

# LEGAL OPINION

## INTERNATIONAL OBLIGATIONS GOVERNING THE ACTIVITIES OF EXPORT CREDIT AGENCIES IN CONNECTION WITH THE CONTINUED FINANCING OF FOSSIL FUEL-RELATED PROJECTS AND ACTIVITIES

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## Executive summary

1. This Opinion has been prepared in response to a request for legal advice from Oil Change International, a not-for-profit research, communications and advocacy organisation focussed on exposing the true costs of fossil fuels and facilitating the ongoing transition to clean energy. Our legal advice is sought with respect to the international legal obligations directly or indirectly governing the conduct of Export Credit Agencies (ECAs), whether as State organs, instrumentalities or private entities, in connection with their continued financing of fossil fuel-related projects/activities in the context of the climate change emergency. The Opinion is based on our knowledge and experience of international law. It is prepared in our personal capacity and reflects our professional opinion as experts in this area. It does not reflect the views of any of the organisations with which we are affiliated.
2. The term ECA generally refers to an agency in a creditor country that provides insurance, guarantees or loans for the export of goods and services. ECAs are characterised functionally by the type of activities they perform, namely the provision of financial support in the form of guarantees, insurance or direct financing, typically as a supplement to resources of the private sector, and generally for the promotion of exports of capital equipment and large-scale, medium-term projects, involving companies of the home State. In practice, the entities through which this financial support for the export of goods and services is provided vary significantly in their form and features.
3. The continued financing of fossil fuel-related projects/activities by ECAs must be legally assessed in a specific context characterised by the climate emergency, the rapidly decreasing carbon budget, and the widely acknowledged need to reform fossil fuel subsidies and support. This specific context is established on the basis of the compelling scientific evidence referred to in Section I of this Opinion. In the light of this specific context, we reach the following conclusions regarding the question put to us.
4. ECAs do not operate in an international legal vacuum. The conduct of ECAs is directly or indirectly governed by certain international legal obligations because their conduct may be attributed to the State and/or because States may be required under international law to regulate their conduct and/or because ECAs, as such, may be subject to certain international legal obligations.
5. Under customary international law, States are required, in principle: not to finance new fossil fuel-related projects/activities or increase the financing of existing ones; to decrease existing support within a clear timeframe dictated, first and foremost, by scientific considerations and the temperature goals of the Paris Agreement, as a reflection of a global consensus; to make proactive efforts to avoid “locking-in” fossil fuel-related projects/activities which may use up a significant part of the remaining carbon budget; to adopt and proactively implement adequate procedures to assess the carbon footprint of any project to be potentially supported; to adopt and proactively implement guidelines concerning the performance of the activities of the relevant ECA in the context described in Section I.

6. These State obligations under customary international law are confirmed, further specified and/or expanded by the obligations arising in specific normative contexts, including in the areas of international climate change law, international human rights law and certain specific instruments adopted under the aegis of the OECD.
7. Under the Paris Agreement, States have set specific goals and requirements which represent a strengthened response to the urgent threat of climate change. That response includes making finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development, which entails addressing inconsistent flows, as well as promoting those which are consistent with the stated pathways. Accordingly, inconsistent flows should be reflected in the Biennial Assessment and Overview of Climate Finance Flows conducted by the UNFCCC Parties, as well as in the Global Stocktake. In making decisions on the provision of export credit for fossil fuel-related projects/activities, States must have regard to the goals and obligations of the Paris Agreement, including those relating to finance. 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 temperature goals, it appears that export credits which support fossil-fuel related projects/activities are not in principle consistent with the pathways set out in Article 2(1)(c), the temperature goals laid down in Article 2(1)(a) or the mitigation requirements under Article 4 of the Paris Agreement. Specific issues which should be addressed by ECAs include the need to proactively avoid locking-in fossil fuel-related emissions, as these are inconsistent with the progressive and ambitious approach for nationally determined contributions and long-term strategies laid down in the Paris Agreement. In the light of the language of Articles 2 and 9 in particular, it is also clear that State parties to the Paris Agreement should seek to ensure that finance flows directed by ECAs address the climate goals and the poverty goals of developing States in an integrated way. This includes 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.
8. Under international human rights law, read in the light of international climate change law, States, whether acting through official ECAs or in relation to separate ECAs regulated by them, are required in principle: not to finance new fossil fuel-related projects/activities or increase the financing of existing ones; to decrease existing support within a clear timeframe dictated, first and foremost, by scientific considerations and the temperature goals of the Paris Agreement, as a reflection of a global consensus; to proactively avoid “locking-in” fossil fuel-related projects/activities which may use up a significant part of the remaining carbon budget; to adopt and proactively implement adequate procedures to assess the carbon footprint of any project to be potentially supported; to adopt and proactively implement guidelines concerning the performance of the activities of the relevant ECA in the context described in Section I. Moreover, procedural obligations under international human rights law require States to ensure that ECAs, whether as official or separate entities, possess, update, disseminate and make available upon request information about their financing of fossil fuel-related projects/activities.

9. In addition, ECAs as individual duty-bearers are subject to certain international obligations analogous to those of States, mainly under international human rights law, to discharge duties analogous to the duties of States to respect and to protect, as well as to provide access to environmental information.
10. States as Adherents to the OECD Common Approaches, including in their regulation of separate ECAs, and ECAs as stand-alone duty bearers, as relevant, must implement the OECD Common Approaches in a manner consistent with State obligations under international law. With respect to ECA finance for fossil fuel-related projects/activities in the context described in Section I, this includes but is not limited to the following obligations: the conduct of a climate change risk assessment covering the full range of physical and transitional risks to the achievement of the international climate goals: this should include assessment of Scope 3 emissions, the risk of overshoot and of lock-in and stranded assets; full transparency in relation to the assessment process and findings; assessment of the extent to which project emissions undermine the contribution to global emissions reductions made by the ECA host State's domestic emissions reductions; a human rights impact assessment that takes into account adverse impacts of climate change including on the right to life, to health and to adequate food; and the assessment of alternatives to fossil fuel projects, so as to meet the goals set out in Article 2 of the Paris Agreement, and in particular Article 2(1)(c).
11. On the basis of the scientific context described in Section I and the wording of the Paris Agreement, there appears to be no clear reason for an OECD Sector Understanding on Export Credits for Coal-Fired Electricity Generation Projects to focus on coal exclusively and not to address in addition oil and gas. States must ensure that finance flows do not undermine the Paris Agreement temperature goals and are consistent with the pathways for finance and emission reductions, together with the requirements to act on the basis of best available science, to reduce vulnerability and strengthen resilience and to act effectively with high ambition and progressively in order to address the urgent threat of climate change. The onus is on State parties/ECAs to show how continued financing of any fossil fuel-related projects/activities can be justified in the light of the obligations and goals of international climate change law, as well as the associated protections under international law examined in this Opinion.

## I. CONTEXT AND SCOPE OF THE LEGAL ADVICE REQUESTED

1. This Opinion has been prepared in response to a request for legal advice from Oil Change International (**OICI**), a not-for-profit research, communications and advocacy organisation focussed on exposing the true costs of fossil fuels and facilitating the ongoing transition to clean energy.
2. Our legal advice is sought with respect to the international legal obligations directly or indirectly governing the conduct of Export Credit Agencies (**ECAs**), whether as State organs, instrumentalities or private entities, in connection with their continued financing of fossil fuel-related projects/activities in the context of the climate change emergency.
3. The Opinion is based on our knowledge and experience of international law. It is prepared in our personal capacity and reflects our professional opinion as experts in this area. It does not reflect the views of any of the organisations with which we are affiliated. The scope of this Opinion is confined to international law, and it is not intended to be an exhaustive examination of all relevant legal issues but only a general analysis of certain legal questions of particular relevance. When references to domestic law and cases from different jurisdictions are provided, this is only to clarify the scope and implications of the relevant international legal obligations. The Opinion has been prepared in a very tight timeframe and, despite the significant amount of materials which we were asked to consider, it must not be considered as an exhaustive examination of all relevant materials and issues.
4. The term ECA generally refers to “[a]n agency in a *creditor economy* that provides insurance, guarantees or loans for the export of goods and services”.<sup>1</sup> An almost identical definition is used in the glossary of terms of the Organisation for Economic Co-operation and Development (**OECD**).<sup>2</sup> ECAs are characterised functionally by the type of activities they perform, namely the provision of “Officially Supported Export Credits”. The IMF Glossary defines this term as follows:

*“Loans or credits to finance the export of goods and services for which an official export credit agency in the creditor economy provides guarantees, insurance, or direct financing. The financing element—as opposed to the guarantee/insurance*

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<sup>1</sup> International Monetary Fund (IMF), *External Debt Statistics – Guide for Compilers and Users (2013 edition), Appendix 3: Glossary of External Debt Terms*, at 234 (italics original), available at < <http://tffs.org/pdf/edsg/ft2014.pdf> >

<sup>2</sup> Organisation for Economic Co-operation and Development (OECD), *Glossary of Statistical Terms (2007)*, at 280, available at < <https://stats.oecd.org/glossary/download.asp> >. This definition is based on the 2003 version of the IMF Glossary. The only difference is that the earlier definition uses the term “creditor country” whereas the current one employs instead the broader expression “creditor economy”.

element—can be extended by an exporter (supplier’s credit), or through a commercial bank in the form of trade-related credit provided either to the supplier, or to the importer (buyer’s credit). *It can also be extended directly by an export credit agency of the exporting countries, usually in the form of medium-term finance as a supplement to resources of the private sector, and generally for export promotion for capital equipment and large-scale, medium-term projects.* Under the rules of the Arrangement on Guidelines for Officially Supported Export Credits covering export credits with duration of two years or more, up to 85 percent of the export contract value can be officially supported.”<sup>3</sup>

This definition refers to the financial support from “official export credit agencies” while acknowledging that other institutions, including private entities, may also provide export credit. The difference between “official” and other institutions is relevant for the determination of the applicable rules of international law (see Section II of this Opinion).

5. The definition provided in the IMF Glossary and followed in the OECD Glossary is intended for use in the compilation of statistical information. As such, it is not a legally binding definition of the overall phenomenon of either “export credit” or ECAs. By contrast, other definitions carry legal consequences in certain contexts. The definition provided in the OECD Arrangement on Guidelines for Officially Supported Export Credits (**OECD Arrangement**),<sup>4</sup> is given some legal effects under international trade law<sup>5</sup> (see Section III.2.C of this Opinion). The OECD Arrangement defines its scope of application as concerning “all official support provided *by or on behalf of* a government for export of goods and/or services, including financial leases, which have a repayment term of two years or more”, with the exception of “military equipment and agricultural commodities”.<sup>6</sup> The terms “by or on behalf” make clear that an entity which is separate from the State may nevertheless be considered an ECA inasmuch as it provides support “on behalf” of the government.
6. In practice, the entities through which official support for the export of goods and services is provided vary significantly in their form and features. Some major examples of such entities are provided in the list maintained by the OECD Export Credit Group,

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<sup>3</sup> International Monetary Fund (IMF), *External Debt Statistics – Guide for Compilers and Users (2013 edition)*, Appendix 3: *Glossary of External Debt Terms*, at 243-244 (emphasis added).

<sup>4</sup> OECD, Arrangement on Guidelines for Officially Supported Export Credits, 15 January 2020 (latest edition), TAD/PG(2020)1, available at [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=tad/pg\(2020\)1](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=tad/pg(2020)1) >

<sup>5</sup> Agreement on Subsidies and Countervailing Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 UNTS 14. According to Article 3(1)(a), subsidies contingent on export performance (an illustrative list is provided in Annex I of the SCM Agreement) are prohibited. However, Annex I, letter (k) provides that “an export credit practice which is in conformity with those provisions [an “international undertaking on official export credits” meeting certain membership conditions] shall not be considered an export subsidy prohibited by this Agreement”.

<sup>6</sup> OECD, Arrangement on Guidelines for Officially Supported Export Credits, 15 January 2020 (latest edition), TAD/PG(2020)1, at Section 5.

which includes 39 such entities from 32 countries.<sup>7</sup> A partly overlapping sample of ECAs from G20 Member States has provided the basis for a series of reports analysing the contribution of such entities to the financing of fossil fuel-related projects/activities.<sup>8</sup> In these reports, ECAs are sometimes examined together with other public finance agencies, such as development finance institutions (**DFIs**), national development banks (**NDBs**) and multilateral development banks (**MDBs**).

7. The latter reports provide one of the three main parameters defining the context of the present Opinion, namely the continued financing provided by ECAs to fossil fuel-related projects/activities in the period from 2013 to 2018. They reach the following key conclusions specifically with respect to ECAs:
  - (a) Between 2016-2018, despite the objectives to which States committed when adopting the Paris Agreement in December 2015, the ECAs from G20 countries provided USD 40.1 billion annually to support fossil fuel activities (coal, oil and gas across the upstream, midstream and downstream sectors) compared to only USD 2.9 billion for clean energy (solar, wind, geothermal, tidal).<sup>9</sup>
  - (b) Between 2016-2018, 78.6 percent of ECA energy financing was given to fossil fuel-related projects/activities, which represents an increase from the 76.6 percent given in the pre-Paris Agreement period (2013-2015). Of particular note, the finance for coal, which is a high-emitting fossil fuel in terms of greenhouse gases, climbed from 10 percent of ECA energy financing in 2013-2015 to 14.7 percent in 2016-2018.<sup>10</sup>
  - (c) Support for fossil fuels can be individualised to specific countries and even specific ECAs. Only four countries – Canada, Japan, China and Korea (in this order) – accounted for 79 percent of the G20 ECA fossil fuel support between 2016-2018.<sup>11</sup> In Canada and China, the annual average amount of support for oil and gas actually increased from the period 2013-2015 to the period 2016-2018, whereas in Japan

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<sup>7</sup> OECD List, Official Export Credit Agencies, < <http://www.oecd.org/trade/topics/export-credits/documents/links-of-official-export-credit-agencies.pdf> >

<sup>8</sup> These reports are, in chronological order: K. DeAngelis, A. Doukas, *Financing Climate Disaster: How Export Credit Agencies Are a Boon for Oil and Gas* (November 2017) < <http://priceofoil.org/2017/10/16/financing-climate-disaster-report/> >; K. DeAngelis, B. Tucker, *Adding Fuel to the Fire: Export Credit Agencies and Fossil Fuel Finance* (January 2020) (which updates the estimates provided in *Financing Climate Disaster*) < <http://priceofoil.org/2020/01/30/g20-ecas-2020/> >; B. Tucker, K. DeAngelis, A. Doukas, *Still Digging: G20 Governments Continue to Finance the Climate Crisis* (May 2020), Appendix < <http://priceofoil.org/2020/05/27/g20-still-digging/> > [which updates the estimates provided in *Adding Fuel to the Fire*]

<sup>9</sup> B. Tucker, K. DeAngelis, A. Doukas, *Still Digging: G20 Governments Continue to Finance the Climate Crisis* (May 2020), at 18.

<sup>10</sup> B. Tucker, K. DeAngelis, A. Doukas, *Still Digging: G20 Governments Continue to Finance the Climate Crisis* (May 2020), at 18.

<sup>11</sup> B. Tucker, K. DeAngelis, A. Doukas, *Still Digging: G20 Governments Continue to Finance the Climate Crisis* (May 2020), at 18.

and Korea it decreased.<sup>12</sup> However, in Japan, support for coal projects substantially increased from the period 2013-2015 to the period 2016-2018.<sup>13</sup> A similar increase in coal support was observed in India.<sup>14</sup>

(d) At the level of individual ECAs, Export Development Canada (**EDC**) was the largest ECA supporter of fossil fuels during this period, which was largely driven by the high levels of domestic support for oil and gas.<sup>15</sup> Support for oil and gas projects by the China Export Credit Insurance Corporation (**SINOSURE**) and the Export-Import Bank of China (**CHEXIM**) almost trebled from the pre-Paris Agreement period 2013-2015 to the period 2016-2018.<sup>16</sup>

8. The second main parameter defining the context of this Opinion is the international recognition of the need for fossil fuel subsidy reform (**FFSR**) if the international climate goals are to be achieved. In the light of concern as to extent to which current finance flows are inconsistent with those goals, there have been growing calls for FFSR.<sup>17</sup> Export credits for fossil fuel projects are generally included in discussions of fossil fuel subsidy. In 2015 the Friends of Fossil Fuel Subsidy Reform, a coalition of eight non-G20 countries, together with France and the United States of America sent out a communiqué calling on the international community to increase efforts to phase out fossil fuel subsidies.<sup>18</sup> The Group of Seven (**G7**) put forward a pledge in May 2016 to end most fossil fuel subsidies by 2025.<sup>19</sup> The key impacts of fossil fuel subsidies and implications of FFSR are outlined below:

(a) Commentators have pointed out that the impact of fossil fuel subsidies is both direct (leading to an increase in greenhouse gas emissions and locking in high

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<sup>12</sup> B. Tucker, K. DeAngelis, A. Doukas, *Still Digging: G20 Governments Continue to Finance the Climate Crisis* (May 2020), at 19.

<sup>13</sup> B. Tucker, K. DeAngelis, A. Doukas, *Still Digging: G20 Governments Continue to Finance the Climate Crisis* (May 2020), at 19.

<sup>14</sup> B. Tucker, K. DeAngelis, A. Doukas, *Still Digging: G20 Governments Continue to Finance the Climate Crisis* (May 2020), at 19.

<sup>15</sup> B. Tucker, K. DeAngelis, A. Doukas, *Still Digging: G20 Governments Continue to Finance the Climate Crisis* (May 2020), at 18 and 20. Another study specifically on the practice of Export Development Canada concludes that ‘Between 2012 and 2017, EDC provided twelve times more support for oil and gas than for clean technologies, facilitating an average of more than CAD 10 billion in oil and gas finance per year, according to EDC’s own published data’, A. Doukas, A. Scott, *Risking it All: How Export Development Canada’s Support for Fossil Fuels Drives Climate Change* (November 2018), at 4.

<sup>16</sup> B. Tucker, K. DeAngelis, A. Doukas, *Still Digging: G20 Governments Continue to Finance the Climate Crisis* (May 2020), at 19.

<sup>17</sup> See the discussion in H. van Asselt, L. Merrill, K. Kulovesi, ‘Fossil Fuels and the Global Climate Regime’, in J. Skovgaard, H. van Asselt (eds.), *The Politics of Fossil Fuel Subsidies and their Reform* (Cambridge University Press, 2018), pp. 140-155.

<sup>18</sup> Friends of Fossil Fuel Subsidy Reform. *Fossil Fuel Subsidy Reform and the Communiqué*. Briefing note. Available at <<http://ffsr.org/wp-content/uploads/2015/07/ffsr-communication-briefing-note.pdf>>.

<sup>19</sup> Mathiesen K. 2016. G7 nations pledge to end fossil fuel subsidies by 2025. *The Guardian*. Available at <<https://www.theguardian.com/environment/2016/may/27/g7-nations-pledge-to-end-fossil-fuel-subsidies-by-2025>>.



emitting infrastructure) and, at the same time, perverse/indirect in preventing take up of renewable energy sources:

“fossil fuel subsidies prevent the uptake of renewable energy because they ‘impair the competitiveness of renewable-energy technologies, reinforce the continuation of fossil fuel–based systems and distort investment decisions in favour of fossil fuel technologies’ ... The negative climate impact of fossil fuel subsidies thus could be even greater if their effects on renewable energy promotion are considered part of the equation”<sup>20</sup>

- (b) Fossil fuel subsidies may also lead to long-term carbon lock-in, such as the building of carbon intensive infrastructure, further contributing to climate change.<sup>21</sup>
- (c) It has been suggested that the phase-out of fossil fuel subsidies could result in a 6–13 per cent reduction in greenhouse gas emissions by 2050.<sup>22</sup> Redirecting fossil fuel subsidies towards climate financing would have the dual outcome of reducing greenhouse gas emission impacts created by the subsidies and freeing up funds for low-carbon development.<sup>23</sup>
- (d) Some commentators have referred to the concept of “net climate finance”, defined as the value of climate finance flows minus financial flows to high-emissions and maladaptive activities and pointed out that net climate finance continues to be heavily skewed toward carbon-intensive investments.<sup>24</sup>
- (e) The 2020 UNEP Production Gap Report has indicated that fossil fuel subsidies continue to pose a threat to the achievement of the international climate goals:

“In general, government responses to the COVID-19 crisis have tended to intensify patterns that existed prior to the pandemic: jurisdictions that already heavily subsidized the production of fossil fuels have increased this support, while those with stronger commitments to a transition to clean energy are now using stimulus and recovery packages to accelerate this shift. Unfortunately, most of the world’s

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<sup>20</sup> H. van Asselt, L. Merrill, K. Kulovesi, ‘Fossil Fuels and the Global Climate Regime’, in J. Skovgaard, H. van Asselt (eds.), *The Politics of Fossil Fuel Subsidies and their Reform* (Cambridge University Press, 2018), pp. 140-155, at 141-142.

<sup>21</sup> H. van Asselt, L. Merrill, K. Kulovesi, ‘Fossil Fuels and the Global Climate Regime’, in J. Skovgaard, H. van Asselt (eds.), *The Politics of Fossil Fuel Subsidies and their Reform* (Cambridge University Press, 2018), pp. 140-155, at 143.

<sup>22</sup> Merrill L, Bassi AM, Bridle R and Christensen LT. *Tackling Fossil Fuel Subsidies and Climate Change: Levelling the Energy Playing Field*. Nordic Council of Ministers, available at <<http://dx.doi.org/10.6027/TN2015-575>>.

<sup>23</sup> G. Piggot, P. Erikson, M. Lazarus, H. van Asselt, *Addressing fossil fuel production under the UNFCCC: Paris and beyond*, Stockholm Environment Institute Working Paper 2017-09 (2017), page 18. An updated version of this working paper was subsequently published as G. Piggot, C. Verkuil, H. van Asselt, M. Lazarus, “Curbing fossil fuel supply to achieve climate goals” (2020) 20:8 *Climate Policy* 881. See also I. Shishlov, A.-K. Weber, I. Stepchuk, L. Darouich, A. Michaelowa, *Study on internal and external climate change policies affecting export credit and insurance agencies Final Report*, Perspectives Climate Group GmbH, Freiburg Germany 11 03 2020, page 6.

<sup>24</sup> P. Bodnar, C. Ott, J. Thwaites, L. De Marez, B. Kretschmer (2017): *Net Climate Finance: Reconciling the Clean and Dirty Sides of the Finance Ledger*. Rocky Mountain Institute: Basalt, CO <[https://rmi.org/wp-content/uploads/2017/07/RMI\\_Net\\_Climate\\_Finance\\_Discussion\\_Paper\\_2017-1.pdf](https://rmi.org/wp-content/uploads/2017/07/RMI_Net_Climate_Finance_Discussion_Paper_2017-1.pdf)>

major producing countries are in the former category; this needs to change, if the world is to meet climate goals.”<sup>25</sup>

9. The third main parameter defining the context of this Opinion is the rapidly reducing window to take action to curb climate change before its most disastrous effects are irreversibly unleashed. For present purposes, this contextual parameter can be characterised by reference to five converging perspectives:

(a) First, and foremost, it is now established with a very high level of confidence of no less than 95 percent of probability that anthropogenic emissions of greenhouses gases are the dominant cause of the global warming observed since the mid-20<sup>th</sup> century<sup>26</sup> and responsible for approximately 1.0°C of global warming above pre-industrial levels.<sup>27</sup> Continued emission of greenhouse gases will cause further warming and long-lasting changes in all components of the climate system, increasing the likelihood of severe, pervasive and irreversible impacts for people and ecosystems.<sup>28</sup>

(b) Secondly, there is a limited “budget” representing the CO<sub>2</sub> that can still be released in the atmosphere without jeopardising the possibility of reaching the objective set in Article 2(1)(a) of the Paris Agreement 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”.<sup>29</sup>

To have a probability of 50-66 percent of limiting the increase of global average temperature to no more than 1.5°C above pre-industrial levels, the remaining carbon budget, as of January 2018, was between 420-580 gigatonnes of CO<sub>2</sub>,

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<sup>25</sup> SEI, IISD, ODI, E3G, and UNEP. (2020). *The Production Gap Report: 2020 Special Report*, page 5, available at <<http://productiongap.org/2020report>>

<sup>26</sup> Intergovernmental Panel on Climate Change, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Geneva: IPCC, 2014), Summary for Policymakers, at 4 (SPM 1.2) <[https://www.ipcc.ch/site/assets/uploads/2018/02/AR5\\_SYR\\_FINAL\\_SPM.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf)>

<sup>27</sup> IPCC, *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* (2018), Summary for Policymakers, at 4 (A.1) <[https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15\\_SPM\\_version\\_report\\_LR.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_SPM_version_report_LR.pdf)>

<sup>28</sup> IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Geneva: IPCC, 2014), Summary for Policymakers, at 8 (SPM 2).

<sup>29</sup> “Adoption of the Paris Agreement”, Decision 1/CP.21, FCCC/CP/2015/10/Add.1, 29 January 2016, Annex. The official texts of both the Decision and the Paris Agreement are available at <[https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/FCCC\\_CP\\_2\\_015\\_10\\_Add.1.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/FCCC_CP_2_015_10_Add.1.pdf)>

whereas the carbon budget to remain within the 2°C target is between 1170-1500 gigatonnes of CO<sub>2</sub>.<sup>30</sup>

- (c) Thirdly, countries must very substantially increase the level of ambition of their nationally determined contributions under the Paris Agreement – threefold to more than fivefold – to achieve the Agreement’s targets, respectively, of 2°C and 1.5°C and close the gap between current pledges and such goals.<sup>31</sup>
- (d) Fourthly, the carbon budget for the 1.5°C target would be exceeded, and over one half of the carbon budget for the 2°C target would be used up, even in the absence of any new fossil fuel power plant, if existing fossil-fuel energy infrastructure is operated as historically (adding 658 gigatonnes of CO<sub>2</sub>).<sup>32</sup> If fossil fuel-based power plants under construction, permitted or planned are effectively operated as historically, that would add between 37-427 gigatonnes of CO<sub>2</sub> possibly using up most of the entire carbon budget for 2°C target.<sup>33</sup> The study on which these estimates are provided, published in the leading peer-reviewed journal *Nature*, concludes that:

“our estimates suggest that little or no new CO<sub>2</sub>-emitting infrastructure can be commissioned, and that existing infrastructure may need to be retired early (or be retrofitted with carbon capture and storage technology) in order to meet the Paris Agreement climate goals”.<sup>34</sup>

This conclusion is corroborated by a separate study, which also concludes that:

“even under the very optimistic assumption that other sectors reduce emissions in line with a 2°C target, no new emitting electricity infrastructure can be built after 2017 for this target to be met, unless other electricity infrastructure is retired early or retrofitted with carbon capture technologies”.<sup>35</sup>

- (e) Finally, even if the amount of CO<sub>2</sub> released in the atmosphere is such that the increase of global average temperature is limited to between 1.5°C and 2°C, there is still a risk that a planetary threshold is crossed beyond which climate change

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<sup>30</sup> IPCC, *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* (2018), Chapter 2, at 96 and 108 (Table 2.2) < [https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15\\_Chapter2\\_Low\\_Res.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_Chapter2_Low_Res.pdf) >

<sup>31</sup> UN Environment Programme, *Emissions Gap Report 2019*, Executive Summary, at x (conclusion 5) < <https://wedocs.unep.org/bitstream/handle/20.500.11822/30798/EGR19ESEN.pdf?sequence=13> >

<sup>32</sup> Dan Tong, Qiang Zhang, Yixuan Zheng, Ken Caldeira, Christine Shearer, Chaopeng Hong, Yue Qin, Steven J. Davis, “Committed emissions from existing energy infrastructure jeopardize 1.5 °C climate target” (2019) 572 *Nature* 373.

<sup>33</sup> Dan Tong, Qiang Zhang, Yixuan Zheng, Ken Caldeira, Christine Shearer, Chaopeng Hong, Yue Qin, Steven J. Davis, “Committed emissions from existing energy infrastructure jeopardize 1.5 °C climate target” (2019) 572 *Nature* 373.

<sup>34</sup> Dan Tong, Qiang Zhang, Yixuan Zheng, Ken Caldeira, Christine Shearer, Chaopeng Hong, Yue Qin, Steven J. Davis, “Committed emissions from existing energy infrastructure jeopardize 1.5 °C climate target” (2019) 572 *Nature* 373.

<sup>35</sup> A. Pfeiffer, R. Millar, C. Hepburn, E. Beinhocker, “The 2°C capital stock’ for electricity generation: Committed cumulative carbon emissions from the electricity generation sector and the transition to a green economy” (2016) 179 *Applied Energy* 1395.

would self-reinforce despite reduction in anthropogenic emissions.<sup>36</sup> The study unveiling this risk, published in the leading peer-reviewed journal *Proceedings of the National Academy of Sciences*, concludes that:

“[i]f the threshold is crossed, the resulting trajectory would likely cause serious disruptions to ecosystems, society, and economies. Collective human action is required to steer the Earth System away from a potential threshold and stabilize it in a habitable interglacial-like state”.<sup>37</sup>

10. The science defining these parameters is solid and its conclusions are compelling. If the extremely dangerous consequences of climate change are to be averted or, more modestly, their likelihood reduced, there is no room for additional fossil fuel capacity and existing capacity or its emissions must be reduced urgently and proactively. This is the context within which our advice on the international legal obligations directly or indirectly governing the conduct of ECAs is sought.
11. Overall, our conclusions can be summarised as follows:
  - (a) ECAs do not operate in an international legal vacuum. The conduct of ECAs is directly or indirectly governed by certain international legal obligations because their conduct may be attributed to the State and/or because States may be required under international law to regulate their conduct and/or because ECAs, as such, may be subject to certain international legal obligations.
  - (b) Under customary international law, States are required, in principle: not to finance new fossil fuel-related projects/activities or increase the financing of existing ones; to decrease existing support<sup>38</sup> within a clear timeframe dictated, first and foremost, by scientific considerations and the temperature goals of the Paris Agreement, as a reflection of a global consensus; to make proactive efforts to avoid “locking-in” fossil fuel-related projects/activities which may use up a significant part of the remaining carbon budget; to adopt and proactively implement adequate procedures to assess the carbon footprint of any project to be potentially supported; to adopt and proactively implement guidelines concerning the performance of the activities of the relevant ECA in the context described in Section I.

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<sup>36</sup> W. Steffen, J. Rockström, K. Richardson, T. M. Lenton, C. Folke, D. Liverman, C. P. Summerhayes, A. D. Barnosky, S. E. Cornell, M. Crucifix, J. F. Donges, I. Fetzer, S. J. Lade, M. Scheffer, R. Winkelmann, and H-J. Schellnhuber, “Trajectories of the Earth System in the Anthropocene” (2018) 14 *Proceedings of the National Academy of Sciences* 8252, at 8254.

<sup>37</sup> W. Steffen, J. Rockström, K. Richardson, T. M. Lenton, C. Folke, D. Liverman, C. P. Summerhayes, A. D. Barnosky, S. E. Cornell, M. Crucifix, J. F. Donges, I. Fetzer, S. J. Lade, M. Scheffer, R. Winkelmann, and H-J. Schellnhuber, “Trajectories of the Earth System in the Anthropocene” (2018) 14 *Proceedings of the National Academy of Sciences* 8252.

<sup>38</sup> We recognise that the issue of what constitutes “new” or “existing” support will require close scrutiny, taking into account the adoption and entry into force for relevant States of the Paris Agreement, the evolving science and the issue of increased finance for existing projects and/or the expansion of existing oil and gas fields, among other issues.

(c) These State obligations under customary international law are confirmed, further specified and/or expanded by the obligations arising in specific normative contexts, including in the areas of international climate change law, international human rights law and certain specific instruments adopted under the aegis of the OECD. This is clarified in the analysis of each normative context.

12. The specific reasons leading to these conclusions are provided in the following sections.

## II. CONDUCT OF EXPORT CREDIT AGENCIES GOVERNED BY INTERNATIONAL LAW

13. The legal status, functions and organisation of ECAs in domestic law varies significantly across countries. As noted in Section I of this Opinion, as a general matter, the term ECA is a functional – not a legal – definition, except in specific contexts such as the OECD Arrangement. Clarification of their status therefore requires a case-by-case examination in the light of the features of each specific ECA.
14. However, such a legal qualification is not necessary to determine the general question of whether the conduct of ECAs is directly or indirectly governed by certain international legal obligations. This is because different rules of international law govern the conduct of ECAs whether this conduct can be attributed to a State or not, thereby encompassing, to varying degrees, conduct by the full spectrum of ECAs.
15. From an international law perspective, three main scenarios must be distinguished. International legal obligations governing the conduct of States directly apply to the conduct of ECAs when such conduct – or some specific action/inaction – is attributable to the State under international law (**First Scenario**). When this is not the case, international legal obligations may nevertheless govern the conduct of ECAs in two other ways. On the one hand, States have duties, under international customary and treaty law, to regulate the conduct of entities operating under their jurisdiction. An international obligation which is not directly applicable to an ECA as a duty-bearer, may nevertheless require the State, as a duty-bearer, to regulate the conduct of ECAs (**Second Scenario**). On the other hand, there is authority for the proposition that the conduct of separate – public or private – entities, including ECAs, is subject to certain international legal obligations (**Third Scenario**). Each scenario is examined in turn.
16. **First Scenario:** when the conduct of an ECA is attributable to the State, it is legally deemed to be conduct of the State, hence all the relevant international obligations binding on the State are applicable to determine the lawfulness of the conduct of the ECA. The rules governing the attribution of conduct to the State are of customary nature, therefore applicable to all States. They are codified in the International Law Commission's (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts (**ILC Draft Articles on State Responsibility**).<sup>39</sup> The most relevant

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<sup>39</sup> Responsibility of States for Internationally Wrongful Acts, draft articles and commentaries, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), available at < [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) >. The customary international law character of these rules has been widely recognised. See e.g. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Reports 1999, p. 62, paragraph 62; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, p.168, paragraph 213. In the economic field see e.g. *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Panel (10 November 2004), WT/DS285/R, paragraph 6.128; *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Report of the Appellate Body (11 March 2011), WT/DS379/AB/R, paragraph 311, footnote 222 (recognising the customary

rules for present purposes are those concerning the attribution to the State of the conduct of State organs (Articles 4 and 7), the conduct of entities exercising elements of governmental authority (Articles 5 and 7) and conduct directed or controlled by a State (Article 8).<sup>40</sup>

17. When an ECA is, according to the domestic law of the creditor economy where it is based, part of the State structure, it must be legally considered as an organ of the State and its conduct in an official capacity – whether in the exercise of public authority or of a commercial nature – is entirely attributable to the State, even when the entity acts beyond its mandate. Article 4 of ILC Draft Articles on State Responsibility provides, indeed, that:

“1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”

This provision codifies a long-standing rule of customary international law.<sup>41</sup> This rule takes a structural perspective. If the entity is structurally part of the State, then its conduct as a whole is legally deemed to be conduct of the State. Article 7 of the ILC Draft Articles on State Responsibility adds that the conduct of an organ “shall be considered an act of the State under international law if the organ [ ... ] acts in that capacity, even if it exceeds its authority or contravenes instructions”. This rule is also a codification of customary international law.<sup>42</sup>

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character of the rule stated in Article 4); *Jan de Nul N.V., Dredging International N.V. v. Egypt*, ICSID Case No. ARB/04/13, Award (6 November 2008), paragraph 156; *Ortiz Construcciones y Proyectos S.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/17/1, Award (29 April 2020), paragraph 155.

<sup>40</sup> 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 11. The Committee also refers to other attribution grounds, such as conduct carried out in the absence or default of the official authorities, or conduct acknowledged and adopted by a State as its own (respectively, Articles 9 and 11 of the ILC Draft Articles on State Responsibility). These grounds are more relevant for business operating abroad than for ECAs.

<sup>41</sup> See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Reports 1999, p. 62, paragraph 62 (“According to a well-established rule of international law, the conduct of any organ of a state must be regarded as an act of that state. This rule [ ... ] is of a customary character”).

<sup>42</sup> See *Velásquez Rodríguez Case*, Inter-American Court of Human Rights, ICtHR Series C No. 4 (1988), Judgment (29 July 1988), paragraph 170 (“under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law”).

18. For the conduct of the organ to be attributable, it suffices that the conduct has been “carried out by persons cloaked with governmental authority”.<sup>43</sup> Importantly, “[i]t is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as ‘commercial’ or *acta iure gestionis*”.<sup>44</sup> This is because attribution of conduct by organs is structural: it is based on the position of the organ within the State organisation, not on the nature of the act. By contrast, when “the act had no connexion with the official function [of an entity] and was, in fact, merely the act of a private [entity]”, then it is not attributable to the State under the rules codified in Articles 4 and 7.
19. When an ECA is structurally an organ of the State, the distinction between “official” and purely “private” activities is of limited practical relevance in the context of “Officially Supported Export Credits”. Any such export credits, whether policy-driven or purely commercial, whether authorised or unauthorised, from an ECA which is an organ of the State would be “carried out by persons cloaked with governmental authority”. Therefore, they would be conduct of the State governed by the applicable international obligations.
20. A different question is whether conduct of an ECA that is not structurally part of the State under its domestic law may be attributable to it. There are four main possibilities.
21. The first is the exceptional possibility that an entity which is not formally (*de jure*) an organ of the State may be so in practice (*de facto*). The rule codified in Article 4(2) of the ILC Draft Articles on State Responsibility admits such a possibility when it states that “[a]n organ *includes* [hence, it is not limited to] any person or entity which has that status in accordance with international law of the State”.<sup>45</sup> In the economic sphere, it has been recognised, at the level of principle, that “internal status does not necessarily imply that an entity is not a State organ if other factors, such as the performance of core governmental functions, direct day-to-day subordination to central government, or lack of all operational autonomy, point the other way”.<sup>46</sup> The requisite factual

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<sup>43</sup> See *Petrolane, Inc. v. The Government of the Islamic Republic of Iran*, Award No. 518-131-2 (14 August 1991), *Iran-U.S. Claims Tribunal Reports*, vol. 27, p. 64, paragraph 83; Responsibility of States for Internationally Wrongful Acts, draft articles and commentaries, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), commentary to Article 4, paragraph 13, and to Article 7, paragraph 7.

<sup>44</sup> Responsibility of States for Internationally Wrongful Acts, draft articles and commentaries, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), commentary to Article 4, paragraph 6.

<sup>45</sup> Responsibility of States for Internationally Wrongful Acts, draft articles and commentaries, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), commentary to Article 4, paragraph 11 *in fine*.

<sup>46</sup> *Kristian Almås and Geir Almås v. Poland*, PCA Case No. 2015-13, Award (27 June 2016), paragraph 207. Cases where an entity is effectively characterised as having a *de facto* “structural” relationship with the State are rare. In *Salini v. Morocco*, an investment tribunal concluded at the jurisdictional stage that a majority State-owned company was structurally part of Morocco because it was effectively controlled and treated by the Moroccan State as such (see *Salini Construttori SpA v. Kingdom of Morocco*, ICSID ARB/00/4, Decision on Jurisdiction (23 July 2001), paragraphs 30-35). But, possibly due to its date of adoption, this decision does not specifically frame its analysis under Article 4 of the ILC Draft Articles on State Responsibility. An example where an investment tribunal considered the



demonstration is demanding, hence the exceptional character of this possibility. But when an entity is deemed a *de facto* legal organ, it is treated as an organ of the State and its conduct, whether policy-driven or commercial, authorised or unauthorised, is attributable to the State and subject to any relevant international obligations governing the latter's conduct.

22. The second possibility concerns cases where the entity is not an “organ” of the State. In such cases, the conduct may be attributed to the State under the rule codified in Article 5 of the ILC Draft Articles on State Responsibility<sup>47</sup> if the entity is “empowered by the law of that State to exercise elements of the governmental authority” and “is acting in that capacity in the particular instance”. As many ECAs are organised as separate legal entities under the domestic law of their State, this attribution channel is particularly relevant. But the extent of attribution and, therefore, the specific action/inaction that may be brought under the international obligations applicable to the State are limited to cases in which the ECA is empowered with the exercise of “governmental authority” (rather than merely commercial activity) and the specific financial support provided to a fossil fuel project qualifies as such an exercise (rather than being a merely commercial loan, guarantee or insurance).
23. Ascertainment of whether these conditions are met requires a fact-intensive inquiry guided by the general understanding of what is “governmental authority” for the purpose of the rule codified in Article 5. Of note, the commentary to Article 5 clarifies that “[t]he fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution”.<sup>48</sup> The decisive criterion is that the entity has been vested with “governmental authority” and was exercising it in the specific action/inaction under examination.
24. “Governmental authority” is not defined in the ILC Draft Articles on State Responsibility, but the commentary to Article 5 notes that “[o]f particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is

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Polish Airports State Enterprise expressly as a *de facto* organ under the rule codified in Article 4 is provided by *Flemingo DutyFree Shop Private Limited v. Poland*, UNCITRAL Rules, Award (12 August 2016), paragraphs 425-435.

<sup>47</sup> *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (12 October 2005), paragraph 70; *Jan de Nul N.V., Dredging International N.V. v. Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (16 June 2006), paragraph 89.

<sup>48</sup> Responsibility of States for Internationally Wrongful Acts, draft articles and commentaries, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), commentary to Article 5, paragraph 3.

accountable to government for their exercise”.<sup>49</sup> Content, conferral, purpose, and accountability are thus key guiding criteria. Like in the context of Article 4, conduct “cloaked with governmental authority” suffices for attribution under the rule codified in Article 5, even if it exceeds the mandate or instructions (Article 7).

25. In practice, many ECAs which are not organs are likely to meet these criteria at a general level, to the extent that they are established through public law acts or as public corporations, their purpose is not merely commercial profitability but the advancement of the industrial policy interests of their State, their financial resources are largely based on public money, and they are subject to ‘public accountability’, i.e. oversight systems akin to those of State organs, distinct from mere shareholder oversight or public regulation of private companies. In the case law, investment tribunals have considered that entities analogous in some respects to ECAs, such as government-owned development banks,<sup>50</sup> development agencies,<sup>51</sup> and privatisation funds<sup>52</sup> may be vested with governmental authority.
26. Yet, in order to be attributable, the specific conduct (action/inaction) must also be a display of governmental authority. This inquiry must be conducted at a level of specificity that encompasses all the circumstances of a given transaction. But it must be noted that industrial promotion through lending or other financial support has, in the past, been considered as a specific display of governmental authority. In *Maffezini v. Spain*, some of the acts of a domestic development corporation (SODIGA) were deemed to be attributable to Spain and hence governed by Spain’s international legal obligations.<sup>53</sup> The investment tribunal noted that:

“[b]ecause SODIGA was an entity charged with the implementation of governmental policies relating to industrial promotion, it performed a number of functions not normally open to ordinary commercial companies [ ... ] A decision to increase the investment taken [ ... ] by the entity entrusted by the State to

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<sup>49</sup> Responsibility of States for Internationally Wrongful Acts, draft articles and commentaries, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), commentary to Article 5, paragraph 6.

<sup>50</sup> *Waste Management Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), paragraph 75 (“[t]he Organic Law of 1986 regulating Banobras’ activity confers on it a variety of functions, some clearly public, others less so”).

<sup>51</sup> *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award (13 November 2000), paragraph 57 (“[w]hile originally a number of SODIGA’s [Sociedad para el Desarrollo Industrial de Galicia, SA] functions were closer to being governmental in nature, they must today be considered commercial in nature. But at the time of transition, there was in fact a combination of both, some to be regarded as functions essentially governmental in nature and others essentially commercial in character. As mentioned above, this is the dividing line between those acts or omissions that can be attributed to the Spanish State and those that cannot”).

<sup>52</sup> *Luigiterzo Bosca v. Republic of Lithuania*, PCA Case No. 2011-04, Award (17 May 2013), paragraph 127 (“[t]he Tribunal is of the view that the actions of the SPF [Lithuanian State Property Fund] and its related entities are attributable to the State. According to Article 3.1 of the Law on the SPF, the SPF is a state enterprise, having a separate legal personality, the object of which is to privatize State property [ ... ] The SPF is an entity empowered to exercise governmental authority, as described in Article 5”).

<sup>53</sup> *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award (13 November 2000), paragraphs 77-83.

promote the industrialization of Galicia, cannot be considered a commercial activity. Rather, it grew out of the public functions of SODIGA”.<sup>54</sup>

In the context of this Opinion, this attribution test is particularly relevant for the action of ECAs to support not only international but also domestic fossil fuel-related projects/activities, possibly following an amendment of their mandate, and despite indications of the economically unviable nature of the projects/activities in the medium to the long term.<sup>55</sup> Such industrial policy interventions are, in all likelihood, driven not (or not only) by economic considerations but (also) by political ones, hence bringing the specific action under the remit of the rule codified in Article 5.

27. The third possibility encompasses situations where the conduct of the entity is directed or controlled by a State. Direction or control, when established, is a stand-alone ground of attribution, whether other grounds exist (e.g. Articles 4 and/or 5) or not. The customary rule is codified in Article 8 of the ILC Draft Articles on State Responsibility, according to which: “[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”.<sup>56</sup> The factual showing that must be satisfied is demanding and fact-specific. The person or entity must have:

“acted in accordance with that State’s instructions or under its ‘effective control’. It must however be shown that this ‘effective control’ was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken.”<sup>57</sup>

28. In the economic field, the existence of direction or control has been expressly addressed in the commentary to Article 8 of the ILC Draft Articles on State Responsibility by reference to companies or entities that are State-owned or controlled.<sup>58</sup> It notes that “international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the ‘corporate veil’ is a mere device or a vehicle for fraud or evasion”, hence the appropriate attribution route would be Article

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<sup>54</sup> *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award (13 November 2000), paragraphs 77-78.

<sup>55</sup> See M. Coffin, A. Dalman, A. Grant, *Beyond Petrostates. The burning need to cut oil dependence in the energy transition* (Carbon Tracker Initiative, February 2021), at 4 (second key message: “Under a low carbon scenario, combined global government oil and gas revenues worldwide could be \$13 trillion lower than expected (51% less) over the next two decades compared with business-as-usual expectations of continued growth in demand and firm long-term oil prices”); J.-F. Mercure, H. Pollitt, J. E. Viñuales, N. R. Edwards, P. B. Holden, U. Chewpreecha, P. Salas, I. Sognaess, A. Lam, ‘Macroeconomic impact of stranded fossil-fuel assets’ (2018) 8 *Nature Climate Change* 588.

<sup>56</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, paragraph 398.

<sup>57</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, paragraph 400.

<sup>58</sup> Responsibility of States for Internationally Wrongful Acts, draft articles and commentaries, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), commentary to Article 8, paragraph 6.

5. However, a State or its organs may exercise such a degree of control over the separate entity that its conduct is attributable to the State. The issue has arisen in several investment disputes relating to actions which are relevant for the practice of ECAs, such as entering into contracts or exercising contractual powers. Tribunals recognise that this is a demanding attribution test<sup>59</sup> and, in many cases, the argument has been rejected.<sup>60</sup> In some cases, however, the conduct of a separate agency – the exercise of a contractual termination right or the issuance of a force majeure notice – has been deemed to be under the direction or control of the State, hence attributable to it.<sup>61</sup> Attribution based on direction or control is directly relevant for the action of ECAs in support of certain fossil fuel-related projects/activities, both locally and abroad, when seen in the light of the evidence of their harmful effects and their questionable economic prospects.

29. The fourth and final possibility is that the specific conduct of an ECA is not attributable to the State under any of the grounds recognised in customary international law. It must be noted that the rules codified in Articles 4, 5, 7 and 8 of the ILC Draft Articles on State Responsibility analysed so far are not the only attribution grounds, although they are the most relevant ones for present purposes. This fourth possibility thus takes as a starting-point the absence of any attribution grounds in the specific circumstances of a given case. In such case, the specific conduct would not be directly governed by the relevant international obligations binding on the State because it is not State conduct. But it may remain indirectly regulated by them (Second Scenario below) or subject to international obligations binding on the entities as such, irrespective of their relationship with the State (Third Scenario below).
30. Importantly, when the conduct of an ECA is attributable to the State under one of the attribution grounds recognised in customary international law, that only has the effect of characterising the conduct as conduct of the State. However, whether a given international obligation binding on the State is applicable to such conduct or not will depend on the scope of application of each obligation. Similarly, whether an applicable

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<sup>59</sup> *Jan de Nul N.V., Dredging International N.V. v. Egypt*, ICSID Case No. ARB/04/13, Award (6 November 2008), paragraph 173; *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award (30 November 2011), paragraph 8.1.10; *Kristian Almås and Geir Almås v. Poland*, PCA Case No. 2015-13, Award (27 June 2016), paragraph 269.

<sup>60</sup> *Jan de Nul N.V., Dredging International N.V. v. Egypt*, ICSID Case No. ARB/04/13, Award (6 November 2008), paragraph 173; *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award (30 November 2011), paragraphs 8.1.18-8.1.21; *Tulip Real Estate and Development Netherlands B.V. v. Turkey*, ICSID Case No. ARB/11/28, Award (10 March 2014), paragraphs 301-326; *Kristian Almås and Geir Almås v. Poland*, PCA Case No. 2015-13, Award (27 June 2016), paragraphs 268-272.

<sup>61</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009), paragraphs 120-123 (rejecting attribution under the rule of Article 5) and paragraphs 123-130 (finding attribution under the rule of Article 8); *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits (25 July 2016), paras. 282-290 (finding attribution under Article 8).

international obligation has been breached or not will depend on the circumstances of each case. This Opinion examines some of the most relevant obligations to assess their applicability and, when applicable, the implications for the lawfulness of an ECA's continued support for fossil fuel-related projects/activities despite the context described in Section I.

31. **Second Scenario:** in the event that the conduct of an ECA is not attributable to a State and, as result, is not directly subject to the relevant obligations governing State conduct, the activities of ECAs remain nevertheless indirectly subject to a range of international obligations of the State. This is because States are required, under international law, to regulate the activities that take place under their jurisdiction, including both within and beyond their territory. This broad requirement arises from many rules of customary international law as well as treaty law, some of which are examined in Section III.1 of this Opinion. As a result, ECAs are indirectly brought under the operation of a range of international legal obligations, not as duty-bearers but as objects of duties borne by the State.
32. **Third Scenario:** aside from the international obligations of States directly or indirectly governing the conduct of ECAs, there is authority for the proposition that separate entities, public or private, including multinational enterprises, domestic and multilateral financial institutions, and ECAs, may be subject to certain duties arising directly from international law. There are three main sources from which such duties can be derived.
33. The first source encompasses several cases from international and domestic courts and tribunals, which have recognised the direct applicability of international legal obligations to a variety of non-State actors. Examples of particular relevance for the context of this Opinion include:
  - (a) In *Urbaser v. Argentina*, an investment arbitration tribunal considered that, as a matter of principle, nothing prevents international human rights law from applying to the conduct of a multinational enterprise, although it rejected the counterclaim brought by Argentina on the merits.<sup>62</sup> Of note, the tribunal recognised that the conduct of corporations can be directly governed by certain human rights obligations:

“the Tribunal is reluctant to share Claimants’ principled position that guaranteeing the human right to water is a duty that may be born solely by the State, and never borne also by private companies like the Claimants. When extended to human rights in general, this would mean that private parties have no commitment or

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<sup>62</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, Award (8 December 2016).

obligation for compliance in relation to human rights, which are on the States' charge exclusively [ ... ]

A principle may be invoked in this regard according to which corporations are by nature not able to be subjects of international law and therefore not capable of holding obligations as if they would be participants in the State-to-State relations governed by international law. While such principle had its importance in the past, it has lost its impact and relevance in similar terms and conditions as this applies to individuals [ ... ]

international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation. In light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law [ ... ]

The focus must be, therefore, on contextualizing a corporation's specific activities as they relate to the human right at issue in order to determine whether any international law obligations attach to the non-State individual.”<sup>63</sup>

- (b) In *Aven v. Costa Rica*,<sup>64</sup> an investment arbitration tribunal dismissed a counterclaim brought by Costa Rica against the investor. However, in reaching its conclusion, it endorsed the position taken by the tribunal in *Urbaser v. Argentina* that investors may be directly subject to obligations under international law:

“What about the investor's obligations arising of the investment according to international law? This Tribunal shares the views of [the] *Urbaser* Tribunal that it can no longer be admitted that investors operating internationally are immune from becoming subjects of international law. *It is particularly convincing when it comes to rights and obligations that are the concern of all States, as it happens in the protection of the environment.* It is pertinent to recall the observation of the International Court of Justice regarding this kind of obligations: ‘In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*’”<sup>65</sup>

- (c) In a communication brought before the Compliance Committee of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (**Aarhus Convention**)<sup>66</sup> against

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<sup>63</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, Award (8 December 2016), paragraphs 1193-1195.

<sup>64</sup> *David R. Aven and Others v. Costa Rica*, ICSID Case No UNCT/15/3, Award (18 September 2018).

<sup>65</sup> *David R. Aven and Others v. Costa Rica*, ICSID Case No UNCT/15/3, Award (18 September 2018), paragraph 738 (emphasis added), quoting the International Court of Justice's decision in *Barcelona Traction, Light and Power Company, Limited*, Judgment, ICJ Reports 1970, p. 3, at paragraph 33.

<sup>66</sup> Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998, 2161 UNTS 447.

Belarus<sup>67</sup> in connection with a hydroelectricity project, the Committee confirmed that certain obligations relating to access to environmental information are borne by private parties:

“the Committee notes that in Belarus the Environmental *Expertiza* Law and the relevant Instructions make the developer responsible for maintaining the OVOS- and *expertiza*-related [environmental impact assessment] documentation. Therefore, for the purpose of access to information issues, which are the subject of the present communication, the developer should be treated as a public authority under the obligation to provide access to environmental information in compliance with the requirements of article 4 of the Convention”<sup>68</sup>

- (d) The Independent International Commission of Inquiry on the Syrian Arab Republic, although intervening in a different context, clearly recognised that certain international legal obligations govern the conduct of non-State entities:

“The commission carefully reviewed the information gathered on the operations and activities to date of FSA [Free Syrian Army] groups. In this regard, the commission notes that, at a minimum, human rights obligations constituting peremptory international law (*ius cogens*) bind States, individuals and non-State collective entities, including armed groups. Acts violating *ius cogens* – for instance, torture or enforced disappearances – can never be justified.”<sup>69</sup>

- (e) At the domestic level, one noteworthy case is *Nevsun v. Araya*,<sup>70</sup> where the Supreme Court of Canada recognised that a claim for violation of customary international law principles protecting human rights may potentially be asserted against a corporation active in the extractive industries sector:

“it is not ‘plain and obvious’ that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of ‘obligatory, definable, and universal norms of international law’, or indirect liability for their involvement in [ ... ] ‘complicity offenses’ [ ... ] However, because some norms of customary international law are of a strictly interstate character, the trial judge will have to determine whether the specific norms relied on in this case are of such

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<sup>67</sup> Findings and recommendations with regard to communication ACCC/C/2009/37 concerning compliance by Belarus (adopted by the Compliance Committee on 24 September 2010).

<sup>68</sup> Findings and recommendations with regard to communication ACCC/C/2009/37 concerning compliance by Belarus (adopted by the Compliance Committee on 24 September 2010), paragraph 68.

<sup>69</sup> Report of the independent international commission of inquiry on the Syrian Arab Republic, 22 February 2012, A/HRC/19/69, paragraph 106 (italics original). See also the Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, 17 September 2018, A/HRC/39/CRP.2, paragraph 49 (“The Mission concurs with the view that, in addition to the State, some non-State actors have human rights obligations under customary international law, in particular when they exercise effective control over territory and carry out government-like functions. They are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control. This is particularly so for peremptory norms of international law.”)

<sup>70</sup> *Nevsun Resources Ltd. v. Araya*, Judgment (28 February 2020), 2020 SCC 5 (CanLII).

a character. If they are, the question for the court will be whether the common law should evolve so as to extend the scope of those norms to bind corporations”<sup>71</sup>

These five decisions converge on the conclusion that whether an international legal obligation directly governs the conduct of a non-State actor, such as an ECA, depends on the scope of operation of the specific obligation. What must be ascertained is whether a specific international obligation is capable of governing the conduct of separate entities, such as ECAs.

34. The second source encompasses certain treaty provisions or references thereto in authoritative commentaries which, as a result of their wording or subsequent interpretation, may directly govern the conduct of separate entities, such as ECAs. As before, only selected examples of relevance for the present Opinion are provided with the aim to demonstrate that the conduct of ECAs as individual duty-bearers may be directly governed by international law. The operation of the relevant rules is further examined in Section III.2.B of this Opinion:

(a) Certain obligations relating to the right of access to environmental information are borne by entities which are separate from the State. The Aarhus Convention expressly includes within the definition of “public authority”, as the duty-bearer of Article 4, not only the “[g]overnment at national, regional and other level” (Article 2(2)(a)) but also “legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment” (Article 2(2)(b)) and “[a]ny other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b)” (Article 2(2)(c)). Most ECAs, despite their specificities, would normally fall under one of these three categories to the extent that they are government bodies, or separate public entities, or separate private entities performing a relevant function under the Convention. The distinctions made in Article 2(2) of the Aarhus Convention must not be confused with the grounds for attribution of State conduct. A private entity may be subject to certain obligations relating to the right of access to environmental information under the Aarhus Convention without the need for an attribution ground to be met.<sup>72</sup> This is because these international obligations do not have, to paraphrase the Supreme Court of Canada, a “strictly interstate character”.

(b) General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business

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<sup>71</sup> *Nevsun Resources Ltd. v. Araya*, Judgment (28 February 2020), 2020 SCC 5 (CanLII), paragraph 113.

<sup>72</sup> Findings and recommendations with regard to communication ACCC/C/2009/37 concerning compliance by Belarus (adopted by the Compliance Committee on 24 September 2010), paragraphs 68-69.



activities (**General Comment No. 24**)<sup>73</sup> from the Committee on Economic, Social and Cultural Rights expressly acknowledges the possibility that business entities may be subject to international human rights obligations. Although it focusses on State conduct, it also “seeks to assist the corporate sector in discharging *their* human rights obligations”.<sup>74</sup> The Committee is thereby endorsing the proposition that nothing prevents the relevant international human rights obligations from governing the activities of non-State entities.

- (c) General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights (**General Comment No. 16**)<sup>75</sup> from the Committee on the Rights of the Child similarly examines the relevance of global business operations for children’s rights from the perspective of States as duty-bearers. However, it expressly refers to the need “to prevent the *infringement of children’s rights by business enterprises*” through a range of measures,<sup>76</sup> some of which involve public finance and ECAs specifically. Although the role of ECAs is mainly framed from the perspective of the First and Second Scenarios reviewed earlier,<sup>77</sup> the possibility that a non-State actor may commit “infringement of children’s rights” is another endorsement of the proposition that nothing prevents the relevant international human rights obligations from governing the activities of non-State entities.
- (d) The 2016 Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises<sup>78</sup> prepared at the request of the Human Rights Council,<sup>79</sup> provides a similar endorsement in very clear terms:

“Although the present report focuses primarily on States’ duties with respect to State-owned enterprises, it is important to recall that *such enterprises are*

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<sup>73</sup> 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.

<sup>74</sup> 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 5 (emphasis added).

<sup>75</sup> Committee on the Rights of the Child, *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights*, 17 April 2013, CRC/C/GC/16.

<sup>76</sup> Committee on the Rights of the Child, *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights*, 17 April 2013, CRC/C/GC/16, paragraph 45 (emphasis added).

<sup>77</sup> Committee on the Rights of the Child, *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights*, 17 April 2013, CRC/C/GC/16, paragraph 45.

<sup>78</sup> *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, 4 May 2016, A/HRC/32/45.

<sup>79</sup> Human Rights Council, Resolution 17/4: Human rights and transnational corporations and other business enterprises, 16 June 2011 (adopted without a vote), A/HRC/17/L.17/Rev.1, paragraph 6; Human Rights Council, Resolution 26/22: Human rights and transnational corporations and other business enterprises, 27 June 2014 (adopted without a vote), A/HRC/26/L.1, paragraph 6.

*commercial entities that should respect human rights like any other private enterprise.”*<sup>80</sup>

35. The third source encompasses a number of policy instruments, including guidelines, performance standards, guiding principles, and other similar instruments which specifically provide for duties applicable to non-State entities. The binding character of such instruments and/or the rules formulated in them is unsettled, and it requires a specific assessment at the level of each instrument as well as each specific provision within an instrument. That assessment is not provided in this Opinion. For present purposes, these instruments are identified because they provide strong corroboration of the proposition that nothing prevents the international standards referred to therein from governing the activities of non-State entities. These instruments can be organised in three groups, in order of specificity to ECAs:
- (a) The first group concerns guidelines generally applicable to business enterprises. The most relevant ones include: the OECD Guidelines for Multinational Enterprises<sup>81</sup>; the UN Guiding Principles on Business and Human Rights<sup>82</sup>; and International Labour Organization’s Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.<sup>83</sup>
  - (b) The second group concern guidelines addressed to financial institutions from the public and the private sector. The most relevant ones include: the World Bank’s Environmental and Social Framework<sup>84</sup>; the International Finance Corporation’s Performance Standards on Environmental and Social Sustainability<sup>85</sup>; the Equator Principles.<sup>86</sup>
  - (c) The third group concern guidelines specifically focussing on the activities of ECAs, whether general or developed specifically by one ECA. Some key examples

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<sup>80</sup> *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, 4 May 2016, A/HRC/32/45, paragraph 35 (emphasis added).

<sup>81</sup> OECD, *Guidelines for Multinational Enterprises*, Annex I to the Declaration on International Investment and Multinational Enterprises, 25 May 2011.

<sup>82</sup> *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, HRC Resolution 17/4 (16 June 2011).

<sup>83</sup> International Labour Organization, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 5<sup>th</sup> edition (2017).

<sup>84</sup> World Bank, *Environmental and Social Framework* (2017), including several more specific Environmental and Social Standards.

<sup>85</sup> International Finance Corporation, *Performance Standards on Environmental and Social Sustainability* (1 January 2012).

<sup>86</sup> Equator Principles Financial Institutions, *The Equator Principles* (July 2020).

include: the OECD Common Approaches<sup>87</sup>; and Export Development Canada's 2019 Climate Change Policy.<sup>88</sup>

As noted at the beginning of this paragraph, irrespective of whether some of the rules formulated in some of these instruments have as such a binding character or not, they reflect the very wide acceptance that certain international obligations may govern the activities of non-State entities and of ECAs in particular. As such, they provide at the very least corroboration that such obligations are not “of a strictly interstate character”<sup>89</sup> and that they may “attach to the non-State individual”.<sup>90</sup>

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36. In conclusion, the analysis in this section demonstrates that *the conduct of ECAs is directly or indirectly governed by certain international legal obligations because their conduct may be attributed to the State (First Scenario) and/or because States may be required under international law to regulate their conduct (Second Scenario) and/or because ECAs, as such, may be subject to certain international legal obligations (Third Scenario)*. To conclude that the conduct of ECAs is governed by international law is only the first step of the analysis. The next step is to examine certain specific international legal obligations to determine if they apply to ECAs and, if so, whether ECAs' continued financing of fossil fuel-related projects/activities despite the context described in Section I is unlawful under one or more of these obligations.

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<sup>87</sup> Organisation of Economic Co-operation and Development, Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence, adopted on 28 June 2012 and revised by the OECD Council on 6 April 2016, OECD/LEGAL/0393.

<sup>88</sup> EDC, Climate Change Policy (effective 28 January 2019). This policy has been criticised for its permissive character in relation to support for domestic oil and gas projects. See A. Doukas, A. Scott, *Risking it All: How Export Development Canada's Support for Fossil Fuels Drives Climate Change* (November 2018).

<sup>89</sup> *Nevsun Resources Ltd. v. Araya*, Judgment (28 February 2020), 2020 SCC 5 (CanLII), paragraph 113.

<sup>90</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, Award (8 December 2016), paragraph 1195.

### III. LEGALITY OF ECAs' CONTINUED FINANCING OF FOSSIL FUEL-RELATED PROJECTS/ACTIVITIES UNDER INTERNATIONAL LAW

37. This section of the Opinion examines certain obligations under customary international law and under certain specific normative contexts to determine whether they are applicable to ECAs' continued financing of fossil fuel-related projects/activities and, if so, with what implications for the legality of this conduct. It begins with a discussion of customary international law (Section III.1) and then moves to the analysis of three more specific normative contexts (Section III.2), international climate change law (A), international human rights law (B), and the OECD instruments on ECAs (C). Only a selection of the potentially applicable international legal obligations is discussed in the light of their overall relevance.

#### 1. Due diligence obligations under customary international law

38. The duty of States to exercise due diligence is firmly rooted in customary international law. It was recognised by the International Court of Justice (ICJ) in its very first judgment,<sup>91</sup> and only a few years earlier it had also been recognised in the context of transboundary environmental pollution.<sup>92</sup>

39. Its contemporary understanding can be ascertained by reference to the judgment of the ICJ in the *Pulp Mills* case, where the Court observed that an obligation to act with due diligence:

“is an obligation which entails not only the *adoption of appropriate rules and measures*, but also a certain level of *vigilance in their enforcement and the exercise of administrative control* applicable to *public and private operators*, such as the monitoring of activities undertaken by such operators”<sup>93</sup>

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<sup>91</sup> *Corfu Channel* case (*UK v. Albania*), ICJ Reports 1949, p. 4, at 22 (referring to “certain general and well-recognised principles, namely every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”).

<sup>92</sup> *Trail Smelter Arbitration*, Decisions of 16 April 1938 and 11 March 1941, RIAA vol. III, 1905–1982, 1963, at 1965.

<sup>93</sup> See *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 14, paragraph 197 (emphasis added). This statement was made in the context of the interpretation of Article 41(a) of the Statute of the River Uruguay. For a converging understanding under the prevention principle see *Responsibilities and Obligations of States sponsoring Persons and Entities with respect to Activities in the Area*, Case No. 17, ITLOS (Seabed Dispute Chamber), Advisory Opinion (1 February 2011), paragraph 117; *In the matter of the Indus Waters Kishenganga Arbitration before the Court of Arbitration constituted in accordance with the Indus Waters Treaty 1960 between the Government of India and the Government of Pakistan signed on 19 September 1960 (Islamic Republic of Pakistan v. Republic of India)*, PCA, Partial Award (18 February 2013), paragraph 451; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, ITLOS Case No 21, paragraph 131; *In the matter of the South China Sea Arbitration before and Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (Republic of the Philippines v. People’s Republic of China)*, PCA Case No. 2013-19, Award (12 July 2016), paragraph 941.

40. A similar statement has been provided by the Seabed Chamber of the International Tribunal for the Law of the Sea (ITLOS), which interpreted the terms “responsibility to ensure” appearing in a provision of the UN Convention on the Law of the Sea<sup>94</sup> in the light of the ICJ’s reasoning in *Pulp Mills*:

“an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result. To utilize the terminology current in international law, this obligation may be characterized as an obligation ‘of conduct’ and not ‘of result’, and as an obligation of ‘due diligence’.”<sup>95</sup>

41. In the customary international law relating to environmental protection, the duty of due diligence finds expression through three main principles, one substantive and two procedural in nature. As noted by the ICJ in its 2015 judgment in the case *Costa Rica/Nicaragua*:

“to fulfil its obligation to *exercise due diligence in preventing significant transboundary environmental harm*, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, *ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment* [...] If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, *to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk.*”<sup>96</sup>

42. The determination of the relevance of this duty for ECAs’ continued financing of fossil fuel-related projects/activities requires clarification of six aspects: (i) the duty-bearer, (ii) the duty’s spatial scope of application, (iii) the type of conduct governed by the duty, (iv) the outcome to be prevented, (v) the factors defining the degree of diligence to be deployed, and (vi) the possible manifestations of such diligence in connection with ECAs’ activities.
43. On the first aspect, in the current state of international law, the duty-bearer of the duty of due diligence and its expressions in customary international law is mainly the State. Whether the State’s failure to display the requisite diligence arises from the negligent conduct of an ECA attributable to a State (First Scenario) or from the negligence of the State in regulating an ECA as a separate entity (Second Scenario), it is the conduct of the State which forms the object of the international legal duties. Other international

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<sup>94</sup> United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397, Article 139(1).

<sup>95</sup> *Responsibilities and Obligations of States sponsoring Persons and Entities with respect to Activities in the Area*, Case No. 17, ITLOS (Seabed Dispute Chamber), Advisory Opinion (1 February 2011), paragraph 110 (emphasis added).

<sup>96</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Construction of a Road in Costa Rica along the River San Juan (Nicaragua v. Costa Rica)*, ICJ Reports 2015, p. 665, paragraph 104 (emphasis added).

legal obligations involving a due diligence dimension, e.g. those arising from human rights, may have a wider set of duty-bearers, including ECAs as separate entities (Third Scenario).

44. On the second aspect, although the paragraphs of the relevant decisions reproduced earlier refer to a “transboundary” context, the duty of due diligence and its expressions through the principles of prevention, environmental impact assessment and co-operation have a wider scope. This is evidenced by the formulation of Principles 21 of the Stockholm Declaration on the Human Environment<sup>97</sup> and 2 of the Rio Declaration on Environment and Development,<sup>98</sup> which both refer to “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States *or of areas beyond the limits of national jurisdiction*” (emphasis added). This is the formulation which the ICJ recognised as reflecting customary international law in its *Advisory Opinion on the Legality of Nuclear Weapons*.<sup>99</sup> There is also authority for the proposition that the duty to protect and preserve the marine environment, another expression of due diligence codified in Article 192 of the UNCLOS, applies irrespective of the territorial or maritime situation of a given area, even if it is disputed.<sup>100</sup> Therefore, the due diligence duty and its expressions govern conduct that may cause harm to the environment irrespective of where such harm occurs, including in the territory of another country or in the global commons (the climate system, the marine environment, ecosystems, etc.).
45. The third aspect concerns the type of conduct regulated by the duties. Any action/inaction by the duty-bearer, whether punctual action (e.g. a specific transaction), a composite act (e.g. a series of transactions) or a continuous conduct (e.g. constant failure to act or to act sufficiently) may fall under the scope of the duties as long as it results in harm of a certain level or risk thereof. Any of these types of conduct may constitute a “breach” of these duties and lead to State responsibility for internationally wrongful acts. These types of conduct are expressly contemplated in Articles 14 and

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<sup>97</sup> UN Conference on the Human Environment, Declaration of the United Nations Conference on the Human Environment (16 June 1972) UN Doc A/CONF.48/14/Rev.1.

<sup>98</sup> UN Conference on Environment and Development, Rio Declaration on Environment and Development, 13 June 1992, UN Doc. A/CONF.151/26. Rev.1.

<sup>99</sup> *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p. 226, paragraph 29.

<sup>100</sup> *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, ITLOS Case No. 23, Order (25 April 2015), paragraphs 68-73; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion (2 April 2015), ITLOS Case No 21, paragraphs 111, 120; *In the matter of the South China Sea Arbitration before an Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (Republic of the Philippines v. People's Republic of China)*, PCA Case No. 2013-19, Award (12 July 2016), paragraphs 927 and 940; *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)*, PCA Case No. 2017-06, Award concerning the preliminary objections of the Russian Federation (21 February 2020), paragraph 295.

15 of the ILC Draft Articles on State Responsibility, which specify when the breach is deemed to occur.

46. The fourth aspect concerns the outcome to be prevented. The prevention principle, as an expression of the due diligence duty, only governs “significant”<sup>101</sup> harm or risk thereof. Both “harm” and “risk” are covered by the duty, as evidenced by Article 3 of the International Law Commission’s 2001 Draft Articles on Prevention, which provides: “the State of origin shall take all appropriate measures to prevent significant transboundary harm or *at any event to minimize the risk thereof*”.<sup>102</sup> The terms “harm” and “risk of causing significant transboundary harm” are defined in Articles 2(b) and 2(a), respectively. “Harm” means “harm caused to persons, property or the environment” whereas “risk” is understood to include “a high probability of causing significant transboundary harm and a low probability of causing disastrous transboundary harm”. By contrast, the term “significant” is left open. The commentary to Article 2 states that “a determination has to be made in each specific case” and that:

“It is to be understood that ‘significant’ is something more than ‘detectable’ but need not be at the level of ‘serious’ or ‘substantial’. The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards”<sup>103</sup>

Even when the “harm” or the “risk” thereof do not reach the requisite level under the prevention principle, the conduct may still contravene the duty of due diligence. For example, the exercise of due diligence by a State may require the adoption of precautionary measures even in the absence of scientific certainty regarding the existence of risk of significant harm.<sup>104</sup> An indication regarding the level of “harm” or “risk” thereof may be provided by the consistency of the conduct with duties arising

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<sup>101</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 14, paragraph 101.

<sup>102</sup> Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, text and commentaries reproduced in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two (emphasis added).

<sup>103</sup> Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, text and commentaries reproduced in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, commentary to Article 2, paragraph 4.

<sup>104</sup> See *Responsibilities and Obligations of States sponsoring Persons and Entities with respect to Activities in the Area*, Case No. 17, ITLOS (Seabed Dispute Chamber), Advisory Opinion (1 February 2011), paragraphs 125–135, particularly 131 (“it is appropriate to point out that the precautionary approach is also an integral part of the general obligation of due diligence of sponsoring States, which is applicable even outside the scope of the Regulations. The due diligence obligation of the sponsoring States requires them to take all appropriate measures to prevent damage that might result from the activities of contractors that they sponsor. This obligation applies in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks. A sponsoring State would not meet its obligation of due diligence if it disregarded those risks. Such disregard would amount to a failure to comply with the precautionary approach”).

from other norms, e.g. human rights,<sup>105</sup> environmental treaties,<sup>106</sup> or possibly soft-law instruments. In the specific context of conduct by ECAs, relevant considerations would be the magnitude of the support provided, the environmental footprint (in terms of emissions of greenhouse gases and pollution) of the recipient project/operator, the timespan of the investment and the expectations relating to its operation (e.g. whether it will be operated as historically), and the remaining carbon budget at the time of the transaction. If a given transaction does not reach the threshold of “significance” but the ECA is involved in a substantial number of transactions, its conduct may amount to a composite act falling short of its due diligence duty.

47. Regarding the fifth aspect, the level of diligence must be determined in the light of four main considerations: the gravity of the outcome that may result from negligence,<sup>107</sup> the capabilities of the State of the ECA,<sup>108</sup> the historical moment at which diligence is assessed,<sup>109</sup> and the adoption and proactive enforcement of adequate measures.<sup>110</sup> The first consideration has been discussed in the previous paragraph. The second must be understood as setting a “floor”, a certain degree of diligence required from all States,<sup>111</sup> but not a “ceiling”, in that States with higher capabilities are expected to display a commensurate degree of diligence.<sup>112</sup> The third consideration is a proxy for what can

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<sup>105</sup> See e.g., *Budayeva and others v. Russia*, Judgment of 29 September 2008, ECtHR Applications No. 15339/02, 21166/02, 20058/02, 11673/02, and 15343/02, paragraphs 128–137 (referring to the positive obligations arising from the right to life “to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life” and “applying in the context of any activity, whether public or not, in which the right to life may be at stake”).

<sup>106</sup> See e.g. *In the matter of the South China Sea Arbitration before and Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (Republic of the Philippines v. People’s Republic of China)*, PCA Case No. 2013–19, Award of 12 July 2016, paragraphs 962–966 (referring to the fact that the activities unfolding under Chinese responsibility threatened species protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, United Nations, 993 UNTS 243).

<sup>107</sup> See *Alabama claims of the United States of America against Great Britain*, Decision of 14 September 1872, RIAA vol. XXIX, 125-134, at 129; *Responsibilities and Obligations of States sponsoring Persons and Entities with respect to Activities in the Area*, Case No. 17, ITLOS (Seabed Dispute Chamber), Advisory Opinion (1 February 2011), paragraph 117. This is acknowledged in the commentary to the ILC Prevention Articles, when it is stated that ‘degree of care required is proportional to the degree of risk involved in the business,’ Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, text and commentaries reproduced in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, commentary to Article 3, paragraph 18.

<sup>108</sup> See *Responsibilities and Obligations of States sponsoring Persons and Entities with respect to Activities in the Area*, Case No. 17, ITLOS (Seabed Dispute Chamber), Advisory Opinion (1 February 2011), paragraphs 158–9; Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, text and commentaries reproduced in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, commentary to Article 3, paragraph 13.

<sup>109</sup> *Responsibilities and Obligations of States sponsoring Persons and Entities with respect to Activities in the Area*, Case No. 17, ITLOS (Seabed Dispute Chamber), Advisory Opinion (1 February 2011), paragraph 117.

<sup>110</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 14, paragraph 197 (emphasis added).

<sup>111</sup> *Responsibilities and Obligations of States sponsoring Persons and Entities with respect to Activities in the Area*, Case No. 17, ITLOS (Seabed Dispute Chamber), Advisory Opinion (1 February 2011), paragraphs 158–159.

<sup>112</sup> Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, text and commentaries reproduced in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, commentary to Article 3, paragraph 13 (“The economic level of States is one of the factors to be taken into account in determining whether a



reasonably be required under the scientific and technological knowledge prevailing at a given point in time. As noted by the ITLOS Seabed Chamber: “[t]he content of ‘due diligence’ obligations ... *may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge.*”<sup>113</sup> The climate emergency and, more specifically, the contextual parameters described in Section I of this Opinion must therefore be taken into account in determining what conduct of an ECA, as an organ of the State, and what action of the State, with respect to ECAs as separate entities, is diligent in this context. An indication – although not a “safe harbour” – of what is diligent conduct is provided by standards such as those identified in paragraph 35 above, which are constantly updated to reflect relevant developments. The content of these standards may thus become binding, not because of the nature of the instrument stating them, but to the extent that they are the expression of what is “diligent” under the customary due diligence duty at a given point in time. The fourth consideration is that diligence must find expression not only in the adoption of appropriate measures but also in their effective implementation.<sup>114</sup> Displaying due diligence is not and cannot be a *pro forma* exercise but one whereby the duty-bearer displays “vigilance”<sup>115</sup> and does its “utmost, to obtain”<sup>116</sup> the desired result.

48. On the sixth aspect, the basic implications of the duty of due diligence and its manifestations in customary international law for ECAs’ continued financing of fossil fuel-related projects/activities must be determined in the specific context set in Section I, characterised by the climate emergency, the rapidly decreasing carbon budget, and the widely acknowledged need to reform fossil fuel subsidies. In this context, basic expectations of diligence would include: *the requirement, in principle, not to finance new fossil fuel-related projects/activities or increase the financing of existing ones; the requirement to decrease existing support*<sup>117</sup> *within a clear timeframe dictated, first and foremost, by scientific considerations and the temperature goals of the Paris Agreement, as a reflection of a global consensus; proactive efforts to avoid “locking-in” fossil fuel-related projects/activities which may use up a significant part of the*

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State has complied with its obligation of due diligence. But a State’s economic level cannot be used to dispense the State from obligation under the present articles”).

<sup>113</sup> *Responsibilities and Obligations of States sponsoring Persons and Entities with respect to Activities in the Area*, Case No. 17, ITLOS (Seabed Dispute Chamber), Advisory Opinion (1 February 2011), paragraph 117 (emphasis added).

<sup>114</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 14, paragraph 197; *Responsibilities and Obligations of States sponsoring Persons and Entities with respect to Activities in the Area*, Case No. 17, ITLOS (Seabed Dispute Chamber), Advisory Opinion (1 February 2011), paragraphs 115 and 239; Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, text and commentaries reproduced in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, commentary to Article 3, paragraph 10.

<sup>115</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 14, paragraph 197.

<sup>116</sup> *Responsibilities and Obligations of States sponsoring Persons and Entities with respect to Activities in the Area*, Case No. 17, ITLOS (Seabed Dispute Chamber), Advisory Opinion (1 February 2011), paragraph 110.

<sup>117</sup> See footnote 38 above.

*remaining carbon budget; the adoption and proactive implementation of adequate procedures to assess the carbon footprint of any project to be potentially supported; the adoption and proactive implementation of guidelines concerning the performance of the activities of the relevant ECA in the context described in Section I.*

49. These steps are possible manifestations of diligent conduct by ECAs or by States regulating them in the context described in Section I. They all rest on the basic underlying proposition that, in that specific context and given the substantial contribution of ECAs to enable the emissions of greenhouse gases associated with existing and new fossil fuel-related projects/activities, in principle, States comply with their duty of due diligence only if they do their utmost to reduce their contribution to the problem, rather than extending it or increasing it.

## **2. Duties arising in specific normative contexts**

### *A. Duties arising under the international climate change regime*

50. As set out in paragraphs 7-9 above, there is clear evidence that finance flows generally, and those emanating from ECAs in particular, are not currently consistent with achievement of the international climate goals set out in the Paris Agreement on Climate Change. As discussed in Section II above, the conduct of ECAs is directly or indirectly governed by certain international legal obligations because their conduct may be attributed to the State and/or because States may be required under international law to regulate their conduct and/or because ECAs, as such, may be subject to certain international legal obligations (see paragraph 36 above).
51. In this section, we address the ways in which the obligations laid down in the UN Framework Convention on Climate Change (UNFCCC)<sup>118</sup> and the Paris Agreement<sup>119</sup> are relevant to the conduct of State parties, whether acting directly through or regulating ECAs and/or to the conduct of the ECAs directly (the latter is also addressed in the other sections in this part of the Opinion). We address the following elements: specific requirements of the Paris Agreement including Article 2 and in particular Article 2(1)(c) on finance flows; Articles 3, 4 and 9; obligations of due diligence in this context, including the key risks which should be addressed by States funding fossil fuel related projects through export credit; the legal framework for the Biennial Assessment and Overview of Climate Finance Flows conducted under the UNFCCC and the Paris Agreement, the Global Stocktake and the requirements for transparency as to finance flows.

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<sup>118</sup> United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107.

<sup>119</sup> “Adoption of the Paris Agreement”, Decision 1/CP.21, FCCC/CP/2015/10/Add.1, 29 January 2016, Annex.

52. **The International Climate Change Regime:** The objective of the UNFCCC is set out in Article 2 of the Convention:

“The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.”

53. That core objective also underpins the Paris Agreement as a related legal instrument adopted by the UNFCCC Conference of the Parties (**COP**).<sup>120</sup> As such, the Paris Agreement pursues the same ultimate objective as the UNFCCC and the principles laid down in the Convention, including in Article 3 of the UNFCCC, apply generally to the implementation of the Paris Agreement unless qualified by the express terms of the latter. As indicated in Article 2 of the Paris Agreement, that agreement represents a strengthened response to the threat of climate change and as such lays down more specific goals relating to mitigation, adaptation and finance flows:

“1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:

(a) Holding 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;

(b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and

(c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.”

54. The context for considering the international legal duties which apply to States/ECAs when funding fossil fuels is outlined in Section I of this Opinion. At the time of the adoption of the Paris Agreement, the Parties made clear the extent of the concern that had led to the adoption of the strengthened response. The Preamble to the Decision adopting the Paris Agreement highlights these concerns:

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<sup>120</sup> See also the third recital to the Paris Agreement: “In pursuit of the objective of the Convention, and being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances”.

*“Recognizing that climate change represents an urgent and potentially irreversible threat to human societies and the planet and thus requires the widest possible cooperation by all countries, and their participation in an effective and appropriate international response, with a view to accelerating the reduction of global greenhouse gas emissions,*

*Also recognizing that deep reductions in global emissions will be required in order to achieve the ultimate objective of the Convention and emphasizing the need for urgency in addressing climate change ...*

*Emphasizing with serious concern the urgent need to address the significant gap between the aggregate effect of Parties’ mitigation pledges in terms of global annual emissions of greenhouse gases by 2020 and aggregate emission pathways consistent with holding 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” (emphasis added)<sup>121</sup>*

55. These grave concerns provide specific context for interpreting the scope of the requirements laid down in the Paris Agreement as an agreement under the UNFCCC, having regard to the duty to implement the treaty in good faith and with a view to the achievement of its goals, as discussed further below. The urgency and scale of threat posed by dangerous climate change and the need for effective implementation are also reflected in Article 3 of the Paris Agreement which provides:

*“As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement.”*

56. In our view, it is clear from Article 3 that the elements of ambition and progression are integral to the interpretation of the Paris Agreement across the specific requirements laid down in relation to mitigation, adaptation and finance, as well as provisions addressing technology transfer, capacity building and transparency. The reference to Article 2 indicates that the effectiveness of the collective implementation of the Paris Agreement falls to be measured against the achievement of the purposes laid down in Article 2. The contribution of individual States to the collective response also falls to be considered within the parameters of Article 3 as ambition and progression are obligations of individual States in making contributions under the provisions referred to. The recognition of the need to support developing country Parties in this context also means that individual States, particularly developed States, will need to integrate this consideration into their efforts.

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<sup>121</sup> “Adoption of the Paris Agreement”, Decision 1/CP.21, FCCC/CP/2015/10/Add.1, 29 January 2016.

57. The latter element is also reflected in Article 2(2):

“This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances”

We also note the following reference in the preamble to the decision adopting the Paris Agreement:

“Acknowledging the need to promote universal access to sustainable energy in developing countries, in particular in Africa, through the enhanced deployment of renewable energy”<sup>122</sup>

We consider further below the implications of Article 2(2), together with other provisions of the Paris Agreement, for the achievement of the finance goal laid down in Article 2(1)(c) but, in summary, it is clear in our view that the specific needs of developing countries in addressing the eradication of poverty and sustainable development, including in relation to promoting access to sustainable energy, should be addressed by developed States in making their national contributions to the achievement of the Paris Agreement climate goals. What this means in the context of ECA financial support is that State parties to the Paris Agreement should seek to ensure that finance flows directed by ECAs address the climate goals and the poverty goals of relevant States in an integrated way, including in relation to the need to ensure that there is universal access to sustainable energy in developing countries through the “enhanced deployment” of renewable energy. As discussed below, the continued support for fossil fuels, including the production of new fossil fuels, in the form of export credits does not appear on current evidence to meet these requirements.

58. The Preamble to the UNFCCC provides that “all countries, especially developing countries, need access to resources required to achieve sustainable social and economic development and ... in order for developing countries to progress towards that goal, their energy consumption will need to grow”. In our view, this recognition under the UNFCCC now falls to be addressed on the basis of the specific goals of the Paris Agreement and the recognition of the urgency of the threat posed by the gap between what has been pledged by States and what is required to meet the temperature goals (see paragraphs 7-9 and paragraph 54 above). Access to the necessary resources to address the goals of eradicating poverty and achieving sustainable development needs to be secured in line with the principles which underpin the UNFCCC and the Paris Agreement, including the prevention of significant harm to the environment, intergenerational equity, common but differentiated responsibilities and respective capabilities, precaution, and the requirement to base action on the “best available science”.

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<sup>122</sup> “Adoption of the Paris Agreement”, Decision 1/CP.21, FCCC/CP/2015/10/Add.1, 29 January 2016.

59. Article 4(5) of the UNFCCC provides in part that:

“The developed country Parties and other developed Parties included in Annex II shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and knowhow to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention.”

Under Article 7(2)(h) of the UNFCCC, the COP shall take the decisions necessary to promote the effective implementation of the Convention and seek to mobilize financial resources in accordance with Article 4, paragraphs 3, 4 and 5, and Article 11 (which sets out the financial mechanism for the Convention).

60. Although the Paris Agreement gives governments a significant measure of discretion in its implementation, in our view it is clear, so far as Article 2 is concerned, that the temperature goals set out in the Paris Agreement do not permit parties to follow different, less ambitious goals. In relation to finance, it follows that financial flows which are inconsistent with the pathways set out in Article 2(1)(c) are thereby inconsistent with UNFCCC/Paris Agreement and fall to be scrutinized from that perspective in the light of the specific obligations laid down in Articles 3, 4 and 9 in particular. Recent and ongoing scientific evaluation of the pathways required to meet the Article 2(1)(a) temperature goals, as presented by the IPCC and by UNEP, must inform the assessment by State parties as to the consistency of finance flows, including export credits, with their obligations under the UNFCCC/Paris Agreement, both collectively and individually.

61. We note that the relationship between the global carbon budget and national policy has been addressed in domestic climate litigation.<sup>123</sup> In addressing the government’s discretion to review and set emission reduction targets, the High Court of New Zealand Court considered the goals of the UNFCCC and the Paris Agreement and held that:

“These provisions [of the UNFCCC and Paris Agreement] do not expressly require that New Zealand review any target it has set under its domestic legislation when an IPCC report is published. However collectively they do underline the pressing need for global action, *that global action requires all Parties individually to take appropriate steps to meet the necessary collective action, and that Parties should do so in light of relevant scientific information and update their individual measures in light of such information.*”<sup>124</sup>

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<sup>123</sup> See the decision of the Supreme Court of the Netherlands in the *Urgenda* case, Judgment of 20 December 2019, English translation available at <<https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf>> at paragraphs 4.6 and 7.4.3. See also the decision of the Land and Environment Court of New South Wales in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 judgment of 8 February 2019, at paragraph 554.

<sup>124</sup> Judgment of 2 Nov. 2017, CIV 2015-485-919 [2017] NZHC 733, paragraph 91 (emphasis added). The court went on to hold that the review of mitigation targets in light of new best available scientific information presented by the IPCC “is a mandatory relevant consideration” under domestic law, paragraph 94 of the judgment.

62. We do not address the implications of the Paris Agreement in domestic law in this Opinion, but these cases indicate the increasing preparedness of some national courts to consider closely the relationship between individual State action and the implications for the global carbon budget and/or attainment of the Article 2 Paris Agreement goals. The effectiveness of individual State implementation of the Paris Agreement, as a matter of international law, also raises the issue of the implications of individual funding decisions for the remaining global carbon budget, as discussed below.
63. **Article 2(1)(c) of the Paris Agreement:** As was observed by commentators in 2018, Article 2(1)(c) of the Paris Agreement:
- “...is one of the most important parts of the Paris Agreement: aligning finance to support climate action is the means to meeting both the temperature and adaptation goals. Yet there is limited awareness of, few opportunities for discussion on, and insufficient action to meet the goal.”<sup>125</sup>
64. References to the reduction and phasing down of “high carbon investments and fossil fuel subsidies” appeared in the Geneva negotiating text, which formed the basis for the final negotiations of the Paris Agreement.<sup>126</sup> However those references did not appear in the October Non-Paper presented by the Co-Chairs to the negotiations. The October draft referred to reducing international support for “high-emission and maladaptive investments”.<sup>127</sup> None of this language appears in the final text of the Paris Agreement, nor is it included in the COP decision adopting the Agreement.<sup>128</sup> The issue of FFSR has however been discussed at certain technical and side meetings at the UNFCCC.
65. The absence of an explicit reference to fossil fuel subsidies does not mean in our view that the requirements laid down in Articles 2(1)(c), 4 and 9 of the Paris Agreement are not relevant or applicable to, the issue of their retention or removal. The key issue is whether such investments/subsidies are directly relevant to the achievement of the object and purpose of both the Convention and the Paris Agreement. As indicated in Section I above, this is clearly the case on the basis of the best available scientific

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<sup>125</sup> S. Whitley, J. Thwaites, H. Wright, C. Ott, *Making finance consistent with climate goals Insights for operationalising Article 2.1c of the UNFCCC Paris Agreement*, December 2018 ODI, WRI, Rocky Mountain Institute and E3G, page 40.

<sup>126</sup> Work of the Contact Group on Item 3, Negotiating text Advance unedited version, 12 February 2015, paragraphs 34ter and 53.1(d), available at <[https://unfccc.int/sites/default/files/negotiating\\_text\\_12022015%402200.pdf](https://unfccc.int/sites/default/files/negotiating_text_12022015%402200.pdf)> (accessed 2 March 2021).

<sup>127</sup> Ad Hoc Working Group on the Durban Platform for Enhanced Action, ADP.2015.8.Informal Note, October 2015, Article 6(9)(c), available at <<https://unfccc.int/sites/default/files/resource/docs/2015/adp2/eng/8infnot.pdf>> (accessed 2 March 2021).

<sup>128</sup> Article 2(1)(a)(v) of the Kyoto Protocol to the United Nations Convention on Climate Change, 11 December 1997, 2302 UNTS 148, does provide for the “[p]rogressive reduction or phasing out of market imperfections, fiscal incentives, tax and duty exemptions and subsidies in all greenhouse gas emitting sectors that run counter to the objective of the Convention and application of market instruments”.

evidence and the recognition by States that fossil fuel subsidies in particular must be ended if those goals are to be met.

66. Some States have addressed FFSR in their Nationally Determined Contributions (NDCs).<sup>129</sup> As suggested in a working paper published by the Stockholm Environment Institute, States could include in their NDCs the removal of subsidies for fossil fuel producers, the implementation of production and export taxes on fossil fuels, restrictions on exploration and extraction on government lands, and/or limiting financing for mining and infrastructure of high-carbon fuels. Countries could report on such activities alongside their mitigation and fossil fuel reduction targets.<sup>130</sup>
67. Given the broad framing of the reference to finance flows in Article 2(1)(c), export credits in all their forms fall within its scope in our view (see outline of export credits above in Section I, paragraphs 4 and 5). In our view, there are three key elements to the goal laid down in Article 2(1)(c) which should inform the legal obligations of State parties to the Paris Agreement, namely the requirements that (1) “finance flows [are] consistent”, (2) with a “pathway towards low greenhouse gas emissions”, and (3) “climate-resilient development”.
68. It follows from these three elements: (1) consistency with (2) low emissions and (3) climate resilient development, that for a State party, acting through its ECA or required to regulate it, or for the ECA itself (see the three scenarios set out above in Section II) to knowingly direct finance flows which are inconsistent with a pathway towards low emissions and/or climate resilient development undermines that objective (and the related objectives in Article 2) and breaches the requirements of Article 2(1)(c). The inclusion of a specific finance goal, in our view, is a clear recognition by State parties of the importance of ensuring consistent finance flows if the ultimate objective of the UNFCCC is to be achieved and that this entails addressing the significant risk posed by inconsistent finance flows.
69. The language of Article 2 as a whole, including subparagraph (1)(c), is expressed as an aim of the Agreement, but Article 3 expressly requires “[a]ll Parties” to “undertake ... ambitious efforts” in connection with several areas, expressly including finance

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<sup>129</sup> See H. van Asselt, L. Merrill, K. Kulovesi, ‘Fossil Fuels and the Global Climate Regime’, in J. Skovgaard, H. van Asselt (eds.), *The Politics of Fossil Fuel Subsidies and their Reform* (Cambridge University Press, 2018), pp. 140-155, at 146 (“Terton et al. (2015) found that 13 countries included references to fossil fuel subsidy reform in their INDCs in the run-up to Paris. Ethiopia’s INDC, for example, indicates that the country has ‘already removed fossil fuel subsidies to enable enhanced generation and use of clean and renewable energy’ (Ethiopia 2015: 7). Morocco’s INDC commits the country to ‘[s]ubstantially reducing fossil fuel subsidies, building on reforms already undertaken in recent years’ (Morocco 2015). And India’s INDC explains how India has ‘cut subsidies and increased taxes on fossil fuels (petrol and diesel) turning a carbon subsidy regime into one of taxation’ (India 2015: 27)”).

<sup>130</sup> G. Piggot, P. Erikson, M. Lazarus, H. van Asselt, *Addressing fossil fuel production under the UNFCCC: Paris and beyond*, Stockholm Environment Institute Working Paper 2017-09 (2017).



(Article 9), “with a view to achieving the purpose of this Agreement as set out in Article 2”. The goals are therefore an essential integral part of the requirements imposed on “[a]ll Parties” and their efforts are to “represent a progression over time”. The evidence, as outlined in Section I (paragraphs 7-9) indicates that continued financial support for fossil fuels will exacerbate the production gap and jeopardize the attainment of the goals of both the Paris Agreement and the Convention itself. Given the scale and urgency of the threat posed by climate change and the link between continued fossil fuel production and the increased risk that the threat will not be addressed, State parties are under a duty in our view to approach Article 2(1)(c), in the light of Articles 3 and 9, as restricting finance flows which are clearly inconsistent with the pathway laid down in that provision.

70. **Overshoot:** Finance flows which are inconsistent with Article 2(1)(c) are by definition those which undermine the goals of the Paris Agreement. On the basis of the evidence as outlined above (paragraphs 7-9), inconsistent pathways pose specific risks of exacerbating the emissions and production gaps and jeopardizing the achievement of the temperature goals set out in Article 2(1)(a) of the Paris Agreement. As the IPCC has indicated:

“Overshoot<sup>131</sup> trajectories result in higher impacts and associated challenges compared to pathways that limit global warming to 1.5°C with no or limited overshoot (high confidence). Reversing warming after an overshoot of 0.2°C or larger during this century would require upscaling and deployment of CDR [carbon dioxide removal] at rates and volumes that might not be achievable given considerable implementation challenges (medium confidence).”<sup>132</sup>

71. In our view, States should assess the risk that inconsistent finance flows in the form of fossil fuel subsidies and other forms of public finance will contribute to the risk of overshoot. We address further below the specific implications of this, and related risks, for impact assessment and due diligence, as well as the extent to which Article 2(1)(c), as an essential integral component of the requirements imposed on “[a]ll Parties” by the Paris Agreement, limits further investment in fossil fuels.

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<sup>131</sup> Overshoot is defined by the IPCC as “the temporary exceedance of a specified level of global warming”, see IPCC, *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* (2018), Summary for Policy Makers, page 24 (Box SPM.1) <[https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15\\_SPM\\_version\\_report\\_LR.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_SPM_version_report_LR.pdf)>

<sup>132</sup> IPCC, *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* (2018), Summary for Policy Makers, page 18 (D.1.2) <[https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15\\_SPM\\_version\\_report\\_LR.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_SPM_version_report_LR.pdf)>

72. As discussed below, it follows from the language of Article 2 as reflecting the object and purpose of the Paris Agreement, together with the object and purpose of the UNFCCC which the Paris Agreement supports, that all relevant finance flows must be assessed for Article 2(1)(c) consistency, including those most likely to have adverse impacts/be inconsistent with Article 2 goals. Consistency cannot only be assessed in relation to finance flows which promote the Paris Agreement goals, Article 2(1)(c) clearly requires that inconsistency must also be identified and addressed.
73. It is not enough to increase finance flows for low emission renewable energy for example, if inconsistent finance flows directed by the same State party towards fossil fuels undermines that support (either at the global or national level) by risking overshoot and/or locking in high emitting infrastructure. Such inconsistent flows also undermine national and international mitigation and adaptation policies adopted pursuant to Articles 4 and 7 of the Paris Agreement.
74. **Article 3 of the Paris Agreement:** As discussed above, the implications of Article 2(1)(c) of the Paris Agreement for measuring and addressing the consistency and inconsistency of finance flows with Article 2 goals are reinforced by the references to ambition, progression and support for developing countries in Article 3. Article 3 serves to integrate the requirements of Article 2(1)(c) with a range of specific obligations and measures to be taken under the Paris Agreement including: the delivery of Nationally Determined Contributions (NDCs), meeting the global goal on adaptation, the provision of financial resources to developing countries, the progressive mobilization of climate finance, technology transfer and operating with transparency.
75. In relation to finance (addressed specifically in Article 9 as well as Article 2(1)(c)), Article 3 requires Parties “to undertake and communicate ambitious efforts” with a view to achieving the Article 2 purposes. This contribution should be progressive: ‘The efforts of all Parties will represent a progression over time...’, whilst supporting developing countries in their effective implementation of the Paris Agreement. This requires in our view specific assessment of all relevant finance flows including export credits, given their significant role in financing fossil fuels as outlined in Section I.
76. We acknowledge that under the Paris Agreement significant discretion is left to governments in determining what constitutes the “highest possible ambition” (Article 4(3)) in the measures undertaken and communicated in their NDCs. However, that discretion is not unlimited. As discussed below at paragraphs 78-85: the obligation of State parties to implement the Paris Agreement in good faith means that action which directly threatens the achievement of the Article 2 goals exceeds, in our view, the margin of discretion allowed by the Paris Agreement. An interpretation of the Agreement, and of Article 2(1)(c) in particular, as lacking any definite parameter for decision-making, is not consistent with the strengthened response that the Agreement

represents, nor with the ultimate goals of the climate change regime as set out in Article 2 of the UNFCCC. Finance flows which support the continued exploitation and lock-in of fossil fuels fall to be considered in the light of their consistency with the Article 2 pathways, otherwise the progressive mobilization of climate finance under Article 9, as well as the delivery of mitigation and adaptation under Articles 4 and 7 could be partly or completely negated by such inconsistent flows. The evidence is that this is indeed the current position in light of the emissions and production gaps, as indicated above in Section I, at paragraphs 7-9.

77. The issue of what does, or does not, constitute good faith implementation of the Paris Agreement by State parties arises acutely in the context of ECA policy, given that it has been reported that ECAs provide almost twice the amount of international public finance as MDBs and also given the length of time that has elapsed since this issue was first raised in the early 2000s.<sup>133</sup>
78. **Good faith implementation of Article 2(1)(c) of the Paris Agreement:** The duties arising from Article 2(1)(c) of the Paris Agreement and related provisions 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, as well as ECAs. States can regulate to reduce or eliminate fossil fuel financing by setting policies and targets for climate aligned investments; the adoption of positive and negative lists for investment decision-making; and inclusion of climate goals in the national budget and expenditure framework.<sup>134</sup> The duty to use the leverage of ECA finance to support the aims of the Paris Agreement includes addressing misalignment with those aims and in particular the retention of fossil fuel subsidies and other forms of public financial support for fossil fuels more generally.
79. That duty arises from the 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)<sup>135</sup> and under customary international law. The duty also stems from a good faith interpretation of Article 2(1)(c), in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose of the Paris Agreement, as required under Article 31 of the VCLT.

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<sup>133</sup> I. Shishlov, A.-K. Weber, I. Stepchuk, L. Darouich, A. Michaelowa, *Study on internal and external climate change policies affecting export credit and insurance agencies Final Report*, Perspectives Climate Group GmbH, Freiburg Germany 11 03 2020, page 8.

<sup>134</sup> S. Whitley, J. Thwaites, H. Wright, C. Ott, *Making finance consistent with climate goals Insights for operationalising Article 2.1c of the UNFCCC Paris Agreement*, December 2018 ODI, WRI, Rocky Mountain Institute and E3G, page 27.

<sup>135</sup> United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

80. A good faith interpretation of Article 2(1)(c) “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”, as per Article 31(1) VCLT (alongside Article 2 as a whole and Articles 3, 4 and 9 of the Paris Agreement) entails an interpretation which is likely to give effect to, and certainly not directly undermine or frustrate, the object and purpose of the UNFCCC/Paris Agreement, namely the prevention of dangerous climate change (as discussed above, paragraphs 52-54).
81. The specific elements of alignment of most direct relevance to the issue of ECA finance include adherence to the Article 4(1) goals of peaking emissions as soon as possible with rapid reductions thereafter and achieving net zero emissions by the second half of this century. Those goals need to be considered against “the best available science” represented by the IPCC Special Report on 1.5 °C.
82. **Misalignment:** Alignment with the Paris Agreement goals must be comprehensive and coherent. The Green Climate Fund has agreed that, when considering re-accreditation of its accredited entities (which includes major public and private financial institutions), it will assess the extent *to which their entire portfolios* have evolved towards the GCF’s mandate (GCF Decision B.11/10 paragraph 35).<sup>136</sup> The OECD Environment Directorate has referred to the need for reference points to measure misalignment with climate policy goals.<sup>137</sup> This indicates that, as a policy, alignment with the Paris Agreement goals has both a positive and a negative element: to direct flows towards lower emissions and net zero and to end finance flows that run counter to those goals (misalignment).
83. National bodies have also highlighted misalignment as an issue to be addressed if alignment is to be achieved, for example the UK Government’s Committee on Climate Change, stated in 2019 that the UK’s “export finance is not aligned with climate goals, and often supports high-carbon investments.”<sup>138</sup>
84. The preamble to the Paris Agreement recognizes “the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge”. References to effectiveness are then repeated in the language of Articles 3, 6, 7, 10, 11, 13 and 16. In our view, one clear aspect of an effective response is that it is based on an appreciation of the global impact of specific

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<sup>136</sup> S. Whitley, J. Thwaites, H. Wright, C. Ott, *Making finance consistent with climate goals Insights for operationalising Article 2.1c of the UNFCCC Paris Agreement*, December 2018 ODI, WRI, Rocky Mountain Institute and E3G, page 21.

<sup>137</sup> Comments made in a webinar on Article 2(1)(c), available at <<https://unfccc.int/event/webinar-on-article-2-paragraph-1c-of-the-paris-agreement>> (48 minutes into the webinar).

<sup>138</sup> Committee on Climate Change, “*Net Zero – The UK’s contribution to stopping global warming*” (May 2019), available at <<https://www.theccc.org.uk/publication/net-zero-the-uks-contribution-to-stopping-global-warming/>>, page 118 (Box 4.3)

national policies and measures since these directly affect all the contributions made by other States. Cumulative greenhouse gas emissions impact the extent to which progression and ambition on the part of other States will be sufficient to close the existing emissions and production gaps. The adverse impacts of the policies of individual ECAs in supporting fossil fuel investment have implications for all the actions taken by all States in seeking to achieve the Paris Agreement goals. The explicit emphasis on the need for an effective response in the Paris Agreement reinforces in our view the general principle of effectiveness as an aid to the interpretation of the Paris Agreement under Article 31 of the VCLT, having regard to its object and purpose as a strengthened response to the urgent threat of dangerous and potentially irreversible climate change.

85. In our view, the Paris Agreement imposes legal requirements to align finance flows with the Paris Agreement goals and these requirements are reflected in specific duties. We address the elements of the Paris Agreement which inform these requirements below but, in outline, the core obligations arising from the duty to implement the UNFCCC/Paris Agreement effectively and in good faith, and to cooperate to that end, in the context of ECA financing of fossil fuel-related projects/activities, include as a minimum:

- (a) *A general duty not to act so as to risk exacerbating the emission and production gaps and thereby increasing the risks posed by climate change (prevention) (see Section III.1). The entire UNFCCC/Paris Agreement system must be interpreted in the light of the general duty and with regard to the specific duty to ensure that finance flows are directed to a pathway for low emissions, having regard to the global carbon budget;*
- (b) *A duty not to act regressively, for example by increasing or maintaining FFS or public finance, including ECA financial support, in the light of the clear evidence that this will exacerbate the emissions and production gaps;*
- (c) *A duty to act ambitiously, which implies not only a duty not to act regressively (see above) but also to do the maximum possible to act consistently with a pathway which will meet Paris Agreement goals. This includes seeking alternative ways of meeting the sustainable energy needs of developing countries;*
- (d) *A duty to act on the basis of the “best available science”, including by reference to evolving scientific knowledge as to the timescales which must be met in order to achieve Paris Agreement temperature goals and minimize the risks of overshoot and crossing planetary climate tipping points;*
- (e) *The duties to respect, protect and fulfil human rights (see Section III.2.B) in discharging the duties under the UNFCCC/Paris Agreement and the need to*

*strengthen resilience and reduce vulnerability as goals of the Paris Agreement (Article 7(1)).*

86. These duties provide a broad framework for considering individual decisions in relation to the framing of NDCs, long-term strategies and individual decisions on finance flows.
87. The OECD Common Approaches are considered in Section III.2.C below, but in our view the explicit recognition of: “the responsibility of Adherents to implement the commitments undertaken by the Parties to the [UNFCCC]” indicates the need for an integrated approach and also confirms the relevance of the Paris Agreement, as an agreement under the UNFCCC, to the implementation of the Common Approaches. Furthermore, the objectives of the Common Approaches are to:

“Promote *coherence* between Adherents’ policies regarding officially supported export credits, their international environmental, climate change, social and human rights policies, and their commitments under relevant international agreements and conventions, thereby contributing towards sustainable development” (paragraph 3(i) emphasis added)
88. This call for coherence requires that misalignment with the Paris Agreement goals is assessed and addressed in the review processes conducted under the Common Approaches, as discussed further below.
89. **Article 4 of the Paris Agreement:** The pathways indicated in Article 2(1)(c) of the Paris Agreement must be interpreted consistently with the goals set in Article 4(1) of the Paris Agreement, both as regards reducing emissions (peaking as soon as possible and undertaking rapid reductions thereafter) and securing climate resilient development more broadly so that the aim to achieve net zero is achieved, and certainly not knowingly undermined.
90. Article 4(2) of the Paris Agreement provides:

“Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.”
91. This language refers to domestic mitigation measures but, in our view, it would not be consistent with a good faith interpretation of Article 2(1)(c), as read with Articles 3 and 4(2), to ignore the adverse impact of national policy on finance flows in the form of ECA support for fossil fuel investment. That adverse impact is to undermine the contribution made by the State concerned to the achievement of the Article 2 goals. Article 4(2) requires *meaningful* action from each Party and this encompasses the avoidance of regressive action as well as the contribution of positive action, in order for implementation to be effective and in good faith. In all events, Parties are required

to “undertake ... ambitious efforts” as defined, not only in Article 4, but also in other provisions, including Article 9 on finance, which expressly envision financial flows across Parties, and which are part of the “nationally determined contributions to the global response to climate change” (Article 3).

92. The standard of diligence to be discharged is further reinforced under the terms of Article 4(3) which provides:

“Each 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 the light of different national circumstances” (emphasis added)

93. The requirements for progression and highest possible ambition for successive NDCs are undermined in our view where a State directs an ECA, or fails to regulate its action, in such a way that available finance which could contribute to the fight against climate change (e.g. by financing renewable energies) is used to the detriment of it (e.g. by financing fossil fuels). The standard of “highest possible ambition” would clearly not be met in such circumstances. Failure to meet this standard would be particularly clear when the finance decision contributes to “lock in” the host State’s emissions by a fossil fuel investment supported by an ECA in the exporting State. Furthermore, even where the locked-in emissions are likely to be exported (because the fossil fuels extracted are consumed elsewhere) they will then run counter to the requirements for progression and highest possible ambition in other States which import the fossil fuels produced in one form or another.

94. **Long term strategies (LTSs):** The long term strategies provided for in Article 4(19) of the Paris Agreement should in our view, in order to be “mindful of Article 2” (as required under Article 4(19)), address the risks posed by lock in and the transition risk of stranded assets, particularly for developing countries. A working paper published by the Stockholm Environment Institute points out that, like NDCs, LTSs focus more on demand-side measures than fossil fuel supply. While six States identified in the report discuss the need to transition away from fossil fuels in their LTSs, none of the countries surveyed explicitly mapped out a phase-down of fossil fuel extraction.<sup>139</sup>

95. As discussed in Section III.1 of this Opinion, under customary international law the standard for due diligence requires vigilance on the part of States, is variable, and may change over time and in relation to the risks posed by the activity in question (see paragraphs 42-48). This rigorous and dynamic international standard for due diligence under customary international law is reinforced by the requirements for the “highest

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<sup>139</sup> G. Piggot, P. Erikson, M. Lazarus, H. van Asselt, *Addressing fossil fuel production under the UNFCCC: Paris and beyond*, Stockholm Environment Institute Working Paper 2017-09 (2017), page 13.

possible ambition” and “progression” as laid down in Articles 3 and 4(3) of the Paris Agreement. The context for the adoption of the Paris Agreement indicates the need for a dynamic response from States, being one of urgency in the face of a potentially irreversible threat and the recognition of the risks posed by the significant gap between what is required to meet the temperature goals and the steps pledged by States (see paragraph 54).

96. **Article 9 of the Paris Agreement:** Article 9 of the Paris Agreement requires developed country Parties to provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention, while other Parties are encouraged to provide or continue to provide such support voluntarily. Article 9(3) then states:

“As part of a global effort, developed country Parties *should continue to take the lead in mobilizing climate finance* from a wide variety of sources, instruments and channels, noting the significant role of public funds, through a variety of actions, including supporting country-driven strategies, and taking into account the needs and priorities of developing country Parties. Such mobilization of climate finance *should represent a progression beyond previous efforts.*” (emphasis added)

97. In our view, this direction that developed country Parties should take the lead also implies taking the lead in addressing finance flows which are not aligned with the Paris Agreement climate goals (misalignment, see paragraphs 82-85 above). We note that paragraph 52 of Decision 1/CP.21 adopting the Paris Agreement provides:

“in the implementation of the Agreement, *financial resources provided to developing countries should enhance ... their climate change actions with respect to both mitigation and adaptation to contribute to the achievement of the purpose of the Agreement as defined in Article 2*” (emphasis added)

In our view, it is very difficult to see how support for fossil fuel production located in any State, including developing countries, meets this requirement on the basis of the current evidence as to the production gap.

98. 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, as applicable, including, as available, projected levels of public financial resources to be provided to developing country Parties. Other Parties providing resources are encouraged to communicate biennially such information on a voluntary basis. The scope of the biennial assessment is considered further below.
99. Parties have agreed that the information to be provided under Article 9(5) should include: “*Information on how support provided and mobilized is targeted at helping developing countries in their efforts to meet the long-term goals of the Paris Agreement*, including by assisting them in efforts to make finance flows consistent with



a pathway towards low greenhouse gas emissions and climate-resilient development”.<sup>140</sup>

100. In our view, 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) (misalignment) including through the provision of ECA support for fossil fuel-related projects/activities.
101. Furthermore, the Parties to the Paris Agreement decided in 2018 that in accordance with Article 9(3), the COP serving as the meeting of the Parties of the Paris Agreement (CMA) would initiate deliberations on setting a new collective quantified finance goal from a floor of USD 100 billion per year in the context of “meaningful mitigation actions and transparency of implementation and taking into account the needs and priorities of developing countries”.<sup>141</sup> The CMA agreed to include in its deliberations the aim of making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.<sup>142</sup> (see further paragraphs 117-128).
102. In our view, the acknowledgement of the Parties that, in addressing the new finance goal, Parties would consider the aim set out in Article 2(1)(c) of the Paris Agreement confirms the need to address inconsistent flows (misalignment) as these may impact on the extent to which sufficient/adequate funds can be made available which are consistent with the goals set in Article 2.
103. As set out above, in our view it follows from Article 2 of the Paris Agreement, as read with Articles 3, 4 and 9 in particular that *(1) States have an obligation of due diligence to assess whether finance flows, including those for which ECAs are responsible, are consistent with the global carbon budget (see paragraph 9 of this Opinion) and (2) in cases where there is clear inconsistency, as is the case in relation to support for new fossil fuel production, State Parties should refrain from allowing finance flows to support such production.*
104. **Due Diligence:** The standards of “highest possible ambition”, “progression” and “best available science” (Articles 3, 4(1) and (3) of the Paris Agreement), as these relate to the current production gap and global carbon budget, should in our view inform due diligence conducted by States when making decisions about ECA support for fossil fuels. As discussed in Section III.1 of this Opinion, the obligation of due diligence

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<sup>140</sup> “Identification of the information to be provided by Parties in accordance with Article 9, paragraph 5, of the Paris Agreement”, Decision 12/CMA.1, 19 March 2019, FCCC/PA/CMA/2018/3/Add.1, Annex, paragraph (m) (emphasis added).

<sup>141</sup> “Setting a new collective quantified goal on finance in accordance with decision 1/CP.21, paragraph 53”, Decision 14/CMA.1, 19 March 2019, FCCC/PA/CMA/2018/3/Add.2, paragraph 1.

<sup>142</sup> “Setting a new collective quantified goal on finance in accordance with decision 1/CP.21, paragraph 53”, Decision 14/CMA.1, 19 March 2019, FCCC/PA/CMA/2018/3/Add.2, paragraph 2.

arises under customary international law and is also an aspect of the good faith implementation of Article 2(1)(c) of the Paris Agreement and related provisions as discussed above. The specific elements of due diligence as an obligation under customary international law are set out in paragraphs 42-48 and the obligations and requirements considered in this section should be considered in that context.

105. In the light of the current evidence as to the emissions and production gaps, it is difficult to see how a State could meet its due diligence requirements if it ignores or overlooks the fact that investments in fossil fuels need to be phased out as a matter of urgency, taking into account the timescales for emission reduction indicated by the IPCC in its SR 1.5. The relevance of the production gap is that, as UNEP has shown, further expanding production is inconsistent with the achievement of the Paris Agreement goals. The specific obligations relating to finance flows would therefore appear to preclude the continuation of subsidies for fossil fuel production, including support provided by ECAs and other forms of public finance. In order to address this issue, it may be appropriate for a multilateral agreement to be reached on the phase out of such subsidies (as has been done for coal, see paragraphs 253-264 below) and other forms of support. However, the presence or absence of such a multilateral commitment does not in our view supplant or remove the obligation on State parties to consider as a matter of urgency the phase out of all fossil fuel subsidies on the basis of their duties under the UNFCCC/Paris Agreement.
106. **Key risks to be addressed in due diligence for ECA funding:** Given their importance for the prospects of achieving the Paris Agreement goals, the key risks of overshoot (see paragraphs 70-71 above) and the crossing of tipping points must form part of a good faith due diligence process. The risks of lock-in and stranded assets are also central to a determination of the longer term implications of fossil fuel investments for emissions and climate resilient development.
107. **Lock-in:** The 2020 Production Gap Report defines carbon lock-in as:

“The tendency for certain carbon-intensive technological systems to persist over time, ‘locking out’ lower-carbon alternatives, owing to a combination of linked technical, economic, and institutional factors” (Glossary, page v).

In relation to fossil fuel production, the 2019 UNEP Production Gap Report observes that:

“The more fossil fuel infrastructure that is built, the harder it is to shift away from fossil-based energy, for reasons both financial and political (Gurria 2013; Seto et al. 2016). Limiting fossil fuel production therefore has tangible emission reduction benefits by helping non-fossil alternatives compete (Erickson and Lazarus 2014)...

...the continued rapid expansion of gas supplies and systems risks locking in a much higher gas trajectory than is consistent with a 1.5°C or 2°C future. However, national plans and projections — and the current boom in liquefied natural gas

(LNG) infrastructure (Nace et al. 2019) — indicate that countries are on track for this kind of rapid expansion...

...Government support reduces the capital and operational costs of extraction to fossil fuel producers, thus unlocking projects that would otherwise not be commercially viable.”<sup>143</sup>

We note that the Report of the UNFCCC Standing Committee on Finance on the 2018 Biennial Assessment indicates potential stranded assets of \$20 trillion by 2050 and potentially \$35 trillion real estate assets at risk by 2070.<sup>144</sup>

108. **Scope 3 emissions:** Greenhouse gas emissions are categorised into three groups or “scopes” by the most widely-used international accounting tool, the Greenhouse Gas (GHG) Protocol.<sup>145</sup> Scope 1 covers direct emissions from owned or controlled sources. Scope 2 covers indirect emissions from the generation of purchased electricity, steam, heating and cooling consumed by the reporting company. Scope 3 includes all other indirect emissions that occur in a company's value chain. In our view, the consistency of finance flows with the Article 2 pathways can only be assessed effectively if scope 3 emissions are taken into account. Specific guidance on scope 3 emissions has been developed by the Greenhouse Gas Protocol Initiative.<sup>146</sup>
109. The Task Force on Climate Related Financial Disclosures (TCFD) has recommended that scope 3 emissions should be reported “if appropriate”.<sup>147</sup> This goes beyond the explicit requirements of the OECD Common Approaches which address only scope 1

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<sup>143</sup> EI, IISD, ODI, Climate Analytics, CICERO, and UNEP (2019). *The Production Gap: The discrepancy between countries' planned fossil fuel production and global production levels consistent with limiting warming to 1.5°C or 2°C*, pages 9, 18 and 24 <<http://productiongap.org/>>.

<sup>144</sup> “Report of the Standing Committee on Finance”, Decision 4/CP.24, 19 March 2019, FCCC/CP/2018/10/Add.1, Annex, page 26 (Figure 3: Climate finance in context). The note to the graphic states: Note: All flows are global and annual for 2016 unless stated otherwise. Energy investment needs are modelled under a 2 °C scenario. The representation of stocks that overlap is not necessarily reflective of real-world overlaps. The flows represented are not representative of all flows contributing to the stocks presented. Data points are provided to place climate finance in context and do not represent an aggregate or systematic view. Climate finance flows are those represented in section B of the Summary and Recommendations and as reported in chapter 2 of the 2018 Biennial Assessment and Overview of Climate Finance Flows technical report. Investment in renewable energy overlaps with this estimate of climate finance flows. Source: See figure 3.9 in the 2018 Biennial Assessment and Overview of Climate Finance Flows technical report

<sup>145</sup> Available at <https://ghgprotocol.org/corporate-standard>. As stated on the website, the Greenhouse Gas Protocol Initiative is a multi-stakeholder partnership of businesses, non-governmental organizations (NGOs), governments, and others convened by the World Resources Institute (WRI), a U.S.-based environmental NGO, and the World Business Council for Sustainable Development (WBCSD). The Initiative's mission is to develop internationally accepted greenhouse gas accounting and reporting standards for business and to promote their broad adoption. The GHG Protocol Initiative comprises two separate but linked standards: the GHG Protocol Corporate Accounting and Reporting Standard and the GHG Protocol Project Quantification Standard, see further at <https://ghgprotocol.org/about-us> (accessed 8 March 2021).

<sup>146</sup> Such guidance is available at <<https://ghgprotocol.org/standards/scope-3-standard>>

<sup>147</sup> TCFD, *Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures* (June 2017), pages 12, 27 and 79.

and 2 emissions (paragraph 46 of the Common Approaches) (see further below, Section III.2.C).

110. Due diligence must entail in our view 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. In this context, that means that scope 3 emissions should be included in any assessment of ECA support for fossil fuels, notwithstanding the extent to which a host State may, or may not, be able to comply with their current NDCs if they import fossil fuels. The associated risk of lock-in both in relation to the host State and more widely should also be addressed since this is relevant to the risks, both environmental and economic (and therefore also social) posed by the investment.
111. In this context, actions by ECAs which undermine fulfilment of a host State's NDC constitute a breach of the consistency requirement in Article 2(1)(c) of the Paris Agreement and the duties placed on developed countries, in particular under Article 9. In view of the global impact of greenhouse gas emissions and the continuing emissions and production gaps, the continuation of ECA financing for fossil fuel production also undermines the donor State's domestic efforts to address climate change by reducing the impact of those contributions and leading to a widening of the existing emissions and production gaps.
112. In our view, the duties of good faith implementation and the interpretation of the provisions of the Paris Agreement in good faith serve to limit the discretion of State parties to undermine their own NDCs, or those of other State parties, by directing finance flows in such a way as to undermine their contribution and contrary to goals set in Article 2(1)(c). The language of Article 2(1)(c) does not indicate that the goal is limited to finance flows which occur within individual parties. The significant impact of international financial flows, including ECA funding, is evident, as outlined in Section I. In our view consistency with the pathways indicated in Article 2(1)(c) is to be assessed in relation to all finance flows including those which relate to international investments and including ECAs. It is clear from the context considered in Section I above that international finance flows including ECAs play a significant role in fossil fuel related investment and thus Article 2(1)(c) and related requirements of the Paris Agreement fall to be considered when making decisions about financial support for fossil fuel related projects located in other States.
113. **Transparency:** The purpose of the Transparency Framework established under Article 13 of the Paris Agreement 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, and Parties' adaptation actions under Article 7, including good practices, priorities, needs and gaps, to inform the global stocktake under Article 14" (Article 13(5))

114. As discussed above (paragraphs 78-81), in our view 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.
115. Article 13 of the Paris Agreement calls for information submitted under the transparency framework to undergo a technical expert review as well as a "facilitative, multilateral consideration of progress" (Article 13 paragraphs (11) and (13)).
116. The explicit reference to a low emissions pathway in Article 2(1)(c) of the Paris Agreement means in our view that State parties should report the impact of their financial flows, including those awarded by ECAs, on emissions. This also follows from Articles 9(5) and (7) and Article 13(9). This should then be assessed under the technical expert review.
117. **Biennial Assessment:** The Standing Committee on Finance (SCF) assists the COP in exercising its functions with respect to the Financial Mechanism of the Convention, inter alia, in terms of measurement, reporting and verification of support provided to developing country Parties, through activities such as the biennial assessment and overview of climate finance flows (BA).<sup>148</sup> In 2018, the COP requested the SCF to map, every four years, as part of its Biennial Assessment and overview of climate finance flows, the available information relevant to Article 2, paragraph 1(c), of the Paris Agreement.<sup>149</sup>
118. The 2018 Biennial Assessment provided an updated overview of climate finance flows in 2015 and 2016, considered the implications of these flows and assessed their relevance to international efforts to address climate change.<sup>150</sup> The 2018 Biennial Assessment included, for the first time, information relevant to Article 2(1)(c), including methods and metrics, and data sets on flows, stocks and considerations for integration.

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<sup>148</sup> "Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention", Decision 2/CP.17, 15 March 2012, FCCC/ CP/2011/9/Add.1, paragraph 121(f).

<sup>149</sup> "Report of the Standing Committee on Finance", Decision 4/CP.24, 19 March 2019, FCCC/ CP/2018/10/Add.1, paragraph 10.

<sup>150</sup> UNFCCC Standing Committee on Finance, *2018 Biennial Assessment and Overview of Climate Finance Flows. Technical Report, Summary and recommendations*, paragraph 4 < <https://unfccc.int/sites/default/files/resource/2018%20BA%20Technical%20Report%20Final.pdf> >

119. In our view, in the light of the scope of the goals laid down in Article 2(1)(c), future Biennial Assessments should address finance flows that are inconsistent with Article 2(1)(c) as well as those that are consistent with the Article 2 pathway. In the light of the information available to State parties as to the ongoing emissions and production gaps, and of concerns as to the extent to which these undermine the achievement of the Paris Agreement goals, State parties should have a complete picture on finance flows which includes flows which are inconsistent with those goals. Otherwise the picture is a misleading one. It is not possible to measure “consistency” within the meaning of Article 2(1)(c) in our view, unless inconsistent flows are also taken into account. The problem is highlighted in UNEP’s Production Gap Reports and, in our view, it is incumbent on State parties to the Paris Agreement to ensure that processes established to assess the consistency of financial flows with Article 2(1)(c) also measure inconsistent flows, particularly those related to the production of new fossil fuel reserves.
120. An accurate picture of the consistency of financial flows with an Article 2 pathway will also enable parties to determine with greater effectiveness the collective ambition of NDCs and State parties mitigation efforts for the purposes of Article 2(1)(a), bearing in mind that, as acknowledged by the SCF: “The reduction of GHG emissions remains the primary impact metric for climate change mitigation.”<sup>151</sup>
121. As is signalled in the 2018 Biennial Assessment:
- “Ongoing voluntary efforts to develop approaches for tracking and reporting on consistency of public and private sector finance with the [Paris Agreement] are important for enhancing the collective understanding of the consistency of the broader finance and investment flows with Article 2, paragraph 1(c), of the [Paris Agreement]...
- Some financial actors, such as MDBs and bilateral DFIs, have started to develop approaches for tracking the integration of climate change considerations into their operations. However, there was no publicly available information on the progress made on this matter at the time of preparation of the 2018 BA [biennial assessment]. Ongoing work for developing climate-resilience metrics is important for enhancing understanding of the consistency of multilateral and bilateral development finance with the [Paris Agreement].”<sup>152</sup>
- The SCF indicates greatest uncertainty in relation to data on private climate finance.<sup>153</sup>

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<sup>151</sup> UNFCCC Standing Committee on Finance, *2018 Biennial Assessment and Overview of Climate Finance Flows. Technical Report*, Summary and recommendations, paragraph 46.

<sup>152</sup> UNFCCC Standing Committee on Finance, *2018 Biennial Assessment and Overview of Climate Finance Flows. Technical Report*, Summary and recommendations, paragraphs 21-22.

<sup>153</sup> UNFCCC Standing Committee on Finance, *2018 Biennial Assessment and Overview of Climate Finance Flows. Technical Report*, Chapter 2, paragraph 229.

122. Estimates of renewable and sustainable climate finance do not give a full picture for the purposes of Article 2(1)(c) of the Paris Agreement unless they report information on the extent to which they may be undermined by the finance of fossil fuels. Thus figure 1 on Climate Finance Flows (page 9 of the SCF Technical Report) only presents part of the picture for the purposes of assessing Article 2(1)(c). We note however that there remains a risk that aggregate information including offsetting may obscure fossil fuel finance by reporting a single number. Even net positive climate finance would be inconsistent if a significant level of finance is provided to new fossil fuel projects.
123. We note that the SCF Summary and Recommendations do make brief reference to negative flows:
- “Across the financial sector, both the reporting of data on financial flows and stocks consistent with low greenhouse gas (GHG) emissions and climate-resilient pathways, and the integration of climate considerations into decision-making are at a nascent stage. The data sets available on bond markets are the most advanced, with regular and reliable data published based on green bond labelling and analysis of bonds that may be aligned with climate themes. *Less information is available on bonds that may be inconsistent with low GHG emissions and climate-resilient pathways*. Other market segments lack completeness of coverage and reporting quality across peer institutions”<sup>154</sup> (emphasis added)
124. The SCF, in its 2018 Report to the COP, did address inconsistent flows to a degree, as part of the context for assessing consistency with Article 2(1)(c):
- “Climate finance continues to account for just a small proportion of overall finance flows (see figure 3); the level of climate finance is considerably below what one would expect given the investment opportunities and needs that have been identified. However, although climate finance flows must obviously be scaled up, it is also important to ensure the consistency of finance flows as a whole (and of capital stock) pursuant to Article 2, paragraph 1(c), of the Paris Agreement. *This does not mean that all finance flows have to achieve explicitly beneficial climate outcomes, but that they must reduce the likelihood of negative climate outcomes*. Although commitments are being made to ensure that finance flows from DFIs are climate consistent, more can be done to understand public finance flows and ensure that they are all consistent with countries’ climate change and sustainable development objectives”<sup>155</sup> (emphasis added)
125. In our view, it appears that the SCF and the State parties need to go further in addressing the production gap in this regard, by taking into account the full “net” impact of finance flows that are inconsistent with Article 2(1)(c) (whilst bearing in mind that a net figure

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<sup>154</sup> Report of the Standing Committee on Finance to the Conference of the Parties, 23 November 2018, FCCC/CP/2018/8, Annex II: Summary and recommendations by the Standing Committee on Finance on the 2018 Biennial Assessment and Overview of Climate Finance Flows, paragraph 36.

<sup>155</sup> Report of the Standing Committee on Finance to the Conference of the Parties, 23 November 2018, FCCC/CP/2018/8, Annex II: Summary and recommendations by the Standing Committee on Finance on the 2018 Biennial Assessment and Overview of Climate Finance Flows, paragraph 49.

may not of itself show that the production gap is being addressed, see paragraph 122 above). The SCF/COP/CMA should call on State parties to account for these inconsistent flows in their reporting and to increase their efforts to end such flows. Figure 3 of the 2018 Biennial Assessment Report indicates 373 billion dollars of fossil fuel subsidies but does not appear to draw any conclusion from this acknowledgement, nor invite the Parties to do so.

126. In its recommendations, which were welcomed by State parties,<sup>156</sup> the SCF recommended the COP to invite:

“private sector associations and financial institutions to build on the progress made on ways to improve data on climate finance and to engage with the SCF, including through their participation in the forums of the SCF with a view to enhancing the quality of the BA [biennial assessment]”

The SCF also recommended that the COP:

“Request the SCF to continue its work in the mapping of available data sets that integrate climate change considerations into insurance, lending and investment decision-making processes, and to include information relevant to Article 2, paragraph 1(c), of the Paris Agreement in future BAs [biennial assessments]”<sup>157</sup>

127. The Fourth Biennial Assessment, to be launched at COP26, will focus on climate finance flows for 2017 and 2018 as well as any identified trends from previous years.<sup>158</sup> As indicated in a 2019 Report of the SCF, the Fourth Assessment, in assessing global total climate finance and developing country flows in context will include:

“(a) Total investments by sector and region, including in high-carbon energy;  
(b) *Estimates of subsidies*;  
(c) *Subsidies and financing measures affecting forests and land-use change*;  
(d) Global finance at risk from climate change.”<sup>159</sup>

128. Although this does not explicitly refer to ECA support, that should, in our view, be included, for the reasons set out above.

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<sup>156</sup> The recommendations were welcomed by the Parties, see “Long-term climate finance”, Decision 3/CP.24, 19 March 2019, FCCC/CP/2018/10/Add.1, paragraph 1.

<sup>157</sup> Report of the Standing Committee on Finance to the Conference of the Parties, 23 November 2018, FCCC/CP/2018/8, Annex II: Summary and recommendations by the Standing Committee on Finance on the 2018 Biennial Assessment and Overview of Climate Finance Flows, Section IV (Recommendations), paragraph 51, letters (h) and (i).

<sup>158</sup> Report of Standing Committee on Finance, 6 November 2019, FCCC/CP/2019/10–FCCC/PA/CMA/2019/3, Annex II: Outcome of discussions on the 2020 Biennial Assessment and Overview of Climate Finance Flows.

<sup>159</sup> Report of Standing Committee on Finance, 6 November 2019, FCCC/CP/2019/10–FCCC/PA/CMA/2019/3, Annex II: Outcome of discussions on the 2020 Biennial Assessment and Overview of Climate Finance Flows, paragraph 22 (emphasis added).



129. **Global Stocktake:** Article 9(6) of the Paris Agreement confirms that the Global Stocktake provided for under Article 14 of the Paris Agreement “shall take into account the relevant information provided by developed country Parties and/or Agreement bodies on efforts related to climate finance.” As confirmed by decision of the CMA, the Global Stocktake will include:

“(b) Technical assessment, focusing on taking stock of the implementation of the Paris Agreement to assess the collective progress towards achieving the purpose and long-term goals of the Paris Agreement, as well as opportunities for enhanced action and support to achieve its purpose and goals”<sup>160</sup>

Sources of input to the Global Stocktake will include information at a collective level on:

“(d) The finance flows, including the information referred to in Article 2, paragraph 1(c), and means of implementation and support and mobilization and provision of support, including the information referred to in Article 9, paragraphs 4 and 6, Article 10, paragraph 6, Article 11, paragraph 3, and Article 13, in particular paragraphs 9 and 10, of the Paris Agreement. This should include information from the latest biennial assessment and overview of climate finance flows of the Standing Committee on Finance;

(e) Efforts to enhance understanding, action and support, on a cooperative and facilitative basis, related to averting, minimizing and addressing loss and damage associated with the adverse effects of climate change;

(f) Barriers and challenges, including finance, technology and capacity-building gaps, faced by developing countries”<sup>161</sup>

The CMA has also decided that: ‘equity and the best available science will be considered in a Party-driven and cross-cutting manner, throughout the global stocktake.’<sup>162</sup>

130. In our view, the reference to the best available science in the decision taken by the Parties in relation to the Global Stocktake confirms that, in relation to the assessment of progress towards achieving the goal set in Article 2(1)(c), the collective impact of fossil fuel subsidies and/or ECA support (and other public financial support) for fossil fuels should be taken into account so that the net (and overall) finance flow can be assessed.

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<sup>160</sup> “Matters relating to Article 14 of the Paris Agreement and paragraphs 99–101 of decision 1/CP.21”, Decision 19/CMA.1, 19 March 2019, FCCC//PA/CMA/2018/3/Add.2, paragraph 3(b).

<sup>161</sup> “Matters relating to Article 14 of the Paris Agreement and paragraphs 99–101 of decision 1/CP.21”, Decision 19/CMA.1, 19 March 2019, FCCC//PA/CMA/2018/3/Add.2, paragraph 36(d)-(f).

<sup>162</sup> “Matters relating to Article 14 of the Paris Agreement and paragraphs 99–101 of decision 1/CP.21”, Decision 19/CMA.1, 19 March 2019, FCCC//PA/CMA/2018/3/Add.2, paragraph 2.

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131. In the light of the above, it is our view that the provisions of the UNFCCC and the Paris Agreement set out the following obligations in respect of ECA funding of fossil fuels-related projects/activities:
- (a) In the context of concerns about the production gap and the adverse impacts of fossil fuel subsidies, State parties to the UNFCCC and the Paris Agreement, through their official ECAs or in their regulation of separate ECAs, are required to ensure that any further ECA support for fossil fuels is consistent with the goals and principles of the Paris Agreement, including those set out in Articles 2, 3 and 4. As a result, the States parties bear the onus to show – or to require ECAs to show – that funding decisions: (i) are consistent with the goals and principles of the Paris Agreement, including those set out in Articles 2, 3 and 4, (ii) do not undermine the achievement of current or future NDCs in recipient States, and (iii) more generally, are consistent with the aim of peaking emissions as soon as possible and undertaking rapid reductions thereafter, so as to achieve net zero (and recognizing that peaking will take longer for developing countries);
  - (b) If State parties are unable to show – or to require ECAs to show – such consistency with the Paris Agreement’s goals, the financial support should not be provided or authorised;
  - (c) States parties – through their official ECAs or in their regulation of separate ECAs – should be able to demonstrate how ECA policies/decisions meet the obligations of (i) the funding State and/or (ii) the recipient State’s obligations under the UNFCCC and the Paris Agreement (Article 2(1)(c) of the Paris Agreement, Article 9, 10, 11 and 13 as read with Articles 3 and 4 of the Paris Agreement);
  - (d) The principle of common but differentiated responsibilities is relevant to fossil fuel funding by ECAs, as is the principle of equity.<sup>163</sup> One implication of these principles, taken together with Article 9(3) of the Paris Agreement, is that developed country ECAs need to take the lead in ending financing for fossil fuel industries as this undermines the positive impact of finance flows which are consistent with Article 2(1)(c) of the Paris Agreement;
  - (e) In line with Article 13, including paragraphs (5) and (6), and in order to fulfil their obligations under Articles 2, 3 and 4 of the Paris Agreement effectively, State parties should adopt a transparent approach to providing information on support provided by ECAs, whether as official entities or as separate regulated ones, for fossil fuels including as to the projects they support, the assessment of the emissions generated by such projects over their lifetime, the extent to which the

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<sup>163</sup> This principle is referred to inter alia in Article 3(1) of the UNFCCC and in Article 2(2), 4(1) and 14(1) of the Paris Agreement.

project locks in emissions and the basis for funding the project instead of lower emitting alternatives, including in relation to the goals of eradicating poverty in developing countries;

- (f) Such a process should account for any undermining of domestic mitigation action by the host State of the ECA, arising from ECA funding for fossil fuels which increases global emissions.

B. *Duties arising under international human rights law*

- 132. As explained in Section II of this Opinion, the conduct of ECAs can be governed by international legal obligations applicable to States, directly (First Scenario: when the conduct of the ECA is attributed to the State) or indirectly (Second Scenario: through the State's duties to regulate ECAs as separate legal entities), and by those applicable to ECAs as individual duty-bearers (Third Scenario). Different obligations can apply concurrently. For example, certain specific action/inaction of an ECA, as a separate legal entity, may be attributable to a State and therefore governed as such while, at the same time, the State remains bound to diligently regulate the entire conduct of the ECA (including conduct not attributable to the State) and the ECA, as such, remains bound by its own international obligations.
- 133. This section of the Opinion examines the relevance of international human rights law for the conduct of ECAs in connection with the continued financing of fossil fuel-related projects/activities despite the context described in Section I. It focusses first on the relevant international obligations of States and then on those of ECAs as duty-bearers.
- 134. **Obligations of States:** Regarding the obligations of States, both directly and indirectly governing the conduct of ECAs, the specific context of the financing of projects abroad raises the issue of whether such obligations cover human rights violations beyond the territory of the home State but within an extended conception of its jurisdiction. In the case law of the ICJ and human rights bodies, human rights violations taking place abroad may be deemed to be under the extraterritorial jurisdiction of a State if the latter (or entities whose conduct is attributable to it) had "effective control" over the

victim.<sup>164</sup> This effective control is generally understood as “the exercise of physical power and control over the person in question”.<sup>165</sup>

135. However, a broader conception of control and, hence, of jurisdiction has been recognised by some human rights bodies. In its *Advisory Opinion 23/17*, the Inter-American Court of Human Rights reasoned that State control over the source of harm (and by analogy over an ECA) may be sufficient to consider that a situation taking place abroad falls nevertheless under the jurisdiction of a State:

“For the purposes of the American Convention, when transboundary damage occurs that affects treaty-based rights, *it is understood that the persons whose rights have been violated are under the jurisdiction of the State of origin, if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory* [ ... ]. In cases of transboundary damage, *the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or under whose jurisdiction the activities were carried out that has the effective control over them and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory*”<sup>166</sup>

136. A similar position has been taken by the UN Human Rights Committee in *Basem Ahmed Issa Yassin v. Canada*:

“While the human rights obligations of a State on its own territory cannot be equated in all respects with its obligations outside its territory, the Committee considers that *there are situations where a State party has an obligation to ensure that rights under the Covenant are not impaired by extraterritorial activities conducted by enterprises under its jurisdiction.*”<sup>167</sup>

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<sup>164</sup> International Court of Justice: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory, ICJ Reports 2004, p. 136, paragraphs 108–113; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, ICJ Reports 2008, p. 353, paragraph 109. UN Human Rights Committee: *Delia Saldias de Lopez v. Uruguay*, HRC Communication no. 52/1979 (29 July 1981), paragraphs 12.1 and 12.3. African Commission of Human and Peoples Rights: *Association pour la sauvegarde de la paix au Burundi v. Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*, Communication no. 157/96 (29 May 2003), paragraph 75. European Court of Human Rights: *Al-Skeini and Others v UK*, ECtHR Application no. 55721/07 (7 July 2011), paragraphs 130-140; *Jaloud v the Netherlands*, ECtHR Application no. 47708/08 (20 November 2014), paragraph 139. Inter-American Commission on Human Rights: *Alejandro and Others v. Cuba* (1999), IACommHR Case 11.589, Report no. 86/99, paragraphs 23–25; *Ecuador v. Colombia* (2010), IACommHR, Inter-State Petition IP-02, Report no. 112/10, paragraph 91.

<sup>165</sup> *Al-Skeini and Others v UK*, ECtHR Application no. 55721/07, 7 July 2011, paragraph 136.

<sup>166</sup> *Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia: The Environment and Human Rights (State obligations in relation to the environment within the framework of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4.1 and 5.1 in relation with Articles 1.1 and 2 of the American Convention on Human Rights)*, paragraphs 101-102 (emphasis added).

<sup>167</sup> *Basem Ahmed Issa Yassin v Canada*, HRC Communication no. 2285/2013 (26 July 2017), paragraph 6.5 (emphasis added).

On the facts of the case, the Committee considered the communication inadmissible, but in reaching this conclusion it clarified what steps would be expected from a diligent home State under the International Covenant on Civil and Political Rights (ICCPR):<sup>168</sup>

“in the present case, the authors have not provided the Committee with sufficient information about the extent to which Canada could be considered responsible as a result of a *failure to exercise reasonable due diligence over the relevant extraterritorial activities of the two corporations*. This includes, for example, a lack of information regarding the existing *regulations in place in the State party governing the corporations’ activities* and the *State party’s capacity to effectively regulate the activities at issue*; the *specific nature of the corporations’ role* in the construction of the settlement and the *impact of their actions on the rights of the authors*; and the *information reasonably available to the State party regarding these activities, including the foreseeability of their consequences*”<sup>169</sup>

137. Further authority for this broader conception of jurisdiction can be derived from some concluding observations and general comments from the Human Rights Committee,<sup>170</sup> the Committee on Economic, Social and Cultural Rights,<sup>171</sup> and the Committee on the Elimination of Racial Discrimination.<sup>172</sup>
138. Of note, in these authorities, the distinction between, on the one hand, the requirements for extending the scope of the human rights obligations of a State extraterritorially and, on the other hand, those to consider the State in breach of its human rights obligations under the relevant treaty is not clearly made. The factual considerations that may be relied upon for both inquiries may be similar, but the scope of operation of the relevant obligations and the existence of a breach are distinct questions. The conclusion that can be derived from the authorities reviewed so far is that the scope of operation of a State’s human rights obligations under the relevant treaties may be extended to cover

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<sup>168</sup> International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

<sup>169</sup> *Basem Ahmed Issa Yassin v Canada*, HRC Communication no. 2285/2013 (26 July 2017), paragraph 6.7 (emphasis added).

<sup>170</sup> Concluding Observations on the Sixth Periodic Report of Germany adopted by the Committee at its 106th Session (15 October–2 November 2012) CCPR/C/DEU/CO/6, (12 November 2012), paragraph 16; *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, 30 October 2018, CCPR/C/GC/36, paragraphs 21-22.

<sup>171</sup> Concluding observations on the sixth periodic report of Canada, E/C.12/CAN/CO/6 (23 March 2016), paragraphs 15 and 16; Concluding observations of the Committee on Economic Social and Cultural Rights: Germany E/C.12/DEU/CO/5 (12 July 2011), paragraphs 10-11; Concluding observations on the fourth periodic report of Austria E/C.12/AUT/CO/4 (13 December 2013), paragraphs 11-12; *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, paragraphs 31-33; *General Comment No. 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic Social and Cultural Rights)*, E/C.12/2002/11, 20 January 2003, paragraphs 31-34; *General Comment No. 18: The Right to Work*, E/C.12/GC/18, 6 February 2006, paragraph 30; *General Comment No. 14: The Right to the Highest Attainable Standard of Health (article 12 of the International Covenant on Economic Social and Cultural Rights)*, E/C.12/2000/4, 11 August 2000, paragraph 39; *General Comment 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, UN Doc. E/C.12/ 1997/8, 12 December 1997, paragraphs 11–14.

<sup>172</sup> Concluding Observations on Canada, CERD/C/CAN/CO/18, 25 May 2007, paragraph 17.

extraterritorial situations when the State has control over the source of harm. This is directly relevant for the situation of ECAs, whether their conduct is attributable to the home State or indirectly governed by the home State's obligations to regulate them. The next question is whether ECAs' continued financing of fossil fuel-related projects/activities despite the context described in Section I may violate certain internationally recognised human rights.

139. The relevant obligations of States include those arising from a wide range of internationally recognised human rights. Their scopes vary, however, due to both their nature (treaty-based, hence binding only on State parties, or customary international law, in principle generally applicable) and the specific object protected (life, health, private and family life, property, culture, etc.). Yet, it is generally considered that every human right entails three correlative State obligations: the obligation of the State *to respect* the human rights of the right-holders under its jurisdiction; the obligation of the State *to protect* the right-holders from deprivation of their human rights by third parties or certain natural phenomena; and the obligation of the State *to fulfil* the conditions enabling the full enjoyment of a human right.<sup>173</sup>
140. The obligations of States to respect, protect and fulfil can be understood as specific manifestations of the general duty of due diligence<sup>174</sup> examined in Section III.1 of this Opinion, whether in a territorial or an extraterritorial context. Although the due diligence nature of these obligations is most visible in the 'positive' obligations to protect and to fulfil, it also concerns the obligation to respect to the extent that the mere occurrence of harm does not amount to responsibility if there is no faulty behaviour of the duty-bearer. Stated in different terms, obligations arising from human rights are not obligations of result, which would be breached every time harm occurs, irrespective of the circumstances.
141. Assessing the consistency of ECAs continued financing of fossil fuel-related projects despite the context described in Section I with States' obligations under international human rights law would require a case-by-case analysis in the light of specific conduct (action/inaction) and specific human rights obligations. Yet, a general assessment is possible by reference to the statements of human rights bodies which have addressed the activities of ECAs or other analogous entities, including multinational corporations. The legal authority of these statements has been expressly recognised by the ICJ in the

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<sup>173</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food (Art. 11), UN Doc. E/C.12/1999/5, 12 May 1999, paragraph 15; Report on the Right to Adequate Food as a Human Right. Final Report Presented by the Special Rapporteur Asbjørn Eide, UN Doc. E/CN.4/Sub.2/1987/23, 7 July 1987, paragraphs 66–69; *African Commission on Human and Peoples' Rights, Social and Economic Rights Action Center (SERAC) and Others v. Nigeria*, Comm. no. 155/96 (27 October 2001), paragraphs 44–47.

<sup>174</sup> *Velasquez Rodriguez v Honduras*, ICtHR, Judgment (29 June 1988), Series C No. 4, paragraph 172; *Opuz v Turkey*, ECtHR Application No. 33401/02, Judgment (9 June 2009), paragraphs 129–130; *Talpis v Italy*, ECtHR Application No. 41237/14, Judgment (2 March 2017), paragraph 129.

*Diallo* case in relation to the practice of the UN Human Rights Committee and of regional human rights bodies:

“the Human Rights Committee has built up a *considerable body of interpretative case law, in particular through its findings in response to the individual communications* which may be submitted to it in respect of States parties to the first Optional Protocol, *and in the form of its “General Comments”*. Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that *it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty*. The point here is to achieve the *necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled* [ ... ] *Likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question.*”<sup>175</sup>

142. Some directly relevant practice of human rights bodies has been identified in paragraph 34 of this Opinion. We now examine them to assess whether ECAs’ continued financing of fossil fuel-related projects/activities despite the context described in Section I may violate certain internationally recognised human rights.
143. General Comment No. 24<sup>176</sup> from the Committee on Economic, Social and Cultural Rights clarifies the requirements of all the rights included in the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>177</sup> in connection with business activities. These activities are broadly defined to encompass “all activities of business entities, *whether they operate transnationally or their activities are purely domestic, whether they are fully privately owned or State-owned*, and regardless of their size, sector, location, ownership and structure.”<sup>178</sup> Due to its broad coverage, General Comment No. 24 is framed from the perspective of States’ obligations arising from the rights recognised in the ICESCR, particularly the obligation of non-discrimination and the obligations to respect, protect and fulfil such rights.

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<sup>175</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, ICJ Reports 2010, p. 639, paragraphs 66-67 (emphasis added).

<sup>176</sup> 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.

<sup>177</sup> International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

<sup>178</sup> 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 3 (emphasis added).

144. The activities of ECAs are expressly contemplated under the obligation to protect. States parties should: “revise relevant tax codes, public procurement contracts, export credits and other forms of State support, privileges and advantages in case of human rights violations, thus aligning business incentives with human rights responsibilities”.<sup>179</sup> In the extraterritorial context ordinarily involved in the activities of ECAs:

“a State party would be in breach of its obligations under the Covenant where the violation reveals a *failure by the State to take reasonable measures that could have prevented the occurrence of the event. The responsibility of the State can be engaged in such circumstances even if other causes have also contributed to the occurrence of the violation, and even if the State had not foreseen that a violation would occur, provided such a violation was reasonably foreseeable.* For instance, considering the well-documented risks associated with the extractive industry, particular due diligence is required with respect to mining-related projects and oil development projects”<sup>180</sup>

145. This well-documented risk is not limited to infringements of human rights arising directly from the operations of the extractive industries; it also encompasses the similarly well-documented risk arising from the contribution of fossil fuel projects/activities to climate change, with its massive effects on human rights. A landmark Joint Statement on “Human Rights and Climate Change” adopted by five human rights treaty bodies expressly concludes that:

“in order for States to comply with their human rights obligations and to realize the objectives of the Paris Agreement, they must adopt and implement policies aimed at reducing emissions. *These policies must reflect the highest possible ambition, foster climate resilience and ensure that public and private investments are consistent with a pathway towards low carbon emissions and climate resilient development [ ... ]*

*In their efforts to reduce emissions, States parties should contribute effectively to phasing out fossil fuels, promoting renewable energy and addressing emissions from the land sector, including by combating deforestation. In addition, States must regulate private actors, including by holding them accountable for harm they generate both domestically and extraterritorially. States should also discontinue financial incentives or investments in activities and infrastructure that are not consistent with low greenhouse gas emissions pathways, whether undertaken by*

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<sup>179</sup> 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. 15

<sup>180</sup> 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 32 (emphasis added).



*public or private actors, as a mitigation measure to prevent further damage and risk.*<sup>181</sup>

146. In the current state of science, it is clear that such impacts of activities that contribute to climate change on human rights are “reasonably foreseeable”, and that “reasonable measures” could prevent the occurrence of the events leading to the infringements. Such reasonable measures would include,<sup>182</sup> as noted in connection with the general duties of due diligence (see paragraph 48 above): refraining in principle from financing new fossil fuel-related projects/activities or increasing the financing of existing ones; decreasing existing support within a clear timeframe dictated, first and foremost, by scientific considerations and the temperature goals of the Paris Agreement, as a reflection of a global consensus; proactively avoiding “locking-in” fossil fuel-related projects/activities which may use up a significant part of the remaining carbon budget; adopting and proactively implementing adequate procedures to assess the carbon footprint of any project to be potentially supported; adopting and proactively implementing guidelines concerning the performance of the activities of the relevant ECA in the context described in Section I.
147. General Comment No. 16<sup>183</sup> from the Committee on the Rights of the Child is more specific on the types of measures that are expected from a State acting diligently to regulate business activities under the Convention on the Rights of the Child (**CRC**).<sup>184</sup> Paragraph 45 of General Comment No. 16 identifies several measures to be taken in order “to prevent the infringement of children’s rights by business enterprises when they are operating abroad”:
- “(a) Making access to public finance and other forms of public support, such as insurance, *conditional on a business carrying out a process to identify, prevent or mitigate any negative impacts on children’s rights in their overseas operations*;
  - (b) Taking into account the *prior record* of business enterprises on children’s rights *when deciding on the provision of public finance and other forms of official support*;

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<sup>181</sup> *Statement on Human Rights and Climate Change*, Joint statement by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, 14 May 2020, HRI/2019/1, paragraphs 11 and 12, footnotes omitted (emphasis added). The footnotes in these paragraphs refer to additional statements and practice of these committees of further relevance for the link between contribution to climate change and human rights obligations.

<sup>182</sup> Committee on Economic, Social and Cultural Rights, *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, E/C.12/GC/24, paragraph 50.

<sup>183</sup> Committee on the Rights of the Child, *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights*, 17 April 2013, CRC/C/GC/16.

<sup>184</sup> Convention on the Rights of the Child, 20 November 1989, 1977 UNTS 3.

(c) *Ensuring that State agencies with a significant role regarding business, such as export credit agencies, take steps to identify, prevent and mitigate any adverse impacts the projects they support might have on children’s rights before offering support to businesses operating abroad and stipulate that such agencies will not support activities that are likely to cause or contribute to children’s rights abuses.*<sup>185</sup>

Remaining within the carbon budget compatible with the objectives of the Paris Agreement is particularly important for children’s rights because of their particular exposure to the adverse effects of climate change. Paragraph 4(a) of General Comment No. 16 emphasises that, in establishing “adequate legal and institutional frameworks to respect, protect and fulfil children’s rights, and to provide remedies in case of violations in the context of business activities and operations”, States “should take into account that [ ... ] violations of children’s rights, such as exposure to [ ... ] environmental hazards may have lifelong, irreversible and even transgenerational consequences”.<sup>186</sup>

148. In *Basem Ahmed Issa Yassin v. Canada*, the UN Human Rights Committee clarified the elements that it would take into account in assessing whether a State has exercised “reasonable due diligence over the relevant extraterritorial activities” of a corporation, including the “regulations in place” in the home State, this State’s “capacity to effectively regulate the activities at issue”, “the specific nature of the corporations’ role” in the relevant activities and “the impact of their actions on the rights of the [affected individuals]”, and the “information reasonably available to the State party regarding these activities, including the foreseeability of their consequences”.<sup>187</sup> These elements are relevant both for official ECAs supporting a corporation abroad and for ECAs as separate entities which, as a result of their financing, are involved in the “activities at issue”.
149. In the statements of the three committees reviewed so far, and in line with the general due diligence duty of States, the measures expected from a State are based on the fact that the adverse impact is reasonably “foreseeable” or “likely”. It is important to recall, again, the contextual parameters within which this Opinion is given, namely the climate emergency with the limited remaining carbon budget, the widely acknowledged need to reform fossil fuel subsidies and the substantial contribution of ECA financing of fossil fuel-related projects/activities to depleting the remaining budget. These contextual parameters are “well-documented” (see paragraphs 7-9 of this Opinion).

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<sup>185</sup> Committee on the Rights of the Child, *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights*, 17 April 2013, CRC/C/GC/16, paragraph 45 (emphasis added).

<sup>186</sup> Committee on the Rights of the Child, *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights*, 17 April 2013, CRC/C/GC/16, paragraph 4(a).

<sup>187</sup> *Basem Ahmed Issa Yassin v Canada*, HRC Communication no. 2285/2013 (26 July 2017), paragraph 6.7 (emphasis added).

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150. As a result, it can be concluded that, *under international human rights law, States, whether acting through official ECAs or in relation to separate ECAs regulated by them, are required in principle: not to finance new fossil fuel-related projects/activities or increase the financing of existing ones; to decrease existing support<sup>188</sup> within a clear timeframe dictated, first and foremost, by scientific considerations and the temperature goals of the Paris Agreement, as a reflection of a global consensus; to proactively avoid “locking-in” fossil fuel-related projects/activities which may use up a significant part of the remaining carbon budget; to adopt and proactively implement adequate procedures to assess the carbon footprint of any project to be potentially supported; to adopt and proactively implement guidelines concerning the performance of the activities of the relevant ECA in the context described in Section I.*

151. **Procedural obligations:** One additional requirement imposed on any “public authority” under the Aarhus Convention<sup>189</sup> is to make environmental information available to the public in response to a request, under certain conditions defined in Article 4 of the Convention. As noted in paragraph 34(a) of this Opinion, the term “public authority” normally encompasses both official and separate ECAs (Article 2(2)).<sup>190</sup> The term “environmental information” is broadly defined in Article 2(3) as:

“any information in written, visual, aural, electronic or any other material form on:

(a) The state of elements of the environment, such as *air and atmosphere*, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) Factors, such as substances, energy, noise and radiation, and *activities or measures*, including administrative measures, environmental agreements, policies, legislation, plans and programmes, *affecting or likely to affect the elements of the environment* within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above”

152. The “activities or measures [ ... ] affecting or likely to affect the elements of the environment”, with the later elements including “air and atmosphere” would likely

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<sup>188</sup> See footnote 38 above.

<sup>189</sup> Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998, 2161 UNTS 447.

<sup>190</sup> Findings and recommendations with regard to communication ACCC/C/2009/37 concerning compliance by Belarus (adopted by the Compliance Committee on 24 September 2010), paragraph 67 (concerning private entities).

encompass the information about the activities of ECAs in connection with the financing of fossil fuel-related projects/activities, to the extent that the latter affect or are likely to affect the state of the atmosphere, specifically the quantity of greenhouse gases in it. In an analogous context, the Compliance Committee of the Aarhus Convention has considered that “[t]he contracts for rent of lands of the State Forestry Fund, to which access was requested by the communicant, constitute ‘environmental information’ as defined in article 2, paragraph 3 (b), of the Convention”.<sup>191</sup> In another case concerning a request for the disclosure of financing contracts by the European Investment Bank relating to a thermal power plant in Albania, the Compliance Committee specified that:

“financing agreements, even though not listed explicitly in the definition, may sometimes amount to ‘measures ... that affect or are likely to affect the elements of the environment’. For example, if a financing agreement deals with specific measures concerning the environment, such as the protection of a natural site, it is to be seen as containing environmental information. *Therefore, whether the provisions of a financing agreement are to be regarded as environmental information cannot be decided in a general manner, but has to be determined on a case-by-case basis*”<sup>192</sup>

153. Articles 4 and 5 generally require State parties to “ensure” that “public authorities” “posses”, “update”, “disseminate” and “make available” such information upon request, within certain specific parameters. Grounds to refuse access are listed in paragraphs (3) and (4) of Article 4. The latter states that “[t]he aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment”.
154. The right of access to environmental information rests also on other international instruments with a scope wider or different from the Aarhus Convention.
155. At the global level, General Comment No. 15 of the Committee on Economic, Social and Cultural Rights states that:

“[b]efore any action that interferes with an individual’s right to water is carried out by the State Party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner [ ... ] that comprises [ ... ] (b) timely and full disclosure of information on the proposed measures”<sup>193</sup>

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<sup>191</sup> Findings adopted by the Compliance Committee on 25 September 2009 with regard to compliance by the Republic of Moldova with its obligations under the Convention (communication ACCC/C/2008/30), paragraph 29.

<sup>192</sup> Findings with regard to communication ACCC/C/2007/21 concerning compliance by the European Community, adopted by the Compliance Committee on 3 April 2009, paragraph 30(b) (emphasis added).

<sup>193</sup> *General Comment No. 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic Social and Cultural Rights)*, E/C.12/2002/11, 20 January 2003, paragraph 56.

General Comment No. 15 further states in this regards that “[i]ndividuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties”.<sup>194</sup> In a similar vein, General Comment No. 36 of the Human Rights Committee states, in connection with the right to life enshrined in Article 6 of the ICCPRs, that:

“Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life [ ... ] Obligations of States parties under international environmental law should thus inform the contents of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law.”<sup>195</sup>

One corollary of this statement is that “States parties should therefore [ ... ] provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach”.<sup>196</sup>

156. At a regional level, the right of access to environmental information is clearly recognised as an implicit requirement of several human rights enshrined *inter alia* in the African Charter on Human and Peoples’ Rights (**African Charter**),<sup>197</sup> the American Convention on Human Rights (**ACHR**)<sup>198</sup> and the European Convention on Human Rights (**ECHR**).<sup>199</sup> In *SERAC v. Nigeria*, the African Commission observed that the rights to health (Article 16) and to a generally satisfactory environment (Article 24) enshrined in the African Charter include a strong procedural component.<sup>200</sup> In a

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<sup>194</sup> *General Comment No. 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic Social and Cultural Rights)*, E/C.12/2002/11, 20 January 2003, paragraph 48. See further *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Republic of Korea*, 17 December 2009, UN Doc. E/C.12/KOR/CO/3, paragraph 32 (concluding that the State party must “ensure that adequate information on health hazards relating to the bottled drinking water that was found to contain carcinogenic substances is made available to the public”).

<sup>195</sup> *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, 30 October 2018, CCPR/C/GC/36, paragraph 62.

<sup>196</sup> *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, 30 October 2018, CCPR/C/GC/36, paragraph 62. The footnote placed at the end of this sentence explicitly refers to “Rio Declaration on Environment and Development, 14 June 1992, principles 1, 2, 11, 15, 17, 18. Cf. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998”.

<sup>197</sup> African Charter on Human and Peoples' Rights, 27 June 1981, 21 ILM 58 (1982).

<sup>198</sup> American Convention on Human Rights, 22 November 1969, 1144 UNTS 12.

<sup>199</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No.005.

<sup>200</sup> *African Commission on Human and Peoples’ Rights, Social and Economic Rights Action Center (SERAC) and Others v. Nigeria*, Comm. no. 155/96 (27 October 2001), paragraph 53 (“Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.”)

1997 Report on the situation of human rights in Ecuador, the Inter-American Commission on Human Rights recognised that the right of access to environmental information was part of Article 13 (freedom of thought and expression) and related to Articles 23 (right to participate in government) and 25 (right to judicial protection).<sup>201</sup> Similarly, the Inter-American Court of Human Rights confirmed that the obligation to provide access to information is part of the right to freedom of thought and expression (Article 23) and to judicial guarantees enshrined in Article 8(1) of the ACHR.<sup>202</sup> Furthermore, a Regional Agreement was concluded in 2018 with a content similar to the Aarhus Convention, expressly providing for a right of access to environmental information.<sup>203</sup> In the European context, the European Court of Human Rights has interpreted Articles 2 (right to life) and 8 (right to private and family life) of the ECHR as including a strong procedural component characterised by reference to the Aarhus Convention,<sup>204</sup> even in cases where the respondent State is not a party to the latter.<sup>205</sup>

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157. In the context of this Opinion, these provisions are relevant because they provide an *international legal basis to require States to ensure that ECAs, whether as official or separate entities, possess, update, disseminate and make available upon request information about their financing of fossil fuel-related projects/activities.*
158. **Obligations of ECAs as duty-bearers:** Regarding the obligations of ECAs as duty-bearers, the main consideration for present purposes is not whether the instruments

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<sup>201</sup> Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Ecuador*, 24 April 1997, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, Chap. VIII, conclusions (“Access to information is a prerequisite for public participation in decision-making and for individuals to be able to monitor and respond to public and private sector action. Individuals have a right to seek, receive and impart information and ideas of all kinds pursuant to Article 13 of the American Convention. Domestic law requires that parties seeking authorization for projects which may affect the environment provide environmental impact assessments and other specific information as a precondition. However, individuals in affected sectors have indicated that they lack even basic information about exploitation activities taking place locally, and about potential risks to their health. The Government should ensure that such information as the law in fact requires be submitted is readily accessible to potentially affected individuals”).

<sup>202</sup> *Case of Claude-Reyes et al. v. Chile*, 19 September 2006, Merits, Reparations, and Costs Judgment, ICtHR Series C No. 15, paragraphs 88-103 and 114-123.

<sup>203</sup> Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, 4 March 2018, Articles 5 and 6 (this treaty will enter into force on 22 April 2021).

<sup>204</sup> *Tătar v. Romania*, ECtHR Application No. 67021/01, Judgment (6 July 2009), paragraphs 113-118.

<sup>205</sup> *Taşkin and others v. Turkey*, ECtHR Application No. 46117/ 99, Judgment (30 March 2005), paragraphs 98-99 (referring to the Aarhus Convention) and 118-119 (“The Court reiterates that, according to its settled case-law, whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect for the interests of the individual as safeguarded by Article 8 [ ... ] Where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals’ rights and to enable them to strike a fair balance between the various conflicting interests at stake [ ... ] The importance of public access to the conclusions of such studies and to information which would enable members of the public to assess the danger to which they are exposed is beyond question”).

identified in paragraph 35 of this Opinion have a binding character or not, but the fact that they provide corroboration that such obligations are not “of a strictly interstate character”<sup>206</sup> and that they may “attach to the non-State individual”.<sup>207</sup>

159. Assessing the consistency of ECAs’ continued financing of fossil fuel-related projects/activities despite the context described in Section I with their obligations as duty-bearers under international human rights law would require a case-by-case analysis. Yet, it is possible to shed light on this question in general terms by reference to some of the instruments most directly relevant to the activities of ECAs. The following discussion does not cover the OECD Common Approaches,<sup>208</sup> which are specifically examined in Section III.2.C of this Opinion.

160. The UN Guiding Principles on Business and Human Rights<sup>209</sup> address the activities of ECAs both explicitly, from the perspective of the State’s duty to protect, and implicitly, from that of the ECA itself. Regarding the first perspective, Principle 4 provides that:

“States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence”

This principle is a re-statement of the requirements discussed in paragraphs 134-150 relating to the obligations of States. However, in the commentary to this principle, the position of the entity as duty-bearer is more clearly addressed:

“Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk – in reputational, financial, political *and potentially legal terms* – for supporting any such harm, and they may add to the human rights challenges faced by the recipient State.”<sup>210</sup>

161. ECAs as duty-bearers are encompassed<sup>211</sup> by the general duty stated in Principle 11 of the UN Guiding Principles, according to which: “[b]usiness enterprises should respect

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<sup>206</sup> *Nevsun Resources Ltd. v. Araya*, Judgment (28 February 2020), 2020 SCC 5 (CanLII), paragraph 113.

<sup>207</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, Award (8 December 2016), paragraph 1195.

<sup>208</sup> Organisation of Economic Co-operation and Development, Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence, adopted on 28 June 2012 and revised by the OECD Council on 6 April 2016, OECD/LEGAL/0393.

<sup>209</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, HRC Resolution 17/4 (16 June 2011).

<sup>210</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, HRC Resolution 17/4 (16 June 2011), commentary to Principle 4, page 7.

<sup>211</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, HRC Resolution 17/4 (16 June 2011), Principle 14: “The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure”.

human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”. Understood as corroboration that the relevant internationally recognised human rights are not “of a strictly interstate character”<sup>212</sup> and may “attach to the non-State individual”,<sup>213</sup> this statement emphasises that certain human rights obligations govern the conduct of ECAs as such. Principle 12 identifies the relevant human rights by reference, as a minimum,<sup>214</sup> to the “International Bill of Rights”, an expression encompassing both customary and treaty international law, as codified and/or provided for in the Universal Declaration of Human Rights,<sup>215</sup> the ICCPR and the ICESCR.

162. As applied to a non-State entity, *these international obligations require business entities to discharge duties analogous to the duties of States to respect and to protect, as well as to provide access to environmental information.*

163. Principle 13 formulates the duties requiring business enterprises to:

“(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”

The role of ECAs is covered to the extent that, at a minimum, “their business relationships”, namely the entities involved in the fossil fuel-related projects/activities receiving financial support, are contributing to the adverse impacts on human rights through climate change. The link may be more direct in that ECAs can no longer ignore that supporting new fossil fuel capacity creates a tangible risk of aggravating the impact of climate change on human rights. Principles 15 to 21 further specify the steps that business enterprises must take, which Principle 15 summarises as including “a policy commitment” to respect human rights, a “human rights due diligence process” and “processes to enable the remediation” of their adverse impacts.

164. For the activities of ECAs, two requirements deserve closer attention. First, according to Principle 14, business enterprises – including ECAs – must display a degree of diligence commensurate with their scale, complexity and severity of the enterprise’s impact on human rights. This involves, according to Principle 17, establishing

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<sup>212</sup> *Nevsun Resources Ltd. v. Araya*, Judgment (28 February 2020), 2020 SCC 5 (CanLII), paragraph 113.

<sup>213</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, Award (8 December 2016), paragraph 1195.

<sup>214</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, HRC Resolution 17/4 (16 June 2011), commentary to Principle 12, pages 13-14.

<sup>215</sup> Universal Declaration of Human Rights, 10 December 1948, UN General Assembly Resolution 217 A(III) of 10 December 1948.



procedures capable of “assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed”. Principle 18 adds that this assessment should cover “any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships”. Secondly, in line with the requirements imposed on “public authorities” under the Aarhus Convention to provide environmental information upon request, Principle 21 states that:

“In order to account for how they address their human rights impacts, *business enterprises should be prepared to communicate this externally*, particularly when concerns are raised by or on behalf of affected stakeholders. *Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them.*”<sup>216</sup>

165. In addition to the UN Guiding Principles, the OECD Guidelines for Multinational Enterprises<sup>217</sup> are also relevant for the conduct of ECAs. This has been confirmed by a specific instance initiated by a group of civil society organisations against the Dutch ECA, Atradius, before the Dutch National Contact Point (NCP) under the OECD Guidelines.<sup>218</sup> The complaint concerned the provision of export credit insurance by Atradius to a Dutch company in connection with a dredging project in Brazil. The complainants alleged *inter alia* that Atradius had failed to exercise influence on the Dutch company to ensure the latter’s compliance with the Guidelines.
166. The first finding of the NCP which is relevant for present purposes concerns the application of the OECD Guidelines to ECAs. Atradius and the State challenged such application to the transactions in question. The NCP concluded, however, that the Guidelines were applicable to Atradius:

“The NCP is aware of the international policy frameworks within which ADSB [Atradius] and other Export Credit Agencies operate. However, the Common Approaches do not preclude the Guidelines’ applicability to the OECD member states or implementing organisations. Furthermore, ADSB states that it attaches great importance to its corporate social responsibility both as a private enterprise and as a manager of the Dutch State’s export credit insurance facility. The NCP is of the opinion that the export credit services by the Dutch State and ADSB are part of a business relationship within the meaning of the Guidelines”.<sup>219</sup>

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<sup>216</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, HRC Resolution 17/4 (16 June 2011), Principle 21 (emphasis added).

<sup>217</sup> OECD, Guidelines for Multinational Enterprises, Annex I to the Declaration on International Investment and Multinational Enterprises, 25 May 2011.

<sup>218</sup> *Final Statement, Both ENDS, Associação Fórum Suape Espaço Socioambiental, Conectas Direitos Humanos and Colônia de Pescadores do Município do Cabo de Santo Agostinho vs. Atradius Dutch State Business* (30 November 2016).

<sup>219</sup> *Final Statement, Both ENDS, Associação Fórum Suape Espaço Socioambiental, Conectas Direitos Humanos and Colônia de Pescadores do Município do Cabo de Santo Agostinho vs. Atradius Dutch State Business* (30 November 2016), at 4.

167. Another key aspect of the NCP findings concerned the extent to which an insurance company, which has less leverage than other financiers, could be expected under the Guidelines to exercise leverage. Paragraph II.A.12 of the Guidelines states that:

“Enterprises should [ ... ] [s]eek to prevent or mitigate an adverse impact where they have not contributed to that impact, *when the impact is nevertheless directly linked to their operations, products or services by a business relationship*. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship”<sup>220</sup>

The NCP considered that “[s]ince the leverage that can be exerted by insurance companies after issuing an insurance policy is limited, effective ex ante due diligence on all aspects of the proposed transaction, including the elements referred to in the Guidelines, deserves their full attention and is the core business of insurance companies.”<sup>221</sup> After an evaluation of the different allegations, it stated that both the ECA and its client, the Dutch company, “have a duty to comply not only with national and regional laws and regulations, but also with relevant international norms and standards, including - but not limited to - the Guidelines”.<sup>222</sup> With respect to the ECA, it concluded that:

“as an MNE [Multinational Enterprise] under the Guidelines, [Atradius] is ‘directly linked’ to possible adverse impacts to which its business relationships [the Dutch company benefiting from the insurance support] have ‘contributed’; it may not quite have fulfilled its duty to use its leverage over these business relationships, as described in paragraph II.A.12 of the Guidelines, to prevent or mitigate these possible adverse impacts”.<sup>223</sup>

168. The findings of the Dutch NCP are relevant for two main reasons. First, they corroborate that “the relevant international norms and standards”<sup>224</sup> are not “of a strictly interstate character”<sup>225</sup> and that they may “attach to the non-State individual”.<sup>226</sup> Secondly, they suggest that the OECD Guidelines may apply to some ECAs, as

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<sup>220</sup> OECD, Guidelines for Multinational Enterprises, Annex I to the Declaration on International Investment and Multinational Enterprises, 25 May 2011, paragraph II.A.12 (emphasis added).

<sup>221</sup> *Final Statement, Both ENDS, Associação Fórum Suape Espaço Socioambiental, Conectas Direitos Humanos and Colônia de Pescadores do Município do Cabo de Santo Agostinho vs. Atradius Dutch State Business* (30 November 2016), at 5.

<sup>222</sup> *Final Statement, Both ENDS, Associação Fórum Suape Espaço Socioambiental, Conectas Direitos Humanos and Colônia de Pescadores do Município do Cabo de Santo Agostinho vs. Atradius Dutch State Business* (30 November 2016), at 7.

<sup>223</sup> *Final Statement, Both ENDS, Associação Fórum Suape Espaço Socioambiental, Conectas Direitos Humanos and Colônia de Pescadores do Município do Cabo de Santo Agostinho vs. Atradius Dutch State Business* (30 November 2016), at 7.

<sup>224</sup> *Final Statement, Both ENDS, Associação Fórum Suape Espaço Socioambiental, Conectas Direitos Humanos and Colônia de Pescadores do Município do Cabo de Santo Agostinho vs. Atradius Dutch State Business* (30 November 2016), at 7.

<sup>225</sup> *Nevsun Resources Ltd. v. Araya*, Judgment (28 February 2020), 2020 SCC 5 (CanLII), paragraph 113.

<sup>226</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, Award (8 December 2016), paragraph 1195.

multinational enterprises. The views of national NCPs on this point diverge, however. The UK NCP has dismissed further examination of a complaint brought by a non-governmental organisation in connection with UK Export Finance (UKEF)'s support for fossil fuel projects on the grounds *inter alia* that UKEF is not a multinational enterprise.<sup>227</sup> Similarly, the Korean NCP has also dismissed the applicability of the OECD Guidelines to certain activities of the Korean ECA, KEXIM, because of their non-commercial nature.<sup>228</sup> Yet, in these two cases, it was the specific nature of the ECA (UKEF was described by the government as “a ministerial government department”) or the transaction (“a concessional loan” by KEXIM) which determined the outcome. The UK NCP expressly noted that “[w]hat constitutes a multinational enterprise must be considered on a case-by-case basis”. In these two cases, there would be grounds to consider the conduct of the relevant ECAs as attributable to the State under the rules codified in Articles 4 (for UKEF) and 5 (for KEXIM's specific transaction) of the ILC Draft Articles on State Responsibility.

169. The two instruments examined in the preceding paragraphs were not developed to govern specifically the activities of ECAs. Other more specific guidelines are examined next.

### C. *The OECD instruments on ECAs*

170. **The OECD Convention:** The OECD was established under the 1960 Convention on the Organisation for Economic Cooperation and Development (the **OECD Convention**).<sup>229</sup> Article 1 of the OECD Convention provides that the aims of the OECD shall be to promote policies designed:

“(a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;

(b) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and

(c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.”

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<sup>227</sup> Initial Assessment: Global Witness complaint to the UK NCP about UK Export Finance (9 September 2020), available at < <https://www.gov.uk/government/publications/global-witness-complaint-to-the-uk-ncp-about-uk-export-finance/initial-assessment-global-witness-complaint-to-the-uk-ncp-about-uk-export-finance#fn:7> >

<sup>228</sup> Initial Assessment of the Korean NCP for the OECD Guidelines for Multinational Enterprises. Complaint from the Jalaur River for the People's Movement, the People's Solidarity for Participatory Democracy and the Korean Transnational Corporations Watch regarding the Jalaur River Multi-Purpose Project II (18 January 2019), at 5 (“project funded by KEXIM is not an investment activity but a public project promoted by the Philippine government. As it is classified as a non-commercial project under the OECD Ex-Ante Guidance, such a concessional loan provision for the project is not considered to be an international investment or a commercial activity”), available at < [https://complaints.oecdwatch.org/cases/Case\\_547](https://complaints.oecdwatch.org/cases/Case_547) >

<sup>229</sup> Convention on the Organisation for Economic Co-operation and Development, 14 December 1960, UNTS 179.

171. The ninth recital of the preamble to the OECD Convention provides that the adopting Governments are:

*“Determined to pursue these purposes in a manner consistent with their obligations in other international organisations or institutions in which they participate or under agreements to which they are a party”* (emphasis added)

172. In our view, this recital indicates that the parties to the OECD Convention intended the actions taken under the Convention to be pursued in a manner consistent with other agreements to which they were party. The language suggests that this intention should be interpreted dynamically to include consistency with subsequent agreements such as the UNFCCC and the Paris Agreement (see Section III.2.A above). The reference to the promotion of coherence with international agreements and commitments set out in the OECD Recommendation of the Council on Environmental and Social Due Diligence for officially supported export credits<sup>230</sup> (the **Common Approaches**) is consistent with the intention expressed in the preamble to the Convention (see below).

173. Article 2(c) sets out individual and joint actions which members of the OECD agree to take in pursuit of these aims, including the pursuit of:

*“... policies designed to achieve economic growth and internal and external financial stability and to avoid developments which might endanger their economies or those of other countries”* (emphasis added)

174. In the light of language in the preamble, this language in Article 2(c) of the 1960 Convention should also be interpreted in the light of the goals and requirements of the international climate regime, including under Article 2 of the Paris Agreement (see Section III.2.A above) which include goals relating to the protection of economies from the risks posed by climate change (see for example Article 7(9)(e) of the Paris Agreement).

175. Under Article 5 of the OECD Convention, the Organisation may, in order to achieve its aims: (a) take decisions which, except as otherwise provided, shall be binding on all the Members; (b) make recommendations to Members; and (c) enter into agreements with Members, non-member States and international organisations.

176. Although it follows from the language of Article 5 that OECD Recommendations, such as the Common Approaches considered below, are not themselves legally binding (in contrast to OECD Decisions adopted under Article 5), in our view action taken under OECD Recommendations should be consistent with the requirements of the OECD Convention, including the direction in Article 2(c) and the ninth recital to the

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<sup>230</sup> Organisation of Economic Co-operation and Development, Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence, adopted on 28 June 2012 and revised by the OECD Council on 6 April 2016, OECD/LEGAL/0393.

Convention. It follows that the impacts of decisions taken by ECAs to fund fossil fuel-related projects/activities fall to be considered in the context of the requirements of the international climate regime, as well as the other international standards referred to in the Common Approaches, to the extent that they are relevant to meeting those requirements (see further below).

177. We note that Article 6 of the OECD Convention requires consensus for the adoption of Recommendations and Decisions, though members may abstain and thereby enter the equivalent of a reservation. In the absence of any abstention/reservation, there does not appear to be any basis for a member not to follow the recommendations laid down in the Common Approaches.

178. **The OECD and Sustainability:** Article 1 of the OECD Convention refers to “the highest sustainable economic growth” as an aim of policies promoted by the OECD. The goal of sustainable development is reflected in the OECD Common Approaches. The Preamble to the Common Approaches notes that:

“OECD Ministers in 2001 have recognised that export credit policy can contribute positively to sustainable development and should be coherent with its objectives”

179. **OECD Common Approaches:** The OECD Common Approaches were adopted in 2012 in the form of a Recommendation<sup>231</sup> and take the form of a set of guidelines on the approach to be adopted by ECAs to environmental, social and human rights impacts. The Common Approaches apply to all types of officially supported export credits for exports of capital goods and/or services, except exports of military equipment or agricultural commodities, with a repayment term of two years or more (paragraph 2).

180. “Adherents” are member and non-member States adhering to the Recommendation. At present, all Adherents are OECD member States.<sup>232</sup> Almost all OECD members are Adherents to the Common Approaches.<sup>233</sup>

181. The stated objectives of the Common Approaches include:

“[promoting] coherence between Adherents’ policies regarding officially supported export credits, their international environmental, climate change, social and human rights policies, and their commitments under relevant international

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<sup>231</sup> Organisation of Economic Co-operation and Development, Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence, adopted on 28 June 2012 and revised by the OECD Council on 6 April 2016, OECD/LEGAL/0393.

<sup>232</sup> The list of Adherents is available at < <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0318#adherents> > (accessed 7 March 2021)

<sup>233</sup> According to the OECD website, the only exceptions currently appear to be Lithuania and Colombia.

agreements and conventions, thereby contributing towards sustainable development” (paragraph 3(i))

“[promoting] good practice and consistent review and assessment processes for projects and existing operations benefiting from officially supported export credits, *with a view to achieving a high level of environmental and social performance as measured against the relevant international standards*” (paragraph 3(iii), emphasis added)

182. The preamble to the Common Approaches recognises that:

“whilst this Recommendation sets out common approaches for addressing environmental and social issues relating to officially supported export credits, Adherents may adopt additional measures for undertaking due diligence that are consistent with the overall objectives of this Recommendation and that any such measures should be shared with other Adherents with the aim of improving common practices, developing guidance and promoting a level playing field.”

183. The preamble also states that in recommending the Common Approaches, the OECD Council was wishing:

“to consolidate and build on commitments and progress made by Adherents and other countries to apply international standards to, and to develop environmental and social review procedures for, officially supported export credits”

184. The language set out above indicates that, as a matter of policy, the members of the OECD are seeking to treat the Common Approaches as a floor and not a ceiling and to treat international standards as a minimum which they will aim to build on. In our view, this also indicates that in adopting the Recommendation, members regarded the Common Approaches as a means to deliver their international obligations under relevant agreements, including those relating to climate change and human rights. Where these legal regimes lay down principles for state conduct, these should inform relevant action taken by States under the Common Approaches. The commitment to progression and ambition in the Paris Agreement (see Section III.2.A) therefore reinforces the need to interpret the Common Approaches expansively, having regard to the goals of the international climate regime and the increased effort required from State parties to achieve those goals. The international legal obligations of States remain, however, controlling. The Common Approaches, even when interpreted in the light of such obligations, are a guidance instrument and not a “safe harbour”. This means that meeting the requirements of the Common Approaches is not necessarily sufficient to establish compliance with international law, whether in the areas of climate change, human rights, or other areas.

185. In order to meet the objectives of the Common Approaches, Adherents are to:

“Encourage the prevention and the mitigation of adverse environmental and social impacts of projects and the consideration of environmental and social risks

associated with existing operations and take into account the benefits of any projects and existing operations supported, thereby enhancing the overall financial risk assessment process.

Undertake appropriate environmental and social reviews and assessments for projects and existing operations respectively, as part of their due diligence relating to applications for officially supported export credits” (paragraphs 4(i) and (ii))

186. Adherents are to screen (Part III) and classify (Part IV) all officially supported applications for export credits on the basis of their potential positive and negative environmental and social impacts. Projects are categorised as A, B and C. A project is classified as Category A if it has the potential to have significant adverse environmental and/or social impacts, which are diverse, irreversible and/or unprecedented. These impacts may affect an area broader than the sites or facilities subject to physical works. Category A, in principle, includes projects in sensitive sectors or located in or near sensitive areas (paragraph 11). An illustrative list of Category A projects set out in Annex 1 includes: “large scale oil, gas or liquified natural gas development, as well as installations for petrol storage of over 200,000 tonnes.”

187. Adherents should then conduct environmental and social review as set out in Part V of the Common Approaches (see paragraphs 190-191 below).

188. **Due diligence under the Common Approaches:** Due diligence is defined in the Recommendation as:

“the process through which Adherents identify, consider and address the potential environmental and social impacts and risks relating to applications for officially supported export credits as an integral part of their decision-making and risk management systems.”

189. As discussed above, one of the stated aims in adopting the Common Approaches was to build on commitments to apply international standards. The international law standards for due diligence have been addressed in Section III.1 (customary international law) and in Sections III.2.A (international climate change law) and III.2.B (international human rights law). In our view, the process of due diligence under the Common Approaches confirms and specifies the international law standards set out in those Sections and must also remain within the bounds set by those international law standards. We address below a number of specific elements of the due diligence to be conducted under the Common Approaches.

190. **Environmental and Social Impact Assessment:** The Preamble to the Common Approaches recognizes:

“the responsibility of Adherents to consider the positive and negative environmental and social impacts of projects, in particular in sensitive sectors or located in or near sensitive areas, and the environmental and social risks associated

with existing operations, in their decisions to offer official support for export credits”

191. Adherents are to undertake environmental and social review of projects:

“in accordance with the international standards applied to the project as set out in paragraphs 21-26 of this Recommendation, consisting of:

- benchmarking of the project’s environmental and social performance against the relevant aspects of the international standards applied to the project; and
- consideration of measures that can be taken to prevent, minimise, mitigate or remedy adverse impacts and/or to improve environmental and social performance, as appropriate to the size of the relevant parties involved in the project, the context of their operations, the nature and extent of potential adverse impacts, the international standards applied to the project, and the significance of the Adherent’s share in the overall project” (paragraph 13)

192. When undertaking a review, Adherents should indicate to the appropriate parties involved in the project the type of information they require, including, where appropriate, the need for an Environmental and Social Impact Assessment (ESIA). The applicant is responsible for providing the appropriate information to satisfy Adherents’ requirements. The information to be supplied for an ESIA includes but is not limited to:

“A description of the project and its geographic, ecological, social, and temporal context.

- Information relating to the potential environmental and/or social impacts of the project, together with any information on related mitigating and monitoring measures.
- The standards, practices and processes that the parties involved in the project intend to apply, including information that the project complies with local legislation and other host country relevant regulations.
- The results of any public consultations with local communities directly affected by the project and/or their legitimate representatives and of any engagement with other parties, such as civil society organisations, that have expressed an interest in the project. It is the responsibility of the buyer/project sponsor to undertake any such public consultations and/or engagements with interested parties. For the purposes of public consultations, environmental and social impact information should be made available to affected communities in a language accessible to them” (paragraph 17)

193. Paragraph 18 of the Common Approaches provides that, for a Category A project, Adherents should require an ESIA to be undertaken. The applicant is responsible for providing the resulting ESIA report, together with other studies, reports or action plans covering the relevant aspects of the project. An ESIA report and any supporting documents should address the issues set out in the international standards applied to



the project in accordance with paragraphs 21-26 of the Common Approaches: in this context, Annex II contains information on the typical items to be included in an ESIA report. An ESIA should not be carried out and reviewed by the same party.

194. Annex II to the Common Approaches states that an ESIA should examine global, transboundary, and cumulative impacts as appropriate (paragraph 5)
195. **International Standards:** The international standards referred to in paragraphs 21-26 of the Common Approaches include: the World Bank Safeguard Policies (now the Environmental and Social Standards (ESS), see paragraph 35 of this Opinion) and the IFC Performance Standards (paragraph 21) together with the World Bank EHS Guidelines.<sup>234</sup>
196. The IFC Performance Standards include: Assessment and Management of Environmental and Social Risks and Impacts (PS1); Labor and Working Conditions (PS2); Resource Efficiency and Pollution Prevention (PS3); Community Health, Safety, and Security (PS4); Land Acquisition and Involuntary Resettlement (PS5); Biodiversity Conservation and Sustainable Management of Living Natural Resources (PS6); Indigenous Peoples (PS7); and Cultural Heritage (PS8).
197. On 1 October 2018, the World Bank launched a new Environmental and Social Framework (ESF) which replaces the former safeguard policies and sets out 10 Environmental and Social Standards (ESS). The ESS replace the standards set out under the Safeguard Policies referred to in the Common Approaches. The ESS include ESS1 on Assessment and Management of Environmental and Social Risks and Impacts.
198. Paragraph 25 of the Common Approaches provides that in the absence of any relevant industry sector EHS Guidelines, Adherents should benchmark against the relevant aspects of any internationally recognised sector specific or issue specific standards and then sets out examples including the Convention on Nuclear Safety<sup>235</sup> and the Joint Convention on the Safety of Spent Fuel Management<sup>236</sup>; and/or may refer to relevant international sources of guidance and set out examples such as where appropriate, the Hydropower Sustainability Assessment Protocol<sup>237</sup> and the Core Values and Strategic

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<sup>234</sup> “EHS Guidelines” refers to the World Bank Group Environmental, Health and Safety Guidelines: these are technical reference documents with general and industry sector performance levels and measures that are normally acceptable to the World Bank Group and that the World Bank Group generally considers to be achievable in new undertakings at reasonable costs by existing technology (para 1)

<sup>235</sup> Convention on Nuclear Safety, 17 June 1994, 1963 UNTS 293.

<sup>236</sup> Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, 5 September 1997, 2153 UNTS 303.

<sup>237</sup> Hydropower Sustainability Assessment Protocol, available at <<https://www.hydrosustainability.org/assessment-protocol>>

Priorities of the World Commission on Dams (WCD) Report for hydro-power projects.<sup>238</sup>

199. Paragraph 26 of the Common Approaches states:

“Alternatively, where appropriate, Adherents may benchmark projects against the relevant aspects of *any other internationally recognised standards*, such as European Union standards, that are more stringent than those standards referenced above” (emphasis added)

200. Where an Adherent decides “in exceptional cases” to support a project that does not meet the relevant aspects of the international standards against which it has been benchmarked, “the reasons for the choice of international standards, the reasons for the failure to meet such international standards, the related justification for supporting the project, and any related monitoring procedures must be reported to the ECG in accordance with paragraph 44 of this Recommendation” (paragraph 30).

201. Paragraph 27 ensures that current standards are applied in the review process:

“The World Bank Safeguard Policies and the IFC Performance Standards referred to in paragraph 21 of this Recommendation are those applicable at the time of the adoption of the Recommendation. In the event of a review of such standards by the relevant standard-setting body, the ECG may decide to adopt the updated standards without undertaking a complete review of this Recommendation. The other international standards and sources of guidance referred to in paragraphs 22-26 of this Recommendation are those applicable at the time of the environmental and social review.”

202. In our view, where these international standards address climate change and human rights, action to meet those standards must be consistent with relevant international obligations (or indeed other international obligations of members, such as those relating to the protection of biodiversity). This follows from the terms of the OECD Convention (the preambular reference to consistency with international agreements to which states are party) as well as the stated objectives of the Common Approaches (promoting coherence with climate and human rights policies). In the context of climate change in particular, it also follows from the commitment in Article 2(c) of the OECD Convention, which refers to the pursuit of policies designed to avoid developments which might endanger their economies or those of other countries.

203. International obligations of OECD members which are relevant to the implementation of the Common Approaches must clearly be complied with, as appears to be the intention of OECD members in adopting the Recommendation. The international climate change regime and international human rights standards are relevant to the

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<sup>238</sup> World Commission on Dams, *Dams and Development: A New Framework for Decision-making* (London: Earthscan, 2000),

application of the review obligations laid down in the Common Approaches given the impacts of financial support made by ECAs (see Section I and Sections III.2A and B of this Opinion).

204. **Relationship with the International Climate Change Regime:** The Common Approaches explicitly recognise “the responsibility of Adherents to implement the commitments undertaken by the Parties to the United Nations Framework Convention on Climate Change” (preamble).
205. In our view, the Members of the OECD in making explicit reference to a number of international standards which are relevant to climate change, and to the achievement of the UNFCCC, have signalled that compliance with these is required in order to ensure coherence with the international climate regime. We consider the key standards below. We also consider standards to which the Common Approaches do not explicitly refer but which have been adopted to support the fulfilment of the UNFCCC and/or the Paris Agreement in relation to finance flows and are therefore relevant to the aim of ensuring coherence with international climate commitments and to standards to which the Common Approaches do expressly refer.
206. Furthermore, the scope of review provided for under the Common Approaches clearly encompasses the potential climate related environmental and social impacts of projects. The specific language of Annex II is relevant in this context, including the references to global, transboundary, and cumulative impacts as appropriate (paragraph 5). Paragraph 46 of the Common Approaches calls on Adherents to report the estimated annual greenhouse gas emissions from all fossil-fuel power plant projects and other projects, where such emissions are projected to be in excess of 25,000 tonnes CO<sub>2</sub>-equivalent annually (see further below at paragraphs 218-219 of this Opinion).
207. The reference in paragraph 26 to “other internationally recognised standards... that are more stringent than those standards referenced above” encompasses not only standards derived from the UNFCCC and/or the Paris Agreement (including through decisions of the COP/CMA or subsidiary bodies for example), but also in our view the Equator Principles and the Recommendations of the TCFD, considered below where these are more stringent.
208. Accordingly, in relation to climate change, and the review of the impacts of fossil fuel-related projects in particular, the principles and requirements of the UNFCCC and the Paris Agreement are clearly relevant both under the express terms of the Common Approaches (for the reasons stated above) and as international legal obligations of the Adherents as State parties to the UNFCCC and/or the Paris Agreement. Those obligations are relevant to ECAs in the ways described in Section III.2.A of this Opinion.

209. It follows that principles laid down by the UNFCCC and/or the Paris Agreement are also relevant to action taken under the Common Approaches, including the principle that action should be based on the “best available science”.<sup>239</sup> In this context, the best available science includes in our view the science presenting the emissions and production gaps and the threat they pose to achievement of the UNFCCC/Paris Agreement goals by further investment in fossil fuel production, as discussed above in Section I and Section III.2.A.
210. A review of a relevant Category A project, such as the development of new oil and gas fields, must therefore take into account the principles, goals and requirements of the UNFCCC and the Paris Agreement. A review which does not, for example, take account of all the physical and transition risks posed by a project, including the risk of overshoot of the Paris Agreement temperature goals and of lock-in and stranded assets, is not consistent with the international climate change regime in our view. Failure to address these risks would not meet the requirements of paragraph 17 of the Common Approaches for information “relating to the potential environmental and/or social impacts of the project”. Contribution to global greenhouse gas emissions and to the risk of overshoot of the international climate goals is clearly an environmental (and social) impact in our view.
211. A failure to take into account the emissions and production gaps and the likely impact on global emissions of the project in question will not enable ‘consideration of measures that can be taken to prevent, minimise, mitigate or remedy adverse impacts and/or to improve environmental and social performance,’ as required under paragraph 13 of the Common Approaches.
212. Such consideration should include the option of not proceeding with the project if the adverse impacts cannot be prevented or mitigated. Annex II to the Common Approaches requires an analysis of alternatives as part of the ESIA and this must include: “the basis for selecting the particular project design proposed and [justification for] recommended emission levels, including where relevant for greenhouse gases, and approaches to pollution prevention and abatement.” (paragraph 6)
213. The Common Approaches require that projects comply with host country laws and international standards. In relation to the latter, it is stated that:
- “Projects should also meet the international standards against which they have been benchmarked, in accordance with paragraphs 21-26 of this Recommendation, recognising that some of these standards contain margins of tolerance in how their overall objectives may be achieved.” (paragraph 29)

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<sup>239</sup> See the references in the Preamble, Article 4(1), Article 7 and Article 14 of the Paris Agreement.

214. Paragraph 30 then provides that in exceptional cases:

“an Adherent may decide to support a project that does not meet the relevant aspects of the international standards against which it has been benchmarked. In such cases, the reasons for the choice of international standards, the reasons for the failure to meet such international standards, the related justification for supporting the project, and any related monitoring procedures must be reported to the ECG in accordance with paragraph 44 of this Recommendation. With due regard to business confidentiality, aggregated information on such cases will be made publicly available by the ECG in accordance with paragraph 42 of this Recommendation.”

215. Clearly the implications of non-compliance with international or associated domestic legal obligations would not be resolved by operation of paragraph 30 alone but the provision does indicate that States should: acknowledge publicly cases where they proceed with support which does not meet international standards; that this should be exceptional and reasons should be provided.

216. **Transparency:** The Common Approaches also state that Adherents should: “foster transparency, predictability and responsibility in decision-making, by encouraging disclosure of relevant environmental and social impact information, with due regard to any legal stipulations, business confidentiality and other competitive concerns.” (paragraph 4(v))

217. In our view, the references to transparency in the Common Approaches should be considered in the context of duties laid down in relevant international treaties including the UNFCCC and the Paris Agreement (including Articles 12 and 13 of the Paris Agreement) as well as the Aarhus Convention and other procedural human rights obligations (see Section III.2.B above). The requirement for coherence in the preamble to the Common Approaches as well as the legal nature of those obligations all reinforce the need to address transparency in a rigorous and structured way under the Common Approaches.

218. **Greenhouse Gas Emissions:** Paragraph 46 of the Common Approaches states that:

“To facilitate the building of the body of experience and to give further consideration to climate change issues, Adherents shall:

- Report the estimated annual greenhouse gas emissions from all fossil-fuel power plant projects.
- Also report the estimated annual greenhouse gas emissions from other projects, where such emissions are projected to be in excess of 25 000 tonnes CO<sub>2</sub>-equivalent annually and where the applicant or project sponsor has provided the Adherents with the necessary information, e.g. via an ESIA report.

In this context, where relevant and feasible, Adherents shall try to obtain and to report the estimated annual direct and indirect greenhouse gas emissions (Scope I and Scope II respectively) in CO<sub>2</sub>- equivalent and/or the estimated annual direct greenhouse gas emissions (Scope 1) by carbon intensity (e.g. in g/kWh) for the six greenhouse gases to be generated during the operations phase of the project as provided during the environmental and social review.”

219. The issue raised by this paragraph is whether, in the light of the general requirements for review considered above, and in the light of the requirements of the UNFCCC and the Paris Agreement, Adherents should also address scope 3 emissions and climate related risks such as lock-in and stranded assets. We have addressed the range of climate related risks which fall to be addressed under the international climate regime in Section III.2.A of this Opinion and, in our view, the ESIA required for relevant Category A projects should also address these risks. In the light of the call for coherence with climate change (and human rights) policies in the Common Approaches and the reference to the UNFCCC, the lack of explicit reference to scope 3 emissions in paragraph 46 is not determinative in our view, where it is clear that the physical and/or transition risks of a project cannot be assessed without this information.

220. **Equator Principles:** The Equator Principles are a financial industry benchmark for determining, assessing and managing environmental and social risk in projects. They have been adopted by financial institutions, including some ECAs, for determining, assessing and managing ESHR risks in projects.<sup>240</sup> The fourth version of the Principles, Equator Principles 4 was adopted in July 2020, in place of Equator Principles III which were adopted in June 2013. The Disclaimer to the Principles states that:

“Financial institutions adopt and implement the Equator Principles voluntarily and independently, without reliance on or recourse to the IFC, the World Bank Group, the Equator Principles Association, or other EPFIs” (page 17)

221. Paragraph 45 of the Common Approaches provides that Adherents should:

“Engage with Equator Principles Financial Institutions, Major Multilateral Financial Institutions, ECAs from non-OECD countries and other relevant financial institutions with a view to sharing experiences and promoting common procedures and processes for undertaking due diligence and applying international standards.”

222. The Preamble to Equator Principles 4 provides that the EPFIs have adopted the Principles:

“...in order to ensure that the Projects we finance and advise on are developed in a manner that is socially responsible and reflects sound environmental management practices. EPFIs acknowledge that the application of the Equator Principles can contribute to delivering on the objectives and outcomes of the United Nations

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<sup>240</sup> See <[www.equator-principles.com](http://www.equator-principles.com)>

Sustainable Development Goals (SDGs). 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. In this regard, when financing Projects:

- we will fulfil our responsibility to respect Human Rights in line with the United Nations Guiding Principles on Business and Human Rights (UNGPs) by carrying out human rights due diligence;
- we support the objectives of the 2015 Paris Agreement and recognise that EPFIs have a role to play in improving the availability of climate-related information, such as the Recommendations of the [TCFD] when assessing the potential transition and physical risks of Projects financed under the Equator Principles”

223. The Principles apply globally and to all industry sectors. They apply to a range of financial products including project finance. In relation to export finance,<sup>241</sup> the principles state that “In the case of Export Credit Agency supported transactions, the new commercial, infrastructure or industrial undertaking to which the export is intended will be considered the Project” (page 29).

224. A number of States as well as individual ECAs<sup>242</sup> have stated that they adhere to the Equator Principles, including the United Kingdom’s ECA.

225. The Principles state that the EPFI will only provide Project Finance and Project-Related Corporate Loans to Projects that meet the relevant requirements of Principles 1-10 (page 6).

226. Principle 1 addresses review and categorisation of projects into Category A, B or C, on the basis of the IFC’s categorisation process. Category A projects include those with potential significant adverse environmental and social risks and/or impacts that are diverse, irreversible or unprecedented. This is clearly similar to the definition in the Common Approaches (see above).

227. In relation to climate change, the Environmental and Social Assessment required under Principle 2 must include a climate change assessment:

“For all Category A and, as appropriate, Category B Projects, and will include consideration of relevant physical risks as defined by the TCFD.”

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<sup>241</sup> Defined as an insurance, guarantee or financing arrangement which enables a foreign buyer of exported goods and/or services to defer payment over a period of time. Export credits are generally divided into short-term, medium-term (usually two to five years repayment) and long-term (usually over five years). (page 26)

<sup>242</sup> EP members are listed at < <https://equator-principles.com/members-reporting/> >

For all Projects, in all locations, when combined Scope 1 and Scope 2 Emissions are expected to be more than 100,000 tonnes of CO2 equivalent annually. Consideration must be given to relevant Climate Transition Risks (as defined by the TCFD) and an alternatives analysis completed which evaluates lower Greenhouse Gas (GHG) intensive alternatives.

The depth and nature of the Climate Change Risk Assessment will depend on the type of Project as well as the nature of risks, including their materiality and severity. Refer to Annex A for an overview of a Climate Change Risk Assessment, including alternatives analysis requirements.” (emphasis added)

228. Annex A to the Equator Principles addresses the Climate Change Risk Assessment and provides in part:

“The Climate Change Risk Assessment should address the following questions at a high level:

- What are the current and anticipated climate risks (transition and/or physical as defined by the TCFD) of the Project’s operations?
- Does the client have plans, processes, policies and systems in place to manage these risks? i.e. to mitigate, transfer, accept or control.

This assessment should also consider the Project’s compatibility with the host country’s national climate commitments, as appropriate.”

229. These elements are consistent with the need to address the transition and physical risks discussed above including: overshoot and the crossing of tipping points; lock-in and stranded assets, as well as more generally the impact of relevant projects on the production gap. Although the Equator Principles refer explicitly only to scope 1 and 2 emissions, they also endorse the TCFD Recommendations which in turn call for the assessment of scope 3 emissions if appropriate (see paragraphs 108-109 above). The reference to the Paris Agreement in the Preamble indicates an intention to conduct assessment in a way which supports the achievement of the international climate goals. For the reasons set out in Section III.2.A, we consider that this includes full assessment of the range of risks to those goals in the light of the best available scientific evidence represented by the IPCC Reports and Assessments and the UNEP Emissions and Production Gap Reports.

230. Principle 7 requires independent review of the assessment process for all Category A and, as appropriate Category B projects. Principle 10 addresses Reporting and Transparency and requires that for all Category A projects:

- The client will ensure that, at a minimum, a summary of the ESIA is accessible and available online and that it includes a summary of Human Rights and climate change risks and impacts when relevant 11.
- The client will report publicly, on an annual basis, GHG emission levels (combined Scope 1 and Scope 2 Emissions, and, if appropriate, the GHG



efficiency ratio<sup>12)</sup> during the operational phase for Projects emitting over 100,000 tonnes of CO<sub>2</sub> equivalent annually. Refer to Annex A for detailed requirements on GHG emissions reporting”

231. In our view, ECAs operating under the Common Approaches should apply the standards set out in the Equator Principles as other internationally recognised standards under paragraph 26 and/or as necessary to give effect to the need to address the requirements for ESIA as set out in paragraphs 17,18 and Annex II. Although these are voluntary standards they should be considered within the overall context of the international standards for due diligence discussed above in Section III.1, together with the requirements of the climate change regime addressed in Section III.2.A. The key issue however, over and above specific international standards, is that the implementation of the Common Approaches is coherent with international legal obligations relating to climate change under the UNFCCC and Paris, and with international climate policy. This entails an effective review of all the environmental and social risks posed by specific fossil fuel related projects.
232. **The TCFD:** We have considered the Recommendations of the TCFD in Section III.2.A of this Opinion. The TCFD Recommendations addresses governance, strategy, risk management and metrics and targets and both physical and transition climate risks.
233. The TCFD Recommendations place emphasis on the use of climate-related scenarios in risk assessment, stating that:
- “The Task Force recognizes the use of scenarios in assessing climate-related issues and their potential financial implications is relatively recent and practices will evolve over time, but believes such analysis is important for improving the disclosure of decision-useful, climate-related financial information.”<sup>243</sup>
234. The TCFD has also stated that organizations more significantly affected by transition risk, such as fossil fuel based industries, should consider a more in-depth application of scenario analysis (page 26) and that:
- “Organizations with more significant exposure to transition risk and/or physical risk should undertake more rigorous qualitative and, if relevant, quantitative scenario analysis with respect to key drivers and trends that affect their operations”<sup>244</sup>
235. The TCFD has stated that in conducting such analysis, organisations should strive to achieve transparency around parameters, assumptions, analytical approaches and time frames (page 29). Included among their recommendations was that organisations:

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<sup>243</sup> TCFD, *Recommendations of the Task Force on Climate-related Financial Disclosures* (June 2017), page v and pages 25-30.

<sup>244</sup> TCFD, *Recommendations of the Task Force on Climate-related Financial Disclosures* (June 2017), page 27.

“Describe how processes for identifying, assessing, and managing climate-related risks are integrated into the organization’s overall risk management;

Disclose the metrics used by the organization to assess climate-related risks and opportunities in line with its strategy and risk management process”<sup>245</sup>

The TCFD also noted that, in relation to climate related information:

“In general, inadequate information about risks can lead to a mispricing of assets and misallocation of capital and can potentially give rise to concerns about financial stability since markets can be vulnerable to abrupt corrections”<sup>246</sup>

236. In our view, ECAs operating under the Common Approaches should apply the standards recommended by the TCFD as other internationally recognised standards under paragraph 26 and/or as necessary to give effect to the need to address the social and environmental impacts for the purposes of ESIA as set out in paragraphs 17, 18 and Annex II.
237. **Relationship with human rights law:** The preamble to the Common Approaches notes that Adherents have “existing obligations to protect human rights and fundamental freedoms, and that business enterprises have the responsibility to respect human rights, as outlined in the ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’...” The application of international human rights law, including under the UNGP framework is addressed in Section III.2.B above.
238. It is notable that the framework for addressing human rights impacts has been strengthened since the adoption of the Common Approaches in 2012. Paragraph 14, introduced in the 2016 revision of the Common Approaches, states that:
- “where there is a high likelihood of severe project-related human rights impacts the environmental and social review of a project may need to be complemented by specific human rights due diligence.”
239. Paragraph 48 of the Common Approaches provides that Adherents shall give further consideration to the issue of human rights, with the aim of reviewing how project-related human rights impacts are being addressed and/or might be further addressed in relation to the provision of officially supported export credits. To facilitate this work, Adherents shall share approaches to and experience of, inter alia, screening and assessing applications for potential severe project-related human rights impacts, reviewing projects where there is a high likelihood of such impacts occurring, and applying relevant due diligence tools and international standards. Adherents should

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<sup>245</sup> TCFD, *Recommendations of the Task Force on Climate-related Financial Disclosures* (June 2017), page 14, Figure 4, Risk Management-Recommended Disclosures c) and Metrics and Targets-Recommended Disclosures a).

<sup>246</sup> TCFD, *Recommendations of the Task Force on Climate-related Financial Disclosures* (June 2017), page 1.

also consider further issues relating to policy coherence with the OECD Guidelines for Multinational Enterprises and with the “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework”.

240. An important aspect of ensuring coherence between the actions of ECAs and international undertakings relating to climate change and human rights is the need to address the human rights implications of climate change. The preamble to the Paris Agreement addresses this explicitly:

“Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity”

241. The relationship between human rights and climate change has been an increasing focus of human rights bodies including the Human Rights Committee in adopting General Comment No 36 on the Right to Life.<sup>247</sup> Paragraph 62 of General Comment No 36 states in part:

“Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment”

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242. In the light of the considerations set out above, we conclude that *the Common Approaches should be applied by States as Adherents, including to their regulation of ECAs and, to the extent indicated in Section II above, to ECAs as stand-alone duty bearers*. Implementation of the Common Approaches should be consistent with State obligations under international law, including those arising under international human rights law and the international climate change regime. *With respect to ECA finance for fossil fuel-related projects/activities in the specific context described in Section I, this includes but is not limited to the following obligations* (see further Sections III.2.A and B above):

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<sup>247</sup> General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, 30 October 2018, CCPR/C/GC/36.

- (a) *The conduct of a climate change risk assessment covering the full range of physical and transitional risks to the achievement of the international climate goals: this should include assessment of Scope 3 emissions, the risk of overshoot and of lock-in and stranded assets;*
- (b) *Full transparency in relation to the assessment process and findings;*
- (c) *Assessment of the extent to which project emissions undermine the contribution to global emissions reductions made by the ECA host State's domestic emissions reductions;*
- (d) *A human rights impact assessment that takes into account adverse impacts of climate change including on the right to life, to health and to adequate food;*
- (e) *The assessment of alternatives to fossil fuel projects so as to meet the goals set out in Article 2 of the Paris Agreement, and in particular Article 2(1)(c).*

243. In order to clarify the implications of the need for coherence with the climate and human rights obligations identified above, it may be helpful to set out further guidance on the application of the Common Approaches and/or revise the text of the Common Approaches. Such revisions should also address specific relevant standards for due diligence and transparency, including those adopted under the Equator Principles and recommended by TCFD.

244. **The OECD arrangement on Officially Supported Export Credits:** The main purpose of the Arrangement on Officially Supported Export Credits (**OECD Arrangement**)<sup>248</sup> is: “to provide a framework for the orderly use of officially supported export credits.” The Arrangement “seeks to foster a level playing field for official support, as defined in Article 5 a), in order to encourage competition among exporters based on quality and price of goods and services exported rather than on the most favourable officially supported financial terms and conditions.”

245. The OECD Arrangement states that it is a: “Gentlemen’s Agreement among the Participants; it is not an OECD Act [as defined in Article 5 of the OECD Convention], although it receives the administrative support of the OECD Secretariat”.<sup>249</sup>

246. Despite this characterisation, the OECD Arrangement carries some legal effects in the area of trade law. Under the Agreement on Subsidies and Countervailing Measures (**SCM Agreement**),<sup>250</sup> official export credits may be prohibited if the circumstances

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<sup>248</sup> Arrangement on Officially Supported Export Credits, TAD/PG(2020)1. This version of the Arrangement on Officially Supported Export Credits replaces the January 2019 version [TAD/PG(2019)1]. This revision of the Arrangement includes all modifications agreed to the Arrangement, including its Annexes, and is effective as of 1 January 2020.

<sup>249</sup> Arrangement on Officially Supported Export Credits, TAD/PG(2020)1, Section 2 (Status), page 10.

<sup>250</sup> Agreement on Subsidies and Countervailing Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 UNTS 14.

are such that they meet two sets of conditions, namely (i) the transaction constitutes a subsidy (i.e. a financial contribution by a government or public body, or income or price support, which confers a benefit to the recipient) (Article 1(1) SCM Agreement), and (ii) the reception of the subsidy is de jure or de facto contingent upon export performance (Article 3(1)(a) SCM Agreement) (i.e. when “the granting of the subsidy is geared to induce the promotion of future export performance of the recipient”<sup>251</sup>).

247. Annex I to the SCM Agreement provides an illustrative list of export subsidies prohibited under Article 3(1)(a) of the SCM Agreement. Letter (k) (first paragraph) of Annex I, includes in this illustrative list of prohibited subsidies the core activities of ECAs:

“The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.”

248. However, letter (k) (second paragraph) exempts export credits that fall under an “international undertaking on official export credits” under certain conditions:

“if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.”

249. To the extent that the OECD Arrangement can be deemed to be an “international undertaking on official export credits” meeting the requirements of letter (k), certain activities of ECAs (credits at an interest rate below market levels)<sup>252</sup> consistent with the OECD Arrangement would be consistent with Article 3(1)(a) of the SCM Agreement. Conversely, when such support is provided in violation of the OECD Arrangement or its sectoral extensions, it would no longer fall under the exemption and

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<sup>251</sup> *European Communities and Certain Member States - Measures Affecting Trade in Large Civil Aircraft*, Report of the Appellate Body (18 May 2011), WT/DS316/AB/R, paragraph 1050.

<sup>252</sup> Of note, the exemption of Annex I, letter (k), second paragraph of the SCM Agreement does not extend to other key activities of ECAs. For example, Annex I, letter (j) include in the illustrative list of prohibited subsidies: “The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes”.

would therefore be inconsistent with Article 3(1)(a) of the SCM Agreement. Thus, it is inaccurate to conclude that the OECD Arrangement has no legal character. When its requirements are met, it operates as a “safe harbour” from the relevant obligations under the SCM Agreement.

250. The OECD Arrangement applies to all official support provided by or on behalf of a government for export of goods and/or services, including financial leases, which have a repayment term of two years or more.<sup>253</sup>
251. Six sector understandings form part of the Arrangement including the OECD Sector Understanding on Export Credits for Coal-Fired Electricity Generation Projects (CFSU), considered further below.
252. The OECD Arrangement governs financial terms and conditions for export credits (Chapter II), provisions for tied aid (Chapter III) and procedures (Chapter IV). The procedures addressed in Chapter IV include notifications and consultations between participants. The only explicit reference to the Common Approaches (see below) is in relation to the Sector Understanding on Renewable Energy (see Appendix I of the OECD Arrangement, at page 97).
253. **The OECD Sector Understanding on Export Credits for Coal-Fired Electricity Generation Projects (CFSU):** There are currently six OECD Sector Understandings, which are part of the OECD Arrangement on Officially Supported Export Credits and which comprise additional sector-specific rules. Covered areas are (I) ships, (II) nuclear power plants, (III) civil aircraft, (IV) renewable energy, climate change mitigation and adaptation, and water projects, (V) rail infrastructure, and (VI) coal-fired electricity generation projects.
254. The Text of the Arrangement on Officially Supported Export Credits was amended in 2016 to include Annex VI Sector Understanding on Export Credits for Coal-Fired Electricity Generation Projects, which limits export credit support for new coal-fired power plants. The CFSU is meant to encourage both exporters and buyers of coal-fired power plants to move away from low-efficiency towards high-efficiency technologies by limiting export credit support for coal-fired power plants. However, it does not mandate the phase out of export support to coal-fired power plants completely, neither does it affect the support for upstream coal projects. It thus falls short of the requirements of due diligence under customary international law (Section III.1 above), the international law of climate change (Section III.2.A above) and international human rights law (Section III.2.B above).

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<sup>253</sup> Arrangement on Officially Supported Export Credits, TAD/PG(2020)1, Section 5 (Scope of application), page 10.

255. In January 2017, the restrictions on coal financing for OECD-member ECAs came into effect. The OECD Agreement prohibits OECD ECAs from supporting coal plants unless they use marginally more efficient ultra-supercritical technology or are small plants in the poorest countries (less than 300 MW for subcritical and less than 500 MW for supercritical). Only certain types of financing, such as export credit guarantees and insurance, direct credit financing and refinancing, and interest rate support, are covered.
256. Following an extension of the OECD guidelines in 2019, financing is only allowed for large coal-fired power plants with “ultra-supercritical technology”, or with an emissions intensity of below 750g CO<sub>2</sub>/kWh of electricity produced.
257. As has been pointed out by commentators, support for coal increased despite the CFSU restrictions.<sup>254</sup>
258. There have been calls to strengthen the CFSU beyond the current threshold of 750g CO<sub>2</sub>/kWh so as to exclude any new coal power investments and to further expand the CFSU to all coal-related projects as well as the oil and gas sectors.<sup>255</sup>
259. The legal considerations which apply to any revision of the CFSU are those set out above in Section III.2.A and include the obligation on State parties to the UNFCCC/PA to act consistently with Articles 2(1)(c), 3, 4 and 9 of the Paris Agreement. The principles of progression and ambition indicate that the current flaws in the CFSU should be addressed as a matter of urgency in the light of the emissions and productions gaps. The increase in support for coal indicates that the current policy does not appear to be effective and that finance flows are not consistent with Article 2(1)(c) of the Paris Agreement.
260. We understand that the text of the CFSU is due to be reviewed. We are instructed that section 6 of the Review Text states that this review is required to take into account “The most recent reports on climate science and the implications for global infrastructure investment decisions of remaining on the path to limit global warming to below 2 degrees Celsius higher than pre-industrial levels.” In our view, if the review is to take account of and align with, the Paris Agreement, it should align with the latter’s explicit goals, as discussed above in Section III.2.A, and address the best available

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<sup>254</sup> B. Tucker, K. DeAngelis, A. Doukas, *Still Digging: G20 Governments Continue to Finance the Climate Crisis* (May 2020), the authors of the report note that: “Progress on coal took a step backwards compared to 2013 to 2015, with annual average support for coal from G20 countries increasing by \$1.3 billion”, page 5.

<sup>255</sup> I. Shishlov, A.-K. Weber, I. Stepchuk, L. Darouich, A. Michaelowa, *Study on internal and external climate change policies affecting export credit and insurance agencies Final Report*, Perspectives Climate Group GmbH, Freiburg Germany 11 03 2020, pages 52-53.

science represented *inter alia* by the IPCC SR 1.5 and UNEP's Emissions and Production Gap Reports (see paragraphs 7-9 of this Opinion).

261. On the basis of the scientific context discussed in Section I and the wording of the Paris Agreement, *there appears to be no clear reason for the CFSU to focus on coal exclusively and not to address in addition oil and gas*. In our view, the onus is on Members of the OECD and on individual States to justify differentiating coal from oil and gas, given that all greenhouse gas emissions are of concern, as indicated in the UNEP Production Reports referred to above. We are not aware of any impact assessment of the CFSU which would justify excluding oil and gas from the restrictions it lays down. In our view, the legal requirements outlined above in Section III.2.A all confirm that such an expanded approach is required: *namely to ensure that finance flows do not undermine the Paris Agreement temperature goals and are consistent with the pathways for finance and emissions reductions described in its provisions, together with the requirements to act on the basis of best available science, to reduce vulnerability and strengthen resilience and to act effectively with high ambition and progressively in order to address the urgent threat of climate change*.
262. Although the specific issue of the current threshold set under the CFSU is important as it appears that it is set too low to be effective, the legal issues are the same as those discussed more generally in Section III.2.A above, that is to say, whether the current position represents a good faith and effective response to the threat of climate change. Burning coal may emit more greenhouse gases than burning oil and gas but, as is clear from the UNEP Production Gap Reports, oil and gas production gaps also pose a direct short and long-term threat to achievement of the Paris Agreement temperature goals.
263. Any finance flow which is inconsistent with the achievement of the Paris Agreement goals should be addressed by State parties, and in particular developed States, as a matter of urgency in the light of the emission and production gaps.

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264. *The onus in our view is on State parties/ECAs to show how continued financing of any fossil fuel-related projects/activities can be justified in the light of the obligations and goals of international climate change law, as well as the associated protections under international law examined in this Opinion.*



#### IV. CONCLUSIONS

265. On the basis of the foregoing analysis, we reach the following overall conclusions:

- (a) ECAs do not operate in an international legal vacuum. The conduct of ECAs is directly or indirectly governed by certain international legal obligations because their conduct may be attributed to the State and/or because States may be required under international law to regulate their conduct and/or because ECAs, as such, may be subject to certain international legal obligations.
- (b) Under customary international law, States are required, in principle: not to finance new fossil fuel-related projects/activities or increase the financing of existing ones; to decrease existing support within a clear timeframe dictated, first and foremost, by scientific considerations and the temperature goals of the Paris Agreement, as a reflection of a global consensus; to make proactive efforts to avoid “locking-in” fossil fuel-related projects/activities which may use up a significant part of the remaining carbon budget; to adopt and proactively implement adequate procedures to assess the carbon footprint of any project to be potentially supported; to adopt and proactively implement guidelines concerning the performance of the activities of the relevant ECA in the context described in Section I.
- (c) These State obligations under customary international law are confirmed, further specified and/or expanded by the obligations arising in specific normative contexts, including in the areas of international climate change law, international human rights law and certain specific instruments adopted under the aegis of the OECD.
- (d) Under international climate change law, States have set specific goals and requirements which represent a strengthened response to the urgent threat of climate change. That response includes making finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development, which entails addressing inconsistent flows, as well as promoting those which are consistent with the stated pathways. Accordingly, inconsistent flows should be reflected in the Biennial Assessment and Overview of Climate Finance Flows conducted by the UNFCCC Parties, as well as in the Global Stocktake. In making decisions on the provision of export credit for fossil fuel-related projects/activities, States must have regard to the goals and obligations of the Paris Agreement, including those relating to finance. 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 temperature goals, it does not appear that export credits which support fossil-fuel related projects/activities are in principle consistent with the pathways set out in Article 2(1)(c), the temperature goals laid down in Article 2(1)(a) or the mitigation requirements under Article 4 of the Paris Agreement. Specific issues which should be addressed by ECAs include the proactive avoidance of locking-in fossil fuel-related emissions, as these are

inconsistent with the progressive and ambitious approach for nationally determined contributions and long-term strategies laid down in the Paris Agreement. In the light of the language of Articles 2 and 9 in particular, it is also clear that State parties to the Paris Agreement should seek to ensure that finance flows directed by ECAs 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.

- (e) Under international human rights law, read in the light of international climate change law, States, whether acting through official ECAs or in relation to separate ECAs regulated by them, are required in principle: not to finance new fossil fuel-related projects/activities or increase the financing of existing ones; to decrease existing support within a clear timeframe dictated, first and foremost, by scientific considerations and the temperature goals of the Paris Agreement, as a reflection of a global consensus; to proactively avoid “locking-in” fossil fuel-related projects/activities which may use up a significant part of the remaining carbon budget; to adopt and proactively implement adequate procedures to assess the carbon footprint of any project to be potentially supported; to adopt and proactively implement guidelines concerning the performance of the activities of the relevant ECA in the context described in Section I. Moreover, procedural obligations under international human rights law require States to ensure that ECAs, whether as official or separate entities, possess, update, disseminate and make available upon request information about their financing of fossil fuel-related projects/activities.
- (f) In addition, ECAs as individual duty-bearers are subject to certain international obligations analogous to those of States, mainly under international human rights law, to discharge duties analogous to the duties of States to respect and to protect, as well as to provide access to environmental information.
- (g) States as Adherents to the OECD Common Approaches, including in their regulation of separate ECAs, and ECAs as stand-alone duty bearers, as relevant, must implement the OECD Common Approaches in a manner consistent with State obligations under international law. With respect to ECA finance for fossil fuel-related projects/activities in the context described in Section I, this includes but is not limited to the following obligations: the conduct of a climate change risk assessment covering the full range of physical and transitional risks to the achievement of the international climate goals: this should include assessment of Scope 3 emissions, the risk of overshoot and of lock-in and stranded assets; full transparency in relation to the assessment process and findings; assessment of the extent to which project emissions undermine the contribution to global emissions reductions made by the ECA host State’s domestic emissions reductions; a human

rights impact assessment that takes into account adverse impacts of climate change including on the right to life, to health and to adequate food; and the assessment of alternatives to fossil fuel projects, so as to meet the goals set out in Article 2 of the Paris Agreement, and in particular Article 2(1)(c).

- (h) On the basis of the scientific context described in Section I and the wording of the Paris Agreement, there appears to be no clear reason for an OECD Sector Understanding on Export Credits for Coal-Fired Electricity Generation Projects to focus on coal exclusively and not to address in addition oil and gas. States must ensure that finance flows do not undermine the Paris Agreement temperature goals and are consistent with the pathways for finance and emission reductions, together with the requirements to act on the basis of best available science, to reduce vulnerability and strengthen resilience and to act effectively with high ambition and progressively in order to address the urgent threat of climate change. The onus is on State parties/ECAs to show how continued financing of any fossil fuels-related projects/activities can be justified in the light of the obligations and goals of international climate change law, as well as the associated protections under international law examined in this Opinion.

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24 March 2021



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Kate Cook



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Jorge E. Viñuales