Written Submission on Asian Development Bank's (ADB) September 2023 Draft Environmental and Social Framework (ESF)

Submission from Bank Climate Advocates and Endorsing Organizations
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Asian Development Bank
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Attn: E&S Safeguards Update Unit
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Re: CSOs' Supplemental Climate Change Comments on the Asian Development Bank Environmental and Social Framework (ESF) September 2023 Consultation Draft (Draft ESF)

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

Thank you for the opportunity to comment on ADB's draft ESF. Bank Climate Advocates (BCA) and the undersigned civil society organizations (CSOs) incorporate the March 14, 2024 comments from a coalition of 17 CSOs attached as Enclosure 1 (March 2024 Comments) by reference, and submit the following supplemental comments on the Draft ESF. These supplemental comments are informed by BCA's participation in ADB's April ESF consultations on April 3, 5, and 12, 2024 (ESF Consultations), regarding necessary improvements to the ESF pertaining to climate change.

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

Supplemental Comments

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

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

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

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

[1] This includes ADB's and its Member State's obligations to set forth provisions in the ESF that would prevent ADB from funding fossil fuel projects and ensuring adequate assessments and mitigation to avoid emissions as far as feasible for each project ADB finances. See March 2024 Comments at 2-18, Appendices A-D.
[2] On April 9, 2024, the European Court of Human Rights ruled that Switzerland had failed to act in time and in an appropriate and consistent manner to devise, develop and implement relevant legislation and measures to mitigate the effects of climate change.
[3] In January 2023, Colombia and Chile requested, under Article 64(1) of the American Convention on Human Rights, an Advisory Opinion from the IACtHR in order to clarify the scope of States' obligations in responding to the climate emergency within the framework of international human rights (link to proceedings available here).
[4] The applicant in this case is the Commission on Small Island States on Climate Change and International Law, which requested an Advisory Opinion from the Tribunal in December 2022 (link to proceedings available here).
[5] The request for an Advisory Opinion was made by the UN General Assembly in March 2023, following a huge diplomatic effort spearheaded by Vanuatu and inspired by the vision of students in the Pacific Islands (link to proceedings available here).

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

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

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

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

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

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

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

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

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

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

6.) **ADB must amend the ESF and E&S Policy to require that ADB disclose on an annual basis, the sum of all absolute Scope 1, 2, and 3 GHG emissions of its entire investment portfolio for (a) all active investment and (b) all the investments ADB makes during a fiscal year.** This information is needed to gage ADB's alignment with the 1.5°C degree warming limitation objective.

7.) **Only Absolute, and not Relative GHG Emissions, Must be Used as ADB's threshold for when a client/borrower is required to disclose GHG emissions: estimates and quantification analysis, alternatives analysis, and mitigation hierarchy measures and analysis for each project to the public prior to ABD's financing decision.** As such the following sentence in paragraph 9 of ESS9 mush be amended to remove "and relative GHG emissions" after "with absolute" and must provide:

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

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

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

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

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

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

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

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

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

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

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

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

ESS9 paragraph 8 provides:

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

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

a.) To specify that if fossil fuel energy infrastructure and fossil fuel projects are being contemplated or proposed for financing, the alternatives to be included in the alternatives analysis must be renewable energy sources and infrastructure. Ensuring that renewables are pursued when feasible to meet energy demand is essential for ADB to align its financing flows with the 1.5°C warming limitation objective, and for ADB and its Global North Member States to meet their climate change due diligence and harm prevention requirements under international law. (See Enclosure 1, March 14, 2024 joint CSO comments at Appendix B, D).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As detailed on page 8 of the March 14, 2024 joint CSO comments (see Enclosure 1), ESS9 paragraph 8 must specify that deferring adoption of a mitigation hierarchy for GHG emissions and climate change impacts until after project approval is impermissible when the project has clearly defined components. In the case in which assets to be developed, acquired or financed have yet to be defined at the time of ADB financing, ESS9 must require that (1) a mitigation hierarchy for GHG emissions and climate change impacts, along with an adequate GHG emissions and climate change alternatives analysis, is provided to the ADB and public for a duration sufficient to allow for meaningful review prior to the client moving forward with asset development, implementation, acquisition, or financing, and (2) an adequate mitigation hierarchy is adopted, prior to the ADB client's commitments to the development, acquisition, or financing that was not defined at the time of ADB financing.

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

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

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

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

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

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

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

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

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

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

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

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

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

ADB's staff expressing during the ESF Consultations that:

(1) considering FIs are a substantial part of ADB's portfolio, ADB's intention in the draft ESF is for the same requirements applicable to its direct investments to apply to investments by its FI clients, and

(2) ADB's intention - for all but those projects with very limited GHG impacts such as an education project or operation of a school with almost negligible GHG emissions – that ADB considers the rest of projects it finances to have significant emissions and thus will need to adhere to these requirements in the ESS and ESF: (a) GHG emissions quantification estimates, alternatives analysis, adoption of measures to avoid GHG emissions as far as economically and technically feasible, and (b) public disclosure of estimated GHG emissions amounts, analysis, and mitigation prior to financing decisions

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

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

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

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

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

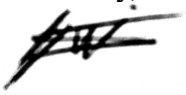
A copy of the published article is also attached as Enclosure 2. We reviewed the published article, and have determined any edits made during the publication process reflected in the published article, do not effect the positions in the March 2024 Comments. ADB can locate the content cited to in the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

Conclusion

Thank you for considering our comments. These improvements, in addition to those set forth in the attached March 14, 2024 comments (see Enclosure 1) are necessary for ADB's financing and guarantee activities to come into alignment with the 1.5°C warming limitation objective, and for the ADB and its global north shareholders to comply with their obligations under international law. Moreover, they are needed for ADB to avoid causing and contributing to irreversible severe harm to communities and millions of people all over the world and in its investment regions, especially those who are differentially or disproportionately affected by changing climate.

We look forward to your timely response and engagement with us on these issues. Please confirm receipt of this submission, and let us know if we can provide any additional information.

Sincerely,



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Enclosures: Enclosure 1 - March 14, 2024 CSO Climate Change Comments on ADB ESF; Enclosure 2 - Baine P. Kerr, All Necessary Measures: Climate Law for International Shipping, Virginia Journal of International Law, 64 Va. J. Int'l L. 523 (2024) at 523-570 (also available at: https://www.vjil.org/all-necessary-measures-climate-law-for-international-shipping); Enclosure 3 - UN OHCHR Comments on the Asian Development Bank (ADB) draft Environmental and Social Policy, 29 April 2024.

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Enclosures to BCA's and CSOs' May 5, 2024 Supplemental Climate Change Comments on the Asian Development Bank Environmental and Social Framework (ESF) September 2023 Consultation Draft (Draft ESF)

Enclosure 1

March 14, 2024

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

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

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

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

ADB's Draft ESF Must Be Improved to Address the Climate Crisis: As ADB may be aware, approximately 3.3–3.6 billion people that live in contexts that are highly vulnerable to climate change, are already suffering from the worst impacts of global warming, such as more frequent and

severe heat waves, wildfires, supercharged storms, atmospheric rivers, and extended droughts.[1] And things will get worse. Global warming is expected to increase at least through 2040 mainly due to increased cumulative greenhouse gas (GHG) emissions in nearly all considered scenarios and modelled pathways.[2] And on the world's current trajectory of GHG emissions, the global temperature will increase by up to 2.7°C by 2100.[3] This is more than the previously envisaged 1.5°C, which has been considered a critical threshold for limiting the most severe effects of climate change.[4] According to the Intergovernmental Panel on Climate Change, this temperature rise will have devastating effects not only on ecosystems but also on human health and well-being, water, agriculture, cities, settlements, and infrastructure.[5] People living in the Global South, and economically, politically, and socially marginalized people living in poverty, and who deal with the lasting effects of racial injustice and inequality, are likely to be hit hardest. The world and its most marginalized people cannot handle further significant GHG emissions, and especially ones that the ADB can and has the duty to avoid.

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

I. First, ADB's ESF Framework must explicitly prohibit financing of and guarantees/insurance for *all* upstream, midstream, and downstream fossil fuel projects. As provided in the Oil Change International (OCI) and BCA from the December 18, 2023 Amicus Curiae brief drafted by OCI and submitted by OCI and BCA to the Inter-American Court of Human Rights regarding the request from Chile and Columbia for an advisory opinion regarding "*Climate Emergency and Human Rights"* ("Climate Emergency Amicus to Inter-American Court of Human Rights"):

> Fossil fuels are the biggest single source of GHGs, accounting for 91% of CO2 emissions globally in 2022.[6] Under scenarios where global warming is limited to 1.5°C, [no new investments will be made in oil, gas, and coal production, and there will also be no further

[1] Synthesis Report of the IPCC Sixth Assessment Report (AR6), March 2023, Summary for Policy Makers at 5-6, 12-13 (available at: www.ipcc.ch/report/ar6/syr/); See Appendix A for summary of current and expected climate change harms projected by the IPCC.
[2] *Id*.; See Appendix A for summary of current and expected climate change harms.
[3] World Bank. 2023. Creating an Enabling Environment for Private Sector Climate Action: An Evaluation of World Bank Group Support, Fiscal Years 2013–22. Independent Evaluation Group. Washington, DC: World Bank at 1.
[4] IPCC (Intergovernmental Panel on Climate Change). 2018. Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty, Cambridge: Cambridge University Press; UN (United Nations). 2021. "Nationally Determined Contributions under the Paris Agreement." Synthesis Report by the Secretariat, Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement, Third Session, Glasgow, October 31–November 12; UNEP (United Nations Environment Programme). 2021. Emissions Gap Report 2021: The Heat Is On—A World of Climate Promises Not Yet Delivered. Nairobi: UNEP.
[5] IPCC. 2022. "Summary for Policymakers." In *Climate Change 2022: Impacts, Adaptation and Vulnerability.* Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge: Cambridge University Press.
[6] Dr. Zeke Hausfather, Prof. Pierre Friedlingstein. "Analysis: Global CO2 emissions from fossil fuels hit record high in 2022" 11 Nov. 2022. Carbon Brief (available at: www.carbonbrief.org/analysis-global-co2-emissions-from-fossil-fuels-hit-record-high-in-2022/#:~:text=Global%20carbon%20dioxide%20emissions%20from,by%20the%20Global%20Carbon%20Project).

> investment in LNG infrastructure]…[7] The Intergovernmental Panel on Climate Change's (IPCC's) recent synthesis report warned that, *"projected CO2 emissions from existing fossil fuel infrastructure without additional abatement would exceed the remaining carbon budget for 1.5°C."*[8] The International Energy Agency (IEA) concludes that in scenarios that maintain a 50% chance to limit global heating to 1.5°C, there are no further investments in new oil, gas and coal production.[9] In addition, [IEA finds that] no further LNG infrastructure investments are required in such scenarios, and even under construction LNG projects exceed what is compatible with 1.5°C.[10] According to the IEA's NZE there is <u>no need</u> for production and infrastructure expansion given forecasted clean energy expansion and fossil fuel demand reduction… At current rates of carbon pollution, the world will exhaust the 1.5°C budget in just seven years.[11] Recent analysis from Climate Analytics finds that fossil fuel production and use (oil, gas, and coal combined) must fall by 40% by 2030.[12] The same analysis shows that fossil fuels can be replaced with better, safer alternatives, ramping up wind and solar energy deployment five-fold, to 1.5 terawatt (TW) per year by 2030, while using energy more efficiently and fairly, including curbing overconsumption by the world's wealthiest countries.[13]

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

As such, ADB's ESF Framework must go further than its limited fossil fuel prohibitions, and explicitly prohibit financing of and guarantees/insurance for *all* upstream, midstream, and downstream fossil fuel projects and fossil fuels, including via its direct investments, financial intermediary investments, trade finance, advisory services, and captive power plants that are part of financed projects (an example of a captive power plant is a natural gas or coal plant powering a cement or other facility, development, activities, or operation). Without doing so, ADB's financing activities cannot be aligned with the Paris Agreement's 1.5°C global warming limitation objective. Furthermore, as detailed in Appendix B and C below, such prohibitions are necessary for the ADB and its shareholders to adhere to the Paris Agreement and their obligations under customary international law to prevent ADB's activities from causing or contributing to climate change harms.

II. Second, ADB's ESF must prioritize and facilitate the financing of renewable energy projects in a just and equitable way to meet energy demand throughout the Global South as a needed compliment to its prohibition on the financing of fossil fuel energy projects. As detailed in the Climate Emergency Amicus to Inter-American Court of Human Rights:

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[7] See fns. 8 and 9, *post*.
[8] IPCC, 2023: Summary for Policymakers. In: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, pp. 1-34, doi: 10.59327/IPCC/AR6-9789291691647.001
[9] IEA (2023), Net Zero Roadmap: A Global Pathway to Keep the 1.5 °C Goal in Reach, IEA, Paris, p. 16 (available at: www.iea.org/reports/net-zero-roadmap-a-global-pathway-to-keep-the-15-0c-goal-in-reach).
[10] IEA (2023), World Energy Outlook 2023, IEA, Paris, p. 139 (available at: https://www.iea.org/reports/world-energy-outlook-2023).
[11] Pierre Friedlingstein et al, "Global Carbon Budget 2023," Earth Syst. Sci. Data, 15 (2023), 5301–5369 (available at: https://doi.org/10.5194/essd-15-5301-2023).
[12] Climate Analytics (2023). 2030 targets aligned to 1.5°C (available at https://climateanalytics.org/publications/2030-targets-aligned-to-15c-evidence-from-the-latest-global-pathways).
[13] See fn. 12, *ante*, Climate Analytics, "2030 Targets."

> Protecting a livable climate and environment will require a fast and fair phase out of existing fossil fuel production alongside a fast and fair ramp up of energy efficiency and renewable energy solutions globally… Recent analysis from Climate Analytics … shows that fossil fuels can be replaced with better, safer alternatives, ramping up wind and solar energy deployment five-fold, to 1.5 terawatt (TW) per year by 2030, while using energy more efficiently and fairly, including curbing overconsumption by the world's wealthiest countries…[14]
>
> A fair phase-out must be guided by principles of justice and equity to leave no one behind. Not all fossil fuel producing countries have the same degree of dependence on fossil fuel revenues and ability to plan and implement economic diversification and just transition strategies, nor the same level of historical responsibility for driving climate pollution and exploitative models of resource extraction.[15] As over 150 economists detailed ahead of the 2023 "Summit for a New Financing Pact," wealthy countries have no shortage of resources to pay their fair share to support a global fossil fuel phase-out. Wealth taxes, Global South debt cancellation, and defunding fossil fuels are three key levers that could raise over $3 trillion per year in public funds for these efforts.[16] The phase-out of fossil fuels must be guided not only by economic capacity and historical responsibility, but also by environmental justice and respect for Indigenous sovereignty, prioritizing the need to end extraction practices that destroy health and livelihoods, or violate the rights of Indigenous Peoples to free, prior and informed consent. The energy transition must also ensure universal access to healthy, safe energy and protect workers and communities, while ensuring labor rights, decent work, and the clean-up of local environments.

Climate Emergency Amicus to Inter-American Court of Human Rights at 5-6 (attached as Exhibit 2).

In addition to climate change policy and human rights justifications, ADB's and its member state's obligations under international law provide compelling reasons for ADB's ESF to explicitly prioritize and facilitate financing of just and equitable renewable energy projects. The Paris Agreement requires that ADB and its member states party to the Paris Agreement ensure that ADB's finance flows address the climate and the poverty goals of developing States in an integrated way, including by ensuring universal access to sustainable energy through the "enhanced deployment" of renewable energy. Paris Agreement Articles 2, 9; preamble to UNFCCC Decision 1/CP.21 adopting the Paris Agreement; see Appendix C, *post*. As such, the ESF must include provisions that result in prioritization of financing for just and equitable renewable energy projects needed to meet energy demand throughout the Global South.

III. Third, the following 11 significant enhancements must be made to the final ESF to ensure ADB adequately assesses, avoids, and mitigates GHG emissions and their impacts from the projects it finances <u>prior to its financing and guarantee decisions</u>.

[14] See fn. 12, *ante*, Climate Analytics, "2030 Targets."
[15] Greg Muttitt and Sivan Kartha, "Equity, climate justice and fossil fuel extraction: principles for a managed phase out," Climate Policy 20, no. 8 (2020): 1024-1042 (available at: https://www.tandfonline.com/doi/abs/10.1080/14693062.2020.1763900).
[16] "Letter: Global North leaders must redirect trillions from fossils, debt, and the 1% to address global crises," Oil Change International, June 19 2023 (available at: https://priceofoil.org/2023/06/19/open-letter-globalnorth-governments-can-redirect-trillions-in-fossil-debt-and-superrich-harms-to-fix-global-crises-the-paris-summit-must-be-aboutbuilding-the-roadmap-to-do-so/).

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

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

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

   As detailed in Appendix B and D below, because the projects with GHG emissions ADB enables by providing financing or guarantees pose a severe risk of climate harm, ADB's, and its member state shareholders from the Global North's, due diligence[17] obligations arising under the Paris Agreement, and human rights and customary international law require that the ESF mandate ADB ensure climate impacts, and measures to avoid them, are assessed and implemented prior to financing approvals using a "best reasonably available and practiced methods" standard.[18] Furthermore, the ESF should specify that those methods include the processes required and performed under the National Environmental Policy Act (NEPA) in the United States applicable to quantifying GHG emissions, assessing their impacts, and analyzing

[17] Due diligence is defined as the care that a reasonable person exercises to avoid harm to other persons or their property. See Merriam Webster Dictionary definition of due diligence (available at: https://www.merriam-webster.com/dictionary/due%20diligence).

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

alternatives and feasible avoidance and other mitigation measures.[19] NEPA's requirements for climate change and GHG impact assessments, which are frequently practiced and implemented, constitute an example of reasonably best available and practiced methods standard that the ESF must require is met if it is to adhere to its due diligence obligations under international law. Adopting NEPA's requirements for GHG emissions and climate change would also help prevent ADB's directly and indirectly financed projects from imparting climate change harms, and help it significantly reduce the occasions remedial action is required as a result of its financing activities.

(2) Our second overarching comment is that as detailed in Appendix B and D, ADB and its Global North shareholders/member states have capabilities, control, and due diligence obligations and duties under international law - independent of ADB's clients/borrowers - to ensure borrower/client adherence to ADB policies and all aspects of the ESF prior to financing approvals to prevent climate change harms to communities from ADB's financing activities. ADB ensuring borrower/client adherence to ADB policies and all aspects of the ESF prior to financing approvals means ADB (i) ensuring client/borrower adoption mitigation measures in-line with the ESF's requirements to avoid impacts as far as economically and technically feasible, and (ii) when its clients/borrowers do not have the resources or expertise, to (a) finance requisite environmental and social impact and impact avoidance/mitigation analysis, or (b) advance funds to clients/borrowers for this analysis as part of a project's costs that could be forgiven if the project is not financed. These measures respect ADB client capacity and principles of "common but differentiated responsibilities" at the project assessment, diligence, and planning stages.

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

[19] Interim U.S. Council of Environmental Quality (CEQ) NEPA guidance effective January 8, 2023 for GHG emissions and climate change assessments, alternatives analysis and mitigation in environmental impact statements (available at: https://www.regulations.gov/document/CEQ-2022-0005-0001).

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

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

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

   Furthermore, the ESF must ensure and secure adoption of a mitigation hierarchy for GHG emissions and climate change impacts (including for impacts to affected communities – the ESF has no climate change impact mitigation guarantees or standards for a project's climate change impacts to affected communities), ***and the analysis needed to inform and support it***. This includes analyzing, and providing supporting analysis to document, prior to financing decisions (i) measures that can be taken to avoid GHG emissions to the furthest extent technically and economically feasible as a first priority; and (ii) after implementation of the avoidance measures, additional measures that can be taken to minimize any remaining GHG emissions to the furthest extent economically and technically feasible. In addition, it includes assessment of the full extent of a project's scope 1, 2, and 3 GHG emissions to assess the avoidance and minimization measures needed. The mitigation hierarchy requirement thus also requires the ADB ensure quantification of scope 1, 2, and 3 GHG emissions for each project prior to financing approval.

   We oppose the inclusion of carbon offsets in the ESF mitigation hierarchy and for the ESF to permit carbon offsets as permissible mitigation or impact avoidance measures for GHG emissions and climate change impacts. This is because carbon offsets are too commonly used as false solutions in lieu of feasible measures that can entirely avoid or substantially minimize GHG emissions from projects, and can result in enabling harmful projects with impacts that should and can be avoided. Furthermore, they too oft fail to meet necessary environmental integrity requirements pertaining to additionality, permanence, not overestimated, not claimed by another entity, and not associated with significant social and environmental harms. They also commonly

fail to respect and protect the ecosystem services indigenous peoples and affected communities depend upon, and their full rights, territories, sovereignty, and jurisprudence over the land, air, water, and biodiversity. Thus, we request the ESF (including from the definition of mitigation hierarchy at Draft ESF page 139, paragraph 30 of ESS1, paragraph 21 of ESS3 section IV(F), Annex 1 Section 3(iv), and A-2: Indicative Outline of an Environmental and Social Management Plan) remove offsets as permissible mitigation and explicitly prohibit there use for GHG emissions.

In addition, the ESF must specify that deferring adoption of a mitigation hierarchy for GHG emissions and climate change impacts until after project approval is impermissible when the project has clearly defined components. In the case in which assets to be developed, acquired or financed have yet to be defined at the time of ADB financing, the ESF must require that (1) a mitigation hierarchy for GHG emissions and climate change impacts, along with an adequate GHG emissions and climate change alternatives analysis (see section III(3), *post*), is provided to the ADB and public for a duration sufficient to allow for meaningful review, and (2) an adequate mitigation hierarchy is adopted, prior to ADB commitments to the development, acquisition, or financing that was not defined at the time of ADB financing.

3. **The ESF Must Be Amended to Enhance the GHG Emissions and Climate Change Impacts Alternatives Analysis Requirements.** As detailed in Section III, 1., *ante*., ADB must ensure its ESF contains requirements to ensure implementation of best reasonably available and practiced methods to assess and prevent climate change harms. Such a best reasonably available and practiced method is the GHG emissions and climate change alternatives analysis required by NEPA.[21] Accordingly, the ESF's GHG and climate change alternatives analysis requirement must be improved at a minimum to adopt NEPA's requirements, which include, but are not limited to, the following accompanied by analysis/study sufficient to support findings:

> (*1) for energy projects - comparison of the proposed energy project to a no project 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 minimize/significantly reduce GHG emissions and climate change impacts; (2) technical and economic feasibility analysis for all renewable energy sources; (3) full quantification of scope 1, 2, and 3 GHG emissions for the proposed project over its lifetime in comparison to all feasible alternatives that can avoid or minimize/significantly reduce GHG emissions; (*4) for the proposed project and all alternatives, best available social cost of GHG emissions estimates with monetary figures of the societal cost from incremental metric ton of GHG emissions including from physical damages (e.g., sea-level rise, infrastructure damage, human health effects, etc.)*; (5) full analysis of mitigation measures to reduce GHG emissions to the greatest extent economically and technically feasible; (6) an explanation of how the proposed action and alternatives would help meet or detract from achieving relevant climate action goals and commitments that looks beyond NDCs to limiting warming to 1.5°C; and (7) analysis, after affected community engagement, to explain the real-world effect, including those that will be experienced locally and disproportionately by vulnerable communities, associated with

[21] See fn. 19, *ante*.

GHG emissions from the proposed project that contribute to climate change (e.g. from sea-level rise, fire, drought, health impacts, etc.).

NEPA's GHG emissions and climate change alternatives analysis requirements contain a plethora of elements,[22] that if performed, provide powerful substantive tools needed to persuade banks and their directors to abandon financing for proposed carbon intensive energy projects, and to instead direct financing towards feasible renewable energy infrastructure that can meet a project's and or region's energy demand. Proper and supported performance of this analysis is also needed to significantly reduce GHG emissions from all projects ADB is contemplating financing, and to reveal the true cost (in monetary terms) of each ton of GHG emissions a project emits in comparison to its feasible alternatives to ADB, governments, communities in a project's region, and the public. Without conducting an alternatives analysis that meets NEPA's requirements, ADB cannot perform the necessary due diligence prior to financing decisions required by its obligations under international law, and necessary to prevent climate change harms and help significantly reduce the occasions where remedial action is required for climate change harms ADB causes or contributes to.

We note that the ADB management approved 2021 Energy Policy of the ADB Supporting Low-Carbon Transition in Asia and the Pacific (June 2023) ("2021 ADB Energy Policy") provides the following:

> *Accounting for externalities. ADB incorporates the social cost of carbon across all operations, including in the energy sector. The current unit value used by ADB is based on the empirical estimates of the global social cost of carbon reported by the Intergovernmental Panel on Climate Change, to be increased annually in real terms to allow for the potentially increasing marginal damage of global warming over time.[23] This unit value is used in economic analyses to estimate the value of avoided GHG emissions for projects that reduce emissions and the cost in damage created for projects that increase emissions. The unit value will be revised in the future as more and newer estimates of damages caused by climate change become available.*

2021 ADB Energy Policy at 15. The Draft ESF provides that Environmental and Social Impact Assessments will include an Analysis of Alternatives that "for each of the alternatives, quantifies the E&S risks and impacts to the extent possible, and attaches economic values where feasible." Draft ESF A-1 (vii) at 38. Considering the forementioned factors, including the ADB's due diligence obligations to prevent climate change harms under international law and the stronger social cost of carbon requirements in the ADB management approved 2021 ADB Energy Policy that indicates ADB will ensure quantification of the social cost of carbon for all projects, the ESF social cost of carbon requirements must be strengthened. Specifically, the ESF must be improved to require that prior to financing decisions for each project with anticipated GHG emissions, that ADB will ***ensure that*** along with ensuring completion of and publicly disclosing the aforementioned elements of an alternatives analysis, that it will also ensure completion of and publicly disclose social cost of GHG emissions estimates for all project alternatives using (a) the global social cost of carbon reported by the Intergovernmental Panel on Climate Change, and (b) best available methods to quantify social cost of GHG emissions to communities in the project's

[22] See fn. 19, *ante*.
[23] ADB. 2017. Guidelines for the Economic Analysis of Projects. Manila.

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

4. **The ESF Must Require Quantification and Public Disclosure of all of a Project's GHG Emissions (Scope 1, 2, and 3), and the Analysis Used to for this Quantification, *Prior to Project Financing*.** ADB's and its Global North shareholder's due diligence obligations under international law to assess and prevent harm require the ADB ensure that prior to project financing decisions, the full scope of a project's climate change impacts are assessed and disclosed. Including Scope 3 emissions in this analysis constitutes good international industry practice and best reasonably available and practiced methods for environmental and social impact assessments, as it is required and performed regularly under NEPA in the United States, and in many jurisdictions across the world. As such, the ESF must be amended to require the ADB to ensure not only that Scope 1 and 2 GHG emissions are quantified and disclosed for each project over its lifecycle prior to financing approval, but to clarify that quantification of Scope 3 emissions over a project's lifecycle is mandatory as well by removing the language that quantification of Scope 3 emissions is only required "*where relevant*". Furthermore, quantification of a project's Scope 1, 2, and 3 emissions prior to project financing is needed to determine whether the ADB must disclose and require ongoing monitoring and reporting of a project's GHG emissions (needed to determine whether a project's estimated GHG emission will cross over the ESF public disclosure and continuous monitoring/reporting thresholds), and to determine the carbon footprint of ADB's cumulative financing activities – especially in the instance where ADB's ongoing GHG monitoring and reporting requirements do not apply.

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

   - deferral of quantification of GHG emissions until after financing approval is not permissible, except for the case in which assets to be developed, acquired or financed have yet to be defined; In the case in which assets to be developed, acquired or financed have yet to be defined, the ESF must require that scope 1, 2, and 3 GHG emissions are quantified and provided to the ADB and public for a duration sufficient for meaningful review prior to commitments to the development, acquisition, or financing yet to be defined at the time of project financing;

   - that scope 1, 2, and 3 GHG emissions must be quantified not just for a new project, but for the portions of projects funded, including an addition to or expansion of an existing activity, operation, and or facility;

   - that scope 1, 2, and 3 GHG emissions must be quantified for all of a corporation's GHG emissions for current and future defined activities when ADB makes an equity investment in the corporation;

- that quantification and analysis of a project's Scope 1, 2, and 3 GHG emissions shall include, but not be limited to, all clearly recognized sources of GHG emissions, including for example from: (i) aspects of projects well known to emit GHG emissions; (ii) the loss of carbon sequestration due to the project; (iii) construction activities; and (iv) unplanned but predictable developments caused by the project that may occur later in time or at a different location and or caused by associated facilities.

5. **The ESF Must Require Public Disclosure of a Project's GHG Emissions 120 Days Prior to Financing Decisions[24] if a Project's Scope 1, 2, and 3 Emissions are Estimated to Exceed 20,000 tCO2-eq over a project's lifecycle, not just over 20,000 tCO2-eq per year.** This is necessary to ensure the public and ADB are aware of projects that will emit significant GHG emissions, and have opportunities to ensure avoidance of these emissions prior to project financing decisions. To further support this, although their threshold amounts are outdated and set too high considering the climate crisis, the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) have had a disclosure requirement based on tCO2-eq over a project's lifecycle (rather than tCO2-eq per year) in place since 2012 as standard practice all DFI's should replicate.[25]

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

6. **The ESF Must Be Amended to *Explicitly Require* Including Scope 3 GHG Emissions in the Cumulative GHG Emissions Threshold for determining the applicability of Ongoing Monitoring and Reporting of a financed project's GHG emissions – the decision to include Scope 3 emissions should not be discretionary.** For many projects and their components, such as for airports, projects that contract out transportation, and projects that source materials that are GHG intensive to produce and or transport depending on the sourcing decisions (e.g. when a livestock operation in Europe or Asia sources GHG intensive cereals for livestock feed from South America), a significant percentage and amount of GHG emissions are Scope 3 emissions that can be avoided or minimized if assessed and disclosed. In order for ADB to adhere to its due diligence obligations under international law to avoid causing and contributing to climate change harms, Scope 3 emissions must be included in the quantification of GHG emissions prior to project financing, be counted towards determining whether the 20,000 tCO2-eq per year threshold for ongoing and continuous monitoring of GHG emissions is triggered, and included in the GHG emissions monitoring and reporting totals should the 20,000 tCO2-eq per year threshold be exceeded.

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

[25] IFC's Access to Info Policy plainly states that prior to project financing, a project's GHG emissions must be publicly disclosed when these amounts will exceed 25,000 tCO2-eq over a project's life cycle, not just per year. IFC Access to Info Policy at ¶ 31 (a)(v).

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

7. **The ESF must require a GHG emissions and climate change cumulative impacts assessment is conducted that accounts not only for a country's National Determined Contributions (NDCs), but also the Paris Agreement's warming objectives and other applicable regional, national and global GHG emission plans.** This is because ADB's due diligence requirements under international law[26] require an analysis of how a project it is contemplating for financing, and its alternatives, would help meet or detract from achieving NDC's and relevant climate action goals and commitments, including limiting global warming to 1.5°C.

8. **The ESF must specify that 120 days prior to ADB's financing decisions, for each project the ADB finances or guarantees, public disclosure and opportunity for public review of the full GHG emissions and climate change impact and mitigation analysis, alternatives analysis, and mitigation measures, and all supporting studies for these analysis and measures, is required.** For quite some time, it has been universally accepted that at the minimum, the opportunity for public review of a project and its environmental and social impact assessments prior to project approval is a central practiced component of an environmental assessment.[27] This is demonstrated by the inclusion of public disclosure, and opportunity for public review of, a project and its environmental impact analysis well prior to project approvals in the vast majority of countries' environmental and social impact assessment laws and within international organizations.[28] As documented in 2018 United Nations Environment Programme (UNEP) Report with examples from states around the world:

> *There is a wide consensus that public participation constitutes a fundamental element of EIAs – or in fact even that EIA is not an EIA without public participation. It is also widely recognized that public participation is not only a goal in itself, but that it is a key to accurate and effective environmental assessments…Due to the fact that public participation is considered an integral part of the EIA process, all countries have enacted some kind of legal measure for public participation in EIAs…. The review stage of the EIA process, i.e. the review of the EIA report prior to the decision on whether a project can go ahead taking environmental considerations into account, is a key element of the EIA process. The objective*

[26] See Appendix B & D, *post*, detailing ADB's due diligence obligations under international law to ensure the ESF uses best reasonably available and practiced methods, such as those required under NEPA, to perform a GHG and climate change cumulative impact analysis in this manner. NEPA contains such a requirement (see fn. 19, *ante*).
[27] See e.g., UNEP, *Assessing Environmental Impacts: A Global Review of Legislation* (2018) (hereinafter "UNEP EIA Report") at Chapter 3. EIA systems – Legal and institutional frameworks for EIAs, Section 3.2.3 Public participation at 50-66.
[28] See UNEP EIA Report at 50-66.

is to verify whether the information provided is sufficient and adequately presented so as to form a sound basis for decision-making. Public participation, comments from the public on the EIA report are an integral part of the review process in many countries.[29]

While the UNEP Report documents that there is no general agreement in laws or the literature on what constitutes good practice in relation to public participation in Environmental Impact Assessments (EIAs), it finds most legislation in Global North and South states around the world make it mandatory to publicly publish information on disclosing a project when an application is submitted or the project is being considered, to make the draft EIA reports publicly available, and to provide the opportunity to submit comments on the EIA reports and project well prior to project approval.[30] In addition to being included in NEPA and EU's EIA Directive (both included as examples of guidance for good international industry practice and best international practice for developing environmental as social impact assessment and studies in IFC's Guidance Notes to IFC Performance Standard 1),[31] these requirements are common place in international environmental treaties.[32]

Because of the Climate Crisis (see Appendix A, *post*; pages 1-3, *ante*), it is clear that for all projects that cross a ESF significance threshold 20,000 tCO2-eq of scope 1, 2, and 3 emissions over a project's lifecycle or 20,000 tCO2-eq of scope 1, 2, and 3 emissions per year, the ESF must specify that the GHG emissions analysis and mitigation measures for the project must be disclosed to the public on ADB's website to provide opportunity for review and comment at least 120 days prior to ADB's, and ADB financed financial intermediaries', financing decisions. In addition, we more broadly request that the ESF specify that all project's (Category A, B, C, and trade finance, financial intermediary, advisory services, etc.) environmental and social impact assessments and analysis, regardless of their categorization, must be publicly disclosed on the ADB website a minimum of 120 days prior to ADB's financing or a ADB financed financial intermediaries' decision for a project. This disclosure period must be further extended when it is apparent consultation with affected communities will be necessary, so as to adequately inform these communities about project impacts and to ensure a consultation process occurs, and is adequate and meaningful.

These improvements must be made because (a) they are necessary to allow affected communities and the concerned public to be informed, to be consulted, and to provide the review and input necessary for ADB to adhere to its due diligence obligations under international law (See Appendix B and D, *post*); and (b) neither the Draft ESF or ADB's Access to Information Policy

[29] UNEP EIA Report at 50-51, 65-66.
[30] UNEP EIA Report at 50, 53, 55, 60-61.
[31] IFC's Guidance Notes: Performance Standards, Guidance Note 1 at GN23, 25, 58 at 10-11, 19, 49 (updated June 14, 2021) (directing readers to the Guidance Note 1 bibliography listing (1) NEPA and (2) EU's Environmental Impact Assessment (EIA) Directive (European Commission. 2011, Environmental Impact Assessment, Directorate-General for the Environment, European Commission, Brussels, available at: http://ec.europa.eu/environment/eia/eia-support.htm).
[32] See 'Espoo' Convention on Environmental Impact Assessment in a Transboundary Context (adopted 25 February 1991, entered into force 10 September 1997) 1989 UNTS 309 (The member states of the UN Economic Commission for Europe that are party to this treaty comprise of 56 States located in Europe, Northern America and Central Asia); Protocol on Environmental Protection to the Antarctic Treaty, Annex I arts 3.2, 3.3, 3.6, 6; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1988 (Aarhus Convention), Art. 6 (see also Art. 1, 3, 5); Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Escazú, Costa Rica, 4 March 2018 (Escazú Agreement), Art. 7 (see also Art. 1, 5, 6).

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

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

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

In addition, ADB's ESF must make clear that the confidentiality and commercial sensitivity provisions in ADB's Access to Information Policy (September 2018) do not allow ADB to not publicly disclose the full GHG emissions and climate change impact and mitigation analysis, alternatives analysis, and mitigation measures, and all supporting studies, for each project the ADB finances or guarantees 120 days prior to financing decisions. This is because the components of a GHG impact and mitigation analysis, routinely and fully disclosed to the public for review as required by environmental assessment laws all over the world,[35] should not be shielded from public disclosure.

[33] ADB's Safeguard Policy Statement (June 2009) at ¶ 53.
[34] IFC Access to Information Policy (2012) at ¶ 34.
[35] See fn. 27, *ante*.

We bring this to ADB's attention and make this request, because impermissibly, a trend at IFC is that contrary to IFC's disclosure requirements, IFC management frequently cites the commercial sensitivity and confidentiality provisions of its Access to Information Policy (2012) to excuse not disclosing certain GHG emissions analysis and mitigation measures.[36] ADB's Access to Information Policy does not allow for, and the ESF should not allow for, withholding of this information central to implementation of the ESF.

ADB should have no supportable basis to justifiably claim that any of the Exceptions to Disclosure found in its Access to Information Policy, including in regards to commercial sensitivity and confidentiality, shields disclosure of GHG emissions and mitigation analysis.[37] And more generally, for ADB to ensure its own accountability and to allow the concerned public and stakeholders to address a situation where the ADB does claim any sort of confidentially provisions as a basis for non-disclosure for analysis or mitigation pertaining to any environmental and social impacts, the ESF must require ADB to publicly disclose a full and supported justification for the non-disclosure.

Disclosure of GHG emissions impact analysis and mitigation, including all supporting studies and documents with GHG emissions and mitigation analysis, sufficiently prior to financing approval provides the opportunity for public review and input that has long been established as a key element to meeting a good international industry practice standard at the risks and impacts assessment stage. Moreover, it is critical to ADB meeting its due diligence obligations under international law and ensuring projects it finances adequately quantify, assess the impacts of, and mitigate GHG emissions. Such public disclosure has also been accepted by other DFIs as central to informed decision making, important to managing environmental, social, and governance risks, and "fundamental to fulfilling [their] development mandate[s]." See, e.g., IFC Access to Information Policy at ¶¶ 3, 8, E&S Policy at ¶¶ 13, 14. It is a necessary check to best ensure a project meets the ESF's requirements and thus avoids or mitigates a project's GHG emissions as much as economically and technically feasible. *Id*.

9. **The ESF must specify that prior to its Financial Intermediary (FI) client's decisions to invest in a project, that the FI adheres to the ESF's requirements for public disclosure, and providing opportunity for public review, of the full GHG emissions and climate change impact and mitigation analysis, alternatives analysis, and mitigation measures as detailed in Sections III.1.-8. above. In addition, the ESF must specify that during the appraisal process and prior to approving financing for FI investments, ADB is required to ensure that the FI client ensures adherence to all requirements of the ESF.** In the context of climate change impacts, this requires the ESF specifies amongst other things, that the FI must publicly disclose, and provide opportunity for public review, of the full GHG emissions and climate change impact

[36] We observe this occurs mainly in the context of when the GHG impact assessment information initially posted on the IFC data portal contains facially inadequate GHG emissions analysis or mitigation, and or when a contemplated project will have significant GHG emissions, and at the request of the public or IFC directors, IFC management conducts or secures supplemental analysis from the client, its staff, or its own consultants. Conversation with IFC Management, member state directors, and member state agencies that provide direction to directors, reveals this supplemental analysis still falls well short of what the IFC's board adopted policies and its due diligence obligations under international law require. This further highlights the need for and importance of disclosure prior to project financing.

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

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

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

In addition, as a necessary part of ensuring its FI clients meet all of the ESF's requirements applicable to ADB direct investments, the ESF must be amended to specify ADB is required to ensure the FI understands, and agrees in its financing agreement with the ADB, that the FI is required to disclose its contemplated investments and their environmental impact assessments (including for GHG emissions and climate change) to the ADB and public 120 days prior to its financing decisions. This would provide the public and ADB, with needed safeguards, and notice and opportunity for review of FI contemplated investments prior to the FI's financing decision. In addition to ensuring quantification and reduction of GHG emissions from FI projects in line with the ADB's policies, ADB ensuring such FI disclosures and release of impact assessments to the ADB and public prior to FI financing commitments could substantially help ADB prevent its FI clients from impermissibly using ADB funds to finance fossil fuel or other harmful projects without public or ADB knowledge. *See* e.g., IFC FI investments resulting in financing of coal powerplants: "CAO, *Compliance Investigation Report, IFC Investments in Rizal Commercial Banking Corporation (RCBC*), The Philippines, November 19, 2021" (RCBC case); *see also* Complaint to the CAO for FI financing of Jawa 9 and 10 coal fossil fuel projects "Complaint concerning IFC investment KEB Hana Indonesia Rights Issue IV, Project No 42034" (Jawa 9 and 10 case).[38] In the RCBC and Jawa 9 and 10 cases, if the IFC took necessary measures to ensure its FI clients disclosed their contemplated investments in coal powerplants and their impact assessment documents to the IFC and public prior to FI financing, the IFC and public could have been made aware of, and prevented, IFC's FI client from investing in these projects in the first instance.

It is well documented DFI financing of FIs remains a particular risk in terms of channeling funds to coal and other fossil fuel projects.[39] As such, the recent External Review of IFC/MIGA emphasized the need for IFC to "further clarify how it will assure itself of FI E&S performance, and strengthen its due diligence and supervision of FI clients," as "significant gaps remain in IFC's ability to ensure that FI clients are adequately assessing E&S risks in their portfolios and ensuring the application of the IFC Performance Standards in their higher-risk investments." External Review Report ¶ 8.

Specifying in its financing agreement with FIs, that public disclosure of the FI's investments and their environmental and social impact assessments prior to FI financing in accordance with the disclosure timeliness in ADB's board adopted policies is required as part of FI's requisite

[38] RCBC case (available at: https://www.cao ombudsman.org/sites/default/files/downloads/CAO%20Compliance%20Investigation_RCBC-01_Philippines_Nov%202021.pdf); Jawa 9 and 10 case (available at: https://www.inclusivedevelopment.net/wp-content/uploads/2023/09/Java-9-and-10_CAO-complaint.pdf).
[39] *Id*.

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

10. **The ESF Must Specify that ADB Ensures that in Providing its Advisory Services, that ADB Adheres, or Ensures Adherence, to the ESF Requirements Applicable to GHG Emissions and Climate Change Impacts.** Advice provided by ADB contributes to achieving the ultimate implementation of a project and a project securing funding. It is also critical to a project being designed to avoid significant reductions in local and global environmental and social climate change harms. ADB's due diligence requirements to prevent harm require the ESF to specify that in providing its advisory services, that ADB adheres, or ensures adherence, to the ESF requirements applicable to GHG emissions and climate change impacts. This means ADB is required to ensure, and the ESF must be improved to specify, that when ADB advises on a project, it provides its client with, or ensures: quantification of scope 1, 2, and 3 GHG emissions from the project, a GHG alternatives analysis for the project consistent with NEPA's requirements, an analysis as to indirect impacts of the contemplated project's GHG emissions on affected communities, and a mitigation hierarchy analysis for the project's GHG emissions and their impacts. See Sections III.1.-8., *ante* (detailing these requirements). In addition, this means that the ESF must also be improved to specify that ADB's contemplated advisory services that may result in a project with greater than 20,000 tCO2-eq of scope 1, 2, and 3 emissions over its lifecycle, must be publicly disclosed on the ADB's website prior to ADB approval as required by ADB's due diligence obligations. See Section III. 8., *ante* (detailing ADB's disclosure requirements).

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

11. **The ESF Must Specify that ADB Ensures that Prior to Approving Trade Finance[40] or any investment products with shorter tenor including short-term loans, guarantees, and trade finance products with maturities of up to three years, that ADB Adheres, or Ensures Adherence, to the ESF Requirements Applicable to GHG Emissions and Climate Change**

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

Impacts. This means ADB is required to ensure that when it provides trade finance or any investment products with shorter tenor to a client, it ensures adherence to all ESF requirements, including quantification of scope 1, 2, and 3 emissions from the project financed, a GHG alternatives analysis for the project consistent with NEPA's requirements, an analysis as to indirect impacts of the contemplated project's GHG emissions on affected communities, a mitigation hierarchy analysis for the project's GHG emissions and their impacts, and adoption of all requisite ESF mitigation measures, including a mitigation hierarchy for GHG emissions and climate change impacts. See Sections III.1.-8., *ante* (detailing these ESF requirements). In addition, this means ADB's contemplated trade finance products or investments that may cause or contribute to greater than 20,000 tCO2-eq of scope 1, 2, and 3 emissions over a project's lifecycle, must be publicly disclosed on the ADB's website prior to ADB approval as required by ADB's due diligence obligations. See part 8, *ante* (detailing ADB's disclosure requirements).

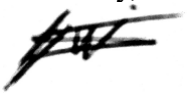
In sum and unlike peer MDB's like the IFC,[41] the draft ESF is silent on the applicability of its requirements to trade finance and short-term investment products. ADB's due diligence requirements to prevent harm require the ESF to specify that prior to approving trade finance transactions and products,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

Conclusion

Thank you for considering our comments. The three sets of improvements to ADB's draft ESF above are necessary for ADB's financing and guarantee activities to come into alignment with the Paris Agreement's 1.5°C warming limitation objectives, and for the ADB and its global north shareholders to comply with their obligations under international law. Moreover, they are needed for ADB to avoid causing and contributing to irreversible severe harm to communities and millions of people all over the world and in its investment regions, especially those who are differentially or disproportionately affected by changing climate.

We look forward to your timely response and engagement with us on these issues. Please confirm receipt of this submission, and let us know if we can provide any additional information.

Sincerely,



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

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Enclosures: Exhibits 1 and 2

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Appendix A: Summary of Current and Expected Climate Change Harms

Global warming has already resulted in more frequent and severe heat waves, wildfires, supercharged storms, atmospheric rivers, and extended droughts resulting in catastrophic harms and loss of life. Weather events in 2022 broke records and devastated communities, ecosystems, and infrastructure. Deadly floods displaced millions in Pakistan, Nigeria, South Africa, and Australia; severe heat waves struck India, China, Europe, the U.S., and East Asia; and the Horn of Africa experienced its worst drought in 40 years.[42] And as documented by the IPPC:

> *Approximately 3.3–3.6 billion people live in contexts that are highly vulnerable to climate change…Regions and people with considerable development constraints have high vulnerability to climatic hazards. Increasing weather and climate extreme events have exposed millions of people to acute food insecurity and reduced water security, with the largest adverse impacts observed in many locations and/or communities in Africa, Asia, Central and South America, LDCs, Small Islands and the Arctic, and globally for Indigenous Peoples, small-scale food producers and low-income households. Between 2010 and 2020, human mortality from floods, droughts and storms was 15 times higher in highly vulnerable regions, compared to regions with very low vulnerability.*
>
> *In all regions increases in extreme heat events have resulted in human mortality and morbidity (very high confidence). The occurrence of climate-related food-borne and water-borne diseases (very high confidence) and the incidence of vector-borne diseases (high confidence) have increased. In assessed regions, some mental health challenges are associated with increasing temperatures (high confidence), trauma from extreme events (very high confidence), and loss of livelihoods and culture (high confidence). Climate and weather extremes are increasingly driving displacement in Africa, Asia, North America (high confidence), and Central and South America (medium confidence), with small island states in the Caribbean and South Pacific being disproportionately affected relative to their small population size (high confidence).*
>
> *Climate change has caused widespread adverse impacts and related losses and damages to nature and people that are unequally distributed across systems, regions and sectors. Economic damages from climate change have been detected in climate-exposed sectors, such as agriculture, forestry, fishery, energy, and tourism. Individual livelihoods have been affected through, for example, destruction of homes and infrastructure, and loss of property and income, human health and food security, with adverse effects on gender and social equity. (high confidence) … In urban areas, observed climate change has caused adverse impacts on human health, livelihoods and key infrastructure. Hot extremes have intensified in cities. Urban infrastructure, including transportation, water, sanitation and energy systems have been compromised by extreme and slow-onset events, with resulting economic losses, disruptions of services and negative impacts to well-being. Observed adverse impacts are concentrated amongst economically and socially marginalised urban residents. (high confidence).*

[42] Banking on Climate Chaos, Fossil Fuel Finance Report 2023 (https://www.bankingonclimatechaos.org/).

> *Global warming will continue to increase in the near term (2021-2040) mainly due to increased cumulative CO2 emissions in nearly all considered scenarios and modelled pathways… Continued emissions will further affect all major climate system components. With every additional increment of global warming, changes in extremes continue to become larger… With further warming, every region is projected to increasingly experience concurrent and multiple changes in climatic impact-drivers. Compound heatwaves and droughts are projected to become more frequent, including concurrent events across multiple locations (high confidence). Due to relative sea level rise, current 1-in-100 year extreme sea level events are projected to occur at least annually in more than half of all tide gauge locations by 2100 under all considered scenarios (high confidence). Other projected regional changes include intensification of tropical cyclones and/or extratropical storms (medium confidence), and increases in aridity and fire weather (medium to high confidence).*

Synthesis Report of the IPCC Sixth Assessment Report (AR6), March 2023, Summary for Policy Makers at 5-6, 12-13 (available at www.ipcc.ch/report/ar6/syr/).

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

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

International law has long provided that if a state breaches an obligation established by a treaty or customary international law it can be held responsible in international tribunals or applicable domestic courts.[43] Courts have found that "when member States participate in [an] international organization's decision-making processes, they are [ ] carrying out state acts that have to comport with their international obligations."[44] The International Court of Justice made this finding in *FYROM v. Greece*.[45] In a dictum in *Southern Bluefin Tuna*, the International Tribunal for the Law of the Sea also found it could examine state conduct within an international organization to determine compliance with its legal obligations.[46] "[These courts and] the European Court of Human Rights indicate that when states make decisions within an international organization, they must adhere to their human rights obligations and substantive obligations related to the organization's area of competence." [47] Scholars in the field have come to similar conclusions. Barros persuasively applies those cases to the governing boards of international financial institutions, arguing that member states have due diligence obligations to take all measures to ensure that they know about risks to human rights before approving loans, mitigate those risks when making decisions, and ensure that loans already issued conform to their human rights conditions."[48] Kerr and Barros also point out that the Articles on State Responsibility—which were applied by the International Court of Justice in *FYROM v. Greece*— indicate that the conduct of state representatives when decision-making at international organizations can be attributed to a state and independently assessed. [49]

II. ADB's General Obligations Under International Law

[43] Kerr, B. P. (2020), Regulating the Environmental Integrity of Carbon Offsets for Aviation: the International Civil Aviation Organization's 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*.
[44] Kerr, B.P., All Necessary Measures: Climate Law for International Shipping, *Virginia Journal of International Law* (Accepted/In press; Note the page and footnote numbering may differ in the published copy. This letter cites to the pre-publication version of this article, which is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4549961 or upon request if not available after publication) (hereinafter "Kerr, All Necessary Measures") at 50-51, and fn. 254; Ana Sofia Barros & Cedric Ryngaert, The Position of Member States in (Autonomous) Institutional Decision-Making, 11 INT'L ORG. L. REV. 53 (2014) (hereinafter "Barros & Ryngaert") at 53, 55.
[45] Kerr, All Necessary Measures at 50-51, and fn. 255; Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece), Judgment, 2011 I.C.J. Rep. 644 (Dec. 5) [hereinafter FYROM].
[46] Kerr, All Necessary Measures at 51, and fn. 261; Southern Bluefin Tuna (N.Z. v. Japan; Austl. v. Japan), Cases Nos. 3 and 4, Order of Aug. 27, 1999, ITLOS Reports 1999 [hereinafter Southern Bluefin Tuna], ¶ 50; See, Moritaka Hayashi, The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the International Tribunal for the Law of the Sea, 13 TULANE ENV. L. J. 361 (2000).
[47] Kerr, All Necessary Measures at 9, and fn. 32, 53; FYROM, Southern Bluefin Tuna at ¶ 50, Gasparini v. Italy and Belgium, App. No. 10750/03, (May 19, 2009), https://hudoc.echr.coe.int/eng?i=001-92899; Perez v. Germany, App. No. 15521/08 (Jan. 6, 2015), https://hudoc.echr.coe.int/eng?i=001-151049; Klausecker v. Germany, App. No. 415/07 (Jan. 6, 2015), https://hudoc.echr.coe.int/eng?i=001-151029).
[48] Kerr, All Necessary Measures at 53-54, and fn.275; Ana Sofia Barros, Governance as Responsibility: Member States as Human Rights Protectors in International Financial Institutions (2019) (hereinafter "Barros") at Chapter III; *see also* Pasquale De Sena, International Monetary Fund, World Bank and Respect for Human Rights: A Critical Point of View, 20(1) ITALIAN Y.B. INT'L. L. 247, 257 (2010).
[49] Kerr, All Necessary Measures at 54, and fn. 278; Barros at 94.

International organizations,[50] including the ADB, can also be held responsible for breaching their obligations, including those established by a treaty or customary international law.[51] This has happened numerous times, in various domestic courts.[52] The ILC DARIO Articles[53] provide a structural roadmap for evaluating an organization's obligation established by a treaty or customary international law. International Law Commission, 'Draft Articles on the Responsibility of International Organizations with commentaries,' Yearbook of the International Law Commission (2011), vol. II, Part Two, UN Doc. A/66/10 (hereinafter "ILC DARIO Articles").[54] ILC DARIO Article 10 provides that there 'is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.'[55] In addition, "the ICJ found long ago that international organizations are bound by 'obligations incumbent upon them under general rules of international law." [56] And even in the absence of an express textual indication that an international organization is bound by a treaty's obligations, an international organization is transitively bound to the same treaty obligations as their members, in a way that avoids or resolves treaty conflicts between organizations and their member states.[57] Thus, for example, the ADB itself must adhere to its member states' obligations under Article 4 of the UNFCCC to reduce or limit GHG emissions and their obligation under Articles 2 and 3 of the Paris Agreement to take ambitious efforts to hold global warming to less than 1.5°C.

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

[51] Kerr, ICAO at 3, and fn. 23 (citing Jan Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act,' (2017) 28(4) European Journal of International Law, 1137).

[52] Kerr, B. (2022). Mitigating the Risk of Failure: Legal Accountability for International Carbon Markets. Utrecht Law Review, 18(2), 145-161 (hereinafter "Kerr, Legal Accountability Int. Carbon Markets") at 152, fn. 57 and 58 (citing August Reinisch, *International Organizations Before National Courts* (2nd edn, Cambridge 2009) 28, notes 124-130 (listing and discussing cases), and fn. 61 (citing *Jam v International Finance Corp*, 586 US __ (2019) 5-6; Clemens Treichl and August Reinisch, 'Domestic Jurisdiction over International Financial Institutions for Injuries to Project-Affected Individuals: The Case of Jam v International Finance Corporation' (2019) 16 International Organizations Law Review 133).

[53] International Law Commission, 'Draft Articles on the Responsibility of International Organizations with commentaries,' Yearbook of the International Law Commission (2011), vol. II, Part Two, UN Doc. A/66/10 (hereinafter "ILC DARIO Articles").

[54] Kerr, ICAO at 3.

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

[56] Kerr, Clear Skies at 112, and fn. 134 (citing *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, I.C.J. Reports 1980, p. 73, para. 37. *Reparation for Injuries*, note 50, 174).

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

<u>Appendix C</u>: ADB's and its Shareholder's Obligations Under International Law for the ADB ESF to explicitly prohibit financing of and guarantees/insurance for all upstream, midstream, and downstream fossil fuel projects

As required by the Paris Agreement and customary international law that the ADB and its global north member state shareholders are obliged to adhere to,[58] the ADB's ESF Framework must explicitly prohibit financing of and guarantees/insurance for all upstream, midstream, and downstream fossil fuel projects. These requirements are fully established by the analysis by Cook and Viñuales, and detailed in OCI's and BCA's December 18, 2023 OCI drafted Amicus brief to the Inter-American Court of Human Rights regarding the request from Chile and Columbia for an advisory opinion regarding "*Climate Emergency and Human Rights*" (attached as Exhibit 2), which the undersigned incorporate by reference.[59] In summary, Cook and Viñuales demonstrate that:

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

Cook and Viñuales, including at paragraph 265; Cook and Viñuales further establish that ADB has a duty for its financing activities to result in enhanced deployment of renewable energy. In summary, they demonstrate that:

> In the light of the language of Articles 2 and 9 in particular, it is also clear that the ADB and it shareholder State parties to the Paris Agreement should seek to ensure that ADB's finance flows address the climate goals and the poverty goals of developing States in an integrated way, including the need to ensure universal access to sustainable energy in developing countries, in particular in Africa, through the "enhanced deployment" of renewable energy, as indicated in the preamble to UNFCCC Decision 1/CP.21 adopting the Paris Agreement.

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

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

[59] International Obligations Governing the Activities of Export Credit Agencies in Connection with the Continued Financing of Fossil Fuel-Related Projects and Activities, Legal Opinion, Kate Cook and Jorge E. Viñuales, March 24, 2021, attached as Exhibit 1 and available at: https://priceofoil.org/2021/05/04/eca-legal-opinion/ (hereinafter "Cook and Viñuales"); The analysis in Appendix B, *ante*, makes it clear that Cook's and Viñuales' opinion applies beyond export credit agencies to international organizations like the ADB, and its Member State shareholders.

<u>Appendix D</u>: ADB's and its Shareholder's Due Diligence Obligations Under the Paris Agreement, and human rights and customary international law, require that the ESF contains requirements that ADB ensure use of best readily available and necessary methods to adequately assess, avoid, and mitigate GHG emissions and their impacts from projects prior to its financing and guarantee decisions.

I. Summary / Overview

The ADB, and also its member state shareholders, have obligations under international law that that they can be held accountable to in international tribunals and domestic courts. See Appendix B, *ante*.

As it pertains to climate change, the obligations under international law that the ADB and its member states must adhere, include their due diligence[60] obligations arising under the Paris Agreement and human rights and customary international law. Because the projects with GHG emissions ADB enables by providing financing or guarantees pose a severe risk of climate harm, these due diligence obligations require ADB and its member states to ensure that its ESF requires climate change impacts, and measures to avoid them, to be assessed and implemented prior to financing approvals using best reasonably available and practiced methods.[61] Those methods include the processes required and practices performed under the National Environmental Policy Act (NEPA) in the United States applicable to quantifying GHG emissions, assessing their impacts, and analyzing alternatives and feasible avoidance and other mitigation measures because these methods are frequently and routinely practiced and implemented.[62]

The ADB's ESF thus must explicitly adopt NEPA's requirements for climate change and GHG impact assessments as a minimum threshold for the reasonably best available methods that the ADB must meet if it is to adhere to its due diligence obligations under international law. Adopting NEPA's requirements for GHG emissions and climate change would also help prevent ADB's directly and indirectly financed projects from imparting climate change harms, and help it significantly reduce the occasions remedial action is required as a result of its financing activities.

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

[60] Due diligence is defined as the care that a reasonable person exercises to avoid harm to other persons or their property. See Merriam Webster Dictionary definition of due diligence, available at: https://www.merriam-webster.com/dictionary/due%20diligence.

[61] As detailed in Appendix C, *ante*, ADB's due diligence obligations extend beyond adequate study prior to project approvals to prevent its financing activities from causing or contributing to climate change harms. They also include ADB taking substantive measures, such ceasing all direct and indirect financing of fossil fuels.

[62] See fn. 19, *ante*: Interim (CEQ) NEPA guidance effective January 8, 2023 for GHG emissions and climate change assessments, alternatives analysis and mitigation in environmental impact statements.

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

A more detailed overview of ADB's due diligence obligations under the Paris Agreement and customary international law with supporting citations is provided below in Sections II-IV to this Appendix D.

II. ADB's and its Member State's Due Diligence Obligations under the Paris Agreement

As detailed in Appendix B, the IFC and its Members States party to the Paris Agreement, are obliged under international law to adhere to the Paris Agreement's requirements. See Appendix B., *ante*.

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

The temperature goals set out in the Paris Agreement, including as applied to finance flows, are universally binding norms for the behavior of international organizations and their member states.[63] They do not permit members state parties to follow different, less ambitious goals.[64] "Finance flows which are inconsistent with Article 2(1)(c) are by definition those which undermine the goals of the Paris Agreement," including the warming limitation objectives in Article 2(1)(a).[65] Thus, the language of Article 2 reflecting the object and purpose of the Paris Agreement, together with the object and purpose of the UNFCCC which the Paris Agreement supports, requires that all relevant finance flows are assessed for Article 2(1)(a) and (c) consistency, including those most likely to be inconsistent with Article 2's temperature goals.[66] As applied to the ADB, the consistency of finance flows with the Article 2 pathways can only be assessed effectively if, prior to ADB's financing approval, a project's scope 1, 2 and 3 emissions and their impacts are fully quantified and taken into account, GHG/climate change alternatives analysis is conducted, and mitigation measures are assessed and implemented that can avoid and minimize a project's GHG emissions to the furthest extent economically and technically feasible.[67]

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[63] International Obligations Governing the Activities of Export Credit Agencies in Connection with the Continued Financing of Fossil Fuel-Related Projects and Activities, Legal Opinion, Kate Cook and Jorge E. Viñuales, March 24, 2021, available at: https://priceofoil.org/2021/05/04/eca-legal-opinion/ ("Cook and Viñuales") at ¶¶ 60, 70-72, 85, 265(h); See, e.g. World Bank Group, The World Bank Group's Approach to Paris Alignment, Washington, D.C., March 16, 2023 (http://documents. worldbank.org/curated /en/099658203162320142/IDU1598309ef195cc148fd195421981d12bf8bf6; 2018 MDBs' Joint Declaration, The MDBs' alignment approach to the objectives of the Paris Agreement: working together to catalyse low-emissions and climate-resilient development at 1 (https://thedocs. worldbank.org/en/doc/78414 15438063 48331-0020022018/original/JointDeclarationMDBsAlignment ApproachtoParisAgreementCOP24Final.pdf).
[64] Cook and Viñuales at ¶60
[65] Cook and Viñuales at ¶70
[66] Cook and Viñuales at ¶72
[67] *Id*.; See *also*, Cook and Viñuales at ¶108

Article 3 further requires specific assessment of all relevant finance flows. It requires Parties "to *undertake and communicate ambitious efforts*," including in regards to finance, with a view to achieving the Article 2 purposes.[68] Article 4 (1) provides "[i]n order to achieve the long-term temperature goal set out in Article 2, Parties aim … to undertake rapid reductions [in GHG emissions] thereafter in accordance with *best available science*."

State parties are required to implement the Paris Agreement in good faith, [69] which means that action which directly threatens, undermines, or frustrates the achievement of the Article 2 goals – namely the prevention of dangerous climate change - exceeds the margin of discretion allowed by the Paris Agreement.[70] It follows from Article 2 of the Paris Agreement, as read with Articles 3, 4 and 9 in particular that (1) States, as an aspect of their requisite good faith implementation, have an obligation of due diligence that encompasses undertaking *ambitious efforts* in regards to financial flows to meet the Paris Agreement's objectives.[71] Furthermore, these efforts must be informed by *best available science* to assess whether finance flows, including those for which the ADB is responsible, are consistent with the global carbon budget.[72] This not only means the ADB must ensure best reasonably available commonly practiced science, such as the methods used under NEPA, are used – prior to financing approval for each project - to quantify a project's scope 1, 2 and 3 emissions and their impacts, conduct a GHG/climate change alternatives analysis, and assess the mitigation measures that can avoid and minimize a project's GHG emissions to the furthest extent economically and technically feasible. It also means prior to a financing approval, ADB must actually ensure alternatives and mitigation measures are adopted to avoid GHG emissions that good faith due diligence shows to be economically and technically feasible and that allows for achievement of the project purpose. Thus, for a hypothetical example – not taking into consideration that the ADB's ESF should prohibit financing of fossil fuel energy infrastructure anyway for the reasons in the text of this letter and Appendix C - in the context of contemplating financing fossil fuel energy projects, such as a natural gas plant which would emit very large quantities of GHG emissions no matter the plant's configuration, efficiency, or mitigation measures, if an alternatives analysis shows it would be technically and economically feasible for renewable energy infrastructure to meet a region's energy demand, the Paris Agreement requires the ADB abandon financing for the contemplated fossil fuel project and facilitate financing for renewable energy options instead.

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

[68] Cook and Viñuales at ¶ 75.
[69] Cook and Viñuales at ¶ 79 (providing there is a "general duty to implement the Paris Agreement in good faith, as reflected in Article 26 of the Vienna Convention on the Law of Treaties (VCLT) 135 and under customary international law").
[70] Cook and Viñuales at ¶ 80.
[71] Paris Agreement, Article 3; Cook and Viñuales at ¶¶ 75, 76, 103-105.
[72] Paris Agreement, Article 4(1); Cook and Viñuales at ¶¶ 103-105; Cook and Viñuales at ¶110 (providing "due diligence must entail acting in proportion to the scale of the risk posed by the conduct assessed, having regard to the best available science…This means that assessment of the risks posed by an investment/project should take account of all the risks posed.").

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

Article 9(5) requires that developed country Parties are to biennially communicate indicative quantitative and qualitative information related to Article 9, paragraphs 1 and 3, of the Paris Agreement.[74] "Article 9(5) therefore entails not only a duty to report on the provision of support[,] but also to account for finance flows which run counter to the goal set out in Article 2(1)(c)." [75] It follows Article 9 also requires quantification and reporting of a project's scope 1, 2 and 3 emissions, and assessing and reporting on the studied and actually implemented alternatives mitigation measures that could avoid and minimize a project's GHG emissions to the furthest extent economically and technically feasible.

Article 13 establishes a transparency framework, one purpose of which is to: "provide a clear understanding of climate change action in the light of the objective of the Convention as set out in its Article 2, including clarity and tracking of progress towards achieving Parties' individual nationally determined contributions under Article 4." [76] "A good faith interpretation of this obligation entails transparency in relation to finance flows which are inconsistent with the Article 2(1)(c) pathway and Article 2 goals as well as finance flows which are consistent with it." [77] It follows Article 13 also requires quantification and reporting of a project's scope 1, 2 and 3 emissions, and assessing and reporting on the studied and actually implemented alternatives mitigation measures that could avoid and minimize a project's GHG emissions to the furthest extent economically and technically feasible.

The due diligence "duties arising from Article 2(1)(c) of the Paris Agreement and related provisions, including from Articles 2(1)(a), 3, 4, 9, and 13 as detailed above, should be considered in the context of the leverage that States have to align public finance with low greenhouse gas emissions and climate-resilient development through their contributions to and regulation of a range of bodies including MDBs and DFIs." [78] It is clear that this duty of due diligence applies to the ADB and its Global North members states, as they possess ample financial resources to satisfy it. That these due diligence responsibilities fall on the ADB and its Global North Member states, is consistent with Article 2(2) of the Paris Agreement requiring the Agreement to "be implemented to reflect equity and the principle of common

[73] Cook and Viñuales at ¶ 104.
[74] Cook and Viñuales at ¶ 98.
[75] Cook and Viñuales at ¶ 100.
[76] Paris Agreement, Article 13(5).
[77] Cook and Viñuales at ¶¶ 113-114.
[78] Cook and Viñuales at ¶¶ 78-79.

but differentiated responsibilities and respective capabilities, in the light of different national circumstances." [79] ADB and its Global North Member States securing such diligence is also consistent with Article 3's objective for "[t]he efforts of all Parties [to] represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of th[e] Agreement." [80]

III. ADB's and its Member State's Due Diligence Obligations under Customary International Law

In addition to the Paris Agreement, other sources of law that apply to the ADB's and its member state's climate change due diligence obligations prior to financing approval are customary international law, informed by principles such as harm prevention and the precautionary approach, and human rights treaties.[81]

"Customary international principles require that states take all necessary measures to prevent transboundary harm, and exercise precaution when making decisions that pose a risk of harm to the environment."[82] For instance, [u]nder the harm prevention principle, states are required to 'take all appropriate measures to prevent significant transboundary harm or at any event minimize the risk thereof' from activities in its territory or arising under its jurisdiction or control." [83] This principle overlaps with others, including the "responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond national jurisdiction"—articulated in the Rio Declaration— and the requirement that states take precautionary measures even in the absence of scientific certainty as to significant harm."[84] The cumulative climate impacts from the significant GHG emissions resulting from ADB's financing activities cross those risk thresholds, as climate change poses a risk of significant harm. See pages 1-2 and Appendix A, *ante*. This is because "assuming an approximately linear relation between GHG concentrations in the atmosphere and the severity of climate change, even very small cuts in global emissions can achieve significant global harm-prevention (or risk-reduction) benefits."[85] Accordingly, harm prevention and precautionary

[79] Cook and Viñuales at ¶¶ 56-57.
[80] Cook and Viñuales at ¶¶ 56-57, 75.
[81] See Appendix B, *ante*; Barros, Section III; Kerr, All Necessary Measures at 4 and note 16 (detailing state's requirements under customary international law); Jose Viñuales, Due Diligence in International Environmental Law: a Fine-Grained Cartography, in Due Diligence in the International Legal Order, 113 (Heike Krieger et al. eds., 2021) (hereinafter "Viñuales"); Benoit Mayer, Interpreting States' General Obligations on Climate Change Mitigation: a Methodological Review, 28 RECIEL 107 (2019); Benoit Mayer Climate Change Mitigation as an Obligation under Customary International Law, 48(1) YALE J. INT'L L. 105, 130-131 (2023)); *see also*, fn.48, *ante* (Kerr, All Necessary Measures at 53-54, and fn.275).
[82] Kerr, All Necessary Measures at 4, and fn. 16; Viñuales at 113; *see also*, Benoit Mayer, Interpreting States' General Obligations on Climate Change Mitigation: a Methodological Review, 28 RECIEL 107 (2019); Benoit Mayer, Climate Change Mitigation as an Obligation under Customary International Law, 48(1) YALE J. INT'L L. 105, 130-131 (2023).
[83] Kerr, All Necessary Measures at 25-26, and fn.119; United Nations, International Law Commission (ILC), Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, A/RES/56/82, (Dec. 12, 2001), at art. 3, commentary to art. 3, ¶ 18; Viñuales at 124.
[84] Kerr, All Necessary Measures at 26, and fn. 120; Viñuales at 116-117 (citing Rep. of the UN Conf. on Envir. and Devel., Rio Declaration on Environment and Development, A/ CONF.151/ 26 (1992); Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, Case No. 17, 2011 ITLOS Rep. 10, ¶¶ 125-135.
[85] Kerr, All Necessary Measures at 26, and fn. 121; Benoit Mayer Climate Change Mitigation as an Obligation under Customary International Law, 48(1) YALE J. INT'L L. 105 (2023) at 134.

customary principles clearly apply to climate change.[86] This means, international environmental principles require that the Paris Agreement's 1.5°C warming limitation objective must guide ABD's and its member states in their actions related to the climate impacts of ADB's financing activities, and ADB must take all necessary measures to ensure that its financing activities do not cause or contribute to exceedance of the 1.5°C warming objective.

Human rights law continues to evolve to encompass protection of the environment,[87] and it is firmly established "[c]limate change is one of the greatest threats to human rights."[88] The UN General Assembly recognized the right to a clean, healthy, and sustainable environment as a human right in 2022.[89] Moreover, international treaties governing human rights guarantee rights to life and property, and international and domestic courts have found these rights implicate a due diligence obligation to reduce risks of environmental harms.[90] "Cases from the International Court of Justice, the International Tribunal for the Law of the Sea, and the European Court of Human Rights indicate that when states make decisions within an international organization, they must adhere to their human rights due diligence obligations and substantive obligations related to the organization's area of competence."[91]

As directly related to climate change impacts, "recent opinions from human rights treaty bodies have adopted a risk-based test for when human rights due diligence obligations apply to climate change: if it

[86] Kerr, All Necessary Measures at 25-26, and fn. 122.
[87] Kerr, All Necessary Measures at 38-39.
[88] The United Nations Environment Programme (UNEP) - "[c]limate change is one of the greatest threats to human rights of our generation posing a serious risk to the fundamental rights to life, health, food and an adequate standard of living of individuals and communities across the world."
[89] Kerr, All Necessary Measures at 38, and fn. 186; G.A. Res. 76/300, The Human Right to a Clean, Healthy and Sustainable Environment, at 3 (July 28, 2022).
[90] Kerr, All Necessary Measures at 5, and fn. 20; The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda (Urgenda) [2019] Dutch Supreme Court 19/00135 (Engels); *See also*, Jaqueline Peel & Harri Osofsky A Rights Turn in Climate Change Litigation, 7(1) TRANSNAT'L ENVTL. L. 37, 48 (2018) (discussing case law); Siobhan 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 (Art. 4(1) and 5(1) American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser.A) No. 23 (Nov. 15, 2017), ¶¶ 62–63, 101–103.
[91] Kerr, All Necessary Measures at 9, and fn. 32 (citing numerous cases and scholarly articles in support).

is reasonably foreseeable that an activity under a state's jurisdiction or control will cause a risk of climate harm, the state must diligently prevent it within the limits of its capacity." [92] [93] [94]

"Due diligence requires states to 'employ all means reasonably available to them' to prevent a violation 'so far as possible'."[95] The types of conduct that could breach a due diligence obligation include action, inaction, or deficient action.[96] Cases from the International Court of Justice, the International Tribunal for the Law of the Sea, and the European Court of Human Rights indicate that when participating in the governing boards of international financial institutions, "member states have due diligence obligations to take all measures to ensure that they know about risks to human rights before approving loans, mitigate those risks when making decisions, and ensure that loans already issued conform to their human rights conditions." [97] The same reasoning applies to states' climate decision-making within the ADB. Accepting that climate change harms human rights,[98] and ADB member states are bound by their human rights obligations when acting as decision-makers within the ADB, they are therefore under an obligation of conduct to do all they can in that role to make sure the ADB's climate decisions, and

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

[93] Pending cases before regional human rights courts and the International Court of Justice may further reinforce how human rights intersect and impact states' obligations to prevent climate harm. *See* Kerr, All Necessary Measures at 38, and fn. 187; European Court of Human Rights, Press Release, Grand Chamber Procedural Meeting in Climate Cases (Feb. 3, 2023) https://hudoc.echr.coe.int/eng-press (describing cases); UN General Assem., Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change,' G.A. Res. A/77/L.58 (Mar. 29, 2023); Order on Request for Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Order 2023/4 of June 30, 2023, https://www.itlos.org/en/main/resources/media-room/calendar-of-events/#ar542; Request for an Advisory Opinion on the Climate Emergency and Human Rights Submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, (Jan. 9, 2023), https://www.corteidh.or.cr/solicitud_opiniones_consultivas.cfm?lang=en).

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

[95] Kerr, All Necessary Measures at 48, and fn. 241; Case Concerning the Application on the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 430 (Feb. 26, 2007); SRFC Advisory Opinion, supra note 203, ¶ 129; John Dugard & Annemarieke Vermeer-Künzli, The Elusive Allocation of Responsibility to Informal Organizations: the Case of the Quartet on the Middle East in Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie, 265 (Maurizio Ragazzi ed., 2013); *see also* Barros at 158, n. 916.

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

[97] Kerr, All Necessary Measures at 53-54, and fn. 275; Barros at Chapter III; see also Pasquale De Sena, International Monetary Fund, World Bank and Respect for Human Rights: A Critical Point of View, 20(1) ITALIAN Y.B. INT'L. L. 247, 257 (2010).

[98] Kerr, All Necessary Measures at 32-39.

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

Accordingly, in light of the climate risks and impacts from ADB's financing activities, customary international principles and human rights law impose an equivalent obligation mandating that the ADB and its member states use best available and practiced methods, and take all measures, to diligently account for, prevent, and mitigate the GHG emissions. This means that ADB and its member states must require the ESF mandate ADB ensures it diligently assesses and prevent the risk of climate harm from ADB investments to extent of its capacities prior to financing approvals that meets the best reasonably available and practiced standard.

"As with other international environmental obligations, the required degree of diligence differs based on states' development and individual circumstances."[101] Thus, like in the context of transboundary harm from hazardous activities, a highly developed or technologically advanced state has a greater scope of diligent conduct than other states.[102] This means, ADB and its Global North Member States must use their best efforts, and best available practiced methods, to ensure that GHG emissions and their impacts from each project the ADB finances are fully assessed, avoided, and mitigated to the furthest extent technically and economically feasible prior to ADB financing. It also means, assuming that climate measures do not burden least developed countries or small island developing states and otherwise account for equitable principles, ADB and its Member States are obliged to use their influence to push its clients to adopt a high level of ambition and effective measures that are consistent with the best available and used GHG emissions and mitigation methodologies and technological developments.[103] Considering the ADB itself is required to commit the resources to ensure that for each project: Scope 1, 2, and 3 GHG emissions are fully quantified, that an adequate GHG / climate change alternatives analysis is conducted, and that a mitigation hierarchy for GHG emissions is implemented that avoids and eliminates GHG emissions as far as feasible, such a diligence obligation accounts for equitable principles and the right to develop.

Accordingly, the ADB and its member states have a due diligence obligation to account for and reduce GHG emissions from its financing activities beyond what is required by any climate treaty.[104] As supported by Kerr, to the extent the risk of harm posed by climate change is not adequately addressed by the climate regime (e.g. the Paris Agreement, see Appendix D, Part II.B, *ante*), ADB's general

[99] See fns. 94-101; Cook and Viñuales at ¶¶ 47, 132-146, and fn. 182 (citing Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24, paragraph 50; Ana Sofia Barros, Member States and the International Legal (Dis)order Accounting for the notion of Responsible Governance, International Organizations and Member State Responsibility, Critical Perspectives, Brill Nijhoff 2017, Chapter 4 at 66-71).
[100] Kerr, All Necessary Measures at 25-26, 56; Cook and Viñuales at ¶¶ 41, 44, 46, 47, 48 (PDF at 29-34).
[101] Kerr, All Necessary Measures at 8, and fn. 29; Viñuales at 125-126; Jaqueline Peel, Climate Change, in Shared Responsibility, 1033, 1041-1044 (Andre Nollkaemper, ed., 2018) (failure to stop, reduce or regulate emitting activities could be basis for finding state did not discharge due diligence obligation of harm prevention).
[102] Kerr, All Necessary Measures at 8, and fn. 30; United Nations, International Law Commission (ILC), Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, A/ RES/ 56/ 82, 12 December 2001, commentary to art. 3, ¶18; Cook and Viñuales at ¶47.
[103] Kerr, All Necessary Measures at 9-10; Kerr, Erga Omnes Obligation; Baine P. Kerr, Binding the International Maritime Organization to the United Nations Convention on the Law of the Sea, 19 INT'L ORG. L. REV. 391 (2022).
[104] See Kerr, All Necessary Measures at 4, and fn. 15; Neil McDonald, The Role of Due Diligence in International Law, 68 INT'L & COMP. L.Q. 1041 (2019).

obligations imposed by human rights treaties and customary law demand that the ADB and its member states do more.[105]

[105] Kerr, All Necessary Measures at 7-8, and fn. 27 (citing Natalie Dobson, Extraterritoriality and Climate Change Jurisdiction: Exploring EU Climate Protection Under International Law, 30 (2021); Jaqueline Peel, Climate Change, in Shared Responsibility 1041-1044 (Andre Nollkaemper, ed., 2018) (failure to stop, reduce or regulate emitting activities could be basis for finding state did not discharge due diligence obligation of harm prevention); Rozemarijn J. Roland Holst, Taking the Current When it Serves: Prospects and challenges for an ITLOS Advisory Opinion on Oceans and Climate Change' RECIEL (2022), 7 ("as long as intended NDCs fall short of Paris Agreement temperature goal, can be argued that due diligence under LOSC obliges states to do more.").

Enclosure 2

ARTICLE

All Necessary Measures: Climate Law for International Shipping

BAINE P. KERR*

International shipping is one of the largest sources of climate pollution. The conventional view is that, despite some ambiguities in the climate treaties, international law only requires states to implement global rules adopted by the International Maritime Organization. This overlooks the important and timely question of whether other sources of law oblige states to do more. This Article argues that customary environmental principles, human rights law, and the UN Convention on the Law of the Sea mandate that states take all necessary measures to prevent and reduce shipping's climate risks. The measures that are necessary are dynamic and differential, and they include support for ambitious and effective global rules and unilateral actions. Because shipping is a well-quantified sector, emissions data is readily available and there are various options for legal accountability.

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I. INTRODUCTION

What law governs the world's eighth-largest greenhouse gas (GHG) emitter? International shipping—a vast industry and the backbone of world trade—emits approximately 700 million metric tons of carbon annually; if it were a country, shipping's emissions would be about the same as Germany's.[1] The sector is regulated on a global level by the International Maritime Organization (IMO), a specialized agency of the United Nations headquartered in London.[2] In July 2023, the IMO's member states agreed "to peak GHG emissions from international shipping as soon as possible and to reach net-zero GHG emissions by or around, i.e. close to,

1. U.N. Conference on Trade & Developement, *Review of Maritime Transport 2022*, 107, U.N. Doc. UNCTAD/RMT/2022 (Nov. 29, 2022) [hereinafter UNCTAD]; *JRC Science for Policy Report: CO2 Emissions of All World Countries*, at 33, 110 (Sept. 16, 2022), https://publications.jrc.ec.europa.eu/repository/handle/JRC130363.

2. Int'l Maritime Org. [IMO], Assembly Res. A.908(22), *Agreement with the Host State Regarding Extension of Privileges and Immunities to Permanent Representatives and Divisional Directors* (Jan. 25, 2002) (amending and approving the headquarters agreement); Convention of the Intergovernmental Maritime Consultative Organization arts. 1, 2, 38, Mar. 6, 1948, 9 U.S.T. 621, 289 U.N.T.S. 3, as amended. A consolidated version is contained in Int'l Maritime Org., *Basic Documents, Volume I* (2010 ed.), at 8–32, https://digitallibrary.un.org/record/701517 [hereinafter IMO Convention].

2050 . . . ."[3] But the measures currently in place are inadequate to meet that goal, with emissions projected to either remain relatively constant or even rise between now and the middle of the century.[4] Emissions at that level are incompatible with limiting global warming to 1.5 degrees above pre-industrial levels,[5] which the Paris Agreement calls for and scientists view as necessary to avoid catastrophic climate change.[6] Earlier this year, the European Union enacted climate regulations for international shipping that are more stringent than the IMO's, stating that progress at the IMO "has so far not been sufficient to achieve the objectives of the Paris Agreement."[7]

This Article identifies states' international legal obligations to mitigate shipping's climate emissions and describes the ways in which compliance with those obligations may be assessed.[8] It analyzes the IMO's institutional structure and relationship with its members, as well as the international law that applies to the regulation of climate pollution from ships. Historically, the scholarly attention on this subject has focused on obligations—or the

3. IMO, Assembly Res. MEPC.377(80), *2023 IMO Strategy on Reduction of GHG Emissions from Ships*, annex 15, at 6, IMO Doc. MEPC 80/WP.12 (July 7, 2023) [hereinafter IMO 2023 Strategy].

4. IMO, *Fourth IMO Greenhouse Gas Study 2020*, at 26 (2020), https://www.imo.org/en/OurWork/Environment/Pages/Fourth-IMO-Greenhouse-Gas-Study-2020.aspx.

5. Simon Bullock et al., *The Urgent Case for Stronger Climate Targets for International Shipping*, 22 CLIMATE POL'Y 301, 301 (2022) (stating that Paris-compliant targets for international shipping "require a 34% reduction in emissions by 2030, with zero emissions before 2050"); JEAN-MARC BONELLO ET AL., SCI. BASED TARGETS INITIATIVE, SCIENCE BASED TARGET SETTING FOR THE MARITIME SECTOR 9 (2023), https://sciencebasedtargets.org/resources/files/SBTi-Maritime-Guidance.pdf ("For maritime transport emissions, a long-term science-based target means reducing emissions to a 96% residual level in line with 1.5°C scenarios by no later than 2040."); U.N. Environment Programme, *Emissions Gap Report 2020*, at xiii (Dec. 9, 2020), https://www.unep.org/emissions-gap-report-2020 (explaining that shipping and aviation together will consume between 60–220% of the carbon budget for the goal of 1.5 degrees by 2050). When referring to temperature, this Article uses Celsius rather than Fahrenheit.

6. U.N. Framework Convention on Climate Change [UNFCCC], Adoption of the Paris Agreement, art. 2, U.N. Doc. FCCC/CP/2015/L.9/Rev.1, annex, art. 2 (Dec. 12, 2015) [hereinafter Paris Agreement]; INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C, at 4–6 (2018), https://www.ipcc.ch/sr15/ [hereinafter IPCC].

7. Directive 2023/959, of the European Parliament and of the Council of 10 May 2023 Amending Directive 2003/87/EC Establishing a System for Greenhouse Gas Emission Allowance Trading Within the Union and Decision (EU) 2015/1814 Concerning the Establishment and Operation of a Market Stability Reserve for the Union Greenhouse Gas Emission Trading System, 2023 J.O. (L 130) ¶ 19 [hereinafter EU Maritime ETS Measure]. The European Union also recently enacted a maritime fuel measure to reduce GHG emissions. *See* Regulation 2023/1805 of the European Parliament and of the Council of 13 September 2023 on the Use of Renewable and Low Carbon Fuels in Maritime Transport, and Amending Directive 2009/16/EC, 2023 O.J. (L 234) [hereinafter EU Maritime Fuel Measure].

8. For reasons of space, this Article does not address the important question of whether ship owners, operators, or other components of the shipping industry could be independently liable for climate emissions. Nor does it address the IMO's climate obligations, which have been explored in other scholarship. *See, e.g.*, Baine P. Kerr, *Bridging the Climate and Maritime Legal Regimes: The IMO's 2018 Climate Strategy as an Erga Omnes Obligation*, 11 CLIMATE L. 119 (2021); Baine P. Kerr, *Binding the International Maritime Organization to the United Nations Convention on the Law of the Sea*, 19 INT'L ORGS. L. REV. 391 (2022).

lack thereof—that might arise from international climate treaties.[9] The conventional view is that, despite some ambiguities in the climate treaties, states are solely required to implement the IMO's rules.[10]

That view is incomplete. There is an ongoing debate about whether climate treaties are the exclusive source of international obligations regarding climate change.[11] Other sources of law that could apply are customary international law (informed by principles such as harm prevention and the precautionary approach), human rights treaties, and the UN Convention on the Law of the Sea (LOSC, sometimes styled UNCLOS).[12] At least three international courts—the International Court of Justice, the Inter-American Court of Human Rights, and the International Tribunal for the Law of the Sea—are examining this question in advisory proceedings.[13] I do not definitively determine whether and how customary principles, human rights law, or the LOSC apply to climate change. But to the extent that they do, a state's obligations to mitigate climate change should encompass all activities within its territories and under its jurisdiction and control—including ships that fly its flag, the voluntary entry of ships into its ports, its regulation of shipping companies, and the positions its representatives take at the IMO.[14] I argue that states have a due diligence obligation to reduce GHG emissions from shipping beyond the obligations imposed by the climate treaties and IMO rules.[15]

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9. *See infra* Part II.A; Beatriz Martinez Romera, *The Paris Agreement and the Regulation of International Bunker Fuels*, 25 REV. EUR. COMPAR. & INT'L ENV'T L. 215 (2016) (noting that bunker fuels and shipping's climate impacts were deliberately omitted from the Paris Agreement, although some mitigation obligation might apply based on UNFCCC Art. 4.1).

10. *See, e.g.*, YUBING SHI, CLIMATE CHANGE AND INTERNATIONAL SHIPPING: THE REGULATORY FRAMEWORK FOR THE REDUCTION OF GREENHOUSE GAS EMISSIONS 424 (2017) (describing how under the harm prevention principle, flag states must implement pollution control rules that take into account IMO standards).

11. *Compare* Alexander Zahar, *The Contested Core of Climate Law*, 8 CLIMATE L. 244 (2018), *with* Benoit Mayer, *Interpreting States' General Obligations on Climate Change Mitigation: A Methodological Review*, 28 REV. EUR. COMPAR. & INT'L ENV'T L. 107 (2019).

12. *See* sources cited *infra* notes 16, 20–23, and 27.

13. G.A. Res. A/77/L.58 (Mar. 29, 2023); Request for Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, Order 2023/4 of June 30, 2023, https://itlos.org/fileadmin/itlos/documents/cases/31/C31_Order_2023_4_30_June_2023.pdf; 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.

14. *See* 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); Ana Sofia Barros & Cedric Ryngaert, *The Position of Member States in (Autonomous) Institutional Decision-Making*, 11 INT'L ORGS. L. REV. 53, 55 (2014); *see infra* Part III.

15. I use the term "due diligence" to describe a type of primary obligation rather than a stand-alone rule of international law. *See generally* Neil McDonald, *The Role of Due Diligence in International Law*, 68 INT'L & COMPAR. L.Q. 1041 (2019).

Customary international law 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.[16] Shipping's climate impacts cross these thresholds.[17] There is not yet sufficient state practice to demonstrate a binding customary obligation on states to mitigate these effects, but there is an emerging customary norm, and that has several important legal consequences.[18] In addition, customary international law principles inform and define the scope of states' other obligations, in particular by requiring that states mitigate climate change in order to prevent warming above 1.5 degrees.[19]

International 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.[20] Recent opinions from human rights treaty bodies have articulated a test for the application of human rights obligations to climate change: if it is reasonably foreseeable that an activity under a state's jurisdiction or control will cause a risk of climate harm, the state must diligently prevent the harm within the limits of its capacity.[21] Applying that

16. Jorge E.Viñuales, *Due Diligence in International Environmental Law: A Fine-Grained Cartography*, *in* DUE DILIGENCE IN THE INTERNATIONAL LEGAL ORDER, *supra* note 14, at 113; *see also* Mayer (2019), *supra* note 11 (discussing the general obligation to avoid transboundary harm); Benoit Mayer, *Climate Change Mitigation as an Obligation Under Customary International Law*, 48 YALE J. INT'L L. 105, 130–31 (2023) (discussing how the precautionary approach is related to an obligation of prevention).

17. *See infra* Part II.A, Part II.B.

18. *See* Michael P. Scharf, *Accelerated Formation of Customary International Law*, 20 INT'L L. STUDENTS ASS'N J. INT'L & COMP. L. 305, 314 (2014). *See generally* Irit Mevorach, *Modified Universalism as Customary International Law*, 96 TEX. L. REV. 1403 (2018) (describing the formation and function of customary international law).

19. *See infra* Part II.A.

20. *See, e.g.*, 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); HR 20 december 2019, RvdW 2020, 19/00135 mn.nt C.A.S. (The State of the Netherlands (Ministry of Economic Affairs and Climate Policy)/Stichting Urgenda) (Neth.). *See also* Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 TRANSNAT'L ENV'T L. 37, 48 (2018) (discussing case law); Siobhán McInerney-Lankford, *Climate Change and Human Rights: An Introduction to Legal Issues*, 33 HARV. ENV'T L. REV. 431, 433 (2009) (examining the nexus of human rights and climate change). 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].

21. U.N. International Covenant on Civil and Political Rights [ICCPR], Views Adopted by the Committee Under Art. 5 (4) of the Optional Protocol, Concerning Communication No. 3624/2019, ¶ 8.13, U.N. Doc. CCPR/C/135/D/3624/2019 (Sept. 22, 2022) [hereinafter Billy et al.]; U.N. Convention 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

test to shipping suggests that states must use their best efforts to mitigate the risk that their acts and omissions related to international shipping will result in harmful climate change.

The LOSC mandates that states protect the marine environment and instructs them to "take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source."[22] Climate effects "more than satisfy the test for marine pollution" under the LOSC, and therefore states must take all necessary measures to prevent, reduce, and control them.[23] Accordingly, the LOSC and human rights law impose an equivalent obligation—whether termed "best efforts" or "all necessary measures"—on states to diligently mitigate shipping's climate emissions.[24]

The obligation I identify shares characteristics with other due diligence obligations.[25] It is complex, contingent, and dynamic, with a graduated level of care that correlates to the gravity of risk presented.[26] Drawing on reasoning from other scholars, I argue that in this context, the risk calculus includes the inadequacy of states' commitments under the Paris Agreement,

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Communication No. 104/2019, ¶ 10.5–7, U.N. Doc. CRC/C/88/D/104/2019 (Oct. 8, 2021) [hereinafter Saachi]; *see* Recent Cases, Saachi v. Argentina*, No. CRC/C/88/D/104/2019*, 135 HARVARD L. REV. 1981 (2022); Violi, *supra* note 14, at 81–82 (stating that in Colombia Advisory Opinion, OC-23/17, the "court equated jurisdiction with causality and ultimately with imputability, thus altering the vertical understanding of human rights jurisdiction, and eventually risk proximity").

22. U.N. Convention on the Law of the Sea, arts. 192, 194(1), *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC]. The United States has not ratified the LOSC but regards portions of it as reflecting customary international law. *See* John A. Duff, *The United States and the Law of the Sea Convention: Sliding Back from Accession and Ratification*, 11 OCEAN & COASTAL L.J., 1, 10, 15 (2005). Articles 192 and 194 impose obligations on "states" rather than "state parties," indicating they may have been intended to have legal effects even for states that did not ratify the LOSC. *See* Stephen Vasciannie, *Part XI of the Law of the Sea Convention and Third States: Some General Observations*, 48 CAMBRIDGE L.J. 85, 91 (1989) (explaining that some rules in Part XI of the LOSC are addressed to "all states" and some to "state parties," and that the former may have been intended to have erga omnes effects).

23. Alan Boyle, *Litigating Climate Change Under Part XII of the LOSC*, 34 INT'L J. MARINE & COASTAL L. 458, 463 (2019). *But see* SHI, *supra* note 10, at 43 ("GHG emissions from international shipping can be regarded as a type of 'conditional' pollution."). The non-governmental organization, Opportunity Green, argued in a submission to the International Tribunal for the Law of the Sea that the LOSC requires GHG reductions for international shipping. *See* Brief of Opportunity Green as Amicus Curiae, Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (June 15, 2023).

24. *See generally* Tomer Broude & Yuval Shany, *The International Law and Policy of Multi-Sourced Equivalent Norms*, *in* MULTI-SOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW 2 (Tomer Broude & Yuval Shany eds., 2011) (discussing "normative parallelism and equivalence" in international law).

25. *See generally* Anne Peters et al., *Due Diligence in the International Legal Order: Dissecting the Leitmotif of Current Accountability Debates*, *in* DUE DILIGENCE IN THE INTERNATIONAL LEGAL ORDER, *supra* note 14, at 1.

26. Viñuales, *supra* note 16, at 124 (citing Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 155, commentary to art. 3, ¶ 18 (2001)).

as well as the IMO's insufficient climate measures.[27] In other words, because the risk of harm posed by climate change is not effectively addressed by the climate regime or IMO rules, general obligations imposed by human rights treaties and the LOSC demand that states do more.

When and how this obligation applies depends on the state. The size of a state's maritime sector, measured by the number of vessels that fly its flag or by its port traffic, impacts its lawmaking power within the IMO and the mitigation potential of any unilateral measures.[28] As with other international environmental obligations, the required degree of diligence differs based on states' development and individual circumstances, and it can change over time.[29] Thus, similarly to the International Law Commission's finding on hazardous transboundary activities,[30] a highly developed or technologically advanced state with a large maritime sector has a greater scope of diligent conduct than other states.

There are two specific types of acts—or omissions—that in my view are particularly relevant to assess compliance with the obligation I identify.[31] 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 obligations and substantive obligations related to the organization's area of competence.[32] Therefore, the IMO's member

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27. *See* NATALIE L. DOBSON, EXTRATERRITORIALITY AND CLIMATE CHANGE JURISDICTION: EXPLORING EU CLIMATE PROTECTION UNDER INTERNATIONAL LAW 30 (2021); Jacqueline Peel, *Climate Change*, *in* THE PRACTICE OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW 1041–44 (André Nollkaemper ed., 2018) (explaining that failure to stop, reduce or regulate emitting activities could be a basis for finding that a state did not discharge its 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*, 32 REV. EUR. COMPAR. & INT'L ENV'T L. (SPECIAL ISSUE) 217, 223 (2022) ("As long as current NDCs collectively fall short of reaching this target, it can be argued that due diligence under UNCLOS obligates States to do more.").

28. Flag states have codified influence in the adoption of IMO rules that correlate to the relative size of their fleets. Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships arts. 16(2)(f)(ii), (iii), Feb. 17, 1978, 1340 U.N.T.S. 61, 191 [hereinafter MARPOL] (stating that amendments to MARPOL are effective when ratified by states representing fifty percent of the world's merchant fleet). As discussed *infra* Part I, flag states and port states have prescriptive jurisdiction to set vessel-source pollution rules under the LOSC.

29. Viñuales, *supra* note 16, at 125–126; Peel, *supra* note 27, at 1033.

30. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, *supra* note 26, commentary to art. 3, ¶ 18; *see* Viñuales, *supra* note 16, at 124, 126.

31. Generally speaking, due diligence obligations "do not prescribe a particular measure that has to be taken." Medes Malaihollo, *Due Diligence in International Environmental Law and International Human Rights Law*, 68 NETH. INT'L L. REV. 121, 123 (2021). But whether a measure is "necessary" is fact dependent, and in certain scenarios, only some might be sufficient to show compliance. *Id.* at 146 (discussing European Court of Human Rights jurisprudence).

32. Application of the Interim Accord of 13 September 1995 (Maced. v. Greece), Judgment, 2011 I.C.J. Rep. 644 (Dec. 5) [hereinafter FYROM]; Southern Bluefin Tuna (N.Z. v. Japan; Austl. v. Japan), Case No. 3 & 4, Order of Aug. 27, 1999, 1999 ITLOS Rep. 280, 294, ¶ 50 [hereinafter Southern Bluefin

states are required to use their best efforts to ensure that shipping's GHG emissions do not harm human rights or the marine environment when they adopt climate measures at the IMO. Assuming that proposed climate measures do not burden the least developed countries or small island developing states and otherwise account for equitable principles,[33] IMO members are obliged to use their influence to push the organization to adopt ambitious and effective measures that are consistent with scientific and technological developments.[34]

States' jurisdiction over their ports, ships that fly their flags, and private entities within their territories likewise implicate their obligations to prevent and reduce shipping's climate impacts. Ports are part of states' territories, and port states have jurisdiction under international law to condition the voluntary entry of ships on environmental standards.[35] Moreover, states can regulate ships that fly their flags and shipping companies that operate from within their territories. The European Union has asserted this jurisdiction to reduce international shipping's climate emissions more steeply and comprehensively than the IMO has. This type of action is particularly relevant in determining whether a state is complying with its due diligence obligation, at least for states similarly situated to the European Union.[36]

In addition to being interpretively sound, there are legal and practical benefits to the approach taken here. By clarifying the legal source and nature

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Tuna]; Gasparini v. Italy & 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. *See generally* Barros & Ryngaert, *supra* note 14, at 55; ANA SOFIA BARROS, GOVERNANCE AS RESPONSIBILITY: MEMBER STATES AS HUMAN RIGHTS PROTECTORS IN INTERNATIONAL FINANCIAL INSTITUTIONS (2019). There are multiple and complex ways in which states and international organizations obligations intersect. *See, e.g.*, Kristina Daugirdas, *Member States' Due Diligence Obligations to Supervise International Organisations*, in DUE DILIGENCE IN THE INTERNATIONAL LEGAL ORDER, *supra* note 14, at 59. Those are surveyed and distinguished from the case at hand *infra* Part III.A.

33. *See* Kerr (2022), *supra* note 8, at 395–96 (discussing preferences for developing states in IMO climate measures).

34. *See* Nikolaos Giannopoulos, International Law and Offshore Energy Production: Marine Environmental Protection Through Normative Interactions (2020) (Ph.D. dissertation, Utrecht University) (on file with Utrecht University Library at https://dspace.library.uu.nl/handle/1874/400007), at 456–57 (demonstrating that the best available techniques and best environmental practices required by due diligence obligations are subject to change).

35. LOSC, *supra* note 22, art. 211(3). As discussed *infra* Part I, although generally accepted, this understanding of port state jurisdiction is nevertheless contested. Arron N. Honniball, *The "Enrica Lexie" Incident Award and Exclusive Flag State Jurisdiction*, NAT'L UNIV. SING.: CIL DIALOGUES, https://cil.nus.edu.sg/blogs/the-enrica-lexie-incident-award-and-exclusive-flag-state-jurisdiction-by-arron-n-honniball (last visited July 18, 2023) (discussing the M/Norstar Judgment and Enrica Lexie Award).

36. As a party to the Paris Agreement and in light of its actions to regulate shipping's emissions, the European Union itself may bear legal obligations related to the sector's climate emissions. Natalie L. Dobson, *Competing Climate Change Responses: Reflections on EU Unilateral Regulation of International Transport Emissions in Light of Multilateral Developments*, 67 NETH. INT'L L. REV. 183, 206 (2020). That question is beyond the scope of this Article.

of states' obligations to address shipping's climate impacts, it unifies rather than fragments international law.[37] Yet it is also flexible: the standard of compliance changes over time, is responsive to new scientific and technological developments, and accounts for states' differential capacities and capabilities.[38] It is therefore consistent with equity, sustainable development, and the common-but-differentiated responsibilities principle.[39] Because shipping is a well-studied and well-quantified sector, states' individual shares of the total risk can be easily determined and assigned, and the multi-source nature of the obligation means that there are various legal options for ensuring compliance.[40]

To prove its claims, the Article first explains the current regulatory framework for GHG emissions from ships in Part I. It discusses the IMO's prescriptive jurisdiction over vessel-source pollution under the LOSC and states' jurisdiction to set rules for ships that enter their ports and fly their flags.[41] In so doing, it provides the legal basis for the maritime climate measures enacted by the IMO and the European Union. Part II develops the Article's central thesis that states have a due diligence obligation to mitigate shipping's climate impacts. It addresses the conventional view, grounded in the climate treaties, that international law does not directly or clearly require that states reduce GHG emissions from shipping. I survey scholarship and case law on customary international principles, human rights law, and the LOSC, showing that these sources of law indicate that states must diligently address the climate risks posed by shipping. Part III develops a framework to assess whether states are meeting this obligation, focusing both on decision-making within the IMO and on unilateral actions. The Article concludes by briefly examining potential legal venues to hold states to account.

II. REGULATING SHIPPING'S CLIMATE POLLUTION

Defining climate obligations for shipping requires understanding state jurisdiction over ships and how that jurisdiction relates to IMO rules. Under the LOSC, vessels engaged in international shipping are regulated by

37. *See* Int'l Law Comm'n Study Group, Conclusions of the Work of the Study Group, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.702 (July 18, 2006).

38. Giannopoulos, *supra* note 34, at 457.

39. *See generally* SUMUDU ATAPATTU, EMERGING PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (2007) (discussing international environmental principles' legal sources, significance, and interactions).

40. *See infra* Part IV.

41. For a description of different types of jurisdiction under LOSC, see generally Aaron N. Honniball, *The Exclusive Jurisdiction of Flag States: A Limitation on Pro-active Port States?*, 31 INT'L J. MARINE & COASTAL L. 499 (2016).

multiple states.[42] These include the states where they are flagged or registered, the states whose coastal zones they sail through, and states whose ports they enter.[43] When and how these states can assert jurisdiction varies. In the context of pollution control, jurisdiction is tightly tied to rules adopted by the IMO's Marine Environmental Protection Committee (MEPC), which are made effective as annexes to the International Convention for the Prevention of Pollution by Ships (MARPOL).[44] In addition to directly regulating ships, states can also regulate shipping companies doing business within their territories. Part I explains these different bases for jurisdiction, and in doing so gives an overview of the IMO's GHG reduction measures and the European Union's parallel measures.

The IMO is charged with developing uniform pollution-control rules for ships engaged in international voyages.[45] Over eighty percent of world trade in goods is conducted by sea, and the IMO has stated that "the global character of shipping requires global regulation that applies universally to all ships."[46] The IMO has emphasized the need for uniform climate measures for shipping as well, asserting that "IMO regulations apply worldwide without discrimination, thus providing a global equal level playing field, preventing distortion of specific trade flows and trade agreements, [and] avoiding carbon leakage or sub-optimal shipping in certain parts of the world."[47]

MARPOL Annex VI entered into force in 2005 and regulates air pollution from ships.[48] Annex VI provisions cover various types of pollution, including nitrous oxides, sulfur oxides, and volatile organic

42. Henrik Ringbom, *Regulating Greenhouse Gas Emissions from Ships*, *in* THE LAW OF THE SEA AND CLIMATE CHANGE 131 (Elise Johansen et al. eds., 2021).

43. DONALD R. ROTHWELL & TIM STEPHENS, THE INTERNATIONAL LAW OF THE SEA 382–86 (2d ed. 2016).

44. MARPOL, *supra* note 28; IMO Convention, *supra* note 2, art. 38.

45. *See supra* note 2; Frederic L. Kirgis, Jr., *Shipping*, *in* 2 UNITED NATIONS LEGAL ORDER 718–23 (Oscar Schachter & Christopher C. Joyner eds., 1995).

46. UNCTAD, *supra* note 1, at 153; IMO, Submission to the 34th Session of SBSTA, *in* UNFCCC, Information Relevant to Emissions from Fuel Used for International Aviation and Maritime Transport, paper no. 2, U.N. Docs. FCCC/SBSTA/2011/MISC.5, at 15, ¶ 2 (Apr. 20, 2011).

47. IMO, *Note by the International Maritime Organization to the Fifty-Seventh Session of the UNFCCC Subsidiary Body for Scientific and Technological Advice*, https://www4.unfccc.int/sites/SubmissionsStaging/Documents/202210281824---IMO%20submission%20to%20SBSTA%2057.pdf (last visited July 19, 2023); *see* Ellen Hey, *Regime Interaction and Common Interests in Regulating Human Activities in Areas Beyond National Jurisdiction*, *in* REGIME INTERACTION IN OCEAN GOVERNANCE: PROBLEMS, THEORIES AND METHODS 93–98 (Seline Trevisanut et al. eds., 2020) (discussing the IMO's design and implementation of non-discriminatory climate measures).

48. *International Convention for the Prevention of Pollution from Ships (MARPOL)*, INT'L MARITIME ORG., https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx (last visited July 19, 2023).

compounds.[49] The MEPC—which is composed of all IMO member states—usually adopts measures by consensus,[50] but it can amend a MARPOL annex through a two-thirds majority vote representing fifty percent of the world's merchant fleet.[51] The amendment must then be ratified by individual states to become effective, but as with the MEPC procedure, not all IMO member states are equal in this process: for a MARPOL annex or amendment to enter into force it must be adopted by states representing at least fifty percent of the world's merchant fleet.[52] Once effective, IMO rules are regarded as "generally accepted international rules and standards" under the LOSC, and thereby trigger a variety of obligations and powers for flag, coastal, and port states.[53]

Shipping's climate impacts have been on the IMO's agenda since the early 1990s.[54] It did not act until 2011, when it amended MARPOL Annex VI, instituting fuel efficiency rules for new ships over a certain size and operational rules that adjusted ship routing and speed to lower energy consumption.[55] In 2016, the IMO adopted rules requiring that ships collect and register data on their fuel consumption.[56] In 2021, it strengthened the efficiency and operational rules in an effort to reduce carbon intensity across the sector.[57]

These climate measures—like other MARPOL provisions—bind states and are enforceable against ships in various ways that illustrate the breadth and depth of the IMO's law-making authority. Under the principle of no-more-favorable treatment, states that have ratified an IMO rule must enforce it not only against their own ships but also the ships of non-parties that visit their ports.[58] The principle thus promotes a level playing field by preventing states from opting out of pollution-control rules.[59] To illustrate, even though Bahrain, Colombia, Israel, and other states have not ratified

49. *Index of MEPC Resolutions and Guidelines Related to MARPOL Annex VI*, INT'L MARITIME ORG., https://www.imo.org/en/OurWork/Environment/Pages/Index-of-MEPC-Resolutions-and-Guidelines-related-to-MARPOL-Annex-VI.aspx (last visited July 19, 2023).

50. Sophia Kopela, *Climate Change, Regime Interaction, and the Principle of Common but Differentiated Responsibility: The Experience of the International Maritime Organization*, 24 Y.B. INT'L ENV'T L. 70, 80 (2014).

51. MARPOL, *supra* note 28, art. 16(2)(d), (f).

52. *Id.* For readability, this Article refers to effective MARPOL annexes as "IMO rules."

53. LOSC, *supra* note 22, art. 211; *see* ERIK MOLENAAR, COASTAL STATE JURISDICTION OVER VESSEL SOURCE POLLUTION 136–37 (1998) (explaining that the IMO is "the competent international organization" for vessel source pollution under the LOSC).

54. IMO, Assembly Res. A. 719(17), *Prevention of Air Pollution from Ships*, IMO Doc. A 17/Res. 719 (Dec. 4, 1991).

55. IMO, Marine Env't Prot. Comm. [MEPC] Res. 203(62), IMO Doc. MEPC 62/24/Add.1, annex 19 (July 15, 2011).

56. IMO, MEPC Res. 278(70), IMO Doc. MEPC 70/18/Add.1, annex 3 (Oct. 28, 2016).

57. IMO, MEPC Res. 328(76), IMO Doc. MEPC 76/15/Add.1, annex 1 (July 12, 2021).

58. MARPOL, *supra* note 28, arts. 5(4), 16(4)(a); IMO, Assembly Res. A. 1119(30), *Procedures for Port State Control, 2017* (Dec. 6, 2017), annex, at 4–5.

59. MOLENAAR, *supra* note 53, at 114.

MARPOL Annex VI, ships flying their flags are subject to IMO climate measures when visiting the ports of Annex VI parties, including the United States, the Netherlands, China, and other major maritime states.[60] Moreover, under the LOSC, flag states' national rules relating to vessel-source pollution must have "at least the same effect" as IMO rules, regardless of whether they have ratified a particular MARPOL annex or amendment.[61] And flag states must take IMO rules "into account" for atmospheric pollution from vessels.[62] IMO rules thus operate as binding legal standards for all states.

Under the LOSC, IMO rules are enforceable at port and at sea. States cannot independently set pollution rules for ships sailing through their exclusive economic zones and territorial seas unless ecological conditions for a clearly defined area warrant the rules and procedural steps are followed.[63] But they can enforce IMO rules for violations in their territorial seas, including by detaining suspect ships, and suspected violations of IMO rules in exclusive economic zones can trigger a more limited enforcement procedure.[64]

States have discretion to go beyond IMO rules for ships voluntarily entering their ports.[65] Although some scholars contend that there is a customary international law principle establishing a right to entry,[66] there is little state practice supporting that position,[67] and the LOSC specifies that states exercise sovereignty over their ports as part of their territories.[68] Moreover, many scholars agree that states retain jurisdiction over their ports under customary international law.[69] The U.S. Supreme Court has held that ports and inland waters are "subject to the complete sovereignty of the

60. *See Ratifications by State*, INT'L MARITIME ORG., https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx (last visited July 21, 2023).

61. LOSC, *supra* note 22, arts. 92, 211; Kirsten Bartenstein, *Article 211*, *in* UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 1419, 1436 (Alexander Proelss ed., 2017).

62. LOSC, *supra* note 22, art. 212(1). Whether the IMO's GHG rules relate to pollution of the marine environment or atmospheric pollution—and thus operate as a floor for flag state rules or merely as standards that need to be taken into account—has not been formally determined and is not relevant to the claims made here.

63. LOSC, *supra* note 22, art. 211(6).

64. LOSC, *supra* note 22, arts. 211(5), 220(2), (3).

65. LOSC, *supra* note 22, art. 211(3). They cannot do so for vessels in distress or in *force majeure* situations. Aaron N. Honniball, Extraterritorial Port State Measures: The Basis and Limits of Unilateral Port State Jurisdiction to Combat Illegal, Unreported and Unregulated Fishing 144–45 (2019) (Ph.D. dissertation, Utrecht University) (on file with Utrecht University Library).

66. A.V. Lowe, *The Right of Entry into Maritime Ports in International Law*, 14 SAN DIEGO L. REV. 597, 598 (1977) (discussing Aramco Arbitration, 27 I.L.R. 117, 212 (Int'l Lab. Org. Ad. Trib. 1958)).

67. John T. Oliver, *Legal and Policy Factors Governing the Imposition of Conditions on Access to and Jurisdiction over Foreign-Flag Vessels in U.S. Ports*, 5 S.C. J. INT'L L. & BUS. 209, 213–14 (2009).

68. LOSC, *supra* note 22, art. 2(1).

69. *See, e.g.*, Erik Molenaar, *Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage*, 38 OCEAN DEV. & INT'L L. 225, 227 (2007). *See also* Donald Rothwell et al., *Charting the Future for the Law of the Sea*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 893 (Donald Rothwell et al. eds., 2015) ("[T]he balance of the power between flag States and coastal/port States has undoubtedly shifted from the former to the latter of the last two decades . . . .").

nation, as much as if they were a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether."[70]

The European Union has assertively exercised this type of jurisdiction to regulate international shipping's climate impacts. In 2016, it instituted a GHG emissions data collection scheme more stringent than the IMO's global measure for ships visiting European ports and flying European flags.[71] In 2023, it expanded the scope of the EU Emissions Trading System (ETS) to include maritime emissions and limited the GHG intensity of energy used by ships; both measures are designed to lower emissions from international shipping far more quickly than the IMO's current regulations.[72] The European Union enforces these measures by regulating shipping companies that are registered within its member states' territories, individual ships that enter EU ports, and ships that fly its members' flags.[73]

The EU measures will initially cover fifty percent of emissions from all international voyages to and from its member states' ports; the scope of maritime emission coverage in the ETS will rise to one hundred percent if the IMO does not adopt a global market-based measure by 2028.[74] The ETS measure requires that companies legally affiliated to ships entering and departing European ports purchase credits through the trading system based on emissions for each voyage.[75] The GHG intensity limit requires that companies report and reduce the yearly average GHG intensity of energy used by ships according to a set schedule.[76] A ship's operations on the high seas, including its speed and route, as well as its equipment and the fuel it uses, will impact the quantity of credits that companies must obtain and its compliance with the GHG intensity limits.[77] By indirectly regulating ships' conduct on the high seas, the measures represent a significant extraterritorial expansion of port state jurisdiction.[78]

Despite this expansion of regulation on the high seas, the European Union's measures are lawful.[79] Under the LOSC, port state "operational measures regulating behaviour occurring outside a state's territory may raise

70. United States v. Louisiana, 394 U.S. 11, 22 (1969).

71. DOBSON, *supra* note 27, at 194–95 (comparing EU and IMO monitoring schemes).

72. EU Maritime ETS Measure, *supra* note 7, ¶¶ 8–9; EU Maritime Fuel Measure, *supra* note 7, arts. 1, 4.

73. EU Maritime ETS Measure, *supra* note 7, ¶¶ 31–32, 34–35; EU Maritime Fuel Measure, *supra* note 7, arts. 2(1), 6–7, 25.

74. EU Maritime ETS Measure, *supra* note 7, ¶ 28; EU Maritime Fuel Measure, *supra* note 7, art. 2(1)(d).

75. EU Maritime ETS Measure, *supra* note 7, ¶ 20.

76. EU Maritime Fuel Measure, *supra* note 7, arts. 4(2), 8, Annex III.

77. EU Maritime ETS Measure, *supra* note 7, ¶¶ 32, 63.

78. Manolis Kotzampasakis, *Intercontinental Shipping in the European Union Emissions Trading System: A "Fifty-Fifty" Alignment with the Law of the Sea and International Climate Law?*, 32 REV. EUR. COMPAR. & INT'L ENV'T L. 29, 33 (2023).

79. *Id.*

issues of extraterritoriality."[80] In addition, measures that relate to the construction, design, equipment, and manning (CDEM) of ships are "often considered to be the most intrusive ones with respect to ships' navigational rights,"[81] and are specifically assigned to the jurisdiction of flag states by the LOSC.[82] But CDEM standards enacted by port states can be justified on a territorial basis because vessels violate the standards when they sail into port.[83] As Kotzampasakis explains, the text of the LOSC shows that it "does not preclude States from establishing port entry conditions in relation to ships' conduct beyond their territorial sea, but it prevents them from undertaking in-port investigations and instituting proceedings related to extraterritorial vessel-source pollution, unless a breach of international rules is suspected."[84] Thus, because the European Union's maritime climate measures operate as port entry conditions, they comply with the LOSC.[85]

Under customary international law's jurisdictional limitations—non-intervention, non-interference, and sovereign equality—states should exercise self-restraint in designing extraterritorial regulations.[86] But, as Dobson points out, the question is more complex when it comes to climate change and the relative stringency of the European Union's regulations compared to the IMO's measures, given that EU member states will internally suffer the adverse effects of climate harm caused by ships that enter their ports.[87] Thus, although port state jurisdiction remains a contested issue in the law of the sea,[88] states have jurisdiction to regulate a ship's climate emissions outside their territory more stringently than the IMO does, so long as they do so in a manner consistent with the LOSC and with general principles of international law, such as good faith and nonabuse of rights.[89]

At the moment, the European Union stands alone in taking this step; the United States and other major maritime states are using incentives and funding to decarbonize their shipping sectors, but do not currently

80. DOBSON, *supra* note 27, at 104.

81. Henrik Ringbom, *Global Problem—Regional Solution? International Law Reflections on an EU CO2 Emissions Trading Scheme for Ships*, 26 INT'L J. MARINE & COASTAL L. 613, 621 (2011).

82. LOSC, *supra* note 22, art. 94(3).

83. Ringbom, *supra* note 81, at 632; *see also* DOBSON, *supra* note 27, at 104–05 (collecting literature on the territorial basis for port state jurisdiction over CDEM standards).

84. Kotzampasakis, *supra* note 78, at 33.

85. *Id.* at 36. Kotzampasakis finds that a non-compliance fine included in the measures likely is not a permissible enforcement measure, although the denial of right of entry is.

86. DOBSON, *supra* note 27, at 240–41; *see also* CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 35–37 (2008); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 403, 407–13 (AM. L. INST. 2018) (providing equivalent "reasonableness" jurisdictional test).

87. DOBSON, *supra* note 27, at 179 (defining "climate change jurisdiction" under customary international law).

88. Honniball, *supra* note 35.

89. Kotzampasakis, *supra* note 78.

implement maritime climate regulations other than IMO rules.[90] Having shown what states may do to regulate shipping's climate emissions, I now turn to what they must do.

III. LEGAL OBLIGATIONS

A. The Climate Treaties

The climate treaties are a logical place to look for state obligations to reduce GHG emissions from shipping, and that is where scholarly attention has focused.[91] As I will elaborate, the climate treaties implicitly include shipping when interpreted in a certain way, but they do not clearly or directly mandate that states reduce GHG emissions from the sector. Despite this ambiguity, the 1.5 degree temperature goal does serve as a binding legal norm for shipping, because states have resolved that it will guide the sector's emissions reductions at the IMO, and the goal reflects what international environmental principles demand.

The United Nations Framework Convention on Climate Change (UNFCCC) encompasses international transport in that its goal is the prevention of "dangerous" climate change, and its principles state that climate policies should "comprise all economic sectors."[92] Article 4(2) provides that developed countries "are taking the lead" in adopting national policies and measures to limit GHG emissions.[93] Scholars describe this provision as a very soft obligation.[94] And it may not even apply to shipping, because the UNFCCC's conference of parties decided that international transport emissions should not be included in national totals for Article 4(2) purposes.[95] Under the Kyoto Protocol, developed countries "shall pursue limitation or reduction" of GHG emissions from shipping, "working

90. OCEAN POLICY COMMITTEE, NAT'L OCEANIC & ATMOSPHERIC ADMIN., OCEAN CLIMATE ACTION PLAN 36–38 (2023). *See infra* Part III (discussing states' voluntary measures). There is legislation pending in Congress that would amend the Clean Air Act to direct the EPA to implement sustainable fuel standards for international shipping and impose a $150 per ton fee on carbon emissions on marine bunker fuel. Clean Shipping Act of 2023, H.R. 4024, 118th Cong. § 2 (2023); International Maritime Pollution Account Act of 2023, S. 1920, 118th Cong. § 5 (2023).

91. *See, e.g.*, Martinez Romera, *supra* note 9.

92. U.N. Framework Convention on Climate Change, art. 3, May 9, 1992, 1771 U.N.T.S. 107, S. Treaty Doc No. 102-38 (1992) [hereinafter UNFCC Convention].

93. *Id.* art. 4(2)(a).

94. Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT'L L. 451, 515–16 (1993) (citing Philippe Sands, *The United Nations Framework Convention on Climate Change*, 1 REV. EUR. COMPAR. & INT'L ENV'T L. 270 (1992)); *see also* BEATRIZ MARTINEZ ROMERA, REGIME INTERACTION AND CLIMATE CHANGE: THE CASE OF INTERNATIONAL AVIATION AND TRANSPORT 67 (2018) (referring to UNFCC Convention art. 4(2) as an "ill-defined obligation").

95. FARHANA YAMIN & JOANNA DEPLEDGE, THE INTERNATIONAL CLIMATE CHANGE REGIME 84 (2004).

through" the IMO.[96] But even assuming that this language constitutes an obligation, it only applies to developed countries that are parties to the Protocol, and thereby excludes non-party developed states, like the United States and Canada, andstates such as China, India, Singapore, South Korea, and the Gulf States, which the UNFCCC classifies as developing states.[97]

The Paris Agreement does not directly refer to shipping or the IMO. For nearly a year, the Agreement's negotiating text contained provisions requiring parties to work through the IMO to reduce emissions consistent with the Agreement's temperature goals, and that they establish a levy scheme for shipping to that end.[98] Those provisions were removed from the Agreement's text at the last minute, without any public explanation.[99] Some scholars nevertheless view the Paris Agreement's temperature goal as a "rule for interpretation" for all obligations within the UNFCCC, including its implicit requirement that states limit all emissions, including those arising from shipping, so as to prevent dangerous climate change.[100] Others argue that the Paris Agreement is a stand-alone treaty, albeit one that is closely linked to the UNFCCC.[101]

Regardless of the Paris Agreement's relationship with the UNFCCC, several of its articles indirectly include shipping. These include Article 4(4), which states that developed country parties "should continue taking the lead by undertaking economy-wide absolute emission reduction targets."[102] Because international shipping is a part of developed countries' economies, the sector could be construed to fall within that provision. The European Union appears to agree: in its legislation mandating the inclusion of maritime transport in the EU carbon market, the European Union noted that all sectors of the economy need to contribute to achieving emissions reductions, and its 2020 nationally-determined contribution stated that the European Union complies with Article 4(4) by having an economy-wide absolute target.[103] But, as Lavanya Rajamani points out, Article 4(4) uses the

96. Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 2(2), Dec. 10, 1997, 2303 U.N.T.S. 148.

97. *Id.*; UNFCC Convention, *supra* note 92, annexes I, II; *A Kyoto Protocol to the United Nations Framework Convention on Climate Change*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-a&chapter=27&clang=_en.

98. Yubing Shi, *The Implications of the Paris Agreement for the Regulation of Greenhouse Gas Emissions from International Shipping*, 32 OCEAN Y.B. 528, 532 (2018); Ringbom, *supra* note 42, at 136.

99. MARTINEZ ROMERA, *supra* note 94, at 80. *See generally* Radoslav S. Dimitrov, *The Paris Agreement on Climate Change: Behind Closed Doors*, 16 GLOB. ENV'T POL. 1 (2016).

100. MARTINEZ ROMERA, *supra* note 94, at 181.

101. Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope?*, 110 AM. J. INT'L L. 288, 296 (2016).

102. Paris Agreement, *supra* note 6, art. 4(4).

103. EU Maritime ETS Measure, *supra* note 7, ¶¶ 2, 4; European Commission Press Release, Update of the Nationally Determined Contribution of the European Union and its Member States, annex at 19 (Oct. 16, 2023), https://unfccc.int/sites/default/files/NDC/2023-10/ES-2023-10-17%20EU%20submission%20NDC%20update.pdf.

term "should" rather than "shall," indicating a normative expectation that parties will exercise a particular mitigation pathway rather than a legal obligation.[104] That word choice was deliberate, and appears to have been a precondition for the United States to join the Agreement.[105] Thus, Article 4(4) should be read as indicating a normative expectation that states will implement economy-wide reductions in light of their national circumstances, rather than a binding obligation that they must do so.

Other provisions in Article 4 could likewise encompass shipping. Article 4(2) states that parties "shall" submit nationally-determined contributions (NDCs) towards the temperature goals, and that parties "shall pursue domestic mitigation measures" in order to achieve those contributions.[106] But scholars disagree about whether these are substantive obligations at all, given the aspirational nature of the temperature goals and the procedural nature of NDCs.[107] And in 2018, the parties to the Paris Agreement decided that emissions from international shipping and aviation should be reported separately from national totals.[108] The logic of the Paris Agreement is premised on the reporting of national emissions, the communication of national contributions towards the temperature goals based on emissions reporting, and an obligation that states pursue domestic mitigation measures to meet their contributions.[109] Because national emissions reporting is legally tied to substantive mitigation requirements under the Agreement, it is therefore unclear whether Article 4(2) encompasses shipping.[110]

Can supplementary means of interpretation resolve this ambiguity?[111] The conscious decision of the Agreement's drafters to omit any explicit reference to shipping indicates that the sector's emissions should not be subject to the Agreement's obligations, whether substantive or

104. Lavanya Rajamani, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretive Possibilities and Underlying Politics*, 65 INT'L & COMPAR. L.Q. 493, 510–11 (2016).

105. *Id.* at 510–11.

106. Paris Agreement, *supra* note 6, at art. 4(1)–(3).

107. Alexander Zahar, *Collective Obligation and Individual Ambition in the Paris Agreement*, 9 TRANSNAT'L ENV'T L. 165, 167–73 (2019) (collecting and discussing literature).

108. UNFCCC, Rep. of the Conf. of the Parties Serving as the Meeting of the Parties to the Paris Agreement, U.N. Doc. FCCC/PA/CMA/2018/3/Add.2, at 23, 27.

109. *See* Rajamani, *supra* note 104, at 497–98.

110. *See* Chris Lyle, *Beyond the ICAO's CORSIA: Towards a More Climatically Effective Strategy for Mitigation of Civil-Aviation Emissions*, 8 CLIMATE L. 104, 122 (2018) (arguing that "[i]nternational aviation should be brought under the direct responsibility of states through their NDCs").

111. Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331 (stating that if the meaning of a treaty is ambiguous, "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion"); *see also* Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), Judgment, 1991 I.C.J. Rep. 53, ¶ 48 (Nov. 11) ("Articles 31 and 32 of the Vienna Convention on the Law of Treaties . . . may in many respects be considered as a codification of existing customary international law . . . .").

procedural.[112] Nevertheless, Cabo Verde, China, the Marshall Islands, the United Kingdom, and the United States asserted in their NDCs that they are committed to reducing shipping's impacts through the IMO.[113] Yet the Vienna Convention on the Law of Treaties "demands the agreement of *all the parties* in order to make [subsequent] practice relevant for treaty interpretation,"[114] and most states do not refer to shipping at all in their NDCs. Instead, the only relevant practice on this point is the decision by the Agreement's parties to exclude shipping from national totals.[115] That carries particular weight because decisions by the Paris Agreement's conference of parties have binding legal force under the Agreement.[116] State practice is therefore insufficient—at least currently—to support interpreting the Paris Agreement's obligations as including international shipping's GHG emissions.

Yet there are two ways in which the Agreement's temperature goals, as opposed to its procedural and substantive obligations, are legally linked to international shipping. First, in 2018, the IMO's member states, all of whom are parties to the Agreement, resolved that the IMO would reduce shipping's GHG emissions to fifty percent below 2008 levels by 2050 "whilst pursuing efforts towards phasing them out as called for in the Vision as a point on a pathway of CO2 emissions reduction consistent with the Paris Agreement temperature goals."[117] The IMO has also stated that it

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112. *See* RICHARD GARDINER, TREATY INTERPRETATION 386–87 (2d ed. 2015) (discussing cases interpreting "the meaning of a term by showing that the course of the negotiations excluded an interpretation that is being put forward").

113. CABO VERDE, 2020 UPDATE TO THE FIRST NATIONALLY DETERMINED CONTRIBUTION (NDC) 26 (Apr. 2, 2021), https://unfccc.int/sites/default/files/NDC/2022-06/Cabo%20Verde_NDC%20Update%202021.pdf; CHINA FIRST NDC (UPDATED SUBMISSION) 47 (Oct. 28, 2021), https://unfccc.int/sites/default/files/NDC/2022-06/中国落实国家自主贡献成效和新目标新举措.pdf; UPDATE COMMUNICATION ON THE MARSHALL ISLANDS PARIS AGREEMENT NDC 3 (Dec. 30, 2020), https://unfccc.int/sites/default/files/NDC/2022-06/RMI%20NDC-UpdateUPDATED_01.20.2021.pdf; UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND'S NATIONALLY DETERMINED CONTRIBUTION 6 (Sept. 22, 2022), https://unfccc.int/sites/default/files/NDC/2022-09/UK%20NDC%20ICTU%202022.pdf; THE UNITED STATES OF AMERICA NATIONALLY DETERMINED CONTRIBUTION 4 (Apr. 4, 2021), https://unfccc.int/sites/default/files/NDC/2022-06/United%20States%20NDC%20April%2021%202021%20Final.pdf.

114. Christopher Peters, *Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?*, 3 GOETTINGEN J. INT'L L. 617, 619 (2011).

115. *Id.* at 627 (stating that the resolutions of a treaty's parties reflect their agreement on its interpretation).

116. Rajamani, *supra* note 104, at 499–500 (citing Paris Agreement, *supra* note 6, arts. 4(8), (9)); *see also* HARRO VAN ASSELT, THE FRAGMENTATION OF GLOBAL CLIMATE GOVERNANCE: CONSEQUENCES AND MANAGEMENT OF REGIME INTERACTIONS (2014) (discussing the importance of climate regime lawmaking by treaty bodies).

117. IMO, MEPC Res. 304(72), IMO Doc. MEPC 72/17/Add.1, annex 11 (Apr. 13, 2018), at 5. *Compare Member States*, INT'L MARITIME ORG., https://www.imo.org/en/OurWork/ERO/Pages/MemberStates.aspx (last visited July 20, 2023), *with Status of Paris Agreement*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en (last visited July 20, 2023).

supports the Glasgow Climate Pact, which resolved to pursue efforts to limit global temperature increase to 1.5 degrees.[118] In its July 2023 climate strategy, the IMO resolved that GHG emissions from shipping would reach net-zero "by or around, i.e. close to 2050 . . . consistent with the long-term temperature goal set out in Article 2 of the Paris Agreement."[119]

Moreover, principles of international environmental law indicate that the Paris Agreement's 1.5 degree temperature goal should guide states in their actions related to shipping's climate impacts. Under the harm prevention principle, a States is 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.[120] Viñuales explains that this principle overlaps with others, including the "responsibility to ensure that activities within [a State's] 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.[121] Climate change poses a risk of significant harm: "[a]ssuming 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."[122] Accordingly, these customary principles apply to climate change.[123]

These principles should be read to encompass shipping's climate impacts for the same reason that they encompass states' emissions: the sector's aggregate annual GHG emissions are more than 700 million metric tons of carbon, which qualifies it as a leading global source of climate pollution.[124] Accordingly, the risk that shipping contributes to climate change is likely rather than speculative.[125] Although each state's share of the harm posed by shipping's climate impact varies depending on its maritime trade, incremental reductions will lessen the risk of significant harm, as with

118. UNFCCC, Rep. of the Conf. of the Parties Serving as the Meeting of the Parties to the Paris Agreement, U.N. Doc. FCCC/PA/CMA/2021/10/Add.1 (Mar. 8, 2022), Decision 1/CMA.3, ¶ 16; IMO, *Report of the Marine Environment Protection Committee on its Seventy-Eighth Session*, at 33, 40, IMO Doc. MEPC 78/17 (June 24, 2022).

119. IMO 2023 Strategy, *supra* note 3, at 6.

120. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, *supra* note 26, at 153, art. 3.

121. Viñuales, *supra* note 16, at 116–17 (citing U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/ 26/Rev.1 (Aug. 12, 1992); Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, 2011 ITLOS Rep. 10, ¶¶ 125–35 [hereinafter Seabed Advisory Opinion]).

122. Mayer (2023), *supra* note 16, at 134.

123. *See infra* Part II.B.1 regarding their relevance to a customary international obligation.

124. *See supra* notes 1, 5.

125. Viñuales, *supra* note 16, at 123 ("Risk, in this context, requires a reliable probability ('high' or 'small', but reliable as opposed to volatile) of a negative outcome.").

other emissions. Shipping's climate impacts therefore cross the threshold for harm prevention. Because limiting global warming to 1.5 degrees is necessary to avoid a high risk of sea level rise that damages small islands and coastal areas, species loss and extinction, ocean acidification and other harm,[126] the Paris Agreement's 1.5 degree goal should be interpreted as a legal benchmark for shipping's climate emissions and for the prevention of disastrous levels of climate change more broadly.

Yet multiple studies suggest that the IMO's current measures are not compatible with that goal, assuming that shipping only needs to achieve average global reductions.[127] Thus, although the Paris Agreement's temperature goals are substantively linked to shipping—through the IMO's citation of them in its resolutions and through the application of principles of international environmental law—there is not yet a legal framework to hold states to account for this sector's emissions. National courts have given the Paris Agreement's temperature goals legal weight as normative standards for actions by governments and corporations, standards that inform the substance of legal obligations.[128] As discussed next, the 1.5 degree goal can operate in a similar way to inform legal obligations for international shipping.

B. A Due Diligence Obligation to Mitigate

In this section, I discuss the debate on whether states have a due diligence obligation to take all necessary measures to mitigate climate change, imposed by three areas of international law: customary international law, human rights treaties, and the LOSC. I do not definitively answer those important questions, but instead examine sources of law and scholarly perspectives to determine that, to the extent that such obligations exist, they must extend to international shipping.

1. Customary International Law

The application of international environmental legal principles to specific disputes—and their crystallization into binding customary

126. IPCC, *supra* note 6, at 8–9.

127. *See* sources cited *supra* note 5. There are reasons to believe that the sector should decarbonize more quickly, given that it is relatively easy and inexpensive for it to do so compared with other economic sectors such as aviation and land use. Maria Sharmina et al., *Decarbonising the Critical Sectors of Aviation, Shipping, Road Freight and Industry to Limit Warming to 1.5–2°C*, 21 CLIMATE POL. 455, 462 (2021).

128. *See, e.g.*, HR 20 december 2019, RvdW 2020, 19/00135 mn.nt C.A.S. (The State of the Netherlands (Ministry of Economic Affairs and Climate Policy)/Stichting Urgenda) (Neth.); Bundesverfassungsgericht [BvR] [Federal Constitutional Court] Mar. 24, 2021, 2656 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1, ¶¶ 7, 192 (2021) (Ger.) (English translation).

international law—is ad-hoc.[129] Courts identify customary international law by looking to whether there is a "general practice . . . accepted as law[;]" in other words, whether there is widespread, representative, and consistent practice among states that is viewed by those states as legally required.[130]

Mayer surveys state practice and identifies a customary obligation to mitigate climate change, but finds that because almost all states are mitigating in a way that is inconsistent with the Paris Agreement's temperature goals (both the 2 and 1.5 degree goals), there is currently insufficient state practice to support a customary obligation tied directly to them.[131] He instead identifies an obligation for states to "follow consistently, over time, a reasonable interpretation of the temperature targets" as applied to their own mitigation goals—in other words, a state could choose the least demanding interpretation of its fair share of the collective effort to meet the targets as long as the choice was justified.[132] Under Mayer's analysis, as part of their good faith mitigation efforts, states must take necessary or appropriate measures, which might include assessment, project planning, and internally consistent policies.[133] He concedes that his conservative approach is less demanding than that adopted by several courts that have relied on customary legal principles in climate disputes, including the Dutch Supreme Court's approach in *Urgenda v. Netherlands*.[134]

How does Mayer's finding intersect with international shipping? I agree that there is insufficient state practice to indicate a customary legal obligation to mitigate climate change consistent with the Paris Agreement's goals. Mayer also appears correct that states have a customary legal obligation to identify and implement a fair-share contribution towards the prevention of global warming that reaches disastrous levels.[135] That process necessarily involves consideration of international shipping: the sector consists of a large and growing share of the carbon budget available to prevent global warming above 1.5 degrees, and some studies estimate that it will account for more than one hundred percent by 2050 under a business-as-usual scenario.[136] Thus, any "reasonable interpretation" of what the temperature goals demand must include the sector and its growth.[137]

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129. PIERRE-MARIE DUPUY & JORGE E. VIÑUALES, INTERNATIONAL ENVIRONMENTAL LAW 60–62 (2d ed. 2018) (discussing the differences between principles, concepts, and rules).

130. Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10, at 135–38 (2018).

131. Mayer (2023), *supra* note 16, at 142–43.

132. *Id.* at 145.

133. *Id.* at 147–50.

134. *Id.* at 150.

135. *Id.* at 145.

136. *See* sources cited *supra* at note 5.

137. *See* Mayer (2023), *supra* note 16.

Is there also a specific customary legal obligation to consider and mitigate the international shipping sector's emissions, either through the IMO or on a unilateral, bilateral, or regional basis? The IMO's member states have unanimously resolved that the IMO will reduce shipping's emissions consistent with the Paris Agreement's temperature goals.[138] But those resolutions themselves do not legally bind states,[139] and the IMO has not implemented measures that would achieve emissions reductions consistent with the Agreement's temperature goals.[140] The resolutions therefore do not constitute state practice consistent with a customary legal obligation.

As noted above, some states have asserted in their NDCs that they are committed to reducing shipping's climate impacts through the IMO.[141] NDCs have legal status under the Paris Agreement, are arguably binding undertakings, and have been enforced against states in domestic courts.[142] Committing to an act in an NDC therefore has particular legal salience. In contrast to state practice when used as a supplementary means of treaty interpretation, in which case the state practice must be unanimous, in the case of the identification of customary international legal obligations, "the most important practice is that of 'States whose interests are specially affected.'"[143] The states that have committed to work through the IMO in their NDCs to reduce shipping's emissions include some, but not all, major flag and port states.[144] But it is very difficult to determine which, if any, states are "specially affected" by international shipping's climate impacts, given its global reach.[145] Therefore, in my view there is insufficient support for a customary international legal obligation requiring that states reduce shipping's climate impacts through the IMO or on a unilateral, bilateral, or regional basis.

Yet states' commitments in their NDCs and increasing unilateral actions indicate that there may be an emerging customary norm that states must

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138. MEPC Res. 304(72), *supra* note 117, at 4; IMO 2023 Strategy, *supra* note 3, at 6; IMO, *Report of the Marine Environment Protection Committee on its Seventy-Eighth Session*, *supra* note 118, at 33.

139. Aldo Chircop, *The IMO Initial Strategy for the Reduction of GHGs from International Shipping: A Commentary*, 34 INT'L J. MARINE & COASTAL L. 482, 509 (2019).

140. IMO, *Fourth IMO Greenhouse Gas Study*, *supra* note 4.

141. *See* sources cited *supra* at note 113.

142. Benoit Mayer, *International Law Obligations Arising in Relation to Nationally Determined Contributions*, 7 TRANSNAT'L ENV'T L. 251 (2018); Mayer (2023), *supra* note 16.

143. Scharf, *supra* note 18, at 315 (quoting North Sea Continental Shelf (Ger. v. Den., Ger. v. Neth.), Merits, 1969 I.C.J. 3, ¶ 74 (Feb. 20)).

144. *See* sources cited *supra* note 113; UNCTAD, *supra* note 1, at 41 (top flag states), 82 (top port states).

145. *See* UNCTAD, *supra* note 1, at xv (noting that ships carry over eighty percent of the volume of global trade); Kevin Jon Heller, *Specially-Affected States and the Formation of Custom*, 112 AM. J. INT'L L. 191, 193 (2018) ("[A] state should be considered specially affected if it either engages in a practice that some states do not or is distinctively affected by a practice—directly or indirectly—in a manner that distinguishes it from other states.").

address shipping's climate impacts.[146] This has several legal consequences. States are under an obligation to persistently object to an emerging customary norm if they disagree in order to avoid being bound to the resultant customary legal obligation.[147] The current body of state practice will be relevant to judicial determinations of general trends that can "crystalize[] emerging rules and [] influence[] state behavior."[148] In addition, a future UN General Assembly resolution could be sufficient to "consolidate" the state practice into a customary obligation, depending on the resolution's text and the vote.[149]

Even though there is no binding obligation in customary international law to mitigate shipping's climate emissions, principles of international environmental law nevertheless play an important role in the scope and content of any treaty obligation to do so. Principles can give coherence to obligations and help with their interpretation.[150] They "point to particular decisions about legal obligation[s] in particular circumstances," and give "a reason that argues in one direction, but does not necessitate a particular decision."[151] There are many examples of this function: the harm prevention and precaution principles were used by the International Court of Justice to illuminate Uruguay's treaty obligations in *Pulp Mills*;[152] the Dutch Supreme Court cited the no harm principle to interpret Articles 2 and 8 of the European Convention on Human Rights;[153] and the Inter-American Court of Human Rights referred to the principles of harm prevention and precaution, among others, in addressing Colombia's obligation to respect the rights to life and personal integrity.[154] Thus the climate risks posed by a state's maritime sector and a state's associated due diligence obligations under treaty regimes should be informed by general principles, such as harm prevention and precaution, even in the absence of a legally-binding customary obligation.

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146. *See* Scharf, *supra* note 18, at 318–20 (discussing the role of emerging norms in the development of customary international law); *id.* at 323 (explaining how acceptance of such norms as law can be shown by couching "their innovation in the language of existing law" or through "consent to an emerging rule" rather than acknowledgement that it already has the force of law).

147. *Id.* at 318.

148. *Id.* at 321 (quoting Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 775 (2001)).

149. *Id.* at 326–27.

150. Gilles J. Martin, *Principles and Rules*, *in* 4 ELGAR ENCYCLOPEDIA OF ENVIRONMENTAL LAW 19–21 (2018).

151. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 24, 26 (1977).

152. Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶¶ 193, 200 (Apr. 20).

153. HR 20 december 2019, RvdW 2020, 19/00135 mn.nt C.A.S. (The State of the Netherlands (Ministry of Economic Affairs and Climate Policy)/Stichting Urgenda), ¶¶ 5.6.1, 5.7.5 (Neth.).

154. Colombia Advisory Opinion, OC-23/17, ¶¶ 104(h), 106, 107; *see also* Mayer (2023), *supra* note 16, at 139, 143 (citing domestic and regional litigation that appeals to customary law).

2. Human Rights

For over a decade, climate law has experienced a "rights based turn,"[155] and in recent years that turn has been wide enough to encompass international shipping. Successful climate lawsuits have been grounded in human rights guaranteed under international treaties, state constitutions, and other legal bases, such as the use of tort law in the *Urgenda* case.[156] The European Court of Human Rights recently ruled that Switzerland's climate mitigation measures were inconsistent with the rights to life and health guaranteed under the European Convention on Human Rights.[157] The UN General Assembly, in its request for an advisory opinion to the International Court of Justice, asked the court to have regard for the "the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights . . . [and] the rights recognized in the Universal Declaration of Human Rights,"[158] demonstrating that human rights implicate climate obligations.

Many scholars and UN bodies take this view, finding that the protection of human rights necessarily requires preventing and addressing climate harm.[159] Others argue that human rights offer only a "narrow window" to compel mitigation for various reasons, including the diffuse and technical causes of climate change and the "absence of identifiable victims."[160] For example, Mayer writes that "a state's action on climate change mitigation, in itself, cannot be considered as a necessary or appropriate measure because it would result in virtually no benefit to the rights of individuals within that state's territory or under its jurisdiction."[161] He concludes that, because a state's individual emission reductions alone are insufficient to remedy human rights violations resulting from climate harm within its territory,

155. Peel & Osofsky, *supra* note 20, at 46.

156. *See, e.g.*, HR 20 december 2019, RvdW 2020, 19/00135 mn.nt C.A.S. (The State of the Netherlands (Ministry of Economic Affairs and Climate Policy)/Stichting Urgenda), at 46, n.35 (Neth.); 2656 BVerfGE 1, ¶ 203. *See also* Anxhela Mile, *Emerging Legal Doctrines in Climate Change Law—Seeking an Advisory Opinion from the International Court of Justice*, 56 TEX. INT'L L.J. 59, 83–85 (2021) (discussing human rights cases and climate mitigation duties).

157. *Case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20, ¶¶ 573–74.

158. G.A. Res. A/77/L.58, *supra* note 13, at 3.

159. *See, e.g.*, Off. of the U.N. High Comm'r for Hum. Rts., Rep. on the Relationship Between Climate Change and Hum. Rts., U.N. Doc. A/HRC/10/61, ¶ 16 (Jan. 15, 2009); Human Rights Council Res. 29, U.N. Doc. A/HRC/29/L.21, ¶ 4 (June 30, 2015); Alan Boyle, *Climate Change, the Paris Agreement and Human Rights*, 67 INT'L & COMP. L.Q. 759, 773–76 (2018); John H. Knox, *Climate Change and Human Rights*, 50 VA. J. INT'L L. 163, 190–210 (2009).

160. Benoit Mayer, *Climate Change Mitigation as an Obligation Under Human Rights Treaties?*, 115 AM. J. INT'L L. 409, 413, 422 (2021); *see also* Alexander Zahar, *Human Rights Law and the Obligation to Reduce Greenhouse Gas Emissions*, 23 HUM. RTS. REV. 385, 407 (2022) (arguing that causation and non-trivial harm amounting to a human rights violation cannot be shown from GHG emissions).

161. Mayer (2021), *supra* note 160, at 433; *see also* Peel & Osofsky, *supra* note 20, at 40, 63 (noting that many states resist extra-territorial human rights obligations).

human rights law—with its traditional territorial grounding—is not legally suited to address climate change.[162]

Recently, the Committee on the Rights of the Child in *Saachi v. Argentina* took a different approach, adopting a test that looked to whether petitioners' asserted climate harms were caused by the respondent states' acts or omissions because they were "reasonably foreseeable" consequences of the states' GHG emissions.[163] The Committee drew on the Inter-American Court of Human Rights' 2017 *Advisory Opinion on the Environment and Human Rights*, which held that a state's human rights jurisdiction for transboundary harms arises "if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory."[164] Although the Committee ultimately found it did not have jurisdiction because the petitioners failed to exhaust domestic remedies, the decision nevertheless represents a meaningful evolution in human rights jurisprudence.[165]

In addition to causation objections, scholars and states have argued against using the climate regime's temperature goals in human rights disputes.[166] For example, in the *Billy et al.* case at the UN Human Rights Committee, Australia argued that systemic integration under the Vienna Convention on the Law of Treaties did not justify the incorporation of the Paris Agreement's temperature goals into its obligations under the International Covenant on Civil and Political Rights (ICCPR) because the "two instruments have different aims and scopes."[167] The Committee found that it could consider arguments about whether Australia was complying with its obligations under other treaties and agreements,[168] but did not directly incorporate the climate regime's principles or standards into ICCPR obligations.[169] On the merits, the Committee determined that because the threat to Torres Strait islanders from climate change was reasonably foreseeable to Australia, Australia had a duty to take "necessary" measures, including adaptation measures that would protect the islanders' human rights.[170] Several Committee members wrote separately to say that Australia

162. Mayer (2021), *supra* note 160, at 424–25.

163. Saachi, *supra* note 21, ¶ 10.5–7.

164. *Id.*; Colombia Advisory Opinion, OC-23/17, ¶ 104(h).

165. Colombia Advisory Opinion, OC-23/17, ¶ 10.21.

166. Mayer, *supra* note 160 (2021), at 442–43.

167. Billy et al., *supra* note 21, ¶¶ 4.1–4.3.

168. *Id.* ¶ 7.5.

169. *Id.* ¶¶ 8.1–12 (noting that climate regime's principles and standards are not referenced in merits portion of decision); *see also* ICCPR, Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2728/2016, ¶ 9.11, U.N. Doc. CCPR/C/127/D/2728/2016 (Oct. 24, 2019) ("[W]ithout robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant.").

170. Billy et al., *supra* note 21, ¶ 11.

also had human rights obligations to reduce its GHG emissions in a way that was consistent with the Paris Agreement's temperature goals.[171]

Other scholars claim that human rights law requires states to go beyond the commitments in their Paris Agreement NDCs because the commitments, even if carried out, fall far short of preventing "disastrous" human rights outcomes.[172] Margaretha Wewerinke-Singh and Ashleigh McCoach argue that the 1.5 degree target should be incorporated into human rights obligations, and, in a similar approach to the one taken in *Urgenda*, suggest that courts could determine acceptable emissions trajectories for particular states using principles such as equity and common-but-differentiated responsibilities and respective capacities (CBDR-RC).[173] They reason that the 1.5 degree target can be seen as "common ground" between states, which must then individually translate scientific evidence into fair shares in light of those principles.[174]

That approach is being implemented in practice. A member of the UN Human Rights Committee in *Billy et al.* found that states have a due diligence obligation to set their national mitigation targets at the highest possible level, and a higher standard of due diligence applies with respect to states with significant total emissions, very high per capita emissions, and greater capacities to mitigate.[175] The Dutch Supreme Court followed a similar line of reasoning when holding that the Netherlands had to do more because of its high level of development and high per capita emissions.[176] And in *Declic Association v. The Government of Romania et al.*, the petitioners argue that the test of whether "all possible measures [have] been taken to reduce emissions" consistent with human rights obligations requires examining whether a state has taken steps to eliminate "luxury emissions" or "convenience emissions" and only allowed emissions "strictly necessary for the realization of human rights."[177] Thus, a sliding scale of risk and care can

171. *Id.* at annex I, ¶¶ 4–6; *id.* at annex II, ¶¶ 10–13.

172. Boyle, *supra* note 159, at 774 (quoting Rep. of the Special Rapporteur on the Issue of Hum. Rts. Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, & Sustainable Env't, ¶¶ 72–84, U.N. Doc. A/HRC/31/52 (Feb. 1, 2016)).

173. Margaretha Wewerinke-Singh & Ashleigh McCoach, The State of the Netherlands v. Urgenda Foundation*: Distilling Best Practice and Lessons Learnt for Future Rights-Based Climate Litigation*, 30 REV. EUR. COMPAR. & INT'L ENV'T L. 275, 278–80 (2021).

174. *Id.* at 280.

175. Billy et al., *supra* note 21, ¶¶ 3–5 (Zyberi, comm. member, concurring).

176. HR 20 december 2019, RvdW 2020, 19/00135 mn.nt C.A.S. (The State of the Netherlands (Ministry of Economic Affairs and Climate Policy)/Stichting Urgenda), ¶¶ 6.2, 7.3.4 (Neth.).

177. Cluj Ct. of Appeal Jan. 31, 2023, File No. 114/33/2023 (Rom.), Complaint at 44, translated in Declic et al. v. the Romanian Government, CLIMATE CASE CHART, https://climatecasechart.com/non-us-case/declic-et-al-v-the-romanian-government/ (last visited Apr. 7, 2023).

be applied depending on a respondent's level of development and the diligence of its actions.[178]

A human rights obligation to prevent climate harm would likewise apply to international shipping. The sector has many legal interactions with states: through the control of shipping companies by flag states and other states, the regulation of port access, and decision-making within the IMO.[179] The European Court of Human Rights has held that states are required to use all possible efforts to secure rights even if a state does not have full control over a territory or activity and more recently found that Switzerland must account for and prevent the human rights harms caused by GHG emissions "embedded" in imported products, even though those emissions occur outside that country's territory.[180]

In calling for a new binding instrument to regulate transnational corporations with respect to human rights, the UN Human Rights Council stressed that while international obligations to protect human rights lie with states, they "must protect against human rights abuse within their territory and/or jurisdiction by third parties, including transnational corporations."[181] Similarly, the Committee on the Rights of the Child found that states' obligations under the Convention on the Rights of the Child "must" be fulfilled with respect to business activities under their jurisdiction.[182] Thus, states' jurisdiction over the entities and vessels engaged in international shipping implicates their due diligence obligations to prevent climate harm, even though vessels emit GHGs both outside and within national maritime zones.[183]

Shipping's climate impacts meet the causal test articulated in *Saachi v. Argentina* and *Billy et al.*[184] Large port states have shipping sectors that generate millions of tons of carbon dioxide emissions annually, and some

178. Rep. of the Special Rapporteur on the Issue of Hum. Rts. Obligations, *supra* note 172, ¶ 46 ("All States have a duty to work together to address climate change, but the particular responsibilities necessary and appropriate for each State will depend in part on its situation.").

179. *See supra* Part I.

180. Ilaşcu v. Moldova & Russia, App. No. 48787/99, ¶¶ 331, 333 (July 8, 2004), https://hudoc.echr.coe.int/eng?i=001-61886; *Case of Verein Klimaseniorinnen Schweiz v. Switzerland*, App. No. 53600/20, ¶¶ 279–83, 287.

181. Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9, at 2 (July 14, 2014).

182. Convention on the Rts. of the Child, General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights, ¶ 8, U.N. Doc. CRC/C/GC/16 (Apr. 17, 2013).

183. *See* Alex Oude Elferink, *The* Arctic Sunrise *Incident: A Multi-Faceted Law of the Sea Case with a Human Rights Dimension*, 29 INT'L J. MARINE & COASTAL L. 244, 270–73 (2014) (discussing the interaction between a state's human rights jurisdiction and enforcement jurisdiction under the law of the sea).

184. Billy et al., *supra* note 21, ¶ 8.3; Saachi, *supra* note 21, ¶¶ 10.4–5.

flag states have primary jurisdiction over thousands of ships.[185] It is therefore reasonably foreseeable that those states' shipping policies could pose a significant risk of climate change that will harm human rights.[186] And the sector as a whole, governed by states through the IMO, emits a significant and increasing share of global emissions.[187] Therefore, states must diligently address ship emissions at the IMO and unilaterally in order to prevent temperature increases above 1.5 degrees and avoid the human rights harms that will foreseeably follow.

Moreover, human rights law continues to evolve towards environmental protection. In 2022, the UN General Assembly recognized the right to a clean, healthy, and sustainable environment as a human right,[188] and cases before regional human rights courts and the International Court of Justice may further clarify how human rights intersect with and impact states' obligations to prevent climate harm.[189] In light of the international shipping sector's climate impacts, human rights law requires that states diligently mitigate the risk of climate harm that the sector poses to the greatest extent possible.

3. The UN Convention on the Law of the Sea

Similar to human rights treaties, the LOSC does not mention climate change or ocean warming and acidification. But Part XII of the treaty imposes environmental obligations that apply to states' climate emissions, including those arising from shipping.[190] Article 192 provides that "[s]tates have the obligation to protect and preserve the marine environment."[191] Article 194 requires that they take "all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source," and that they "take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment."[192]

185. UK DEP'T FOR BUS., ENERGY, & INDUS. STRATEGY, 2020 UK GREENHOUSE GAS EMISSIONS, FINAL FIGURES (Feb. 1, 2022) (stating that international shipping emissions were estimated at 6.1 million tons in 2020); UNCTAD, *supra* note 1, at 42.

186. *See* sources cited *supra* note 21.

187. *See* sources cited *supra* notes 1, 5.

188. G.A. Res. 76/300, ¶ 3 (July 28, 2022).

189. *See* sources cited *supra* notes 13, 157.

190. Catherine Redgwell, *Treaty Evolution, Adaptation and Change: Is the LOSC "Enough" to Address Climate Change Impacts on the Marine Environment?*, 34 INT'L J. MARINE & COASTAL L. 440, 445 (2019); *see also* Jesse Cameron Glickenhaus, *Potential ICJ Advisory Opinion: Duties to Prevent Transboundary Harm from GHG Emissions*, 22 N.Y.U. ENV'T L.J. 117, 141–45 (2015) (discussing states' affirmative duties under the LOSC and that they encompass the prevention of GHG emissions).

191. LOSC, *supra* note 22, art. 192.

192. *Id.* art. 194.

These provisions codified the harm prevention principle in the context of protecting the marine environment.[193] Perhaps recognizing the existence of a customary obligation, the UN General Assembly asked the International Court of Justice to have regard to "the duty to protect and preserve the marine environment," in addition to having regard to the LOSC, in an advisory opinion on climate obligations.[194] But in contrast to a legal principle that binds through custom, the LOSC is a treaty that has been ratified by nearly every state.[195] The most significant non-party—for the purposes of this Article—is the United States, whose courts have found that certain of its provisions, including those in Part XII, reflect customary international law.[196] Accordingly, the treaty's text, signatories' subsequent practice, and judicial decisions applying the treaty can help determine the scope and content of what it requires.[197]

The LOSC's reference to "pollution of the marine environment" encompasses GHG emissions.[198] The Convention defines pollution broadly as "the introduction by man . . . substances or energy into the marine environment," and various types of pollutants have been classified as such in IMO legal instruments, including noise, trash, and GHG emissions from ships.[199] Moreover, ocean acidification directly results from CO_2 emissions, establishing a clear nexus between impacts on marine biodiversity and the predominant climate pollutant.[200] Thus, "[t]here is widespread consensus that climate change and ocean acidification fall within the scope of Part XII."[201] Accordingly, the LOSC is facially broad enough to include GHG

193. DUPUY & VIÑUALES, *supra* note 129, at 67.

194. G.A. Res. A/77/L.58, *supra* note 13, at 3.

195. *United Nations Convention on the Law of the Sea*, UN TREATY COLLECTION https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en (last visited July 20, 2023).

196. Sarei v. Rio Tinto, PLC, 221 F. Supp. 2d 1116, 1160–63 (C.D. Cal. 2002) (explaining that plaintiffs could state a claim that for environmental harm based on violation of LOSC provisions because the treaty "reflects customary international law"); Sarei v. Rio Tinto, PLC, 650 F. Supp. 2d 1004, 1026 (C.D. Cal. 2009) (explaining that while the LOSC's environmental provisions "may reflect customary international law that is specific and obligatory," they are not *jus cogens* norms); *see* Duff, *supra* note 22.

197. Redgwell, *supra* note 190, at 446 ("LOSC was always intended to be capable of further evolution."); IRINA BUGA, MODIFICATION OF TREATIES BY SUBSEQUENT PRACTICE 337, n.835 (2018) ("[T]he general environmental approach of the LOSC is gradually changing through regime interaction fuelled by subsequent practice.").

198. Boyle, *supra* note 23, at 463.

199. LOSC, *supra* note 22, art. 1(1)(4); *International Convention for the Prevention of Pollution from Ships (MARPOL)*, *supra* note 48.

200. Karen N. Scott, *Ocean Acidification: A Due Diligence Obligation Under the LOSC*, 35 INT'L J. MARINE & COASTAL L. 382, 384–89 (2020).

201. Redgwell, *supra* note 190, at 445 n.27 (citing Alan Boyle, *Law of the Sea Perspectives on Climate Change*, 27 INT'L J. MARINE & COASTAL L. 831, 832 (2012)); *see also* Roland Holst, *supra* note 27.

emissions from any source within its definition of pollution of the marine environment.[202]

Moreover, LOSC jurisprudence supports the argument that the treaty imposes a due diligence obligation to mitigate climate change.[203] The *South China Sea* arbitral tribunal found that Articles 192 and 194 impose due diligence obligations to protect the marine environment from future damage and preserve the marine environment in its present condition.[204] And in an advisory opinion examining the general obligations in Articles 192 and 194, the International Tribunal for the Law of the Sea found that due diligence requires a state to "deploy adequate means, to exercise best possible efforts, to do the utmost."[205] As Roland Holst points out, "the open-ended character of due diligence obligations . . . requires a case-by-case assessment" and "also provides an opening for systemic integration by interpreting UNCLOS" in line with other sources of international law, such as the UNFCCC, Paris Agreement, or customary international law.[206] She further notes that because states' NDCs under the Paris Agreement fall short of preventing warming above its temperature goals, "it can be argued that due diligence under UNCLOS obliges States to do more."[207]

The LOSC has a global reach.[208] In *South China Sea*, the tribunal held that "the obligations in Part XII apply to all States with respect to the marine environment in all maritime areas, both inside the national jurisdiction of States and beyond it."[209] In that case and *Southern Bluefin Tuna*, the tribunals found that the general obligation in Article 192 and 194 to protect the marine environment includes the protection of ecosystems and biodiversity, in line with developments in international environmental law.[210] Thus, the LOSC's scope includes the entirety of the world's ocean and the life within it.

There would likely be *lex specialis* objections to interpreting the LOSC as imposing climate obligations that are more stringent than what the Paris Agreement demands.[211] But what the Paris Agreement demands is open-

202. Redgwell, *supra* note 190, at 448–50.

203. Roland Holst, *supra* note 27, at 219 (citing S. China Sea (Phil. v. China), 33 R.I.A.A. 153, 521–22, ¶¶ 743–44 (Perm. Ct. Arb. 2016) [hereinafter South China Sea]); Southern Bluefin Tuna, 1999 ITLOS Rep.

204. South China Sea, 33 R.I.A.A. at 373, ¶ 940.

205. Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Case No. 21, Advisory Opinion of Apr. 2, 2015, 2015 ITLOS Rep. 4, ¶ 129 [hereinafter SRFC Advisory Opinion] (quoting Seabed Advisory Opinion, 2011 ITLOS Rep. ¶¶ 110–17).

206. Roland Holst, *supra* note 27, at 223.

207. *Id.*

208. *But see* Mayer (2023), *supra* note 16, at 109 (explaining that the LOSC "may imply an obligation for states to mitigate climate change only in relation to the particular environmental resources [it] oblige[s] states to conserve").

209. South China Sea, 33 R.I.A.A. at 373, ¶ 940.

210. *Id.* ¶¶ 941–45; Southern Bluefin Tuna, 1999 ITLOS Rep. ¶ 70.

211. Boyle, *supra* note 23, at 471–72.

textured.[212] Thus, as Boyle explains, "if the question arises what measures are 'ambitious' enough to constitute the 'necessary measures' required by the LOSC, a comparison could be made with the best performers in a similar situation."[213] Accordingly, the LOSC's broad environmental obligations and progressive caselaw indicate it could support a due diligence climate change obligation that, depending on the state and the factual situation, would allow incorporation of the Paris Agreement's requirement that states adopt the highest possible ambition for GHG reductions.[214]

Yet, as detailed above, the Paris Agreement does not directly or clearly apply to shipping, while the LOSC does. Irini Papanicolopulu notes that the content of the LOSC's general due diligence obligation can be "proceduralized" with specific rules that must be adopted. She gives as an example the pollution of the marine environment by ships and "generally accepted international rules and standards" (GAIRS)—i.e., the MARPOL regulatory regime.[215] In a similar vein, Redgwell writes that "[t]he only elaboration of GAIRS in the climate context has been the amendment of MARPOL Annex VI to include the regulation of GHG emissions from international shipping."[216] Other scholars have argued that Article 211, which requires that states establish GAIRS for shipping through the IMO, "completes the obligation of States under article 194, paragraph 3(b), to take measures designed to minimize to the fullest possible extent pollution of the marine environment from vessels."[217]

In my view, the reference to the "fullest possible extent" in Article 194 is analogous to the Paris Agreement's requirement that its parties make contributions representing their "highest possible ambition" to the temperature goals.[218] Thus, when adopting GAIRS at the IMO, states are obliged to take all necessary measures to protect the marine environment. That obligation has a particular meaning in the context of designing and implementing IMO climate regulations, discussed *infra* Part III.A.[219]

The LOSC can also be interpreted to oblige states to act unilaterally to prevent, reduce, and control vessel source pollution in a way that is more aggressive than what GAIRS require. In other words, IMO rules should be seen as either a floor or a reference point for what states must do to fulfill their general obligations to protect the marine environment, not a standard

212. *See supra* Part II.A.

213. Boyle, *supra* note 23, at 474.

214. *Id.*

215. Irini Papanicolopulu, *Due Diligence in the Law of the Sea*, *in* DUE DILIGENCE IN THE INTERNATIONAL LEGAL ORDER, *supra* note 14, at 158.

216. Redgwell, *supra* note 190, at 450–51.

217. 4 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 180, 211.1 (Myron H. Nordquist et al. eds., 1985).

218. Paris Agreement, *supra* note 6, art. 4(3).

219. *See infra* Part III.

that per se satisfies Articles 192 and 194.[220] Under the LOSC's Article 211, flag states must adopt rules "at least as effective" as IMO rules, and Article 212 requires flag states to adopt and implement rules for atmospheric pollution from ships that take IMO rules "into account."[221] Other articles in the LOSC differ because they require that states enact or enforce laws that "conform to" GAIRS or "ensure compliance with them."[222] In contrast, the the LOSC's drafters expressly anticipated in this case that states could and would implement measures that are more demanding than IMO rules.

Moreover, Articles 192 and 194 mandate that states protect the marine environment using the "best practicable means at their disposal and in accordance with their capabilities."[223] This differentiated approach contrasts starkly with the no-more-favorable treatment principle enshrined in Articles 211, 212, and MARPOL,[224] and it applies to all states and all maritime zones, not only flag states.[225] The LOSC contemplates that states will impose "particular requirements"[226] for vessels that voluntarily enter their ports, and port state control is "developing from a right into an obligation."[227] In light of the current inadequacy of the IMO's climate rules,[228] the best practical means to protect the marine environment are unilateral measures, at least for states similarly situated to those in the European Union.[229]

This progressive interpretation of states' obligations under the LOSC is consistent with the way in which due diligence climate obligations are viewed generally. As Jacqueline Peel explains, compliance with climate treaty obligations should not be viewed as legally equivalent to satisfying a due diligence obligation to prevent environmental damage.[230] She reasons that the climate regime has a relatively narrow focus on requiring cooperation between states, and emission reduction commitments made within it are widely viewed as inadequate.[231] Similarly, in the context of maritime climate measures, because the emission reduction pathways established by IMO rules are incompatible with limiting global warming to 1.5 degrees, compliance with them should not be viewed as satisfying the requirement

220. LOSC, *supra* note 22, art. 211.
221. *Id.* arts. 211, 212.
222. *Id.* arts. 41(3), 53(8), 94(5).
223. *Id.* art. 194(1).
224. *See supra* text accompanying notes 58–62.
225. LOSC, *supra* note 22, arts. 211, 212.
226. *Id.* arts. 211(3), 218(2).
227. Rothwell et al., *supra* note 69, at 893.
228. *See* sources cited *supra* notes 5, 6.
229. *See* EU Maritime ETS Measure, *supra* note 7, ¶ 28 (expanding shipping measures in 2028 if IMO has not enacted a market-based measure by then); *see infra* Part III.B (discussing unilateral measures).
230. Peel, *supra* note 27, at 1034–35.
231. *Id.*

that states take "all measures . . . that are necessary to prevent, reduce and control pollution of the marine environment from any source."[232] State practice more stringent than IMO pollution rules is "scarce."[233] But the European Union's climate measures, and an earlier ship recycling regulation, are notable examples.[234] Accordingly, rather than merely requiring that states implement IMO rules, the LOSC—read together with human rights obligations and customary principles—obliges states to use all necessary measures to mitigate shipping's climate risks.

IV. NECESSARY MEASURES

What exactly must states do to fulfill their due diligence obligation to mitigate shipping's climate impacts? The sector's effects on the climate system are cumulative to those from national emissions and international aviation. Thus, if states collectively reduced emissions from all sources besides shipping and implemented carbon removal and sequestration to address shipping's emissions, no further action would be needed to prevent 1.5 degree warming.[235]

That scenario is unrealistic. Therefore, states must address the sector's emissions in order to prevent climate change that harms human rights and the marine environment. But not every action relating to shipping's impact on the climate would be enough. Establishing compliance with due diligence obligations in the climate context "requires assessing whether a balance has been equitably struck 'between what is possible and what is economically acceptable.'"[236] Reasonableness, flexibility, and objectivity are common elements of due diligence obligations, and measures must be proportional, meaning that technological and economic abilities should be balanced against state interests.[237] Accordingly, the content of obligations can change over time.[238] Due diligence can be measured "in terms of technical and

232. LOSC, *supra* note 22, art. 194.

233. Bartenstein, *supra* note 61, at 1429 n.55.

234. *Id.*

235. *See* Bullock, *supra* note 5, at 304–05 (explaining that a global carbon budget of 373 gigatons of CO2 from 2021 to 2050 remains available for a fifty percent chance of limiting warming to 1.5 degrees); IMO, *Fourth IMO Greenhouse Gas Study*, *supra* note 4, at 2–3, tbl.1, fig.1 (estimating international shipping's annual emissions from 2021 onwards at between eight hundred million tons and one gigaton of CO2).

236. Annalisa Savaresi, *Inter-State Climate Change Litigation: "Neither a Chimera nor a Panacea*," *in* CLIMATE CHANGE LITIGATION: GLOBAL PERSPECTIVES 366, 377 (Ivano Alogna et al. eds., 2021).

237. Papanicolopulu, *supra* note 215, at 152–53 (citing Seabed Advisory Opinion, 2011 ITLOS Rep. ¶ 110); *see also* Christina Voigt, *State Responsibility for Climate Change Damages*, 77 NORDIC J. INT'L L. 1, 10 (2008) (explaining that with due diligence obligations, "[w]hat constitutes the appropriate standard of care is, thus, determined by looking at a State's means and capacities at its disposal in an international context").

238. Papanicolopulu, *supra* note 215, at 149–50.

scientific standards of behavior that are commonly accepted by States."[239] As Nikolaos Giannopoulos writes, states "must consider the contemporary level of technological and scientific progress, because developments in scientific awareness regarding the risks posed by specific activities may enhance the level of due diligence required."[240]

Shipping industry practice also illuminates the due diligence that should be expected from states. The World Shipping Council, which represents the liner shipping industry, has endorsed climate policies that are more ambitious than the IMO's, calling for application of a carbon price using a market-based mechanism such as a trading system or tax on maritime fuel.[241] Specific companies have gone further: Maersk, one of the world's largest container shipping companies, has committed to net zero emissions by 2040, and other companies have committed to interim goals and policies that are more ambitious than those adopted by the IMO.[242] These industry practices form part of the facts and circumstances in which states' diligence can be assessed.[243]

Due diligence requires states to "employ all means reasonably available to them" to prevent a violation "so far as possible."[244] The types of conduct that could breach a due diligence obligation include action, inaction, and deficient action.[245] With that in mind, this Part discusses the two primary areas of state conduct—decision-making within the IMO and states' unilateral actions. It also shows how relatively few states control whether

239. Giannopoulos, *supra* note 34, at 156 (quoting DUNCAN FRENCH & TIMOTHY STEPHENS, INTERNATIONAL LAW ASSOCIATION STUDY GROUP ON DUE DILIGENCE IN INTERNATIONAL LAW, FIRST REPORT 29–30 (2014)).

240. *Id.*

241. IMO, Submission by the World Shipping Council, *Reduction of GHG Emissions from Ships*, at 2–3, IMO Doc. MEPC 78/7 (Feb. 9, 2022).

242. *Decarbonising Ocean Transport*, MAERSK, https://www.maersk.com/sustainability/our-esg-priorities/climate-change/decarbonising-ocean-shipping (last visited July 20, 2023); *Energy and Greenhouse Gas Management*, EVERGREEN MARINE, https://csr.evergreen-marine.com/csr/jsp/CSR_EnergyEmissionManagement.jsp (last visited July 20, 2023) (committing to a fifty percent reduction below 2008 levels by 2030); *Sustainability Strategy*, HAPAG-LLOYD, https://www.hapag-lloyd.com/en/company/responsibility/sustainability/strategy.html (last visited July 20, 2023) (giving an objective of net-zero GHG emissions by 2045); *see 20 Largest Container Shipping Companies in the World in 2024*, MARINE INSIGHT (Apr. 30, 2023), https://www.marineinsight.com/know-more/10-largest-container-shipping-companies-in-the-world/.

243. Peel, *supra* note 27, at 1035.

244. Application of 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) [hereinafter Genocide]; *accord* SRFC Advisory Opinion, 2015 ITLOS Rep. 205, ¶ 129. Although the court in *Genocide* interpreted a treaty obligation, "its comments on the obligation of prevention are of a general nature." 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 261, 265 (Maurizio Ragazzi ed., 2013); *see also* BARROS, *supra* note 32, at 158 n.916 (making the same argument).

245. *See* BARROS, *supra* note 32, at 195 (explaining that conduct breaching the due diligence obligation can be action, inaction, or the "*maintenance* of a situation of risk of damage to human rights").

and how quickly shipping decarbonizes, and it establishes a framework to differentiate and assess states' compliance with the obligation identified above. This Part concludes by surveying legal venues that could hold states to account.

A. Decision-Making Within the IMO

As an international organization, the IMO has legal personality and can bear obligations under international law.[246] Thus, there are complex and overlapping ways to conceptualize legal responsibility between the IMO and its member states, given that states and organizations have different international legal obligations and organizations exercise varying degrees of autonomy.[247] Possible configurations of this legal relationship include that states might have duties to "supervise" organizations to prevent them from violating their organizational obligations;[248] they might be required to implement organizational acts which violate their own obligations;[249] and states might be jointly responsible with organizations for internationally wrongful acts.[250]

This Article is concerned with a particular way in which the IMO and its member states interact: the conduct of the IMO's members in the organization's institutional decision-making.[251] International organizations are "Janus-faced."[252] They are autonomous entities with their own will, yet they are also fora for their member states to collectively make decisions.[253] The individual diplomats representing states in organizations are state actors under the rules of international responsibility.[254] In treaties, soft law, and

246. *See* Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. Rep. 73, ¶ 37 (Dec. 20, 1980).

247. Tarcisio Gazzini, *The Relationship Between International Legal Personality and the Autonomy of International Organizations*, *in* INTERNATIONAL ORGANIZATIONS AND THE IDEA OF AUTONOMY 196, 196 (Richard Collins & Nigel D. White eds., 2011).

248. Kristina Daugirdas, *Member States' Due Diligence Obligations to Supervise International Organisations*, *in* DUE DILIGENCE IN THE INTERNATIONAL LEGAL ORDER, *supra* note 14, at 59, 64.

249. Iain Cameron, *UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights*, 72 NORDIC J. INT'L L. 159, 168 (2003).

250. Antonios Tzanakopoulos, *Sharing Responsibility for UN Targeted Sanctions*, *in* INTERNATIONAL ORGANIZATIONS AND MEMBER STATE RESPONSIBILITY: CRITICAL PERSPECTIVES 139, 151–58 (Ana Sofia Barros et al. eds., 2016). *See generally* Andre Nollkaemper & Dov Jacobs, *Shared Responsibility in International Law: A Conceptual Framework*, 34 MICH. J. INT'L L. 359, 365–69 (2013); MOSHE HIRSCH, THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARD THIRD PARTIES: SOME BASIC PRINCIPLES (1995).

251. *See* Barros & Ryngaert, *supra* note 14; BARROS, *supra* note 32.

252. Ramses A. Wessel & Ige F. Dekker, *Identities of States in International Organizations*, 12 INT'L ORGS. L. REV. 293, 306 (2015). *See generally* CATHERINE BRÖLMANN, THE INSTITUTIONAL VEIL IN PUBLIC INTERNATIONAL LAW (2007) (describing the legal nature of international organizations).

253. Wessel & Dekker, *supra* note 252, at 306.

254. G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts, at 2–3 (Dec. 12, 2001).

scholarship, states are often referred to as "acting within" international organizations when they participate in those organs.[255] Thus, if the American Permanent Representative to the IMO votes against a climate resolution in the MEPC, her vote is presumably cast under instructions from her government, and it is legally an act of the United States.[256]

Ana Sofia Barros and Cedric Ryngaert submit that "when member States participate in [an] international organization's decision-making processes, they are arguably carrying out State acts, which have to comport with their international obligations."[257] The International Court of Justice made just such a finding in *FYROM v. Greece*.[258] That case concerned Greece's opposition to the Former Yugoslav Republic of Macedonia (FYROM)'s accession to the North Atlantic Treaty Organization (NATO). In a 1995 treaty, Greece agreed "not to object" to FYROM's membership in international organizations.[259] Greece made clear before, during, and after a NATO summit in 2008 that it opposed FYROM's membership in the alliance, and NATO collectively decided not to invite FYROM to apply.[260] The Court held that Greece's opposition to FYROM's membership could be considered separately from the conduct of NATO's other members and evaluated in light of Greece's obligations under the treaty.[261] Moreover, NATO's collective decision was irrelevant because Greece had an obligation of conduct not to oppose FYROM's membership.[262] The Court concluded that Greece breached its obligation.[263]

In a dictum in *Southern Bluefin Tuna*, the International Tribunal for the Law of the Sea likewise found that it could examine state conduct within an international organization to determine compliance with legal obligations.[264] In that case, Australia and New Zealand argued that Japan violated the LOSC by unilaterally fishing for southern bluefin tuna in excess of its national allocation agreed to by the Commission for the Conservation of Southern Bluefin Tuna (the Commission). The tribunal observed that "the conduct of the parties within the Commission . . . is relevant to an evaluation of the extent to which the parties are in compliance with their obligations"

255. Barros & Ryngaert, *supra* note 14, at 58.

256. *See* Wessel & Dekker, *supra* note 252, at 306.

257. Barros & Ryngaert, *supra* note 14, at 55.

258. FYROM, 2011 I.C.J. Rep.

259. *Id.* ¶ 21 (citing Interim Accord, Greece-Maced., art. 11, ¶ 1, Sept. 13, 1995, 1891 U.N.T.S. 4).

260. *Id.* ¶¶ 42–43.

261. *Id.*

262. *Id.* ¶ 70; Barros & Ryngaert, *supra* note 14, at 77–78.

263. FYROM, 2011 I.C.J. Rep. ¶ 170.

264. Southern Bluefin Tuna, 1999 ITLOS Rep. ¶ 50. *See generally* Moritaka Hayashi, *The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the International Tribunal for the Law of the Sea*, 13 TUL. ENV'T L.J. 361 (2000) (discussing case background and outcome).

under the LOSC.[265] It ordered that the parties refrain from unilateral fishing exceeding their national allocations pending further proceedings.[266] An arbitral tribunal later found that it lacked jurisdiction to consider the merits of the claims.[267] Yet, like *FYROM*, *Southern Bluefin Tuna* shows that courts might be willing to determine the lawfulness of states' conduct within international organizations.

Jurists and scholars nevertheless disagree about whether states should be held individually responsible for the positions they take in international organizations. In *FYROM*, the Greek *ad hoc* judge, Roucounas, argued in dissent that holding a member state legally responsible for its position undercuts the international organization's autonomy because doing so in effect renders judgment on the organization itself.[268] Wessel and Dekker note that when states participate in organizations' decision-making processes they are not acting as states per se, but as *member* states who are fulfilling a particular role guaranteed to them under an organization's constituent instrument.[269] Therefore, in a sense they are a legal arm of the organization.[270]

Yet a distinction can be drawn between decision-making and decision-implementing.[271] The former conduct is by a member state—only states (and other international organizations that are also members) hold decision-making authority in international organizations, and they do so as an attribute of their sovereignty. States therefore have discretion to participate or not and to take whatever position they like—subject to their other legal obligations.[272] In contrast, when carrying out an international organization's decision, a member state acts more like an arm of the institution, particularly when a state is under a legal obligation to do so, as with implementing UN Security Council sanctions.[273] Thus, the degree to which a member state can be seen through an organization's institutional form depends on the legal context.[274]

FYROM involved a discrete and specific obligation—Greece had explicitly committed not to do exactly what it did.[275] The International Court of Justice has not yet ruled on whether states' positive obligations also apply

265. Southern Bluefin Tuna, 1999 ITLOS Rep. ¶ 50.

266. *Id.* ¶ 90.

267. S. Bluefin Tuna (Austl. & N.Z. v. Japan), 23 R.I.A.A. 1, 43–45 (Aug. 4, 2000).

268. FYROM, 2011 I.C.J. Rep. 720, ¶ 47 (Roucounas, J., dissenting).

269. Wessel & Dekker, *supra* note 252, at 304–05.

270. *Id.*; *see also* Niels Blokker, *International Organizations and Their Members*, 1 INT'L ORG. L. REV. 144, 147–48 (2004).

271. BARROS, *supra* note 32, at 77–81.

272. BARROS, *supra* note 32, at 100.

273. *See* U.N. Charter art. 25; Tzanakopoulos, *supra* note 250.

274. Catherine Brölmann, *Transparency as a Contested Fundamental in the Law of International Organizations*, 20 INT'L ORGS. L. REV. 10, 18–19 (2023).

275. FYROM, 2011 I.C.J. Rep. ¶ 70.

to their decision-making within international organizations. But UN human rights bodies have commented that states retain their obligations to comply with human rights when acting within international organizations.[276] And in a string of cases, the European Court of Human Rights has gone further. In *Gasparini v. Italy and Belgium*, the court held that states' human rights obligations bind them when they participate in international organizations' decision-making.[277] In *Perez v. Germany* and *Klausecker v. Germany*, it likewise contemplated that Germany could be held responsible for the lack of due process at UN bodies and the European Patent Office when it had participated in decision-making within those organizations.[278]

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.[279] Her approach is broader and more comprehensive than the International Law Commission's in its Draft Articles on the Responsibility of International Organizations, which is limited to states' intentional efforts to "support, push or force international organisations to commit an act that is internationally wrongful."[280] But the Commission itself acknowledged that "[n]ot all the questions that may affect the responsibility of a State in connection with the act of an international organization are examined in the present draft articles."[281] Instead, as Barros argues, the Articles on State Responsibility—which were applied by the International Court of Justice in *FYROM*—indicate that the conduct of state representatives when making decisions at international organizations can be attributed to their state and independently assessed.[282]

The same reasoning applies to states' climate decision-making within the IMO. Even more so than directors at international financial institutions,

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276. Comm. on Econ., Soc., & Cultural Rts., General Comment No. 19: The Right to Social Security, ¶ 58, U.N. Doc. E/C.12/GC/19 (Feb. 4, 2008) ("States parties should ensure that their actions as members of international organizations take due account of the right to social security."); Convention on the Rts. of the Child, *supra* note 182, ¶¶ 47–48 (stating that states should uphold their obligations under Convention on the Rights of the Child "when acting as members" of international organizations); *see* Martina Buscemi, *The Duty of States to Ensure Respect for the Duty of Care Through Their Membership in International Organizations*, *in* THE DUTY OF CARE OF INTERNATIONAL ORGANIZATIONS TOWARDS THEIR CIVILIAN PERSONNEL 131 (Andrea De Guttry et al. eds., 2018).

277. Gasparini v. Italy & Belgium, App. No. 10750/03.

278. Perez v. Germany, App. No. 15521/08; Klausecker v. Germany, App. No. 415/07; Buscemi, *supra* note 276, at 137.

279. BARROS, *supra* note 32, ch. III. *Accord* Pasquale De Sena, *International Monetary Fund, World Bank and Respect for Human Rights: A Critical Point of View*, 20 ITALIAN Y.B. INT'L L. 247, 257 (2010).

280. BARROS, *supra* note 32, at 215.

281. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Third Session, U.N. Doc. A/66/10, at 157 (2011).

282. BARROS, *supra* note 32, at 94.

whose legal status "has long been a matter fraught with controversy," member state representatives at the IMO speak directly on behalf of their governments.[283] Because climate change harms human rights,[284] and IMO member states are bound by their human rights obligations when acting as decision-makers within the IMO, they are therefore under an obligation to do all they can in that role to make sure the IMO's climate decisions uphold human rights.

States' due diligence obligation to protect the marine environment under the LOSC yields the same result. Article 194 provides that states are to take all necessary measures to "prevent, reduce and control pollution of the marine environment," and the measures must include those "designed to minimize to the fullest possible extent" pollution from vessels.[285] Thus states are obliged to cooperate when establishing rules within the IMO,[286] but they must also design them to mitigate climate harm "so far as possible."[287]

This means that IMO member states must consider and apply the most comprehensive and current levels of scientific and technological expertise in designing and adopting climate standards for shipping.[288] States are therefore required to consider how policies can avoid path dependence and force technological innovation.[289] And if a proposed level of ambition or reduction measure is clearly inadequate—and therefore it is reasonably foreseeable that it would exacerbate the risk of catastrophic climate harm—due diligence demands that states vote against it and instead support more ambitious and effective climate measures.

The Paris Agreement's temperature goals—in particular its 1.5 degree goal—operate as legal benchmarks for avoiding harmful climate change and informing the level of diligence that should be expected of states. As noted above, major maritime states committed in their NDCs to working through the IMO to reduce shipping's GHG emissions, and within the IMO, its member states have agreed that the temperature goals should guide the IMO's climate policies in several resolutions adopted over a period of

283. *Compare id.* at 103, *with* IMO, *Report of the Marine Environment Protection Committee on its Seventy-Eighth Session*, *supra* note 118.

284. *See supra* Part II.C.

285. LOSC, *supra* note 22, art. 194.

286. LOSC, *supra* note 22, arts. 210–11.

287. Genocide, 2007 I.C.J. Rep. ¶ 430; Seabed Advisory Opinion, 2011 ITLOS Rep. ¶ 117 (stating that the standard of due diligence is "more severe for the riskier activities").

288. Giannopoulos, *supra* note 34, at 156–57.

289. *See* Jonathan Köhler et al., *Transitions for Ship Propulsion to 2050: The AHOY Combined Qualitative and Quantitative Scenarios*, 140 MARINE POL'Y 105049 (2022) (analyzing policy as driving shipping's rapid decarbonization); Eeva-Lotta Apajalahti & Gregor Kungl, *Path Dependence and Path Break-Out in the Electricity Sector*, 43 ENV'T INNOV. & SOC. TRANS. 220, 221–23 (2022) (defining and discussing path dependence).

years.[290] Application of the harm prevention principle and precautionary principle yields the same result.[291] Thus, states are obliged to support a reduction pathway in the IMO that will credibly achieve zero emissions by 2050 and steep emission cuts by 2030,[292] which is more ambitious than what the IMO agreed to in July 2023.[293]

Should states be held to different standards for their compliance with this duty based on their economic development or other factors? There is a long-standing disagreement about the degree to which the common-but-differentiated-responsibilities (CBDR) principle should be incorporated into climate measures for shipping.[294] In my view, the costs and benefits associated with the sector's decarbonization should be allocated in a way that is consistent with the CBDR principle.[295] But the principle applies in a specific way here. Unlike climate policies affecting national emissions, states have equal capacity to make informed decisions at the IMO, and the IMO has nearly universal membership.[296] Even small landlocked states therefore have some capacity to address shipping's risk of climate harm by virtue of their influence within the IMO's rule-making processes. Thus, if the IMO's climate policies prevent small island developing states and least-developed countries from bearing the burden of decarbonizing shipping and give them preferences in any technology transfer and financial assistance,[297] these states are also obliged to use their influence to push the organization to adopt a high level of ambition and effective climate measures.

To the extent that there is differentiation, large flag states should be held to a higher standard, because they enjoy special lawmaking authority within MEPC and therefore have more "control" over the IMO than other states.[298] The Marshall Islands seemed to acknowledge this in its most recent NDC, where it noted that it is the second-largest flag registry in the world and stated that it "is proud to support efforts for ambitious decarbonization action in the International Maritime Organization (IMO), including through

290. *See supra* notes 3, 113, 117.

291. *See supra* Part II.A.

292. *See* Bullock et al., *supra* note 5. *See generally* Sam Fankhauser et al., *The Meaning of Net Zero and How to Get It Right*, 12 NATURE CLIMATE CHANGE 15, 17 (2022); Shelley Welton, *Neutralizing the Atmosphere*, 132 YALE L.J. 171 (2022).

293. *See supra* note 3.

294. Kopela, *supra* note 50, at 81–85.

295. Kerr (2022), *supra* note 8, at 419–20.

296. The MEPC is a plenary organ of the IMO. IMO Convention, *supra* note 2, art. 37.

297. Shawkat Alam, *Technology Assistance and Transfers*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 957 (Lavanya Rajamani et al. eds., 2d ed. 2021) ("At its heart, technology transfers aim to address the inequitable distribution of costs and benefits that have occurred between developed and developing countries under conventional patterns of economic growth.").

298. *See supra* note 28; BARROS, *supra* note 32, at 86 (discussing differentiated diligence burdens on international legal subjects based on the degree of "control" exercised within international organizations).

the introduction of a market-based measure to put a price on carbon."[299] The Marshall Islands' long-standing commitment to a high level of ambition and effective measures at the IMO has not yet been mirrored by a majority of states at the MEPC.[300] And, as discussed below, the IMO's inadequate response obliges states to enact measures that are more ambitious than the global minimum.

B. Unilateral Measures

States are taking a variety of independent actions to decarbonize the international shipping sector. Norway and Singapore are working with the IMO to assist small island developing states and least-developed countries with maritime climate policies.[301] Cabo Verde and the United States are using voluntary domestic measures to stimulate the sector's decarbonization.[302] Other policies include India's development of renewable energy at ports and green shipbuilding; Norway's public procurement of low and zero carbon ships; the United Kingdom's support for innovators in clean maritime fuel; and Japan's technology research and development to help meet the IMO's climate ambitions.[303]

At the Glasgow UNFCCC Conference of the Parties, twenty-four states agreed on the "Clydebank Declaration" to establish green corridors for shipping.[304] The declaration's signatories, which include Japan, Singapore, the United Kingdom, and the United States, noted the 1.5 degree global warming goal and the IMO's endorsement of the goal in its 2018 Strategy.[305] They stated that they are alarmed that shipping's emissions are projected to be 90 to 130 percent of 2008 levels by 2050, and they therefore aimed to establish up to six green shipping corridors by 2030 where zero carbon

299. UPDATE COMMUNICATION ON THE MARSHALL ISLANDS PARIS AGREEMENT NDC, *supra* note 113, at 3.

300. IMO, *Report of the Marine Environment Protection Committee on its Seventy-Ninth Session*, annex 16 at 26–27, IMO Doc. MEPC 79/15/Add.1 (Feb. 9, 2023) (statement by the Marshall Islands to the IMO).

301. Press Release, IMO, Norway and Singapore Sign MOU on Maritime Decarbonization (Mar. 21, 2023), https://greenvoyage2050.imo.org/1768-2/.

302. *See supra* note 90 and accompanying text; CABO VERDE, *supra* note 113.

303. MINISTRY OF PORTS, SHIPPING & WATERWAYS, MARITIME INDIA VISION 2030, at 223–25 (Feb. 22, 2021); IMO, *Update on the Norwegian National Action to Address GHG Emissions from Ships and Green Status for Green Shipping in Norway*, IMO Doc. MEPC 76/7/1 (Mar. 9, 2021); UK DEP'T OF TRANSPORT, CLEAN MARITIME PLAN 5 (July 2019); JAPANESE MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM & JAPAN SHIP TECH. RSCH. ASS'N, SHIPPING ZERO EMISSION PROJECT, ROADMAP TO ZERO EMISSION FROM INTERNATIONAL SHIPPING (May 27, 2020); *see National Action Plans*, INT'L MARITIME ORG., https://www.imo.org/en/ourwork/environment/pages/relevant-national-action-plans-and-strategies.aspx (last visited July 20, 2023).

304. UK DEP'T OF TRANSP., COP 26: CLYDEBANK DECLARATION FOR GREEN SHIPPING CORRIDORS (Dec. 6, 2023), https://www.gov.uk/government/publications/cop-26-clydebank-declaration-for-green-shipping-corridors/cop-26-clydebank-declaration-for-green-shipping-corridors.

305. *Id.*

technology will be used. The declaration specified that ship operators' participation will be voluntary.[306]

Is the voluntary encouragement of green shipping enough to satisfy the due diligence obligation described above? Scientists believe the sector must reduce emissions by thirty-four to thirty-six percent by 2030 for it to be compatible with limiting global warming to 1.5 degrees.[307] Measures that do not represent best efforts toward that goal do not comply with the due diligence obligation identified here. Best efforts can be defined based on risk: states are held to a higher standard of care if activities under their control present a greater risk of harm, and they must do more if they have a greater capacity to address that risk.[308] Thus, the legal sufficiency of a measure is dynamic, depending on the facts and on the state in question.

In this context, major port states and flag states are held to a higher standard of care because more of the international shipping sector falls under their control. Although shipping is a global industry that is important for nearly every national economy, control over it is concentrated: the twenty-five states with the busiest container ports account for seventy-seven percent of global container traffic.[309] Slightly more than half of global maritime traffic is containerized, with most of the rest split between tanker and cargo.[310] The states with the largest tanker terminals—the United States, Saudi Arabia, the United Arab Emirates, Singapore, the Netherlands, and China—overlap with the states with the most container traffic.[311] The states with the most bulk carrier traffic are also generally the same as those with the most container traffic.[312] The top ten flag states overlap with the top port states, with the exception of Liberia, the Marshall Islands, and the Bahamas.[313] And the top ten ship-owning countries overlap with the biggest port states, with the addition of Norway and Switzerland.[314] Thus, thirty-

306. *Id.*

307. Bullock et al., *supra* note 5, at 305–07; BONELLO ET AL., *supra* note 5, at 14.

308. Viñuales, *supra* note 16, at 124–26 (citing Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, *supra* note 26); Peel, *supra* note 27, at 1035 (noting that states with high per capita GHG emissions or high total emissions are subject to more stringent standards to mitigate climate change).

309. UNCTAD, *supra* note 1, at 82. Although Hong Kong is often designated separately from China in shipping data, this Article does not distinguish between them.

310. *Facts & Figures*, WORLD SHIPPING COUNCIL, https://www.worldshipping.org/facts-figures (last visited July 21, 2023). Although container vessels emit the most carbon per ton-mile, container, tanker and cargo traffic each account for about the same amount of GHG emissions. UNCTAD, *supra* note 1, at 107.

311. Craig Jallal, *Top 10 Tanker Terminals Revealed*, RIVIERA (Dec. 5, 2019), https://www.rivieramm.com/news-content-hub/news-content-hub/top-ten-tanker-terminals-57057.

312. UNCTAD, *supra* note 1, at 87.

313. *Id.* at 42–43.

314. *Id.* at 39.

three states control the vast majority of international shipping, and six of those are members of the European Union.[315]

Among these states, capacity to address shipping's climate risk can be differentiated based on wealth and technological capacity.[316] These are relevant factors because the installation of port infrastructure to accommodate low and zero carbon shipping requires significant capital investment and technology, and decarbonization measures will likely lead to incremental shipping costs and potential loss of market share.[317] Figure 1 depicts some major maritime states according to their wealth, measured in terms of gross domestic product per capita based on purchasing power parity (GDP PPP), and in terms of technological sophistication, measured in terms of the score assigned by the Global Innovation Index (GII), which is published by the World Intellectual Property Organization.[318] GDP PPP equitably depicts the ability of a country to finance decarbonization: it reflects total economic activity adjusted for population and price differentials across countries, and it also reflects the world income distribution.[319] GII ranks innovation among 132 countries and has been recognized as an important metric for sustainable development by the UN General Assembly.[320] Bubble sizes correspond to container ship port arrivals, which is a metric used to measure maritime traffic.[321]

315. These states are Australia, the Bahamas, Belgium, Brazil, Canada, China, Egypt, Germany, Greece, India, Indonesia, Japan, Liberia, Malaysia, Malta, the Marshall Islands, Morocco, the Netherlands, Norway, Oman, Panama, the Philippines, Saudi Arabia, Singapore, South Korea, Spain, Sri Lanka, Switzerland, Thailand, the United Arab Emirates, the United Kingdom, the United States, and Vietnam. *See* sources cited *supra* notes 309–314.

316. *See* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, *supra* note 26; Viñuales, *supra* note 16, at 124; Peel, *supra* note 27, at 1033 (asserting that assessment of a breach should be differentiated based on a state's individual circumstances).

317. IMO, Submission by India, *Reduction of GHG Emissions from Ships*, at 4–5, IMO Doc. MEPC 78/7/4 (Mar. 30, 2022); EU Maritime ETS Measure, *supra* note 7, ¶¶ 17, 28.

318. *World Economic Outlook Database*, INT'L MONETARY FUND (Apr. 2023), https://www.imf.org/en/Publications/WEO/weo-database/2023/April; WORLD INTELLECTUAL PROPERTY ORGANIZATION, GLOBAL INNOVATION INDEX 2022 (Soumitra Dutta et al. eds., 2022) [hereinafter 2022 GII REPORT].

319. PRINCETON ENCYCLOPEDIA OF THE GLOBAL ECONOMY 700 (Kenneth A. Reinert et al. eds., 2009) (describing the use of per-capita GDP as the main way of defining world income distribution); *id.* at 1224 (defining purchasing power parity).

320. 2022 GII REPORT, *supra* note 318; G.A. Res. A/RES/76/213, ¶ 18 (Jan. 7, 2022).

321. UNCTAD, *supra* note 1, at 82.

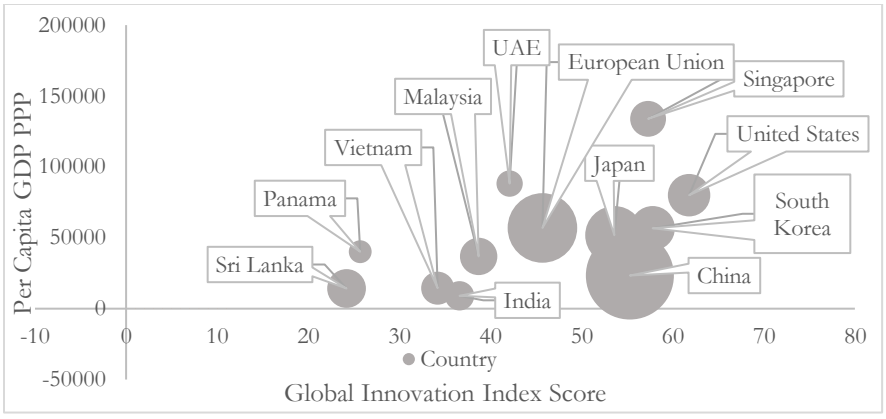

Figure 1: Shipping's Risk of Climate Harm and State Capacity to Address It

As Figure 1 shows, a handful of states' shipping sectors pose a significant risk of climate harm, and some of those states are also wealthy and have a high degree of technological sophistication. Accordingly, Japan, Singapore, South Korea, and the United States bear a higher standard of due diligence.[322] These states have policies that are undoubtedly important and necessary for the sector to decarbonize, such as technology development and transfer.[323] But the European Union's measures demonstrate what technical and scientific GHG reductions are currently possible, and what constitutes "means reasonably available" to similarly situated states.[324] Thus, for highly developed and technologically advanced major maritime states, unilateral actions that do not meet that standard are deficient and inconsistent with the obligation identified here.[325] A lesser degree of diligence would be expected from states such as Panama, Sri Lanka, or Vietnam, which could satisfy their due diligence obligations based on support for ambitious and effective measures at the IMO or participation in voluntary programs such as those discussed above.

Whether a state meets the required level of diligence is fact-driven and shaped by the opportunity to act.[326] Maritime states without a cap-and-trade system similar to the European Union's—such as the United States—would need to use other market-based instruments or technology mandates to

322. Peel, *supra* note 27, at 1033–35.

323. *See National Action Plans*, *supra* note 303.

324. Genocide, 2007 I.C.J. Rep. ¶ 430; Giannopoulos, *supra* note 34, at 447. The European Union will need to monitor the effectiveness of its measures in real time and adjust them in light of "developments in scientific awareness." *Id.* at 479.

325. Viñuales, *supra* note 16, at 125–26; Boyle, *supra* note 23, at 474 (explaining that comparison can be made to a best performer to find out whether "necessary measures" have been implemented).

326. Voigt, *supra* note 237, at 11–15.

accomplish reductions.[327] And landlocked states with close economic connections to the shipping sector, such as Switzerland, would be expected to regulate business entities in a way that reduces climate emissions.[328] Global economic patterns are also relevant: because the European Union's largest maritime trading partner is the United States, if the United States acted similarly to the European Union, a highly significant share of global emissions from shipping would be mitigated in a way that is more ambitious and effective than IMO measures.[329] Similarly, Japan, China, the European Union, and the United States account for half of all shipping imports and exports worldwide.[330] By offering the potential for enhanced shipping emissions mitigation corridors, the European Union's action increases the diligence expected of those other states.

C. Accountability

There are various interrelated mechanisms that could hold states to account for their obligation to prevent and reduce shipping's climate risks. Some scholars have proposed utilizing the law of state responsibility for climate harm and damages.[331] Others have cautioned that showing causation between a claimed injury and an internationally wrongful act would be difficult because of the diffuse nature of climate emissions and harms.[332] But a case based on shipping could avoid some of those difficulties: as shown above, relatively few states exercise disproportionate jurisdiction and control over the shipping sector, and there is already ample data available about vessel movements and emissions. Accordingly, a market-share division of liability for shipping could be more feasible and justiciable.[333] Moreover, as Millicent McCreath points out with respect to a claim brought under the LOSC, proving causation is only necessary if damages are claimed: a state could seek declaratory relief and remedies such as cessation, assurances, or guarantees of non-repetition based on an alleged breach of

327. *See* OCEAN POLICY COMMITTEE, *supra* note 90; International Maritime Pollution Accountability Act of 2023, S. 1920, 118th Cong. § 5 (2023).

328. *See* UNCTAD, *supra* note 1, at 39 (identifying Switzerland as the eleventh largest ship-owning country).

329. *See* EUROSTAT, USA-EU—INTERNATIONAL TRADE IN GOODS STATISTICS (Feb. 2024); EU Maritime ETS Measure, *supra* note 7.

330. *See* EUROSTAT, *supra* note 329, at 4, fig.3.

331. Voigt, *supra* note 237; Wewerinke-Singh & McCoach, *supra* note 173; Seokwoo Lee & Lowell Bautista, *Part XII of the United Nations Convention on the Law of the Sea and the Duty to Mitigate Against Climate Change: Making Out a Claim, Causation, and Related Issues*, 45 ECOLOGY L.Q. 129 (2018).

332. Peel, *supra* note 27, at 1042–44.

333. *See id.* at 1046–47 (discussing the market share concept).

the LOSC's environmental obligations, which are owed to the world at large.[334]

A climate claim based on shipping could be also grounded in human rights and brought before a regional court or a human rights treaty body. The European Court of Human Rights recently issued a landmark ruling against Switzerland's inadequate climate mitigation measures violated its citizens' human rights.[335] The Inter-American Court of Human Rights could hear a claim by citizens alleging that their country was violating human rights by not diligently addressing shipping's climate impacts if the case were first referred to the court by the Inter-American Commission on Human Rights or by a state party to the American Convention on Human Rights.[336] The third regional human rights court—the African Court on Human and Peoples' Rights—is charged with upholding the African Charter on Human and Peoples' Rights, which guarantees the right to a satisfactory environment as well as other rights that implicate climate change.[337]

As discussed above, the UN Committee on Human Rights found that Australia violated human rights based on climate inaction, and the UN Committee on the Rights of the Child articulated a causal test for climate harm and human rights.[338] States that have submitted to monitoring of their compliance with the ICCPR by the UN Committee on Human Rights include Australia, Brazil, Canada, South Korea, Turkey, and all members of the European Union.[339] Most South American states, European states, and Turkey have agreed to compliance procedures before the UN Committee on the Rights of the Child.[340] It is therefore plausible that an individual or group of individuals could allege that those states are not complying with their due diligence obligations to address shipping's climate impacts.[341] Findings by human rights treaty bodies do not bind respondent states, but they are nevertheless important in international diplomatic fora and

334. Millicent McCreath, *The Potential for UNCLOS Climate Change Litigation to Achieve Effective Mitigation Outcomes*, *in* CLIMATE CHANGE LITIGATION IN THE ASIA PACIFIC 131–32 (Jolene Lin & Douglas Kysar eds., 2020); *contra* Lee & Bautista, *supra* note 331, at 147.

335. *See Case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20.

336. American Convention on Human Rights art. 61, Nov. 22, 1969, 1144 U.N.T.S.123.

337. African Charter on Human and Peoples' Rights arts. 2–17, 20, 21, 24, June 27, 1981, 1520 U.N.T.S. 217; *see* Ademola Oluborode Jegede, *Climate Change and the Future Generation Under the African Human Rights System: Fostering Pathways and Partnerships*, GLOB. CAMPUS HUM. RTS. (2021), https://repository.
gchumanrights.org/items/9f84d339-5495-401a-817d-46b56513a97d (discussing potential climate litigation under the African human rights system).

338. *See* Saachi, *supra* note 21, ¶¶ 8.12, 8.14; Recent Cases, Sacchi v. Argentina, *supra* note 21, at 1986–88.

339. U.N. High Commissioner for Human Rights, *Ratification of 18 International Human Rights Treaties*, https://indicators.ohchr.org/ (last visited July 20, 2023).

340. *Id.*

341. *See* Saachi, *supra* note 21.

domestic legal and political processes, and they would inform the content of the due diligence obligation described here.[342]

International law can influence how national constitutions and statutes are interpreted in climate cases. Some countries' court systems allow direct allegations of violations of international law.[343] In many others, international decisions are relevant to the interpretation of national laws. The American Convention on Human Rights requires that its parties' judiciaries consider any decision by the Inter-American Court of Human Rights, including its advisory opinions, when deciding domestic cases.[344] The International Tribunal for the Law of the Sea has noted that a domestic court's interpretation of enforcement measures against ships would be guided by the LOSC's provisions.[345] Presumably a court's interpretation of the legality of national climate measures for shipping—or the lack thereof—would as well. Germany's constitutional court interpreted the Paris Agreement's temperature goals as legal benchmarks for the constitutionality of the federal government's carbon budget.[346] American federal courts give "respectful consideration" to the interpretation of international agreements by international courts and tribunals, and international law can be used to interpret statutes and constitutional provisions.[347] Thus, an assertion that the United States or other countries are not diligently mitigating shipping's climate emissions as required by international law could be relevant to cases grounded in national constitutions or statutes.

342. Rosanne van Albeek & André Nollkaemper, *The Legal Status of Decisions by Human Rights Treaty Bodies in National Law*, *in* U.N. HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 412 (Helen Keller & Geir Ulfstein eds., 2012); Michael O'Flaherty, *The United Nations Human Rights Treaty Bodies as Diplomatic Actors*, *in* HUMAN RIGHTS DIPLOMACY: CONTEMPORARY PERSPECTIVES 161 (Michael O'Flaherty et al. eds., 2011); *see also* Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279, 284 (2017) (discussing problems with human rights conditions and enforcement).

343. *See, e.g.*, HR 20 december 2019, RvdW 2020, 19/00135 mn.nt C.A.S. (The State of the Netherlands (Ministry of Economic Affairs and Climate Policy)/Stichting Urgenda)(Neth.).

344. Maria Antonia Tigre et al., *A Request for an Advisory Opinion at the Inter-American Court of Human Rights: Initial Reactions*, COLUM. L.: CLIMATE L. (Feb. 17, 2023), https://blogs.law.columbia.edu/climatechange/2023/02/17/a-request-for-an-advisory-opinion-at-the-inter-american-court-of-human-rights-initial-reactions/ (citing Almonacid-Arellano et al. v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 124 (Sept. 26, 2006)). The United States is not a party to the Convention. *B-32: American Convention on Human Rights*, ORG. AM. STATES: INTER-AM. COMM'N HUM. RTS., https://www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm (last visited July 17, 2023).

345. M/V Virginia G (Pan. v. Guinea-Bissau), Case No. 19, Judgment of Apr. 14, 2014, 2014 ITLOS Rep. 4, ¶ 294.

346. 2656 BVerfGE 1, ¶¶ 235–36.

347. Sanchez-Llamas v. Oregon, 548 U.S. 331, 355 (2006); *see* Murray v. The Schooner Charming Betsy, 6 U.S. 64 (1804) (interpreting a statute to avoid conflict with international law); Procopio v. Wilkie, 913 F.3d 1371 (Fed. Cir. 2019) (interpreting a statute in light of international law); Latta v. Otter, 779 F.3d 902, 906 n.7 (9th Cir. 2015) (considering European Court of Human Rights jurisprudence when ruling on a constitutional right to same-sex marriage).

V. CONCLUSION

Climate obligations are in flux, with judgments from international, regional, and national courts establishing increasingly demanding standards for states' behavior. As I discuss in this Article, those obligations should encompass a significant and growing source of climate pollution—the international shipping sector. Human rights law and the LOSC show that states have a due diligence obligation to mitigate shipping's climate impacts, and this obligation is informed and shaped by customary international legal principles of harm prevention and precaution. Consequently, states must take all necessary measures to address the climate risks posed by shipping in order to limit global warming to 1.5 degrees. Whether measures are necessary is fact-dependent, dynamic, and differential. They include decision-making within the IMO as well as the exercise of jurisdiction over ships and shipping companies.

The European Union's maritime climate measures and commitments by the shipping industry show that states can and must do more. Wealthy and technologically advanced states with large maritime sectors are not yet diligently preventing and reducing the sector's climate risks—apart from those in the European Union. Although the IMO's member states recently set new goals for shipping's GHG emission reductions, these goals are incompatible with limiting global warming to 1.5 degrees, and even they will not be met under current regulations. There are potential avenues to hold states to account for their conduct within the IMO and outside of it. Evaluating and applying climate obligations in terms of all activities under states' jurisdiction and control—as done here—can fill gaps in international governance and ensure that every sector is fully addressing the climate crisis.

Enclosure 3

UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Comments on the Asian Development Bank (ADB) draft Environmental and Social Policy

29 April 2024

Contents

Introduction

1. OHCHR welcomes the opportunity to comment on the ADB's draft Environmental and Social Framework (ESF), and for the numerous opportunities to contribute to ADB's consultation processes since 2022. We have greatly valued our constructive engagement and the time made available by ADB's safeguards team for this purpose. We would particularly like to recognize the time and effort expended by Bruce Dunn and Takako Morita to travel to Geneva in January 2023 for consultations with OHCHR, ILO and OECD.

2. We note that the proposed structure of the draft ESF is harmonized to a considerable degree with the safeguard policies of other leading MDBs, and that the substantive requirements for ADB and clients are also broadly similar (and in many cases, the same). We welcome the fact that a number of OHCHR's previous recommendations appear to be reflected in the draft ESF, but are concerned that in certain important respects the ESF falls short of "best practice" in development finance institutions (DFI) sustainability frameworks and international business and human rights standards.

Positive elements

3. The first and most obvious positive feature of the draft ESF in OHCHR's view is its relatively broad coverage of social issues, in line with international human rights treaties to which the great majority of ADB shareholders have subscribed, and in line with best practice in MDB sustainability frameworks. We note in particular the new stakeholder engagement requirements in ESS 10, which include explicit attention to reprisals, although further specification and strengthening is required, in OHCHR's view, as discussed further below, particularly on the question of ADB's own responsibilities and responses. We also note the

inclusion of new SEAH requirements and the recognition, in ESS 5, of the need to strive for a higher level of protection of women's rights than the level guaranteed by national law.[1] However in other respects the treatment of gender does not appear especially robust, and gender terminology differs throughout the document which may generate confusion and inconsistent practice. Our Office maintains the view that gender equality and SOGIESC warrant dedicated attention within a stand-alone Environmental and Social Standard, in addition to being integrated throughout the ESF, and considers IDB's ESPF to constitute best practice in this regard.[2]

4. In a similar vein, we welcome the broad definition of "disadvantaged or vulnerable" groups (Definitions, p.134), which includes discrimination on grounds of ethnicity and SOGI (Intro, paras. 36, para 52, fn 25), and the fact that "vulnerability" is included in social risks (Policy, para.30(ii)). Importantly, we welcome the fact that under the Policy (para. 52) the design of mitigation measures for vulnerable groups should take into account "information relevant to host country obligations under applicable international agreements" (para. 21(v)(i)). We also welcome the new requirements for contextual risk assessment, explicitly linked to project risk assessment, including for DPLs (Policy 21(v) and 22(i)), and the relevance in this regard of "information relevant to host country obligations under applicable international agreements." This is a leading practice among DFIs, in OHCHR's review.[3]

5. On the critical issue of "remedy", OHCHR welcomes the fact that "off-setting" is removed from what would otherwise be the standard MDB risk mitigation hierarchy (ESS 1, II. (b), consistent with the glossary, p.139, which discusses offsets solely in terms of biodiversity impacts). We take this as an acknowledgement of the inappropriateness of off-setting for many social risks and impacts and would urge ADB to ensure that this is also reflected in draft ESS 1, para. 30. OHCHR also warmly welcomes the critical requirement in ESS 1, para. 29 that E&S costs should be internalized within the project: "The borrower/client will ensure that the cost of addressing E&S risks and impacts through the mitigation hierarchy, are considered as part of a project's costs." Consistent with best practice in other MDBs, in the specific context of resettlement (ESS 5), we also welcome the explicit requirements for contingency funds and budgeting for corrective actions (ESS 5, paras. 30 & 36).[4] As

[1] E.g. ESS 5, para 42 provides: "When the host country's applicable laws and tenure systems do not recognize the rights of women to hold or exchange property, provision will be made to ensure, to the extent possible, that women can gain security of tenure."

[2] We note that ADB's Summary of Analytical Study on Gender and Safeguards (May 2022), para. 32, expresses a similar view: "[A]mongst all MFIs, IDB has the most comprehensive coverage with explicit mention of gender considerations across various standards in addition to a standalone standard on gender."

[3] We note that contextual risk assessment is contemplated for the annex to the ESF containing "E&S Requirements for Financing Modalities and Products", e.g. paras 22, 26, 29, 36. However as discussed in para. 9 of this memo, the status of the memo seems unclear, as does the extent to which its content is intended to be subject to Board oversight and independent accountability.

[4] ESS 5, para. 30: "The budget will contain adequate contingencies to finance corrective actions as well as the planning and mitigation of unanticipated impacts, if any. … For projects using a [Land Acquisition Framework], a borrower/client will prepare an estimated tentative budget based on scoping of anticipated [Land Acquisition/Land Use Restriction] risks and impacts and with sufficient contingency, …." And see ESS 5, para. 36 which contains an explicit requirement to cost corrective action plans.

discussed below, it would be important to ensure that contingency funds are in place to address other kinds of impacts as well, in higher-risk projects.

6. Other positive features, in OHCHR's view, include the fact that a stand-alone ESS is proposed for climate change risks (ESS 9), subject to the critical comments of other stakeholders.[5] We also welcome the placeholder in the ESF on digitalization risks,[6] although as discussed below more detailed requirements will be needed if the ESF is to equip ADB and its clients to more successfully identify and address the potentially wide range of digital risks applicable to ADB-financed projects. OHCHR also notes a number of positive features pertaining to FI operations in the "Financing Modalities and Products" annex (also referred to as "ADB Management document"), including the referral and screening procedure for higher-risk sub-projects and the grievance mechanism requirement,[7] although we would encourage ADB to clarify the status of the annex and its relationship to the more schematic requirements concerning FI operations in the Policy and ESS 1 (see further para 9 below).

Suggested areas for strengthening

7. Beyond the issues outlined above, OHCHR would urge that the draft ESF be strengthened in a number of important respects, in order to achieve its stated aims and reflect best practice in E&S risk management among DFIs. Many of these issues have been raised by OHCHR previously however the recommendations in this memo have been updated to reflect intervening consultations and research and respond to the specific terms of the draft ESF.

8. Firstly, as a general matter, we note that the draft ESF contains a great many broad discretions and/or under-specified requirements, which may generate confusion, inconsistent practice, and undermine sustainability and accountability objectives. We do not attempt a full account of this here however some of the more significant examples include: (a) the requirement that the ESSs be implemented "within a timeframe acceptable to the Bank"[8] (rather than a more objective and auditable "reasonableness" requirement such as that in the IFC Performance Standards); (b) under-specification of timeframes for disclosure of documentation of different kinds, such as E&S assessments and monitoring reports;[9] (c) requirements that clients achieve "objectives materially consistent with the

[5] Letter from 17 civil society organizations to the ADB President on 14 March 2024, arguing, among other things, that the ESF should explicitly prohibit financing of and/or guarantees or insurance for all upstream, midstream and downstream fossil fuel projects.
[6] Intro, para. 47(iii) in the contextual risk definition; and Policy, para. 21(v)(h), and ESS 1, para 24(ii). However the term "digital risk" is not defined in the ESF and the reference in ESS 1, para 24(ii) is limited to privacy risks. Hence under the draft ESF digital risks, whatever this is intended to encompass, is mostly confined to contextual risk assessment and does not address the many possible scenarios in which an ADB-financed project may be the source of digital risk.
[7] ESF Annex, E&S Requirements for Financing Modalities and Products, paras. 52, 53, 55, 64 and 68.
[8] E&S Policy, para. 13.
[9] The SPS' requirement for public disclosure of draft E&S documentation for category A projects at least 120 days prior to project approval has been replaced by "prior to appraisal", with significant discretion for later disclosure (Policy, para. 49, & ESS 1, paras. 53 & 54). The frequency of monitoring reports is rarely specified, with the exception of FI's and corporate finance (ESS 1, paras. 66 & 67): "The extent and frequency of monitoring report will be proportionate to the E&S risks and impacts of the activities and

ESS's," rather than implement the ESS's actual requirements;[10] and, perhaps most strikingly of all, (d) an apparent waiver of the ESF in (broadly-defined) emergency or FCAS contexts (discussed in more detail below at p.22).

9. Another structural question, in OHCHR's view, concerns the status of the "Financing Modalities and Products" annex, which contains more detailed requirements than those in Policy and ESS 1 on a range of important operational modalities including policy-based lending, program-for-results, corporate lending and FI operations. As presented in the W-paper, it does not seem clear what the status of the "Financing Modalities and Products" annex (or "ADB Management document") is, or what its relationship with the corresponding subject matter in the ESP and ESS 1 is intended to be.[11] The W-paper gives no reason as to why the content of the ADB Management document will not be subject to formal Board review and approval, along with the ESF. Whether any or all of the content of the ADB Management document will eventually form part of the ESF, and will be contractually binding upon clients and subject to independent accountability, does not seem clear.[12] It would seem critical to clarify this important premise, in OHCHR's view, in order to enable a clear, consistent and effective approach to E&S risk management across ADB's portfolio.

10. Beyond these structural questions, the more specific issues that we wish to highlight are: (a) the need for risk-based due diligence throughout the value chain; (b) the need for a more robust and effective approach to remedying adverse impacts; (c) the need for a more explicit framework to guide ADB in exiting projects in a responsible fashion ("responsible exit"); (d) the need for a more detailed and robust framework for managing risks of digital projects; (e) the need to reflect applicable requirements of international law more consistently and accurately; (f) the need to avoid categorical E&S carve-outs in emergency and FCAS settings; (g) the need for a clearer and more robust approach to addressing intimidation and reprisals risks; (h) the need for enhanced rigour when seeking to use the borrower's E&S system, and (i) the need to strengthen requirements for policy-based lending. A list of recommendations is included in the Annex.

11. The analysis and recommendations below, if implemented, would also further alignment between ADB's safeguards and global human rights standards and emerging regulatory

transactions supported by ADB financing but will be at least annually." Other exceptions are ESS 3, para. 13(iii) and ESS 5, para. 34(i).

[10] Such as in the case of common approaches and policy-based lending.

[11] Para. 62 of the draft Policy states: "For financing modalities and products that are developed by ADB post-effectiveness of the ESF, the application of the requirements of the E&S Policy and the ESSs will be guided by paras 62-70, and the ADB Management document will be updated to include the detailed E&S requirements specific to such new financing modalities and products, as appropriate."

[12] OHCHR's comments (and admittedly, confusion) on this issue pertain to paras. 43, 54, 80 and 97 of the Introduction to the W-paper, para. 62 of the Policy, para. 60 of ESS 1, and the cover page and para. 2 of the "Financing Modalities and Products" annex. The content of the ADB Management document is sometimes described in the W-paper as "requirements," but also "approaches", without accounting for the difference. The W-paper states that the annex will be approved by ADB Management, not the Board, which seems to give rise to questions about its contractual status *vis-à-vis* clients.

requirements for responsible business conduct.[13] The UN Guiding Principles on Business and Human Rights (UNGPs) have particular significance in this regard. The UNGPs were unanimously endorsed by the UN Human Rights Council in 2011 and are the most authoritative framework for enhancing standards and practices with regard to human rights risks related to business activities. The UNGPs reflect existing international law as well as good practice in risk management. Many other standards and developments are aligned with or based on the UNGPs' framework, including the OECD Guidelines for Multinational Enterprises, the ILO MNE Declaration, ISO 26000, and the Equator Principles. The recent approval of the EU Corporate Sustainability Due Diligence Directive is another notable development in this regard.[14]

12. Numerous implementation initiatives for the UNGPs are underway in Asia, such as through National Action Plans on Business and Human Rights, draft mandatory human rights and environmental due diligence legislation in the Republic of Korea modelled on the UNGPs and OECD MNE Guidelines,[15] guidance from countries including China and Japan, and projects between UN offices and countries and companies in the region. Relevant practice in Asia includes guidance in September 2022 from the Japanese government on Respecting Human Rights in Responsible Supply Chains, guidance from the Chinese Chamber of Commerce on Metals Minerals and Chemicals Importers and Exporters,[16] and mineral supply chain due diligence guidelines in China based on the UNGPs and OECD MNE guidelines.

13. Additionally, an increasing number of DFIs have reflected the UNGPs within their safeguard policies and associated procedural guidance to varying degrees. Examples include IDB, IDB Invest, FMO (including in relation to FI operations), British International Investment, FinDev (Canada), Swedfund, Finnfund, and the safeguards of the German government's International Climate Initiative (IKI). Hence, to the extent that the ADB's ESF aligns with the UNGPs, clients can be confident that complying with ADB's requirements means they will comply with all of these other policy and regulatory demands (and vice versa).

Managing risks in value chains

14. We refer to our earlier analysis and recommendations on supply chain due diligence at pp.19-22 of our April 2021 submission in response to the SPS review. We note that the draft ESF limits the scope of due diligence to "primary suppliers," upstream, and to forced and child labour, "serious safety issues" and biodiversity impacts.[17] Primary suppliers are

[13] On the relevance of the UN Guiding Principles on Business and Human Rights (UNGPs) in the context of DFI operational policies *see* OHCHR, DFI Safeguard Policies Benchmarking Study (2023), pp.4-9.
[14] *See e.g.* Third Time's a Charm: EU Moves to Approve the Sustainability Due Diligence Directive | Insights | Jones Day.
[15] Herbert Smith Freehills, South Korea tables mandatory human rights and environmental due diligence law (Sept. 14, 2023).
[16] Materially, the guidance states that Chinese mining companies should "observe the UN Guiding Principles on Business and Human Rights during the entire life-cycle of the mining project."
[17] ESS 2, para. 37 & ESS 6, para. 45. We note that a somewhat higher level of ambition is reflected in the Introduction, para. 62, which states: "Where significant risks are identified through project screening and assessment—or through contextual risk analysis—ADB will require extended due diligence at higher levels of the supply chain, including suppliers and workers engaged by primary suppliers." Para 69 of the Introduction (on Biodiversity and Sustainable Natural Resource Management), ESS 2 (para. 37) and ESS 6 (para. 34) contain similar references. However in OHCHR's understanding the ESS's will take precedence

defined in ESS 2, para. 3(iii) as: "suppliers who provide directly to a project goods or materials essential for production and/or service processes that are necessary for a specific project activity and without which a project cannot continue." This definition seems marginally stronger than other MDB definitions in one respect, in that there is no requirement that goods, materials or services be supplied to the project on an "ongoing" basis. However the requirements for "direct" provision of goods or materials "essential" for production, and/or "necessary" service processes "without which a project cannot continue" are similar to other MDB requirements and seem unduly restrictive, in OHCHR's view. The ESF cannot claim to be "risk-based" if a boundary is erected around the 1st or 2nd tier of suppliers. Many salient and serious (but potentially manageable) risks lie beyond this, while allowing for necessary prioritization in accordance with severity. Limiting one's focus to primary suppliers can be inefficient as well as ineffective, if that is not where the most salient risks are.

15. More fundamentally, whatever the actual scope of risks and impacts associated with the project, the E&S risk management responsibilities are expressed to apply only to "upstream" suppliers, not to users or consumers or other stakeholders elsewhere in the value chain. There seems to be one small exception to this rule, in ESS 4, section J, concerning consumer protection, where downstream risk assessment is contemplated, although this is limited to health & safety impacts. In OHCHR's view it is essential that impacts on users, consumers and other relevant stakeholders be included in a more comprehensive fashion, according to risk. This is not just a question of aligning with international business and human rights standards: the simple reality is that not all salient risks lie upstream. An increasing number of companies are effectively carrying out "downstream" due diligence in various sectors,[18] demonstrating feasibility, and there is ample finance sector experience to draw upon in the AML/KYC context.[19] The effective management of digital risks, in particular, is impossible without an explicit and intentional "downstream" focus on users and others who may be impacted in potentially profound and irremediable ways by DFI-supported digital projects.[20] The discussion in ADB's digital risk primer (chapter 5) of how (not whether) to address third-party risks supports this view.

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over the Introduction, in terms of the E&S risk management requirements to be reflected in client contracts.

[18] *See e.g.* OHCHR B-Tech, The Feasibility of Mandating Downstream Human Rights Due Diligence: Reflections from technology company practices (Sept. 2022); Hogan & Reyes, Downstream Human Rights Due Diligence: Informing Debate Through Insights from Business Practice, *Business & Human Rights Journal* (2023), pp.1-7; OECD Watch *et al*, Downstream due diligence: Setting the record straight (Dec. 2022); Danish Institute for Human Rights, Due diligence in the downstream value chain: Case studies of current company practice (Oct. 12, 2023); and Global Business Initiative, Effective downstream human rights due diligence: Key questions for companies (Feb. 14, 2023). Moreover in June 2023 the OECD released updated Guidelines for Multinational Enterprises which, among other things, reinforced the applicability of downstream (as well as upstream) due diligence expectations.

[19] Anti-Money Laundering/Know Your Customer. On the growing movement and motivating factors towards downstream due diligence generally *see* BSR, Human Rights Due Diligence of Products and Services (July 15, 2021).

[20] OHCHR, Policy Brief: DFIs & Digital Risks (consultation draft, March 2024).

16. Relatedly, there appears to be a serious incentives problem embedded in the draft ESF's proposed supply chain risk management framework: ESS 2 (paras. 37 and 39) limits the scope of the client's risk management responsibilities to its present sphere of control or influence.[21] In so doing, this may have an unintended effect of diminishing expectations and incentives for clients to proactively build and exercise leverage to ensure that salient E&S risks and impacts are identified and addressed.

17. OHCHR recognizes that the client's existing control over other entities will certainly affect the extent to which they can effect change in those business relationships causing human rights harms. Nevertheless, under international standards for business and human rights, this should not affect the scope of harms that clients and DFIs should be trying to address. Where it is necessary to prioritize actions to address harms, this should be determined by the severity (scale, scope and irremediability)[22] of risk, not the client's existing control. Rather, under international standards for business and human rights, clients should be encouraged to lean into risk and proactively explore all feasible avenues through which leverage could usefully be exercised across the scope of their business relationships. ESS 2, para. 39, would at least require the client to demonstrate its lack of influence, where it claims that this is the case,[23] but this is not likely to address the incentives problem referred to above and is not the same as an explicit, proactive requirement to build all available forms of leverage.[24]

18. In OHCHR's view a more robust and proactive approach would be strongly desirable if issues such as forced labour and child labour, often buried deep in supply chains, are to be more consistently identified and tackled. In OHCHR's view, consistent with international business and human rights standards, the scope of due diligence should cover all those impacts with which ADB and its clients are involved (including those directly linked to their

[21] ESS 2, para. 39: "The ability of a borrower/client to address risks in paras 37 and 38 will depend on the borrower's/client's level of control or influence over its primary suppliers." This is a common constraint in other MDBs' safeguard policies as well, e.g. IFC, PS 1 (Jan. 1, 2012), para. 10; Performance Standard 2 (paragraphs 27–29) and Performance Standard 6 (paragraph 30)," and World Bank, Guidance Note for Borrowers (ESS 1) (June 2018), para. 34.

[22] UNGPs, Principle 24.

[23] ESS 2, para. 39: "The borrower/client will be required to demonstrate the extent to which it cannot exercise control or influence over a primary supplier by providing details of the considerations for such determination, which may include legal, regulatory, and institutional factors."

[24] By contrast IFC PS 1 does include an attenuated requirement to build leverage in the context of supply chain risk management: "Where the client does not have control or influence over the management of certain environmental risks and impacts in its supply chain, an effective ESMS should identify the entities involved in the value chain and the roles they play, the corresponding risks they present to the client, and any opportunities to collaborate with these entities in order to help achieve environmental and social outcomes that are consistent with the Performance Standards." However collaboration is only one of many possible forms of leverage. For a fuller discussion on the ways in which banks and clients may build and exercise leverage on E&S issues in the value chain (including but not limited to contractual leverage), see the report of the Dutch Banking Sector Agreement working group on enabling remediation (2019); OHCHR, Remedy in Development Finance: Guidance and Practice (2022), Chap. III, and IFC/CAO, The Remedy Gap: Lessons from CAO Compliance and Beyond (Apr. 2023). The latter (CAO) report also notes at p.5 that: "In 70 percent (9 of 16) CAO compliance cases since 2018, IFC did not exhaust available leverage to address outstanding E&S compliance issues." The under-utilization of available leverage options seems to be a problem across many DFIs, in OHCHR's understanding.

operations, products or services by its business relationships),[25] downstream as well as upstream, including and beyond forced and child labour and biodiversity impacts, whether or not these relate to primary suppliers.

19. OHCHR would particularly recommend the explicit inclusion of SEAH in the ESF's value chain risk management requirements, given the precarious nature of women's work in global supply chains (particular for apparel and agriculture), the high prevalence and under-reporting of SEAH, and the rapid increase in the availability of tools and technologies to facilitate supply chain analysis.[26] The issue of SEAH is of course already high on ADB's agenda and is reflected in other ways in the draft ESF. MDBs regularly exchange information and good practices on supply chains and SEAH risks.[27] The Covid-19 pandemic has illuminated in a vivid and compelling way the problems of E&S risk management in supply chains, and has stimulated a range of innovative responses, including from ADB.[28] Supply chain mapping techniques have been improving dramatically through digital technologies.[29] These demands and developments call for a re-set of expectations, in OHCHR's view, and for more forward-looking, fit-for-purpose standards to drive sustainability in value chains over the life of ADB's ESF. This is not the moment for ADB to be harmonizing downwards with the legacy standards of other MDBs, in OHCHR's view.

OHCHR recommends that:

- *The ESF should clarify that clients should address all potential E&S (including human rights) impacts they may cause or contribute to, or which may be directly linked to their operations, products or services by their business relationships, downstream as well as upstream, without any categorical limitation to "primary suppliers".*

[25] UNGP, Principle 17. The commentary to UNGP 17 recognizes that where business enterprises have large numbers of entities in their value chains it may not be possible to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence. OHCHR, Corporate Responsibility to Respect Human Rights: An Interpretive Guide (2012), p.42.

[26] *See e.g.* ILO-ITC, *Gender based violence in global supply chains: Resource kit*, at Briefing_3_2.pdf (itcilo.org); OHCHR notes that SEAH is included in the definition of hazardous child labour, and to that extent is included within the scope of the "primary supplier" risk management requirements of draft ESS 2 (paras. 21 and 37). SEAH is also is covered by ESS 2, para. 15. However as OHCHR reads the relevant ESS's, the larger problem of SEAH (of women as well as girls) in value chains beyond the child labour context is not addressed.

[27] ADB, W-Paper (Oct. 2023), para. 37.

[28] *See e.g.* ADB Innovation Talks Series: Supply Chain Mapping Tool | Asian Development Bank: "If we are going to successfully tackle issues like fixing the environment, stamping out child and forced labor, or making the workplace more gender-friendly, we need to do it through supply chains."

[29] *Id*. See also Diginex, Leveraging Technology to Uncover Gender Based Violence in Supply Chains (June 15, 2023); and Deep-Tier Supply Chain Finance (adb.org), noting (among numerous other examples) an inclusive finance platform in China (JDH platform, operated by JDH Information Tech (Zhuhai) Co. Ltd) which penetrates to level 9 suppliers.

- *Risk-based risk management throughout the value chain should be prioritized according to risk, and should include but not be limited to forced and child labour, SEAH and biodiversity issues.*

A proactive and robust approach to remediation

20. We refer to the recommendations on remedy in our April 2021 submission, pp.15-18, and the subsequent discussions between ADB and OHCHR on this issue. The idea of "remedy" for E&S impacts is central to accountability, and to DFIs' mandates to promote sustainable development and avoid harm to people and the environment. As indicated in our introductory remarks above, we welcome the recognition in ESS 1, para. 29 of the basic principle that E&S costs should be internalized within the project. We welcome the removal of "off-setting" in the mitigation hierarchy (ESS 1, II. (b)) and glossary, and would urge ADB to ensure that this is also reflected in draft ESS 1, para. 30. We welcome the provisions in ESS 5 concerning contingency funds in the resettlement context and would recommend that such arrangements be in place for all higher-risk projects, whether or not resettlement is implicated.

21. However, contrary to leading practice among DFIs and commercial banks, we note that the remedy framework in the draft ESF still does not reflect a robust and comprehensive approach to remedy predicated upon building and exercising all available forms of leverage, and on an assessment of the client's, ADB's and other relevant parties' involvement in (or contributions to) E&S impacts. There is no operative definition of remedy, and there are no suggested criteria to guide the ADB's assessment of its own involvement in impacts.

22. Under international human rights law, "remedy" is a holistic concept encompassing not only compensation (a standard component of DFI mitigation hierarchies), but also restitution, rehabilitation, satisfaction (including public accounting, aimed at restoring the dignity of those who have suffered human rights violations), and guarantees of non-repetition (including policy changes to prevent recurrence).[30] Where projects are associated with serious abridgements of human rights, such as forced evictions, GBV or SEAH, or reprisals against environmental or human rights defenders, a combination of the above remedies will often be required in order to make people whole. OHCHR would recommend that this multi-faceted definition of remedy be included in the glossary of the E&S Policy, and that the mitigation hierarchy be amended as follows: "avoid, minimize, reduce and mitigate risks and adverse impacts, and where significant residual impacts remain, to *remedy* such impacts."[31] [Emphasis added].

[30] OHCHR, Remedy in Development Finance: Guidance and Practice (2022), pp.11-12.

[31] In this regard the Preamble of the 4th revision of the Equator Principles states: "Specifically, we believe that negative impacts on Project-affected ecosystems, communities, and the climate should be avoided where possible. If these impacts are unavoidable, they should be minimised and mitigated, and where residual impacts remain, clients should provide *remedy* for human rights impacts or offset environmental impacts as appropriate." [Emphasis added]. The AfDB's updated Integrated Safeguard System (2023), Operational Safeguard Standard 7 ("Vulnerable groups"), includes "remedy" in the mitigation hierarchy, although the term is not defined. OHCHR's Remedy in Development Finance: Guidance and Practice (2022) Chapter II, elaborates more extensively on this theme.

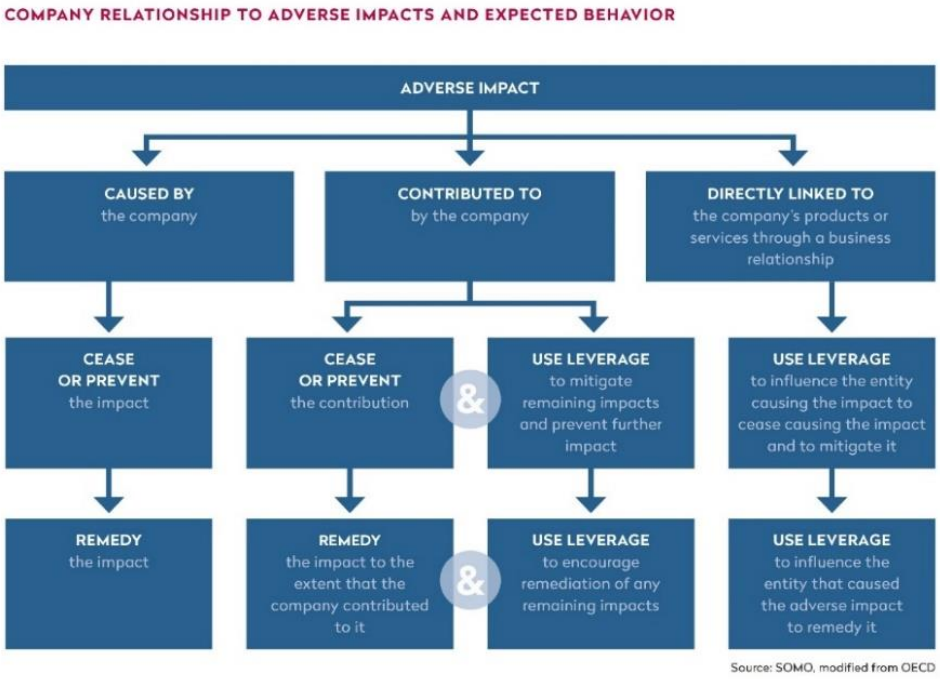
23. Secondly, building upon our Office's earlier recommendations, we would recommend that the ESF articulate how ADB and clients are to assess their respective involvement in E&S impacts. Under the UNGPs, OECD RBC guidance, and leading practice among DFIs, a party's responsibilities in connection with adverse impacts should be determined in light of whether they may fairly be said to have "caused" or "contributed to" adverse impacts, or alternatively are "directly linked" to those impacts through their business relationships and financial products or services. This was also among the central recommendations of the 2020 IFC/MIGA External Review on E&S Accountability.[32]

24. "Linkage" situations (rather than "causing" or "contributing to" impacts) are the most common scenario in the context of development financing.[33] Where adverse impacts are "linked" to ADB's operations, products or services by its business relationship with another entity, ADB should build and use whatever forms of leverage it can to prevent or mitigate the adverse impacts (UNGPs 13(b) and 19). In this regard, we would note that the mere existence of such a business relationship does not automatically mean that there is a direct link between an adverse impact and ADB's financial product or service. Rather, the link needs to be between the financial product or service provided by ADB and the adverse impact itself.[34]

25. However, there may well be circumstances where a lender by its own actions or omissions has "contributed" to harms together with an implementing organization, such as where the lender has not carried out adequate due diligence.[35] In "contribution" situations, under the UNGPs and OECD RBC guidance, a lender should: (i) cease its own contribution; (ii) use its leverage with the implementing organization to mitigate any remaining impact to the greatest extent possible; and (iii) actively engage in remediation appropriate to its share in the responsibility for the harm. In practice, there is a continuum between "contributing to" and having a "direct link" to an adverse human rights impact. Moreover, a financial institution's involvement with an impact may shift over time, depending on its own actions and omissions.[36] Figure 1 summarises these principles, applicable in principle to lenders as well as clients:

[32] IFC/MIGA External Review on E&S Accountability (June 2020), paras. 306-339, discussed at p.17 of our April 2021 submission on the ADB SPS review.
[33] OHCHR advice on the application of the UN Guiding Principles on Business and Human Rights in the banking sector (June 2017), p.3.
[34] OHCHR advice on the application of the UN Guiding Principles on Business and Human Rights in the banking sector (June 2017), pp.5-6. *See also* OECD (2018) Due Diligence for Responsible Business Conduct, p.71.
[35] For a discussion of relevant factors determining "contribution" to harm *see* OHCHR advice on the application of the UN Guiding Principles on Business and Human Rights in the banking sector (June 2017), pp.5-10.
[36] *Id*.

Figure 1



26. "Contributing to remedy" means providing remediation appropriate to one's share in the responsibility for the harm. Whether providing for or cooperating in remedy,[37] the processes should be legitimate in the eyes of those who have suffered the harm and should follow basic requirements of fairness and due process. Cooperating in remediation does not necessarily mean that a lender should be expected to provide financial compensation to project-affected people, although there may well be circumstances where this is warranted.[38] Other means of contribution may include the engagement of expert studies, supporting the engagement of a facilitator and providing technical expertise. Ultimately, affected stakeholders should be meaningfully consulted about the type of remedy that would be appropriate in a given situation and the manner in which it should be delivered.[39]

27. It is sometimes thought that lenders should not contribute directly to remedy, even if they have contributed to the adverse impacts, because to do so would either discincentivize client remedial actions (the "moral hazard" problem) and/or increase litigation risk for the lender. But neither concern holds up to scrutiny, at least as a categorical proposition.

[37] On the distinction between "providing for" and "cooperating in" remedy, *see* OHCHR, Corporate Responsibility to Respect Human Rights: An Interpretive Guide (2012), p.64.
[38] *See e.g.* OHCHR, Remedy in Development Finance: Guidance and Practice (2022), Part IV, pp.82-88. On the importance of and suggested parameters for financial compensation for victims of GBV *see* UN Women, UNFPA, WHO, UNDP & UNODC, Essential Services Package for Women and Girls Subject to Violence (2015), Module 3, p.26; and the Guidance Note of the UN Secretary General on Reparations for Conflict-Related Sexual Violence (June 2014), pp.16-17.
[39] A/HRC/44/32, annex, policy objective 12, para. 12.2; *and* A/HRC/44/32/Add.1, paras. 64–66.

28. On the "moral hazard" problem, firstly: we could well appreciate that clients may be disincentivized to take a proactive approach to remedy if or to the extent that ADB were to contribute whenever the client opted not to. But lenders and clients have fundamentally different roles. The former will never stand in the shoes of the latter. ADB has contributed directly to remedy in particular cases albeit without the benefit of clear policy.[40] Clear decision-making criteria and contractual conditions, including in relation to contingency funds for remedy and reimbursement rights to the lender, can keep concerns about moral hazard in proportion.[41] Conversely, the lack of any framework to guide ADB's contributions generates inconsistency and disincentivizes ADB engagement with E&S risk. In any case the most pressing moral hazard concern on the present state of affairs is undoubtedly the continuing externalization of E&S costs upon project-affected people who are least responsible or able to influence the project. The recognition in ESS 1, para. 29 that E&S costs should be internalized within the project provides the foundation for a more structured, robust and equitable approach to this question, in OHCHR's view.

29. Concerns about litigation risk, similarly, are often overstated given the broad scope and construction of most jurisdictional immunities of MDBs, the many legal and practical barriers to litigating claims (particularly, international claims), and the narrow scope for lender liability claims in many jurisdictions, even against commercial banks, much less MDBs. A recent study commissioned by OHCHR of lender liability regimes pertaining to commercial banking in the United Kingdom of Great Britain and Northern Ireland and the United States of America, as well as in the European Union and Hong Kong, China, among several other jurisdictions, suggests that: (a) lender liability for environmental and social impacts is limited in the jurisdictions surveyed; and (b) broader proactive due diligence will not be likely to increase liability risks and in fact may reduce them.[42]

30. In any case, theoretical concerns about moral hazard and litigation risk need to be seen in the light of DFI policy and practice, which are evolving in the direction of more proactive and effective approaches. Among DFIs, Swedfund's Sustainability Policy provides one of the clearest articulations of remedy expectations, closely aligned with the UNGPs:

> *"To fulfil our commitment to respect human rights, we aim to avoid causing or contributing to adverse human rights impacts resulting from our own activities and to address such impacts if they occur. Where we identify that we have caused or contributed to adverse human rights impacts, we will provide for, or cooperate in, their remediation through legitimate processes.*
>
> *We also aim to prevent or mitigate adverse human rights impacts that are directly linked to our operations by our business relationships. Where we identify adverse human right impacts that are directly linked to our operations through*

[40] *See* para. 34 below.
[41] Contractual conditions might include, for example, reimbursement rights to ADB in circumstances where it chose to step in early and remediate potentially serious impacts, without having contributed to those impacts itself.
[42] *See* OHCHR, Remedy in Development Finance: Guidance and Practice (2022), pp.20-21; *and* Fisher & de Búrca, Opinion: Challenging the World Bank Group's stance on remedying harm, *Devex* (June 13, 2023).

our business relationships, we will seek to work with our business partners to ensure that remediation occurs.[43]"

31. Other financing institutions' policies have been evolving in this direction as well. Examples include Finnfund's Sustainability Policy (Feb. 28, 2020) (s. 3.3.1), the International Climate Initiative (IKI) Safeguards Policy (valid Jan. 15, 2023) (pp.9-10), guidance produced by Legacy Landscapes Fund (LLF) for ESAPs in the conservation sector (page 4), and the Grievance Mechanism Policy (2022) of the Belgian Investment Company for Developing Countries (BIO) (p.6, "Remedy").[44]

32. Best practice in commercial banking supports this trend. The ANZ Human Rights Statement (May 2022), pp.3-4, states: "We use risk-based due diligence to identify human rights risks and impacts associated with our business relationships. … In line with the UNGPs we seek to cooperate in remediation through legitimate processes and, where reasonable, use leverage to encourage our Customers to prevent or mitigate any impacts."[45] ANZ is also a notable instance where an enabling policy on remedy has successfully been put into practice (see further below), generating "win-win" outcomes for the bank and project-affected people.[46]

33. Another commercial bank whose remedy policy appears to be moving ahead of that of the MDBs is Westpac bank, which has committed to "[p]roviding for, or cooperating in, the remediation of adverse human rights impacts where we identify that we have caused or contributed to these impacts. Where we have not caused or contributed to an adverse impact, but are directly linked to it, we recognise we may [nevertheless] be able to play a role in remedy."[47] The leadership of commercial banks on this issue is all the more notable given their private character and lack of a sustainable development mandate.

34. There is also a growing body of experience showing how DFIs may contribute directly to remedy in practice, without triggering unmanageable moral hazard or litigation risk concerns. While only the tip of the iceberg, and while clearer policy frameworks and more consistent practice would certainly be desirable, illustrative examples from different DFIs, geographies and sectors include:

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[43] Swedfund Policy for Sustainable Development, pp.2-3. See also Swedfund's Human Rights Guidance (2020), para. 1.4, and Equator Principles Guidance Note on Implementing Human Rights Assessments (2020), p.18.

[44] BIO Grievance Mechanism Policy (2022), p.6: "In situations where BIO has caused the harm, for instance by failing to comply with its own policies and procedures such as the environmental and social due diligence or monitoring, BIO's Grievance Mechanism shall take the necessary steps, appropriate to the company's size and circumstances, to ensure the provision of remedy." The Legacy Landscapes Fund ESAP guidance, produced with the support of KfW and SHIFT, is closely aligned with the UNGPs and provides helpful guidance and decision-making trees on assessing involvement in impacts and exercising leverage.

[45] Moreover ANZ's Grievance Mechanism Framework states (para 23.3.2) that where ANZ has contributed to harms it will "remedy the impact appropriate to the Customer's own conduct and contribution" and (para 24) an independent mediator or expert may be engaged to help make determinations on ANZ's contribution to an impact.

[46] *See* OHCHR, Remedy in Development Finance: Guidance and Practice (2022), Box 5.

[47] *See* Westpac Human Rights Position Statement and Action Plan (June 2023).

- In March 2024 IFC agreed to directly fund a remediation program for survivors of child sexual abuse for a period of 3 years, following non-compliance findings by its Compliance Advisor Ombudsman;[48]
- IFC Asset Management Company has agreed to finance $5.2M for community services as part of a settlement of a legal claim brought by communities in Honduras adversely impacted by an IFC-financed agribusiness project[49];
- World Bank, Uganda Transport Sector Development Project, involving a wide range of actions including mobilization of $1.67M from the Bank's rapid social response trust fund and technical assistance to the Uganda National Roads Authority (see Box 7 of the OHCHR Remedy report 2022);
- World Bank, Albania Coastal Management project: World Bank: Albania Project Mistakes Appalling – Eurasia, where the World Bank's contributions reportedly included payment of legal aid and assistance packages for those affected by housing demolitions;
- ADB and AusAID support for livelihoods and debt relief in connection with the Cambodia Railway Project;[50]
- ADB's financing of a $200k mitigation plan in connection with the North-South Corridor (Kvesheti-Kobi) Road Project in Georgia;[51] and
- OPIC's financing of an indigenous peoples' development plan in connection with a mining venture in Bolivia, following non-compliance findings by its Office of Accountability (Box 5 of the OHCHR Remedy report 2022).

35. Drawing from evolving policy and practice, OHCHR recommends that the ESF reflect a robust and comprehensive remedy framework according to which responsibilities to address adverse impacts take into account the respective involvement of clients and ADB in impacts (cause-contribute-direct linkage), thereby helping to align ADB's and the clients' incentives with the ESF's objectives, keep pace with best practice, and contribute to more consistent and effective remedial responses.

[48] *See* IFC Board Approves Action Plan in Response to CAO Investigation Related to IFC's Investment in Bridge International Academies in Kenya. One notable weakness in the remediation proposal at the time of writing was the apparent omission of the possibility of financial compensation for victims (as opposed to financial assistance to access services made more widely available). On the importance and parameters for financial compensation in this context, as part of a wider suite of remedy options, *see* UN Women, UNFPA, WHO, UNDP and UNODC, : Essential Services Package for Women and Girls Subject to Violence (unfpa.org), Module 3, p.26; *and* Guidance Note of the UN Secretary General on Reparations for Conflict-related Sexual Violence (June 2014), pp.16-17.

[49] *See* Honduran farmers, IFC settle suit alleging violence linked to investment | Devex (Dec. 2023).

[50] ADB is reported to have provided technical assistance for an enhanced livelihood program while AusAID contributed to household debt relief, following non-compliance findings of a Compliance Review Panel investigation report.

[51] ADB, Proposed Remedial Action Plan, Georgia: North-South Corridor (Kvesheti-Kobi) Road Project (April 2023) at p.8: "Implementation of the RAP and the mitigation action plan is expected to cost about $200,000 and will be financed by ADB loan proceeds and existing technical assistance resources. The RAP includes the actions and timelines to bring the project back into compliance with ADB policies and procedures and/or mitigate any harm, as appropriate."

OHCHR recommends that:

- *The following definition of remedy should be included in the Definitions section of the ESF: "Restitution, rehabilitation, satisfaction, and guarantees of non-repetition." Such a definition would reflect international human rights standards and equip ADB and clients to address a broad range of adverse social (including human rights) impacts;*
- *The mitigation hierarchy in the ESF should be amended to: "avoid, minimize, reduce and mitigate risks and adverse impacts, and where significant residual impacts remain, to remedy such impacts." The inappropriateness of off-setting human rights impacts should explicitly be recognized in draft ESS 1, para. 30.*
- *The "technically or financially feasible" criterion in ESS 1, para. 30 should be deleted. Such a provision creates perverse incentives. Projects with significant residual impacts, without any prospect of remedy, should not be financed.*
- *Responsibilities to address adverse impacts should take into account the respective involvement of clients and ADB in impacts (cause-contribute-direct linkage), as summarized in Figure 1 above.*
- *The ESF should spell out different kinds of leverage (including commercial, contractual, convening, normative, and through capacity building) that may be built and deployed by ADB and clients to address human rights risks in which they are involved. An examination all available forms of leverage should be part of project Appraisal.*
- *The following sentence should integrated within para. 36 of the Policy: "The ESCP/ESAP will include a budget for capital and recurrent costs." This would help to clarify requirements and give effect to the commitment expressed in ESS 1, para. 29, that all E&S costs should be internalized within the project.*[52]
- *ADB's monitoring requirements (Policy, paras. 56-59) should include the following requirements: (a) the client must report serious E&S incidents to ADB within a specified deadline; and (b) ADB has the right to carry out, or require the client to carry out, an audit or assessment where there is evidence of a serious departure from the ESCP/ESAP and/or the ESSs, the costs of which should be borne by the client.*
- *ADB should undertake an analysis of the remedy eco-system in-country, including judicial and non-judicial mechanisms, as part of its due diligence for higher risk projects, and integrate this within project risk classifications, risk mitigation plans, and technical guidance to project stakeholders on accessing remedy. Where there is weak capacity within the government or the client, this should be a specific focus of capacity building.*
- *Consistent with Section 7.8 of the report for the External Review of the ES Accountability of the IFC and MIGA (paras. 329-339), the ADB should require the establishment of contingent liability funding to remedy harms in all higher-risk projects, complemented by ADB contributions to the extent of the bank's own involvement in any adverse impacts. A decision by ADB to contribute financially to remediation, in line with its own contribution to harms, is separate from and should not be seen as an admission of legal liability.*

Responsible exit

36. We refer to our April 2021 submission (p.22) and to the discussion in pp.89-93 of OHCHR's DFI Safeguard Policies Benchmarking Study (2023). We note the continuing imbalance, generally, between the efforts expended by DFIs on up-front compliance and development

[52] ESS 1, para. 29: "The borrower/client will ensure that the cost of addressing E&S risks and impacts through the mitigation hierarchy, are considered as part of a project's costs."

impact when entering projects, compared with exit. We note that numerous DFIs (including IFC, IDB Invest and certain EDFIs) have been moving to address this significant gap in operational policy and practice, but that the draft ADB ESF contains little guidance in this respect. We note that UN and OECD standards on responsible business conduct encourage companies to build and exercise all feasible leverage options, engage with E&S risk, and assess human rights impacts of any decision to exit.[53]

37. It seems particularly important to address the "responsible exit" gap, in OHCHR's view, particularly in the context of ADB's planned expansion of private sector operations. The latter operations have shorter project cycles than those pertaining to sovereign lending operations, and exits may occur on shorter time frames.

OHCHR recommends that:

- *The ESF should outline the main elements of a "responsible exit framework" to guide actions across the project cycle, including:*
  - *integrating potential environmental and social impacts of exit within project due diligence from the earliest stages of the project cycle;*
  - *a clear requirement not to exit without first using all available leverage to address unremediated E&S harms, and without assessing impacts of exit and consulting with all relevant stakeholders;*
  - *a commitment to ensure that any promised project benefits have been provided and the project will operate in an environmentally and socially responsible manner after exit;*
  - *a requirement that no community members or workers face risk of retaliation due to the exit; and*
  - *a commitment to seek a responsible replacement(s) for the DFI, or the client, as the case may be, on exit*.[54]

Digitalization risks

38. OHCHR notes that ADB's Strategy 2030 has identified "*promoting innovative technology*" as one of the guiding principles for ADB operations.[55] We also note the detailed and valuable analysis of the impacts of digital technologies on human rights in ADB's Managing Digital Risks: A Primer (Dec. 2023),[56] a leading resource in this field, and ADB's recommendations on addressing risks to consumers of Fintech.[57] There is clearly a growing awareness of the environmental and social (including human rights) risks of digital technologies, and of particular challenges in the Asian region.[58] The central question is, how can the ESF most effectively address these risks?

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[53] UNGP 19, commentary.

[54] For an excellent analysis supportive of these recommendations, albeit targeted to IFC, *see* IFC/CAO, Responsible Exit: Insights from CAO Cases (Dec. 2023).

[55] ADB, Strategy 2030 Digital Technology Directional Guide: Supporting Inclusive Digital Transformation for Asia and the Pacific (2022), p. i.

[56] ADB, Managing Digital Risks: A Primer (Dec. 2023), pp.144-156.

[57] ADB, Managing Fintech Risks: Policy and Regulatory Implications, ADB Brief No. 245 (May 2023), pp.7 & 10-11.

[58] *See e.g.* Sarah George, World's largest ICT companies failing to tackle human rights abuses in supply chains (Jun. 12, 2020), assessing human rights risks in global ICT supply chains. The report found that ICT

39. Between October 2023 to January 2024, OHCHR assessed 3,450 digitalization projects, and/or projects with digital components, in nine MDBs, including 527 ADB projects, in four sectors: ICT, health, finance and public administration. The research noted that the digital footprint of the surveyed MDBs is large, and growing, but digital risks are not adequately being identified and addressed at the project level.[59] In ADB's case, within a sample of 182 projects assessed by OHCHR to have a relatively clear digital component, only one was assigned an "A" rating, and seven were rated "B."[60] Yet digital risks can be diverse, pervasive and severe, as outlined in our Office's submission on April 2021 (p.29), and go well beyond abridgements of the right to privacy.

40. Digital risks, including their human rights implications, have been well-recognized by ADB. ADB's Managing Digital Risks primer notes that: "Digital risks to projects can take many forms and typically have a technical underpinning. If these risks are not evaluated and communicated at the design stage, they will likely be left unaddressed throughout the project life cycle."[61] ADB notes further that "MDBs would be well advised to incorporate human rights risk factors associated with the data cycle (collection, storage, use, and re-use) into their risk assessments to ensure the protection of vulnerable groups."[62] This applies to all users of digital goods and services as well.

41. OHCHR welcomes the placeholder in the draft ESF for privacy and digital risks (Intro, para. 47(iii) and Policy, para. 21(v)(h), as part of contextual risks, and ESS 1, para 24(ii)) which is limited to privacy risks. However the ESF does not define the term "digital risk" and, with the exception of privacy risks, the effect of the above-mentioned provisions is to confine digital risks to contextual risk assessment. Hence the draft ESF does not address the many possible scenarios in which an ADB-financed project may be the source of digital risk.

42. In light of the foregoing, OHCHR would respectfully recommend that the ESF's "Definitions" section (pp.132-) include a clear and comprehensive definition of "digital risks", in line with the scope of this concept discussed in ADBs' digital risk primer (chapters 3-9). We would respectfully recommend that the ESF recognize that in digital tech projects or any project with digital dimensions, the collection, processing and use of data should be guided by specific safeguards addressing not only privacy and data security considerations, but other relevant human rights risk factors associated with environmental harms and climate change, non-discrimination and equality, freedoms of information, association and

companies in the Asian region scored the lowest out of all regions on a bundle of indicators relating to commitments; governance; traceability and risk assessments; purchasing practices; recruitment practices; monitoring; ensuring worker voice and remediation when breaches occur.

[59] The database and methodology note are available on request.

[60] The "A" rating was for resettlement impacts of an e-health project. Finance and ICT sector projects had one "B" project each within the given sample. Across all MDBs surveyed, ICT sector projects were more likely to trigger safeguards given physical impacts of ICT infrastructure rather than digital risk concerns.

[61] ADB, Managing Digital Risks: A Primer (Dec. 2023), p. 74: "As a result, organizations did not build the necessary de-risking processes and safeguards into their procurement, assistance, or investment operations."

[62] ADB, Managing Digital Risks: A Primer (Dec. 2023), p. xvii.

expression, economic and social rights, access to justice and due process rights, and the political and social context in which projects are designed and implemented.[63]

43. In OHCHR's view "digital risks", broadly defined, should not only be part of the definition of contextual risk in the ESP's risk classification requirements (Intro, para. 47(iii) and Policy, para. 21(v)(h)) but should also be reflected in the definition of the project, the definition of the scope of due diligence (which should include downstream impacts on users and consumers), E&S risk and contextual risk assessment requirements, the client's Environmental and Social Management System and other E&S risk management requirements, and the architecture for remedy. Moreover, given the comparatively long period of time over which digital risks may materialize, the admissibility threshold for complaints to the Accountability Mechanism and other relevant mechanisms needs to be more flexible.

44. In OHCHR's view, a self-standing ESS would offer the optimal and most effective means of addressing digital risks. Digital innovations, and their associated risks, are cross-cutting, complex, rapidly evolving and in some cases far broader than any other type of impact covered by existing Safeguards. That means they need to be addressed through a more detailed and nuanced set of requirements that go well beyond simply adding references to privacy and/or data protection as risks to be addressed in existing E&S safeguard requirements. Identifying and addressing these risks will require bespoke approaches that are often fundamentally different from existing approaches set out in E&S safeguards. The insightful analysis of digital risk management challenges contained in ADB's digital risk primer supports this recommendation, in our view.

45. It is sometimes suggested that the novel and dynamic nature of many digital risks may actually militate *against* the inclusion of these risks in safeguard policies, and that other kinds of policy guidance such as policy notes, good practice notes and/or programming guides would enable more flexible responses tailored to specific emerging challenges. However in OHCHR's view the ESF and "softer" forms of guidance should be seen as complementary rather than in opposition. The ESF should be the central focus given that this will be the main framework for managing E&S risks in ADB-supported projects, backed by dedicated E&S expertise and resources. The ESF will be approved by the Board and its requirements will be integrated within client contracts and subject to independent accountability. The incentives for implementation of ESF requirements are greater than those for other kinds of guidance. If a full range of digital risks are not explicitly integrated in the ESF, practice will be inconsistent and the goals of accountability and sustainability will be undermined.

OHCHR recommends that:

- *The ESF should include a stand-alone ESS on digital risk.*
- *The ESF's "Definitions" section (pp.132-) should include a clear and comprehensive definition of "digital risks", in line with the scope of this concept discussed in ADBs'*

[63] OHCHR, DFI Safeguard Policies Benchmarking Study (2023), pp.112-114 (Box 59). To similar effect *see* ADB, Managing Digital Risk: A Primer (Dec. 2023), chapter 8.

digital risk primer (chapters 3-9). In digital tech projects or any project with digital dimensions, the collection, processing and use of data should be guided by specific requirements addressing not only privacy and data security considerations, but other relevant human rights risk factors associated with environmental harms and climate change, non-discrimination and equality, freedoms of information, association and expression, economic and social rights, access to justice and due process rights, and the political and social context in which projects are designed and implemented.

- *"Digital risks", broadly defined, should not only be part of the definition of contextual risk in the ESP's risk classification requirements (Intro, para. 47(iii) and Policy, para. 21(v)(h)) but should also be reflected in the definition of the project should be integrated within project risk classification requirements, the definition of the project, the definition of the scope of due diligence (which should include downstream impacts on users and consumers), E&S risk and contextual risk assessment requirements, the client's Environmental and Social Management System and other E&S risk management requirements, and the architecture for remedy.*

Respecting international law

46. Good practice in DFI safeguards increasingly requires the observance of all relevant sources of law, including international standards, prioritizing whichever standards are most stringent. This is particularly important in view of the potentially wide gaps between national and international standards on issues covering by DFI safeguards, particularly in connection with social issues.[64] However we note that the draft ESF proposes to retain a formulation which confuses the sources of applicable law: para. 13 of the Policy, repeated elsewhere, would set E&S requirements against the "host country's applicable laws, including those laws implementing host country obligations under international laws."

47. OHCHR has already addressed the confusion inherent in the latter formulation (April 2021 submission, pp.6-7). A national law is a national law, whether or not it purports to implement international obligations. National laws do not always specify whether or not they purport to implement international law, and even where they do, they may not reflect international requirements fully. Moreover, depending upon the client country's constitution, international treaties may have domestic effect without need for legislation. In OHCHR's view the highest applicable source of law should be respected, and the term "applicable law" should be defined in the ESF to include all sources of law relevant to project E&S risk management: national and international.[65] The logic of the latter proposition is reflected in the draft ESF's approach to addressing the right of women to security of tenure (ESS 5, para. 42[66]) but, regrettably, not in relation to other population groups or social risk issues.

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[64] *See e.g.* University of Wyoming International Human Rights Law Clinic, Social Trends Analysis for Select Countries in the Asia-Pacific Region (2021). More comprehensive country-specific analysis and recommendations from the various UN human rights bodies are available through the "Country" tab at OHCHR's home page: UN Human Rights Office (ohchr.org).

[65] For an example from commercial banking practice, *see* Westpac's human rights Position Statement: "If there is a direct conflict between an applicable domestic law and international human rights standards, we will look at ways to respect international human rights to the extent possible."

[66] ESS 5, para. 42: "When the host country's applicable laws and tenure systems do not recognize the rights of women to hold or exchange property, provision will be made to ensure, to the extent possible, that women can gain security of tenure."

48. Incoherence is also reflected in the very selective referencing of international human rights instruments pertaining to the subject matter of the ESF, notwithstanding their legally binding nature. We note that explicit references to human rights instruments, and specific grounding of E&S safeguards or performance standards in relevant human rights standards, is increasing in DFIs across the various regions.[67] This is important in order to ensure that E&S requirements such as forced evictions, forced labour, FPIC and gender-based violence are interpreted consistently with international human rights standards, and conversely, that the latter standards are not unwittingly renegotiated or undermined through the process of incorporation within E&S risk frameworks.[68]

49. It is important and useful, as noted earlier, that the Policy (para 21(v)(i)) stipulates that international agreements should inform contextual risk assessments. Moreover, international conventions are to be taken into account in connection with the identification of gap-filling measures in connection with Project Impact Assessments for Indigenous Peoples (ESS 7, Annex 1). And under ESS 2, para. 23, the minimum age of child labour is expressed to be governed by the "host country's applicable laws … consistent with the applicable international convention", which is presumably an implicit reference to ILO Convention No. 138 (1973, Minimum Age Convention). However these partial references to applicable international human rights standards pale by comparison to the numerous specific references to environmental conventions throughout the ESF.

50. We would respectfully suggest that relevant international human rights standards be integrated more systematically throughout the E&S Policy and client E&S risk management requirements, in order to ensure that the E&S Policy fully reflects and keeps pace with evolving human rights norms. Any contradictions between E&S Policy requirements, international and national standards should be resolved in favour of the more stringent standard.

OHCHR recommends that:

- *The Policy should contain an explicit human rights policy commitment in line with that of leading practice in other MDBs: "The ADB is committed to respecting internationally recognized human rights standards. To that end, in accordance with its safeguards, the ADB requires clients to respect human rights, avoid infringement of the human rights of others, and address risks to and impacts on human rights in the projects it supports".* [69]
- *The Definitions section of the ESF should contain a definition of "applicable law", which includes international and national E&S standards relevant to the project. The phrase "host country's applicable laws, including those laws implementing host country*

[67] OHCHR, DFI Safeguard Policies Benchmarking Study (2023), pp.11-12 and 18-26.
[68] Human rights cross-referencing and alignment should be undertaken in an intentional, substantive and rigorous fashion. Perceptions of window-dressing or rhetorical repackaging should be avoided.
[69] This wording draws from IDB ESPF (2021), para. 2.1, which also cites a range of relevant international human rights instruments. The human rights policy commitment in EBRD ESP (2019), para. 2.4, carried forward to the draft updated ESP (2024), is in similar terms. The policy statement in draft ADB ESF (Vision, para. 44) seems non-committal and aspirational, by contrast, and is located in the Vision rather than Policy which presumably reduces its practical significance.

obligations under international laws" should be deleted from wherever it appears in the ESF, given the confusion it generates about the relationship between national and international law.

- *Relevant international human rights standards should be integrated throughout the E&S Policy and client E&S risk management requirements, in order to ensure that the E&S Policy fully reflects and keeps pace with evolving human rights norms. Any contradictions between E&S Policy requirements, international and national standards should be resolved in favour of the more stringent standard.*
- *In additional to contextual risk analysis,[70] international human rights law and information from UN human rights bodies (Annex II of OHCHR's April 2021 submission) should guide: (i) ADB's risk classification and due diligence, (ii) social and environmental assessments, (iii) assessments of the robustness of client risk management systems (equivalence assessments), (iv) contextual risk analysis and Strategic Environmental Assessments, and (v) assessments of country/implementing authorities' implementation practice, track record, capacities and commitment.*

Proposed carve-out for fragile and conflict situations (FCAS) and emergencies

51. OHCHR notes the loose requirements and broad discretions which are proposed to govern E&S risk assessment and management in FCAS contexts and emergencies. In particular we note that under ESS 1, para. 45 "the borrower/client will address key risks and impacts and propose management measures, *to the extent possible*" [emphasis added]. Moreover, draft para. 65 of the Policy and ESS 1, para. 62 would permit financing of projects without E&S risk assessments where "details are not yet available." Risk management would instead proceed under agreed (but unspecified) "risk management principles," initially, and an ESMF. The term "emergency" is defined in very broad terms in the draft ESF ("Definitions") and does not take into account situations where actions or omissions of the client government have caused or are perpetuating the emergency.

52. These provisions may set up perverse incentives, in OHCHR's view, for any client seeking to avoid E&S risk management obligations. Similar concerns apply in connection with ESS 1, para. 45 (for FCAS), which makes no distinction as to the various causes of fragility,[71] and to the provisions relating to Emergency Assistance Loans in the "Financing Modalities and Products" annex (Section B), whatever the status of this annex may be.[72]

OHCHR recommends that:

- *In order to limit perverse incentives, paragraph 45 of the Policy should be deleted, and references to emergencies in the Policy (para. 65) and ESS 1 (para. 62) should either be deleted or limited to a clearly defined set of genuinely compelling "emergency" situations not of the client government's making.*

Assessing, preventing and responding to reprisals risks

53. Project-related reprisals risks have been increasing in recent years in line with shrinking civic space and erosion of democratic governance in many countries in the region.

[70] ESP, para. 21(v)(i).
[71] The term FCAS does not appear to be defined in the draft ESF, however in practice it may be necessary to distinguish between endogenous causal factors (for example, situations where fragility been substantially caused by government policy) and exogenous factors (such as in the context of environmental shocks).
[72] *See* para. 9 above.

Militarization of projects and the mobilization of military and police forces to evict and restrict the freedom of expression also seem to be magnifying personal security risks to local communities.[73] These trends are regrettably not unique to the Asia-Pacific region, and most MDBs have published "zero tolerance" commitments to address reprisals and some have developed internal guidance, often following the lead of their independent accountability mechanisms.

54. OHCHR notes, positively, the new stakeholder engagement requirements in ESS 10, which include explicit attention to reprisals. We note that the term "reprisals" is defined on p.141 and appears in the Policy (para. 5, zero-tolerance statement) and ESS's 2 and 7, in addition to ESS 10. However the draft ESF's framework for protection against reprisals seems to be very limited and focused exclusively upon the client. It is hard to see how such a framework could be effective in practice, in OHCHR's view. The main substantive requirements in the ESF are that stakeholder engagement and grievance mechanisms should be free of reprisals. However clients are frequently the source of reprisals risk, and project-level grievance mechanisms may be as well. There appears to be nothing in the ESF on ADB's role and responsibilities to build and exercise leverage to ensure that reprisals risks are assessed, prevented and addressed throughout the project cycle. In the absence of such requirements, the zero-tolerance statement in para. 5 of the Policy seems highly aspirational, in OHCHR's view.

OHCHR recommends that:

- *The ESP should contain clear requirements for ADB to assess, prevent and respond to reprisals risks throughout the project cycle.*
- *ADB should publish detailed procedures on how it should fulfil the above requirements,[74] including parameters and data sources for retaliation risk assessment and an outline of the various forms of leverage (contractual and non-contractual) that may be deployed to prevent and respond to reprisals.*
- *Paragraph 21(v) of the Policy should be amended to include "civic space and freedoms of expression, association and assembly" as contextual factors in project risk classification.*
- *Paragraph 24 of ESS 1 should be amended to include civic space and reprisals risk within the scope of E&S risk assessment.*
- *ADB and its Accountability Mechanism should systematically collect and publish aggregate data and trends analysis on reprisals in connection with ADB-supported projects and Accountability Mechanism procedures, including information on the nature and impact of response measures.*

[73] *See e.g.* Dwyer *et al*, "The security exception: Development and militarization in Lao's protected areas," Vol. 69 *GeoForum* 207-217 (Feb. 2016); *and* Indonesia: UN experts alarmed by reports of increasing militarization and intimidation around Mandalika project, press release (Mar. 1, 2023).
[74] Certain MDBs, such as EBRD, have developed internal guidance on these issues. Other materials to draw upon include the IAM Network's Guide for Independent Accountability Mechanisms to Address Risk of Reprisals in Complaint Management (2019), with necessary adaptations for the parent banks.

Strengthening & use of the borrower's E&S system

55. National legal and policy frameworks on E&S issues have been weakening in many countries and in many respects. "National ownership", while an important objective in principle, should not prejudice more fundamental E&S risk management and sustainability objectives, in OHCHR's view.

56. We refer to our previous recommendations on this issue at pp.11-12 of our April 2021 submission. We note, positively, the requirements in paras. 33-34 of the draft Policy concerning the preparation and publication of equivalence assessments, including the proactive information gathering requirements in para. 34 and the requirement for Board approval, and the requirement in ESS 1, para. 57 that the client must furnish all information reasonably requested by ADB for this purpose.

57. However we note that the draft ESF would permit the use of client E&S systems where to do so would enable the project to "achieve objectives materially consistent with the ESS's"[75] (although presumably this is intended to mean "objectives materially consistent *with those of* the ESS's"). This is an unclear and highly aspirational test, on its face. Consistent with our previous recommendations, we would recommend a more rigorous "functional equivalence" test, taking into account MDB best practice,[76] and reflecting the need for equivalence assessments to take into account the actual E&S standards to be used (not only aspirational objectives).

OHCHR recommends that:

- *In order to promote rigour and consistent practice, ADB should replace its proposed equivalence test in the Policy, paras. 41 & 43; ESS 1, para. 57 ("objectives materially consistent with the ESSs") with a more rigorous "functional equivalence" standard, in line with MDB best practice: "ADB may consider the use of the Borrower's E&S system relevant to the project, provided that the Borrower's E&S standards are substantially equivalent to those of the ESS's and that the Borrower's E&S system will be likely to address the risks and impacts of the project and will enable the project to achieve outcomes equivalent to those achieved with the application of the ESF."*

Policy-based lending

58. We refer to our previous recommendations on this issue at p.7 of our April 2021 submission. We note, positively, the fact that contextual risk assessment should guide PBL (Policy, para. 66). However we note with concern that risk management is proposed to focus exclusively on risks and impacts of the "policy actions" for PBL,[77] rather than impacts

[75] Policy, paras. 41 & 43; ESS 1, para. 57.

[76] For example IDB ESPF, para. 5.1 provides: "The IDB may consider the use of the Borrower's Environmental and Social Framework relevant to the project, provided this is likely to address the risks and impacts of the project and will enable the project to achieve objectives and outcomes equivalent to those achieved with the application of the ESPF (functional equivalence)."

[77] Policy, para. 66, and "Environmental and Social Requirements for Financing Modalities and Products" (Sept 2023 Consultation Draft), paras. 22-23. OHCHR interprets "policy actions" in accordance with the definition in fn 30 of ADB's Operations Manual (June 30, 2023): "All conventional PBL types and PBGs will use a policy matrix (in the PDMF), which presents crucial reforms (policy actions) and addresses constraints in the program's problem analysis diagram (problem tree). The policy matrix presents conditions that need to be satisfied and actions that need to be taken before the release of each

of the actual financing at country level, and risk mitigation need only aim to "achieve objectives materially consistent with the relevant ESS's." The latter standard is vague and aspirational and will surely not encourage rigorous risk management or consistent practice, in OHCHR's view.

59. PBLs may have significant and widespread human rights risks and impacts, well beyond the scope of the relevant policy actions. For example, the UN Special Rapporteur on the Right to Adequate Housing has drawn attention to concerns about impacts of development policy lending on housing affordability, location, tenure security and the availability of services.[78] Impacts of development policy operations in the land and natural resources sector have been well studied in various national contexts,[79] as have impacts in the energy sector.[80] The need for parsimony in the deployment of DPLs was clearly articulated by the World Bank Inspection Panel in connection with its investigation of a development policy operation in the DRC, where the Panel concluded that the selection of the DPL financing modality effectively precluded the assessment of (otherwise predictable) impacts of forestry sector reforms on indigenous peoples:

> *"The Panel also notes its concern that Development Policy Lending is being used for supporting activities which in earlier times have been financed as projects. This effectively bypasses the environmental and social safeguard policies that apply to projects. The Panel understands that Development Policy Lending may sometimes be the preferred instrument. However, since DPLs are usually disbursed in a single tranche, it is difficult to ensure that attention is paid to environmental and social issues. Moreover, in the case of DRC and increasingly most other DPLs in Africa with forest components, the Bank determines that there are no significant environmental and social effects, or alternatively that any effects would be positive. The Panel is concerned that these determinations are cursory with little time available to assess the proposed endeavor and with an implicit assumption that technical assistance programs affect only the targeted government program. Activities such as support for a forest concession program have very broad and very significant social and environmental effects in the country that cannot be ignored and need to be assessed."*[81]

60. Given the fungibility of financing, DPLs may trigger serious fiduciary concerns in weak governance contexts. High-volume fast-disbursing operations like PBLs have potentially destabilizing effects and may fuel serious human rights violations, especially in FCAS

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tranche in a single-tranche or multitranche stand-alone PBL, subprograms for a programmatic approach, .. etc."

[78] UN Special Rapporteur on Adequate Housing, Submission to the World Bank's Safeguard Review and Update Process (Phase 1 – Public Consultation) (2013), p. 14.

[79] *See e.g.* Executive Summary of World Bank Inspection Panel investigation in relation to Forest Sector Operations in the Democratic Republic of the Congo (2008); *and* Bank Information Center & Asociación Ambiente y Sociedad, The World Bank and Colombia's Territorial Development Policy Financing: *whose land is it anyway*? (Apr. 2018).

[80] Bretton Woods Project, Gambling with the planet's future? World Bank Development Policy Finance, "green" conditionality, and the push for a private-led energy transition (Apr. 2024).

[81] World Bank Inspection Panel, footnote 79 above, p. xxviii.

settings. Policy based financing at scale in conflict-affected states provides fiscal space to finance armed conflict. In the example discussed in our April 2021 submission (p.7), policy based lending may even raise the risk of complicity by a lender in international crimes. The quick disbursing nature of PBLs makes it more challenging for affected stakeholders to be aware of these operations, to understand them and to participate in consultations. Deficiencies in transparency and accountability have been widely noted,[82] and the windows to bring complaints to IAMs may be very short.

61. The above factors warrant the selective application of PBL and more rigorous, systematic application of E&S safeguards, in OHCHR's view, focused as far as possible on actual impacts of the financed program, in addition to impacts of policy actions. Paragraph 24 of the "Financing Modalities and Products" annex usefully provides that if any "strategic, geographic, and/or sector-wide E&S risks related to the scope and nature of a policy-based loan operation are identified by a borrower or ADB," additional assessment and risk management measures will be required. However more specific, rigorous requirements would seem to be desirable in OHCHR's view. The World Bank has relatively detailed requirements for *ex ante* analysis and consultation for development policy financing (World Bank, OP/BP 8.60, paras. 6-9 & 12-14) although implementation is a more challenging question.[83]

62. Inspiration may be drawn from the AfDB ESP (2023), para. 44, which has a relatively short framework for PBLs (called programme-based operations, or PBOs) which, while schematic in nature, seeks to apply the actual requirements of the Operational Standards (not merely their objectives) to the programme itself (not merely the policy actions required by AfDB), with necessary adaptations: "Where the Bank provides support for programme-based operations (PBOs), the E&S provisions of this ISS apply. Specifically, the Bank will identify in consort (sic) with the Borrower how the specific provisions of the OSs may be applied appropriately at the programme and sector level, taking into account that such operations do not have the same granularity of E&S risks and impacts that are manifest in investment for project financing."

OHCHR recommends that:

- *For the sake of clarity and accountability, all requirements in the "Financing Modalities and Products" annex (or ADB Management document) should be integrated within the ESF.*
- *In line with ADB's Articles of Agreement,[84] and given the inherent challenges in effectively managing E&S risks in PBLs, the ESF should explicitly note the exceptional nature of this kind of operation.*
- *PBLs should be subject to the actual requirements of the ESS's, and should not merely aim to "achieve objectives materially consistent" with the ESSs.*
- *As far as practicable, E&S risk management requirements should apply to the policies and programme supported by the DPL, as well as the actions in the policy matrix.*

[82] *See e.g*. Bretton Woods Project, above note 80, p.9; Bretton Woods Project, What is World Bank Development Policy Financing? (Mar. 23, 2021).
[83] *Id*.
[84] ADB's Articles of Agreement provide, Article 14(i), that "The operations of the Bank shall provide principally for the financing of specific projects[.]"

- *The ESF should contain more detailed requirements regarding the analytical underpinnings of DPLs, poverty and social impact analysis, transparency and participation.*[85]
- *Analytical work for PBLs should include an analysis of the availability and accessibility of grievance redress mechanisms at national and sub-national levels, in anticipation of potential negative E&S impacts. A description of grievance redress mechanisms, including the ADB-AM, should made publicly available in stakeholder consultations associated with PBLs.*

Conclusion

63. We hope that these comments, and the recommendations in the Annex, are useful to ADB in finalizing the ESF. We reiterate our appreciation for our constructive and ongoing engagement with ADB on these issues, and are at your disposal for clarifications and any follow-up as needed.

* * *

[85] The World Bank's OP/BP 8.60 (2017) may provide inspiration in these respects.

ANNEX - LIST OF RECOMMENDATIONS

OHCHR respectfully recommends the following:

Risk-based value chain due diligence

1. *The ESF should clarify that clients should address all potential E&S (including human rights) impacts they may cause or contribute to, or which may be directly linked to their operations, products or services by their business relationships, downstream as well as upstream, without any categorical limitation to "primary suppliers".*

2. *Risk-based risk management throughout the value chain should be prioritized according to risk, and should include but not be limited to forced and child labour, SEAH and biodiversity issues.*

A proactive and robust approach to remediation

3. *The following definition of remedy should be included in the Definitions section of the ESF: "Restitution, rehabilitation, satisfaction, and guarantees of non-repetition." Such a definition would reflect international human rights standards and equip ADB and clients to address a broad range of adverse social (including human rights) impacts.*

4. *The mitigation hierarchy in the ESF should be amended to: "avoid, minimize, reduce and mitigate risks and adverse impacts, and where significant residual impacts remain, to remedy such impacts." The inappropriateness of off-setting human rights impacts should explicitly be recognized in draft ESS 1, para. 30.*

5. *The "technically or financially feasible" criterion in ESS 1, para. 30 should be deleted. Such a provision creates perverse incentives. Projects with significant residual impacts, without any prospect of remedy, should not proceed.*

6. *Responsibilities to address adverse impacts should take into account the respective involvement of clients and ADB in impacts (cause-contribute-direct linkage), as summarized in Figure 1 above.*

7. *The ESF should spell out different kinds of leverage (including commercial, contractual, convening, normative, and through capacity building) that may be built and deployed by ADB and clients to address human rights risks in which they are involved. An examination all available forms of leverage should be part of project Appraisal.*

8. *The following sentence should integrated within para. 36 of the Policy: "The ESCP/ESAP will include an indicative budget for capital and recurrent costs." This would help to clarify requirements and give effect to the commitment expressed in ESS 1, para. 29, that all E&S costs should be internalized within the project.*[86]

9. *ADB's monitoring requirements (Policy, paras. 56-59) should include the following requirements: (a) the client must report serious E&S incidents to ADB within a specified*

[86] ESS 1, para. 29: "The borrower/client will ensure that the cost of addressing E&S risks and impacts through the mitigation hierarchy, are considered as part of a project's costs."

deadline; and (b) ADB has the right to carry out, or require the client to carry out, an audit or assessment where there is evidence of a serious departure from the ESCP/ESAP and/or the ESSs, the costs of which should be borne by the client.

10. *ADB should undertake an analysis of the remedy eco-system in-country, including judicial and non-judicial mechanisms, as part of its due diligence for higher risk projects, and integrate this within project risk classifications, risk mitigation plans, and technical guidance to project stakeholders on accessing remedy. Where there is weak capacity within the government or the client, this should be a specific focus of capacity building.*

11. *ADB should require the establishment of contingent liability funding to remedy harms in all higher-risk projects, complemented by ADB contributions to the extent of the bank's own involvement in any adverse impacts. A decision by ADB to contribute financially to remediation, in line with its own contribution to harms, is separate from and should not be seen as an admission of legal liability.*

Responsible exit

12. *The ESF should outline the main elements of a "responsible exit framework" to guide actions across the project cycle, including:*
    - *Integrating potential environmental and social impacts of exit within project due diligence from the earliest stages of the project cycle;*
    - *A clear requirement not to exit without first using all available leverage to address unremediated E&S harms, and without assessing impacts of exit and consulting with all relevant stakeholders;*
    - *A commitment to ensure that any promised project benefits have been provided and the project will operate in an environmentally and socially responsible manner after exit;*
    - *A requirement that no community members or workers face risk of retaliation due to the exit; and*
    - *A commitment to seek a responsible replacement(s) for ADB, or the client, as the case may be, on exit.*

Digitalization risks

13. *The ESF should include a stand-alone ESS on digital risk.*

14. *The ESF's "Definitions" section (pp.132-) should include a clear and comprehensive definition of "digital risks", in line with the scope of this concept discussed in ADBs' digital risk primer (chapters 3-9). In digital tech projects or any project with digital dimensions, the collection, processing and use of data should be guided by specific requirements addressing not only privacy and data security considerations, but other relevant human rights risk factors associated with environmental harms and climate change, non-discrimination and equality, freedoms of information, association and expression, economic and social rights, access to justice and due process rights, and the political and social context in which projects are designed and implemented.*

15. *"Digital risks", broadly defined, should not only be part of the definition of contextual risk in the ESP's risk classification requirements (Intro, para. 47(iii) and Policy, para. 21(v)(h)) but should also be reflected in the definition of the project should be integrated within project risk classification requirements, the definition of the project, the definition of the scope of due diligence (which should include downstream impacts on users and consumers), E&S risk and contextual risk assessment requirements, the client's Environmental and Social Management System and other E&S risk management requirements, and the architecture for remedy.*

Respecting international law

16. *The Policy should contain an explicit human rights policy commitment in line with that of leading practice in other MDBs: "The ADB is committed to respecting internationally recognized human rights standards. To that end, in accordance with its safeguards, the ADB requires clients to respect human rights, avoid infringement of the human rights of others, and address risks to and impacts on human rights in the projects it supports".*

17. *The Definitions section of the ESF should contain a definition of "applicable law", which includes international and national E&S standards relevant to the project. The phrase "host country's applicable laws, including those laws implementing host country obligations under international laws" should be deleted from wherever it appears in the ESF, given the confusion it generates about the relationship between national and international law.*

18. *Relevant international human rights standards should be integrated throughout the ESP and ESS's, in order to ensure that the ESF accurately reflects and keeps pace with evolving human rights norms. Any contradictions between ESF requirements, international and national standards should be resolved in favour of the more stringent standard.*

19. *In additional to contextual risk analysis,[87] international human rights law and information from UN human rights bodies (Annex II of OHCHR's April 2021 submission) should guide: (i) ADB's risk classification and due diligence, (ii) social and environmental assessments, (iii) assessments of the robustness of client risk management systems (equivalence assessments), (iv) contextual risk analysis and Strategic Environmental Assessments, and (v) assessments of country/implementing authorities' implementation practice, track record, capacities and commitment.*

Proposed carve-out for FCAS and emergencies

20. *In order to limit perverse incentives, paragraph 45 of the Policy should be deleted, and references to emergencies in the Policy (para. 65) and ESS 1 (para. 62) should either be deleted or limited to a clearly defined set of genuinely compelling "emergency" situations not of the client government's making.*

Assessing, preventing and responding to reprisals risks

21. *The ESP should contain clear requirements for ADB to assess, prevent and respond to reprisals risks throughout the project cycle.*

[87] ESP, para. 21(v)(i).

22. *ADB should publish detailed procedures on how it should fulfil the above requirements, including parameters and data sources for retaliation risk assessment and an outline of the various forms of leverage (contractual and non-contractual) that may be deployed to prevent and respond to reprisals.*

23. *Paragraph 21(v) of the Policy should be amended to include "civic space and freedoms of expression, association and assembly" as contextual factors in project risk classification.*

24. *Paragraph 24 of ESS 1 should be amended to include civic space and reprisals risk within the scope of E&S risk assessment.*

25. *ADB and its Accountability Mechanism should systematically collect and publish aggregate data and trends analysis on reprisals in connection with ADB-supported projects and Accountability Mechanism procedures, including information on the nature and impact of response measures.*

Strengthening & using borrower E&S systems

26. *In order to promote rigour and consistent practice, ADB should replace its proposed E&S systems equivalence test in the Policy (paras. 41 & 43) and ESS 1 (para. 57) ("objectives materially consistent with the ESSs") with a more rigorous "functional equivalence" standard, in line with MDB best practice: "ADB may consider the use of the Borrower's E&S system relevant to the project, provided that the Borrower's E&S standards are substantially equivalent to those of the ESS's and that the Borrower's E&S system will be likely to address the risks and impacts of the project and will enable the project to achieve outcomes equivalent to those achieved with the application of the ESF."*

Policy-based lending

27. *For the sake of clarity and accountability, all requirements in the "Financing Modalities and Products" annex (or ADB Management document) should be integrated within the ESF.*

28. *In line with ADB's Articles of Agreement,[88] and given the inherent challenges in effectively managing E&S risks in PBLs, the ESF should explicitly note the exceptional nature of this kind of operation.*

29. *PBLs should be subject to the actual requirements of the ESS's, and should not merely aim to "achieve objectives materially consistent" with the ESSs.*

30. *As far as practicable, E&S risk management requirements should apply to the policies and programme supported by the DPL, as well as the actions in the policy matrix.*

31. *The ESF should contain more detailed requirements regarding the analytical underpinnings of DPLs, poverty and social impact analysis, transparency and participation.*

[88] ADB's Articles of Agreement provide, Article 14(i), that "The operations of the Bank shall provide principally for the financing of specific projects[.]"

32. *Analytical work for PBLs should include an analysis of the availability and accessibility of grievance redress mechanisms at national and sub-national levels, in anticipation of potential negative E&S impacts. A description of grievance redress mechanisms, including the ADB-AM, should made publicly available in stakeholder consultations associated with PBLs.*

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