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May 5, 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’ Supplemental 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) incorporate the March 14, 2024 comments from a coalition of 17 CSOs attached as Enclosure 1 (March 2024 Comments) by reference, and submit the following supplemental comments on the Draft ESF. These supplemental comments are informed by BCA’s participation in ADB’s April ESF consultations on April 3, 5, and 12, 2024 (ESF Consultations), regarding necessary improvements to the ESF pertaining to climate change.

In addition to our supplemental comments below, we draw to ADB’s attention that the United Nations Human Rights Office of the High Commissioner (UN OHCHR) agrees with the necessity of ADB adopting the improvements requested to the climate change aspects of the ESF requested by the 17 undersigned CSOs to the [March 2024 Comments](#). See UN OHCHR Comments on ADB draft Environmental and Social Policy, 29 April 2024 at page 4 item 6 sentence 1, and footnote 5 at the end of this first sentence in item 6 linking to our March 2024 CSO Comments (providing: “Other positive features, in OHCHR’s view, include the fact that a stand-alone ESS is proposed for climate change risks (ESS 9), subject to the critical comments of other stakeholders.5 ...[fn. 5 to this sentence:] Letter from 17 civil society organizations to the ADB President on 14 March 2024, arguing, among other things, that the ESF should explicitly prohibit financing of and/or guarantees or insurance for all upstream, midstream and downstream fossil fuel projects.”). Available at: <https://www.ohchr.org/sites/default/files/documents/issues/development/dfi/OHCHR-comments-ADB-ESF-20240429.pdf> and in Enclosure 3 below.

Supplemental Comments

- 1.) Human Rights Obligations to Prevent Climate Change Harms Under Customary International Law v. Paris Alignment:** The aspects of the ESF relating to GHG emissions and climate change impacts quantification and harm prevention must be greatly improved due to

evolving international law in relation to ADB's financing of GHG emissions in Asia. In the ESF ADB adopts, in addition to specifically addressing the rapidly changing legal framework and obligations around climate change risk mitigation and harm prevention from Paris Agreement, the ESF must also address the legally binding human rights requirements set forth in litigation at the national and international courts, and in customary international law pertaining to human rights, harm prevention, and the precautionary principle, that establish ADB's and its Member States' obligations to not finance projects that would cause or contribute to exceedance of the 1.5°C degree warming limitation objective.¹

Accordingly, in addition to addressing and explaining how the ESF ADB adopts is in line with ADB's and its members state shareholder's obligations under customary human rights and harm prevention international law to prevent climate change harms prior to financing decisions as detailed in Appendix B and D of the March 14, 2024 CSO Climate Change Comments (see Enclosure 1), ADB must also address and explain how the ESF ADB adopts is in line with ADB's and its members state shareholder's obligations as set forth in the European Court of Human Rights case *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* ([judgement available here](#)),² and also in any decisions issued by the Inter American Court of Human Rights (IACtHR),³ International Tribunal on the Law of the Sea,⁴ and International Court of Justice prior to ADB's adoption of the ESF.⁵ ADB's and its member state's customary human rights and harm prevention obligations to prevent climate change harms differ from those under the Paris Agreement, and ADB must explain how the ESF it adopts meets these obligations on top of those set forth under the Paris Agreement.

2.) We request the ADB not move or place critical specific requirements, thresholds, and definitions into “guidance documents” that would only be management approved. Rather, we request that all critical specific requirements, thresholds, and definition be placed in the body of the board adopted ESF and ESSs. Essential to ADB's Board Directors, and also to ADB as an entity, is ensuring that the ESF ADP adopts is in line with their due diligence obligations under international law to assess and prevent harms. For instance, during the April 5th consultation session, ADB suggested that some specific requirements, thresholds, and definitions needed to give effect to the ESF's requirements may be moved or included in a management approved guidance document, instead of the Environmental and Social Policy in the ESF (E&S Policy) or Environmental and Social Standards in the ESF (ESS). One example of this we oppose that ADB gave, was moving an absolute GHG emission threshold to a management approved only guidance document that would definitively dictate when (a) a full GHG emissions analysis meeting ESS1's and 9's requirements is required, and (b) when a GHG emissions analysis and

¹ This includes ADB's and its Member State's obligations to set forth provisions in the ESF that would prevent ADB from funding fossil fuel projects and ensuring adequate assessments and mitigation to avoid emissions as far as feasible for each project ADB finances. See March 2024 Comments at 2-18, Appendices A-D.

² On April 9, 2024, the European Court of Human Rights ruled that Switzerland had failed to act in time and in an appropriate and consistent manner to devise, develop and implement relevant legislation and measures to mitigate the effects of climate change.

³ In January 2023, Colombia and Chile requested, under Article 64(1) of the American Convention on Human Rights, an Advisory Opinion from the IACtHR in order to clarify the scope of States' obligations in responding to the climate emergency within the framework of international human rights ([link to proceedings available here](#)).

⁴ The applicant in this case is the Commission on Small Island States on Climate Change and International Law, which requested an Advisory Opinion from the Tribunal in December 2022 ([link to proceedings available here](#)).

⁵ The request for an Advisory Opinion was made by the UN General Assembly in March 2023, following a huge diplomatic effort spearheaded by Vanuatu and inspired by the vision of students in the Pacific Islands ([link to proceedings available here](#)).

mitigation for GHG emissions as consistent with ESS9 is required (See more about our position on absolute v. relative emissions thresholds, and suggested edits to ESS9 below).

3.) Prohibited Investment Activities List: As consistent with and supported by the March 2024 Comments, in regards to the ESF Prohibited Investment Activities list (PIA List):

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

(b) the ESF definition of borrower/client and the definition of project must be clarified to specify that financial intermediaries (FIs), recipients of advisory services and or technical assistance, and recipients of trade and short-term finance are all included in the definition of borrower/client and the definition of project – this clarification is important for the ESF to require that FIs do not invest in activities on the PIA List and that the ADB ensures that FIs do not finance such projects and activities;

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

4.) Incorporation of ADB Paris Agreement Methodologies into the ESF. Our understanding is that ADB intends to first implement its Paris Methodologies, and then ensure and disclose implementation of its ESF requirements applicable to climate change prior to project financing. The ESF should clarify the relation of the ESF to the Paris Methodologies. Moreover, the ESF must be improved to meet the requirements in the March 2024 Comments (see Enclosure 1) and those comments herein. Further, ESS1, 9, and or 10 must require full public disclosure, at least 120 days prior to project financing decisions, of the analysis conducted and results obtained from any Paris Methodology analysis or implementation if conducted separate from the ESF's climate change impact and GHG emissions analysis and mitigation requirements.

5.) ADB's Threshold for GHG emissions quantification estimates, alternatives analysis, adoption of measures to avoid GHG emissions as far as economically and technically feasible, and public disclosure of this information. We were pleased to learn during ADB's April 5, 2024, ESF Consultation session that ADB's intention - for all but those projects with very limited GHG impact such as an education project or operation of a school with almost negligible GHG emissions – that ADB considers the rest of projects it finances to have significant emissions and thus will need to ensure adherence to the following requirements in the ESS and ESF: GHG emissions quantification estimates, alternatives analysis, and adoption of measures to avoid GHG emissions as far as economically and technically feasible, and public disclosure of these analysis and mitigation measures prior to financing approvals.

Considering the climate crisis, where limiting global warming to 1.5°C is critical for the future of the planet and its inhabitants, we feel this approach is appropriate, needed to determine if ADB's financial flows are aligned with the 1.5°C warming limitation objective, and needed to achieve avoidance of GHG emissions for each project as far as economically and technically feasible. As such we propose that the threshold for GHG emissions quantification estimates, alternatives

analysis, adoption of measures to avoid and minimize GHG emissions as far as economically and technically feasible (GHG mitigation hierarchy), and public disclosure these GHG emissions analyses and mitigation measures prior to financing approvals, are provided as follows in paragraph 9 of ESS9, (this requirement must be written into ESS9): **+500 absolute tons of carbon dioxide equivalent per year or +500 absolute tons of carbon dioxide equivalent during project construction.** Including a construction threshold is important as well, as some projects may have significant GHG emissions during the construction stage that are feasible to avoid.

Importantly, the portion of this threshold of +500 absolute tons of carbon dioxide equivalent per year, lines up with the IFC's board adopted policy requirements in place since 2012, which requires that prior to its financing decision for a project, the IFC publicly disclose the forecasted GHG emissions for all projects expected to result in GHG emissions exceeding 25,000 tCO₂-eq over a project's life cycle, not just per year. IFC Access to Information Policy (2012) at ¶ 31(a)(v).

- 6.) **ADB must amend the ESF and E&S Policy to require that ADB disclose on an annual basis, the sum of all absolute Scope 1, 2, and 3 GHG emissions of its entire investment portfolio for (a) all active investment and (b) all the investments ADB makes during a fiscal year.** This information is needed to gauge ADB's alignment with the 1.5°C degree warming limitation objective.
- 7.) **Only Absolute, and not Relative GHG Emissions, Must be Used as ADB's threshold for when a client/borrower is required to disclose GHG emissions: estimates and quantification analysis, alternatives analysis, and mitigation hierarchy measures and analysis for each project to the public prior to ADB's financing decision.** As such the following sentence in paragraph 9 of ESS9 must be amended to remove "and relative GHG emissions" after "with absolute" and must provide:

"Except for projects with absolute GHG emissions between -20,000 tons of carbon dioxide equivalent and **+500 tons of carbon dioxide equivalent per year or less than 500 tons of carbon dioxide equivalent during project construction,** a borrower/client will disclose the ex-ante estimation **of absolute and relative GHG emissions** to the stakeholders and submit the same to ADB for ADB's disclosure in relevant project documents."

Such an amendment is necessary for ADB to (a) ensure adequate due diligence and avoidance of climate change harms as far as economically feasible, (b) be able to quantify the carbon footprint of each investment and its overall investment portfolio to gauge ADB's alignment with the 1.5°C warming limitation objective, and (c) ensure GHG emissions are avoided to the furthest extent economically and technically feasible. In addition, such an amendment is necessary to capture the ESS1's and ESS9's GHG emissions mitigation hierarchy, alternatives analysis and avoidance and mitigation requirements.

If the ESF allows relative GHG emissions to be used as the thresholds for these GHG analysis, mitigation, and disclosure requirements, not only would the ADB and public not be provided with information needed to ensure full and adequate quantification of a project's GHG emissions. In addition, ADB would eliminate a safeguard necessary to achieve and ensure avoidance of GHG emissions as far as economically and technically feasible. An example of the pitfalls of using a relative threshold would be in the case of a cement plant that implemented GHG

emissions efficiency technology that was better than technology used 10 years ago or better than other cement plants in the region, which would thereby be forecasted to achieve negative relative GHG emissions, but still would emit considerable absolute GHG emissions of likely well over 100,000 tons CO₂-eq/yr. If instead the trigger for the cement plant to reduce its emissions as far as economically and technically feasible is based on absolute emissions, it would be required to implement best available economically and technically feasible technology that could potentially achieve closer to net zero emissions. This example poignantly demonstrates how allowing relative GHG emission to remain as a threshold for GHG emissions quantification, alternatives analysis, mitigation, and disclosure, would be an impermissible loophole that would thwart ADB's alignment with the 1.5°C warming limitation objective.

8.) Ensuring Scope 3 GHG emissions are quantified, and avoided as far as economically and technically feasible. During the April 5, 2024 ADB ESF consultation, in response to our positions on ensuring quantification, disclosure, and avoidance of scope 3 GHG emissions, ADB suggested editing the following clause in the ESF definitions for absolute GHG emissions as follows, by replacing “where relevant” with “where feasible”, could be a solution (contemplated edit suggested by ADB in blue:

Absolute greenhouse gas (GHG) emissions. GHG emissions and removals resulting from a project, including all scope 1 and scope 2 emissions attributable to projects, and scope 3 emissions, where **feasible**.

We feel such an edit, while an improvement, also needs to be clarified to provide the following, to ensure ADB adheres to its due diligence obligations to assess and prevent climate change harms (see our additions in red):

Absolute greenhouse gas (GHG) emissions. GHG emissions and removals resulting from a project, including all scope 1 and scope 2 emissions attributable to projects, and scope 3 emissions, where **feasible**. **Where feasible means as consistent with best available commonly practiced methods for quantifying GHG Scope 1, 2, and 3 emissions and when information is obtainable that would allow GHG emissions to be quantified.**

This addition in green respects client capacity, and principles of common but differentiated responsibilities, as if the client does not have the expertise, capacity, or resources to conduct this analysis, ADB through its duty to ensure adherence to the ESF – could conduct this analysis or retain consultants to do so. In the alternative, ADB could loan the client funds to secure this analysis. This loan could be forgiven if the project is not ultimately pursued, or if the project is pursued, included in the total amount of financing provided.

The notion that scope 3 emissions should not be required to be calculated because they are hard to calculate and out of client control, may have been closer to true 10-15 years ago, but not anymore given current practices regularly implemented around the globe. Further, some clients chose to contract out activities with significant GHG emissions like construction and retaining contractors or fleets for shipping. Not only is information obtainable that would allow for quantification of these Scope 3 emissions, but for ADB's individual project and cumulative financing flows to come into alignment with the 1.5°C warming limitation objective, it must also

require that these emissions be avoided when economically and technically feasible as well.⁶ To do so, these emissions must be quantified in the first instance prior to financing approvals.

- 9.) **GHG Emissions Alternatives analysis:** In addition to the requests and positions on pages 8-10 of the March 14, 2024 joint CSO comments (see Enclosure 1) regarding the provisions of ADB's ESF that must be modified to contain an adequate GHG emissions and climate alternatives analysis, we have supplementary alternatives analysis comments we request the ADB address.

ESS9 paragraph 8 provides:

8. To minimize the absolute and relative GHG emissions attributable to a project, the borrower/client will consider alternatives including adoption of energy efficiency, lower-carbon energy sources, renewable energy, alternative project locations, reduction of fugitive emissions, or other GHG management practices. The borrower/client will implement such measures where technically and financially feasible during the project preparation and design phase. Where such measures are adopted for implementation during a project, the borrower/client will include them in the environmental and social commitment plan (ESCP)/environmental and social action (ESAP).

In addition to strengthening the GHG emissions and climate change alternatives analysis requirements as detailed on pages 8-10 of the March 14, 2024 joint CSO comments (see Enclosure 1), ESS9 paragraph 8 must be modified to:

- a.) To specify that if fossil fuel energy infrastructure and fossil fuel projects are being contemplated or proposed for financing, the alternatives to be included in the alternatives analysis must be renewable energy sources and infrastructure. Ensuring that renewables are pursued when feasible to meet energy demand is essential for ADB to align its financing flows with the 1.5°C warming limitation objective, and for ADB and its Global North Member States to meet their climate change due diligence and harm prevention requirements under international law. (See Enclosure 1, March 14, 2024 joint CSO comments at Appendix B, D).
- b.) Eliminate reference to “lower carbon energy sources” as an alternative that a client could acceptably implement if economically and technically feasible. Including “lower carbon energy sources” could allow use of GHG intensive sources of energy such as natural gas to power a project, even in the instances where renewables are economically and technically feasible. Thus, “lower carbon energy sources” must be removed, or in the alternative changed to “low~~est~~ carbon energy sources” so not to negate feasible renewable energy sources from being considered and adopted. Moreover, this adjustment is needed for ADB to align its financing flows with the 1.5°C warming limitation objective, and for ADB and its Global North Member States to meet their climate change due diligence and harm prevention requirements under international law. (See Enclosure 1, March 14, 2024 joint CSO comments at Appendix B, D).

⁶ See judgement in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (2024), at paragraph 280 page 126 providing: “[i]t would therefore be difficult, if not impossible, to discuss Switzerland’s responsibility for the effects of its GHG emissions on the applicants’ rights without taking into account the emissions generated through the import of goods and their consumption or, as the applicants labelled them, “embedded emissions”.”([judgement available here](#))

- c.) To indicate that Annex A-1 (Indicative Outline of Environmental and Social Impact Assessment) at Draft ESF pages 37-38) at vii (Analysis of Alternatives) provides an outline of minimum alternatives analysis requirements for GHG emissions and climate change impacts. **Furthermore and moreover, Annex A-1 vii. should be amended to include the specific GHG emissions and climate change impacts alternatives analysis requirements** detailed on pages 8-10 of the March 14, 2024 joint CSO comments (see Enclosure 1) and ESS9 should specify that this GHG emissions and climate change impacts specific alternatives analysis is required to be performed and publicly disclosed for all ADB's contemplated investments.

These adjustments to the ESF are necessary for ADB and its Global North Member States to adhere to their due diligence obligations under international law to prevent avoidable climate change harms by simply ensuring proper and full study of ways to avoid climate change impacts. Further, such adjustments are consistent with ADB staff positions expressed during the ESF Consultations that: ADB desires to move away from fossil fuels except for natural gas in exceptional circumstances which has to be really justified. Adequate and credible GHG emissions and climate change impact alternatives analysis as detailed in pages 8-10 of the March 2024 CSO comments (see Enclosure 1) are critical due diligence harm prevention tools that can (a) determine whether it is economically and technically feasible for renewables to meet energy demand instead of any contemplated natural gas project which is certain to impart adverse and irreversible climate change harms, and (b) provide decision makers with the monetary values of future harms to communities local to a contemplated project for each ton of GHGs the contemplated project will emit in comparison to renewable alternatives – which in turn can aid decision makers in determining whether the harm to the community from a project outweighs the benefit.

10.) Mitigation Hierarchy for GHG Emissions and Climate Change Impacts, and Mitigation Hierarchy Requirements More Broadly for all Environmental and Social Impacts: To further expound on the request on pages 7-8 of the March 2024 Comments for ADB's ESF to specify that the mitigation hierarchy requirement applies to GHG emissions and climate change impacts, we have specific suggestions. See Enclosure 1 for March 2024 Comments (requesting that the avoidance and minimization components of the mitigation hierarchy apply to GHG emissions and climate change impacts, and opposing the use of carbon offsets).

Draft ESS9 fails to include a mitigation hierarchy requirement for GHG emissions and climate change impacts. Such a requirement must be independent of the GHG emissions alternatives analysis and alternatives adoption requirement in ESS9 paragraph 8, as a GHG emissions alternatives analysis is an independent mechanism commonly practiced around the world used to avoid and minimize GHG emissions. As such, we request that ESS9 contains a new paragraph, separate from paragraph 8, that specifies the requirement to adopt a mitigation hierarchy prior to financing decisions applies to GHG emissions. This is critical because as currently written, ESS9 paragraph 8 precludes the applicability of the mitigation hierarchy's avoidance and minimization requirements to GHG emissions. Specifically, the draft text provides:

8. To minimize the absolute and relative GHG emissions attributable to a project, the borrower/client will consider alternatives including adoption of energy efficiency, lower-carbon energy sources, renewable energy, alternative project locations, reduction of fugitive emissions, or other GHG management practices. The

borrower/client will implement such measures where technically and financially feasible during the project preparation and design phase.

This mitigation language in the second sentence, (1) allows the client to select “such” measures in the immediately preceding first sentence that might just lower or reduce GHG emissions as compared to prior practice, and or (2) just choose at its discretion from the list of alternatives to consider (including “other GHG management practices”) and as such, does not require the client to implement one or many measures that could avoid GHG emissions as far as economically and technically a first priority, then to further minimize GHG emissions to the furthest extent economically and technically feasible. An example would be that under the current draft language in paragraph 8 of ESS9, a cement plant could arguably permissibly use natural gas to power its facility as a “lower carbon energy source”, even if renewable energy is feasible instead, if 10 years ago or currently cement plants in the region were or are using coal to power their operations.

Further, ESS9 paragraph 8 also impermissibly allows the client to implement lower carbon energy source or other GHG management practices, instead of adopting economically and technically feasible renewable energy options to power a project, in another way. As written, the first sentence of ESS9 paragraph 8 would allow a client to limit its consideration of alternatives to lower carbon energy source or other GHG management practices (see the word “or” prior to “other GHG management practices”) – which would in turn allow the client to only have to implement the feasible options from these two alternatives considered AND not feasible renewable energy options if it did not consider renewable energy.

ADB must remove both of these loopholes provided within ESS9 paragraph 8 detailed in the preceding two paragraphs, and explicitly and separately require that the mitigation hierarchy avoidance and minimization requirements apply to GHG emissions and climate change impacts. In addition, the GHG emissions mitigation hierarchy requirement and mitigation hierarchy requirement as applied to all environmental and social impacts, must mirror, and be strengthened to mirror, the requirements of other international financial institutions, like the IFC’s (but without allowing offsets). IFC Policy on Environmental and Social Sustainability (2012) (E&S Policy) at Paragraph 6, page 2; IFC Performance Standards on Environmental and Social Sustainability (2012) (PS): Bullet 2 at PS page 6, PS paragraph 3 at page 3, PS 1 paragraphs 5 and 14 at PS page 7, 10; PS 3 at paragraph 3 at PS page 23. The IFC’s board adopted policies provide not only that avoidance measures must be implemented as a first priority as far as economically and technically feasible, but that after these avoidance measures are committed to, then minimization measures must be implement as far as economically and technically feasible – **not just to “acceptable levels” as provided in the ESF Definitions for mitigation hierarchy at Draft ESF page 139, ESS1 Section II.b. at Draft ESF page 23, ESS1 Paragraph 29 at Draft ESF page 27, and Appendix A-2 section (i) at Draft ESF page 39. *Id.*** Thus, ADB must also replace “to acceptable levels” with “as far as economically and technically feasible” in all mitigation hierarchy definitions in the ESF (E&S Policy and ESS) for all social and environmental impacts.

During the ESF consultation, ADB representatives expressed that a mitigation hierarchy may not properly apply to GHG emissions because of differentiated responsibilities and the right to develop in the Global South. We disagree with this perception. Adoption of a mitigation hierarchy for all environmental and social impacts has long been considered a central component of international financial institutions’ safeguards to reduce the risks harms to people and the environmental from financed projects. See e.g., IFC 2012 Performance Standards on

Environmental and Social Sustainability (PS) at PS 1 paragraph 14. Furthermore, any concern about inclusion of a mitigation hierarchy for climate change and GHG emissions impacts on grounds concerning the right to develop and differentiated responsibilities in the Global South is misplaced. This is because the economic and technical feasibility limitations of the mitigation hierarchy requirements ensure respect for client capacity and principles of “common but differentiated responsibilities” at the project planning, assessment, and implementation stages. Furthermore, adoption of a mitigation hierarchy as applied to GHG emissions is necessary for ADB and its Global North Member States to adhere to its due diligence obligations under international law to prevent avoidable harm, that especially applies when that harm and GHG emissions certain to cause harm are avoidable, and or can be substantially minimized through feasible measures. (See Enclosure 1, March 14, 2024 joint CSO comments at Appendix B, D).

11.) Avoiding Impermissible Deferral of Mitigation. We understand it is not ADB’s intention to allow deferral of formulation and commitment to measures to avoid as a first priority then minimize GHG emissions as far as economically and technically feasible until after project financing. However, this clause in ESS9 paragraph 8 seemingly allows for just that:

Where such measures are adopted for implementation during a project, the borrower/client will include them in the environmental and social commitment plan (ESCP)/environmental and social action (ESAP).

As detailed on page 8 of the March 14, 2024 joint CSO comments (see Enclosure 1), ESS9 paragraph 8 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, ESS9 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, is provided to the ADB and public for a duration sufficient to allow for meaningful review prior to the client moving forward with asset development, implementation, acquisition, or financing, and (2) an adequate mitigation hierarchy is adopted, prior to the ADB client’s commitments to the development, acquisition, or financing that was not defined at the time of ADB financing.

12.) ADB’s September 2023 Consultation Draft of its Environmental and Social Requirements for Financing Modalities and Products (E&S Requirements for Financing Modalities and Products), must be adopted by the ADB board of directors, for the ADB and its Member State Shareholders to adhere to their obligations under international law. This is because The E&S Requirements for Financing Modalities and Products are applicable to likely over half of ADB’s investment portfolio and contain too many specific due diligence requirements not in the ESF not to be adopted and required by ADB’s Directors.

13.) Financial Intermediary Provisions: In addition to the requests and positions in pages 15-17 of the March 2024 CSO climate comments (see Enclosure 1) in regards to provisions needed to reduce the risk of harm to communities and the environment, we have the following language requests based on additional information learned during the ESF consultations:

- (a) The E&S Requirements for Financing Modalities and Products must be adopted by ADB’s Directors. If it is not, the following provision (paragraph 65 of the E&S Requirements for Financing Modalities and Products) must be added to the E&S Policy,

and the following edits in red must be made to ensure the FI discloses the higher risk transactions to ADB 120 days prior to the FI's financing decision:

65. **120 days prior to FI's financing decision and financing commitment**, FI will refer all *higher risk transactions* to be supported by ADB financing to ADB for its review, clearance, and disclosure, including the screening, risk classification, and FI ESDD undertaken by FI, as well as the relevant assessment tools and management tools prepared by FI borrowers/investees in accordance with paragraph 55.

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

- (b) To ensure ADB's FI investments align with the 1.5°C warming objective and considering the climate crisis, paragraph 26 of the E&S Policy must be amended to provide that any FI transaction expected to emit over absolute GHG emissions of 1,000 ton CO₂-eq/yr. is considered a high E&S risk with a subclassification of FI-1, and that such classification as high E&S risk is dependent on the total absolute GHG emissions from the project accounting for commitments to avoidance and GHG minimization measures.

In addition, paragraph 26 of the E&S policy must be amended to explicitly provide that any FI transaction expected to emit over absolute GHG emissions of 500 ton CO₂-eq/yr. or during construction prior to avoidance and mitigation measures is a "substantial E&S risk" under the FI-2 classification. This is important as well, because under the FI-2 subclassification, risks could be classified as "moderate" instead of "substantial", and if classified as substantial, a contemplated FI investment would not be considered a "higher risk transactions" subject to the disclosure, impact avoidance, and other GHG emissions ESS requirements Paragraphs 27 and 69 of the E&S Policy.

Considering the climate crisis, these edits must be made, as any new continuous streams of GHG emissions are irreversible and will contribute to exceeding the 1.5°C warming limitation objective. These edits and thresholds are therefore also appropriate and fitting, as FI-1 defines "high risk" as "potential significant adverse E&S risks and impacts that are diverse, irreversible, or unprecedented", while FI-2 has a similar definition of risk but qualifies it by impacts that for the most part can be avoided with mitigation. Moreover, these edits are critical to aligning ADB's investments with the 1.5°C warming limitation objective, as ADB's financial flows can only come into alignment with this objective if its FI client's individual projects resulting in over 500 ton CO₂-eq/yr. or during construction are subject to the ESF requirements for GHG emissions quantification, alternatives analysis, mitigation, and disclosure.

- (c) The ESF needs to define "relevant" as a defined term in the board adopted ESF definitions, and further needs to specify that relevant in the context of climate change means that for any FI transaction expected to emit over absolute GHG emissions of 500 tons CO₂-eq/yr or 500 tons CO₂-eq/yr during construction prior to avoidance and mitigation measures, that at a minimum the requirements in ESS1 and ESS9 will apply.

Paragraph 27 of the E&S Policy provides “For FIs with portfolio and/or activities and transactions that **present high to substantial** E&S risks (part or all of FI-1 and FI-2 portfolio), ADB will require that such FIs assess and require higher risk activities and transactions they support to apply *the relevant* requirements of the ESSs.” Without a definition of relevant, and such a definition of relevant in relation to GHG emissions, the FI would have too much leeway to disregard applicable E&S requirements necessary for due diligence and to prevent a transaction’s or project’s adverse environmental and social impacts. For similar reasons, Paragraph 69 of the E&S Policy requires the same edits, and a definition of “relevant”.

- (d) The following clause in Paragraph 69 of the E&S Policy must be amended as follows (see edits in red text) to provide the public with adequate opportunity to review a FI transaction prior to the FI’s approval or commitment to the transaction, and to ensure the FI adheres to the appropriate ESS (at least ESS1 and ESS9 for climate change impacts and GHG emissions)

For higher risk transactions to be supported by ADB financing, ADB will require an FI to use the relevant ESSs **for each higher risk transaction and** as the underlying risk assessment and management standard in ESMS. For such transactions, ADB will also review the screening and risk classification undertaken by the FI under its ESMS. **120 days prior to a FI’s financing decision and financing commitment**, ADB will disclose the relevant E&S documentations prepared and submitted by FI borrowers/investees.

ADB’s staff expressing during the ESF Consultations that:

- (1) considering FIs are a substantial part of ADB’s portfolio, ADB’s intention in the draft ESF is for the same requirements applicable to its direct investments to apply to investments by its FI clients, and
- (2) ADB’s intention - for all but those projects with very limited GHG impacts such as an education project or operation of a school with almost negligible GHG emissions – that ADB considers the rest of projects it finances to have significant emissions and thus will need to adhere to these requirements in the ESS and ESF: (a) GHG emissions quantification estimates, alternatives analysis, adoption of measures to avoid GHG emissions as far as economically and technically feasible, and (b) public disclosure of estimated GHG emissions amounts, analysis, and mitigation prior to financing decisions

provides additional justification that these requests in this Section 13) of our comments regarding the ESF’s FI climate change provisions, must and should be adopted. Essential to ADB meeting its obligations under international law to align its financing flows with the 1.5°C objective, is ADB requiring its FI investments to meet the same ESS1 and ESS9 GHG emissions impact assessment and mitigation requirements as its direct investments.

Additional Note Regarding Citations in the March 14, 2024 Joint CSO Comments

The citations to Kerr, B.P., All Necessary Measures: Climate Law for International Shipping, Virginia Journal of International Law (Accepted/In press) (hereinafter “Kerr, All Necessary Measures”) in

footnotes 44-49, 81-87, 89-92, 95-105 of the March 2024 Comments must be replaced with the following, because this pre-publication article cited to is no longer available at the link provided, as the article has now been published and is properly cited to as follows:

Baine P. Kerr, All Necessary Measures: Climate Law for International Shipping, Virginia Journal of International Law, 64 Va. J. Int'l L. 523 (2024) at 523-570 (available at: <https://www.vjil.org/all-necessary-measures-climate-law-for-international-shipping>);

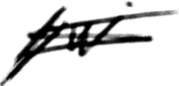
A copy of the published article is also attached as Enclosure 2. We reviewed the published article, and have determined any edits made during the publication process reflected in the published article, do not effect the positions in the March 2024 Comments. ADB can locate the content cited to in the March 2024 Comments in the published article by comparing the Accepted/In press version to the published version. However, because the page and footnote numbering differs in the published version from the Accepted/In press version, BCA will provide a key lining up the page and footnote numbers in the Accepted/In press version with the published version so ADB can easily locate the proper pages and footnotes in the published version should it desire citations to the published version during its review of the March 2024 Comments.

Conclusion

Thank you for considering our comments. These improvements, in addition to those set forth in the attached March 14, 2024 comments (see Enclosure 1) are necessary for ADB's financing and guarantee activities to come into alignment with the 1.5°C warming limitation objective, 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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Enclosures: Enclosure 1 - March 14, 2024 CSO Climate Change Comments on ADB ESF; Enclosure 2 - Baine P. Kerr, All Necessary Measures: Climate Law for International Shipping, Virginia Journal of International Law, 64 Va. J. Int'l L. 523 (2024) at 523-570 (also available at: <https://www.vjil.org/all-necessary-measures-climate-law-for-international-shipping>); Enclosure 3 - UN OHCHR Comments on the Asian Development Bank (ADB) draft Environmental and Social Policy, 29 April 2024.

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