requirements contain a plethora of elements,<sup>47</sup> that if performed, provide powerful substantive tools needed to persuade EBRD and its Directors to abandon financing for proposed carbon intensive energy projects, and to instead direct financing towards feasible renewable energy infrastructure that can meet a project's and or region's energy demand. Proper and supported performance of this analysis is also needed to significantly reduce GHG emissions from all projects EBRD is contemplating financing, and to help understand the true cost (in monetary terms) of each ton of GHG emissions a project emits in comparison to its feasible alternatives to EBRD. Without conducting an alternatives analysis that meets NEPA's requirements, EBRD cannot perform the necessary due diligence prior to financing decisions required by its obligations under international law, and necessary to prevent climate change harms and help significantly reduce the occasions where remedial action is required for climate change harms EBRD causes or contributes to.

**(iii) The Paris Methodology Specific Assessment Must Require Analyzing, Adopting, Factoring in, and Disclosing a GHG Emissions Mitigation Hierarchy**

For EBRD and its Member States adhere to their harm prevention and due diligence obligations under the Paris Agreement, human rights treaties, the Law of the Sea, and customary international law, EBRD Member States must ensure the Paris Methodology it adopts does not result in the projects EBRD finances to individually or cumulatively cause or contribute to exceedance of the 1.5°C warming limitation objective. See Appendices B-D,

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<sup>47</sup> See fn. 46, *ante*.

*post.* Essential to doing so is EBRD's Paris Methodology securing and requiring adoption of measures to avoid GHG emissions as far as economically and technically feasible as a first priority, followed by adoption of measures to minimize impacts as far as economically and technically feasible.

Thus, the Draft Paris Methodology must be amended to specify that the Specific Assessment will require, as a requisite to a determination that a project is Paris aligned, that mitigation measures are adopted that avoid GHG emissions and climate change impacts as far as economically and technically feasible (as a 1<sup>st</sup> priority), and mitigation measures to minimize GHG emissions as far as economically and technically feasible are adopted after adoption of all feasible avoidance measures. The economic and technical feasibility limitations of the mitigation hierarchy requirements ensure respect for client capacity and the principle of "common but differentiated responsibilities" at the project planning, assessment, and implementation stages.

In addition to the Draft Paris Methodology ensuring and securing adoption of a mitigation hierarchy for GHG emissions and climate change impacts, the Paris Methodology must require ***that analysis is conducted and disclosed that is needed to inform and support it.*** This includes analyzing, and providing supporting analysis to document, prior to financing decisions (i) measures that can be taken to avoid GHG emissions to the furthest extent technically and economically feasible as a first priority; and (ii) after implementation of the avoidance measures, additional measures that can be taken to minimize any remaining GHG emissions to the furthest extent economically and technically feasible. In addition, it includes a complete assessment of a project's scope 1, 2, and 3 GHG emissions to assess the extent of the GHG emissions avoidance and minimization measures needed.

We oppose the Paris Methodology permitting carbon offsets as permissible mitigation or impact avoidance measures for GHG emissions and climate change impacts. This is because carbon offsets are too commonly used as false solutions in lieu of feasible measures that can entirely avoid or substantially minimize GHG emissions from projects, and can result in enabling harmful projects with impacts that should and can be avoided. Furthermore, they too oft fail to meet necessary environmental integrity requirements pertaining to additionality, permanence, not overestimated, not claimed by another entity, and not associated with significant social and environmental harms. They also commonly fail to respect and protect the ecosystem services indigenous peoples and affected communities depend upon, and their full rights, territories, sovereignty, and jurisprudence over the land, air, water, and biodiversity. Thus, we request the Paris Methodology prohibit offsets as permissible use for GHG emissions and in a GHG emissions mitigation hierarchy.

**(e) Fifth, the Economic Viability test is flawed in that the GHG emissions threshold for conducting the test is way too high.**

Specifically, the Draft Methodology Section 2.42 provides that an Economic Viability Test is required "if a project leads to an increase of 25,000 tonnes of carbon dioxide equivalent (CO<sub>2</sub>e) per year relative to a baseline or has a footprint of more than 100,000 tonnes of CO<sub>2</sub>e per year in absolute terms." If these thresholds are left as is, it would lead to incomplete Paris Alignment analysis for most projects EBRD finances, including those with significant emissions that could be avoided with analysis and adoption of feasible mitigation measures. Further, it would preclude EBRD from measuring the GHG emissions and their impacts cumulatively from all projects



EBRD finances, which is also needed to gauge EBRD's alignment with the Paris Agreement and the 1.5°C warming limitation objective.

Instead of the thresholds in the Draft Paris Methodology, the following thresholds should be used to determine when the Methodology requires GHG emissions be quantified and when it requires application of its Economic Viability Test:

***When a Project's Scope 1, 2, and 3 Emissions are Estimated to Exceed (a) 20,000 tCO<sub>2</sub>-eq over a project's lifecycle (not just over 20,000 tCO<sub>2</sub>-eq per year), (b) 500 absolute tons of carbon dioxide equivalent per year, or (c) 500 absolute tons of carbon dioxide equivalent during project construction.***

Including a construction threshold is important as well, as some projects may have significant GHG emissions during the construction stage that are feasible to avoid.

Considering the climate crisis, where limiting global warming to 1.5°C is critical for the future of the planet and its inhabitants, we feel this approach is appropriate, as it includes all EBRD financed projects except those with a very limited GHG emissions impact; is needed to determine if EBRD's financial flows are aligned with the 1.5°C warming limitation objective – as it is necessary for EBRD and the public to measure the cumulative carbon footprint of all of EBRD's investments; and is needed to achieve avoidance of GHG emissions for each project as far as economically and technically feasible, which requires quantification and disclosure of a project's true total Scope 1, 2 and 3 GHG emissions amounts in the first instance.

In addition, these thresholds are necessary to ensure the public and EBRD are aware of projects that will emit significant GHG emissions, and to ensure feasible avoidance of these emissions prior to project financing decisions. And further, although their threshold amounts are outdated and set too high considering the climate crisis, **the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) have had a disclosure requirement of 25,000 tCO<sub>2</sub>-eq over a project's life cycle (*rather than tCO<sub>2</sub>-eq per year*)** in place since 2012 as standard practice all DFIs need to at least replicate to adhere to their due diligence obligations under international law to assess and prevent climate change risks and harms.<sup>48</sup>

## **8.) The Annex 5 List of High Emitting Sectors and Annex 2's Universally Aligned List Must Be Amended to Address the Significant and High Level of GHG Emissions from Poultry and Swine Livestock Operations.**

It is common knowledge that emissions from livestock, including from poultry and swine operations, result in significant GHG emissions due to methane emissions in their manure and the Scope 3 GHG emissions from growing and transporting cereals for feed.<sup>49</sup> As seen in almost all IFC investments in poultry and swine operations, these emissions are overlooked. And in many cases, poultry and swine

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<sup>48</sup> IFC's Access to Info Policy plainly states that prior to project financing, a project's GHG emissions must be publicly disclosed when these amounts will exceed 25,000 tCO<sub>2</sub>-eq over a project's life cycle, not just per year. IFC Access to Info Policy at ¶ 31 (a)(v).

<sup>49</sup> See Harwatt, H. Hayek, M.N. Behrens, P. and Ripple, W.J. (2024) Options for a Paris-compliant livestock sector. Timeframes, targets and trajectories for livestock sector emissions from a survey of climate scientists. Research report, Brooks McCormick Jr. Animal Law & Policy Program, Harvard Law School. March 2024 (available at: <https://animal.law.harvard.edu/wp-content/uploads/Paris-compliant-livestock-report.pdf>).

operations in Europe or Asia source GHG intensive cereals for poultry and swine feed from South America or other distant non-local locations, which results in tremendous GHG emissions during transport. For these reasons, Annex 2 of the Draft Paris Methodology listing non-ruminant livestock, should be amended to specifically detail that poultry and swine livestock operations are never considered Universally Paris Aligned. Similarly, Annex 5 of the Draft Paris Methodology should specifically provide that poultry and swine livestock operations are considered High Emitting Sectors. Such adjustments to Annex 2 and 5 are critical to ensuring EBRD's alignment with the Paris Agreement and its 1.5°C warming limitation objective. Without these modifications, EBRD could improperly automatically determine poultry and or swine projects are "Universally Aligned" and thus not subject to GHG emissions quantification and avoidance/mitigation requirements needed for EBRD to align these projects with the Paris Agreement.

**9.) The Draft Paris Methodology Incorporates EBRD's Draft Environmental and Social Policy (ESP) to Achieve Alignment of its Indirect Investments with the Paris Agreement.<sup>50</sup> However, the ESP is Inadequate to Ensure Financial Intermediaries' Individual and Cumulative Investments Align with the Paris Agreement.** As such, BCA incorporates our requests for improvements on the Draft ESP, AIP, and DAIP requests as follows, which must be adopted for EBRD's finance flows and its Paris Methodology to align with the Paris Agreement:

**The ESP, AIP, and DAIP must specify that prior to its Financial Intermediary (FI) client's decisions to invest in a project, that the FI adheres to the ESP's requirements for public disclosure, and providing opportunity for public review, of the full GHG emissions and climate change impact and mitigation analysis, alternatives analysis, and mitigation measures as detailed in BCA's, The Big Shift Global's, Recourse's, Oil Change International's, and Menfem's Joint May 16, 2024 climate change comments on the ESP, AIP, and DAIP ([these May 16, 2024 Joint CSO Comments are available here](#)). In addition, the ESP must specify that during the appraisal process and prior to approving financing for FI investments, EBRD is required to ensure that the FI client ensures adherence to all requirements of the ESP. In the context of climate change impacts, this requires the ESP, AIP, and DAIP specify amongst other things, that the FI must publicly disclose, and provide opportunity for public review of, the full GHG emissions and climate change impact and mitigation analysis, alternatives analysis, and mitigation measures for a contemplated investment ***120 days before the FI decides to finance a project.*****

The ESP must also specify that prior to financing FIs, EBRD is required to ensure that the FI will adhere to the ESP impact assessment and mitigation requirements before the FI makes investments of its own. As such, the ESP must be amended to specify EBRD is required to ensure the FI understands, and agrees in its financing agreement with the EBRD, that the FI is required to meet all of the ESP's requirements applicable to EBRD direct investments (e.g. all of the ESP's requirements applicable to Category A, B, and C Projects).

In addition, as a necessary part of ensuring its FI clients meet all of the ESP's requirements applicable to EBRD direct investments, the ESP must be amended to specify EBRD is required to

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<sup>50</sup> Draft Paris Methodology Section 1.22 provides that EBRD's financial intermediaries (PFIs) will be required to meet minimum requirements to ensure that projects are structured in such a way that provides confidence in the Paris alignment of sub-transactions financed by EBRD proceeds, which "includes application of the Bank's Environmental and Social Policy [ESP] and the fossil-fuel exclusions set out in its Energy Sector Strategy. Draft Paris Methodology Section 1.22 at 8.

ensure the FI understands, and agrees in its financing agreement with the EBRD, that the FI is required to disclose its contemplated investments and their environmental impact assessments (including for GHG emissions and climate change) to the EBRD and public 120 days prior to its financing decisions. This would provide the public and EBRD, with needed safeguards, and notice and opportunity for review of FI contemplated investments prior to the FI's financing decision. In addition to playing a critical role in ensuring quantification and reduction of GHG emissions from FI projects in line with the EBRD's policies, EBRD ensuring such FI disclosures and release of impact assessments to the EBRD and public prior to FI financing commitments could substantially help EBRD prevent its FI clients from using EBRD funds to finance fossil fuel or other harmful projects without public or EBRD knowledge. See e.g., IFC FI investments resulting in financing of coal powerplants: "CAO, *Compliance Investigation Report, IFC Investments in Rizal Commercial Banking Corporation (RCBC)*, The Philippines, November 19, 2021" (RCBC case); see also Complaint to the CAO for FI financing of Jawa 9 and 10 coal fossil fuel projects "Complaint concerning IFC investment KEB Hana Indonesia Rights Issue IV, Project No 42034" (Jawa 9 and 10 case).<sup>51</sup> In the RCBC and Jawa 9 and 10 cases, if the IFC took necessary measures to ensure its FI clients disclosed their contemplated investments in coal powerplants and their impact assessment documents to the IFC and public prior to FI financing, the IFC and public could have been made aware of, and prevented, IFC's FI client from investing in these projects in the first instance.

It is well documented DFI financing of FIs remains a particular risk in terms of channeling funds to coal and other fossil fuel projects.<sup>52</sup> As such, the recent External Review of IFC/MIGA emphasized the need for IFC to "further clarify how it will assure itself of FI E&S performance, and strengthen its due diligence and supervision of FI clients," as "significant gaps remain in IFC's ability to ensure that FI clients are adequately assessing E&S risks in their portfolios and ensuring the application of the IFC Performance Standards in their higher-risk investments." External Review Report ¶ 8.

Specifying in its financing agreement with FIs, that public disclosure of the FI's investments and their environmental and social impact assessments prior to FI financing decisions in accordance with the disclosure timeliness in EBRD's board adopted policies is required as part of FI's requisite adherence to the ESP, is needed to achieve implementation of the ESP. Moreover, it is required to ensure EBRD adheres to its due diligence obligations to prevent harm from its financing activities under international law.

In addition, to reflect these above positions, we request the following additions and modifications to the ESP, AIP, and DAIP:

- (a) That ESP Paragraph 7.9 be modified as follows (modification in red text) so that ESRs 1 and 3 apply to FI investments:

A project will be categorised as a "financial intermediary" ("FI") if the financing structure involves the provision of funds through financial intermediaries (FI projects). FI clients are required to comply with ESR 2, ESR 4 and ESR 9. If sub-

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<sup>51</sup> RCBC case (available at: [https://www.cao.ombudsman.org/sites/default/files/downloads/CAO%20Compliance%20Investigation\\_RCBC-01\\_Philippines\\_Nov%202021.pdf](https://www.cao.ombudsman.org/sites/default/files/downloads/CAO%20Compliance%20Investigation_RCBC-01_Philippines_Nov%202021.pdf)); Jawa 9 and 10 case (available at: [https://www.inclusivedevelopment.net/wp-content/uploads/2023/09/Jawa-9-and-10\\_CAO-complaint.pdf](https://www.inclusivedevelopment.net/wp-content/uploads/2023/09/Jawa-9-and-10_CAO-complaint.pdf)).

<sup>52</sup> *Id.*

projects financed by FIs through EBRD funding meet the criteria of Category A or B projects as listed in Appendix 2 to this Policy, these will be required to meet ESRs 1 to ~~8~~ and 10.

This requirement is necessary to ensure EBRD discloses the FI's contemplated investment and full environmental and social impact assessment on EBRD's public portal with sufficient time for EBRD and public review. Further, the ESP, AIP, and DAIP must also specify EBRD is required to disclose this information 120 days prior to FI financing approvals.

- (b) To ensure EBRD's FI investments align with the 1.5°C warming objective and considering the climate crisis, the ESP must be amended to provide that any FI transaction expected to emit over absolute GHG emissions of 1,000 tons CO<sub>2</sub>-eq/yr. is considered a high risk with a "A" Risk Categorization under ESP paragraph 7.6, and that such classification as high E&S risk is dependent on the total gross or absolute GHG emissions from the project.

In addition, the ESP must be amended to explicitly provide that any FI transaction expected to emit over absolute GHG emissions of 500 tons CO<sub>2</sub>-eq/yr. or during construction prior to avoidance and mitigation measures is considered a substantial risk with a "B" Risk Categorization under ESP paragraph 7.6.

Considering the climate crisis, these edits must be made, as any new continuous streams of GHG emissions are irreversible and will contribute to exceeding the 1.5°C warming limitation objective. Moreover, these edits are critical to aligning EBRD's investments with the 1.5°C warming limitation objective, as EBRD's financial flows can only come into alignment with this objective if its FI client's individual projects resulting in over 500 ton CO<sub>2</sub>-eq/yr. or during construction are subject to the ESP requirements for GHG emissions quantification, alternatives analysis, mitigation, and disclosure.

- (c) The ESP, AIP, and DAIP must be amended to include the following language in red to provide the public with adequate opportunity to review a FI transaction prior to the FI's approval or commitment to the transaction, and to ensure the FI adheres to the appropriate ESRs (at least ESR 1 and ESR 3 for climate change impacts and GHG emissions):

**For Category A and B FI transactions to be supported by EBRD financing, EBRD will require FIs to meet the requirements of ESRs 1 through 10. For all FI transactions, EBRD will also review the screening and risk classification undertaken by the FI under its ESMS. 120 days prior to a FI's financing decision and financing commitment, EBRD will publicly disclose the environmental and social impact assessment and mitigation, and its underlying analysis, prepared and submitted by FI borrowers/investees to EBRD.**

Such an edit is also necessary for EBRD to ensure adherence to the requirements of its "Exclusion List" requiring the EBRD to "not knowingly finance, directly, or indirectly through FIs, projects where EBRD Bank proceeds are used for activities relating to {the activities on the Exclusion list}." ESP Appendix 1 at page 16, ESP Section III at 1.2.

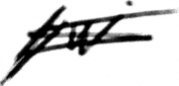
**10.) EBRD's Board must adopt the Paris Methodologies.** To adhere to their obligations under international law, EBRD Member States must not only ensure the Paris Methodology EBRD adopts results in the projects EBRD finances to not individually or cumulatively cause or contribute to exceedance of the 1.5°C warming limitation objective. In addition, for EBRD and its Member States to adhere to their duties under the Paris Agreement, the Law of the Sea, human rights treaties, and customary international law, EBRD Member State Directors must formally adopt the Paris Methodology to bind EBRD to its requirements. Such an action is also necessary for EBRD's Member States themselves to assume responsibility and take necessary action to ensure alignment of EBRD's finance flows with the 1.5°C warming objective and the Paris Agreement.

### **Conclusion**

Thank you for considering our comments. The improvements we request to EBRD's Draft Paris Methodology are necessary for EBRD's financing and guarantee activities to come into alignment with the 1.5°C warming limitation objective, and for the EBRD and its each of its Member States to comply with their obligations under international law. Moreover, they are needed for EBRD to avoid causing and contributing to irreversible severe harm to communities and millions of people all over the world and in its investment regions, especially those who are differentially or disproportionately affected by changing climate.

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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**Enclosures:** Exhibits 1 and 2.

## **Appendix A: Summary of Current and Expected Climate Change Harms**

Global warming has already resulted in more frequent and severe heat waves, wildfires, supercharged storms, atmospheric rivers, and extended droughts resulting in catastrophic harms and loss of life. Weather events in 2022 broke records and devastated communities, ecosystems, and infrastructure. Deadly floods displaced millions in Pakistan, Nigeria, South Africa, and Australia; severe heat waves struck India, China, Europe, the U.S., and East Asia; and the Horn of Africa experienced its worst drought in 40 years.<sup>53</sup> And as documented by the IPCC:

*Approximately 3.3–3.6 billion people live in contexts that are highly vulnerable to climate change...Regions and people with considerable development constraints have high vulnerability to climatic hazards. Increasing weather and climate extreme events have exposed millions of people to acute food insecurity and reduced water security, with the largest adverse impacts observed in many locations and/or communities in Africa, Asia, Central and South America, LDCs, Small Islands and the Arctic, and globally for Indigenous Peoples, small-scale food producers and low-income households. Between 2010 and 2020, human mortality from floods, droughts and storms was 15 times higher in highly vulnerable regions, compared to regions with very low vulnerability.*

*In all regions increases in extreme heat events have resulted in human mortality and morbidity (very high confidence). The occurrence of climate-related food-borne and water-borne diseases (very high confidence) and the incidence of vector-borne diseases (high confidence) have increased. In assessed regions, some mental health challenges are associated with increasing temperatures (high confidence), trauma from extreme events (very high confidence), and loss of livelihoods and culture (high confidence). Climate and weather extremes are increasingly driving displacement in Africa, Asia, North America (high confidence), and Central and South America (medium confidence), with small island states in the Caribbean and South Pacific being disproportionately affected relative to their small population size (high confidence).*

*Climate change has caused widespread adverse impacts and related losses and damages to nature and people that are unequally distributed across systems, regions and sectors. Economic damages from climate change have been detected in climate-exposed sectors, such as agriculture, forestry, fishery, energy, and tourism. Individual livelihoods have been affected through, for example, destruction of homes and infrastructure, and loss of property and income, human health and food security, with adverse effects on gender and social equity. (high confidence) ... In urban areas, observed climate change has caused adverse impacts on human health, livelihoods and key infrastructure. Hot extremes have intensified in cities. Urban infrastructure, including transportation, water, sanitation and energy systems have been compromised by extreme and slow-onset events, with resulting economic losses, disruptions of services and negative impacts to well-being. Observed adverse impacts are concentrated amongst economically and socially marginalised urban residents. (high confidence).*

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<sup>53</sup> Banking on Climate Chaos, Fossil Fuel Finance Report 2023 (<https://www.bankingonclimatechaos.org/>).

*Global warming will continue to increase in the near term (2021-2040) mainly due to increased cumulative CO2 emissions in nearly all considered scenarios and modelled pathways... Continued emissions will further affect all major climate system components. With every additional increment of global warming, changes in extremes continue to become larger... With further warming, every region is projected to increasingly experience concurrent and multiple changes in climatic impact-drivers. Compound heatwaves and droughts are projected to become more frequent, including concurrent events across multiple locations (high confidence). Due to relative sea level rise, current 1-in-100 year extreme sea level events are projected to occur at least annually in more than half of all tide gauge locations by 2100 under all considered scenarios (high confidence). Other projected regional changes include intensification of tropical cyclones and/or extratropical storms (medium confidence), and increases in aridity and fire weather (medium to high confidence).*

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/](http://www.ipcc.ch/report/ar6/syr/)).

## **Appendix B: EBRD's and its Member States' Obligations Under International Law**

### **I. EBRD'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.<sup>54</sup> 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.”<sup>55</sup> The International Court of Justice made this finding in *FYROM v. Greece*.<sup>56</sup> 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.<sup>57</sup> “[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.”<sup>58</sup> Scholars in the field have come to similar conclusions. Barros persuasively applies those cases to the governing boards of international financial institutions, arguing that member states have due diligence obligations to take all measures to ensure that they know about risks to human rights before approving loans, mitigate those risks when making decisions, and ensure that loans already issued conform to their human rights conditions.<sup>59</sup> 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.<sup>60</sup>

### **II. EBRD's General Obligations Under International Law**

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<sup>54</sup> 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, Legal Accountability Int. Carbon Markets, at 152, 157-159 (Section 3.2); For examples, see fns. 52-57, 63, 90-105 *post*.

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

<sup>56</sup> 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*].

<sup>57</sup> 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).

<sup>58</sup> 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>.

<sup>59</sup> 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).

<sup>60</sup> Kerr, All Necessary Measures at 560-561, and fn. 282; Barros at 94.



International organizations,<sup>61</sup> including the EBRD, can also be held responsible for breaching their obligations, including those established by a treaty or customary international law.<sup>62</sup> This has happened numerous times, in various domestic courts.<sup>63</sup> The ILC DARIO Articles<sup>64</sup> 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").<sup>65</sup> 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.'<sup>66</sup> In addition, "the ICJ found long ago that international organizations are bound by 'obligations incumbent upon them under general rules of international law.'" <sup>67</sup> And 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.<sup>68</sup> Thus, for example, the EBRD itself must adhere to its member states' obligations under Article 4 of the UNFCCC to reduce or limit GHG emissions and their obligation under Articles 2 and 3 of the Paris Agreement to take ambitious efforts to hold global warming to less than 1.5°C.

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<sup>61</sup> 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).

<sup>62</sup> Kerr, ICAO at 3, and fn. 23 (citing Jan Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act,' (2017) 28(4) European Journal of International Law, 1137).

<sup>63</sup> Kerr, B. (2022). Mitigating the Risk of Failure: Legal Accountability for International Carbon Markets. Utrecht Law Review, 18(2), 145-161 (hereinafter "Kerr, Legal Accountability Int. Carbon Markets") at 152, fn. 57 and 58 (citing August Reinisch, *International Organizations Before National Courts* (2nd edn, Cambridge 2009) 28, notes 124-130 (listing and discussing cases), and fn. 61 (citing *Jam v International Finance Corp.*, 586 US \_\_ (2019) 5-6; Clemens Treichl and August Reinisch, 'Domestic Jurisdiction over International Financial Institutions for Injuries to Project-Affected Individuals: The Case of *Jam v International Finance Corporation*' (2019) 16 International Organizations Law Review 133).

<sup>64</sup> 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").

<sup>65</sup> Kerr, ICAO at 3.

<sup>66</sup> Kerr, ICAO at 4; ILC DARIO Articles, Art. 10.

<sup>67</sup> 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).

<sup>68</sup> Kerr, Clear Skies at 112, and fn. 138 (citing K. Daugirdas, 'How and Why International Law Binds International Organizations,' (2016) 57 Harvard International Law Journal, 137, 350, 364; citing F. Megret & F. Hoffman, 'The UN as a Human Rights Violator-some Reflections on the United Nations Changing Human Rights Responsibilities,' (2003) 25 Human Rights Quarterly, 318 (arguing that United Nations should be transitively bound by their member states' treaty obligations), <<https://www.jstor.org/stable/20069667>>; O. De Shutter, 'Human Rights and the Rise of International Organizations: The Logic of Sliding Scales in the Law of International Responsibility,' (2009) (CRIDHO Working Papers Faculte de Droit de L'Universite Catholique de Louvain), 10 (discussing functional succession theory), <https://ssrn.com/abstract=2446913>); see also, Kerr, Clear Skies at 113, and fn. 145 (citing Daugirdas, note 137, 368; Megret, note 138, 318).

## **Appendix C: EBRD’s and its Shareholder’s Obligations Under International Law for the EBRD Paris Methodology to explicitly prohibit financing of and guarantees/insurance for all upstream, midstream, and downstream fossil fuel projects**

As required by the Paris Agreement and customary international law that the EBRD and its Global North member state shareholders are obliged to adhere to,<sup>69</sup> the EBRD’s Paris Methodology must explicitly prohibit financing of and guarantees/insurance for all upstream, midstream, and downstream fossil fuel projects. These requirements are fully established by the analysis by Cook and Viñuales, and detailed in OCI’s and BCA’s December 18, 2023 OCI drafted Amicus brief to the Inter-American Court of Human Rights regarding the request from Chile and Columbia for an advisory opinion regarding “*Climate Emergency and Human Rights*” (attached as Exhibit 2), which the undersigned incorporate by reference.<sup>70</sup> In summary, Cook and Viñuales demonstrate that:

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

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

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

*Id.* As such, the EBRD’s Paris Methodology must include provisions that specify prioritization of financing for renewable energy projects to meet energy demands.

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<sup>69</sup> Appendix B, *ante*, details how both the EBRD and its Members State shareholders are obliged under international law to adhere to the Paris Agreement’s requirements, human rights treaties, and customary international law.

<sup>70</sup> International Obligations Governing the Activities of Export Credit Agencies in Connection with the Continued Financing of Fossil Fuel-Related Projects and Activities, Legal Opinion, Kate Cook and Jorge E. Viñuales, March 24, 2021, attached as Exhibit 1 and available at: <https://priceofoil.org/2021/05/04/eca-legal-opinion/> (hereinafter “Cook and Viñuales”); The analysis in Appendix B, *ante*, makes it clear that Cook’s and Viñuales’ opinion applies beyond export credit agencies to international organizations like the EBRD, and its Member State shareholders.

**Appendix D: EBRD’s and its Shareholder’s Due Diligence Obligations Under the Paris Agreement, and human rights and customary international law, require that its Paris Methodology contains requirements that EBRD ensure use of best readily available and necessary methods to adequately assess, avoid, and mitigate GHG emissions and their impacts from projects prior to its financing and guarantee decisions.**

## **I. Summary / Overview**

The EBRD, and also its member state shareholders, have obligations under international law that that they can be held accountable to in international tribunals and domestic courts. See Appendix B, *ante*.

As it pertains to climate change, the obligations under international law that the EBRD and its member states must adhere, include their due diligence<sup>71</sup> obligations arising under the Paris Agreement, human rights treaties, and customary international law. Because the projects with GHG emissions EBRD enables by providing financing or guarantees pose a severe risk of climate harm, these due diligence obligations require EBRD and its member states to ensure that its Paris Methodology requires climate change impacts, and measures to avoid them, to be assessed and implemented prior to financing approvals using best reasonably available and practiced methods.<sup>72</sup> Those methods include the processes required and practices performed under the National Environmental Policy Act (NEPA) in the United States applicable to quantifying GHG emissions, assessing their impacts, and analyzing alternatives and feasible avoidance and other mitigation measures because these methods are frequently and routinely practiced and implemented.<sup>73</sup>

EBRD’s Paris Methodology thus must explicitly adopt NEPA’s requirements for climate change and GHG impact assessments as a minimum threshold for the reasonably best available methods that the EBRD must meet if it is to adhere to its due diligence obligations under international law. Adopting NEPA’s requirements for GHG emissions and climate change would also help prevent EBRD’s directly and indirectly financed projects from imparting climate change harms, and help it significantly reduce the occasions remedial action is required as a result of its financing activities.

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

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

<sup>72</sup> As detailed in Appendix C, *ante*, EBRD’s due diligence obligations extend beyond adequate study prior to project approvals to prevent its financing activities from causing or contributing to climate change harms. They also include EBRD taking substantive measures, such ceasing all direct and indirect financing of fossil fuels.

<sup>73</sup> See fn. 46, *ante*: Interim (CEQ) NEPA guidance effective January 8, 2023 for GHG emissions and climate change assessments, alternatives analysis and mitigation in environmental impact statements.

diligence will ensure that alternatives and mitigation measures to avoid GHG emissions and their impacts are *economically and technically feasible*.

A more detailed overview of EBRD's due diligence obligations under the Paris Agreement, human rights treaties, and customary international law with supporting citations is provided below in Sections II-IV to this Appendix D.

## II. EBRD's and its Member State's Due Diligence Obligations under the Paris Agreement

As detailed in Appendix B, the IFC and its Members States party to the Paris Agreement, are obliged under international law to adhere to the Paris Agreement's requirements. See Appendix B., *ante*.

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

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

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<sup>74</sup> International Obligations Governing the Activities of Export Credit Agencies in Connection with the Continued Financing of Fossil Fuel-Related Projects and Activities, Legal Opinion, Kate Cook and Jorge E. Viñuales, March 24, 2021, available at: <https://priceofoil.org/2021/05/04/eca-legal-opinion/> (“Cook and Viñuales”) at ¶¶ 60, 70-72, 85, 265(h); See, e.g. World Bank Group, The World Bank Group's Approach to Paris Alignment, Washington, D.C., March 16, 2023 (<http://documents.worldbank.org/curated/en/099658203162320142/IDU1598309ef195cc148fd195421981d12bf8bf6>); 2018 MDBs' Joint Declaration, The MDBs' alignment approach to the objectives of the Paris Agreement: working together to catalyse low-emissions and climate-resilient development at 1 (<https://thedocs.worldbank.org/en/doc/784141543806348331-0020022018/original/JointDeclarationMDBsAlignmentApproachtoParisAgreementCOP24Final.pdf>).

<sup>75</sup> Cook and Viñuales at ¶60

<sup>76</sup> Cook and Viñuales at ¶70

<sup>77</sup> Cook and Viñuales at ¶72

<sup>78</sup> *Id.*; See *also*, Cook and Viñuales at ¶108

Article 3 further requires specific assessment of all relevant finance flows. It requires Parties “to undertake and communicate ambitious efforts,” including in regards to finance, with a view to achieving the Article 2 purposes.<sup>79</sup> Article 4 (1) provides “[i]n order to achieve the long-term temperature goal set out in Article 2, Parties aim ... to undertake rapid reductions [in GHG emissions] thereafter in accordance with *best available science*.”

State parties are required to implement the Paris Agreement in good faith,<sup>80</sup> which means that action which directly threatens, undermines, or frustrates the achievement of the Article 2 goals – namely the prevention of dangerous climate change - exceeds the margin of discretion allowed by the Paris Agreement.<sup>81</sup> It follows from Article 2 of the Paris Agreement, as read with Articles 3, 4 and 9 in particular that (1) States, as an aspect of their requisite good faith implementation, have an obligation of due diligence that encompasses undertaking *ambitious efforts* in regards to financial flows to meet the Paris Agreement’s objectives.<sup>82</sup> Furthermore, these efforts must be informed by *best available science* to assess whether finance flows, including those for which the EBRD is responsible, are consistent with the global carbon budget.<sup>83</sup> This not only means the EBRD must ensure best reasonably available commonly practiced science, such as the methods used under NEPA, are used – prior to financing approval for each project - to quantify a project’s scope 1, 2 and 3 emissions and their impacts, conduct a GHG/climate change alternatives analysis, and assess the mitigation measures that can avoid and minimize a project’s GHG emissions to the furthest extent economically and technically feasible. It also means prior to a financing approval, EBRD must actually ensure alternatives and mitigation measures are adopted to avoid GHG emissions that good faith due diligence shows to be economically and technically feasible and that allows for achievement of the project purpose. Thus, for a hypothetical example – not taking into consideration that the EBRD’s Paris Methodology should prohibit financing of fossil fuel energy infrastructure anyway for the reasons in the text of this letter and Appendix C - in the context of contemplating financing fossil fuel energy projects, such as a natural gas plant which would emit very large quantities of GHG emissions no matter the plant’s configuration, efficiency, or mitigation measures, if an alternatives analysis shows it would be technically and economically feasible for renewable energy infrastructure to meet a region’s energy demand, the Paris Agreement requires the EBRD abandon financing for the contemplated fossil fuel project and facilitate financing for renewable energy options instead.

Article 4(3) further provides “[e]ach Party’s successive nationally determined contribution will represent a *progression* beyond the Party’s then current nationally determined contribution and reflect its *highest possible ambition*, reflecting its common but differentiated responsibilities and respective capabilities, in

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<sup>79</sup> Cook and Viñuales at ¶ 75.

<sup>80</sup> Cook and Viñuales at ¶ 79 (providing there is a “general duty to implement the Paris Agreement in good faith, as reflected in Article 26 of the Vienna Convention on the Law of Treaties (VCLT) 135 and under customary international law”).

<sup>81</sup> Cook and Viñuales at ¶ 80.

<sup>82</sup> Paris Agreement, Article 3; Cook and Viñuales at ¶¶ 75, 76, 103-105.

<sup>83</sup> Paris Agreement, Article 4(1); Cook and Viñuales at ¶¶ 103-105; Cook and Viñuales at ¶110 (providing “due diligence must entail acting in proportion to the scale of the risk posed by the conduct assessed, having regard to the best available science... This means that assessment of the risks posed by an investment/project should take account of all the risks posed.”).

the light of different national circumstances.” “The standards of “highest possible ambition” and “progression” (Articles 3, 4(1) and (3) of the Paris Agreement), as these relate to the current production gap and global carbon budget, should [] inform due diligence.”<sup>84</sup> This further supports that prior to EBRD approving financing for a project, EBRD must ensure a project’s scope 1, 2 and 3 emissions and their impacts must be taken into account, a robust and supported GHG/climate change alternatives analysis is conducted in line with best reasonably available methods, and alternatives and mitigation measures are assessed and committed to that can avoid and minimize a project’s GHG emissions to the furthest extent economically and technically feasible.

Article 9(5) requires that developed country Parties are to biennially communicate indicative quantitative and qualitative information related to Article 9, paragraphs 1 and 3, of the Paris Agreement.<sup>85</sup> “Article 9(5) therefore entails not only a duty to report on the provision of support[,] but also to account for finance flows which run counter to the goal set out in Article 2(1)(c).”<sup>86</sup> It follows Article 9 also requires quantification and reporting of a project’s scope 1, 2 and 3 emissions, and assessing and reporting on the studied and actually implemented alternatives mitigation measures that could avoid and minimize a project’s GHG emissions to the furthest extent economically and technically feasible.

Article 13 establishes a transparency framework, one purpose of which is to: “provide a clear understanding of climate change action in the light of the objective of the Convention as set out in its Article 2, including clarity and tracking of progress towards achieving Parties’ individual nationally determined contributions under Article 4.”<sup>87</sup> “A good faith interpretation of this obligation entails transparency in relation to finance flows which are inconsistent with the Article 2(1)(c) pathway and Article 2 goals as well as finance flows which are consistent with it.”<sup>88</sup> It follows Article 13 also requires quantification and reporting of a project’s scope 1, 2 and 3 emissions, and assessing and reporting on the studied and actually implemented alternatives mitigation measures that could avoid and minimize a project’s GHG emissions to the furthest extent economically and technically feasible.

The due diligence “duties arising from Article 2(1)(c) of the Paris Agreement and related provisions, including from Articles 2(1)(a), 3, 4, 9, and 13 as detailed above, should be considered in the context of the leverage that States have to align public finance with low greenhouse gas emissions and climate-resilient development through their contributions to and regulation of a range of bodies including MDBs and DFIs.”<sup>89</sup> It is clear that this duty of due diligence applies to the EBRD and its Global North members states, as they possess ample financial resources to satisfy it. That these due diligence responsibilities fall on the EBRD and its Global North Member states, is consistent with Article 2(2) of the Paris Agreement requiring the Agreement to “be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national

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<sup>84</sup> Cook and Viñuales at ¶ 104.

<sup>85</sup> Cook and Viñuales at ¶ 98.

<sup>86</sup> Cook and Viñuales at ¶ 100.

<sup>87</sup> Paris Agreement, Article 13(5).

<sup>88</sup> Cook and Viñuales at ¶¶ 113-114.

<sup>89</sup> Cook and Viñuales at ¶¶ 78-79.

circumstances.”<sup>90</sup> EBRD and its Global North Member States securing such diligence is also consistent with Article 3’s objective for “[t]he efforts of all Parties [to] represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of th[e] Agreement.”<sup>91</sup>

### III. EBRD’s and its Member State’s Due Diligence Obligations under Customary International Law and Human Rights Treaties

In addition to the Paris Agreement, other sources of law that apply to the EBRD’s and its member state’s climate change due diligence obligations prior to financing approval are customary international law, informed by principles such as harm prevention and the precautionary approach, and human rights treaties.<sup>92</sup>

“Customary international principles require that states take all necessary measures to prevent transboundary harm, and exercise precaution when making decisions that pose a risk of harm to the environment.”<sup>93</sup> For instance, [u]nder the harm prevention principle, states are required to ‘take all appropriate measures to prevent significant transboundary harm or at any event minimize the risk thereof’ from activities in its territory or arising under its jurisdiction or control.”<sup>94</sup> This principle overlaps with others, including the “responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond national jurisdiction”—articulated in the Rio Declaration—and the requirement that states take precautionary measures even in the absence of scientific certainty as to significant harm.”<sup>95</sup> The cumulative climate impacts from the significant GHG emissions resulting from EBRD’s financing activities cross those risk thresholds, as climate change poses a risk of significant harm. See pages 1-2 and Appendix A, *ante*. This is because “assuming an approximately linear relation between GHG concentrations in the atmosphere and the severity of climate change, even very small cuts in global emissions can achieve significant global harm-prevention (or risk-reduction) benefits.”<sup>96</sup> Accordingly, harm prevention and precautionary customary principles clearly apply to climate change.<sup>97</sup> This means, international environmental principles require that the 1.5°C warming limitation objective must guide ABD’s and its member states

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<sup>90</sup> Cook and Viñuales at ¶¶ 56-57.

<sup>91</sup> Cook and Viñuales at ¶¶ 56-57, 75.

<sup>92</sup> See Appendix B, *ante*; Barros, Section III; Kerr, All Necessary Measures at 525-527 and note 16 (detailing state’s requirements under customary international law); Jose Viñuales, Due Diligence in International Environmental Law: a Fine-Grained Cartography, in *Due Diligence in the International Legal Order*, 113 (Heike Krieger et al. eds., 2021) (hereinafter “Viñuales”); Benoit Mayer, Interpreting States’ General Obligations on Climate Change Mitigation: a Methodological Review, 28 *RECIEL* 107 (2019); Benoit Mayer Climate Change Mitigation as an Obligation under Customary International Law, 48(1) *YALE J. INT’L L.* 105, 130-131 (2023)); *see also*, fn.48, *ante* (Kerr, All Necessary Measures at 560-561, and fn. 279).

<sup>93</sup> Kerr, All Necessary Measures at 527, and fn. 17; Viñuales at 113; *see also*, Benoit Mayer, Interpreting States’ General Obligations on Climate Change Mitigation: a Methodological Review, 28 *RECIEL* 107 (2019); Benoit Mayer, Climate Change Mitigation as an Obligation under Customary International Law, 48(1) *YALE J. INT’L L.* 105, 130-131 (2023).

<sup>94</sup> Kerr, All Necessary Measures at 541, and fn.120; United Nations, International Law Commission (ILC), Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, A/RES/56/82, (Dec. 12, 2001), at art. 3, commentary to art. 3, ¶ 18; Viñuales at 124.

<sup>95</sup> Kerr, All Necessary Measures at 541, and fn. 121; Viñuales at 116-117 (citing Rep. of the UN Conf. on Envir. and Devel., Rio Declaration on Environment and Development, A/ CONF.151/ 26 (1992); Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, Case No. 17, 2011 ITLOS Rep. 10, ¶¶ 125-135.

<sup>96</sup> Kerr, All Necessary Measures at 541, and fn. 122; Benoit Mayer Climate Change Mitigation as an Obligation under Customary International Law, 48(1) *YALE J. INT’L L.* 105 (2023) at 134.

<sup>97</sup> Kerr, All Necessary Measures at 541, and fn. 123.

in their actions related to the climate impacts of EBRD’s financing activities, and EBRD must take all necessary measures to ensure that its financing activities do not cause or contribute to exceedance of the 1.5°C warming objective.

Human rights law continues to evolve to encompass protection of the environment,<sup>98</sup> and it is firmly established “[c]limate change is one of the greatest threats to human rights.”<sup>99</sup> The UN General Assembly recognized the right to a clean, healthy, and sustainable environment as a human right in 2022.<sup>100</sup> Moreover, “human rights treaties guarantee rights to life and property—rights that international and domestic courts have found implicate a positive obligation to reduce environmental risks, including risks of harm from climate change.”<sup>101</sup> “Cases from the International Court of Justice, the International Tribunal for the Law of the Sea, and the European Court of Human Rights indicate that when states make decisions within an international organization, they must adhere to their human rights due diligence obligations and substantive obligations related to the organization’s area of competence.”<sup>102</sup>

As directly related to climate change impacts, “recent opinions from human rights treaty bodies have adopted a risk-based test for when human rights due diligence obligations apply to climate change: if it

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<sup>98</sup> Kerr, *All Necessary Measures* at 550.

<sup>99</sup> The United Nations Environment Programme (UNEP) - “[c]limate change is one of the greatest threats to human rights of our generation posing a serious risk to the fundamental rights to life, health, food and an adequate standard of living of individuals and communities across the world.”

<sup>100</sup> Kerr, *All Necessary Measures* at 550, and fn. 188; G.A. Res. 76/300, *The Human Right to a Clean, Healthy and Sustainable Environment*, at 3 (July 28, 2022).

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

<sup>102</sup> Kerr, *All Necessary Measures* at 529, and fn. 32 (citing numerous cases and scholarly articles in support).



is reasonably foreseeable that an activity under a state’s jurisdiction or control will cause a risk of climate harm, the state must diligently prevent it within the limits of its capacity.”<sup>103 104 105</sup>

“Due diligence requires states to ‘employ all means reasonably available to them’ to prevent a violation ‘so far as possible’.”<sup>106</sup> The types of conduct that could breach a due diligence obligation include action, inaction, or deficient action.<sup>107</sup> Cases from the International Court of Justice, the International Tribunal for the Law of the Sea, and the European Court of Human Rights indicate that when participating in the governing boards of international financial institutions, “member states have due diligence obligations to take all measures to ensure that they know about risks to human rights before approving loans, mitigate those risks when making decisions, and ensure that loans already issued conform to their human rights conditions.”<sup>108</sup> The same reasoning applies to states’ climate decision-making within the EBRD. Accepting that climate change harms human rights,<sup>109</sup> and EBRD member states are bound by their human rights obligations when acting as decision-makers within the EBRD, they are therefore under an obligation of conduct to do all they can in that role to make sure the EBRD’s climate decisions, and

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<sup>103</sup> Kerr, All Necessary Measures at 527, and fn. 21 (citing UN Human Rights Committee, ‘Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019,’ UN Doc. CCPR/C/135/D/3624/2019 (Sept. 22, 2022), ¶ 8.13; UN Committee on the Rights of the Child, ‘Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 104/2019,’ No. CRC/C/88/D/104/2019 ¶ 10.5-.7 (Oct. 8, 2021); see Case Comment, Committee on the Rights of the Child Extends Jurisdiction over Transboundary Harms; Enshrines New Test, *Saachi v. Argentina*, 135(7) HARVARD L. REV. 1981 (2022); Federica Violi, The Function of the Triad ‘Territory,’ ‘Jurisdiction,’ and ‘Control’ in Due Diligence Obligations, in *Due Diligence in the International Legal Order 75* (Heike Krieger et al. eds., 2021) at 81-82 (in Colombia Advisory Opinion, supra note 20 “court equated jurisdiction with causality and ultimately with imputability, thus altering the vertical understanding of human rights jurisdiction, and eventually risk proximity.”)).

<sup>104</sup> See European Court of Human Rights case *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* ([judgement available here](#)), and the International Tribunal on the Law of the Sea May 21, 2024 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 ([advisory opinion available here](#)); Pending cases before regional human rights courts and the International Court of Justice may further reinforce how human rights intersect and impact states’ obligations to prevent climate harm. See Kerr, All Necessary Measures at 550, and fn. 189; UN General Assem., Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change,’ G.A. Res. A/77/L.58 (Mar. 29, 2023); Request for an Advisory Opinion on the Climate Emergency and Human Rights Submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, (Jan. 9, 2023), [https://www.corteidh.or.cr/solicitud\\_opinion\\_consultivas.cfm?lang=en](https://www.corteidh.or.cr/solicitud_opinion_consultivas.cfm?lang=en).

<sup>105</sup> Cook and Viñuales at ¶¶ 47, 132-146, and fn. 182 (citing Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24, paragraph 50).

<sup>106</sup> Kerr, All Necessary Measures at 556-557, and fn. 244; Case Concerning the Application on the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 430 (Feb. 26, 2007); SRFC Advisory Opinion, supra note 203, ¶ 129; John Dugard & Annemarieke Vermeer-Künzli, The Elusive Allocation of Responsibility to Informal Organizations: the Case of the Quartet on the Middle East in Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie, 265 (Maurizio Ragazzi ed., 2013); see also Barros at 158, n. 916.

<sup>107</sup> Kerr, All Necessary Measures at 556, and fn. 245 (citing Barros at 121-122, 124, 195).

<sup>108</sup> Kerr, All Necessary Measures at 560-561, and fn. 279; Barros at Chapter III; see also Pasquale De Sena, International Monetary Fund, World Bank and Respect for Human Rights: A Critical Point of View, 20(1) ITALIAN Y.B. INT’L L. 247, 257 (2010).

<sup>109</sup> Kerr, All Necessary Measures at 546-550.

actions or inactions, uphold human rights.<sup>110</sup> Applying the harm prevention principle and precautionary principle yields the same due diligence obligations.<sup>111</sup>

Accordingly, in light of the climate risks and impacts from EBRD's financing activities, customary international principles and human rights law impose an equivalent obligation mandating that the EBRD and its member states use best available and practiced methods, and take all measures, to diligently account for, prevent, and mitigate the GHG emissions. This means that EBRD and its member states must require EBRD's Paris Methodology mandates EBRD ensures it diligently assesses and prevent the risk of climate harm from EBRD investments to extent of its capacities prior to financing approvals that meets the best reasonably available and practiced standard.

“As with other international environmental obligations, the required degree of diligence differs based on states' development and individual circumstances.”<sup>112</sup> Thus, like in the context of transboundary harm from hazardous activities, a highly developed or technologically advanced state has a greater scope of diligent conduct than other states.<sup>113</sup> This means, EBRD and its Global North Member States must use their best efforts, and best available practiced methods, to ensure that GHG emissions and their impacts from each project the EBRD finances are fully assessed, avoided, and mitigated to the furthest extent technically and economically feasible prior to EBRD financing. It also means, assuming that climate measures do not burden least developed countries or small island developing states and otherwise account for equitable principles, EBRD and its Member States are obliged to use their influence to push its clients to adopt a high level of ambition and effective measures that are consistent with the best available and used GHG emissions and mitigation methodologies and technological developments.<sup>114</sup> Considering the EBRD itself is required to commit the resources to ensure that for each project: Scope 1, 2, and 3 GHG emissions are fully quantified, that an adequate GHG / climate change alternatives analysis is conducted, and that a mitigation hierarchy for GHG emissions is implemented that avoids and eliminates GHG emissions as far as feasible, such a diligence obligation accounts for equitable principles and the right to develop.

Accordingly, the EBRD and its member states have a due diligence obligation to account for and reduce GHG emissions from its financing activities beyond what is required by any climate treaty.<sup>115</sup> As supported by Kerr, to the extent the risk of harm posed by climate change is not adequately addressed by the climate regime (e.g. the Paris Agreement, see Appendix D, Part II.B, *ante*), EBRD's general

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<sup>110</sup> See fns. 105-109, 111-112; Cook and Viñuales at ¶¶ 47, 132-146, and fn. 182 (citing Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24, paragraph 50; Ana Sofia Barros, Member States and the International Legal (Dis)order Accounting for the notion of Responsible Governance, International Organizations and Member State Responsibility, Critical Perspectives, Brill Nijhoff 2017, Chapter 4 at 66-71).

<sup>111</sup> Kerr, All Necessary Measures at 541, 561-562; Cook and Viñuales at ¶¶ 41, 44, 46, 47, 48 (PDF at 29-34).

<sup>112</sup> Kerr, All Necessary Measures at 529, and fn. 29; Viñuales at 125-126; Jaqueline Peel, Climate Change, in Shared Responsibility, 1033, 1041-1044 (Andre Nollkaemper, ed., 2018) (failure to stop, reduce or regulate emitting activities could be basis for finding state did not discharge due diligence obligation of harm prevention).

<sup>113</sup> Kerr, All Necessary Measures at 529, and fn. 30; United Nations, International Law Commission (ILC), Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, A/ RES/ 56/ 82, 12 December 2001, commentary to art. 3, ¶18; Cook and Viñuales at ¶47.

<sup>114</sup> Kerr, All Necessary Measures at 529-530; Kerr, Erga Omnes Obligation; Baine P. Kerr, Binding the International Maritime Organization to the United Nations Convention on the Law of the Sea, 19 INT'L ORG. L. REV. 391 (2022).

<sup>115</sup> See Kerr, All Necessary Measures at 526, and fn. 15; Neil McDonald, The Role of Due Diligence in International Law, 68 INT'L & COMP. L.Q. 1041 (2019).

obligations imposed by human rights treaties and customary law demand that the EBRD and its member states do more.<sup>116</sup>

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<sup>116</sup> Kerr, *All Necessary Measures* at 529-529, and fn. 27 (citing Natalie Dobson, *Extraterritoriality and Climate Change Jurisdiction: Exploring EU Climate Protection Under International Law*, 30 (2021); Jaqueline Peel, *Climate Change*, in *Shared Responsibility* 1041-1044 (Andre Nollkaemper, ed., 2018) (failure to stop, reduce or regulate emitting activities could be basis for finding state did not discharge due diligence obligation of harm prevention); Rozemarijn J. Roland Holst, *Taking the Current When it Serves: Prospects and challenges for an ITLOS Advisory Opinion on Oceans and Climate Change*’ *RECIEL* (2022), 7 (“as long as intended NDCs fall short of Paris Agreement temperature goal, can be argued that due diligence under LOSC obliges states to do more.”).