

# NOTES & COMMENTS

## LEVERAGING FOREIGN INVESTMENTS TO SUPPORT CLIMATE CHANGE ADAPTATION IN THE GLOBAL SOUTH: CERTIFYING CLIMATE-NEXUS INVESTMENTS AND CONDITIONING PROTECTIONS

BY  
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*Climate change poses increasingly grave risks to Global South states lacking the extensive capital and robust economies necessary to effectively adapt. The international investment regime may offer a path forward for resource-exporting Global South states willing to redraft international investment agreements to leverage resource demand and secure vital capital for climate adaptation. This Note suggests that Global South states might accomplish this by incorporating a mandatory investment certification scheme into international investment agreements targeting “climate-nexus investments,” investments that exacerbate the adverse effects of climate change. This approach could provide a source of capital for Global South host states without threatening extant systems of international trade. Climate justice demands that capital-exporting Global North states play a role in providing Global South states that are disproportionately affected by the climate crisis with the means to*

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*confront its adverse impacts, and the international investment regime provides an optimal vehicle to do so.*

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## I. INTRODUCTION

Climate science increasingly highlights the tension between humanity's desire for development and the fundamental need to protect the environment.<sup>1</sup> Foreseen in 1992 and broadly identified in the United Nations Framework Convention on Climate Change (UNFCCC),<sup>2</sup> these tensions remain unresolved. Initial formulations of developed-state leadership, mitigation, and technological and financial support, embodied in the UNFCCC<sup>3</sup> and retained by the international climate regime,<sup>4</sup> are woefully insufficient to offset the adverse effects of climate change on many Global South<sup>5</sup> states struggling to adapt. For example, the United Nations Environment Programme (UNEP) estimates the annual climate change adaptation costs for Global South states will likely reach \$160–340 billion USD by 2030,<sup>6</sup> a sum five to ten times greater than what

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<sup>1</sup> Compare Richard B. Alley et al., *Summary for Policymakers*, in CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 2–3 (Susan Solomon et al. eds., 2007) (explaining there is very high confidence “that the global average net effect of human activities since 1750 has been one of warming”), with Richard P. Allan et al., *Summary for Policymakers*, in CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS 3 (Valérie Masson-Delmotte et al. eds., 2021) (“It is unequivocal that human influence has warmed the atmosphere, ocean and land.”).

<sup>2</sup> United Nations Framework Convention on Climate Change (UNFCCC), pmble. paras. 2, 5, 10, 21, 22, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

<sup>3</sup> *Id.* art. 3(1) (highlighting equity and common but differentiated responsibilities); *id.* art. 3(2) (recognizing the “special circumstances of developing country Parties”); *id.* art. 4(2) (identifying developed country Party obligations); *id.* art. 4(3) (providing for developed Parties’ financial support); *id.* art. 4(4) (requiring support for developed country adaptation); *id.* art. 4(5) (contemplating developed Party technology transfer and support).

<sup>4</sup> UNFCCC, *Adoption of the Paris Agreement, Rep. of the Conf. of the Parties on its Twenty-First Session, Addendum*, U.N. Doc. FCCC/ CP/2015/10/Add.1, arts. 4(1), 4(4)–(5), 6(6), 7, 9 (Jan. 29, 2016) [hereinafter Paris Agreement]; UNFCCC, *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, FCCC/CP/1997/L.7/Add.1, 37 I.L.M. 32 (Dec. 10, 1997).

<sup>5</sup> This Note uses the term “Global South states” in place of “developing countries” and “Global North states” over “developed countries” where possible. The two primary reasons for doing so are: (1) to reject the Western-centric and development-based terminology that has been historically utilized to selectively elevate a narrowly defined form of “progress” through “development” and (2) to highlight the very real global geographical division of wealth that exists as a result of the historic colonialist practices of states largely in the northern hemisphere. However, where a source utilizes the latter terms, these terms are left unchanged for clarity and to retain the original intent of the author.

<sup>6</sup> U.N. ENV’T PROGRAMME, ADAPTATION GAP REPORT 2022: TOO LITTLE, TOO SLOW—CLIMATE ADAPTATION FAILURE PUTS WORLD AT RISK 19 (2022).

finance pipelines currently provide.<sup>7</sup> In addition, attaining the 45% reduction in global greenhouse gas emissions required to keep planetary warming to the 1.5°C aspirational goal outlined in the Paris Agreement appears dubious when current pledges project no more than a 5–10% reduction.<sup>8</sup> Most Global North states are not on track to meet even these inadequate pledges.<sup>9</sup> The situation is dire and its circumstances are unprecedented.

International investment law provides an avenue for scaling up financial resources to address climate change in the Global South. This body of law is an established component of the international legal landscape, with implementing instruments in 212 world economies.<sup>10</sup> Currently, 2,604 international investment agreements (IIAs) are in force;<sup>11</sup> additionally, in 2016 foreign direct investment (FDI) reached \$1.75 trillion USD, with more than a third of that going to Global South states.<sup>12</sup> The international investment regime largely rejects environmental considerations, and conspicuously maintains traditional principles of economic efficiency and development as its core drivers.<sup>13</sup> Nevertheless, the nature of many international investments, especially in sectors implicating natural resources and extractive industry, makes the international investment regime and climate change fundamentally related. The former should incorporate the latter to achieve equitable climate development and responses in the Global South.

The perpetuation of an artificial dichotomy between international investment law and environmental and climate impacts ignores the ways many international investments exacerbate climate change and affect vulnerable Global South communities.<sup>14</sup> This Note introduces the term “climate-nexus investments” to refer to investment activities that directly or indirectly exacerbate climate change and its effects, locally or globally, often as a result of the destructive nature of such investments.<sup>15</sup> It argues

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<sup>7</sup> *Id.* at 24.

<sup>8</sup> U.N. ENV'T PROGRAMME, EMISSIONS GAP REPORT 2022: THE CLOSING WINDOW—CLIMATE CRISIS CALLS FOR RAPID TRANSFORMATION OF SOCIETIES 32–33 (2022).

<sup>9</sup> *Id.* at XIX.

<sup>10</sup> *International Investment Agreements Navigator*, U.N. CONF. ON TRADE & DEV. <https://perma.cc/46U7-7ZWR> (last visited Feb. 17, 2023) (click on “IIAs by Economy”).

<sup>11</sup> *Id.* (listing totals under “Bilateral Investment Treaties (BITs)” and “Treaties with Investment Provisions (TIPs)” on lefthand side).

<sup>12</sup> LISE JOHNSON, GREEN FOREIGN DIRECT INVESTMENT IN DEVELOPING COUNTRIES 8 (2017) <https://perma.cc/P6C5-XLLV> (internal citation omitted).

<sup>13</sup> See Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT'L ECON. L. 1037, 1065 (2010) (“[N]eo-liberal economic theory and the IIAs identified with it are not concerned with the pursuit of . . . environmental policy objectives *per se*.”) (emphasis in original) (internal citation omitted).

<sup>14</sup> See Carmen G. Gonzalez, *Bridging the North-South Divide: International Environmental Law in the Anthropocene*, 32 PACE ENV'T L. REV. 407, 408–10 (2015) (discussing how investment law exploits nature for economic gain, ignoring its environmental and climate impacts).

<sup>15</sup> Classic examples of investment activities of this nature include sectors such as mining, oil and gas exploration and extraction, or timber harvesting. These are activities which adversely affect the immediate environment and ecosystems of a host State, and also

that Global South host states should take advantage of the demand for raw materials to secure capital for climate change adaptation and that investment capital channeled through IIAs presents a tool these states should leverage to mitigate the adverse environmental impacts of investments.<sup>16</sup> Specifically, Global South states should redraft IIAs to create a certification scheme for climate-nexus investments that conditions investment agreement protections upon certification. Climate-nexus investments should trigger an obligation by investors to provide support to help offset the environmental and climate damage these investments cause in Global South host states.

This Note explores how Global South states can, and should, leverage IIAs to secure climate benefits. Part II provides background on international investment law, investment agreements, and the climate crisis. It underscores the colonialist roots of the international investment regime's power imbalances and examines the shortcomings of current multilateral environmental agreements in providing the necessary climate support to the Global South. Part III highlights how international investments implicate environmental and climate issues, and the conspicuous absence of effective environmental considerations in IIAs. Part IV elaborates key features of an effective environmental and climate protection provision in an IIA and offers sample language for such a provision. Part V surveys potential obstacles to the proposed incorporation of environmental and climate interests into the international investment regime and ultimately concludes that, while significant, these obstacles can and must be overcome.

## II. A COMPLICATED WEB: COLONIAL AND IMPERIALIST ROOTS, THE GLOBAL CLIMATE CRISIS, AND THE CURRENT STATE OF MULTILATERAL CLIMATE AND INVESTMENT AGREEMENTS

Far from being a unique phenomenon, the disadvantages many Global South states experience while struggling to effectively confront climate change arise from the same systematized and institutionalized Western imperialist and colonialist structures responsible for the disparity in power, wealth, and capacity in other realms of contemporary relations between the hemispheres.<sup>17</sup> Global South states experience more adverse effects from climate change due to geographical position and dependence on sectors, such as agriculture, that are dramatically

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cumulatively have a significant effect on climate-warming through combustion of fossil fuels as end products or deforestation. *Id.* at 411–13.

<sup>16</sup> This becomes especially important considering the often resource-intensive nature of many components and technologies that are instrumental in the push for decarbonization and the shift toward renewable energy sources and infrastructure. See Melina Gkionaki, *How It Works: Decarbonisation Through Innovation*, EUR. INV. BANK (Oct. 23, 2020), <https://perma.cc/9H9H-QDM3> (discussing the inputs, outputs, and implications of decarbonization). Demand for products of such investments is unlikely to soon diminish.

<sup>17</sup> Gonzalez, *supra* note 14, at 411–12.

affected by a changing climate.<sup>18</sup> They also have less capacity to implement the expensive and technical adaptations required to effectively confront climate change.<sup>19</sup> Though many multilateral environmental agreements address these economic disparities by requiring Global North states to provide financial resources and technologies to Global South states,<sup>20</sup> treatment of Global South states trends towards equality and not equity, yielding insufficient results.<sup>21</sup>

*A. Colonialism Still Affects Global South Capacity for Climate Change Adaptation*

The colonialist period was defined by widespread exploitation of the labor (i.e., people), land, and natural resources of the Global South by the Global North and set Western ideas of economics and markets as the metrics for measuring wealth and power.<sup>22</sup> It essentially established an economic relationship between the Global North and Global South cementing the Global North as the consumer and the Global South as the provider of raw materials.<sup>23</sup> The respective capacities and roles of Global North and Global South states reflect this dynamic within the contemporary international investment regime, in which Global North states largely export capital while Global South states import capital.<sup>24</sup> Ultimately, colonialism gave Global North states the financial and

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<sup>18</sup> Myles Allen et al., *Summary for Policymakers*, in GLOBAL WARMING OF 1.5°C. 9 (Valérie Masson-Delmotte et al. eds., 2018).

<sup>19</sup> See Ruth Gordon, *Climate Change and the Poorest Nations: Further Reflections on Global Inequality*, 78 U. COLO. L. REV. 1559, 1591 (2007) (noting Africa, in particular, does not have the resources or wealth to effectively adapt to climate change).

<sup>20</sup> See, e.g., UNFCCC, *supra* note 2, art. 4; U.N. Conference on Environment and Development, *1992 Convention on Biological Diversity*, arts. 12, 16, 1760 U.N.T.S. 79 (June 5, 1992) [hereinafter *Convention on Biological Diversity*]; U.N. Conference of Plenipotentiaries on the Protocol on Chlorofluorocarbons, *1987 Montreal Protocol on Substances that Deplete the Ozone Layer*, art. 5, 1522 U.N.T.S. 3 (Sept. 16, 1987) [hereinafter *Montreal Protocol*].

<sup>21</sup> See Paris Agreement, *supra* note 4, arts. 4(2)–(3) (requiring Nationally Determined Contributions). This requirement to produce a legally-binding Nationally Determined Contribution (NDC) and for the commitment to progress in ambition with each submission represented an unprecedented shift in the climate change regime; prior to the Paris Agreement, Global South parties did not have any legally binding obligations and their expected contributions to the regime were largely recognized as dependent upon the amount of support given by Global North parties. Daniel Bodansky, *Paris Agreement*, AUDIOVISUAL LIBR. OF INT'L L. (Dec. 12, 2015) <https://perma.cc/XTN2-MA5L> (defining differentiation and how the Paris Agreement created different obligations for Global South and Global North states).

<sup>22</sup> Carmen G. Gonzalez, *Environmental Justice, Human Rights, and the Global South*, 13 SANTA CLARA J. INT'L L. 151, 159, 168 (2015) (identifying that the use of gross national product (GNP) as the barometer for economic success was a product of Global North economic theory imposed on the world stage and Global South States) (internal citations omitted).

<sup>23</sup> *Id.* at 158.

<sup>24</sup> Carmen G. Gonzalez, *Global Justice in Anthropocene*, in ENVIRONMENTAL LAW AND GOVERNANCE FOR THE ANTHROPOCENE 223–27 (Louis J. Kotzé ed., 2017).

political agency to become capital-exporting states and boxed Global South states into the role of capital-importing states, making any chance of redefining these roles increasingly difficult.

One consequence of this colonialist legacy is the different capacities of states to adapt to climate change. The resource-poor and agriculture-dependent Global South is disproportionately vulnerable to climate change and relatively unable to adapt to its effects.<sup>25</sup> Despite only accounting for 13% of the global population, 18% of climate-related disasters occur in Least Developed Countries (LDCs),<sup>26</sup> and these countries suffer a hugely disproportionate 69% of deaths resulting from climate-related disasters.<sup>27</sup> Climate change is an expensive problem.<sup>28</sup> Global North states confront the capital-intensive challenges of the climate crisis from a relatively well-situated position, due in part to vast available capital, technological expertise, robust infrastructure, strong medical networks, and comprehensive trade and economic systems.<sup>29</sup> For the Global South, development decisions require an additional balancing of priorities and the choice often becomes one between confronting climate change or developing fundamental infrastructure.<sup>30</sup> Global South states often must look to foreign capital for funds to combat the climate crisis, especially when these states are expected to reject the “traditional” carbon-intensive development practices so effectively employed by the Global North in its own developmental pursuits.<sup>31</sup>

In many ways, the cycle is a self-perpetuating one: Global South states, critically lacking in capital but rich in resources, seek Global

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<sup>25</sup> Gordon, *supra* note 19, at 1589. This can be for many reasons, but the underlying reason is often the financial requirements for adaptation are too great. *See id.* at 1590–91 n.142. However, there is often also a lack of technology and capacity for adaptation in Global South states, along with the conflicting interests a Global South state may have between development and climate change mitigation or adaptation, as will be discussed below. *See id.* at 1605.

<sup>26</sup> These Least Developed Countries are almost exclusively Global South states. For a complete list of Least Developed Countries, see *UN List of Least Developed Countries*, UNITED NATIONS, <https://perma.cc/U2V2-QJ4V> (last visited Mar. 15, 2023).

<sup>27</sup> CAMILLA MORE, GABRIELLE SA SWABY, & SONAM P WANGDI, TIME TO REDRESS THE GLOBALLY UNJUST COST OF CLIMATE CHANGE 3 (Sept. 2019), <https://perma.cc/NN27-LTW9>.

<sup>28</sup> *See* Tom Kompas, Van Ha Pham, & Tuong Mhu Che, *The Effects of Climate Change on GDP by Country and the Global Economic Gains from Complying with the Paris Climate Accord*, 6 EARTH'S FUTURE 1153, 1168 (2018) (stating that effectively limiting warming to the 2°C limit contemplated by the Paris Agreement, instead of following a carbon-intensive trajectory that results in a 3°C global temperature rise, would result in year 2100 GDP losses of almost \$4 trillion USD avoided annually).

<sup>29</sup> *See, Notre Dame Global Adaptation Initiative Country Index*, UNIV. OF NOTRE DAME, <https://perma.cc/5WXG-EJ76> (last visited on Dec. 15, 2022) [hereinafter *Global Adaption Initiative*] (measuring readiness and vulnerability of nations based on economic condition to support adaptation and attract adaptation investment, governance support that enables effective use of adaptation investment, and the social capacity that facilitates the uptake of benefits brought about by adaptation investment).

<sup>30</sup> *See id.* (under “ND-Gain Index” scroll down to e.g., #138 “Zambia;” then click on the country name and “view profile.” Zambia’s infrastructure reflects relatively low levels of disaster preparedness and electricity access).

<sup>31</sup> Gordon, *supra* note 19, at 1601–02.

North capital to fill the gap.<sup>32</sup> In return, Global North states receive raw materials, for which they possess the requisite capital and technology to transform into valuable end products to sell at a steep profit. Foreign investment is one form of capital importation that takes place.<sup>33</sup> However, IIAs often are manifestations of the greater global economic and political landscape and not arms length negotiations.<sup>34</sup>

*B. A Delicate Balance: Pressure on Global South States to Decarbonize and the Fundamental Need for Development*

The international legal, economic, and political landscapes often conflict with the development and climate change adaptation goals of Global South states. Mitigation within the climate change context refers to “human intervention to reduce emissions or enhance the sinks of greenhouse gases,”<sup>35</sup> whereas adaptation describes “the process of adjustment to actual or expected climate and its effects, in order to moderate harm or exploit beneficial opportunities.”<sup>36</sup> This creates a fundamental divide between the more forward-focused and proactive mitigation approach and the more backward-looking and reactive world of adaptation. For example, as a result of the funding and financing mechanisms in the international climate change framework, mitigation commanded 93% of private foreign investment flows between 2016 and 2018.<sup>37</sup> However, many capital-importing states are already experiencing the adverse effects of climate change and find themselves in desperate need of financing for adaptation.<sup>38</sup> Without surplus capital to dedicate to adaptation, allocations from domestic reserves divert funds from vital development projects.<sup>39</sup> Global South states may choose to seek capital in the form of foreign direct investment,<sup>40</sup> in which case a Global South host

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<sup>32</sup> Shalanda H. Baker, *Climate Change and International Economic Law*, 43 *ECOLOGY L. Q.* 53, 57 (2016).

<sup>33</sup> *Id.* at 55.

<sup>34</sup> See J. Anthony VanDuzer, *Canadian Investment Treaties with African Countries: What Do They Tell Us About Investment Treaty Making in Africa?* 18 (Soc’y of Int’l Econ. L., Working Paper No. 2016/23, 2016).

<sup>35</sup> *Annex I: Glossary*, in Allen et al., *supra* note 18, at 554.

<sup>36</sup> *Id.* at 542; see also, E. Lisa F. Schipper, *Conceptual History of Adaptation in the UNFCCC Process*, 15 *REV. EUR. CMTY. & INT’L ENV’T L.* 82, 84–5 (2006) (discussing the different backgrounds and roles of mitigation and adaptation in the climate change regime).

<sup>37</sup> U.N. ENV’T PROGRAMME, *ADAPTATION GAP REPORT 2021: THE GATHERING STORM—ADAPTING TO CLIMATE CHANGE IN A POST-PANDEMIC WORLD* 34 (2021) [hereinafter *GAP REPORT 2021*].

<sup>38</sup> NEHA RAI, MAREK SOANES, ANDREW NORTON, SIMON ANDERSON, PAULE STEELE, JANNA TENZING, & JAMES MACGREGOR, *A FAIR CLIMATE DEAL IN PARIS MEANS ADEQUATE FINANCE TO DELIVER INDCS IN LDCS 1–2* (2015), <https://perma.cc/E2Q5-TZ4U>.

<sup>39</sup> See, *GAP REPORT 2021*, *supra* note 37, at 36 (describing how Covid-19 has required Least Developed Countries to “reallocate resources towards health and social services [which] could cause countries to cut domestic climate finance flows.”) (internal citation omitted).

<sup>40</sup> Karl P. Sauvart & Padma Mallampally, *Policy Options for Promoting Foreign Direct Investment in the Least Developed Countries*, 7 *TRANSNAT’L CORPS. REV.* 237, 255 (2015).



state must attempt to balance complicated domestic and external pressures to satisfy its need to both develop and to adapt.

Internally, perhaps the most salient pressure on a Global South state to prioritize climate change action is the existential nature of the risk the climate crisis poses. Take, for example, Bangladesh, a Least Developed Country with ambitious development goals<sup>41</sup> but with roughly 80% of its surface area classified as a flood plain.<sup>42</sup> This exposes it to immense risk from increased extreme weather events such as flooding and typhoons, events it is already experiencing with higher frequency and intensity.<sup>43</sup> In turn, these events dramatically affect other key sectors like agriculture.<sup>44</sup> Additionally, projections show sea levels rising half a meter by 2100, even under low global emissions scenarios, threatening to submerge vast swaths of the country without sufficient intervention.<sup>45</sup> Bangladesh already spends almost \$1 billion USD each year, accounting for 6–7% of its annual budget, on climate change adaptation.<sup>46</sup> The sheer cost of climate change, both present and future, places immense pressure on a state like Bangladesh to decarbonize to protect its environmental interests.

Global South states also face broad international pressure to decarbonize. The international climate change regime most recently produced the Paris Agreement in 2016 to catalyze climate action.<sup>47</sup> This instrument created unprecedented, legally binding duties for Global South parties<sup>48</sup> and contained broad-sweeping mandates concerning each

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<sup>41</sup> G.A. Res. 76/8, at 2 (Nov. 24, 2021) (stating that Bangladesh will graduate from its Least Developed Country status in 2026); *see also*, *List of Least Developed Countries*, U.N. COMM. FOR DEV. POL'Y (Nov. 24, 2021), <https://perma.cc/F639-G887> (showing Bangladesh as first being included as a Least Developed Country in 1975).

<sup>42</sup> MINISTRY OF ENV'T & FORESTS GOV'T OF THE PEOPLE'S REPUBLIC OF BANGL., NATIONAL ADAPTATION PROGRAMME OF ACTION (NAPA) 2 (2009), <https://perma.cc/S4UX-RWTS>.

<sup>43</sup> Allan et al., *supra* note 1, at 10 (showing Bangladesh, as part of Southern Asia, having an observed increase in heavy precipitation).

<sup>44</sup> For example, Bangladesh's agricultural sector alone lost more than \$1 billion USD due to natural disasters between 2009 and 2014. MINISTRY OF ENV'T, FOREST & CLIMATE CHANGE GOV'T OF THE PEOPLE'S REPUBLIC OF BANGL., THIRD NATIONAL COMMUNICATION OF BANGLADESH TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE 211 (2018) [hereinafter THIRD COMMUNICATION OF BANGLADESH], <https://perma.cc/3Y7E-Q2J4>.

<sup>45</sup> Allan et al., *supra* note 1, at 22.

<sup>46</sup> MINISTRY OF ENV'T, FOREST & CLIMATE CHANGE GOV'T OF THE PEOPLE'S REPUBLIC OF BANGL., NATIONALLY DETERMINED CONTRIBUTIONS (NDC) 2021 BANGLADESH (UPDATED) 19 (2021), <https://perma.cc/WH5D-KHNN>.

<sup>47</sup> Paris Agreement, *supra* note 4, at 2, 21, art. 2.

<sup>48</sup> *Id.* art. 4(2). Nationally Determined Contributions (NDCs) are set by the country themselves in a bottom-up approach and are not prescribed by the instrument in a top-down fashion. *Id.* This does little to decrease the pressure on Global South states, however, since they ultimately must balance the same interests in decarbonizing and developing, but now must also calculate the feasibility of commitments within the legally binding broader regime that does prescribe ambition and progress in NDCs.

state's obligation to produce ambitious emissions reduction goals.<sup>49</sup> In the international investment world, climate change was recently mentioned explicitly in a bilateral investment treaty for the first time,<sup>50</sup> taking its place amongst the environmental provisions traditionally found in IIAs.<sup>51</sup> Global South states must also navigate the increasingly climate-conscious policies mandated by international bodies such as the World Bank,<sup>52</sup> International Monetary Fund (IMF),<sup>53</sup> and African

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<sup>49</sup> *Id.* arts. 3, 4(2)–(3). Each NDC is expected to be more ambitious than the previous ones, to progress towards meeting the temperature increase goals (reductions) of the instrument. *Id.*

<sup>50</sup> *2021 Model Foreign Investment Promotion and Protection Agreement (FIPA)*, GOV'T OF CAN. art. 3 [hereinafter Canada 2021 Model FIPA], <https://perma.cc/AHE3-KL3Q> (last visited on Feb. 25, 2023).

<sup>51</sup> *See, e.g., U.S. 2012 Model Bilateral Investment Treaty (BIT)*, OFFICE OF U.S. TRADE REPRESENTATIVE art. 12, [hereinafter U.S. 2012 Model BIT], <https://perma.cc/KCJ7-AR2M> (last visited on Jan. 25, 2023) (showing how both parties to the agreement must follow relevant environmental statutes and regulations); Canada 2021 Model FIPA, *supra* note 50; *Brazil 2015 Model Cooperation and Facilitation Investment Agreement (CFIA)*, U.N. CONF. ON TRADE AND DEV. art. 14, [hereinafter Brazil 2015 Model CFIA], <https://perma.cc/UD3A-HZZU> (last visited on Jan. 25, 2023).

<sup>52</sup> *See* WORLD BANK GROUP, CLIMATE CHANGE ACTION PLAN 2021–2025: SUPPORTING GREEN, RESILIENT, AND INCLUSIVE DEVELOPMENT ii (2021), <https://perma.cc/68R2-UZY6> (“The WBG is the largest multilateral provider of climate finance for developing countries and has increased financing to record levels over the past two years.”). Additionally, the report states:

The Climate Change Action Plan 2021–2025 aims to advance the climate change aspects of the WBG’s Green, Resilient, and Inclusive Development (GRID) approach, which pursues poverty eradication and shared prosperity with a sustainability lens. . . . The Action Plan also considers the vital importance of natural capital, biodiversity, and ecosystems services and will increase support for nature-based solutions, given their importance for both mitigation and adaptation.

*Id.*

<sup>53</sup> *See* INT’L MONETARY FUND, IMF STRATEGY TO HELP MEMBERS ADDRESS CLIMATE CHANGE RELATED POLICY CHALLENGES: PRIORITIES, MODES OF DELIVERY, AND BUDGET IMPLICATIONS 6–7 (2021), <https://perma.cc/7YF6-X2RD> (highlighting the scale of the economic threats posed by climate change and identifying the IMF as a natural player to leverage its expertise and increase its activity in this space in order to work towards a solution).

Development Bank (AfDB),<sup>54</sup> vital funders for Global South development projects.<sup>55</sup>

*C. The Climate Change Regime Promises Climate Support but Is Insufficient*

Existing instruments within the international climate change regime contemplate an equitable path forward for Global South states in the face of the climate crisis, but they fall short.<sup>56</sup> The UNFCCC established a foundation for the climate change regime based on equity and differentiated responsibilities.<sup>57</sup> The Paris Agreement promised

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<sup>54</sup> *Bank Climate Change Commitment*, AFR. DEV. BANK GRP., <https://perma.cc/2S5R-KVLT> (last visited Feb. 25, 2023) (“The African Development Bank is spearheading efforts to help Africa tackle climate change and continues to show leadership in accelerating and scaling climate action across the continent.”). The African Development Bank has recently reiterated its commitment to combating climate change and has stated that it “continues to prioritize mainstreaming climate change and green growth in its portfolio and has committed to incorporating climate-informed design into 100% of its investments.” *Climate Change*, AFR. DEV. BANK GRP., <https://perma.cc/GA4E-ZPW6> (last visited Feb. 25, 2023). It has also reported concerning its Climate Action Plan 2016–2021 that:

The Bank is on course to meet the following commitments made under this Action Plan:

1. Allocating 40 percent of project approvals to climate finance by 2021, with equal proportions for adaptation and mitigation.
2. Mainstreaming climate change and green growth into all Bank investments by 2021.
3. Securing significantly increased access to climate finance for low-income African countries with a target of \$25 billion by 2025 and positioning Africa’s financial sector at the forefront of financing innovations.

*Id.*

<sup>55</sup> See *What We Do*, THE WORLD BANK, <https://perma.cc/QZ4J-48B8> (last visited Feb. 25, 2023) (“The World Bank is a vital source of financial and technical assistance to developing countries around the world.”); *IMF Lending*, THE INT’L MONETARY FUND, <https://perma.cc/CSV9-AJU7> (last visited Feb. 25, 2023) (“[T]he IMF provides financial support to countries hit by crises to create breathing room as they implement policies that restore economic stability and growth. It also provides precautionary financing to help prevent crises.”); *Mission & Strategy*, AFR. DEV. BANK GRP., <https://perma.cc/MT45-ZDKB> (last visited Feb. 25, 2023) (“The overarching objective of the African Development Bank . . . Group is to spur sustainable economic development and social progress in its regional member countries . . . , thus contributing to poverty reduction.”).

<sup>56</sup> See Baker, *supra* note 32, at 62 (explaining that although there have been attempts by various actors to “create a cohesive and uniform system of international environmental law . . . no single doctrinal approach defines the whole of international environmental law,” which is especially problematic as international environmental law “touches upon nearly every major area of governance—migration, security, and natural resources management, to name a few examples.”) (internal citation omitted).

<sup>57</sup> UNFCCC, *supra* note 2, arts. 3, 4, 5.

support for mitigation,<sup>58</sup> adaptation,<sup>59</sup> technology,<sup>60</sup> finance,<sup>61</sup> and capacity building.<sup>62</sup> However, climate support funds established under the Paris Agreement and the climate regime are woefully undercapitalized in relation to present demand,<sup>63</sup> and the lack of technology and capacity-building support leads to a dependency on the Global North to fill these gaps. This dearth of capital precludes Global South states from effectively confronting the climate crisis.<sup>64</sup> In November 2022, during the Conference of the Parties to the Framework Convention on Climate Change (COP 27) in Egypt, a landmark agreement on loss and damage was reached, promising to establish and operationalize a new fund earmarked specifically to help with compensation for climate change related damages already sustained by states.<sup>65</sup> This agreement is an unprecedented step forward for Global South states struggling to pay for the rising costs of climate change, and a long-awaited source of optimism in the arena of climate response. However, the details of the arrangement must be fleshed out in future conferences<sup>66</sup> and the efficacy of the system remains to be determined.

Other agreements exist within different spaces of the international environmental realm but do not squarely address the issue of adaptation for the Global South.<sup>67</sup> Likely, the most successful program when it comes to incentivizing climate action is the Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD+) program, established by the international climate change regime through the UNFCCC regulatory framework.<sup>68</sup> Originally introduced in 2005,<sup>69</sup>

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<sup>58</sup> Paris Agreement, *supra* note 4, art. 4.

<sup>59</sup> *Id.* art. 7.

<sup>60</sup> *Id.* art. 10.

<sup>61</sup> *Id.* art. 9.

<sup>62</sup> *Id.* art. 11.

<sup>63</sup> As of January 31, 2023, the balances of the respective funds were: Adaptation Fund, \$778.09 million USD; Capacity-building Initiative for Transparency, \$15.19 million USD; Least Developed Countries Fund, \$879.47 million USD; Special Climate Change Fund, \$48.07 million USD. *Who We Are: Financial Intermediary Funds (FIFs)*, THE WORLD BANK, <https://perma.cc/4C9D-UGTL> (last visited Feb. 25, 2023). Compare these fund balances to the adaptation funding required. *See* text accompanying *supra* note 6.

<sup>64</sup> UNFCCC, Dec. -/CP.27 -/CMA.4, Funding Arrangements for Responding to Loss and Damage Associated with the Adverse Effects of Climate Change, Including a Focus on Addressing Loss and Damage, 2 (Nov. 20, 2022) (non-official session document), <https://perma.cc/L8BX-7BZU>.

<sup>65</sup> *Id.* annex, Terms of Reference for the Transitional Committee on the Operationalization of the New Funding Arrangements for Responding to Loss and Damages and the Associated Fund, ¶¶ 2–3.

<sup>66</sup> *Id.* ¶ 4.

<sup>67</sup> *See, e.g.*, Convention on Biological Diversity, *supra* note 20, arts. 12, 16 (discussing the need to establish programs to assist Global South states access technology, education, and training to help achieve adaptation goals); Montreal Protocol, *supra* note 20, art. 5.

<sup>68</sup> *Warsaw Framework for REDD+: Fact Sheets*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, <https://perma.cc/NDV2-6KUB> (last visited Feb. 25, 2023).

<sup>69</sup> Antonio G M La Viña & Alaya de Leon, *Conserving and Enhancing Sinks and Reservoirs of Greenhouse Gases, Including Forests (Article 5)*, in *THE PARIS AGREEMENT ON CLIMATE CHANGE: ANALYSIS AND COMMENTARY* 173 (Daniel Klein et al. eds., 2017).

the program reduces greenhouse gas emissions from deforestation by incentivizing forest conservation and awarding valuable carbon credits in exchange for successful conservation measures.<sup>70</sup> Some scholars argue that the program triggers issues of equity, framing it as another opportunity for wealthy Global North states to “buy” more polluting potential and deny Global South states the chance to leverage their own emissions budgets and resources for development.<sup>71</sup> However, REDD+ has enjoyed success, and elements such as monetary incentives for both state and private action will likely be important components of an effective path forward.<sup>72</sup> In any case, though a step in the right direction, REDD+ has not supplied the comprehensive capital many Global South states require for climate change adaptation and likely cannot do so.<sup>73</sup>

### III. THE STATUS QUO: IIAS PROMOTE INVESTMENTS BUT DO LITTLE OR NOTHING TO FURTHER CLIMATE CHANGE GOALS

At base, IIAs regulate the flow, terms, and protection of home state capital and investments abroad in host states.<sup>74</sup> IIAs such as bilateral investment treaties (BITs) commonly protect investor interests by assuring them fair and equitable treatment (FET), compensation for expropriations, and other protections.<sup>75</sup> In fact, foreign investments many

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<sup>70</sup> Kathleen Birrell & Lee Godden, *Benefits and Sharing: Realizing Rights in REDD+*, 9 J. HUM. RTS. & ENV'T 6, 10 (2018).

<sup>71</sup> *Id.* at 11.

<sup>72</sup> See, e.g., ICIMOD & GIZ, *BENEFITING FROM THE REDD+ HIMALAYA PROGRAMME: SUCCESS STORIES FROM BHUTAN, INDIA, MYANMAR, AND NEPAL* 44 (Yukari Yamasaki & Nabin Bhattarai eds., 2020) (highlighting the successes of the REDD+ program in Bhutan, India, Myanmar, and Nepal); Gabriela Simonet, Julie Subervie, Driss Ezzine-De-Blas, Marina Cromberg, & Amy E. Duchelle, *Effectiveness of a REDD+ Project in Reducing Deforestation in the Brazilian Amazon*, 101 AM. J. AGRIC. ECON. 211, 224 (2019) (analyzing the success of a Brazilian REDD+ pilot project that reduced deforestation by half).

<sup>73</sup> See Steven R. Brechin & Maria I. Espinoza, *A Case for Further Refinement of the Green Climate Fund's 50:50 Ratio Climate Change Mitigation and Adaptation Allocation Framework*, 142 CLIMATIC CHANGE 311, 312–313 (2017) (discussing the gap between current levels of investment and required funding to meet adaptation needs in the Global South). One of the fundamental differences between REDD+ and the certification and conditioning regime proposed by this Note is that, where in the REDD+ context the goal is to prevent deforestation in its entirety, in the investment realm the goal is to mitigate environmental degradation and, by effect, climate change, but not to prevent climate-nexus investments full stop—at least not yet. This being the case, it is possible to reach the desired outcome solely through governmental regulation and treaty redrafting, an especially appealing avenue considering the insufficient action (if any) being taken by investors. See discussion *supra* Part I.

<sup>74</sup> Lise Johnson, Lisa Sachs, & Nathan Lobel, *Aligning International Investment Agreements with the Sustainable Development Goals*, 58 COLUM. J. TRANSNAT'L L. 58, 67–68 (2019).

<sup>75</sup> RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 13 (2d ed. 2012). This is just to name a few of the most common protections, though the number of provisions in IIAs to protect investors are numerous and continually growing or being reinterpreted and reapplied. See U.N. Conference on Trade and Development, *Recent Developments in the IIA Regime: Accelerating IIA Reform*, 2, U.N.

times enjoy greater protections, or at least stability, under IIAs than the investments might have enjoyed under the same host state's domestic laws, at times putting domestic investors and investments at a disadvantage.<sup>76</sup> These agreements often catalyze investment and protect investors at the expense of diminished host state sovereignty and regulatory latitude by, for example, limiting a host state's ability to adjudicate in domestic courts<sup>77</sup> or inhibiting a host state's willingness to regulate for fear of the expensive consequences of triggering investor-brought claims.<sup>78</sup>

*A. IIAs Promote Investments, Including "Climate-Nexus" Investments, That Are Fundamentally Connected to Climate Change*

IIAs traditionally exist solely to promote investments.<sup>79</sup> Sticking to neo-liberal theories of economics and development, international investment law in many ways skirts the issue of environmental protection<sup>80</sup> and creates a largely siloed legal regime in which environmental and social issues frequently fall by the wayside.<sup>81</sup> Though present in various instruments, the efficacy of these provisions and the respect paid them by tribunals is another matter entirely. This is true despite the fact that many forms of investment in the Global South have traditionally centered around resource extraction.<sup>82</sup> This Note has introduced the term "climate-nexus investment" to refer to an investment that exacerbates climate change and its adverse effects directly or indirectly, locally or internationally.<sup>83</sup> Climate-nexus investments traditionally involve a capital-exporting Global North investor that invests in the extraction of Global South raw materials,<sup>84</sup> investments that are instrumental in supporting the Global North's disproportionate

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Doc. UNCTAD/DIAE/PCB/INF/2021/6 (2021) (noting IIAs established in 2020 vary from inclusion of common standards of investment protection to inclusion of new institutional frameworks for cooperation in lieu of substantive investment protections).

<sup>76</sup> See Johnson et al., *supra* note 74, at 104 (noting that IIAs may include intellectual property protections that extend beyond those available under domestic law).

<sup>77</sup> Lisa Sachs, Lise Johnson, & Ella Merrill, *Environmental Injustice: How Treaties Undermine Human Rights Related to the Environment*, LA REVUE DES JURISTES DE SCIENCES PO, Jan. 2020, at 91.

<sup>78</sup> Johnson et al., *supra* note 74, at 104.

<sup>79</sup> Spears, *supra* note 13, at 1066.

<sup>80</sup> See Baker, *supra* note 32, at 57 (noting that neoliberal policies have set a "regulatory ceiling" for states seeking to enhance environmental protections).

<sup>81</sup> Gonzalez, *supra* note 14, at 413.

<sup>82</sup> Sauvart & Mallampally, *supra* note 40, at 239.

<sup>83</sup> See *supra* note 15 and accompanying text.

<sup>84</sup> See Sauvart & Mallampally, *supra* note 40, at 239 (discussing how FDI in Least Developed Countries (LDCs) has historically been in natural resources extraction and noting that Europe accounted for 20–30%, and Global North states 50%, of FDI in LDCs from 2003 to 2010).

resource consumption compared to the Global South.<sup>85</sup> Though the current approach of international investment law allows host states to require investors to internalize the costs of adverse environmental and climate effects of climate-nexus investments (provided the regulatory regime employed is non-discriminatory), the key shortcoming is that such internalization is not mandatory or common practice. The result is that high costs of localized pollution, environmental degradation, and climate change become expensive externalities for the global citizenry and host states to shoulder.<sup>86</sup> Instead of requiring investors to pass costs of climate degradation on to consumers, the current system allows investors to avoid these costs altogether, resulting in artificially cheaper prices for end-products and incentivizing unsustainable practices and business models as businesses fight for competitive advantage.<sup>87</sup>

These climate-nexus investments have a heightened importance for the Global South, given the environmental impacts felt by the host state and the important ramifications for climate change generally. Increasingly sophisticated science and modeling demonstrates that local ecosystems and local anthropogenic actions play an important role in broader climatic systems because local actions and degradation have ripple effects on broader ecological systems.<sup>88</sup> Thus, international cooperation is vital to achieve the emissions reductions<sup>89</sup> and dramatic societal and technological transitions required.<sup>90</sup> Adaptation support and increased environmental protections in the realm of investments could serve both national and international interests because increased environmental preservation on a local level will contribute to climate change mitigation internationally. In an increasingly economically interconnected world, climate-nexus investments are unlikely to disappear in the foreseeable future and thus must, at minimum, be

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<sup>85</sup> Carmen G. Gonzalez, *Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade*, 78 DENVER UNIV. L. REV. 979, 1001 (2001).

<sup>86</sup> See Ian Parry, Simon Black, & Nate Vernon, *Still Not Getting Energy Prices Right: A Global and Country Update of Fossil Fuel Subsidies 3* (Int'l Monetary Fund, Working Paper No. WP/21/236, 2021), <https://perma.cc/7S6M-5X3C> (“Just 8 percent of the 2020 subsidy [of \$ 5.9 trillion USD] reflects undercharging for supply costs (explicit subsidies) and 92 percent for undercharging for environmental costs and forgone consumption taxes (implicit subsidies).”).

<sup>87</sup> Gonzalez, *supra* note 14, at 431.

<sup>88</sup> Qiang He & Brian R. Silliman, *Climate Change, Human Impacts, and Coastal Ecosystems in the Anthropocene*, 29 CURRENT BIOLOGY REV. R1021, R1024–25 (2019).

<sup>89</sup> Allan et al., *supra* note 1, at 14, 30 (indicating, for example, that achieving global net negative CO<sub>2</sub> emissions could gradually reverse global CO<sub>2</sub>-induced surface temperature increases).

<sup>90</sup> See Allen et al., *supra* note 18, at 15 (“Pathways limiting global warming to 1.5°C with no or limited overshoot would require rapid and far-reaching transitions in energy, land, urban and infrastructure (including transport and buildings), and industrial systems (*high confidence*). These systems transitions are unprecedented in terms of scale, but not necessarily in terms of speed, and imply deep emissions reductions in all sectors, a wide portfolio of mitigation options and a significant upscaling of investments in those options (*medium confidence*).”).

leveraged to secure the capital required to offset adverse climate effects in the near term.

*B. Current Approaches to IIAs Are an Important Beginning but Leave Many Holes*

States employ various strategies to incorporate climate interests into IIAs. Some states promote environmental interests by locating these interests in the treaty's preambular language.<sup>91</sup> A second strategy is to embed environmental language in corporate social responsibility (CSR) provisions.<sup>92</sup> Lastly, there is a growing movement to include environmental exception provisions in IIAs to protect these interests.<sup>93</sup> Each strategy represents progress. However, each approach has shortcomings as currently employed, and adequate enforcement remains an overarching concern. At the end of the day, the contemporary strategies surveyed are starting points. To secure adequate climate change adaptation funding, Global South states should be prepared to surpass the status quo, both in drafting environmental and climate provisions and in enforcing them.

*1. Environmental Protection in Preambular Language Is Necessary but Not Sufficient*

Including environmental interests in the preambular language of an IIA is one strategy to protect a host state's environmental or climate interests. For example, the U.S. 2012 model BIT states that investment practices should be "consistent with the protection of . . . the environment[]" in its preamble.<sup>94</sup> Canada's 2021 model Foreign Investment Promotion and Protection Agreement (FIPA) also includes preambular language "[r]eaffirming the importance of promoting . . . environmental protection and conservation."<sup>95</sup> This is a valuable approach because tribunals often interpret agreements within the scope of their broader purposes and objectives,<sup>96</sup> and the practice of including preambular language on environmental interests should be employed by Global South states. Though this approach situates environmental and climate interests within the scope of the treaty, states should complement

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<sup>91</sup> U.N. CONF. ON TRADE & DEV., *supra* note 10. To view the preamble of the Columbia-Japan BIT see *id.* (select "Preamble"; then select "Reference to environmental aspects"; then click the check-box next to "Yes"; then scroll to No. 44; then click "Full text: en").

<sup>92</sup> See Karl P. Sauvant & Evan Gabor, *Facilitating Sustainable FDI for Sustainable Development in a WTO Investment Facilitation Framework: Four Concrete Proposals*, 55 J. WORLD TRADE, 261, 270 (2021) (providing examples of IIAs with CSR instruments).

<sup>93</sup> Barnali Choudhury, *International Investment Law and Noneconomic Issues*, 53 VAND. J. TRANSNAT'L L. 1, 49–50 (2020).

<sup>94</sup> U.S. 2012 Model BIT, *supra* note 51, pmb. para. 5.

<sup>95</sup> Canada 2021 Model FIPA, *supra* note 50, pmb. para. 3.

<sup>96</sup> Spears, *supra* note 13, at 1065–68.



it with additional provisions outlining the details of how these interests will be protected and the implications for investors and investments.

## 2. CSR Language: Another Key Ingredient in the Mix

The idea that foreign corporations owe a duty to promote good governance in their interactions with the communities and host states in which they invest is beginning to find a place in IIAs.<sup>97</sup> Brazil's 2015 model Cooperation and Facilitation Investment Agreement (CFIA) contains one of the more robust examples of CSR language. This agreement includes the expectation that investors should adopt a "high degree of socially responsible practices[]"<sup>98</sup> and endeavor to comply with standards for "responsible business conduct."<sup>99</sup> Such principles extend and contribute to "the economic, social and environmental progress[]"<sup>100</sup> of Brazil as a host state and the need to "[r]espect the internationally recognized human rights of those involved in the companies' activities."<sup>101</sup> However, in addition to being fairly abstract and failing to articulate clear metrics for measuring corporate conduct, the CSR principles in Brazil's 2015 model CFIA are voluntary<sup>102</sup> and fail to establish a meaningful enforcement mechanism.

Notably, CSR provisions play an important role in the international investment regime. Various widely accepted standards for CSR have been published by the United Nations (UN),<sup>103</sup> the International Labour Organization (ILO),<sup>104</sup> and the Organization for Economic Cooperation and Development (OECD).<sup>105</sup> Additionally, many private multinational corporations and larger firms now draft their own CSR statements and policies.<sup>106</sup> CSR provisions in IIAs play a valuable role in setting forth the host state's environmental interests. Ultimately, while a useful tool for Global South host states, CSR provisions—like preambular language—do not alone go far enough.

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<sup>97</sup> Sauvants & Gabor, *supra* note 92, at 270.

<sup>98</sup> Brazil 2015 Model CFIA, *supra* note 51, art. 14.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* art. 14(2)(a).

<sup>101</sup> *Id.* art. 14(2)(b).

<sup>102</sup> *Id.* art. 14(1) ("[B]ased on the voluntary principles and standards set out in this Article.").

<sup>103</sup> U.N. Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/2, 12–16 (2012), <https://perma.cc/MU9Y-T2T6>.

<sup>104</sup> INT'L LAB. ORG., TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (5th ed. 2017) [hereinafter ILO PRINCIPLES], <https://perma.cc/ZV98-TAQ2>.

<sup>105</sup> ORG. FOR ECON. COOP. & DEV. (OECD), OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011) [hereinafter OECD GUIDELINES], <https://perma.cc/6UGZ-2P6J>.

<sup>106</sup> Sauvants & Gabor, *supra* note 92, at 269.

3. *Existing Exception Provisions Do Not Provide Adequate Regulatory Space for States to Protect Environmental Interests*

Exception provisions in IIAs carve out protection from liability for host state action to protect its interests in certain sectors and create space for the host state to regulate to protect these interests.<sup>107</sup> Historically, exception provisions protected the economic or security interests of a host state concerning specific named sectors<sup>108</sup> but more recently they have also upheld social,<sup>109</sup> moral, and other public interest considerations in a push to extend their protections to noneconomic interests.<sup>110</sup> These provisions protect environmental interests with varying levels of success.

The U.S. 2012 model BIT includes an exception provision addressing the environment in Article 12 (Investment and Environment).<sup>111</sup> Article 12 mentions the inappropriateness of encouraging investment practices that undermine domestic environmental laws and recognizes the right of the Parties to “exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters”<sup>112</sup> and enforce environmental interests.<sup>113</sup> However, Article 12 also states that any such measures are at the discretion of the Party, and includes consultation between the States as an initial dispute settlement mechanism while they “endeavor to reach a mutually satisfactory resolution.”<sup>114</sup> This language provides an example of how flimsy, non-binding language and the lack of a robust enforcement mechanism often undercut current environmental exceptions. Per these terms, to protect its environmental interests, the Host State must enter state-to-state consultation, while the investor causing such environmental degradation will likely submit a claim directly against the State through Investor-State Dispute Settlement (ISDS).

The Canadian Model FIPA represents a second approach to incorporating environmental interests. With no freestanding environmental exception, the Agreement instead nestles environmental protections within provisions throughout the treaty text. For example, environmental interests are outlined in sections regarding indirect

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<sup>107</sup> Catherine H. Gibson, *Beyond Self-Judgement: Exceptions Clauses in US BITS*, 38 *FORDHAM INT'L L.J.* 1, 4 (2015).

<sup>108</sup> See, e.g., Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, Arg.-U.S., art. II, Protocol paras. 2–5, Nov. 14, 1991, TIAS 94-1020 [hereinafter U.S. Treaty with Argentina] (reserving the United States’ right to “make or maintain limited exceptions to national treatment” for twelve different sectors, including banking, telecommunications, and the use of land and natural resources).

<sup>109</sup> See, e.g., Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), chptr. 19, Mar. 8, 2018 (including broad protections for labor rights and requiring extensive measures to be taken by contracting parties to protect such rights).

<sup>110</sup> Choudhury, *supra* note 93, at 48–49.

<sup>111</sup> U.S. 2012 Model BIT, *supra* note 51, art. 12(3), 12(6).

<sup>112</sup> *Id.* art. 12(3).

<sup>113</sup> *Id.* art. 12(2)–(3).

<sup>114</sup> *Id.* art. 12(6).

expropriations<sup>115</sup> and the parameters of responsible business conduct.<sup>116</sup> The Agreement reaffirms the right of Parties to regulate to “achieve legitimate policy objectives, such as with respect to the protection of the environment”<sup>117</sup> and identifies relaxing domestic measures that protect the environment among the strategies considered inappropriate to catalyze investment.<sup>118</sup> Being such a young model treaty, more testing must be done before a verdict can be reached on the FIPA’s strategy of incorporating cross-cutting environmental interests throughout the instrument. However, this Note suggests that, in order to realize the substantial shift from the status quo that is necessary, this approach of sprinkling environmental provisions should be accompanied by a standalone provision dedicated specifically to environmental interests.

States historically considered part of the Global South have also started experimenting with environmental exception provisions in model BIT language. Article 16 of Brazil’s 2015 model CFIA asserts that the Agreement shall not be construed to prevent a Party from utilizing measures “it deems appropriate to ensure that investment activity in its territory is undertaken in a manner according to . . . environmental . . . legislations.”<sup>119</sup> However, it conditions this by adding, “provided that this measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction.”<sup>120</sup> This follows the exceptions chapeau promulgated in the General Agreement on Tariffs and Trade’s (GATT) article XX almost verbatim<sup>121</sup> and, ultimately, undermines the strength of the provision and greatly restricts its interpretation. Additionally, the Brazil 2015 CFIA, like the U.S. 2012 model BIT and Canadian FIPA, notes that environmental disputes should be handled through state-to-state consultation,<sup>122</sup> posing the same dispute resolution issues mentioned above concerning the U.S. 2012 model BIT.

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<sup>115</sup> Canada 2021 Model FIPA, *supra* note 50, art. 9(3).

<sup>116</sup> *Id.* art. 16(1).

<sup>117</sup> *Id.* art. 3.

<sup>118</sup> *Id.* art. 4.

<sup>119</sup> Brazil 2015 Model CFIA, *supra* note 51, art. 16(1).

<sup>120</sup> *Id.*

<sup>121</sup> General Agreement on Tariffs and Trade (GATT) art. XX, Oct. 30, 1947, 61 Stat. 5, 55 U.N.T.S. 194. The chapeau states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures[.]

*Id.*

<sup>122</sup> Brazil 2015 Model CFIA, *supra* note 51, at art. 16(2).

#### IV. A PATH FORWARD: CONDITIONING IIA PROTECTION FOR CLIMATE-NEXUS INVESTMENTS ON CERTIFICATION

Global South IIAs must recognize and enforce the integral relationship between international investments and environmental and climate concerns to meaningfully confront the mounting pressures of climate change. Specifically, Global South host states should redraft IIA language to include an explicit and discrete provision governing climate-nexus investments. This provision should condition treaty protections for climate-nexus investments on a certification process outlined in the treaty. Such a process should possess a few key components. First, it should incorporate baseline environmental protection requirements applicable to any climate-nexus investment within its jurisdiction. Second, it should establish a fixed fee, tax, or rate of contribution to be collected by the host state for climate change mitigation and adaptation expenses. Third, an investor's failure to meet either of these requirements should constitute noncompliance with the investment treaty and result in the revocation of certification, loss of treaty protections for the investment, and expose the investor to liability in domestic courts. This Part outlines the contours of what a successful certification and conditioning provision is likely to include before offering example language for how such an article might be drafted.

##### *A. Required Elements of Successful Redrafting Language*

Effectively conditioning climate-nexus investment protections on certification will require four essential elements. First, it should set forth an unambiguous statement of the host state's environmental and climate interests and its intent to regulate accordingly. Second, it should provide concrete, reasonable, and transparent parameters and conditions for climate-nexus investments. Third, it should articulate an enforcement mechanism that catalyzes adherence but does not overly chill investment. Lastly, any climate-nexus conditioning provision should be drafted as a discrete, standalone provision of the investment treaty.

##### *1. States Should Establish a Clear Regulatory Interest in the Environment*

The conditions for climate-nexus investment certification should be framed by clear purpose and expressly articulated host state goals. The preamble is an ideal place to situate such a broad statement of intent<sup>123</sup> because tribunals are required to interpret IIAs within the scope of their

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<sup>123</sup> See, e.g., Canada 2021 Model FIPA, *supra* note 50, at pmb1. (containing broad objectives to encourage investment while promoting diversity, protecting the environment, and preserving the rights of the parties to self-regulate); U.S. 2012 Model BIT, *supra* note 51, at pmb1. (containing broad objectives of economic cooperation, economic stability, protecting health and safety, and investment protection).

purpose and objectives.<sup>124</sup> Such preambular text will go far to shape the broad contours of the treaty and should include explicit language articulating that the parties have a “right to regulate”<sup>125</sup> to protect environmental and climate interests, making clear that this right is ongoing and protects reasonable modifications to any regulations in place at the time of investment. However, language introduced by the host state should strike a balance between its reservation of authority to regulate and assurances to investors that their investments will be adequately protected. This could be accomplished by including preambular language underscoring the importance of foreign investments to development and the mutually beneficial nature of these investments.<sup>126</sup> Without such assurance, it is unlikely investors will be quick to site investments in a market they may perceive as hostile to their sector or overregulated by a host state unwilling to strike a mutually beneficial arrangement.

## 2. States Should Lay Forth Unambiguous, Reasonable, and Transparent Parameters

A scheme that conditions treaty protections for climate-nexus investments needs clear, reasonable, unambiguous terms and parameters. They should be grounded in transparency between the host state and the investor. This will be especially important considering that compliance, and hence treaty protections, will be contingent upon climate-nexus investment certification. Treaty language should state exactly what the requirements of certification are, and these requirements should be objectively verifiable. This is important because host state discretion in a successful certification scheme must be limited in order to protect investors’ due process interests and present a stable market for investments. Unambiguous language will establish objective guideposts for later review by a tribunal, should any disagreements arise.

Ultimately, a certification provision should protect the right of the host state to regulate but should not compromise stability. Investors should have clear expectations as to the regulatory structure governing any investment. To begin, a provision establishing a certification scheme should reference the sector a host state is trying to protect and include its purposes for protecting it.<sup>127</sup> In the case of climate-nexus investments,

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<sup>124</sup> Spears, *supra* note 13, at 1065–68.

<sup>125</sup> See, e.g., Canada 2021 Model FIPA, *supra* note 50, at pmb1. (affirming Parties’ right to regulate in the interest of the public); Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, Morocco-Nigeria, pmb1. para. 5, art. 23, Dec. 3, 2016 (not in force) [hereinafter Morocco-Nigeria BIT] (establishing a “right to regulate”).

<sup>126</sup> These assertions are commonplace in IIAs. See, e.g., Canada 2021 Model FIPA, *supra* note 50, at pmb1.; U.S. 2012 Model BIT, *supra* note 51, at pmb1.. However, a drafting state should seek to moderate language to make clear such interests should be balanced with environmental interests and that the importance of investment capital and development do not supersede environmental interests.

<sup>127</sup> Choudhury, *supra* note 93, at 51.

this should: (1) establish a clear host state interest in preventing degradation of the environment and adapting to the adverse effects of climate change; (2) articulate that the purpose of certification is to help offset the impacts of climate-nexus investments on the host state by mitigating localized environmental degradation and providing adaptation support for adverse climate effects; and (3) include the understanding of the host state that certification measures are a mechanism to promote sustainable development.

The first fundamental step for redrafting will be for a state to establish a concrete definition of “climate-nexus investment.” Though this definition may vary from instrument to instrument, it should at minimum encompass extractive industry investments and likely extend to investment sectors that result in other environmentally damaging activities such as deforestation or unsustainable water use. This definition should identify which investments are implicated to inform investor choices early in the process and prevent surprises. However, there is no reason such a definition must include an exhaustive list of industries or activities, or foreclose reasonable host state discretion to determine the status of some investments on a case-by-case basis.

### *3. Any Provision Should Include an Effective Enforcement Mechanism*

Conditioning IIA protections on climate-nexus investment certification will likely be a significant proposition for most investors. It will require enforcement mechanisms that are sufficiently robust to ensure compliance, but not so aggressive that they deter potential investors from entering the market.<sup>128</sup> The threat of having IIA protections for a climate-nexus investment revoked is likely a substantial deterrent for noncompliance in itself, but a proper enforcement mechanism will aid in compelling investor compliance and will provide the authority for a host state to effectively take measures against non-compliance. One strategy could be to tap into the influence of investors’ home states to incentivize compliance. Many home states already make efforts to promote or enhance the social and sustainable development their outward foreign direct investments offer to host states and communities.<sup>129</sup> For example, the Morocco-Nigeria BIT establishes a mechanism by which investors could be found liable in their home states for damages caused by their investments abroad.<sup>130</sup> Additionally, the UN, the ILO, and the OECD all have produced documents outlining concepts

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<sup>128</sup> *Id.* at 42–43. Though this balance may initially seem difficult to strike, it is likely feasible through objectivity and stability. The key to maintaining a favorable investment environment—though certainly this does include any additional benefits a state may offer—is the ability to provide clarity and consistency in terms of what an investor can expect for an investment. This allows for adequate balancing and the formulation of a calculated decision concerning an investment.

<sup>129</sup> Sauvart & Mallampally, *supra* note 40, at 258.

<sup>130</sup> Morocco-Nigeria BIT, *supra* note 125, at art. 18.

of CSR in the international context.<sup>131</sup> Ultimately, redrafted provisions should go further and enforcement language should be stronger than anything present today.

Alternatively, the foundation for an enforcement mechanism could be for an IIA to waive ISDS for any noncomplying climate-nexus investment, allowing recourse by the state to be pursued in domestic courts. Or agreements could include a provision incentivizing compliance by opening climate-nexus investment activities to enforcement claims or transparency measures brought by members of the public, like the citizen environmental complaint provisions present in the North American Free Trade Agreement (NAFTA) Agreement on Environmental Cooperation<sup>132</sup> or the broad citizen participation and investigatory power in the recently amended regulations implementing the Aarhus Convention.<sup>133</sup> In any case, due process will almost certainly require the option of review by an international tribunal for investors who believe the host state's noncompliance finding is unreasonable.

As demonstrated by the sample language offered below in Part IV.B, an approach to this enforcement issue could be to set the IIA's general dispute settlement mechanism as the default pathway for addressing the narrow question of compliance for a climate-nexus investment. Under this approach, an international tribunal could review the host state's non-compliance determination and, once a ruling is made on this narrow issue, compliance status would either be reinstated or the ruling of the domestic court would be upheld and state claims could proceed in domestic courts.<sup>134</sup> Alternatively, a treaty could require a certain level of domestic exhaustion before tribunal or ISDS review may be sought. This is not unprecedented, though the drafting state would likely want to preempt the challenges that often accompany exhaustion by delineating

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<sup>131</sup> See U.N. Human Rights Council, *supra* note 103, at 13, 25 (acknowledging the impact of business enterprises on “virtually the entire spectrum of internationally recognized human rights” and guiding business enterprises to comply with all applicable laws and to respect international human rights everywhere they operate); ILO PRINCIPLES, *supra* note 104, at V (providing multinational enterprises with social policy principles to guide them in areas such “as employment, training, conditions of work and life, and industrial relations.”); OECD GUIDELINES, *supra* note 105, at 3 (“provid[ing] non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards.”). See also, Sauvart & Mallampally, *supra* note 40, at 261–62 (recommending that Least Developed Countries implement policies such as requiring foreign companies to reinvest earnings made within the Least Developed Country into that country's social and economic infrastructures).

<sup>132</sup> Canada-Mexico-United States: North American Agreement on Environmental Cooperation art. 14, Sept. 14, 1993, 107 Stat. 2057, 32 I.L.M. 1480.

<sup>133</sup> Council Regulation 2021/1767, arts. 1(2)–(3), 2021 O.J. (L 356) (EU) (amending Regul. (EC) No. 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies).

<sup>134</sup> See generally, U.N. Conference on Trade and Development, *Dispute Settlement: Investor-State*, U.N. Doc. UNCTAD/ITE/IIT/30, 79–90 (2003) (discussing procedural and substantive options for IAA dispute resolution provisions addressing conflicts between states and foreign investors).

the extent of exhaustion required by the treaty and reaffirming the authority of the reviewing tribunal.<sup>135</sup> Under any approach, the language of the treaty should provide objective and clear criteria outlining investor compliance obligations to make the identification of noncompliance straightforward enough to preempt all but the most meritorious claims from reaching an ISDS tribunal.

As part of an effective enforcement mechanism, a certification and conditioning provision should: identify which host state agency or governmental body is responsible for issuing climate-nexus investment certificates and ensuring compliance, provide an outline of the methodology and assessment tools this agency will use, and articulate the appeals process available to an investor in case of a dispute. A host state will have broad discretion regarding each of these considerations but should exercise caution because, if provisions are too ambitious, the result will almost certainly be a retreat of foreign investment capital. The most outwardly stable regulatory structure in the eyes of investors will be one that accords their investment at least as much protection as their home state would but that still incentivizes the decision to locate the investment in the host state.<sup>136</sup> There are countless possible iterations of a regulatory scheme for certification and, ultimately, each host state must strike its own balance between investor protection and certification rigor. However, the touchstone of any successful scheme will be clear terms and a transparent process.

#### *4. Climate Conditioning Language Is Strongest as a Discrete, Standalone Article*

Global South host states should incorporate environmental and climate interests in a discrete, standalone article to minimize overlap with shifting notions such as fair and equitable treatment (FET). FET

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<sup>135</sup> See generally, George K. Foster, *Striking a Balance Between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration*, 49 COLUM. J. TRANSNAT'L L. 201 (2011) (arguing that an approach to exhaustion provisions that is reasonable in scope and allows reviewing tribunals adequate discretion on review will be the most effective in balancing investor protections and national sovereignty). In the context of conditioning climate-nexus investments, this balance will be especially important to prevent a chilling of investment. Perhaps investment contracts might provide additional details that would stipulate the level of exhaustion required, a mechanism for interlocutory appeal in unreasonably delayed cases, and a mechanism for appeal from final decisions.

<sup>136</sup> The reasons may be due to lower costs, laxer regulations, or simply access to certain raw materials and markets. However, the question of a proper "price" challenges a host state to decide how it will apply similar climate support measures for domestic climate-nexus investments. It will likely be inclined to encourage domestic sectoral participation, but this may be difficult if the certification process for foreign investment is rigid or especially costly. This puts a host state in the difficult position of being legally prohibited from favoring domestic market participants but facing domestic investors that may be unable to provide the support demanded by a certification process for foreign investment. This leads to a balancing challenge for the host state between setting any such support threshold high enough to obtain the funds it needs but low enough to protect domestic investors who might also be in the space.



has been interpreted to include a broad spectrum of state action ranging from good faith accordance with notions of due process to action that is simply not arbitrary, unjust, or unfair.<sup>137</sup> Though concepts like FET have been successfully leveraged to protect environmental interests by states in a handful of disputes,<sup>138</sup> FET ultimately leaves too much discretion to tribunals' interpretations of these terms and has resulted in the terms taking on wide-ranging meanings,<sup>139</sup> leading some economies to forsake FET in treaties altogether.<sup>140</sup> A discrete environmental provision will go far to elucidate expectations and obligations and, thereby, prevent the need to fall back on unsettled principles.

Unlike nebulous concepts such as FET, exception provisions are concrete in their ability to be molded to a state's purposes and to be applied to discrete economic sectors. They enjoy broad latitude and have encompassed everything from financial services<sup>141</sup> to national security.<sup>142</sup> However, they still leave too much discretion to tribunals, which may interpret the exceptions articulated in an agreement to constitute an exhaustive list.<sup>143</sup> Ultimately, effectively conditioning climate-nexus investment protection requires more flexibility than offered by traditional exception provisions. A fully separate environment and climate article that establishes the host state's regulatory interest and outlines the climate-nexus investment certification process that the host state will employ to protect this interest is more effective.

### *B. Effective Conditioning for Climate-Nexus Investments: Sample Language*

Due to its novel and, likely, contentious nature, language conditioning climate-nexus investment protections will require clarity. Importantly, investment conditioning provisions are not unprecedented in the Global South. Restrictions already utilized include provisions:

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<sup>137</sup> Lise Johnson, *International Investment Agreements and Climate Change: The Potential for Investor-State Conflicts and Possible Strategies for Minimizing It*, 39 ENV'T. L. REP.: NEWS & ANALYSIS 11147, 11152–53 (2009).

<sup>138</sup> See, e.g., *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award. ¶ 219 (Aug. 27, 2008) (“However, the Tribunal believes that the ECT does not protect investors against any and all changes in the host country's laws. Under the fair and equitable treatment standard the investor is only protected if (at least) reasonable and justifiable expectations were created in that regard. It does not appear that Bulgaria made any promises or other representations to freeze its legislation on environmental law to the Claimant or at all.”).

<sup>139</sup> Choudhury, *supra* note 93, at 46.

<sup>140</sup> Sonia E. Rolland & David M. Trubek, *Legal Innovation in Investment Law: Rhetoric and Practice in Emerging Countries*, 39 UNIV. PA. J. INT'L L. 355, 395, 405, 407, 408 (2017) (listing India, the Southern African Development Community (SADC), Brazil, and South Africa as examples of states that have used FET in their treaties).

<sup>141</sup> U.S. 2012 Model BIT, *supra* note 51, art. 20.

<sup>142</sup> Brazil 2015 Model CFIA, *supra* note 51, art. 13 (noting “Security Exceptions” to the treaties).

<sup>143</sup> Choudhury, *supra* note 93, at 50–51.

closing certain sectors to foreign participation entirely;<sup>144</sup> requiring approval from government ministries for designated sectors;<sup>145</sup> setting national ownership requirements;<sup>146</sup> introducing special conditions, equity participation requirements, and prior authorization;<sup>147</sup> and regulating the sale and purchase of any foreign-owned company's shares.<sup>148</sup> As such, broad discretion exists in drafting conditions.

The sample article below incorporates the proposed drafting elements above. The final text settled upon is likely to vary from state to state. Though this text can be a standalone article, the strongest IIA will supplement such an article with preambular language and robust definitions.<sup>149</sup> The sample text nevertheless captures the essence of what a provision should ultimately contain and seek to accomplish:

#### **Article [X]: Environment, Climate, and Climate-Nexus Investments**

1. Foreign investment affects the environmental and climate interests of the Party in which such investment occurs and often has a direct relationship with such interests. Parties have a right to regulate foreign investment to protect the local environment and domestic ecosystems and to set in place measures to mitigate and adapt to adverse climate effects on the Host Party that may be exacerbated by investment activity within its jurisdiction.
2. Climate change is international in nature and there exists a fundamental need for cooperation between Parties, and States generally, to overcome the threats climate change poses to sustainable development, and to preserve the benefits conferred upon Parties through foreign investment.
3. Climate-nexus investments are uniquely implicated in the context of climate change due to their nature and consequences and shall be required to obtain certification by the [*designated agency*] in order to enjoy the protections of this Agreement.

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<sup>144</sup> Sauvart & Mallampally, *supra* note 40, at 242. (mentioning, as an example, how Sudan has restricted foreign investor access to “transportation, media and communications, electricity, and financial services” sectors and prohibited access to “railway freight transportation, airport operation, and newspaper publishing”).

<sup>145</sup> *Id.* (outlining Bangladesh's requirement of ministry approval for investors in natural resources and infrastructure sectors, such as “power, mineral resources, and telecommunications”).

<sup>146</sup> *Id.* (“In South Sudan, companies with less than seven employees are reserved for national owners and medium-sized and large private companies are required to have at least 31 per cent national ownership.”).

<sup>147</sup> *Id.* (stating that Cambodia has such regulations on numerous sectors, “including cigarettes, movies, . . . gemstone mining and processing, publishing and printing”).

<sup>148</sup> *Id.* (noting that Haiti allows foreign ownership and joint ventures but regulates foreign sale and purchase of shares).

<sup>149</sup> Of course, the definition of “climate nexus investment” is foundational and will prove a critical first step for any host state as it contemplates the scope of its new certification and conditioning scheme.

4. Certification is a reasonable means for the Host Party to cooperate in international efforts to combat climate change, is essential for sustainable development, and is necessary to allow Parties to continue to mutually benefit from foreign investments. Certification shall be granted, and for no reason withheld, by the Host Party, upon a finding of compliance with the following:
  - a. A potential investor in a climate-nexus investment has produced an Investment Plan that identifies the reasonably foreseeable effects the investment may have on the local environment and ecosystems of the Host Party;<sup>150</sup> and
  - b. A climate-nexus investment has mitigation measures in place to reduce any adverse effects identified by the Investment Plan to levels that do not raise reasonable doubt as to the ability of ecosystems, species, and communities in the investment area to continue to exist on individual and group bases without a geographic relocation; and
  - c. A climate-nexus investment has designated an individual to serve as the representative of the investment in communications with the [*designated agency*]; and
  - d. A climate-nexus investment that was in compliance and certified by [*designated agency*] during the year prior has submitted proof of payment of the requisite fee or payment under section 5 of this article for the year prior.
5. Certification shall be expressly granted or renewed to any climate-nexus investment demonstrating compliance with section 4 of this article upon the payment of an annual fee of [*x quantity of designated currency*] before such investment becomes profitable, or an annual payment equal to [*y percentage*] of the net profits of an investment after such investment becomes profitable.

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<sup>150</sup> Notice that this subsection (a), and to some degree the following subsection (b), will likely overlap with the customary international law principle of requiring an Environmental Impact Assessment (EIA) for projects that may have a major effect on the environment. Nicholas A. Robinson, *International Trends in Environmental Impact Assessment*, 19 B.C. ENV'T AFF. L. REV. 591, 602 (1991) (exploring customary EIA approaches around the world). EIAs may also overlap with domestic environmental measures in place. Though this redundancy may have the added benefit of allowing the Host State an additional means to encourage EIAs or mitigation measures, it is not meant to preempt any extant legal framework. The principal goal of a certification scheme is to provide the Host State with climate adaptation support it otherwise would not receive by regulating investment activities that likely otherwise would still exist. This being the case, the fact that these two subsections will already be met if an investor is complying with other international legal obligations should not be seen as a weakness or shortcoming. Instead, the subsections should be seen as objective criteria that demonstrate the Host State's interest in protecting its environmental interests and highlight the State's commitment to providing stable, objective criteria to guide climate-nexus investment decisions in conformity with accepted international law and practice.

6. An investment must at all times comply with the provisions of subsection 4 of this article and may be subject to inspection by [*designated agency*] as frequently as twice annually.
7. A climate-nexus investment found to be in noncompliance shall be given due notice of violation and its non-compliant status, but no investment protections under this instrument shall be revoked before [*z period of time*] elapses after any finding of noncompliance.
8. Any dispute arising under this article shall be resolved in accordance with [*Article Y*] of this instrument (“Dispute Resolution”), but subject to an investor’s election to pursue a remedy in domestic courts instead. The choice of the latter by the investor shall constitute a waiver of the right to bring a claim under [*Article Y*] and the decision of a domestic court shall preclude any later claim brought under [*Article Y*], but only as concerning a dispute arising under this article.

The above sample article differs from the current drafting precedent in fundamental ways. This is an attempt to remedy the many shortcomings of the status quo approach to IIA drafting identified in Part III above.<sup>151</sup> First, the language of the sample article would be strongest complemented by preambular language establishing a right to regulate environmental interests, such as that found in the Canadian 2021 Model FIPA. However, even though preambular language would benefit the sample article, the language above can stand alone and does not depend on preambular language to designate the scope of the right to regulate. This is in part due to its clear articulation of the authority asserted by the Host State to regulate regarding its environmental and climate interests and the detailed guidance provided as to the scope and limits of this authority.

Second, the terms of the draft language establish a clear enforcement mechanism, unlike the CSR provisions in the U.S. 2012 Model BIT and Brazil 2015 Model CFIA. This mechanism is robust but limited. The sample article may be unprecedented in its approach to enforcement and as to the target of this enforcement, but the unambiguous language of the article does not overstep the regulatory latitude that is proper for a host state and constrains the Host State’s discretion by identifying clear, objective elements for measuring compliance. The transparency of the process outlined in the article preserves the integrity of the regulatory intent and the means chosen to enforce it while dispelling investor doubts as to due process and recourse in the event of a dispute.

Finally, though the sample article is a standalone provision, it is both narrower in scope and more consistent in effect than contemporary exception provisions. Where exception provisions generally tend to be broad, sector-wide provisions that may be overinclusive in their reach, the above conditioning provision is clear in its application solely to

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<sup>151</sup> Johnson et al., *supra* note 74, at 103.

climate-nexus investments. Additionally, exception provisions often cut toward ambiguity and instability by cleansing host states of liability for regulatory actions within a certain sector but do little to assist investors in understanding when such regulation might be used or the form it might take.<sup>152</sup> In contrast, the sample language offered cuts toward clarity by unambiguously introducing a uniform regulatory framework that provides stability for investors by identifying exactly which investments will be subject to regulation, the form regulation will take, and the measures investors must take to comply. The sample language is objective and protects against the risk of overly broad discretion inherent in exception provisions.

#### V. IDENTIFYING AND OVERCOMING CHALLENGES TO THE PROPOSED INVESTMENT PARADIGM

Incorporating environmental and climate protections into the contemporary international investment law regime comes with challenges. The first will be overcoming the inertia of the status quo. However, the international pressure on states to take climate action is growing. Citizens of some of the most economically dominant Global North states are demanding concrete climate action by governments, banks, and the financial system at large, exerting unprecedented pressure on capital flows.<sup>153</sup> The success of this pressure is evident in that some of the largest Western banks have committed to reducing their carbon footprint and to taking a more active role in the climate solution.<sup>154</sup> The transitions and emissions reductions required are unprecedented in scale<sup>155</sup> and international investment law inhabits a unique space: it can either catalyze or disrupt the joint action that is necessary. IIAs could become vehicles for delivering the promises of politicians in capital-exporting states for climate action.

Assuming the inertia is overcome, more glaring obstacles exist. First, measures taken to protect the environment by host states might make climate-nexus investments economically infeasible for investors. Second, and related, Global South states must overcome the fear that protections will result in losing vital foreign capital. Finally, there is a risk that too few Global North states will accept climate-nexus investment conditioning, causing international political gridlock. Ultimately, the incorporation suggested is both politically feasible and normatively desirable, and each of these obstacles can be overcome.

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<sup>152</sup> See, e.g., U.S. Treaty with Argentina, *supra* note 108, art. II, Protocol paras. 2–5 (stating that limited exceptions may be utilized but failing to identify any specific scope or mechanism for establishing the validity of an exception).

<sup>153</sup> See Sarah E. Light & Christina P. Skinner, *Banks and Climate Governance*, 121 COLUM. L. REV. 1895, 1909 (2021) (noting that major U.S. banks are taking action to combat climate change by directing their capital flow toward more sustainable investments).

<sup>154</sup> *Id.* at 1896–98.

<sup>155</sup> Allen et al., *supra* note 18, at 15.

*A. Conditioning Climate-Nexus Investments Could Affect the Financial Viability of Investments for Investors*

Perhaps the greatest challenge to redrafting IIAs to condition protections for climate-nexus investments is the effect it will likely have on the cost of investments. Measures to secure climate support by host states would essentially be aiming to force investors involved in climate-nexus investments to internalize at least part of the cost of damage to the environment as a result of their activities.<sup>156</sup> There will likely be pushback. Historically, efforts to require internalization of environmental costs have been met with staunch opposition, labeled as economically inefficient and unduly burdensome.<sup>157</sup> However, from an equity perspective, FDI in the Global South has traditionally been focused on extractive industry<sup>158</sup> and Global South states stand to benefit greatly from increased regulation of climate-nexus investment activities.

Though the most reasonable method of financing environmental and climate protections is for costs to be covered by the investor, there are schemes through which costs could be allocated to alter this burden. Individual investment contracts will still be drawn up for investment projects, and broad flexibility exists in drafting these to include a cost allocation scheme.<sup>159</sup> Alternatively, a fund could be established and financed by capital-exporting home states to offset the adverse effects of climate-nexus investments in host states. This fund would be a natural addition to the trust funds already set up by the World Bank to assist nations with large extractive resources negotiate the intricacies of these

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<sup>156</sup> Johnson et al., *supra* note 74, at 74–77 (describing government use of political risk insurance and export credit insurance programs to incentivize companies operating abroad to reduce negative “social, environmental, and human rights impacts in host countries”).

<sup>157</sup> See E. Donald Elliott & Daniel C. Esty, *The End Environmental Externalities Manifesto: A Rights-Based Foundation for Environmental Law*, 29 N.Y.U. ENV'T L.J. 505, 514–16 (2021) (describing how prevailing modern framework for cost-benefit analysis prioritizes economic efficiency above all else). Though cost internalization is found in certain principles of international law, such as the polluter-pays principle, the nuances of this principle, in theory and application, are outside the scope of this Note. Suffice to say, it is fundamentally a reactive principle that brings with it many enforcement challenges upon any sort of triggering event. *Id.* at 517–18. Certifying climate-nexus investments and conditioning IIA protections attempts to effectively build the polluter-pays principle into the FDI/regulatory system proactively on the front end and construct a framework for real oversight and enforcement capabilities throughout the life of the investment.

<sup>158</sup> Sauvnt & Mallampally, *supra* note 40, at 239.

<sup>159</sup> For example, it might be negotiated that a percentage of the cost for adhering to the host state’s required environmental protection measures would be taken out of their share of profits from the investment. However, Global South host states should avoid utilizing this approach, if possible, because the entire point of the certification process and climate-nexus investment conditioning is to allow the host state to sustainably secure adequate climate support. A scheme in which funding supplied to a host state is immediately allocated toward mere mitigation of environmental damage and is not able to be allocated to broader climate change adaptation costs would not be successful or sustainable. It is normatively preferable for the costs of environmental protection measures of an investment to be borne by the investor.

investments.<sup>160</sup> Additionally, many home states already take measures to incentivize their foreign investments to protect host state interests.<sup>161</sup> There are also calls for home states to take additional measures such as to link investors' political risk insurance to their adherence of environmental or social requirements in a host state or for adherence to host state requirements to unlock home state financial assistance for either investors or host states.<sup>162</sup>

*B. Global South States Risk Losing Foreign Investment Vital to Development*

If Global South states implement a certification scheme for climate-nexus investments that leads to a significant increase in the cost of compliance, and, ultimately, the cost of doing business, the result could be that host states lose potential investors to less-regulated locations. This would have critical consequences for Global South states, many of which depend on such investments for capital. For example, between 2011 and 2013 the average FDI flow to Global South states was \$744 billion USD.<sup>163</sup> Beginning in 2006, flows of FDI to Least Developed Countries “exceeded bilateral official development assistance (ODA) . . . and reached more than half of the amount of total ODA [these states] received.”<sup>164</sup> Though this is not the exclusive income of Global South states, the numbers are significant considering that the stock of foreign direct investment to gross domestic product (GDP) was 23% in Least Developed Countries and 30% in Global South states during this same period.<sup>165</sup> The risk of losing this capital is especially alarming for many Global South states that may have ongoing programs to build out infrastructure, eradicate poverty, or combat food insecurity.<sup>166</sup> When weighing these fundamental development goals against the more abstract interests of environment and climate protection, protecting the latter at the risk of losing the former may prove to be a gamble Global South states are not willing to make.

The Global South should act in a coordinated fashion to offset this risk. This will require robust diplomacy and sharing best practices to construct a foundation of trust and create sufficient pressure on Global North states to sign IIAs and on fellow Global South states to participate

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<sup>160</sup> Sauvnt & Mallampally, *supra* note 40, at 254 (explaining that the World Bank set up the Extractive Industry Transparency Initiative and the Extractive Industry Technical Advisory Facility).

<sup>161</sup> Johnson et al., *supra* note 74, at 74–77.

<sup>162</sup> Sauvnt & Mallampally, *supra* note 40, at 258.

<sup>163</sup> *Id.* at 238.

<sup>164</sup> *Id.* (internal citation omitted).

<sup>165</sup> *Id.*

<sup>166</sup> *See, e.g.*, THIRD COMMUNICATION OF BANGLADESH, *supra* note 44, at 10, 24, 139, 222, 249 (detailing Bangladesh's progress in infrastructure reforms, poverty eradication, and steps toward reducing food insecurity, while emphasizing the country's need for “continued investment” in these areas).

in the conditioning scheme.<sup>167</sup> Despite the differences in domestic circumstances between Global South states with varying interests and politics,<sup>168</sup> Global North investment capital remains within reach. Strong channels for communication through which Global South states may organize already exist and have proven effective in negotiations around other international regimes such as the climate change regime.<sup>169</sup> Regional coordination should take advantage of existing mechanisms for development and planning such as the Mercado Común del Sur (MERCOSUR),<sup>170</sup> Association of Southeast Asian Nations (ASEAN),<sup>171</sup> and African Union.<sup>172</sup>

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<sup>167</sup> See Baker, *supra* note 32, at 63 (highlighting the challenges of a “free rider” mentality when such a broad system of cooperation is required).

<sup>168</sup> Ruth Gordon, *Contemplating the WTO from the Margins*, 17 BERKELEY LA RAZA L. J. 95, 104 (2006).

<sup>169</sup> See generally, Sumudu Atapattu, *Climate Change, International Environmental Law Principles, and the North-South Divide*, 26 TRANSNAT'L L. & CONTEMP. PROBS. 247, 248, 250, 251 (2017) (describing the collaborative efforts of Global South states in negotiating provisions of the United Nations Framework Convention on Climate Change).

<sup>170</sup> *MERCOSUR in Brief*, MERCOSUR, <https://perma.cc/BTG3-RPSY> (last visited Feb. 26, 2023). This economic bloc was founded in 1991 and encompasses the economies of Argentina, Brazil, Paraguay, Uruguay, and Venezuela. *Mercosur Countries*, MERCOSUR, <https://perma.cc/4DXM-CXGY> (last visited Feb. 26, 2023). On its website, it states that its “main objective has been to promote a common space that generates business and investment opportunities through the competitive integration of national economies into the international market.” *MERCOSUR in Brief*, *supra* note 170. It boasts that it “has also signed commercial, political or cooperation agreements with a diverse number of nations and organizations on all five continents.” *Id.* If leveraged, MERCOSUR could prove an important tool for encouraging a bloc-wide position on investment theory and approach to IIA drafting, especially considering common interests of member states.

<sup>171</sup> *About Us*, ASS'N OF SE. ASIAN NATIONS, <https://perma.cc/E888-3L8F> (last visited Feb. 26, 2023). ASEAN was established in 1967 and serves as a regional bloc for Southeast Asian nations. *Id.* It has as one of its aims and purposes to “accelerate the economic growth, social progress and cultural development in the region through joint endeavors in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of Southeast Asian Nations.” *What We Do*, ASS'N OF SE. ASIAN NATIONS, <https://perma.cc/ZV4G-YJLG> (last visited Feb. 26, 2023). It sets up a key framework for cooperation between regional member states. *Id.*

<sup>172</sup> *About the African Union*, AFR. UNION, <https://perma.cc/X6R3-TE7U> (last visited Feb. 26, 2023). The Union is a clear example of an organization whose mission and approach could serve to further a unified approach to investments within the bloc. *Id.* The website states its objectives include “[t]o promote and defend African common positions on issues of interest to the continent and its peoples” and to “establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations” as well as “[t]o coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union.” *AU in a Nutshell*, AFR. UNION, <https://perma.cc/T8W7-3QQD> (last visited Feb. 26, 2023).



*C. Certification Conditions, if Rejected by the Global North, Could Result in International Political Gridlock*

Disagreements arising from IIA certification and conditioning schemes could lead to international political disruption. One primary challenge will be the unequal bargaining power between capital-exporting states and capital-importing states. Ultimately, the threats and costs posed by climate change should catalyze Global South state unification. Additionally, interests in environmental and climate protection enjoy widespread support in many Global North states<sup>173</sup> and this alone is likely to provide the requisite pressure to encourage cooperation. Global South states should be prepared to leverage a unified position to advocate for measures on the international stage through strategies that have proven successful when employed in the past.

One example of the Global South collectively advocating on behalf of shared health and environmental interests was its catalyzing the Basel Ban Amendment, the result of widespread Global South protests that ultimately banned the export of hazardous wastes from the Global North to the Global South.<sup>174</sup> A unified Global South has also enjoyed political victory thanks to cohesive bargaining in the United Nations. The passage of the U.N. Declaration for the Establishment of a New International Economic Order (NIEO) is one such example. Promoting the sovereignty of Global South states, NIEO worked to eliminate the widening gap between the Global North and Global South, and sought to accelerate economic and social development for Global South states.<sup>175</sup> This underscored the importance of development for the Global South and set the stage for a right to develop by establishing a nexus between development and human rights.<sup>176</sup> Though NIEO had a rocky start and limited success, its underlying principles concerning development became concretely situated in the modern international legal landscape.<sup>177</sup>

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<sup>173</sup> See *Global Adaptation Initiative*, *supra* note 29 (showing the top ranked countries are the least vulnerable to climate change and other global disasters); see, e.g., *Majority of Europeans Say the Ukraine and High Energy Prices Should Accelerate the Green Transition*, EUR. INV. BANK, <https://perma.cc/73DC-UL89> (last visited Feb. 26, 2023).

<sup>174</sup> Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57, 28 I.L.M. 657. Historically, the Basel Convention, though providing each party with a right of refusal of hazardous waste imports, did not ban such imports. *Id.* The result was the continued export of hazardous wastes to the Global South, likely in part due to the fear of each individual state of potential economic or political repercussions should they refuse such imports from powerful Global North states. Jim Puckett & Cathy Fogel, *A Victory for Environmental Justice: The Basal Ban and How it Happened*, GREENPEACE INT'L, Sept. 1994, at 1. The Global South unified in its demand for a blanket prohibition of exports to Global South Parties, eventually leading to the passing of the Basel Ban in 1995. *Id.*

<sup>175</sup> G.A. Res. 3201 (S-VI), Declaration on the Establishment of a New International Economic Order (May 1, 1974).

<sup>176</sup> Bonny Ibhawoh, *The Right to Development: The Politics and Polemics of Power and Resistance*, 33 HUM. RTS. Q. 76, 81–85 (2011).

<sup>177</sup> Choudhury, *supra* note 93, at 7.

*D. Conditioning Investment Actions Is Both Feasible and Necessary*

On balance, Global South states' choice to redraft IIAs to incorporate environmental and climate interests will face obstacles, but is both politically feasible and normatively desirable. There is significant global appetite for climate action,<sup>178</sup> and this will go a long way to apply pressure upon Global North states to cooperate with conditioning measures. This political pressure will also be felt by any Global South states that are hesitant to adopt these provisions.<sup>179</sup> The cooperative nature of any meaningful path forward and the high demand by the Global North for the products of climate-nexus investment activities abroad will spur Global North acceptance of efforts to redraft IIAs to secure climate adaptation support for Global South states.

Arguments for the incorporation of these provisions into the international investment regime are compelling. Fundamental principles of equity already accepted by more mature international legal regimes, such as the international climate change regime, should inform the trajectory of the still-young international investment regime. Current power disparities and capital imbalances should not define the Global South's ability to respond to the climate crisis. Equitable concerns call for more sophisticated and accountable Global North investors and markets to internalize the costs of their investment activities in the Global South. Governing principles of international customary law such as the duty not to cause transboundary harm,<sup>180</sup> the precautionary principle,<sup>181</sup> the rights

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<sup>178</sup> Damian Carington, *UN Global Climate Poll: 'The People's Voice is Clear – They Want Action'*, THE GUARDIAN (Jan. 27, 2021), <https://perma.cc/ZDW9-G7J8>; James Bell, Jacob Pushter, Moira Fagan, & Christine Huang, *In Response to Climate Change, Citizens in Advanced Economies Are Willing to Alter How They Live and Work*, PEW RSCH. CTR. (Sept. 14, 2021), <https://perma.cc/5ASJ-5A3K>.

<sup>179</sup> This reluctance might stem, for example, from the desire to protect extractive industry sector investment opportunities as part of a competitive advantage or because the state may fear potential international blowback as a result of such provisions as related to specific aid needs or political maneuvering.

<sup>180</sup> See, e.g., *Construction of a Road in Costa Rica Along the San Juan River* (Nicar. v. Costa Rica), Separate Opinion of Judge Donoghue, 2015 I.C.J. 665, 782–84 (Dec. 16, 2015); U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, Principle 2, U.N. Doc. A/CONF.151/5 (June 13, 1992) [hereinafter *Rio Declaration*] (“States have . . . the sovereign right to exploit their own resources . . . and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”).

<sup>181</sup> See, e.g., Haydn Davies, *Investor-State Dispute Settlement and the Future of the Precautionary Principle*, 5 BRIT. J. AM. LEGAL STUDIES 449, 468 (2016) (discussing the history of the precautionary principle); *Rio Declaration*, *supra* note 180, at Principle 15 (“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”).

of future generations,<sup>182</sup> and the polluter-pays principle<sup>183</sup> also militate in favor of regulations to offset environmentally harmful investment activities. At the end of the day, compelling normative reasons and mounting political momentum for swift and unprecedented global climate action are enough to overcome any obstacles Global South states might face.

## VI. CONCLUSION

International investment law is a young body of law that carries with it old baggage. The deep inequities between the Global North and Global South born of an imperialist and colonialist past have shaped interactions between the two hemispheres and are still present in international investments. Though the extreme manifestations of exploitation seen in colonialism have since been rejected, familiar dynamics of the system live on in contemporary international investment law through the disproportionate influence capital-exporting states have on capital flows. Capital-exporting states today are strongly correlated with the Global North states harboring colonialist pasts and, likewise, capital-importing states often are those states that were exploited by imperialist systems. The lines have been drawn and mobility is difficult.

Climate change creates a new field upon which these old inequities play out. Capital-exporting Global North states possess the extensive capital required to adequately adapt to the emerging risks of climate change. Capital-importing Global South states experience disproportionately adverse effects of climate change and lack the capital to meaningfully adapt. The international investment regime is a natural tool to leverage toward climate equity for the Global South, and climate-nexus investments are logical targets for increased regulation to provide climate change adaptation support. Global South states should redraft international investment agreements to create a certification system for climate-nexus investments upon which treaty protections for these investments are contingent. Such a course is politically feasible, normatively desirable, and is necessary for the international investment regime to evolve to promote sustainability and uphold fundamental principles of equity. It is not too late for the young international investment regime to shed the baggage it has inherited from the past.

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<sup>182</sup> *Rio Declaration*, *supra* note 180, at Principle 3 (“The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”).

<sup>183</sup> *Id.* at Principle 16 (“National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.”).