





















Via Email

October 3, 2025

Asian Development Bank

Attn: ADB Member State Shareholders

Attn: Mr. Masato Kanda, President; Priyantha Wijayatunga, Senior Director, Energy Sector Office

6 ADB Avenue, Mandaluyong City 1550

Metro Manila, Philippines

ADB Member States' emails below; civilsociety@adb.org; pwijayatunga@adb.org

Re: <u>ADB's UNFCCC Climate Change Obligations in the Energy Policy Review</u> & Follow Up on our August 28 and September 24 Letters Detailing Other Substantive and Procedural Deficiencies in the Review that Violate ADB's and its Member States' Obligations Under International Law

Dear Asian Development Bank (ADB) Member State Shareholders, Mr. President Kanda, Mr. Wijayatunga and to Whom it May Concern at ADB:

On behalf of Bank Climate Advocates (BCA) and the undersigned Civil Society Organizations (CSOs), we write to ask: (1) that ADB address its climate change obligation under the United Nations Framework Convention on Climate Change (UNFCCC)¹ in its Energy Policy² Review (hereinafter "Review"), (2) confirm ADB agrees it is obligated under international law to adhere to the requirements in its board adopted policies, and to meet these requirements during the Review by assessing and aligning the Energy Policy with 1.5°C; and (3) meet its and its member states' obligations to provide a legally adequate period for public review and comment from that time the contemplated amendments to the Energy Policy are publicly released – this would be more than the 3 weeks we understand is currently planned.

We further request (4) ADB fully respond with supported legal analysis to our September and August comments that details why ADB believes it does not have climate change nor environmental impact assessment obligations under customary international law. And most importantly, we (5) re-iterate our ask

¹ United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

² 2021 Energy Policy of the Asian Development Bank – Supporting Low-Carbon Transition in Asia and the Pacific, June 2023 (hereinafter "Energy Policy", "2021 Energy Policy", or "Policy").

that ADB and its member states take corrective action in the Review and through Policy amendments to prevent ADB and its member states from violating their substantive and procedural climate change and environmental assessment obligations under international law as set forth in our <u>August 28, 2025 letter</u>.

The undersigned make these asks at this time because in response to our September and August comments, we understand ADB has been taking an incorrect and concerning position, without providing legal analysis in support: that ADB is not bound to customary international law nor international legal instruments or treaties unless all of their member states have signed them. Because ADB is taking this position, is indeed bound to treaties where all of its member states are signatories, and all of ADB's Member States are party to the UNFCCC, the undersigned now additionally request ADB analyze and meet its UNFCCC climate change obligations as the International Court of Justice (ICJ) has recently crystalized in its July 2025 Climate Change Advisory Opinion (ICJ Advisory Opinion).³ For the reasons detailed in Section A, below, if the Energy Policy Review is concluded and Policy amendments are adopted as ADB currently contemplates, ADB and its member states will be violating their legal requirements under the UNFCCC in addition to their climate change and environmental impact assessment legal requirements under customary international law and applicable treaties. See our August 28, 2025 letter detailing these legal requirements. Moreover, ADB will be causing substantial harm to the communities it is supposed to benefit and exposing itself to institutional risk.

We also, make these asks because: (a) from the Energy Policy amendments it is contemplating, it appears ADB has taken a position it does not have obligations under international law to follow and adhere to its own board adopted policies, and thus does not have to follow the Energy Policy Review requirements in its 2021 board adopted Energy Policy; (b) we understand that ADB now plans to vote to approve its contemplated Energy Policy amendments in late October, and to release the Energy Policy with all of its contemplated amendments for review three weeks before the board adoption date, and (c) while asserting verbally it has no legal obligations under customary international law, ADB has yet to respond to our September and August letters with any and supported legal analysis as to why it believes this is the case.

Section A: ADB's Contemplated Energy Policy Amendments Violate ADB and its Member States' Climate Change Obligations under the UNFCCC

In meetings between ADB and civil society where our <u>August 28, 2025 comments</u> were discussed, <u>ADB</u> Energy Director staff opined that the only international law ADB is bound to are treaties or international legal instruments signed by all its member states. First and foremost, this is a dangerously narrow assertion of ADB's legal obligations and we ask ADB and its Member States' take action during the Review as requested in our August 28, 2025 comments to ensure ADB's adherence to its climate change obligations under customary international law, and ADB Member States' adherence to their climate change obligations under customary international law and applicable treaties. **Nonetheless, considering ADB is asserting it is bound to treaties signed by all of its member states, because all of ADB's member states are party to the UNFCCC, ADB must analyze the Review's and its Energy Policy's consistency with UNFCCC, and propose amendments that meet and are consistent with ADB's and its member states' UNFCCC climate change obligations.**

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³ July 23, 2025 Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change (2025 ICJ Climate Advisory Opinion) (<u>available here</u>).

The ICJ Advisory Opinion explicitly sets forth what the UNFCCC requires of ADB during the Review. In detailing the "stringent obligations upon States to ensure the protection of the climate system and other parts of the environment from anthropogenic GHG emissions," the Opinion provides:

The UNFCCC sets the overall objective of "stabilization" of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system... Under the UNFCCC, and based on the principle of common but differentiated responsibilities and respective capabilities, all parties have an obligation to develop and report on national policies, programmes and measures to address climate change (Article 4, paragraph 1), while developed country parties and other parties identified in Annex I have additional obligations to, inter alia, adopt policies and take corresponding measures to limit emissions of GHGs and protect and enhance carbon sinks and reservoirs (Article 4, paragraph 2). ICJ Advisory Opinion at pps. 268, 206, 208.

As the ICJ Opinion recognized, the level of GHGs in the atmosphere that would prevent dangerous interference with the climate system is 1.5°C, and:

a State acts wrongfully if it fails to use all means at its disposal to bring about the objective [aligning its activities with 1.5°C] envisaged under the obligation [stringent due diligence], but will not act wrongfully if it takes all measures at its disposal with a view to fulfilling the obligation even if the desired objective is ultimately not achieved. In the case of an obligation of result, a State acts wrongfully if it fails to bring about the result required under the obligation. At the same time, it cannot be said that an obligation of result, such as an obligation to "adopt national policies and take corresponding measures on the mitigation of climate change", will be met merely by the adoption of any policies and the taking of corresponding measures. To comply with this obligation of result, the policies so adopted and the measures so taken must be such that they are able to achieve the required goal. ICJ Advisory Opinion at pp. 208.

As such, ADB's obligations under the UNFCCC require it, during the Energy Policy Review, to assess its climate change obligations under the UNFCCC and adopt amendments so that the Policy meets the stringent climate change due diligence obligations required by the UNFCCC that in effect align its Energy Policy with 1.5°C.

The Policy and its contemplated amendments are clearly not in line with limiting global warming to 1.5°C or the stringent climate change due diligence requirements of the UNFCCC. Evidence of this is that ADB made a factual finding that the Policy, when adopted in 2021, was only consistent with the Paris Agreement's "plan to keep global warming below 2 degrees Celsius." See the finding in the ADB Strategy 2030 finding that ADB's 2021 Energy Policy relies on to define Paris Alignment. Best available science produced by the IPCCC evidences that the Paris Agreement alignment now requires measures to keep global warming below 1.5°C, not 2°C.

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⁴ ADB. 2018. Strategy 2030: Achieving a Prosperous, Inclusive, Resilient, and Sustainable Asia and the Pacific. Manila (ADB Strategy 2030) at page 6; 2021 Energy Policy at page 1 and Introduction providing "The 2021 Energy Policy is an update to the 2009 Energy Policy to guide ADB's energy sector operations. It focuses on energy operations that are optimally aligned with ADB's Strategy 2030[] and the global commitments that Strategy 2030 supports, including the SDGs, the related Financing for Development Agenda,[] and the Paris Agreement[] on climate change (Paris Agreement); See also 2021 Energy Policy at pages 10, 12, 16, vii, ix.

⁵ IPCC, 2023: 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.

Further evidence that the Policy and its contemplated amendments are not in line with limiting global warming to 1.5°C or the stringent climate change due diligence requirements of the UNFCCC are detailed in our August 28, 2025 letter which provides:

In light of the ICJ and ITLOS Opinions, and Global Stocktake, ADB and its member state shareholders are clearly under a duty of conduct to amend its Energy Policy to require a prohibition on financing new coal, oil, gas production and power plants and associated infrastructure, and LNG infrastructure, absent a demonstration—supported by the best available science—that the activity is compatible with a 1.5°C pathway, avoids lock-in and stranded-asset risks, and does not undermine the rights of those most exposed to climate harms. These obligations also clearly require that ADB's Energy Policy is further amended to set a stringent presumption against financing any of these new fossil fuel supplies and unabated fossil power plants and infrastructure, while heightening disclosure and analysis justification requirements (including GHG emissions alternatives analysis requirements) to align with best available science and practiced methods for any of these contemplated or potentially allowed investments, including for residual gas infrastructure claimed to be transitional. ADB's contemplated amendments to its Energy Policy for the first time allows ADB to finance, and sets the framework for ADB to finance and support: (1) nuclear energy infrastructure, (2) the co-firing of green hydrogen, biofuels, and ammonia in existing coal and gas plants, (3) to allow carbon, capture, utilization and storage (CCUS) in depleted oil and gas wells; (4) to stimulate investments in existing upstream oil and gas fields to reduce methane leakages and routine gas flaring; and (5) to expanding its Energy Transition Mechanism—originally meant to retire coal—to include decommissioning of oil and gas plants. All of these amendments pose multiple severe environmental and social impacts, and all but for those pertaining to nuclear infrastructure, risk worsening the climate crisis, including through prolonging and supporting fossil fuel production and the life of fossil fuel power plants.⁶

Section B: ABD must confirm whether it agrees it is obligated under international law to adhere to the requirements in its board adopted policies, and to meet these requirements during the Review by assessing and aligning the Energy Policy with 1.5°C

From the Energy Policy amendments it is contemplating, it appears ADB is taking a position that neither it nor its member states have obligations under international law to ensure ADB's own board adopted policies are adhered to, and thus that ADB does not have to follow the Energy Policy Review requirements in its 2021 board adopted Energy Policy. However, if this ADB's position, ADB is incorrect and has no basis to support it.

As detailed in the legal analysis on <u>pages 2-3 (section 1.A.) of our August 28, 2025 letter</u>, ADB has positive legal obligations to adhere to its board adopted policies, and its member states have legal obligations to ensure ADB adheres to its board adopted policies.

⁶ For details of these impacts, and why ADB's contemplated policy amendments allowing ADB to finance, and setting the framework for ADB to finance and support: 2) the co-firing of green hydrogen, biofuels, and ammonia in existing coal and gas plants, (3) to allow carbon, capture, utilization and storage (CCUS) in depleted oil and gas wells; (4) to stimulate investments in existing upstream oil and gas fields to reduce methane leakages and routine gas flaring; and (5) to expanding its Energy Transition Mechanism—originally meant to retire coal—to include decommissioning of oil and gas plants, are inconsistent with the ADB's and its member states UNFCCC, customary, and other treaty climate change obligations under international law, see our July 24, 2025 comments, our August 28, 2025 comments, and the Energy Policy Review comments submitted by NGO Forum on ADB in August 2025 (these comments are entitled "FORUM NETWORK SUBMISSION ON 2025 ADB ENERGY POLICY REVIEW") and Big Shift Global on August 8, 2025 (these comments are entitled: "Concerns on ADB Energy Policy Review and Proposed Amendments – Gas Expansion, False Solutions, and Policy Loopholes").

ADB's 2021 board adopted Energy Policy contains a commitment in 2025 that requires ADB and its directors to assess alignment with a just, low-carbon transition in a 2025 Energy Policy review, during the 2025 Review and before any Policy amendments are adopted. Because international law requires ADB and its member states to ensure ADB adheres to its board adopted policies, ADB and its Member States are thus required to assess the consistency of the entire Energy Policy, any contemplated amendments, and the Policy's prohibitions and permissions to invest in certain energy infrastructure, with ADB's and its member states' much changed climate change obligations under international law that have evolved with the accelerated climate crisis since the Policy was adopted in 2021. This is especially the case considering best available science produced by the IPCCC evidences that Paris Agreement alignment now requires measures to keep global warming below 1.5°C, and that ADB made a factual finding that the Policy, when adopted in 2021, was only consistent with the Paris Agreement's "plan to keep global warming below 2 degrees Celsius." See the finding in the ADB Strategy 2030 finding that ADB's 2021 Energy Policy relies on to define Paris Alignment.

In sum, ADB is in a position to assess its climate change legal obligations, and because it has the mandate to do so during this Review under a board adopted policy, ADB and its member states have a positive obligation under international law to assess and align ADB's entire Energy Policy, and any contemplated amendments, with ADB's and its member states' current climate change obligations under international law. Failure to do so would constitute committing an internationally wrongful omission, for which ADB, and its member states due to their duty to ensure ADB adheres to its board adopted policy requirements, could be held to account for in a court of law.

Section C: ADB's and its Member States' Environmental Assessment and Public Participation Legal Requirements Obligate ADB to Provide More than Three Weeks for Public Review and Comment on Proposed Energy Policy Amendments

We understand ADB's current revised plan is to release the actual proposed Energy Policy amendments for public review and comment for three weeks in early October prior to their board adoption date later in the month. This falls far short of the minimum required time for public to review and comment that states and international organizations – like ADB – are legally required to provide.

As detailed in our July 7, 2025 letter, this opportunity for comment falls far short of ADB's and its member states' obligations under customary international law, and ADB's European and various Central Asian Shareholders Aarhus Convention treaty obligations to provide a reasonable amount of time for public comment. Aarhus Convention Articles 7, 6(2)(d), 6(3). This is because the comment period itself falls exceptionally short of the requisite reasonable timeframe needed to allow the public to prepare and participate effectively in the decision-making process. Considering the complexity and severe risk of substantial adverse environmental and social impacts, at least 60 days from the date of release of a final

⁸ IPCC, 2023: 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.

⁷ See ADB 2021 Energy Policy at page 37 and Section VI.: Implementation Arrangement.

⁹ ADB. 2018. Strategy 2030: Achieving a Prosperous, Inclusive, Resilient, and Sustainable Asia and the Pacific. Manila (ADB Strategy 2030) at page 6; 2021 Energy Policy at page 1 and Introduction providing "The 2021 Energy Policy is an update to the 2009 Energy Policy to guide ADB's energy sector operations. It focuses on energy operations that are optimally aligned with ADB's Strategy 2030[] and the global commitments that Strategy 2030 supports, including the SDGs, the related Financing for Development Agenda,[] and the Paris Agreement[] on climate change (Paris Agreement); See also 2021 Energy Policy at pages 10, 12, 16, vii, ix.

¹⁰ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, Denmark, UNECE (1998) (hereinafter "Aarhus Convention").

draft of the updated Policy with precise proposed amendments and supporting SEA or EIA analysis would be appropriate and meet good international practice.

As such, for ADB to meet its and its member states' legal obligations to provide an adequate period for public review and comment from the time the contemplated amendments to the Energy Policy are publicly released, more than the 3 weeks currently planned is required.

Section D: ADB and its Member States' Must Take Action to Adhere to their Climate Change and Environmental Impact Assessment Obligations Under International Law in the Energy Policy Review Process and Adoption of Energy Policy Amendments.

While ADB has yet to respond to our <u>August 28, 2025 letter</u> in writing regarding its climate change and environmental review obligations under international law, we understand that ADB Energy Sector management has been expressing to CSOs that ADB feels that ADB itself is not bound to customary international law nor international legal instruments or treaties unless all of their member states have signed them. Per the analysis in our <u>August 28, 2025 letter</u>, our position is ADB is incorrect that it does not have obligations under customary international law. Moreover, ADB's member states do not dispute they all have climate change obligations under at least customary international law that they each must adhere to in adopting any Energy Policy amendments.

We thus request ADB fully respond with supported legal analysis to our <u>August comments</u> that details whether and why ADB believes it, and separately its member states when acting at ADB to approve Energy Policy amendments, have or do not have the climate change and environmental impact assessment obligations under customary international law we set forth <u>in Sections 1.A-B. and 2.A.-B in our August 28, 2025 letter</u>. And most importantly, we re-iterate our ask that ADB and its member states take corrective action in the Review and through Policy amendments to prevent ADB and its Member States from violating their substantive and procedural climate change and environmental assessment obligations under international law. For the legally supported reasons detailed in our August 2025 comments, to meet these obligations during, ADB must, and ADB's member states must ensure ADB:

- 1. Assess the Energy Policy's consistency with ADB's and its member states' much changed climate change obligations under international law since the Policy was adopted in 2021, and amend the Policy to reflect these obligations;
- 2. Conduct a Strategic Environmental Assessment (SEA) for (a) the contemplated Energy Policy amendments our August 28, 2025 letter highlights, ¹² ¹³ and also (b) the entire Energy

¹¹ As detailed in Appendix A, and our July 24, 2025 letter, it is not only ADB's member states that have these legal obligations that apply to their acts, omissions, or votes at ADB – ADB has these obligations under international law as well when it makes decisions on policies, plans, or investments, financial support, and guarantees. See Appendix A pages

15-16 of our July 24, 2025 comment letter available <u>here</u>.

¹² These contemplated Policy amendments include those that for the first time allow ADB to finance, and sets the framework for ADB to finance and support: (1) nuclear energy infrastructure, (2) the co-firing of green hydrogen, biofuels, and ammonia in existing coal and gas plants, (3) to allow carbon, capture, utilization and storage (CCUS) in depleted oil and gas wells; (4) to stimulate investments in existing upstream oil and gas fields to reduce methane leakages and routine gas flaring; and (5) to expanding its Energy Transition Mechanism—originally meant to retire coal—to include decommissioning of oil and gas plants. All of these amendments on their own open up the door and set the framework (albeit without necessary and appropriate guardrails) for ADB to finance and support new types of energy projects. They also all pose significant risks of adverse environmental impacts, and all but for those pertaining to nuclear infrastructure, risk worsening the climate crisis, including through prolonging and supporting fossil fuel production and the life of fossil fuel power plants.

¹³ While we acknowledge that the Energy Policy is in part a policy that establishes the strategic vision and high-level strategy, certain critical aspects of it, including the contemplated amendments highlighted on pages xx of our August 28, 2025 letter, are

Policy's consistency with ADB's and its member states' climate change obligations under international law; and

Considering the gravity of the matter, and that ADB did not respond to our August 28, 2025 comment letter by September 15, 2025 as requested with legal analysis supporting what it believes its' and its members states' climate change and environmental assessment obligations are during the Energy Policy Review – or at all -, we respectfully request that ADB and its member states comprehensively respond in writing to our concerns and requests in this and our <u>August 28, 2025</u> letter in writing as soon as possible and by October 13, 2025 at the latest.

Conclusion and Requests:

ADB's and its member states' failures to (1) assess the Policy's consistency with their much changed and clarified climate change obligations under international law during the Policy's review period, and amend the policy to meet these obligations; (2) adhere to their climate change assessment and substantive obligations during the 2025 Energy Policy Review as specified in ADB's board adopted 2021 Energy Policy; (3) produce and release a SEA (a) for the contemplated Policy amendments we detail above (see footnote 12, *ante*.) for public review prior to their adoption and (b) that assesses the Policy's consistency with ADB's and its member states' climate change obligations; and (4) to circulate the amendments for public review a reasonable time prior to adoption – severely compromises the legality and integrity of the ADB's Energy Policy Review process. Should ADB adopt the Energy Policy in late October without curing these failures, it would (1) violate ADB's climate change, environmental review, and public participation obligations under international law, (2) cause each ADB member state that votes to approve or that abstains from approving the Energy Policy amendments to violate these same legal obligations, and (3) would result in an updated Policy that fails to adequately address environmental and social risks or leverage opportunities for truly sustainable development.

We thus urge the ADB Board of Directors and its Member State Shareholders to immediately:

- 1. Conduct and publicly release a comprehensive and fully supported SEA covering the contemplated amendments to the Energy Policy allowing for ADB to invest in nuclear energy infrastructure; the co-firing of green hydrogen, biofuels, and ammonia in existing coal and gas plants, CCUS storage in depleted oil and gas wells; to reduce methane leakages and routine gas flaring in existing upstream oil and gas fields; and to expand its Energy Transition Mechanism—originally meant to retire coal—to include oil and gas plants.
- 2. As part of the Review and its SEA, re-assess ADB's and its member states' climate change obligations under international law, release this assessment for public review and comment prior to adoption of any Policy amendments, and propose adjustments to the Policy that would meet these obligations.

each a de facto plan for which a SEA is required under the Kyiv Protocol and customary international law because they function in a way that provides ADB with explicit permission and a framework to invest in specific energy infrastructure for the first time. In other words, these amendments constitute a plan under international law because they effectively give the "permission" for ADB staff to consider and pursue certain types of investments. They further are plans requiring a SEA under international law not only because they provide eligibility criteria that make ADB's investments and support an option in the first place, but because they will influence more detailed sectoral programmes, sectoral guidance notes, and Country Partnership Strategies (as noted, the contemplated guardrails in the Energy Policy are impermissibly boundless for nuclear and for the other aforementioned contemplated Policy amendments).

3. Initiate an official, adequately publicized period for written public comments on the full draft of the proposed amended Energy Policy and its SEA, ensuring sufficient time (a minimum of 60 days, given the policy's complexity and regional significance) for all stakeholders to meaningfully review and comment.

ADB, and each of its member states, must meet their procedural and substantive due diligence and harm prevention obligations not only to prevent avoidable harms to communities and maintain accountability, but to avoid risks that come with being held to account in various courts of law. As ADB and many of its member states should well be aware, it is not just ADB's member states that can be brought into court for their decisions at ADB to approve a plan or policy, or fail to ensure sufficient ones are in place that meets harm prevention and due diligence procedural and substantive obligations. As, *Jam v. IFC* demonstrated, ¹⁴ multilateral development banks like ADB can be held to account too.

ADB's credibility as a multilateral development bank committed to sustainable development and good governance hinges on its adherence to principles of transparency, accountability, and genuine public participation. We trust that you will take our concerns seriously and implement immediate steps to rectify our identified shortcomings in the Review that pose substantial risk to the environment and communities ADB is supposed to be benefiting.

Considering the gravity of the matter, we respectfully request that ADB respond in full to our concerns and requests in this letter in writing by October 13, 2025. We look forward to your timely response and engagement with us on these issues. Please confirm receipt of this submission, let us know if we can provide any additional information.

Sincerely,

Jason Weiner (he/him/his)

Executive Director & Legal Director

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¹⁴ Jam v International Finance Corp, 586 US 273 (2019).

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