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15. Governing international climate finance and investment: the Paris Agreement and related international and transnational mechanisms

David Rossati and Alexander Zahar

1. INTRODUCTION

> When it comes to climate change, finance is about more than money. It's about helping people impacted by climate change. It's about reducing their suffering. And, in some cases, it's about saving lives.[1]

With these words, Patricia Espinosa, the then Executive Secretary of the United Nations Framework Convention on Climate Change (UNFCCC),[2] made an appeal to developed countries to contribute funds to the replenishment of the Green Climate Fund (GCF), the flagship operational entity of the Framework Convention and the Paris Agreement. The GCF is tasked to channel billions of dollars of public finance into climate mitigation and adaptation projects in developing countries. Espinosa also remarked that 'success here means sending a clear and unmistakable message of trust to developing countries that they can have confidence in the process going forward'.[3]

Her words capture the essence of climate finance under the international climate change regime as a discrete regulatory and institutional setting covered by international law, having at its centre the climate treaties and their institutions. As one of the three pillars of the multilateral governance structure on the climate,[4] climate finance is generally understood as a concerted effort by developed countries to scale up financial flows to developing and least-developed countries. Climate finance primarily takes the form of funding for specific climate-related projects and programmes, whose assemblage is considered to promote global decarbonization and the climate resilience of societies in the Global South, as well as the achievement of the global mitigation and adaptation goals of the Paris Agreement, by enabling countries in need of support to comply with their obligations and their own goals.

Yet, if climate finance was first conceived of as a purely interstate affair and a planned transnational transfer of public finance,[5] it has become apparent through the years that the demands and needs of the Global South would not be matched solely by a transfer of public money. It

1 UNFCCC Secretariat, 'Patricia Espinosa: "Climate Change is about Saving Lives"' (18 October 2018), <https://unfccc.int/news/patricia-espinosa-climate-finance-is-about-saving-lives>.

2 United Nations Framework Convention on Climate Change (adopted on 9 May 1992, entered into force on 21 March 1994) 1771 UNTS 107.

3 UNFCCC Secretariat (n. 1).

4 Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), in UNFCCC Conference of the Parties (COP), 'Decision 1/CP.21, Adoption of the Paris Agreement', UN Doc. FCCC/CP/2015/10/Add.1 (29 January 2016) Annex, art. 2.

5 UNFCCC, arts 4(3) and 11.

can be debated whether this was a political or a pragmatic realization,[6] but it led nonetheless to an expansion of climate finance as a phenomenon and as a policy objective, buttressed by law to some extent. Since the Copenhagen Accord – a non-binding agreement reached at COP 15 in 2009[7] – efforts on climate finance by states are to include the mobilization of capital from a 'wide variety of sources, instruments, and channels'.[8]

This terminological shift has transformed the way in which climate finance is understood and accounted for today.[9] It has also transformed how it should operate and how it should be regulated and 'governed'. Transfers of public climate finance are now mostly intended to work as a 'catalyst' or 'leverage' for the expansion of private capital investment in climate-related activities,[10] be they of a national or international nature. This way of understanding the linkages between the public and private spheres of economic intervention for the benefit of the climate also affects the way in which one should understand the law and the form of governance it leads to.

Thus, in this chapter, we look at a broad spectrum of law and governance related to climate finance and investment. Of necessity, we go far beyond the Paris Agreement. We offer a perspective on how law operates in selected contexts by enabling or hampering this ambitious and complex global policy effort. But rather than attempting to examine *all* of the law related to climate finance and investment, we have instead selected some crucial sites of regulation and governance, on the basis of the different forms law takes in terms of specificity and precision in designing climate finance and investment policies. At the core of this regulatory realm, no doubt, is the Paris Agreement, with its stated aim of redirecting financial flows toward sustainable and climate-resilient causes.[11] The picture that emerges is one of a multiplicity of roles and 'densities' that law has in 'governing' climate finance.

Accordingly, in section 2, we consider whether an international (treaty) law of climate finance, as such, has emerged. We show that while the international climate change regime accords a critical role to climate finance, it falls short of creating legal obligations for states, except in the narrow area of state reporting on climate finance. In section 3 we then ask a similar question in relation to a level below the treaty regime: How does the regulation of climate finance work in the context of the worldwide network of multilateral development banks (MDBs) as institutions that raise and distribute a sizable chunk of multilateral climate finance to developing countries? We find that a significant concentration of sustainability-focused finance and investment law, as well as norm creation, specifically relating to climate change, occurs at the level of MDBs. In section 4 we shift our attention to the international trade and investment regimes. By looking at their foundational rules and some milestone disputes, we

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6 For a critical analysis of the move toward private investment and finance for development of public goods, see Celine Tan, 'Private Investments, Public Goods: Regulating Markets for Sustainable Development' (2022) 23 *European Business Organization Law Review* 241.

7 UNFCCC COP, 'Decision 2/CP.15, Copenhagen Accord', UN Doc. FCCC/CP/2009/11/Add.1 (18 December 2009), Annex, para. 9.

8 Paris Agreement (n. 3), art. 9(3).

9 Barbara Buchner, et al., *Global Landscape of Climate Finance 2021* (London: Climate Policy Initiative, 2021).

10 Throughout the chapter we loosely refer to climate-related activities as projects or investments that reduce greenhouse gas emissions or promote the adaptation of livelihoods and ecosystems to the changing climate.

11 Paris Agreement, art. 2(1)(c).

find that both regimes can have positive as well as negative impacts in regulating and promoting climate finance and investment, even if they do so in a non-specific and fragmented manner. Finally, in section 5, we delve into Socially Responsible Investment (SRI) and climate bonds, these being two fast-developing areas of climate finance and investment. Although dominated by self-regulatory initiatives of the private sector, we show how public authorities – particularly the EU – are expanding their clout through regulatory interventions aimed at safeguarding the genuine contributions to climate change mitigation and adaptation which those initiatives and instruments ought to make.

2. CLIMATE FINANCE LAW UNDER THE UNFCCC AND PARIS AGREEMENT

2.1 Introduction

Does there exist an international law of climate finance? While the UNFCCC contains relevant provisions on this topic,[12] our focus here is on the Paris Agreement. If there is evidence in this treaty of such a law, then a claim that climate finance is specifically governed by international law would be well supported. Conversely, in the absence of such evidence in the Paris Agreement, such a claim would seem doubtful. This is because the Paris Agreement is not only the most recent of the climate treaties, it is also the most comprehensive. It is prefaced by a lengthy decision[13] of the Conference of the Parties (COP) to the UNFCCC, which serves to supplement the Paris Agreement; and the Agreement was supplemented again in 2018–2019, as well as in more recent years, by decisions of the Paris Agreement's own Conference of the Parties (the CMA).[14] Because this Agreement represents a 'new beginning' for the climate change regime, there is good reason to turn to it for an answer to the question about the existence of an international law of climate finance.[15]

2.2 The Nature of Treaty Obligations on Climate Finance

The UNFCCC and the Kyoto Protocol[16] did not refer to climate finance in their objectives. By contrast, the Paris Agreement includes a reference to 'finance flows', in Article 2(1)(c):

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[12] UNFCCC, arts 4(3) and 11.

[13] UNFCCC COP, 'Decision 1/CP.21' (n. 4) (hereafter 'Decision 1/CP.21').

[14] For 2018, see the CMA decisions collected in UN Doc. FCCC/PA/CMA/2018/3/Add.1 and UN Doc. FCCC/PA/CMA/2018/3/Add.2 (19 March 2019); for 2019, see the decisions in UN Doc. FCCC/PA/CMA/2019/6/Add.1 (16 March 2020); and for 2021, see the decisions in UN Doc. FCCC/CP/2021/12/Add.1 (8 March 2022).

[15] For other commentary on climate finance in the Paris Agreement, see Jorge Gastelumendi and Inka Gnittke, 'Climate Finance (Article 9)', in *The Paris Agreement on Climate Change: Analysis and Commentary*, ed. Daniel Klein, et al., 239–257 (Oxford University Press, 2017); and Yulia Yamineva and Kati Kulovesi, 'The New Framework for Climate Finance under the United Nations Framework Convention on Climate Change: A Breakthrough or an Empty Promise?', in *Climate Change and the Law*, ed. Erkki J. Hollo, Kati Kulovesi, and Michael Mehling (Springer, 2013) 191–223.

[16] Adopted on 10 December 1997, entered into force on 16 February 2005, 2303 UNTS 214.

> This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: … Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

'Finance flows', as a non-standard term,[17] should be interpreted broadly. It could mean any flow of finance. Accordingly, it should be understood more broadly than state-sourced or state-leveraged finance, which is what 'climate finance' often stands for.[18] The making of finance flows 'consistent' with the specified 'pathway' is a condition for the achievement of the two main aims of the Paris Agreement, namely mitigation of greenhouse gas emissions and adaptation to the impacts of climate change. We note that the requirement of consistency in Article 2(1)(c) is addressed generally to all states and is not the responsibility of any particular group of parties to the Agreement.

These few terms we have highlighted are non-technical, non-specific, and non-binding. There is no indication, at least in Article 2 of the Paris Agreement, that climate finance is to be regulated through a body of law in the treaty.[19] Despite this initial impression of a weak approach to climate finance, the Paris Agreement does contain a relatively long and detailed article on the topic – Article 9. Its first paragraph states that:

> Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.[20]

The 'shall' and the 'existing obligations' in this provision might seem to settle the matter on whether an international law of climate finance exists. Yet, upon closer scrutiny, they do not. The subject of the obligation ('developed country Parties') is an undefined multitude of states: a group or collective. Even assuming that a 'collective obligation' – which in this case would be owed to yet another undefined collective, namely developing-country parties – is a meaningful concept in international law, it is a highly controversial one. In international law, a (legal) obligation is normally owed to a state, group of states, or community of states by *an individual state*, not by a group or collective of states.[21] There is no convincing textual evidence, whether in the climate treaties themselves or in related COP decisions, that the drafters of the Paris Agreement or the earlier UNFCCC (to which the phrase 'in continuation of their existing obligations under the Convention' refers) sought to create any kind of group or collective obligation, whether for developed countries (in the Paris Agreement's terminology) or for Annex II parties (in the UNFCCC's).

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[17] The UNFCCC and the Kyoto Protocol each refer, once, to the 'flow of funds'.

[18] See, for example, Decision 1/CP.21 (n. 4), para. 57, and the reference therein to 'public interventions'.

[19] Navraj Singh Ghaleigh, 'Article 2: Aims, Objectives and Principles', in Geert van Calster and Leonie Reins (eds), *The Paris Agreement on Climate Change: A Commentary* (Edward Elgar Publishing, 2021) 73, 83: 'Article 2's provisions on finance are … yet another non-obligation upon state parties … From the perspective of state responsibility, it amounts to very little.'

[20] Paris Agreement, art. 9(1).

[21] See Alexander Zahar, 'Collective Obligation and Individual Ambition in the Paris Agreement' (2020) 9(1) *Transnational Environmental Law* 165.

Since Article 9(1) does not create (or reiterate) a cognizable legal obligation, it must be a kind of political statement. As a political statement, its function would be to express agreement about what certain countries are expected to (or 'should') do. The use of 'shall' in Article 9(1) of the Paris Agreement must therefore be taken as a term of emphasis rather than a reference to an obligation: it indicates that there is no disagreement among the parties to the Paris Agreement that this is what developed countries wish to do, namely to provide financial resources to assist developing countries. However, even if it were considered to be a provision with legally binding content, it would still be indeterminate (because the groups and their individual responsibilities are not defined), and, therefore, unenforceable in practice.

The second paragraph of Article 9 consists of just one sentence: 'Other Parties are encouraged to provide or continue to provide such support voluntarily.'[22] The term 'support' appeared in the language of the international climate negotiations around 2011 as a shorthand phrase for financial and other assistance in three areas: climate finance, technology transfer, and capacity building.[23] 'Support' is therefore a technical term with a specific meaning in the climate-treaty regime. The fact that 'other Parties' are encouraged by the Paris Agreement to provide 'such support' seems to confirm the political reading of Article 9(1): climate finance is one form of 'support' to be offered to developing countries that need it, and even non-developed countries are encouraged to offer it if they have the capacity to do so.

Climate finance, therefore, currently appears to be no more a state-to-state legal obligation than technology transfer or capacity building are. Rather, these three forms of treaty-based assistance together represent a kind of international solidarity (to use a frankly political expression) in response to the inequities of climate change – a solidarity initiated by the UNFCCC and further solemnized by the Paris Agreement.[24]

What is the group of 'developed country parties' expected to do, in practice, about climate finance? Article 9(3) of the Paris Agreement provides an answer:

> As part of a global effort, developed country Parties should continue to take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels, noting the significant role of public funds, through a variety of actions.

The 'shall' of Article 9(1) has been replaced here with a 'should'. The appearance of a substantive obligation has now fallen away.

Article 9(3) expresses the idea that the role of treaty law in governing climate finance goes beyond the use of public resources (which should nevertheless be maintained at a 'significant'

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22 Paris Agreement, art. 9(2).

23 See UNFCCC COP, 'Decision 1/CP.17, Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action', UN Doc. FCCC/CP/2011/9/Add.1 (15 March 2012), para. 5.

24 The distinction between climate finance, technology transfer, and capacity building, corresponding to Articles 9, 10, and 11 of the Paris Agreement, respectively, is difficult to pin down. Technology transfer and capacity building are both costly to provide, consume state resources, and are, therefore, in a practical sense, varieties of climate finance. An example is the Technology Needs Assessments, which are to be funded through international transfers of finance: Decision 1/CP.21 (n. 4), para. 67. (See also Paris Agreement, art. 10(6).) We note that the UNFCCC's COP has called for 'a work programme [on] how to enhance linkages and create synergy between, inter alia, mitigation, adaptation, finance, technology transfer and capacity-building' (ibid., para. 39), implying that 'synergy' is currently lacking. There is a good case for conceptualizing international 'support' holistically, given that all of it is ultimately directed to enhancing mitigation and adaptation actions in developing countries.

level), and that states should, in their domestic jurisdiction, set up regulatory conditions to support the use of *private capital* as climate finance.

However, the latter element is, at most, implicit. The role of private capital is understated in the Paris Agreement, for political reasons, so as to keep the focus on public sources of finance.[25] (In sections 3 and 5 of this chapter we discuss how private capital dominates the actual practice of climate finance.)

Article 9(3)'s continuation, that the 'mobilization of climate finance should represent a progression beyond previous efforts', most likely refers to the UNFCCC COP's target of mobilizing US$100 billion of climate finance per year, from developed countries collectively, by 2020.[26]

All this vagueness is, we must presume, deliberate. It shields developed countries from legal liability.[27] Any 'role of law', *qua* climate finance law, can only be minimal and process-oriented in this context.

The process-oriented legal obligation on climate finance for developed-country parties individually is created by the Paris Agreement's Article 9 provisions on reporting.[28] The climate change regime has always been strict on reporting by developed countries – or, more accurately, by Annex I parties to the UNFCCC – especially in relation to the Kyoto Protocol's commitment periods. This was due to the binding nature of the Protocol's mitigation commitments. A binding commitment requires careful measurement and careful reporting.[29]

Under the Paris Agreement, developed countries are required to report every two years on the climate finance they plan to mobilize, including on the 'projected levels of public financial resources to be provided to developing country Parties'.[30] In the same biennial report,

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[25] Neither the UNFCCC nor the Kyoto Protocol specifically mention investment or the private sector as a source of climate finance. While the Paris Agreement also does not mention the term 'investment', the decision adopting the Agreement 'encourag[es] the coordination of support from, inter alia, public and private, bilateral and multilateral sources, such as the Green Climate Fund, and alternative sources in accordance with relevant decisions by the Conference of the Parties' (Decision 1/CP.21 (n. 4), para. 54). Moreover, the Kyoto Protocol and the Paris Agreement both set up market-based mechanisms that offer financial incentives to investment in greenhouse-gas-mitigation projects. These are the Joint Implementation and Clean Development Mechanism under the Kyoto Protocol (arts 6 and 12, respectively), and the mechanism under art. 6(4) of the Paris Agreement.

[26] For the US$100 billion target, see UNFCCC, 'Decision 1/CP.16, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention', UN Doc. FCCC/CP/2010/7/Add.1 (15 March 2011), para. 98. The decision adopting the Paris Agreement foresees the setting of 'a new collective quantified goal from a floor of US$100 billion per year, taking into account the needs and priorities of developing countries' (Decision 1/CP.21 (n. 4), para. 53).

[27] It should also be noted that the COP decision adopting the Paris Agreement makes the climate finance obligation of developed-country parties conditional on certain conduct by developing-country parties: 'developed countries intend to continue their existing collective mobilization goal through 2025 *in the context of meaningful mitigation actions and transparency on implementation*' – impliedly by developing countries (Decision 1/CP.21 (n. 4), para. 53, emphasis added). This vague conditionality further supports the interpretation that the international treaty regime does not create any substantive obligations for developed countries (individually or otherwise) on climate finance.

[28] See Alexander Zahar, 'The Paris Agreement and the Gradual Development of a Law on Climate Finance' (2016) 6(1–2) *Climate Law* 75, 83–89.

[29] Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge University Press, 2004), 327.

[30] Paris Agreement, art. 9(5).

a developed country must declare its level of 'support' to developing countries through its use of public funds or its 'public interventions' that successfully raise private investment.[31] The report is to comply with reporting guidelines that have been issued as CMA decisions under the Paris Agreement.[32] Each report is to undergo a technical expert review.[33]

However, to reiterate, the Paris Agreement does not require a developed country individually to deliver any level of climate finance or to reach any standard of 'support' for developing countries.

While the Paris Agreement requires each developed country to report on the matters discussed above, the performance information on climate finance scrutinized in other processes set up by the Paris Agreement, such as the Global Stocktake,[34] is aggregated to the level of the group or collective of developed countries. Article 13's 'framework for transparency of support is to … provide a full overview of aggregate financial support provided, to inform the global stocktake under Article 14'.[35] This conforms with the view that the climate-treaty regime has created a collective (i.e. a political or promissory) goal on climate finance by developed countries, not a legal obligation. The performance of developed countries in this respect is not, officially at least, to be assessed on a state-by-state basis, but in aggregate.

Developing-country parties to the Paris Agreement have an even lighter legal load than their developed counterparts. They have no apparent form of obligation, whether individual or collective, on climate finance under treaty law – not even an obligation to report on the international climate finance they receive or how they expend it.[36]

2.3 Summary

To recapitulate, climate finance law at the international (treaty) level is almost non-existent. To the extent that any quantified target is involved, it is only a promise made by one (vaguely identified) group of countries to another. What modest law does exist relates to the reporting obligations of developed-country parties to the climate treaties; in other words, it is about the transparency of their actions rather than their substance.

Nevertheless, it should be emphasized that treaty law has given rise to a particular legal *concept* of climate finance, understood as a transfer of financial resources from developed to developing countries in fulfilment of the aims of the climate treaties (and we may recall 'the significant role of public funds'). All three climate treaties recognize the essential role of climate finance and outline the direction of its flow. This minimal legal content allows for

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[31] Ibid., art. 9(7).

[32] Ibid., arts 9(7) and 13(13), leading to Paris Agreement CMA, 'Decision 12/CMA.1, Identification of the Information to Be Provided by Parties in Accordance with Article 9, Paragraph 5, of the Paris Agreement', UN Doc. FCCC/PA/CMA/2018/3/Add.1 (19 March 2019), Annex (hereafter 'Decision 12/CMA.1'), and Paris Agreement CMA, 'Decision 18/CMA.1, Modalities, Procedures and Guidelines for the Transparency Framework for Action and Support Referred to in Article 13 of the Paris Agreement', UN Doc. FCCC/PA/CMA/2018/3/Add.2 (19 March 2019), Annex, Part V (hereafter 'Decision 18/CMA.1').

[33] Paris Agreement, art. 13(11–12); and Decision 12/CMA.1 (n. 32), para. 2; and Decision 18/CMA.1 (n. 32), Annex, Part VI, para. 150(c).

[34] Paris Agreement, art. 14.

[35] Ibid., art. 13(6).

[36] Such reporting is optional or 'voluntary': Paris Agreement, art. 13(10); Decision 12/CMA.1 (n. 32), para. 2; and Decision 18/CMA.1 (n. 32), Annex, Part VI, para. 134.

political and academic debates to continue about state responsibility, yet it is unlikely that any state will ever be held formally responsible for an alleged failure to act ambitiously or even to report meticulously on climate finance, for even the reporting obligation of states is rendered in broad strokes.

Having reviewed the climate-treaty regime and its provisions on climate finance, we may now consider what is being done about climate finance in practice. In keeping with the purpose of this chapter, our analysis will remain focused on questions of law.

3. CLIMATE FINANCE LAW AND DEVELOPMENT-FINANCE INSTITUTIONS

3.1 Introduction

Despite the substantively vague treaty law on climate finance, developed countries have been channelling climate finance, both bilaterally and multilaterally, to developing countries for decades. Bilateral transfers maximize the control of the transferring country, and are attractive for this reason from the transferring country's perspective. Multilateral transfers, by contrast, distribute and control resources pooled among several states. They are designed to take into account what is being financed regionally, if not globally, since bilateral support is often tied to domestic strategies of international development cooperation and focuses on recipient countries that have been selected for historical, political, or other contingent reasons.

3.2 The Role of MDBs and their Regulatory Convergence

By one count, bilateral and multilateral sums of climate finance in 2019 were, respectively, US$29 and 34 billion, for a total of US$63 billion; and, in the symbolic year of 2020, this total had grown to US$68 billion.[37]

However, exactly how much climate finance is being supplied through these and other channels for climate-sensitive development (a term we will use for initiatives that reduce emissions or support adaptation) will always be differently estimated, and even disputed,[38] as there are many data gaps, and, more importantly, conceptual and political issues about what to count as climate finance,[39] with the result that there is no 'right' definition of climate finance, or even

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[37] Respectively, Organisation for Economic Co-operation and Development (OECD), *Climate Finance Provided and Mobilised by Developed Countries: Aggregate Trends Updated with 2019 Data* (OECD, 2021), 8; and idem, *Climate Finance Provided and Mobilised by Developed Countries in 2016–2020: Insights From Disaggregated Analysis* (OECD, 2022), 4. Private-sector finance mobilized by public climate finance was US$13 billion in 2020, down slightly from earlier years (ibid.).

[38] See J. Timmons Roberts and Romain Weikmans, 'Fragmentation, Failing Trust and Enduring Tensions over What Counts as Climate Finance' (2017) 17 *International Environmental Agreements* 129, 130. One should avoid placing too much blame for the confusion that currently reigns over the raised amounts of climate finance on the absence of agreed definitions or precise accounting rules. As we noted in the previous section, the trouble originates with the treaty-based promises having been kept deliberately vague.

[39] Ibid., 131.

a prospect of universal agreement on one, notwithstanding the rather precise target agreed to by the UNFCCC parties (US$100 billion per year by 2020).

MDBs[40] are tasked with raising and channelling most of the multilateral climate finance and investment that developing countries receive.[41] Because the MDBs are not mentioned, as such, in the climate treaties, they tend to be overshadowed by their institutional cousins, the Global Environment Facility (GEF) and the GCF and even by the Kyoto Protocol's much smaller Adaptation Fund (AF). Yet, the amount of climate finance being transferred through the GCF, which serves both the UNFCCC and the Paris Agreement, combined with the amount channelled through the GEF, which is affiliated with the climate treaties but is not under their direct authority, is considerably smaller than what the MDBs collectively are responsible for, and it is growing at a slower rate.[42]

The multilateral climate finance of the MDBs, GCF, and GEF (plus the trickle from the AF) is the climate finance which, along with bilateral climate finance, crosses borders. It is to be distinguished from the finance that is raised and spent domestically, which is also sometimes referred to as climate finance.[43] Under all estimates, the domestic component is much larger than the cross-border component.[44]

Has a body of law developed on how climate finance and investment are raised and deployed by the MDBs? Global and regional MDBs are for the most part established or heavily supported by developed countries from public funds. As we have indicated, the operations of MDBs represent only a small area of climate finance when domestic climate finance is taken into account. Nevertheless, there is a clear link between the operations of MDBs and the state 'promise' of support expressed in the climate treaties, and by any measure the MDBs are major *international* players in climate finance.[45] Indeed, the link between the climate-treaty level and the MDBs is remarkably strong, despite the fact that these 'development finance institutions' are outside the control of the treaties' governance arrangements. The nature of the relationship is reflected in a declaration of nine MDBs, made at the UNFCCC's COP 24 meeting in 2018,

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40 Ihsan Ugur Delikanli, Todor Dimitrov, and Roena Agolli, *Multilateral Development Banks: Governance and Finance* (Palgrave Macmillan, 2018), 10. They count a total of 25 MDBs. Of these, 13 operate at the 'global' and 'regional' levels, with the remaining 12 operating at the 'sub-regional' level.

41 For example, Inter-American Development Bank, *Annual Report 2018: The Year in Review* (IADB, 2019), inside front cover, whose loans and guarantees approved in 2018 alone amounted to US$14.3 billion, up from $13 billion in 2017 and $10.8 billion in 2016; and Buchner, et al. (n. 9), 12 (the Asian Development Bank has committed to increase its climate finance to US$80 billion over the decade to 2030). See also OECD (n. 37), 8.

42 See Global Environment Facility, *Report of the Global Environment Facility to the Twenty-Fifth Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change*, UN Doc. FCCC/CP/2019/5 (26 August 2019), viii (for mitigation) and xi–xii (for adaptation); and Green Climate Fund, *Eighth Report of the Green Climate Fund to the Conference of the Parties to the United Nations Framework Convention on Climate Change*, UN Doc. FCCC/CP/2019/3 (2 September 2019), 1–2. The amounts distributed by the GEF and the GCF mainly consist of public funds. Replenishment of the funds takes place at specially organized international conferences.

43 For instance, Sophie Yeo, 'Climate Finance: The Money Trail', 573 *Nature* 328 (19 September 2019).

44 Buchner, et al. (n. 9), 5.

45 Laurence Delina, 'Multilateral Development Banking in a Fragmented Climate System: Shifting Priorities in Energy Finance at the Asian Development Bank' (2017) 17 *International Environmental Agreements* 73, 76 ('key actors').

in which the MDBs reiterated a previously announced 'vision to align financial flows with the objectives of the Paris Agreement'; they then proceeded to commit to:

> working together to develop a dedicated approach, which constitutes our concrete and ongoing contribution to the operationalization of the Paris Agreement's Article 2.1.(c). This approach aims at the alignment of the MDBs' activities with the goals of the Paris Agreement … based on six building blocks.[46]

The first 'block' commits the MDBs to make their operations 'consistent with the different countries' low-emissions development pathways and compatible with the overall climate change mitigation objectives of the Paris Agreement'.[47] This closely follows the wording of Article 2(1)(c) of the Paris Agreement.

As international organizations, it is well understood that the MDBs are bound, not only by customary international law,[48] but also to act consistently with the provisions of multilateral environmental agreements.[49] Yet, as independent, self-regulated[50] organizations of considerable financial strength and consequence, the MDBs' solemnly declared and close identification with the Paris Agreement's objectives – a closeness that is more systematic and enthusiastic than that of some state parties to the treaty![51] – suggests a power to move the law on finance and investment in a climate-friendly direction.

To appreciate the potential implications of the MDBs' bold adoption of the Paris Agreement's aims,[52] we may briefly recall the 'unique and powerful financial model'[53] that lies at their heart. MDBs are capitalized by states, and, as noted above, in large part by developed countries. They generally do not transfer state-deposited funds,[54] but instead borrow from the private sector at favourable rates, largely due to their state backing.[55] Invariably (with one instructive exception),[56] they maintain a triple-A rating for their bonds. MDBs onward-lend the borrowed money at a slightly higher interest rate to subscribing developing countries, as

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46 Asian Infrastructure Development Bank (AIDB), et al., *The MDBs' Alignment Approach to the Objectives of the Paris Agreement: Working Together to Catalyse Low-Emissions and Climate-Resilient Development* (AIDB, 3 December 2018), 1.

47 Ibid.

48 Günther Handl, 'The Legal Mandate of Multilateral Development Banks as Agents for Change toward Sustainable Development' (1998) 92(4) *American Journal of International Law* 642, 657–658.

49 Ibid., 653–654, 658, 661, and 664.

50 Delikanli, et al. (n. 40), 26–27.

51 Another sign of such closeness is that most MDBs are also implementing entities accredited to apply and receive funds from the GCF, GEF, and Adaptation Fund.

52 MDBs have a long history of 'adopting' and internalizing progressive elements of international environmental law, as outlined in Makane Moïse Mbengue and Stéphanie de Moerloose, 'Multilateral Development Banks and Sustainable Development: On Emulation, Fragmentation and a Common Law of Sustainable Development' (2017) 10(2) *Law and Development Review* 389, 397–404.

53 Chris Humphrey, 'He Who Pays the Piper Calls the Tune: Credit Rating Agencies and Multilateral Development Banks' (2017) 12 *Review of International Organizations* 281, 282.

54 OECD (n. 37), 9.

55 Delikanli, et al. (n. 40), 13 ('the bonds issued by the World Bank depended on the implicit guarantee of the shareholders, rather than on the loan repayments of the borrowing countries').

56 The African Development Bank began with a developing-country-only membership model, lending out paid-in capital, but soon failed. It changed to the standard model in 1973, with developed countries joining as members and a turn to capital-market loans: see ibid., 16.

well as to non-state actors within those countries.[57] These borrowers in general would not otherwise have been able to secure reasonable market rates for their developmentally beneficial projects.[58]

In the MDBs' funding model, then, the commitment of public funds is relatively small, yet is significant enough to allow for a mobilization of enormous wealth from commercial sources. With climate change having become an issue at the very top of the developmental agenda, an increasingly large portion of investor wealth gravitating to MDBs is being directed to the climate-sensitive purposes that MDBs support.[59] Development-finance institutions can thus have a relatively significant developmental impact with a relatively insignificant outlay of public funds.[60]

Earlier we quoted from a declaration committing the MDBs to six 'building blocks' intended to align their activities with the goals of the Paris Agreement. The third block provides as follows:

> We will strive to actively support low-emissions and climate-resilient development pathways through our interventions. To that end, we will further scale-up the provision of climate finance. We will operationalize new approaches to bridge the climate finance gap and accelerate the transition in order to effectively support countries in achieving the goals articulated in their Nationally Determined Contributions (NDCs), including adaptation plans. We will go beyond current efforts to (i) prioritize, target and report on climate finance, (ii) mobilise private sector investments, (iii) support clients' access to concessional finance, including for leveraging private capital, and (iv) provide the needed technical assistance for climate action. We will do this in support of ambitions agreed to under the [UNFCCC].[61]

In these aspirations, MDBs seek to hold a central position in the governance of international climate finance. Of greatest interest for our purposes is that MDBs make no secret of the fact that private-sector investment will provide the bulk of the climate finance that the world needs into the future. The declaration's words render moot the ideological issue raised in the treaties (and at COPs) about the role of public funds versus private investment in climate finance. In MDB operations, public funds remain in the background while private investors shoulder by far the greatest load. If this is a downside in the view of those who would prefer climate finance to pay off the debt of 'historical responsibility',[62] then the upside is that, with almost unlimited resources, the MDBs can sustain a vast quantity of projects while setting nearly uniform sustainability standards for all of them.

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57 See, for example, the Asian Development Bank's constitutive document, *Agreement Establishing the Asian Development Bank* (adopted on 4 December 1965, entered into force on 22 August 1966), 571 UNTS 23 (hereafter 'ADB Agreement'), art. 11. See also OECD (n. 37), 9; and Delikanli, et al. (n. 40), 13–14.

58 See, for example, ADB Agreement (n. 57), art. 14(v).

59 Buchner, et al. (n. 9), 12 (climate finance is in the range of 25–40 per cent of MDB loan portfolios); and Delina (n. 45), 76 ('In 2014, MDBs … committed up to $28.3 billion of their resources to climate finance in developing countries, of which 82% were for mitigation purposes').

60 Humphrey (n. 53), 282.

61 AIDB, et al. (n. 46), 2; see also Buchner, et al. (n. 9), 5.

62 Yeo (n. 43), 331 (discussing the position of the so-called Like-Minded Developing Countries).

It was many years ago when the primary aim of MDBs transformed from economic development to sustainable development.[63] To ensure the repayment of loans and maintain their high bond ratings, MDBs provide knowledge-rich services to borrowers,[64] which in effect 'condition' their loans with all manner of standards relating to environmental integrity.[65] One example is the near-universal trend of environmental (or climate) impact assessment applied to MDB-funded projects,[66] which, according to one view,[67] is contributing to the emergence of a new rule of customary international law that makes such assessment a matter of legal obligation. Because MDBs are, at least in theory, apolitical and single-mindedly pro-sustainability agencies, and because, in fact, they have been among the earliest movers on climate change, their normative influence on the proper uses of finance and investment is potentially powerful and self-reinforcing.[68] Predictably, a debate simmers about the level of control that the major developed countries enjoy in the MDB context,[69] but there is no space here to consider this secondary issue.

3.3 Summary

There are several reasons why MDBs can punch above their weight when it comes to a regulatory evolution in support of climate-friendly finance: (i) the MDBs are not affected by political considerations in the same way that states are, and so they can engage in a 'race to the top'; (ii) they are relatively independent and self-governed, and in a sense their sole objective is to maximize the amount of sustainable development finance and investment they can raise; (iii) facing for the most part little competition from each other, they cooperate and engage in normative convergence (or even normative monopoly);[70] (iv) most of the funds they

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63 Handl (n. 48), 642 ('MDBs in general have responded to the emerging international consensus on "sustainable development" as a new global paradigm by explicitly endorsing much of what the paradigm connotes as significant to their financial role in development activities'); and Mbengue and de Moerloose (n. 52), 404 ('the unquestionable integration of sustainable development in MDB mandates').

64 See, for example, ADB Agreement (n. 57), art. 2(iv); see also Delikanli, et al. (n. 40), 27.

65 Delikanli, et al. (n. 40), 114 ('MDBs have a rather common set of requirements on … environmental and social norms, acting as a promoter (quasi-legislator) of such standards in many regions'); Mbengue and de Moerloose (n. 52), 395–396 (on the MDBs' social and environmental safeguards); and Zygmunt J. B. Plater, 'Multilateral Development Banks, Environmental Diseconomies, and International Reform Pressures on the Lending Process: The Example of Third World Dam-Building Projects' (1989) 9 *Boston College Third World Law Journal* 169, 203.

66 See Mbengue and de Moerloose (n. 52), 405 on the 'climate impact assessment' that has now become standard at MDBs.

67 Benoit Mayer, 'Climate Assessment as an Emerging Obligation under Customary International Law', (2019) 68 *International and Comparative Law Quarterly* 271. But see Alexander Zahar, 'Environmental Impact Assessment for Greenhouse Gas Emissions Is Pie in the Sky', in *Debating Climate Law*, edited by Benoit Mayer and Alexander Zahar (Cambridge University Press, 2021), 297–309.

68 Delikanli, et al. (n. 40), 179.

69 See, for example, ibid., 22; see also, ibid., 99 (giving the rationale 'that the prevailing decision-making power should stay outside the borrowing countries, to ensure financial discipline and lending prudency as borrowing countries have [an] interest to support higher risk or more concessional lending decisions').

70 Ibid., 112 ('While each MDB sets its rules of operation and governance, this is more a collective, rather than an individual process. MDBs usually operate in a similar manner, as a family of peer

disburse are raised in the international capital markets, as explained above, and are in practice unlimited; and (v) the conditionalities MDBs impose on loans create a kind of 'common law' of sustainable finance and investment[71] throughout the world that MDBs operate in, which is now essentially the whole of the developing world.

We may conclude from the above that, to the extent that MDBs operate uniformly around the world (and to a considerable extent they do),[72] leveraged private capital will become increasingly tied up in climate-sensitive investment globally under the control of the MDBs and their climate-treaty-aligned aims. By the same token, a decreasing proportion of private-sector investment will go in the opposite direction, that is, to climate-damaging projects. This positive development has a legal dimension which is as yet underexplored.

4. CLIMATE FINANCE FROM THE PERSPECTIVE OF INTERNATIONAL INVESTMENT AND TRADE LAW

4.1 Introduction

Other relevant sites of regulation which affect climate finance and investment are the international investment and trade regimes.[73] Despite their potential in promoting sustainable forms of production and diffusion of clean technologies, these regimes have so far supported an increase of unsustainable production and consumption patterns in the global economy and of greenhouse gas emissions.[74] At the same time, the regulation of these activities can support or hamper the international mobilization of finance and capital for climate mitigation and adaptation.

At the international level, the structure of law and institutions has for decades reflected an approach aimed at protecting the transnational flow of capital, goods, and services from the regulatory barriers of states. However, in the past decade or more, the international investment and trade regimes have been developing flexibilities to allow state interventions aimed at environmental protection.[75] The thrust in this direction has come from the WTO Appellate Body, as well as from the adoption of new free-trade and investment treaties which give stronger

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cross-referenced institutions adhering to common norms and standards, with large MDBs often acting as role models').

71 Mbengue and de Moerloose (n. 52), 407.

72 See ibid., 392, on the MDB 'emulation phenomenon'.

73 We generally consider international investments to be cross-border movements of tangible and intangible capital for the purposes of generating wealth in the territory of the state hosting the business activity, where the foreign investor holds total or partial control over the assets. We define international trade as the commerce and transfer of merchandise and services across borders. See, respectively, M. Sornarajah, *The International Law on Foreign Investment* (3rd ed., Cambridge University Press, 2010); and Simon Lester, Bryan Mercurio, and Arwel Davies, *World Trade Law: Text, Materials and Commentary* (2nd rev. ed., Hart, 2012), 7–10.

74 Ottmar Edenhofer, et al. (eds), *Climate Change 2014: Mitigation of Climate Change: Working Group III Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate* Change (Cambridge University Press, 2014), 385–387.

75 For instance, see Jorge Enrique Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2013); and Kati Kulovesi, *The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation* (Kluwer Law International, 2011).

consideration to sustainability. Moreover, these regimes interact (and at times conflict) in their rules and aims, as the saga of WTO disputes in renewable-energy policies described below shows. This section focuses on selected issues in the international investment and trade regimes to highlight their role in, as well as their effects on, climate finance and investment.

4.2 International Investment Law and Arbitration

International investment law mainly concerns standards of behaviour, also termed 'standards of protection', such as fair and equitable treatment and protection from indirect expropriation, which states must guarantee to foreign investments and foreign investors. International investment treaties also contain provisions on Investor-State Dispute Settlement (ISDS), including investor-state arbitration. These aim at ensuring state compliance with the standards of protection contained in treaties or investor-state contracts, but also at redressing the injured foreign investor for damages caused by the host state's wrongful behaviour.

This regime formally has a neutral and limited stance toward governing or promoting climate-sensitive investment. It is limited because, given its historical origins[76] and main aim of promoting the free movement and expansion of capital across states, the standards of protection under international investment law protect the transfers of privately owned capital belonging to private international investors. Such a focus leads to an exclusion from international investment protection of public finance and capital streams that are transferred by development-finance institutions for the purpose of implementing the UNFCCC and Paris Agreement's collective goals on climate finance.[77] Moreover, while some international investment treaties also define state-owned enterprises as investors eligible to launch claims under ISDS clauses,[78] development agencies or other national entities channelling climate finance are not regarded as international investors. International organizations are also excluded from the definition of protected international investors.

Nevertheless, international investment law gains some relevance in the governance of climate finance and investment through the work of international investment tribunals, which interpret and apply the standards of protection in investor-state disputes that have as their object climate-related policies or activities.[79] Because these standards protect investments from host-state action, regardless of the actual object of the commercial activity, foreign investors may use them to protect climate-related investments. At the same time, however, these standards also have the effect of dissuading host states from adopting bold climate policies that negatively affect greenhouse-gas-intensive investments.

Therefore, climate finance and investment are directly protected by law under the former type of action by investors, but indirectly threatened by the latter, since host states might

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[76] Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press, 2013), 22.

[77] These financial streams would indirectly be covered when, in case of co-financing, the entity managing the overall finance can be deemed a 'foreign investor' and the project has implemented an 'investment' under the applicable international investment agreement or contract. In the realm of traditional streams of public climate finance, this is rarely the case.

[78] David Collins, *An Introduction to International Investment Law* (Cambridge University Press, 2016), 86.

[79] Kate Miles, 'Arbitrating Climate Change: Regulatory Regimes and Investor-State Disputes' (2010) 1 *Climate Law* 63, 66.

be barred from implementing ambitious policies to phase out carbon-intensive activities and promote green investment. Indeed, there have been cases of so-called 'regulatory chill' caused by international investors threatening to use international investment law in response to state action on climate change.[80] For example, in 2017, the French government sought to pass a law phasing out hydrocarbon extraction by not renewing existing licences after their expiry. While the bill was under the scrutiny of the Conseil d'État, the Canadian company Vermilion Energy submitted an amicus curiae brief, claiming that such a law would go against its legitimate expectations over existing permits, which were protected by the standards of the Energy Charter Treaty (ECT).[81] The Conseil d'État gave a negative opinion on the bill, which was later amended to allow for the renewal of existing licences through to 2040.[82] Although it cannot be said with certainty that a threat of legal action by the foreign investor was the cause of policy backtracking in this case, this example nonetheless shows that states will need to carefully consider their obligations under international investment law when designing climate policies aiming at net-zero targets. Another case concerns RWE, a German energy company, that in 2021 initiated proceedings against the Netherlands at the International Centre for the Settlement of Investment Disputes for breach of the ECT.[83] The dispute – still pending at the time of writing – came after the Dutch Parliament passed a law prohibiting energy producers from using coal after 2030. This case raises important issues about the validity of arbitration agreements on, and jurisdiction for, intra-European Union ISDS, since the Court of Justice of the European Union has deemed the ISDS provision of the ECT not applicable in such a context.[84]

International investment law can also *protect* climate-related investments, of course. Investment-arbitration awards have signalled that host states should be careful in backtracking from climate policies that work as key incentives for foreign investment. A telling case is the cascade of ISDS claims by foreign investors against Spain, whose government, in the aftermath of the 2009 financial crisis, repealed financial incentives for renewable-energy production. Among the awards already rendered in relation to that repeal, some have found against the state, noting that the sudden way in which the policy change occurred breached the fair and equitable treatment standard of the ECT.[85] It follows that the role of these tribunals

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80 Anatole Boute, 'Combating Climate Change through Investment Arbitration' (2012) 35 *Fordham International Law Journal* 613, 615. See also Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7 *Transnational Environmental Law* 229.

81 Energy Charter Treaty (opened for signature 17 December 1994, entered into force 16 April 1998), 2080 UNTS 100 (ECT).

82 Maxime Vaudano, 'Comment la menace d'arbitrage a permis aux lobbys de détricoter la loi Hulot', *Le Monde.fr* (4 September 2018), <www.lemonde.fr/accord-commercial-europe-canada-ceta/article/2018/09/04/comment-la-menace-d-arbitrage-a-permis-aux-lobbys-de-detricoter-la-loi-hulot_6005132_4998347.html>.

83 *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands* (ICSID Case No. ARB/21/4).

84 Case C-741/19, *Republic of Moldova v. Komstroy LCC* ECLI:EU:C:2021:655, para. 66. See also Case C-284/16, *Slovak Republic v. Achmea BV* ECLI:EU:C:2018:158. In July 2023, the arbitration agreement behind the RWE dispute was also declared inadmissible the German Federal Court of Justice in application of the CJEU's jurisprudence on the matter. See BGH Decision, 27 July 2023, I ZB 75/22.

85 Wendy Miles and Merryl Lawry-White, 'Arbitral Institutions and the Enforcement of Climate Change Obligations for the Benefit of All Stakeholders: The Role of ICSID' (2019) 34 *ICSID Review –*

in protecting investment in renewable energy was not due to the climate-related nature of the investment, as such, or to the climate-related scope of the measure, but to the interpretation of a standard contained in an investment treaty. This rather confirms the apparent neutrality of this regime in dealing with climate-related investment.

There are, however, two noticeable trends signalling a more inclusive approach toward climate change concerns within the international investment regime. First, more-recent treaties promoting trade and investment contain better-defined standards, as well as provisions that refer directly to instruments of the international climate change regime.[86] Second, prominent international arbitration organizations have implemented changes or considered new procedural rules that provide for a more balanced investment arbitration involving environmental issues.[87]

Overall, a regime based on investors' action to protect their own private assets and on a fragmented landscape of treaties and arbitral tribunals is nowhere close to delivering a comprehensive form of governance of climate investment and finance. Nonetheless, the regime does create rules with specific standards imposed on host states, which, if properly harnessed, could at least shield climate-related investments from being negatively impacted by state actions.[88]

4.3 International Trade Law

International trade law[89] has numerous and complex interactions with the design and implementation of climate laws and policies.[90] The scholarly debate on the linkages between climate

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Foreign Investment Law Journal 1, 19–20, also noting that Italy, the Czech Republic, and Slovakia are facing similar claims due to similar policy changes.

86 For instance, the 'Agreement between the European Union and Japan for an Economic Partnership' (EU OJ L 330/3, entered into force on 1 February 2019), art. 16.5(c), requires parties to 'strive to facilitate trade and investment in goods and services of particular relevance to climate change mitigation, such as those related to sustainable renewable energy and energy-efficient goods and services, in a manner consistent with this Agreement'. While this provision is clearly geared to favour climate finance and investment, it is not applicable under ISDS provisions.

87 For instance, see Permanent Court of Arbitration, 'Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources' (2001), <https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf>. While these rules do not refer directly to climate change, they allow for participation of actors other than the parties to the proceedings, as well as the possibility of using an expert panel to contribute to the final decision. See also Miles and Lawry-White (n. 85), 23.

88 Pierre-Marie Dupuy, *Harnessing Foreign Investment to Promote Environmental Protection* (Cambridge University Press, 2015). For a detailed overview of the tensions and synergies between international investment law and states, see J. Anthony Van Duzer, 'The Complex Relationship Between International Investment Law and Climate Change Initiatives: Exploring the Tension', in Panagiotis Delimatsis (ed.), *Research Handbook on Climate Change and Trade Law* (Edward Elgar Publishing, 2016).

89 We understand 'international trade law' as a regime under public international law regulating trade among states, mostly comprising bilateral and multilateral treaties, often establishing international organizations or other soft-law bodies. The WTO is the only global international organization and regulatory regime in this field.

90 The literature here is understandably vast. For comprehensive works, see Thomas Cottier, Olga Nartova, and Sadeq Z. Bigdeli, *International Trade Regulation and the Mitigation of Climate Change: World Trade Forum* (Cambridge University Press, 2009); Panagiotis Delimatsis (ed.), *Research Handbook on Climate Change and Trade Law* (Edward Elgar Publishing, 2016); P. Low, G. Marceau,

and trade emerged after the entry into force of the Kyoto Protocol[91] and has mainly concerned issues about the legality of domestic climate policies under WTO law,[92] as well as legal techniques to harness this legal regime, including its dispute-settlement mechanism, to promote mitigation.[93] Prominent in the debates are the legality of carbon border-tax adjustments to be adopted by states on imported carbon-intensive products,[94] as well as the role of WTO law in phasing out fossil-fuel subsidies[95] and in promoting technology transfer while protecting intellectual property rights.[96] Instead, WTO members have been quite active in initiating disputes over subsidies and other incentives for renewable energy.[97]

Despite being the bedrock of global trade regulation, WTO law weaves only a part of the regulatory tapestry, which consists as well of other bilateral, regional, and 'mega-regional' trade agreements, whose assemblage of rules disciplines the movement and affects the competitiveness of goods and services across borders. It is significant that many of these treaties contain 'environmentally friendly' provisions of various kinds, including some that refer to climate change as a legitimate area of state regulation, to be exempted from anti-discriminatory obligations and other rules promoting free trade involving tariff and non-tariff barriers.[98] Nonetheless, the WTO's dispute-settlement mechanism and its influence in informing general principles and rules of international trade law[99] are significant in understanding the role of this regime in governing climate finance and investment. This is because WTO law and its dispute settlement work as the bedrock of international trade regulation, with the other regional or mega-regional trade agreements being complementary regimes aimed at promoting further

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and J. Reinaud, 'The Interface between the Trade and Climate Change Regimes: Scoping the Issues' (2012) 46 *Journal of World Trade* 485; Kulovesi (n. 75); Harro van Asselt, *The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions* (Edward Elgar Publishing, 2014).

91 Cottier, Nartova, and Bigdeli (n. 90).

92 Low, Marceau and Reinaud (n. 90).

93 Kulovesi (n. 75).

94 Ingo Venzke and Geraldo Vidigal, 'Are Unilateral Trade Measures in the Climate Crisis the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism (CBAM)', in Maarten den Heijer and Harmen van der Wilt (eds), *Netherlands Yearbook of International Law 2020: Global Solidarity and Common but Differentiated Responsibilities* (TMC Asser Press, 2022); Michael A. Mehling, et al., 'Designing Border Carbon Adjustments for Enhanced Climate Action' (2019) 113 *American Journal of International Law* 433; and Navraj Singh Ghaleigh and David Rossati, 'The Spectre of Carbon Border-Adjustment Measures' (2011) 2 *Climate Law* 63.

95 Dirk De Bièvre, Ilaria Espa, and Arlo Poletti, 'No Iceberg in Sight: On the Absence of WTO Disputes Challenging Fossil Fuel Subsidies' (2017) 17 *International Environmental Agreements: Politics, Law and Economics* 411; and Ronald Steenblik, Jehan Sauvage, and Christina Timiliotis, 'Fossil Fuel Subsidies and the Global Trade Regime', in Jakob Skovgaard and Harro van Asselt (eds), *The Politics of Fossil Fuel Subsidies and their Reform* (Cambridge University Press, 2018), 121.

96 Wei Zhuang, *Intellectual Property Rights and Climate Change: Interpreting the TRIPS Agreement for Environmentally Sound Technologies* (Cambridge University Press, 2017).

97 Timothy Meyer, 'Explaining Energy Disputes at the World Trade Organization' (2017) 17 *International Environmental Agreements: Politics, Law and Economics* 391, 394–397.

98 José-Antonio Monteiro, 'Typology of Environment-Related Provisions in Regional Trade Agreements', (2016) WTO Working Paper No ERSD-2016-13, 66–67.

99 For a treatise on the role of the WTO Appellate Body, see Robert Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27 *European Journal of International Law* 9.

trade liberalization.[100] Also, these agreements often make direct linkages to, or replicate in their substance, fundamental principles and obligations of WTO law.

It is important to emphasize that climate finance is not directly regulated under WTO law. This comes as no surprise, given the niche role that this type of finance had at the time of the adoption of the WTO agreements in 1994, but also the indeterminate linkages that WTO law makes with sustainable development and the environment.[101] Yet, just by looking at public climate finance under the UNFCCC regime, one can plausibly argue that WTO principles, rules, and institutions can have indirect effects on access to the various goods, technologies, and services that are necessary to realize specific climate-finance projects. This can be seen, for instance, in the non-discrimination principles and the obligations on tariff and non-tariff measures scattered through the WTO agreements. As their general effect is to keep barriers to market access and distribution of most products and services as low as possible, they also support the procurement of international goods and services for implementing climate-finance projects.

General considerations aside, WTO law also affects specific forms of climate investment and finance, such as those in the renewable-energy sector. For example, the surge of disputes at the WTO over renewable-energy measures[102] shows how this law interacts with the design of domestic climate-finance initiatives. The WTO Dispute Settlement Body has so far dealt with several disputes involving measures aimed at giving different forms of incentives to the national production and distribution of renewable energy.[103] In cases decided by Panels and the Appellate Body, some of these incentives were made conditional on a percentage of components being locally produced, or on the use of a local workforce.[104] For all these disputes, the measures have been found to be discriminatory and against the national-treatment principle under the General Agreement on Tariffs and Trade, as well as in breach of the Agreement on Trade-Related Investment Measures.[105] The measures might have also violated the WTO

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[100] Bernard M. Hoekman and Petros C. Mavroidis, 'WTO "à La Carte" or "Menu Du Jour"? Assessing the Case for More Plurilateral Agreements' (2015) 26 *European Journal of International Law* 319.

[101] Riccardo Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the "WTO-and-Competing-Regimes" Debate?' (2010) 21 *European Journal of International Law* 649.

[102] Meyer (n. 97). As of August 2023, we counted 20 disputes involving green-energy products – initiated via consultations, in progress, or concluded – under the WTO Dispute Settlement Mechanism. See also Angelica Rutherford, *Energy Security and Green Energy: National Policies and the Law of the WTO* (Springer, 2020), 110.

[103] Rutherford (n. 102), ibid.

[104] *Canada – Certain Measures Affecting the Renewable Energy Generation Sector and Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R & WT/DS426/AB/R, AB Report (6 May 2013) (hereafter '*Canada-Feed-in Tariffs*'); *India – Certain Measures Relating to Solar Cells and Solar Modules,* WT/DS456/AB/R, Panel Report (16 September 2016) (hereafter '*India-Solar Panels*'); and *United States – Certain Measures Relating to the Renewable Energy Sector*, WT/DS510/R, Panel Report (27 June 2019) (hereafter '*US-Renewable Energy*').

[105] General Agreement on Tariffs and Trade 1994 (adopted 15 April 1994, entered into force 1 January 1995), 1867 UNTS 190 (GATT); and Agreement on Trade-Related Investment Measures (adopted on 15 April 1994, entered into force 1 January 1995), 1868 UNTS 186 (TRIMs Agreement). In *US – Renewable Energy* the Panel did not take a decision on an alleged breach of Article 2(1) of the TRIMs Agreement because of reasons of judicial economy (para. 7.354).

Agreement on Subsidies and Countervailing Measures;[106] however, for lack of factual findings, the non-lodgement of such a complaint, or judicial economy, no such finding has been made in any of the disputes.

To give an illustration of some of these incentives and how they can affect international climate investment, in *Canada-Feed-in Tariffs* the measure under scrutiny was an incentive programme established by the Government of Ontario to increase the amount of renewable energy in the energy mix of the regional grid. Under the scheme, renewable energy producers based in Ontario would benefit from a guaranteed higher energy tariff paid to them by the national energy authority. However, to be eligible, these producers would have to source a certain minimum local content level of renewable energy equipment and components from Ontario-based producers.[107] In *India-Solar Panels*, the Indian government launched an initiative to support the development of a domestic solar-power industry by directly purchasing energy from facilities making use of solar cells and modules produced in India.[108] In *US-Renewable Energy* the measures at stake had been adopted by several states across the United States to promote the distributed production of renewable energy.[109] While some measures consisted of fiscal incentives, others had a clear financial character, with all incentives having a domestic-content requirement for eligibility.[110]

These measures have in common that they all conditioned fiscal and financial support on the use of locally produced goods or local labour. In investment policy, measures of this kind are part of the broader array of national 'performance requirements' that foreign investors at times face when they move their capital or business abroad.[111] While national governments usually adopt these measures to control or incentivize foreign investment,[112] in the cases under dispute the incentives also aimed at two key objectives: to promote the domestic production of renewable energy and to enable the development of a local industry by protecting it from foreign competition, but also from a dependence on foreign goods and technologies.[113] Therefore, in each dispute, the discrimination between domestic and foreign products (renewable energy, equipment, or solar cells) resulted in a sanctioned barrier to foreign climate investment under WTO law. Yet, the very measures found in breach of WTO law can also be seen as climate finance initiatives from a national perspective. Indeed, most of the measures challenged in the above WTO disputes consisted of some form of public financial support to renewable-energy production and mitigation of climate change.

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106 Adopted on 15 April 1994, entered into force 1 January 1995, 1869 UNTS 14.

107 *Canada-Feed-in Tariff* (n. 104), paras 4.17–4.23.

108 *India-Solar Panels* (n. 104), paras 1.1–1.5.

109 *US-Renewable Energy* (n. 104), para. 2.5.

110 For instance, the 'California Self-Generation Incentive Programme' consisted of 'a payment of financial incentives for the installation of qualifying new technologies'; see *US-Renewable Energy*, para. 2.14.

111 Julien Chaisse, 'Rules and Disputes on Foreign Investment in Renewable Energies: Exploring the Nexus of Trade and Investment Treaties', in Panagiotis Delimatsis (ed.), *Research Handbook on Climate Change and Trade Law* (Edward Elgar Publishing, 2016), 470–471. Performance requirements are at times prohibited in international investment agreements.

112 Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (Oxford University Press, 2013).

113 At least, this was the claim that India made in its submissions at AB proceedings, when it claimed that the measure would ensure energy security because, among other things, it would not make renewable-energy production dependent on international supply. See Rutherford (n. 102), 114.

This outline shows that international trade law can impact on climate finance and investment, although one can hardly label this relationship as reflective of climate-specific regulation or governance. As an international organization, the WTO is likely poorly placed to deal with climate finance and investment, not just because of its principles and rules, but also because of its institutional bias toward trade liberalization. Due to the international trade regime's functional specialization, it can give a negative connotation to policies which, from a climate change perspective, positively impact on mitigation of climate change. While the WTO's Dispute Settlement Body has evolved its stance on certain measures adopted by states to pursue environmental aims,[114] the saga of disputes on renewable energy shows that national climate finance and investment measures might be challenged if they do not appear to be trade-neutral or necessary to protect the climate, as well as non-discriminatory.[115] Similarly to international investment law, this can curb states' ambitions when they seek to design climate policies that protect interests other than free trade, such as local economic development and energy security.

Finally, attempts at mainstreaming climate change mitigation in international trade law can also be found in preferential (regional) trade agreements, particularly in those adopted in the last decade.[116] These agreements come with a host of substantive and procedural solutions for potential conflicts between trade and environment, including conflicts related to climate change. Given their variety, the potential of these agreements to bypass the limitations of WTO law depends on the wording of their provisions and how they are applied.[117] As they are relatively recent and have yet to generate any international disputes, it is too early to make a comprehensive evaluation of their significance.

4.4 Summary

The international trade and investment regimes do not specifically recognize climate finance and investment as a distinguishable form of economic development deserving support and special treatment. Despite this, both regimes are influential, with their overarching rules, institutions, and dispute-settlement mechanisms, in ways that can alternatively favour or hamper climate-related finance and investment. On the one hand, the low barriers to the transnational transfer and market access to capital, goods, and services are beneficial to most forms of international climate finance and investment. On the other hand, as the examples in this section demonstrate, the 'regulatory chill' on domestic climate policies from trade and investment disputes is unlikely to be fully overcome under the current rules. While both regimes are developing in ways that try to accommodate environmental concerns through new

[114] Kulovesi (n. 75).

[115] Under GATT and the TRIMs Agreement, a state could justify the legality of a trade-restrictive measure on the basis of the 'environmental' exceptions of GATT art. XX(b) and (g). See Low, Marceau, and Reinaud (n. 90).

[116] Jean-Frédéric Morin and Sikina Jinnah, 'The Untapped Potential of Preferential Trade Agreements for Climate Governance' (2018) 27 *Environmental Politics* 541.

[117] For instance, with regard to the EU's practice on renewable-energy subsidies in its preferential trade agreements, see Ilaria Espa and Gracia Marin Duran, 'Promoting Green Energy Through EU Preferential Trade Agreements: Potential and Limitations' (2020) 47 *Legal Issues of Economic Integration* 115.

treaty provisions, the resulting fragmentation limits the development of a coherent governance system at the international level.

5. REGULATING PRIVATE FINANCIAL ACTORS: SOCIALLY RESPONSIBLE INVESTMENT AND CLIMATE BONDS

5.1 Introduction

The role of law is even weaker in driving private capital toward climate finance and investment. Given the liberal structures of the global economy, law does not directly impose on banks, institutional funds, or other key actors of transnational finance any duty to commit part of their capital to climate-related activities. As the previous sections elucidate, international law and domestic regulation can both facilitate and obstruct the flow of climate finance and investment.

This section focuses on two ways in which private financial actors are induced to either withdraw their support for carbon-intensive activities or invest in climate-friendly ones. First, we outline Socially Responsible Investment (SRI) initiatives and their relationship with climate finance writ large. Second, we consider the gradual standardization of climate bonds, since these financial instruments are increasingly used to draw financial actors to climate-related investment. This section will also show that, as both areas are gaining traction in the financial industry, there is a growing momentum for forms of standardization under the law, such as under the EU regime.

5.2 Socially Responsible Investment

SRI is an economic activity whereby investors and financiers leverage their efforts to improve the ethical, social, and environmental dimensions of financed activities and corporate behaviour. In some instances, this can also translate into direct investment and financial support for climate-related activities, and thus be considered climate finance in broad terms.

Originally, SRI developed as an ethical movement,[118] but today it is a fully fledged industry underpinned by a wealth of initiatives. To give a rough picture, a 2021 estimate of sustainable-investing assets in some major developed economies reports assets worth US$35.3 trillion.[119] Despite this figure's apparent precision, SRI is a loosely defined economic phenomenon,[120] resembling, as Richardson notes, a 'fluid discourse' more than a set of activities covered under a form of international governance or regulation.[121] Predictably, then, law has

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[118] An example is the global divestment campaign during the 1970s against firms engaged in the South African economy during the apartheid regime.

[119] Global Sustainable Investment Alliance, *Global Sustainable Investment Review 2020* (Global Sustainable Investment Alliance, 2021), <www.gsi-alliance.org/wp-content/uploads/2021/08/GSIR-20201.pdf>, 4.

[120] For a list of generally accepted categories, see ibid., 3, listing negative screening, positive screening, norm-based screening, Environmental and Social Governance (ESG) integration, sustainability themed investing, impact/community investing and corporate engagement, and shareholder action.

[121] Benjamin J. Richardson, 'Climate Finance and Its Governance: Moving to a Low Carbon Economy through Socially Responsible Financing?' (2009) 58 *International and Comparative Law Quarterly* 597, 598.

so far played only a secondary and functional role in this complex yet growing phenomenon,[122] both because some of the activities performed under the SRI umbrella take place through formal and often legally prescribed means, such as shareholder activism, and because there are many voluntary or self-regulatory initiatives under SRI that can be interpreted as a 'reaction to the impacts of the economic system and the failure of states to regulate them'.[123]

There have been several attempts at self-regulation by the financial industry to mainstream climate change considerations in investment decisions and corporate activities. For instance, two early initiatives have been the Climate Principles drawn up by the Climate Group, a multi-stakeholder initiative, and the Carbon Principles created by an alliance of leading US investment banks.[124] Although broadly formulated and now discontinued, both sets of instruments contained general aims to scale up finance toward low-carbon investment and activities. Subsequent initiatives have included the Net-Zero Asset Owner Alliance, which comprises institutional investors that commit to and report on an increased ambition in their portfolio in support of the Paris Agreement's 1.5°C limitation goal.[125] Similarly, the Investor Agenda, comprising pro-climate institutional investor groups, commits its members to increase their level of low-carbon investment.[126] While the potential of these initiatives grows out of the sheer amount of asset value that their members represent, their foundational statements and principles are merely aspirational and do not present a clear set of commitments on quantifiable climate finance and investment efforts.[127]

A trend toward better-defined standards and commitments seems to have emerged from initiatives on transparency about the assessment and disclosure of companies' climate risks and opportunities,[128] from so-called Environmental and Social Governance (ESG) dimensions

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[122] Magnus Jesko Langer, 'Key Instruments of Private Environmental Finance: Funds, Project Finance and Market Mechanisms', in Pierre-Marie Dupuy and Jorge E. Viñuales (eds), *Harnessing Foreign Investment to Promote Environmental Protection* (Cambridge University Press, 2015), 138–155.

[123] Benjamin J. Richardson, 'The Evolving Marketscape of Climate Finance' (2014) 4 *Climate Law* 94, 97.

[124] Climate Group, 'Climate Principles: a Framework for the Finance Sector' (2008), <www.theclimatechangeorganisation.org/sites/default/files/archive/files/The-Climate-Principles-English.pdf>; and CITI, 'Leading Wall Street Banks Establish The Carbon Principles', <https://www.citigroup.com/citi/news/2008/080204a.htm>.

[125] UN Environment Programme (UNEP), 'Institutional Investors Transitioning their Portfolios to Net Zero GHG Emissions by 2050' (undated), <www.unepfi.org/net-zero-alliance/>.

[126] The Investor Agenda, 'Investment', <https://theinvestoragenda.org/focus-areas/investment/>.

[127] An exception appears to be the Principles for Responsible Banking, initiated by UNEP-FI in collaboration with a group of investment banks. These include target-setting and disclosure of climate-related activities. However, the Principles do not focus on climate change, but are construed around the promotion of sustainability in general. See UNEP-FI, 'Principles for Responsible Banking' (2019), <www.unepfi.org/wordpress/wp-content/uploads/2019/07/FINAL-PRB-Signature-Document-2-Interactive-22-07-19.pdf>.

[128] An example is the Taskforce on Climate-related Financial Disclosure discussed immediately below. Two earlier initiatives that set the ground for self-reporting of greenhouse gas emissions are the Carbon Disclosure Project and the Greenhouse Gas Protocol. The first has consolidated a comprehensive carbon disclosure platform and database of public and private entities. The second has created the most widely used standards for carbon accounting, including a standard for corporations. See Greenhouse Gas Protocol, 'A Corporate Accounting and Reporting Standard' (rev. ed., undated), <www.ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf>.

of investments,[129] and from sporadic, yet growing, commitments of individual financial actors to end their financial support for new carbon-intensive investments.[130] Even though these activities are all part of recognized categories of SRI and do not directly set standards for climate-finance efforts, their normative ambitions point to behavioural changes in the corporate and financial sectors with respect to carbon mitigation, such as through avoidance of greenhouse gas emissions by divesting from the fossil fuel supply chain.

A case that illustrates the standardization efforts to indirectly mobilize private climate finance and investment involves the instruments released by the Taskforce on Climate-related Financial Disclosure (TCFD). This group was set up by the Financial Stability Board in 2015 to spur the financial sector's attention to the risks of climate change for existing assets and long-term strategies.[131] As the name of the initiative indicates, disclosure by companies and financial actors on the climate-related risks and opportunities of their activities holds promise of a transition to a 'more efficient allocation of capital'.[132] The idea is that lenders and investors should improve their decision-making and redirect their capital to organizations that are better positioned to mitigate risks and pursue opportunities for a low-carbon transition.

Against this background, in 2017 the TCFD released a set of best-practice recommendations that identify activities related to carbon mitigation as 'opportunities' that should be disclosed by companies.[133] The broadscale implementation of these disclosures should have the effect of channelling finance and investment to entities that are active in climate mitigation and adaptation. While the number of companies recognizing and implementing the TCFD process has grown considerably in a matter of few years[134] – it is still too early to say with confidence that the TCFD framework mobilizes private climate finance.

As the SRI industry has mostly developed in the form of voluntary initiatives, investor coalitions, and self-regulation, its expansion and increasing importance are also prompting the intervention of law-making bodies. For instance, in 2020 the EU adopted a set of regulatory instruments concerning sustainable finance, whose aims include 'channelling private investment into the transition to a climate-neutral and climate-resilient economy'.[135] Moreover, in 2017, following TCFD's example, the EU Commission produced its own guidelines on non-financial reporting for large undertakings and groups, extending them in 2019 with

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129 An example is the Principles for Responsible Investing, followed by the Principles for Responsible Banking (n. 127), both set up under the UNEP-FI. In addition to inviting its signatories to commit to mainstreaming ESG considerations in their activities, the Principles assist them to comply with the TCFD's recommendations. See <www.unpri.org/pri/an-introduction-to-responsible-investment/what-are-the-principles-for-responsible-investment>.

130 For instance, Barclays plc. in March 2020 pledged to become a 'net-zero bank' by 2050; see <https://home.barclays/society/our-position-on-climate-change/>.

131 See TCFD, 'About', <www.fsb-tcfd.org/about/>.

132 TCFD, *2020 Status Report* (October 2020), <https://assets.bbhub.io/company/sites/60/2020/09/2020-TCFD_Status-Report.pdf>, 2.

133 TCFD, *Recommendations of the Task Force on Climate-related Financial Disclosures* (June 2017), <https://assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf>, 6.

134 TCFD, *2022 Status Report (September 2022)*, <https://assets.bbhub.io/company/sites/60/2022/10/2022-TCFD-Status-Report.pdf>, 12–18.

135 EU Commission, 'Overview of Sustainable Finance' (undated), <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/overview-sustainable-finance_en>.

specific guidelines on climate-related information.[136] A first set of binding requirements for sustainability disclosures began with a regulation applying to the financial services sector.[137] In 2022, the EU adopted a directive extending disclosure requirements to small and medium public-interest enterprises from 2026 onward and giving the Commission the competence to adopt binding sustainability-reporting standards, including on climate mitigation and adaptation.[138]

Another important step by the EU has been the adoption of a regulation establishing a 'sustainable finance taxonomy' of sustainable economic activities and the criteria required for defining such activities, which include criteria related to climate change mitigation and adaptation.[139] Determining at law what a sustainable activity is for directing finance and investment to 'green businesses' should, in theory, not only help to avoid 'greenwashing' practices but also direct capital toward sustainable activities and sectors, including mitigation and adaptation.[140] This governance technique of defining climate-related activities by law can be regarded as an indirect attempt to promote climate finance and investment in the EU, in three ways: first, by harmonizing EU Member States' regulation of financial products on climate-related activities; second, by offering a benchmark for disclosure of information on sustainable activities, which financial actors will have to offer under the EU Taxonomy Regulation; and, third, by determining the climate-related criteria for public or private labelling schemes on climate bonds.[141] These crucial financial instruments for the mobilization of private-sector climate finance are covered in more detail below.

[136] European Commission, 'Communication from the Commission: Guidelines on non-financial reporting (methodology for reporting non-financial information)' (2017/C 215/01). The Guidelines implement Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1. See also European Commission, 'Guidelines on Non-Financial Reporting: Supplement on Reporting Climate-Related Information' (2019/C 209/01) adopting a similar approach to the TCFD recommendations, but integrating them with the standards and models of other similar initiatives.

[137] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, [2019] OJ L 317/1.

[138] European Commission, Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No. 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, and, as regards corporate sustainability reporting [2022] OJ L 32/15, arts 1(7) and 5(2)(c).

[139] Regulation of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, [2020] OJ L 198/13, arts 3, 10–11 (EU Taxonomy Regulation).

[140] As part of the sustainable finance package, in April 2021 the EU Commission also adopted a set of 'technical screening criteria', which work as determinants and conditions for each type of activity to be regarded as contributing to climate mitigation and adaptation. See 'Commission Delegated Regulation (EU) supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives', C/2021/2800 final.

[141] EU Taxonomy Regulation (n. 139), arts 1(2), 4, and 8.

5.3 Climate Bonds

With the diversification of financial instruments in the field of climate finance, climate bonds have become increasingly relevant.[142] The main feature of these financial instruments, which can be considered a type of SRI vehicle, is that debt issuers commit to invest the proceeds from the bonds in new or existing climate-related projects.[143] Climate bonds were first introduced by public financial institutions,[144] but are now an established financial instrument in the private sector at an estimated issuance of US$858.5 billion for labelled products in 2022.[145]

With the increasing importance of these instruments in the landscape of capital mobilization for the climate, standardization and regulatory intervention are on the increase as well, in order to guarantee the trustworthiness of the bond in its 'green' benefits and effects. The International Capital Markets Association has promoted the Green Bond Principles as a set of guidelines to promote transparency in the process of issuance of green bonds and reporting by the issuer.[146] The Climate Bonds Initiative, a non-profit, has developed a Climate Bonds Standard that integrates the Green Bond Principles in setting labelling standards for climate bonds; it is currently the most widely recognized standard in the industry.[147] The Standard sets a process for issuance and labelling. It also offers a taxonomy of recognized financial instruments and it conditions the certification of bonds on criteria for eligible sectors.[148] An entity wishing to certify its climate bonds under the Standard has to undergo a process of verification by accredited companies. Thus, this regulatory initiative creates a labelling scheme to bolster confidence in the market for climate bonds by providing assurance that the proceeds from the bonds are used to finance genuine climate-related projects.

However, as with other SRI self-regulatory initiatives, there are concerns about the legitimacy of the Standard's governance and the guaranteeing of the integrity of the climate-bond market without stifling it.[149] This has attracted the intervention of national public authorities in

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[142] Paul Rose, 'Certifying the "Climate" in Climate Bonds' (2019) 14 *Capital Markets Law Journal* 59.

[143] Climate Bonds Initiative, 'Climate Bonds Standard – Version 3.0' (2019), <www.climatebonds.net/files/files/climate-bonds-standard-v3-20191210.pdf>, 8, D.1.

[144] Rose (n. 142), 62, referring to the European Investment Bank and the World Bank as the leading institutions.

[145] Climate Bonds Initiative, 'Green Bonds: The State of the Market 2022', <https://www.climatebonds.net/files/reports/cbi_sotm_2022_03e.pdf>, 3.

[146] ICMA, *Green Bond Principles: Voluntary Process Guidelines for Issuing Green Bonds* (2018), <www.icmagroup.org/assets/documents/Regulatory/Green-Bonds/Green-Bonds-Principles-June-2018-270520.pdf>.

[147] Climate Bonds Initiative (n. 143).

[148] Ibid., Annex I; for the criteria, see <www.climatebonds.net/standard/available>.

[149] For a critical discussion see Stephen Kim Park, 'Investors as Regulators: Green Bonds and the Governance Challenges of the Sustainable Finance Revolution' (2018) 54 *Stanford Journal of International Law* 1. On the role of standardization in promoting or stifling the green bond market, see Kathrin Berensmann, Florence Dafe, and Nannette Lindenberg, 'Demystifying Green Bonds', in Sabri Boubaker, Douglas Cumming, and Duc K. Nguyen (eds), *Research Handbook of Investing in the Triple Bottom Line: Finance, Society and the Environment* (Edward Elgar Publishing, 2020), 342–345.

China[150] and India,[151] and has led the European Commission to promote the adoption of an EU Green Bond Standard. As currently formulated, the EU's Standard is envisaged as a voluntary standard to act in competition with other labelling schemes and in alignment with the EU Taxonomy requirements.[152] Therefore, if adopted in this form, the EU Green Bond Standard would not represent a direct legal intervention in the realm of private climate finance, but rather a voluntary labelling scheme backed by a public authority.

5.4 Summary

The two types of initiative examined in this section show a tendency toward legal intervention in private climate finance to supplement existing forms of self-regulation and standardization. Climate bonds and, in part, SRI initiatives attempt to divert private capital to climate activities and support a growing market and industry. However, with governance hinging on fragmented and diverse initiatives, organizations, and standards, the emerging law does not directly instigate capital transfers, but rather seeks to shape a business ecosystem where the SRI industry can thrive and, at the same time, ensure that the actual contribution of the private sector to climate action is reasonably verifiable. The reluctance of public authorities to engage in regulatory intervention is open to criticism.[153] Especially in the context of international climate finance and climate bonds, it is doubtful that this approach will promote the use of climate bonds in developing countries for the purpose of meeting the goals of the Paris Agreement.[154]

6. CONCLUSION

In this chapter we have argued that there is no specific role given to law in governing international climate finance and investment, including by the Paris Agreement, despite the weightiness of the rhetoric surrounding the subject and its undoubted importance in theory. The economic realities of international capital transfers for climate change mitigation and adaptation are too numerous and too complex; and so too are the political tensions surrounding them, mainly reflecting a North–South divide on the amount, nature, and purposes of such resources.

Law in this context assumes different roles depending on the discrete sites where it is relevant. From our analysis it emerges that law manifests in a weak, procedural form under the international climate change regime. From there it gradually becomes more fragmented and diluted in regulating the supply, disbursement, and other aspects of the implementation of

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150 Hao Zhang, *Regulating Green Bonds in the People's Republic of China: Definitional Divergence and Implications for Policy Making* (Asian Development Bank Institute, 2020), <www.adb.org/sites/default/files/publication/562076/adbi-wp1072.pdf>.

151 Park (n. 149), 36.

152 EU Commission, Proposal for a Regulation of the European Parliament and of the Council on European green bonds (6 July 2021), COM(2021) 391 final. See also EU Technical Expert Group on Sustainable Finance, *Report on EU Green Bond Standard* (June 2019), <https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/190618-sustainable-finance-teg-report-green-bond-standard_en.pdf>.

153 Berensmann, Dafe, and Lindenberg (n. 149).

154 Josué Banga, 'The Green Bond Market: A Potential Source of Climate Finance for Developing Countries', (2019) 9 *Journal of Sustainable Finance and Investment* 17.

climate finance in observance of international obligations, or the protection of, and incentives for, international climate investment.

We have also offered a corresponding argument on the 'governance' question: from the top of the mountain (the international climate change regime), where a modest form of overarching governance is in place, our analysis descends through the transnational and national domains to find such a degree of institutional and regulatory complexity that climate finance and investment can hardly be deemed to be 'governed' at those lower levels in any coherent manner, either.