# Advancing a Just Transition: A Rights-Based Approach to Climate Financing

## CLIMATE AMBITION TO ACCOUNTABILITY PROJECT

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# Acronyms and abbreviations

| | |
|---|---|
| BIT | Bilateral investment treaty |
| CSO | Civil society organisation |
| DFIs | Development finance institutions |
| DSA | Debt sustainability assessment |
| GCF | Green Climate Fund |
| ICCPR | International Covenant on Civil and Political Rights |
| ISDS | Investor-state dispute settlement |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| JET-IP | Just Energy Transition Investment Plan |
| PPPs | Public Private Partnerships |
| SDGs | Sustainable Development Goals |
| UDHR | Universal Declaration of Human Rights |
| UNCTAD | United Nations Conference on Trade and Development |
| UNFCCC | United Nations Framework Convention on Climate Change |
| UNGP | United Nations Guiding Principles |
| WSC | Wall Street Consensus |

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## Acknowledgements

The Climate Ambition to Accountability Project (CAAP) would like to thank Shingi Masanzu, Dr Anil Yilmaz Vastardis (University of Essex), Jon Sward (Bretton Woods Project), and James Reeler (CAAP) for taking the time to review this working paper. The content of this paper is however in no way a reflection of their views, with any error being the sole responsibility of the CAAP.

# Executive Summary

The purpose of this report is two fold. First the paper establishes a rights-based framework for critically examining the role of climate finance in achieving a just energy transition. Second, the paper proposes a research agenda that may empower civil society and social movements with the tools to help close some of the gaps between applicable human rights norms and realisation of these rights in climate investment plans.

A human rights-based approach is defined as a conceptual framework grounded in global human rights standards, aiming to analyse responsibilities, tackle inequalities, and correct discriminatory practices hindering progress and undermining rights realisation. Human rights are intrinsic to every individual, regardless of diverse categories, and fundamental for affirming shared humanity, preserving integrity, and treating human lives as sacred. The purpose is to protect dignity, assign value to human existence, and ensure basic needs are met without compromising safety and security. While human rights are inherent and exist independently of legal instruments, both domestic and international law play a crucial role in actively realising human rights and preventing and addressing human rights violations

The central relationship in human rights law is between the state (the duty bearer) and people (rights holders). The state is required to ensure that human rights are respected, protected and fulfilled. Non-state actors, including the private sector, generally do not have direct human rights obligations and responsibilities under international law. Businesses play a secondary role in human rights legal frameworks, with no binding obligations towards realising rights, yet it is increasingly common practice to hand over the responsibility to private actors to enable and finance the development agenda for the provision of public goods and services. This poses a significant threat as not all development or human rights imperatives are in line with the profit-driven mindset of corporations. Therefore, challenges arise when private sector interests do not align with development goals.

The "Billions to Trillions" agenda, initially spearheaded by the World Bank and subsequently adopted by various international financial institutions, including the IMF and development banks, advocates for mobilising public finance to attract private investment on a massive scale. The agenda gives effect to the Wall Street Consensus (WSC). The WSC, acknowledges that averting the climate crisis is contingent on the stability of the global financial system, but seeks an alternative to a more interventionist 'green developmental state'. The WSC, therefore, seeks ways to exploit the climate crisis for profitable opportunities that benefit financial markets and financial institutions. The Billions to Trillions agenda gives effect to the WSC as it operates on the premise that the fiscal space for states is limited, and seeks to bridge the development financing gap by leveraging trillions of dollars from the private sector.

The Billions to Trillions agenda contends that the perceived riskiness of investing in developing countries hinders the mobilisation of private funds. It also operationalises the WSC by urging the use of public finance to de-risk opportunities for private investment, shifting risks to the public sector to support private profit gains. This model relies on the state creating an enabling environment to de-risk private finance through innovative financing instruments like blended financing, public-private partnerships and liberal international investment regimes. Therefore, the agenda not only pushes for the dominance of private finance debt instruments; but also pushes for the commodification of public goods and services as a response to the climate crisis.

The paper critically appraises this approach through a rights based framework of climate finance. Our rights based climate finance approach for a fair climate finance regime draws on three main human rights international agreements and guides, namely: 1) the International Bill of Rights which encapsulate the principles that guide financing rights realisation; the United Nations Framework Convention on Climate Change (UNFCCC) frameworks and the Paris Agreement that provide internationally agreed upon standards for climate financing; and the Guiding Principles on Foreign Debt and Human Rights which guides the terms and conditions of foreign debt in alignment with rights realisation. This is especially relevant today because while foreign assistance could be burden-free when provided through grants, currently debt makes up a significant component of this foreign assistance in the reality of climate related financial flows.

The paper examines the impact of the prevailing financing approach on human rights through five identified clusters of human rights principles.

The first cluster of principles 'national responsibilities' captures the principles that address the duties of the state to finance rights realisation. In a state-based approach to financing public goods and services, public investments focus on developing expansive public green infrastructure funded through taxes, sovereign bonds and grants, with minimal private sector involvement. Conversely, in a de-risking approach (aligned with the Billions to Trillions agenda), the state addresses various risks to facilitate private sector participation in financing and providing public services, often involving Public-Private Partnerships (PPPs). However, reliance on PPPs and blended finance instruments may risk limiting access to infrastructure through high user fees, potentially undermining essential rights for the poor, as states pass on their rights realisation responsibilities to profit-oriented actors who do not have any duty to actively realise rights. This undermines the state's responsibilities to finance development.

Maintaining national sovereignty is the second cluster of human rights principles, which indicate the need to protect a state's independence and allow for decision-making that is country-owned and democratic. The use of private finance in providing public goods exposes states to rules governed under international investment treaties at both bilateral and multilateral levels, such as bilateral investment treaties (BITs) and the World Trade Organisation's Trade Related Investment Measures (TRIMS). These treaties aim to protect foreign investors and can undermine a nation's development objectives by limiting policy autonomy. Such treaties, adjudicated through Investor-State Dispute Settlement (ISDS) mechanisms, allow private investors to challenge government actions, often resulting in substantial financial compensation funded by the public coffers in instances where regulatory changes impact investor profitability. This regulatory regime undermines a state's ability to act independently in releasing the rights of people.

Procedural fairness is a cluster of human rights obligations outlined for actors to observe fair and just procedures during financing and implementing of climate projects. It ensures that all actors are treated fairly during the process of project planning and implementation, and requires transparency of procedures and decision making. The challenge of accountability arises in the complex landscape of climate finance involving various actors, including multilateral and bilateral development finance institutions, commercial lenders, and private financiers. This complexity leads to opacity, particularly in projects led by the private sector or enacted through PPPs, hindering meaningful community participation and restricting access to critical information. In South Africa, the Promotion of Access to Information Act, 2000 (PAIA) offers an opportunity for civil society organisations (CSOs) to address information gaps. However, even when information is accessible, it may not be sufficient to support a CSO's claim to enabling justice. The JETP is a bilateral deal that is a key example of a process that lacks sufficient transparency and public participation.

The fourth cluster of human rights principles is labelled 'responsibilities of financial investment', and describes the duties and conditions that financial investment needs to meet in order to allow for equitable distribution of resources. A key example to this is that the Billion to Trillions agenda undermines the structural impediments that prevent the reallocation of capital flows from dirty industries towards green industries. The predominant trend directs most funds towards established corporations with substantial access to capital markets. Furthermore, prominent investors often sidestep penalties associated with investments in polluting sectors by leveraging intricate financial structures, discreet investment funds, and shadow banking. Due to the minimal supervision of these private investment mechanisms and shadow banking, the financing of environmentally harmful industries persists, rather than bolstering initiatives combating climate change. The prevailing strategy of risk assessment, which involves integrating risks into asset valuation through methods such as disclosing climate-related information and relying on impartial third-party evaluations, fails to adequately accommodate the inherent uncertainty of climate change. This approach also lacks the versatility required to adapt to governmental strategies for change, causing monetary policies to inadvertently favour industries responsible for carbon emissions. Consequently, the transition to cleaner energy in the Billions to Trillions agenda hinges on uncertain private investments, impeding the predictability principle required for financial flows.

Principle five addresses the obligations that actors have in 'times of crises' to manage financial flows and decrease financial pressure or constraints that inhibit a swift response to crisis. The financing of Just Energy Transition Plans (JETPs) relies heavily on public and private finance debt instruments, posing challenges in debt restructuring, especially when private actors prove difficult to engage. Legal risks associated with debt governance and jurisdiction need careful evaluation to prevent undermining human rights obligations during crises, as exemplified by ongoing debt justice campaigns supporting nations like Zambia. Existing Debt Sustainability Assessment (DSA) procedures by international institutions lack key considerations, necessitating an evolution to address factors like foreign currency borrowing costs, climate change impact, and human rights implications. Additionally, the Debt Service Suspension Initiative (DSSI), though initiated to alleviate economic hardships during the Covid-19 pandemic, fell short due to limited private sector involvement and an exclusive focus on bilateral debt. Contingent liabilities, integral to the Billions to Trillions agenda, transfer commercial risk exposure to the state, but their undisclosed nature in private companies poses risks, and their emergence during crises, like the ongoing climate crisis, raises concerns about long-term costs. A comprehensive

evaluation of these financial mechanisms is essential to align with principles promoting sustainability, transparency, and human rights.

The appraisal of the Billions to Trillions agenda based on our rights based climate finance approach illustrates the gap between the norms set within international agreements and guidelines and the global climate finance architecture. Therefore, we conclude by proposing a research agenda that may empower civil society and social movements from democratic countries with tools to help close some of the shortfall between climate finance human rights norms and the realisation of these rights in climate investment plans to keep rights holders accountable.

# Section 1. Introduction

The mobilisation of adequate climate finance is a crucial ingredient for achieving a just energy transition. As the climate agenda gains momentum, financial flows dedicated to climate action, from both public and private sources, are on the rise. Developing countries have been vocal in urging developed counterparts to address their climate debt by contributing essential finance towards their climate goals. Over the past two decades, developed nations have made significant commitments to mobilise more funding to support various climate endeavours, including mitigation, adaptation and addressing loss and damage. With these increases in climate-related financial flows, South Africa has become a focal petri-dish for bilateral financing, attracting substantial funds as an "investable" nation with significant decarbonisation goals.

However, the sources of financing and the manner in which it is distributed and governed can profoundly shape the socio-economic and environmental trajectory of a nation, deeply implicating the realisation of human rights. Yet the current financial architecture often prioritises investor interests and profit-seeking, rather than thoroughly considering the human rights implications of these decisions and their impact on communities and individuals. Climate investment plans are often overly complex, lack transparency, and frequently overlook the concerns of affected communities and workers during their formulation and implementation. To ensure a just energy transition, investment plans must be constructed with meticulous attention to their social justice and human rights implications, safeguarding afflicted communities from being left in worse conditions than before.

A progressive rights-based approach should be embedded in the financial decisions of climate investment plans. It is imperative to advocate for institutions and nations providing climate finance to prioritise rights. While some international legally binding instruments – such as the documents forming the International Bill of Human Rights (United Nations, 1948), guiding documents such as the United Nations Guiding Principles on Foreign Debt and Human Rights (United Nations 2012), and climate-related agreements such as the United Nations Framework Convention on Climate Change (UNFCCC 1992) and the Paris Agreement (2015) – emphasise the relevance of human rights in the context of finance. Others, such as the Addis Ababa Action Agenda (Conference on Financing for Development 2015) and the G20 framework on debt, may conflict with the realisation of rights through their recommended financial mechanisms. In addition, institutions such as the World Bank, the International Monetary Fund (IMF), and various development banks lack official human rights guidelines in their operations, leading them to overlook how their decisions on financing and policy may impact human rights. Under the UN Guiding Principles on Business and Human Rights, businesses have a responsibility to respect human rights, but this is not a binding and enforceable obligation under international law. Despite the significant social and economic power business has, and in particular the potential for business to generate significant rights violations, there remains an absence of clear accountability and an established normative framework guiding how businesses participate in financing development.

This general lack of accountability of actors in the international financial landscape (including governments, financial institutions, and corporations) permits development and climate financial flows that may not always align with established human rights principles. To address this issue and guide climate financing towards a just transition, there is a need for a progressive, rights-based approach that can be harnessed by activists and advocates. This paper proposes such an approach to financing that aligns climate financing with the pursuit of a just transition. It commences by examining the intersection between human rights and the just transition, identifying the obligations related to climate financing, and exploring the significance of a human rights-based approach (Section 2). Subsequently, the paper analyses climate finance through a human rights lens, delving into international obligations to finance the climate agenda, framing the global financial architecture, and evaluating its performance to date (Section 3). Next, it uses human rights obligations concerning development and the climate agenda, along with associated principles, as a guideline to assess the financial architecture and ascertain its relevance in promoting a just energy transition (section 4). Finally, the paper proposes a research agenda that may empower civil society and social movements from democratic countries with tools to help close some of the shortfall between climate finance human rights norms and the realisation of these rights in climate investment plans to keep rights holders accountable.

# Section 2. Key international agreements on human rights and development

In order to comprehend the importance of human rights on the global stage, it is imperative to begin by defining human rights and its significance within the context of development. This section will outline the key international agreements that establish the human rights obligations binding states and businesses, and touch on the provisions of the South African constitution that governs socio-economic and environmental rights.

According to the Office of the High Commissioner for Human Rights (OHCHR), a human rights-based approach is "a conceptual framework that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights". The primary aim of such an approach is to "analyse obligations, inequalities and vulnerabilities and to redress discriminatory practices and unjust distributions of power that impede progress and undercut human rights" (OHCHR 2011).

The notion of human rights is based on the belief that all individuals, regardless of race, class, gender, religion, or any other category, possess an inherent set of rights and freedoms (UN Charter, Article 55). These rights are fundamental to affirm our shared humanity, protect our integrity, and treat human lives as sacred. These rights are inherent, meaning that they are accorded to each human being by virtue of their existence. The purpose of rights is to protect and restore dignity, provide worth to human existence, and protect human security, by ensuring that basic needs such as food, water, shelter, clothing, and clean environment are met in a way that does not compromise safety and security. In meeting these obligations, we protect not only the physiological well-being of individuals but also the well-being of the planet (Nagpal 2013). While human rights are inherent, and therefore exist independently of legal instruments, domestic and international law serve as a critical tool for enabling the proactive realisation of human rights as well as preventing and remedying human rights violations.

The UN was established at the end of World War II, marking a significant milestone in the modern history of human rights. Shortly after the war, the Universal Declaration of Human Rights (UDHR) was adopted by the UN's General Assembly to provide a common standard for realising fundamental human rights across all nations in 1948. The UDHR declared that "the recognition of inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". The UDHR served as the basis for the creation of two legally binding international treaties: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICCPR commits states to protect and respect civil and political rights, including the right to life, the right to a fair trial, freedom of speech, and freedom of religion, among others. The ICESCR recognises a range of social, economic, and cultural rights, including the right to food, health, education, and shelter. The ICESCR

requires signatory states to take progressive steps to realise these rights. Together with the UDHR, these covenants make up the International Bill of Human Rights. Under international law, the ICCPR and ICESCR are given equal importance through equivalent measures of expression and protection (Chenwi and Chirwa 2016). These two sets of rights should work in harmony as one emphasises and enhances the other. For example, realising civil and political rights such as self-expression and freedom of movement can be pointless if not accommodated by the right to access basic needs and by equipping everyone with power to advocate equally for their rights. Dignity lies in ensuring that all needs are met, without prioritising one over the other.

Sustainable development is a concept closely related to human rights. Development was described in the UN Declaration on the Right to Development as an 'inalienable human right' which allows people to take enjoyment from cultural, political, social and economic rights (UN General Assembly 1986). The Sustainable Development Goals (SDGs) are a voluntary guideline agreed upon by all 191 UN member states which aims to realise human rights for all (UN General Assembly 2015). They are a set of 17 goals, each with various targets and indicators that aim to address the environmental, social, and economic challenges facing the globe, ultimately aiming to increase human dignity and equality. SDGs closely align with the rights indicated in the ICESCR with targets tackling hunger (SDG 2), education (SDG 4), decent work (SDG 8) and affordable energy (SDG 7), among others. Rights in the ICCPR are also evident in the right to life (SDG 3), access to information (SDG 9), participation (SDG 16), and equity and non-discrimination (SDG 10) (OCHR 2015). While the SDGs are not framed as part of international human rights law, they are vehicles aimed at the end goal of the human rights enshrined in the two covenants of UDHR.

The central relationship in human rights instruments is between the state (the duty bearer) and people (rights holders). Among its duties, the state is required to ensure that human rights are respected, protected and fulfilled. Non-state actors, including the private sector, generally don't have direct human rights obligations and responsibilities under international law. The UN Guiding Principles (UNGP) on Business and Human Rights, established in 2011, provided a voluntary guide for business to adhere to. The UNGP on Business and Human Rights rests on three pillars. The first pillar calls upon states to fulfil their duty in protecting human rights. The second pillar encourages businesses to respect the principles of human rights. The third pillar provides avenues for affected parties to seek a remedy for any business related human rights violations (Surya 2021). The UNGP on Business and Human Rights relies on the concept of due diligence, which requires businesses to manage their own risks in relation to any obligations to do no harm.

Yet despite businesses only playing a secondary role in human rights with no binding obligations towards realising rights, it is increasingly common practice to hand over the responsibility to private actors to enable and finance the development agenda. For example, the Addis Ababa Action Agenda is a framework that provides guidelines on financial flows and policies designed to align with the achievement of the SDGs. Even though achieving the SDGs remains a state's responsibility, the Action Agenda marks the private sector as a key actor in financing the SDGs, stating that "unlock[ing] the transformative potential" of the private sector is vital. Enabling private sector investment for development is increasingly a trend globally, with financial institutions such as the World Bank and the IMF encouraging states to create an enabling environment for the private sector to fund development projects rather than directly using public funds (Gabor 2021).

Development agendas do not always line up with the interests of the private sector. On one hand, development may be in the best interest of many private entities as it can help create new market opportunities and increase business resilience (Rashed and Shah 2021). On the other hand, not all SDGs align with  businesses' primary focus on profitability. This is illustrated by the use of cheap child labour (SDG 8) in order to lower costs, and the bypassing expensive air quality measures (SDG 11) during mining that impact the health of surrounding communities. Thus, despite non-binding obligations on the private sector in international law, there is a need to recognise the larger role that the private sector is playing in financing development, and to have corresponding measures of accountability.

Box 1 below highlights some of the key human rights obligations of the South African state.

### Box 1. The South Africa's Human Rights Obligations

South Africa has legally enshrined human rights in the Bill of Rights. The Bill of Rights is a cornerstone of the country's democracy and was enshrined in the constitution in 1996, following the end of apartheid. The Bill of Rights is a set of fundamental human rights that are protected and upheld by the state. It guarantees civil and political rights such as freedom of assembly (section 17), expression (section 16), and belief (section 15), as well as social and economic rights, such as the right to housing (section 26), the right of access to healthcare services, sufficient food and water, social security (section 27) and education (Section 29). The Bill of Rights recognises the rights of marginalised groups, including women, children, and persons with disabilities. South Africa is a signatory on the two covenants (ICCPR and ICESCR) and the UDHR, that make up the UN Bill of Rights, as well as the SDGs. South Africa's Bill of Rights is considered among the most progressive in the world. The Constitutional Court, as the highest court in the land, is the body that ultimately enforces and ensures respect for the Constitution and Bill of Rights (Mubangizi 2008). Associated rights enforcing bodies include the South African Human Rights Commission and the Public Protector, which aim to protect and uphold respect for human rights and assess their observance in an effort to hold the government accountable for any rights violations.

# Section 3. Analysing climate finance through a human rights lens: Understanding international obligations and assessing the global climate finance architecture

Mobilising adequate resources is one of the constraints faced in rights realisation. The aim of this section is to outline the human rights obligations on financing development as well as the architecture of the climate finance landscape. Subsection 3.1 underlines all human rights obligations as well as other international agreements and guidelines that speak to financing development. It also touches on international obligations that nations have to finance the climate agenda. Subsection 3.2 maps out the architecture of international climate finance specifically, illustrating the institutions involved, and their roles and mandates. Subsection 3.3 then analyses the performance of the climate financial architecture by assessing the scale, sources and direction of financing.

## 3.1. Human rights obligations to financing rights realisation

Both international human rights agreements and principles, as well as the South African constitution, address the issues of financing for development. This, with a focus on climate justice, is represented in Figure 1, and unpacked further below.

Figure 1 captures key international human rights agreements and principles, specifically those aiming to finance development broadly and climate justice in particular. The relevant rights based agreements highlighted are the International Covenant on Economic, Social and Cultural Rights; Guidelines on Foreign Debt and Human Rights and the Paris Agreement and the UNFCCC Framework.

Figure 1. Human rights principles Identified for a rights based approach to climate financing

| *International Covenant on Economic, Social and Cultural Rights* | *Guidelines on Foreign Debt and Human Rights* | | | | *Paris Agreement and the UNFCCC* |
|---|---|---|---|---|---|
| | A –External Debt | B – Debt Sustainability | C – National Development Strategy | D – Resolution of debt | |
| Obligation to take Steps | Decision to borrow or to lend | Debt sustainability assessment | Policy Formulation and Implementation Freedom | Independent mechanism | Common but Differentiated Responsibilities |
| Maximum amount of available resources | Loan negotiation and contracting | Public audits of debt and lending portfolios | Avoiding Conditionalities | | New and Additional |
| Efficient and effective use of resources | Use of loan funds | Contingent liabilities | Policy and Human Rights Alignment | | Agreed full incremental costs |
| Minimum core obligation of essential rights | Debt servicing or repayment | | Alignment to national development goals | | Transparency |
| Non-Retrogression | Renegotiation and restructuring | | Investment agreements | | Predictability |
| Non-Discrimination | Debt relief | | | | Technological Transfer |
| Extraterritorial Obligation | Debt moratorium | | | | Country Owned Strategies |
| | Sharing risk of the loan | | | | Consistent with climate goals |

Source: Authors construction

### 3.1.1. Key financing principles on human rights: International Covenant on Economic, Social and Cultural Rights

The failure to realise universal human rights is often classified as a resource issue. The International Covenant on Economic, Social and Cultural Rights outlines in Article 2(1) that states must take steps subject to the maximum available resources to progressively realise rights (UN General Assembly 1966). The article states that each state party is obliged to take immediate steps, individually or through international assistance and cooperation, towards achieving the full realisation of recognised rights by all appropriate means. This article embeds the responsibility of the state to achieving human rights and ensuring the appropriate and maximal financing available.

General Comment No. 3 includes several principles that are essential to ensure the full realisation of human rights. General Comment 3 first and foremost outlines that states have an *obligation to take steps* towards financing the realisation of rights and development. Second, the comment highlights the importance of directing the *maximum available resources* towards realising human rights. This involves the allocation of resources in a manner that benefits all, with states using their discretion to balance competing priorities. Third, it involves the *efficient and effective use of resources*, considering value for money and avoiding waste and corruption. Fourth, states have a *minimum core obligation of essential rights* which includes all the basic social, cultural and economic rights and sets a floor for each right in order to quantitatively and qualitatively understand the minimum level of

the right that must be achieved, even during disaster events. Fifth, the principle of *non-retrogression* highlights the importance of preventing intentional backsliding in human rights progress. This means that parties must work towards maintaining and improving the gains made in human rights, rather than regressing to a previous state. Sixth, the principle of *non-discrimination* emphasises the need to collect disaggregated data to ensure that no one is intentionally left behind in the pursuit of human rights. This principle is crucial for promoting equality and preventing discrimination based on factors such as gender, ethnicity, religion, or social status. Finally, the comment emphasises the need to mobilise all resources from different sources, including domestic and international sources. This involves *extraterritorial obligations to provide assistance and cooperation* regarding resources, which requires countries that are unable to mobilise sufficient domestic resources to seek foreign assistance and international financing to meet their human rights obligations (CESCR 1990, 30).

### 3.1.2. Guiding principles of foreign debt and human rights

In developing nations, the perception of limited financial resources is widespread, prompting many countries to fulfil their extraterritorial obligations by pursuing foreign assistance. While foreign assistance could be burden-free when provided through grants, debt makes up a significant component of this foreign assistance in reality. The terms and conditions that constitute foreign debt have the potential to undermine the progressive realisation of human rights, as history shows with respect to the spate of harmful structural adjustment policies. In 2012, to confront this challenge, the UN developed a guiding document called the Guiding Principles on Foreign Debt and Human Rights (Human Rights Council 2014). The guiding principles are soft laws which are not legally binding for states but rather suggest best practices for lenders and borrowers on how to balance loan agreements and debt arrangements with the legal obligations of human rights.

The Guiding Principles speak to foundational and operational principles. The foundational principles address the human rights obligations (outlined in the first paragraph of this section) upon which the ICESCR Article 2(1) should base their analysis. Operational principles include the duty of international cooperation; the shared responsibility of creditors and debtors; and ensuring an independent process of national development (Table 1, Annexure 1). The operational principles address four main areas, namely external debt (Principle A), debt sustainability (Principle B), national development strategy (Principle C), and resolution of debt related issues (Principle D).

Principle A delves into the intricate aspects of external debt, setting forth terms and conditions that safeguard against any infringement upon human rights. These guidelines underscore the importance of democratic loan agreements and negotiations, emphasising the necessity of comprehensive consultations with relevant stakeholders and unwavering transparency in the finalisation of conditions. Principle A emphasises that the borrowed funds are used only for their intended purpose, supporting projects that uphold and respect human rights. It states that debt servicing should never become disproportionately burdensome, detracting from the realisation of fundamental human rights. Equally, debtor states must refrain from implementing regressive measures that prioritise debt repayments over the preservation of human rights, relinquishing their commitment to allocate financial resources in a balanced manner. While honouring external debt agreements remains essential, it is recognised that challenging circumstances such as financial distress or natural disasters may necessitate adjustments. In such cases, Principle A calls for genuine negotiations with all creditors, including international

financial institutions, and restructuring, ensuring that human rights obligations and developmental aspirations are met while preserving the debtor state's capacity.

Principle B speaks to the critical concept of debt sustainability, emphasising the need for debtor countries to not only ensure their ability to fulfil repayment obligations but to also carefully assess the impact of debt burdens on their capacity to uphold and advance human rights. This principle outlines that borrower states and lenders should take into account the impact of contingent liabilities – such as debts from export credits, foreign investments, and public-private partnerships – on the borrower's financial position when making decisions about borrowing or lending and assessing debt sustainability. Additionally, all states should regulate and monitor private sector external lending and borrowing to prevent the creation of private debt burdens that can lead to financial instability and undermine the realisation of human rights. Principle C highlights the significance of national development strategies being truly owned by the country itself, forged through inclusive consultations involving all relevant stakeholders. The principle states that country ownership entails the freedom to choose and lead policy formulation and implementation and that creditors should not impose conditions related to privatisation, trade liberalisation, or financial sector reforms, essentially prohibiting structural adjustment policies. Finally, Principle D underlines the imperative to resolve debt repayment challenges and disputes through an independent mechanism, potentially an international debt workout mechanism. These are expanded in Table 1 (Annexure 1).

### 3.1.3. International obligation on climate financing

These human rights obligations and guidelines on financing are then complemented by an international legal obligation to finance the climate agenda outlined in two main documents, the UNFCCC (1992) framework and the Paris Agreement (2015).

The UNFCCC primary goal was to establish a shared framework for international collaboration on climate change. It was adopted in 1992 during the Earth Summit held in Rio de Janeiro, Brazil. The framework outlines the "common but differentiated responsibilities and respective capabilities" (UNFCCC 1992 Article 3(1)) of countries, which recognise that not all countries are equally responsible historically for the crisis, and should therefore act and finance accordingly. Thus the agreement states that the climate action measures of developing countries are dependent on developed countries providing significant financial resources to enable the transition. The financing mobilised from developed nations must be "new and additional" (Article 4(3) of the UNFCCC), indicating that the same financing directed to other development goals cannot be repurposed to meet climate goals. The principle of "new" financing means that climate finance should not divert existing development assistance or aid, and should be fresh and separate from this existing financing. The principle of "additional" financing states that financial resources should be provided in addition to domestic resources in developing countries, supporting poverty eradication and sustainable development efforts. This financing is also meant to meet the "agreed full incremental costs" of mitigation and adaptation (Articles 4(3) and 4(4) of the UNFCCC). The principle of "agreed costs" indicates that the financial resources provided should be based on a transparent and mutually agreed assessment of the specific costs associated with climate-related projects and activities. This assessment takes into account the unique circumstances and needs of each developing country. It ensures that the funding allocated aligns with the actual financial requirements for implementing climate action. The principle of 'full incremental costs' refers

to the complete additional expenses incurred by developing countries when implementing climate-related projects or activities. It recognises that these costs go beyond their existing development expenditures. The financial support provided should cover the entirety of these incremental costs to ensure that countries can effectively address climate change without diverting resources from other vital development priorities. The UNFCCC agreement also calls for transparent financing mechanisms that exist within a transparent system of governance in Article 11(2). It encourages predictability of financing, saying "The implementation of these [financial] commitments shall take into account the need for adequacy and predictability in the flow of funds ..." (Article 11(3)). This means that countries receiving financial support should have a reasonable expectation that the funds will be available in a consistent and timely manner. Predictability enables better planning and implementation of climate projects and helps countries to effectively utilise the financial resources provided.

The Paris Agreement was established at COP21 in Paris, France, in 2015, and aimed to keep global temperatures below 2°C above pre-industrial levels. The Paris Agreement, in Article 2, states that countries should ensure that "finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development". It emphasises the UNFCCC agreements for developed countries to mobilise financing for developing countries under Article 9, stating that developed countries should lead in the climate finance agenda. The article emphasises the significance of public financing while also encouraging a wide variety of sources, instruments and channels to fund the climate agenda. Article 9(3) and 9(4) calls for "country owned strategies", which refers to the recognition that each country has the autonomy to determine and implement its own climate action plans based on its national circumstances, capabilities, and priorities. It also encourages ensuring transparency and good governance of financial assistance provided by developed countries in Article 9(3) and Article 9(7)).

In addition, a technology mechanism was established in the Paris Agreement to pave the way for effective technology development and transfer during the transition. This mechanism serves as a catalyst for advancing research, innovation, and the widespread adoption of climate-friendly technologies, enabling a greener and more sustainable future for all. In this regard the agreement again emphasises the call for developed countries to step up and mobilise support for developing nations. This support encompasses a wide spectrum of actions, including the strengthening of cooperative efforts on technology development and transfer at various stages of the technology cycle, and mobilising funding for developing nations in this endeavour (Article 10(6)). The climate finance and human rights implications of this principle is elaborated on in section 4.

The Paris Agreement also regulates a 5-year stock-take for each nation, to report back on their progress regarding their climate commitments. This global stock-take takes account of a country's progress in achieving their financial commitment, which ensures some semblance of a monitoring and evaluating system. The Paris Agreement underscored the longstanding commitment of wealthier nations to mobilise an annual sum of $US100  billion a year to support less affluent nations. At COP26 in 2021, climate negotiators began to discuss the extension of the $US100 billion a year goal to ensure that this financing continued to be mobilised until 2025.

## 3.2 Outlining the global climate finance architecture

A range of financing mechanisms have been developed through and around these frameworks of the UNFCCC and the Paris Agreement in order to mobilise funds from developed countries to developing countries. Mechanisms are techniques developed nationally and through international financial institutions to ensure that money flows toward the climate agenda.

The Kyoto Protocol (1997) was an early document that committed states to reduce their greenhouse gas emissions. The protocol introduced the concept of financial mechanisms specifically designed to support climate action such as the Clean Development Mechanism (CDM) (Article 12 of the Kyoto Protocol), which aimed to incentivise investments in emission reduction projects in developing countries. Operating as a market-based mechanism, the CDM relied on the acquisition and trading of carbon credits, providing high-emitting nations with a means to mitigate or offset their climate impact. Starting from 2001, the Global Environmental Facility (GEF), a multilateral environmental fund, assumed responsibility for operating the CDM. At COP 15 in 2009 in Copenhagen, financing negotiations led wealthier nations to pledge $100 billion a year in finance for less affluent nations by 2020.

In 2010, the Green Climate Fund (GCF) came into being during COP 16 in Cancun, Mexico. Recognised as the primary financial mechanism for climate ambition, the GCF strives to mobilise adequate funding for climate-centric projects and programs. Its modus operandi involves providing financial resources through grants, concessional loans, and various financial instruments, with the explicit aim of supporting initiatives in developing countries. These endeavours span a diverse range of climate-related activities, encompassing renewable energy, energy efficiency, adaptation measures, capacity building, and initiatives focused on climate resilience. The GCF principles include country ownership, transparency, and gender responsiveness, ensuring their integration within its operations. It aims to maximise co-benefits among mitigation and adaptation and development goals, catalyse climate action by investing in innovation, and develop de-risking strategies in the effort to mobilise enough private resources that promote net investment norms by ensuring that climate risks are incorporated into investment decisions.

The calls for de-risking and privatisation emphasised in the GCF's principles (GCF 2010) are echoed in the Addis Ababa Action Agenda, which is a framework established in 2015 which laid out the financing plan needed to achieve the SDGs. The action agenda discusses similar principles, such as the importance of private investment in sustainable development. The Action Agenda aims to "unlock the transformative potential of" and "create an enabling environment for" the private sector. Further, it encourages Public Private Partnerships (PPPs) and blended financing approaches, indicating that these financing methods lower investment risk (Ghosal 2016). Blended financing is also being pushed by the likes of the IMF and certain UN branches as an important avenue for financing the just transition. Despite its advocacy for blended financing and the supposed ability of this approach to generate large sums of debt, the Action Agenda simultaneously recognises that servicing debt can detract from public expenditure and deters private investors, preventing new borrowing that is more productive (Ghosal 2016, 38). The prevalence of the likes of the GCF and the Action Agenda, calling for an increasingly privatised and market based approach to financing the climate and development

agenda, can undermine the achievement of global climate goals. This is further explored in Section 4. Ultimately, the GCF aims to mobilise significant funds from various sources, including developed countries, private sector contributions, and multilateral development banks. It also plays a crucial role in fulfilling the commitment made by developed countries to mobilise US$100 billion a year in climate finance for developing countries by 2020.

Beyond the GCF significant financing is being funnelled through the many other funds which exist. At COP 26 and COP 27, US$360 million and US$230 million respectively were pledged to the Adaptation Fund, and US$600 million to the Least Developed Countries Fund (LDCF) in 2021. Many multilateral and bilateral funds have been established, all with various implementing institutions. Linked to the UNFCCC, funds such as the LDCF, Special Climate Change Fund (SCCF) and Adaptation Fund (AF) have mobilised US$1.4 billion, US$530 billion, and US$1.4 billion respectively as of 2022 for climate financing. Outside of UNFCCC agreements, funds exist as part of the World Bank or multilateral development banks (MDBs), which have delivered US$4.12 billion in 2021 alone, and host sub projects which funding can stem from. The European Investment Bank administers the EU's Global Energy, Efficiency, and Renewable Energy Fund (GEEREF) (Watson et al. 2023, 40).

Bilateral commitments are also becoming increasingly popular where the terms, negotiations about and transfer of financing occur directly between two parties, without an international organisation channelling the money. The Just Energy Transition Partnerships are an example of a bilateral deal, where wealthier nations collaborate to provide financing to middle income countries to meet their mitigation targets. Climate financial flows are bigger than ever and thus rapidly increasing in complexity. Some of this complexity is distilled in Annexure 2 and the South African situation is captured in Box 2

**Box 2. South African Climate Finance Policy Environment**

At a domestic level, the importance of financing for climate is mentioned in several domestic policy documents such as the NDCs, the National Climate Change Adaptation Strategy, and the National Climate Change Response White Paper (NCCRWP). The NCCRWP commits to engage in reform discussions on financing measures within the UNFCCC, to ensuring fair and transparent access to additional resources for developing and least-developed countries in Southern Africa, to attract and secure additional international resources through official development assistance and bilateral development agencies, and to directing these climate-related contributions to national, provincial, and local government development priorities. It also commits to significant monitoring and effective management of available resources and collaborates with domestic financial institutions to expedite and mainstream climate-resilient development, encompassing both mitigation and adaptation measures. These commitments are mainstreamed into action documents such as the Medium Term Strategic Framework, the Integrated Resources Plan or the Just Energy Transition Investment Plan (JET-IP). The JET-IP stemmed from South Africa's Just Energy Transition Partnership, a bilateral deal made between South Africa, European partner groups, and the United States. While the JET-IP provides a unique opportunity for climate investment to drive South Africa's

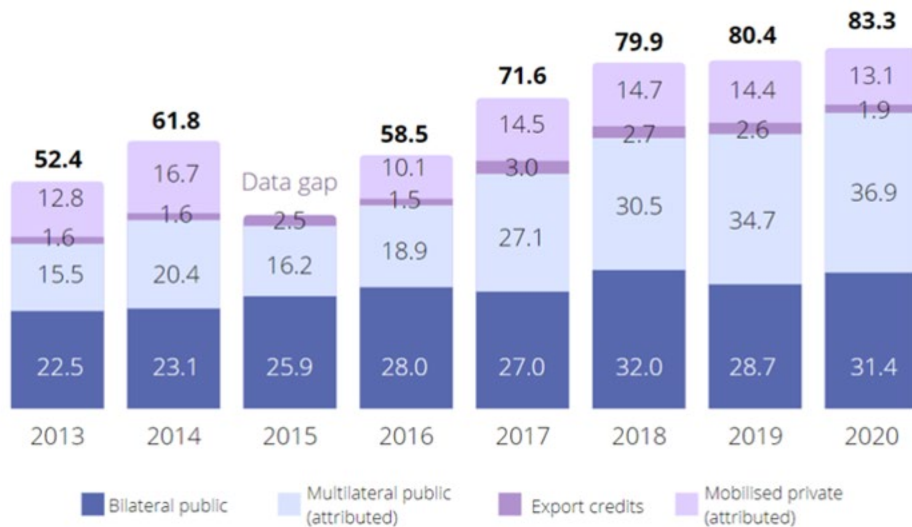
energy transition, it is a complex and technical process that can leave affected communities and workers behind if not implemented transparently. In general, climate finance is vulnerable to the predatory tactics of foreign development aid and a global financial system which prioritises generating profits for financiers at the expense of effective adaptation and mitigation efforts and associated justice outcomes. Furthermore, the lack of understanding and capacity around climate investment in South Africa can have serious implications for human rights and gender equity.

## 3.3. Performance of the global climate finance architecture: Scale, sources and direction of finance

Despite the substantial financial resources exchanged between countries, and the considerable level of climate ambition, it unfortunately remains that the targets have yet to be achieved, and the level of ambition falls short of what is necessary to accomplish the monumental scale of this transition. This is illustrated in this section through an overview of international and national climate financing and an analysis of where financing stems from, who it is going to, and what is being financed.

Since its initial pledge in 2009, the annual flow of $100 billion from developed to developing countries has stood as a symbolic commitment, encapsulating the global community's collective responsibility to address climate change and support vulnerable nations in their pursuit of increased climate action. Despite this ambitious promise, the reality has been disappointing, as the actual financing has consistently fallen significantly short of the target, as shown in Figure 2 (OECD 2022). The majority of this financing has been allocated through multilateral or bilateral agreements, with a consistent focus on mitigation efforts over the years. Since the inception of the agreement, 2020 marked the closest we have ever come to reaching the US$100 billion milestone, with a total of US$83.3 billion being funnelled through various sources. In addition, the self reporting nature of these figures have meant that they are up for speculation with Oxfam (2020) reporting that the actual figure stemming from this pledge may have been closer to US$24.4 billion.

Figure 2. Climate finance provided and mobilised from developed to developing countries in 2013-2020 (USD billion) (OECD, 2022)

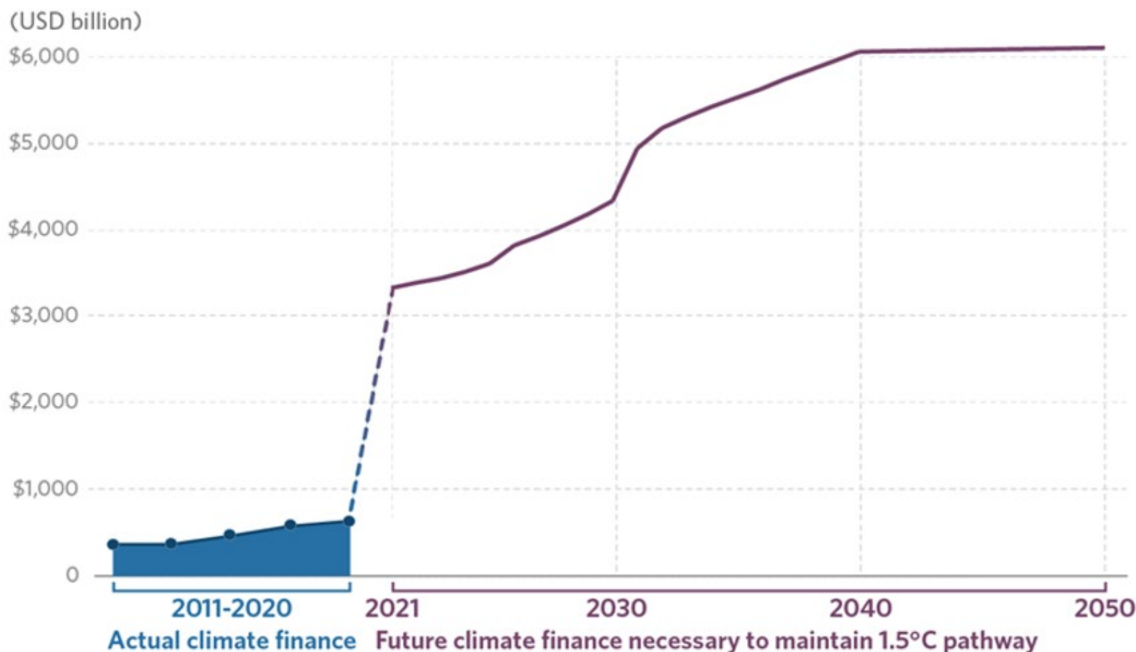



Note: The sum of components may not add up to totals due to rounding. The gap in time series in 2015 for mobilised private finance results from the implementation of enhanced measurement methods. As a result, grand totals in 2016-20 and in 2013-14 are not directly comparable.
Source: Based on Biennial Reports to the UNFCCC, OECD DAC and Export Credit Group statistics, complementary reporting to the OECD.

From the self reported number of US83.3 billion financing directed towards climate financing is mainly directed as loans make up 71% of this funding, with grants comprising a smaller portion (26%), and equity raised the smallest share (3%). This pattern of loans dominating the public financing landscape over grants has been consistent in previous years as well. This is in the context that 88% of projects being financed through loans were given at market rates rather than concessional rates (Climate Policy Initiative 2021). This is pertinent as the implications of unsustainable debt can hinder a country's development trajectory. Debt burdened countries often divert money from public services such as health and education in the name of servicing debt. South Africa is a key example where 18.6% of the budget is spent on debt in an ever growing environment of austerity (National Treasury 2023). This creates financial instability that decreases a country's resilience to climatic impacts through weakened infrastructure and service delivery. This can make climate finance almost counterintuitive to the intended alleviating measures this financing is meant to provide.

In order to meet the global financing requirements for climate goals, there is an urgent need for a substantial increase in financial flows. It is projected that these flows will need to rise by 590% by 2030, reaching a staggering US$4 trillion(Climate Policy Initiative 2021, 42). Figure 3 illustrates the large gap in financing that will continue to persist if financing remains at present levels.

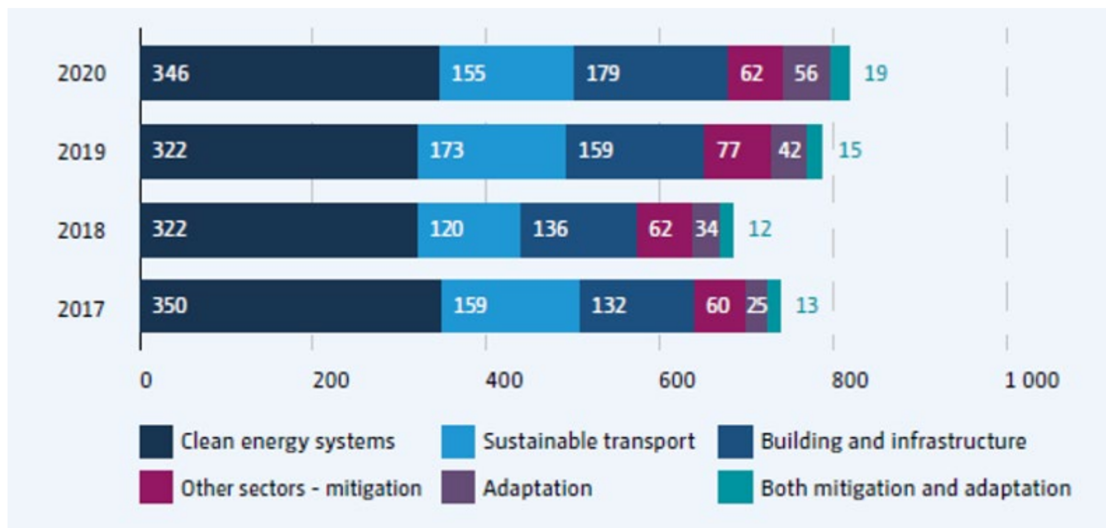
**Figure 3. Global tracked climate finance flows and the average estimated annual climate investment need through 2050**




Source: Climate Policy Initiative 2021

Globally, cumulative climate financial flows in 2019/2020 fell below the trillion-dollar mark, reaching a total of US$803 billion, representing a mere 12% increase from the 2017/2018 period. Out of the total, a substantial 92% was directed towards mitigation efforts, with a focus on sectors such as transport, renewable energy, and enhancing building efficiency, as shown in Figure 4 (UNFCCC 2022). Despite an increase in adaptation finance over the years, its overall volume has remained critically low. In 2020, the highest level of financing for adaptation reached merely US$56 billion, accounting for less than 10% of the total financing that year (UNFCCC 2022, 43). The majority of adaptation financing is sourced through bilateral and multilateral development banks' channels, with a higher likelihood of being provided in the form of grant financing (UNFCCC 2022, 43). This trend can be attributed to the unprofitable nature of many adaptation activities, which necessitates support through grant funding. Adaptation financing was also more likely to incorporate a gendered lens and collect gender tagged data (UNFCCC 2022, 42).

Figure 4. Total global climate finance flows in 2017–2020 by sector

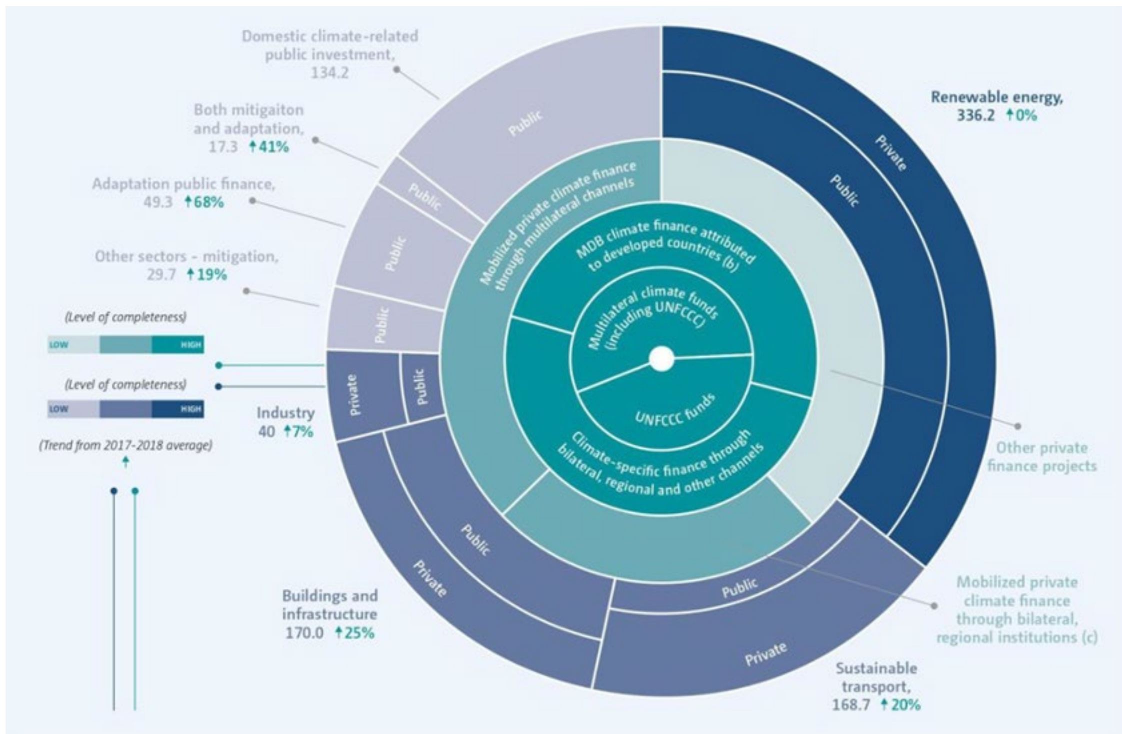



Source: UNFCCC Summary Report 2022

Figure 5 showcases a comprehensive overview of financial flows during the period 2019 to 2020. While it's challenging to quantify private financing precisely, some analyses have indicated that it constituted approximately 49% of the total financing in 2019/2020 (UNFCCC 2022, 8). This substantial share of private finance primarily originated from commercial financial institutions , such as banks, corporations, or "other business". Notably, the private sector dominated the renewable energy (RE) sector, contributing an average of 69% of the total renewable energy finance. Having the private sector heavily involved in the just transition and handing over the responsibility of basic good provisioning to these actors can have much deeper implications on the equity and cost efficiency of service delivery. This is expanded upon in the below sections.

Within the publicly funded portion of the financial landscape, state-owned financial institutions accounted for 44% of the funding, followed by national development finance institutions (DFIs) at 28%. These public funding sources played a significant role in supporting renewable energy initiatives and bolstering sustainable development efforts (UNFCCC 2022, 8). However, when it comes to the financing of transmission and distribution, the responsibility historically fell exclusively on the public sector, and as of 2019/2020, the private sector's involvement in this sector constituted 15% of the overall financing.

**Figure 5. Climate Finance Flows, 2019-2020**



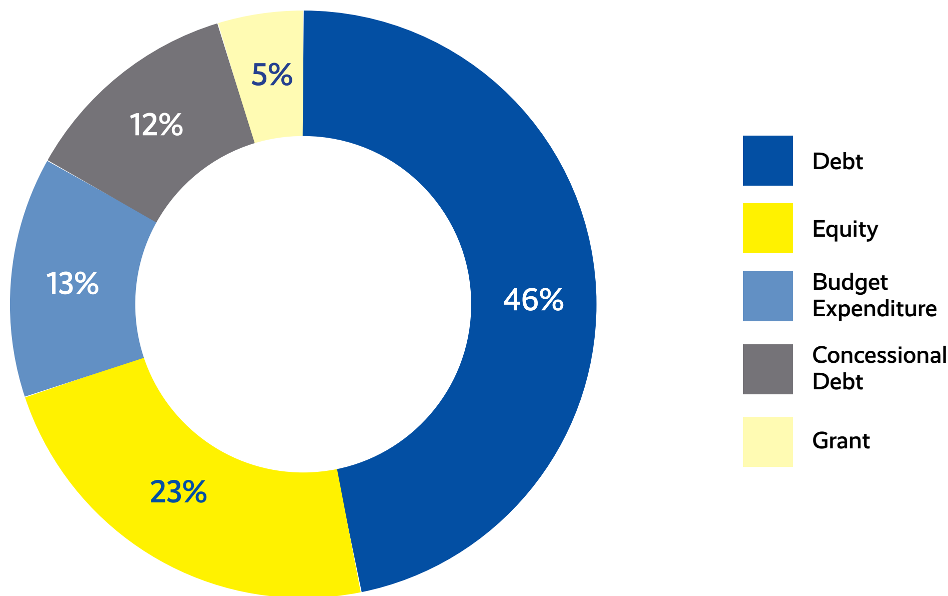

Source: UNFCCC Summary Report 2022

The recent JET-IP, which outlines the South African trajectory over the next five years, has indicated that R1.5 trillion is needed to finance the just transition plans of the country. This averages about R300 billion a year. By contrast, South Africa's recently tracked annual climate finance for the period 2017 and 2018 amounted to R62.2 billion combined. This indicates that the scale of national financing will need to be ramped up substantially in order to meet the financing goals needed.

In the financial landscape of 2017/2018, private financing claimed the majority of the total, at 57%, while public financing constituted 35% and blended finance made up 8%. Notably, 76% of the climate finance mobilised was dedicated to the advancement of clean energy initiatives (Cassim et al. 2021), indicating a trend similar to the international climate financing landscape wherein financing is predominantly dedicated to mitigation efforts. A total of 81% of financing was dedicated towards mitigation and adaptation finance was allocated a mere 7% of funds, while the difference went to energy efficiency measures and demand side management.

Over the same period, 59% of financing was raised as debt, and 23% was raised through equity. From the debt financing market rate, debt made up 46% of South Africa's total financing with concessional loans and grants making up 12% and 5% of the total respectively (Figure 6). The absence of grant financing is again seen in the JET-IP whereby only 4% of financing stems from grants. However, concessional loan financing has increased significantly, making up 63% of the planned financing from the international partner group. Yet it remains to be seen what the actual repayment rates will be as, often, even loans termed 'concessional' are not given at rates that significantly differ from commercial rates. This is explored further in Section 4.

Figure 6: Key sources of climate finance tracked in South Africa for 2017 and 2018 (private, public and blended)




Cassim et al. 2021

The public financing segment, totalling R22 billion, encompassed funds provided by governments, climate funds, and government-funded DFIs. These resources were strategically allocated across various sectors, with a primary focus on clean energy, general ecosystem support, and cross-sector investments, which collectively absorbed 75% of the tracked public climate finance. It is worth highlighting that an overwhelming 79% of the public finance was raised and deployed domestically, underscoring a strong preference for local investment. The South African government contributed more than R12 billion, representing 55% of the tracked public investments. These investments were primarily directed to priority sectors such as transport, energy, and water, as outlined in the National Development Plan initiatives (Cassim et al. 2021, 52).

In the realm of private financing, an annual amount of R35.3 billion was used during the specified period, with commercial investors emerging as the primary source, injecting a sum of R19.3 billion. Additionally, a diverse range of actors, including corporates, philanthropists, donors, NGOs, and households accounted for the remaining 45% of the tracked private sector investments. Their contributions predominantly flowed into climate mitigation sectors, with a particular emphasis on clean energy, energy efficiency, and demand-side management. Blended finance, characterised as the astute leveraging of public or philanthropic finance to mobilise additional private capital, played a significant role, contributing an average of R4.9 billion a year during the period studied (Cassim et al. 2021, 52).

While there has been an exchange of financial resources between nations and a some increased level of climate ambition, the realization of targets continues to elude us.

The analysis presented in this section underscores the existing gap between aspirations and achievements, emphasising the inadequacy of the current level of ambition to meet the monumental

challenges of the transition to a sustainable future. As we navigate the complex landscape of international and national climate financing, it becomes imperative to reassess and augment our strategies, ensuring that financial resources are directed more effectively towards initiatives that can truly catalyze the transformative changes required. The journey towards a resilient and low-carbon global economy demands not only increased financial commitments but also a strategic realignment of priorities, forging a path towards a more sustainable and equitable future.

# Section 4: Applying a rights based approach to the current climate financing agenda

Fourteen years have passed beyond the Copenhagen Agreement since the first commitments were made between developed and developing nations about climate financial flows. In addition, more than two decades have passed since the inception of the first international climate accords. Therefore, a compelling question emerges: Why have global efforts to rally sufficient financial support – vital for steering us away from the perilous path of 2° Celsius warming – faltered? What barriers have impeded our stride towards this critical goal? And what have been the implications of the patterns of climate finance that have emerged?

Answering this requires unpacking the dominant approaches to climate finance, most notably the “Billions to Trillions” agenda, championed by prominent players across the global financial landscape. This section aims to explore this agenda. It shows both how it has failed to mobilise sufficient funds and its incompatibility with the human rights principles identified above. The section aims to assess if there are sufficient accountability mechanisms embedded in the current human rights regime to enable universal rights realisation and a truly just transition.

## 4.1. The Billions to Trillions agenda in development finance

The Billions to Trillions agenda enforces neoliberalism in development finance. The agenda was first driven by the World Bank to support the realisation of the SDGs, and has now been taken on board by many international financial institutions, including the IMF (2015), and development banks, including the African Development Bank, Asian Development Bank and so on (Development Committee 2015). The core principle of this agenda is to mobilise the billions in public finance in order to catalyse the trillions of dollars in private finance to bridge the development financing gap and adequately finance climate ambitions (Tan 2022). The Billions to Trillions agenda operates on the premise that, first, there is no fiscal space for the state to finance this agenda, and second, there is ample financing in the private sector. However, the agenda argues that the trillions in private finance are not being mobilised due to the inherent riskiness of investing in developing countries.

The Billions to Trillions agenda aligns neatly with what Gabor (2021) terms the Wall Street consensus. The Wall Street consensus (WSC) recognises that the climate crisis impinges on the stability of the global financial system, but seeks to produce an alternative in opposition to an interventionist ‘green developmental state’ (Gabor 2021). The WSC aims “to create investable opportunities in poor countries that can attract the trillions of global institutional investors and orient them to the SDG ambition” (Gabor 2021). The WSC, therefore, seeks ways to exploit the climate crisis for profitable opportunities that benefit financial markets and financial institutions. The WSC operationalises the Billions to Trillions agenda by similarly advocating for the use of public finance to de-risk opportunities for

private finance, thereby reallocating private risks to the public sector in order to support private profit gains.

The creation of an enabling environment through the state is key to de-risking private finance. The state intervenes to guarantee the profits of private finance by minimising the commercial, regulatory, and political risks faced by the private sector which is then absorbed by the public sector. The state undertakes this through a range of "innovative financing instruments" such as blended financing[1], public private partnerships, and state backed guarantees. The implication of this private financing model is that delivery of green public goods is the responsibility of the private sector.

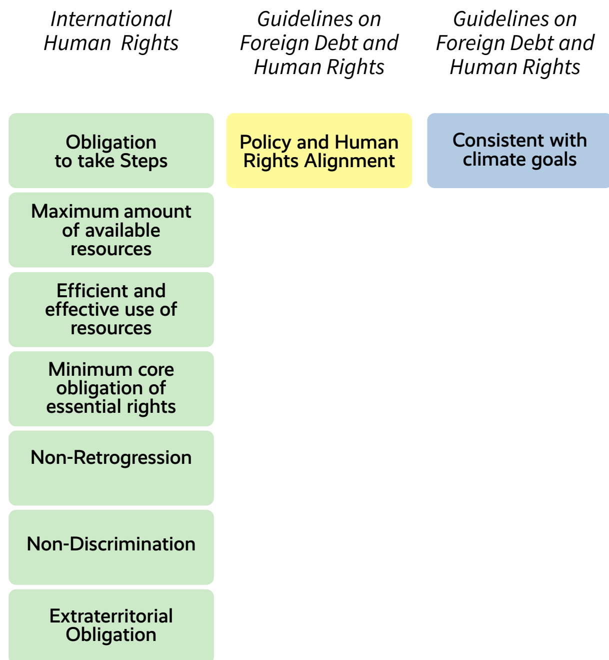
There is good reason to be extremely cautious about this approach to public provisioning. Research to date indicates that these methods of financing failing to provision for accessible public goods and services. Instead the approach commodifies public goods and services, thereby limiting access to these for the most vulnerable. Such public goods and services are essential for the enjoyment of human rights (Gabor 2021,Tan 2022, Sial 2022). To assess the manner in which this approach to climate finance undermines the realisation of human rights - as well as under-funding the climate agenda - we have separated the identified human rights principles from Section 3 into five clusters. We unpack this interplay between the dominant approach to climate financing and rights realisation through each cluster of principles in turn.

## PRINCIPLE CLUSTER 1: national responsibilities

The first cluster of principles is labelled 'national responsibilities', and speaks to the principles that address the duties of the state to finance rights realisation. These principles are displayed in Figure 7. This includes responsibilities such as the obligation to take steps towards financing rights realisation, efficient and effective use of resources, and the Paris Agreement's stipulations that states should ensure that financial flows are consistent with climate goals. The Billions to Trillions agenda undermines many of the principles in this group. Fundamentally, it inhibits states from maximising their available resources for realising rights.

[1] Strategic use of development finance and philanthropic resources to stimulate the influx of private capital into emerging and frontier markets is also implemented.

**Figure 7. Principle cluster 1: indicating human rights principles that lay out the country's national responsibilities regarding financing development and the climate agenda**

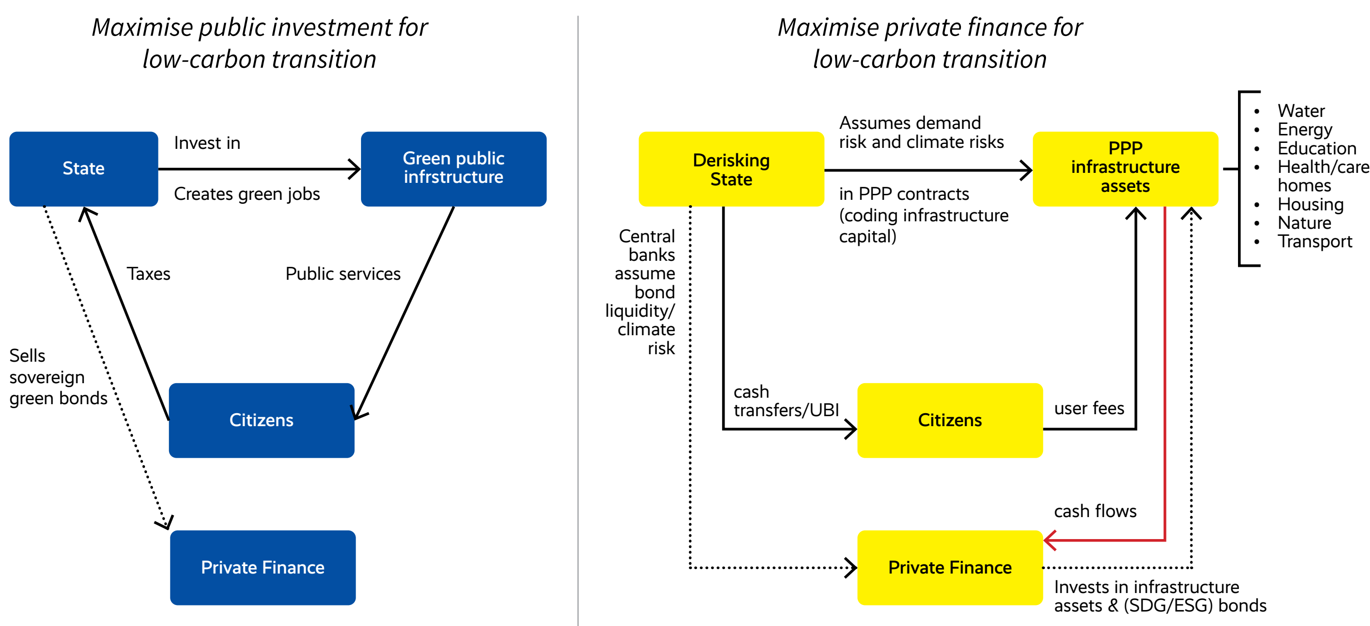



Source: Authors construction

In a state-based approach to financing infrastructure programmes, the focus is on channeling significant public investments into the development of expansive public green infrastructure. This infrastructure is meant to be open for free access, at best, or via highly subsidised user fees, at most, to all citizens. The public green infrastructure is funded via taxes and the sale of sovereign bonds. Therefore, the private sector is secondarily involved when the state issues bonds to investors to finance certain projects that are high cost or in foreign currencies. In a de-risking WSC approach to financing development, the state would determine a range of financial, social or climate risks and then implement a range of de-risking measures that facilitate the involvement of the private sector in the financing and provision of the public service. Figure 8 illustrates the difference between a state based approach and a de-risking approach. PPPs have become a hugely popular financing and procurement model that facilitates the privatisation of public infrastructure services such as energy, water, health, education, transport and so on. Under the PPP model, the state may de-risk private finance by assuming the demand risk (in other words, it guarantees the revenues to be earned by the private partner that the infrastructure will generate once in operation), the sovereign risks (guarantees that the state will pay back loan obligations should the need arise due to crisis), and the regulatory and political risks (that is, gives assurances that there will be no policy changes that will affect the operations and revenues generated by the infrastructure. Private finance makes use of blended finance instruments to invest in the infrastructure and earns revenues from user fees that are charged to users of the infrastructure. User fees are set at a level that not only ensures that the revenues generated will cover the full costs of the infrastructure, but also that the private financiers will earn a particular return on investment.

This runs the risk of limiting access to the infrastructure through user fees, resulting in minimum core obligations of essential rights and non-retrogression being undermined. This is because the poor are effectively excluded from service provision. The state may introduce cash transfers to ameliorate the exclusion, however these are seldom sufficient for them to realise the full benefit of the public infrastructure service. Under this paradigm, states are essentially passing on their responsibilities towards rights realisation to other actors who fundamentally prioritise profits over social, environmental, and economic rights. This abdicates states' obligations to take meaningful steps towards realising rights[2] though raising the maximum available resources[3] towards this end.

### Figure 8. The differences between a state based approach and a de-risking approach to financing development projects




Source:Gabor 2021

In addition, this skews resource allocation in a manner that may not prioritise rights realisation. This is because there are only a few sectors that are attractive to private investment, which is only interested in 'investable' or 'bankable' even if other projects advance rights realisation more. This is seen in climate finance in a disproportionate amount of funds being directed towards profitable mitigation projects rather than unprofitable adaptation projects, which only received 7% of funding in 2019/2020 (Naran et al. 2022). This portrays the agenda's inability to support investments that are compatible with human rights principles, including the principles of minimum core obligation on economic, social and cultural rights,[4] as failing to finance adaptation puts many rights at risk, including the right to water, food and development. This jeopardises a nation's resilience and ability to respond and realise rights in times of crises (Wewerinke-Singh, 2018).

[2] The obligation to take steps indicates that the states are responsible for initiating progress towards resourcing rights realisation

[3] The principles of maximum available resources involve the allocation of resources in a manner that benefits all, with states using their discretion in balancing competing priorities.

[4] A minimum core obligation of essential rights includes all the basic social, cultural, and economic rights, and sets a floor for each right in order to quantitatively and qualitatively understand the minimum level of the right that must be achieved, even during disasters.

South Africa's JET-IP offers a vivid example. In this plan a significant portion of the available funds are directed towards new energy vehicles and 'green hydrogen'. Both of these industries are created with the intention of exporting to foreign markets, with 60% of current vehicle production in South Africa being exported. The plan aims to maintain the feasibility of this industry under newly imposed international carbon tax laws. Yet, while safeguarding employment opportunities within the automotive sector stands as a pivotal developmental pursuit, it's crucial to recognise that exclusively investing in private vehicle manufacturing, albeit essential for sustaining the export niche, doesn't comprehensively address the need to inclusively decarbonise the local transport ecosystem. The plan allocates 4.7% of transport financing to public transport – which is largely going towards developing charging infrastructure rather than creating a modal shift towards public transportation. Yet 56.5% of South Africans use public transport, with some of the longest travelling distances from home to work ( Harber, 2023). Similarly, investments outlined in the JET-IP may not actually produce the emission reduction outlined in the country's Nationally Determined Contributions and other documents such as the Green Transport Strategy. According to the Green Transport Strategy, the plans for South Africa are to introduce a 'Reduce, Shift and Improve' strategy to decarbonise the transport sector. This requires, first, prioritising 'reducing', which requires "lessening the movement of goods and people" through improved urban planning. Second, the plan requires a "shift to low carbon modes of transport" such as walking, cycling and public transport. Finally, it plans to "improve energy and fuel efficiency", which includes improving the efficiency and reducing the emissions of public and private transportation through electrification. The JET-IP has prioritised an improvement strategy through a relatively higher carbon mode of transport that appeals to the market over a strategy that may truly embody social justice and mitigation options. The opposition in the investment plan and the country's NDCs indicates financial flows are not consistent with climate goals, undermining this human rights principle.[5]

Thus the Billions to Trillions strategy fails to meet many of human rights principles for financing for development and climate finance in this cluster because, first, the state is not observing its obligations to take steps but rather offsetting this responsibility to profit-driven actors who often fail to provide basic services, specifically excluding the most vulnerable through high user fees. Unlike states, these private sector actors do not have a responsibility under international law to protect and fulfil human rights. The onus is on the state to ensure availability, accessibility, affordability and quality of essential services such as energy, water and sanitation. Those obligations are not absolved when water provision is privatised, yet we have not seen significant recognition of the failures of privatisation or significant regulation of this system. Second, available resources are directed towards strategies that support protecting investments and creating an enabling environment for investors (violating the principle of maximum available resources).

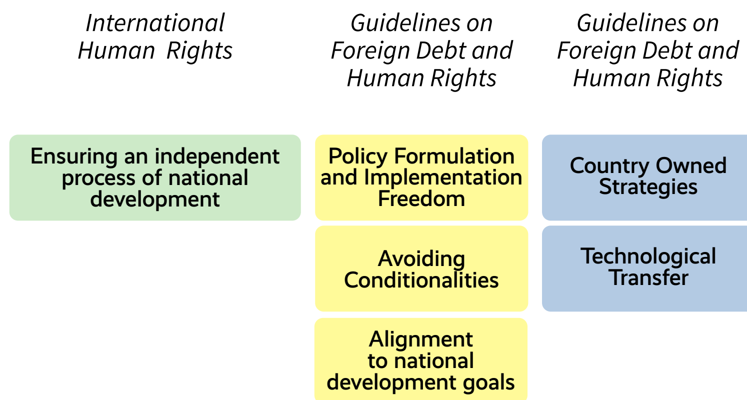
Third, financial flows are not congruent with the stipulated climate objectives, as they currently align with projects that are profitable to the private sector rather than the intended climate goals (violating the principles of consistency with climate goals). Fourth, resources are not allocated in a method that is efficient and effective to maximise availability, accessibility, affordability and quality of public services and infrastructure, which are essential to the realisation of human rights.

[5] An identified principle that states that financial flows must speak to the country's climate goals and outlined climate agenda.

## PRINCIPLE CLUSTER 2: maintaining national sovereignty

Maintaining national sovereignty is the second cluster of human rights principles, which indicate the need to protect a state's independence and allow for decision-making that is country-owned and democratic. Principles include ensuring an independent process of national development, allowing for policy formulation and implementation, freedom, and avoiding conditionalities (Figure 9). National sovereignty can be undermined by a host of measures that help to de-risk opportunities for private finance such as international investment treaties and conditionalities placed on loan agreements.

**Figure 9. Principle cluster 2: indicating the human rights principles that lay out obligations for states to maintain their national sovereignty**




Source: Authors construction

The use of private finance in the provision of public goods, opens states up to the use of international investment treaties at the multilateral level and at the bilateral level (See Olivet 2017)[6]. A bilateral investment treaty (BIT) is an agreement between two countries that establishes the terms and conditions for foreign investment protection and promotion. These treaties typically aim to provide certain rights and protections to investors from one country (the home state) that invests in the other country (the host state). The World Trade Organisation's Trade Related Investment Measures (TRIMS) is an example of a multilateral level investment agreement. The TRIMS, according to the WTO website, recognises "that certain investment measures can restrict and distort trade. It states that WTO members may not apply any measures that discriminate against foreign products or that leads to quantitative restrictions, both of which violate basic WTO principles"[7].

International investment treaties at the multilateral (such as the World Trade Organisation's Trade Related Investment Measures) and bilateral level can unreasonably protect companies at the expense of development objectives of a nation. While these treaties inflate the legally binding policy

[6] See Olivet "Why did Ecuador leaves its bilateral Investment Treaties?" available at https://www.tni.org/en/article/why-did-ecuador-terminate-all-its-bilateral-investment-treaties ( accessed 2019-01-22 ).

[7] See world Trade Organisation, "Agreement on Trade Related Investment Measures", available at https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm

protections of private investors, on the one hand, they reduce the policy autonomy away from the national government. Muchhala (2018) highlights the measures that could support the realisation of socio-economic and environmental rights but may be challenged by investors through the use of international investment treaties:

- "Attempts to collect legally owed taxes, changes to domestic fiscal policy that are in the national interest;
- Decisions regarding whether to grant development permits;
- Efforts to renegotiate investment contracts;
- Efforts to resist renegotiation of investment contracts;
- Government bans on harmful chemicals, bans on mining;
- Environmental restrictions on the manner in which mining can take place;
- Requirements for environmental impact assessments, regulations regarding transport and disposal of hazardous waste;
- Regulations governing health insurance;
- Measures aiming to reduce smoking, measures affecting the price and delivery of water, regulations aiming to improve the economic situation of minority populations;
- Measures aiming to increase revenues gained from production and export of sovereign natural resources." (Muchhala, 2018,: 15).

The example of the Indonesian Nickel ban, as unpacked in Box 3, shows how international treaties can undermine the opportunity for developing countries to use their critical minerals to localise technological development and job creation.

**Box 3. International investment treaties and technological transfer policies**

Technological transfer[8] is an example of how international agreements can be used to undermine a developing country's ability to pursue national climate and developmental objectives. In January 2022, Indonesia took a distinctive approach that could serve as a model for developing nations aiming to localise innovation and manufacturing. The country imposed a ban on the export of nickel, a vital mineral in batteries and electric vehicles. This mandate compelled businesses to process raw materials within Indonesia before exporting, with the rationale being the fulfilment of immediate domestic processing needs, supported by the emerging High-Pressure Acid Leach (HPAL) technology. As the first HPAL plants became operational, collaboration between companies such as Vale Indonesia owned by Japanese, Canadian, and Chinese counterparts ensued, resulting in the transfer of technology and the nurturing of a local innovative ecosystem. The nickel export ban prompted the emergence of local nickel smelting companies in Sulawesi, contributing to the adoption of advanced technology and a reduced reliance on foreign workers. Indonesia's fiscal policies, including super-deduction tax incentives and tax holidays, have played a pivotal role in incentivising research, facilitating technology transfer, and fostering the growth of the base metal

[8] Technology transfer is defined as the "movement of know-how, technical knowledge, or technology from one organizational setting to another".

industry. Despite persistent challenges, Indonesia's experience underscores the importance of meticulous preparation by critical minerals-producing countries as they transition from exporting raw materials to establishing independent manufacturing processes. However, the EU has since taken Indonesia to the WTO international dispute settlement process for violating the TRIMS agreement. The Panel recommended in favour of the EU in September 2023. The Indonesian government has since appealed the recommendation.

**Source: Celios, 2023**

The consequences of pursuing the right to development may come at a heavy penalty. This is because companies frequently use these international treaties to challenge government's developmental actions through Investor-State Dispute Settlement (ISDS) mechanisms should these measures undercut investor profitability.[9] Importantly, ISDS between the state and private investors are adjudicated through international arbitration instead of using local courts. Foreign investors are afforded the opportunity to be claimant against the state, the state however can only appeal the decisions made by the court. These tribunals possess the authority to impose substantial financial compensation provided to investors by the state to enforce specific regulatory obligations. A notable concern arises in the realm of calculating compensation in instances where there is a breach founded on a violation of an investment treaty standard or a contractual obligation undermining the dispute. The method, most commonly, employed for this purpose is referred to as 'discounted cash flow' (DCF), which entails an evaluation of the anticipated future financial gains of an investment while factoring in associated risks. In other words, the state will have to pay the investor a compensation for changes in the regulatory environment that affect the investors ability to make the expected returns. This amount is the equivalent of the balance of the future cashflows that would have been generated by the project that would have been earned by the investor.

This approach has, on occasion, resulted in the allocation of significant monetary awards to investors, funded from the public coffers of the respective nation. To illustrate, in 2019, Pakistan was instructed to remit nearly US$6  billion in damages to a mining enterprise for a project that had made limited progress and had not proceeded pass past the exploration phase[10]. Opposition to the Investor-State Dispute Settlement (ISDS) has gained momentum, with activists highlighting the tendency for mega-corporations to consistently benefit from these legal proceedings, often leaving states and their communities with inadequate protection. Advocates are actively working towards eliminating corporate courts in pursuit of more equitable trade regulations (Global Justice No date)[11].

As Muchhala observes, "Countries have been paying exorbitant legal costs and arbitration compensation awards to investors, averaging over $8 million per dispute, and exceeding $30 million in some cases. At times, the quantum of compensation has been comparable to the annual public expenditure of

[9] Brower & Schill "Is arbitration a threat or a boon to the legitimacy of international investment law?" 2009 Chicago Journal of International Law 472.

[10] Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan, ICSID Case No. ARB/12/1.

[11] https://www.globaljustice.org.uk/our-campaigns/trade/

many developing countries, in critical social sectors such as health and education."[12]

Some countries, like South Africa have opted to terminate their BITS in order to reclaim the protection of domestic rights. South Africa implemented the Protection of Investment Act in 2015 which ensured that the country could create a better balance between the extent to which foreign investors are protected and the manner in which the constitution is upheld and public interest is prioritised. Developing a domestic act for investors provides a better framework for ensuring a fairer investment environment that is aligned to the public interests. However, there still remain investment treaties with some states within the EU (for example Sweden). Therefore, it is possible for existing IPG partner countries to engage in treaty shopping, that is, to establish investment vehicles in countries to which South Africa continues to have investment treaties in order to benefit from investment protections.[13] Investment protections and international arbitration can also be embedded into contracts, permits or licences. Therefore, there is a need to rely on the domestic act for investment protection for just transition investments.

Another example includes structural adjustment policies (SAPs), which were designed to reorganise economies in the Global South, primarily with the goal of helping them repay debts while achieving some developmental progress. However, in practice, these policies often resulted in increased debt, economic cutbacks, diminished development outcomes, environmental harm, and the continuation or worsening of global inequality. Overall, these policies were a hindrance rather than a stimulant of growth for developing economies (Logan 2015). In response to growing resistance against structural adjustments and their conditions, the World Bank introduced development policy operations. These operations involve providing financial support that is linked to the adoption and implementation of policies known as 'prior actions', which are conditions similar to those attached to IMF loans. During the pandemic, the World Bank lent South Africa US$750 million, and the South African government committed to a range of conditionalities proposed by the World Bank, which put forward a macroeconomic framework of fiscal consolidation. These conditionalities included cutting red tape that would create an enabling environment for the private sector, specifically enhancing their role in public utilities and enabling private sector procurement by municipalities. The Development Policy Operations (DPOs) also prescribed the speedy decommissioning of coal fired power plants (Ramburuth et al. 2023). These go against the outlined human rights principles because they impose conditionalities[14] and undermine a country's ability to ensure that the climate agenda is country owned[15]. Many countries have not legislated a requirement for parliament to ratify loans before they are officially agreed to (The Inter-Parliamentary Union (IPU) 2013). Parliamentary oversight of public finances is needed along with transparent and public budgets, especially within the current energy transition, where debts promise to become an increasing source of finance. There is a need to

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[12] The duty of international cooperation among States indicates that states are to cooperate with and assist each other in order to achieve certain goals, including ensuring development and eliminating obstacles to development, finding solutions to international economic, social, health and related problems, and promoting universal respect for, and observance of, human rights and fundamental freedoms

[13] Yilmaz Vastardis, A (2020), *The Nationality of Corporate Investors under International Investment Law*, London: Hart Publishing.

[14] The principle of avoiding conditionalities states that "Creditors should not impose conditions related to privatisation, trade liberalisation, or financial sector reforms".

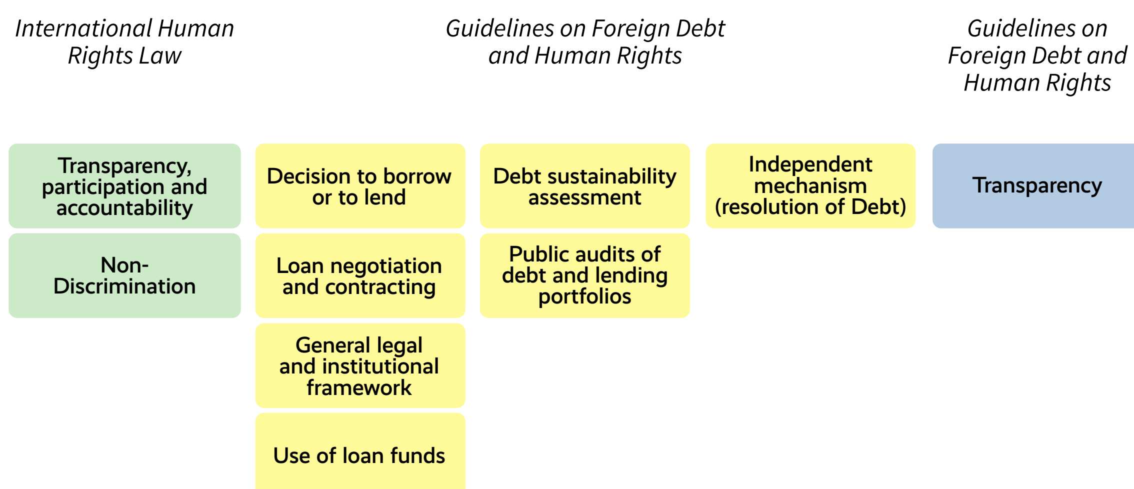
[15] The principle of country-owned climate strategy indicates that each country has the autonomy to determine and implement its own climate action plans based on its national circumstances, capabilities, and priorities.

define the process and protocols of an effective parliamentary input into any loan agreements which mandates structural adjustment policies. This must be complemented with participatory methods of approval.

## PRINCIPLE CLUSTER 3: procedural fairness

Procedural fairness is a cluster of human rights obligations outlined for actors to observe fair and just procedures during financing and implementing of climate projects. It ensures that all actors are treated fairly during the process of project planning and implementation, and requires transparency of procedures and decision making. It emphasises the opportunity to be heard and influence outcomes that may impact you directly or indirectly and the ability to hold transgressive parties to account. In general, these include principles such as transparency[16], participation[17], accountability[18], and non-discrimination[19] (Figure 10).

**Figure 10. Principle cluster 3: indicating the principles that lay out human rights obligations to observe procedural fairness during financial flows**




Source: Authors construction

Accountability can become increasingly challenging when actors are multitudinous and involved with each other in a fragmented way. The finance landscape consists of multilateral DFIs, bilateral DFIs, commercial lenders and many other private financers. Projects executed by the private sector often exhibit a greater degree of opacity compared to development initiatives undertaken by the public sector. This opacity is especially pronounced within PPPs, where the establishment of robust transparency mechanisms tends to be lacking (Eurodad 2022). A parallel challenge surfaces in the

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[16] Transparency requires the full disclosure of all relevant information regarding loan agreements, debt repayments, debt management, outcomes of public debt audits, and other related matters.

[17] Participation requires effective and meaningful input from all stakeholders (including project beneficiaries) in loan policy and resource utilisation decisions.

[18] Accountability requires remedial measures that ensure decision-makers are answerable, if warranted, for their actions regarding external debt agreements or arrangements, as well as external debt policies and strategies.

[19] The principle of non-discrimination emphasises the need to collect disaggregated data to ensure that no one is intentionally left behind in the pursuit of human rights. This principle is crucial for promoting equality and preventing discrimination on the basis of factors such as gender, ethnicity, religion or social status.

domain of Development Finance Institutions (DFIs), where concerns related to commercial sensitivity or client confidentiality sometimes lead to transparency deficiencies. Moreover, these institutions frequently fall short in providing adequate explanations for designating specific information as confidential (Vervynckt 2015). As a consequence, this opacity undermines the potential for meaningful community participation and restricts access to critical information, particularly during the preliminary stages of a project's lifecycle. These initial phases, when pivotal decisions are formulated and the project's contours take shape, become enshrouded in ambiguity. Moreover, this lack of transparency is perpetuated in subsequent stages, including the handling of grievances and complaints (Tan et al. 2023). Many bilateral DFIs do not have centralised grievance or dispute resolution mechanisms but rely on fragmented project-level mechanisms which tend to have limited operational independence from their project sponsor and lack independent verification or scope for appeal.

In South Africa, the Promotion of Access to Information Act, 2000 (PAIA) presents an opportunity for CSOs to tackle the information gap, encompassing availability, accessibility, and adequacy (the three As). According to section 51(1) of PAIA, heads of private bodies are mandated to compile a manual disclosing information about the subjects and categories of records they hold. However institutions, both private and public, frequently cite a lack of resources or capacity to fulfil this requirement. Additionally, in cases involving contracts such as independent power producers (IPPs) or power purchase agreements (PPAs), access challenges may arise via citing privacy under the Protection of Personal Information Act, 2013 (POPIA). POPIA aims to balance the right to privacy against other rights, including the right to access to information. Even when information is accessible, it may not be sufficient to support a CSO's claim. Addressing these gaps in climate finance frameworks necessitates a collaborative effort by CSOs to advocate for the effective implementation of PAIA.

The JETP is a bilateral deal that faces this described trajectory. Throughout the negotiation process, there was limited substantial consultation or interaction with civil society, organised labour, and other stakeholders. During this negotiation phase, requests from civil society for information access were either dismissed or met with assertions that the subject was too sensitive to discuss due to the government-to-government nature of the deal. Within the JET-IP framework, the prioritisation of private investor interests over the rights of communities is evident in the governance process. This preference leans toward private investors, potentially overshadowing the rightful engagement of local communities. The JET-IP explicitly mentions that a government review of the PPP policy framework "will simplify approval and compliance requirements for the participation of private investors in the JET-IP" (section 5.3). However, it's worth noting that renewable energy projects can encompass a range of adverse effects on communities, including forced displacement and disruptions to livelihoods. By streamlining the bureaucratic procedures surrounding the development of these projects, more investors might indeed be attracted, but this approach could expose communities and the environment to significant social and environmental risks if this trend is associated with waiving Environmental Impact Assessments.

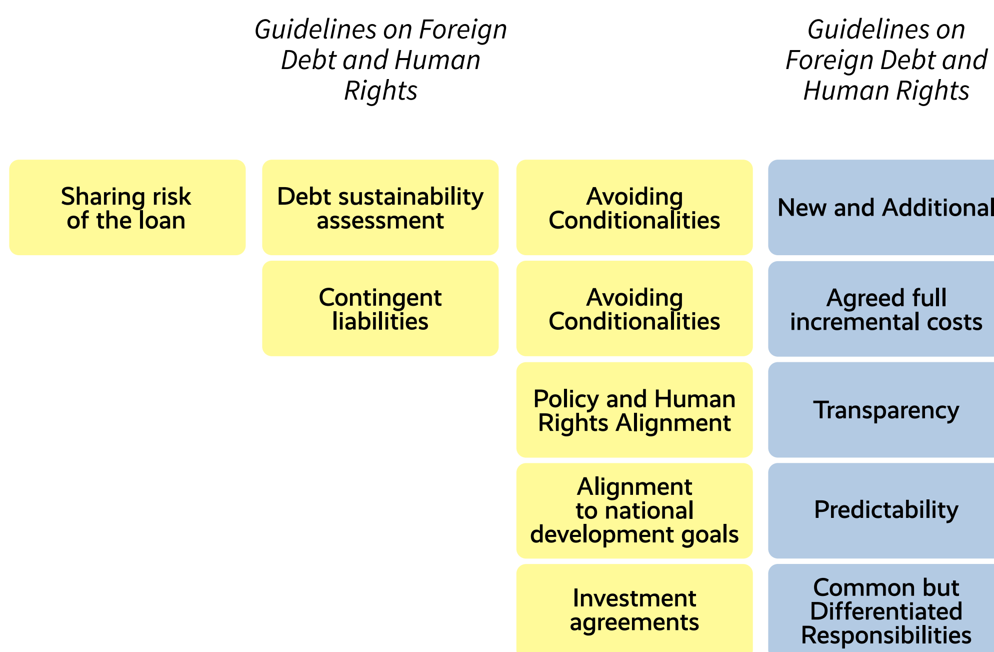
Without conscious efforts to incorporate the perspectives of the most vulnerable and marginalised, development projects might overlook their needs. Inadequate or diluted protective measures subsequently have the greatest adverse impact on segments of society that are particularly susceptible to marginalisation and disadvantage, including children, women, individuals with disabilities, elderly individuals, and indigenous communities. Therefore, it is imperative to both uphold and enhance

safeguards throughout all phases – before, during, and after – project execution. The incorporation of similar safeguards in loan agreements, as outlined in the UN Guiding Principles on Foreign Debt and Human Rights, becomes essential[20]. This ensures that comprehensive human rights assessments are undertaken during the negotiation of loan agreements and subsequent project implementation.

## PRINCIPLE CLUSTER 4: responsibilities of financial investment

The fourth cluster of human rights principles is labelled "responsibilities of financial investment", and describes the duties and conditions that financial investment needs to meet in order to allow for equitable distribution of resources. These include principles such as new and additional financing, financing that is provided at agreed and full incremental costs, common and differentiated responsibilities and loans that have been provided after debt sustainability assessments have occurred (Figure 11).

**Figure 11. Principle cluster 4: indicating the principles that lay out human rights obligations and responsibilities towards fair financial flows**




Source: Authors construction

Under the framework of the Billions to Trillions agenda, developed nations have not upheld their commitments and obligations concerning financial flows. The performance of climate financial targets such as the $US 100 billion goal agreed upon at Copenhagen reveals a recurring pattern of shortfall from developed nations. This signals a notable inability to effectively channel funds towards the development of nations who are less responsible for and more vulnerable to the climate crisis. This failure is in light of the fact that the annual allocation of $US100 billion falls considerably short of the amount necessary for countries in the Global South to genuinely undertake their transition

[20] Such as the general legal and institutional framework, which requires lender states and institutions to have a transparent and accountable legal and institutional framework for loan negotiation, contracting, and debt management.

endeavours. At the time of writing, the COP 28 was due to discuss the New Collective Quantified Goal which promised to re-evaluate the $US100 billion goal based on the needs and priorities of developing nations. These discussions will provide a more accurate analysis of financing that is closer to the full cost, leading to more ambitious financing goals (Colenbrander et al. 2023).

In the context of South Africa, a commitment of US$8.5 billion or R158 billion was made by international partner groups at COP 26. However, this pledge was accompanied by a requirement for the formulation of a more comprehensive investment plan. This strategic plan identified a financing gap amounting to R1.5 trillion. The complete financial requirement was discerned only subsequent to the initial agreement being reached. Consequently, the sectors to be financed had already been predetermined, and funds had already been earmarked for specific industries. In some instances, these allocations were in alignment with the investment preferences of foreign nations. Evidently, this situation underscores a failure to conduct a comprehensive needs assessment, which indicates a lack of adherence to the agreed-upon and full incremental costs responsibility[21]. Full conducive analysis of financial needs must be done in order to garner how much is needed based on development needs rather than investor interest. Domestic resource mobilisation should be prioritised, which also encompass the need for robust climate responsive budgeting (CRB) that involves institutionalising the incorporation of climate concerns into national budgets and developing surrounding reviews of financial priorities, policies and processes to accompany government action plans. This also involves increasing transparency and ensuring accountability (UNDP 2021).

Contrary to the intended paradigm of delivering new and additional[22] resources, there is evidence that the climate financing landscape has not manifested this transformative outcome. A comprehensive study conducted from 2011 to 2018 has exposed that a mere 6% of the climate finance allocated during this period can be recognised as both novel and supplemental to the robust commitments of affluent nations towards official development assistance. Even under a weaker definition of additionality, 45% of the Global North's public climate finance is development finance being diverted towards climate change action (Hattle and Nordbo 2022).

The Billion to Trillions agenda also undermines the structural impediments that prevent the reallocation of capital flows from dirty industries towards green industries. The predominant trend directs most funds towards established corporations with substantial access to capital markets. Furthermore, prominent investors often sidestep penalties associated with investments in polluting sectors by leveraging intricate financial structures, discreet investment funds, and shadow banking. Due to the minimal supervision of these private investment mechanisms and shadow banking, the financing of environmentally harmful industries persists, rather than bolstering initiatives combating climate change. The prevailing strategy of risk assessment, which involves integrating risks into asset valuation through methods such as disclosing climate-related information and relying on impartial third-party evaluations, fails to adequately accommodate the inherent uncertainty of climate change. This approach also lacks the versatility required to adapt to governmental strategies for change,

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[21] The principle of 'agreed costs' indicates that the financial resources provided should be based on a transparent and mutually agreed-on assessment of the specific costs associated with climate-related projects and activities. This assessment takes into account the unique circumstances and needs of each developing country. It ensures that the funding allocated aligns with the actual financial requirements for implementing climate action. The principle 'full and incremental' refers to the complete additional expenses incurred by developing countries when implementing climate-related projects or activities.

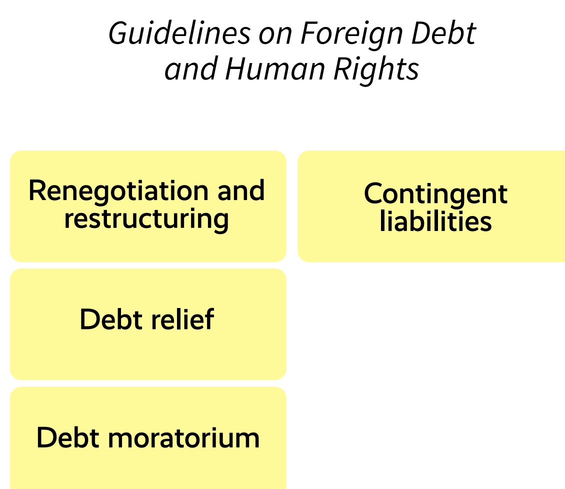
[22] This principles indicate that the same financing directed to other development goals cannot be repurposed to meet climate goals. The principle of 'new' financing means that climate finance should not divert existing development assistance or aid and should be fresh and separate from this existing financing. The principle of 'additional' financing states that financial resources should be provided in addition to domestic resources in developing countries, supporting poverty eradication and sustainable development efforts.

causing monetary policies to inadvertently favour industries responsible for carbon emissions. Consequently, the transition to cleaner energy in the Billions to Trillions agenda hinges on uncertain private investments, impeding the predictability[23] principle required for financial flows.

## PRINCIPLE CLUSTER 5: times of crisis

Principle 5 speaks to obligations that actors have in times of crises to manage financial flows and decrease financial pressure or constraints that inhibit a swift response to crisis. These include principles such as negotiating and restructuring debt, providing debt moratoriums, and ensuring independent mechanisms for debt resolution (Figure 12).

**Figure 12. Principle cluster 5 - indicating the principles that lay out human right's obligations that actors must observe during times of crises**




Source: Authors construction

The financing of JETPs is heavily reliant upon public and private finance debt instruments. However, the addition of new creditors and new debt instruments to an already intricate and difficult fiscal and financial environment is likely to make the process of restructuring sovereign debt more complex if the need for it arises specifically when formal sovereign insolvency processes are absent. Private actors have proved difficult to engage with when the need for debt restructuring arises and can often be reluctant or refuse outright to undertake measures that offer relief to developing nations. Certain countries, such Sri Lanka and Zambia, have encountered substantial challenges in obtaining debt relief. These difficulties have arisen from prolonged negotiations that have unfolded since the onset of the global Covid-19 pandemic. In these negotiations, private creditors have been reluctant to provide debt relief to these nations (See for example Elliot 2023; Inmna 2022).

Thus the way debt is governed and the associated legal risks need to be seriously reevaluated. The terms of the debt, and the jurisdiction in which the debt is governed, need to be clearly outlined

[23] The predictability principle indicates that countries receiving financial support should have a reasonable expectation that the funds will be available in a consistent and timely manner.

when engaging with private creditors. Restructuring debt under domestic legal regulations will likely be more straightforward compared to dealing with debt regulated by an external jurisdiction, which could be influenced by international agreements and contractual commitments. These legal risks can undermine the human rights obligations that allow for debt restructuring, renegotiation[24], and relief[25] measures during times of crisis. However many debt justice campaigns are being run that attempt to create change. The Independent Working Groups on Debt Reforms is supporting Zambia's struggle for debt justice in numerous ways, including through research and policy briefs that promote alternate mechanisms of financing such as debt swaps or cancellations for climate financing, and by exposing the full social impact and documenting human rights violations through unjust debt practices

Formal debt sustainability assessment (DSA) procedures have been established by the International Development Association (IDA) and the IMF. The IDA's lending is guided by criteria within the Country Policy and Institutional Assessment (CPIA) approach, while the IMF and World Bank employ a standardised DSA procedure for surveillance and lending. Despite its systematic application by these institutions, the current DSA model lacks consideration of key factors. It does not incorporate the cost of borrowing in foreign currency, a common practice for many developing countries, and it falls short in predicting the full fiscal impact of the complex effects of climate change. Additionally, the model neglects the human rights implications of a growing debt burden and does not factor in the costs linked to delays in debt negotiation or restructuring. Recent IMF measures to restrict lending to countries failing DSAs pose a notable liquidity risk for developing nations grappling with worsening climate shocks. This ongoing evolution in debt sustainability analysis provides an opportunity for developing countries to advocate for more comprehensive DSA models that address these critical gaps and introduce metrics beyond traditional frameworks.

The Debt Service Suspension Initiative (DSSI) is a debt moratorium that emerged in April 2020 as a response to the economic hardships presented by the Covid-19 pandemic. Its primary objective was to offer temporary respite to qualifying low-income and developing nations. This was achieved by permitting them to halt debt service payments to official bilateral creditors, which encompassed governments and multilateral institutions. By granting these nations a reprieve from immediate debt servicing responsibilities, the initiative aimed to channel resources toward critical health and economic priorities during the pandemic. This initiative entailed the provisional suspension of both principal and interest payments on eligible debts. Initially designed to conclude by the close of 2020, the DSSI's duration was extended to the end of 2021 due to the sustained impact of the pandemic on the economies of numerous countries (See IMF No date). The end of this debt moratorium means that nations must resume their debt obligations, even in the midst of ongoing debt crises and a deteriorating global context. While 73 countries were eligible for the DSSI, only 43 of these nations actually applied, seeking a total of US$13 billion in debt service suspension, a fraction of what the G20 aimed to achieve at the onset of the DSSI announcement. The temporary nature of the

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[24] The principles of debt restructuring and renegotiating state: "Debtor States must honour external debt agreements, but in cases of financial distress or natural disasters, adjustments may be needed. If repayment becomes challenging, the debtor State should engage in sincere negotiations and restructuring with all creditors, including international financial institutions, to meet human rights obligations and development goals while preserving capacity."

[25] The principle of debt relief states that "Debt relief efforts, including debt forgiveness, rescheduling, service reduction, and interest moratorium, should prioritise the realisation of all human rights, especially economic, social, and cultural rights. Additionally, financing from debt relief should not be a substitute for official development assistance and should not be treated as such."

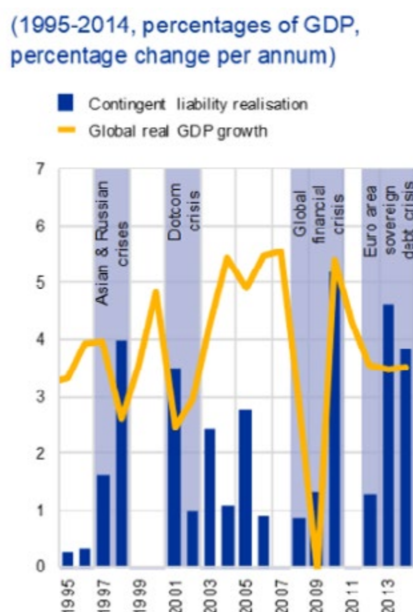
debt moratorium on bilateral debt payments and the absence of significant involvement from the private sector contributed to the failure of this initiative (Bretton Woods Project 2022). Therefore, it's imperative for debt moratoriums[26] to be inclusive and accessible to all stakeholders, particularly the private sector.

The prevailing approaches managing contingent liabilities also risks failing to meet rights standards. Contingent liabilities[27] encompass potential financial duties or commitments that might materialise in the future, contingent upon specific events either occurring or not occurring. These responsibilities are uncertain and hinge on the fulfilment of particular conditions. Contingent Liabilities are used under a Billions to Trillions agenda as a means of transferring commercial risk exposure faced by the private sector to the state. They are not registered as actual liabilities on the government's balance sheet, but they are divulged within the company's financial statements and accompanying notes due to their representation of potential financial hazards that an entity could confront. However, if the companies in question are not public companies (i.e. not listed on the stock exchange) or private companies, then these financial statements are not made public. Therefore, the true risks of the company are not known to the public. State guarantees for projects may be more attractive than directly financing certain projects due to the concealed nature of the support. However, these contingent explicit liabilities could ultimately prove to be more costly over the long term (Polackova 1999). Contingent liabilities historically pose significant risks for governments, especially during crises such as the global financial and euro area debt crises, with fiscal costs often exceeding 5% of GDP and aggravated by economic downturns. Figure 13 illustrates how contingent liabilities peak during an economic crisis (Gardó et al. 2021). The emergence of contingent liability concerns during times of crises is particularly concerning given the ongoing climate crisis.

[26] The principle of debt moratorium states that "When a change in circumstances beyond the control of the Borrower State arises, the parties should negotiate and agree on a moratorium on debt repayment. Such a moratorium should apply to the principal, interest, commission and penalties and should apply throughout negotiations on debt restructuring."

[27] The principle on contingent liabilities states that "Borrower States and lenders should take into account the impact of contingent liabilities, such as debts from export credits, foreign investments, and public-private partnerships, on the borrower's financial position when making borrowing or lending decisions and assessing debt sustainability.

**Figure 13. Contingent liability materialisations can be a significant source of risk for sovereigns during times of crises**




Source: Gardó et al. 2021, 97

## 4.2. The failure to implement human rights financing for development principles

The analysis above grapples with the ways in which the Billions to Trillions agenda undermines the human rights principles that were identified to guide climate financial flows. Yet it also displays how the failure to implement these human rights and international agreements guidelines has significantly undermined the ability to contest the prevailing global financial architecture and the underlying agendas that guide it. This section analyses the shortfall in the human rights architecture that fails to account for systems that may capture and undermine the identified human rights principles that states are obliged to adhere to. It grapples with solid on-paper principles that have failed to materialise in real-world action.

The presence of repressive nations that have willingly signed on to various human rights treaties serves as a stark reminder of the shortcomings of international human rights law in effecting substantial implementation and ensuring culpable parties are held to account. Despite these nations' formal commitments, the persistence of grave issues such as malnutrition, lack of access to clean water, and recurrent outbreaks of armed conflicts underscores an ongoing pattern of human rights violations. This pattern persists despite the existence of meticulously crafted legal documents, obligating states to uphold the dignity and rights of their citizens. The efficacy of these legal frameworks is hampered by the absence of comprehensive accountability mechanisms that can be effectively applied on a global scale and a failure for CSOs and activists to advocate for such. Compliance with international law is often sporadic, punctuating moments of adherence and negligence across time. The essence of the matter lies in the insufficiency of mechanisms capable of compelling governments, institutions, and entities to be answerable for their actions or inactions that infringe upon the basic rights of individuals.

Under the WSC there has been a significant private turn in development finance yet the internal human rights obligations for the private sector remain soft. Many of the outlined progressive documentation that guides human rights are soft laws that lack sufficient gravitas to allow them to be carefully considered unless embedded into domestic law. Soft law instruments like the UN Guiding Principles on Business and human rights do not have the same legal force as binding treaties such as the two covenants in the UDHR. While they provide important guidance, they don't impose legal obligations on businesses to respect human rights but rather soft suggestions and encouragements towards businesses performing their 'due diligence'.This means that private entities often face less rigorous reporting and monitoring requirements compared to states. Soft law instruments might encourage voluntary reporting, but without legal mandates, businesses can choose whether or not to disclose their human rights practices and impacts. Without legal consequences for non-compliance, private entities may perceive limited incentives to proactively address human rights concerns in their operations. This means that entities have now been handed over the responsibilities of both development and steering the climate agenda but do not have overarching laws that guide them towards justice-based action. Similarly, the UN guiding principles on foreign debt and human rights fall prey to similar contentions. Despite there being significant calls in various UN bodies to provide debt at sustainable levels there has been no integration of human rights in any negotiations on debt sustainability. Sustainable debt practices should inherently incorporate human rights as a pivotal facet, considering the profound impact of economic policies on the social fabric of societies. To rectify this situation, there must be a concerted effort to elevate the significance of human rights within discussions on debt sustainability. Integrating human rights considerations into these negotiations is not merely a symbolic gesture; it is a strategic imperative. This integration can serve as a driving force to ensure that economic decisions align with the broader goals of justice, equality, and human dignity. CSOs and activists must play a vital role in advocating for better implementation and greater accountability of human rights principles in order to truly contest this economic hegemony

# Section 5. Proposed research agenda

The analysis above grapples with the ways in which the Billions to Trillions agenda undermines the human rights principles that were identified to guide climate financial flows. Yet it also displays how the failure to implement these human rights and international agreements and guidelines has significantly undermined the ability to contest the prevailing global financial architecture and the underlying agendas that guide it. This section proposes a research agenda that may empower civil society and social movements from democratic countries with tools to help close some of the shortfall between climate finance human rights norms that have been highlighted and the realisation of these rights in climate investment plans to keep rights holders accountable.
The gap between human rights financing for development principles enshrined in treaties and the tangible implementation of these principles raises questions regarding the pragmatic influence of such standards. It serves as a reminder that despite the existence of comprehensive and well-crafted human rights norms, the real impact is stymied by a lack of enforcement and genuine consequences. Consequently, the imperative to bridge this divide between theory and practice becomes all the more pronounced, signifying an urgent call to action to recalibrate the international human rights framework.

In this context, the necessity to establish robust and applicable accountability systems becomes paramount. The absence of consistent accountability not only perpetuates human rights violations but also undermines the credibility of the international human rights regime. As nations, organisations, and individuals strive to close this gap, they are confronted with the intricate challenge of designing mechanisms that can transcend political boundaries, foster cooperation among nations with divergent interests, and uphold the fundamental tenets of human rights.

We propose a research agenda that can be developed into tools that may help to support social movements and civil society in their advocacy for just climate finance regimes as means of closing the gap between human rights based financing for development principles and the implementation of these principles. Illustrated in table 1, are the selected principles that have been discussed above and some of the research questions that our analysis poses as entry points for possible civil society advocacy. These span from research questions that respond to the national responsibilities of the state in the JET (e.g. how to keep the state accountable on issues of investments that are consistent with climate goals, how to regulate existing PPPs for rights realisation) to research questions that address responsibilities of financial investments (e.g. how to assess if finance is new and additional).
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**Table 1 . Proposed Research Question**

| Cluster | Principles | Analysis | Research Questions |
| --- | --- | --- | --- |
| **National responsibilities** | Consistency with climate goals; | The principles address the duties of the state to finance rights realisation such as climate action, and the public provision of public goods and services such as accessible and affordable renewable energy. | How to keep the state accountable on the alignment between NDCs and actual climate investments? |
| | Minimum core obligation for resources and non-retrogression | Includes all the basic social, cultural, and economic rights, and sets a floor for each right in order to quantitatively and qualitatively understand the minimum level of the right that must be achieved, even during disasters. A key aspect analysed in the paper was the right to accessible and affordable renewable energy. The Billion to Trillions agenda sets the norm for the use of Public Private Partnerships in the provisioning of public goods. | How to advocate for the regulation of existing PPPs for rights realisation?<br><br>How to advocate for a public pathway for energy provisioning? |

| Cluster | Principles | Analysis | Research Questions |
|---|---|---|---|
| **Maintaining National Sovereignty** | Ensuring independent process of development | Indicates the need to protect a state's independence and allow for decision-making that is country- owned and democratic. The paper identified how international investment treaties and loans conditionalities can undermine a country's ability to pursue its development agenda. | How to advocate for legislating that conditionalities and loan agreements must go through parliament oversight?<br><br>How Bilateral Investment Treaties can be terminated to create policy autonomy? |
| **Responsibilities of Financial Investments** | New and additional finance; full, incremental and agreed costs; predictable finance | Describes the duties and conditions that financial flows need to meet in order to allow for equitable distribution of resources. | How to assess if financing is new and additional?<br><br>How to assess full incremental and agreed costs?<br><br>What type of financing regimes allow for predictable finance? |
| **Times of Crisis** | Debt Relief | Obligations that actors have in times of crises to manage decrease in financial flows and increasing financial pressure or constraints that inhibit a swift response to crisis. | What does a fair debt relief package look like? |

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*This publication was produced with the financial support of the European Union. Its contents are the sole responsibility of the Climate Ambition to Accountability Project and do not necessarily reflect the views of the European Union.*

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# Annexure 1

Table 1: Principles outlined in the Guidelines on Foreign Debt and Human Rights

<table>
<tr><th>Foundational principles</th><th colspan="5">Operational principles</th><th></th></tr>
<tr><td></td><td colspan="2">A - External debt</td><td colspan="2">B - Debt Sustainability</td><td>C - National development strategy</td><td></td></tr>
<tr><td>Ensuring the primacy of human rights</td><td>General legal and institutional framework</td><td>Lender States and institutions should have a transparent and accountable legal and institutional framework for loan negotiation, contracting, and debt management.</td><td>Debt sustainability assessment</td><td>Assessments that analyse a country’s ability to pay back money but also the impacts of debt burdens on a country's ability to realise human rights.</td><td>A national development strategy should be owned by the country and agreed upon through a participatory consultation process involving all stakeholders. Country ownership entails the<ul><li>Freedom to choose and lead policy formulation and implementation</li><li>Creditors should not impose conditions related to privatisation, trade liberalisation, or financial sector reforms.</li><li>The implementation of policies should not hinder the realisation of human rights</li></ul></td><td>Debt repayment problems and disputes should be resolved through an independent mechanism, potentially an international debt workout mechanism, to restructure unsustainable debts in a fair, transparent, efficient, and timely manner. The primary goal of such a mechanism is to ensure that debtor States can achieve economic viability and growth while fulfilling their international human rights obligations.</td></tr>
</table>

Table 1: Principles outlined in the Guidelines on Foreign Debt and Human Rights

| Foundational principles | Operational principles | | | | | |
|---|---|---|---|---|---|---|
| | A - External debt | | B - Debt Sustainability | | C - National development strategy | |
| Equality and non-discrimination | **Decision to borrow or to lend** | Borrower States should conduct transparent needs assessments and prioritise human rights, ensuring that borrowing is necessary, existing resources are properly allocated, loans are used for public purposes, debt levels remain sustainable, and loans do not violate human rights. | **Public audits of debt and lending portfolios** | Borrower States should regularly conduct transparent and participatory audits of their debt portfolios, disclosing the findings to ensure accountability and inform future borrowing decisions, development expenditure, and human rights action plans. | A national development strategy should be owned by the country and agreed upon through a participatory consultation process involving all stakeholders. Country ownership entails the<br>• Freedom to choose and lead policy formulation and implementation<br>• Creditors should not impose conditions related to privatisation, trade liberalisation, or financial sector reforms.<br>• The implementation of policies should not hinder the realisation of human rights | Debt repayment problems and disputes should be resolved through an independent mechanism, potentially an international debt workout mechanism, to restructure unsustainable debts in a fair, transparent, efficient, and timely manner. The primary goal of such a mechanism is to ensure that debtor States can achieve economic viability and growth while fulfilling their international human rights obligations. |

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| Foundational principles | Operational principles | | | | | | |
|---|---|---|---|---|---|---|---|
| | A - External debt | | B - Debt Sustainability | | C - National development strategy | | |
| Progressive realisation | **Loan negotiation and contracting** | Negotiations should be based on consultations with all stakeholders, including affected communities and civil society organisations and the key terms and conditions of loan agreements publicly disclosed. | **Contingent liabilities** | Borrower States and lenders should take into account the impact of contingent liabilities, such as debts from export credits, foreign investments, and public-private partnerships, on the borrower's financial position when making borrowing or lending decisions and assessing debt sustainability. Additionally, all states should regulate and monitor private sector external lending and borrowing to prevent the creation of private debt burdens that can lead to financial instability and undermine the realisation of human rights. | **Alignment to national development goals** | Loans and foreign investment agreements must be consistent with country-designed development strategies. | |

Table 1: Principles outlined in the Guidelines on Foreign Debt and Human Rights

| Foundational principles | Operational principles | | | | | | |
|---|---|---|---|---|---|---|---|
| | A - External debt | | B - Debt Sustainability | | C - National development strategy | | |
| Minimum core obligations | **Legal authority to contract** | Loan contracts must comply with the formal and substantive requirements outlined in the relevant national laws and regulations of both the Borrower State and the Lender State. | **Contingent liabilities** | Borrower States and lenders should take into account the impact of contingent liabilities, such as debts from export credits, foreign investments, and public-private partnerships, on the borrower's financial position when making borrowing or lending decisions and assessing debt sustainability. Additionally, all states should regulate and monitor private sector external lending and borrowing to prevent the creation of private debt burdens that can lead to financial instability and undermine the realisation of human rights. | **Investment agreements** | International investment agreements should uphold and protect investments while also ensuring full compliance with human rights within the territories of the contracting States. If these agreements include sovereign debt as a form of investment, they should be interpreted and applied in a manner that aligns with the principles outlined in these guidelines. | |

Table 1: Principles outlined in the Guidelines on Foreign Debt and Human Rights

| Foundational principles | Operational principles | | | | | | |
|---|---|---|---|---|---|---|---|
| | A - External debt | | B - Debt Sustainability | | C - National development strategy | | |
| Non-retrogression | **Use of loan funds** | External loans should be used exclusively for their intended purpose, and under no circumstances should the funds be allocated to activities or projects that would worsen or contribute to human rights violations, particularly in relation to economic, social, and cultural rights. | **Contingent liabilities** | Borrower States and lenders should take into account the impact of contingent liabilities, such as debts from export credits, foreign investments, and public-private partnerships, on the borrower's financial position when making borrowing or lending decisions and assessing debt sustainability. Additionally, all states should regulate and monitor private sector external lending and borrowing to prevent the creation of private debt burdens that can lead to financial instability and undermine the realisation of human rights. | **Investment agreements** | International investment agreements should uphold and protect investments while also ensuring full compliance with human rights within the territories of the contracting States. If these agreements include sovereign debt as a form of investment, they should be interpreted and applied in a manner that aligns with the principles outlined in these guidelines. | |

## Table 1: Principles outlined in the Guidelines on Foreign Debt and Human Rights

| Foundational principles | Operational principles | | | | | | |
|---|---|---|---|---|---|---|---|
| | A - External debt | | B - Debt Sustainability | | C - National development strategy | | |
| The duty of international cooperation among States | **Debt servicing or repayment** | Debtor States must ensure manageable debt servicing, prioritising essential social services and human rights expenditures while avoiding excessive payments that compromise their core obligations. Retrogressive measures that prioritise debt payments over human rights should be prevented, maintaining a balanced allocation of financial resources. | | | | | |

Table 1: Principles outlined in the Guidelines on Foreign Debt and Human Rights

| Foundational principles | Operational principles | | | | | | |
|---|---|---|---|---|---|---|---|
| | A - External debt | | B - Debt Sustainability | | C - National development strategy | | |
| The shared responsibility of creditors and debtors | **Renegotiation and restructuring** | Debtor States must honour external debt agreements, but in cases of financial distress or natural disasters, adjustments may be needed. If repayment becomes challenging, the debtor State should engage in sincere negotiations and restructuring with all creditors, including international financial institutions, to meet human rights obligations and development goals while preserving capacity. | | | | | |

Table 1: Principles outlined in the Guidelines on Foreign Debt and Human Rights

| Foundational principles | Operational principles | | | | | | |
|---|---|---|---|---|---|---|---|
| | A - External debt | | B - Debt Sustainability | | C - National development strategy | | |
| Ensuring an independent process of national development | **Debt relief** | Debt relief efforts, including debt forgiveness, rescheduling, service reduction, and interest moratorium, should prioritise the realisation of all human rights, especially economic, social, and cultural rights. Additionally, financing from debt relief should not be a substitute for official development assistance and should not be treated as such. | | | | | |

Table 1: Principles outlined in the Guidelines on Foreign Debt and Human Rights

| Foundational principles | Operational principles | | | | | | |
|---|---|---|---|---|---|---|---|
| | A - External debt | | B - Debt Sustainability | | C - National development strategy | | |
| Transparency, participation and accountability | **Debt moratorium** | When a change in circumstances beyond the control of the Borrower State arises, the parties should negotiate and agree on a moratorium on debt repayment. Such a moratorium should apply to the principal, interest, commission and penalties and should apply throughout negotiations on debt restructuring. | | | | | |

Table 1: Principles outlined in the Guidelines on Foreign Debt and Human Rights

| Foundational principles | Operational principles | | | | | | |
|---|---|---|---|---|---|---|---|
| | A - External debt | | B - Debt Sustainability | | C - National development strategy | | |
| | **Sale of debt on the secondary market** | Loan agreements should include clear restrictions on the sale or assignment of debts to third parties without the prior informed consent of the Borrower State | | | | | |
| | **Sharing risk of the loan** | To mitigate risks associated with loans, lenders should provide the option of denominating the loan in the Borrower State's local currency to address exchange rate risk, and they should also offer the possibility of indexing loan repayments to economic and/or export growth rates to balance output or trade risk. | | | | | |

# Annexure 2