

CONTRIBUTIONS OF CLIMATE FINANCE AND HUMAN RIGHTS RESPONSIBILITIES IN SHAPING A NORTH-SOUTH OUTBOUND CLIMATE FDI PROMOTION COMMITMENT

*Zaker Ahmad**

Abstract

The distribution of global climate finance is unjust, due to it concentrating on developed nations while leaving developing countries facing a growing shortfall of funds. This Article advocates for incentivizing climate-friendly outbound foreign direct investment (OFDI) from developed to developing countries (i.e., North to South) as a potential solution to this persistent challenge. It demonstrates that additional normative support for such a proposition can be drawn from climate change and human rights legal regimes. Under the climate regime, developed countries remain under a strict obligation to provide financial support. In the human rights regime, recent jurisprudential development shows that the promotion of climate OFDI is closely aligned with the states' roles in regulating the extraterritorial human rights impacts of their outbound economic entities. Unfortunately, the existing network of international investment agreements (IIAs) fails to build upon this potential synergy. Strong IIA commitments to promote climate OFDI, especially between developed and developing countries, are virtually absent. This Article concludes that the contestability of climate OFDI promotion as a norm in IIAs is contributed by the differences in the scope and legal characteristics of these regimes, as well as the prevailing power imbalances among participating states. It proposes that developing countries must take the lead in formulating new commitments for climate OFDI promotion within IIAs, emphasizing alignment with overarching principles such as equity, sustainability and prevention of transboundary harm. An illustrative text, supplied at the end, outlines the general contours for such commitments, and the operational conditions.

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* Guest Researcher, Walther Schücking Institute for International Law, Kiel University; Senior Researcher, Max Planck Institute for Comparative Public Law and International Law, Heidelberg University (email: zahmad@wsi.uni-kiel.de).

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INTRODUCTION

The global distribution of financial resources committed to climate action continues to be disproportionate, polarized, and unfair. The continued rise of global average temperatures¹ calls for large-scale financial allocations to structural and systemic transitions everywhere in the world.² However, capacity imbalances among countries result in major portions of the global total volume of climate finance either

1. For more than 12 months, global average temperature has remained above 1.5 degrees of the pre-industrial levels. See *Monthly Climate Bulletin: May 2024 marks 12 months of record-breaking global temperatures*, COPERNICUS CLIMATE CHANGE SERV. (June 6, 2024), <https://climate.copernicus.eu/may-2024-marks-12-months-record-breaking-global-temperatures> [https://perma.cc/BNZ6-9EMQ]; see also World Meteorological Org. [WMO], *WMO Global Annual to Decadal Climate Update*, 1, 6 (2024), https://library.wmo.int/viewer/68910/download?file=WMO_GADCU_2024-2028_en.pdf&type=pdf&navigator=1 [https://perma.cc/W2W5-M8NK].

2. Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2023: Synthesis Report*, 38, 80–81, Doc. 10.59327/IPCC/AR6-9789291691647 (2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_LongerReport.pdf [https://perma.cc/RP3F-FMVX]; U.N. Framework Convention on Climate Change [UNFCCC], *Summary and recommendations by the Standing Committee on Finance: Fifth Biennial Assessment and Overview of Climate Finance Flows*, 1, 14 (2022) [hereinafter UNFCCC Fifth Biennial Assessment], https://unfccc.int/sites/default/files/resource/J0156_UNFCCC%20BA5%202022%20Summary_Web_AW.pdf [https://perma.cc/C7H9-CZUX] (showing that to reach net-zero before 2050, the energy sector itself requires \$4.5 trillion per year).

remaining within or feeding into the economies of the global North.³ Developed countries account for 75% of all greenfield investments (i.e., the creation of a foreign operation from the ground up) in climate change.⁴ At the same time, the global South faces an ever-widening financial shortfall.⁵ This deep-seated inequality of climate finance is not new. To address this, a collective commitment and sustainable development goal (SDG) of annually mobilizing new and additional 100 billion U.S. dollars from developed to developing countries in support of climate finance has long been agreed. However, the commitment remains unfulfilled.⁶

Improving private financial flows⁷ is one of the most viable means to fulfil the existing commitment gap and improve the scale of climate finance flowing from the global North to the global South (hereinafter North-South).⁸ Available options include leveraging private financial

3. China is an exception to this trend. Barbara K. Buchner et al., *Global Landscape of Climate Finance 2021*, 1, 30–31 (2021), <https://www.climatepolicyinitiative.org/wp-content/uploads/2021/10/Full-report-Global-Landscape-of-Climate-Finance-2021.pdf> [<https://perma.cc/X36D-LTUP>]; U.N. Conference on Trade and Development [UNCTD], *International Investment in Climate Change Mitigation and Adaptation: Trends and Policy Developments*, UNCTAD/DIAE/INF/2022/2 (2022), https://unctad.org/system/files/official-document/diaecinf2022d2_en.pdf [<https://perma.cc/3U8K-6CUN>].

4. For the purpose of this Article, the terms “global North” and “global South” are used as a relational and geospatially delinked reference to broadly distinguish between countries and regions in terms of economic, political and epistemic marginalization, as well as historic contribution to climate change. This Article uses these terms synonymously with “developed” and “developing” countries. See Anne Garland Mahler, *Global South*, OXFORD BIBLIOGRAPHIES (Oct. 25, 2017), <https://oxfordbibliographies.com/view/document/obo-978-0190221911/obo-978-0190221911-0055.xml> [<https://perma.cc/T6T7-FE8L>]. Although a strict categorization of the global South is impossible—even counterproductive—emerging markets and developing economies excluding China (“EMDE - China”) can be a close approximation.

5. In the mitigation sectors, actual investment in developing countries range between 15%–25% of the optimal amount. Pieter Pauw et al., *Transforming the finance system to enable the achievement of the Paris Agreement*, in THE CLOSING WINDOW: CLIMATE CRISIS CALLS FOR RAPID TRANSFORMATION OF SOCIETIES: EMISSIONS GAP REPORT 2022 65, 66–67 (U.N. Env’t Programme, 2022).

6. UNFCCC Fifth Biennial Assessment, *supra* note 2, at 11, 88; UNFCCC, *UNFCCC Standing Committee on Finance: Report on progress towards achieving the goal of mobilizing jointly USD 100 billion per year to address the needs of developing countries in the context of meaningful mitigation actions and transparency on implementation* (2022) [hereinafter UNFCCC Report on Progress], https://unfccc.int/sites/default/files/resource/J0156_UNFCCC%20100BN%202022%20Report_Book_v3.2.pdf [<https://perma.cc/HE9Y-WH2E>].

7. UNFCCC Fifth Biennial Assessment, *supra* note 2, at 94–95.

8. Developed countries already point out the importance of improving private flows. See CLIMATE FINANCE DELIVERY PLAN PROGRESS REPORT: ADVANCING THE TEN COLLECTIVE ACTIONS, 9 (2022), <https://www.auswaertiges-amt.de/blob/2560806/8cc5034f86da07811f8cb6adacba1130/neuer-inhalt--1--data.pdf> [<https://perma.cc/G3J9-6ABM>]. OECD Secretary-General, Organization for Economic Co-Operation and Development [OECD], CLIMATE FINANCE PROVIDED AND MOBILISED BY DEVELOPED COUNTRIES IN 2013-2021: AGGREGATE TRENDS AND OPPORTUNITIES FOR SCALING UP ADAPTATION AND MOBILISED PRIVATE FINANCE 8 (2023)

contributions through bilateral development finance or works of multilateral institutions—like the Green Climate Fund (GCF) and multilateral development banks—and promoting greenfield investments. Given that relevant foreign direct investment (FDI) flows are counted toward aggregate climate finance, one way to partially discharge the abovementioned obligation would be by incentivizing developed countries' climate-friendly outbound foreign direct investments (hereinafter climate OFDI)⁹ to developing countries.¹⁰ In addition to meeting developed countries' climate finance obligations and addressing climate finance shortfall in the global South, promoting North-South climate OFDI would also counteract the popular association of foreign investment regulation with exploitation, increased emissions and crises.¹¹

In practice, the importance and urgency of boosting climate finance and the beneficial role climate OFDI can play in this regard translate poorly in the investment regime. Current language in the myriad of IIAs do not adequately reflect the climate urgency, or the need to promote climate OFDI, at least from developed to developing countries. The

(estimating share of private finance at approximately 14% of total mobilization per year since 2017); see also Montek Singh Ahluwalia & Utkarsh Patel, *Financing Climate Change Mitigation and Adaptation in Developing Countries*, in KEYS TO CLIMATE ACTION: HOW DEVELOPING COUNTRIES COULD DRIVE GLOBAL SUCCESS AND LOCAL PROSPERITY, 309, 311–17, 320–26 (Amar Bhattacharya, Homi Kharas, & John W. McArthur eds., 2023), <https://www.brookings.edu/wp-content/uploads/2023/02/Chapter-12.-Financing-climate-change-mitigation-and-adaptation-in-developing-countries.pdf> [<https://perma.cc/8PCD-E8Y8>].

9. Climate OFDI is used to denote greenfield foreign direct investments (FDI) that can reduce GHG emissions in the host country or contribute to climate adaptation therein through deployment and use of novel products, processes, know-hows or any combination thereof. Matthew Stephenson & James Zhan, *What Is Climate FDI? How Can We Help Grow It?*, GLOB. SOLS. INITIATIVE FOUND. 1, 2–3 (Nov. 3, 2022), https://www.global-solutions-initiative.org/wp-content/uploads/2025/03/TF1_What_is_Climate_FDI_How_can_we_help_grow_it.pdf [<https://perma.cc/67VL-YCS3>].

10. Climate OFDI can be promoted through informational assistance, financial assistance (loans and grants), fiscal incentives (tax relief), and risk sharing (guarantees and insurances). See Karl P. Sauvart et al., *Trends in FDI, Home Country Measures and Competitive Neutrality*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 10–15 (Andrea K. Bjorklund ed., 2012).

11. Emission and FDI are positively associated, particularly in low- and middle-income countries. See Qiang Wang et al., *Reexamining the Impact of Foreign Direct Investment on Carbon Emissions: Does per Capita GDP Matter?*, 10 HUMANITIES SOC. SCIS. COMM'NS. 1, 1–18 (2023); Yanyan Huang et al., *The Impacts of FDI Inflows on Carbon Emissions: Economic Development and Regulatory Quality as Moderators*, 9 FRONTIERS ENERGY RSCH. (Jan. 10, 2022), <https://www.frontiersin.org/articles/10.3389/fenrg.2021.820596> [<https://perma.cc/AB69-XWYK>]; A. Patt et al., *International Cooperation*, in CLIMATE CHANGE 2022: MITIGATION OF CLIMATE CHANGE: CONTRIBUTION OF WORKING GROUP III TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 1451, 1499 (2022), https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_Chapter14.pdf [<https://perma.cc/5AXR-34WM>] (holding with medium confidence that investment agreements hinder governments' ability to take positive climate mitigation action).

priorities and guiding principles of climate and investment regimes are therefore at odds. In contrast, there is a strand of positive development in the human rights regime. A growing wave of human rights-anchored climate responsibility claims is manifested in domestic, regional, and global forums,¹² contributing to addressing climate vulnerabilities¹³ and progressively widening the scope of a state's human rights responsibility in the process. Instances of such positive inter-regime interactions have lessons for the investment regulation discipline, especially when seeking to establish a stronger climate motivation therein.

In a fragmented international legal order marked by competing forums and narratives, it is a worthwhile task to disambiguate states' legal obligations on a particular issue—which is what this Article intends to accomplish regarding climate OFDI promotion. Considering ongoing developments in states' human rights and climate finance obligations, it makes an ambitious prognosis about their contribution in shaping a North-South responsibility to promote climate OFDI. It starts with a brief account of the developed countries' climate finance responsibilities and their relevance for promotion of climate OFDI.¹⁴ Moving on to the paradigm of international human rights law, this Article outlines the evolving human rights obligations of states with regard to climate-related extraterritorial claims.¹⁵ This Article then squares off the findings with the existing policies, practices, and commitments in the investment legal regime.¹⁶ The final section of this Article combines the existing elements of responsibilities in both climate and human rights regimes to present a version of the ideal North-South obligation to promote climate OFDI and proposes steps for such to be embedded in IIAs.¹⁷

12. JOANA SETZER & CATHERINE HIGHAM, *Global trends in climate change litigation: 2023 snapshot*, 1, 32–35 (2023), https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf [https://perma.cc/T27L-XSHK].

13. This includes, but is not limited to observed and projected loss of livelihood, health hazards, food and water insecurity, and loss of cultural heritage brought forth by the widespread damage caused by climate change, disproportionately impacting low-income, marginalized and vulnerable people, and communities particularly dependent on natural systems (e.g., indigenous populations). See Hans-Otto Pörtner et al., *Summary for Policymakers*, in CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY: CONTRIBUTION OF WORKING GROUP II TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 1, 5–33 (2022), <https://www.ipcc.ch/report/ar6/wg2/chapter/summary-for-policymakers/> [https://perma.cc/N2X4-AYNU].

14. See *infra* Part II.

15. See *infra* Part III.

16. See *infra* Part IV.

17. See *infra* Part V.

I. SUPPORT OF CLIMATE FINANCE COMMITMENTS FOR OFDI PROMOTION

The blueprint for long-term climate action supplied by the Paris Agreement (PA)¹⁸ in 2015 also covers states' responsibilities regarding mobilization of financial resources. The PA framework of legal principles establishes the normative character and direction of financial support as a differentiated legal responsibility. This is then bolstered by specific obligations to provide financial assistance, imposed on developed countries and enhanced over time. This section discusses the extent of support the PA extends to strengthen an obligation to promote climate OFDI from developed to developing countries.

A. *Developments Under the Paris Agreement*

The body of interrelated legal principles that set the normative character of obligations in the climate regime includes, among others, the common concern of humankind, sustainable development, prevention of harm, and common but differentiated responsibility.¹⁹ Recalling the function of legal principles as guides for how states use discretionary policy space,²⁰ these climate principles ideally inform the economic policy approaches touching upon climate change. For example, the principle of sustainable development would require states to integrate the interest of climate impact avoidance into every economic decision made at home and abroad.²¹ It also requires that states—at the minimum—make diligent efforts to mitigate the adverse climate impact of economic

18. Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, *Adoption of the Paris Agreement*, 2 U.N. Doc FCCC/CP/2015/10/ADD.1 (2015) [hereinafter Paris Agreement], <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf> [<https://perma.cc/G3B5-JXTD>].

19. Shinya Murase et al., *International Law Association - Washington Conference (2014): Legal Principles Relating to Climate Change* (July 2, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2461556 [<https://perma.cc/K754-X2G2>]; DANIEL BODANSKY, JUTTA BRUNNÉE & LAVANYA RAJAMANI, *INTERNATIONAL CLIMATE CHANGE LAW* 1, 40–54, 126–29 (July 25, 2017).

20. Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 38–39 (1967).

21. MARIE-CLAIRE CORDONIER SEGGER, *CRAFTING TRADE AND INVESTMENT ACCORDS FOR SUSTAINABLE DEVELOPMENT: ATHENA'S TREATIES* 80–88 (2021) (finding that integration can potentially amount to a customary principle, or certainly amount to a normative principle); Murase et al., *supra* note 19, at 5–7; CHRISTINA VOIGT, *SUSTAINABLE DEVELOPMENT AS A PRINCIPLE OF INTERNATIONAL LAW: RESOLVING CONFLICTS BETWEEN CLIMATE MEASURES AND WTO LAW* 1, 35–56 (2009); *see also* U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Principle 4 (Aug. 12, 1992), https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf [<https://perma.cc/PH4Z-KQRF>].

decisions.²² In addition, the customary law of harm prevention²³ demands that states use resources in a manner that avoids significant transboundary harm.²⁴ The principle of common but differentiated responsibility and respective capabilities (CBDR),²⁵ actively influences the direction of financial assistance responsibility under the regime. Despite CBDR's evolution towards flexibility,²⁶ it makes the global North responsible for financially assisting mitigation activities in the global South. Finally, the recognition of climate change as a common concern of humankind (CCH) indicates the globally shared interest in tackling the problem²⁷ and restrains rule-makers from taking measures that worsen climate change.²⁸

In the above normative backdrop, the PA supplies two distinct avenues detailing the financial conduct expected from parties. First, Article 2.1(c) sets out a broad, global target for all members, specifying the agreement's aim as "[m]aking finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development."²⁹ This general target serves as a springboard to mobilize finance at an increasingly large scale (so-called "from billions to

22. CORDONIER SEGGER, *supra* note 21, at 85.

23. *Id.* at 85–86; Jutta Brunnée, *International Environmental Law and Community Interests: Procedural Aspects*, in COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW, 156–59 (Eyal Benvenisti & Georg Nolte eds., July 24, 2018); Murase et al., *supra* note 19, at 21–25.

24. *See, e.g.*, Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion of May 21, 2024, ¶¶ 242–43, 256–58, https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf [<https://perma.cc/MJ3E-CM93>].

25. *See, e.g.*, Paris Agreement, *supra* note 18, at art. 2, 4.

26. Lavanya Rajamani, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics*, 65 INT'L. COMPAR. L.Q. 493, 502, 510–11 (2016).

27. Murase et al., *supra* note 19, at 3–7. *See* Shinya Murase (Special Rapporteur), Int'l Law Comm'n, Second Report on the Protection of the Atmosphere, on Its Sixty-Seventh Session, U.N. Doc. A/CN.4/681, at ¶¶ 19–24 (Mar. 2, 2015) (regarding treaty practices); *see also* Georg Nolte, *The International Law Commission and Community Interests*, in COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW, 114–15 (Eyal Benvenisti & Georg Nolte eds., July 24, 2018).

28. *See* Jutta Brunnée, *Common Areas, Common Heritage, and Common Concern*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (Daniel Bodansky, Jutta Brunnée, & Ellen Hey eds., 1st ed. 2007). Thomas Cottier, *The Principle of Common Concern of Humankind*, in THE PROSPECTS OF COMMON CONCERN OF HUMANKIND IN INTERNATIONAL LAW 3, 3–94 (Thomas Cottier ed., 2021) (advocating that the principle of CBDR should be taken as entailing a duty to act with due diligence and good faith domestically, along with a responsibility to assist abroad); *see also* Thomas Cottier et al., *The Principle of Common Concern and Climate Change*, 52 ARCHIV DES VÖLKERRECHTS. 293, 293–324 (2014).

29. Paris Agreement, *supra* note 18, at art. 2.1(c).

trillions”).³⁰ Although the language of the provision is not normative *per se*, it has been at the center of efforts to reshape investment regulation.³¹

Second, a North-South obligation of financial support is laid out in Article 9 of the PA.³² Despite strictly holding that developed countries “shall provide financial resources” to assist developing countries,³³ Article 9.1 does not receive nearly as much attention as Article 2.1 in investment promotion and reform discussions. Scholars regard Article 9 as an obligation of conduct and not of result,³⁴ devoid of novelty.³⁵ It has also been noted that due to the commitment being assigned to “developed country parties” as a collective,³⁶ it cannot be enforced against any particular developed nation.³⁷ Such views belie the fact that the North-South financial support commitment does not reside in a vacuum, but in the immediate context of a multilaterally agreed, clearly quantified, pre-existing goal and SDG of generating an additional \$100 billion per year from developed to developing countries.³⁸ This is reinforced by the fact

30. Igor Shishlov & Philipp Censkowsky, *Same but different? Understanding divergent definitions of and views on climate finance*, in HANDBOOK OF INTERNATIONAL CLIMATE FINANCE, 16, 26–27 (Axel Michaelowa & Anne-Kathrin Sacherer eds., 2022).

31. See, e.g., ANNA NOVIK & DAVID GAUKRODGER, *Future of Investment Treaties Track 1 - Investment Treaties and Climate Change: Note on Survey of climate policies for investment treaties*, 1, 16–17 (Oct. 25, 2023), [https://one.oecd.org/document/DAF/INV/TR1/WD\(2023\)2/en/pdf](https://one.oecd.org/document/DAF/INV/TR1/WD(2023)2/en/pdf) [<https://perma.cc/537F-EAJ6>]; David Gaukrodger, *Investment Treaties and Climate Change: The Alignment of Finance Flows under the Paris Agreement* (2022), [https://one.oecd.org/document/DAF/INV/TR1/WD\(2022\)5/REV2/en/pdf](https://one.oecd.org/document/DAF/INV/TR1/WD(2022)5/REV2/en/pdf) [<https://perma.cc/34K A-LREC>].

32. Paris Agreement, *supra* note 18, at art. 9.1, .3–.5, .7.

33. *Id.* at art. 9.1 (emphasis added). This obligation applies “with respect to both mitigation and adaptation in continuation of [developed countries’] existing obligations under the Convention.” *Id.* In addition, developed countries are collectively enjoined “to take the lead,” whereas other parties are “encouraged” to provide support (first quoting *id.* at art 9.3, then quoting *id.* at 9.2).

34. Sebastian Oberthür & Ralph Bodle, *Legal Form and Nature of the Paris Outcome*, 6 CLIMATE L. 40, 51–54 (2016).

35. Michael Mehling, *Article 9 Finance*, in THE PARIS AGREEMENT ON CLIMATE CHANGE: A COMMENTARY 218, 226 (Geert Van Calster & Leonie Reins eds., Apr. 9, 2021); Yulia Yamineva, *Climate Finance in the Paris Outcome: Why Do Today What You Can Put Off Till Tomorrow?*, 25 REV. EUR. CMTY. INT’L. ENV’L. L. 174, 180 (July 1, 2016).

36. Daniel Bodansky, *The Legal Character of the Paris Agreement*, 25 REV. EUR. CMTY. INT’L. ENV’L. L. 142, 147 (June 22, 2016).

37. Compare Lavanya Rajamani, *The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations*, 28 J. ENV’L. L. 337, 348, 353 (2016), with Rajamani, *supra* note 26, at 13 (distinguishing the obligation imposed on individuals with the obligation imposed on a collective); see also BENOÎT MAYER, INTERNATIONAL LAW OBLIGATIONS ON CLIMATE CHANGE MITIGATION 1, 57–58 (Nov. 4, 2022).

38. It was first agreed in 2009 and has been closely monitored since. See Paris Agreement, *supra* note 18, at ¶ 53.; Yamineva, *supra* note 35, at 181; BODANSKY, BRUNNÉE & RAJAMANI, *supra* note 19, at 240; see also UNFCCC Fifth Biennial Assessment, *supra* note 2, at 11, 88; UNFCCC Standing Committee on Finance, *supra* note 6.

that progress is now being made towards formulating a new collective quantified goal (NCQG) by 2025, using the current target of \$100 billion as a floor.³⁹ Regarding implementation, developed countries are subject to layers of reporting requirements, including biennial communications under Article 9(5) PA,⁴⁰ and transparency reports.⁴¹ These requirements, in turn, feed into various reviews such as the UNFCCC Standing Committee of Finance's report on jointly mobilizing \$100 billion,⁴² biennial assessments,⁴³ and the global stocktake.⁴⁴ Persistent unfulfillment of the aforementioned obligations may also expose a developed country to additional compliance consultation,⁴⁵ triggering significant reputational costs. It is expected that this iterative, information-intensive process will induce developed countries to bring significant positive changes to their respective public and private financial assistance mechanisms in line with the specific commitments and broad aims of the PA.

39. Paris Agreement, *supra* note 18, at ¶ 53; Hao Zhang, *Implementing Provisions on Climate Finance Under the Paris Agreement*, 9 CLIMATE L. 21, 28 (Apr. 27, 2019).

40. UNFCCC, Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on the third part of its first session, held in Katowice from 2 to 15 December 2018, *Decision 12/CMA.1: Identification of the Information to Be Provided by Parties in Accordance with Article 9, Paragraph 5, of the Paris Agreement*, 35, 35–37, U.N. Doc. FCCC/PA/CMA/2018/3/ADD.1 (Mar. 19, 2019), <https://documents.un.org/doc/undoc/gen/g19/107/63/pdf/g1910763.pdf> [<https://perma.cc/EZ24-XMA9>].

41. UNFCCC, Report of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement on the third part of its first session, held in Katowice from 2 to 15 December 2018: Addendum Part Two, *Decision 18/CMA.1: Modalities, Procedures and Guidelines for the Transparency Framework for Action and Support Referred to in Article 13 of the Paris Agreement*, 18, 18–19, U.N. Doc. FCCC/PA/CMA/2018/3/Add.2 (Mar. 19, 2019), https://unfccc.int/sites/default/files/resource/CMA2018_03a02E.pdf [<https://perma.cc/T4RK-R8XP>].

42. UNFCCC Standing Committee on Finance, *supra* note 6.

43. UNFCCC Fifth Biennial Assessment, *supra* note 2.

44. UNFCCC, Conference of the Parties serving as the meeting of the Parties to the Paris Agreement Fifth Session United Arab Emirates, 30 November to 12 December 2023, *Outcome of the First Global Stocktake, Draft Decision -/CMA5*, U.N. Doc. FCCC/PA/CMA/2023/L.17 (2023), https://unfccc.int/sites/default/files/resource/cma2023_L17_adv.pdf [<https://perma.cc/8VS2-MJ55>] [hereinafter UNFCCC Outcome of the First Global Stocktake].

45. UNFCCC, Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on the third part of its first session, held in Katowice from 2 to 15 December 2018: Addendum Part two, *Decision 20/CMA.1: Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement*, 59, 59–64, U.N. Doc. FCCC/PA/CMA/2018/3/Add.2 (Mar. 19, 2019), https://unfccc.int/sites/default/files/resource/CMA2018_03a02E.pdf [<https://perma.cc/NSJ6-3EXA>].

B. *Implication for Climate OFDI Promotion*

The normative framework of climate principles and the strict North-South obligation of financial assistance strengthen the case for enhancing climate OFDI promotion efforts by developed countries. The existential urgency to enhance climate finance to developing countries, combined with the framework of the core climate principles—e.g., sustainable development, common concern, CBDR, and prevention of harm—leads to the only possible solution that countries must cooperate with due diligence and good faith in pursuing all feasible climate response measures, including economic ones. This obligation is general, overarching, and should influence all areas of human interaction and regulatory disciplines, including that of international investment and promotion of OFDI.

More specifically, support obligations under Article 9 PA must be taken into account by developed countries when formulating policies touching upon investment and climate change. The PA itself foresaw the importance of leveraging private financial flow to fulfil the North-South climate finance obligation. This is reflected in the Article 9 language allowing developed countries to discharge their obligation by mobilizing a “wide variety of sources, instruments and channels.”⁴⁶ This formulation was the result of recognizing the necessity and relevance of complementing public climate finance⁴⁷ with incentivized private financial flows.⁴⁸ Promotion of climate OFDI is the best policy option in that regard. This position is supported by the incremental developments in policy and practice surrounding climate finance. For example, the ongoing deliberation among PA parties and inputs collected on the NCQG make repeated indications of the importance of private finance and addressing particular access challenges faced by developing countries in that regard.⁴⁹ Also, the outcome of the first global stocktake in 2023 regrettably noted developed countries’ failures to meet the \$100 billion target before 2021, “owing to challenges in mobilizing finance from private sources.”⁵⁰ The draft outcome decision urged them to fully deliver upon this commitment per year through 2025.⁵¹ Incentivization of

46. Paris Agreement, *supra* note 18, at art. 9.3.

47. Such finances take place bilaterally through development finance institutions (DFI), multilateral development banks (MDBs), and multilateral climate funds (MCFs).

48. This currently is predominantly composed of private finance leveraged by public and multilateral channels. See UNFCCC Fifth Biennial Assessment, *supra* note 2, at ¶¶ 94–97; Pauw et al., *supra* note 5, at 69–72; Zhang, *supra* note 39, at 29–30, 33.

49. UNFCCC, *Updated Input Paper for the Second Meeting under the Ad Hoc Work Programme on the New Collective Quantified Goal on Climate Finance*, ¶¶ 83, 88, 243, 275, U.N. Doc. NCQG/2024/MAHWP/Co-chairs’InputPaper/Updated2/8 (June 9, 2024), https://unfccc.int/sites/default/files/resource/MAHWP2_second_update.pdf [https://perma.cc/NV3R-W6QX].

50. UNFCCC Outcome of the First Global Stocktake, *supra* note 44, at ¶ 80.

51. *Id.* at ¶¶ 80–81, 85.

private finance also appears as a potential policy avenue in the biennial reports on climate finance submitted by developed country parties. For example, Austria described its mainstreaming approach as “supporting an enabling regulatory and policy framework that improves the capacities for climate responsive planning at all levels and provides incentives to the private sector to invest in net zero and climate resilient technologies.”⁵² North-South climate OFDI promotion is a response that fits seamlessly into this narrative of augmenting private finance. To the extent adopted, it would bring developed countries into greater compliance with their PA commitments.

II. SUPPORT OF HUMAN RIGHTS OBLIGATIONS FOR OFDI PROMOTION

Compared to international climate change law, international human rights instruments present important parallels and departures.⁵³ In contrast with voluntary commitments and interstate obligations in the climate regime, human rights treaties and regulatory bodies focus largely on the relationship between a state and individuals within its jurisdiction, obligating the former to respect, protect, and improve upon the latter’s human rights. Again, while the climate goals—expressed as shared expectations—must depend on incremental, iterative, and voluntary implementation, human rights regimes provide access to different forms of national and supra-national adjudicatory bodies, as well as encourage civil society to participate in rule enforcement. Despite contrasts, normative cross-fertilization is increasingly taking place between these two regimes, leading to innovative pathways addressing domestic and transboundary human rights challenges resulting from climate-induced harm. The following paragraphs take stock of the new developments along the climate and human rights fronts, focusing primarily on states’ human rights obligations regarding public and private economic entities operating abroad.

52. Submission by the Czech Republic and the European Commission on behalf of the European Union and its Member States, *EU Submission on Information to Be Provided by Parties in Accordance with Article 9, Paragraph 5, of the Paris Agreement*, 1, 30 (Oct. 13, 2022), <https://www4.unfccc.int/sites/SubmissionsStaging/Documents/202211291347---EU%20Submission%20on%20information%20to%20be%20provided%20by%20Parties%20in%20accordance%20with%20Article%209%20paragraph%205%20of%20the%20PA.pdf> [https://perma.cc/B7JE-UZ5Q].

53. SUMUDU A. ATAPATTU, *HUMAN RIGHTS APPROACHES TO CLIMATE CHANGE: CHALLENGES AND OPPORTUNITIES* 1, 49–50 (2016); MAYER, *supra* note 37, at 148–50.

A. Human Rights Obligations Regarding Outbound Economic Activities

Extraterritorial expansion of a state's human rights responsibility requires an unconventional “diagonal linkage”—a legal jurisdictional bond between the duty-bearer state and the affected individuals or communities abroad.⁵⁴ For a state to have obligations regarding its outgoing investment, this linkage needs to be traced through the intermediation of the investor, which itself is a public or a private entity. The possibility of successfully establishing such a legal connection depends on the legal context (i.e., applicable treaty language) as well as the nature of the human rights in question (e.g., civil and political rights, or economic and social rights). These factors will also determine whether the state human rights obligation regarding outbound investments would only encompass negative duties—e.g., a duty to ensure that businesses do not interfere with human rights abroad—or may also entail positive duties to assist and promote human rights conditions through outgoing businesses and investments.

It is already well established that under multilateral and key regional human rights treaty bodies, a state is obligated to refrain from encroaching upon individuals' civil and political rights abroad (e.g., the right to life). The scope of such an obligation encompasses a state's perceived domain of “effective control,”⁵⁵ or violations that are “direct and immediate cause[s]”⁵⁶ of state action. The General Comment No. 31 of the U.N. Human Rights Committee (HRC) clarified that a state's obligation is to “respect and ensure” the covenant rights to “anyone

54. John H. Knox, *Diagonal Environmental Rights*, in UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS 148 (Mark Gibney & Sigurn Skogly eds., 2010), <https://www.degruyter.com/document/doi/10.9783/9780812204841/html?lang=en> [https://perma.cc/83TE-N3CW].

55. First quoting John H. Knox, *Climate Change and Human Rights Law*, 50 VA. J. INT'L. L. 164, 186–89 (2009); then Yuval Shany, *The Extraterritorial Application of International Human Rights Law*, in 409 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW – RECUIL DES COURS, 9, 54–76, 80–81, 93–96 (2020); see also Lopez Burgos v. Uru. (Delia Saldias de Lopez v. Uru.), Decision on merits, Comm. No. 52/1979, U.N. Doc. CCPR/C/OP/1 at 88, at ¶ 12.3 (I.C.J. 1981), <https://juris.ohchr.org/casedetails/298/en-US> [https://perma.cc/B837-QSDL]; (calling for a broader understanding of the state obligation to respect and ensure protection of the ICCPR to “all individuals within its territory and subject to its jurisdiction”). The separate opinion by Mr. Christian Tomuschat—appended to the decision in *Lopez Burgos*—underlines the need to strike a balance between the drafters' intent to limit the Covenant's jurisdiction on the one hand and preventing states from acting with impunity beyond its territorial boundaries on the other. *Id.* at 8–9. The same view was later echoed by the European Court of Human Rights (ECtHR) in *Issa and Others v. Turkey*, 31821/96, Eur. Ct. H.R. (2004) ¶ 69.

56. *Andreou v. Turkey*, 45653/99, Eur. Ct. H.R. (2009) ¶ 25.

within the power or effective control of the State Party.”⁵⁷ The position was later endorsed by the International Court of Justice (ICJ) on different occasions.⁵⁸ Regarding outbound economic entities, the HRC has urged states to ensure that extraterritorial activities of private companies under its control do not violate human rights.⁵⁹ In connection with the human right to life (Article 6) under the International Covenant on Civil and Political Rights (ICCPR), in General Comment No. 36, the HRC further articulates that a state’s human rights obligation extends to such persons abroad, whose rights are impacted by the state’s “activities in a direct and reasonably foreseeable manner.”⁶⁰ It was also added that states are required to take measures to ensure that “*activities undertaken by corporate entities* [. . .] are consistent with article 6.”⁶¹

Regarding economic, social and cultural (ESC) rights, it is well-articulated that there are no explicit territorial limits to state obligations under the International Covenant on ESC Rights (ICESCR).⁶² Moreover, the ICESCR language imposes soft positive obligations to assist states when they are in a position to do so.⁶³ The optimistic take on it is the

57. U.N. Human Rts. Comm., General Comment No. 31 [80]: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, at ¶ 10, CCPR/C/21/Rev.1/Add. 13 (Mar. 29, 2004).

58. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Rep. 131, ¶¶ 109–11 (July 9, 2004); *see also* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, I.C.J. Rep. 116, ¶ 216 (Dec. 19, 2005); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Reparations, I.C.J. Rep. 116, ¶ 188 (Feb. 9, 2022).

59. *See* U.N. Int’l Covenant on Civil and Pol. Rts., Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2285/2013, at 3.10 (Dec. 7, 2017); *see also* Shany, *supra* note 55, at 85.

60. U.N. Human Rts. Comm., General comment No. 36 on article 6: right to life, CCPR/C/GC/36, at 22 (Sept. 3, 2019).

61. *Id.* at ¶ 22 (emphasis added); *see also* Shany, *supra* note 55, at 85–87.

62. U.N. Comm. on Econ., Social and Cultural Rts., *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, at ¶ 27 (2017); *see also* Knox, *supra* note 55, at 206–09; Ottavio Quirico, Jürgen Bröhmer & Marcel Szabo, *States, climate change and tripartite human rights: the missing link*, in CLIMATE CHANGE AND HUMAN RIGHTS: AN INTERNATIONAL AND COMPARATIVE LAW PERSPECTIVE 7, 23–24, 26 (Ottavio Quirico & Mouloud Boumghar eds., 2016). Regarding claim of a potential North-South obligation to fulfil access to health services (Article 12) *see* Paul Hunt & Rajat Khosla, *Climate change and the right to the highest attainable standard of health*, in HUMAN RIGHTS AND CLIMATE CHANGE 238, 251–52 (Stephen Humphreys ed., 2009); *see also* Margaretha Wewerinke-Singh, *State Responsibility for Human Rights Violations Associated with Climate Change*, in ROUTLEDGE HANDBOOK OF HUMAN RIGHTS AND CLIMATE GOVERNANCE 75, 80–81 (Sébastien Duyck, Sébastien Jodoin, & Alyssa Johl eds., 2018).

63. The Covenant obliges its parties “to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources,” to progressively realize the ESC rights. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, at Art. 2(1) (Dec. 16, 1966).

Maastricht Principles on the Extraterritorial Obligation (ETO) of States,⁶⁴ wherein experts use strict obligatory language such as *must* to indicate the extraterritorial obligation of states to conduct, *inter alia*, investment activities in a way that creates an enabling environment conducive for ESC rights.⁶⁵ Such a take is also supported by the view of The Committee on ESC Rights (CESCR), which holds that extraterritorial obligations arise when a state has such control over its domiciled corporations so that it can influence the latter's conduct to improve the enjoyment of ESC rights abroad.⁶⁶ The CESCR further elaborated that states' obligations regarding ESC rights are comprised of: (i) not obstructing other states' performance of ESCR obligations through trade and investment commitments;⁶⁷ (ii) protecting ESCR by providing incentives to businesses that display the best human rights conduct;⁶⁸ (iii) cooperating with and assisting other states, including through financial support; and (iv) collectively aiming to attain the "highest possible ambition" under the Paris Agreement.⁶⁹ This aligns seamlessly with the narrative of promoting climate OFDI.

Beyond the ICCPR and the ICESCR, the Committee on the Rights of the Child (CRC) also repeatedly expressed its view that home states have an obligation to respect, protect and promote children's rights with regard to businesses' extraterritorial operations, provided that there is a 'reasonable link' between the state and the conduct abroad.⁷⁰ Echoing the CESCR, the CRC urged states to incentivize sustainable investments and harmonization of human rights obligations with trade and investment

64. See ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* ¶¶ 17, 29 (Jan. 2011), https://www.fidh.org/IMG/pdf/maastricht-eto-principles-uk_web.pdf [<https://perma.cc/S4BR-NQZP>].

65. Olivier De Schutter et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 34 HUM. RTS. Q. 1146–49 (2012).

66. U.N. Comm. on Economic, Social and Cultural Rts., *supra* note 62, at 9 ¶ 28 (noting that not only does the general comment draw upon the Maastricht Principles on ETO—in footnotes 71, 78 and 86—but it also acknowledges its contribution to the progressive development of the law).

67. *Id.* at 9–10 ¶ 29.

68. *Id.* at 10 ¶ 31 (aligning with the climate OFDI promotion narrative).

69. U.N. Comm. on Economic, Social and Cultural Rts., *Climate change and the International Covenant on Economic, Social and Cultural Rights*, ¶ 6 (2018), <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=0Prwal3TWUTsYtzfOL36%2Bg7DdatbAlFAsS%2F60q%2FA0Unc0DoKPhIEerVOzA0zRNsj0fvZQe0KX2rtIytQQ1SM0Q%3D%3D> [<https://perma.cc/X2MH-HNLY>].

70. U.N. Comm. on the Rts. of the Child, General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights, 43 (2013) [hereinafter CRC General Comment No. 16]; U.N. Comm. on the Rts. of the Child, General Comment No. 26 (2023) on Children's Rights and the Environment, with a Special Focus on Climate Change, at 107–10 (2023) [hereinafter CRC General Comment No. 26].

activities.⁷¹ In 2019, five human rights treaty bodies issued a joint statement urging states to hold private actors accountable for domestic and extraterritorial harms as well as to discontinue programs and incentives for public and private investments that are harmful to a green economic transition.⁷² Furthermore, in its 2017 advisory opinion, the Inter-American Court on Human Rights (IACtHR) opened the opportunity to further refine states' obligations regarding outbound businesses by incorporating the customary environmental obligation of preventing transboundary environmental harm. It held that "when transboundary damage occurs that effects treaty-based rights, it is understood that the persons whose rights have been violated are under the jurisdiction of the State of origin, if there is a *causal link between the act originated and the infringement of the human rights of persons outside its territory*."⁷³ This arguably opens the door for establishing a cross-border 'diagonal linkage' as the state is made responsible for the human rights consequences of any activity that originates in its territory and causes transboundary harm.

B. *Climate-Related Extraterritorial Human Rights Claims: Turn of the Tide?*

A state's role in regulating its outbound economic activities can touch upon climate OFDI promotion in two ways. Positively, the soft obligation to assist may come into play when outbound economic entities of a state have the capacity to reduce climate-related human vulnerabilities abroad. Negatively, the obligation to respect and protect human rights may come to play when outbound activities trigger climate vulnerabilities in host countries. Examining the current expanse of climate-related human rights legal claims will help perceive the nuances, limits and challenges involved along both avenues.

In key domestic jurisdictional settings, the linkage between adequate climate action and states' human rights responsibilities is now beyond doubt. Courts increasingly consider scientific information, risk analysis

71. CRC General Comment No. 26, *supra* note 70, at 109–10.

72. U.N. Comm. on the Elimination of Discrimination Against Women et al., Statement on human rights and climate change, at 12 (2020) (The human rights bodies consisted of the CEDAW, CESCR, CRC, CMW, and CRPD.); Monica Feria-Tinta, *Climate Change as a Human Rights Issue: Litigating Climate Change in the Inter-American System of Human Rights and the United Nations Human Rights Committee*, in CLIMATE CHANGE LITIGATION: GLOBAL PERSPECTIVES 310, 330–31 (Ivano Alogna, Christine Bakker, & Jean-Pierre Gauci eds., Apr. 26, 2021); U.N. Committee on Econ., Social and Cultural Rts. (CESCR), General comment No. 26 (2022) on Land and Economic, Social and Cultural Rights, 40–47 (Dec. 22, 2022).

73. The Environment and Human Rights, Advisory Opinion OC-23/17 Inter-Am. Ct. H.R. (Ser. A) No 23, ¶ 101 (Nov. 15, 2017) (emphasis added); *see also* Feria-Tinta, *supra* note 72, at 320–23; Shany, *supra* note 55, at 95.

and emission pathway projections⁷⁴ to counteract foreseeability and causality challenges⁷⁵ seeking to thwart linkage between climate action and human rights obligations. In *Neubauer et al. v. Germany*, the Federal Constitutional Court established that the state is not absolved of its constitutional duty to protect life and physical integrity from climate hazard only because its individual action has little global impact.⁷⁶ According to the court, it makes the state's obligation even wider, including a responsibility to meaningfully engage at the international level on the basis of mutual trust.⁷⁷ This line of argument creates an obligation upon states to make effective mitigation and adaption strategies as well as to live up to the same, as deviation therefrom affects effective enjoyment of human rights by both present and future generations. This position is further strengthened by a state's constitutional duty to protect,⁷⁸ or civil law-embedded duty of care.⁷⁹ Hence domestically, the reviewability of the climate impact of states' economic decisions, including regulation of public and private

74. HR 20 December 2019, NJ 2019, 00135 m.nt. (State of Netherlands (Ministry of Economic Affairs and Climate Policy)/Stichting Urgenda) (Neth.), at 5.2.2–5.2.3 [hereinafter *Urgenda*]. (The Dutch Supreme Court decided on the basis of IPCC reports and climate risk analyses, and found that there existed an unavoidable risk of human rights violations to populations on the whole, although not temporally imminent, as a direct consequence of the climate action shortcomings of the state.); see also Christine Bakker, *Climate Change Litigation in Netherlands: The Urgenda Case and Beyond*, in CLIMATE CHANGE LITIGATION: GLOBAL PERSPECTIVES 199, 209 (Ivano Alogna, Christine Bakker, & Jean-Pierre Gauci eds., 2021).

75. MAYER, *supra* note 37, at 152 (holding that one state's action—or lack thereof—has a marginal impact and cannot be individually attributed as a cause to a specific hazardous event); see also *Debate 6: Human Rights*, in DEBATING CLIMATE LAW 145, 145–59 (Alexander Zahar & Benoit Mayer eds., 2021); Alexander Zahar, *The Limits of Human Rights Law: A Reply to Corina Heri*, 33 EUR. J. INT'L L. 953 (2022).

76. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Mar. 24, 2021, 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20. (Ger.), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html [<https://perma.cc/7KTP-T9XY>] [hereinafter *Neubauer*].

77. *Id.* at ¶¶ 199–204.

78. *Id.* at ¶¶ 99, 407. It is noteworthy that the constitutional guarantee to life, as found in Art. 2(2) of the German Federal Constitution, was elaborated in the light of the ECtHR jurisprudence on the human right to life.

79. For example, in 2021, the Hague District Court decided that Dutch civil law's duty of care required Royal Dutch Shell Plc to reduce its global emissions by 45%. Case C/09/571932, *Milieudefensie et al. v. Royal Dutch Shell*, ECLI:NL:RBDHA:2021:5337, ¶¶ 4.4.29–4.4.55 (May 26, 2021) *overruled in part by* 200.302.332/01 *Shell et al. v. Env't Def. Ass'n et al.*, ECLI:NL:GHDHA:2024:2100 (12 November 2024). To articulate the scope of the relevant duty of care, the court—took note of the *Urgenda* decision, the human right to life and respect for private and family life, and concluded that “RDS’[sic] argument that the human rights invoked by Milieudefensie et al. offer no protection against dangerous climate change therefore does not hold.” *Id.* at ¶ 4.4.10; see also *Urgenda*, *supra* note 74. It should be noted that the overruling judgement of the Hague Court of Appeal did not reject the idea of a standard of care applicable on corporations regarding climate change.

investment activities, by courts of law on *inter alia* human rights grounds, is well-grounded.

At the international level, the connection between a state's human rights obligations and regulation of outbound economic activities remains contestable. International human rights bodies have only begun to accept the connection between the effective enjoyment of human rights to adequate and timely climate action. For example, in *Daniel Billy et al. v. Australia*, the HRC commented that the gradual onset of adverse effects and resulting violation of the claimants' human rights to family life and enjoyment of culture was clearly foreseeable, and hence, slow and inadequate adaptation efforts were found to be in breach of those rights.⁸⁰ However, no common parameters yet exist regarding the establishment of such connections extraterritorially, i.e., a 'diagonal linkage' between a state's obligation and human rights of affected people abroad. Progress remains positive, but it is slow and incremental. In a few instances, international practice has hinted at such progress. In *Teitiota v. New Zealand*, a claim that denial of an asylum application potentially forced the claimant to face climate hazards in his home country, in turn affecting his right to life, was considered admissible by the HRC.⁸¹ Although no violation was found, as the risk to applicant's life was considered only hypothetical,⁸² future claims may bring different results considering increasing climate-induced vulnerabilities worldwide. In *Sacchi et al. v. Argentina et al.* the CRC followed the footsteps of the IACtHR advisory opinion⁸³ and accepted the theoretical possibility that states may incur extraterritorial responsibility for emission-induced breaches of children's rights abroad.⁸⁴ The CRC held that states are not absolved of their individual responsibilities to reduce emissions, even though an effective response to climate change is only possible through collective global action.⁸⁵

A key motivation behind extending a state's human rights obligations to extraterritorial dimension is to avoid protection gaps by preventing states from acting with impunity beyond national boundaries. However,

80. U.N. Human Rts. Comm., Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 3624/2019, U.N. Doc. CCPR/C/135/D/3624/2019, at ¶¶ 8.12, 8.14 (Sept. 18, 2023).

81. U.N. Human Rts. Comm., Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2728/2016, U.N. Doc. CCPR/C/127/D/2728/2016, at ¶ 9.4 (Sept. 23, 2020).

82. *Contra Feria-Tinta*, *supra* note 72 (criticizing this view).

83. *See sources cited supra* note 73.

84. U.N. Comm. on the Rts. of the Child, Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, concerning communication No. 104/2019, U.N. Doc. CRC/C/88/D/104/2019 at ¶ 10.5 (Nov. 11, 2021).

85. *Id.* at ¶¶ 10.8–10.10. The Petition was ultimately denied, however, on ground of not exhausting local remedies.

it remains unclear whether the human rights-fueled motivation that applies regarding regulation of domestic economic activities—as shown above—would operate the same way regarding outbound ones. A dialectic is currently in progress seeking to find a balance between effective discharge of climate-related human rights responsibilities on one hand and keeping a foreseeable limit on the scope of government obligation on the other. One example of it is in the reasoning of German Constitutional court in *Neubauer*. The court acknowledged that the constitutional obligation of protection is not legally confined to territorial limits, and can take both negative and positive forms.⁸⁶ Outlining the relevant mitigation and adaptation actions that must be taken with reference to IPCC reports, the court pointed out the impossibility for a foreign government to undertake such tasks abroad.⁸⁷ It remains unfortunate, however, that while outlining the IPCC suggestions, the court's attention was not drawn to the importance of systemic change and climate investments in the vulnerable regions. Unlike adaptation and mitigation measures, actions such as climate OFDI promotion are ideally implemented from abroad and remain within the ability of governments in developing countries. Nevertheless, the court importantly emphasized that the logistical difficulty and respect for sovereign equality does not absolve the government of responsibility to take positive steps to protect people in poorer and harder-hit countries.⁸⁸ On that very note, the court drew attention to the North-South responsibility to provide financial assistance under Art. 9(1) of the PA.⁸⁹ This supports the argument for stronger climate OFDI promotion, involving the human rights regime.

Unfortunately, in the recent ECHR case of *Duarte Agostinho and others v. Portugal and 32 others states*, the court's conservatism took one step further.⁹⁰ The court refused to exercise jurisdiction over the extraterritorial effects of the state's inadequate climate action, i.e., allowing adverse impacts to claimants' rights to life, family and freedom from discrimination and degrading treatment. Based on past jurisprudence, the court enumerated the basis for exercising extraterritorial jurisdiction in exceptional situations: when there is (i) effective territorial control; (ii) control through state agents; or (iii) other

86. *Neubauer*, *supra* note 76, at 175.

87. *Id.* at 178 (“Given the limits of German sovereignty under international law, it is practically impossible for the German state to afford protection to people living abroad by implementing adaptation measures there ([...]). Rather, it is the task of the states concerned to select and implement the necessary measures.”).

88. *Id.* at 179.

89. *Id.*

90. *Duarte Agostinho v. Portugal*, App. No. 39371/20, ¶¶ 214, 231 (Apr. 9, 2024), <https://hudoc.echr.coe.int/eng%23%7b%22appno%22%5b%2239371/20%22%5d,%22itemid%22%5b%22001-233261%22%5d%7d?i=001-233261> [https://perma.cc/9WGD-YBPY] [hereinafter *Duarte Agostinho*].

special factors.⁹¹ The first two bases were considered absent. As for special factors, the court took account of the existential nature of climate crisis, its complex role in causing extraterritorial harms, and the state's role as ultimate controller of GHG-emitting activities within its boundaries.⁹² Despite that, the court concluded that these considerations do not create novel ground for extending jurisdiction extraterritorially.⁹³ Instead, the global dimension of the climate change problem drew the court to refuse the possibility of dealing with instances where state actions affect convention-protected-interests of persons abroad. According to the court, such an extension would lead to a "critical lack of foreseeability" of the convention's jurisdictional scope and turn into a "global climate-change treaty."⁹⁴ Moreover, the court also distinguished its jurisprudence from other international bodies that adopt prevention of climate-related transboundary harm as a valid ground for extraterritorial responsibility.⁹⁵ This conservative view not only isolates the court from the main body of international jurisprudence, but also opens the opportunity for convention member states to act with a greater degree of impunity regarding extraterritorial impacts of climate actions. Moreover, a complete rejection of the effects-based reading of jurisdiction does not reflect the court's past views.⁹⁶ It is also less useful in the modern world where states are able to inflict harm without maintaining actual and complete control, e.g., in drone warfare, digital surveillance, and misinformation campaigns. Yuval Shany, former Chair of the U.N. Human Rights Committee, finds that ECtHR jurisprudence is on a pathway to gradual acceptance of an effects-based reading of jurisdiction.⁹⁷

Developments in the human rights legal domain, as summarized above, do not yet support the reading of a positive extraterritorial state obligation to promote climate OFDI from the global North to the global

91. *Id.* ¶¶ 168–73.

92. *Id.* ¶¶ 192–94.

93. *Id.* ¶ 195.

94. *Id.* ¶¶ 206–08.

95. *Id.* ¶ 212; Armando Rocha, *States' Extraterritorial Jurisdiction for Climate-Related Impacts*, VERFASSUNGSBLOG (Apr. 12, 2024), <https://verfassungsblog.de/states-extraterritorial-jurisdiction-for-climate-related-impacts/> [<https://perma.cc/NB2R-CJ73>].

96. It is to be noted that the court categorically accepted as "well-established case law" that when acts of state parties produce effects outside their own territories, it constitutes an exercise of jurisdiction within the meaning of the Convention. *Duarte Agostinho*, *supra* note 90, ¶ 169 (citing *Ukraine and the Netherlands v. Russia*, App. No. 8019/16, ¶ 555 (Nov. 30, 2022), <https://hudoc.echr.coe.int/fre?i=001-222889> [<https://perma.cc/DM8Q-B9D3>]). *See also* Andreou v. Turkey, 45653/99, Eur. Ct. H.R. (2009) ¶ 25.

97. Yuval Shany, *Catching Up: The European Court of Human Rights Approximates Its Approach to Extraterritorial Jurisdiction Over Digital Surveillance to That of the Human Rights Committee*, 5 EUR. CONVENTION ON H.R.L. REV. 182, 184 (2024), https://brill.com/view/journals/eclr/5/2/article-p182_003.xml (last visited May 15, 2025).

South. Nevertheless, there are incremental justifications for state actions towards that end. As seen above, formal recognition of the urgency of climate action, its accepted causal linkage with the enjoyment of human rights both within and beyond borders, and the assigned importance of implementing the customary obligation of transboundary harm prevention—are all signs that states' climate and human rights responsibilities are intertwined. Hence, reiterating the argument in *Neubauer*, states' positive obligations to protect human life and well-being ought to draw upon the transboundary and differentiated obligation of climate finance as contained in Art. 9(1) of the PA. It is especially true for states that are major sources of foreign investment capital, as the existing investment relationships puts them in a position of proximity and control that⁹⁸—in turn—activates the extraterritorial jurisdictional hook in terms of regulating outbound economic entities.

To conclude, there is domestic and international endorsement of a state's positive obligation extending extraterritorially to promote and ensure human rights in climate vulnerable regions. However, the way such a responsibility is to be implemented is more of a policy question and beyond courts' purview at present. That said, promotion of North-South climate OFDI is indeed one of the ways in which such a responsibility can be discharged in a mutually-beneficial fashion. The following section explores the extent to which this has been a reality.

III. CLIMATE OFDI IN INVESTMENT LAW AND POLICY: HOME STATE RESPONSIBILITY

Compared to the collectivist and almost universally-participated-in climate change and human rights treaty systems, the predominantly bilateral network of international investment agreements (IIAs) are distinct in terms of their liberal economic worldview, focus on protection of foreign investments, and prioritization of domestic economic welfare.⁹⁹ State obligations in climate change and human rights regimes increasingly coalesce to create a normative expectation and a growing emphasis on promoting climate OFDI upon the global North, as shown before. It remains to be seen how far short such an expectation falls from the reality. This section undertakes that task. Optimistically, embedding effective commitment to promote climate OFDI in the IIAs would not only align the investment regime with the developments in climate and human rights regime, but also tune these specialized legal frameworks to

98. It can be argued that the presence of economic entities abroad engaging in GHG emitting activities puts a state in a situation of control over the affected communities, distinguishing the circumstances from those underlying in *Duarte Agostinho*.

99. M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 10–15 (2015).

contribute to their original purpose, i.e., their contribution to host countries' development.¹⁰⁰

A. Policies and Practices Related to Climate OFDI Promotion

So far, the climate change regime's cornerstone principles of sustainability, differentiation and prevention of transboundary harm only have a partial influence at best on the policies and practices in the investment domain. Although institutions have increasingly zeroed in on the virtues of improving climate FDI in the post-PA era, the insights gleaned and policy suggestions proffered by institutions appear bifurcated. On one hand, the UN Agencies—with broader developing country participation—make the clearest recommendations for stronger home country policies to promote climate OFDI. The UNCTAD-led Investment Policy Framework for Sustainable Development (IPFSD)¹⁰¹ suggests for IIAs to include home-country commitments of incentives, information access, and partnerships to promote sustainable OFDI.¹⁰² Similarly, the UNESCAP has developed an OFDI Policy Toolkit¹⁰³ that recommends OFDI promotion through IIA commitments by a home country to attain mutually beneficial and sustainable development.¹⁰⁴ In contrast, research and policy suggestions by the OECD on FDI policy and climate change—showcasing approaches aligned with developed countries' worldview—do not venture into climate OFDI promotion. The FDI Qualities Policy Toolkit developed by the institution incorporates a range of host country policy measures to attract FDI while decarbonising the domestic economy,¹⁰⁵ but refrains from assigning roles for home countries to play. It is to be noted however, in the context of the ongoing

100. John Linarelli, Margot E. Salomon & M. Sornarajah, *Foreign Investment: Property, Contract and Protecting Private Power*, in *THE MISERY OF INTERNATIONAL LAW: CONFRONTATIONS WITH INJUSTICE IN THE GLOBAL ECONOMY* 159–60 (1st ed. 2018); Lise Johnson, Lisa Sachs & Nathan Lobel, *Aligning International Investment Agreements with the Sustainable Development Goals*, 58 COLUMBIA J. TRANSNAT'L. L. 60–63 (2019).

101. Principle 10 “International Cooperation”, UNCTAD, *Investment Policy Framework for Sustainable Development*, 35–36 (2015), https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf [<https://perma.cc/P335-RQVM>].

102. *Id.* at 74, 85. In absence of such innovations, it is cautioned that IIAs will largely become instruments disproportionately benefitting developed home countries. *See also* Stephenson & Zhan, *supra* note 9.

103. UNESCAP, *OFDI Policy Toolkit for Sustainable Development*, <https://ofdi.unescap.org/advanced-search> (last visited May 15, 2025).

104. This borrows from earlier work on this issue done by Sauvants and others. Sauvants et al., *supra* note 10.

105. OECD, FDI QUALITIES POLICY TOOLKIT (2022), https://www.oecd-ilibrary.org/finance-and-investment/fdi-qualities-policy-toolkit_7ba74100-en [<https://perma.cc/A26K-7H4Z>]; also echoed in WEF, *Guidebook on Facilitating Climate FDI*, 10–12 (2023), https://www3.weforum.org/docs/WEF_Guidebook_on_Facilitating_Climate_FDI_2023.pdf [<https://perma.cc/A6XC-V52Z>].

work at the OECD on investment treaties and climate change, several of the solicited responses have proposed for inclusion of home country responsibilities regarding climate OFDI promotion in the IIAs.¹⁰⁶

Domestic policy practice at the key foreign investment origin countries on climate FDI promotion reveals another form of bifurcation. While the capital-abundant developed countries legitimize domestic industrial subsidies on climate grounds, the same countries refrain from adopting any policies to promote climate OFDI. A recent G20 survey revealed that none of the major FDI-origin countries have any particular policy to promote climate OFDI in particular.¹⁰⁷ The U.S. response therein elucidated the predominance of neoliberal economic thinking, holding that “[t]he decision on whether or how to invest internationally is a private sector decision that should be made for commercial rather than political reasons.”¹⁰⁸ Leaving private OFDI unfettered is hence a calculated profit-maximizing decision, as public financial engagement by the same countries in outbound development finance projects requires prior sustainability impact assessments and demonstrated social and environmental benefits.¹⁰⁹

B. *Climate OFDI Promotion in the Investment Agreements*

The presence of climate change-related provisions in the IIAs has gradually increased over the last decade. In this vein, increasingly strict language regarding climate FDI promotion has emerged since 2015—predominantly in agreements signed by the EU, the United Kingdom or New Zealand. Initially, commitments on climate change and investment tended to be quite nebulous, e.g., parties resolving “to make effort,” “pay

106. OECD, INVESTMENT TREATIES AND CLIMATE CHANGE: OECD PUBLIC CONSULTATION 1, 70, 109 (2022), <https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/investment-treaties/climate-alignment/2022-04%20Climate%20change%20consultation%20-%20compilation%20of%20submissions.pdf> [<https://perma.cc/5K3W-7CBB>].

107. See UNCTAD, *G20 Compendium on Promoting Investment for Sustainable Development (Bali Compendium)* (2022), https://unctad.org/system/files/official-document/diae_g20_2022_Indonesia_d1_en.pdf [<https://perma.cc/QA8D-TXJY>].

108. *Id.* at 53.

109. See for example, U.S. Int’l Dev. Fin. Corp. (DFC), *Environmental and Social Policy and Procedures (ESPP)* (2020), https://www.dfc.gov/sites/default/files/media/documents/DFC_ESPP_07312020-final_1.pdf [<https://perma.cc/7C7K-ZEZ8>]. Not only does ESPP calls for all its OFDI support measures to be in compliance with low or no-carbon economic development, but it also categorically prohibits (Annex B), among others, projects that emit high level of greenhouse gases.

special attention,”¹¹⁰ or “strive to facilitate”¹¹¹ climate FDI. Stronger language appeared in the currently frozen Comprehensive Agreement on Investment between the EU and China in 2021, mentioning that “*the Parties [. . .] shall [. . .] promote and facilitate investment of relevance for climate change mitigation and adaptation.*”¹¹² In the FTA between the UK and New Zealand signed in 2022, among other detailed commitments, it was included that the parties “*shall [. . .] facilitate and promote trade and investment in goods and services of particular relevance for climate change mitigation and adaptation.*”¹¹³ Similar straightforward bidirectional commitment also appears in agreements signed by the UK with Australia, Iceland, Liechtenstein, and Norway. Such commitments are planned to be implemented through periodic cooperation, consultation, monitoring and reporting.¹¹⁴

However, the outlook is markedly different when it comes to North-South agreements. Similar strict language is yet to appear in North-South IIAs, with or without any implementation mechanism.¹¹⁵ For example, in the EU-Angola Investment Facilitation Agreement in 2022, parties only commit to promoting the “mutual supportiveness of investment and

110. Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Can.-E.U., art. 24.9, Jan. 14, 2017, 2017 O.J. (L 11) 23, http://data.europa.eu/eli/agree_international/2017/37/oj [<https://perma.cc/9SNR-8TLV>].

111. Among others, the EU – Japan Economic Partnership Agreement (2019), and the EU – Vietnam Free Trade Agreement (2019) also adopt similar language (“Shall endeavour to” and “shall strive to”). EU-Japan Economic Partnership Agreement, E.U.-Japan, art. 16.5, Apr. 18, 2018, 2018 O.J. (L 330) 3, http://data.europa.eu/eli/agree_international/2018/1907/2024-05-14 [<https://perma.cc/M3WJ-3T8R>]; Free Trade Agreement, E.U.-Viet, art. 13.10, June 12, 2020, 2020 O.J. (L 186) 63, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2020:186:TOC> [<https://perma.cc/4ZAL-YJ2D>].

112. Free Trade Agreement, U.K.-N.Z., art. 22.6, 2022, N.Z. MINISTRY OF FOREIGN AFF. AND TRADE, NZ-UK FREE TRADE AGREEMENT, <https://www.mfat.govt.nz/assets/Trade-agreements/UK-NZ-FTA/Chapters/Chapter-22-Environment.pdf> [<https://perma.cc/SD99-TX79>] (emphasis added).

113. *Id.*

114. For example, the EU-New Zealand FTA establishes an environment and climate change sub-committee to prioritize, track and implement activities parties commitments under the Climate Change chapter. *Id.* art. 22.20.

115. It should be noted in this connection that South-South agreements, particularly the investment protocol signed between the African Continental Free Trade Area (AfCFTA) parties contain ambitious commitments. As the focus of the paper is on North-South commitments, it refrains from providing further details on the developments in the AfCFTA. *See generally* Protocol on Investment to the Agreement Establishing the AfCFTA, Feb. 19, 2023, AFR. UNION, PROTOCOL TO THE AGREEMENT ESTABLISHING THE AFRICAN CONTINENTAL FREE TRADE AREA OF INVESTMENT, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/8533/download> [<https://perma.cc/JD64-96GR>].

climate policies and measures.”¹¹⁶ Similarly, in the 2022 Economic Partnership Agreement signed between the EU and the Organization of African, Caribbean and Pacific (OACP) States, parties only “affirm the need” to take ambitious actions and to mainstream sustainability and climate considerations in *inter alia* investment rulemaking.¹¹⁷ A few attempts to create North-South investment promotion commitments are notable nonetheless. The Economic Partnership Agreement (EPA) between the United Kingdom and Kenya highlights a potential cooperation area as “supporting climate change adaptation and mitigation options in the EAC Partner State(s),” which can be taken as an indirect commitment to promote climate OFDI in EAC countries.¹¹⁸ Similarly, the previously mentioned agreement between the EU and OACP states holds that “[t]he Parties agree to undertake climate action to address adaptation, mitigation, as well as means of implementation and be focused on the most vulnerable countries, including Small Island Developing States, Low-lying Coastal States, Least Developed Countries and Land Locked Developing Countries.”¹¹⁹ It was also agreed that “[t]he Parties shall address the security threat that climate change and environmental degradation pose, particularly in situations of fragility and on the most vulnerable countries.”¹²⁰ A bold progress has recently been made in the Trade and Economic Partnership Agreement signed between the member states of the European Free Trade Association (EFTA) and India.¹²¹ In the first-ever formulation, the parties have agreed to a specific target of investment promotion and job creation in India,¹²² backed up by

116. Sustainable Investment Facilitation Agreement between the European Union and the Republic of Angola, E.U.-Angl., art. 5.5, Mar. 8, 2024, 2024 O.J. (L 830) 1, <http://data.europa.eu/eli/agree/2024/830/oj> [<https://perma.cc/3NLR-MFSW>].

117. Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of the African, Caribbean and Pacific States, of the other part, E.U.-O.A.C.P., art. 54, Dec. 28, 2023, 2023 O.J. (L 2862) 1, http://data.europa.eu/eli/agree_internation/2023/2862/oj [<https://perma.cc/X5PH-UYKB>] [hereinafter EU–OACP EPA].

118. Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the Republic of Kenya, a Member of the East African Community, of the other Part (2020), U.K.-Kenya, art. 83, Dec. 8, 2020, FOREIGN, COMMONWEALTH AND DEV. OFF., ECONOMIC PARTNERSHIP AGREEMENT, https://assets.publishing.service.gov.uk/media/5fdb54868fa8f54d564af133/MS_9.2020_Economic_Partnership_Agreement_UK_Kenya_Member_of_East_Africa_Community.pdf [<https://perma.cc/M3S6-JCQD>].

119. EU–OACP EPA, *supra* note 117, at art. 58.

120. *Id.* at art. 59.

121. *See generally* Trade and Economic Partnership Agreement Between the EFTA States and the Republic of India, E.F.T.A.-India, Mar. 10, 2024, *Trade and Economic Partnership Agreement between the EFTA States and the Republic of India*, UNCTAD, <https://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/india/1.%20Main%20Agreement.pdf> [<https://perma.cc/G87Q-UDTC>].

122. *Id.* at arts. 7.1, 7.2. EFTA states committed to increasing OFDI to India to 50 billion in first 10 years and an additional 50 billion in the following 5 years. They also aim to create 1

periodic reviews.¹²³ India is accorded an opportunity to suspend concessions in a proportionate manner, if the agreed level of OFDI and job growth is not realized.¹²⁴

Except for the EFTA-India agreement, the relative lack of ambitious climate-related investment promotion measures in North-South IIAs is attributable to several likely factors. It can result from the absence of any identified shared interests in each other's markets to expand climate-friendly investments. Alternatively, countries may have an interest in allowing their less climate-efficient businesses to continue operating abroad. For example, only as late as in 2021, Germany along with thirty-three other countries pledged to stop public financial support for fossil fuel projects abroad.¹²⁵ It is also likely that there is a jaded understanding, also acceptance, on the part of developing countries that most investment flows would take place in the traditional sectors—e.g., extractive industries—anyways. While the analysis here is not sufficient to corroborate any of these hypotheses, this identified disparity in IIA commitments indeed corresponds to the reality of climate finance remaining largely confined within the developed regions.¹²⁶ It also reinforces the unfortunate reality of climate OFDI not being a priority issue in the North-South agreements. While it is not impossible to draft unilateral North to South commitment in an IIA, there is obviously less appetite for a traditional developed country “norm entrepreneur” to introduce and improve upon such provision. The EFTA-India agreement is the first step to break that mold.

The near-complete agreement on Investment Facilitation for Development (IFD) at the WTO remains a potential forum to introduce developed country commitments to promote climate OFDI. Although the text of the agreement remains to be made public, it has been disclosed that commitments therein focus on, among others, improving transparency, responsible business conduct, and anti-corruption practices.¹²⁷ While the IFD may invite home countries to improve OFDI

million jobs in India during the same period. The green transition is one of the agreed goals of investment promotion.

123. *Id.* at arts. 7.4, 7.7 & Annex 7.A.

124. *Id.* at art. 7.8.

125. UN Climate Change Conference (COP26) at the Glasgow 2021, *Statement on International Public Support for the Clean Energy Transition*, <https://webarchive.nationalarchives.gov.uk/ukgwa/20230313124743/https://ukcop26.org/statement-on-international-public-support-for-the-clean-energy-transition/> [https://perma.cc/2LKX-RVYX].

126. See Buchner et al., *supra* note 3.

127. *Report on the 7th capacity building workshop/webinar on facilitating sustainable FDI flows to developing countries through the WTO Investment Facilitation for Development Agreement*, Int'l Trade Ctr. (2023), <https://www.intracen.org/sites/default/files/inline-files/IF%2C%2029%20June%20public%20webinar%2C%20report%2C%20final%20for%20pu>

transparency and encourage investors to contribute to the sustainable development of the host country, it remains unlikely that it would propose the promotion of climate OFDI.¹²⁸

IV. NORTH-SOUTH CLIMATE OFDI COMMITMENT: BETWEEN CONTESTABILITY AND PROGRESS

A. Key Takeaway: *The Contestability of a Climate OFDI Promotion Commitment*

The key takeaway emerging from this Article is that despite favorable developments in both climate and human rights legal regimes endorsing promotion of climate OFDI, a specific, enforceable commitment to that effect remains wanting. The analysis reveals several factors contributing to the continued contestability of global North-South obligations to promote climate OFDI. These are summarized below.

First, the climate change, human rights, and investment legal regimes display different characteristics in terms of involved participants, pursued goals and implementation mechanisms. These differences lead to functional variations in their incorporation of the legal principles urging extraterritorial climate actions like climate finance. In this regard, the scope of a legal regime and inclusivity of participation particularly stand out. As progressive evolution of a norm is fueled by dynamic exchanges between stakeholders at different levels of governance,¹²⁹ it is unsurprising that broad-based, inclusive legal regimes provide more opportunities for such claims and responses to take place. It also appears that the more imbalanced a legal regime is in terms of power distribution among its participants, the less effective transboundary assistance commitments there are from the strong to the weak. This is a plausible explanation for the underdevelopment of climate-related OFDI commitments in the North-South IIAs. Similarly, balance of powers resulting from a large number of participants, or robust implementation mechanisms in climate and human rights regimes have been more successful in generating transboundary state commitments on climate action.

Second, the nature and content of a state's responsibility in any given regime is attuned to the latter's characteristics and therefore cannot immediately be extrapolated to the concurrent regimes without added innovation. For example, the collective North-South financial obligation in the climate regime appears strict but remains subject to only an

blication.pdf [https://perma.cc/2RSH-7T9R]. Stephenson and Zhan proposed climate FDI facilitation commitment to be included in IFD. See Stephenson & Zhan, *supra* note 9, at 12.

128. *Id.*

129. Antje Wiener, *A Theory of Contestation – A Concise Summary of its Argument and Concepts*, 49 POLITY 109, 112–15 (2017).

incremental and soft implementation mechanism. However, we have seen that some aspects of soft climate responsibilities have been brought into play in determining states' human rights obligations, thereby giving them an increasingly strict nature. Similar innovations can also take place in the investment domain regarding climate OFDI, but it currently lacks the catalytic engagement of individuals and civil societies which is emblematic of the human rights field.

Third, a degree of policy freedom resides at the domestic level in terms of fixing climate action targets and choice of policy instruments to fulfil the same. As a function of domestic realpolitik, discharge of climate responsibility in the global North is therefore aligned with other domestic priorities—e.g., economic growth—resulting in varied paces of progress along different sub-issues. For example, while developed countries are reluctant to contribute to transboundary emission mitigation by promoting climate OFDI, globalist concerns over emissions abroad are presented as justification for border carbon adjustments, or to regulate deforestation abroad. This points to the necessity of finding similar interest alignments for strengthening climate OFDI commitments in IIAs.

Contestations leading to the emergence of a potential norm of climate OFDI promotion can be viewed as taking place along horizontal and vertical dimensions.¹³⁰ The horizontal contestation takes place between the three competing regimes where repeated interactions determine the nature and scale of influence that climate principles and commitments may exert in a particular legal setting. The vertical contestation takes place between domestic and international levels of governance, determining the extent and manner in which states reflect climate responsibilities in domestic and transboundary economic measures. As Krisch further argues, directions matter less in such contestations, compared to the “material and ideational resources” a given constituency can muster in support of its respective viewpoints.¹³¹ This is why it remains important to draw support from climate change and human rights regimes to further the narrative of North-South climate OFDI promotion.

Last but not least, the account supplied in this Article importantly highlights the role of state agency and power as tools of influence in this milieu. Much like Benvenisti and Downs's argument,¹³² it shows how the claim of climate OFDI promotion has fragmented across forums,

130. NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW 231–32 (Loughlin et al. eds. 2010).

131. *Id.* at 232.

132. See generally Eyal Benvenisti & George W Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STANFORD L. REV. 595 (2007) (arguing that fragmentation is a serious problem because “it operates to sabotage the evolution of a more democratic and egalitarian international regulatory system and to undermine the normative integrity of international law”).

increasing the participation costs for developing countries and magnifying the impact of power imbalance on rulemaking. Following the pluralist line of reasoning, this *status quo* can only be positively altered through further contestation and political demands for change, made by both state and non-state actors in relevant forums.¹³³

B. *Towards a Stronger North-South Climate OFDI Commitment*

The fact that traditional forerunners in sustainability-focused investment regulation (e.g., the EU) have remained so far disinclined to pursue a stronger North-South climate OFDI promotion agenda, indicates the need for new norm entrepreneurs¹³⁴—ideally those from the global South. Developing countries should take the lead in offering new formulations of climate OFDI promotion commitments that accommodate the interests of all parties while improving the nature and realization of the efforts. To reach mutually beneficial outcomes, it remains necessary to embed such commitments in a wider transactional bargain, enabling cross-issue linkage to improve joint gains of parties.¹³⁵ IIAs are therefore an ideal platform for such initiatives, also because it has been the forum of choice so far and its legal framework is undergoing a dynamic evolution. The WTO agreement on investment facilitation for development (IFSD) can also serve as a potential forum.

In addition to interest alignment and new first-movers, the salience of an emerging norm also depends on its connection with broader meta-norms.¹³⁶ Hence, developing upon existing IIA language on climate OFDI promotion by drawing from climate change and human rights disciplines would strengthen the claims' connections with overarching principles such as equity, sustainability, and human dignity, thereby making it even harder to reject. Keeping that in mind, any concrete proposition to that effect should—first and foremost—broadly recognize and foreground these principles as the basis of climate OFDI promotion. Combined, this will serve as the legal context against which parties to the IIA should further articulate commitments to promote and incentivize private financial flows to developing countries. As far as substantive obligations are concerned, the starting point is a strict commitment to

133. KRISCH, *supra* note 130, at 255–58; Nolte, *supra* note 27, at 103, 105–06; Cottier, *supra* note 28, at 82–83.

134. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 896–98 (1998).

135. JOEL P. TRACHTMAN, *THE FUTURE OF INTERNATIONAL LAW: GLOBAL GOVERNMENT* 55 (Cambridge Univ. Press, 2013); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 UNIV. CHI. L. REV. 1113, 1171, 1176–77 (1999).

136. KRISCH, *supra* note 130, at 257 (Citing Wayne Sandholtz, *Explaining International Norm Change*, in *INTERNATIONAL NORMS AND CYCLES OF CHANGE* 1, 17 (Oxford Univ. Press, 2008), <https://doi.org/10.1093/acprof:oso/9780195380088.003.0001> (last visited Feb. 7, 2024)).

cooperate on promoting climate OFDI by sharing information, making appropriate needs and capacity assessments, and targeting areas of opportunity and growth. The extraterritorial human rights responsibility should be reflected in state parties' commitments towards controlling the human rights impact of the outbound investments, particularly in refraining from promoting FDI affecting human rights or causing transboundary harm. The developed countries' responsibilities to provide climate finance should inform stronger commitments to ensure, promote and incentivize climate OFDI to developing countries. This can be further balanced by opening the opportunity for the grant components of the promotion measures leading to successful climate FDI to be counted towards the quantified North-South climate finance goal. Although the exact nature and scope of the commitments would depend on the bargaining between countries involved, below is an illustrative text outlining the general contours.

Illustrative Text: Promotion of Climate-Friendly Investment

The Parties agree that climate change is a common concern of humankind; thereby requiring active cooperation and diligent domestic action to promote climate FDI and ensure sustainable economic development. The Parties also agree that all transboundary investment taking place between their respective territories must be guided by the principles of sustainability, prevention of transboundary harm, and the duty to respect, protect and fulfil the human rights of individuals in the investment localities. In light thereof-

- (a) Parties shall periodically consult and inform each other about the necessities, priorities and opportunities of climate FDI into and from their territories, including the use of emission-reducing technologies and processes in each sector.
- (b) To prevent the breach of human rights obligations from GHG emissions and emission leakage, each party shall ensure that its outbound investments correspond with its ambitious climate mitigation and adaptation targets under the Paris Agreement.
- (c) The developed country party shall not allow the facilitation of outbound investments with an adverse climate and human rights impact, particularly in sectors where viable, less emission-intensive alternatives are available or can become available with the financial incentives mentioned below.
- (d) The developing country party shall ensure that its investment promotion activities are in line with the ambitious target of reaching an emission peak sustainably and within the earliest possible timeframe.

- (e) The developed country party shall actively promote and incentivize outbound investments into projects with climate mitigation and adaptation benefits as well as into sectors and technologies prioritized through periodic consultations in the territory of the developing country party. Any new and additional financial support made available and utilized in this regard may count towards fulfilment of the new collective quantified finance goal agreed upon under the Paris Agreement on climate change.

Language such as the above needs to be further accompanied by necessary periodic work programs to assess and update ambition, as well as inter-state forums to address, monitor, verify and settle potential conflicts of views. The EFTA-India economic cooperation agreement has already set out a potential example to follow and improve upon in this regard. It can be further appended with exception clauses to save any climate OFDI support or incentive from legal challenges. As far as implementation is concerned, IIAs with a North-South dimension that is to be negotiated or are soon to be up for renegotiation can adopt this language. The South-South IIAs can also adopt variations of the language.

CONCLUSION

This Article reveals that despite sustainability and the common concern over climate change having a central position in regulatory affairs worldwide over past decades, practices under different treaty regimes in that regard do not always converge. While there is an obligation for developed countries to boost climate finance, which can be met by promoting and incentivizing climate OFDI from developed to developing countries, the existing framework of international investment agreements fails to internalize that motivation. Foregrounding the climate finance responsibility into IIA language is one of the suggestions made in this Article. Additionally, this Article argues that the gradual reassessment of a state's extraterritorial human rights responsibility in relation to climate change further strengthens the case for a North-South obligation to foster climate OFDI. By combining the responsibilities of the climate and human rights regimes, this Article proposes new commitment language to promote climate OFDI, which could serve as a foundation for future negotiations on international investment agreements.