

ARTICLE

INTERNATIONAL INVESTMENT LAW AND CLIMATE  
JUSTICE: THE SEARCH FOR A JUST GREEN  
INVESTMENT ORDER

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ABSTRACT

*Efforts are underway to craft responses to the climate crisis within the international investment order. This Article highlights international investment law (“IIL”) and international climate law (“ICL”) as two basic governance contexts within which investment-related responses to climate change are being designed. There is, however, a multilevel—normative and institutional—dissonance between both regimes that makes for an asymmetric integration of the regimes at best, or worse still, the escalation of the injustices which have characterized both. While similar in their recognition of international investment as an important tool for responding to climate change, assumptions and approaches under both regimes are different. Both regimes, however, are responsible for the entrenchment of climate injustice. This Article re-envision climate justice through a Third World Approaches to International Law (“TWAIL”) lens and provides recommendations on the actualization of a just green investment order. Drawing on TWAIL, we argue that treaty proposals that simply emphasize making IIL compatible with international climate frameworks for green investments, despite their relevance for the transition to a green economy, overlook structural normative dynamics which have perpetuated historical injustice, skewed power relations, and contributed to diverse tragedies of the commons. To avoid cascading into a new regime of inequities, we argue that IIL reform and investment-related measures under the ICL regime must center on climate justice and a nuanced interpretation of historical responsibility.*

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## I. INTRODUCTION

International Investment Law (“IIL”) and International Climate Change Law (“ICL”) are two fundamentally misaligned regimes.<sup>1</sup> The misalignment of these regimes can be located within three arenas: their histories, structures, and goals. *Historically,*

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1. Anja Ipp, similarly, argued that IIL seems at odds with developments in ICL as investment agreements are still largely silent on climate issues and the regulations necessary to meet climate law obligations may trigger liability under investor-protection provisions. See Anja Ipp, *Regime Interaction in Investment Arbitration: Climate Law, International Investment Law and Arbitration*, KLUWER ARBITRATION BLOG (Jan. 12, 2022), <http://arbitrationblog.kluwerarbitration.com/2022/01/12/regime-interaction-in-investment-arbitration-climate-law-international-investment-law-and-arbitration> [https://perma.cc/48P9-GDH9].

while IIL dates to the early years after colonization,<sup>2</sup> ICL is a comparatively more recent construct.<sup>3</sup> The historical misalignments in IIL and ICL are also evident from the fact that traditional international investments agreements (“IIAs”) do not distinguish between climate friendly and unfriendly investments.<sup>4</sup> *Structurally*, IIL’s asymmetric regime consists of investment treaties—bilateral investment treaties (“BITs”) and free trade agreements with investment chapters, their investor-state dispute settlement system (“ISDS”), as well as international, national, and sub-national laws and contracts that govern international investment.<sup>5</sup> The ILC flows from the global to the local,<sup>6</sup> a reflection of its unique nature as the quintessential tragedy of the global commons. Climate change actions taken by state governments occur under various international, national, regional, and sub-regional instruments.<sup>7</sup> As for *goals*, IIL arguably facilitates investment flows and contributes economic growth in the host state; its ISDS regime protects investments and capital. ICL seeks solutions to a global public ‘bad’—climate change—with negative impacts beyond the sovereign entity where it is generated. Given this multi-level dissonance, IIL and ICL operate at cross-purposes, and investment law has been shown to inhibit ambitious and

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2. See generally DAVID SCHNEIDERMAN, INVESTMENT LAW’S ALIBIS: COLONIALISM, IMPERIALISM, DEBT AND DEVELOPMENT (2022).

3. See DANIEL BODANSKY ET AL., INTERNATIONAL CLIMATE CHANGE LAW 9, 36 (2017).

4. See generally UN Conference on Trade and Development, *The International Investment Treaty Regime and Climate Action*, UNITED NATIONS (Sept. 2022).

5. See generally M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (5<sup>th</sup> ed. 2021).

6. The Paris Agreement allows countries to determine their contributions to the global climate goals and determine their domestic mitigation measures. See Paris Agreement art. 4(2), Dec. 12, 2015, 3156 U.N.T.S. 54113 (entered into force Nov. 4, 2016).

7. At the international level, the Paris Agreement is the dominant international treaty. A patch work of climate response measures and enabling legal regimes now exists both at the national and regional levels given this bottom-up approach under the Paris Agreement. Recent years have also seen a flurry of voluntary non-state climate standards which corporations are committing to, and domestic courts are relying on to interpret climate obligations. But some institutions created under the United Nations Framework Convention on Climate Change (“UNFCCC”) and the Kyoto Protocol still exist and Parties continue to make decisions under these institutions. For example, the Hague District Court’s RDS decision refers to voluntary standards like the GHG protocol. See *Milieudefensie et al. v. Royal Dutch Shell plc*, ECLI:NL:RBDHA:2021:5337 (May 26, 2021) (“RDS Decision”).

effective climate actions, with particularly dire impacts on the Global South.<sup>8</sup>

International investment and climate change regimes thus raise questions that appear fundamentally at odds. Notably, there is an imminent risk that actions taken by states to further their obligations under ICL may trigger investment disputes. Climate change related disputes may also arise from tensions between both regimes. Examples include where host states introduce a subsidy in favor of climate-friendly technologies; outright withdrawal of subsidies for fossil fuel production and/or consumption to make the renewable energy industry more competitive; future withdrawal or reduction of subsidies initially granted to an investor in renewable energy; or treaties or agreements that relate to the implementation of energy or other systems transition, mitigation or adaptation in line with the Paris Agreement commitments.<sup>9</sup> The limited effectiveness of the overt recognition of environmental protection and sustainable development in modern investment treaties<sup>10</sup> has further entrenched the skepticism on whether conventional IIA is an effective tool for crafting meaningful responses to climate change.<sup>11</sup>

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8. See generally Stephan W. Schill, *Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?*, 24 J. INT'L. ARB. 469–77 (2007); Daniel B. Magraw & Sergio Puig, *Greening Investor-State Dispute Settlement*, 59 B.C.L. REV. 2717 (2018); KYLA TIENHAARA & LORENZO COTULA, RAISING THE COST OF CLIMATE ACTION? INVESTOR-STATE DISPUTE SETTLEMENT AND COMPENSATION FOR STRANDED FOSSIL FUEL ASSETS (Int'l Inst. Env't. & Dev. 2020); Martin Brauch et al., *Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation: Aligning International Investment Law with the Urgent Need for Climate Change Action*, 36 J. INT'L. ARB. 7 (2019); Daniel Magraw et al., *Model Green Investment Treaty: International Investment and Climate Change*, 36 J. INT'L. ARB. 95, 96 (2019).

9. See, e.g., JORGE E. VIÑUALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW 258 (2012); see also INTERNATIONAL CHAMBER OF COMMERCE, ICC COMMISSION REPORT: RESOLVING CLIMATE CHANGE RELATED DISPUTES THROUGH ARBITRATION AND ADR 8 (2019).

10. See generally Investment Protection Agreement between the European Union and its Member States, of the One Part, and the Republic of Singapore, of the Other Part, Eur.-Sing., art. 2.2(1), Oct. 15, 2018 O.J. (L 294/3); Eur.-Vietnam Investment Protection Agreement, Eur.-Viet., art. 2.2(1), June 30, 2019 O.J. (L 186/3); Comprehensive Economic and Trade Agreement between Canada and the European Union, Eur.-Can., art. 8.9(1), Oct. 30, 2016 O.J. (L 11/23). These all include substantive environmental provisions with respect to the right of the host State's right to regulate to meet their policy objectives. The 2019 Morocco Model BIT that expressly lays down the obligation of investors to comply with climate change mitigation goals. *Morocco Model BIT* art 20.4 (June 2019).

11. In fact, many references to climate change in existing BITs/IAs appear impliedly as environmental concern. For example, the 2016 Morocco-Nigeria BIT or the 2019 Dutch Model BIT require investors to conduct environmental impact assessments. Morocco-

In this Article, we argue that the scholarship on IIL and climate change that takes IIAs as its starting point in addressing climate change misses the mark.<sup>12</sup> The investment law regime is characterized by structural and normative dynamics which have perpetuated historical injustice and skewed power relations. These features have contributed to diverse tragedies of the commons, including climate change disaster. As such, treaties or IIA proposals that simply emphasize making IIL and ICL compatible through preferential frameworks for green investments, and international climate and sustainability instruments miss the mark. In the absence of a holistic reform that addresses the deep-seated systemic challenges of IIL, efforts to deploy IIL in addressing climate change risk reproducing the inequalities of IIL. Substantive revisions to IIAs aimed at facilitating low emissions investments represent one-way IIL can respond to the urgency of climate change. However, while useful, the treaty-based changes are modest and far from the radical reform required to contribute meaningfully and equitably.

This Article focuses on the absence of the notions of equity, climate justice, and differentiation in the IIL-based climate change discourse. We contend that the dominant historical focus on questions, such as what role IIAs may play to mitigate climate change, misses the mark and risks deepening the structural inequalities in IIL. Further, we show that while the IIL regime is the dominant context in which the investment dimensions of climate change response measures are being addressed, other equally relevant developments are taking place within the ICL regime. A

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Nigeria Bilateral Investment Treaty, Morocco-Nigeria, art 14, Dec. 3, 2016; *Dutch Model Bilateral Investment Treaty* art. 7(3), Mar. 22, 2019. Notably, some of the recent BITs have started introducing substantive provisions that allow States to take account of the effects of climate change when making policy decisions that affect investments. See generally Lithuania-Turkey Bilateral Investment Treaty, Lith.-Turk., Aug. 28, 2018; Brazil-Suriname Bilateral Investment Treaty, Braz.-Surin., May 2, 2018; Canada-Republic of Moldova Bilateral Investment Treaty, Can.-Mold., June 12, 2018; Agreement between Japan and the Republic of Armenia for the Liberalization, Promotion and Protection of Investment, Japan-Arm., Feb. 14, 2018. In *Al Tamini v Oman*, ICSID Case No. ARB/11/33, Final Award (Nov. 3, 2015), IIC 745 (2015), the tribunal recognized an express carve-out for environmental protection under investment Chapter of the Oman-USA FTA, which is based on the 2004 US Model BIT. The tribunal concluded that Oman did not expropriate Al Tamini's investment.

12. See James T. Gathii, *Without Centering Race, Identity, and Indigeneity, Climate Responses Miss the Mark*, in CLIMATE CHANGE, EQUITY AND THE FUTURE OF DEMOCRACY 11-10 (Wilson Center & Adelphi eds., 2020).

combined consideration of the developments under both regimes provide a more fulsome picture of investment-related climate response measures. Theoretically, we draw on Third World Approaches to International Law (“TWAIL”) to locate and analyze post-colonial continuities of climate injustices with respect to investment-related initiatives under the ICL and IIL regimes.<sup>13</sup>

Following this Introduction, we develop the Article in Parts II, III, and IV. In Part II, we develop our conceptualization of climate justice through a TWAIL lens. Centering historical responsibility for the climate crisis, our analysis of a TWAIL informed climate justice contains five attributes: *first*, it accounts for the existing historical inequities of IIL for Global South countries, which exacerbate their vulnerability to climate change; *second*, the implications of the debt crisis on the capacity of Global South countries to finance climate actions effectively; *third*, mismatch of investment flowing to climate friendly projects in Global South countries;<sup>14</sup> *fourth*, climate justice should be understood in the wider and pre-existing context of environmental justice; and *fifth*, a call for fundamental reform that centers the concerns of the most vulnerable peoples of the Global South and Global North. In Part III, we critically analyze the scholarly debates on how IIL—IAs and the ISDS—might respond to climate change in a way that does not further entrench Global South countries’ subordination. In Part IV, we deepen the analysis by examining the regime under the Paris Agreement in light of our analysis of climate justice and historical responsibility. Once the lens are changed, the fraught nature of the current regime emerges, and the misalignments are further magnified. We examine these fault lines in the contexts of climate

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13. We note that the insights from TWAIL and climate change can be applied both in the Global South and Global North contexts. This Article, however, primarily focuses on the developing countries of the Global South. See generally Amar Bhatia, *The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World*, 14 OR. REV. INT’L. L. 131 (2012).

14. By climate-friendly investment, we mean “(i) investments that uses only clean energy and clean technologies; (ii) investments with a neutral or “lower than business as usual GHG footprint; or (iii) investment that reduces anthropogenic emissions by sources or enhances anthropogenic removals by sinks of GHGs in any sector of the economy that is additional to any that would otherwise occur.” See Fiona Marshall et al., *Climate Change and International Investment Agreements: Obstacles or Opportunities*, INT’L INST. FOR SUSTAINABLE DEV., 1, 5 (Mar. 10, 2010), [https://www.iisd.org/system/files/publications/bali\\_2\\_copenhagen\\_iias.pdf](https://www.iisd.org/system/files/publications/bali_2_copenhagen_iias.pdf) [<https://perma.cc/6U3C-2DBL>].

justice and finance, as well as climate justice and voluntary measures.

## II. *TWAIL, INTERNATIONAL INVESTMENT LAW, AND CLIMATE JUSTICE*

### A. *A Normative Blend: TWAIL and Climate Justice*

This Section outlines TWAIL and climate justice as important framing lenses for international investment law and climate change. Global economic order inequalities are reflected in climate change's causes and consequences. Climate change in the context of international investment law implicates the historical patterns of investment in fossil fuel, shows the intersections of structural inequalities in the relations between Global South and Global North countries, and produces differentiated experiences of winners and losers. Global North and Global South countries have different historical responsibilities as contributors to climate change. Despite contributing the least, developing countries remain most vulnerable to the negative impacts of climate change.<sup>15</sup> Hence, without addressing the persistent questions of historical inequities associated with the international investment regime and global economic governance on a broader scale, mere obligatory attempts at redressing climate change miss the mark.

TWAIL scholarship focuses on history to understand the genealogies and continuities of contemporary forms of domination, imperialism, and oppression.<sup>16</sup> TWAIL magnifies the historical inequalities in the IIL regime between the Global South and the Global North, and their effect on climate vulnerable peoples.<sup>17</sup> The TWAIL perspective is vital to climate justice and IIL on at least four levels. First, calls for ambitious and

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15. See JULIA DEHM, *RECONSIDERING REDD, AUTHORITY, POWER, AND LAW IN THE GREEN ECONOMY* 213 (2021). The issue of how to respond to and address these inequalities has been a key point of international contestation within climate negotiations.

16. See generally James T. Gathii, *TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography*, 3 *TRADE, L. & DEV.* 26 (2011); Obiora Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?*, 10 *INT'L COMM. L. REV.* 371, 371–78 (2008).

17. “The climate vulnerable describes those communities or nation-states that have a particularly acute vulnerability to present and forecasted climatic changes.” Maxine Burkett, *Climate Reparations*, 10 *MELB. J. INT'L L.* 509, 513 (2009).

expedited transition to climate-friendly<sup>18</sup> investments leave developing countries at a disadvantage in attracting new investments vis-à-vis their ongoing commitments in the fossil fuel laden extractive sectors. Second, treaty-based solutions do not adequately address the power imbalance in the investor-host state relationship. Third, embracing market-based solutions led by transnational corporations may yet reinforce and create a more difficult regime that entrenches climate injustice while hardly reducing GHG emissions.<sup>19</sup> Fourth, the risk of ISDS disputes, damages and compensation arising therefrom—which is generally skewed against developing countries—will significantly impact developing countries’ capacity to take climate action. TWAIL thus offers a useful lens for analyzing the systemic and structural issues in IIL and ICL in a way that foregrounds climate justice.

From a TWAIL perspective, to achieve a green and just transition in the international investment regime, the system must be fundamentally transformed, and the economic structure that privileges the imperial scramble for control of climate-friendly energy resources must be displaced. We frame our analysis of TWAIL, climate change and IIL as a continuum of the broader critical scholarship of environmental justice.<sup>20</sup> Environmental justice is “both a social movement and a framework through which to evaluate domestic and international laws, policies, and practices that have a disparate impact on vulnerable

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18. By climate-friendly investment, we mean “(i) investment that uses only clean energy and clean technologies; (ii) investment with a neutral or ‘lower than business as usual’ GHG footprint; or (iii) investment that reduces anthropogenic emissions by sources or enhances anthropogenic removals by sinks of GHGs in any sector of the economy that is additional to any that would otherwise occur.” Marshall et al., *supra* note 14.

19. See, e.g., James Kanter, *African Economies Risk Suffocation by “Shock” Carbon Tax*, EU OBSERVER (May 12, 2022), <https://euobserver.com/war-peace-green-economy/154571> [<https://perma.cc/5A73-26C4>].

20. In this regard, we draw on and build on broader TWAIL critiques of environmental law and calls for environmental justice. See generally Natarajan Usha, *TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring*, 14 OR. REV. INT’L L. 177 (2012); Gonzalez Carmen, *Environmental Justice, Human Rights and the Global South*, 13 SANTA CLARA J. INT’L L. 151 (2015); Carmen G. Gonzalez, *Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade*, 78 DENV. U. L. REV. 979 (2001); Adebayo Majekolagbe, *Africa’s Sustainability Transition in a Post-Fossil World: Posture, Negotiation, and Agreements*, 17 MANCHESTER J. INT’L ECON. L. 64 (2020); Carmen G. Gonzalez & Sumudu Atapattu, *International Environmental Law, Environmental Justice, and the Global South*, 26 TRANSNAT’L L. & CONTEMP. PROBS. 229 (2017).



communities.”<sup>21</sup> Environmental justice approach “ [m]akes visible the distributive outcomes of . . . environmental goods and bads and how they correlate, in particular, with race and class.”<sup>22</sup> Hence, fundamental reforms that account for the historical responsibility for climate change are conditions necessary in effectively addressing the crisis of climate change.

An important aspect of TWAIL’s inquiry is probing how economic relations are shaped and re-constituted by the power dynamics of the actors.<sup>23</sup> As the climate change crisis is a legacy of imperial dominant economic exploitation in the fossil fuel industries of the Global South and a consequence of decades of climate unfriendly industrialization in the Global North, a TWAIL inquiry offers an analytical framework that unmasks power asymmetries.<sup>24</sup> Imbalances in the relationship of the Global South and Global North also manifest in the essentialization of market-based mechanisms and technocentric solutions for climate change, which has in turn meant increase in mining activities in the Global

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21. According to Gonzalez and Atapattu, “[f]irst, environmental justice calls for the fair distribution of the benefits and burdens of economic activity, as well as equitable access to environmental goods and services, such as clean air, clean water, and healthy and nutritious food. Second, environmental justice requires procedural equity and inclusiveness, including the right of all communities to participate in governmental decisions related to the environment. Third, environmental justice encompasses corrective justice: the even-handed enforcement of environmental laws and the compensation of those whose rights are violated. Finally, environmental justice is deeply intertwined with other forms of social and economic justice and cannot be achieved without addressing related social problems, such as poverty racism.” Gonzalez & Atapattu, *supra* note 20, at 234; *see generally* Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENV’T L. REP. 10681 (2000).

22. Tracy-Lynn Humby, *Evaluating the Value of TWAIL, Environmental Justice, and Decolonization Discourses as Framing Lenses for International Environmental Law*, 26 TRANSNAT’L L. & CONTEMP. PROBS. 317, 328 (2017).

23. *See generally* E. Tendayi Achieve & Asli Ü. Bali, *Race & Empire in International Law at the Intersection of TWAIL & CRT*, THIRD WORLD APPROACHES TO INT’L L. REV. (July 30, 2021), <https://twailr.com/wp-content/uploads/2021/07/Race-Empire-in-International-Law-at-the-Intersection-of-TWAIL-CRT.pdf> [<https://perma.cc/G9VJ-XM26>].

24. *See* Amuradha Varanasi, *How Colonialism Spawned and Continues to Exacerbate the Climate Crisis*, COLUM. CLIMATE SCH. (Sept. 21, 2021), <https://news.climate.columbia.edu/2022/09/21/how-colonialism-spawned-and-continues-to-exacerbate-the-climate-crisis/> [<https://perma.cc/X3US-D78H>].

South by multinationals.<sup>25</sup> TWAIL also commits to reforming and remaking international investment law for a more equal society.<sup>26</sup>

Assessing the intersection between IIL and climate change using a TWAIL approach thus problematizes how the substantive instruments of IIL (i.e., IIAs, BITs, and investment chapters in FTAs) and its dispute settlement mechanism (i.e., the ISDS) entrench historical inequalities and continuities of subjugation of the Third World.<sup>27</sup> We question the inequitable impact of fossil fuel production on the vulnerable communities and peoples of the Global South on one hand, and the adverse impacts of an inequitably planned transition from the fossil economy on the Global South on the other hand. As Usha Natarajan argues, albeit in the context of international environmental law, “[t]he onset of international environmental law was greeted with ambivalence by many in the South: Northern desire to globally regulate the harmful consequences of industrial development came too close upon the heels of the South finally achieving a degree of economic freedom, raising fears of ‘environmental colonialism.’”<sup>28</sup>

A TWAIL perspective also reveals the problem of an overly state-centric international climate regime on one hand, and a capital-protectionist international investment law regime on the other. Sornarajah highlights these dual problems. While primarily attributing climate change to the activities of multinational corporations (“MNCs”), he argues that climate change law should

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25. See Julia Dehm, *Carbon Colonialism or Climate Justice? Interrogating the International Climate Regime from a TWAIL Perspective*, 33 WINDSOR YEARBOOK OF ACCESS TO JUST. 129, 139 (2016).

26. See generally Olabisi D. Akinkugbe, *Africanization and the Reform of International Investment Law*, 53 CASE W. RES. J. INT’L L. 7 (2021); James T. Gathii, *Third World Approaches to International Economic Governance*, in INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE 255 (Richard Falk, Jacqueline Stevens & Balakrishnan Rajagopal eds., 2008); James Thuo Gathii, *Reform and Retrenchment in International Investment Law*, Loy. Univ. Chi. Sch. of L., (Sept. 16, 2022).

27. The systemic challenges of IIL are not being addressed by the UNCITRAL Working Group III reform process. Their focus has been mainly procedural. As such the work of the forum has drawn critical responses from scholars. It therefore goes without saying that climate change has also not been at the heart of the issues the Working Group has focused on.

28. Usha Natarajan, *Climate Justice*, in THE ROUTLEDGE HANDBOOK OF LAW AND SOCIETY 102-03 (Mariana Valverde, Kamari Clarke, Eve Darian-Smith, & Prabha Kotiswaran eds., 2021).

be directed towards regulating the activities of MNCs.<sup>29</sup> Regarding the IIL regime, Soonarajah proposes the separation of generic foreign investment protection from the “community values such as climate change, human rights, or the environment.”<sup>30</sup> He argues that in such dichotomized regime, “a hierarchy of values should be constructed with foreign investment yielding to those international community interests that stand on a higher plane. Certainly, climate change would displace foreign investment protection due to the urgency involved in issues of climate change.”<sup>31</sup>

In our view, a climate justice-centered approach that draws on TWAAIL offers an analysis of IIL’s climate change deficit that centers on the vulnerability of marginalized communities in Global South host states vis-à-vis the economic interests of investors and transnational actors. Climate change exacerbates pre-existing inequities in the investment regime for developing countries, which have historically had disproportionately low responsibility for emissions.<sup>32</sup> Phasing out fossil fuel subsidies, ending fossil fuel extraction, and shifting to decarbonized modes of production, distribution, and consumption for foreign investments might cripple the economies of the Global South if the planning and implementation of these policies do not mainstream equity.

#### *B. Climate Justice as Common but Differentiated Responsibility*

The multi-layered iterations of justice—common but differentiated responsibilities (“CBDR”),<sup>33</sup> climate justice, and just transition—which have evolved within the international climate regime, while not perfect, are useful in identifying, organizing, and addressing the injustices manifesting in efforts to green IIL. The combination of the relevant features of these iterations of justice is what we describe in this Article as climate justice. Apart from enjoying notoriety, recognition, and relative acceptance, these

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29 . See Muthucumaraswamy Sornarajah, *Disintegration and Change in the International Law on Foreign Investment*, 23 J. INT’L. ECON. L. 413, 421, 427 (2020).

30. *Id.* at 427.

31. *Id.*

32. See generally Sarah Mason-Case & Julia Dehm, *Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present*, in DEBATING CLIMATE LAW, 170 (Benoit Mayer & Alexander Zahar eds., 2021).

33. See *Id.* at 140-42.

iterations of justice are arguably products of the “subaltern,” particularly in their original design. For example, while CBDR as contained in the 1992 United Nations Framework Convention on Climate Change (“UNFCCC”) was a product of compromise, it primarily reflects the contributions of the G-77<sup>34</sup> and China during the negotiation of the UNFCCC.<sup>35</sup>

Each iteration of climate justice has its set of claims and addresses the justice concerns of the subaltern in the Global South. For example, the CBDR principle focuses on the interest of developing and undeveloped countries; climate justice, as narrowly and technically applied, addresses the concerns of individuals and communities who least contributed to climate change but are most affected by it; and just transition primarily caters host communities and workers in the fossil fuel industry.<sup>36</sup> Combining these three climate justice concepts provides a framework of minimal justice expectations for a green IIL regime. This is important for three main reasons. First, these three concepts are already recognized and arguably accepted under the climate regime.<sup>37</sup> Second, the adoption and use of common normative principles deepens and enriches the effort to integrate regimes with regards to climate sensitive investments. Third, given that the commitments of states under the international climate regime are underpinned by the notion of justice,<sup>38</sup> the fact that climate actions are under the IIL regime does not disapply these commitments or expectations that climate actions will be just.

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34. See *Latest Statements and Speeches*, GRP. OF 77 AT THE UNITED NATIONS, <https://www.g77.org> [<https://perma.cc/HX2R-8YM4>].

35. See *Input from the G77 & China in Preparation for COP19 on Loss and Damage Associated with Climate Change Impacts in Developing Countries that Are Particularly Vulnerable to the Adverse Effects of Climate Change*, U.N. CLIMATE CHANGE, [https://unfccc.int/files/adaptation/application/pdf/ld\\_g77\\_submission\\_nov\\_2013.pdf](https://unfccc.int/files/adaptation/application/pdf/ld_g77_submission_nov_2013.pdf) [<https://perma.cc/X5P5-FCW8>].

36. See Dehm, *supra* note 25, at 140-42.

37. Apart from the robust reference to and direct and indirect application of the CBDR principle (albeit in its revised form) in the text of the Paris Agreement, both climate justice and just transition were recognized in the preamble to the Agreement. See Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

38. The Paris Agreement provides that it “will be implemented to reflect equity and the principle of common but differentiated responsibilities and respect capabilities. in the light of different national circumstances.” *Id.* at art. 2(2).

A common denominator in these iterations of climate justice is the idea of differentiation. We, therefore, highlight the CBDR principle as the dominant expression of climate justice in this Article. The principle has evolved over the years from the state-centricity of the CBDR principle to a more people-centric notion, which focuses on the linkage of human rights and development with emphasis on the protection of the most vulnerable, including future generations.<sup>39</sup> More recently, the need to ensure that vulnerable host communities and workers do not unfairly bear the cost of the green transition has given rise to the introduction of “just transition” into the climate justice conversation.<sup>40</sup>

Notably, the CBDR principle is the primary platform through which developing states have articulated their demands for justice within the ICL regime.<sup>41</sup> The principle is TWAIL-consistent, at its core, given the involvement of developing states in the development and continued relevance of the principle and the principle’s operational rootedness in history.<sup>42</sup> The CBDR principle recognizes the role of all states to respond to climate change while imposing a greater response-burden on developed states given their historical contribution to emissions and greater financial and technological capabilities.<sup>43</sup> The principle has been interpreted in different ways—moral and legal—with sharp geopolitical perspectives.<sup>44</sup>

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39. See generally Mary Robinson Foundation, *Climate Justice* (Sept. 16, 2022) <https://www.mrfcj.org/pdf/Principles-of-Climate-Justice.pdf> [https://perma.cc/EVVC4-A88K].

40. See Paris Agreement, *supra* note 37; *Climate Change and the Just Transition: A Guide for Investor Action*, GRANTHAM RSCH. INST. ON CLIMATE CHANGE AND THE ENV’T 1-7 (Dec. 10, 2018), [https://sustainabledevelopment.un.org/content/documents/22101ijtguidanceforinvestors23november1118\\_541095.pdf](https://sustainabledevelopment.un.org/content/documents/22101ijtguidanceforinvestors23november1118_541095.pdf) [https://perma.cc/2FW9-TA8L].

41. See Ivo Wallimann-Helmer, *Common but Differentiated Responsibilities: Agency in Climate Justice*, in A RESEARCH AGENDA FOR CLIMATE JUSTICE 27 (Edward Elgar ed., 2019).

42. See Dehm, *supra* note 25, at 130.

43. See Joyeeta Gupta, *The Common but Differentiated Responsibility (CBDR) Principle in Relation to Other Principles of Law*, in THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE: GLOBAL TRENDS: LAW, POLICY & JUSTICE ESSAYS IN HONOUR OF PROFESSOR GIULIANA ZICCARDI CAPALDO 28 (M. Cherif Bassiouni, Gomula Joanna, Paolo Mengozzi, John G. Merrills, Rafael Nieto Navia, Anna Oriolo, William Schabas & Anna Vigorito eds., 2013).

44. See generally Lavanya Rajamani, *The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law*, 88 INT’L AFFS. 605 (2012); P. Pauw et al., *Different Perspectives on Differentiated Responsibilities: A State-of-the-Art Review of the Notion of Common But Differentiated Responsibilities in International Negotiations*, GERMAN

The 2015 Paris Agreement introduced a more nuanced and dynamic version of the CBDR principle under which every State party is expected to undertake and communicate ambitious emission reduction commitments through the submission of nationally determined contributions (“NDCs”).<sup>45</sup> Nevertheless, there is a recognition that it will take longer for emissions in developing countries to peak, while developed countries will continue to take the lead by undertaking economy-wide absolute emission reductions and providing financial support to assist developing countries’ climate mitigation and adaptation.<sup>46</sup> While the CBDR principle has been watered-down, the principle’s core recognition of the differentiated responsibilities, conditions, and capacities of States remains. Importantly, under the Paris Agreement, there is a tacit appreciation that the binary orientation of developed and developing countries, which informed the original iteration of the CBDR principle in 1992, is moribund.<sup>47</sup> Hence, the CBDR principle was suffixed in 2015 with the phrase “national circumstance.”<sup>48</sup> There is, therefore, a more dynamic differentiation framework under the Paris Agreement.<sup>49</sup> While it does not completely jettison the historical responsibilities of developed countries, the Paris Agreement recognizes the upward socio-economic trajectory of some developing states and their exponentially growing carbon footprints. This dynamic iteration of CBDR also assigns greater legitimacy to the claims of particularly vulnerable countries and other states at the lower rungs of the developmental ladder.<sup>50</sup>

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DEV. INST. 1, 6 (Mar. 18 2022) [https://www.die-gdi.de/uploads/media/DP\\_6.2014..pdf](https://www.die-gdi.de/uploads/media/DP_6.2014..pdf) [<https://perma.cc/J8XF-UPSS>].

45. See Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 at arts. 3, 4(2); see generally Christina Voigt & Felipe Ferreira, *Differentiation in the Paris Agreement*, 6 CLIMATE L. 58 (2016).

46. See Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 at art. 4(4).

47. See Pieter Pauw et al., *Subtle differentiation of countries’ responsibilities under the Paris Agreement* 5 PALGRAVE COMM’N 86 (2019) 2.

48. A development explained by some to be because of the compromise between the United States and China. See Lavanya Rajamani, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics*, 65 INT’L. & COMP. L. Q. 493 (2016).

49. Rajamani notes that the Paris Agreement tailors differentiation to specific areas of the Paris Agreement (Durban Pillars)—mitigation, adaptation, finance, technology, capacity-building, and transparency. *Id.* at 509–13.

50. Pauw et al., *supra* note 47 at 2-3.

Over the years, there has been a remarkable thawing of the perceived tension between the developmental imperatives of developing states vis-à-vis the urgent and ambitious responses demanded by the increasingly changing climate. For example, while the UNFCCC notes that developing countries need to grow their share of global emissions to meet their social and developmental needs,<sup>51</sup> this overt coupling of development to growth in emissions is absent from the Paris Agreement. Although there is a recognition that the peaking of emissions in developing countries will take longer, they are expected to undertake rapid reductions thereafter.<sup>52</sup> Developing states are admonished to enhance their mitigation efforts and move over time towards economy-wide emission reduction or limitation targets.<sup>53</sup> While development remains critical in developing states, it is currently decoupled from emission growth and instead situated in the contexts of direly and urgently needed robust responses to climate change.<sup>54</sup> Our argument in this Article is informed by this nuanced understanding of CBDR, particularly as it pertains to the development-ecological integrity argument. First, the history of the climate crisis matters. Second, the development of the Global South is critical. Third, the growth of the Global South must be decoupled from emissions, but such decoupling will be unjust if done in a manner and pace that makes prosperity unreachable for the countries and peoples of the Global South.

What then does the CBDR principle look like when contextualized within climate justice and investment law? At the very least, it fundamentally compels the rethinking of the IIL's fundamental principles. Take the contested fair, and equitable treatment ("FET") principle as an example.<sup>55</sup> Within the ICL regime, CBDR becomes an essential interpretive guide in

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

52. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 at art. 4 (1).

53. *Id.* at art. 4(4).

54. See Klaus Hubacek et al., *Evidence of Decoupling Consumption-based CO<sub>2</sub> Emissions from Economic Growth*, 4 *ADVANCES IN APPLIED ENERGY* 1, 1–10 (2021) (discussing the need to decouple economic growth from emissions to stay within planetary boundaries).

55. While contested, the FET principle, generally entails the host states' obligation of vigilance, protection, due process, transparency, and good faith. See OECD, *Fair and Equitable Standard in International Investment Law* 28,40 (OECD 2004).

mainstreaming FET for climate investments. This turns FET on its head. A CBDR-interpreted FET principle will, at the minimum, require fairness, equity, transparency, and lack of arbitrariness or discrimination in transition-related decision making at the corporate and home state levels. Unlike the vagueness that characterizes traditional FET, the contours of a CBDR-informed FET are more defined by the understanding of CBDR in the ICL regime and its current dynamic expression in the Paris Agreement. This dynamic expression constitutes the minimum standard of engagement with climate justice in the climate investment context. We consider the implications of a CBDR-informed understanding of climate justice in the subsequent Parts of this Article.

*C. The Dilemma of Greening Foreign Investment in Developing Countries*

The scholarly debates on green foreign direct investment (“FDI”) in IIL have not focused sufficiently on the risks that this transition engenders for developing countries. This Section focuses on developing countries’ political economies in balancing their “climate-unfriendly” extractive industries with attracting climate friendly investments. The discourse of climate change and IIL is as much about eco-friendly economic development as it is about social protection. Many African states and their Global South counterparts largely depend on the extractive industry to sustain their economy.<sup>56</sup> Beyond fossil fuel, the global transition to renewable energy has wider ramifications for the production of batteries, electric vehicles (“EVs”), and other renewable energy systems, which require mineral resources from the Global South.<sup>57</sup>

Our conceptualization of climate justice builds on existing concepts of ecological debt, ecological justice, and environmental justice, and acknowledges the history and continuities of unsustainable investments that have led to today’s climate change

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56. See generally LORI LEONARD & SIBA N. GROVOGUI, *GOVERNANCE IN THE EXTRACTIVE INDUSTRIES: POWER, CULTURAL POLITICS AND REGULATION* (2017); Alan Roe & Samantha Dodd, *Dependence on Extractive Industries in Lower-income Countries: The Statistical Tendencies, in EXTRACTIVE INDUSTRIES: THE MANAGEMENT OF RESOURCES AS A DRIVER OF SUSTAINABLE DEVELOPMENT* 33 (2018).

57. See Oliver Hailes, *Lithium in International Law: Trade, Investment, and the Pursuit of Supply Chain Justice*, 25 J. OF INT’L ECON. L. 1, 1–23 (2022).



crisis.<sup>58</sup> In this regard, TWAIL and other critically inclined scholarship have pointed to the Global North investors' historical responsibility—*ecological debt*—to Global South countries arising from the industrialization and investment activities of the rich Western countries in the Global North.<sup>59</sup> We envision ecological debt and wider calls for environmental, economic, and debt justice as closely interconnected with climate justice.<sup>60</sup> While the ecological debts owed primarily by developed states have put developing states in great ecological peril, the sovereign debt owed by developing states have weakened their capacity to mitigate climate change and address socioeconomic vulnerabilities.<sup>61</sup> These vulnerabilities in turn lower their resilience and reduce their capacity to adapt to climate change. Climate change, therefore, is implicitly and expressly implicated in the discourse of ecological debt and environmental justice.<sup>62</sup> As climate emergency has triggered unsustainable debt accumulation in developing countries, the fiscal space in which they need to take climate action has further shrunk significantly.<sup>63</sup>

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58. See JOAN MARTINEZ-ALIER, *The Environmentalism of the Poor*, U.N. RSCH. INST. FOR SOC. DEV. & UNIV. OF WITWATERSRAND (AUG. 2012) (noting that “ecological debt” has accrued “on account of ecologically unequal exchange, biopiracy, damage from toxic exports, and the disproportionate use of carbon sinks and reservoirs.”).

59. The concept of ecological debt was developed in response to oppressive and unjust indebtedness of the developing countries. See generally *Id.*; See also Karin Mickelson, *Leading towards a Level Playing Field, Repaying Ecological Debt, or Making Environmental Space: Three Stories about International Environmental Cooperation*, 43 OSGOODE HALL L. J. 137, 137-170 (2005) (arguing that “instead of the nations of the [Global] North being seen as creditors, ecological debt assumes they ought to be seen as owing an enormous amount to the peoples of the [Global] South, who have borne many of the costs of environmentally unsustainable development but have reaped few of its benefits”).

60. Global Action for Debt Cancellation, *No Climate Justice without Debt Justice* (May 14, 2022) <https://debtgwa.net/debt-and-climate> [<https://perma.cc/DM9V-VLVY>] (stating “Climate justice will not be possible without economic and debt justice. And debt and economic justice won’t be possible without environmental and climate justice.”).

61. See John Beirne, *Feeling the Heat: Climate Risks and the Cost of Borrowing* 76 *Int’l Rev. of Econ. and Fin.* 920, 921 (2021).

62. See J. Timmons Roberts & Bradley C. Parks, *Ecologically Unequal Exchange, Ecological Debt, and Climate Justice: The History and Implications of Three Related Ideas for a New Social Movement*, 50 *INT’L J. OF COMPAR. SOCIO.* 385, 385-409 (2009).

63. See Rikard Warlenius, *Decolonizing the Atmosphere: The Climate Justice Movement on Climate Debt*, 27 *THE J. OF ENV’T & DEV.* 131, 131-55 (2018); Iolanda Fresnillo, *A Tale of Two Emergencies, The Interplay of Sovereign Debt and Climate Crises in the Global South* *EUR. NETWORK ON DEBT AND DEV.* (May 14, 2022) <https://d3n8a8pro7vhm.cloudfront.net/eurodad/pages/1945/attachments/original/1>

From another perspective, our call for climate justice in the context of IIL is predicated on the power asymmetry and hierarchies in the international energy transition regime. The international energy regime, which corporations control in the developed countries, is skewed against the Global South.<sup>64</sup> For example, the justifications for putting a moratorium on oil and gas investment in “foreign countries,” while canonizing natural gas as a “transition energy source” is self-serving at best.<sup>65</sup> The current reality is that existing investments in fossil fuel extractives are critical to the economic development and overall well-being of many Global South countries.<sup>66</sup> As such, the urgency of energy transition—particularly, a transition that does not explicitly consider justice implications—presents an existential dilemma for Global South countries. The imperative of green or climate-friendly investment subordinates Global South countries in a deeply unequal hierarchy of international energy.

Developing countries, therefore, confront an existential dilemma in striking a balance between the continuation of climate-unfriendly fossil fuel extraction, and bringing in new green and climate-friendly investments.<sup>67</sup> On the one hand, while increased

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610462143/debt-and-climate-briefing-final.pdf?1610462143 [https://perma.cc/2W5G-4GZC].

64 . See generally Vijaya Ramachandran, *Rich Countries' Climate Polices are Colonialism in Green*, FOREIGN POL'Y (Sept. 16, 2022) <https://foreignpolicy.com/2021/11/03/cop26-climate-colonialism-africa-norway-world-bank-oil-gas/> [https://perma.cc/W9UK-8892].

65. For example, the United Kingdom in 2020 announced that it will end support for fossil fuel sector overseas. See Press Release, UK Government, *PM announces the UK will end Support for Fossil Fuel Sector Overseas* (Dec. 12, 2020) <https://www.gov.uk/government/news/pm-announces-the-uk-will-end-support-for-fossil-fuel-sector-overseas> [https://perma.cc/7TTB-Z5LV]. In 2022, however, similar to the European Union, the United Kingdom is labelling natural gas as ‘sustainable’ in its investment rulebook. See Rachel Morison & Alex Morales, *UK Plans to Label Gas as a Green Investment to Replace Coal*, BLOOMBERG (May 16, 2022) <https://www.bloomberg.com/news/articles/2022-05-16/uk-plans-to-label-gas-as-a-green-investment-to-replace-coal> [https://perma.cc/V54J-FDUZ].

66 . See Dawud Ansari & Franziska Holz, *Between Stranded Assets and Green Transformation: Fossil-fuel-producing Developing Countries Towards 2055*, 130 WORLD DEV. 1, 12-13 (June 2020).

67. The Nigerian Minister of Petroleum recently argued that Nigeria is still “in transition from firewood to gas . . . please allow us to continue with our own transition.” The Equatorial Guinean Minister of Mines and Hydrocarbons similarly noted how “very unjust” the pressure over renewables is. The Nigerian Minister further notes how the country has been forced to reduce oil and gas production by 300,000 barrels per day due to lack of financing. See Sabrina Valle and Arathy Somasekhar, *CERAWEEK “Energy*

demands for electric vehicles and renewable energy present imminent opportunities for developing states, it is not evident that the states have the capacity to capture the significant aspects of the supply chains of the new green economy that will deliver meaningful impact for their citizens.<sup>68</sup> On the other hand, the growing disfavour towards fossil fuel, which constitutes the core of foreign investment earnings for many of the states, plunges them in the post-colonial and TWAIL critiques of the unequal insertion of these states into the global economic regime.<sup>69</sup> Balancing these two investments portfolio forms until a time when the latter becomes the major form of investment in developing countries is a major challenge for those countries. In other words, the general favouritism for green investments entrenches the ongoing mechanisms of inequality in IIL.

Attracting, keeping, and financing green FDI has important ramifications for the sustainable development of developing countries. The heavy dependence on natural resources and the extractive industry is challenging for them.<sup>70</sup> Tellingly, the growing number of wealthy nations banning or restricting public investment in fossil fuels, including natural gas, poses a major challenge for developing countries.<sup>71</sup> For Third World countries, unlike their counterparts in the Global North, the transition to net-zero emissions poses several existential problems: climate crisis, extreme poverty, and access to energy.<sup>72</sup> If not carefully designed

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*Transition? Leave Us Out," Say African Energy Leaders*, REUTERS (Mar. 9 2022) <https://www.reuters.com/business/environment/ceraweek-energy-transition-leave-us-out-says-nigeria-oil-minister-2022-03-09/> [<https://perma.cc/D9CU-Q7BU>].

68. See generally Stephen Karekezi & Waeni Kithyoma, *Renewable Energy in Africa: Prospects and Limits*, <https://sdgs.un.org/sites/default/files/documents/nepadkarekezi.pdf> [<https://perma.cc/8KMV-RLJG>].

69. See generally Patrick Trent Greiner, *How Colonialism's Legacy Makes it Harder for Countries to Escape Poverty and Fossil Fuel Today*, THE CONVERSATION, <https://theconversation.com/how-colonialisms-legacy-makes-it-harder-for-countries-to-escape-poverty-and-fossil-fuels-today-159807> [<https://perma.cc/Z73A-7FT8>].

70. See generally LORENZO COTULA, HUMAN RIGHTS, NATURAL RESOURCE AND INVESTMENT LAW IN A GLOBALIZED WORLD: SHADES OF GREY IN THE SHADOW OF THE LAW (Routledge ed., 2012).

71. See generally Benjamin Attia & Morgan, *Brazilian, Why Banning Financing for Fossil Fuel Projects in Africa isn't a Climate Solution*, THE CONVERSATION, (Oct. 14, 2021), <https://theconversation.com/why-banning-financing-for-fossil-fuel-projects-in-africa-isnt-a-climate-solution-169220> [<https://perma.cc/V97Q-6M9R>].

72. See *id.*; see generally Graham Mayeda, *Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties*, 41 J. WORLD TRADE 273 (2007).

and implemented, policy decisions geared towards attracting climate-friendly investment in developing states could lead to a deepening of the inequalities faced in and by these states. Climate-friendly international investment may not be the harbinger of climate change solutions. It can easily become an albatross for developing states' sustainable growth.

The extent to which foreign investment contributes to economic development is contested in legal scholarship. Part of the rationale for FDI is that the investment projects will bring enhanced capital flow, technology, and economic development to the host-state developing country.<sup>73</sup> To the extent that the nexus between FDI and economic development lacks clarity, the notion that international investment law will facilitate climate action compounds the predicament of developing countries further. The mostly extractive nature of foreign investment in developing countries pitches competing interests of different actors against each other: investors, host state governments, and local or indigenous communities.<sup>74</sup> While alignment of goals may exist in some situations between these communities, their interests are difficult to present in stark terms that outline profit, economic growth and development, ecological sustainability, and indeed climate action aspirations. Despite its urgency, climate action presents a dilemma for many extractive communities of the Global South. For example, despite the formal commitments by developing countries to the Paris Agreement, the substantive actions have not gone far enough to address climate mitigation as expected.<sup>75</sup> Misalignments thus exist in balancing the foreign

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73. See Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT'L ECON. L. 1037, 1040-41 (2010) (noting that "[m]ost of the [international investment agreements] in force today were drafted in the 1990s by Northern, capital-exporting states that subscribed to a market fundamentalist or 'neo-liberal' version of economic liberalism at the time.").

74. For host communities, "climate change threatens to wreak havoc on food production by increasing the frequency and severity of extreme weather events, depressing agricultural yields, reducing the productivity of the world's fisheries, and placing additional pressure on scarce water resources." Carmen G. Gonzalez, *Climate Change, Food Security, and Agrobiodiversity: Toward a Just, Resilient, and Sustainable Food System*, 22 *FORDHAM ENV'T. LAW. REV.* 493, 502 (2011).

75. See FADEKUNAYO ADENIYI, *OVERCOMING THE MARKET CONSTRAINTS TO ON-GRID RENEWABLE ENERGY INVESTMENTS IN NIGERIA*, (The Oxford Inst. for Energy Stud., 2019), <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2019/11/Overcoming-the-Market-Constraints-to-On-Grid-Renewable-Energy-Investments-in-Nigeria-EL37.pdf> [<https://perma.cc/KUJ7-UYYX>] (arguing that in Nigeria, the structure of the Nigerian

investments required for urgent, climate-friendly transition of Third World economies vis-à-vis the extant reality of their historical patterns of climate-unfriendly investments, especially in the natural resources and extractive sectors.

Hence, developed and developing countries need to aggressively change their FDI patterns to achieve their goals. Developed and developing countries would cut back, if not eliminate, investments in high-emissions and climate-unfriendly investments. For developing countries, this mandate worsens their vulnerability to international investment regimes.<sup>76</sup> African states cannot finance the level of investment necessary to meet the continent's just transition aspiration.<sup>77</sup> FDI specifically targeted at energy transitions and related investments in sustainable infrastructure, investments in climate change adaptation and resilience, and restoration of natural capital (through agriculture, food, and land use practices) and biodiversity are essential. In other words, climate action constrains the capacity of capital-importing countries in the most vulnerable parts of the world from simultaneously fulfilling other economic development activities.<sup>78</sup>

To summarize, a global transition from carbon-based fuel must account for the economic differences between countries and allow for multiple pathways to net-zero emissions. The need for variation in global transition is much more acute for developing countries which are faced with the difficult task of re-orienting the economic base of their countries towards a more compliant climate regime. In Part III of this Article, we analyze the extent to which IIAs and the ISDS regime constitute opportunities to address

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Electricity Supply Industry and the conduct of the actors within it create constraints to all new on-grid investments, including on-grid renewable energy investments).

76. See Karen L. O'Brien & Robin M. Leichenko, *Double Exposure: Assessing the Impacts of Climate Change Within the Context of Economic Globalization*, 10 GLOBAL ENV'T CHANGE 221, 228-29 (2000) (illustrating how the majority of rural Mexican farmers are simultaneously exposed to the negative, synergistic consequences of both climate change and globalization).

77. African Development Bank Group, *Financing Climate Resilience and a Just Energy Transition in Africa: New Strategies and Instruments*, in AFRICAN OUTLOOK 2022 93 (2022), [HTTPS://WWW.AFDB.ORG/SITES/DEFAULT/FILES/2022/05/25/AEO22\\_CHAPTER3\\_ENG.PDF](https://www.afdb.org/sites/default/files/2022/05/25/AEO22_CHAPTER3_ENG.PDF) [[TTPS://PERMA.CC/3URR-LHPW](https://perma.cc/3URR-LHPW)].

78. See generally Gaetan Verhoosel, *Foreign Direct Investment and Legal Constraints on Domestic Environmental Policies: Striking a "Reasonable" Balance Between Stability and Change*, 29 L. & POL'Y INT'L BUS. 451,453 (1998); Shalanda H. Baker, *Climate Change and International Economic Law*, 43 ECOLOGY L. Q. 5 (2016).

the misalignment of climate change and IIL for a green investment order. Two fundamental questions guide our analyses. First, to what extent might substantive commitments in IIAs allow Global South countries to address a public interest-driven transition to a green economy? Second, does the ISDS mechanism serve as a bulwark for Global South countries to protect themselves and enforce the climate measures that are taken to further their commitments in climate agreements?

### III. AN IIL OUTLOOK ON CLIMATE JUSTICE AND THE GREEN INVESTMENT ORDER

IIAs create obligations that require states to protect private investors.<sup>79</sup> BITs and ISDS have come under critical scrutiny because of their alleged deficit to allow host states to address public policy and public interest driven concerns such as environment, public health, and climate change.<sup>80</sup> Dissident reactions by states in the Global South (and North) against BITs and ISDS have ranged from terminating BITs,<sup>81</sup> to giving up the ISDS mechanism, to altering the language of BITs to suitably incorporate public policy concerns.<sup>82</sup> As state action on climate

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79. See generally Nicolas Perrone, *INVESTMENT TREATIES AND THE LEGAL IMAGINATION: HOW FOREIGN INVESTORS PLAY BY THEIR OWN RULES* 19 (Cambridge Univ. Press ed. 2021); Jean Ho, *STATE RESPONSIBILITY FOR BREACHES OF INVESTMENT CONTRACTS* (Cambridge Univ. Press 2018); Mavluda Sattorova, *THE IMPACT OF INVESTMENT TREATY LAW ON HOST STATE: ENABLING GOOD GOVERNANCE* (Bloomsbury ed. 2018).

80. See generally Rodrigo Polanco, *THE RETURN OF THE HOME STATE TO INVESTOR STATE DISPUTES, BRINGING BACK DIPLOMATIC PROTECTION* (Cambridge Univ. Press ed. 2019); Tania Voon & Andrew D. Mitchell, *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law*, 31 *ICSID REV – FOREIGN INV. L. J.* 413, 413-433 (2016); Simon Lester & Bryan Mercurio, *Safeguarding Policy Space in investment Agreements*, *INST. OF INT'L ECON. L.* 1, 1-2. <https://www.law.georgetown.edu/iiel/wp-content/uploads/sites/8/2018/01/Simon-Lester-and-Bryan-Mercurio-General-Exceptions-in-IIAs-IIEL-Issue-Brief-December-2017-Accessible.pdf> [<https://perma.cc/JR66-65PP>].

81. Bolivia, Ecuador, and Venezuela have denounced the ICSID convention, which provides for ISDS mechanism, in 2007, 2009 and 2012, respectively. See generally James Thus Gathii, *Understanding Tanzania's Termination of its BIT with the Netherlands in Context*, *AFRONOMICSLAW BLOG* (Apr. 1, 2019), <https://www.afronomicslaw.org/2019/04/01/understanding-tanzanias-termination-of-its-bit-with-the-netherlands-in-context> [<https://perma.cc/MHH4-2AV9>].

82. James T. Gathii, *Understanding Tanzania's Termination of its BIT with the Netherlands in Context*, *AFRONOMICS BLOG* (Sept. 16, 2022) <https://www.afronomicslaw.org/2019/04/01/understanding-tanzanias-termination-of-its-bit-with-the-netherlands-in-context> [<https://perma.cc/TML4-3ZY5>].

change grows based on their obligations under climate change agreements, the roles BITs and the ISDS in service of climate change have come under scrutiny.

Host states have obligations under international climate laws that require them to adopt regulatory and policy measures to phase out fossil fuels and transition to low-carbon energy sources. However, the implementation of the regulatory and policy measures may set off investor claims under the established system of investment treaties that protect foreign investors from the negative effects of certain state actions. These climate regulatory and policy actions portend various risks for host states. To the extent that existing commitments in IIAs/BITs are at odds with climate change aspirations of Global South countries, we contend that they entrench the further marginalization of these states in IIL. Likewise, the Global South and their Northern counterparts face the risk of ISDS dispute where they take national climate measures.<sup>83</sup> Indeed, investors are increasingly advised to position themselves to pursue ISDS actions against host states that take climate measures that they consider a violation of their investor rights.<sup>84</sup> The 2019 Stockholm Chamber of Commerce Report on “Green Technology Disputes in Stockholm” concluded that more green technology companies prefer arbitration as a means of resolving their

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83. *Treaty-Based Investor-State Dispute Settlement Cases and Climate Action*, UNCTAD 1, 8-21 (Sept. 2022), [https://unctad.org/system/files/official-document/diaepcbinf2022d7\\_en.pdf](https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf) [<https://perma.cc/R4ZR-Z7BT>] (citing many environmental and fossil fuel ISDS cases based on IIAs).

84. For example, law firms are advising their transnational investor clients in stark terms to prepare to use the ISDS regime. “Companies in industries most affected by States’ climate change obligations (e.g., fossil fuels, mining, etc.) should audit their corporate structure and change it, if needed, to ensure they are protected by an investment treaty. Such restructuring should take place before any climate-related dispute with the State has arisen or is reasonably foreseeable. Notably, some treaties have superior investor protections than others. It is thus important to assess which treaty would best protect the company from any adverse climate-related government measures.” Jones Day, *Climate Change and Investor-State Dispute Settlement*, THE CLIMATE REP. (Feb. 2022), <https://www.jonesday.com/en/insights/2022/02/climate-change-and-investorstate-dispute-settlement> [<https://perma.cc/39US-9DUW>]. See also Kyla Tienhara, et al., *Investor-state disputes threaten the global green energy transition*, SCIENCE (Sept. 16, 2022) <https://www.science.org/doi/10.1126/science.abo4637> [<https://perma.cc/AD95-YUC4>] (illustrating the legal and financial risks associated with limiting oil and gas production and arguing that governments should take steps to prevent fossil fuel investors from accessing ISDS).

disputes.<sup>85</sup> Thus, the dominant narrative on IIL, from practitioners perspective, envisions that “ISDS is . . . likely to be an increasingly important avenue for the resolution of climate change disputes”.<sup>86</sup> Indeed, the 2022 Report of the IPCC acknowledges the danger of ISDS as a potential impediment that may make States (developing and developed) to refrain from or delay measures to phase out fossil fuels.<sup>87</sup>

Our point about the fundamental imbalance in the foundations and purposes of IIL and climate change, which creates difficulty for addressing climate action through IIAs and ISDS, is replicated here.<sup>88</sup> Although the potential chilling effect and risk of ISDS claims by fossil fuel investors against host states are shared by both developed and developing countries,<sup>89</sup> developing countries are more negatively impacted by the ISDS regime.<sup>90</sup>

85. Sukma Dwi Andrina, *Green Technology Disputes in Stockholm*, STOCKHOLM CHAMBER OF COM. (Aug. 2019), <https://sccinstitute.com/media/1059447/green-technology-disputes-in-stockholm.pdf> [<https://perma.cc/4U2H-ZDHH>].

86. Jones Day, *supra* note 84.

87. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022: MITIGATION OF CLIMATE CHANGE: WORKING GROUP III CONTRIBUTION TO THE IPCC SIXTH ASSESSMENT REPORT 14.5.2.2 1505-06 (2022) (“A large number of bilateral and multilateral agreements, including the 1994 Energy Charter Treaty, include provisions for using a system of investor-state dispute settlement (ISDS) designed to protect the interests of investors in energy projects from national policies that could lead their assets to be stranded. Numerous scholars have pointed to ISDS being able to be used by fossil-fuel companies to block national legislation aimed at phasing out the use of their assets. . .”).

88. The ongoing energy sector and modernization of the Energy Charter Treaty challenge most recently illustrates this difficulty. See generally Anja Ipp, Annette Magnusson & Andrina Kjellgren, *The Energy Charter Treaty, Climate Change and Clean Energy Transition: A Study of the Jurisprudence*, CLIMATE CHANGE COUNS. (Mar. 15, 2022), [https://www.climatechangecounsel.com/\\_files/ugd/f1e6f3\\_d184e02bff3d49ee8144328e6c45215f.pdf](https://www.climatechangecounsel.com/_files/ugd/f1e6f3_d184e02bff3d49ee8144328e6c45215f.pdf) [<https://perma.cc/NY7Q-B4HR>].

89. For example, German Minister of Environment, Svenja Schulze echoed this view in contextualizing the rationale for halting the certification of Nord Stream 2 gas pipeline linking Germany to Russia as opposed to cancelling it. See Yamina Sahed, *An Energy Investment Treaty has Been Holding Nord Stream 2 Hostage*, CLIMATE HOME NEWS (Feb. 24, 2022) <https://www.climatechangenews.com/2022/02/24/the-energy-charter-treaty-delayed-nord-stream-2-halt/> [<https://perma.cc/9PD2-FF25>]. See also Kyla Tienhaara & Lorenzo Cotula, *Raising The Cost of Climate Action? Investor State Dispute Settlement and Compensation for Stranded Fossil Fuel Assets*, INT’L INST. FOR ENV’T AND DEV. (2020), <https://www.iiied.org/sites/default/files/pdfs/migrate/17660IIED.pdf> [<https://perma.cc/TKQ5-3HMY>].

90. See generally RUMANA ISLAM, THE FAIR AND EQUITABLE TREATMENT (FET) STANDARD IN INTERNATIONAL INVESTMENT ARBITRATION: DEVELOPING COUNTRIES IN CONTEXT (Springer 2018); Angelos Dimopoulos, *Climate Change and Investor-State Dispute Settlement: Identifying the Linkages*, in RSCH. HANDBOOK ON CLIMATE CHANGE AND TRADE L. 415-33



Against the foundational misalignments that characterize both regimes of IIL and climate change, we further analyze two levels of substantive engagement where tensions are manifested—IAs and ISDS—in the following Section.

*A. IAs and Climate Change: Balancing the Interests of Investors v. Host States' Right to Regulate*

Reconciling IIL and climate change is a complex task. IAs and BITs are negotiated and implemented in the shadow of power asymmetries, historical inequities, and imbalance in the relations between the investors who are importing capital and the host states that require the capital for projects in their economies.<sup>91</sup> The complexity of making IAs climate-friendly has both historical and contemporary dimensions in not only the drafting of the treaties but also their implementation. Historically, IAs have been blind to environmental, climate change, and general public interest issues.<sup>92</sup> The profit maximizing idea at the core of investor relations does not align with the public interest nature of climate change. Public interest concerns such as climate justice and environmental justice have played a marginal role in the

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(Panagiotis Delimatsis ed., 2016) (focusing on how ISDS influences the balance between investment protection and climate change).

91 . See generally, NICOLÁS M. PERRONE, INVESTMENT TREATIES AND THE LEGAL IMAGINATION: HOW FOREIGN INVESTORS PLAY BY THEIR OWN RULES (Jean Ho and Mayluda Sattorova eds., 2021); AIKATERINI FLOROU, CONTRACTUAL RENEGOTIATIONS AND INTERNATIONAL INVESTMENT ARBITRATION: A RELATIONAL THEORY INTERPRETATION OF INVESTMENT TREATIES, in NIJHOFF INT'L INV. L. SERIES (Brill ed. 2020).

92 . See generally, J. Anthony VanDuzer, *The Complex Relationship between International Investment Law and Climate Change Initiatives: Exploring the Tension*, in RSCH. HANDBOOK ON CLIMATE CHANGE AND TRADE L. (Panagiotis Delimatsis ed., 2016) (examining how IIL is becoming more accommodating to the adoption of climate change measures as, increasingly, investment treaties include provisions that seek to ensure that host states have flexibility to address environmental protection, as well as other social policy goals). See also Meredith Wilensky, *Reconciling International Investment Law and Climate Change Policy: Potential Liability for Climate Measures Under the Trans-Pacific Partnership*, 45 ENV'T L. REP. 10683 (2015) (examining whether the TPP investment chapter adequately shields governments from the risk of liability for climate change policies); see Bradley J. Condon, *Climate Change and International Investment Agreements*, 14 CHINESE J. OF INT'L L. 305 (2015) (analyzing how international investment agreements might constrain the ability of governments to adopt climate change measures); Makane Moïse Mbengue & Elena Cima, *Greening International Investment Arbitration*, in A MULTIFACETED APPROACH TO TRADE LIBERALISM AND INV. PROT. IN THE ENERGY SECTOR 218-40 (Makane Moïse Mbengue and Elena Cima eds., 2021) (positing optimistically about the capacity of investment arbitration to respond to environmental concerns that investment projects raise).

international investment regime.<sup>93</sup> As such, proposals aimed at addressing the climate change deficit of IIAs/BITs obligations through innovative provisions, without more, may not only reproduce but further entrench the marginalization of developing countries and their capacity to meaningfully respond to climate change.

As the primary legal mechanism by which host states facilitate FDI, IIAs impose four principal types of obligations on governments with respect to their treatment of foreign investors: (1) non-discrimination between domestic and foreign investors (“national treatment”); (2) non-discrimination between foreign investors from different countries (“most-favoured-nation treatment”); (3) a minimum standard of fair and equitable treatment for foreign investors (“FET”);<sup>94</sup> and (4) an obligation to pay compensation for expropriation.<sup>95</sup> Based on their current practice and trends that have emerged from investor-state disputes, IIAs—FET, National Treatment, Most Favoured Nation Treatment, or Expropriation—can have negative implications for the regulatory and policy space of the host states that adopt climate action. From this perspective, their capacity to shepherd a green investment regime that centers climate change and climate justice is questionable. Scholarly opinions differ on the question of how and to what extent the commitments in IIAs limit state autonomy to take climate action.<sup>96</sup> Finding a balance in investor and host-

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93. See generally J. Benton Heath, *Eco Oro and the Twilight of Policy Exceptionalism*, INV. TREATY NEWS (Dec. 21, 2021), <https://www.iisd.org/itn/en/2021/12/20/eco-oro-and-the-twilight-of-policy-exceptionalism/> [<https://perma.cc/WFR4-ZQEK>].

94. OECD, *Fair and Equitable Treatment Standard in International Investment Law*, OECD WORKING PAPERS ON INT’L INV. (Sept. 2004), <http://dx.doi.org/10.1787/675702255435> [<https://perma.cc/Y442-CPKJ>].

95. *A Sustainability Toolkit for Trade Negotiators: Trade and investment vehicles for achieving the 2030 Sustainable Development Agenda*, INT’L INST. FOR SUSTAINABLE DEV., <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/5-investment-provisions/5-3-investor-and-home-state-obligations/> [<https://perma.cc/E3WH-29V6>]. For more on these principles, see WTO, UNDERSTANDING THE WTO 10-14 (WTO 1995).

96. See generally Stephen W. Schill, *Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change*, 24 J. OF INT’L ARB. 469 (2007) (arguing that climate change initiatives are safe from challenge under international investment treaties and that investment treaty commitments do not chill state interest in taking such initiatives). *But cf.* Kate Miles, *Sustainable Development, National Treatment and Like Circumstances in Investment Law*, in SUSTAINABLE DEV. IN WORLD INV. L. (Cordonier Segger, M Gehring & A Newcombe eds., 2011). See generally Anatole Boute, *The Potential Contribution of*

state responsibilities has been elusive because most BITs in force are the old generation with far more negative implications for climate action.<sup>97</sup>

We illustrate our point in this section specifically with FET. FET is arguably one of the most successfully invoked and controversial clauses by investors in disputes against host states.<sup>98</sup> FET has both substantive and procedural dimensions. The procedural aspect of FET raises questions about the fairness and equitability of the decision making at the national level.<sup>99</sup> Substantively, it raises the question of the “legitimate expectations” of the investor.<sup>100</sup> The controversy of FET arises from the expansive ways in which it can and has been used by arbitrators. IIAs do not provide any guidance as to the meaning and what criterion is to be applied where FET is invoked. Its interpretation by Tribunals therefore often fails to account for the

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*International Investment Protection Law to Combat Climate Change*, 27 J. OF ENERGY AND NAT. RES. L. 333 (2009).

97. See generally Muthucumaraswamy Sornarajah, *The Unworkability of “Balanced Treaties” and the Importance of Diversity of Approach among the BRICS*, 112 AJIL UNBOUND 223 (2018).

98. See, e.g., ISLAM, *supra* note 90 (arguing that the FET standard as the focal point of the law has created inequities and imbalances against developing countries, after debunking the myth that the law is held with even hands between the rich and the poor). Islam argues that “there is a pressing need to reconceptualize the interpretation of the FET standard, taking into account the particular developmental circumstances of the developing countries in investor-State disputes.” Rumana Islam, *Introduction to the Book: The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration: Developing Countries in Context - Book Review Symposium*, AFRONOMICSLAW (Mar. 2, 2021) <https://www.afronomicslaw.org/category/analysis/introduction-book-fair-and-equitable-treatment-fet-standard-international> [https://perma.cc/BL5Y-ADY7]; see generally Enrique Boone Barrera, *The Case for Removing the Fair and Equitable Treatment Standard from NAFTA*, CIGI PAPERS NO. 128 (Apr. 2017), [https://www.cigionline.org/sites/default/files/documents/Paper%20no.128web\\_1.pdf](https://www.cigionline.org/sites/default/files/documents/Paper%20no.128web_1.pdf) [https://perma.cc/SLF4-U4AW] (showing developing countries’ arguments for removal of FETs). FETs have also become very controversial in the context of the Energy Charter Treaty. See generally T.W. Wälde, *Energy Charter Treaty-Based Investment Arbitration - Controversial Issues*, 5 J. WORLD INV. & TRADE 373 (2004); Ipp, *supra* note 1.

99. See generally MARTINS PAPARINSKIS, *THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT* (Oxford Univ. Press 2013); Rudolf Dolzer, *Fair and Equitable Treatment: Today’s Contours*, 12 SANTA CLARA J. INT’L L. 7, 29–31 (Jan. 17, 2014); Kenneth J. Vandeveld, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U. J. INT’L L. AND POL. 43 (2010).

100. Tribunals are not united in their determination of the notion of “legitimate expectations.” Compare *Tecmed v. Mexico*, ICSID, Case No. ARB (AF)/00/2, Final Award (May 29, 2003), with *Parkerings-Compagniet AS v. Lithuania*, ICSID, Case No. ARB/05/8, Final Award (Sept. 11, 2007), See Dolzer, *supra* note 99, at 20–27.

socio-economic and political contexts of the developing countries.<sup>101</sup> The challenge FET poses is not easily addressed by the restrictions in new IIAs.<sup>102</sup> In our view, the vagueness and uncertainty of FET interpretation by Tribunals may negatively impact the capacity of states to take climate action. As we argue in the ensuing Section on ISDS and climate change, there is an imminent concern that the arbitral awards, which are stacked against developing countries where FET has been invoked, may easily cascade further in disputes that arise from regulatory climate actions taken by host states.

In responding therefore to the question whether renegotiating or new IIAs/BITs will offer constructive avenue to address climate change and not chill climate action by host states, we are skeptical of the capacity of BITs to address the fundamental challenges that are required to deliver the conditions to support climate action and deliver climate justice. Put differently, while useful, modest efforts at addressing climate change through innovative drafting of investment treaties fall short of the fundamental and urgent approach that is required to reconstitute an international green investment regime that centers justice for the marginalized.

### *B. Climate Change and ISDS*

As states invest in new projects and infrastructure related to the climate-friendly and associated industries' transitions or to mitigate the effects of climate change, it is inevitable that contractual disputes involving states and state-owned entities will arise.<sup>103</sup> Climate-friendly legislative or policy measures

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101. ISLAM, *supra* note 98.

102. Enrique Boone Barrera compares the difference in the provisions of the FET in old and new IIAs and concludes that their effect remains essentially the same despite the restrictions introduced. *See* Barrera, *supra* note 98.

103. For example, in the January 2020 case of *Frazer Solar GMBH v. The Kingdom of Lesotho*, an ad hoc tribunal ordered the Kingdom of Lesotho to pay EU€50 million to a German investor claimant for breach of the investment contract for an energy project. In August 2019, the claimant filed for ad hoc arbitration against Lesotho pursuant to Clause 24 of the supply agreement, alleging that Lesotho breached several obligations under the supply agreement. The claimant sought payment of EU€50 million in liquidated damages and the expected value of the profits that the project would have realized had the respondent complied with the supply agreement. *See Frazer Solar v. Lesotho*, JUS MUNDI (2020), <https://jusmundi.com/en/document/decision/en-frazer-solar-gmbh-v-the->

undertaken by developing country governments with a view to protecting the environment and their peoples or aligning their investment regime with IIA commitments may be the basis of an ISDS proceeding. The stark reality for host states of the Global South is that the ISDS regime remains a potent and strategic tool in the hands of investors to challenge measures that the investors deem as an interference with their obligations. Developing countries are thus left with an important dilemma: striking a balance between attracting climate-friendly investments and keeping the regulatory space for climate measures to avoid ISDS claims.

The ISDS mechanism allows an aggrieved investor to commence arbitral proceedings in ad hoc international tribunals to demand compensation for alleged losses that have arisen from the host state's actions that are deemed violations of the investor protection provisions in their IIA.<sup>104</sup> Although ISDS is undergoing reform which has led to calls for its outright termination, ISDS remains the forum of choice among investors.<sup>105</sup> Skeptics of the ISDS-climate change linkage argue that the current regime of international investment law poses a threat to the capacity of developed and developing countries to phase out fossil fuel energy sources.<sup>106</sup> For the optimists, the global "green" industry can leverage IIL to force climate-friendly actions. As ISDS tribunals will ultimately be tasked with the responsibility to balance the competing interests of the foreign investors and the host states where climate measures are disputed, determining which host government measures are unreasonable, disproportionate,

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[<https://perma.cc/AS7P-WM28>].

104. See Arseni Matveev, *The Evolving Balance Between Investor Protection and State Sovereignty*, 40 UNIV. W. AUSTL. L. REV. 348, 349 (2015).

105. See generally José E. Alvarez, *ISDS Reform: The Long View*, 36 ICSID REV. - FOREIGN INV. L. J. 253-77 (2021); Anthea Roberts & Taylor St John, *Complex Designers and Emergent Design: Reforming the Investment Treaty System*, 116 AM. J. INT'L L. 96 (2022); Olabisi D. Akinkugbe, *Africanization and the Reform of International Investment Law*, 53 CASE W. RES. J. INT'L L. 7 (2021).

106. Martin Dietrich Brauch argues that "for international investment law to support climate goals, we need a wholly new regime for investment governance, not investment protection and arbitration." Martin Dietrich Brauch, *Climate Action Needs Investment Governance, Not Investment Protection and Arbitration*, PHYS.ORG (Mar. 18, 2022), <https://phys.org/news/2022-03-climate-action-investment.html> [<https://perma.cc/EL6A-JQXD>].

arbitrary, or discriminatory to trigger valid treaty claims remains not only unclear but also portends a source of concern for developing and developed states.

At its core, ISDS is antithetical to climate change and climate justice concerns. More generally, international investment arbitration and ISDS have been less responsive to the concerns that TWAIL and other critical scholars have raised about the regime. Investors have successfully challenged national policy measures that were taken by host states to protect the environment and public health with consequential compensation for the states.<sup>107</sup> This view is illustrated by the *Eco Oro Minerals* case where the tribunal decision highlighted the limitations of host state governments in taking measures towards the protection of the environment, human rights, and climate change policies.<sup>108</sup> The lack of clarity shows the hollowness of the modernizing language in IIAs.<sup>109</sup> Further, ISDS awards and the damages that arise from them have a negative impact on the fiscal capacity of host states to take climate action. The massive damages awarded to investors against host states cast a regulatory chill on countries.<sup>110</sup>

Climate-related ISDS is on the rise. While a handful of cases that have gone to ISDS have been against developed countries, the imminent risk remains that it is a question of time for developing

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107. See Jonathan Bonnitcha et al., *Damages and ISDS Reform: Between Procedure and Substance*, J. INT'L DISP. SETTLEMENT 1 (2021).

108. For a compelling analysis of the negative impact of this case, see Stuart Trew, *The False Hopes and Empty Promises of Investment Treaty Modernization*, THE MONITOR (Sept. 16, 2022), <https://monitormag.ca/articles/the-false-hopes-and-empty-promises-of-investment-treaty-modernization> [<https://perma.cc/HL2N-HQQY>]. The Columbia Center on Sustainable Investment (“CCSI”), for example, argues that “[t]here is a fundamental misalignment between the existing international investment regime—including its centerpiece: invest-state arbitration—and the actions needed to meet the objectives of the international climate regime.” Martin Dietrich Brauch, *Climate Action Needs Investment Governance, Not Investment Protection and Arbitration*, in OECD PUB. CONSULTATION: INV. TREATIES AND CLIMATE CHANGE 75 (Mar. 25, 2022).

109. See, e.g., Trew, *supra* note 108 (arguing that “the modernizing language of Canadian trade and investment treaties doesn’t work. Tribunals will do what they want. In this case to the benefit of international mining firms and with significant harm to democracy and the protection of environment in Colombia.”).

110. See TIENHAARA & COTULA, *supra* note 8, at 19–22; Matteo Fermeglia et al., “*Investor-State Dispute Settlement*” as a New Avenue for Climate Change Litigation, SABIN CTR. FOR CLIMATE CHANGE L. (Mar. 18, 2022), <http://blogs.law.columbia.edu/climatechange/2021/06/02/investor-state-dispute-settlement-as-a-new-avenue-for-climate-change-litigation/> [<https://perma.cc/ZF7V-8Y5Q>].

countries.<sup>111</sup> *Eco Oro* thus affirms the argument of the skeptics that ISDS harbors more harm for climate change policy.<sup>112</sup>

ISDS cases challenging States' actions and measures to address climate change may undermine their capacity to address climate change. Although there is neither certainty nor clarification around how tribunals will rule in cases that challenge climate measures taken by states, the success rate of fossil fuel-related disputes, the crippling nature of compensation<sup>113</sup> and overall potential chilling effects of the ISDS regime affirm the complicity of ISDS vis-à-vis climate measures taken by states. In the next Section, we turn to our analysis of climate justice in the light of climate change law and the search for a green investment order.

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111. For example, panels in various cases brought against Spain's roll-back of incentives for renewable energy producers held that the country created a legitimate expectation that those benefits are irrevocable and, in some cases, breached the stability guarantee under the Fair and Equitable Treatment (FET) clause of the ECT. See 9REN Holding v. Spain, ICSID, Case No. ARB/15/15, Final Award (May 31, 2019); BayWa r.e. v. Spain, ICSID, Case No. ARB/15/16, Final Award (Jan. 25, 2021); Cube Infrastructure and Others v. Spain, ICSID, Case No. ARB/15/20, Final Award (July 15, 2019). Although panels elsewhere have reached a different decision, the application of conventional IIL principles in resolving "green" investment disputes as in the cases in Spain portends a cautionary tale. See also RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands, ICSID, CASE No. ARB/21/4, (2021). The action was under the provisions of the ECT in response to the Netherland's decision to phase out coal energy. See Stephanie Triefus, *Climate Change and International Investment Law – A Dangerous Mix?*, ILA REPORTER (Sept. 16, 2022), <https://ilareporter.org.au/2021/03/climate-change-and-international-investment-law-a-dangerous-mix-stephanie-triefus> [<https://perma.cc/9B6M-G3JW>].

112. Jimena Sierra expresses this view is concluding "[t]he Eco Pro arbitral award demonstrates that there is still a long way to go before the adjustments that ISDS needs to make to correct its profound inequalities are taken seriously." Jimena Sierra, *Is the Arbitral Award in the Eco Pro v. Colombia Dispute Bad Law?*, AFRONOMICSLAW (Nov. 11, 2021), <https://www.afronomicslaw.org/category/analysis/arbitral-award-eco-oro-v-colombia-dispute-bad-law> [<https://perma.cc/ZP2T-7NBP>].

113. See Martins Paparinskis, *Crippling Compensation in the International Law Commission and Investor–State Arbitration*, 37 ICSID REV. FOREIGN INV. LAW J. 289 (2021); Jonathan Bonnitcha & Sarah Brewin, *Compensation Under Investment Treaties*, IISD BEST PRACTICES SERIES (Nov. 2020), <https://www.iisd.org/system/files/publications/compensation-treaties-best-practices-en.pdf> [<https://perma.cc/3XS6-DQLH>].

IV. AN INTERNATIONAL CLIMATE LAW OUTLOOK ON  
CLIMATE JUSTICE AND THE GREEN INVESTMENT  
ORDER

ICL is not monolithic. It is a “vast and complex web of principles, rules, regulations, and institutions.”<sup>114</sup> However, the United Nations Climate Change regime is the most consequential and determinative component of the ICL matrix.<sup>115</sup> The regime is primarily made up of the 1992 United Nations Framework Convention on Climate Change (“the Convention”), the 2015 Paris Agreement, various decisions of authoritative bodies under the climate regime, particularly the Conference of Parties to the Convention (“COP”), and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (“CMA”).<sup>116</sup> From the inception of the regime in 1992, the relationship between climate goals and international investment and trade has been considered, albeit mutedly.<sup>117</sup> Efforts to directly attend to investment-related concerns within the climate regime have generally been unsuccessful.<sup>118</sup>

Directly addressing investment issues within the climate regime is vital for different reasons: (1) for the effective and efficient complementation of the regimes and (2) to ensure that

114. DANIEL BODANSKY ET AL., *INTERNATIONAL CLIMATE CHANGE LAW* 10 (Oxford Univ. Press ed. 2017).

115. Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, HARV. PROJECT ON INT’L CLIMATE AGREEMENTS 5 (Jan. 2010).

116. *See id.*

117. For example, the 1992 Convention encourages cooperation for the promotion of a supportive and open international economic system for sustainable economic growth and development in all parties to enable them to better address the problems of climate change. It also disapproves of using measures to combat climate change as a means of “arbitrary or unjustifiable discrimination or a disguised restriction on international trade”. U.N. Framework Convention on Climate Change art. 3, ¶ 5 (June 4, 1992).

118. A good example is the perennial argument on whether intellectual property rights (“IPRs”), particularly patent, are barriers to or enablers of effective and equitable climate response, and if they are best dealt with within the climate regime. *See, The Climate Technology Mechanism: Issues and Challenges*, Int’l Ctr. for Trade and Sustainable Dev. (Mar. 2011), [https://seors.unfccc.int/applications/seors/attachments/get\\_attachment?code=C5S2E617QDROQPLODCND23NN2Y1CNRGE](https://seors.unfccc.int/applications/seors/attachments/get_attachment?code=C5S2E617QDROQPLODCND23NN2Y1CNRGE) [https://perma.cc/9XPF-6J4Z]; Adebayo Majekolagbe, *The Evolution of the UNFCCC Environmentally Sound Technology Development and Transfer Framework*, 16 L., ENV’T & DEV. J. 112, 127-28 (2020); Caominhe Ring, *Patent Law and Climate Change: Innovation Policy for a Climate in Crisis*, 35 HARV. J. OF L. & TECH. 373, 387-97 (2021).



investment-related climate response measures are equitable. In this Part of the Article, we deepen our analysis by arguing that the Paris Agreement's objective on finance flows and its narrow manifestation in market-based voluntary measures under Article 6 of the Paris Agreement are the primary points of intersection of investment and climate law within the ICL regime. Article 2 of the Paris Agreement lays out the objectives of the instrument: (a) holding global average temperature to well below 2°C while making efforts to achieve a 1.5°C reduction; (b) increasing the ability to adapt to the adverse impacts of climate change and fostering climate resilience and low GHG emissions development; and (c) making finance flows consistent with low GHG emissions pathway and climate-resilient development. The Agreement requires that its objectives be pursued reflecting equity and the CBDR principle.<sup>119</sup>

#### *A. Finance Flows and Climate Justice*

Even though the term “investment” is not featured in the Paris Agreement, Ralph Bodle and Vicky Noens argue that Article 2(1)(c) provides the “only textual hook . . . for addressing the bigger picture of general finance and investment flows with other parties under the Paris Agreement.”<sup>120</sup> The consistent finance flows objective articulates the Paris Agreement's vision of transforming the global economy by deeply reforming the incentives and disincentives for economic transformation and scaled-up cooperative action.<sup>121</sup> The consistent finance flow objective is one of the stand-out innovations of the Paris Agreement. While the Convention and the Kyoto Protocol situated climate finance in the contexts of administrative support for the UNFCCC and transitional support for developing States, the Paris Agreement went further to introduce a more transformational notion of “finance” which demands nothing less than an alignment of the global economy to

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119. Paris Agreement to the United Nations Framework Convention on Climate Change, art. 2, ¶ 2, Dec. 12, 2015, T.I.A.S. No. 16-1104.

120. Ralph Bodle & Vicky Noens, *Climate Finance: Too Much on Detail, Too Little on the Big Picture*, 3 CLIMATE CHANGE L. REV. 248, 250 (2018).

121. See Halldór Thorgeirsson, *Objective (Article 2.1)*, in THE PARIS AGREEMENT ON CLIMATE ACTION: ANALYSIS AND COMMENTARY 123, 128 (Daniel Klein et al. eds., 2017).

the global climate goals.<sup>122</sup> Importantly, Article 2(1)(c) emphasizes the consistency of finance flows with mitigation and adaptation pathways, rather than just mitigation pathways.<sup>123</sup> This is particularly important in a world where the window for effective adaptation is increasingly shrinking with grave implications for developing countries.

Making the finance flow consistent with climate goals is a multi-dimensional endeavour. It includes financial policies and regulations, fiscal policies, public finance, and information instruments.<sup>124</sup> These policy instruments increasingly define the global green investment landscape,<sup>125</sup> and Tienhaara et al. have shown how these policies interact with IIL principles.<sup>126</sup> Notably, while there are various examples of states already enshrining these tools in domestic laws, the overarching evolution of these regulatory spaces is largely multicentric with businesses in many cases in the driver's seat. Take disclosure obligations for example. Although countries like France and New Zealand have mandatory climate disclosure laws, one of the most recognized climate disclosure frameworks in the world—the Recommendations of the Taskforce on Climate-related Financial Disclosures (“TCFD”)<sup>127</sup>—

122. See Luis Zamarioli et al., *The Climate Consistency Goal and the Transformation of Global Finance*, 11 *NATURE CLIMATE CHANGE* 578, 581 (2021).

123. See Shelagh Whitley, *Making finance consistent with climate goals: insights for operationalising Article 2.1c of the UNFCCC Paris Agreement*, ODI (Dec. 5, 2018), <https://odi.org/en/publications/making-finance-consistent-with-climate-goals-insights-for-operationalising-article-21c-of-the-unfccc-paris-agreement/> [https://perma.cc/69BH-KH98].

124. Examples of relevant financial policies and regulations include disclosure obligations, credit rating, climate risk assessment, lending requirements; fiscal policies cover initiatives including fossil fuel subsidy reform, divestment, moratorium and bans, border tax adjustment; public finance entails grants, debt equity, insurance guarantees; and information instruments includes examples like voluntary standards and labelling. *See id.*

125. As noted by Bodle and Noens, although Article 2(1)(c) is not explicitly directed at private actors, “the domestic actions of states are crucial in creating and maintaining the conditions that spurn and attract climate-friendly investments and make finance flows, both domestic and international, go towards low greenhouse gas emissions and climate-resilient development”. Bodle & Noens, *supra* note 120, at 253.

126. See Kyla Tienhaara et al., *Submission to the OECD Public Consultation on Investment Treaties and Climate Change*, in *OECD PUB. CONSULTATION: INV. TREATIES AND CLIMATE CHANGE* 216 (Mar. 25, 2022).

127. The TCFD was created by the Financial Stability Board “to develop recommendations on the types of information that companies should disclose to support investors, lenders and insurance underwriters in appropriately assessing and pricing a specific set of risks - risks related to climate change.” *About*, TASK FORCE ON CLIMATE-

is essentially industry-led.<sup>128</sup> Further, although there is an increase in legislated net-zero goals by states,<sup>129</sup> frameworks for the actual operationalization of net zero targets are overwhelmingly non-state-led.<sup>130</sup> Further, courts across the world are turning to these “voluntary” commitments and tools to interpret and compel climate obligations.<sup>131</sup>

The complexity of aligning IIL and climate change is laid bare in the different roles of transnational corporations. Transnational corporations are dominant actors in IIL and with an even more central role to play in climate investment governance. Yet, an important difference is that while multinational corporations are primarily business actors in the IIL regime, they are both beneficiaries and “norm creators” in climate investment governance as seen in the TCFD and net zero examples above.<sup>132</sup> The non-bindingness of voluntary initiatives under the ICL regime is, however, a challenge. In other words, multinational corporations and investors with no binding obligations in their old BITs and IIAs have little incentives to comply with “voluntary” climate commitments. Yet, corporate interests play a central role in the determination of the winners and losers in the transition to a green economy.<sup>133</sup> The makers of rules and setters of norms

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RELATED FIN. DISCLOSURES, <https://www.fsb-tcdf.org/about/> [<https://perma.cc/H3HX-Q76M>] (last visited Nov. 16, 2022). For the Report on the Recommendations of the TCFD 2017, see TCFD, *Recommendations of the Task Force on Climate-related Financial Decisions* (June 2017). The recommendations prefer a framework for companies and their organizations to develop more effective climate-related financial disclosures through their existing reporting processes. See *id.*

128. The TCFD Recommendations are overseen by a Taskforce entirely constituted by corporations and corporate interests. It is currently chaired by Michael Bloomberg, and includes representatives from companies including Unilever, BlackRock, Eni, and BHP. See TCFD, *Task Force Members*, <https://www.fsb-tcdf.org/members/> [<https://perma.cc/9N6L-UL5T>] (last visited Nov. 16, 2022).

129. See *Net Zero Emissions Race*, ENERGY & CLIMATE INTEL. UNIT, <https://eciu.net/netzerotracker> [<https://perma.cc/FV4G-MMEA>] (last visited Feb. 28, 2022).

130. For example, under the Business Ambition for 1.5°C campaign, more than 1000 companies worldwide representing over \$23 trillion in market capitalization have committed to set ambitious 1.5°C and net-zero aligned targets at the pace and scale required by science. See SCIENCE BASED TARGETS, STATUS REPORT: BUSINESS AMBITION FOR 1.5°Cs - RESPONDING TO THE CLIMATE CRISIS 5 (2021).

131. See, e.g., Dist. Ct. Den Haag 26 kunnen 2021, ECLI:NL:RBDHA:2021:5339, *Milieudefensie v. Royal Dutch Shell PLC*.

132. See SCIENCE BASED TARGETS, *supra* note 130; TCFD, *supra* note 127.

133. See TCFD, *supra* note 128.

governing the green transition matter. As it stands, developing countries are generally not involved in the crafting of rules governing climate investment. This is in part due to the decentralized and informal approach adopted in the crafting of the rules. For example, unlike most key provisions in the Paris Agreement, there is no framework for the development and advancement of Article 2(1)(c) of the Paris Agreement under the UNFCCC regime.<sup>134</sup>

Participation is the first order of justice. As TWAIL and other critical scholarship have shown, international law and the international economic order were largely crafted without substantive input from Global South countries.<sup>135</sup> Although this is not the pre-1960s when many developing countries had not become independent, it is certainly not the age of untrammelled equality of States in the theory and practice of IIL. This is an ongoing phenomenon as seen in the design and implementation of policies like moratorium on overseas investment in fossil fuel and border tax adjustments.<sup>136</sup> For example, the European Union's proposed Carbon Border Adjustment ("CBA") Mechanism was designed to address the risk of carbon leakage when carbon price is put on certain goods from within the European Union.<sup>137</sup> The instrument has, however, been criticized for contradicting the CBDR principle as it will shut out emerging and developing countries by placing considerable barriers between the western trade bloc and the rest of the world and leading to fewer producers from less developed countries.<sup>138</sup> Again, financial disclosure and

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134. As noted elsewhere, "UN climate negotiations have 'underdiscussed' Art 2.1(c) as it lacks a 'home.'" Zamarioli et al., *supra* note 122, at 582.

135. See generally Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, in *CAMBRIDGE STUDIES IN INT'L AND COMPAR. L.* 3 (Cambridge Univ. Press 2012); See BEDJAOUI MOHAMMED, *TOWARDS A NEW INTERNATIONAL ORDER* 12, 16 (Holmes & Meier ed. 1979); See Makau W. Mutua, *What is TWAIL?*, 31 *PROCS. OF THE ASIL ANN. MEETING* 31 (2000).

136. Vijaya Ramachandran, *Blanket Bans on Fossil-Fuel Funds Will Entrench Poverty*, 592 *NATURE* 489 (2021) ("[B]lanket ban[s] will entrench poverty in regions such as sub-Saharan Africa but do little to reduce the world's carbon emissions.").

137. *EU Green Deal (Carbon Border Adjustment Mechanism)*, EUR. COMM'N, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12228-Carbon-Border-Adjustment-Mechanism> [<https://perma.cc/TT8U-TTRJ>] (last visited Sept. 16, 2022).

138. See Kerstine Appunn, *Emission Reduction Panacea or Recipe for Trade War: The EU's Carbon Border Tax Debate*, *CLEAN ENERGY WIRE* (June 7, 2022, 4:26 PM), <https://www.cleanenergywire.org/factsheets/emission-reduction-panacea-or-recipe->

the consideration of climate risks in investment decision-making have potential adverse impacts on poorer vulnerable countries as seen in Moody's indication that Island states' sovereign credit could be downgraded due to climate risks.<sup>139</sup>

The trends in climate change-informed investment policies have opened a hybrid space where third-country policies tacitly govern the conduct of investors in other countries.<sup>140</sup> Take CBA as an example. Essentially, it is designed to ensure that companies in countries with low or no carbon pricing costs do not have a competitive edge over companies in countries with high carbon pricing costs.<sup>141</sup> It also signals to companies not to relocate to countries with low or no carbon pricing costs. Although the CBA supposedly addresses the free rider challenge,<sup>142</sup> least developed states with the least emissions and considerable carbon budgets are not free riders, even when they do not adopt market mechanisms like carbon pricing. Whereas the CBA has, at least, a chilling effect on companies seeking to relocate investments, neither traditional IIL—which is more focused on the investment policies of host states—nor international trade law—of which analysis borders on technical fairness at best—seems equipped to

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trade-war-eus-carbon-border-tax-debate [https://perma.cc/J5YY-BQ8Q]; Arvind Ravikumar, *Carbon Border Taxes are Unjust*, MIT TECH. REV. (July 27, 2020) <https://www.technologyreview.com/2020/07/27/1005641/carbon-border-taxes-eu-climate-change-opinion/> [https://perma.cc/68XM-7L6Y].

139. Zamarioli et al., *supra* note 122, at 582.

140. A similar trend is observed in the increasing enactment of due diligence laws in Europe. For example, the French Duty of Vigilance Law require eligible companies to establish and implement an effective plan that allows for risk identification and prevention of severe human rights violation resulting directly from their operations or indirectly from the operations of the companies they control within or outside the country. See FRANÇOIS HOLLANDE, LOI 2017-399 DU 27 MARS. 2017 RELATIVE AU DEVOIR DE VIGILANCE DES SOCIETES MERES ET DES ENTREPRISES DONNEUSES D'ORDRE, in JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE (Mar. 28, 2017) (relating the Law 2017-399 of March 27, 2017 to the duty of vigilance of parent companies and ordering companies). See also EUR. COAL. FOR CORP. JUST., <https://corporatejustice.org/> [https://perma.cc/J5ZW-X5PN] (last visited Nov. 20, 2022); *French Duty of Vigilance Law, – English Translation*, BUS. & HUM. RTS. RES. CTR. (Dec. 14, 2016), <https://www.business-humanrights.org/en/latest-news/french-duty-of-vigilance-law-english-translation/> [https://perma.cc/7NC8-42RE].

141. DAVID SAWYER & RENAUD GIGNAC, BORDER CARBON ADJUSTMENTS: THE CASE FOR A COOPERATIVE, PRINCIPLES-BASED APPROACH 1, 4 (Feb. 2022).

142. Michael Keen et al., *Border Carbon Adjustments: Rationale, Design and Impact*, IMF Working Papers 4 (Sept. 2021) (“[C]arbon pricing . . . faces a fundamental free rider problem, since each country has an incentive to leave it to others to address the common climate challenge: [border carbon adjustments] may be a way to help address this difficulty.”).

address the unique justice questions the CBA raises. For instance, what role does the fact that least developed countries should have a higher carbon budget play in a CBA analysis?<sup>143</sup> When carbon budgets are considered in a CBA analysis, countries like the United States and Germany should enact ambitious mitigation policies consistent with their deficit carbon budget including carbon pricing policies, countries like Ethiopia and Madagascar have carbon budgets which could allow for developmentally necessary and reasonable emissions. Ethiopia and Madagascar should not be indirectly coerced into enacting policies like carbon pricing as is this case with the CBA. In summary, when viewed through the lenses of a history sensitive notion of justice, climate investment-related policies do not look alike or apply equally to all.

Although one could argue that there is already a forum that considers the impacts of response measures to climate change under the UNFCCC regime,<sup>144</sup> the forum is arguably unfit for purpose as it is a general framework for the consideration of traditional climate policies adopted domestically, albeit with transboundary effects. As previously noted, Article 2(1)(c) is an innovation of the Paris Agreement, and it is time to provide a home for concerted development of policies under this very important objective and the consideration of their impacts on developing States and vulnerable people. Though largely mute on this point, the Glasgow Climate Pact<sup>145</sup> recognizes that just transition could be ensured by making finance flows consistent with the climate goals.<sup>146</sup> In sum, Article 2(1)(c) not only provides the ideal “liaison”

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143. A carbon budget estimate which factors in historical responsibility, for example, shows that for a 1.5°C target, the United States’ carbon budget is -18.6 Gt CO<sub>2</sub>, Germany’s is -3.9 Gt CO<sub>2</sub>, while Ethiopia’s and Madagascar’s are 12.7 Gt CO<sub>2</sub> and 3.3 Gt CO<sub>2</sub> respectively. Keith Williges et al., *Fairness Critically Conditions the Carbon Budget Allocation Across Countries*, 74 *GLOB. ENV’T CHANGE* 11 (2022) (contending that the “primary objective of a BCA is to ensure that production and hence emissions don’t migrate to jurisdictions with lower carbon costs.”).

144. UNFCCC, *Report of Forum on the Impact of the Implementation of Response Measures* (Nov. 18, 2021), [https://unfccc.int/sites/default/files/resource/RM\\_decision\\_0.pdf](https://unfccc.int/sites/default/files/resource/RM_decision_0.pdf) [<https://perma.cc/YM5K-6ZTK>].

145. See UNFCCC, Glasgow Climate Pact ¶ 52, FCCC/PA/CMA/2021/10/Add.1 (Mar. 8, 2022). The Glasgow Climate Pact was agreed to by Parties to the Paris Agreement at the Conference of Parties to the UNFCCC (COP 26) in 2021. While unlike the Paris Agreement, the Glasgow Pact is not legally binding, it is nevertheless indicative of the current understanding and aspirations of parties.

146. *Id.* at ¶ 52.

between the IIL and ICL regimes, but also the expectation that it could be operationalized to reflect equity. CBDR, also positions Article 2(1)(c) as a potential driver of a just investment order.

### *B. Voluntary Measures and Climate Justice*

Article 6 of the Paris Agreement is one of the major potential vehicles for implementing the Article 2(1)(c) objective.<sup>147</sup> The relatively comprehensive Article 6 structures and rules for the cooperative implementation of response measures under the Paris Agreement exemplify the usefulness of a concerted approach to crafting a global climate investment regime. Article 6 encourages market and non-market based cooperative efforts both at the state to state and private sector to state levels. It allows States to use internationally-transferred mitigation outcomes (“ITMOs”) generated from mitigation or adaptation projects in other states towards their international mitigation commitments (“NDCs”).<sup>148</sup> Further, a mechanism through which participating public and private entities can earn certified Article 6(4) emission reduction (“A6.4ER”) from mitigation projects was established.<sup>149</sup> Both ITMOs and the mechanism are potential vehicles for green investment, particularly, in developing States. After six years of negotiation, State parties finally adopted the Guidance on ITMOs, rules and procedures for the mechanism, and work program on non-market approaches in 2021. The outcomes are not perfect, but they are considerably reflective of the voices and interests of participants, including developing States.

Neither the use of ITMOs under Article 6(2) nor the Article 6(4) mechanism is novel. Versions of both existed under the Kyoto Protocol; TMOs as joint implementation, and the mechanism as

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147. Some have suggested Article 6 as a successor to cooperative initiatives under the 1997 Kyoto Protocol. In fact, it was explicitly stated during the 2021 informal technical expert dialogue on Article 6 that “[t]he 6.4 mechanism is the successor to the CDM.” A full transition from the Kyoto Protocol to the Paris Agreement, would, however, require a decision on the status of ongoing activities under the CDM and a clear agreement on core elements of the implementing rules for Article 6(4). UNFCCC, *Chair’s Summary, Informal Consultations/Informal Technical Expert Dialogue on Article 6 of the Paris Agreement: Clean Development Mechanism Activity Transition to the Article 6.4 Mechanism* (June 8, 2021). The Clean Development Mechanism (CDM) is one of the cooperative initiatives under the Kyoto Protocol. See Kyoto Protocol art. 12, 2303 U.N.T.S. 162 (Dec. 11, 1997).

148. See Paris Agreement, *supra* note 119, at art. 6 ¶ 1-2.

149. See Paris Agreement, *supra* note 119, at art. 6 ¶ 4.

Clean Development Mechanism (“CDM”). The experience with these instruments under Kyoto, particularly the effects of the CDM in developing countries, has been useful in designing an arguably more effective and equitable framework. Activities under Article 6(4) are required to, among other things, minimize and where possible, avoid negative environmental and social impacts, and undergo local stakeholder consultation consistent with applicable domestic public participation arrangement involving local communities and Indigenous peoples.<sup>150</sup> To assist developing countries which are particularly vulnerable to the effects of climate change, 5 percent of issued A6.4ERs are required to be transferred to the Adaptation Fund.<sup>151</sup> In addition, the administrative and oversight machinery established for the implementation of Article 6(4) has been arguably designed to ensure that developing countries benefit from transactions under the mechanism.<sup>152</sup>

However, while Article 6(4) is an important subset of the consistent finance flow goal, its scope is considerably narrow. This leaves us with the need for a broader framework for the operationalization of Article 2(1)(c) which although could draw inspiration from developments under Article 6, will go farther in providing structure and rules for the emergence of a just climate investment order. Article 6 is by no means perfect. For one, it is undergirded by the *quid pro quo* mindset whereby developed countries and Global North corporate entities receive something (e.g., A6.4ER) by giving something (a ‘climate-friendly’ project).<sup>153</sup> While there are efforts to filter in equity elements (e.g., the 5% CER transfer),<sup>154</sup> the system is fundamentally detached from the historical responsibilities of developed States and corporations. A historical responsibility aligned framework will provide for the possibility of applying ITMOs and CERs from proven climate

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150. See UNFCCC, *Rules, Modalities and Procedures for the Mechanism Established by Article 6, Paragraph 4, of the Paris Agreement* ¶ 31, FCCC/PA/CMA/2021/L.19, (Nov. 13, 2021).

151. This commitment is to further Article 6 ¶ 6 of the Paris Agreement requiring that a share of the proceeds from activities under the mechanism be used to assist developing countries vulnerable to climate change impacts. *See id.* ¶ 58.

152. Charles Di Leva & Scott Vaughan, *The Paris Agreement’s New Article 6 Rules: The Promise and Challenge of Carbon Market and Non-Market Approaches*, INT’L INST. FOR SUSTAINABLE DEV. (Mar. 18, 2022), <https://www.iisd.org/articles/paris-agreement-article-6-rules> [<https://perma.cc/6JUN-9VW6>].

153. See UNFCCC, *supra* note 150, ¶ 1.

154. *See id.* at ¶ 58.



friendly investments in the global south to address past emissions and not just future emissions.

Outside the UNFCCC, there are developments that mirror the envisioned broader multilateral climate investment regime under Article 2(1)(c). An example is the Energy Charter Treaty (ECT) modernization process announced in 2017.<sup>155</sup> Climate change was, however, not explicitly included on the final list of topics to be negotiated.<sup>156</sup> Nevertheless, negotiation has been replete with emphatic demands to strongly reflect climate imperatives. The European Union, for example, proposed that the modernized treaty should “reflect climate change and clean energy transition goals and contribute to the achievement of the objectives of the Paris Agreement” and Luxembourg has proposed a stand-alone article on climate change commitments, decarbonization process, corporate social responsibility, and sustainable development.<sup>157</sup>

Whether the ECT can be successfully modernized in compliance with the global climate goals is questionable.<sup>158</sup> A more relevant question here, however, is even if successfully modernized, will the ECT lead to just ends for the world’s most vulnerable? This brings us back to the subject of participation. ECT’s members are primarily European countries (including the European Union) and a handful of Asian countries.<sup>159</sup> A review of decision on policy options for the modernization shows the participation of less than ten member parties made up of European countries and Japan.<sup>160</sup> While there are multiple possible reasons for such paucity in participation, the point remains that the level of participation is abysmally low. This is particularly so considering

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155. See, e.g., Energy Charter Secretariat, *Decision of the Energy Charter Conference: Modernization of the Energy Charter Treaty*, CCDEC/2017/23/STR (Nov. 28, 2017).

156. See Energy Charter Secretariat, *Report of the Chair of the Subgroup on Modernization* ¶ 6, CCDEC/2018/21/NOT (Nov. 27, 2018).

157. See Energy Charter Secretariat, *Adoption by Correspondence - Policy Options for Modernization of the ECT* 39, CCDEC/2019/08/STR (Oct. 6, 2019).

158. See Sam Meredith, “*Either We Kill It, or It Will Kill Us*”: *The Fight to Dismantle a Shadow Court System Threatening Climate Goals*, CNBC (Mar. 18, 2022), [https://www.cnbc.com/2021/11/24/climate-the-fight-to-dismantle-the-little-known-energy-charter-treaty.html?\\_source=google%7Ceditorspicks%7C&par=google](https://www.cnbc.com/2021/11/24/climate-the-fight-to-dismantle-the-little-known-energy-charter-treaty.html?_source=google%7Ceditorspicks%7C&par=google) [<https://perma.cc/63RQ-UNNE>].

159. See *Members and Observers to the Energy Charter Conference*, INT’L ENERGY CHARTER, <https://www.energycharter.org/who-we-are/members-observers/> [<https://perma.cc/4J9K-MFUV>] (last visited Nov. 20, 2022).

160. See Energy Charter Secretariat, *supra* note 157.

that the ECT is one of the most consequential investment treaties to climate change. Nothing in the modernization process shows that the adverse impacts of climate response measures particularly on Global South countries are being considered.

We return to the argument that an article 2(1)(c) facility is well-positioned to facilitate a global just climate investment regime. In addition to the arguments already made, the Paris Agreement is the singularly most comprehensive and ratified climate treaty in the world. It is a regime which although still characterized by an imbalanced power structure, developing countries have been able to influence, albeit incrementally, over the years. For thirty years, developing countries have worked to ensure that issues of justice and fairness as represented by the CBDR principle remain paramount in the workings of the UNFCCC regime.<sup>161</sup> The concepts of responsibility, capacity, and circumstance actuate the CBDR principle. Related to this is the polluter pays principle—the idea that those responsible for climate change or other forms of ecological damage should bear the burden of addressing the problem and redressing harms therefrom.<sup>162</sup> A wisdom behind the international climate regime is that having contributed the most to climate change and given their higher technological and financial capacity, developed countries should take a leading role in measures to combat climate change and provide support to vulnerable countries. In furtherance of climate justice, the rules of the game need to be “drafted in a way that clearly favors those who are most affected by climate change, for example by supporting their livelihood.”<sup>163</sup>

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161. See Reinout Debergh, *Climate Justice in the UNFCCC*, CLIMATALK (June 10, 2021), <https://climatalc.org/2021/06/10/climate-justice-in-the-unfccc/> [<https://perma.cc/ZYK9-882E>].

162. See United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc A/Conf.151/26 (1992), 31 I.L.M. 874, 876 (1992) (describing the principle, the Rio Declaration admonishes states to “promote the internalization of environmental costs . . . taking into account the approach that the polluter should, in principle, bear the cost of pollution . . .”). The “no-harm” principle, an established customary international norm, which mandates states to prevent activities within their territory causing extra-territorial harm and impose a duty to compensate on states which fail in this obligation also applies here. See Sandrine Maljean-Dubois, *The No-Harm Principle as the Foundation of International Climate Law*, in *DEBATING CLIMATE L.* 15-28 (Benoit Mayer & Alexander Zahar eds., 2021).

163. TOMASO FERRANDO ET AL., *PATHWAY TO JUST, EQUITABLE AND SUSTAINABLE TRADE AND INVESTMENT REGIMES* 108 (Fairtrade Germany and Fairtrade Australia, 2021).

### V. CONCLUSION

In this Article, we situate investment-based responses to climate change within the IIL and ICL regimes within the normative context of climate justice. We have construed climate justice through a TWAIL lens as a historically-nested and differentiation-premised notion. This understanding of climate justice goes against a difference-blind IIL regime and insists that investment-related measures under the ICL regime must be true to the mandate of the Paris Agreement that climate actions must be consistent with the principle of equity. We argue that the ongoing calls for systemic reform of IIL and investment-based measures under the ICL must be climate justice centered. While we acknowledge that treaty-based reforms could play a role in achieving effective and equitable transition, current treaty-based changes are modest and far from the radical reform required to contribute meaningfully and equitably. This is for various reasons. First, treaty-based solutions do not adequately address the power imbalance in the investor-host state relationship. As we argue in this Article, treaty-based solutions can be made more justice-aligned depending on the drafting process, substantive provisions, and procedural implementation. Second, embracing market-based solutions led by the powerful transnational corporations may yet reinforce and create a more difficult regime that hardly reduces gas emissions. Third, the plethora of issues that developing country confront, most recently rising debt and debt servicing payments, limits their capacity to effectively divert funds to address climate change. Fourth, foreign investors can challenge state measures addressing climate change via ISDS, which can lead to huge compensation awards that may deter states from taking such action. Hence, addressing the systemic issues in IIL must be undertaken with an urgent focus on climate change concerns and climate justice.

