

February 14, 2024

Multilateral Guarantee Agency (MIGA)

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Via Email: kwallace@worldbank.org; yibrahim@worldbank.org; hmatano@worldbank.org, hhatashima@worldbank.org; etafara@worldbank.org

## **Re: Request for MIGA to Adhere to its Policies and other Legal Obligations Applicable to Climate Change**

Dear Ms. Wallace, Mr. Mohamed, and to Whom it May Concern with the Multilateral Guarantee Agency (MIGA):

Thank you for engaging with civil society during the World Bank Group 2024 Annual Meetings regarding MIGA's adherence to its board adopted policies applicable to greenhouse gas (GHG) emissions, and MIGA's obligations under international law to prevent climate change harms from its guarantees.<sup>1</sup> Bank Climate Advocates (BCA) and the undersigned 18 additional civil society organizations (CSOs) and CSO alliances, collectively encompassing over 150 CSOs from the Global South and North, are writing to further detail these obligations and BCA's findings evidencing MIGA's systematic failure to meet them. Moreover, we respectfully request that MIGA responds to this letter by acknowledging these obligations and immediately committing to their adherence.

<sup>&</sup>lt;sup>1</sup> World Bank Group 2024 Annual Meeting CSPF Session: "The Importance of MIGA: New Guarantee Platform and World Bank Evolution Roadmap", October 23, 2024 available at https://www.worldbank.org/en/events/2024/06/26/civil-society-policy-forum-annual-meetings-2024#1; October 24, 2024 meeting between BCA and MIGA staff reviewing MIGA's systematic failures.

In line with the World Bank Group Evolution Roadmap's ambition for WBG guarantees "to catalyze more private investment, including equity investment, to address both country priorities and global challenges,"<sup>2</sup> the World Bank launched its guarantee platform in July 2024. The platform streamlines and consolidates all its guarantee offerings, and triples MIGA's guarantee issuance to \$20 billion by 2030 so that significantly more private capital can be channeled into the countries the World Bank serves.<sup>3</sup> Considering too that MIGA has expanded its guarantees to renewable energy and climate action investments,<sup>4</sup> MIGA is poised to play a more critical role than ever in the efforts to address the climate crisis. Its guarantees – that provide investment enabling risk insurance - will largely dictate whether and how a large number of energy projects and other potentially high carbon emitting projects in the Global South move forward.<sup>5</sup>

If MIGA does not take corrective action by (1) immediately implementing the requirements of its board adopted policies applicable to its direct, financial intermediary (FI), and trade finance guarantees, and (2) adhering to its climate change obligations under international law, it will cause and contribute to millions more tons of greenhouse gas (GHG) emissions that can be feasibly avoided. About 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 (see Appendix D). And these impacts will get worse - global warming is expected to increase at least through 2040 mainly due to increased cumulative GHG emissions in nearly all considered scenarios and modelled pathways.<sup>6</sup> The world and its most marginalized people that are especially vulnerable to the adverse effects of climate change cannot handle further GHG emissions, and especially ones that MIGA has the duty, ability, and mandate to avoid causing. See Appendix D for MIGA's mandate and outward commitments to not cause or contribute to climate change harms.

So, the question is: how will MIGA respond to the climate crisis? Will it adhere to its policies applicable to GHG emissions, and its due diligence and other climate change harm prevention obligations under international law to align each of its guarantees and overall portfolio with 1.5°C, or will it continue along another path to the detriment to the people it is charged with serving in its Global South guarantee regions?

On the policy implementation front, with the update to MIGA's board adopted Sustainability

<sup>&</sup>lt;sup>2</sup> See https://www.devex.com/news/the-world-bank-launched-a-one-stop-guarantee-shop-here-s-how-it-s-going-108786, also available in PDF form <u>here</u>; World Bank Group. (2022, December 18). Evolving the World Bank Group's mission, operations, and resources: A roadmap. https://documents1.worldbank.org/curated/

en/099845101112322078/pdf/SECBOS0f51975e0e809b7605d7b690ebd20.pdf;

<sup>&</sup>lt;sup>3</sup> *Id.*; See also, World Bank. (2024, April 11). New guarantee platform delivers efficiency, simplicity to boost impact. https://www.worldbank.org/en/news/feature/2024/04/11/new-guaranteeplatform-delivers-efficiency-simplicity-to-boost-impact.

<sup>&</sup>lt;sup>4</sup> MIGA. (2024, February 28). World Bank Group prepares major overhaul to guarantee business.

https://www.worldbank.org/en/news/press-release/2024/02/27/world-bankgroup-prepares-major-overhaul-to-guarantee-business?cid=MIG\_LI\_Miga\_EN\_EXT;

<sup>&</sup>lt;sup>5</sup> See Adva Saldinger, "The World Bank Launched a one-stop guarantee shop. Here's how it's going." Devex, November 26, 2024, <u>available here</u> (providing the following opinions: Harrison Moskowitz, head of export and agency finance at JP Morgan Chase "MIGA guarantees also enable commercial banks to lend larger amounts with longer tenors in regions they might otherwise avoid." Jay Collins, vice chair of banking, capital markets, and advisory "The most important tool in the private capital mobilization toolbox is actually guarantees," he said. "It's where the most bang is out of everything short of equity. It is extraordinarily enabling. With a guarantee, high mobilization rate, without a guarantee, low mobilization rate. It's just that simple.").

Policies<sup>7</sup> apparently at least two years away, MIGA must begin adhering to: (1) its Compliance Advisor Ombudsman's (CAO's) definitive interpretation<sup>8</sup> of the clear requirements of MIGA's Sustainability Policies pertaining to GHG emissions quantification, alternatives analysis, mitigation, and disclosure prior to MIGA's guarantee decisions (See Appendix A, Sections I-II); and (2), the other requirements in its Sustainability Policies applicable to preventing climate change harms that the CAO Opinion did not cover (See Appendix A, Sections I, III). As BCA's analysis of 60 MIGA guarantees from January 2020 - January 2025 demonstrates (see Appendices B, C, and Exhibit 1 data), MIGA is systematically failing to adhere to these requirements for each guarantee prior to approval, by routinely failing to ensure:

(1) quantification of Scope 1 and 3 emissions as Performance Standard 1 (PS 1) requires in line with good international industry practice;

(2) that a comprehensive, credible, and supported GHG emissions alternatives analysis required by PS 1 is conducted in line with good international industry practice that examines the feasibility of renewable energy sources, mitigation measures that will avoid GHG emissions as far as economically and technically feasible, and analyzes the societal cost of carbon emitted from the contemplated project in comparison to each alternative;

(3) selection of these avoidance and mitigation measures in line with Performance Standard 3 (PS 3) that can avoid GHG emissions as far as economically and technically feasible, instead of measures that do not go as far MIGA's policies require and or are based on the severely outdated World Bank Group EHS guidelines; and

(4) disclosure<sup>9</sup> of the GHG emissions figures and alternatives/mitigation analysis for public review and input as PS 1 and MIGA's Access to Information Policy paragraph 29(e) require.

Without meeting these obligations, MIGA also cannot generate enough information, nor ensure harm prevention measures, to support the threshold test to issue a MIGA guarantee: that the material available to MIGA during the pre-investment review supports a conclusion that the client could operate in accordance with MIGA's Performance Standards (E&S Policy, paragraph 19).

The GHG emissions analysis, avoidance, and disclosure requirements the CAO Opinion identifies in IFC's policies, which are substantively identical to the relevant and applicable MIGA policies, <sup>10</sup> are also required under MIGA's and its shareholders' due diligence obligations and other obligations under international law (see Appendix E). And more broadly, MIGA and its shareholders have a

<sup>&</sup>lt;sup>7</sup> These policies include the: MIGA Policy on Environmental and Social Sustainability (January 1, 2012) (hereinafter, "E&S Policy"), MIGA Performance Standards on Environmental and Social Sustainability ("PS" or "Performance Standards") (Effective January 1, 2012), and MIGA Access to Information Policy (January 1, 2012) (hereinafter, "Access to Info Policy" or "AIP"). E&S Policy, PS, and AIP all together "Sustainability Policies".

<sup>&</sup>lt;sup>8</sup> Strengthening Greenhouse Gas Mitigation in IFC Financed Project, IFC/MIGA Compliance Advisor Ombudsman (CAO) Advisory Function, October 30, 2024, available at: https://www.cao-ombudsman.org/sites/default/files/2024-10/12\_Rpt-WBG-3675-CAO%20Climate%20Report%20R4%20V1%201029-1.pdf ("CAO Opinion"). See fn. 9, post (explaining direct applicability of the CAO Opinion to MIGA).

<sup>&</sup>lt;sup>9</sup> In addition to the disclosure requirements the CAO Opinion details, such as the AIP requirement to disclose ESIAs (See CAO Opinion at 22, fn. 73), additional disclosure requirements apply that MIGA is not adhering to that the CAO has yet to analyze and that MIGA must adhere to. See Appendix A, Part III (1), (10).

<sup>&</sup>lt;sup>10</sup> MIGA has the substantially the same Policy on Environmental and Social Sustainability, Performance Standards on Environmental and Social Sustainability, and Access to Information Policy as IFC. The subtle differences between MIGA's Sustainability Policies and IFC's do not apply to or impact the CAO's Opinion, or any analysis in Appendix A or this Request. As such, this letter properly applies the CAO's interpretations of the requirements in IFC's Sustainability Policies to MIGA's Sustainability Policies.

distinct obligation under international law to ensure MIGA's adherence to its board adopted policies (see Appendix F).<sup>11</sup>

Immediate implementation of MIGA's Sustainability Policies is needed to fill gaps in MIGA's Paris Agreement Alignment Methodology and bring MIGA's guarantees into closer alignment with  $1.5^{\circ}$ C for two reasons. First, MIGA's Paris Agreement Methodologies do not require MIGA to align, or to ensure MIGA's alignment of, each of its investments with  $1.5^{\circ}$ C. Rather, they allow MIGA to defer to a country's Nationally Determined Contributions (NDCs) where an investment is located. However, current NDCs will only limit global warming to  $2.5 - 2.9^{\circ}$ C,<sup>12</sup> and MIGA's Paris Methodology allows MIGA to finance fossil fuel and other GHG-intensive projects that the Intergovernmental Panel on Climate Change (IPCC) and International Energy Agency (IEA) have shown will cause  $1.5^{\circ}$ C to be exceeded.<sup>13</sup> And second, unlike MIGA's board adopted policies, MIGA's Paris Methodology does not require MIGA to ensure: quantification of each investment's Scope 1, 2, and 3 GHG emissions that is needed to determine the mitigation needed to avoid these emissions; supported and credible GHG emissions alternatives analysis that meets a good international industry practice or any standard; public disclosure and review of GHG emissions figures and avoidance/mitigation assessments; or adoption of measures and alternatives that avoid GHG emissions as far as feasible.

MIGA's adherence to its Sustainability Policies must also be accomplished to ensure MIGA implements all its board adopted GHG emissions policy obligations applicable to FIs and trade finance guarantees. These FI guarantees, which roughly consist of 30% of MIGA's portfolio and have limited fossil fuel exclusions, are potentially responsible for substantial GHG emissions.

**On the policy improvement side**, MIGA must improve its Sustainability Framework, its Paris Agreement Methodology, energy policies, and climate change action plans to align with its, and separately its shareholders', obligations under international law to: (1) prevent MIGA's guarantees from causing or contributing to climate change harms; and (2) to align each of its guarantees with 1.5°C. These obligations are detailed in Appendix E. As the CAO Opinion acknowledges, they include climate change due diligence and harm prevention obligations under customary international law, human rights treaties, the Law of the Sea, and the Paris Agreement. In addition to requiring MIGA to use best available and practiced methods to assess GHG emissions, their impacts, and alternatives and mitigation to avoid GHG emissions as far as feasible, these obligations require MIGA go further to align with 1.5°C. They also require MIGA to cease guarantees for coal, natural gas, and LNG projects, and to not guarantee any other investment that will cause or contribute to 1.5°C being exceeded.<sup>14</sup>

<sup>13</sup> IPCC, 2023: Summary for Policymakers. In: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, ¶ 1-34, doi: 10.59327/IPCC/AR6-9789291691647.001; 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); See Appendix D.

<sup>&</sup>lt;sup>11</sup> These legal obligations include those under human rights treaties, customary international law harm prevention and precautionary principles, the Law of the Sea, and Paris Agreement

<sup>&</sup>lt;sup>12</sup> See fn. 13, *post*; see also, Climate Analytics, <u>1.5°C national pathway explorer (this tool highlights the ambition gap between existing unconditional and conditional NDC targets (excl. LULUCF) and 1.5°C pathways for all countries), available at https://1p5ndc-pathways.climateanalytics.org.</u>

<sup>&</sup>lt;sup>14</sup> *Id.*; see Appendix D; see Appendix E, Section III; For examples of MIGA financing fossil fuel projects, see: Recourse report, "DE-RISKING FOR CLIMATE? A closer look at the MIGA-supported.

investments on energy projects, "July 2024 (detailing MIGA's continued support for fossil energy and that from FY 1994 to 2023, MIGA supported more fossil energy projects compared to non-fossils, such as the Myingyan fossil gas power plant in Myanmar and the Bhola-2 gas power plant in Bangladesh, that pose risks of greenhouse gas (GHG) lock-in and have caused negative social and environmental impacts on communities) available at https://re-course.org/wp-

Considering the climate crisis that the World Bank Group acknowledges is already having severe impacts on the Global South countries and communities it is supposed to be benefiting, time is of the essence for MIGA to implement its board adopted climate change policies and to align them with  $1.5^{\circ}$ C.

In short order, we thus respectfully ask MIGA for the following:

- to confirm in writing whether it agrees with, and will immediately implement, the specific requirements in its Sustainability Policies detailed in Appendix A, Sections I-II: (a) that the CAO Opinion identifies as applicable to climate change; and (b) the additional requirements in its Sustainability Policies not analyzed by the CAO that are detailed in Appendix A, Sections I, III.
- Further we emphasize that because of the climate crisis, time is also of the essence for MIGA to meet its legal, moral, and institutional obligations to align its board adopted policies and Paris methodologies with 1.5°C. We thus ask MIGA to immediately amend its Paris Methodology, energy policy, and guarantee exclusion policy to ensure alignment of each guarantee, including financial intermediary guarantees, with 1.5°C so that MIGA and its shareholders meet their climate change obligations under international law as set forth in Appendix E. This necessarily includes (a) banning guarantees for all projects using coal as an energy source, all upstream, midstream, and downstream natural gas energy projects, including LNG,<sup>15</sup> and (b) not allowing a country's NDCs, LTS, or climate plans where a guarantee is located to allow for a determination of a guarantee's alignment with 1.5°C or the Paris Agreement if the project guaranteed would cause or contribute to the 1.5°C global warming limitation objective being exceeded;
- to commit in writing to immediately disclose its Paris Alignment Methodology analysis and findings, along with all GHG emissions, alternatives, and mitigation analysis supporting adherence to PS requirements, for public review prior to MIGA's guarantee decisions. We see no conceivable rationale for MIGA not to disclose this information, and MIGA's board adopted policies require this timely public disclosure. See Appendix A, Section III (1).
- Engage a sufficient number of qualified staff and expert consultants to ensure implementation of its Sustainability Policies' GHG emissions analysis and mitigation requirements across its portfolio and for new investments under consideration. And where necessary due to a client demonstrating financial or technical constraints, assist clients, via MIGA's own financial resources, to adequately implement the Performance Standards' requirements pertaining to GHG emissions assessments and mitigation prior to MIGA's guarantee decision.

Thank you for your consideration. We look forward to your timely response. Should MIGA disagree with any obligations detailed herein, including in regards to the CAO's and or civil society's interpretation of MIGA's policies, MIGA's and its shareholders' obligations under international law, or the findings in BCA's data of MIGA's non-compliance with its Sustainability Policies, we request MIGA provide explanations as to why that is the case.

Please let us know if we can provide any additional information, and please share this letter with all applicable MIGA management and staff. We would appreciate acknowledgement of receipt of

content/uploads/2024/07/De-risking-for-climate-2.pdf and see Bretton Woods Project. (2023, April 5). MIGA's support for gas projects raises concerns about its climate credentials. https://www.brettonwoodsproject.org/2023/04/migas-support-forgas-projects-raises-concerns-about-its-climate-credentials/.

<sup>&</sup>lt;sup>15</sup> See fn. 13, *ante*.

this Request at your earliest convenience, and ask for a full and formal written response by April 1, 2025 at the latest. All responses will be shared with the signatories of this letter. Please direct responses to the representatives from BCA and the CSOs co-signed to this Request. We stand ready to further discuss these matters with you at your convenience.

Sincerely,

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**Enclosures:** Exhibits 1 (Ex.1\_BCA Database of MIGA's Systematic Failures to Adhere to its Policies.xlsx), 2 (Ex. 2\_Excerpts of EIA Alt. Analysis.pdf), and 3 (Ex.3\_Deputy Speaker\_Uzbekistan Solar 51 billion tonnes of oil eq.yr.pdf).

#### **Co-Signatory Civil Society Organizations:**

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World Council of Churches (WCC) - Rev. Dr. Kenneth Mtata, WCC Programme Director for the
Life, Justice and Peace unit, Frederique.Seidel@wcc-coe.org

#### Appendix A

#### I. MIGA is Required to Ensure Client Adherence to the Performance Standards' Requirements Applicable to Climate Change Impacts and GHG Emissions Prior to Approval of a Guarantee for a Project.

MIGA not ensuring that the requirements of its Performance Standards (PS) are adhered to before approving a guarantee violates its E&S Policy and AIP. See CAO Opinion at 19.

MIGA's Policy on Environmental and Social Sustainability (2013) (E&S Policy) requires MIGA to ensure implementation of the PS prior to approval of a guarantee for a project. Specifically, the E&S Policy requires MIGA to conduct, consider, and provide its board with environmental and social due diligence of all of its proposed guarantees, whether in the design, construction, operation stage, or whether the guarantee is for a new element of a project MIGA already supported. E&S Policy ¶ 2, 18, 19, 24, 27. This diligence requires MIGA, amongst other things, to (a) "analyz[e] the business activity's environmental and social performance in relation to the requirements of the Performance Standards and provisions of the World Bank Group Environmental, Health and Safety Guidelines or other internationally recognized sources, as appropriate;" and (b) "identify ] any gaps between the performance and the requirements, and corresponding additional measures and actions beyond those identified by the Client's in-place management practices," and (c) "[t]o ensure the business activity meets the Performance Standards [by making] these supplemental actions, in the form of an Environmental and Social Action Plan, necessary conditions of MIGA's guarantee as per an agreed time frame." E&S Policy ¶ 26. Because Performance Standard 1 and 3 set forth the requirements for assessing and mitigating a project's environmental and social impacts prior to guarantee approvals, MIGA must assure itself these requirements are met prior to approving a guarantee. E&S Policy ¶ 26; PS 1 and 3. The assurance of an adequate environmental and social assessment prior to MIGA guarantee approval that complies with the PS requirements, is also a requisite component to inform Environmental and Social Action Plans that become "necessary conditions of MIGA's investment." E&S Policy ¶ 26. Moreover, this assurance is necessary for MIGA to ensure it can meet its requirements to "not provide guarantee support for projects that cannot be expected to meet to meet the requirements of the Performance Standards within a reasonable period of time." E&S Policy ¶ 19. For all these reasons, a failure of MIGA to ensure applicable PS requirements are met prior to approval of a guarantee for a project is a violation of its E&S Policy.

The MIGA Access to Information Policy (2013) ("Access to Info Policy" or "AIP") further demonstrates that MIGA must ensure the PS 1 and PS 3 requirements that apply before MIGA approves a guarantee are met before MIGA approves a guarantee for each project. MIGA's AIP, in its section entitled "Pre-Approval Disclosure", requires MIGA to make a Summary of Proposed Guarantee (SPG) and Environmental and Social Review Summary (ESRS) available 30-60 days "prior to consideration of the proposed guarantee for formal concurrence by MIGA's Board of Directors." Access to Info Policy at ¶¶ 33-34, 36-37. The AIP provides that a project's SPG: "is made publicly available once MIGA has determined that: ... (b) that the client can be expected to undertake the project in a manner consistent with the Performance Standards." AIP at ¶ 32. MIGA cannot determine a client can be expected to undertake a project in a manner consistent with the PS if the client has not satisfied the PS' requirements for environmental and social impact assessment prior to guarantee approvals. The AIP thus requires that MIGA necessarily assure itself that all PS environmental and social assessment requirements are met that apply prior to MIGA guarantee decisions before public disclosure and consideration of the guarantee for Director approval. Therefore, a failure of MIGA to ensure prior to approving a guarantee that the PS requirements are

met that apply before MIGA guarantee decisions constitutes a violation of its AIP.

## **II.** Specific Requirements in MIGA's Board Adopted Policies that the CAO Opinion<sup>16</sup> Identifies as Applicable to Climate Change that the Undersigned Request MIGA Confirm in Writing that it Agrees with, and Will Immediately Implement:

The GHG emissions analysis, avoidance, and disclosure requirements the CAO Opinion identifies in IFC's policies, are substantively identical to the relevant and applicable MIGA policies. MIGA has the substantially the same E&S Policy, PS, and AIP as IFC (all together "Sustainability Policies"). The subtle differences between MIGA's Sustainability Policies and IFC's do not apply to, or impact, the CAO's Opinion or any analysis in Appendix A or this Request. As such, this letter and specifically this section II, properly applies the CAO's interpretations of the requirements in IFC's Sustainability Policies to MIGA's.

#### (1) <u>MIGA's Duties to Ensure<sup>17</sup> Client Adherence to the GHG Emissions Requirements in</u>

**Performance Standard 1 and 3:** The CAO Opinion details that IFC's E&S Policy, which in relevant part is identical to MIGA's, requires IFC, and thus by extension MIGA, to ensure that its clients satisfy (a) PS 1's good international industry practice (GIIP) requirement for environmental and social impact assessments, which requires client quantification of Scope 1, 2, and 3 GHG emissions for the contemplated investment prior to guarantee decisions<sup>18</sup> and (b) PS 3's ongoing GHG quantification and reporting requirement when Scope 1 and 2 GHG emissions combined will exceed 25,000 tCO2eq *per year*. MIGA & IFC PS 1 at ¶ 7; CAO Opinion at 15, 18.

In relation to these requirements, the CAO found IFC is not ensuring client adherence to the GIIP standard in PS 1 because it almost always impermissibly omits Scope 3 emissions that "can comprise more than 70 percent of their [investment's] carbon footprint" (the CAO Opinion found only 2 of 16 investments analyzed included Scope 3 emissions). CAO Opinion at 18. The CAO also found "effectiveness and impact of IFC's climate strategy depends on measuring and mitigating its GHG emissions at the project and institutional levels [but]...[i]n order to mitigate climate change impacts, IFC and its clients must have comprehensive knowledge of and data on project emissions." CAO Opinion at 15.

BCA's analysis of the information in the ESIA documents and or ESRS for 60 MIGA guarantees from 2020 – January 2025 evidences that MIGA does not ensure adherence to the PS 1 GIIP requirements for quantification GHG emissions as follows (See Ex. 1 for data):<sup>19</sup>

<sup>&</sup>lt;sup>16</sup> MIGA has the substantially the same Policy on Environmental and Social Sustainability, Performance Standards on Environmental and Social Sustainability, and Access to Information Policy as IFC. The subtle differences between MIGA's Sustainability Policies and IFC's do not apply to or impact the CAO's Opinion, or any analysis in Appendix A or this Request. See citation to CAO Opinion at fn. 8, *ante*.

<sup>&</sup>lt;sup>17</sup> See Appendix A at Section I, *ante*, detailing MIGA's obligation to ensure adherence to its PS' requirements prior to guarantee decisions.

<sup>&</sup>lt;sup>18</sup> CAO Opinion at 18 (finding: "The Sustainability Framework commits IFC clients not only to adhere to specific requirements regarding GHGs detailed in the PS, but also to apply good international industry practice (GIIP) generally in managing an IFC investment...By only requiring clients to quantify Scope 1 and 2 emissions, IFC falls short of GIIP standards, which typically also require reporting on Scope 3 value chain emissions."

<sup>&</sup>lt;sup>19</sup> The information from ESRSs for projects with only a ESRS available do not demonstrate inconsistency with the trends demonstrating systematic MIGA non-adherence to the GHG emissions requirements from projects with ESIA documents available. *Id.* 

- **No GHGs Quantified:** for 40% (17 of 43) of direct guarantees analyzed in Exhibit 1, MIGA did not ensure quantification of any GHG emissions as required by PS 1;
- Failure to Quantify or Disclose Exact GHG Emissions Amounts: MIGA appears to have failed to ensure approximately 15% (5 of 26) projects adhere to PS 1 because where GHG emissions figures are provided, the project's ESIA documents and or ESRS information only indicate project GHG emissions would be greater or less than 25,000 MT CO2 equivalent per year, and do not quantify or disclose exact GHG emissions amounts (see Exhibit 1). These failures are harmful because they preclude identifying the extent of project's climate change impact. Moreover, they are harmful and violate PS 1 because they preclude crafting and adopting alternatives and mitigation that avoids or reduces a project's net GHG impact to the fullest extent economically and technically feasible;
- Failure to Assure Itself of Quantification of any GHG Emissions for the Project Expansion or Addition Guaranteed - 14% (3 of 22) of projects because GHG emissions were not quantified for the significant expansion or addition guaranteed. Instead of quantifying and disclosing the GHG emissions for the significant expansion or addition guaranteed, for many of these Projects, it appears from information included in the ESRS and ESIA documents that MIGA is impermissibly only requiring and utilizing quantification of GHG emissions from a project's existing components;
- Failure to ensure quantification of the full extent of GHG emissions (Scope 1 and 3) widely known to be associated with a project activity – 93% (40 of 43) guarantees analyzed. Examples of missed Scope 1 emissions include methane manure emissions from livestock, and natural gas leakage from pipelines, storage units, and LNG infrastructure. Additional, common failures on these scope 1 emissions include:
  - Scope 1: At least 89% (8 of 9) of projects for which an increase in GHGs in the atmosphere from the loss of carbon sequestration due to the Project is foreseeable prior to the adoption of mitigation (e.g. if for instance tree loss will occur as part of the project), appear to have failed to meet the requirements of PS 1 because neither ESIA documents nor the project's ESRS provide quantification of increased GHGs in the atmosphere from the loss of carbon sequestration due to the project;
  - Scope 1: 82% (28 of 34) of projects for which construction is a part of the project appear to have failed to meet the requirements of PS 1 because neither ESIA documents nor the project's ESRS provide GHG emissions figures for the construction activities that will occur as part of the project;
  - Scope 3: Failure to include an analysis or quantification of Scope 3 GHG Emissions. For 91% (39 of 43) of guarantees analyzed, MIGA did not ensure quantification of Scope 3 GHG emissions as required by PS 1.<sup>20</sup> Examples of significant scope 3 emissions MIGA almost always does not ensure

<sup>&</sup>lt;sup>20</sup> Scope 3 GHG emissions are emissions that are a consequence of a project's activities, which occur at sources not owned or controlled by the project, and which are not classified as scope 2 indirect emissions (scope 2 indirect emissions are GHG emissions associated with a project's consumption of purchased electricity, heat, steam, and or cooling). See IFC's Guidance Notes: Performance Standards on Environmental and Social Sustainability, January 1, 2012 (PS Guidance Notes), at PS Guidance Note 3 GN17 at 6; PS Guidance Note 3 Annex A at 17.

quantification of are: delivery, transport, shipping or distribution of goods by a 3<sup>rd</sup> party by means not owned or controlled by the project owners; purchased materials and fuels (e.g. emissions from extraction, processing, and production of purchased materials and fuels); emissions from construction or operation activities carried out by 3<sup>rd</sup> parties or contractors; emissions from waste disposal, waste decomposition, or recycling; emissions from leased assets, franchising, and outsourcing; emissions from use of sold goods and services; emissions from airplanes or ships from expansions of airports or shipping ports respectively;

Scope 3: Further, between 91-97% of projects fail to include Scope 3 GHG emissions from unplanned but predictable developments caused by the project that may occur later or at a different location and or caused by associated facilities. Read as a whole, PS 1 provides that "[w]here the project involves specifically identified physical elements, aspects, and facilities that are likely to generate impacts," GHG impacts will be identified for "impacts from unplanned but predictable developments caused by the project that may occur later or at a different location" and "[a]ssociated facilities, which are facilities that are not funded as part of the project and that would not have been constructed or expanded if the project did not exist and without which the project would not be viable." PS 1 at ¶¶ 8, 7. Examples of some types of these GHG impacts include: GHG emissions from new vehicular traffic resulting from the project (employees, residents, customers etc. traveling to and from the project); new or expanded residential areas resulting from project induced population increases that deforests surrounding vegetation (resulting in more GHGs in the atmosphere) and that result in GHG emissions from the new or expanded population as a consequence of the project; and or the impacts of new roads that open a forest up to timber harvesting activities. However, approximately 91% (32 of 35) of projects where GHG emissions from increases in transportation related emissions due to projects are foreseeable (e.g. significant new community or workforce commutes, not counting company vehicle use or use of 3rd party contracted vehicles, caused by the project is foreseeable), appear to have failed to meet the requirements of PS 1 because these projects' ESIA documents and or ESRS fail to provide quantification or analysis of these GHG emissions.

In addition, 97% (32 of 33) of projects where local population growth related Scope 3 GHG emissions due to project are foreseeable (e.g. if deforestation from influx of people due to project is foreseeable), appear to have failed to meet the requirements of PS 1 because these projects' ESIA documents and or ESRS fail to provide quantification or analysis of these GHG emissions.

(2) <u>MIGA's Duties, Irrespective of its Clients' Obligations, to Disclose GHG Emissions for</u> <u>Each Investment Prior to Guarantee Decisions:</u> The CAO Opinion details (1) that prior to financing decisions, IFC AIP paragraph 31(a)(v)), which is the same as paragraph 29.e of MIGA's AIP, requires IFC, and thus by extension MIGA, to disclose GHG emissions when estimated over 25,000 tCO2eq total over a project's lifecycle, and (2) that this requirement differs from the monitoring and reporting requirements in PS 3 paragraph 8 applicable to clients when a client's GHG emissions are estimated to be over 25,000 tCO2eq per year. See CAO Opinion at fn. 39 and 94 distinguishing and differentiating the two independent and separate AIP and PS requirements. MIGA's AIP thus necessarily requires MIGA to quantify the total estimated Scope 1, 2, and 3 GHG emissions an investment will emit over its lifecycle when its clients do not, so MIGA can disclose these figures as its AIP demands.

BCA findings demonstrate for 40% (17 of 43) of MIGA direct guarantees BCA analyzed, despite the clear foreseeability that the vast majority of these projects will emit greater than 25,000 MT CO2 equivalent over their lifecycle, MIGA did not disclose any, or even a partial amount of, GHG emissions prior to guarantee approvals when Scope 1, 2, and 3 emissions would clearly exceed 25,000 tCO2eq total. See Exhibit 1.

BCA's data also demonstrates that for 91% (39 of 43) of guarantees, MIGA is failing to disclose Scope 3 emissions prior to guarantee approvals. See Exhibit 1.

And for 93% (40 of 43) of projects evaluated, despite the clear foreseeability that the vast majority of these projects will emit greater than 25,000 MT CO2 equivalent over their lifecycle, MIGA failed to disclose all of these project's expected GHG emissions, including significant Scope 1 emissions, prior to guarantee approvals. See Exhibit 1.

In addition, for 15% (5 of 26) of projects evaluated, MIGA did not disclose an exact amount of the expected GHG emissions (Scope 1, 2, and 3 GHG emissions, including construction emissions) during a project's life cycle prior to guarantee approvals (see Exhibit 1).<sup>21</sup> Rather, for these projects, MIGA only disclosed whether the projects would emit greater or less than 25,000 MT CO2 equivalent *per year*.

By routinely failing to adhere to its AIP requirements for disclosure of a project's expected GHG emissions, MIGA is failing to reveal the full extent and sources of its projects' climate change impacts, and is precluding feasible mitigation and avoidance of GHG emissions.

- (3) <u>MIGA's Duties to Ensure<sup>22</sup> Client Adherence to the GHG Emissions Alternatives Analysis</u> <u>Requirements in Performance Standard 1:</u> The CAO Opinion finds that prior to financing decisions, IFC's policies, which in relevant part are identical to MIGA's, require IFC, and thus by extension MIGA, to ensure that for all guarantees for investments that are greenfield developments or large expansions of an activity likely to generate potential significant environmental or social impacts, that the client to conduct a GHG emissions and climate change impact alternatives analysis that adheres to GIIP. MIGA and IFC PS 1 at ¶ 7. The CAO Opinion details that GIIP for an alternatives analysis includes at a minimum:
  - a. "a detailed discussion of each alternative presented"
  - b. "specific proposed GHG mitigation measures to address E&S risks for each alternative"
  - c. "considers [] GHG-reducing alternatives within the project scope, and [] lowercarbon alternatives to projects"
  - d. "provide a solid justification/rationale for the alternative they chose"

<sup>&</sup>lt;sup>21</sup> A plain reading of this requirement indicates GHG mitigation reporting is distinct, and thus the total GHG emissions figures reported should include total GHG emissions estimated before and after mitigation measures.

<sup>&</sup>lt;sup>22</sup> See Appendix A at Section I, *ante* detailing MIGA's obligation to ensure adherence to its PS' requirements prior to guarantee decisions.

Like the PS Guidelines,<sup>23</sup> the CAO Opinion also points to the United States National Environmental Policy Act (NEPA) requirements for alternatives analysis as GIIP.<sup>24</sup> Of note, NEPA requires all findings in alternatives analysis pertaining to whether avoidance and mitigation measures are feasible be supported by substantial evidence, and not be cursory and unsupported.

Specifically, the CAO Opinion finds that IFC failed to ensure adequate GHG emissions alternative analysis as consistent with the PS 1 paragraph 7 GIIP requirement, as:

"critical elements of established [] GIIP [required in Performance Standard 1] were missing from 21 of the 27 [analyses] reviewed. Specifically, the clients did not provide a detailed discussion of each alternative presented to IFC or specify proposed GHG mitigation measures to address E&S risks for each alternative...Further, IFC typically considers only GHG-reducing alternatives within the project scope, and not lower-carbon alternatives to projects...In addition, these clients failed to provide a solid justification/rationale for the alternative they chose. *As a result, the alternatives analysis for these IFC investments was limited in its utility to inform decision making on lowercarbon alternatives and the mitigation of project greenhouse gases.*"

These GIIP alternatives analysis requirements the CAO Opinion details that apply to MIGA's identical PS GHG alternatives analysis requirements, contain a plethora of elements, that if performed, provide powerful substantive tools needed to persuade banks and their directors to abandon guarantees and financing for proposed carbon intensive fossil fuel projects, and to instead direct guarantees and financing towards feasible renewable energy infrastructure that

<sup>&</sup>lt;sup>23</sup> IFC PS Guidance Notes, Guidance Note 1 at GN23, 25, 58 at 10-11, 19, 49 (directing readers to the Guidance Note 1 bibliography listing (1) NEPA and (2) EU's Environmental Impact Assessment (EIA) Directive (European Commission. 2011, Environmental Impact Assessment, Directorate-General for the Environment, European Commission, Brussels, available at: http://ec.europa.eu/environment/eia/eia-support.htm).

<sup>&</sup>lt;sup>24</sup> NEPA has its own guidelines specific to GHG emissions and climate change alternatives analysis that further details common sense GIIP. See 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. These guidelines specify necessary components of GIIP for alternatives analysis, including the need to quantify Scope 1, 2, and 3 GHG emissions in the first instance, and to analyze the feasibility of the lowest carbon alternatives (for instance renewable energy sources when fossil fuel projects are contemplated) to inform the alternatives analysis. These components 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 alterative 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 significantly reduce GHG emissions and climate change impacts; (2) technical and economic feasibility analysis for all renewable energy sources; (3) full quantification of Scope 1, 2, and 3 GHG emissions for the proposed project over its lifetime in comparison to all feasible alternatives that can avoid or minimize/significantly reduce GHG emissions; (4) for the proposed project and all alternatives, best available social cost of GHG emissions estimates with monetary figures of the societal cost from incremental metric ton of GHG emissions including from physical damages (e.g., sea-level rise, infrastructure damage, human health effects, etc.); (5) full analysis of mitigation measures to reduce GHG emissions to the greatest extent economically and technically feasible; (6) an explanation of how the proposed action and alternatives would help meet or detract from achieving relevant climate action goals and commitments that looks beyond NDCs to limiting warming to 1.5°C; and (7) analysis, after affected community engagement, to explain the real-world effect, including those that will be experienced locally and disproportionately by vulnerable communities, associated with GHG emissions from the proposed project that contribute to climate change (e.g. from sea-level rise, fire, drought, health impacts, etc.).

can meet a country or region's energy demand. Performance of this analysis can also significantly reduce GHG emissions from projects MIGA guarantees in other sectors.

BCA's analysis of 43 direct MIGA guarantees from 2020 – January 2025 evidences that MIGA does not ensure adherence to PS 1's alternatives analysis requirements for GHG emissions and climate change impacts. This is because for 69% (25 of 36) guarantees analyzed in Exhibit 1 where PS 1 required a GHG alternatives analysis, MIGA did not ensure that a GHG emissions alternatives analysis was conducted. Further, all or 100% of the GHG emissions alternatives analysis that were conducted did not meet PS 1's GIIP requirement for alternatives analysis.

MIGA failures to ensure its clients adherence to GIIP for alternatives analysis prior to its guarantee decisions, and the adverse global warming impacts of these failures, is perhaps best demonstrated by examining four new natural gas plants MIGA financed from 2020-2023 without securing alternatives analysis demonstrating whether renewable energy alternatives were feasible instead (see Exhibit 1). These plants include:

- ACWA Power Sirdarya in Uzbekistan (MIGA project #: 14688): 1.5 GW Natural Gas Power Plant, GHG emissions: 3,921,436 to 4,324,960 tCO2-eq/yr.
- Central Térmica de Temane in Mozambique (MIGA project # 14661 / IFC project # 43099): 450 MW Natural Gas Power Plant, GHG emissions: 1,323,827 tCO2-eq/yr.
- Gaziantep Hospital PPP Project in Türkiye (MIGA project # 11754): 17 MWth capacity Captive Natural Gas Power Plant (proposed as part of Hospital Development Project and funded with MIGA climate change funds/designated as a MIGA climate change finance mitigation project), GHG emissions: 138,644 tCO2-eq/yr.
- Ghorasal Polash Urea Fertilizer Project in Bangladesh (MIGA project # 14070): 17 MWth capacity Captive Natural Gas Power Plant (proposed as part of fertilizer production project to power operations and funded with MIGA climate change funds/designated as a MIGA climate change finance mitigation project), GHG emissions from natural gas plant: 940,000 tCO2-eq/yr.

Of these four natural gas plants MIGA financed, only one alternatives analysis – the analysis for **Central Térmica de Temane in Mozambique -** even examined renewables (the remaining three only looked at different configurations of the natural gas plants or higher emitting sources of energy such as coal). For the **Central Térmica de Temane** alternatives analyses that examined renewables, the analysis' finding that renewables were not feasible was cursory and not supported in text or anywhere in the EIA document or its appendices. It is thus clear that the analysis for the project did not meet PS 1's GIIP standard, as the analysis did not examine nor document whether implementing renewable energy sources that could meet the region's energy was economically and technically feasible. Just stating that renewables were considered, and are not feasible, without supporting evidence, is not GIIP.

Further demonstrating that **Central Térmica de Temane** alternatives analyses did not meet GIIP, are two distinct Civil Society Policy Forum presentations. One by Lorraine Chiponda of Don't Gas Africa and Power Shift Africa at the World Bank 2023 Annual Meeting, and another by Daniel Ribeiro of Justiça Ambiental in Mozambique at the World Bank 2024 Annual Meetings. Both presentations detail how flawed the alternatives analysis was due to its failure to credibly and adequately examine renewables that can feasibly meet energy supply for the

region.<sup>25</sup> The later presentation, detailed how MIGA failed to ensure a credible up to date evaluation of whether alternative energy sources, such as wind or solar, were more cost-effective "despite other research at the time indicating that renewable energy options could have been viable alternatives." <sup>26</sup>

Central Térmica de Temane highlights one of MIGA's most prominent systematic failures to ensure client GIIP for GHG emissions alternatives analysis across the direct guarantees analyzed by BCA, where almost all client findings of the infeasibility of alternatives and mitigation that could entirely or furthest avoid GHG emissions are cursory conclusions and not supported by analysis. The full GHG emissions alternatives analysis from the environmental impact assessment (EIA) document from Central Térmica de Temane in Mozambique (MIGA project # 14661 / IFC project # 43099) is pasted in Exhibit 2. Indeed, the cursory and unsupported conclusion in the EIA analysis that renewables are not feasible, and the lack of analysis supported by study examining the feasibility of renewables, evidences the alternatives analysis for the project fails to meet PS 1's GIIP requirement.

Another glaring example of how the GHG alternatives analysis for MIGA's guarantees are falling far short of GIIP is the analysis for ACWA Power Sirdarya in Uzbekistan (MIGA project #: 14688). The project's ESIA from MIGA's website even states that the Uzbekistan 2030 Energy Strategy provides for "development and expansion of renewables use and their integration into the unified power system," and "[t]he development strategy of Uzbekistan for 2017-2021 stresses the importance of the county moving towards greater development and use of renewable energy." See Exhibit 2, Excerpt 2. However, the entirely deficient ESIA GHG alternatives analysis - falling exceptionally short of GIIP as PS 1 requires - does not even examine feasibility of renewables or list renewables as an option. It only examines a no project alternative, different configurations of the natural gas plant (closed v. open cycle), and efficiency technology for the plant. Moreover, it fails to assess the technical and economic feasibility of implementing renewables and the social cost of carbon from the proposed natural gas plant to local communities. Perhaps most glaringly, the EIA estimates that solar energy alone can provide "51 billion tonnes of oil equivalent per year" and that this "could pose a significant risk relating to the CCGT Project emissions." See Exhibit 2, Excerpt 2. This suggests the plant need not be built to meet the country's energy demand. Further, demonstrating just how severely short the EIA GHG emissions alternatives analysis is, an interview with the Deputy Speaker of the Legislative Chamber, provides these key missing details the EIA did not cover:

"It is possible in Uzbekistan to get energy from the sun in the amount equal to 51 billion tonnes of oil equivalent per year," Boriy Alikhanov said. "This indicator is calculated on a global scale..In Uzbekistan, there are more than 320 sunny days a year ...If we assume the possibility of obtaining energy from the sun, then we have real conditions for the use of sunlight throughout almost the whole year. That is, we will be able to receive energy in the amount of more than 182 million tonnes of oil equivalent

<sup>&</sup>lt;sup>25</sup> Lorraine Chiponda, presentation during the CSPF Session: "Greenhouse Gas Emissions and Climate Change Alternatives Analysis: Ensuring World Bank Group Paris Agreement Alignment", Oct. 13, 2023 available at https://www.worldbank.org/en/events/2023/06/12/civil-society-policy-forum-2023-annual-meetings-2023#6); Daniel Ribeiro, presentation during the CSPF Session: "The Importance of MIGA: New Guarantee Platform and World Bank Evolution Roadmap", October 23, 2024 available at https://www.worldbank.org/en/events/2024/06/26/civil-societypolicy-forum-annual-meetings-2024#1.

<sup>&</sup>lt;sup>26</sup> See Adva Saldinger, "The World Bank Launched a one-stop guarantee shop. Here's how it's going." Devex, November 26, 2024, <u>available here</u> (quoting Daniel Ribeiro from his CSPF presentation).

per year. This is almost three times the amount of energy consumed in the country at present. The sun is the most optimal and efficient source of energy in Uzbekistan."

See Exhibit 3 for the full article.<sup>27</sup>

If MIGA's position is that the alternatives analysis for any of the natural gas plants it guaranteed met a GIIP standard based on information not disclosed for the public's review on MIGA's project database website prior to MIGA's guarantee approval, then by definition, a GIIP standard was not met. This is because it is commonly accepted around the world that a component of GIIP for environmental assessments is disclosure of the full impacts and alternatives analysis for public review prior to decision making. See Appendix A, Section III (1), *post*. However, from conversations with MIGA management and engagement with U.S. Treasury at the Tuesday Group about the alternatives analysis for these projects, any supplemental alternatives analysis information provided to MIGA directors not disclosed on MIGA's project database portal, still falls incredibly short of GIIP because they are not sufficiently supported by study.

#### (4) <u>MIGA's Duties to Ensure<sup>28</sup> its Clients Meet Their PS Obligations to Mitigate GHG</u> <u>Emissions.</u>

The CAO Opinion, via analysis of identical IFC requirements, establishes that MIGA's policies require MIGA to ensure that its clients adhere to PS 3's mitigation requirements for GHG emissions prior to guarantee approvals, including the requirement in PS 3 paragraph 7 providing that "[i]n addition to the resource efficiency measures described above, the client will consider alternatives and implement technically and financially feasible and cost-effective options to reduce project-related GHG emissions during the design and operation of the project." This necessarily includes an analysis of mitigation measures that can reduce GHG emissions as far as technically and financially feasible, and also the cost-effectiveness of the options that can reduce GHG emissions.

The CAO Opinion further provides three additional elements as to what must go into a GHG emission mitigation analysis so the substantive mitigation requirements in PS 3 are met that require implementation of technically and financially feasible, and also cost-effective options, to reduce a project's GHG emissions. These elements are as follows:

- (1) Quantification of Scope 1, 2, and 3 GHG emissions, as required by PS 1, so that PS 3's mitigation measures can be tailored to fit an investment's estimated GHG emissions;<sup>29</sup>
- (2) To conduct a GHG emissions and climate change impact alternatives analysis consistent with the GIIP requirement in PS 1, which encompasses an analysis of alternative mitigation measures to inform the mitigation selected. Specifically, the CAO Opinion finds that this mitigation analysis must include: (a) "a detailed discussion of each alternative presented,"
  (b) "specific proposed GHG mitigation measures to address E&S risks for each alternative,"

<sup>&</sup>lt;sup>27</sup> Available at https://www.uzdaily.uz/en/deputy-speaker-uzbekistan-can-get-energy-from-the-sun-in-the-amount-equal-to-51-billion-tonnes-of-oil-equivalent-per-year/.

<sup>&</sup>lt;sup>28</sup> See Appendix A at Section I, *ante* detailing MIGA's obligation to ensure adherence to its PS' requirements prior to guarantee decisions.

<sup>&</sup>lt;sup>29</sup> The CAO Opinion found "effectiveness and impact of IFC's climate strategy depends on measuring and mitigating its GHG emissions at the project and institutional levels [but]...[i]n order to mitigate climate change impacts, IFC and its clients must have comprehensive knowledge of and data on project emissions."

(c) analysis / "consider[ation of] GHG-reducing alternatives within the project scope, and [] lower-carbon alternatives to projects," and (d) "provide a solid justification/rationale for the alternative they chose."

(3) MIGA is required to ensure client adherence to the PS 3 paragraph 4 requirement to apply GIIP in the evaluation and selection of GHG emissions mitigation measures, and that the IFC Environmental Health and Safety (EHS) Guidelines mitigation standards are no longer GIIP, as the PS contemplates they could be in *appropriate* circumstances. See PS 3 ¶¶ 4, 5 providing:

the client will consider ambient conditions and apply technically and financially feasible resource efficiency and pollution prevention principles and techniques that are best suited to avoid, or where avoidance is not possible, minimize adverse impacts on human health and the environment. The principles and techniques applied during the project life-cycle will be tailored to the hazards and risks associated with the nature of the project and consistent with good international industry practice (GIIP), *as reflected in various internationally recognized sources*, *including the World Bank Group Environmental*, *Health and Safety Guidelines (EHS Guidelines)*...The client will refer to the EHS Guidelines <u>or</u> *other internationally recognized sources, as appropriate*, when evaluating and selecting resource efficiency and pollution prevention and control techniques for the project. The EHS Guidelines contain the performance levels and measures *that are normally acceptable and applicable to projects*.

See also, PS Overview at ¶ 6. Specifically, the CAO found that client use of defective mitigation analysis, benchmarks, and measures from "badly outdated" EHS Guidelines mitigation standards from over 15 years ago far out of line with current GIIP and technology, results in "effective GHG mitigation actions are likely to be left out of environmental plans and agreements." The CAO Opinion further details that:

both the general and many sectoral [EHS] guidelines do not reflect current expert understanding of the risks and impacts of GHGs as well as the significant technological advancements and innovations that have taken place over the past 18 years that can help companies achieve necessary GHG reductions. Further, the General EHS Guidelines section on greenhouse gases does not recognize that supply chain inputs or downstream uses can generate significant emissions although the current state of knowledge recognizes that these can be significant.

The CAO Opinion thus clarifies MIGA can no longer rely on the EHS Guidelines mitigation standards to ensure adherence to PS 3's GHG mitigation requirements.

BCA's analysis of 43 direct MIGA guarantees from 2020 - January 2025 evidences that MIGA does not ensure adherence to the following mitigation analysis and implementation requirements detailed above prior to guarantee approval:

 for 93% (40 of 43) guarantees analyzed in Exhibit 1, MIGA did not ensure quantification of the project's Scope 1, 2, and 3 GHG emissions, as required by PS 1, so that PS 3's mitigation measures can be tailored to fit an investment's estimated GHG emissions. For 91% (40 of 43) guarantees, MIGA failed to quantify Scope 3 emissions, and for 40% (17 of 43) guarantees, MIGA did not quantify any GHG emissions at all;

- MIGA further failed to secure the following analysis needed to secure mitigation that meets PS 3's requirements to implement (a) the technically and financially feasible options to reduce a project's GHG emissions, in addition to (b) cost effective options to reduce a project's GHG emissions:
  - for 100% (0 of 43) guarantees analyzed in Exhibit X, MIGA did not ensure that the GHG emissions mitigation analysis for the project analyzed the economic and technical feasibility of mitigation measures that could reduce GHG emissions as far as possible as PS 3 requires;
  - for (19%) 8 of 43 guarantees analyzed in Exhibit 1, MIGA did not ensure any GHG mitigation analysis was conducted.
- As such, at least due to MIGA's mitigation analysis failures, for 43 of 43 guarantees analyzed in Exhibit 1, MIGA failed to ensure the implementation of the technically and financially feasible options to reduce project-related GHG emissions during the design and operation of the project as PS 3 requires.
- In addition, for (19%) 8 of 43 guarantees analyzed in Exhibit 1, MIGA failed to ensure and secure any GHG mitigation measures. And for 50% (17 of 34) of projects where construction occurred, MIGA failed to assure itself that any mitigation for GHG emissions from construction activities was adopted prior to approving guarantees.

Further MIGA routinely does not meet PS 3's GHG mitigation analysis requirements in regards to the use of benchmarks. PS 3 provides the mitigation analysis should include a comparison of energy, fuel and other GHG relevant efficiency and reduction measures to benchmarks, if such benchmarks are applicable, to ensure the most efficient and best GHG reduction measures are implemented. PS 3 at  $\P$  6. It appears however from project's ESIA documents and or ESRS, that approximately 65% (28 of 43) projects fail to make use of benchmarks or fail to specify that no benchmarks are available.

#### (5) MIGA's Duties to Assure Itself that its FI Clients Ensure Each of Their Investments Meet the PS Requirements Pertaining to GHG Emissions

The CAO Opinion details FI's are required "to apply the PS to their sub projects financed by IFC." <sup>30</sup> This reinforces the substantively identical requirements in MIGA's Sustainability Policies, which like IFC's provide in part:

- (1) "In the case of MIGA guarantee (including project and/or corporate finance provided through <u>financial intermediaries</u>), MIGA requires its clients to apply the Performance Standards to manage environmental and social risks and impacts." PS Overview at paragraph 1;
- (2) "FIs with portfolio and/or prospective business activities that present moderate to high environmental or social risks (i.e., Category FI-1 and FI-2) will require the

<sup>&</sup>lt;sup>30</sup> See CAO Opinion at 27 providing "[w]hile IFC's Performance Standards do not include a specific set of standards for Financial Intermediaries, FI clients are expected themselves to apply the performance standards to their sub projects financed by IFC."

higher risk business activities<sup>[31]</sup> they support to apply relevant requirements of the Performance Standards," E&S Policy at paragraph 33, and

(3) that FI's must implement an Environmental and Social Management System (ESMS) covering all of an FI's investments that at least incorporates PS 1's GHG emissions requirements prior to FI investment decisions. E&S Policy at paragraph 33, PS Overview at paragraph 1.

BCA's data unveils MIGA is failing to meet all of these requirements.

For 11 of 11 or 100% of MIGA's FI guarantees analyzed, MIGA did not assess the FI's ESMS (or E&S policies and procedures) to ensure consistency of the FI's E&S policies and procedures with at least PS 3's GHG emissions requirements (MIGA did not assess the FIs' policies and procedures for consistency with PS 3's requirements at all). While MIGA's project database indicates MIGA checked whether its FIs' policies required implementation of PS 1's requirements, because of MIGA's widespread non-adherence to PS 1's GHG emissions quantification and analysis requirements for its direct Category A and B investments (see Exhibit 1 and Section II above,), it is safe to assume MIGA did not, and is not, ensuring any of its FI clients' ESMSs suffice to meet these PS 1 GHG requirements as well.

In addition, for 3 of 11 or 27% of MIGA's FI-1 and FI-2 guarantees analyzed, the information on the SPG and ESRS MIGA project website pages details that MIGA did not require the FI to meet the requirements of PS 1 or PS 3 for each of the FI's investment. These failures also release FIs from monitoring and reporting to MIGA, the GHG emissions from its investments after investment decisions. This also precludes MIGA from reporting on the carbon footprint of its portfolio as MIGA's AIP requires. (See section **x**, post).

Further, for the remaining 8 of 11 projects where MIGA did require the FI-1 or FI-2 to meet the PS requirements for each of the FI's investments, the information on the ESRS project website page does not indicate whether MIGA required the FI to meet PS 1 and PS 3's GHG emissions quantification, analysis, and mitigation requirements set forth in the CAO Opinion. (see Appendix A, Section II. for these requirements). Because of MIGA's widespread non-adherence to these and its additional requirements for its direct Category A and B investments (see Exhibit 1 and Appendix A Sections II-III, *ante*), it is safe to assume MIGA did and is not requiring its FI clients to meet PS 1 and PS 3's GHG requirements as well.

MIGA not ensuring its FI clients meet the PS GHG emissions quantification, avoidance, and minimization requirements for each of the FI's investments has tremendous consequence for global warming. Between 1990 to 2023, MIGA guaranteed a total of 1,009 projects, 29% or 302 of which were FI investments.<sup>32</sup> Considering the sheer magnitude of MIGA FI guarantees and the WBG's vision for increasing them<sup>33</sup>, as the CAO Opinion

<sup>&</sup>lt;sup>31</sup> The E&S Policy cites to IFC's Interpretation Note on Financial Intermediaries to define "Higher Risk Transactions." E&S Policy paragraph 33 at fn. 19. Paragraph 9 and fn. 13 of the IFC Interpretation Note on Financial Intermediaries' definition of Higher Risk Transactions are the sub-projects that, if guaranteed directly by IFC, would be considered category A or B projects for their environmental and social risks.

<sup>&</sup>lt;sup>32</sup> See fn. 14, *ante* (Recourse MIGA Report at 7-8 and fn. 27).

<sup>&</sup>lt;sup>33</sup> See pages 1-3 and fns. 2-5, *ante*.

provides, "[e]nsuring that relevant [] PS are applied to [] subprojects is critical to ensuring alignment of IFC's portfolio with climate targets." CAO Opinion at 27. To hammer home the importance of applying the PS to all FI guarantees and or investments, the CAO further provides:

An example of the pitfalls that can result from shortfalls in ensuring [FI's] application of PS is IFC's investment in Rizal Commercial Banking Corporation — an FI which funded coal-powered plants in the Philippines. A CAO compliance investigation found that shortcomings in IFC's review and supervision contributed to RCBC supporting the development and expansion of the power plants without assurance that the plants would operate in accordance with IFC's Performance Standards including with requirements to quantify and reduce greenhouse gas (GHG) emissions. Once the plants referenced in this investigation are operational, they will produce approximately 40 million metric tonnes of CO2 annually, which is equivalent to 30 percent of total CO2 emissions in the Philippines for 2019.

CAO Opinion at 27.

#### (6) MIGA's Duties to Assure Itself that its FI Trade Finance Clients Ensure Each of Their Investments Meet the PS Requirements Pertaining to GHG Emissions

All of MIGA's trade finance guarantees are issued through FIs, and classified by MIGA as FI-3 (low risk) transactions. As supported in the CAO Opinion detailing IFC's policy requirements that are substantively identical to MIGA's,<sup>34</sup> the PS and E&S Policy require MIGA to require its FI clients to apply the Performance Standards, in addition to applying other FI requirements such as adhering to national laws where a project/investment is located and MIGA's exclusion list and national laws, to manage environmental and social risks and impacts. E&S Policy at ¶ 33; See also, Section (5) immediately above. And further, paragraph 3 of MIGA's E&S Policy provides that proposed projects, including FI proposed projects, "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." See also paragraph 33 of MIGA's E&S Policy.

Considering the climate crisis and science supporting it, MIGA guaranteeing trade finance for fossil fuels, to enable components of fossil fuel projects, and to enable projects with facially significant GHG emissions by funding certain components or supplies for these projects clearly presents (a) moderate to high levels of environmental and/or social risk and (b) presents the potential for adverse environmental and/or social impacts. Thus, paragraphs 2-6 (see paragraph 3 specifically), 31, 33, and 34 of MIGA's E&S policy requires MIGA to ensure at least PS 1's and 3's GHG requirements are adhered to for these types of FI trade finance guarantees.

For instance, the MIGA ESRS for project # 15239 (Angola Trade Finance Guarantee Facility) provides only that:

<sup>&</sup>lt;sup>34</sup> See fn. 8, 10, ante.

"The applicable E&S requirements for this project are the MIGA Exclusion List and applicable E&S laws in Angola..Deutsche Bank will be responsible for screening the transactions...Deutsche Bank will also be required to comply with the labor standards set forth in MIGA Performance Standard 2: Labor and Working Conditions."

Inconsistent with these requirements, for 100% (6 of 6) of MIGA FI trade finance guarantees BCA analyzed on the SPG and ESRS pages of MIGA's project database portal, MIGA only requires the FI to adhere to PS 2's labor requirements and did not indicate it checked the FI's ESMS for consistency with PS 1 and PS 3's requirements, including as applied to GHG. This despite that none of these guarantees exclude fossil fuel trade financing; all may allow for trade finance investments that are or enable significant GHG emissions; and one is apparently intended for fossil fuel trade financing (see project for trade financing in Ukraine).

Further, MIGA misclassifies the six FI guarantees analyzed in Exhibit 1 as FI-3 (low risk). This perhaps contributes to its failures to require it FI-Trade Finance clients to ensure their GHG intensive investments adhere to PS 1 and PS 3's requirements applicable to GHGs (See E&S Policy at paragraph 33, only specifying that requiring that MIGA's Category FI-1 and FI-2 guarantee clients will require the higher risk business activities they support to apply relevant requirements of the Performance Standards).

As Urgewald has documented, the World Bank Group's financing of fossil fuels through Trade Finance is a significant threat to its alignment with the Paris Agreement's 1.5°C warming limitation objective, and moreover is contributing to climate change harms to communities. (see September 2023 paper "Is the World Bank giving billions of trade finance to fossil fuels?" (available at: <u>https://www.urgewald.org/sites/default/files/mediafiles/Urgewald%20-%20Trade%20Finance%20Paper%20-0923.pdf</u>). Concerningly, MIGA is guaranteeing FIs to engage in trade finance transactions: (a) to fund fossil fuels, (b) to fund components of fossil fuel projects, and (c) to enable projects with facially significant GHG emissions by funding certain components or supplies for these projects without even ensuring FI client adherence to the requirements of the PS applicable to GHG emissions prior to the FI's trade financing investments.

(7) <u>MIGA's Duties to Ensure<sup>35</sup> its Clients' GHG Emissions Quantification, Alternatives Analysis and Mitigation Measures Comply with Host Country Laws.</u> The CAO Opinion affirms IFC's, and thus MIGA's identical obligations to ensure that in addition to the PS at the bare minimum, its clients also comply with applicable national law, including those laws implementing host country obligations pertaining to climate change impact due diligence and harm prevention under international law (CAO opinion at fn. 19 providing: "IFC requires clients to comply with host country laws, including [] obligations under international law (PS1, Overview, para. 5)."); See MIGA PS 1 Overview at ¶ 5 setting forth the same requirements; see also PS 1 at ¶ 6. As such, where MIGA's PS omits requirements pertaining to GHG emissions quantification, alternatives analysis, mitigation, and disclosure set forth by human rights treaties, harm prevention customary legal obligations, the Paris Agreement, and/or the Law of the Sea that a host country has incorporated into its laws, MIGA's board adopted policies require it ensure these GHG

<sup>&</sup>lt;sup>35</sup> See Appendix A at Section I, *ante* detailing MIGA's obligation to ensure adherence to its PS' requirements prior to guarantee decisions.

emissions analysis and mitigation requirements are secured and disclosed prior to its financing decisions. As detailed in Appendix E, human rights treaties, customary international law pertaining to harm prevention, human rights, and the precautionary principle; the Law of the Sea; and the Paris Agreement require (a) actions that cause or contribute to the 1.5°C warming limitation objective be avoided, and (b) GHG emissions quantification and alternatives and mitigation analysis meet a best available practiced method standard to assess and prevent climate change harms.

An example of the best available practiced method standard is that practiced under NEPA, which as detailed in section II (3) and footnote 24 above, requires: quantification of Scope 1, 2, and 3 emissions; a thorough GHG emissions and climate change alternatives analysis that also requires this quantification; an alternatives analysis supported by and with studies detailing the feasibility alternatives and mitigation that can be pursued to avoid GHG emissions for each investment, including the feasibility of renewables to meet energy demand; and an alternatives analysis that includes societal cost of carbon for each ton of GHGs a contemplated investment and all of its alternatives would emit.

(8) <u>MIGA's Duties Under its E&S and AIP Policy to Quantify and Report on the Carbon Footprint of its Portfolio</u>. The CAO Opinion found that IFC's E&S Policy with the same applicable provisions as MIGA's E&S Policy, "commits IFC to quantify and report on the carbon footprint of its direct investment portfolio in accordance with the emerging state of practice on accounting and reporting," and "[t]his entails reporting both at the project and institutional level." See MIGA E&S Policy at ¶11, IFC E&S Policy at ¶11, CAO Opinion at 15 and fn. 34.

MIGA's Access to Info Policy sets forth this same requirement. It provides: "[i]n accordance with the Policy on Environmental and Social Sustainability, MIGA will quantify, manage, and report on the carbon footprint of its portfolio in accordance with the emerging state of practice on GHG accounting and reporting." Access to Info Policy at ¶ 24.

Contrary to these requirements, in the 12 years since MIGA adopted its Access to Info Policy and E&S Policy, not one year has MIGA reported or estimated the annual GHG emissions from its entire portfolio. And while MIGA, through the WBG, has made a "corporate commitment to better understand the GHG "footprint" of the [its] portfolio [as] articulated in the Strategic Framework on Development and Climate Change (SFDCC),"<sup>36</sup> since 2008, MIGA has only stated its intention to work on quantifying the carbon footprint of its portfolio and has not done much else.

With the 1.5°C warming objective upon us, and in the 12 years since MIGA pledged to report the GHG emissions from its portfolio where the emerging state of practice has been for quite some time to quantify all GHG emissions (Scope 1, 2, and 3) from a business activity,<sup>37</sup> MIGA is clearly non-compliant with the requirement in its AIP to report the carbon footprint of its guarantee portfolio. While MIGA has indicated difficulty in calculating the emissions from its Portfolio since 2008,<sup>38</sup> if MIGA abides by the requirements in its Sustainability Policies to

 <sup>&</sup>lt;sup>36</sup> See Toward a Green, Clean, and Resilient World for All: A World Bank Group Environment Strategy 2012 – 2022 (2012) at 63; 2008 World Bank Group's "Strategic Framework for Development and Climate Change at 11, 18.
 <sup>37</sup> See Appendix A, Section II(1) and fn. 17, *ante*.

<sup>&</sup>lt;sup>38</sup> See Toward a Green, Clean, and Resilient World for All: A World Bank Group Environment Strategy 2012 – 2022 (2012) at 63; 2008 World Bank Group's "Strategic Framework for Development and Climate Change at 11, 18.

ensure an adequate GHG emissions assessments prior to guarantee decisions,<sup>39</sup> and if it also adheres to the requirements of its PS to ensure annual monitoring of GHG emissions from all projects with GHG emissions of greater than 25,000 tons CO2/year,<sup>40</sup> it will have all the information it needs to quantify and report on the carbon footprint of its portfolio. This is because Scope 1, 2, and 3 operations and construction emissions would all be quantified prior to MIGA board approval, even for projects for which the sum of estimated GHG emissions is under 25,000 tons CO2/year. And in addition, to help update and obtain more precise figures, for those "projects that are expected to or currently produce more than 25,000 tons of CO2equivalent annually," the client would be required to quantify and report those project's Scope 1 and 2 emissions to MIGA annually. E&S Policy at ¶ 11; PS 3 at ¶ 8.

To achieve compliance with E&S Policy's requirement to report on its carbon footprint of its direct guarantee portfolio and the AIP's transparency, accountability, and overall access to information requirements, the report detailing the carbon footprint of MIGA's portfolio must be supported by publicly provided data. In order to accomplish this, prior to approval of project guarantees, MIGA must necessarily provide the detailed Scope 1, 2, and 3 GHG emissions analysis for each MIGA project. This analysis includes revealing the project will not result in GHG emissions. In addition, prior to guarantee approval for each project, MIGA must disclose if no GHG emissions analysis was conducted to alert MIGA board and management, affected communities, and public that a GHG analysis must be conducted.

- III. Specific Requirements in MIGA's Board Adopted Policies Applicable to Climate Change Not Covered in the Scope of the CAO Opinion that the Undersigned Request MIGA Confirm in Writing that it Agrees with, and Will Immediately Implement:
  - (1) <u>MIGA Board Adopted Policy Requirements to Disclose, and Provide Adequate</u> <u>Opportunity for the Public to Review, the full GHG Emissions and Climate Change Impact</u> <u>and Mitigation Analysis, Alternatives analysis, and Mitigation Measures in MIGA</u> <u>Management's Possession for its Direct and Financial Intermediary (FI) Guarantees</u>
    - I. PS 1's good international industry practice requirement for environmental and social impact assessments requires prior to MIGA guarantee decisions public disclosure, and adequate opportunity for public review, of the full GHG emissions and climate change impact and mitigation analysis, alternatives analysis, and mitigation measures.

PS 1 requires MIGA ensure that prior to project guarantee decisions, the environmental and social impact assessments for each project meet a "good international industry" practice standard. PS 1 at ¶ 7, See Appendix A, Sections I-II. For quite some time, it has been universally accepted that at the minimum, the opportunity for public review of a project and its environmental and social impact assessments prior to project approval is a central practiced component of an environmental assessment.<sup>41</sup> This is demonstrated by the inclusion of public disclosure, and opportunity for public review of, a project and its environmental impact

<sup>&</sup>lt;sup>39</sup> See Appendix A, Sections II (1) and (2), ante.

<sup>&</sup>lt;sup>40</sup> PS 3 at ¶ 8, E&S Policy at ¶ 11.

<sup>&</sup>lt;sup>41</sup> See e.g., UNEP, Assessing Environmental Impacts: A Global Review of Legislation (2018) (hereinafter "UNEP EIA Report") at Chapter 3. EIA systems – Legal and institutional frameworks for EIAs, Section 3.2.3 Public participation at 50-66.

analysis well prior to project approvals in the vast majority of countries' environmental and social impact assessment laws and within international organizations.<sup>42</sup>

As documented in 2018 United Nations Environment Programme (UNEP) Report with examples from states around the world,

There is a wide consensus that public participation constitutes a fundamental element of EIAs – or in fact even that EIA is not an EIA without public participation. It is also widely recognized that public participation is not only a goal in itself, but that it is a key to accurate and effective environmental assessments...Due to the fact that public participation is considered an integral part of the EIA process, all countries have enacted some kind of legal measure for public participation in EIAs.... The review stage of the EIA process, i.e. the review of the EIA report prior to the decision on whether a project can go ahead taking environmental considerations into account, is a key element of the EIA process. The objective is to verify whether the information provided is sufficient and adequately presented so as to form a sound basis for decision-making. Public participation, comments from the public on the EIA report are an integral part of the review process in many countries.<sup>43</sup>

While the UNEP Report documents that there is no general agreement in laws or the literature on what constitutes good practice in relation to public participation in EIAs, it finds most legislation in Global North and South states around the world make it mandatory to publicly publish information on disclosing a project when an application is submitted or the project is being considered, to make the draft EIA reports publicly available, and to provide the opportunity to submit comments on the EIA reports and project well prior to project approval.<sup>44</sup> In addition to being included in NEPA and EU's Environmental Impact Assessment (EIA) Directive (both included as examples of guidance for GIIP and best international practice for developing environmental as social impact assessment and studies in IFC's Guidance Notes to PS 1),<sup>45</sup> these requirements are common place in international environmental treaties.<sup>46</sup>

Disclosure of GHG emissions impact analysis and mitigation prior to guarantee approval provides the opportunity for public review and input that has long been established as a key element to meeting the GIIP standard PS 1 requires at the risks and impacts assessment stage. It is critical to ensuring projects MIGA guarantees adequately quantify, assess the impacts of, and mitigate GHG emissions. It has also been accepted by MIGA as central to informed decision making, important

<sup>46</sup> See 'Espoo' Convention on Environmental Impact Assessment in a Transboundary Context (adopted 25 February 1991, entered into force 10 September 1997) 1989 UNTS 309 (The member states of the UN Economic Commission for Europe that are party to this treaty comprise of 56 States located in Europe, Northern America and Central Asia); Protocol on Environmental Protection to the Antarctic Treaty, Annex I arts 3.2, 3.3, 3.6, 6; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1988 (Aarhus Convention), Art. 6 (see also Art. 1, 3, 5); Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Escazú, Costa Rica, 4 March 2018 (Escazú Agreement), Art. 7 (see also Art. 1, 5, 6).

<sup>&</sup>lt;sup>42</sup> See UNEP EIA Report at 50-66.

<sup>&</sup>lt;sup>43</sup> UNEP EIA Report at 50-51, 65-66

<sup>&</sup>lt;sup>44</sup> UNEP EIA Report at 50, 53, 55, 60-61.

<sup>&</sup>lt;sup>45</sup> IFC's Guidance Notes: Performance Standards, Guidance Note 1 at GN23, 25, 58 at 10-11, 19, 49 (updated June 14, 2021) (directing readers to the Guidance Note 1 bibliography listing (1) NEPA and (2) EU's Environmental Impact Assessment (EIA) Directive (European Commission. 2011, Environmental Impact Assessment, Directorate-General for the Environment, European Commission, Brussels, available at: http://ec.europa.eu/environment/eia/eia-support.htm).

to managing environmental, social, and governance risks, and "fundamental to fulfilling its development mandate." AIP at  $\P\P$  2, 4, 8, 9, E&S Policy at  $\P\P$  14, 16.

II. MIGA's Board Adopted Policies Require it Ensure that Prior to its Financial Intermediary (FI) client's decisions to invest in a project, that the FI adheres to PS 1'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 in the FI Clients' possession.

Paragraph 33 of MIGA's E&S Policy requires that during the appraisal process and prior to approving financing for financial intermediary (FI) guarantees, MIGA is required to ensure that the FI client develops and operates an Environmental and Social Management System (ESMS) that incorporates the relevant principles of PS 1. Paragraph 32 of the E&S Policy further reinforces this. It provides that at the appraisal phase, "MIGA reviews the implementation capacity of FIs as well as their ESMS, as required by Performance Standard 1." PS 1 provides the *ESMS is developed under the procedures and requirements provided by PS 1*, which necessarily means that when read with paragraphs 32 and 33 of the E&S Policy, FI clients are required to have an ESMS for their investments that ensures consistency with PS 1's environmental and social impact assessment, mitigation, consultation, and other requirements. PS at ii., Section I ¶¶ 4, 5.

Further and moreover, PS 1 clearly states MIGA is required to ensure, prior to providing a guarantee to FIs, that PS 1's requirements apply to FIs:

In the case of MIGA guarantee (including project and/or corporate finance provided through financial intermediaries), MIGA requires its clients to apply the PS to manage environmental and social risks and impacts so that development opportunities are enhanced.

PS at i., Section 1, ¶ 1. Read alone, this PS requirement requires MIGA to ensure its FI clients apply PS 1 prior to FI financing approvals. MIGA's E&S and AIP further oblige MIGA to ensure adherence to this PS requirement. See Appendix A, Section I, *ante*.

As detailed in the CAO Opinion, Appendix A Section III (1) I, and Appendix A Section II (1), PS 1 requires adherence to "good international industry practice" in the assessment of environmental and social impacts prior to approval of a guarantee for a project. PS 1 at  $\P$  7. In the context of climate change impacts, this requires amongst other things, public disclosure, and opportunity for public review, of the full GHG emissions and climate change impact and mitigation analysis, alternatives analysis, and mitigation measures for a contemplated investment.

Because MIGA, prior to guaranteeing a FI, is required to ensure that the FI will adhere to PS 1's impact assessment and mitigation requirements before the FI makes investments of its own, MIGA is required to ensure the FI understands, and agrees in its financing agreement with MIGA, that the FI is required to publicly disclose its contemplated investments and their environmental impact assessments (including for GHG emissions and climate change) well prior to its financing decisions. This would provide the public and MIGA, with notice and opportunity for review prior to the FI's financing decision.

In addition to ensuring quantification and reduction of GHG emissions from FI projects in line with MIGA's policies, MIGA ensuring such FI disclosures and release of impact assessments prior

to FI financing commitments could substantially help MIGA prevent its FI clients from impermissibly using MIGA guarantees to finance fossil fuel projects without public or MIGA knowledge. See for example, IFC's FI investments resulting in financing of coal powerplants in the Philippines due the IFC's failure to adhere to its Sustainability Policy requirements applicable to FIs that are substantively identical to MIGA's. See: CAO, *Compliance Investigation Report, IFC Investments in Rizal Commercial Banking Corporation (RCBC)*, The Philippines, November 19, 2021 (RCBC case); see CAO Opinion at 27 (describing these failures); see also Complaint to the CAO for IFC's FI's financing of Java 9 and 10 coal fossil fuel projects "Complaint concerning IFC investment KEB Hana Indonesia Rights Issue IV, Project No 42034" (Java 9 and 10 case). In the RCBC and Java 9 and 10 cases, if IFC required its FI clients to disclose its contemplated investments in coal powerplants and their impact assessment documents prior to FI financing, IFC and the public could have been made aware of, and prevented, IFC's FI clients from impermissibly investing in these projects in the first instance.

Over 1/3 of MIGA's guarantees are to FIs financial institutions. See Appendix A, Section II (5), *ante*. Even beyond the RCBC and Java 9 and 10 cases, it is well documented World Bank Groups' financial support, including guarantees, enabling FI investments remains a particular risk in terms of channeling funds to coal and other fossil fuel projects.<sup>47</sup> As such, the recent External Review of IFC/MIGA<sup>48</sup> emphasized the need for IFC/MIGA 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 PS in their higher-risk investments." IFC/MIGA External Review Report ¶ 26. Specifying in its guarantee agreement with FIs - that public disclosure of the FI investments and their environmental and social impact assessments in accordance with the disclosure timeliness in MIGA's board adopted policies is required as part of FI's requisite adherence to PS 1 - would go a long way towards helping to achieve these objectives. Moreover, MIGA's own board adopted policies require it take this measure.

# III.MIGA's AIP and E&S Policy also require MIGA to publicly disclose *all* GHG emissions, mitigation, impact, and alternatives analysis and supporting study in MIGA Management's possession prior to MIGA approval of a guarantee.

Prior to approval of a guarantee for a project, MIGA's AIP requires complete disclosure of all of the GHG emissions and mitigation figures and analysis for a project, including a full scope 1, 2, and 3 quantification, alternatives, mitigation measures, and affected communities impact analysis. AIP at  $\P$  29 (c)-(e); See Appendix A, Section II (2).

Further, paragraphs 29 (f), 9, 36, and 37 of MIGA's AIP requires MIGA to publicly provide any type of, and all, GHG environmental and social impact assessment ("ESIA") documents to the public 30-60 days before consideration by MIGA for guarantee approval that contain GHG emissions and mitigation analysis and figures. This includes all analysis and information that contains GHG emissions and mitigation analysis and figures in MIGA Management's possession and or that Management provides to Directors. See also detailed analysis in: Appendix A, Sections III (1) I.-II., IV., *ante* and *post*, and in Appendix A, Section III, (10)-(11).

<sup>&</sup>lt;sup>47</sup> *Id*.

<sup>&</sup>lt;sup>48</sup> External Review of IFC/MIGA E&S Accountability, including CAO's Role and Effectiveness Report and Recommendations June 2020, available at: https://thedocs.worldbank.org/en/doc/578881597160949764-0330022020/original/ExternalReviewofIFCMIGAESAccountabilitydisclosure.pdf ("IFC/MIGA External Review Report").

In addition, if supplemental analysis is performed, or additional mitigation is considered or adopted, after and or in addition to the information disclosed on MIGA's public data portal, this additional information must also be disclosed on MIGA's public data portal for public review 30-60 days before consideration by MIGA for guarantee approval. This additional information, which completes the environmental and social impact assessment and mitigation measures, is part of the GHG environmental and social impact assessment ("ESIA") documents that MIGA's AIP requires be disclosed to the public. See detailed analysis in Appendix A, Sections III (1) I.-II., IV., *ante* and *post*, and in Appendix A, Section III, (10)-(11).

As BCA's data documents, for 51% of it guarantees, MIGA is not adhering to its AIP because it is not publicly disclosing a project's environmental and social impact assessment documents with GHG emissions and mitigation analysis prior to guarantee approval. See data in Exhibit 1. For almost all of its projects, MIGA is violating its AIP for not providing the supplemental GHG emissions quantification, alternatives analysis, and mitigation analysis in its possession that inform and support GHG emissions alternatives and mitigation a client commits to that is not included in a formal ESIA document nor provided in the ESRS. As indicated in paragraph 29 and footnote 11 of its AIP, MIGA must disclose this requested information and associated documents, as (1) they are included in, part of, and or pertain to the information in environmental and social impact assessments referred to in paragraph 29 of its AIP, and (2) the information and documents requested are not confidential or otherwise shielded from disclosure by its AIP or other MIGA policies. AIP at ¶¶ 7(b), 11(a)-(1).

## IV. None of the Provisions in MIGA's Access to Information Policy allow MIGA to not disclose this information, including supplemental information, in Sections I-III. above prior to guarantee approvals.

Prior to approval of project financing, MIGA's AIP requires complete disclosure of all of the GHG emissions and mitigation figures and analysis for a project, including a full scope 1, 2, and 3 quantification, alternatives, mitigation, and affected communities impact analysis. AIP at ¶ 27-28, 29 (c)-(f); Sections II-III, ante; Appendix A, Sections II.-III., *ante*. In addition, the E&S Policy and AIP specifies MIGA must ensure client adherence to PS 1, which requires public disclosure and opportunity for review of this information as part of meeting the PS' good international practice standard for environmental and social impact assessments. See Section I. of this Appendix D, *ante*; Appendix A, Section I.

Further, AIP Paragraph 27-29 requires MIGA to make publicly available certain information, including relevant project, environmental and social, and development impact information while the guarantee is under consideration by MIGA. And Paragraph 29 of the AIP specifies the "MIGA make[] publicly available the following environmental and social information, *in addition to other information*:

(d) key measures identified to mitigate those risks and / or impacts, specifying any supplemental actions that will need to be implemented to undertake the project in a manner consistent with the Performance Standards, or where required by MIGA, in the Environmental and Social Action Plan;

(e) where greater than 25,000 MT CO2 equivalent, the expected GHG emissions of the project;

(f) electronic copies or web links, where available, to any relevant environmental and social impact assessment documents prepared by or on behalf of the client;"

MIGA's Sustainability Policies provide policy justifications to support these disclosure requirements as well. As recognized by MIGA, the opportunity for public review of, and input on, environmental and social impact assessments before MIGA project approval is central to informed decision making, important to managing environmental, social, and governance risks, and "fundamental to fulfilling its development mandate." AIP at ¶¶ 2, 4, 8, 9; E&S Policy at ¶¶ 14, 16. It is a necessary check to best ensure a project meets the PS' requirements and thus avoids or mitigates a project's GHG emissions as much as economically and technically feasible. *Id*.

But contrary to these disclosure requirements, and compelling justifications for them, MIGA management references the commercial sensitivity and confidentiality provisions of MIGA's AIP to excuse not disclosing GHG emissions analysis and mitigation measures.<sup>49</sup> The AIP does not allow for withholding of this information central to implementation of the E&S Policy, AIP, PS, and MIGA's development mandate.

AIP Section 11(a) provides "MIGA does not disclose financial, business, proprietary, or other non-public information provided to MIGA by its clients, its member countries, or other third parties." However, MIGA has never articulated, nor justified, how the components of a GHG impact and mitigation analysis - that is routinely fully disclosed to the public for review as required by environmental assessment laws all over the world <sup>50</sup> - could be shielded from public disclosure. Moreover, as long as there is no confidentiality or sensitivity justifications, AIP paragraph 11(i)'s deliberative information exception to public disclosure explicitly allows for MIGA disclosure of ESIA studies, reports, documents, and assessments referred to in Access to Info Policy paragraph 29 that are prepared to inform MIGA's internal decision-making. See Access to Info Policy at Section (11)(i) and fn. 11. MIGA has no basis, and has never supported one, to justifiably claim the commercial sensitivity and confidentiality provisions of MIGA's AIP shields disclosure of GHG emissions and mitigation analysis. Its failure to disclose this information plainly violates its board adopted Sustainability Policies. It also thwarts its development mandate.

(2) Ensuring Impermissible Deferral of GHG Emissions Quantification and or Mitigation Until After Guarantee Approval Does not Occur: As detailed in Section II above, before a guarantee is approved for a project, PS 1 and PS 3 require quantification of GHG emissions, and analysis and adoption of mitigation in line with GIIP. The PS do not provide for the deferral of mitigation before guarantee approval except for the case in which assets to be developed, acquired or financed have yet to be defined. PS 1 at ¶ 7, see also PS 3 at ¶¶ 1-8 not providing any exception for GHG emissions mitigation.

<sup>&</sup>lt;sup>49</sup> We observe this occurs mainly in the context of when the GHG impact assessment information initially posted on MIGA's 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 MIGA directors, MIGA management conducts or secures supplemental analysis from the client, its staff, or its own consultants. Conversation with MIGA Management, member state directors, and member state agencies that provide direction to directors, reveals this supplemental analysis still falls well short of what MIGA'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.

<sup>&</sup>lt;sup>50</sup> See section (1) I. of this Appendix A.III, *ante*; See fn. 41, UNEP EIA Report at 50-66.

In cases where projects are defined prior to guarantee approval, 37% (16 of 43) of projects appear to violate PS 1 because the ESIA documents and ESRS detail that the analysis and quantification of GHG emissions was deferred to a later time after guarantee approval (see Exhibit 1). Without quantification of a project's emission at the environmental assessment stage prior to guarantee approval, the extent of a project's impacts from GHG emissions cannot be determined and alternatives and mitigation cannot be analyzed and adopted to avoid and prevent GHG emissions from a project to the fullest extent feasible.

In cases where projects are defined prior to guarantee approval, at least approximately 2% (1 of 43) of projects with ESIA documents and or ESRS available appear to violate PS 1 because these projects impermissibly deferred analysis and selection of GHG mitigation measures to a later time with no commitment to select particular measures or achieve a particular amount of GHG reductions. *Id*.

(3) Failure to Ensure a Cumulative Impacts Analysis: A cumulative impact is universally defined as the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what entity or person undertakes such other actions. A cumulative impacts analysis is a cornerstone of environmental assessments because it is well accepted that the most devastating environmental effects may result not from the direct effects of a particular action, but from the combination of individually minor effects of multiple actions over time.<sup>51</sup> PS 1 provides that the scope of the impacts identification process will be consistent with good international industry practice, and that the impacts identification process will consider the emissions of GHGs. The inclusion of a cumulative GHG impacts analysis that quantifies all of a project's GHG emissions (no matter how big or small) in an impact identification process during a project's environmental impact assessment stage is required because it is necessary for consistency with good international industry practice.<sup>52</sup> PS 1 at ¶ 7.<sup>53</sup> An adequate cumulative GHG impact assessment that includes quantification of all of project's GHG emissions, must necessarily analyze a project's impact on a country's ability to meet its Paris Agreement obligations, including a country's ability to achieve its National Determined Contributions (NDCs); the impact on Paris Agreement goals more generally, including its 1.5°C warming limitation objective; the project's incremental contribution combined with all other emissions to global GHG emissions; and any local, regional, nation-wide or global GHG plans and agreements. Such a cumulative analysis that includes quantification of all of project's GHG emissions is also needed to ensure that alternatives and mitigation can be analyzed and adopted that reduces a project's incremental impacts on global warming to the fullest extent feasible.

<sup>&</sup>lt;sup>51</sup> See NEPA Guidance available at: https://ceq.doe.gov/docs/ceq-publications/ccenepa/sec1.pdf.

<sup>&</sup>lt;sup>52</sup> *Id.*; *See* e.g., the National Environmental Protection Act (USA); California Environmental Quality Act (CEQA); IFC sites NEPA as an example of good international industry practice (Guidance Note 1 Assessment and Management of Environmental and Social Risks and Impacts, Published January 1, 2012 (updated June 14, 2021) at 49); See fn. 24, *ante* (The Interim CEQ GHG NEPA Guidance details the cumulative GHG emissions analysis NEPA requires).

<sup>&</sup>lt;sup>53</sup> A collection of other clauses in PS 1 reiterate the requirement for a cumulative impacts analysis. PS 1 provides that when a project involves specifically identified physical elements, aspects, and facilities that are likely to generate GHG emissions, cumulative GHG emissions impacts will be identified that result from the incremental impact of the project's GHG emissions in addition to other existing GHG emissions, planned projects with GHG emissions or reasonably defined developments with GHG emissions at the time the risks and impacts identification process is conducted. PS 1 at ¶¶ 8, 7. PS 1 also provides that when a project involves specifically identified physical elements, aspects, and facilities that are likely to generate GHG emissions, the identification of impacts "will take into account the findings and conclusions of related and applicable plans, studies, or assessments prepared by relevant government authorities or other parties" that are related to the incremental effects of its GHG emissions on global warming. PS 1 at ¶¶ 11, 7, 8.

88% (38 of 43) of projects appear to fail to meet the requirements of PS 1 because for projects evaluated, neither the ESIA documents nor the project's ESRS include a cumulative impacts analysis (see Exhibit 1).

(4) Ensuring Paris Agreement National Determined Contributions (NDCs) and Any Regional, National and Global GHG Emissions Plans are Taken Into Account: Read as a whole, PS 1 provides that "[w]here the project involves specifically identified physical elements, aspects, and facilities that are likely to generate environmental and social impacts," a GHG impacts analysis "will take into account the findings and conclusions of related and applicable plans, studies, or assessments prepared by relevant government authorities or other parties that are directly related to the project and its area of influence." PS 1 at ¶ 11. At least 67% (29 of 43) of projects appear to have failed to meet these PS 1 requirements because neither the ESIA documents nor the project's ESRS take into account a country's National Determined Contributions (NDCs), global warming treaty or agreement goals, or any other applicable regional, national and global GHG emission plans because this information is not mentioned (see Exhibit 1).

#### Affected Communities GHG Emissions Impact Analysis & Mitigation

(5) Failure to Assure Itself that Analysis was Conducted (100% of Projects, 0 of 43) and Mitigation Provided (100% of Projects, 0 of 43) for a Project's GHG Emissions' Contribution to Global Warming Impacts on Biodiversity or on Ecosystem Services upon Which Affected Communities' Livelihoods are Dependent as Required by Performance Standard 1: PS 1 provides that "[w]here the project involves specifically identified physical elements, aspects, and facilities that are likely to generate impacts," indirect project impacts [will be identified] on biodiversity or on ecosystem services upon which Affected Communities' livelihoods are dependent." PS 1 at ¶¶ 8, 7. Thus, Prior to guarantee approval, PS 1 necessarily requires an analysis of a project's GHG emissions' contribution to global warming "impacts on biodiversity or on ecosystem services upon which Affected Communities' livelihoods are dependent, as these are "indirect project impacts". Id. In addition, like for other project impacts, PS 1 and 3 require the adoption of measures that avoid GHG emissions to the furthest extent economically and technically feasible (see Appendix A, Section II (4), *ante*). Failure to conduct this analysis as to a project's GHG emissions impacts on Affected Communities obstructs PS and E&S Policy safeguards to ensure a project does not cause harm to a community, as it can prevent findings that trigger the client to engage in a process of Informed Consultation and Participation (ICP) with Affected Communities. E&S Policy at ¶¶ 28, 53; PS 1 at 6 (PS 1 objectives); PS 1 at ¶¶ 11-12, 15, 25-32, 36.

At least 100% of projects appear to have failed to meet the requirements of PS 1 because neither the project's ESIA documents nor the project's ESRS analyze a project's GHG emissions' contribution to global warming "impacts on biodiversity or on ecosystem services upon which Affected Communities' livelihoods are dependent (see Exhibit 1).

In addition, 100% of projects appear to have failed to meet the requirements of PS 1 because neither the project's ESIA documents nor the project's ESRS indicate mitigation was adopted for project's GHG emissions' contribution to global warming impacts on biodiversity or on ecosystem services upon which Affected Communities' livelihoods are dependent (see Exhibit 1). None of the projects evaluated acknowledged these impacts.

#### (6) Failure to Assure Itself that the Client Identifies and Provides Redress to Individuals and Groups that may be Directly and Differentially or Disproportionately Affected by a Project's

GHG Emissions' Contribution to Global Warming because of their Disadvantaged or Vulnerable Status – 100% (0 of 43) of Projects. PS 1 provides that "[w]here the project involves specifically identified physical elements, aspects, and facilities that are likely to generate impacts," as part of the process to identify GHG impacts, the client will:

identify individuals and groups that may be directly and differentially or disproportionately affected by the project because of their disadvantaged or vulnerable status. Where individuals or groups are identified as disadvantaged or vulnerable, the client will propose and implement differentiated measures so that adverse impacts do not fall disproportionately on them and they are not disadvantaged in sharing development benefits and opportunities.

PS 1 at ¶ 12. 100% of projects appear to have failed to meet these PS 1 requirements because neither the project's ESIA documents nor ESRS contain analysis as to whether individuals or groups may be directly and differentially or disproportionately affected by the project's GHG emissions' contribution to global warming because of their disadvantaged or vulnerable status (see Exhibit 1). Thus, also in violation of PS 1, none of these projects provide redress that prevents (1) a project's adverse impacts from falling disproportionately on individuals and groups that may be directly and differentially or disproportionately affected by climate change, and (2) these individuals and groups from not being disadvantaged in sharing development benefits and opportunities.

#### (7) Failure to Assure Itself the Client Identifies Risks and Potential Impacts of the Project on Priority Ecosystem Services, Outside of Those Services on Which the Project is Directly Dependent for its Operations, that may be Exacerbated by Climate Change – 100% of Projects: PS 4 provides that:

where appropriate and feasible, the client will identify those risks and potential impacts on priority ecosystem services that may be exacerbated by climate change. Adverse impacts should be avoided, and if these impacts are unavoidable, the client will implement mitigation measures in accordance with paragraphs 24 and 25 of PS 6.

PS 4 at  $\P$  8. PS 4 also provides that when a project is "likely to adversely impact ecosystem services, as determined by the risks and impacts identification process, the client will conduct a systematic review to identify priority ecosystem services." PS 4 at  $\P$  24. Priority ecosystem services include "those services on which project operations are most likely to have an impact and, therefore, which result in adverse impacts to Affected Communities." *Id.* PS 4 also instructs that (i) "when Affected Communities are likely to be impacted, they should participate in the determination of priority ecosystem services in accordance with the stakeholder engagement process as defined in [PS] 1," and (ii) that:

With respect to impacts on priority ecosystem services of relevance to Affected Communities and where the client has direct management control or significant influence over such ecosystem services, adverse impacts should be avoided. If these impacts are unavoidable, the client will minimize them and implement mitigation measures that aim to maintain the value and functionality of priority services.

PS 4 at ¶¶ 24, 25. Because these requirements of PS 4 apply at the "risks and impact identification process," this analysis must also be conducted as consistent with PS 1's environmental and social impact assessment requirements prior to MIGA approval of financing for a project.

100% of projects appear to have failed to meet the requirements of PS 1 and 4 because neither the project's ESIA documents nor the project's ESRS contain analysis as to the risks and potential impacts of the project on priority ecosystem services of importance to Affected Communities that may be exacerbated by climate change (see Exhibit 1). In addition, 100% of projects appear to have failed to meet the requirements of PS 1 because neither the project ESIA documents nor the project's ESRS demonstrate adherence to PS 4's procedures and requirements pertaining to avoidance and redress of priority ecosystem services of importance to Affected Communities that may be exacerbated by climate change. *Id*.

#### Additional E&S Policy Requirements

MIGA has ongoing and continuously violated the requirement in paragraph 26 of its (8) E&S Policy to ensure that a project's non-compliance with the Performance Standard's GHG emissions analysis and mitigation requirements are addressed in its Environmental and Social Management System (ESMS) prior to guarantee approvals: To ensure the business activity meets the PS, prior to a project guarantee approval, MIGA is required to make supplemental actions (Environmental and Social Action Plan or "E&S Action Plan") - to fill any gap between the business activity's environmental and social performance and the requirements of the PS and provisions of the World Bank Group Environmental, Health and Safety Guidelines (ESMS implementation gaps) - necessary conditions of MIGA's guarantee issuance. E&S Policy at ¶ 26, see also E&S Policy at ¶¶ 19, 22, 23. For 100% of projects, MIGA appears to not meet these E&S Policy requirement to close gaps in critical weaknesses in the client's ESMS before MIGA's guarantee approval, or as a condition of guarantee issuance. This is because for all of the projects evaluated, neither the project's ESIA documents nor the project's ESRS demonstrate (i) each of these projects meet the PS' requirements for GHG emissions quantification, impact analysis, alternatives analysis, and mitigation, and (ii) MIGA required these ESMS implementation gaps to be addressed prior to guarantee approval (see Exhibit 1).

(9) MIGA Has Ongoing and Continuously Violated the Requirement in Paragraph 41 of its E&S Policy to Properly Categorize Projects According the Severity of their Social and Environmental Risks and Impacts from GHG Emissions. The E&S Policy defines Category A projects as projects "with potential significant adverse environmental or social risks and/or impacts that are diverse, irreversible or unprecedented." E&S Policy at ¶ 38. The E&S Policy defines Category B projects as projects "with potential limited adverse environmental or social risks and/or impacts that are few in number, generally site specific, largely reversible and readily addressed through mitigation measures." E&S Policy at ¶ 38. "Where the use of proceeds covered by MIGA's guarantee and the associated environmental and social footprint of the business activity are known at the time of the decision to provide coverage, MIGA will determine the business activity's environmental and social category based on its potential environmental and social risks and/or impacts." E&S Policy at ¶ 41, 39. MIGA is also required to publicly disclose a project's social and environmental categorization prior to MIGA consideration for guarantee approval. AIP at ¶¶ 27(b), 29(b), 30(a), 28.

Based on current trajectories to meet the 1.5°C warming limitation objective needed to avoid the most catastrophic impacts of climate change, it is well accepted that a project that will emit net GHGs to the atmosphere after mitigation will impart an incremental irreversible adverse

environmental and social impact.<sup>54</sup> For 100% of the Category B projects it guaranteed with net GHG emissions after mitigation, MIGA violated its E&S Policy by (i) failing to factor the project's net GHG emissions in the project's risk categorization and disclose these GHG emissions as part of the risk categorization; and (ii) mis-categorizing projects with estimated net GHG emissions after mitigation as Category B projects instead of Category B projects (see Exhibit 1). In addition, MIGA has routinely violated its E&S Policy for almost all Category A projects for failing to identify a project's net GHG emissions as part of its risk categorization. Curing these violations of its E&S Policy to account for and identify GHG emissions in its risk categorization for projects is essential to alert Affected Communities, the general public, and MIGA when attention to a project prior to guarantee approval is needed to ensure a project's GHG emissions are avoid and mitigated to the furthest extent feasible.

#### **MIGA's Additional Access to Information Policy Requirements**

(10) MIGA is routinely not adhering to paragraphs 29(f) and 9 of its Access to Information Policy for its failure to publicly provide GHG Environmental and Social Impact Assessment ("ESIA") documents to the public 30-60 days before consideration by MIGA for guarantee approval that contain GHG emissions and mitigation analysis and figures. Thirty to sixty days prior to MIGA Board approval of a guarantee, MIGA is required to make environmental and social information [as part of the ESRS for each Category A & B project] publicly available as follows: "electronic copies or web links, where available, to any relevant ESIA documents prepared by or on behalf of the client." AIP at ¶¶ 29(f), 28, 30, 33, 34.<sup>55</sup> These relevant ESIA documents necessarily include all documents analyzing GHG emissions, impacts, alternatives, and mitigation, including technical supporting appendices, prepared by or on behalf of the client, including by MIGA. This is because MIGA has acknowledged the significant adverse effects of global warming caused by GHG emissions,<sup>56</sup> and PS 1 requires that each project's environmental and social impact assessment includes this GHG emissions and mitigation analysis. PS 1 at ¶7; *see* Appendix A, Section II (1)-(8), *ante*.

Despite these requirements, from 2020 to the present, MIGA only provided links to ESIA documents on its project database website for 49% (21 of 43) of its Category A and B direct guarantees analyzed (see Exhibit 1). For almost all of its guarantees, MIGA is violating its AIP for not providing the supplemental GHG emissions quantification, alternatives analysis, and mitigation analysis in its possession that informs and support GHG emissions alternatives and mitigation a client commits to and that is not included in a formal ESIA document nor provided in the ESRS. MIGA is thus not routinely not adhering to its AIP for its failure to provide GHG ESIA documents to the public 30-60 days before consideration by MIGA for guarantee approval that contain GHG emissions and mitigation analysis and figures. This runs afoul of AIP paragraph 29(f) and thwarts the AIP's purpose to achieve "the transparency and accountability [that] are fundamental to fulfilling its development mandate." AIP at ¶¶ 2, 29(f), 28, 30, 33, 34. Furthermore, this practice is contrary to paragraph 9 of the AIP because MIGA is routinely not "mak[ing] available information concerning its activities that would enable its clients, partners and

<sup>&</sup>lt;sup>54</sup> See, United Nations Environment Programme (2022), *Emissions Gap Report 2022: The Closing Window — Climate crisis calls for rapid transformation of societies* (https://www.unep.org/emissions-gap-report-2022); See, Interim CEQ GHG NEPA Guidance (fn. 24, *ante*).

<sup>&</sup>lt;sup>55</sup> The AIP also suggests that for projects or investments with potential significant adverse environmental or social risks and/or impacts, disclosure and provision of the ESIA to the public should occur earlier in the environmental and social assessment process, even if the ESIA prepared by the client is in draft form before MIGA has completed, or in some cases even started, the review of its investment. AIP at  $\P$  42.

<sup>&</sup>lt;sup>56</sup> E&S Policy at ¶¶ 10, 11; PS 3 at ¶ 1.

stakeholders (including Affected Communities), and other interested members of the public, to understand better, and to engage in informed discussion about, MIGA's business activities, the development outcomes and other impacts of its activities." AIP at  $\P$  9.

Without disclosure and provision of the ESIA documents with GHG emissions and mitigation analysis, Affected Communities and members of the public will be unable to help ensure, and verify whether, MIGA is meeting its obligations to ensure the PS requirements for GHG emissions analysis and mitigation are met prior to MIGA guarantee approval for a project. MIGA also loses a critical procedural information disclosure step it has adopted "as a means of managing environmental, social, and governance risks." <sup>57</sup> As recognized by MIGA, this opportunity for public review and input before guarantee approval is accepted by MIGA as central to informed decision making. AIP at ¶ 9, E&S Policy at ¶ 14; *see* Section III.(1), *ante*. It is a necessary check to best ensure a project meets the PS' requirements and thus avoids or mitigates a project's GHG emissions as much as economically and technically feasible. *Id*. Thus, MIGA's regular failures to provide ESIA documents with GHG emissions and mitigation analysis to the public prior to guarantee approval also conflicts with and impedes MIGA's "do no harm" development mission<sup>58</sup> and strategic priorities to combat climate change.<sup>59</sup>

To cure MIGA's non-adherence to paragraphs 29(f) and 9 of its AIP as detailed above in this section (9), for each project, in the disclosure stage prior to MIGA guarantee approval and also immediately for guarantees already approved or issued, MIGA should ensure public provision on its project database website of: (a) all GHG emission and mitigation ESIA documents and analysis prepared by or on behalf of the client, including technical appendices detailing calculations for GHG emissions and mitigation amounts; and (b) a checklist generated by MIGA that details all of PS 1's and 3's GHG emissions analysis and mitigation requirements (including those listed in Appendix A of this Request), and whether the client has adhered to these requirements.

(11) MIGA has routinely violated and continues to violate ¶ 29(d) of its AIP for its failure to publicly disclose supplemental actions PS 1 requires to be implemented to mitigate the GHG emissions risks and impacts of projects, including for projects that are expected to emit over 25,000 MT CO2-equivalent over their life cycle or on an annual basis, prior to guarantee approval for a project. For each Category A and B project, prior to guarantee approval, MIGA is required to disclose and make publicly available a summary of its review findings and recommendations in an Environmental and Social Review Summary (ESRS) that must include:

(c) a description of the main environmental and social risks and impacts of the project;

<sup>&</sup>lt;sup>57</sup> Specifically, the E&S Policy provides that the "MIGA seeks to provide accurate and timely information regarding its guarantee support as well as more general institutional information in accordance with its AIP. MIGA also recognizes the importance of disclosure of information, both for itself and its clients, as a means of managing environmental, social, and governance risks." E&S Policy at ¶ 14.

<sup>&</sup>lt;sup>58</sup> The E&S Policy provides that: "Central to MIGA's development mission are its efforts to carry out support to projects and investment activities with the intent to "do no harm" to people and the environment [and] to enhance the sustainability of private sector operations and the markets they work in...MIGA is committed to ensuring that the costs of economic development do not fall disproportionately on those who are poor or vulnerable, that the environment is not degraded in the process, and that renewable natural resources are managed sustainably." E&S Policy at ¶ 9.

<sup>&</sup>lt;sup>59</sup> Specifically, in regards to climate change, the E&S Policy provides that the: "MIGA recognizes that climate change is a serious global challenge and that climate-related impacts may impede economic and social well-being and development efforts. Working with the private sector and other parties to address climate change is therefore a strategic priority for MIGA. Given the importance of the private sector's role in the reduction of greenhouse gas (GHG) emissions, MIGA will support innovative investments services to climate- friendly solutions …MIGA support for low-carbon economic development is one dimension of a balanced approach to development." E&S Policy at ¶¶ 10, 11.

(d) key measures identified to mitigate those risks and impacts, specifying any supplemental actions that will need to be implemented to undertake the project in a manner consistent with the Performance Standards, or where required by MIGA, Environmental and Social Action Plan;

AIP at ¶ 29. In setting a minimum pre-financing disclosure threshold of 25,000 MT CO2equivalent over a project's life cycle, and in requiring projects omitting over 25,000 MT CO2equivalent on an annual basis to report their annual GHG emissions to MIGA, it is clear that for projects expected to exceed either of these thresholds, that the AIP requires disclosure of the key measures identified to mitigate a project's GHG emissions risks and impacts prior to guarantee approval for a project.<sup>60</sup> AIP at ¶ 29(c)-(e); PS 3 at ¶ 8. As detailed in Appendix A, Section II (4) above, adoption of a mitigation to avoid adverse climate change impacts as far as feasible is amongst the most critical objectives attained from compliance with PS 1 and 3's requirements. Thus, MIGA's failure to publicly disclose a project's mitigation in the ESRS or ESIA documents, whether and to the extent it has been achieved, or if it has not been achieved, and failure to specify any supplemental actions needed to achieve PS 3's GHG mitigation requirements, are violations of its AIP. In violation of its AIP, MIGA is systematically failing to disclose the extent of mitigation addressing a project's GHG emissions for 100% of projects evaluated where MIGA disclosed either 25,000 MT CO2-equivalent would be emitted over the project's life cycle or over 25,000 MT CO2-equivalent would be emitted on an annual basis (see Exhibit 1). Likewise, MIGA has and continues to systematically violate its AIP because none of the ESRS' for these projects specified any supplemental actions need to achieve the PS 3's mitigation requirements to mitigate a project's GHG emissions as far as economically and technically feasible. Id.

<sup>&</sup>lt;sup>60</sup> As detailed in this Request, considering the cumulative impacts of incremental GHG emissions on global warming, GHG emissions resulting from a project MIGA is considering for a guarantee clearly qualifies as a main environmental and social risk and impact.

#### Appendix **B**

#### Methodology Used to For Data Analysis and Compilation in Exhibit 1

The data in Exhibit 1, that informs and supports the findings and request for redress in this Request, was obtained from review of the Environmental and Social Review Summaries (ESRS) and Summaries of Proposed Guarantees (SPG) that MIGA publicly discloses on the "Project" page of its website for each project it guarantees or its Board considers for a guarantee.<sup>61</sup> To obtain relevant results, the ESRSs and SPGs were reviewed for 60 MIGA Category A & B, Financial Intermediary (FI), and FI Trade Finance Guarantees <sup>62</sup> disclosed between 2020 – January 2025 that would likely result in GHG emissions (43 of these were direct Category A and B Guarantees). The review excluded solar, wind, projects specifically to reduce/mitigate GHG emissions, and financial intermediary investments.

BCA's analysis acknowledges it is possible that MIGA may not capture or report the requisite GHG emissions and mitigation analysis and figures in these publicly available ESRS and SPG summaries that MIGA had in its possession prior to approving financing for each project. To reasonably ensure that all of the assertions and findings in this Request are sufficiently supported to sound an alarm of MIGA apparent non-compliance with its Sustainability Policies, 21 projects from 2020–2025 (14 Category A and 7 Category B) were reviewed where in addition to the SPG and ESRS, the environmental impact statements / assessments / studies or documents with similar information and analysis (ESIA) for the project were also available for download on in the Project section of MIGA's website. Review of these detailed ESIA documents, most of which contain GHG analysis and mitigation measures for a project with the exception of those projects where it is clear no GHG analysis was conducted, confirm the trends and findings derived from the ESRS and SPG for each project. In addition, these ESIA documents highlight the apparent severe ongoing and continuous frequency and magnitude of MIGA's failures to adhere to its Sustainability Policies, including its Access to Info Policy requiring the critical disclosure of GHG emissions and mitigation prior to guarantee approval that helps ensure projects MIGA guarantees adequately quantify and mitigate GHG emissions.

<sup>&</sup>lt;sup>61</sup> See: https://www.miga.org/projects

<sup>&</sup>lt;sup>62</sup> Category A, B, FI-1, and FI-2 investments are MIGA projects MIGA determines are likely to have significant environmental and social impacts. *See* E&S Policy at ¶ 38.

#### Appendix C

#### Summary of MIGA's Systematic Non-Adherence to its Sustainability Policies

From 2020 to the present, MIGA has and continues to systematically not adhere to its policies governing GHG impact assessment and mitigation for each project prior to MIGA guarantee approval and issuance. As detailed in Appendix A, BCA's review of 43 Category A & B projects, 11 financial intermediary (FI) projects classified as FI-1 or FI-2, and 6 FI trade finance projects MIGA classified as FI-3 that MIGA approved or disclosed for guarantees from 2020 to January 2025, reveals MIGA has and continues to routinely fail to ensure that adequate GHG emissions quantification, impact assessment, and mitigation commitments have been secured and disclosed prior to guarantee approval as required by its Sustainability Policies.<sup>63</sup> In most cases, the requisite assessments or critical components of them are entirely missing, along with the GHG mitigation commitments that MIGA's Sustainability Policies require.

In summary and as further detailed in Section A and Exhibit 1, contrary to MIGA's E&S Policy and or Access to Info Policy, from 2020 to the present at the environmental assessment stage before MIGA approves a guarantee for an investment, *it is apparent MIGA has failed and continues to fail to ensure and secure for approximately:* 

#### **Quantification of GHG Emissions (PS Requirements)**

- 40% (17 of 43) of direct guarantees analyzed, quantification of any GHG emissions as required by PS 1;
- 15% (5 of 26) of direct guarantees analyzed, quantification of exact GHG emissions estimates (when any GHG emissions amounts are actually disclosed) as required by PS 1 and PS 3 (ESIA documents and or ESRS GHG information only indicate project GHG emissions would be greater or less than 25,000 MT CO2 equivalent per year);
  - 12% (2 of 16) of direct guarantees analyzed, quantification of exact GHG emissions estimates when the ESRS indicates GHG emissions would be greater than 25,000 CO2 Equivalent Tons/Year as necessarily required by PS 1;
  - 30% (3 of 10) of direct guarantees analyzed, quantification of exact GHG emissions estimates when the ESRS indicates GHG emissions would be less than 25,000 CO2 Equivalent Tons/Year as necessarily required by PS 1;
- 14% (3 of 22) of direct guarantees analyzed, quantification of any GHG Emissions for the Project Expansion or Addition Guaranteed as required by PS 1;
- 93% (40 of 43) of direct guarantees analyzed, quantification of GHG emissions that include all of a project's clearly recognized sources of GHG emissions as required by PS 1;

 $<sup>^{63}</sup>$  MIGA did not rely on the environmental or social due diligence of another Development Finance Institution, and did not rely on nor use IFC, IBRD, or WBG's environmental standards, environmental and social due diligence and/or monitoring for any of the projects analyzed as provided in MIGA E&S Policy ¶ 6.

- 89% (8 of 9) of direct guarantees analyzed for which an increase in GHGs in the atmosphere from the loss of carbon sequestration due to the Project is foreseeable prior to the adoption of mitigation, quantification of GHG emissions as required by PS 1;
- 82% (28 of 34) of direct guarantees analyzed for which construction is a part of the project, quantification of GHG Emissions figures for the construction activities;
- 91% (39 of 43) of direct guarantees analyzed, quantification of Scope 3 GHG emissions as required by PS 1;
- 91-97% of direct guarantees analyzed, quantification of Scope 3 GHG emissions from unplanned but predictable developments caused by the project that may occur later or at a different location and or caused by associated facilities;
  - 91% (32 of 35) of direct guarantees analyzed where GHG emissions from increases in transportation related emissions due to projects are foreseeable (e.g. significant new community or workforce commutes, not counting company vehicle use or use of 3rd party contracted vehicles, caused by the project is foreseeable), quantification or analysis of these GHG emissions;
  - 97% (32 of 33) of direct guarantees analyzed where local population growth related Scope 3 GHG emissions due to project are foreseeable (e.g. if deforestation from influx of people due to project is foreseeable), quantification or analysis of these GHG emissions;
- 37% (16 of 43) of direct guarantees analyzed where the projects are defined prior to financing, quantification of GHG emissions was deferred to a later time after project financing;

#### <u>Quantification & Disclosure of GHG Emissions (AIP paragraph 29(e) Requirements,</u> and PS 1 paragraph 7 GIIP Requirement for Environmental and Social Impacts to disclose <u>GHG emission estimates for public review prior to decision making)</u>

- 40% (17 of 43) of direct guarantees analyzed, despite the clear foreseeability that the vast majority of these projects will emit greater than 25,000 MT CO2 equivalent Scope 1, 2, and 3 GHG emissions over their lifecycle, quantification and disclosure of any GHG emissions as required by AIP paragraph 29(e);
- 91% (39 of 43) of direct guarantees analyzed, despite the clear foreseeability that the vast majority of these projects will emit greater than 25,000 MT CO2 equivalent Scope 1, 2, and 3 GHG emissions over their lifecycle, MIGA is failing to disclose Scope 3 emissions as required by AIP paragraph 29(e);
- 93% (40 of 43) of direct guarantees analyzed, despite the clear foreseeability that the vast majority of these projects will emit greater than 25,000 MT CO2 equivalent over their lifecycle, MIGA failed to disclose all of these project's expected GHG emissions, including significant Scope 1 emissions, as required by AIP paragraph 29(e);
- 15% (5 of 26) of direct guarantees analyzed when clearly foreseeability that the project will emit greater than 25,000 MT CO2 equivalent Scope 1, 2, and 3 GHG emissions

over its lifecycle, quantification and disclosure of exact GHG emissions estimates as required by AIP paragraph 29(e), as ESIA documents and or ESRS GHG information only indicate project GHG emissions would be greater or less than 25,000 MT CO2 equivalent per year);

#### Alternatives Analysis

- 69% (25 of 36) of direct guarantees analyzed when GHG emissions alternatives analysis was required, a GHG emissions alternatives analysis required by PS 1;
- 100% (12 of 12) of GHG emissions alternatives analysis conducted for direct guarantees analyzed, consistency with good international industry practice as PS 1 requires;

#### **Cumulative Impacts Analysis**

- 88% (38 of 43) of direct guarantees analyzed, a cumulative impacts analysis was conducted as required by PS 1;
- 67% (29 of 43) of direct guarantees analyzed, that Paris Agreement, Kyoto Protocol, UNFCCC, 1.5°C warming objectives, National Determined Contributions (NDCs) or other applicable regional, national and global GHG emission plans were taken into account as required by PS 1;

#### **Mitigation Analysis and Measures**

- 93% (40 of 43) of direct guarantees analyzed, quantification of the project's Scope 1, 2, and 3 GHG emissions, as required by PS 1 and PS 3, so that PS 3's mitigation measures can be tailored to fit an investment's estimated GHG emissions. For 91% (40 of 43) guarantees, MIGA failed to quantify Scope 3 emissions, and for 40% (17 of 43) guarantees, MIGA did not quantify any GHG emissions at all;
- MIGA failed to secure the following analysis needed to secure mitigation that meets PS 3's requirements to implement (a) the technically and financially feasible options to reduce a project's GHG emissions, in addition to (b) cost effective options to reduce a project's GHG emissions:
  - 100% (0 of 43) of direct guarantees analyzed, GHG emissions mitigation analysis for the project that analyzed the economic and technical feasibility of mitigation measures that could reduce GHG emissions as far as possible as PS 1 and 3 requires;
  - 19% (8 of 43) of direct guarantees analyzed in Exhibit 1, any GHG mitigation analysis was conducted as required by PS 1 and 3;
- 100% (43 of 43) of direct guarantees analyzed in Exhibit 1, implementation of the technically and financially feasible options to reduce project-related GHG emissions during the design and operation of the project as required by PS 3;
- 19% (8 of 43) of direct guarantees analyzed, any GHG mitigation measures as required by PS 3;

- 50% (17 of 34) of direct guarantees analyzed where construction occurred, any mitigation for GHG emissions from construction activities was adopted prior to approving guarantees as required by PS 3;
- 65% (28 of 43) of direct guarantees analyzed, use of GHG emissions reduction or efficiency benchmarks or specify that no such benchmarks are available as required by PS 3;
- 2% (1 of 43) of direct guarantees analyzed where projects are defined prior to guarantee approval, no impermissibly deferred analysis and selection of GHG mitigation measures to a later time with no commitment to select particular measures or achieve a particular amount of GHG reductions as required by PS 3;

#### **Affected Communities Analysis**

- 100% (43 of 43) of direct guarantees analyzed, analysis of a Project's GHG emissions' contribution to global warming impacts on biodiversity or on ecosystem services upon which Affected Communities' livelihoods are dependent as required by PS 1;
- 100% (43 of 43) of direct guarantees analyzed, adoption of adequate mitigation for project's GHG emissions' contribution to global warming impacts on biodiversity or on ecosystem services upon which Affected Communities' livelihoods are dependent as required by PS 1;
- 100% (43 of 43) of direct guarantees analyzed, analysis was conducted as to whether individuals or groups may be directly and differentially or disproportionately affected by the Project's GHG emissions' contribution to global warming because of their disadvantaged or vulnerable status as required by PS 1;
- 100% (43 of 43) of direct guarantees analyzed, identification of risks and potential impacts of the Project on priority ecosystem services (outside of those services on which the project is directly dependent for its operations) that may be exacerbated by climate change as required by PS 1 and 4;

#### Financial Intermediary (FI-1 and F-2) Violations

- 100% (11 of 11) of FI-1 and FI-2 FI guarantees analyzed, consistency of the FI's E&S policies and procedures with at least PS 3's GHG emissions requirements as the E&S Policy requires. (MIGA did not assess the FIs' policies and procedures for consistency with PS 3's requirements at all).
- 27% (3 of 11) of FI-1 and FI-2 FI guarantees analyzed, the FI meet the requirements of PS 1 or PS 3 for each of the FI's investments as the E&S Policy requires. For the 8 of 11 projects where MIGA requires the FI-1 or FI-2 to meet the PS requirements for each of the FI's investments, the information on the SPG and ESRS project website page does not indicate whether MIGA required the FI to meet PS 1 and PS 3's GHG emissions quantification, analysis, and mitigation requirements set forth in the CAO Opinion.

100% (11 of 11) of FI-1 and FI-2 financial intermediary (FI) guarantees analyzed, FI implementation of the technically and financially feasible options to reduce project-related GHG emissions during the design and operation of each FI investment as provided in PS 3 as the E&S Policy requires;

#### **Financial Intermediary Trade Finance Violations**

- 100% (6 of 6 of FI trade finance guarantees analyzed, the FI adhere to the PS 1 and 3 GHG emissions requirements as the E&S Policy requires (MIGA only required adherence to PS 2's labor requirements). MIGA further failed to indicate it checked the FI's ESMS for consistency with PS 1 and PS 3's requirements, including as applied to GHGs. None of these 7 FI trade finance guarantees exclude fossil fuel trade financing, all may allow for trade finance investments that result in or enable significant GHG emissions, and one purportedly is intended for fossil fuel trade financing (see project for trade financing in Ukraine);
- 100% (6 of 6) of FI trade finance guarantees analyzed, failure to ensure the proper risk classification that accounts for GHG emissions and climate change impacts as the E&S Policy requires. MIGA classified these FI transactions as FI-3 (low risk), perhaps contributing to it failures to require these FI clients to ensure its GHG intensive investments adhere to PS 1 and PS 3's requirements applicable to GHGs. See E&S Policy at paragraph 33.

#### Additional E&S Policy and Access to Info Policy Violations

In addition, and as further detailed in Section III and Exhibit 1, contrary to MIGA's E&S Policy and or Access to Info Policy, from 2020 to the present at the environmental assessment stage before MIGA approves financing for a project, *for approximately and as demonstrated by:* 

- 100% (43 of 43) of direct guarantees analyzed, it is apparent MIGA has violated and continues to violate the requirement in ¶ 26 of its E&S Policy to ensure that a project's non-compliance with the PS' GHG emissions analysis and mitigation requirements are addressed in an Environmental and Social Management System (via an amendment, Action Plan, or other action) prior to financing;
- 100% (60 of 60) of direct and FI guarantees analyzed, it is apparent MIGA has violated and continues to violate the requirement in ¶ 41 of its E&S Policy to assign a proper risk categorization commensurate with the severity of a project's GHG emissions risks and impacts, as it appears not to have factored GHG emissions into its risk categorizations;
- 51% (22 of 43) of direct guarantees analyzed, MIGA has violated and continues to violate ¶¶ 29(f) and 9 of its AIP for its failure to publicly provide GHG ESIA documents or ESRS information with GHG emissions and mitigation analysis and figures for projects;
- 100% (43 of 43) of direct guarantees analyzed, MIGA violated ¶ 29(d) of its AIP because it failed to disclose the extent of mitigation addressing a project's GHG emissions where MIGA disclosed either 25,000 MT CO2-equivalent would be emitted over the project's life cycle or over 25,000 MT CO2-equivalent would be emitted on an annual basis;

- 100% (43 of 43) of direct guarantees analyzed, MIGA has violated ¶ 29(d) of its AIP because none of the ESIA documents or ESRS' for these projects specified any supplemental actions need to achieve PS 3's mitigation requirements to mitigate a project's GHG emissions as far as economically and technically feasible;
- Further, MIGA is not complying with ¶ 24 of its AIP or ¶ 11 of its E&S Policy, as it is not quantifying and reporting, or collecting the requisite information to quantify and report on, the carbon footprint of its portfolio almost 12 years after adoption of its Sustainability Policies.

## <u>Appendix D:</u> Summary of Current and Expected Climate Change Harms, Prevention of Which is Required by MIGA's Mandate.

In addition to legal obligations, other compelling reasons exist for MIGA and its shareholders to ensure MIGA adheres to its Sustainability Policy requirements applicable to climate change. Global warming has already resulted in more frequent and severe heat waves, wildfires, supercharged storms, atmospheric rivers, and extended droughts resulting in catastrophic harms and loss of life. Weather events in 2022 broke records and devastated communities, ecosystems, and infrastructure. Deadly floods displaced millions in Pakistan, Nigeria, South Africa, and Australia; severe heat waves struck India, China, Europe, the U.S., and East Asia; and the Horn of Africa experienced its worst drought in 40 years.<sup>64</sup> And as documented by the Intergovernmental Panel on Climate Change (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 foodborne 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

<sup>&</sup>lt;sup>64</sup> Banking on Climate Chaos, Fossil Fuel Finance Report 2023 (https://www.bankingonclimatechaos.org/).

impacts to well-being. Observed adverse impacts are concentrated amongst economically and socially marginalised urban residents. (high confidence).

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/).

#### <u>Preventing causing and or contributing to these climate change harms from the</u> <u>investments it guarantees is consistent with MIGA's mandate and outwardly expressed</u> <u>intentions:</u>

- The mandate of the World Bank Group, including MIGA, is to achieve sustainable development, end extreme poverty, and boost shared prosperity on a livable planet,<sup>65</sup> and MIGA recognizes climate change impacts are inexorably linked to its success in fulfilling these mandates. For instance, MIGA acknowledges climate change is deepening poverty and President Banga himself has called climate change an "existential" crisis.<sup>66</sup> If MIGA continues to not adhere to what its board adopted policies applicable to climate change require, it will keep working against its own mandate. These alarming practices and lack of accountability continue to result in substantial and avoidable GHG emissions that contribute to an unlivable planet and harms to communities in its investment regions.
- The World Bank Group itself recognizes the centrality and urgency of the climate crisis, updating its mission in 2024 to seek to "eradicate poverty *on a livable planet.*"<sup>67</sup> As President Banga himself said "the truth is: We cannot endure another period of emission heavy growth."<sup>68</sup> President Banga is right: On the world's current trajectory of GHG emissions, the

<sup>&</sup>lt;sup>65</sup> See Performance Standards at pp 1, page (i); see World Bank's new mission within "Ending Poverty on a Livable Planet: Report to Governors on World Bank Evolution," September 28, 2023, World Bank Development Committee, Document Number DC2023-004; Consistent with the World Bank Group's mandate is MIGA's mission to achieve sustainable development, end extreme poverty, and boost shared prosperity on a livable planet. Available at: https://www.miga.org/history.

<sup>&</sup>lt;sup>66</sup> Remarks by World Bank Group President Ajay Banga at the 2023 Annual Meetings Plenary, October 13, 2023 (available at: https://www.worldbank.org/en/news/speech/2023/10/13/remarks-by-world-bank-group-president-ajay-banga-at-the-2023-annual-meetings-plenary); See *also*, E&S Policy at ¶10 and World Bank Group Climate Change Action Plan 2021-2025, World Bank Group 2021 at ii, 2; See *also*: When poverty meets climate change: A critical challenge that demands cross-cutting solutions, World Bank Blogs, Akihiko Nishio, Nov. 5, 2021.

<sup>&</sup>lt;sup>67</sup> See fn. 65, *ante*.

<sup>68</sup> See fn. 66, ante.

global temperature will increase by up to 2.7°C by 2100.<sup>69</sup> This is more than the previously envisaged 1.5°C, which has been considered a critical threshold for limiting the most severe effects of climate change.<sup>70</sup> According to the IPCC, this temperature rise will have devastating effects not only on ecosystems but also on human health and wellbeing, water, agriculture, cities, settlements, and infrastructure.<sup>71</sup> People living in the Global South, and economically, politically, and socially marginalized people living in poverty, and who deal with the lasting effects of racial injustice and inequality, are likely to be hit hardest.

For example, global warming has already resulted in more frequent and severe heat waves, wildfires, supercharged storms, atmospheric rivers, and extended droughts resulting in catastrophic harms and loss of life. Weather events in 2022 broke records and devastated communities, ecosystems, and infrastructure. Deadly floods displaced millions in Pakistan, Nigeria, South Africa, and Australia; severe heat waves struck India, China, Europe, the U.S., and East Asia; and the Horn of Africa experienced its worst drought in 40 years.<sup>72</sup> See Appendix D, *ante*, summarizing IPCC's analysis as to the impacts to the approximately 3.3–3.6 billion people who live in contexts that are highly vulnerable to climate change.

- Not only does the World Bank recognize the urgency of the climate crises, but it seeks to be at the forefront of a new model of development finance that protects the climate and works with countries to reduce emissions.<sup>73</sup> President Banga himself recognizes that the Bank "must change to make good on that promise and deliver on what is being demanded."<sup>74</sup> From our engagement with MIGA Management, what we have seen however, is that Management has not yet course corrected to meet this moment. It is not even complying with existing climate change and GHG emissions accounting and reduction requirements in MIGA's Sustainability Policies. Without change, MIGA will not achieve its mission of poverty reduction on a livable planet.
- Further, President Banga has specifically highlighted the importance MIGA places on its quantification and mitigation of GHG emissions resulting from its financing activities, both of which this request documents that MIGA is failing to perform in accordance with its Sustainability Policies. At the European Union member states' biannual meeting of top development officials in November 2023, President Banga said the World Bank is planning announcements on joint efforts with other MDBs to measure their climate

<sup>&</sup>lt;sup>69</sup> World Bank. 2023. Creating an Enabling Environment for Private Sector Climate Action: An Evaluation of World Bank Group Support, Fiscal Years 2013–22. Independent Evaluation Group. Washington, DC: World Bank at 1.

<sup>&</sup>lt;sup>70</sup> IPCC (Intergovernmental Panel on Climate Change). 2018. Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty, Cambridge: Cambridge University Press; UN (United Nations). 2021. "Nationally Determined Contributions under the Paris Agreement." Synthesis Report by the Secretariat, Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement, Third Session, Glasgow, October 31–November 12; UNEP (United Nations Environment Programme). 2021. Emissions Gap Report 2021: The Heat Is On—A World of Climate Promises Not Yet Delivered. Nairobi: UNEP.

<sup>&</sup>lt;sup>71</sup> IPCC. 2022. "Summary for Policymakers." In *Climate Change 2022: Impacts, Adaptation and Vulnerability.* Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge: Cambridge University Press.

 <sup>&</sup>lt;sup>72</sup> Banking on Climate Chaos, Fossil Fuel Finance Report 2023 (https://www.bankingonclimatechaos.org/).
 <sup>73</sup> COP28 Multilateral Development Banks (MDB) Joint Statement (available at

https://www.ifc.org/en/statements/2023/cop28-mdb-joint-statement).

<sup>&</sup>lt;sup>74</sup> See fn. 66. *ante*.

impact, including an outcome-based approach to mitigation.<sup>75</sup> At COP28, the World Bank indeed confirmed its commitment "to tracking and reporting climate outcomes" and agreed as part of "an increased focus on measuring results and outcomes … to develop a common approach [with other MDBs] for reporting climate results and impact."<sup>76</sup>

 <sup>&</sup>lt;sup>75</sup> Devex Invested: What to expect at COP 28. An inside look at the 28th U.N. Climate Change Conference, World Bank planned announcements at COP 28, plus the criteria for companies shaping EU aid, Vince Chadwick, 28 Nov. 2023 (https://www.devex.com/news/devex-invested-what-to-expect-at-cop-28-106653).
 <sup>76</sup> See fn. 73, *ante*.

#### Appendix E: MIGA's and its Member States' Climate Change Due Diligence and Harm <u>Prevention Obligations Under International Law</u>

#### I. MIGA's Member States' General Obligations Under International Law

International law has long provided that if a state breaches an obligation established by a treaty or customary international law it can be held responsible in international tribunals or applicable domestic courts.<sup>77</sup> Courts have found that "when member States participate in [an] international organization's decision-making processes, they are [] carrying out state acts that have to comport with their international obligations."<sup>78</sup> The International Court of Justice made this finding in FYROM v. Greece.<sup>79</sup> In a dictum in Southern Bluefin Tuna, the International Tribunal for the Law of the Sea also found it could examine state conduct within an international organization to determine compliance with its legal obligations.<sup>80</sup> "[These courts and] the European Court of Human Rights indicate that when states make decisions within an international organization, they must adhere to their human rights obligations and substantive obligations related to the organization's area of competence."<sup>81</sup> Scholars in the field have come to similar conclusions. Barros persuasively applies those cases to the governing boards of international financial institutions, arguing that member states have due diligence obligations to take all measures to ensure that they know about risks to human rights before approving loans, mitigate those risks when making decisions, and ensure that loans already issued conform to their human rights conditions."82 Kerr and Barros also point out that the Articles on State Responsibility—which were applied by the International Court of Justice in FYROM v. Greece— indicate that the conduct of state representatives when decision-making at international organizations can be attributed to a state and independently assessed.<sup>83</sup>

#### II. MIGA's General Obligations Under International Law

<sup>&</sup>lt;sup>77</sup> Kerr, B. P. (2020), Regulating the Environmental Integrity of Carbon Offsets for Aviation: the International Civil Aviation Organization's Additionality Rule as International Law. *Carbon and Climate Law Review*, *14*(4) (hereinafter "Kerr, ICAO") at 3; Kerr, Legal Accountability Int. Carbon Markets, at 152, 157-159 (Section 3.2); For examples, see fns. 52-57, 63, 90-105 *post*.

<sup>&</sup>lt;sup>78</sup> Baine P. Kerr, All Necessary Measures: Climate Law for International Shipping, Virginia Journal of International Law, 64 Va. J. Int'l L. 523 (2024) at 523-570 (available at: <u>https://www.vjil.org/all-necessary-measures-climate-law-for-international-shipping</u>) (hereinafter "Kerr, All Necessary Measures") at 558-559, and fn. 257; Ana Sofia Barros & Cedric Ryngaert, The Position of Member States in (Autonomous) Institutional Decision-Making, 11 INT'L ORG. L. REV. 53 (2014) (hereinafter "Barros & Ryngaert") at 53, 55.

<sup>&</sup>lt;sup>79</sup> Kerr, All Necessary Measures at 558, and fn. 258; Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece), Judgment, 2011 I.C.J. Rep. 644 (Dec. 5) [hereinafter FYROM].

<sup>&</sup>lt;sup>80</sup> Kerr, All Necessary Measures at 558-559, and fn. 264; Southern Bluefin Tuna (N.Z. v. Japan; Austl. v. Japan), Cases Nos. 3 and 4, Order of Aug. 27, 1999, ITLOS Reports 1999 [hereinafter Southern Bluefin Tuna], ¶ 50; See, Moritaka Hayashi, The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the International Tribunal for the Law of the Sea, 13 TULANE ENV. L. J. 361 (2000).

<sup>&</sup>lt;sup>81</sup> Kerr, All Necessary Measures at 529-530, 559-560, and fn. 32; FYROM, Southern Bluefin Tuna at ¶ 50, Gasparini v. Italy and Belgium, App. No. 10750/03, (May 19, 2009), https://hudoc.echr.coe.int/eng?i=001-92899; Perez v. Germany, App. No. 15521/08 (Jan. 6, 2015), https://hudoc.echr.coe.int/eng?i=001-151049; Klausecker v. Germany, App. No. 415/07 (Jan. 6, 2015), https://hudoc.echr.coe.int/eng?i=001-151029).

<sup>&</sup>lt;sup>82</sup> Kerr, All Necessary Measures at 560-561, and fn. 279; Ana Sofia Barros, Governance as Responsibility: Member States as Human Rights Protectors in International Financial Institutions (2019) (hereinafter "Barros") at Chapter III; *see also* Pasquale De Sena, International Monetary Fund, World Bank and Respect for Human Rights: A Critical Point of View, 20(1) ITALIAN Y.B. INT'L. L. 247, 257 (2010).

<sup>&</sup>lt;sup>83</sup> Kerr, All Necessary Measures at 560-561, and fn. 282; Barros at 94.

International organizations,<sup>84</sup> including MIGA, can also be held responsible for breaching their obligations, including those established by a treaty or customary international law.<sup>85</sup> This has happened numerous times, in various domestic courts.<sup>86</sup> The ILC DARIO Articles<sup>87</sup> provide a structural roadmap for evaluating an organization's obligation established by a treaty or customary international law. International Law Commission, 'Draft Articles on the Responsibility of International Organizations with commentaries,' Yearbook of the International Law Commission (2011), vol. II, Part Two, UN Doc. A/66/10 (hereinafter "ILC DARIO Articles").<sup>88</sup> ILC DARIO Article 10 provides that there 'is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.<sup>89</sup> In addition, "the ICJ found long ago that international organizations are bound by 'obligations incumbent upon them under general rules of international law." 90 And even in the absence of an express textual indication that an international organization is bound by a treaty's obligations, an international organization is transitively bound to the same treaty obligations as their members, in a way that avoids or resolves treaty conflicts between organizations and their member states.<sup>91</sup> Thus, for example, MIGA 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.

### **III.** MIGA's and its Shareholders' Due Diligence Obligations Under the Paris Agreement, and human rights and customary international law.

#### A. Summary / Overview

<sup>84</sup> An 'international organization' is 'an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.' Baine P. Kerr, 'Clear skies or turbulence ahead? The international civil aviation organization's obligation to mitigate climate change' (2020) 16(1) Utrecht Law Review (hereinafter "Kerr, Clear Skies") at 104, fn. 25 (citing Chicago Convention, note 11, Art. 64).

<sup>&</sup>lt;sup>85</sup> Kerr, ICAO at 3, and fn. 23 (citing Jan Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act,' (2017) 28(4) European Journal of International Law, 1137).
<sup>86</sup> Kerr, B. (2022). Mitigating the Risk of Failure: Legal Accountability for International Carbon Markets. Utrecht Law Review, 18(2), 145-161 (hereinafter "Kerr, Legal Accountability Int. Carbon Markets") at 152, fn. 57 and 58 (citing August Reinisch, *International Organizations Before National Courts* (2nd edn, Cambridge 2009) 28, notes 124-130 (listing and discussing cases), and fn. 61 (citing *Jam v International Finance Corp*, 586 US (2019) 5-6; Clemens Treichl and August Reinisch, 'Domestic Jurisdiction over International Financial Institutions for Injuries to Project-Affected Individuals: The Case of Jam v International Finance Corporation' (2019) 16 International Organizations Law Review 133).

<sup>&</sup>lt;sup>87</sup> International Law Commission, 'Draft Articles on the Responsibility of International Organizations with commentaries,' Yearbook of the International Law Commission (2011), vol. II, Part Two, UN Doc. A/66/10 (hereinafter "ILC DARIO Articles").

<sup>&</sup>lt;sup>88</sup> Kerr, ICAO at 3.

<sup>&</sup>lt;sup>89</sup> Kerr, ICAO at 4; ILC DARIO Articles, Art. 10.

<sup>&</sup>lt;sup>90</sup> Kerr, Clear Skies at 112, and fn. 134 (citing *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, I.C.J. Reports 1980, p. 73, para. 37. *Reparation for Injuries*, note 50, 174).

<sup>&</sup>lt;sup>91</sup>Kerr, Clear Skies at 112, and fn. 138 (citing K. Daugirdas, 'How and Why International Law Binds International Organizations,' (2016) 57 Harvard International Law Journal, 137, 350, 364; citing F. Megret & F. Hoffman, 'The UN as a Human Rights Violator-some Reflections on the United Nations Changing Human Rights Responsibilities,' (2003) 25 Human Rights Quarterly, 318 (arguing that United Nations should be transitively bound by their member states' treaty obligations), <https://www.jstor.org/stable/20069667>; O. De Shutter, 'Human Rights and the Rise of International Organizations: The Logic of Sliding Scales in the Law of International Responsibility,' (2009) (CRIDHO Working Papers Faculte de Droit de L'Universite Catholique de Louvain), 10 (discussing functional succession theory), <a href="https://ssrn.com/abstract=2446913">https://ssrn.com/abstract=2446913</a>); see *also*, Kerr, Clear Skies at 113, and fn. 145 (citing Daugirdas, note 137, 368; Megret, note 138, 318).

MIGA, 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 Sections I, II, *ante*.

As it pertains to climate change, the obligations under international law that MIGA and its member states must adhere, include their due diligence<sup>92</sup> and harm prevention obligations arising under the Paris Agreement, Law of the Sea, human rights treaties, and customary international law. Because the projects with GHG emissions MIGA enables by providing guarantees pose a severe risk of climate harm, these due diligence obligations require MIGA and its member states to ensure that MIGA's change impacts, and measures to avoid them, to be assessed and implemented prior to guarantee approvals using best reasonably available and practiced methods.<sup>93</sup> Those methods include the processes required and practices performed under the National Environmental Policy Act (NEPA) in the United States applicable to quantifying GHG emissions, assessing their impacts, and analyzing alternatives and feasible avoidance and other mitigation measures because these methods are frequently and routinely practiced and implemented.<sup>94</sup> They also prohibit investments in, or financing or guarantees of, projects that would cause or contribute to the 1.5°C global warming limitation objective in the Paris Agreement to be exceed.

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 MIGA, which as an independent public institution, has its own unique due diligence obligations separate from its member states. MIGA and its Global North Member States thus have the duty, capabilities, and control - independent of MIGA'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. MIGA can address these harms through ensuring adequate due diligence prior to guarantee approval, which respects client capacity and principles of "common but differentiated 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 MIGA's due diligence obligations under the Paris Agreement, Law of the Sea human rights treaties, and customary international law with supporting citations is provided below in Sections B-C.

## **B.** MIGA's and its Member States' Climate Change Due Diligence and Harm Prevention Obligations under the Paris Agreement

<sup>&</sup>lt;sup>92</sup> Due diligence is defined as the care that a reasonable person exercises to avoid harm to other persons or their property. See Merriam Webster Dictionary definition of due diligence, available at: <u>https://www.merriam-webster.com/dictionary/due%20diligence</u>.

<sup>&</sup>lt;sup>93</sup> As detailed in Appendix E, Section III. B-C, *post*, MIGA's due diligence obligations extend beyond adequate study prior to project approvals to prevent its guarantees from causing or contributing to climate change harms. They also include MIGA taking substantive measures, such ceasing all direct and indirect guarantees for fossil fuels projects that the IPCC and IEA have shown will cause the 1.5°C warming limitation objective to be exceeded. See fn. 13, *ante*.

<sup>&</sup>lt;sup>94</sup> See fn. 24, *ante*: Interim (CEQ) NEPA guidance effective January 8, 2023 for GHG emissions and climate change assessments, alternatives analysis and mitigation in environmental impact statements.

#### i. MIGA's and its Member States' Due Diligence Obligations under the Paris Agreement

As detailed in Appendix E Sections I. and II., MIGA and its Members States party to the Paris Agreement, are obliged under international law to adhere to the Paris Agreement's requirements. See Section I-II., *ante*.

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

The temperature goals set out in the Paris Agreement, including as applied to finance flows, are universally binding norms for the behavior of international organizations and their member states.<sup>95</sup> They do not permit members state parties to follow different, less ambitious goals.<sup>96</sup> "Finance flows which are inconsistent with Article 2(1)(c) are by definition those which undermine the goals of the Paris Agreement," including the warming limitation objectives in Article 2(1)(a).<sup>97</sup> Thus, the language of Article 2 reflecting the object and purpose of the Paris Agreement supports, requires that all relevant finance flows are assessed for Article 2(1)(a) and (c) consistency, including those most likely to be inconsistent with Article 2's temperature goals.<sup>98</sup> As applied to MIGA, the consistency of finance flows (guarantees)<sup>99</sup> with the Article 2 pathways can only be assessed effectively if, prior to MIGA's guarantee approval, a project's scope 1, 2 and 3 emissions and their impacts are fully quantified and taken into account, GHG/climate change alternatives analysis is conducted, and mitigation measures are assessed and implemented that can avoid and minimize a project's GHG emissions to the furthest extent economically and technically feasible.<sup>100</sup>

<sup>&</sup>lt;sup>95</sup> International Obligations Governing the Activities of Export Credit Agencies in Connection with the Continued Financing of Fossil Fuel-Related Projects and Activities, Legal Opinion, Kate Cook and Jorge E. Viñuales, March 24, 2021, available at: https://priceofoil.org/2021/05/04/eca-legal-opinion/ ("Cook and Viñuales") at ¶¶ 60, 70-72, 85, 265(h); See, e.g. World Bank Group, The World Bank Group's Approach to Paris Alignment, Washington, D.C., March 16, 2023 (http://documents. worldbank.org/curated /en/099658203162320142/IDU1598309ef195cc148fd195421981d12bf8bf6; 2018 MDBs' Joint Declaration, The MDBs' alignment approach to the objectives of the Paris Agreement: working together to catalyse low-emissions and climate-resilient development at 1 (https://thedocs. worldbank.org/en/doc/78414 15438063 48331-0020022018/original/JointDeclarationMDBsAlignment ApproachtoParisAgreementCOP24Final.pdf).

<sup>&</sup>lt;sup>96</sup> Cook and Viñuales at ¶60

<sup>&</sup>lt;sup>97</sup> Cook and Viñuales at ¶70

<sup>98</sup> Cook and Viñuales at ¶72

<sup>&</sup>lt;sup>99</sup> Guarantees qualify as finance flows – they are a blended finance tool and involve an outflow of funds of an amount due on a loan, equity, or other instrument in the event of non-payment by the obligor. See Garbacz W., D. Vilalta and L. Moller (2021), "The role of guarantees in blended finance", OECD Development Co-operation Working Papers, No 97 OECD Publishing, Paris.

<sup>&</sup>lt;sup>100</sup> Id.; See also, Cook and Viñuales at ¶108

Article 3 further requires specific assessment of all relevant finance flows. It requires Parties "to *undertake and communicate ambitious efforts*," including in regards to finance, with a view to achieving the Article 2 purposes.<sup>101</sup> Article 4 (1) provides "[i]n order to achieve the long-term temperature goal set out in Article 2, Parties aim ... to undertake rapid reductions [in GHG emissions] thereafter in accordance with *best available science*."

State parties are required to implement the Paris Agreement in good faith, <sup>102</sup> which means that action which directly threatens, undermines, or frustrates the achievement of the Article 2 goals namely the prevention of dangerous climate change - exceeds the margin of discretion allowed by the Paris Agreement.<sup>103</sup> It follows from Article 2 of the Paris Agreement, as read with Articles 3, 4 and 9 in particular that (1) States, as an aspect of their requisite good faith implementation, have an obligation of due diligence that encompasses undertaking *ambitious efforts* in regards to financial flows to meet the Paris Agreement's objectives.<sup>104</sup> Furthermore, these efforts must be informed by best available science to assess whether finance flows, including those for which MIGA is responsible, are consistent with the global carbon budget.<sup>105</sup> This not only means MIGA must ensure best reasonably available commonly practiced science, such as the methods used under NEPA, are used - prior to guarantee 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 guarantee approval, MIGA 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 MIGA's Paris Methodology should prohibit guarantees for fossil fuel energy infrastructure anyway for the reasons in the text of this letter and this Appendix E Section III - in the context of contemplating guaranteeing fossil fuel energy projects, such as a natural gas plant that 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 MIGA abandon a guarantee for the contemplated fossil fuel project and facilitate a guarantee to enable 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

<sup>&</sup>lt;sup>101</sup> Cook and Viñuales at  $\P$  75.

<sup>&</sup>lt;sup>102</sup> Cook and Viñuales at ¶ 79 (providing there is a "general duty to implement the Paris Agreement in good faith, as reflected in Article 26 of the Vienna Convention on the Law of Treaties (VCLT) 135 and under customary international law").

<sup>&</sup>lt;sup>103</sup> Cook and Viñuales at  $\P$  80.

<sup>&</sup>lt;sup>104</sup> Paris Agreement, Article 3; Cook and Viñuales at ¶¶ 75, 76, 103-105.

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

reflect its *highest possible ambition*, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances." "The standards of "highest possible ambition" and "progression" (Articles 3, 4(1) and (3) of the Paris Agreement), as these relate to the current production gap and global carbon budget, should [] inform due diligence." <sup>106</sup> This further supports that prior to MIGA approving a guarantee for a project, MIGA must ensure a project's scope 1, 2 and 3 emissions and their impacts must be taken into account, a robust and supported GHG/climate change alternatives analysis is conducted in line with best reasonably available methods, and alternatives and mitigation measures are assessed and committed to that can avoid and minimize a project's GHG emissions to the furthest extent economically and technically feasible.

Article 9(5) requires that developed country Parties are to biennially communicate indicative quantitative and qualitative information related to Article 9, paragraphs 1 and 3, of the Paris Agreement.<sup>107</sup> "Article 9(5) therefore entails not only a duty to report on the provision of support[,] but also to account for finance flows which run counter to the goal set out in Article 2(1)(c)." <sup>108</sup> It follows Article 9 also requires quantification and reporting of a project's scope 1, 2 and 3 emissions, and assessing and reporting on the studied and actually implemented alternatives mitigation measures that could avoid and minimize a project's GHG emissions to the furthest extent economically and technically feasible.

Article 13 establishes a transparency framework, one purpose of which is to: "provide a clear understanding of climate change action in the light of the objective of the Convention as set out in its Article 2, including clarity and tracking of progress towards achieving Parties' individual nationally determined contributions under Article 4." <sup>109</sup> "A good faith interpretation of this obligation entails transparency in relation to finance flows which are <u>inconsistent</u> with the Article 2(1)(c) pathway and Article 2 goals as well as finance flows which are <u>consistent</u> with it." <sup>110</sup> It follows Article 13 also requires quantification and reporting of a project's scope 1, 2 and 3 emissions, and assessing and reporting on the studied and actually implemented alternatives mitigation measures that could avoid and minimize a project's GHG emissions to the furthest extent economically and technically feasible.

The due diligence "duties arising from Article 2(1)(c) of the Paris Agreement and related provisions, including from Articles 2(1)(a), 3, 4, 9, and 13 as detailed above, should be considered in the context of the leverage that States have to align public finance with low greenhouse gas emissions and climate-resilient development through their contributions to and regulation of a range of bodies including MDBs and DFIs." <sup>111</sup> It is clear that this duty of due diligence applies to MIGA and its Global North members states, as they possess ample financial resources to satisfy it. That these due diligence responsibilities fall on MIGA and its Global

<sup>&</sup>lt;sup>106</sup> Cook and Viñuales at ¶ 104.

<sup>&</sup>lt;sup>107</sup> Cook and Viñuales at ¶ 98.

<sup>&</sup>lt;sup>108</sup> Cook and Viñuales at ¶ 100.

<sup>&</sup>lt;sup>109</sup> Paris Agreement, Article 13(5).

<sup>&</sup>lt;sup>110</sup> Cook and Viñuales at ¶¶ 113-114.

<sup>&</sup>lt;sup>111</sup> Cook and Viñuales at ¶¶ 78-79.

North Member states, is consistent with Article 2(2) of the Paris Agreement requiring the Agreement to "be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances." <sup>112</sup> MIGA and its Global North Member States securing such diligence is also consistent with Article 3's objective for "[t]he efforts of all Parties [to] represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of th[e] Agreement." <sup>113</sup>

#### ii. MIGA's and its Member States' Obligations under the Paris Agreement to stop guarantees for all upstream, midstream, and downstream fossil fuel projects

As required by the Paris Agreement and customary international law that MIGA and its Global North member state shareholders are obliged to adhere to,<sup>114</sup> MIGA's Paris Methodology must explicitly prohibit guarantees 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*", which the undersigned incorporate by reference.<sup>115</sup> In summary, Cook and Viñuales demonstrate that:

On the basis of the best available scientific evidence, and taking into account the current emission and production gaps and the associated risk of overshoot of the Paris Agreement's temperature goals, MIGA 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 MIGA has a duty for its guarantee 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 MIGA and it shareholder State parties to the Paris Agreement should seek to ensure that MIGA's

<sup>&</sup>lt;sup>112</sup> Cook and Viñuales at ¶¶ 56-57.

<sup>&</sup>lt;sup>113</sup> Cook and Viñuales at  $\P$  56-57, 75.

<sup>&</sup>lt;sup>114</sup> Appendix E, Sections I – II, *ante*, detail how both MIGA and its Members State shareholders are obliged under international law to adhere to the Paris Agreement's requirements, human rights treaties, and customary international law. <sup>115</sup> International Obligations Governing the Activities of Export Credit Agencies in Connection with the Continued Financing of Fossil Fuel-Related Projects and Activities, Legal Opinion, Kate Cook and Jorge E. Viñuales, March 24, 2021, available at: https://priceofoil.org/2021/05/04/eca-legal-opinion/ (hereinafter "Cook and Viñuales"); The analysis in Appendix E, Sections I – II, *ante*, makes it clear that Cook's and Viñuales' opinion applies beyond export credit agencies to international organizations like MIGA, and its Member State shareholders.

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, MIGA's Paris Methodology must include provisions that specify prioritization of financing for renewable energy projects to meet energy demands.

#### C. MIGA's and its Member States' Climate Change Due Diligence and Harm Prevention Obligations under Customary International Law and Human Rights Treaties

In addition to the Paris Agreement, other sources of law that apply to MIGA's and its member states' climate change due diligence obligations prior to financing approval are customary international law, informed by principles such as harm prevention and the precautionary approach, and human rights treaties.<sup>116</sup>

"Customary international principles require that states take all necessary measures to prevent transboundary harm, and exercise precaution when making decisions that pose a risk of harm to the environment."<sup>117</sup> For instance, [u]nder the harm prevention principle, states are required to 'take all appropriate measures to prevent significant transboundary harm or at any event minimize the risk thereof' from activities in its territory or arising under its jurisdiction or control." <sup>118</sup> This principle overlaps with others, including the "responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond national jurisdiction"—articulated in the Rio Declaration— and the requirement that states take precautionary measures even in the absence of scientific certainty as to significant harm."<sup>119</sup> The cumulative climate impacts from the significant GHG emissions resulting from MIGA's guarantee activities cross those risk thresholds, as climate change poses a risk of significant harm. This is because "assuming an approximately linear relation between GHG concentrations in the atmosphere and the severity of climate change, even very small cuts in global emissions can achieve significant global harm-prevention (or risk-reduction) benefits."<sup>120</sup> Accordingly, harm prevention and precautionary customary principles clearly apply

<sup>&</sup>lt;sup>116</sup> See Appendix E, Sections I-II, *ante*; Barros, Section III; Kerr, All Necessary Measures at 525-527 and note 16 (detailing state's requirements under customary international law); Jose Viñuales, Due Diligence in International Environmental Law: a Fine-Grained Cartography, in Due Diligence in the International Legal Order, 113 (Heike Krieger et al. eds., 2021) (hereinafter "Viñuales"); Benoit Mayer, Interpreting States' General Obligations on Climate Change Mitigation: a Methodological Review, 28 RECIEL 107 (2019); Benoit Mayer Climate Change Mitigation as an Obligation under Customary International Law, 48(1) YALE J. INT'L L. 105, 130-131 (2023)); *see also*, fn.100, *ante* (Kerr, All Necessary Measures at 560-561, and fn. 279).

 <sup>&</sup>lt;sup>117</sup> Kerr, All Necessary Measures at 527, and fn. 17; Viñuales at 113; *see also*, Benoit Mayer, Interpreting States' General Obligations on Climate Change Mitigation: a Methodological Review, 28 RECIEL 107 (2019); Benoit Mayer, Climate Change Mitigation as an Obligation under Customary International Law, 48(1) YALE J. INT'L L. 105, 130-131 (2023).
 <sup>118</sup> Kerr, All Necessary Measures at 541, and fn.120; United Nations, International Law Commission (ILC), Draft Articles

on the Prevention of Transboundary Harm from Hazardous Activities, A/RES/56/82, (Dec. 12, 2001), at art. 3, commentary to art. 3, ¶ 18; Viñuales at 124.

<sup>&</sup>lt;sup>119</sup> Kerr, All Necessary Measures at 541, and fn. 121; Viñuales at 116-117 (citing Rep. of the UN Conf. on Envir. and Devel., Rio Declaration on Environment and Development, A/ CONF.151/ 26 (1992); Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, Case No. 17, 2011 ITLOS Rep. 10, ¶¶ 125-135.

<sup>&</sup>lt;sup>120</sup> Kerr, All Necessary Measures at 541, and fn. 122; Benoit Mayer Climate Change Mitigation as an Obligation under Customary International Law, 48(1) YALE J. INT'L L. 105 (2023) at 134.

to climate change.<sup>121</sup> This means, international environmental principles require that the 1.5°C warming limitation objective must guide MIGA's and its member states in their actions related to the climate impacts of MIGA's guarantee activities, and MIGA must take all necessary measures to ensure that its guarantee activities do not cause or contribute to exceedance of the 1.5°C warming objective.

Human rights law continues to evolve to encompass protection of the environment,<sup>122</sup> and it is firmly established "[c]limate change is one of the greatest threats to human rights."<sup>123</sup> The UN General Assembly recognized the right to a clean, healthy, and sustainable environment as a human right in 2022.<sup>124</sup> Moreover, "human rights treaties guarantee rights to life and property—rights that international and domestic courts have found implicate a positive obligation to reduce environmental risks, including risks of harm from climate change."<sup>125</sup> "Cases from the International Court of Justice, the International Tribunal for the Law of the Sea, and the European Court of Human Rights indicate that when states make decisions within an international organization, they must adhere to their human rights due diligence obligations and substantive obligations related to the organization's area of competence."<sup>126</sup>

As directly related to climate change impacts, "recent opinions from human rights treaty bodies have adopted a risk-based test for when human rights due diligence obligations apply to climate change: if it is reasonably foreseeable that an activity under a state's jurisdiction or control will

<sup>&</sup>lt;sup>121</sup> Kerr, All Necessary Measures at 541, and fn. 123.

<sup>&</sup>lt;sup>122</sup> Kerr, All Necessary Measures at 550.

<sup>&</sup>lt;sup>123</sup> The United Nations Environment Programme (UNEP) - "[c]limate change is one of the greatest threats to human rights of our generation posing a serious risk to the fundamental rights to life, health, food and an adequate standard of living of individuals and communities across the world."

<sup>&</sup>lt;sup>124</sup> Kerr, All Necessary Measures at 550, and fn. 188; G.A. Res. 76/300, The Human Right to a Clean, Healthy and Sustainable Environment, at 3 (July 28, 2022).

<sup>&</sup>lt;sup>125</sup> Kerr, All Necessary Measures at 527, and fn. 20; Case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland, App. No. 53600/20, ¶¶ 573–74 (Apr. 9, 2024), https://hudoc.echr.coe.int/eng?i=001-233206 (holding that Switzerland is required to quantify GHG emissions limitations through a carbon budget and implement reduction measures); Budayeva v. Russia, App. No. 15339/02, ¶ 116, 133 (Mar. 20, 2008), https://hudoc.echr.coe.int/eng?i=001-85436 (holding that states have a positive obligation to protect life and property from environmental risks). The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda (Urgenda) [2019] Dutch Supreme Court 19/00135 (Engels); *See also*, Jaqueline Peel & Harri Osofsky A Rights Turn in Climate Change Litigation, 7(1) TRANSNAT'L ENVTL. L. 37, 48 (2018) (discussing case law); Siobhan McInerney-Lankford, Climate Change and Human Rights: an Introduction to Legal Issues, 33 HARVARD ENVTL. L. REV. 431, 433 (2009). Other courts have recognized the right to a healthy environment as an autonomous right. *See, e.g.*, The Environment and Human Rights (Arts. 4(1) and 5(1) American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶¶ 62–63, 101–03 (Nov. 15, 2017) [hereinafter Colombia Advisory Opinion].

<sup>&</sup>lt;sup>126</sup> Kerr, All Necessary Measures at 529, and fn. 32 (citing numerous cases and scholarly articles in support).

cause a risk of climate harm, the state must diligently prevent it within the limits of its capacity." 127 128 129

"Due diligence requires states to 'employ all means reasonably available to them' to prevent a violation 'so far as possible'."<sup>130</sup> The types of conduct that could breach a due diligence obligation include action, inaction, or deficient action.<sup>131</sup> Cases from the International Court of Justice, the International Tribunal for the Law of the Sea, and the European Court of Human Rights indicate that when participating in the governing boards of international financial institutions, "member states have due diligence obligations to take all measures to ensure that they know about risks to human rights before approving loans, mitigate those risks when making decisions, and ensure that loans already issued conform to their human rights conditions." <sup>132</sup> The same reasoning applies to states' climate decision-making within MIGA. Accepting that climate change harms human rights,<sup>133</sup> and MIGA member states are bound by their human rights obligations under customary international law and treaties when acting as decision-makers within MIGA, they are therefore under an obligation of conduct to do all they can in that role to make sure MIGA's climate decisions, and actions or inactions, in enacting policies and

<sup>&</sup>lt;sup>127</sup> Kerr, All Necessary Measures at 527, and fn. 21 (citing UN Human Rights Committee, 'Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019,' UN Doc. CCPR/C/135/D/3624/2019 (Sept. 22, 2022), ¶ 8.13; UN Committee on the Rights of the Child, 'Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 104/2019,' No. CRC/C/88/D/104/2019 ¶ 10.5-.7 (Oct. 8, 2021); *see* Case Comment, Committee on the Rights of the Child Extends Jurisdiction over Transboundary Harms; Enshrines New Test, *Saachi v. Argentina*, 135(7) HARVARD L. REV. 1981 (2022); Federica Violi, The Function of the Triad 'Territory,' 'Jurisdiction,' and 'Control' in Due Diligence Obligations, in Due Diligence in the International Legal Order 75 (Heike Krieger et al. eds., 2021) at 81-82 (in Colombia Advisory Opinion, supra note 20 "court equated jurisdiction with causality and ultimately with imputability, thus altering the vertical understanding of human rights jurisdiction, and eventually risk proximity.")).

<sup>&</sup>lt;sup>128</sup> See European Court of Human Rights case *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (judgement available here), and the May 21, 2024 International Tribunal on the Law of the Sea Advisory Opinion in response to the Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (advisory opinion available here); Pending cases before regional human rights courts and the International Court of Justice may further reinforce how human rights intersect and impact states' obligations to prevent climate harm. *See* Kerr, All Necessary Measures at 550, and fn. 189; UN General Assem., Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change,' G.A. Res. A/77/L.58 (Mar. 29, 2023); Request for an Advisory Opinion on the Climate Emergency and Human Rights Submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, (Jan. 9, 2023), https://www.corteidh.or.cr/solicitud\_opiniones\_consultivas.cfm?lang=en).

<sup>&</sup>lt;sup>129</sup> Cook and Viñuales at ¶¶ 47, 132-146, and fn. 182 (citing Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24, paragraph 50).

<sup>&</sup>lt;sup>130</sup> Kerr, All Necessary Measures at 556-557, and fn. 244; Case Concerning the Application on the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 430 (Feb. 26, 2007); SRFC Advisory Opinion, supra note 203, ¶ 129; John Dugard & Annemarieke Vermeer-Künzli, The Elusive Allocation of Responsibility to Informal Organizations: the Case of the Quartet on the Middle East in Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie, 265 (Maurizio Ragazzi ed., 2013); *see also* Barros at 158, n. 916.

<sup>&</sup>lt;sup>131</sup> Kerr, All Necessary Measures at 556, and fn. 245 (citing Barros at 121-122, 124, 195).

<sup>&</sup>lt;sup>132</sup> Kerr, All Necessary Measures at 560-561, and fn. 279; Barros at Chapter III; see also Pasquale De Sena, International Monetary Fund, World Bank and Respect for Human Rights: A Critical Point of View, 20(1) ITALIAN Y.B. INT'L. L. 247, 257 (2010).

<sup>&</sup>lt;sup>133</sup> Kerr, All Necessary Measures at 546-550.

approving guarantees, uphold human rights.<sup>134</sup> Applying the harm prevention principle and precautionary principle yields the same due diligence obligations.<sup>135</sup>

Accordingly, in light of the climate risks and impacts from MIGA's guarantee activities, customary international principles and human rights law impose an equivalent obligation mandating that MIGA 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 MIGA and its member states must require that MIGA's Sustainability Policies and Paris Methodology mandate MIGA ensures it diligently assesses and prevent the risk of climate harm from MIGA investments to extent of its capacities prior to guarantee approvals that meets the best reasonably available and practiced standard. This also necessarily means that MIGA's due diligence obligations extend beyond adequate study prior to project approvals to prevent its guarantees from causing or contributing to climate change harms. They also include MIGA taking substantive measures, such ceasing all direct and indirect financing for fossil fuels projects that the IPCC and IEA have shown will cause the 1.5°C warming limitation objective to be exceeded.<sup>136</sup>

"As with other international environmental obligations, the required degree of diligence differs based on states' development and individual circumstances."<sup>137</sup> Thus, like in the context of transboundary harm from hazardous activities, a highly developed or technologically advanced state has a greater scope of diligent conduct than other states.<sup>138</sup> This means. MIGA 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 MIGA guarantees are fully assessed, avoided, and mitigated to the furthest extent technically and economically feasible prior to MIGA guarantee approvals. It also means, assuming that climate measures do not burden least developed countries or small island developing states and otherwise account for equitable principles, MIGA and its Member States are obliged to use their influence to push its clients to adopt a high level of ambition and effective measures that are consistent with the best available and used GHG emissions and mitigation methodologies and technological developments.<sup>139</sup> Considering MIGA 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 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.

<sup>&</sup>lt;sup>134</sup> See fns. 129-133, 135, 137; Cook and Viñuales at ¶¶ 47, 132-146, and fn. 182 (citing Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24, paragraph 50; Ana Sofia Barros, Member States and the International Legal (Dis)order Accounting for the notion of Responsible Governance, International Organizations and Member State Responsibility, Critical Perspectives, Brill Nijhoff 2017, Chapter 4 at 66-71).

 <sup>&</sup>lt;sup>135</sup> Kerr, All Necessary Measures at 541, 561-562; Cook and Viñuales at ¶¶ 41, 44, 46, 47, 48 (PDF at 29-34).
 <sup>136</sup> See fn.13. *ante*.

<sup>&</sup>lt;sup>137</sup> Kerr, All Necessary Measures at 529, and fn. 29; Viñuales at 125-126; Jaqueline Peel, Climate Change, in Shared Responsibility, 1033, 1041-1044 (Andre Nollkaemper, ed., 2018) (failure to stop, reduce or regulate emitting activities could be basis for finding state did not discharge due diligence obligation of harm prevention).

<sup>&</sup>lt;sup>138</sup> Kerr, All Necessary Measures at 529, and fn. 30; United Nations, International Law Commission (ILC), Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, A/ RES/ 56/ 82, 12 December 2001, commentary to art. 3, ¶18; Cook and Viñuales at ¶47.

<sup>&</sup>lt;sup>139</sup> Kerr, All Necessary Measures at 529-530; Kerr, Erga Omnes Obligation; Baine P. Kerr, Binding the International Maritime Organization to the United Nations Convention on the Law of the Sea, 19 INT'L ORG. L. REV. 391 (2022).

Accordingly, MIGA and its member states have a due diligence obligation to account for, prevent, and reduce GHG emissions from its guarantee activities beyond what is required by any climate treaty.<sup>140</sup> As supported by Kerr, to the extent the risk of harm posed by climate change is not adequately addressed by the climate regime (e.g. the Paris Agreement, see Appendix E, Section III.B., *ante*), MIGA's general obligations imposed by human rights treaties and customary law demand that MIGA and its member states do more.<sup>141</sup>

<sup>&</sup>lt;sup>140</sup> See Kerr, All Necessary Measures at 526, and fn. 15; Neil McDonald, The Role of Due Diligence in International Law, 68 INT'L & COMP. L.Q. 1041 (2019).

<sup>&</sup>lt;sup>141</sup> Kerr, All Necessary Measures at 529-529, and fn. 27 (citing Natalie Dobson, Extraterritoriality and Climate Change Jurisdiction: Exploring EU Climate Protection Under International Law, 30 (2021); Jaqueline Peel, Climate Change, in Shared Responsibility 1041-1044 (Andre Nollkaemper, ed., 2018) (failure to stop, reduce or regulate emitting activities could be basis for finding state did not discharge due diligence obligation of harm prevention); Rozemarijn J. Roland Holst, Taking the Current When it Serves: Prospects and challenges for an ITLOS Advisory Opinion on Oceans and Climate Change' RECIEL (2022), 7 ("as long as intended NDCs fall short of Paris Agreement temperature goal, can be argued that due diligence under LOSC obliges states to do more.").

#### <u>Appendix F: MIGA's and its Member States' Obligations to Adhere and Ensure</u> <u>Adherence to MIGA's Board Adopted Policies Applicable to Climate Change and GHG</u> <u>Emissions</u>

International organizations' obligations are also derived from their own constituent instruments, board adopted rules, and board declarations. According to the International Law Commission (ILC), an organization's board adopted rules (or policies) can impose international obligations on it.<sup>142</sup> ILC DARIO Article 10 provides that there 'is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.'<sup>143</sup> Specifically applied to the World Bank and thus by extension to MIGA, scholars have found MIGA's board adopted policies should be binding rules of conduct in domestic court.<sup>144</sup>

MIGA's Convention sets forth that MIGA's objective "shall be to encourage the flow of investments for productive purposes among member countries, and in particular to developing member countries, thus supplementing the activities of the International Bank for Reconstruction and Development [(IBRD)]<sup>145</sup>, the IFC<sup>146</sup> and other international development finance institutions. Convention Establishing MIGA, Chapter 1, Article 2, Objective and Purposes, Amended November 14, 2010. Consistent with its Convention, MIGA's board adopted mission is to promote foreign direct investment into developing countries to support economic growth and reduce poverty, with a view to improving people's lives. AIP at pp 3. MIGA's board adopted E&S Policy further recognizes MIGA's objective and purpose of furthering economic development, including that of which is supported by IBRD and IFC, and includes working to prevent climate change impacts as a strategic priority and supporting climate friendly solutions in its innovative investments. E&S Policy at ¶ 10. It also provides:

MIGA's support for low-carbon economic development is one dimension of a balanced approach to development, including supporting access to modern, clean, and reliable energy services... MIGA, in its efforts to support its climate-related commitments, will build on the World Bank Group (WBG) experience in energy efficiency, cleaner production, renewable energy, and carbon markets as well as in the development of GHG

<sup>&</sup>lt;sup>142</sup> Kerr, ICAO at 4, and fn. 24, 25 (providing "The ILC DARIO Articles, Article 2, subparagraph (b) defines rules of an organization as 'the constituent instruments, decisions, resolutions and other acts of the organization adopted in accordance with those instruments, and established practice of the organization; citing ILC DARIO Articles, Art. 2., 10); Kerr, Clear Skies at 153.

<sup>&</sup>lt;sup>143</sup> Kerr, ICAO at 4, and fn. 25 citing ILC DARIO Articles, Art. 10.

<sup>&</sup>lt;sup>144</sup> Kerr, B. (2022). Mitigating the Risk of Failure: Legal Accountability for International Carbon Markets. Utrecht Law Review, 18(2), 145-161 (hereinafter "Kerr, Legal Accountability Int. Carbon Markets") at 152, and fn 61citing Clemens Treichl and August Reinisch, 'Domestic Jurisdiction over International Financial Institutions for Injuries to Project-Affected Individuals: The Case of Jam v International Finance Corporation' (2019) 16 International Organizations Law Review at 133; Kerr, Erga Omnes Obligation at 121 -122, and fn. 11 citing Alexander Orakhelashvili, 'The World Bank Inspection Panel in Context: Institutional Aspects of the Accountability of International Organizations', 2 International Organizations Law Review 57 (2005) at 71-72.
<sup>145</sup> IBRD's Articles of Agreement provide in relevant part that IBRD's purposes include "assist[ing] in the encouragement of the development of productive facilities and resources in less developed countries." IBRD

Articles of Agreement, Article I: Purposes, Amended June 27, 2012.

<sup>&</sup>lt;sup>146</sup> IFC's Articles of Agreement provide in relevant part that MIGA's purpose is to "further economic development by encouraging the growth of productive private enterprise in member countries," and that it shall "....assist in financing the establishment, improvement and expansion of productive private enterprises which would contribute to the development of its member countries..." Article 1, Purpose, Amended April 16, 2022.

accounting and approaches to climate change risk assessment, to make available instruments and practices that allow its Clients to consider climate-related risks and opportunities in their investment decisions.

*Id.* at ¶ 11. MIGA's E&S and AIP, also require that prior to approving a guarantee, MIGA ensure adherence to its board adopted Performance Standards to assess, avoid, and mitigate impacts from GHG emissions. See Appendix A, Section I, *ante*. The Policies further contain a plethora of requirements requiring disclosure and reporting of GHG emissions prior to and after project financing. See Appendix A, Sections II and III, *ante*.

As detailed herein, MIGA is systematically failing to adhere to the requirements of its board adopted Sustainability Policies pertaining to GHG emissions quantification, affected communities impact assessment, alternatives analysis, mitigation, disclosure, and reporting. Considering MIGA's Board adopted policies interpret the development mandate in its Articles to include preventing climate change impacts from its activities, by failing to adhere to the requirements of its board adopted Sustainability policies necessary to prevent these impacts, MIGA is also systematically violating the mandates in its Articles.

Because MIGA is in a position to act to fully quantify and mitigate GHG emissions from each project it guarantees, and has the mandate to do so under its board adopted policies and articles, it likewise has a positive obligation under international law. As such, MIGA is violating its own imposed legal obligation under international law by both (1) failing to adhere to the mandates in its Articles and (2) failing to adhere to its board adopted rules. MIGA, by not quantifying, mitigating and preventing the impact of, and disclosing GHG emissions as its own board adopted policies provide, is committing an internationally wrongful omission and could be held responsible under international law. MIGA's member states could be held responsible as well, as they are failing to supervise MIGA and ensure that it is following its own board adopted policy requirements.<sup>147</sup>

<sup>&</sup>lt;sup>147</sup> See, e.g., Kristina Daugirdas, Member States' Due Diligence Obligations to Supervise International Organisations,' in Due Diligence in the International Legal Order 59 (Heike Krieger et al. eds., 2021).