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الحركة النسوية للعدالة الاقتصادية، البيئية والتنمية في الشرق الأوسط وشمال إفريقيا  
MenaFem Movement for Economic, Development And Ecological Justice



May 16, 2024

European Bank for Reconstruction and Development

Attn: Ms. Odile Renaud-Basso, President

Attn: EBRD Board of Directors, EBRD Environment and Sustainability Department, Adonai

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**Re: CSOs' Climate Change Comments on the European Bank for Reconstruction and Development draft 2024 Environmental and Social Policy (ESP), draft 2024 Access to Information Policy (AIP), and draft Directive on Access to Information (DAIP)**

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 draft ESP and AIP. Bank Climate Advocates (BCA) and the undersigned civil society organizations (CSOs) submit the following comments and requests for improvements on the climate change aspects of the draft ESP, AIP, and DAIP.

### **Overarching Comments**

**EBRD's Draft ESP, AIP, and DAIP Must Be Improved 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> And on the world's current trajectory of GHG

<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.

emissions, the global temperature will increase by 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 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, and economically, politically, and socially marginalized people living in poverty, and who deal with the lasting effects of racial injustice and inequality, are likely to be hit hardest. The world and its most marginalized people cannot handle further significant GHG emissions, and especially ones that the EBRD can and has the duty to avoid.

**EBRD’ ESP, AIP, DAIP Must Address EBRD’s and its Member State’s Human Rights Obligations to Prevent Climate Change Harms Under Customary International Law, which Go Above and Beyond its Paris Agreement Obligations:** The aspects of the ESP, AIP, and DAIP 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 ESP, AIP, and DAIP 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 ESP, AIP, and DAIP must also address the legally binding human rights requirements set forth in litigation at the national and international courts, and in customary international law pertaining to human rights, harm prevention, and the precautionary principle, that establish EBRD’s and its Member States’ obligations to not finance projects that would cause or contribute to exceedance of the 1.5°C degree warming limitation objective.<sup>6</sup>

Accordingly, in addition to addressing and explaining how the ESP, AIP, and DAIP EBRD adopts is in line with EBRD’s and its members state shareholder’s obligations under customary human rights and harm prevention international law to prevent climate change harms prior to financing decisions as detailed in Appendix B and D, EBRD must also ensure that, and explain how, the ESP and AIP 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>7</sup> and also in any decisions issued by the Inter American Court of

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<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 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> This includes EBRD’s and its Member State’s obligations to set forth provisions in the ESP 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>7</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.

Human Rights (IACtHR),<sup>8</sup> International Tribunal on the Law of the Sea,<sup>9</sup> and International Court of Justice prior to EBRD's adoption of the ESP, AIP, and DAIP.<sup>10</sup> EBRD's and its member state's customary human rights and harm prevention obligations to prevent climate change harms differ from those under the Paris Agreement, and EBRD must explain how the ESP, AIP, and DAIP it adopts meets these obligations on top of those set forth under the Paris Agreement.

Furthermore, in addition to all the requested edits in the comments below, EBRD must modify the second sentence of ESP paragraph 2.8 to add these changes in red:

The EBRD will support its countries of operation and clients to implement their commitments to the Paris Agreement, **subject to EBRD and EBRD's member states adhering to their obligations under international law, including but not limited to their human rights and harm prevention climate change obligations under customary international law.**

In addition to the overarching comments above, these comments thus set forth three categories of specific improvements that must be made to EBRD's ESP, AIP, and DAIP for EBRD's activities to not worsen climate change, to align EBRD with the Paris Agreement's warming limitation objectives, and to ensure EBRD adheres to its climate change obligations under customary international law.

### **Specific Improvements Needed for EBRD's ESP, AIP, and DAIP**

**I. First, EBRD's ESP 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>11</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>12</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*

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<sup>8</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](#)).

<sup>9</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>10</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>11</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>12</sup> See fns. 13 and 14, *post*.

for 1.5°C.”<sup>13</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>14</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>15</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>16</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>17</sup> The same analysis 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>18</sup>

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

As such, EBRD’s ESP 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 obligations under customary international law 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 Environmental and Social Exclusion List in ESP Appendix 1 (Exclusion List):**

- (a) the Exclusion List must explicitly prohibit 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;

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<sup>13</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>14</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>15</sup> IEA (2023), World Energy Outlook 2023, IEA, Paris, p. 139 (available at: <https://www.iea.org/reports/world-energy-outlook-2023>).

<sup>16</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>17</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>).

<sup>18</sup> See fn. 17, *ante*, Climate Analytics, “2030 Targets.”

(b) in addition to providing that the Exclusion 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 Exclusion List and the alignment of EBRD’s activities with the 1.5°C degree warming limitation objective.

(c) The Exclusions List, like the rest of the ESP, must be adopted by the EBRD board of directors, for EBRD and its Member State Shareholders to adhere to their obligations under international law.

**II. Second, EBRD’s ESP 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>19</sup>

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>20</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>21</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 ESP to explicitly prioritize

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<sup>19</sup> See fn. 17, *ante*, Climate Analytics, “2030 Targets.”

<sup>20</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>21</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/>).

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 ESP 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.

**III. Third, the following 16 significant enhancements must be made to the final ESP to ensure EBRD adequately assesses, avoids, and mitigates GHG emissions and their impacts from the projects it finances prior to its financing and guarantee decisions.**

The following adjustments to the ESP in items 1-16 of this section III must be made, and *applied prior to EBRD's financing decisions*, for EBRD to adhere to its due diligence obligations under international law, to prevent EBRD from causing or contributing to climate change harms, and to help significantly reduce the occasions where remedial action is required for climate change harms EBRD causes or contributes to. EBRD's and its Global North shareholders' obligations under the Paris Agreement, and human rights and customary international law, to adopt and implement the following improvements to the ESP are detailed in Appendices B and D below.

**1. The ESP must be amended to (1) require "best reasonably available and practiced methods" as the standard EBRD ensures is met for the minimum quality of environmental and social impact assessments and their contents, and (2) to require EBRD itself (not just the client) to ensure the ESP's and the Environmental and Social Requirement's (ESR's) impact assessment and mitigation requirements are met prior to financing decisions.**

- (1) The ESP must be improved to include a standard that governs the minimum quality of environmental and social impact assessments and their contents. This standard must apply to the environmental and social impact assessments that the ESP requires are completed and disclosed to the public prior to financing decisions. The standard would also apply to all environmental and social impact assessments and analysis used to inform EBRD decision making and required by the ESP, including in regards to quantification/assessment of impacts, alternatives analysis, impact avoidance and mitigation measures, consultation with project affected communities, and opportunity for public review and input. Without this quality assurance standard and control, including that applies to climate change impacts and GHG emissions, the ESP's environmental and social safeguards are meaningless – as without assessing impacts and requiring measures to avoid them prior to and as a condition of project financing in accordance with a specific standard, there are no assurances EBRD will secure necessary analysis and avoidance of environmental and social impacts.

We note that the draft ESP indicates in regards to preventing human rights harms that "EBRD will continuously improve the projects it finances in accordance with good international practice"; the EBRD "will implement an Environmental Management System (EMS) in accordance with Good International Practice (GIP);" "[c]entral to the ESRs is the application of mitigation hierarchy and GIP;" "the client will ensure that the environmental and/or social risks and impacts arising from associated facilities over which it has control or influence are managed and mitigated in accordance with ... good international practice (GIP).;"

“Appropriate measures, such as Best Available Techniques (BAT) and good international practice (GIP)<sup>39</sup> [Fn. 39 provides: “As outlined in the relevant Guidance Notes”] should be adopted to optimise resource use and energy use, secure GHG reduction, as well as efficiently prevent and control pollution.” ESP at Sections 2.5, 3.1, 6.1, ESR 1 paragraph 6, ESR 3 at paragraph 1. In addition, the ESP provides:

The Bank will report annually on environmental and social risks and impacts resulting from its projects. The EBRD will achieve a level of internal and, where possible, external assurance on reported data, in line with GIP. It will promote similar good practices among its clients.

ESP Section III, paragraph 4.1. Further, the ESP definition of GIP defines GIP as:

The exercise of professional skill, diligence, prudence, and foresight that would reasonably be expected from skilled and experienced professionals engaged in the same type of undertaking under the same or similar circumstances globally or regionally. The outcome of such an exercise will be is that the project employs the most appropriate techniques and standards in the project- specific circumstances, as outlined in relevant guidance notes.

ESP Section II at page 5. The draft ESP’s use of GIP is problematic in multiple regards, and should be addressed as follows:

(A) As detailed in Appendix B and D below, because the projects with GHG emissions EBRD enables by providing financing or guarantees pose a severe risk of climate harm, EBRD’s, and its member state shareholders from the Global North’s, due diligence<sup>22</sup> obligations arising under the Paris Agreement, and human rights and customary international law require that the ESP mandate EBRD ensure climate impacts, and measures to avoid them, are assessed, reported, disclosed, and implemented prior to financing approvals using a “best reasonably available and practiced methods” standard, not GIP.<sup>23</sup> Furthermore, the ESP should specify that those methods include the processes required and 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.<sup>24</sup> NEPA’s requirements for climate change and GHG impact assessments, which are frequently practiced and implemented, constitute an example of reasonably best available and practiced methods standard that the ESP must require is met 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

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<sup>22</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>23</sup> As detailed in Section I, *ante*, and Appendix B, C, and D *post*, EBRD’s and its Member State’s due diligence obligations extend beyond adequate study prior to project approvals to prevent EBRD’s 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 (see e.g., Cook and Viñuales fn. 65, *post*, as applied to EBRD (attached as Exhibit 1 and available at: <https://priceofoil.org/2021/05/04/eca-legal-opinion/>); Appendix B, C, and D, *post*).

<sup>24</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>).

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.

- (B) The standard in the ESP, which is GIP but should be “best reasonably available and practiced methods,” improperly never explicitly applies to environmental and social impact assessments and analysis prior to project financing;
  - (C) The standard in the ESP, which is GIP but should be “best reasonably available and practiced methods,” should not be limited by the explicit requirements in the draft ESP and ESRs (the draft ESP and ESR provide that a management approved guidance document will define GIP). Rather, the ESP standard should be an evolving standard that updates with time to reflect the current applicable methods used to assess and prevent harms.
  - (D) EBRD's and its member states human rights due diligence obligations under customary international law to assess and prevent harms prior to and also after financing clearly requires the application of a “best reasonably available and practiced methods” type standard, and not a lesser GIP standard. See ESP paragraph 2.5.
- (2) Our second overarching comment is that as detailed in Appendix B and D, EBRD and its Global North shareholders/member states have capabilities, control, and due diligence obligations and duties under international law - independent of EBRD's clients/borrowers - to ensure borrower/client adherence to EBRD policies and all aspects of the ESP and ESRs prior to financing approvals to prevent climate change harms to communities from EBRD's financing activities. EBRD ensuring borrower/client adherence to EBRD policies and all aspects of the ESR prior to financing approvals means EBRD (i) ensuring client/borrower adoption mitigation measures in-line with the ESRs' requirements to avoid impacts as far as economically and technically feasible, and (ii) when its clients/borrowers do not have the resources or expertise, to (a) finance requisite environmental and social impact and impact avoidance/mitigation analysis, or (b) advance funds to clients/borrowers for this analysis as part of a project's costs that could be forgiven if the project is not financed. These measures respect EBRD client capacity and principles of “common but differentiated responsibilities” at the project assessment, diligence, and planning stages.

The draft ESP falls short of EBRD's and its Global North member states due diligence duties and obligations under international law because the ESP impermissibly only requires the client/borrower, and not the EBRD itself, to ensure adequacy of the requisite ESR environmental and social impact assessments and mitigation measures prior to financing decisions.<sup>25</sup> ESP at paragraph 7.16. **As such, the final ESP, must require the EBRD itself**

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<sup>25</sup> The draft ESP does not specify EBRD will ensure EBRD's clients/borrowers adhere to the ESRs or other parts of the ESP applicable to EBRD clients – this requirement is notably missing. See ESP; See also ESP paragraphs 7.16 (providing only that it is the responsibility of the client to provide adequate information on environmental and social impacts of the project, and the EBRD only is required to provide guidance to assist the clients with meeting the ESRs requirements), 7.21, and 7.22. The list of EBRD's responsibilities in the ESP even goes as far to seemingly allow the EBRD to let the client off the hook in regards to adhering to ESR impact assessment/analysis/study and mitigation requirements needed to prevent environmental and social harms prior to financing decisions. See e.g. ESP paragraph 7.21 providing: *The EBRD's Board of Directors may agree, as a condition to of EBRD financing, that certain elements of environmental and social appraisal take place following Board approval and after the signing of the financing agreements. The Board will consider the overall impacts, risks and benefits of the proposed approach.* ESP paragraph 7.21. As such, the E&S Policy impermissibly does not require EBRD to ensure adherence to the ESR



**ensure the ESR’s impact assessment and mitigation requirements are met prior to financing decisions.** Such a requirement for EBRD to take ultimate responsibility prior to its financing decisions for adherence to the requirements of its own environmental and social impact prevention and sustainability policies has been standard amongst multilateral financial institutions for quite some time, such as at the IFC and MIGA. *See* e.g. IFC Environmental and Social Sustainability Policy (2012) at ¶¶28,22; IFC Access to Information Policy (2012) at ¶33, IFC Performance Standards on Environmental and Social Sustainability (2012) (PS) PS 1.

**2. Only Absolute or Gross, and not Relative GHG Emissions, Must be Used as EBRD’s threshold for when a client/borrower is required to quantify GHG emissions and publicly disclose GHG emissions: estimates and quantification analysis, alternatives analysis, and mitigation hierarchy measures with supporting analysis for each project prior to EBRD’s financing decision.**

This is essential for EBRD to (a) ensure adequate due diligence and avoidance of climate change harms as far as economically feasible, (b) be able to quantify the carbon footprint of each investment and its overall investment portfolio – which is needed to gauge EBRD’s alignment with the 1.5°C warming limitation objective, and (c) ensure GHG emissions are avoided to the furthest extent economically and technically feasible. In addition, this is necessary for full and proper implementation of the GHG emissions mitigation hierarchy and alternatives analysis requirements.

While the current ESR properly provides for use of gross and not relative GHG emissions to be used as the threshold for these GHG analysis, mitigation, and disclosure requirements, if the EBRD pivots to using a “relative” threshold, not only would the EBRD and public not be provided with information needed to ensure full and adequate quantification of a project’s GHG emissions. In addition, EBRD would eliminate a safeguard necessary to achieve and ensure avoidance of GHG emissions as far as economically and technically feasible. An example of the pitfalls of using a relative threshold would be in the case of a cement plant that implemented GHG emissions efficiency technology that was better than technology used 10 years ago or better than other cement plants in the region, which would thereby be forecasted to achieve negative relative GHG emissions, but still would emit considerable absolute GHG emissions of likely well over 100,000 tons CO<sub>2</sub>-eq/yr. If instead the trigger for the cement plant to reduce its emissions as far as economically and technically feasible is based on gross or absolute emissions, it would be required to implement best available economically and technically feasible technology that could potentially achieve closer to net zero emissions. This example poignantly demonstrates how allowing relative GHG emission to be a threshold for GHG emissions quantification, alternatives analysis, mitigation, and disclosure, would be an impermissible loophole that would thwart EBRD’s alignment with the 1.5°C warming limitation objective.

**3. The ESP and ESRs 1 and 3 Must Specify that a Full and Adequate Mitigation Hierarchy Applies to GHG Emissions and Climate Change Impacts, that “Cost Effectiveness” should not be a Factor in Implementing Measures to Avoid and Minimize GHG Emissions, and**

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and allows EBRD to allow borrower/client deferral of GHG emissions and climate change impact analysis and mitigation until after financing decisions.

## that Adequate Analysis to Inform and Support Adoption of the Mitigation Hierarchy Must Be Performed.

Mitigation Hierarchy is defined in ESP Section II for the ESP and all ERSs as follows on ESP pages 5-6: “Measures taken to avoid creating environmental or social impacts from the outset of development activities, and where this is not possible, to implement additional measures that would minimise, mitigate and as a last resort, offset and/or compensate for any potential residual adverse impacts.”

ESP 6.1 provides, “Central to the PRs ERSs is the application of the mitigation hierarchy...”

ESR 1 (governing the environmental and social impact stage prior to EBRD financing decisions) at paragraph 3 provides: “The objectives of this ESR [1] are to: ...adopt a mitigation hierarchy approach to address environmental and social risks and impacts from project activities on workers, affected communities and the environment;...”

ESR 1 paragraph 26 further provides: “The ESMP will reflect the mitigation hierarchy.”

ESR 3 (for Resource Efficiency and Pollution Control) at paragraph 4 further provides: [The objectives of this ESR [3] are to: ..adopt the mitigation hierarchy approach to addressing adverse impacts on human health and the environment arising from the resource use and pollution released from the project; avoid, minimise and manage project-related GHG emissions; ...”

And then ESR 3 paragraph 23 specifically applying to GHG emissions provides: “[GHG Emissions:] The client’s environmental and social assessment process will consider alternatives and implement technically and financially feasible *and cost-effective options* to avoid or minimise project-related GHG emissions during the design and operation of the project.”

While the ESP and ESR 1 contains a mitigation hierarchy requirement that must be secured for environmental and social impacts prior to project financing, and is “central” to the ESRs, ESR 3 impermissibly weakens these requirements in multiple regards as applied to GHG emissions and climate change in three regards. First ESR 3 paragraph 23, uses cost effectiveness to limit the application of avoidance and minimization measures – as written, even if measures are technically and financially feasible, if they are not cost effective for the client, then they do not have to be adopted.<sup>26</sup> ESR paragraph 23. Second, ESR 3 paragraph 23’s use of “or” between “avoid” and minimize” allows the client to implement measures to minimize, instead of measures to avoid GHG emissions as a first priority. *Id.* And third, the definition of mitigation hierarchy in general and applied to GHG emissions and climate change impacts in ESR 3 and ESR paragraph 23 must be improved to require adoption of measures to avoid impacts 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. This is necessary to prevent

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<sup>26</sup> See also ESR 3 paragraph 16: Although not applicable to GHG emissions, this cost effectiveness requirements is also included in general pollution control and prevention measures.

avoidable GHG emissions, for EBRD and its members states to adhere to their due diligence obligations under international law to prevent avoidable harms, and has been required by the International Finance Corporation's (IFC's) board adopted policies since 2012. IFC Policy on Environmental and Social Sustainability (2012) (E&S Policy) at Paragraph 6, page 2; IFC Performance Standards on Environmental and Social Sustainability (2012) (PS): Bullet 2 at PS page 6, PS paragraph 3 at page 3, PS 1 paragraphs 5 and 14 at PS page 7, 10; PS 3 at paragraph 3 at PS page 23.

In sum, the mitigation hierarchy requirements in the ESP and ESRs as applied to all environmental and social impacts, and GHG emissions and climate change specifically, violates EBRD's and its member states due diligence obligations under international law to prevent harms. Thus, the ESP must be amended to specifically specify that its mitigation hierarchy requirements provide that before the EBRD approves financing for a project, mitigation measures must be adopted to 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 must be adopted after adoption of all measures to avoid GHG emissions and climate change impacts as far as economically and technically feasible. 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 ESP ensuring and securing adoption of a mitigation hierarchy for GHG emissions and climate change impacts (including for impacts to affected communities – the ESP has no climate change impact mitigation guarantees or standards for a project's climate change impacts to affected communities), the ESP must require ***the analysis 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. The mitigation hierarchy requirement thus also requires the EBRD ensure quantification of scope 1, 2, and 3 GHG emissions for each project prior to financing approval.

We oppose the inclusion of carbon offsets in the ESP mitigation hierarchy and for the ESP to permit 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 ESP prohibit and remove offsets as permissible mitigation and explicitly prohibit their use for GHG emissions.

In addition, the ESP must specify that deferring adoption of a mitigation hierarchy for GHG emissions and climate change impacts until after project approval is impermissible when the project has clearly defined components. In the case in which assets to be developed, acquired or financed have yet to be defined at the time of EBRD financing, the ESP must require that (1) a mitigation hierarchy for GHG emissions and climate change impacts, along with an adequate GHG emissions and climate change alternatives analysis (see section III(4), *post*), is provided to the EBRD and public for a duration sufficient to allow for meaningful review, and (2) an adequate mitigation hierarchy is adopted, prior to EBRD commitments to the development, acquisition, or financing that was not defined at the time of EBRD financing.

#### **4. The ESP Must Be Amended to Specify and Enhance the GHG Emissions and Climate Change Impacts Alternatives Analysis Requirements.**

ESR 1 paragraph 18 provides: “Where a project is likely to be associated with significant environmental and social risks and impacts, the assessment process will, as appropriate and commensurate with the nature of the project, include an assessment of technically feasible and financially viable alternatives to the project location, technology, size, design and/or mitigation options in terms of their environmental and social impacts and risks, and consider the “without project” scenario. This process will include appropriate stakeholder engagement in accordance with ESR 10.”

ESR 1 paragraph 19 provides: “Where decisions on project alternatives have been made prior to the involvement of the EBRD, the client will undertake a review of these alternatives to determine: (i) the extent to which environmental and social risks and impacts associated with the preferred alternatives have been appropriately considered, (ii) the stakeholder engagement process undertaken and outcomes, and (iii) the mitigation hierarchy applied. If such review identifies significant risks and/or impacts, the client will develop appropriate risk and/or impact mitigation measures.”

ESR 1 paragraph 22 provides: “A project is categorised “A” when it could result in potentially significant environmental and/or social impacts, including direct and cumulative environmental and social impacts, which are new and additional and cannot readily be identified, or assessed or mitigated. Projects categorised as A require a formalised and participatory environmental and social impact assessment (ESIA), including a screening and/or scoping process and an assessment of alternatives. A list of Category A projects is presented in Appendix 2 to the Policy.

ESR 1 paragraph 23 provides: “A project is categorised “B” when its potential adverse environmental and/or social impacts are typically site-specific, and/or readily identified and addressed through mitigation measures. The scope of environmental and social assessment will be determined by the EBRD on a case-by-case basis, considering the environmental and social risks associated with the project.”

ESR 3 paragraph 23 for GHG emissions provides: “[GHG Emissions] The client’s environmental and social assessment process will consider alternatives and implement technically and financially feasible and cost-effective options to avoid or minimise project-related GHG emissions during the design and operation of the project.”

The alternatives analysis provisions applicable to GHG emissions in the ESR are lacking and require improvement in multiple regards. **First**, while ESR 3 paragraph 23 directs the client to consider alternatives to avoid and minimize GHG emissions, it does not provide direction as to what should go into a GHG emissions alternatives analysis which would yield the alternatives for the client to consider. **Second**, and relatedly, considering the climate crisis, all projects that will emit GHGs are significant and require an GHG emissions alternative analysis to avoid GHG emissions where feasible. However, the ESR only explicitly requires an alternatives analysis for Category A projects, and not for Category B projects with net positive GHG emissions, which could be significant and exceed the GHG emissions from Category A projects. An alternatives analysis is different than the requirement in ESR 3 paragraph 23 to consider alternatives for GHG emissions, and must be explicitly required for all projects with net positive GHG emissions. **Third**, if EBRD's intention is for the ESR's alternatives analysis requirements to apply to GHG emissions and climate change impacts, ESR 1 paragraphs 18 and 19 must also provide that the alternatives analysis must include an assessment of technically feasible and financially viable alternatives to the project itself. This is critical in the context of contemplated energy infrastructure projects, especially any contemplated fossil fuel project, where all renewable energy sources that can be implemented to meet a region's energy demand must be considered to conduct an adequate GHG emissions alternatives analysis and one that meets EBRD's and its member states due diligence obligations under international law. **And lastly**, ESR 1 paragraph 19 must be amended to require that an adequate GHG and climate change alternatives analysis is conducted if the client's existing alternatives analysis is inadequate.

Moreover, above and beyond these improvements, to ensure implementation of best reasonably available and practiced methods to assess and prevent climate change harms, EBRD must improve ESR 1 and 3 to contain specific detailed requirements for a GHG emissions and climate change impacts alternatives analysis. See Section III, 1.(1), *ante*. Such a best reasonably available and practiced method, is the GHG emissions and climate change alternatives analysis required by NEPA, which also constitutes GIP.<sup>27</sup> Accordingly, the ESP's and ESR's GHG and climate change alternatives analysis requirement must be improved at a minimum to adopt 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*

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<sup>27</sup> See fn. 24, *ante*; 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).

*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>28</sup> that if performed, provide powerful substantive tools needed to persuade banks and their 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 reveal the true cost (in monetary terms) of each ton of GHG emissions a project emits in comparison to its feasible alternatives to EBRD, governments, communities in a project's region, and the public. 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.

By comparison to the policies of other MDB's which EBRD must at least match as a part of its due diligence obligations to study and prevent harm, we note that the Asian Development Bank (ADB) management approved 2021 Energy Policy of the ADB Supporting Low-Carbon Transition in Asia and the Pacific (June 2023) ("2021 ABD Energy Policy") provides the following:

*Accounting for externalities. ADB incorporates the social cost of carbon across all operations, including in the energy sector. The current unit value used by ADB is based on the empirical estimates of the global social cost of carbon reported by the Intergovernmental Panel on Climate Change, to be increased annually in real terms to allow for the potentially increasing marginal damage of global warming over time.[<sup>29</sup>] This unit value is used in economic analyses to estimate the value of avoided GHG emissions for projects that reduce emissions and the cost in damage created for projects that increase emissions. The unit value will be revised in the future as more and newer estimates of damages caused by climate change become available.*

ADB Energy Policy at 15. Considering the forementioned factors, including the EBRD's due diligence obligations to prevent climate change harms under international law and the social cost of carbon requirements in the 2021 ADB Energy Policy, the ESP must be improved to require that prior to financing decisions for each project with anticipated GHG emissions, that EBRD will **ensure that** along with ensuring completion of and publicly disclosing the aforementioned elements of an alternatives analysis, that it will also ensure completion of and publicly disclose social cost of GHG emissions estimates for all project alternatives using (a) the global social cost of carbon reported by the Intergovernmental Panel on Climate Change, and (b) best available

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<sup>28</sup> See fn. 24, *ante*.

<sup>29</sup> ADB. 2017. Guidelines for the Economic Analysis of Projects. Manila.

methods to quantify social cost of GHG emissions to communities in the project's region and country. The EBRD must also ensure that both of these social costs of GHG emissions include monetary figures of the societal cost from incremental metric ton of GHG emissions, including from physical damages caused by climate change. Production and disclosure of such figures are essential for the EBRD, communities local to the contemplated project and in the country where the project is located, and communities disproportionately affected by climate change all over the world to understand the true costs of contemplated projects and their alternatives.

- 5. The ESP, AIP, and DAIP Must Require Quantification and Public Disclosure of all of a Project's GHG Emissions (Scope 1, 2, and 3), and the Analysis Used to for this Quantification, Prior to Project Financing.** EBRD's and its Global North shareholder's due diligence obligations under 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. Including Scope 3 emissions in this analysis constitutes 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.

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>30</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 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 ESP 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 is mandatory as well. As such we request the following language be included in ESR 3 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.**

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<sup>30</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](#))

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 duty to ensure adherence to the ESP – 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.

**In addition, to further ensure all of a project’s GHG emissions are quantified prior to project financing, so that analysis can be conducted and measures implemented to avoid these emissions as far as feasible, the ESP must be improved to specify:**

- deferral of quantification of GHG emissions until after financing approval is not permissible, except for the case in which assets to be developed, acquired or financed have yet to be defined; In the case in which assets to be developed, acquired or financed have yet to be defined, the ESP must require that scope 1, 2, and 3 GHG emissions are quantified and provided to the EBRD and public for a duration sufficient for meaningful review prior to commitments to the development, acquisition, or financing yet to be defined at the time of project financing;
- that scope 1, 2, and 3 GHG emissions must be quantified not just for a new project, but for the portions of projects funded, including an addition to or expansion of an existing activity, operation, and or facility;
- that scope 1, 2, and 3 GHG emissions must be quantified for all of a corporation’s GHG emissions for current and future defined activities when EBRD makes an equity investment in the corporation;
- that quantification and analysis of a project’s Scope 1, 2, and 3 GHG emissions shall include, but not be limited to, all clearly recognized sources of GHG emissions, including for example from: (i) aspects of projects well known to emit GHG emissions; (ii) the loss of carbon sequestration due to the project; (iii) construction activities; and (iv) unplanned but predictable developments caused by the project that may occur later in time or at a different location and or caused by associated facilities.

**6. The ESP, ESRs, AIP, and DAIP Must Require Client Provision, and EBRD Public Disclosure, of 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<sup>31</sup> 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 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.

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<sup>31</sup> See Section III.10-11., *post*, regarding the 120-day disclosure requirement.



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 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>32</sup>

In addition to adjusting the GHG emissions threshold in ESR 3 paragraph 24 to reflect these thresholds,<sup>33</sup> the ESP, AIP, DAIP and ESR 3 paragraph 24 must also be amended to (a) require the client to disclose its estimated annual and lifecycle GHG emissions estimates for the project, along with the GHG emissions alternatives analysis and proposed adopted mitigation hierarchy, to the EBRD when any of these thresholds (20,000 tCO<sub>2</sub>-eq over a project's lifecycle, 500 tCO<sub>2</sub>-eq/yr., or 500 tCO<sub>2</sub>-eq during construction) are crossed, and (b) require that 120 days prior to project financing, the EBRD publicly disclose these GHG emissions estimates, alternatives analysis, and mitigation measures.

**7. ESR 3 Must Be Amended to Remove the Requirement that the client quantify GHG emissions in accordance with the 2017 EBRD Protocol for Assessment of Greenhouse Gas Emissions (EBRD GHG Protocol).** This requirement in paragraph 24 of ESR 3 is problematic, as it undermines EBRD's due diligence obligations under international law to assess and prevent climate change risks and harms for the following reasons:

- (a) The EBRD GHG Protocol explicitly does not require EBRD's Financial Intermediary (FI) clients from having to quantify GHG emissions (see below, FI's are a significant part of EBRD's portfolio and thus GHG emissions);
- (b) The EBRD GHG Protocol provides quantification of Scope 3 emissions is discretionary;

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<sup>32</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>33</sup> Paragraph 24 of ESR 3 provides: "For projects that either have, or are expected to have, gross emissions in excess of 20,000 tonnes CO<sub>2</sub>- equivalent annually, or are expected to result in a net change in emissions, positive or negative, of more than 20,000 tonnes of CO<sub>2</sub>-equivalent annually post-investment, the client will quantify these emissions in accordance with the EBRD Protocol for Assessment of Greenhouse Gas Emissions. The client will report emissions data to the EBRD on a yearly basis."

- (c) The EBRD GHG Protocol quantification thresholds requiring a client to quantify and disclose GHG emissions prior to project financing, and after project financing are too high (see Section III.6, *ante*). They are also inconsistent with ESR thresholds;
- (d) The EBRD GHG Protocol provides GHG emissions from construction are only required to be quantified and disclosed if forecasted to be greater than 5% of total emissions. This presents a loss of opportunity to avoid significant GHG emissions, especially for projects with high GHG emissions totals;
- (e) The focus in the EBRD GHG Protocol on quantification of relative emissions, rather than absolute or gross GHG emissions is problematic (see Section III.2, *ante*) and inconsistent with the approach in the ESR to quantify and disclose absolute or gross GHG emissions.

Furthermore, the GHG emissions quantification and disclosure requirements and thresholds are critical climate change safeguards. As such, they should be included and detailed in the ESP, not a management document such as the EBRD GHG Protocol, for the EBRD and its shareholders to adhere to their due diligence and other obligations under international law. See Appendices B and D, *post*.

**8. The ESP Must Be Amended to *Explicitly Require Including Scope 3 GHG Emissions in the Cumulative GHG Emissions Threshold for determining the applicability of Ongoing Monitoring and Reporting of a financed project's GHG emissions – the decision to include Scope 3 emissions should not be discretionary.***

For many projects and their components, such as for airports, projects that contract out transportation, and projects that source materials that are GHG intensive to produce and or transport depending on the sourcing decisions (e.g. when a livestock operation in Europe or Asia sources GHG intensive cereals for livestock feed from South America), a significant percentage and amount of GHG emissions are Scope 3 emissions that can be avoided or minimized if assessed and disclosed. In order for EBRD to adhere to its due diligence obligations under international law to avoid causing and contributing to climate change harms, Scope 3 emissions must be included in the quantification of GHG emissions prior to project financing; be counted towards determining whether the 20,000 tCO<sub>2</sub>-eq per year threshold for ongoing and continuous monitoring of GHG emissions is triggered; and included in the GHG emissions monitoring and reporting totals should the 20,000 tCO<sub>2</sub>-eq per year threshold be exceeded.

**In addition, in regards to ongoing monitoring and reporting, the EBRD must amend the ESP, DAIP, and AIP to require EBRD to disclose on its website, the annual GHG emissions that each project monitors and reports to the EBRD.** This is necessary to ensure the ESP's ongoing monitoring and reporting of GHGs is being implemented as required, to ensure full and proper quantification of all GHG emissions, and to ensure adequate implementation of the mitigation measures the client commits to prior to prior financing. Furthermore, the ESP should be improved to specify that if monitoring results show GHG emissions amounts are greater than anticipated, the client must adopt an additional mitigation hierarchy, with additional mitigation measures, to address these additional emissions. All these measures are also required for the EBRD and its Global North shareholders to adhere to their due diligence obligations under international law to prevent harm. See Appendix B and D, *post*.

9. **The ESP must require a GHG emissions and climate change cumulative impacts assessment is conducted that accounts not only for a country’s National Determined Contributions (NDCs), but also the 1.5°C warming limitation objective and all applicable regional, national and global GHG emissions plans.** This is because EBRD’s due diligence requirements under international law<sup>34</sup> require an analysis of how a project it is contemplating for financing, and its alternatives, would help meet or detract from achieving NDC’s and relevant climate action goals and commitments, including limiting global warming to 1.5°C.
10. **The ESP, AIP, and DAIP must specify that 120 days prior to EBRD’s financing decisions, for each project the EBRD finances or guarantees, public disclosure and opportunity for public review of the full GHG emissions and climate change impact and mitigation analysis, alternatives analysis, and mitigation measures, and all supporting studies for these analysis and measures, is required.** 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>35</sup> This is demonstrated by the 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>36</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>37</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

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<sup>34</sup> See Appendix B and D, *post*, detailing EBRD’s due diligence obligations under international law to ensure the ESP uses best reasonably available and practiced methods, such as those required under NEPA, to perform a GHG and climate change cumulative impact analysis in this manner. NEPA contains such a requirement (see fn. 24, *ante*).

<sup>35</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.

<sup>36</sup> See UNEP EIA Report at 50-66.

<sup>37</sup> UNEP EIA Report at 50-51, 65-66.

project approval.<sup>38</sup> In addition to being included in 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>39</sup> these requirements are commonplace in international environmental treaties.<sup>40</sup>

**Because of the Climate Crisis (see Appendix A, *post*; pages 1-3, *ante*), it is clear that for all projects that cross a ESP significance threshold 20,000 tCO<sub>2</sub>-eq of scope 1, 2, and 3 emissions over a project's lifecycle, 500 tCO<sub>2</sub>-eq of scope 1, 2, and 3 emissions per year, or 500 tCO<sub>2</sub>-eq of scope 1, 2, and 3 emissions during construction, the ESP, DAIP, and AIP must specify that the GHG emissions analysis and mitigation measures for the project must be disclosed to the public on EBRD's website to provide opportunity for review and comment at least 120 days prior to EBRD's, and EBRD financed financial intermediaries', financing decisions.** Unlike as provided in the draft AIP and DAIP, disclosure of this information should be provided the same amount of time in advance for (a) public and private sector financing (not double the review period for private sector financing), and (b) regardless if the project is a category A, B, or C Category project. **In addition, we more broadly request that the ESP, AIP, and DAIP specify that all project's (Category A, B, C, and trade finance, financial intermediary, advisory services, etc.) environmental and social impact assessments and analysis, regardless of their categorization, must be publicly disclosed on the EBRD website a minimum of 120 days prior to EBRD's financing or a EBRD financed financial intermediaries' decision for a project. This disclosure period must be further extended when it is apparent consultation with affected communities will be necessary, so as to adequately inform these communities about project impacts and to ensure a consultation process occurs, and is adequate and meaningful.** 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, amongst the other practices and measures detailed above, 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

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<sup>38</sup> UNEP EIA Report at 50, 53, 55, 60-61.

<sup>39</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>40</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).

Services, and Financial Intermediary projects.<sup>41</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 of estimated GHG emissions at this threshold is standard practice all MDBs, including the EBRD, need to at least replicate to adhere to their due diligence obligations under international law to assess and prevent climate change risks and harms.

**Furthermore, if supplemental GHG emissions or climate change analysis is performed, or additional GHG emissions or climate change mitigation is considered or adopted, after and or in addition to the information disclosed on the EBRD website, the AIP and DAIP must specify this additional information must also be disclosed on the EBRD website for public review 120 days before consideration by the EBRD for financing to provide the public with adequate time for review and input.** This additional information, which completes the environmental and social impact assessment and mitigation measures, is part of the GHG environmental and social impact assessment that must be disclosed to the public.

**In addition, EBRD's ESP, AIP, and DAIP must make clear that the confidentiality, deliberative privileged, and commercial sensitivity provisions in the 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>42</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>43</sup> EBRD's 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 GHG emissions and mitigation analysis. 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

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<sup>41</sup> IFC Access to Information Policy (2012) at ¶ 34.

<sup>42</sup> See fn. 35, *ante*.

<sup>43</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.

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.*

- 11. 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 Sections III.1.-10. above. 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 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>44</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>45</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-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.

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<sup>44</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>45</sup> *Id.*

- (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.

- 12. The ESP Must Specify that EBRD Ensures that in Providing its Advisory Services and Technical Assistance, that EBRD Adheres, or Ensures Adherence, to the ESP Requirements Applicable to GHG Emissions and Climate Change Impacts.** Advice or technical assistance provided by EBRD contributes to achieving the ultimate implementation of a project and a project securing funding. It is also critical to a project being designed to avoid significant reductions in local and global environmental and social climate change harms. EBRD’s due diligence requirements to prevent harm require the ESP to specify that in providing its advisory services and technical assistance, that EBRD adheres, or ensures adherence, to the ESP



requirements applicable to GHG emissions and climate change impacts. This means EBRD is required to ensure, and the ESP must be improved to specify, that when EBRD advises on or provides technical assistance for a project, it provides its client with, and ensures: quantification of scope 1, 2, and 3 GHG emissions from the project, a GHG alternatives analysis for the project consistent with NEPA's requirements, an analysis as to indirect impacts of the contemplated project's GHG emissions on affected communities, and a mitigation hierarchy analysis for the project's GHG emissions and their impacts. See Sections III.1.-8., *ante* (detailing these requirements). In addition, this means that the ESP must also be improved to specify that EBRD's contemplated advisory services or technical assistance that may result in a project with greater than 20,000 tCO<sub>2</sub>-eq of scope 1, 2, and 3 emissions over its lifecycle, over 5,000 tCO<sub>2</sub>-eq/yr. or over 5,000 tCO<sub>2</sub>-eq during construction, must be publicly disclosed on the EBRD's website prior to EBRD approval as required by EBRD's due diligence obligations. See Sections III. 6, 10, *ante* (detailing EBRD's disclosure requirements).

By facilitating financing for projects and providing guidance and expertise for projects in many countries, EBRD's advisory services have a significant impact on achievement of the 1.5°C warming limitation objective. Thus, EBRD ensuring its advisory service's adherence to ESP's requirements has tremendous implications for EBRD's alignment with the Paris Agreement, and limiting climate change harms from its financing activities. It can help and is needed to avoid fossil fuel infrastructure lock-ins that threaten the 1.5°C warming limitation objective, and to expedite regional and global energy transition efforts to renewable energy.

**13. The ESP Must Specify that EBRD Ensures that Prior to Approving Trade Finance<sup>46</sup> or any investment products with shorter tenor including short-term loans, guarantees, and trade finance products with maturities of up to three years, that EBRD Adheres, or Ensures Adherence, to the ESP, AIP, and DAIP Requirements Applicable to GHG Emissions and Climate Change Impacts.** This means EBRD is required to ensure that when it provides trade finance or any investment products with shorter tenor to a client, it ensures adherence to all ESP requirements, including quantification of scope 1, 2, and 3 emissions from the project financed, a GHG alternatives analysis for the project consistent with NEPA's requirements, an analysis as to indirect impacts of the contemplated project's GHG emissions on affected communities, a mitigation hierarchy analysis for the project's GHG emissions and their impacts, and adoption of all requisite ESP mitigation measures, including a mitigation hierarchy for GHG emissions and climate change impacts. See Sections III.1.-8., *ante*. In addition, this means the AIP and DAIP must specify that EBRD's contemplated trade finance products or investments that may cause or contribute to greater than 20,000 tCO<sub>2</sub>-eq of scope 1, 2, and 3 emissions over a project's lifecycle, over 5,000 tCO<sub>2</sub>-eq/yr. or over 5,000 tCO<sub>2</sub>-eq during construction, must be publicly

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<sup>46</sup> Trade finance contributes and is critical to achieving implementation of a project. As detailed by Urgewald's September 2023 paper "Is the World Bank giving billions of trade finance to fossil fuels?" (available at: <https://www.urgewald.org/sites/default/files/media-files/Urgewald%20-%20Trade%20Finance%20Paper%20-0923.pdf>): "*In general, trade finance products make trade transactions feasible by either guaranteeing payments or by providing short-term loans as working capital, i.e., cash flow, to pay for supplies and services to produce the goods or to pay for the imported goods themselves. As such, trade finance allows exporters and importers to support and grow their businesses while using and risking little of their own money. Trade finance is usually short-term because it only covers the period of time to complete the trade transaction, typically three to five months. Every country in the world uses trade finance to import and/or export oil, gas, coal or petrochemicals (e.g., inputs for fertilizers and plastics). Furthermore, in order for most countries to develop a new coal, oil or gas field or to build a new thermal power plant or refinery, they have to import an enormous amount of machinery, pipelines, and other resources. All of this fossil fuel business takes trillions in trade finance.*"

disclosed on the EBRD's website prior to EBRD approval as required by EBRD's due diligence obligations. See Sections III. 6,10, *ante* (detailing EBRD's disclosure requirements).

In sum and unlike peer MDBs like the IFC,<sup>47</sup> the draft ESP, AIP, and DAIP is silent on the applicability of its requirements to trade finance and short-term investment products. EBRD's due diligence requirements to prevent harm require the ESP, AIP, and DAIP to specify that prior to approving trade finance transactions and products, that EBRD adheres, or ensures adherence, to the ESP and EBRD public disclosure requirements applicable to GHG emissions and climate change impacts. In addition, as detailed in Section I., *ante*, the ESP must prohibit trade finance for, that supports, that facilitates, or that enables fossil fuel projects.

#### **14. Incorporation of EBRD Paris Agreement Methodologies into the ESP, AIP, and DAIP.**

The ESP, AIP, and DAIP should clarify the relation of the ESP, AIP, and DAIP to the Paris Methodologies. Moreover, due to EBRD's and its member states obligations under customary international harm prevention and human rights law for EBRD to align its financing flows with the 1.5°C warming limitation objective, that are separate from Paris Agreement obligations, EBRD's ESP, AIP, DAIP must meet the requirements in our comments irrespective of what EBRD requires under its Paris Methodologies and at what point in time. Further, the AIP, DAIP, ESP, and ESR 1, 3 and 10 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 if conducted separate from the ESP's climate change impact and GHG emissions analysis and mitigation requirements. To ensure EBRD aligns its activities with the 1.5°C warming limitation objective, EBRD must implement and secure adherence to its ESP, DAIP, AIP and any Paris Methodologies together and as early in project development as possible to help avoid the need for project re-design or substantial project design modifications.

#### **15. We request the EBRD not move or place critical specific requirements, thresholds, and definitions into "guidance documents" that would only be management approved.**

**Rather, we request that all critical specific requirements, thresholds, and definition be placed in the body of the board-adopted ESP, AIP, and DAIP.** Essential to EBRD's Board Directors, and also to EBRD as an entity, is ensuring that the ESP, AIP, and DAIP EBRD adopts is in line with their due diligence obligations under international law to assess and prevent harms. As such specific requirements, thresholds, and definitions needed to give effect to the ESP's, AIP's, and DAIP's requirements must not be moved or included in a management approved guidance document, instead of the ESP, AIP, and or DAIP. For instance, moving an absolute or gross GHG emission threshold to a management approved only guidance document that would definitively dictate when (a) a full GHG emissions analysis meeting the ESP requirements is required, and (b) when a GHG emissions alternatives analysis and mitigation for GHG emissions as consistent with the ESP is required, would be impermissible (see more about our position on absolute v. relative emissions thresholds, and suggested edits to the ESP, AIP, and GAIP above).

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<sup>47</sup> IFC's board adopted Policy on Environmental and Social Sustainability (IFC E&S Policy) provides: "Investment products with shorter tenor include short-term loans, guarantees, and trade finance products, with maturities of up to three years...[These] [p]roposed investments that are determined to have moderate to high levels of environmental and/or social risk [], or the potential for adverse environmental and/or social impacts[] will be carried out in accordance with the requirements of the Performance Standards." IFC E&S Policy, January 2012 at ¶ 3.

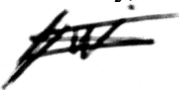
**16. EBRD must amend the ESP and AIP to require that EBRD disclose on an annual basis, the sum of all absolute / gross Scope 1, 2, and 3 GHG emissions of its entire investment portfolio for (a) all active investments and (b) all the investments EBRD makes during a fiscal year.** This information is needed for EBRD, its member states, and the public to gauge EBRD's alignment with the 1.5°C degree warming limitation objective. It could be obtained from the GHG emissions estimates the ESP must require that EBRD secures prior to project financing, and should be supplemented by actual data obtained from annual client reporting.

### **Conclusion**

Thank you for considering our comments. The improvements to EBRD's draft ESP, AIP, and DAIP above 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 Global North shareholders 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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### **Co-Signatory Civil Society Organizations:**

**The Big Shift Global** - *Sophie Richmond, Global Lead*, srichmond@climatenetwork.org

**Oil Change International** - *Bronwen Tucker, Global Public Finance Campaign Co-Manager*, bronwen@priceofoil.org

**MenaFem Movement for Economic, Development and Ecological Justice** - *Shereen Talaat, Founder Director*, Shereen@menafemmovement.org

**Recourse** - *Daniel Willis, Finance Campaign Manager*, dan@re-course.org

**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>48</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>48</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>49</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>50</sup> The International Court of Justice made this finding in *FYROM v. Greece*.<sup>51</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>52</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>53</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>54</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>55</sup>

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

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<sup>49</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>50</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>51</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>52</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>53</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>54</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>55</sup> Kerr, All Necessary Measures at 560-561, and fn. 282; Barros at 94.

International organizations,<sup>56</sup> including the EBRD, can also be held responsible for breaching their obligations, including those established by a treaty or customary international law.<sup>57</sup> This has happened numerous times, in various domestic courts.<sup>58</sup> The ILC DARIO Articles<sup>59</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>60</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>61</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>62</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>63</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>56</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>57</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>58</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>59</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>60</sup> Kerr, ICAO at 3.

<sup>61</sup> Kerr, ICAO at 4; ILC DARIO Articles, Art. 10.

<sup>62</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>63</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 ESP 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>64</sup> the EBRD’s ESP 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>65</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 ESP must include provisions that specify prioritization of financing for renewable energy projects to meet energy demands.

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<sup>64</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>65</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 the ESP 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>66</sup> obligations arising under the Paris Agreement and human rights 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 ESP 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>67</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>68</sup>

The EBRD’s ESP 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

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<sup>66</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>67</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>68</sup> See fn. 24, *ante*: Interim (CEQ) NEPA guidance effective January 8, 2023 for GHG emissions and climate change assessments, alternatives analysis and mitigation in environmental impact statements.

responsibilities” at the project assessment and implementation stages. This is because adequate due diligence will ensure that alternatives and mitigation measures to avoid GHG emissions and their impacts are *economically and technically feasible*.

A more detailed overview of EBRD’s due diligence obligations under the Paris Agreement 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>69</sup> They do not permit members state parties to follow different, less ambitious goals.<sup>70</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>71</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>72</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

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<sup>69</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>70</sup> Cook and Viñuales at ¶60

<sup>71</sup> Cook and Viñuales at ¶70

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

can avoid and minimize a project's GHG emissions to the furthest extent economically and technically feasible.<sup>73</sup>

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>74</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>75</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>76</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>77</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>78</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 ESP 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.

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<sup>73</sup> *Id.*; See also, Cook and Viñuales at ¶108

<sup>74</sup> Cook and Viñuales at ¶ 75.

<sup>75</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>76</sup> Cook and Viñuales at ¶ 80.

<sup>77</sup> Paris Agreement, Article 3; Cook and Viñuales at ¶¶ 75, 76, 103-105.

<sup>78</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.”).

Article 4(3) further provides “[e]ach Party’s successive nationally determined contribution will represent a *progression* beyond the Party’s then current nationally determined contribution and reflect its *highest possible ambition*, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.” “The standards of “highest possible ambition” and “progression” (Articles 3, 4(1) and (3) of the Paris Agreement), as these relate to the current production gap and global carbon budget, should [] inform due diligence.”<sup>79</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>80</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>81</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>82</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>83</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>84</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

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<sup>79</sup> Cook and Viñuales at ¶ 104.

<sup>80</sup> Cook and Viñuales at ¶ 98.

<sup>81</sup> Cook and Viñuales at ¶ 100.

<sup>82</sup> Paris Agreement, Article 13(5).

<sup>83</sup> Cook and Viñuales at ¶¶ 113-114.

<sup>84</sup> Cook and Viñuales at ¶¶ 78-79.

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 circumstances.”<sup>85</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>86</sup>

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

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>87</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>88</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>89</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>90</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>91</sup> Accordingly, harm prevention and precautionary

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<sup>85</sup> Cook and Viñuales at ¶¶ 56-57.

<sup>86</sup> Cook and Viñuales at ¶¶ 56-57, 75.

<sup>87</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>88</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>89</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>90</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>91</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.

customary principles clearly apply to climate change.<sup>92</sup> This means, international environmental principles require that the 1.5°C warming limitation objective must guide ABD’s and its member states 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>93</sup> and it is firmly established “[c]limate change is one of the greatest threats to human rights.”<sup>94</sup> The UN General Assembly recognized the right to a clean, healthy, and sustainable environment as a human right in 2022.<sup>95</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>96</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>97</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>92</sup> Kerr, *All Necessary Measures* at 541, and fn. 123.

<sup>93</sup> Kerr, *All Necessary Measures* at 550.

<sup>94</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>95</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>96</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>97</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>98 99 100</sup>

“Due diligence requires states to ‘employ all means reasonably available to them’ to prevent a violation ‘so far as possible’.”<sup>101</sup> The types of conduct that could breach a due diligence obligation include action, inaction, or deficient action.<sup>102</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>103</sup> The same reasoning applies to states’ climate decision-making within the EBRD. Accepting that climate change harms human rights,<sup>104</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>98</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>99</sup> 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; European Court of Human Rights, Press Release, Grand Chamber Procedural Meeting in Climate Cases (Feb. 3, 2023) <https://hudoc.echr.coe.int/eng-press> (describing cases); 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); Order on Request for Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Order 2023/4 of June 30, 2023, <https://www.itlos.org/en/main/resources/media-room/calendar-of-events/#ar542>; 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\\_opiniones\\_consultivas.cfm?lang=en](https://www.corteidh.or.cr/solicitud_opiniones_consultivas.cfm?lang=en)).

<sup>100</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>101</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>102</sup> Kerr, *All Necessary Measures* at 556, and fn. 245 (citing Barros at 121-122, 124, 195).

<sup>103</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>104</sup> Kerr, *All Necessary Measures* at 546-550.

actions or inactions, uphold human rights.<sup>105</sup> Applying the harm prevention principle and precautionary principle yields the same due diligence obligations.<sup>106</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 the ESP mandate 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>107</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>108</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>109</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>110</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>105</sup> See fns. 100-104, 106-107; 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>106</sup> Kerr, All Necessary Measures at 541, 561-562; Cook and Viñuales at ¶¶ 41, 44, 46, 47, 48 (PDF at 29-34).

<sup>107</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>108</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>109</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>110</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>111</sup>

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<sup>111</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.”).