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An International Law Framework for Climate-Aligned Investment Governance

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CCSI Working Paper



Columbia Center
on Sustainable Investment

January 2024

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Acronyms and Definitions

APEC	Asia-Pacific Economic Cooperation
ACCTS	Agreement on Climate Change, Trade and Sustainability
BCA	Border Carbon Adjustment
BITs	Bilateral Investment Treaties
CBAM	Carbon Border Adjustment Mechanism
CCSI	Columbia Center on Sustainable Investment
CDP	(formerly) Carbon Disclosure Project
COMET	Coalition on Materials Emissions Transparency
COP	Conference of the Parties
CSO	Civil Society Organization
DFI	Development Finance Institution
ECT	Energy Charter Treaty
EPPs	Environmentally Preferable Products
ESTs	Environmentally Sound Technologies
ETD	Energy Taxation Directive
FDI	Foreign Direct Investment
FSB	United Nations Financial Stability Board
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GCF	Green Climate Fund

GHG	Greenhouse Gas
GRI	Global Reporting Initiative
High Seas Treaty	United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction
HRIA	Human Rights Impact Assessment
HS	WCO Harmonized Commodity Description and Coding System
IAM	Independent Accountability Mechanism
ICES	International Council for the Exploration of the Sea
ICJ	International Court of Justice
ICMM	International Council on Minerals and Metals
IEA	International Energy Agency
IGF	Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development
IIA	International Investment Agreement
IISD	International Institute for Sustainable Development
ILO	International Labour Organization
IOSCO	International Organization of Securities Commissions
IPCC	Intergovernmental Panel on Climate Change
IRENA	International Renewable Energy Agency
ISDS	Investor–state dispute settlement
Kyoto Protocol	Kyoto Protocol to the United Nations Framework Convention on Climate Change
LDC	Least Developed Country
MEA	Multilateral Environmental Agreement
NCP	National Contact Point
NZE	Net-Zero Emissions
OECD	Organisation for Economic Co-operation and Development
Pact	The Global Pact for the Environment
PCA	Permanent Court of Arbitration
Plastics Treaty	Draft Resolution of End Plastic Pollution: Towards an International Legally Binding Instrument
R&D	Research and Development
SBTi	Science Based Targets Initiative
SCM	Agreement on Subsidies and Countervailing Measures
SEC	United States Securities and Exchange Commission
SDG	Sustainable Development Goal
TCFD	Task Force on Climate-Related Financial Disclosures
TRIMs	WTO Agreement on Trade-Related Investment Measures
TRIPS	WTO Agreement on Trade-Related Intellectual Property Rights
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEA	United Nations Environment Assembly
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
Vienna Convention	Vienna Convention for the Protection of the Ozone Layer
WCO	World Customs Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Executive Summary

- International law is indispensable in promoting international cooperation and collective action to facilitate and govern the domestic and international investment flows necessary to achieve climate-aligned, sustainable development, and in removing roadblocks for domestic measures aimed at fostering climate investment within or across borders.
- International law evolved and is structured in specific and often self-contained thematic areas, many of which are or could be relevant to investment governance, but fragmentation may lead to overlooking that relevance or cause one area of international law to undermine goals of others.
- This working paper **(1)** identifies areas of international law that are or could be relevant to investment governance, **(2)** highlights points of inconsistency, and **(3)** proposes a framework to reform and integrate international law with the objective of *promoting and facilitating climate investment flows and achieving climate-aligned regulation of investment* (hereafter, ‘**climate-aligned investment governance**’).
- Section 1 (International Human Rights Law) and Section 2 (International Labor Law) illustrate the interdisciplinarity between climate-aligned investment governance and human rights, including labor rights. Rather than proposing reforms to these areas of international law, the sections highlight how the two areas must form the bedrock of an international law framework to achieve climate-aligned investment governance, informing the reform of other areas of international law.
- **International Human Rights Law** is critical to climate-aligned investment governance in ensuring that climate investment respects the rights, needs, and priorities of investment-affected individuals, local communities, and Indigenous Peoples, particularly in developing countries, through participatory and inclusive investment processes, access to justice, accountability mechanisms, and legal protections against human rights violations by foreign investors.
- **International Labor Law** is critical to climate-aligned investment governance in including trade unions, industry, labor representatives, affected communities, and all other relevant actors in the formulation, implementation, and monitoring of climate investment policies that respect, promote, and realize international labor rights, and committing to domestic action, such as through creating or strengthening social safety nets, targeted education and training programs, pension funds, and just transition funds.
- Section 3 recommends reforming **International Investment Law** for climate-aligned investment governance by terminating or withdrawing from investment treaties, withdrawing advance treaty-based consent to investment arbitration, neutralizing survival clauses, and refraining from negotiating new investment treaties that fail to align with climate action. It recommends overhauling the existing international investment regime in favor of support to domestic administrative and judicial systems to facilitate investment governance, timelines to swiftly phase out fossil fuel investments on the basis of fairness and equity, and the facilitation of financial flows for climate investment.
- Section 3 recommends reforming **International Trade Law** for climate-aligned investment governance by, among other measures, renegotiating provisions in international trade agreements that hamper states’ ability to adopt climate investment policies to drive the net-zero energy transition, liberalizing trade in environmental goods and services, expanding carbon pricing mechanisms (cap-and-trade systems and carbon taxes), cooperating on adopting border carbon adjustments, harmonizing greenhouse gas accounting and reporting throughout value chains, and swiftly phasing out fossil fuel subsidies.

- Section 4 recommends reforming **International Intellectual Property Law** for climate-aligned investment governance by adopting measures aimed at accelerating the development and deployment of technologies and capital for climate investment through formal commitment, dedicated financing, and incentives for innovation; facilitating and expediting climate-related technology transfer and rights involving intellectual property management, protection, and enforcement; and creating favorable trading conditions, loosened administrative processes, and financial mechanisms to foster the transfer of low-carbon, environmentally sound technologies.
- The scope and depth of areas covered, issues discussed, and reform solutions proposed in this working paper are non-exhaustive. We did not intend, and could not have intended, to provide complete and definitive answers or conclusions. The reflections in this working paper serve as a preface on the need for coherence in international law for climate-aligned investment governance. We invite and hope to inspire further thinking, research, and discussion on how to bridge gaps and build cohesion among these and other areas of international law relevant to climate-aligned investment governance.

Introduction

Achieving globally agreed climate change mitigation and adaptation goals¹—including the Paris Agreement goal of “[m]aking finance flows consistent with a pathway towards low greenhouse gas [GHG] emissions and climate-resilient development”²—and averting the climate emergency depends on a radical reorientation of global investment flows by public and private economic actors. Massive amounts of ‘**climate investment**’ must be mobilized, which includes investment in energy efficiency; renewable energy sources and storage; zero-emissions transportation; improved urban design; critical mineral reuse and recycling; environmentally sound and climate-resilient infrastructure and technologies; expanded energy grids and access; enhanced adaptive capacity; poverty alleviation; technological transfer and innovation; and disaster risk management.³

Estimates of the investment required to keep the world on track to achieve the energy transition in line with the International Renewable Energy Agency (IRENA)’s 1.5°C Scenario, for example, would require annual investments of USD 5.7 trillion on average by 2030 and USD 3.7 trillion between 2031 and 2050.⁴ Achieving global climate goals requires climate investment to increase significantly and rapidly. Investment must also be shifted away from high-emission, climate-disruptive projects—particularly those that lead to the burning of fossil fuels (coal, oil, and gas), which makes up for approximately 70% of human-caused global warming—toward climate investment.⁵

Robust legal and policy frameworks are essential to facilitate and govern the domestic and international investment flows necessary to achieve climate-aligned, sustainable development. While many aspects of investment governance fall within the realm of domestic law and policy, international law is indispensable in promoting international cooperation and collective action on climate investment flows and climate-aligned development and in removing potential roadblocks for domestic measures aimed at fostering climate investment within or across borders.

International law is structured in specific and often self-contained thematic areas, including human rights, labor, investment, trade, intellectual property, and environment—itself often divided among water, biodiversity, clean air, climate etc. Fragmentation is a desirable feature of international law, in that it brings practicability, specialization, and depth to international lawmaking in the various discrete areas. At the same time, it carries the risk of creating incoherence. With respect to investment governance, fragmentation creates a diffuse landscape conducive to legal gaps and misalignments. Many areas of international law, including the ones listed, are relevant or contain elements that are or could be relevant to investment governance, but fragmentation may lead to overlooking that relevance or cause one area of international law to undermine goals of others. To support the achievement of global climate mitigation and adaptation goals, all areas of international law should work harmoniously toward the goals

of promoting and facilitating climate investment flows and achieving climate-aligned regulation of investment (hereafter, ‘**climate-aligned investment governance**’).

This working paper proposes a framework to integrate various relevant thematic areas of international law, with the goal of achieving climate-aligned investment governance. We examine five select areas of international law—human rights, labor, investment, trade, and intellectual property—based on our perception of their potential relevance to investment governance, and we present our vision of how they could support the achievement of climate-aligned investment governance.

The sections of this working paper are titled simply with the area or issue of international law discussed, but the nature and focus of the discussions vary.

Section 1 (International Human Rights Law) and **Section 2** (International Labor Law) illustrate the interdisciplinarity between climate-aligned investment governance and human rights (including labor rights). The goal of these two sections is not to propose reform of these areas of international law, but to highlight how the two areas must form the bedrock of a coherent international law framework to achieve climate-aligned investment governance, informing the reform of other areas of international law discussed in the following sections.

Section 3 (International Investment Law) discusses how the international investment regime hinders climate-aligned investment governance and how it could be overhauled. **Section 4** (International Trade Law) and **Section 5** (International Intellectual Property Law) examine investment-related aspects of these two regimes and propose reforms to either maximize their positive interactions or minimize their negative interactions with climate-aligned investment governance.

In relation to each of these areas, we provide a literature-backed overview of rationales for change and reform opportunities, summarizing and building upon the existing body of knowledge and research on climate-aligned investment governance at the international level, the just transition to sustainable and net-zero emission (NZE) economies, and the achievement of other Sustainable Development Goals (SDGs). Under each section, the background and rationale is followed by a summary of our main policy recommendations that states could consider adopting to align international legal regimes with climate action, ranging from programmatic or overarching commitments on international cooperation to measurable and enforceable obligations. We roughly ordered our recommendations from most general to most specific and from the highest to the lowest level of ambition, transformative potential, and political feasibility in international negotiations. Each summary is followed by a discussion of recommendations, ordered according to the same criteria.

Implementing these suggested reforms in a discrete manner, by means of amended or new instruments in various areas of international law grounded in common principles of climate-aligned investment governance, can help meet climate goals. Whether additionally or alternatively to siloed reforms, states may consider implementing wholesale reform of international law for climate-aligned investment governance. **Section 6** briefly outlines four types of instruments that could be considered to help coherently advance or consolidate reforms touching on areas of international law that are relevant to achieving climate-aligned investment governance. The choice of instrument or instruments will ultimately depend on various circumstances not analyzed in depth in this paper.

Neither our choice of five areas of international law, nor our selection of discrete issues discussed within each area, nor our discussion of each area or issue is intended to be exhaustive. Our proposals are neither exhaustive nor prescriptive with specific approaches or terminology. Rather, the goal of this working paper is to illustrate the interconnection and interdisciplinarity among the various areas of international law discussed, showcase the importance of thinking holistically about international law, and offer our current vision of how a coherent international law framework could help achieve climate-aligned investment governance.

With this working paper, we invite representatives of governmental and intergovernmental organizations and civil society, among other stakeholders, to conduct more research and host discussions on how to bridge gaps and build cohesion among these and other areas of international law relevant to investment governance, with a view to aligning international law with climate goals. We also hope to inspire government officials in charge of domestic and international policy-making in areas relevant to investment to consider adopting our recommendations as well as other ideas to develop coherence in climate-aligned investment governance.

1 International Human Rights Law

The transformations that climate investment aims to achieve will have profound impacts on various stakeholders, including local communities, vulnerable groups, and workers. Therefore, international law for climate-aligned investment governance requires a strong foundation in human rights and labor law principles, to ensure, among others, sustainable development, equity, inclusion, and a just transition. Accordingly, we first examine international human rights law and international labor law in Sections 1 and 2, respectively, before moving on to the other areas of international law that require reform in Sections 3 (International Investment Law), 4 (International Trade Law) and 5 (International Intellectual Property Law). In doing so, we demonstrate how international human rights law and international labor law should serve as the bedrock for reforming international law for climate-aligned investment governance.

Overview and Rationale

The 1948 Universal Declaration of Human Rights has inspired the establishment of legally binding human rights treaty regimes at both the international and regional levels. Human rights treaties touch on all areas of life, including civil, political, social, and economic rights, and may also apply to specific groups, such as children, women, or Indigenous Peoples. More recently, the United Nations (UN) have recognized a right to a clean, healthy, and sustainable environment, which recognizes the close relationship between climate change and human rights.⁶

Under international human rights law, states have the primary responsibility to respect, protect, and fulfill human rights. However, there is often tension between human rights and the international investment regime as it currently stands. Domestic and international investment processes and investment treaties do not consistently support, and often undermine, the realization of human rights. Investment treaties and arbitration create structural barriers for the realization of social and environmental justice.⁷

Climate change will increasingly threaten the livelihood, health, well-being, and lives of individuals. In the case of inaction or a company or state's failure to meet its environmental obligations, national or, in some cases, international courts and tribunals are important in providing for a fair and impartial judgment. However, litigation cases do not always recognize the right of an individual to halt a project or government action that would go directly against their right for a stable climate.⁸ Moreover, access to mediation at present is limited, and investment dispute settlement mechanisms are typically accessible to investors and states only, meaning they do not provide a forum to address concerns by other stakeholders.

Certain features of existing investment treaties put labor, environmental, and other human rights at risk.⁹ It is imperative to ensure that the economic interests of investors do not undermine human rights. In the context of climate change, disparities among different countries and social groups will be exacerbated. Emphasis should be placed on the sovereignty of less developed and smaller countries to realize the human rights of individuals, local communities, and Indigenous Peoples, who should have a say in discussions on investments that directly or indirectly affect their livelihoods.

Summary of Main Recommendations: International Human Rights Law

- Respecting and enforcing human rights and internationally recognized guiding principles on human rights applicable to investment.
- Ensuring that climate investment respects the rights, needs, and priorities of investment-affected individuals, local communities, and Indigenous Peoples, particularly in developing countries, through participatory and inclusive investment processes, access to justice, accountability mechanisms, and legal protections against human rights violations by foreign investors.
- Requiring investors to conduct human rights impact assessments (HRIAs) of investment projects.
- Establishing compensation funds for people affected by the human rights impacts of land-based investments, including mining and renewable energy projects.

Detailed Recommendations

A climate-aligned investment governance regime must be grounded on principles of human rights and sustainable development. Accordingly, states should adopt responses to climate change in coordination with sustainable development in an integrated manner, taking into account countries' needs and priorities for achieving the SDGs. Moreover, host states of investments, as well as home states of investors, should respect and commit to incorporating and enforcing, at a minimum, the principles of the International Bill of Rights,¹⁰ as well as the UN Guiding Principles on Business and Human Rights,¹¹ the World Bank Environmental and Social Standards,¹² the UNEP Framework Principles on Human Rights and the Environment,¹³ and other policies and procedures to realize human rights and ensure environmental stewardship in foreign investment governance frameworks. Developed country states should commit to contributing toward the realization of human rights in developing country states in the context of climate investment projects. Foreign investors should also commit to respect human rights standards, and their host, as well as home states, should ensure that stakeholders are legally protected from possible human rights infringements by foreign investors (especially non-state actors). Further, all international development cooperation projects, particularly those funded by foreign investors and development finance institutions (DFIs), should make specific provisions denoting human rights and environmental protection as priorities alongside economic development.

Climate-aligned investment governance should ensure a just transition to environmentally, socially, and economically sustainable, climate friendly, and resilient economies and societies.¹⁴ In doing so, states must ensure that climate investment respects the rights, needs, and priorities of individuals, local communities, and Indigenous Peoples. Concurrently, states must recognize, as a matter of principle, individuals, communities, and Indigenous Peoples as the primary decision-makers, by making investment processes participatory and inclusive, and moving away from investor-state arbitration and other dispute settlement mechanisms that fail to accommodate complaints of the people affected by investment projects.

Investment frameworks should be designed to ensure that local populations' views are considered, respected, and given weight in decision-making processes relating to development and climate investment projects in their region. Further, strict procedures should incorporate lessons learned from previous instances of community grievances and human rights infringements into future investment projects rapidly as the scale and speed of climate investment increases.

This section organizes the remaining recommendations into five themes for placing human rights of key stakeholders at the center of decision-making to ensure a just, fair and equitable transition: (a) community consultation and inclusion in decision-making processes; (b) access to justice; (c) accountability mechanisms; (d) land-based climate investments; and (e) DFIs.

a. *Community Consultation and Inclusion in Decision-making Processes*

States should legally recognize, protect, and uphold the human and land rights of investment-affected communities, including their rights to self-determination, self-governance and autonomy rights, and cultural rights. For example, giving local communities the possibility to co-manage their land with the state allows them to have more control over investment processes.¹⁵ These measures should be coupled with mechanisms to protect local communities from corruption and other organized crimes that they might be at risk of when defending their rights to land.

To further protect investment-affected communities, states should establish formal mechanisms as part of investment projects, in order to foster a trusted and durable relationship between local populations and various government ministries—notably ministries of finance and their supportive agencies, which are often among the most influential in government—to ensure the protection of the former’s rights and priorities, and to facilitate constructive exchange throughout the lifetime of the respective project.¹⁶ States should require investors to conduct a collaborative human rights impact assessment (HRIA) of investment projects to ensure a deeper understanding of actual and potential impacts of a project and to provide a forum for all stakeholders to identify shared priorities, enhance communication, and participate in decision-making processes.¹⁷

Indigenous Peoples are particularly vulnerable to interference with their rights by investment projects, especially extractives projects, due to their close cultural ties with their traditional lands. In addition to the distinct rights afforded to Indigenous Peoples under international law, the legal protections and mechanisms mentioned throughout this section should also apply to them, with special attention given to their circumstances. In addition, states should support the political inclusion of Indigenous communities, including their ability to assert comprehensive land claims, their representation in local governance, and their participation in the wage economy.¹⁸

b. *Access to Justice*

To guarantee access to justice for marginalized stakeholders, individuals, local communities, and Indigenous Peoples should continue to be explicitly permitted to bring environmental and climate cases before international human rights courts, tribunals, and commissions, in recognition that the right to a stable climate is a human right.¹⁹ States should recognize existing institutions such as the European Court of Human Rights, the Inter-American Court of Human Rights, the United Nations Human Rights Council, and others as the legal recipients of such complaints. At the same time, states should eliminate strategic opportunities for anti-regulatory plaintiffs to make it difficult to enact domestic climate change regulation.²⁰

c. *Accountability Mechanisms*

Appropriate mediation and accountability mechanisms can help meet the needs of investment-affected individuals, local communities, and Indigenous Peoples. Leaders of local communities should be provided with details on accountability mechanisms available to them in relation to a particular investment project prior to the commencement of development.²¹ To give stakeholders tangible opportunities to raise investment-related concerns a right to consideration and action should be provided from the outset of the investment approval process and throughout the project development²² up until completion.²³

In general, states should recognize and uphold local communities’ rights in dispute settlement processes, with an emphasis on their rights of action, access to justice, and appropriate remedies through grievances and complaints mechanisms. Such dispute settlement processes should draw on existing examples of Independent Accountability Mechanisms, for example, to ensure that communities have the time and forum to address their concerns and that actors that are responsible for harms are being held accountable.

Community leaders, Indigenous Peoples, and key stakeholders, including civil society organizations (CSOs), should be involved in the development of any available accountability or complaint reporting mechanism, to ensure widespread awareness of and access for all investment-affected individuals. Such a mechanism should be centered around transparency, remedial action and addressing non-compliance. It should also include access to mediation, by providing space to address individuals', organizations', or investment-affected communities' concerns. Moreover, it should be governed by transparent guidelines, that are easily publicly accessible to all investment-affected individuals. International recognition, publication, and enforcement of the guidelines for the standardized mechanism will ensure trust of individuals, communities, and Indigenous Peoples. Mechanisms should also ensure that lessons learned from disputes are being systemically incorporated into future investment projects. Moreover, to guarantee access to justice, states should recognize that existing regional and international institutions, such as the European Court of Human Rights, the Inter-American Court of Human Rights, the United Nations Human Rights Council, and others as the legal recipients of such complaints, once domestic remedies have been exhausted.²⁴

National Contact Points (NCPs) should be established outside of local government and ministry structures, in particular those with stakes in investment projects, such as ministries of commerce or finance,²⁵ to handle complaints in a way that is impartial, predictable, equitable, and compatible with the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises.²⁶

d. Land-Based Climate Investments

In recognition of the high-risk nature of land-based climate investments, including in the mining of critical minerals and renewable energy projects, states should establish funds to provide reparations for people affected by the human rights impacts of land-based investments, including for example by displacement from and destruction or expropriation of traditional lands. Similar to mine closure financial assistance, states could require land-based investors to make contributions to such a fund at the beginning, or during the life of, a project to mitigate the risk of companies failing to fulfill obligations to provide reparations for any harms committed through their activities.²⁷

e. Development Finance Institutions

DFIs should abandon their claims to immunity for environmental and social harms, as they can cause and contribute to human rights abuses and should be held accountable for any harm caused.²⁸ Further, DFIs involved in investment projects should make explicit commitments to human rights to meet sustainable development criteria. To ensure lessons learned and efficacy of remedial action, complainants should be provided with invitations to express their views on the complaint and the adequacy of the remedy. These meetings must be accessible online and transparent to watchdogs, CSOs, and community members.²⁹ A publicly accessible database of projects and accountability mechanisms at DFIs should also be created and distributed and publicized in investment-affected communities. All development financing should fall under an accountability mechanism, regardless of the activity being financed or the client receiving the funds from a DFI.³⁰ Further, all investment projects should be required to transparently disclaim any agency funding in the impact assessment.³¹

DFIs should also consider establishing remedy funds, which would “facilitate rapid and reliable reparations” for any harms, minimize “negative externalities of projects” on the most vulnerable and “help to ensure remedy is delivered in practice.”³² Such a funding mechanism should ideally “ring-fenc[e] assets, [either] as a pooled fund or on a project-by-project basis at the start of a project or investment,” thereby creating “greater certainty” that “funds will be available that can be accessed in a timely and efficient manner in the event of harm.”³³

2 International Labor Law

Overview and Rationale

The NZE transition requires countries to employ macroeconomic, industrial, sectoral, and labor policies to mobilize public and private investment in sustainable activities. These activities must generate decent jobs throughout value chains, and require the upgrading and transitioning of jobs, skills, and workers across industries. However, aligning economies with climate action also presents various distributional challenges, particularly in the economic restructuring and subsequent displacement of workers, the inherent costs of adaptation, and adverse effects that may be experienced by low-income households from higher energy and commodity prices.³⁴ Between countries, even well-managed fossil fuel dependent economies will face more exposure to negative economic and fiscal impacts of the NZE transition, disrupting value chains and affecting stakeholders throughout their economies.³⁵

A just transition entails ensuring that “meaningful employment” is available for those whose “jobs are lost in the process of change and ensuring that their rights are respected in the process.”³⁶ The ILO’s 2015 Guidelines for a Just Transition Towards Environmentally Sustainable Economies and Societies for All, negotiated between governments and unions of employers and workers, serves as a valuable resource on the framework for addressing distributional consequences on various economic stakeholders.³⁷ The Guidelines are based upon the four pillars of the Decent Work Agenda—social dialogue, social protection, rights at work, and employment.³⁸ Sustainability and climate action encompass more than just lowered emissions and environmental impacts; they also require addressing decent work, social inclusion, poverty eradication, and socioeconomic development.³⁹

Tripartite dialogue—between workers, industry, and governments—is key to shaping effective measures to mitigate climate impacts and create sustainable jobs and enterprises. Effective social dialogue is necessary to ensure that environmental and employment policies and development strategies are coherent and that the NZE transition is inclusive and just.⁴⁰

Summary of Main Recommendations: International Labor Law

- Including trade unions, industry, labor representatives, affected communities, and all other relevant actors (together, ‘social partners’) in the formulation, implementation, and monitoring of climate investment policies that respect, promote, and realize international labor rights.
- Fostering international cooperation in implementation to avoid a ‘race to the bottom’ and ensuring basic labor rights are recognized across borders.
- Facilitating domestic forums for proactive engagement between social partners to develop agreements on managing energy or workforce transitions.
- Committing to respect international labor obligations and obligating investors and investments to uphold best practices in these areas.
- Committing to domestic action, including through social safety nets, targeted education and training programs, pension funds, and government funding for a just transition.

Detailed Recommendations

States should cultivate social consensus in drawing pathways towards climate alignment and sustainability. Decision-making processes, political or judicial, should not only include governments and investors (employers), but also workers.⁴¹ Trade unions, industry, labor representatives, affected communities, and all other relevant community groups (together, ‘social partners’)⁴² must play an active role in supporting the formulation, implementation, and monitoring of sustainable development policies⁴³ at the national and international level. Countries should strive to implement coherent policies across economic, environmental, social, education, and

labor portfolios to create an enabling environment for enterprise, workers, investors, and consumers to drive the NZE transition together.⁴⁴

Policies and action addressing climate change should respect, promote, and realize the rights at work defined by the ILO.⁴⁵ These include “freedom of association and recognition of the right to collective bargaining, the elimination of forced or compulsory labor, the abolition of child labor and the elimination of discrimination in respect of employment and occupation.”⁴⁶

Sustainable pathways need to account for the gender dimensions of labor and economic policy, ensuring that impacts are appropriately distributed, and that climate-related economic policy does not entrench (or re-entrench) existing gender inequalities in the workforce.⁴⁷

The NZE transition requires a “country-specific mix of macroeconomic, industrial, sectoral, and labor policies” that mobilize and direct public and private investment towards sustainable activities, while generating decent jobs all along the supply chains.⁴⁸ Although policies and programs need to be designed in line with conditions of specific countries, international cooperation is necessary for implementation, in order to avoid a ‘race to the bottom,’ in which basic labor rights are not recognized across borders.⁴⁹

Countries must commit to encouraging climate investment and decent related jobs.⁵⁰ They should facilitate mediated domestic forums for proactive engagement between social partners to develop agreements on managing energy or workforce transitions.⁵¹

Parties must commit to respect international labor and human rights obligations, and in all new investment governance regimes, leverage obligations on investors and investments to similarly uphold best practice in these areas.⁵² Agreements must ultimately promote the creation of decent jobs, ensure social protection for job loss, promote skills development, and protect the right of laborers to organize and bargain.⁵³

All states must commit to domestic action, including the strengthening of social safety nets, creation of targeted education and training programs, protection of pension funds including energy sector workers’ pension savings (requiring divestment from fossil fuel investments), and specifically allocated government funding for just transition.⁵⁴ Funding for these programs can be collected through carbon pricing, as well as reallocation of savings from fossil fuel subsidies (discussed further in Sections 4.3 and 4.4 below).⁵⁵

3 International Investment Law

The area of international law that requires the most substantial reform to achieve alignment with climate goals is international investment law. The regime consists of a network of bilateral investment treaties (BITs), investment chapters in free trade agreements (FTAs), and other treaties with investment provisions governing the treatment of foreign direct investment (FDI) and foreign investors by host states. Investment treaties contain substantive provisions on the protection of investors and their investments along with investor–state dispute settlement (ISDS) mechanisms to enforce those substantive provisions through international arbitration.⁵⁶ As it stands, the regime is an obstacle to achieving climate goals, and it should be fundamentally redesigned to support climate-aligned investment governance, facilitate flows of climate investment, and progressively eliminate climate-disruptive investment.⁵⁷

Overview and Rationale for Change

Investment treaties and arbitration raise the costs of legitimate climate action by states, such as fossil fuel phase-outs and the regulation of other high-emission investment.⁵⁸ Under the existing investment regime, a foreign investor covered by an applicable treaty may claim monetary compensation from its host state for policy measures

perceived to negatively affect its investments in the host state.⁵⁹ As governments adopt climate policy measures, investors are increasingly resorting to ISDS to challenge those measures and seek monetary compensation.⁶⁰ For example, when states restrict petroleum activities, stop the expansion of fossil fuel infrastructure, or phase out fossil-fired power generation, investment treaties and arbitration may entitle foreign investors whose investments are impacted to pursue compensation for those measures.⁶¹ The investment regime effectively transfers liability of private companies to bear the costs of high-emission investments to the public, thereby protecting the economic interests of high-emission companies, at the expense of regulating them in the public interest.⁶²

Even the risk of climate-related investment arbitration may discourage policy action, leading to regulatory chill.⁶³ “Denmark, France, and New Zealand have openly admitted that they pushed back their deadlines to phase out oil and gas exploration or exploitation because of investment treaties and the fear of arbitration claims” by foreign investors.⁶⁴ There may be other states that are likewise “delaying action or lowering ambition” in relation to climate change because of the international investment regime.⁶⁵

The Energy Charter Treaty (ECT)—an investment treaty that protects energy investments only—illustrates how fossil fuel investors can use investment treaties to protect their economic interests, notwithstanding the purportedly ‘climate neutral’ nature of the treaty. Under the terms of the treaty, foreign investors are offered unilateral protections without corresponding obligations. In addition, domestic investors, affected communities, and even states have no meaningful access to justice vis-à-vis investors under the ECT. This framework establishes an asymmetrical system, including through lack of transparency by, and accountability of, foreign investors. Accordingly, although the ECT contains objectives besides the protection of investors, its arbitration system places a one-sided emphasis on protecting investors and capital flows, while downplaying public interests, and thereby undermining environmental, human rights, and sustainable development objectives.⁶⁶

In the effort to catalyze a just transition to NZE, it is inevitable that fossil fuels will be affected by climate policy. Almost one-fifth of investment arbitrations have been brought by fossil fuel companies; the latter have won around three of every four cases initiated.⁶⁷ Simultaneously, other stakeholders who are in much greater need of public support do not benefit from the same privileges to demand justice in the transition away from fossil fuels and other high-emission investments.⁶⁸ By maintaining the international investment regime, states are indirectly subsidizing a framework that ignores the climate imperative and, instead, protects and rewards coal, oil, gas, and other high-emission investments that dangerously interfere with the climate system.⁶⁹ As states increasingly seek to prohibit high-emission activities in an effort to act on climate change, investment treaties, in their current form, will act as an obstacle and are likely to constrain climate action, in both developing and developed countries.

Investment treaties are narrowly designed to safeguard the economic interests of foreign investors and to protect all types of FDI. Accordingly, by their nature, they protect low-emission and high-emission investments equally, as if they were equally desirable.⁷⁰ In recent years, the number and frequency of very large monetary compensation awards granted to foreign fossil fuel investors as a result of investor-state arbitration has significantly increased, especially in relation to disputes against developing countries, where the actions complained of may have been related to efforts of these countries to protect their land, biodiversity, or population.⁷¹

Climate change generates high physical and transition risk, making the valuation of fossil fuel assets extremely complicated and uncertain.⁷² In this context, states should reclaim from private arbitrators the issue of valuation of fossil fuel investments and of the compensation (if any) paid to fossil fuel investors.⁷³ From a market perspective, it is more efficient for private actors to make arrangements to protect themselves from the risks they may incur as a result of the NZE transition, through diversification and insurance, than for governments to pay compensation or other transitional relief.⁷⁴ In short, companies can largely afford to insure themselves against risks and should bear any uninsured costs of the NZE transition.⁷⁵

Without a fundamental deconstruction of the existing framework, the investment regime will continue to perpetuate the influence of fossil fuel companies to chill regulation and leech public funds to cover losses of the fossil fuel industry. In a world that is undeniably undergoing a major energy transition, fossil fuel companies and high-emission investments are increasingly characterized by corporate recklessness, maintaining obsolete energy forms, and investing in stranded assets, and such behavior should not be encouraged or rewarded through the investment treaty regime. Numerous reform proposals aim to bring investment treaties in line with climate action⁷⁶ and improve discrete aspects of substantive investment protection provisions and dispute settlement mechanisms.⁷⁷ These include for example, the creation of a “standing multilateral mechanism,” such as a multilateral investment court, as championed by the European Commission⁷⁸ and considered by the United Nations Commission on International Trade Law (UNCITRAL) Working Group III.⁷⁹ Proponents of these reforms argue that they are steps in the right direction, even if they are piecemeal approaches.⁸⁰

However, marginal changes fail to meet the necessary level of ambition or urgency required to address the climate crisis and the underlying problems of international investment law, and therefore risk legitimizing a fundamentally flawed regime. International investment law needs a full overhaul. It is not only incompatible with states’ commitments under the UNFCCC and the Paris Agreement, by constraining their right and duty to regulate in the climate policy space, as well as hindering policy action on the grounds of public health, access to public goods, protection of human rights and other environmental processes, and sustainable development generally.⁸¹ Further, the evidence on whether investment treaties and ISDS actually achieve their key benefits with respect to promoting FDI is, at best, inconclusive, with existing treaties neither increasing the quality nor quantity of FDI, nor promoting good governance, nor strengthening the rule of law, nor depoliticizing international conflicts surrounding foreign investment.⁸² As a result, even if there were evidence of any marginal benefits in these areas, they would be far outweighed by the outsized costs of the regime, some of which are explained above. Given the scale and urgency of the climate crisis, it is inefficient for states to renegotiate thousands of investment treaties to include climate-specific carve-outs, exceptions, or right to regulate clauses. Therefore, terminating investment treaties and arbitration mechanisms would help prevent complexity and enable urgent action.⁸³

As it stands, the investment regime allows foreign investors to undermine states’ climate ambitions. It sustains rules and power dynamics that are detrimental to individuals, local communities, and Indigenous Peoples, as well as the land and ecosystems on which they depend. In light of the multiple issues concerning investment treaties, international investment law needs to be redesigned to promote and facilitate climate-aligned investment governance.

After moving away from the existing regime, the international community should take bold and immediate action to design a new system that achieves climate-aligned investment governance. This new regime should be grounded in clear and common goals for promoting investment flows that support and protect people and planet; encourage sustainable, climate-aligned investment projects; and provide well-defined guidelines on climate-aligned investment governance, covering areas not only related to climate action, but also public health, environmental protection, and human and labor rights. To prioritize achieving climate goals, the regime should focus on phasing out investments in fossil fuels, related infrastructure, and other high-emission projects; facilitating a significant uptick in domestic and foreign climate investment flows, notably in critical minerals and their value chains, given their importance to the NZE transition; and achieving climate-aligned domestic and international governance of investment.

Summary of Main Recommendations: International Investment Law

- Terminating or withdrawing from investment treaties.
- Withdrawing advance treaty-based consent to investment arbitration.
- Neutralizing survival clauses.
- Eliminating privileges or protections for investors or investments that are unsound from a climate policy perspective or that challenge the sovereignty of states to adopt climate policy.
- Refraining from negotiating new investment treaties that fail to align with global climate goals.
- Strengthening international cooperation between states to address challenges in the governance of international investment.
- Supporting domestic administrative and judicial systems to facilitate investment governance and enforcement, including through investment assessment regimes based on climate-aligned criteria.
- Agreeing to swiftly phase out fossil fuel investments, including an immediate prohibition on new investments in coal, oil, and gas supply, and specific obligations and timelines for individual states, on the basis of fairness and equity.
- Eliminating international, domestic, and contractual law privileges for investors that are unsound from a climate perspective or that challenge climate policy, including protections, subsidies and other incentives, and public financing for fossil fuel and other high-emission investments.
- Agreeing to only incentivize, promote, and facilitate foreign investments that align with climate goals, the SDGs, and national development priorities.
- Moving away from investor–state arbitration in favor of dispute prevention mechanisms and state–state proceedings such as quasi-judicial compliance committees and joint committees.
- Facilitating and increasing North–South FDI flows of finance for climate investment.
- Dedicating public funds to just transition measures for disproportionately impacted workers and communities in developing countries.
- Agreeing to adapt domestic legal frameworks and practices on compensation to primarily protect individuals (workers, local communities, Indigenous Peoples, and low-income taxpayers) and smaller companies that are most vulnerable to climate impacts and the NZE transition.
- Disallowing claims of compensation from fossil fuel companies from states under domestic and international legal frameworks for legitimate regulatory changes responding to climate change.
- Modifying the valuation method of fossil fuel assets under international and domestic law frameworks in light of climate goals, stranded assets, and the remaining carbon budget.
- Focusing international legal frameworks on compensation on ensuring that states, particularly in lower-income economies, have sufficient resources for climate investment and loss and damages.

Detailed Recommendations

To remove the obstacles to climate investment posed by the existing international investment regime, states should adopt binding commitments to terminate, or withdraw from, investment treaties, and to withdraw advance treaty-based consent to investment arbitration. These measures would swiftly phase out investment protections for coal, oil, gas, and other high-emission investments.⁸⁴ States may take a tiered approach, starting with withdrawal of consent to arbitration, and subsequently either unilaterally terminating or withdrawing from treaties, or terminating treaties by mutual consent. Taking this approach would wipe the slate clean to build a just, climate-aligned investment regime.

State parties to relevant investment treaties should agree to neutralize sunset or survival clauses, which are typically included in investment treaties and protect existing investments in the host country for a period ranging from 10 to 30 years beyond the treaty’s termination.⁸⁵

States should also commit to refraining from negotiating new investment treaties that fail to align with global climate goals, the SDGs, or national development or public interest goals.⁸⁶

Moving towards an international investment law regime that supports climate-aligned investment governance will require international cooperation between states. Cooperation could include the creation of “mechanisms to address challenges in the governance of international investment, including with respect to intellectual property, technology transfer, and data; and support domestic administrative and judicial systems to facilitate investment governance and enforcement.”⁸⁷ States could also consider establishing independent national climate-aligned investment advisory bodies to oversee and support the implementation of global-to-local climate investment policies.⁸⁸

The urgency of the climate crisis means states should acknowledge that fossil fuels threaten the climate system and human lives.⁸⁹ Going beyond this, as well as the limited commitments in international climate agreements to date,⁹⁰ states should also agree on timelines to swiftly phase out fossil fuel investments, including an immediate prohibition on new investments in coal, oil, and gas, in line with the International Energy Agency’s (IEA) net-zero pathway.⁹¹ In particular, states could establish a framework to negotiate the phase-out of fossil fuel production, including specific phase-out obligations and timelines for individual states (defining which fuels each country will produce, how much of them, and until when),⁹² on the basis of principles of fairness and equity.⁹³

Moving away from an exclusive focus on the protection of foreign investors and their economic interests, states should consider adopting international law mechanisms to eliminate international, domestic, and contractual law privileges for investors that are unsound from a climate policy perspective⁹⁴ or that challenge the sovereignty of states to regulate climate change and other public interest issues. In particular, states should eliminate all protections, incentives (including subsidies), and public financing for fossil fuel and other high-emission investments.⁹⁵ At the same time as they phase out fossil fuel subsidies, states should commit to dedicating public funds to just transition measures for the benefit of disproportionately impacted workers and communities,⁹⁶ and to restricting the use of public funds to cover losses of companies that continue to invest in fossil fuels despite the climate imperative. The proposed Fossil Fuel Non-Proliferation Treaty for example, envisions an international agreement based on three pillars: non-proliferation of coal, oil, and gas; a fair phase-out in line with the 1.5°C goal; and a just transition.⁹⁷

Another area of cooperation to facilitate climate investment is the standardization of criteria to define sustainable, climate-aligned investment, helping funnel investment into the relevant sectors. States could establish an (international) body, made up of stakeholders spanning the public and private sector, civil society, and academia, to produce and mainstream these criteria. Criteria on sustainability and climate alignment must be applied meaningfully throughout the lifecycle of an investment, not simply its admission. All new investment governance treaties and regulation should provide incentives to meet the criteria, and practical consequences of not meeting them, including, for example, when considering favorable access to sustainable public procurement markets, facilitated approval processes, tax advantages and disadvantages, and regulatory sanctions.⁹⁸

Along with facilitating climate investment, states should also cooperate to shape climate-aligned governance regimes for existing and future foreign investment. For example, states could agree to only incentivize, promote, and facilitate foreign investments that align with climate goals, the SDGs, and national development priorities,⁹⁹ including by incorporating the criteria mentioned above. Similarly, states should strengthen their investment assessment regimes, with a view to thoroughly reviewing all domestic and foreign investments against internationally (and nationally) defined climate-aligned criteria, including environmental, social, and HRIAs; the maintenance of environmental management systems; and labor standards.

Similarly, states’ right and duty to take climate action and other measures in the public interest¹⁰⁰ and to regulate all investment in a climate-aligned manner should be strengthened. For example, states should cooperate to

introduce national measures to regulate and limit the production of fossil fuels and other high-emission activities,¹⁰¹ as well as to create and enforce investors' environmental and social obligations.

Finally, states should move away from investor–state arbitration and rely instead on dispute prevention mechanisms, including mediation, and state–state proceedings, such as quasi-judicial compliance committees and a joint committee between states to prevent and settle disputes. Such joint committees, in the model of existing best-practice investment treaties, could be composed of representatives of both parties, with the intention to monitor compliance, share opportunities for expanded climate investment, promote participation of private sector and civil society, and seek to resolve issues and disputes outside of ISDS.¹⁰²

With respect to building a new investment regime that promotes climate-aligned investment, states should negotiate specific ways in which they will implement the principle of common but differentiated responsibilities and respective capabilities enshrined in the UNFCCC.¹⁰³ They should emphasize the need for developed countries to take the lead in investing in decarbonization, building on earlier experiences regarding the consumption and production of hydrofluorocarbons under the Montreal Protocol¹⁰⁴ and the Kigali Amendment.¹⁰⁵ They should also conceive of innovative ways to facilitate and increase North–South FDI flows of finance for climate investment.¹⁰⁶ Relatedly, states should create and strengthen incentives for countries to conduct Research and Development (R&D) and share technologies, building on earlier experiences.¹⁰⁷

Further, to ensure a just transition, states should establish transition funds and other just transition mechanisms, with developed country funding, to support developing countries' workers and communities in transitioning away from fossil energy sources and other high-emission activities.¹⁰⁸ Establishing a framework with distinct responsibilities for developing and developed countries and common guidelines can help ensure a fair and equitable transition.

In light of the importance of critical minerals to the NZE transition, states should cooperate to ensure sustainable, ethical, and stable investment flows for critical minerals for the energy transition, and thoroughly review and oversee current investments to assure the suspension of unsustainable mining and processing practices. States should also adopt circular economy principles and guidelines on investment in sustainable production and systems and in R&D for efficient recycling practices for minerals and metals used by the industry, including critical minerals.¹⁰⁹

States should also agree to adapt their existing domestic legal frameworks and practices on compensation to primarily protect individuals and smaller companies that are most vulnerable to the impacts of climate change. Domestic legal frameworks on compensation should primarily focus on benefitting workers affected by the phase-out of fossil fuels, as they will need compensation in the form of severance packages, social safety nets, and resources and opportunities for retraining and upskilling.¹¹⁰ Domestic schemes should also primarily benefit other local communities and Indigenous Peoples, as well as broader populations and taxpayers directly or indirectly affected by climate change and the NZE transition.¹¹¹ Such effects include: the impacts of economic diversification away from coal, oil, and gas on other industries; subsequent increases in energy prices; social and environmental impacts of increased mining of critical minerals and metals needed for the NZE transition; and economic, social, and environmental impacts of the closure of coal mines, and the decommissioning of oil and gas fields and infrastructure.¹¹² International law should also embed commitments by states to translate those principles and criteria of distributive and procedural justice into their respective domestic legal frameworks and mechanisms—for example, through just transition or climate justice commissions or task forces—while staying mindful of countries' different priorities and capabilities.¹¹³

States should disallow fossil fuel companies to claim compensation from states under domestic or international legal frameworks for legitimate regulatory changes responding to climate change.¹¹⁴ In addition, states should cooperate to modify the valuation method of fossil fuel assets to represent climate adaptation and mitigation

interests, as well as the remaining carbon budget. If a fossil fuel asset can no longer be exploited for the benefit of the carbon budget, then the cost of stranding it should not be shifted from the investor to the state through an award or judgment for monetary compensation.¹¹⁵

Instead, international legal frameworks should center on ensuring that states have sufficient resources to invest in climate mitigation and adaptation, and to cover the growing costs of loss and damage.¹¹⁶ Compensation for loss and damage should be available especially for lower-income countries that are most vulnerable to climate and transition impacts and have least access to public finance.¹¹⁷

4 International Trade Law

The international trade regime hosts a variety of intersecting and relevant areas to climate investment. Below, we discuss Development and Industrial Policy (Section 4.1), Trade in Environmental Goods (Section 4.2), Carbon Border Adjustments (Section 4.3), and Fossil Fuel Subsidies (Section 4.4) and how these areas should be reformed for climate-aligned investment governance.

4.1 Development and Industrial Policy

Overview and Rationale for Change

Alongside reform of the international investment regime, specific developments and reforms of international trade frameworks are required to prepare and strengthen the economies in low and middle-income countries for an NZE world.¹¹⁸ The developing world is endowed with abundant resources required to address the climate emergency. These resources span across renewable energy, strategic minerals, biodiversity, and human capital. The African continent, in particular, encounters a considerable opportunity to develop productive capacity in zero-carbon value chains, including a massive scaling up of strategic minerals mining and supply chains for photovoltaics, electric batteries, hydrogen and other green fuels, electric vehicles, and digital services.¹¹⁹

A prerequisite for successfully capturing this opportunity is ensuring that international trade law frameworks applicable to the developing world contribute to, and allow for, climate investment flows and therefore, the development of economic sectors relevant to the NZE transition.

The energy sector, in particular, presents a great opportunity for the NZE transition. While there have been some increases in access to energy in Africa, the industry as a whole is generally still plagued with unreliability. Paired with significant rates of poverty, the limited access to energy is a serious problem in the developing world generally, and in Africa specifically. Additionally, widespread dependency on energy from coal, oil, gas, and traditional biomass is causing severe environmental, economic, and health damage.¹²⁰ Africa's energy potential, especially in relation to renewable energy, is vast; yet only a fraction of it is currently being used.¹²¹

As the world adopts renewable energy technologies on a larger scale, the energy transition will become exceedingly more mineral intensive as demand for these resources increases. To ensure sustainable development, circular economy approaches that lead to the recycling and reuse of these minerals, or even their substitution, may have a significant impact on the demand for these resources in the future.¹²²

Africa's extractive industries have been hampered in the past by a lack of infrastructure, political instability, conflict, corruption, and conflicting regulations.¹²³ There is now the opportunity to lower or eliminate emissions within the industry, thus making a much more sustainable venture in the long term, as well as the opportunity to sustainably grow the extractives industry.

Resource-rich countries in Africa, and beyond, have long used local content requirements (LCRs) to try to turn short-term gain from natural resource endowments to long-term prosperity of extractive industries.¹²⁴ In recent years, LCRs have gained in popularity in the renewable energy industry in African countries, which have attached LCRs to solar, wind, and other renewable energy investments, aiming to maximize their benefits.¹²⁵

World Trade Organization (WTO) Agreements have been ratified by the bulk of the world's trading nations. These agreements are intended to provide the legal ground rules for international commerce. The following frameworks cover and prohibit a broad range of policies that governments can and do use to promote nascent local industries and support the implementation of NZE transition policies:

1. The General Agreement on Tariffs and Trade (GATT);¹²⁶
2. Agreement on Trade-Related Investment Measures (TRIMs);¹²⁷
3. Agreement on Subsidies and Countervailing Measures (SCM);¹²⁸ and
4. The General Agreement on Trade in Services (GATS).¹²⁹

The provisions of these agreements focus to a great extent on preventing discrimination against foreign goods and service providers. These agreements are intricate and rely on interconnected provisions. Article III of GATT on National Treatment prohibits WTO member states from applying discriminatory measures on imports vis-à-vis like domestic products. Article XI of the GATT deals with the general elimination of quantitative restrictions on the importation and exportation of any products. Further, the TRIMs Agreement serves to clarify the kinds of trade-related investment measures that are specifically prohibited under Articles III:4 and XI.

The operation of these provisions may restrict countries' ability to enact LCRs and other potentially useful policies for the NZE transition, as described above. Therefore, states should adopt trade policies, including the reform of trade agreements, to provide the policy space to promote and facilitate climate investment, particularly in developing countries.

For example, states and regional organizations such as Ecuador, the EU, Kenya, and New Zealand have started to team up to cooperate on trade and climate, forming the Coalition of Trade Ministers on Climate.¹³⁰ This coalition is the beginning of the needed "joint action to tackle the climate crisis in a fair manner through trade policy."¹³¹ As Kenya's Cabinet Secretary for Industrialization, Trade and Enterprise Development, Betty Maina stated: "trade should not only empower and improve the livelihoods of communities but should also serve as a catalyst for climate solutions."¹³²

Summary of Main Recommendations: Development and Industrial Policy

- Enacting policies (including roadmaps, incentives, and financing mechanisms) to encourage the development of renewable energy systems.
- Renegotiating provisions in international trade agreements that hamper states' ability to adopt climate investment policies to drive the NZE transition.
- Developing innovative climate-aligned trade agreements to foster regional industrial policy.

Detailed Recommendations

States should cooperate in enacting policies to encourage the development of renewable energy sources¹³³ to promote energy security, access to energy, sustainable development, reduction of greenhouse gas (GHG) emissions, reduction of deforestation, and integration of renewable energy production in one state with other countries in the region.¹³⁴ Such policies are particularly vital in the developing world, to boost the development of renewable energy-focused economies rather than developing obsolete and stranded assets in the fossil fuel industry.

Ideally, in line with the recommendations in Section 3.2, states should consider renegotiating international trade agreements that hamper their ability to adopt climate investment policies to drive the NZE transition. In particular, policy space in the form of removing prohibitions or explicitly allowing appropriately designed and implemented performance requirements for climate investments should be formalized within the WTO.

In the interim, states should develop innovative regional treaties, with qualifiers attached that limit the applicable scope of these restrictive obligations. Permitting preferences to achieve development goals and broadening the scope for interpreting like circumstances to consider a variety of local policy and other considerations would accommodate many types of LCRs that might be found contrary to other legal obligations. By incorporating expanded exceptions to substantive standards of treatment in regional treaties, the operation of these standards of treatment could be significantly constrained, thereby enhancing states' policy-making ability.

4.2 Trade in Environmental Goods

Overview and Rationale for Change

One of the most cost-effective ways to foster climate investment is by liberalizing trade in low-carbon environmental goods, services, and Environmentally Preferable Products (EPPs)¹³⁵ by reducing tariffs and non-tariff barriers.¹³⁶ It is “a key mechanism through which climate change will influence the economic outcomes of low- and middle-income countries.”¹³⁷ In terms of environmental goods, while the Asia-Pacific Economic Cooperation (APEC) and the OECD have defined goods lists to be used in negotiations, structured plurilateral negotiations have so far been unsuccessful.¹³⁸ Trade in environmental services is a critical and complementary area to environmental goods, but there has been minimal formal discussion or negotiation of the matter to date.¹³⁹

The Agreement on Climate Change, Trade and Sustainability (ACCTS) is one initiative in this area that seeks to reconcile various issues of climate change, sustainability, and trade. The multilateral negotiations of the ACCTS, taking place amongst a narrow group of climate-progressive countries, will address the recommendations posed in this section.¹⁴⁰ However, action by other states is also needed to scale and mobilize trade in environmental goods and services in a globalized system.

The critical issue in trade in environmental goods has been defining what these goods are in trade classifications. Amendments to the World Customs Organization's (WCO's) Harmonized Commodity Description and Coding System (HS), which is used by nearly every country for classifying imports and exports, were implemented in 2022.¹⁴¹ These amendments specify definitions that should ease the distinction of which goods can be considered environmental goods in tariff schemes. They specifically provide detail and categorization for environmental goods, distinguishing them from alternatives, and making negotiations and data collection in the area much more straightforward.

However, EPPs are not included in the environmental good specifications. EPPs are produced in less carbon-intensive ways, and reducing tariffs on these goods could price in the social costs and benefits of these goods (in comparison to more carbon-intensive alternatives).

Goods and services that contribute to sustainability goals or climate-neutral production processes are opaquely defined and not recognized by any universal system. By providing a common language and broad-based precedents, policymakers can use consensus-based methods to legitimize stakeholders that use and promote sustainability characteristics in their goods and services.¹⁴² Furthermore, universally recognized international standards for environmental goods and EPPs allow international instruments to be used to embed the societal benefit of such goods and services into their prices, making environmentally-friendly products more competitive in market-based economies.

Summary of Main Recommendations: Trade in Environmental Goods

- Exploring options for liberalizing trade in environmental goods and services through universal environmental goods lists (including EPPs) and tariff reduction measures.
- Committing to reducing tariffs on goods and services building on existing standards and environmental goods lists to meet climate goals.
- Establishing inclusive working groups to discuss universalizing a sustainability characteristics list.
- Enhancing transparency and exchanging information on sustainability metrics, regulatory systems, accreditation systems, and testing procedures.

Detailed Recommendations

Countries should continue to commit to exploring options for liberalizing trade in environmental goods and services at the WTO, including through the Trade in Environmental Sustainability Structured Discussions (TESSD). These discussions should develop options for negotiating universal environmental goods lists and tariff reduction measures. Countries should convene these discussions to reopen negotiations on a universal Environmental Goods Agreement. Besides the structured discussions at the WTO, the negotiation of the ACCTS may serve as momentum for developing solutions to these challenges, which could subsequently be applied by other countries.¹⁴³

Countries should explore options for including EPPs on an agreed-upon environmental goods list. The APEC and OECD lists only include goods for which the environmental benefit relates to intrinsic characteristics in use, rather than its production process. Sustainably produced goods should be defined and included in trade liberalization measures. States should also produce further research and data on what defines environmental services and how to incorporate them into liberalizing measures.¹⁴⁴

States should commit to reducing tariffs on goods and services derived from the WCO standards and existing environmental goods lists (APEC and OECD) to meet climate goals.

An essential first step in regulating environmental goods and services is to be transparent and exchange information on sustainability metrics, regulatory systems, accreditation systems, and testing procedures. Working groups should be established to discuss universalizing a sustainability characteristics list. Such groups should consist of a broad range of stakeholders (governments, private sector, civil society, and academia) to explore options for defining “sustainability” in the context of goods and services. These groups should play a key role in improving data on EPPs and services by defining core metrics and methodological standard regulation.

4.3 Carbon Pricing and Border Adjustments

Overview and Rationale for Change

Carbon pricing mechanisms, in the form of either emissions trading (or cap-and-trade) systems or carbon taxes, have emerged as an increasingly promising and ubiquitous form of embedding the social cost of carbon emissions into the economic price of goods and services;¹⁴⁵ they create market-based incentives that encourage climate investment and a shift away from high-emissions investment. As of April 2023, there were 73 emissions trading systems or carbon taxes in operation, covering approximately 23% of global GHG emissions.¹⁴⁶

Despite growing climate ambition, in the absence of a binding multilateral agreement, national and regional carbon pricing mechanisms must be reconciled with each other to apply the same pricing pressure on goods and services crossing borders. The “competitive argument posits that carbon pricing mechanisms, environmental standards, carbon taxes, and more robust domestic regulations impose costs on specific domestic industries. Depending on

how stringent these policy instruments are, the production costs in these countries will be higher than industries making the same goods in jurisdictions with either weak or unenforced environmental regulations.”¹⁴⁷

As a result, policy that regulates and imposes taxes on GHG emissions will be priced into the domestic industry, and imported goods and services from unregulated sectors will be more competitive in domestic markets. For “energy-intensive and hard-to-abate sectors,” compliance costs for meeting environmental regulations can be up to six percent higher.¹⁴⁸ In plainer terms, risks around leakage and competitiveness persist. Border carbon adjustments (BCAs) present an opportunity to avoid these risks by applying the same domestic emissions pricing frameworks to foreign goods and services.

In December 2022, the European Council and European Parliament reached a provisional agreement on the European Union Carbon Border Adjustment Mechanism (CBAM),¹⁴⁹ which began to operate pursuant to the provisional agreement from October 2023.¹⁵⁰ Preliminary design of other BCA policies are also being explored in similar advanced economies, including Canada, the United Kingdom, and the United States.

The effective implementation of carbon pricing and border adjustment mechanisms depends on consistent accounting of the greenhouse gases embedded in traded products and services. Various accounting frameworks, including the Task Force on Climate-Related Financial Disclosures (TCFD), Global Reporting Initiative (GRI), and CDP (formerly Carbon Disclosure Project), rely on voluntary reporting by companies and do not prescribe any particular accounting methodology.¹⁵¹ Harmonizing so that emerging economies that are climate ambitious may verify their carbon competitiveness.¹⁵² Such a system would make it easier for states and organizations to receive credit for lower carbon intensity in an international market that puts a price on carbon emissions.¹⁵³

Summary of Main Recommendations: Carbon Pricing and Border Adjustments

- Expanding carbon pricing mechanisms such as emissions trading systems and carbon taxes, and in the interim cooperating on adopting BCAs to avoid offshoring and leakage.
- Designing cooperative tools based on their role for climate action and adapting international trade rules accordingly.
- Exploring international climate or carbon clubs and other solutions to prevent carbon leakage, as a first step toward a multilateral approach to carbon leakage.
- Dedicate revenues from BCAs to support the industrial low-carbon transition in vulnerable low- and middle-income countries.
- Adopting an internationally harmonized accounting framework for reporting GHG emissions throughout value chains.

Detailed Recommendations

States without carbon pricing mechanisms should, in light of national circumstances, explore cap and trade systems or carbon taxes as policy options to embed the social externalities of fossil fuels into the economy. States with carbon pricing mechanisms should cooperate on the adoption of BCAs to avoid incentivizing offshoring and leakage.¹⁵⁴

Rather than designing climate policies around concerns regarding WTO compatibility, states should “design cooperative tools that further the cause of fighting climate change, and WTO members should broaden their understanding of WTO exceptions to include such measures.”¹⁵⁵

An international climate or carbon club could be one option to prevent carbon leakage. This could be the first step by states towards a more multilateral approach to carbon leakage. It would expand the bounds of carbon pricing

mechanisms, avoid leakage, and pressure external parties to join or face carbon pricing mechanisms to avoid limited market access.¹⁵⁶

Revenues from BCA taxation should support the industrial low-carbon transition in low- and middle-income countries, which is where these mechanisms will have the greatest impact. States implementing BCAs should explore solutions through an international industry transition investment fund that would help to reduce capital costs. Advanced economies could dedicate part of the revenues to top-up climate finance support for vulnerable low-income countries.

To support climate pricing and border adjustment mechanisms, states should explore harmonizing greenhouse gas accounting by developing an internationally uniform and comprehensive framework that accurately and consistently measures GHG emissions throughout supply chains. For example, the Coalition on Materials Emissions Transparency (COMET) Framework is an effort to harmonize GHG emissions standards and protocols and provide sector-specific guidance.¹⁵⁷

4.4 Fossil Fuel Subsidies

Overview and Rationale for Change

Phasing out fossil fuel subsidies would not only remove incentives that make fossil fuels and other high-emission investments artificially competitive but would also help free up resources for climate investment and a just energy transition.¹⁵⁸ Fossil fuel subsidy schemes pull scarce financing and public investment away from the energy transition and climate action plans. A subsidy swap to redirect savings and reallocate spending away from fossil fuels to renewable energy would accelerate the replacement of fossil fuels with sustainable energy systems.¹⁵⁹

Major advanced economies still support coal, oil, and fossil gas production and consumption by funneling hundreds of billions of U.S. dollars into subsidies each year.¹⁶⁰ Fossil fuels receive considerable subsidies in much of the world, and more subsidies are directed towards consumers and producers of fossil fuels than renewable energy.¹⁶¹ According to the OECD and IEA, overall government support for fossil fuels in 51 countries worldwide doubled to USD 697.2 billion in 2021, from USD 362.4 billion in 2020.¹⁶² This total volume is multiples of the USD 100 billion annual commitment by developed countries set out in international climate agreements,¹⁶³ which, according to the OECD, developed countries have so far failed to meet,¹⁶⁴ demonstrating the vast potential resources available to states to funnel into climate investment if fossil fuel subsidies were removed.¹⁶⁵ Governments should instead use these funds to develop low-carbon alternatives and finance the NZE transition, both of which are desperately needed to meet climate goals.

Data from the IEA shows that, while there was a noticeable dip in fossil fuel subsidies in 2020 due to the COVID-19 pandemic, energy subsidies have been rising again since 2021, with fossil fuel consumption subsidies hitting a record USD 1 trillion in 2022, as the global energy crisis triggered by Russia's invasion of Ukraine created turmoil in energy markets.¹⁶⁶ However, as noted by the OECD and IEA, countries should resist raising government support for fossil fuels in response to global surges in energy prices, as well as any lingering economic impacts of the pandemic.¹⁶⁷ According to the OECD, "given the existential threat of climate change and the need for a green recovery, [states] should accelerate investment in sustainable energy infrastructure and the creation of green jobs, as well as meeting the [SDGs], in particular SDG 7, to ensure access to affordable, reliable, sustainable and modern energy for all."¹⁶⁸ For example, despite the increase in public stimulus in response to the COVID-19 pandemic, environmental goals only accounted for 21% of COVID-19 recovery spending.¹⁶⁹ The increase in public spending presents a unique opportunity to shift public resources to areas that support environmental and climate goals, without destabilizing existing economic structures. The current global energy crisis also brings increased opportunities for renewable energy. Energy security has emerged as a strong motivation to accelerate renewable energy deployment.¹⁷⁰ At the EU level for example, in response to concerns about energy security, the European

Commission announced aims to increase the share of renewables in final energy consumption to 45% by 2030, exceeding the 40% previously under negotiation.¹⁷¹ However, as the energy crisis continues, states must be conscious that market interventions to shelter citizens from high energy costs should not harm the business case for renewable developers.¹⁷²

Macro-level changes in the international subsidy structure are visible as overall fossil fuel subsidies decrease and investment in renewables increases. However, progress is not linear and follows oil prices. The OECD and IEA estimate, which covers 76 economies, shows a downward trend in support of fossil fuels from 2013 to 2016.¹⁷³ A reversal in 2017 of 5% indicates that policy is incongruent with the efficiency of energy sources and returns on investments and instead prioritizes vested interests in the fossil fuel industry.¹⁷⁴ Returns on renewable investments have exceeded returns on fossil fuel investments every year since 2008.¹⁷⁵ Falling costs and increasing returns on investment implies the USD 697.2 billion spent in 2021 by 51 economies on fossil fuel subsidies could instead fund more renewables every year at greater efficiency.¹⁷⁶

SDG 12, target 12.C, mandates that countries “[r]ationalize inefficient fossil fuel subsidies that encourage wasteful consumption.”¹⁷⁷ A subsidy swap would funnel assets from fossil fuel industries to retraining programs, renewable energy innovation and production, and other climate goals, and in doing so magnify the contributions to long-term emission reductions and supporting SDGs focused on the economy, jobs, public health, and gender equality.¹⁷⁸

Summary of Main Recommendations: Fossil Fuel Subsidies

- Cooperating in exploring options for swapping subsidies away from the fossil fuel industry and into the renewable energy industry, notably by supporting large-scale on-grid renewables and implementing mechanisms that mobilize private finance into renewable energy projects.
- Expanding and expediting commitments to review and reform fossil fuel subsidies, turning them into actionable mandates to phase out fossil fuel subsidies.
- Increasing taxes on fossil fuels to generate fiscal resources for renewable energy.
- Subjecting subsidies to periodic evaluations and interdepartmental policy reviews to ensure a just transition and efficient spending on climate goals.
- Maintaining a public inventory of fossil fuel production and consumption subsidies, broadly defined, to keep up the momentum for fossil fuel subsidy phase-out.

Detailed Recommendations

To avoid stranding scarce public spending in an industry which will be rendered obsolete by the need to address the climate emergency, countries should commit to international cooperation in exploring options for swapping subsidies away from fossil fuels and into renewable energy.

Commitments have existed since 2009 to reform and revise fossil fuel subsidy schemes. Countries can expand their commitment to exiting fossil fuel subsidies to include mandates for reform, followed by increases in taxes on fossil fuels to continue to generate fiscal resources for renewable energy, while simultaneously reducing emissions.

COVID-19 recovery spending should be committed to financing renewable energy, rather than subsidizing fossil fuels. Countries must commit to using recovery stimulus on climate-aligned technologies and jobs, rather than undermining commitments to address the climate crisis by reinvesting in inefficient subsidy schemes. Similarly, concerns about energy security, as a result of the global energy crisis, should be harnessed to accelerate renewable energy development.¹⁷⁹

Governments should explore ways to focus on higher-impact swaps by supporting large-scale on-grid renewables and implementing mechanisms that mobilize private finance into renewable energy projects.¹⁸⁰

According to the OECD, the G20 has already committed to auditing and reviewing their fossil fuel subsidies for efficiency.¹⁸¹ This agreement should broaden to more countries. Continued peer reviews under the G20 2009 Pittsburgh Agreement can ensure impartial judgment and remove conflicts of interest in the evaluation of subsidy schemes.¹⁸²

Countries should commit to periodic evaluations and interdepartmental policy reviews to ensure both a just transition and efficient spending on climate goals. A policy review should include the impact of energy taxation, alternative measures, and reforms to ascertain how subsidy schemes distribute the burden among consumer groups and interactions with other policy measures proposed to address the just transition and renewable energy transition within countries' climate goals and commitments.¹⁸³

Countries should also maintain a public inventory of fossil fuel subsidies.¹⁸⁴ Increasing transparency on the use of scarce public resources is one way to keep up the momentum for fossil fuel subsidy reform. Inventories should consider subsidies for both production and consumption of fossil fuels, as well as tax and non-tax measures that incentivize fossil fuel production and use. This inventory and review should be open to transparent stakeholder consultation.¹⁸⁵

Countries should consider the “negative externalities of the use of fossil fuels when evaluating the energy taxation and public finance supporting the use and consumption of fossil fuels.”¹⁸⁶ International organizations and political entities should review the tax schedules under their purview, which fit the above description.¹⁸⁷

5 International Intellectual Property Law

Overview and Rationale for Change

Changes to intellectual property laws are needed for more effective and efficient transfers of climate mitigation technologies to ensure the emissions reductions necessary to meet the 1.5°C goal.

The existence of few treaty provisions for the management of intellectual property with respect to the development and transfer of technologies, with little or limited implementation, limits the developing world's ambition to reduce GHG emissions.¹⁸⁸ Beyond acknowledgement of the need, little action has been adopted to address the urgency of scaling up action and support—including finance, capacity building, and technology transfer—to enhance adaptive capacity, strengthen resilience, and reduce vulnerability to climate change in line with the best available science.¹⁸⁹ While the establishment of a Technology Mechanism under the Paris Agreement was a useful step towards facilitating climate-aligned technology transfer, the mechanism has struggled to reach operational level, and fails to fulfill the ambitions needed to match the scale of necessary sustainable development.¹⁹⁰ Delayed technology transfer and stringent international intellectual property regulations impede the priorities and needs of vulnerable and developing countries, where climate-aligned technology is required both to adapt to the consequences of climate change in the short term, and to assist development along low-carbon development pathways in the long term.¹⁹¹ While the Paris Agreement commits countries to collaborate on innovation for the energy transition, the rate of transfer of these technologies fails to meet the urgency of requirements under the UNFCCC.¹⁹² Technology flows from OECD to non-OECD economies accounted for only 22% of all transfers of climate mitigation technology, indicating a vast issue of justice and efficiency in the existing paradigm for distribution of green technology.¹⁹³

The international framework governing intellectual property does not contain specific permissions for environmentally sound technologies (ESTs), though avenues can be found using particular language in Article 27.2 of the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS).¹⁹⁴ Under the TRIPS Agreement, all fields of technologies, including ESTs, have to be equally protected by intellectual property rights, and all developing WTO Members, except Least Developed Countries (LDCs), have to incorporate minimum intellectual

property right standards into their national legal systems. However, according to the Intergovernmental Panel on Climate Change (IPCC), evidence that strict and rigid intellectual property protection facilitates domestic innovation is almost exclusively limited to specific sectors in developed countries.¹⁹⁵

While intellectual property regulations are critical in catalyzing investment and innovation in carbon mitigation and climate-aligned technology, facilitating easy and inexpensive technological transfers avoids wasting resources and human capital reinventing technologies that benefit the collective action required to tackle the climate emergency.¹⁹⁶ FDI is not an essential development tool in the initial stages of technological development across countries, but it plays an increasingly important role in more advanced stages.¹⁹⁷ However, foreign investors tend to do most of their R&D in their home countries, limiting the growth of core technologies in host countries.¹⁹⁸ Effective financing for the transfer of ESTs can avoid duplicating costs and efficient use of investment.

Summary of Main Recommendations: International Intellectual Property Law

- Accelerating the development and deployment of technologies and capital for climate investment through formal commitment, dedicated financing, and incentives for innovation.
- Facilitating and expediting climate-related technology transfer and rights involving intellectual property management, protection, and enforcement.
- Exploring market, hybrid, and non-market approaches to fast track the transfer of ESTs.
- Including private sector technologies and intellectual property in the WIPO GREEN database.
- Strengthening existing funding mechanisms and networks to disseminate green technology.
- Declaring exceptions to intellectual property law under the TRIPS Agreement for “emergency,” “non-commercial use” and “domestic market requirement,” given the climate crisis.
- Increasing multilateral development bank financing for climate-aligned investment projects involving technology transfer.
- Creating favorable trading conditions, loosened administrative processes, and other financial mechanisms to encourage climate-aligned development and foster transfer of EST technologies.

Detailed Recommendations

Countries must accelerate the development and deployment of technologies and capital, which will ensure the emissions reductions necessary to reach the 1.5°C goal, through formal commitment, dedicated financing, and incentives for innovation.

WTO, UNFCCC, and World Intellectual Property Organization (WIPO) members should collaborate to discuss climate-related technology transfer and rights involving intellectual property management, protection, and enforcement.¹⁹⁹ States, key stakeholders from the private sector, and international institutions should undertake these discussions and conclude subsequent agreements to facilitate faster technology transfer and adjust restrictions on intellectual property for ESTs to allow affordable dissemination of these technologies in the developing world.

States should also explore market, hybrid, and non-market approaches to fast track the transfer of ESTs, including examining provisions in EST transfer deals that may limit the transfer of capability and adaptive capacity to technology-importing countries.²⁰⁰ The latter should also consider entering into collaborative agreements, such as innovation cooperation or pooling demand, to improve their bargaining power.²⁰¹

States should commit to collaborating with the private sector to include their technologies and intellectual property in the WIPO GREEN database to deploy climate technology more efficiently.²⁰²

The funding mechanisms and networks to disseminate green technology established by the Copenhagen and Paris negotiations, and in particular the Green Climate Fund (GCF), should be reviewed and reformed as needed for greater efficiency.²⁰³ States must reinforce the commitment to set a quantifiable climate finance goal and mechanism as explored in the ad hoc work program on financing under the Paris Agreement.

Parties should declare exceptions to intellectual property law under the TRIPS Agreement for “emergency,” “non-commercial use” and “domestic market requirement,” given the rapidly accelerating climate crisis.²⁰⁴

Multilateral development banks need to enhance financing for projects which help to achieve climate plans and to develop new approaches for mobilizing finance from private parties for adaptation.

In the style of the Clean Development Mechanism (CDM) in the Kyoto Protocol and its successor, the so-called Sustainable Development Mechanism in the Paris Agreement,²⁰⁵ industrialized countries may be incentivized to develop or finance projects that reduce GHG emissions in developing countries in exchange for emission reduction credits or modified Nationally Determined Contributions (NDCs). Favorable trading conditions, loosened administrative processes, and other financial mechanisms, at the international, multilateral, bilateral or national level should be explored to similarly encourage climate-aligned development. Further, promoting projects in non-Annex I parties may be a great use of financing to foster transfer of EST technologies.

6 Illustrative Options to Reform International Law for Climate-Aligned Investment Governance

The preceding sections provide a literature-backed overview of rationales for change and reform opportunities to align disparate areas of international law to achieve climate-aligned investment facilitation and governance. While our recommendations include measures that can be taken at the multilateral, bilateral, and domestic levels, states may consider, additionally or alternatively, tying all of these strands of reforms together under one or more overarching international instruments on advancing climate-aligned investment governance. Having such international law instruments highlights the global issue of the inadequate level of climate investment and the need to catalyze collective action to meet international climate mitigation and adaptation goals and to ensure a just transition to sustainable, NZE economies.

What is ultimately important is that international law is coherent and supportive of investment flows necessary to achieve climate action, other SDGs, and the realization of human rights. The means of reform is less important than its outcome. Nevertheless, we offer illustrative examples of international instruments that could be useful in realizing a coherent framework for climate-aligned investment governance under international law, serving as a commitment device, a reference framework, or a multilateral instrument of reform:

- **A non-binding political declaration on climate-aligned investment governance:** This declaration would set out the main principles and objectives for climate-aligned reform of international law, in line with the recommendations made in this paper, and include a call to action for states to voluntarily commit to pursuing such reforms.
- **A framework convention on climate-aligned investment governance:** This framework convention would be legally binding. It would set up the general norms, objectives, and institutions of a new regime to form the foundation for subsequent protocols. These protocols would include specific commitments to reform the various areas of international law outlined in this paper.

- **A binding protocol on climate-aligned investment governance under the UNFCCC:** This protocol (or protocols) would set out specific commitments to reform the areas of international law identified in this paper. It would fall under the existing climate-related framework convention.
- **A binding treaty or treaties on climate-aligned investment governance:** Such treaty or treaties would take a comprehensive approach to reforming each of the areas of international law, as relevant, in the various self-contained regimes dealt with in this paper (largely focusing on International Investment, Trade, and Intellectual Property Law).

Our aim is to simply highlight the various options available, as well as to provide ideas of how such instruments could take shape. Further research is needed to discuss these and other possible approaches, outlining advantages and disadvantages of each, considering how to ensure broad representation of state parties and meaningful engagement by non-state parties, and assessing whether the instrument would create a stand-alone regime or be situated within an existing one.

Conclusion

In this working paper, we discussed why and how to align international law holistically to achieve climate-aligned investment governance. Across the thematic areas of international law focused on—namely, human rights (Section 1), labor (Section 2), investment (Section 3), trade (Section 4), and intellectual property (Section 5)—we examined the interdisciplinarity of investment governance and outlined recommendations that states could consider adopting to align international legal regimes with climate action. International law instrument or instruments that states could consider adopting, whether alternatively or additionally to regime-specific reform, to strengthen coherence in climate-aligned investment governance across the various strands of international law, include those listed in (Section 6): (1) a non-binding political declaration on climate-aligned investment governance, (2) a framework convention on climate-aligned investment governance, (3) a binding protocol on climate-aligned investment governance under the UNFCCC, and (4) a binding treaty or treaties on climate-aligned investment governance.

The scope and depth of areas covered, issues discussed, and reform solutions proposed in this working paper are non-exhaustive. We did not intend, and could not have intended, to provide complete and definitive answers or conclusions, which even a treatise on climate-aligned investment governance would have failed to provide, given the need to take into account a diversity of perspectives by all stakeholders, including governments, business, civil society, workers, local communities, Indigenous Peoples, women, youth, and other historically disadvantaged groups.

Instead, the reflections in this working paper serve as a preface on the need for coherence in international law for climate-aligned investment governance and on a possible framework to achieve it. We invite and hope to inspire further thinking, research, and discussion on how to bridge gaps and build cohesion among these and other areas of international law relevant to investment governance, with a view to aligning international law with climate goals.

Annex A

Via IPCC, “Summary for Policymakers” in *Climate Change 2022: Mitigation of Climate Change*, eds. Priyadarshi R. Shukla et al. (Cambridge and New York: Cambridge University Press, 2022), 38, https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_SummaryForPolicymakers.pdf.

Many options available now in all sectors are estimated to offer substantial potential to reduce net emissions by 2030. Relative potentials and costs will vary across countries and in the longer term compared to 2030.



Figure SPM.7 | Overview of mitigation options and their estimated ranges of costs and potentials in 2030.

Annex B






Via IPCC, “Summary for Policymakers” in *Climate Change 2014: Synthesis Report*, eds. Rajendra K. Pachauri et al. (Cambridge and New York: Cambridge University Press, 2022), 27, https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf.

Table SPM.3 | Approaches for managing the risks of climate change through adaptation. These approaches should be considered overlapping rather than discrete, and they are often pursued simultaneously. Examples are presented in no specific order and can be relevant to more than one category. *(Table 4.2)*

Overlapping Approaches	Category	Examples
Vulnerability & Exposure Reduction through development, planning & practices including many low-regrets measures	Human development	Improved access to education, nutrition, health facilities, energy, safe housing & settlement structures, & social support structures; Reduced gender inequality & marginalization in other forms.
	Poverty alleviation	Improved access to & control of local resources; Land tenure; Disaster risk reduction; Social safety nets & social protection; Insurance schemes.
	Livelihood security	Income, asset & livelihood diversification; Improved infrastructure; Access to technology & decision-making fora; Increased decision-making power; Changed cropping, livestock & aquaculture practices; Reliance on social networks.
	Disaster risk management	Early warning systems; Hazard & vulnerability mapping; Diversifying water resources; Improved drainage; Flood & cyclone shelters; Building codes & practices; Storm & wastewater management; Transport & road infrastructure improvements.
	Ecosystem management	Maintaining wetlands & urban green spaces; Coastal afforestation; Watershed & reservoir management; Reduction of other stressors on ecosystems & of habitat fragmentation; Maintenance of genetic diversity; Manipulation of disturbance regimes; Community-based natural resource management.
	Spatial or land-use planning	Provisioning of adequate housing, infrastructure & services; Managing development in flood prone & other high risk areas; Urban planning & upgrading programs; Land zoning laws; Easements; Protected areas.
	Structural/physical	Engineered & built-environment options: Sea walls & coastal protection structures; Flood levees; Water storage; Improved drainage; Flood & cyclone shelters; Building codes & practices; Storm & wastewater management; Transport & road infrastructure improvements; Floating houses; Power plant & electricity grid adjustments.
		Technological options: New crop & animal varieties; Indigenous, traditional & local knowledge, technologies & methods; Efficient irrigation; Water-saving technologies; Desalination; Conservation agriculture; Food storage & preservation facilities; Hazard & vulnerability mapping & monitoring; Early warning systems; Building insulation; Mechanical & passive cooling; Technology development, transfer & diffusion.
		Ecosystem-based options: Ecological restoration; Soil conservation; Afforestation & reforestation; Mangrove conservation & replanting; Green infrastructure (e.g., shade trees, green roofs); Controlling overfishing; Fisheries co-management; Assisted species migration & dispersal; Ecological corridors; Seed banks, gene banks & other <i>ex situ</i> conservation; Community-based natural resource management.
		Services: Social safety nets & social protection; Food banks & distribution of food surplus; Municipal services including water & sanitation; Vaccination programs; Essential public health services; Enhanced emergency medical services.
Institutional	Economic options: Financial incentives; Insurance; Catastrophe bonds; Payments for ecosystem services; Pricing water to encourage universal provision and careful use; Microfinance; Disaster contingency funds; Cash transfers; Public-private partnerships.	
	Laws & regulations: Land zoning laws; Building standards & practices; Easements; Water regulations & agreements; Laws to support disaster risk reduction; Laws to encourage insurance purchasing; Defined property rights & land tenure security; Protected areas; Fishing quotas; Patent pools & technology transfer.	
	National & government policies & programs: National & regional adaptation plans including mainstreaming; Sub-national & local adaptation plans; Economic diversification; Urban upgrading programs; Municipal water management programs; Disaster planning & preparedness; Integrated water resource management; Integrated coastal zone management; Ecosystem-based management; Community-based adaptation.	
Social	Educational options: Awareness raising & integrating into education; Gender equity in education; Extension services; Sharing indigenous, traditional & local knowledge; Participatory action research & social learning; Knowledge-sharing & learning platforms.	
	Informational options: Hazard & vulnerability mapping; Early warning & response systems; Systematic monitoring & remote sensing; Climate services; Use of indigenous climate observations; Participatory scenario development; Integrated assessments.	
	Behavioural options: Household preparation & evacuation planning; Migration; Soil & water conservation; Storm drain clearance; Livelihood diversification; Changed cropping, livestock & aquaculture practices; Reliance on social networks.	
Spheres of change	Practical: Social & technical innovations, behavioural shifts, or institutional & managerial changes that produce substantial shifts in outcomes.	
	Political: Political, social, cultural & ecological decisions & actions consistent with reducing vulnerability & risk & supporting adaptation, mitigation & sustainable development.	
	Personal: Individual & collective assumptions, beliefs, values & worldviews influencing climate-change responses.	
Adaptation including incremental & transformational adjustments		
Transformation		

Annex C

Via UNCTAD, *World Investment Report 2022: International Tax Reforms and Sustainable Investment* (New York: UNCTAD, 2022), 33, https://unctad.org/system/files/official-document/wir2022_en.pdf.

Table I.12. Climate change investment categories	
Sectors	Investment area
Climate change mitigation	
Renewable energy	 <ul style="list-style-type: none"> • Power generation from: biomass, geothermal, hydroelectric, hydrogen, solar, tidal or wave, waste (excluding biomass), wind.
Energy efficiency/ emission reduction	 <ul style="list-style-type: none"> • Energy provision efficiency transmission lines, battery storage, carbon capture. • Other investments in energy efficient technology or products: electric vehicles, clean technologies.
Low-emission transport	 <ul style="list-style-type: none"> • Mass transit systems: rail, public transport systems.
Climate change adaptation	
Water management	 <ul style="list-style-type: none"> • Investments on climate related changes in the water cycle: water pipelines, water supply, district cooling (i.e. deep ocean or lake water cooling systems), desalination, water storage, disposal and treatment.
Other adaptation	 <ul style="list-style-type: none"> • Investments to improve the climate resilience of existing infrastructure, and coastal protection. • Climate resilient agriculture, such as flood / drought resistant crops.

Source: UNCTAD.

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