Choosing Words Wisely: Climate Agreements Viewed Through a Legal Contractual Framework

Samantha Daisy*

Climate finance has become a progressively indispensable consideration in the fight against climate change. Global agreements on climate mitigation and adaptation have changed over time to focus increasingly on the need for climate finance. Many commentators have considered whether climate agreements have been successful in allocating the necessary finance to mitigation and adaptation efforts. What changes can be made to the language of climate agreements to promote an efficient flow of funding to climate goals? This Note argues that we can use pre-existing legal frameworks to analyze and assess the progression of climate finance over the years. By analyzing the progression of climate finance provisions in global climate agreements based on legal frameworks grounded in principal-agent theories, governance principles, and contract law, this paper will show how adherence to these pre-existing legal frameworks may have enhanced the success (or lack thereof) in global climate finance.

* J.D. Columbia Law School, 2023; B.S.S.W. Stony Brook University, 2016. Many thanks to Professor Michael Gerrard and the extremely talented student editors at the Columbia Journal of Environmental Law. Specific thanks to William Leo, Mac McReynolds, and Nicole Franki for creative title suggestions and invaluable guidance.

I. INTRODUCTION

Climate finance has become a progressively indispensable element in the fight against climate change. Language in global agreements for climate mitigation and adaptation has changed over time to focus increasingly on the need for climate finance. As a subset of development finance,[1] we can use pre-existing legal frameworks grounded in principal-agent theories, governance principles, and contract law to analyze and assess the progression of climate finance over the years by focusing on its evolution in subsequent global climate treaties. The goal is to see how adherence to these pre-existing legal frameworks may be correlated to the success (or lack thereof) in global climate finance. When adhering to clear rules of principal-agent, governance, and contract law, the language of climate agreements has the capacity to enhance the efficiency and substance of global climate finance. Without progressively improving climate finance, the global economy cannot transition to lower greenhouse gas (GHG) levels. Without more focus on the language of global climate agreements, climate finance will not work.

A. What is Climate Finance?

Climate finance can be defined as any public, private, or alternative source of financing which aims to support the mitigation or adaptation necessary to respond to climate change nationally or transnationally.[2] Climate finance is a subsect of development finance and can come from local, national, or international sources.[3] The term has become an increasingly common buzzword in both public and private sectors, as it becomes clear that mammoth amounts of climate finance will be required in order to curb the increase of average global temperature.[4] The global community is far from preventing the global

1. The Brookings Institution defines development finance as "the use of public sector resources to facilitate private sector investment in low- and middle-income countries where the commercial or political risks are too high to attract purely private capital, and where the investment is expected to have a positive developmental impact on the host country." *See* George Ingram & Robert A. Mosbacher, Jr., *Development Finance: Filling Today's Funding Gap*, BROOKINGS (July 31, 2018), https://www.brookings.edu/research/development-finance-filling-todays-funding-gap/ [https://perma.cc/TK6D-AXDD]. *See also infra* Parts I(A), II(B).

2. *Introduction to Climate Finance,* U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/topics/climate-finance/the-big-picture/introduction-to-climate-finance [https://perma.cc/X76A-PDYS] (last visited Aug. 28, 2022).

3. *Id.*

4. *See, e.g.,* Beh Lih Yi, *World Needs $5 Trillion in Annual Climate Finance by 2030 for Rapid Action,* REUTERS (Oct. 28, 2021), https://www.reuters.com/business/cop/world-needs-5-

average temperature from rising 1.5 degrees Celsius above pre-industrial conditions as recommended by climate scientists in order to avoid catastrophic impacts to humanity.[5] A recent report by Berkeley Earth, a California-based non-profit, estimates that the globe has already reached 1.21 degrees above pre-industrial conditions and that global temperatures are likely to hit 1.5 degrees above pre-industrial conditions by 2033.[6] In order to prevent global temperature increase, global goals must focus on reducing greenhouse gas emissions and encouraging carbon sinks. As we struggle to meet these critical climate change goals, governments and stakeholders alike are turning toward climate finance initiatives to assist in global mitigation and adaptation to climate change. Due to the push from governments and the court of public opinion,[7] as well as institutional investors' desire to mitigate systematic risk,[8] the private sector has been compelled into the world of Environmental,

trillion-annual-climate-finance-by-2030-rapid-action-2021-10-28/ [https://perma.cc/2F64-8MWY] ("Globally, [a study by green groups] said finance must rise eightfold to meet the estimated $5 trillion needed annually for climate action by 2030—or an average increase of $436 billion a year this decade.").

5. Intergovernmental Panel on Climate Change, *Special Report: Global Warming of 1.5ºC,* IPCC (Apr. 4, 2022), https://www.ipcc.ch/sr15/chapter/chapter-1/ [https://perma.cc/E7AN-QPNK] (discussing the impacts of 1.5 degree Celsius warming on natural and human systems); *State of Climate in 2021: Extreme Events and Major Impacts,* WORLD METEOROLOGICAL ORG. (Oct. 31, 2021), https://public.wmo.int/en/media/press-release/state-of-climate-2021-extreme-events-and-major-impacts [https://perma.cc/DYQ9-MB3A] (stating "record atmospheric greenhouse gas concentrations and associated accumulated heat have propelled the planet into uncharted territory, with far-reaching repercussions for current and future generations."); *Net Zero by 2050: A Roadmap for the Global Energy Sector*, INT'L ENERGY AGENCY (May 2021), https://iea.blob.core.windows.net/assets/deebef5d-0c34-4539-9d0c-10b13d840027/NetZeroby2050-ARoadmapfortheGlobalEnergySector_CORR.pdf [https://perma.cc/97BS-H7DF].

6. Robert Rohde, *Global Temperature Report for 2021,* BERKELEY EARTH (Jan. 12, 2022), http://berkeleyearth.org/global-temperature-report-for-2021/ [https://perma.cc/VK4U-S6BW].

7. Two-thirds of Americans think that the government should "do more" about climate change, including bi-partisan support for large-scale tree-planting efforts and tax credits for carbon capture. Alec Tyson & Brian Kennedy, *Two-Thirds of Americans Think Government Should Do More on Climate*, PEW RSCH. CTR. (June 23, 2020), https://www.pewresearch.org/science/2020/06/23/two-thirds-of-americans-think-government-should-do-more-on-climate/ [https://perma.cc/2Q5Q-QK29].

8. *See* John C. Coffee, *The Coming Shift in Shareholder Activism: From "Firm-Specific" to "Systematic Risk" Proxy Campaigns (and How to Enable Them)*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 7, 2021), https://corpgov.law.harvard.edu/2021/09/07/the-coming-shift-in-shareholder-activism-from-firm-specific-to-systematic-risk-proxy-campaigns-and-how-to-enable-them/ [https://perma.cc/2Q5Q-QK29] (describing a change in shareholder activism priorities from firm-specific risks, like a poor earnings report, to systematic threats on entire investment portfolios, like climate change, which would negatively affect many individual firms at once).

Social, and Governance (ESG) investing,[9] and, thus, climate finance.[10] This can be seen in the increase in climate finance (from USD 364 billion in 2011 to USD 632 billion in 2020[11]) and the development of new climate-centered financial instruments (like green and blue bonds[12]). While private financing makes up 49% (USD 310 billion) of this global private finance,[13] investments in global climate change efforts remain a public and governmental concern. Governments take a leading responsibility in promoting climate finance primarily because of the devastating public impact that will occur if there is inadequate investment in the climate change response. It is this public impact that puts climate finance squarely within the realm of development finance, due to the fact that the potential impact is too high to risk relying solely on private investment.

B. The Status of Climate Finance Today

Today, climate finance shows improvement from where it was ten years ago, but improvements have been slow, and are still drastically behind where they need to be.[14] This growth, with the need for stronger commitments, mirrors the current state of global climate agreements. In December 2015, 196 parties signed onto the Paris

9. ESG standards in the finance world aim to use a set of criteria to screen the social impact of investments. *See, e.g.,* Moliang Jiang, *The Current State of ESG Investing: Towards a More Unified ESG Disclosure Regime?*, COLUM. BUS. L. REV. (Mar. 26, 2021), https://journals.library.columbia.edu/index.php/CBLR/announcement/view/398 [https://perma.cc/635J-D55K].

10. ORG. FOR ECON. CO-OPERATION AND DEV., ESG INVESTING AND CLIMATE TRANSITION: MARKET PRACTICES, ISSUES, AND POLICY CONSIDERATIONS 7 (2021), https://www.oecd.org/finance/ESG-investing-and-climate-transition-market-practices-issues-and-policy-considerations.pdf [https://perma.cc/8QSQ-MEZH] (discussing large shifts in the investing world after the signing of the Paris Agreement and Sustainable Development Goals).

11. BAYSA NARAN ET AL., CLIMATE POLICY INITIATIVE, GLOBAL LANDSCAPE OF CLIMATE FINANCE 2 (2021), https://www.climatepolicyinitiative.org/wp-content/uploads/2021/10/Full-report-Global-Landscape-of-Climate-Finance-2021.pdf [https://perma.cc/27TE-V7XY].

12. Green bonds are financial instruments intended to finance projects that are environmentally beneficial ("green projects"). *See, e.g., What You Need to Know About IFC's Green Bonds*, WORLD BANK (Dec. 8, 2021), https://www.worldbank.org/en/news/feature/2021/12/08/what-you-need-to-know-about-ifc-s-green-bonds [https://perma.cc/3R9M-3V6F]. Blue bonds are a similar, more recent financial instrument intended to "support sustainable marine and fisheries projects." *See Seychelles Launches World's First Sovereign Blue Bond*, WORLD BANK (Oct. 29, 2018), https://www.worldbank.org/en/news/press-release/2018/10/29/seychelles-launches-worlds-first-sovereign-blue-bond [https://perma.cc/V5MW-8FYZ].

13. NARAN ET AL., *supra* note 11, at 12.

14. To meet global climate objectives by 2030, at least a 590% increase in annual climate finance is needed. *Id.* at 2.

Agreement, which took serious steps toward improving global finance initiatives for both climate mitigation and adaptation.[15] At the heart of the Paris Agreement and the achievement of climate mitigation and adaptation are Nationally Determined Contributions (NDCs).[16] "In their NDCs, countries communicate actions they will take to reduce their Greenhouse Gas emissions in order to reach the goals of the Paris Agreement. Countries also communicate. . . actions they will take to build resilience to adapt to the impacts of rising temperatures."[17] The 164 NDCs submitted by 2021 have made clear the need for increased financing in developing countries.[18] However, many NDCs submitted by developed nations do not explain what funding they would be willing to provide toward climate change, as most developed countries are reluctant to include international funding pledges in their NDCs for negotiating purposes in future global conferences about climate change.[19]

Lack of transparency and commitment around climate financing in NDCs is a product of what has commonly been referred to as the "finance gap." The finance gap for climate mitigation and adaptation can be boiled down to the reality that the money and resources currently allocated to avoid the effects of climate change remain far below what is actually needed. While the overview is easy to understand, the problem of the finance gap can be broken down into

15. *The Paris Agreement*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement [https://perma.cc/X6BU-GA9M] (last visited Mar. 31, 2022).

16. *Id.*

17. *Id.*

18. Nationally Determined Contributions Under the Paris Agreement, Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement of Its Third Session (Oct. 31, 2021 to Nov. 12, 2021), U.N. Doc. FCCC/PA/CMA/2021/8 (Sept. 17, 2021). Press Release, U.N. Climate Change News, Full NDC Synthesis Report: Some Progress but Still a Big Concern, U.N. Press Release (Sept. 17, 2021), https://unfccc.int/news/full-ndc-synthesis-report-some-progress-but-still-a-big-concern [https://perma.cc/C7ZG-34ZV] ("The pledge to mobilize USD 100 billion annually by 2020 was key for enhancing climate action by developing countries. That commitment that was made in the UNFCCC process more than 10 years ago has not yet been fulfilled.").

19. Merylyn Hedger & Smida Nakhooda, *Finance and Intended Nationally Determined Contributions (INDCs): Enabling Implementation* 9 (Overseas Dev. Inst., Working Paper No. 425, Oct. 2015), https://cdn.odi.org/media/documents/10001.pdf [https://perma.cc/C8YZ-QUK8]; *See, e.g.,* Submission Under the Paris Agreement, New Zealand's First Nationally Determined Contribution 1 (Nov. 4, 2021), https://unfccc.int/sites/default/files/NDC/2022-06/New%20Zealand%20NDC%20November%202021.pdf [https://perma.cc/T3SH-2UMF] (stating "New Zealand intends to separately communicate its action on climate finance in its biennial reports"). This problem can be traced back to the language of the Paris Agreement, which has been criticized for not *requiring* (only "*strongly urging*") more funding from developed nations, and not specifying where this funding would come from.

more nuanced complications which reveal several different underlying "gaps" in climate finance. The first is the pledge gap contrasted with the action gap: Combined pledges are often higher than the sum of what countries actually contribute.[20] For example, according to Organisation for Economic Co-operation and Development (OECD) Secretary-General Mathias Cormann, "[c]limate finance continued to grow in 2019 but developed countries remain USD 20 billion short of meeting the 2020 goal of mobilising USD 100 billion."[21] The second is the ambition gap, which refers to what individual states are *willing* to do to mitigate and adapt to climate change vs. what is *necessary*.[22] Yet another gap exists between the amount of funding that is allocated to mitigation vs. adaptation. Traditionally, much more money has flowed to mitigation, rather than adaptation which accounts for only 7% of all climate finance.[23] Finally, there is a question about the gap between the quantity vs. the quality of global climate finance. Scholars in the field have pointed out concerns that some funds being allocated to climate mitigation and adaptation might be counted multiple times, and that a majority of these funds come in the form of loans to developing countries, rather than grants.[24] In fact, the majority of climate finance (61%) was raised as debt, and only 12% of that debt was low-cost or concessional debt.[25] When viewed from a multi-dimensional perspective, it is easier to see that the finance gap is both a large and intricate problem.

The 2021 Glasgow Climate Change Conference (COP 26) largely focused on reducing the finance gap, which was an important and valuable step in global climate treaties.[26] The finance gap is not a new

20. Jocelyn Timperley, *The Broken $100-billion Promise of Climate Finance—and How to Fix It,* NATURE (Oct. 20, 2021), https://www.nature.com/articles/d41586-021-02846-3 [https://perma.cc/RH2X-2Y6B] (including a graph exemplifying "missed targets" of climate finance).

21. *Statement from OECD Secretary-General Mathias Cormann on Climate Finance*, OECD (Sept. 17, 2019), https://www.oecd.org/newsroom/statement-from-oecd-secretary-general-mathias-cormann-on-climate-finance-in-2019.htm [https://perma.cc/A4VR-SWV9].

22. *Ambition Gap*, CLIMATE POL'Y INFO HUB, https://climatepolicyinfohub.eu/glossary/ambition-gap.html [https://perma.cc/FWQ3-4FKD] (last visited Sept. 12, 2022).

23. NARAN ET AL., *supra* note 11, at 25.

24. *The Climate Finance Question*, UNITED NATIONS CLIMATE CHANGE (Nov. 2, 2021), https://unfccc.int/blog/the-climate-finance-question [https://perma.cc/E8QS-7ZDX].

25. NARAN ET AL., *supra* note 11, at 3.

26. Press Release, U.N. Climate Change News, COP 26 Reaches Consensus on Key Actions to Address Climate Change (Nov. 13, 2021), https://unfccc.int/news/cop26-reaches-consensus-on-key-actions-to-address-climate-change [https://perma.cc/F8X7-JSJJ] ("Finance was extensively discussed throughout the session and there was consensus in the need to continue increasing support to developing countries. The call to at least double finance for adaptation

discovery or topic of conversation. It has been common for researchers to profess disappointment with "soft law" language and lack of hard commitments from the developed nations in past international climate treaties, which lead to a lack of enforceability or commitments toward climate finance throughout the various climate agreements including the 1992 United Nations Framework Convention on Climate Change (UNFCCC), the 1997 Kyoto Protocol, and the 2015 Paris Agreement.

More recently, the COVID-19 pandemic has driven concerns that the climate finance gap will either grow or stagnate. According to the United Nations Environment Programme (UNEP) 2021 Adaptation Gap Report, "COVID-19 has exacerbated pre-existing financial barriers to investment in adaptation."[27] The report credits this to "decreased government revenues due to the economic impacts of COVID-19, [which] may also hamper future government spending on adaptation, particularly in developing countries."[28] Effects of the ongoing conflict in Ukraine may create similar issues, highlighting the fact that a well-established climate finance agreement must be strong enough to prevail throughout periods of global and political instability.

C. Viewing Climate Treaties and Finance from a Legal Framework

Due to the fact that private finance has been a significant share of climate finance over the years, and the scurry to "unlock" private finance opportunities,[29] few articles have approached development in international climate finance from the legal framework of "development finance." This could potentially be because "[r]esearch on development finance focuses on the general principles structuring the field or on programming at the country level, but not on

was welcomed by the Parties. The duty to fulfill the pledge of providing 100 billion dollars annually from developed to developing countries was also reaffirmed. And a process to define the new global goal on finance was launched.").

27. U.N. ENV'T PROGRAMME, THE GATHERING STORM: ADAPTING TO CLIMATE CHANGE IN A POST-PANDEMIC WORLD, ADAPTATION GAP REPORT 2021, at 52 (2021).

28. *Id*.

29. *See generally* Clark et. al., *Bridging Funding Gaps for Climate and Sustainable Development: Pitfalls, Progress and Potential of Private Finance*, 71 LAND USE POL'Y 335 (2018) (discussing the increased discourse about climate finance waiting to be "unlocked" and analyzing the actual availability of that finance).

inter-country allocations among recipient states."[30] However, Kevin E. Davis focuses on the "interconnected national, international and systemic challenges of financing for development."[31] Davis' framework has been cited in subsequent works on development finance[32] and development cooperation.[33] Thus, his work is a valuable starting point for evaluating the respective strengths and weaknesses of international legal finance agreements.

Davis' development finance framework states that, "[a]lthough it may not be immediately obvious, law plays a significant role in defining the terms upon which financial capital flows to developing countries."[34] Legal tools developed to study other areas of law can shed light on how financing development can clarify climate finance, making it an important field of legal study. Additionally, when analyzing treaties, legal frameworks are "of paramount importance to the realization of the right to social security."[35] Legal and institutional frameworks are "essential for establishing the roles and responsibilities of the different actors involved in designing, administering, delivering, and enforcing social protection systems."[36] Effective legal frameworks concretely establish rights and entitlements "in a clear and transparent way" that will "allow persons who are entitled to benefits to make claims and obtain redress in case of a violation of their rights."[37] Davis mentions the legal frameworks

30. Michael Riegner, *Governance Indicators in the Law of Development Finance: A Legal Analysis of the World Bank's 'Country Policy and Institutional Assessment,'* 19 J. OF INT'L ECON. L. 1, 3 (2016).

31. Kevin E. Davis, *'Financing Development' as a Field of Practice, Study and Innovation*, ACTA JURIDICA 168, 168 (2009) (quoting United Nations Report of the International Conference on Financing for Development (18–22 Mar. 2002), Monterrey Mexico A/Conf. 198/11).

32. *See* Riegner, *supra* note 30, at 2 (citing Davis' article because "[d]evelopment finance has (re)gained some prominence as a distinct field of study in international economic law.").

33. *See* PHILIPP DANN, THE LAW OF DEVELOPMENT COOPERATION 21 n.66 (2013) (stating "Kevin Davis, too, underlines that despite them all furthering development processes, different instruments and actors have to be analyzed in their own context, for example, with reference to the commitments that they demand from the contracting parties, the standards which they uphold or the rules on liability that they involve."); *id.* at 20 ("I see great value in the recent proposal to study all legal rules concerning the financing of development, as put forward by Kevin Davis. Such a law of development finances would analyze ODA transfers, but also private flows (such as remittances), commercial flows (such as loans offered at market rates) as well as the rules pertaining to foreign direct investment or sovereign debt—and hence would stress the immense variety of forms, actors and terms of financing.").

34. Davis, *supra* note 31, at 168.

35. *Legal and Institutional Frameworks,* SOC. PROT. & HUM. RTS., https://socialprotection-humanrights.org/key-issues/governance-accountability-and-democracy/legal-and-institutional-frameworks/ [https://perma.cc/XAM3-VM2H] (last visited Mar. 31, 2022).

36. *Id.*

37. *Id.*

of principal-agent theories, governance principles, and contract law,[38] which allow scholars to analyze the text and legal structure of development finance agreements. One can also analyze global climate agreements from the frameworks of principal-agent theories, governance principles, and contract laws by turning to the specific language used in the UNFCCC, Kyoto Protocol, Copenhagen Accord, and Paris Agreement. This analysis helps indicate what parties are considered principals and agents, what their roles are, how they are responsible for maintaining fair and transparent governance of climate change principles, and which terms reflect (or do not reflect) contractual language that enhances party responsibility. In turn, this analysis can help us determine what language is useful (or not useful) in promoting the roles and responsibilities of each country in financing climate change mitigation and adaptation.

Over time, global climate agreements like the UNFCCC, Kyoto Protocol, Copenhagen Accord, and Paris Agreement have slowly aligned with the legal frameworks of development finance. However, an analysis of this progress shows that the current language used in the Paris Agreement, finance pledges, NDCs, and national adaptation plans (NAPs) can be improved to create more effective principal-agent, governance, and contractual legal obligations between developed and developing countries. Alignment with current legal frameworks might also accelerate the speed at which these obligations are met, as there is less room for legal uncertainty.

The goal of this Note will be to analyze said alignment of global climate treaties to the traditional legal frameworks of principal-agent theories, governance principles, and contract law. To do this, Part II of this Note will explore the background of development finance, the international treaties and agreements that have attempted to clarify ambiguities in climate finance, and the legal frameworks that apply to both. This includes an important summary of the legal concepts underlying principal-agent theories, governance principles, and contract law, and where they can be identified in climate finance.

Part III will analyze the text and terms of the Paris Climate Agreement in a comparative nature to the preceding agreements (UNFCCC, Kyoto, Copenhagen) to assess how the agreements have changed either in adherence or contravention with principal-agent, governance, and contractual frameworks. Here, an analysis of the current NDCs submitted to the UNFCCC under the Paris Agreement

38. *See generally* Davis, *supra* note 31.

will be critical in understanding how close the Agreement has come to meeting global needs for climate finance. A look at the developments from the Glasgow Conference (COP 26) will provide a global perspective of the success or failure of these international finance agreements.

Part IV will apply these same legal concepts of principal-agent theories, governance principles, and contract law to propose forward-looking improvements to the language of international climate finance agreements and treaties to address the systemic shortcomings identified in Parts II and III.

II. LEGAL FRAMEWORKS CAN IMPROVE CLIMATE FINANCE AGREEMENTS

This Note will first explore how legal frameworks can be applied to climate finance pledges, like those outlined in the Paris Agreement, and as an analyzing tool for the future language and terms that might create efficiency in future agreements. Subsequently, in order to understand why legal frameworks are valuable in analyzing the development and climate finance in treaties, this Note will turn to the importance of development finance as a whole. Finally, this Note will trace the history of the climate finance treaties, starting at the UNFCCC and leading up to COP 26 with extra focus on the Paris Climate Agreement.

A. Importance of Development Finance in Analyzing Global Climate Agreements

Development finance has been called many names: "foreign aid," "foreign assistance," "development aid," "development assistance," and "development cooperation."[39] Regardless of the title, two prominent scholars on the topic make sound arguments that the law of development finance should be considered its own field and area of study.[40] The key focus of development finance is the transfer of development funds.[41] This can take the form of both private and public finance, and much discourse swirls around which method is

39. DANN, *supra* note 33, at 25.

40. *See* Davis, *supra* note 31, at 168; *see also* DANN, *supra* note 33, at 13.

41. *See* DANN, *supra* note 33, at 13 (breaking down the "law of [official development assistance (ODA)] transfer" into four stages: "first, the general budget decision to reserve a certain amount for ODA expenses; second, the multi-year planning for one country or one sector; third, the negotiation and agreement on a concrete development intervention (project or program); and fourth, the implementation of such intervention.").

more effective.[42] Regardless of their public or private nature, most agreements about development finance can be viewed through the legal lenses of principal-agent theories, governance principles, and contract law. While economists and political scientists can analyze agreements like the Paris Agreements and Kyoto Protocol from their respective fields, "[t]he importance of financial capital to developing countries is contingent on the terms upon which the capital is provided and those terms appear to be shaped in meaningful ways by law."[43] Philipp Dann has argued that lawyers sometimes avoid viewing development finance through a legal lens because the legal profession has entered the discourse about global governance and finance after economists and political scientists were well versed in the topic.[44] However, according to Michael Riegner, "[d]evelopment finance has (re)gained some prominence as a distinct field of study in international economic law."[45] There is significant benefit in analyzing treaties and agreements though a legal lens. Lawyers "are especially qualified to dissect and explain the competences, decisionmaking procedures and substantive standards" of development finance.[46] Therefore, legal knowledge can ensure accountability, legitimacy, transparency, and a "more systematic understanding" of development finance.[47]

Throughout the various climate agreements since the 1992 UNFCCC, the terms and legal mechanisms have changed and advanced in a way that shows alignment with the proposed framework of development finance. Therefore, applying a development finance framework is an appropriate method to use to analyze the current terms and mechanisms within the Paris Agreement and COP 26

42. *See* Davis, *supra* note 31, at 170.

43. *Id.* at 184.

44. Other reasons provided by Dann include (1) international treaties and decisions are highly political and there is often inequality between participants whereby "[l]aw and especially public international law is based on the assumption of equality"; (2) the *mode of operation* of development finance does not serve the traditional public law mode of operation of limiting freedoms, but instead aims to create opportunities; (3) there is a "structural disconnect" when citizens of developing countries cannot determine what aid will be provided to them; (4) it is considered "soft law"; and (5) the idea that international law is *in general* problematic because it imposes norms on countries outside one's own. DANN, *supra* note 33, at 11–12, 27–30.

45. *See* Riegner, *supra* note 30, at 1–2 (citing DANN, *supra* note 33); *see also* Davis, *supra* note 31; ASIF QURESHI & ANDREAS ZIEGLER, INTERNATIONAL ECONOMIC LAW (London: Sweet & Maxwell/Thomson Reuters eds., 3rd ed. 2011); INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW (Daniel Bradlow & David Hunter eds., 2010).

46. DANN, *supra* note 33, at 13.

47. *Id.*

discussions, and potentially to propose effective ways to enhance accountability based on existing legal premises.

B. The Use of Legal Frameworks in Climate Finance

When analyzing agreements between two parties, above all, the terms matter and the law matters. Scholars can use traditional and well-established legal concepts like principal-agent theories, governance principles, and contract law to analyze agreements between parties.[48] These are important terms to review in global financial instruments like the Paris Agreement, as it is the primary legal treaty that is meant to facilitate and enforce development finance for climate change mitigation and adaptation. However, these laws and terms cannot be viewed solely within the lens of development finance; while the actual legal agreements employ a wide variety of finance structures, the overarching political, economic, and (here) environmental goals remain fundamental to each development finance project.[49] Analyzing the language of the Paris Agreement and climate finance pledges is of utmost importance, as they are the overarching instruments motivating thousands of other legal transactions. Therefore, it is beneficial to understand the conceptual frameworks of principal-agent theories, governance principles, and contract law to begin using these tools to consider the terms and laws of the Agreement specifically.[50]

1. Principal-Agent Frameworks

Principal-agent frameworks identify conflicting interests between those providing the financing (principals) and those receiving financing (agents). The goal is to align the agent's outcomes with the principal's goals. However, the real problem in development finance is in aligning the goals of both parties with the real problem to be solved. In climate financing, the problem to be solved is how investments in climate mitigation and adaption can be profitable for financing principals. In fact, there has been persisting scholarly concern that developed countries are prioritizing their own interests in climate negotiations. Chukwumerije Okereke and Philip Coventry go as far as to accuse developed countries of "ducking their

48. Davis, *supra* note 31.
49. Davis, *supra* note 31, at 174.
50. *Id.* at 175–77.

commitments while coopting developing countries into binding emissions reduction and reporting commitments."[51] There would be benefit in "adopting an alternative framework for analyzing financing development, specifically, one that is associated with less contentious assumptions about the nature and relative importance of the parties' interests."[52] Under a principal-agent framework, the developed countries—known as Annex I or OECD countries—play the role of principals, while the developing countries are cast as agents.

This is especially true in the case of climate change because most emissions come from developed countries and most products of emissions benefit developed countries. Even though there has been an increase in emissions from countries such as Brazil, India, and Chile, developed countries (including the U.S. and countries within the European Union) are the source of 79% of historical emissions.[53] "[In development finance], it is not so clear that the interests of financiers deserve to be privileged over those of recipients" because what is at stake is not purely profit and financial gains.[54] The repercussions of climate change are generational social health and wellbeing, making the input of finance recipients equally, if not more, important. The developed world's historical ability to pollute without repercussion or cost for over 150 years has contributed to its gross domestic product (GDP). Now, the capital from various enterprises in these developed countries that have created emissions can be used to possibly assist those developing countries who are most likely to be harmed by climate change.[55] The further we can move toward creating international finance agreements that align with cooperative goals of both principals and agents of climate finance, the more fair and accurate our concepts of principal-agent will be in the pursuit of slowing global warming. This creates complex questions around where and how much climate finance is allocated, and whose interests should be prioritized.

51. Chukwumerije Okereke & Philip Coventry, *Climate Justice and the International Regime: Before, During, and After Paris*, 7 WIREs CLIMATE CHANGE 834, 835 (2016).

52. Davis, *supra* note 31, at 176.

53. *Developed Countries Are Responsible for 79 Percent of Historical Carbon Emissions*, CTR. FOR GLOB. DEV., https://www.cgdev.org/media/who-caused-climate-change-historically [https://perma.cc/8QW4-4JUC] (last visited Sept. 12, 2022).

54. Davis, *supra* note 31, at 175.

55. Hedger & Nakhooda, *supra* note 19, at 6.

2. Governance Framework

Using a governance framework as a conceptual tool raises unique issues, because a common argument against development finance is that financiers, such as developed nations, are using their roles as principals to dictate the priorities of sovereign states as their agents.[56] Development aid has been accused of mirroring "patterns of colonialism," especially in economic and environmental global policies.[57] "The risk is that where transformational change is imposed in the context of unequal power relations, it takes on overtones of structural adjustment programmes, which stimulated widespread protest and had negative impacts not only on developing economies, but also on the natural environment."[58] An accepted theory of governance under global administrative law is to promote focus on transparency, participation, and basic procedural fairness.[59] "This perspective highlights the roles that various local and international organisations play in setting the terms upon which financing development occurs."[60] Transparency is especially important in climate agreements dictating global financing priorities because of the lack of hierarchy, a central organizing body, and originating documents that spell out international investment law.[61] Additionally, a global governance framework should focus on the sovereignty of nations both in international treaties and in private agreements. International environmental treaties have especially focused on transparency and sovereignty from their inception

56. *See, e.g.*, Riegner, *supra* note 30, at 22 ("With regard to recipients, the principle requires respect for self-determined decisions about fundamental questions of their domestic order, and it is the basis for a legal claim to participation in the negotiation, planning, and design of aid programmes. To donors, the principle guarantees their financial autonomy to grant aid and protects their interest in remaining responsible towards their own taxpayers for the way their money is spent. These competing claims to collective autonomy must be balanced in fair organizational rules and procedures that ensure equality of arms between donors and recipients.").

57. Harald Winkler & Navroz K. Dubash, *Who Determines Transformational Change in Development and Climate Finance?*, 16 CLIMATE POL'Y 783, 787 (2016).

58. *Id.* (citation omitted).

59. Davis, *supra* note 31, at 177.

60. *Id.* at 176.

61. Julie A. Maupin, *Transparency in International Investment Law: The Good, The Bad, and the Murky*, *in* TRANSPARENCY IN INTERNATIONAL LAW 142, 142–44 (Andrea Bianchi & Anne Peters eds., 2013) ("Textually, the regime is a 'spaghetti bowl' of around 3,000 overlapping bilateral and regional treaties, tens of thousands of transnational contracts, and an unknown number of domestic statutes whose purported aim is to stimulate economic development by attracting and protecting foreign investments within the sovereign territories of individual host States.") (citations omitted).

because it is never only the State (as a political entity) that is affected by both climate change and the efforts to mitigate and adapt, but also the people and communities of that sovereignty.[62] Because of these diverse interests, information pertaining to agreements should be easily accessible to promote diverse understanding of the agreements at hand. Sovereignty is also important, as all of the climate change issues are collective action problems, where different countries will have to maintain the capacity to represent their people in the way that fits that country most. "Understanding the extent to which these principles apply not only to public institutions. . .but also, perhaps, to private institutions such as project finance banks, is an important part of the challenge of determining how to finance development."[63]

3. Contractual Framework

The Paris Agreement does not establish or authorize an international climate justice tribunal and, while it is a partially binding agreement, there is no established enforcement mechanism under international law.[64] Therefore, enforcement of financial obligations of developed countries currently occurs through "naming and shaming," defined as "the threat or use of public opprobrium to affect reputation."[65]

There is no international legal forum, so Anglo-American common law contract theory provides methods for resolving potential disagreements. Viewing development and climate finance through a contractual lens means "exploring the roles that contract law and related legal doctrines play in financing development."[66] Examples of contract terms include:

62. Jutta Brunnée & Ellen Hey, *Transparency and Environmental Institutions*, *in* TRANSPARENCY IN INTERNATIONAL LAW 23, 26–27 (Andrea Bianchi & Anne Peters eds., 2013) ("Conceived from this purely pragmatic standpoint, transparency issues arise at a number of points in the spectrum of governance activities undertaken by, or under[,] … agenda-setting, negotiation, decision-making and law-making, implementation review, and compliance processes.").

63. Davis, *supra* note 31, at 177.

64. *See* Zerrin Savaşan, *A Brief Assessment on the Paris Climate Agreement and Compliance Issue*, 14 ULUSLARARASI İLIŞKILER 107, 118 (2017) (Turk.) (noting that the Geneva Negotiating Text and Bonn Draft Agreement both suggested the establishment of an international climate justice tribunal but it was not included in the Paris Agreement).

65. For how "naming and shaming" applies as "soft-law" in international treaties, *see* Jennifer Jacquet & Dale Jamieson, *Soft but Significant Power in the Paris Agreement*, 6 NATURE CLIMATE CHANGE 643, 645 (2016). *See also* JENNIFER JACQUET, IS SHAME NECESSARY: NEW USES FOR AN OLD TOOL (2015) (reviewing the effectiveness of shaming in international politics).

66. Davis, *supra* note 31, at 178.

> the circumstances in which donors' pledges are legally enforceable;. . .whether doctrines protecting third party beneficiaries extend to members of developing societies. . . ; whether financing agreements providing for resolution of disputes before foreign courts or arbitral tribunals are enforceable; whether in cases of silence or ambiguity special interpretive doctrines designed to protect or promote the interests of weaker parties apply to financing agreements; and, whether there are any restrictions upon financiers' ability to enforce their claims against the recipients' assets.[67]

When a contractual lens is applied to international agreements, they begin to reflect specificity around what enforcement might look like, and how enforcement could be feasible moving forward. Combined, contract-mirroring provisions may then lead to more robust adherence to climate finance goals.

C. Analysis of the Current Language of Global Climate Finance Agreements

1. United Nations Framework Convention on Climate Change

The progression of international climate finance agreements for the purpose of mitigation and adaptation began in 1992 when 154 nations (now 198) signed onto the UNFCCC.[68] The UNFCCC's ultimate aim of "[p]reventing 'dangerous' human interference with the climate system"[69] was addressed through the establishment of annually recurring COPs. The UNFCCC highlighted the problem of climate change, the responsibilities of developed countries to lead the changes, and set up the initial institution for international climate funding.[70] Importantly, the UNFCCC addressed the fact that developed countries have contributed the most to climate change and have historically borne disproportionately low international responsibility and tangible consequences.[71]

Even as the language of each of the Agreements changed over the years, much of the relevant terminology and goals have remained the

67. *Id.*
68. UNFCCC, HANDBOOK 19 (2006), https://unfccc.int/resource/docs/publications/handbook.pdf [https://perma.cc/C52H-XH9M]; *What is the United Nations Framework Convention on Climate Change,* U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change [https://perma.cc/Q36G-EWG6] (last visited Sept. 30, 2022).
69. *What is the United Nations Framework Convention on Climate Change, supra* note 68.
70. *Id.*
71. Hedger & Nakhooda, *supra* note 19, at 6.

same, such as the reduction of greenhouse gases, the emphasis on the need for financing for developing countries, and sovereignty of countries to make their decisions. However, the legal structure and terms have evolved to emphasize the responsibility of developed countries and create specified financing mechanisms to make this happen. For example, the UNFCCC first articulated language that became the standard for improving climate finance in the Kyoto Protocol and Copenhagen Accord. The UNFCCC states, "[developed countries] shall provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties."[72] This foundational language has only been built on since 1992.

2. Kyoto Protocol

In 1997, the Kyoto Protocol was signed. The Kyoto Protocol is a different treaty than the UNFCCC, but still "operationalizes the [UNFCCC] by committing industrialized countries and economies in transition to limit and reduce GHG emissions in accordance with agreed individual targets. The Convention itself only asks those countries to adopt policies and measures on mitigation and to report periodically."[73] An important part of the Protocol was that it established "flexible market mechanisms" which allow for the trade of emissions permits.[74] The Protocol established the Adaptation Fund, which aimed to finance adaptation projects and programs in developing nations that are most vulnerable to adverse effects of climate change.[75]

Using specific language to highlight the need for climate finance, the Kyoto Protocol pulls from the exact language of the UNFCCC, requiring "new and additional" financial resources.[76] The continued request for *additional* funding was the first indicator in the language of the treaty that a finance gap was growing.

72. *See* Article 4(3) of the UNFCCC. United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

73. *What Is The Kyoto Protocol?,* U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/kyoto_protocol [https://perma.cc/L58N-FJF8] (last visited Mar. 31, 2022).

74. *Id*.

75. *Adaptation Fund,* U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/Adaptation-Fund [https://perma.cc/Y4Z7-YLUY] (last visited Mar. 31, 2022).

76. *See* Kyoto Protocol Article 11(2)(a). Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162.

3. Copenhagen Accord

In 2009, more specific climate finance goals were pronounced in the Copenhagen Accord.[77] Developed countries concretely pledged USD 30 billion for the years 2010–2012 for "meaningful and transparent action to be taken by developing countries" and USD 100 billion per year from public and private sources by 2020.[78] This was a huge deal. It was the first time that any climate agreement had referenced concrete numbers. The only downfall was that it was a non-binding document, heavily crafted and written by select countries[79] leaving much room for other countries to feel blindsided and coerced. Specific focus was given to small island developing states (SIDS)[80] and least developed countries (LDCs)[81] as the most vulnerable countries to the adverse effects of climate change.[82] As a part of the Accord, the parties agreed to "international consultation and analysis," but this was not defined or established[83] until the 2010 Cancun Agreements, nor put into regular use alongside international assessment and review until 2015.[84]

The Copenhagen Accord builds on the copy-and-paste climate finance language seen in both the UNFCCC and the Kyoto Protocol. It appears to require (but in fact only requests) that "[Developed countries shall provide] [s]caled up, new and additional, *predictable and adequate* funding, . . . *improved access* shall be provided to developing countries, . . . to enable and support *enhanced action on mitigation*, . . . *adaptation*, technology development and transfer and

77. *Copenhagen Climate Change Conference – December 2009*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE (last visited Mar. 31, 2022), https://unfccc.int/process-and-meetings/conferences/past-conferences/copenhagen-climate-change-conference-december-2009/copenhagen-climate-change-conference-december-2009 [https://perma.cc/4H3D-YWJ8] (last visited Mar. 31, 2022).

78. Hedger & Nakhooda, *supra* note 19, at 6.

79. Specifically, Brazil, South Africa, India, and China (dubbed, BASIC). *BASIC Countries*, BYJU'S EXAM PREP, (https://byjus.com/free-ias-prep/basic-countries-copenhagen-accord/) [https://perma.cc/2SV2-WNAF] (last visited Oct. 6, 2022).

80. Some examples of SIDS include Antigua and Barbuda, Bahamas, Barbados, Belize, and Cuba. *UNESCO and Small Island Developing States*, UNESCO, https://en.unesco.org/sids/about [https://perma.cc/MKS3-6KGW] (last visited Mar. 31, 2022).

81. Some examples of LDCs include Afghanistan, Angola, Bangladesh, Benin, and Bhutan. *UN List of Least Developed Countries,* UNCTD, https://unctad.org/topic/least-developed-countries/list [https://perma.cc/PQ6R-P5QT] (last visited Mar. 31, 2022).

82. Hedger & Nakhooda, *supra* note 19, at 6.

83. *Copenhagen Climate Change Conference*, *supra* note 77.

84. U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, INTERNATIONAL CONSULTATION AND ANALYSIS: FACILITATING CLIMATE ACTION THROUGH TRANSPARENCY iii (2020), https://unfccc.int/documents/230923 [https://perma.cc/C4PM-ZC2U].

capacity-building . . ."[85] Not only does the language in the Copenhagen Accord continue to call for *additional* funding, but it emphasizes and specifies the importance of the quality and type of funding that is provided.

The annual COP agreements similarly follow this pattern of stronger language over time. After the USD 100 billion pledge at COP 15, COP 16 again requires "new and additional" funding,[86] as well as continued contributions.[87] It is at COP 17 that we begin seeing the same language which would later be used in the Paris Agreement, requesting that countries "report on policies and measures that promote the *scaling up* of private investment."[88] The call to *scale up* is used consistently and frequently throughout the agreements made in COP 18,[89] COP 19,[90] COP 20.[91] At COP 19, the call for "effective" finance briefly overshadows the request for increased finance,[92] but this is

85. *See* United Nations Framework Convention on Climate Change, *Copenhagen Accord*, Decision 2/CP.15, U.N. Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010) (emphasis added).

86. *See* United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010*, ¶ 18, U.N. Doc. FCCC/CP/2010/7/Add.18 (Mar. 15, 2011).

87. *Id.* at 5, 16.

88. *See* Conference of the Parties, *Report of the Conference of the Parties on Its Seventeenth Session, Held in Durban From 28 November to 11 December 2011, Addendum Part Two: Action Taken by the Conference of the Parties at Its Seventeenth Session*, at 34, U.N. Doc. FCCC/CP/2011/9/Add.1 (Mar. 15, 2012) (emphasis added).

89. *See* Conference of the Parties, *Report of the Conference of the Parties on Its Eighteenth Session, Held in Doha From 26 November to 8 December 2012, Addendum Part Two: Action Taken by the Conference of the Parties at Its Eighteenth Session*, at 7, 13, U.N. Doc FCCC/CP/2012/8/Add.1 (Feb. 28, 2013) (discussing the need to "scale up" and "improve the effectiveness of finance").

90. *See* Conference of the Parties, *Report of the Conference of the Parties on Its Nineteenth Session, Held in Warsaw From 11 to 23 November 2013*, *Addendum Part Two: Action Taken by the Conference of the Parties at Its Nineteenth Session*, at 9, 24, U.N. Doc FCCC/CP/2013/10/Add.1 (Jan. 31, 2014) (calling for countries to start "scaling up climate finance from 2014 to 2020" and recognize the "need to scale up and improve the effectiveness of finance").

91. *See* Conference of the Parties, *Report of the Conference of the Parties on Its Twentieth Session, Held in Lima From 1 to 14 December 2014*, *Addendum Part Two: Action Taken by the Conference of the Parties at Its Twentieth Session*, at 22, U.N. Doc FCCC/CP/2014/10/Add.1 (Feb. 2, 2015) ("Climate finance to be scaled up"); Conference of the Parties, *Report of the Conference of the Parties on Its Twentieth Session, Held in Lima From 1 to 14 December 2014*, Addendum Part Two: Action Taken by the Conference of the Parties at Its Twentieth Session, at 9, U.N. Doc FCCC/CP/2014/10/Add.2 (Feb. 2, 2015) (requesting developed country parties to "scal[e] up" climate finance for the period 2016-2020).

92. *See* Conference of the Parties, *Report of the Conference of the Parties on Its Nineteenth Session, Held in Warsaw From 11 to 23 November 2013*, *Addendum Part Two: Action Taken by the Conference of the Parties at Its Nineteenth Session,* at 21, 28–29, U.N. Doc FCCC/CP/2013/10/Add.1 (Jan. 31, 2014) (calling for countries to start "scaling up climate finance from 2014 to 2020," *id*. at 9).

later folded into requests for increased finance through the language of the Paris Agreement.

4. Paris Agreement

In 2015, 196 parties at COP 21 adopted the Paris Agreement, a partially binding international treaty, which established the NDC system.[93] Through implementation of the NDCs, the agreement enhanced the transparency of the existing framework created by the Copenhagen Accord, Cancun Agreement, and Durban Outcomes.[94] This is because, under these latter agreements, it was only required that developing countries report their finance needs and gaps, while the Paris Agreement requires biennial reporting of financial transfers, support needed, and support received in three separate articles.[95]

In comparison to the Copenhagen Accord's enhanced language around climate finance, the Paris Agreement actually appears to lessen the impact by suggesting that only developed countries provide "*scaled-up* financial resources [which] should aim to achieve a balance between adaptation and mitigation."[96] The treaty's language around the need to close the finance gap is not as strong as it was in Copenhagen, and no additional concrete pledges were made. However, the recognition that adaption and mitigation require equal and adequate funding shows an attempt to close the finance gap that exists between the two, and enhance the quality of climate funding.

Still, the Paris Agreement does emphasize that the COP "*strongly urges* developed country parties to scale up their level of financial support with a concrete roadmap to achieve the goal of jointly providing USD 100 billion. . ."[97] The Agreement states that "[s]uch mobilization of climate finance should represent a progression

93. *The Paris Agreement*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement [https://perma.cc/X6BU-GA9M] (last visited Mar. 31, 2022). The NDC Registry can be found at: https://www4.unfccc.int/sites/ndcstaging/Pages/Home.aspx [https://perma.cc/PZY2-TY7X].

94. For more details on how it was enhanced, *see* UNFCCC Secretariat, Transparency Division, U.N. Framework Convention on Climate Change: Key Commonalities and Differences Between Reporting Provisions Under the Convention and the Paris Agreement, https://unfccc.int/sites/default/files/resource/Training%20material%20_key%20commonalities%20and%20differences_rev2.pdf [https://perma.cc/4KG6-AGTN] (last visited Oct. 10, 2022).

95. *See* Paris Agreement to the United Nations Framework Convention on Climate Change, arts. 9, 10, 11, Dec. 12, 2015, T.I.A.S. No. 16-1104 (arts. 9, 10, and 11 of the Paris Agreement require financial transfer and capacity-building support).

96. *See id.* art. 9, ¶¶ 1, 4 (emphasis added).

97. *See id.* ¶ 114.

beyond previous efforts."[98] After the Paris Agreement, the COP moves away from strong language and toward more specific requests for how climate finance should increase.[99]

5. Glasgow Climate Pact

In 2021, COP 26 resulted in the Glasgow Climate Pact (GCP). It was at this point that the parties could assess the state of climate finance in comparison to what had been concretely pledged in the Copenhagen Accord eleven years earlier. It was clear that, regardless of the explicit pledge of USD 100 billion per year, developed nations had fallen short. While scholars are still struggling to quantify individual country pledges, it is estimated that OECD countries contributed only USD 78 billion in 2018 and USD 80 billion in 2019.[100] Still worse, a 2020 Oxfam report estimates that OECD countries actually only contributed one-third of the OECD's estimate, contributing closer to USD 19–22.5 billion.[101] The 2021 GCP provided an opportunity for the parties to revisit the finance gap. While the GCP does not set actual financial requirements, it instead "[u]rges developed country Parties to *at least double* their collective provision of climate finance for adaptation to developing country Parties from 2019 levels by 2025."[102] Previous treaty language was not as ambitious as COP 26, but the language clearly indicates a need for *more* climate finance in every new Agreement. The COP welcomed more than USD 600 million pledged to the Adaptation Fund and the Least Developed Countries Fund.[103] The focus on adaptation efforts

98. *Id.* art. 9, ¶ 3.

99. *See, e.g.,* Conference of the Parties, *Report of the Conference of the Parties on Its Twenty-Fourth Session, Held in Katowice From 2 to 15 December 2018, Addendum Part Two: Action Taken by the Conference of the Parties at Its Twenty- Fourth Session*, ¶ 10, U.N. Doc. FCCC/CP/2018/10/Add.1 (Mar. 19, 2019) (stating "the dialogue underscored an urgent need to scale up the mobilization of climate finance, including through greater engagement of the private sector to increase finance for adaptation, and to align financial flows with the objectives of the Paris Agreement and the United Nations Sustainable Development Goals.").

100. Jocelyn Timperley, *The Broken $100-Billion Promise of Climate Finance—and How to Fix It,* 598 NATURE 400 (2021), https://www.nature.com/articles/d41586-021-02846-3 [https://perma.cc/RH2X-2Y6B].

101. *Id.*

102. Ewelina Czapla, The Results of COP 26, Am. Action F. (Nov. 17, 2021) (emphasis added), https://www.americanactionforum.org/insight/the-results-of-cop26/ [https://perma.cc/9KN6-G3YL] (quoting GCP, infra note 105).

103. *COP26 Outcomes: Finance for Climate Adaptation*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE https://unfccc.int/process-and-meetings/the-paris-agreement/the-glasgow-climate-pact/cop26-outcomes-finance-for-climate-adaptation#eq-1 [https://perma.cc/MM6E-8K4G] (last visited Sept. 12, 2022).

also seeks to bridge the gap between the amount of funding provided for adaptation as opposed to mitigation efforts.

The most emphatic language comes from the GCP. COP 26 pulled from frequently used terms and specifications in past agreements and added bold language and demands. Not only does the entirety of the GCP call for increased finance, but it does so more frequently than any other agreement. For example, it "*[s]tresses* the urgency of enhancing ambition and action in relation to mitigation and adaptation and finance in this critical decade."[104] The use of the word "ambition" addresses the potential ambition gap in financing, as discussed *supra* Part I(B). Words like "stresses," "urges," "emphasizes," and "urgent" are all common and repeatedly used in the GCP's call for climate finance increase, in a way that shows a new level urgency, if not dedication. However, frequent use of bold words alone does not create enforcement or even adequate incentive for countries to meet and exceed their pledges, which is why we must turn to other areas of law that traditionally facilitate agreements, such as principal-agent theories, governance principles, and contract law.

Attention to language shows that drafters of the agreements are aware of the way in which the urgency of climate change is portrayed, and how it might affect the way agreements are received by various nations. Changing the language of the agreements is not only important to stress the imperative need for global climate finance; crafting the language to adhere to principal-agent, governance, and contract frameworks more strategically may also work to enhance the effectiveness of how agreements are adhered to by various nations, and where future climate finance will be directed.

III. ADHERENCE TO PRINCIPAL-AGENT THEORIES, GOVERNANCE PRINCIPLES,

104. Glasgow Climate Pact, U.N. Framework Convention on Climate Change, Nov. 13, 2021, Decision -/CP.26 at 2 (advance unedited version).

AND CONTRACT LAW IN CLIMATE AGREEMENTS OVER TIME

Scholars assess the efficacy of multilateral treaties to meet their posited goals through the treaty's text,[105] scope of application,[106] or types of obligations created.[107] Daniel Bodanksy points out that the much-revered legally binding provisions of the Paris Agreement came from a change from the word "should" to "shall."[108] Many scholars argue that the lack of certain text, appropriate scope, or domestic obligations can lead to treaties, such as the Paris Agreement, of almost complete unenforceability.[109] Bodansky rebuts this contention, claiming that the Paris Agreement qualifies as a treaty within the meaning of international law, creates legal obligations for its parties, and that compliance with these obligations is not voluntary.[110] While this does not directly speak to enforceability, Bodansky's argument can lend itself to the "name and shame" nature of legally binding international contracts, as well as the consideration that even

105. *See, e.g.,* Margaretha Wewerinke-Singh & Curtis Doebbler, *The Paris Agreement: Some Critical Reflections on Process and Substance*, 39 UNIV. OF S. WALES L. J. 1486 (2016) (comparing the Paris Agreement to the Kyoto Protocol by tracing the development of the language and text from the Kyoto Protocol, to the Durban Accord, to the Copenhagen Accord, including analysis of legally binding language). *See also* Ulrike Will & Cornelia Manger-Nestler, *Fairness, Equity, and Justice in the Paris Agreement: Terms and Operationalization of Differentiation*, 34 LEIDEN J. INT'L L. 397 (2021) (analyzing to what extent the Paris Agreement's introduced terms of "fair" and "climate justice" amend the previously existing term "equity" and the principle of common but differentiated responsibilities (CBDR) in the NDCs).

106. *See Legal Framework*, DEV. FIN. INT'L, https://www.development-finance.org/en/topics-of-work/debt-strategy-information/external-debt-relief/legal-a-institutional-best-practice/legal-framework [https://perma.cc/U8QW-ETF6] (last visited Mar. 31, 2022) ("In terms of best practices, the legal framework for debt and aid management needs to include sections which cover … [p]urpose, scope of application and definitions used with the legal instrument").

107. *See* Benoit Mayer, *Obligations of Conduct in the International Law on Climate Change: A Defence,* 27 REV. OF EUR., COMPAR., & INT'L ENV'T L. 130 (2018). *See also* Daniel Bodansky, *The Legal Character of the Paris Agreement*, 25 REV. OF EUR., COMPAR. & INT'L ENV'T L. 142 (2016) (assessing whether individual provisions of the Paris Agreement create legal obligations); PATRÍCIA GALVÃO FERREIRA, CTR. FOR INT'L GOVERNANCE INNOVATION, CLIMATE FINANCE TRANSPARENCY IN THE PARIS AGREEMENT: KEY CURRENT AND EMERGING LEGAL ISSUES (2018) (analyzing the legal obligations within the Paris climate agreement).

108. Bodansky, *supra* note 107, at 142.

109. *See, e.g.,* Ann-Marie Slaughter, *The Paris Approach to Global Governance*, PROJECT SYNDICATE (Dec. 28, 2015), https://www.project-syndicate.org/commentary/paris-agreement-model-for-global-governance-by-anne-marie-slaughter-2015-12 [https://perma.cc/T3XR-F7AH] (calling the Paris Agreement "essentially a statement of good intentions"). *See also* Richard Falk, *Voluntary International Law and the Paris Agreement*, COMMENTARY ON GLOBAL ISSUES, https://richardfalk.org/2016/01/16/voluntary-international-law-and-the-paris-agreement/ [https://perma.cc/8YPZ-QCUS] (last visited Oct. 13, 2022) (calling the Paris Agreement "voluntary" because there is not "even an obligation to comply").

110. *See* Bodansky *supra* note 107, at 142.

unenforceable aspects of an international treaty may lead to effective change and adherence. This Note argues that the use of already established and respected legal concepts proposed by Davis—principal-agent theories, governance principles, and contract law—can provide a further, important analysis for the efficacy of multilateral climate treaties.

A. The Presence of Principal-Agent Terms and Provisions in Global Climate Finance Agreements

As mentioned above, the principal-agent framework commonly centers on aligning the agent's actions with the interests of the principal. This has led to issues in the development finance context, because "the source of many of the problems of the developing world has been the tendency throughout history to privilege the interests of Western financiers [donor nations] over the interests of inhabitants of developing countries."[111] The shift away from a principal-agent dichotomy also provides the ability for any country to be classified as either the principal or agent in a financial transaction, depending on their identified needs or capability for providing financing to other nations. Ideally, the portrayal of developed and developing nations in global climate agreements will aim to align both of their interests with mitigation and adaptation of climate change without inequitably privileging the developed world, which has been the source of most carbon dioxide emissions. In an analysis of the UNFCCC, Kyoto Protocol, Copenhagen Accord, and Paris Agreement, it becomes clear that language in the Copenhagen Accord and Paris Agreement align developed and developing nations more equally than in the UNFCCC by using language that identifies countries' individual needs, rather than broad classifications of those who can contribute (the financiers) and those who are reliant on that funding (the agents).

Much of the language that reflects principal-agent dynamics in the agreements mirrors the language of the UNFCCC. However, there is an enhanced re-focus on principal-agent dynamics beginning with the Paris Agreement. The text of the UNFCCC acknowledges that the actions of developed nations largely caused climate change and additionally acknowledges countries' "differentiated responsibilities and respective capabilities and their social and economic

111. Davis, *supra* note 31, at 175.

conditions."[112] However, rather than aligning the interest of the developed and developing countries, the language of the UNFCCC attempts to recognize the socioeconomic difficulties of developing countries and provide differentiated responsibilities in their adherence with reducing greenhouse gas emissions. For example, UNFCCC Article 3 states that "[t]he specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration."[113] Developed countries "*may*" provide developing countries "financial resources related to the implementation of the Convention."[114] However, this does little to align the interests of the parties. The word "*may*" is what many scholars have classified as "soft law." The legal character of the word "may" acts as a recommendation to the developed parties.[115] It is more so a statement about goals, values, or expectations.[116] The use of the word "may" does not denote or attempt to denote a legal obligation, unlike the word "shall."[117] The NDCs make it clear that some nations have very specific climate mitigation and adaptation needs which will require funding. However, because there is no obligation imposed (enforceable or not) on the developed world to donate to specific projects (e.g., adaptation projects), specific nations, or specific amounts, there remains a gap between the interest of the developing nations and financiers, whose goal will remain profit-centric. There is also a lack of explanation or rationale about why the developed world should be prioritizing the needs of developing countries.

The language does not change drastically until the Paris Agreement. Article 9(4) of the Paris Agreement states that *scaled-up* financial resources "*should* aim to achieve a balance between adaptation and mitigation."[118] While the character of the word "should" is still a

112. *See* United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107, 166.

113. *Id.* at 169.

114. *Id.* at 180, art. 11, ¶ 5.

115. *See* Bodansky, *supra* note 107, at 145 (assessing whether individual provisions of the Paris Agreement create legal obligations).

116. *Id*.

117. *Id*.

118. *See* Paris Agreement, *supra* note 95, art. 9, ¶ 4 (emphasis added).

recommendation,[119] the Paris Agreement does point to explicit avenues that climate funding should be aimed toward, recommending that countries take into account "*country-driven strategies*, and the *priorities and needs of developing country* Parties. . .considering the need for public and grant-based resources for adaptation."[120] While the use of the word "should" shows that this is not a binding provision, the language in this article actively asks the developed country (traditionally in the role of financier) to re-align its development finance strategies to meet the needs and goals of the developing nations in addressing climate change by aligning to the agent's "country-driven strategies" and their own identified "priorities and needs."[121] Therefore, the agreement is recommending that the financier work to align its interests with the developing nation, rather than making the principal-agent assumption that it is the priority of the developing nation to align its interests with the financier by helping it solely turn a profit.

Finally, it should be noted that the Paris Agreement moves away from the labels of "Annex I," "Annex II," and "non-Annex I" parties, which had been used in earlier agreements. In the Paris Agreement, there is a more "subtle differentiation" between the countries who are being asked to support global efforts, and those who need that support.[122] The move away from such strict designations first occurred in the Copenhagen Accord by stressing the importance of adaptation finance for "most vulnerable developing countries" rather than "non-Annex I" countries. This "subtle differentiation" between the capacity and needs of individual countries is instead signaled through "common but differentiated responsibilities and respective capabilities,"[123] which moves the agreement away from a more typical principal-agent relationship, to that of parties on an equal negotiation playing field who simply have varying needs.

B. The Presence of Governance Terms and Provisions in Global

119. *See,* Bodansky *supra* note 107, at 145.

120. *See* Paris Agreement, *supra* note 95, art. 9, ¶ 4 (emphasis added).

121. *Id.*

122. *See* Pieter Pauw, et al., *Subtle Differentiation of Countries' Responsibilities Under the Paris Agreement*, 5 PALGRAVE COMMC'N 1, 1 (2019) ("The Paris Agreement approached differentiation of countries' responsibilities to address climate change by departing from the rigid distinction between industrialised and developing countries through the inclusion of 'subtle differentiation' of specific subsets of countries (e.g., Least Developed Countries) for certain substantive issues (e.g., climate finance) and/or for specific procedures (e.g., timelines and reporting)").

123. *Id.* at 2.

Climate Finance Agreements

As mentioned above, an ideal governance framework in development finance focuses on transparency, participation, and basic procedural fairness.[124] It is also important to consider here the role of sovereignty in international treaties. As discussed *supra* Part II(B)(2), international environmental treaties have especially focused on transparency and sovereignty from their inception because it is never only the state that is affected by both climate change and the efforts to mitigate and adapt, but also the people and communities of that sovereignty.[125] In an analysis of the UNFCCC, Kyoto Protocol, Copenhagen Accord, and Paris Agreement, this section analyzes language in the agreements that either aims to promote transparency, participation, sovereignty, or procedural fairness.

1. Transparency

Transparency is a key value in recent agreements. The UNFCCC requires that "[p]arties shall communicate, within six months of the entry into force of the Convention for it and periodically thereafter,. . .detailed information on its policies and measures [to be undertaken in collaboration with other countries]."[126] Included in this communication are "(a) A detailed description of the policies and measures that it has adopted to implement its commitment . . .; and (b) A specific estimate of the effects that the policies and measures. . . "[127]

As the first climate agreement, it is understandable that the UNFCCC was still developing how its transparency system would work. The subsequent agreements expound on the importance of transparency and governance, not just in general, but in regard to each specific finance provision. The Kyoto Protocol, three years later, required transparency improvements verbatim: "Parties shall take steps to share their experience and exchange information on such policies and

124. Davis, *supra* note 31, at 177.

125. JUTTA BRUNÉE & ELLEN HEY, *Transparency and Environmental Institutions, in* TRANSPARENCY IN INTERNATIONAL LAW 23, 26–27 (Andrea Bianci & Anne Peters eds., 2015) ("Conceived from this purely pragmatic standpoint, transparency issues arise at a number of points in the spectrum of governance activities undertaken by, or under. . .agenda-setting, negotiation, decision-making and law-making, implementation review, and compliance processes.").

126. *See* United Nations Framework Convention on Climate Change, art. 4, ¶ 2(b), May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

127. *See id.* art. 12, ¶ 2.

measures, *including developing ways of improving their comparability, transparency and effectiveness*."[128] Additionally, in implementation of the Clean Development Mechanism, the Kyoto Protocol requires that the parties "shall. . .elaborate modalities and procedures with the objective of ensuring *transparency*, efficiency and *accountability* through independent auditing and verification of project activities."[129] However, there is no established independent auditor to verify the specific financing occurring to meet goals of the Clean Development Mechanism. It is simply encouraged that countries find their own "third party" assessment of national data quality in order to meet "good practice standards."[130]

In the establishment of the Global Environment Facility, the Copenhagen Accord, twelve years later, states that "[d]elivery of reductions and financing by developed countries will be measured, reported and verified in accordance with existing and any further guidelines adopted by the Conference of the Parties, and will ensure that accounting of such targets and *finance is rigorous*, *robust and transparent*."[131]

Six years later, the Paris Agreement continued to build on the language around transparency by establishing the NDCs, requiring that "all Parties shall provide the information necessary for *clarity, transparency and understanding*."[132] The requirement that countries publicly report their NDCs every five years[133] is another advanced requirement for transparency that had not been seen in previous agreements. In an unprecedented way, the Paris Agreement mentions the need for transparency twelve more times.[134] This is largely due to

128. *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 2, ¶ 1(b), Dec. 10, 1997, 2303 U.N.T.S. 162, U.N. Reg. No. A-30822 (emphasis added).

129. *Id.* (emphasis added).

130. OECD, KYOTO MECHANISMS, MONITORING, AND COMPLIANCE: FROM KYOTO TO THE HAGUE 37 (2001).

131. *See* Conference of the Parties, *Report of the Conference of the Parties on Its Fifteenth Session, Held in Copenhagen From 7 to 19 December 2009, Addendum Part Two: Action Taken by the Conference of the Parties at Its Fifteenth Session*, ¶ 4, U.N. Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010) (emphasis added).

132. *See* Paris Agreement, *supra* note 95, art. 4, ¶ 8 (emphasis added).

133. *Id.* art. 14, ¶ 2.

134. *See, e.g., id.* art. 4, ¶ 13 ("Parties shall promote environmental integrity, *transparency*, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting, in accordance with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement." (emphasis added)); art. 6, ¶ 2 ("Parties shall, where engaging on a voluntary basis in cooperative approaches that involve the use of internationally transferred mitigation outcomes towards nationally determined contributions, promote sustainable development and ensure environmental integrity and *transparency*, including in governance, and shall apply robust accounting to ensure, inter alia, the avoidance of double

Article 13 of the Paris Agreement, which lays out the need for an "enhanced transparency framework."[135] The purpose of the framework is to provide "*clarity* and *tracking of progress* towards achieving Parties' individual nationally determined contributions under Article 4, and Parties' adaptation actions under Article 7, including good practices, priorities, needs and gaps, to inform the global stocktake under Article 14."[136] In making this clear, the Paris Agreement thus shows the most alignment with legal governance principles of any climate agreement to date.

The alignment continues in Article 7.5 of the Paris Agreement, which states that parties should adhere to a "*country-driven*, gender-responsive, *participatory* and *fully transparent* approach." This creates non-binding consideration of not only the developed "*country-driven*" needs, but also of the specific localities within developing nations that might be the most impacted by climate change, and therefore where finances should be directed. Article 7.5 of the Paris Agreement further recommends that countries take into consideration "vulnerable groups, *communities* and ecosystems. . .and, as appropriate, traditional knowledge, knowledge of indigenous peoples and *local knowledge systems*, with a view to *integrating* adaptation into relevant socioeconomic and environmental policies and actions, where appropriate."[137]

Additionally, the global stocktake is another vital development that increases transparency both between countries and governments and their constituents. Originating in the Paris Agreement,[138] the global stocktake is a "process for taking stock of the implementation" of the global progress toward goals established in the agreement.[139] The stocktake consists of three components: (a) information collection and preparation, (b) technical assessment of the collective global progress towards meeting goals set forth in the Paris Agreement and

counting, consistent with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement." (emphasis added)); art. 7, ¶ 5 ("Parties acknowledge that adaptation action should follow a country-driven, gender-responsive, participatory and fully *transparent* approach[.]" (emphasis added)); art. 13, ¶ 15 ("Support shall also be provided for the building of *transparency-related* capacity of developing country Parties on a continuous basis." (emphasis added)).

135. *Id.* art. 13, ¶ 1.

136. *Id.* art. 13, ¶ 5 (emphasis added).

137. *Id.* art. 7, ¶ 5 (emphasis added).

138. *Id.* art. 14.

139. *Global Stocktake*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/topics/global-stocktake [https://perma.cc/49PP-3UEB] (last visited Mar. 31, 2022).

opportunities for enhanced action, and (c) consideration of the outputs and implications of the technical assessment.[140] The components will be executed in collaboration with Subsidiary Body for Scientific and Technological Advice, and the parties agree to engage in "technical dialogue" on issues presented in the assessment. Importantly, "all inputs will be fully accessible by Parties, including online."[141] This is the first technological assessment of its kind, and shows an enhanced binding global commitment to transparency in the use of the word "shall" in its implementation: "Parties to the Paris Agreement shall periodically take stock of the implementation of the Paris Agreement."[142] From the initial use of the word "transparent" in the UNFCCC to the robust transparency mechanisms and consistent use of transparency language, there has been a continuous move toward legal language that enhances transparency in climate agreements.

2. Governance Generally

As mentioned above, an ideal governance framework in development finance focuses on transparency, participation, and basic procedural fairness.[143] The Paris Agreement also begins a more in-depth request for good governance. Article 6(2) states countries, when engaging in international "cooperative approaches," ensure "environmental integrity and transparency, *including in governance*."[144] In prior COP agreements, governance is mentioned only twice in the context of each nation's responsibilities toward climate change. At COP 16 in 2010, "good governance and robust market functioning and regulation" is mentioned as one of the purposes for establishing a financial mechanism at COP 17.[145] In COP 13 in 2007, the New Delhi Work Programme suggests public participation "in climate change activities and in governance" to

140. *Components of the Global Stocktake*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/topics/global-stocktake/components-of-the-global-stocktake [https://perma.cc/5K22-JPSK] (last visited Oct. 25, 2022).

141. *Id.* at 54.

142. *Id.* at 53.

143. Davis, *supra* note 31, at 177.

144. Paris Agreement, *supra* note 95, art. 6, ¶ 2 (emphasis added).

145. *See* Conference of the Parties, *Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancun From 29 November to 10 December 2010*, U.N. Doc. FCCC/CP/2010/7/Add.1 at 14 (Mar. 15, 2011).

enhance public participation.[146] Besides these three instances, national governance is not mentioned in any of the other agreements or COP decisions. Therefore, we can conclude that there has been an ongoing and recent alignment to governance principals that was not previously seen in the earlier COP but has potentially enhanced more recent agreements.

C. The Presence of Contract Terms and Provisions in Global Climate Finance Agreements

When assessing the strength of contract terms, scholars and lawyers consider a multitude of factors including: (1) legal enforceability; (2) if there are any third party beneficiaries that can hold others accountable to the contract; (3) whether the agreement provides for resolution of disputes before foreign courts or arbitral tribunals;[147] (4) whether there are special interpretive doctrines in cases of silence or ambiguity designed;[148] (5) whether it would be considered a relational contract;[149] and, importantly, (6) the specificity of the terms. These factors can similarly be used to assess the strength of global climate agreements. However, international agreements are not considered binding contracts, and are written to avoid such a perception. If international agreements create new binding obligations on the United States, the U.S. President would have to submit them to the Senate for ratification by a two-thirds vote,[150] which is extremely difficult to achieve. Similar provisions exist in other countries,[151] so this political reality is central to the consideration of binding enforceable language in global treaties.

146. *See* Conference of the Parties, *Report of the Conference of the Parties on Its Thirteenth Session, Held in Bali From 3 to 15 December 2007*, U.N. Doc. FCCC/CP/2007/6/Add.1 at 39 (Mar. 14, 2008).

147. Davis, *supra* note 31, at 178.

148. *Id*.

149. For example, imposing a "duty of good faith" from long-term contracts that may be based on long-term relationships between the parties. *See* Rebecca Campbell & James Hart, *Contractual Duties of Good Faith in "Relational Contracts,"* White & Case (Sept. 15, 2019), https://www.whitecase.com/insight-alert/contractual-duties-good-faith-relational-contracts [https://perma.cc/VE4C-CLN5]. *See also* Yam Seng Pte Ltd. v. Int'l Trade Corp. [2013] EWHC 111 (QB) (defining a factual framework to identify a relational contract).

150. *See* CONG. RSCH. SERV., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE U.S. SENATE (2001).

151. *See* DUNCAN B. HOLLIS ET AL., NATIONAL TREATY LAW AND PRACTICE (2005) (discussing and comparing the ratification process in various countries). *See also* STEFAN A. RIESENFELD & FREDERICK M. ABBOTT, PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES: A COMPARATIVE STUDY (1994).

Regardless, legal scholars have advocated for courts to draw from modern contract theory, rather than textualism, when reading treaties.[152] The importance of viewing treaties as contracts dates back to 1764, when the Supreme Court noted that treaties adopted under Article II of the Constitution should be read as "contracts" between sovereign nations, and that they are *not* acts of "legislation."[153] Whereas legislation can be read textually, the interpretation of a contract should be guided by the "shared expectations of the contracting parties."[154] It is these shared expectations, and mutual agreement of entering into a bargain between two sovereign states, that allow courts and tribunals to see *beyond* the words of the treaty. Treaties can, and should, look to the "acts of the parties that provide evidence of a mutual assent to a shared proposition."[155] This should not be a shock to treaty-makers, either. While the treaty does not gain the force of law in the United States until ratified by the Senate, the treaty itself still exists independent of Senate action. "[A] state that signs a treaty subject to ratification assumes certain obligations under international law, if not domestic law."[156] With this in mind, certain aspects of the Paris Agreement are binding and this is largely because these provisions can be traced directly back to the UNFCCC, which was ratified by the U.S. Senate in 1992. As Davis states, "[f]inancing development can be analyzed as a contractual process in which the terms are set by agreements among a subset of the relevant actors as well as various forms of regulation that shape the content of, interpret, override or supplement those agreements and determine how they are enforced."[157] Additionally, we can still use the above listed factors, and thus a contractual framework, as gauges of strength of global treaties.

One striking occurrence in the development of the climate finance agreements is the movement from optional and voluntary provisions in the UNFCCC to the use of more binding terms ("shall") in the subsequent agreements, as well as the complexity and specificity of the terms that accompany binding words. For example, in the UNFCCC, the commitments made by developed nations in Article 4

152. Curtis J. Mahoney, *Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116 YALE L. J. 824, 824 (2007).

153. *Id.* at 826.

154. *Id.* at 833 (quoting Air France v. Saks, 470 U.S. 392, 399 (1985)).

155. *Id.*

156. *Id*. at 837 n.63 (citing Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331, 336).

157. Davis, *supra* note 31, at 173.

include that the parties "shall provide new and additional financial resources" and "shall take into account the need for adequacy and predictability in the flow of funds and the importance of appropriate burden sharing among the developed country Parties."[158] The Copenhagen Accord is by far the most specific in its terms, but is also the most clearly non-legally binding of the agreements, as was agreed by all parties in attendance. The Accord provides that developed countries *shall* provide "predictable and adequate funding," "substantial finance to reduce emission," and the commitment of USD 30 billion between 2010–2012, and USD 100 billion per year by 2020.[159] This is the most specific dollar amount provided in any of the agreements. Unfortunately, the Paris Agreement seriously decreases its binding commitments by stating simply that developed countries "*shall* provide financial resources to assist developing country Parties"[160] and that those "scaled-up financial resources *should* aim to achieve a balance between adaptation and mitigation."[161] Additionally, Article 11 of the Paris Agreement focuses on the capacity-building of developing countries to mitigate and adapt to climate change and the only binding language is in Section 5, which states "[c]apacity-building activities *shall* be enhanced through appropriate institutional arrangements to support the implementation of this Agreement, including the appropriate

158. *Id.*

159. The Copenhagen Accord states that "Scaled up, new and additional, predictable and adequate funding as well as improved access *shall* be provided to developing countries, in accordance with the relevant provisions of the Convention, to enable and support enhanced action on mitigation, including substantial finance to reduce emissions from deforestation and forest degradation (REDD-plus), adaptation, technology development and transfer and capacity-building, for enhanced implementation of the Convention. The collective commitment by developed countries is to provide new and additional resources, including forestry and investments through international institutions, approaching USD 30 billion for the period 2010–2012 with balanced allocation between adaptation and mitigation. Funding for adaptation will be prioritized for the most vulnerable developing countries, such as the least developed countries, small island developing States and Africa. In the context of meaningful mitigation actions and transparency on implementation, developed countries commit to a goal of mobilizing jointly USD 100 billion dollars a year by 2020 to address the needs of developing countries. This funding will come from a wide variety of sources, public and private, bilateral and multilateral, including alternative sources of finance. New multilateral funding for adaptation will be delivered through effective and efficient fund arrangements, with a governance structure providing for equal representation of developed and developing countries. A significant portion of such funding should flow through the Copenhagen Green Climate Fund." Copenhagen Accord ¶ 8., U.N. Framework Convention on Climate Change, Dec. 19, 2009, U.N. Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010).

160. Paris Agreement, *supra* note 95, art. 9(1).

161. *Id.* art. 9(4).

institutional arrangements established under the Convention that serve this Agreement."[162] The lack of binding language in recent agreements might be indicative of increased partisan political perspectives, and fear of the U.S. ratification process in combination with the more hefty requests that countries ramp up their contributions. Regardless, it is clearly a move away from the contractual language used in previous years.

Regarding justiciability, the UNFCCC provides for third-party beneficiaries and the settlement of disputes in "soft-law" terms. In Article 3, the UNFCCC states,

> [t]he Parties *should* protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties *should* take the lead in combating climate change and the adverse effects thereof.[163]

While this is not legally binding, it is important to note that the mention of beneficiaries of mitigation and adaptation efforts is not repeated in any following agreements. Neither are the settlement provisions, which are laid out in Article 14 of the UNFCCC.[164] Because the UNFCCC has been ratified by the United States already, there may be a benefit to using this language in future agreements to create a more enforceable treaty.

IV. ADJUSTING FUTURE CLIMATE AGREEMENT LANGUAGE TO ADHERE TO LEGAL FRAMEWORKS

As international climate finance agreements have changed over the years, there has been criticism of their enforceability and effectiveness in assisting developing nations as they address climate change.[165] However, as discussed above, we have seen a change in the

162. *Id.* art. 11(5).

163. United Nations Framework Convention on Climate Change, art. 3, ¶ 1, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

164. *Id.* at art. 14.

165. *See, e.g.*, Yulia Yamineva, *Climate Finance in the Paris Outcome: Why Do Today What You Can Put Off Till Tomorrow?*, 25 REV. EUR. COMPAR. & INT'L ENV'T L. 174 (2016) (focusing on how the Paris Agreement simply formalized what was previously proposed in the Copenhagen Accord and subsequent decisions of parties to the UNFCCC, and how it avoided substantive solutions by instead establishing processes for negotiating them further, rather than creating enforceability). *See also* Peter Lawrence & Daryl Wong, *Soft Law in the Paris Climate Agreement: Strength or Weakness?*, 26 REV. EUR. COMP. & INT'L ENV'T L. 276 (2017) (challenging the "soft law" approach of the NDCs taken in the Paris Agreement and hypothesizing that it is ineffective to accomplish the goals of the Agreement).

legal language and terms used in the treaties, to align with more effective principal-agent, governance, and contract frameworks. Global climate finance flows have doubled since 2012.[166] This section proposes additional language and terms that could continue to shift the agreements to more closely align with principal-agent, governance, and contract frameworks. It also suggests further avenues of research on climate finance through these frameworks.

A. Improvements on Principal-Agent Language

The Paris Agreement's language shifts in an attempt to align the interests of the developed countries with those of developing countries in climate finance. Moving forward, this approach might be improved by looking at language of "developing countries" and "aid" and the social connotations that then play into imbalanced and inaccurate principal-agent roles in the case of climate finance.[167] Dann mentions how it is common for international organizations, like the United Nations (UN), to define their own terms. "They have the power to shape notions and coin phrases, such as 'structural adjustment,' 'governance,' 'ownership' or 'aid effectiveness.' Often these notions conceal more than they reveal and hide the intentions of the instruments behind them."[168] If the titles "principal" and "agent" create dynamics of catering and privilege to one party, then we can likely expect the same from the language "developed" and "developing." Therefore, it is helpful to move away from the traditional principal-agent language that frames the financing countries (developed countries) as having ultimate control over mitigation and adaptation. As noted *supra* Part II(A), the agreements have moved away from language classifying the financing nations as "Annex I" and "Annex II." There has also been a shift to language that

166. ROB MACQUARIE ET AL., CLIMATE POLICY INITIATIVE, UPDATED VIEW ON THE GLOBAL LANDSCAPE OF CLIMATE FINANCE 7 (2019).

167. *See, e.g.*, DANN, *supra* note 33, at 25 ("The terminological pitfalls continue with the fact that there is no set notion for *development cooperation* itself. Instead, 'foreign aid,' 'foreign assistance,' 'development aid,' 'development assistance' and 'development cooperation' are often used interchangeably. In Germany, by contrast, the 1990s saw a consensus emerge behind the term 'development cooperation' instead of 'development aid,' since cooperation better suggested the element of an equal partnership. One can ponder whether this has only been the stale success of political correctness or even the evil intent to cover up persisting inequalities. This study rather sides with those who understand language indeed as an important instrument in the construction of perception. Even though it might have an idealistic overtone, it is therefore justified to call the interaction what it should be: a cooperation among equal partners." (emphasis added)).

168. *Id.* at 26.

reinforces a "polluter pays" mentality, which acts to realign the financial obligations of the developed nations with the needs of the developing nations by requiring developed nations to "pay" for the increase in emissions they have caused. The World Bank—an institution that continues to use the terms "developed" and "developing" to classify countries—admits that the classifications have become extremely broad and unrepresentative of economic status.[169] Economists believe the continued use of the terms is "intellectually lazy."[170] Suggestions to reframe the terms "developed" and "developing" include creating more classification systems based on many mobility-promoting economies. Agreements could instead classify countries based on geography, or foreseen adaptation needs due to climate change. We see this in the development of the term "small developing island states" that will likely have very similar adaptation needs. Perhaps we can classify countries based on the level of emissions they have contributed globally since pre-industrial times. Continuing to eliminate typical principal-agent language might help reframe climate agreements to what they should be: "a cooperation among equal partners."[171] While changing language does not in itself cure the world of inequalities, it can play a role in impacting how treaty-makers and global citizens view the roles of each country in addressing climate change.

B. Improvements on Governance Language

The Paris Agreement makes strong improvements in the area of governance, as defined *supra* Part II(B)(2), in its use of new language. We see this through the development of a robust transparency framework and stocktake program in the Paris Agreement. However, the language does not yet address the issues of promoting sovereignty and good governance in implementing climate finance agreements. This might include improved language that requests countries to develop internal tracking systems and transparency requirements to hold them accountable to finance agreements and pledges.

Next, the adaptation gap report has shown that one of the largest improvements needed in climate finance, to accomplish the NDCs, is

169. Tariq Khokhar & Umar Serajuddin, *Should We Continue to Use the Term "Developing World"?*, WORLD BANK BLOG (Nov. 16, 2015), https://blogs.worldbank.org/opendata/should-we-continue-use-term-developing-world [https://perma.cc/3XEP-82AS].

170. *Id.*

171. DANN, *supra* note 33, at 25.

for monitoring and evaluation.[172] This is a key aspect of transparency and governance, and a newly implemented part of the Paris Agreement. The inclusion of more language around monitoring and evaluating terms (such as definitions and quantitative standards) in future agreements may lead to future improvements in this area.[173]

More important is the lack of transparency in specific climate finance donations and demands globally. The U.N. Adaptation Gap reports do not include any research or data regarding (1) how much money individual countries have donated; or (2) how much money individual countries have received to meet their mitigation and adaption needs. While we will hopefully see improvements in this area over time from the global stocktakes, a lack of focus on internal governance and climate finance tracking methods in the agreements may play a role in the lack of accessible data. Provisions moving forward can build on the language of governance by adding language about climate donation tracking and internal transparency.

C. Improvements on Contract Language

Adhering to contract frameworks within treaties will provide the global public with more adequate notice of intent. As legal documents, treaties technically only impose obligations on national governments that, if they choose, can impose similar obligations on their population. It is often underestimated the rate at which the general public views treaties as obligatory.[174] A majority of Americans believe that "international law creates obligations like domestic law and rejects the view that nations should not feel obliged to abide by international law."[175] Americans even support the idea of an international law court and judge who will assess the U.S.'s compliance with the treaties it is a party to.[176]

To create an even playing field in contract law, the participants must be free equals.[177] As said by Dann,

172. U.N. Env't Programme, The Gathering Storm: Adapting to Climate Change in a Post-Pandemic World, Adaptation Gap Report 2021 XIII (2021).

173. *See id.* (For example, the inclusion of language around gender equality in climate agreements created highly successful gender considerations in countries' NDCs).

174. International Institutions & Global Governance Program, *U.S. Opinion on General Principles of World Order*, COUNCIL ON FOREIGN REL. (Sept. 4, 2009), https://www.cfr.org/backgrounder/us-opinion-general-principles-world-order [https://perma.cc/U5MY-GKZR].

175. *Id.*

176. *Id.*

177. *See* DANN, *supra* note 33, at 27.

> Equality in this sense contains the idea that equals do not and cannot coerce each other. They are free to agree or disagree. In the context of development cooperation, it is exactly this that is in doubt. The factual inequality, especially in terms of economic strength, is an inherent part of the constellation.[178]

In order to create more equality between developed and developing parties, the future climate agreements can focus on promoting accountability to reduce the power imbalance. Importantly, "accountability should be distinguished from the concept of participation. . . While participation generally contributes to democratic legitimacy, accountability generates legal legitimacy, such as the rule of law does; it is not a concept of democratic legitimacy."[179] This can be done through specifying in the agreements (1) who specifically is most accountable for climate financing, (2) how that accountability will be measured, and (3) to whom specifically that accountability will be owed (this could be the entire COP, or to the developing countries).[180]

Following this framework, analysis of the Paris Agreement shows that improvements can be made in holding developed countries accountable to their financial pledges (viewed as contracts), especially by clarifying which standards and procedures are measuring the type of finance being provided. It would be difficult for the standard of accountability to be through legally enforceable payments, due to the need for Senate approval in the United States upon legally enforceable treaties. However, there are other forms of conflict resolution that are used in contract law that might not need to be legally binding. Naming and shaming already occurs through the watchful reporting of non-governmental organizations (NGOs). However, this could be accompanied by a country-specific reporting body that conducts neutral evaluations of country parties' comparative ability to contribute to climate finance relative to their level of emissions. While this appears to be the goal of the global stocktake, we have yet to see the level of specificity at which reporting will occur. As is done in contract law using a third-party arbitrator or mediator, this neutral evaluation could be used in the creation of new annexes or country responsibilities moving forward. Additionally, as in contract settlements, there could be the opportunity for voluntary settlement conferences, where countries who are struggling to meet

178. *Id.* at 27–28.
179. *Id.* at 448.
180. *Id.* at 449.

their climate finance pledges can meet with bodies who will assess their progress and suggest pathways for compliance.

The text of treaties is becoming increasingly important to reflect the commitments being made by individual countries in order to enhance enforceability. Thus, commitments in climate treaties should incorporate the words "should" and "shall," as discussed. However, a textual analysis would fall short in the same manner that a contract would fall short if the commitments of individual parties are not specified. Contract specificity can be defined as "the level of explicitness, specification, and precision of a contract."[181] Increased contract specificity has been shown to reduce contract violations and increase contract effectiveness.[182] Contract specificity can be controlled through provisions explicitly indicating the relationship of the parties, party responsibilities, and transaction-specific investments.[183] With more specificity comes greater potential for both justiciability and potential future enforceability.

None of the climate agreements to date have included provisions requiring specified financial contributions per country. Therefore, no country can be held individually responsible for not meeting the collaborative goals for climate finance. However, if specifications were to be made in the contracts regarding a baseline amount that each developed country might pledge, the terms of the climate agreements might more adequately meet contractual standards.

V. CONCLUSION

Climate finance has become a progressively indispensable consideration in the fight against climate change. We have seen global agreements on climate mitigation and adaptation change over time to focus increasingly on the need for climate finance. As a subset of development finance, we can use pre-existing legal frameworks to analyze and assess the progression of climate finance over the years, as created by global climate treaties. To do this, we can continue to analyze the progression of climate finance provisions in global climate agreements based on a legal framework grounded in principal-agent theories, governance principles, and contract law to see how adherence to these pre-existing legal frameworks may have enhanced

181. David A. Griffith & Yanhui Zhao, *Contract Specificity, Contract Violation, and Relationship Performance in International Buyer-Supplier Relationships*, 23 J. OF INT'L MKTG. 23 (2015).
182. *Id.*
183. *Id.* at 24.

the success (or lack thereof) we see in global climate finance. The U.N. adaptation gap report has shown that one of the largest improvements needed in climate finance, to accomplish the NDCs, is monitoring and evaluation.[184] This is a key aspect of transparency and governance in the agreements, and a newly implemented part of the Paris Agreement. The inclusion of more language around monitoring and evaluating terms such as definitions and quantitative standards in future agreements may lead to improvements in this area. Following this framework, analysis of the Paris Agreement shows that improvements can be made in holding developed countries accountable to their financial pledges (viewed as contracts), especially by clarifying which standards and procedures are measuring the type of finance being provided. Additionally, if the titles "principal" and "agent" create dynamics of catering and privilege to one party, then we can expect the same from the language "developed" and "developing." Therefore, it is helpful to move away from the traditional principal-agent language that categorizes the financing countries (developed countries) as having ultimate control over mitigation and adaptation. Continued adherence to the laws and using these legal frameworks as guidance to continue improvements on finance agreements may lead to more global acceptance of the binding provisions, increased commitment to climate finance, and clearer goals in finance that increase speed and efficiency of climate finance to meet the world's needs in mitigating and adapting to climate change.

184. U.N. ENV'T PROGRAMME, *supra* note 172, at XIII.