



March 14, 2024

Asian Development Bank
 Attn: Mr. Masatsugu Asakawa, President
 Attn: E&S Safeguards Update Unit
 6 ADB Avenue, Mandaluyong City 1550,
 Metro Manila, Philippines
 safeguardsupdate@adb.org; civilsociety@adb.org

Re: CSOs' Climate Change Comments on the Asian Development Bank Environmental and Social Framework (ESF) September 2023 Consultation Draft (Draft ESF)

Dear Mr. President Asakawa and to Whom it May Concern at the Asian Development Bank (ADB),

Thank you for the opportunity to comment on ADB's draft ESF. Bank Climate Advocates (BCA) and the undersigned civil society organizations (CSOs) submit the following comments on the Draft ESF regarding necessary improvements pertaining to climate change.

ADB's Draft ESF Must Be Improved to Address the Climate Crisis: As ADB 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.¹ 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.² And on the world's current trajectory of GHG emissions, the global temperature will increase by up to 2.7°C by 2100.³ 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.⁴ 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.⁵ 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 ADB can and has the duty to avoid.

These comments thus set forth three categories of improvements that must be made to ADB's ESF for ADB's activities to not worsen climate change, to align ADB with the Paris Agreement's warming limitation objectives, and to ensure ADB adheres to its climate change obligations under international law.

I. First, ADB's ESF Framework 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 CO2 emissions globally in 2022.⁶ 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

¹ 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/); See Appendix A for summary of current and expected climate change harms projected by the IPCC.

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

³ 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.

⁴ 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.

⁵ 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.

⁶ Dr. Zeke Hausfather, Prof. Pierre Friedlingstein. "Analysis: Global CO2 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).

investment in LNG infrastructure]...⁷ The Intergovernmental Panel on Climate Change’s (IPCC’s) recent synthesis report warned that, “*projected CO₂ emissions from existing fossil fuel infrastructure without additional abatement would exceed the remaining carbon budget for 1.5°C.*”⁸ 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.⁹ 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.¹⁰ 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.¹¹ Recent analysis from Climate Analytics finds that fossil fuel production and use (oil, gas, and coal combined) must fall by 40% by 2030.¹² 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.¹³

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

As such, ADB’s ESF Framework 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, ADB’s financing activities cannot be aligned with the Paris Agreement’s 1.5°C global warming limitation objective. Furthermore, as detailed in Appendix B and C below, such prohibitions are necessary for the ADB and its shareholders to adhere to the Paris Agreement and their obligations under customary international law to prevent ADB’s activities from causing or contributing to climate change harms.

II. Second, ADB’s ESF 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:

⁷ See fns. 8 and 9, *post*.

⁸ 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

⁹ 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).

¹⁰ IEA (2023), World Energy Outlook 2023, IEA, Paris, p. 139 (available at: <https://www.iea.org/reports/world-energy-outlook-2023>).

¹¹ 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>).

¹² 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>).

¹³ See fn. 12, *ante*, Climate Analytics, “2030 Targets.”

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...¹⁴

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.¹⁵ 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.¹⁶ 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, ADB's and its member state's obligations under international law provide compelling reasons for ADB's ESF to explicitly prioritize and facilitate financing of just and equitable renewable energy projects. The Paris Agreement requires that ADB and its member states party to the Paris Agreement ensure that ADB'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 ESF 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 11 significant enhancements must be made to the final ESF to ensure ADB adequately assesses, avoids, and mitigates GHG emissions and their impacts from the projects it finances prior to its financing and guarantee decisions.

¹⁴ See fn. 12, *ante*, Climate Analytics, "2030 Targets."

¹⁵ 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>).

¹⁶ "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/>).

The following adjustments to the ESF in items 1-11 of this section III must be made, and *applied prior to ADB's financing decisions*, for ADB to adhere to its due diligence obligations under international law, to prevent ADB from causing or contributing to climate change harms, and to help significantly reduce the occasions where remedial action is required for climate change harms ADB causes or contributes to. ADB's and its global north shareholders' obligations under the Paris Agreement and customary international law to adopt and implement the following improvements to the ESF are detailed in Appendix B and D below.

1. The ESF must be amended to (1) require “best reasonably available and practiced methods” as the standard ADB ensures is met for the minimum quality of environmental and social impact assessments and their contents, and (2) to require ADB itself (not just the client) to ensure the ESF’s impact assessment and mitigation requirements are met prior to financing decisions.

- (1) The first of our two overarching comments is the ESF 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 ESF 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 ADB decision making and required by the ESF, 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 ESF'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 ADB will secure necessary analysis and avoidance of environmental and social impacts.

As detailed in Appendix B and D below, because the projects with GHG emissions ADB enables by providing financing or guarantees pose a severe risk of climate harm, ADB's, and its member state shareholders from the Global North's, due diligence¹⁷ obligations arising under the Paris Agreement, and human rights and customary international law require that the ESF mandate ADB ensure climate impacts, and measures to avoid them, are assessed and implemented prior to financing approvals using a “best reasonably available and practiced methods” standard.¹⁸ Furthermore, the ESF 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

¹⁷ 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>).

¹⁸ As detailed in Section I, *ante*, and Appendix B, C, and D *post*, ADB's and its Member State's due diligence obligations extend beyond adequate study prior to project approvals to prevent ADB's financing activities from causing or contributing to climate change harms. They also include ADB taking substantive measures, such ceasing all direct and indirect financing of fossil fuels (see e.g., Cook and Viñuales fn. 59, *post*, as applied to ADB (attached as Exhibit 1 and available at: <https://priceofoil.org/2021/05/04/eca-legal-opinion/>); Appendix B, C, and D, *post*).

alternatives and feasible avoidance and other mitigation measures.¹⁹ 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 ESF 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 help prevent ADB'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.

- (2) Our second overarching comment is that as detailed in Appendix B and D, ADB and its Global North shareholders/member states have capabilities, control, and due diligence obligations and duties under international law - independent of ADB's clients/borrowers - to ensure borrower/client adherence to ADB policies and all aspects of the ESF prior to financing approvals to prevent climate change harms to communities from ADB's financing activities. ADB ensuring borrower/client adherence to ADB policies and all aspects of the ESF prior to financing approvals means ADB (i) ensuring client/borrower adoption mitigation measures in-line with the ESF's 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 ADB client capacity and principles of "common but differentiated responsibilities" at the project assessment, diligence, and planning stages.

The draft E&S Policy falls short of ADB's and its global north member states due diligence duties and obligations under international law because the E&S Policy impermissibly only requires the client/borrower, and not the ADB itself, to ensure adequacy of the requisite ESF environmental and social impact assessments and mitigation measures prior to financing decisions.²⁰ **As such, the final ESF, including the ADB Environmental and Social Policy (E&S Policy), must require the ADB itself ensure the ESF's impact assessment and**

¹⁹ 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>).

²⁰ The draft ADB Environmental and Social Policy that is part of the Draft ESF (E&S Policy) does not specify ADB will ensure ADB's clients/borrowers adhere to the Environmental and Social Standards (ESSs) or other parts of the ESF applicable to ADB clients – this requirement is notably missing. E&S Policy Sections II, IV. The list of ADB's responsibilities in the E&S Policy even goes as far to seemingly allow the ADB to let the client off the hook in regards to adhering to the ESSs and other ESF requirements. See E&S Policy, Section II (3)e providing: "[t]o carry out this E&S Policy, ADB will: **agree with borrowers/clients** on the conditions under which ADB will consider providing financing to a project, which will be set out in an environmental and social commitment plan/environmental and social action plan (ESCP/ESAP);" see Section IV paragraph 11 providing: ADB will work with a borrower/client so that all E&S assessment requirements under the relevant ESSs will be identified and undertaken **to the extent possible to the satisfaction of ADB**, to enhance E&S readiness of a project." In addition, the E&S Policy impermissibly allows ADB to allow borrower/client deferral of GHG emissions and climate change impact analysis and mitigation until after financing decisions. See E&S Policy at Section IV paragraph 12 providing: "**ADB will agree with a borrower/client** on an ESCP/ESAP for a project as detailed in paras 36-40... **To determine the appropriate manner and acceptable timeframe for a borrower/client to implement the measures to comply with the ESSs, ADB will take into account** the nature and scale of the potential E&S risks and impacts of a project, **the timing for development and implementation, the capacity of a borrower/client**, and the specific measures and actions to be put in place or taken by a borrower/client to address such risks and impacts.

mitigation requirements are met prior to financing decisions. Such a requirement for ADB 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. The ESF Must Specify that its Mitigation Hierarchy Requirements Apply to GHG Emissions and Climate Change Impacts, and that Adequate Analysis to Inform and Support Adoption of the Mitigation Hierarchy Must Be Performed.** While the ESF contains a mitigation hierarchy requirement that must be secured for environmental and social impacts prior to project financing, the sections of the ESF pertaining to assessment and avoidance of GHG emissions and climate change impacts does not specify that the mitigation hierarchy requirement applies to GHG emissions and climate change impacts. This violates ADB's and its member states due diligence obligations under international law to prevent harm. Thus, the ESF must be amended to specifically specify that its mitigation hierarchy requirements provide that before the ADB approves financing for a project, mitigation measures must be adopted to avoid GHG emissions and climate change impacts (as a 1st 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 client capacity and principles of "common but differentiated responsibilities" at the project planning, assessment, and implementation stages.

Furthermore, the ESF must ensure and secure adoption of a mitigation hierarchy for GHG emissions and climate change impacts (including for impacts to affected communities – the ESF has no climate change impact mitigation guarantees or standards for a project's climate change impacts to affected communities), *and 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 assessment of the full extent of a project's scope 1, 2, and 3 GHG emissions to assess the avoidance and minimization measures needed. The mitigation hierarchy requirement thus also requires the ADB 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 ESF mitigation hierarchy and for the ESF 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 ESF (including from the definition of mitigation hierarchy at Draft ESF page 139, paragraph 30 of ESS1, paragraph 21 of ESS3 section IV(F), Annex 1 Section 3(iv), and A-2: Indicative Outline of an Environmental and Social Management Plan) remove offsets as permissible mitigation and explicitly prohibit their use for GHG emissions.

In addition, the ESF 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 ADB financing, the ESF 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(3), *post*), is provided to the ADB and public for a duration sufficient to allow for meaningful review, and (2) an adequate mitigation hierarchy is adopted, prior to ADB commitments to the development, acquisition, or financing that was not defined at the time of ADB financing.

- 3. The ESF Must Be Amended to Enhance the GHG Emissions and Climate Change Impacts Alternatives Analysis Requirements.** As detailed in Section III, 1., *ante.*, ADB must ensure its ESF contains requirements to ensure implementation of best reasonably available and practiced methods to assess and prevent climate change harms. Such a best reasonably available and practiced method is the GHG emissions and climate change alternatives analysis required by NEPA.²¹ Accordingly, the ESF'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 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

²¹ See fn. 19, *ante.*

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,²² 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 ADB 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 ADB, governments, communities in a project's region, and the public. Without conducting an alternatives analysis that meets NEPA's requirements, ADB 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 ADB causes or contributes to.

We note that the ADB management approved 2021 Energy Policy of the ADB Supporting Low-Carbon Transition in Asia and the Pacific (June 2023) ("2021 ADB 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.^[23] 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.

2021 ADB Energy Policy at 15. The Draft ESF provides that Environmental and Social Impact Assessments will include an Analysis of Alternatives that "for each of the alternatives, quantifies the E&S risks and impacts to the extent possible, and attaches economic values where feasible." Draft ESF A-1 (vii) at 38. Considering the forementioned factors, including the ADB's due diligence obligations to prevent climate change harms under international law and the stronger social cost of carbon requirements in the ADB management approved 2021 ADB Energy Policy that indicates ADB will ensure quantification of the social cost of carbon for all projects, the ESF social cost of carbon requirements must be strengthened. Specifically, the ESF must be improved to require that prior to financing decisions for each project with anticipated GHG emissions, that ADB 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 methods to quantify social cost of GHG emissions to communities in the project's

²² See fn. 19, *ante*.

²³ ADB. 2017. Guidelines for the Economic Analysis of Projects. Manila.

region and country. The ADB 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 ADB, 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.

4. **The ESF 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*.** ADB’s and its Global North shareholder’s due diligence obligations under international law to assess and prevent harm require the ADB 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. As such, the ESF must be amended to require the ADB 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 by removing the language that quantification of Scope 3 emissions is only required “*where relevant*”. Furthermore, quantification of a project’s Scope 1, 2, and 3 emissions prior to project financing is needed to determine whether the ADB 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 ESF public disclosure and continuous monitoring/reporting thresholds), and to determine the carbon footprint of ADB’s cumulative financing activities – especially in the instance where ADB’s ongoing GHG monitoring and reporting requirements do not apply.

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 ESF 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 ESF must require that scope 1, 2, and 3 GHG emissions are quantified and provided to the ADB 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 ADB 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.

5. The ESF Must Require Public Disclosure of a Project's GHG Emissions 120 Days Prior to Financing Decisions²⁴ if a Project's Scope 1, 2, and 3 Emissions are Estimated to Exceed 20,000 tCO₂-eq over a project's lifecycle, not just over 20,000 tCO₂-eq per year. This is necessary to ensure the public and ADB are aware of projects that will emit significant GHG emissions, and have opportunities to ensure avoidance of these emissions prior to project financing decisions. To further support this, 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 based on tCO₂-eq over a project's lifecycle (rather than tCO₂-eq per year) in place since 2012 as standard practice all DFI's should replicate.²⁵

Of note, this disclosure requirement further supports that the ADB ESF must require ADB to quantify or ensure quantification of all of a project's scope 1, 2, and 3 emissions over its lifecycle prior to financing approval. Quantification and disclosure of GHG emissions over 20,000 tCO₂-eq over a project's lifecycle is also necessary for the ADB and public to be able to measure the carbon footprint of ADB's financing activities, and for ADB to succeed ensuring an adequate mitigation hierarchy is adopted, which requires adoption of a mitigation hierarchy for GHG emissions that addresses a project's true total Scope 1, 2 and 3 GHG emissions amounts.

6. The ESF 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 ADB 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 tCO₂-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 tCO₂-eq per year threshold be exceeded.

²⁴ See Section III.8., *post*, regarding the 120-day disclosure requirement.

²⁵ 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 tCO₂-eq over a project's life cycle, not just per year. IFC Access to Info Policy at ¶ 31 (a)(v).

In addition, in regards to ongoing monitoring and reporting, the ADB must amend the ESF to require ADB disclose on its website, the annual GHG emissions each project monitors and reports to the ADB. This is necessary to ensure the ESF’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 ESF 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 ADB and its Global North shareholders to adhere to their due diligence obligations under international law to prevent harm. See Appendix B and D, *post*.

- 7. The ESF 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 Paris Agreement’s warming objectives and other applicable regional, national and global GHG emission plans.** This is because ADB’s due diligence requirements under international law²⁶ 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.
- 8. The ESF must specify that 120 days prior to ADB’s financing decisions, for each project the ADB 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.²⁷ 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.²⁸ 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

²⁶ See Appendix B & D, *post*, detailing ADB’s due diligence obligations under international law to ensure the ESF 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. 19, *ante*).

²⁷ 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.

²⁸ See UNEP EIA Report at 50-66.

*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.*²⁹

While the UNEP Report documents that there is no general agreement in laws or the literature on what constitutes good practice in relation to public participation in Environmental Impact Assessments (EIAs), it finds most legislation in Global North and South states around the world make it mandatory to publicly publish information on disclosing a project when an application is submitted or the project is being considered, to make the draft EIA reports publicly available, and to provide the opportunity to submit comments on the EIA reports and project well prior to project approval.³⁰ 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),³¹ these requirements are common place in international environmental treaties.³²

Because of the Climate Crisis (see Appendix A, *post*; pages 1-3, *ante*), it is clear that for all projects that cross a ESF significance threshold 20,000 tCO₂-eq of scope 1, 2, and 3 emissions over a project's lifecycle or 20,000 tCO₂-eq of scope 1, 2, and 3 emissions per year, the ESF must specify that the GHG emissions analysis and mitigation measures for the project must be disclosed to the public on ADB's website to provide opportunity for review and comment at least 120 days prior to ADB's, and ADB financed financial intermediaries', financing decisions. In addition, we more broadly request that the ESF 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 ADB website a minimum of 120 days prior to ADB's financing or a ADB 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 (a) they are necessary to allow affected communities and the concerned public to be informed, to be consulted, and to provide the review and input necessary for ADB to adhere to its due diligence obligations under international law (See Appendix B and D, *post*); and (b) neither the Draft ESF or ADB's Access to Information Policy

²⁹ UNEP EIA Report at 50-51, 65-66.

³⁰ UNEP EIA Report at 50, 53, 55, 60-61.

³¹ 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>).

³² 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).

(September 2018) specify any minimum number of days prior to financing decisions the ADB must disclose social and environmental assessments for Category A, B, or C projects/direct investments, or trade finance, advisory services, and financial intermediary projects.³³

Even IFC's outdated Access to Information Policy, falling well short of IFC's due diligence obligations under international law, requires the IFC to publicly disclose environmental and social impact assessments at least 60 days prior to financing decisions for Category A projects and 30 days prior to financing approvals for Category B and C, Trade Finance, Advisory Services, and Financial Intermediary projects.³⁴ ADB's Safeguard Policy Statement (June 2009), that the ESF will replace, requires ADB disclose a project's social and environmental impact assessments 120 days prior to project financing approvals for Category A projects, but is impermissibly silent in regards to the number of days prior to ADB financing that ADB must publicly disclose this information for all other categories of ADB investments (Category B and C, trade finance, advisory services, financial intermediary projects, etc.). ADB's 2003 Environmental Assessment Guidelines went further than ADB's Safeguard Policy Statement (June 2009) by requiring public disclosure of this analysis and information 120 days prior to ADB's financing decisions for all public and private sector category A projects and for those Category B projects deemed to be environmentally sensitive. ADB Environmental Assessment Guidelines (2003) ¶ 32 at 10. However, this prior more protective disclosure requirement in the 2003 Guidelines still falls well short of good international industry practice and ADB's due diligence obligations under international law to implement best reasonably available and practiced methods for environmental and social impact assessments, which amongst other practices and measures, as detailed above, requires public disclosure of impact assessments and providing a minimum and sufficient amount of time for public review and comment.

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 ADB website, this additional information must also be disclosed on the ADB website for public review 120 days before consideration by the ADB 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, ADB's ESF must make clear that the confidentiality and commercial sensitivity provisions in ADB's Access to Information Policy (September 2018) do not allow ADB 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 ADB 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,³⁵ should not be shielded from public disclosure.

³³ ADB's Safeguard Policy Statement (June 2009) at ¶ 53.

³⁴ IFC Access to Information Policy (2012) at ¶ 34.

³⁵ See fn. 27, *ante*.

We bring this to ADB'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.³⁶ ADB's Access to Information Policy does not allow for, and the ESF should not allow for, withholding of this information central to implementation of the ESF.

ADB should have no supportable basis to justifiably claim that any of the Exceptions to Disclosure found in its Access to Information Policy, including in regards to commercial sensitivity and confidentiality, shields disclosure of GHG emissions and mitigation analysis.³⁷ And more generally, for ADB to ensure its own accountability and to allow the concerned public and stakeholders to address a situation where the ADB does claim any sort of confidentiality provisions as a basis for non-disclosure for analysis or mitigation pertaining to any environmental and social impacts, the ESF must require ADB 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 ADB 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 ESF's requirements and thus avoids or mitigates a project's GHG emissions as much as economically and technically feasible. *Id.*

- 9. The ESF must specify that prior to its Financial Intermediary (FI) client's decisions to invest in a project, that the FI adheres to the ESF'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.-8. above. In addition, the ESF must specify that during the appraisal process and prior to approving financing for FI investments, ADB is required to ensure that the FI client ensures adherence to all requirements of the ESF. In the context of climate change impacts, this requires the ESF specifies amongst other things, that the FI must publicly disclose, and provide opportunity for public review, of the full GHG emissions and climate change impact**

³⁶ 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.

³⁷ ADB Access to Information Policy (September 2018), at Section III.B., pages 8-12, ¶¶ 16,17,19.

and mitigation analysis, alternatives analysis, and mitigation measures for a contemplated investment ***120 days before the FI decides to finance a project.***

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

In addition, as a necessary part of ensuring its FI clients meet all of the ESF's requirements applicable to ADB direct investments, the ESF must be amended to specify ADB is required to ensure the FI understands, and agrees in its financing agreement with the ADB, that the FI is required to disclose its contemplated investments and their environmental impact assessments (including for GHG emissions and climate change) to the ADB and public 120 days prior to its financing decisions. This would provide the public and ADB, with needed safeguards, and notice and opportunity for review of FI contemplated investments prior to the FI's financing decision. In addition to ensuring quantification and reduction of GHG emissions from FI projects in line with the ADB's policies, ADB ensuring such FI disclosures and release of impact assessments to the ADB and public prior to FI financing commitments could substantially help ADB prevent its FI clients from impermissibly using ADB funds to finance fossil fuel or other harmful projects without public or ADB 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).*³⁸ 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.³⁹ 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 in accordance with the disclosure timeliness in ADB's board adopted policies is required as part of FI's requisite

³⁸ RCBC case (available at: 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/Java-9-and-10_CAO-complaint.pdf).

³⁹ *Id.*

adherence to the ESF, is needed to achieve implementation of the ESF. Moreover, it is required to ensure ADB adheres to its due diligence obligations to prevent harm from its financing activities under international law.

10. The ESF Must Specify that ADB Ensures that in Providing its Advisory Services, that ADB Adheres, or Ensures Adherence, to the ESF Requirements Applicable to GHG Emissions and Climate Change Impacts. Advice provided by ADB 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. ADB's due diligence requirements to prevent harm require the ESF to specify that in providing its advisory services, that ADB adheres, or ensures adherence, to the ESF requirements applicable to GHG emissions and climate change impacts. This means ADB is required to ensure, and the ESF must be improved to specify, that when ADB advises on a project, it provides its client with, or 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 ESF must also be improved to specify that ADB's contemplated advisory services that may result in a project with greater than 20,000 tCO₂-eq of scope 1, 2, and 3 emissions over its lifecycle, must be publicly disclosed on the ADB's website prior to ADB approval as required by ADB's due diligence obligations. See Section III. 8., *ante* (detailing ADB's disclosure requirements).

By facilitating financing for projects and providing guidance and expertise to for projects in many countries, ADB's advisory services have a significant impact on achievement of the Paris Agreement's 1.5 C warming objective. Thus, ADB ensuring its advisory service's adherence to ESF's requirements has tremendous implications for ADB'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.

11. The ESF Must Specify that ADB Ensures that Prior to Approving Trade Finance⁴⁰ or any investment products with shorter tenor including short-term loans, guarantees, and trade finance products with maturities of up to three years, that ADB Adheres, or Ensures Adherence, to the ESF Requirements Applicable to GHG Emissions and Climate Change

⁴⁰ 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.*"

Impacts. This means ADB 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 ESF 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 ESF mitigation measures, including a mitigation hierarchy for GHG emissions and climate change impacts. See Sections III.1.-8., *ante* (detailing these ESF requirements). In addition, this means ADB's contemplated trade finance products or investments that may cause or contribute to greater than 20,000 tCO₂-eq of scope 1, 2, and 3 emissions over a project's lifecycle, must be publicly disclosed on the ADB's website prior to ADB approval as required by ADB's due diligence obligations. See part 8, *ante* (detailing ADB's disclosure requirements).

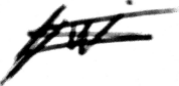
In sum and unlike peer MDB's like the IFC,⁴¹ the draft ESF is silent on the applicability of its requirements to trade finance and short-term investment products. ADB's due diligence requirements to prevent harm require the ESF to specify that prior to approving trade finance transactions and products, that ADB adheres, or ensures adherence, to the ESF and ADB public disclosure requirements applicable to GHG emissions and climate change impacts. In addition, as detailed in Section I., *ante*, the ESF must prohibit trade finance for, that supports, that facilitates, or that enables fossil fuel projects.

Conclusion

Thank you for considering our comments. The three sets of improvements to ADB's draft ESF above are necessary for ADB's financing and guarantee activities to come into alignment with the Paris Agreement's 1.5°C warming limitation objectives, and for the ADB and its global north shareholders to comply with their obligations under international law. Moreover, they are needed for ADB 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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⁴¹ 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.

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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.⁴² 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).

⁴² 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/).

Appendix B: ADB's and its Member States' Obligations Under International Law

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

International law has long provided that if a state breaches an obligation established by a treaty or customary international law it can be held responsible in international tribunals or applicable domestic courts.⁴³ 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.”⁴⁴ The International Court of Justice made this finding in *FYROM v. Greece*.⁴⁵ 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.⁴⁶ “[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.”⁴⁷ 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.⁴⁸ 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.⁴⁹

II. ADB's General Obligations Under International Law

⁴³ Kerr, B. P. (2020), Regulating the Environmental Integrity of Carbon Offsets for Aviation: the International Civil Aviation Organization’s Additivity 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*.

⁴⁴ Kerr, B.P., All Necessary Measures: Climate Law for International Shipping, *Virginia Journal of International Law* (Accepted/In press; Note the page and footnote numbering may differ in the published copy. This letter cites to the pre-publication version of this article, which is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4549961 or upon request if not available after publication) (hereinafter “Kerr, All Necessary Measures”) at 50-51, and fn. 254; 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.

⁴⁵ Kerr, All Necessary Measures at 50-51, and fn. 255; 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*].

⁴⁶ Kerr, All Necessary Measures at 51, and fn. 261; *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).

⁴⁷ Kerr, All Necessary Measures at 9, and fn. 32, 53; *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>.

⁴⁸ Kerr, All Necessary Measures at 53-54, and fn.275; 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).

⁴⁹ Kerr, All Necessary Measures at 54, and fn. 278; Barros at 94.

International organizations,⁵⁰ including the ADB, can also be held responsible for breaching their obligations, including those established by a treaty or customary international law.⁵¹ This has happened numerous times, in various domestic courts.⁵² The ILC DARIO Articles⁵³ 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").⁵⁴ 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.'⁵⁵ In addition, "the ICJ found long ago that international organizations are bound by 'obligations incumbent upon them under general rules of international law.'" ⁵⁶ 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.⁵⁷ Thus, for example, the ADB itself must adhere to its member states' obligations under Article 4 of the UNFCCC to reduce or limit GHG emissions and their obligation under Articles 2 and 3 of the Paris Agreement to take ambitious efforts to hold global warming to less than 1.5°C.

⁵⁰ 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).

⁵¹ 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).

⁵² 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).

⁵³ 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").

⁵⁴ Kerr, ICAO at 3.

⁵⁵ Kerr, ICAO at 4; ILC DARIO Articles, Art. 10.

⁵⁶ 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).

⁵⁷ 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: ADB’s and its Shareholder’s Obligations Under International Law for the ADB ESF 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 ADB and its global north member state shareholders are obliged to adhere to,⁵⁸ the ADB’s ESF Framework 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.⁵⁹ In summary, Cook and Viñuales demonstrate that:

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

Cook and Viñuales, including at paragraph 265; Cook and Viñuales further establish that ADB has a duty for its financing 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 ADB and its shareholder State parties to the Paris Agreement should seek to ensure that ADB’s finance flows address the climate goals and the poverty goals of developing States in an integrated way, including the need to ensure universal access to sustainable energy in developing countries, in particular in Africa, through the “enhanced deployment” of renewable energy, as indicated in the preamble to UNFCCC Decision 1/CP.21 adopting the Paris Agreement.

Id. As such, the ESF must include provisions that specify prioritization of financing for renewable energy projects to meet energy demands.

⁵⁸ Appendix B, *ante*, details how both the ADB and its Members State shareholders are obliged under international law to adhere to the Paris Agreement’s requirements and customary international law.

⁵⁹ 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 ADB, and its Member State shareholders.

Appendix D: ADB’s and its Shareholder’s Due Diligence Obligations Under the Paris Agreement, and human rights and customary international law, require that the ESF contains requirements that ADB 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 ADB, and also its member state shareholders, have obligations under international law that that they can be held accountable to in international tribunals and domestic courts. See Appendix B, *ante*.

As it pertains to climate change, the obligations under international law that the ADB and its member states must adhere, include their due diligence⁶⁰ obligations arising under the Paris Agreement and human rights and customary international law. Because the projects with GHG emissions ADB enables by providing financing or guarantees pose a severe risk of climate harm, these due diligence obligations require ADB and its member states to ensure that its ESF 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.⁶¹ 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.⁶²

The ADB’s ESF 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 ADB 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 ADB’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 ADB, which as an independent public institution, has its own unique due diligence obligations separate from its member states. The ADB and its Global North Member States thus have the duty, capabilities, and control - independent of ADB’s clients – to fully assess (or secure an independent entity with expertise to assess) and demand alternatives or measures to prevent harm from climate change when its clients may not have the resources to. The ADB can address these harms through ensuring adequate due diligence prior to financing approval, which respects client capacity and principles of “common but differentiated

⁶⁰ 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>.

⁶¹ As detailed in Appendix C, *ante*, ADB’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 ADB taking substantive measures, such ceasing all direct and indirect financing of fossil fuels.

⁶² See fn. 19, *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 ADB’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. ADB’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.⁶³ They do not permit members state parties to follow different, less ambitious goals.⁶⁴ “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).⁶⁵ 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.⁶⁶ As applied to the ADB, the consistency of finance flows with the Article 2 pathways can only be assessed effectively if, prior to ADB’s financing approval, a project’s scope 1, 2 and 3 emissions and their impacts are fully quantified and taken into account, GHG/climate change alternatives analysis is conducted, and mitigation measures are assessed and implemented that can avoid and minimize a project’s GHG emissions to the furthest extent economically and technically feasible.⁶⁷

⁶³ 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>).

⁶⁴ Cook and Viñuales at ¶60

⁶⁵ Cook and Viñuales at ¶70

⁶⁶ Cook and Viñuales at ¶72

⁶⁷ *Id.*; See *also*, Cook and Viñuales at ¶108

Article 3 further requires specific assessment of all relevant finance flows. It requires Parties “to undertake and communicate ambitious efforts,” including in regards to finance, with a view to achieving the Article 2 purposes.⁶⁸ 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,⁶⁹ 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.⁷⁰ 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.⁷¹ Furthermore, these efforts must be informed by *best available science* to assess whether finance flows, including those for which the ADB is responsible, are consistent with the global carbon budget.⁷² This not only means the ADB 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, ADB must actually ensure alternatives and mitigation measures are adopted to avoid GHG emissions that good faith due diligence shows to be economically and technically feasible and that allows for achievement of the project purpose. Thus, for a hypothetical example – not taking into consideration that the ADB’s ESF 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 ADB abandon financing for the contemplated fossil fuel project and facilitate financing for renewable energy options instead.

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

⁶⁸ Cook and Viñuales at ¶ 75.

⁶⁹ 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”).

⁷⁰ Cook and Viñuales at ¶ 80.

⁷¹ Paris Agreement, Article 3; Cook and Viñuales at ¶¶ 75, 76, 103-105.

⁷² Paris Agreement, Article 4(1); Cook and Viñuales at ¶¶ 103-105; Cook and Viñuales at ¶110 (providing “due diligence must entail acting in proportion to the scale of the risk posed by the conduct assessed, having regard to the best available science... This means that assessment of the risks posed by an investment/project should take account of all the risks posed.”).

the light of different national circumstances.” “The standards of “highest possible ambition” and “progression” (Articles 3, 4(1) and (3) of the Paris Agreement), as these relate to the current production gap and global carbon budget, should [] inform due diligence.”⁷³ This further supports that prior to ADB approving financing for a project, ADB must ensure a project’s scope 1, 2 and 3 emissions and their impacts must be taken into account, a robust and supported GHG/climate change alternatives analysis is conducted in line with best reasonably available methods, and alternatives and mitigation measures are assessed and committed to that can avoid and minimize a project’s GHG emissions to the furthest extent economically and technically feasible.

Article 9(5) requires that developed country Parties are to biennially communicate indicative quantitative and qualitative information related to Article 9, paragraphs 1 and 3, of the Paris Agreement.⁷⁴ “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).”⁷⁵ 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.”⁷⁶ “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.”⁷⁷ 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.”⁷⁸ It is clear that this duty of due diligence applies to the ADB and its Global North members states, as they possess ample financial resources to satisfy it. That these due diligence responsibilities fall on the ADB and its Global North Member states, is consistent with Article 2(2) of the Paris Agreement requiring the Agreement to “be implemented to reflect equity and the principle of common

⁷³ Cook and Viñuales at ¶ 104.

⁷⁴ Cook and Viñuales at ¶ 98.

⁷⁵ Cook and Viñuales at ¶ 100.

⁷⁶ Paris Agreement, Article 13(5).

⁷⁷ Cook and Viñuales at ¶¶ 113-114.

⁷⁸ Cook and Viñuales at ¶¶ 78-79.

but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”⁷⁹ ADB 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.”⁸⁰

III. ADB’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 ADB’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.⁸¹

“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.”⁸² 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.”⁸³ 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.”⁸⁴ The cumulative climate impacts from the significant GHG emissions resulting from ADB’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.”⁸⁵ Accordingly, harm prevention and precautionary

⁷⁹ Cook and Viñuales at ¶¶ 56-57.

⁸⁰ Cook and Viñuales at ¶¶ 56-57, 75.

⁸¹ See Appendix B, *ante*; Barros, Section III; Kerr, All Necessary Measures at 4 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 53-54, and fn.275).

⁸² Kerr, All Necessary Measures at 4, and fn. 16; 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).

⁸³ Kerr, All Necessary Measures at 25-26, and fn.119; 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.

⁸⁴ Kerr, All Necessary Measures at 26, and fn. 120; 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.

⁸⁵ Kerr, All Necessary Measures at 26, and fn. 121; 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.⁸⁶ This means, international environmental principles require that the Paris Agreement’s 1.5°C warming limitation objective must guide ADB’s and its member states in their actions related to the climate impacts of ADB’s financing activities, and ADB 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,⁸⁷ and it is firmly established “[c]limate change is one of the greatest threats to human rights.”⁸⁸ The UN General Assembly recognized the right to a clean, healthy, and sustainable environment as a human right in 2022.⁸⁹ Moreover, international treaties governing human rights guarantee rights to life and property, and international and domestic courts have found these rights implicate a due diligence obligation to reduce risks of environmental harms.⁹⁰ “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.”⁹¹

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

⁸⁶ Kerr, *All Necessary Measures* at 25-26, and fn. 122.

⁸⁷ Kerr, *All Necessary Measures* at 38-39.

⁸⁸ 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.”

⁸⁹ Kerr, *All Necessary Measures* at 38, and fn. 186; G.A. Res. 76/300, *The Human Right to a Clean, Healthy and Sustainable Environment*, at 3 (July 28, 2022).

⁹⁰ Kerr, *All Necessary Measures* at 5, and fn. 20; *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 McNerney-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* (Art. 4(1) and 5(1) American Convention on Human Rights), *Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser.A) No. 23* (Nov. 15, 2017), ¶¶ 62–63, 101–103.

⁹¹ Kerr, *All Necessary Measures* at 9, 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.”^{92 93 94}

“Due diligence requires states to ‘employ all means reasonably available to them’ to prevent a violation ‘so far as possible’.”⁹⁵ The types of conduct that could breach a due diligence obligation include action, inaction, or deficient action.⁹⁶ 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.”⁹⁷ The same reasoning applies to states’ climate decision-making within the ADB. Accepting that climate change harms human rights,⁹⁸ and ADB member states are bound by their human rights obligations when acting as decision-makers within the ADB, they are therefore under an obligation of conduct to do all they can in that role to make sure the ADB’s climate decisions, and

⁹² Kerr, *All Necessary Measures* at 5, 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.”)).

⁹³ 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 38, and fn. 187; 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).

⁹⁴ 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).

⁹⁵ Kerr, *All Necessary Measures* at 48, and fn. 241; 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.

⁹⁶ Kerr, *All Necessary Measures* at 48, and fn. 242 (citing Barros at 121-122, 124, 195).

⁹⁷ Kerr, *All Necessary Measures* at 53-54, and fn. 275; 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).

⁹⁸ Kerr, *All Necessary Measures* at 32-39.

actions or inactions, uphold human rights.⁹⁹ Applying the harm prevention principle and precautionary principle yields the same due diligence obligations.¹⁰⁰

Accordingly, in light of the climate risks and impacts from ADB's financing activities, customary international principles and human rights law impose an equivalent obligation mandating that the ADB and its member states use best available and practiced methods, and take all measures, to diligently account for, prevent, and mitigate the GHG emissions. This means that ADB and its member states must require the ESF mandate ADB ensures it diligently assesses and prevent the risk of climate harm from ADB 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.”¹⁰¹ 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.¹⁰² This means, ADB and its Global North Member States must use their best efforts, and best available practiced methods, to ensure that GHG emissions and their impacts from each project the ADB finances are fully assessed, avoided, and mitigated to the furthest extent technically and economically feasible prior to ADB 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, ADB and its Member States are obliged to use their influence to push its clients to adopt a high level of ambition and effective measures that are consistent with the best available and used GHG emissions and mitigation methodologies and technological developments.¹⁰³ Considering the ADB itself is required to commit the resources to ensure that for each project: Scope 1, 2, and 3 GHG emissions are fully quantified, that an adequate GHG / climate change alternatives analysis is conducted, and that a mitigation 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 ADB 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.¹⁰⁴ 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*), ADB's general

⁹⁹ See fns. 94-101; 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).

¹⁰⁰ Kerr, All Necessary Measures at 25-26, 56; Cook and Viñuales at ¶¶ 41, 44, 46, 47, 48 (PDF at 29-34).

¹⁰¹ Kerr, All Necessary Measures at 8, 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).

¹⁰² Kerr, All Necessary Measures at 8, 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.

¹⁰³ Kerr, All Necessary Measures at 9-10; Kerr, Erga Omnes Obligation; Baine P. Kerr, Binding the International Maritime Organization to the United Nations Convention on the Law of the Sea, 19 INT'L ORG. L. REV. 391 (2022).

¹⁰⁴ See Kerr, All Necessary Measures at 4, 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 ADB and its member states do more.¹⁰⁵

¹⁰⁵ Kerr, *All Necessary Measures* at 7-8, 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.”).