Evaluation of the Just Energy Transition Investment Plan (JET-IP)

This is a contribution by the researchers on the Climate Finance for Equitable Transitions (CLiFT) project to the Institute for Economic Justice (IEJ) submission to the South Africa Presidential Climate Commission (PCC) Consultation on the Just Energy Transition Plan (JET-IP).

CLIFT is a multi-institutional and multi-stakeholder initiative aimed at exploring the climate finance supply chain within the context of the multilateral climate change regime, international financial architecture and the multi-layered landscape of international economic law.

The NeF DeF network brings together research and policy thinking on how the shifting landscape of international development finance impacts on law, regulation and governance.

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It draws on the work of NeF DeF researchers which can be found here.

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1. The JET-IP and the Climate Finance Architecture

The South Africa Just Energy Transition Investment Plan (JET-IP) is embedded within the broader international architecture of climate finance and obligations that countries have agreed to under the multilateral climate regime of the United Nations Framework Convention on Climate Change (UNFCCC). As it a financing platform intended to support decarbonisation plans established in South Africa's National Defined Contribution (NDC), it is important that the financial arrangements entered into between South Africa and it's Just Economic Transition Partnership (JETP) partners, the European Union (EU), France, Germany, the United Kingdom (UK) and the United States (US), conform to commitments of all parties who are signatories to the UNFCCC and the Paris Agreement.

The JET-IP recognises that climate finance is central to all parties meeting their international legal obligations under the UNFCCC and Paris Agreement (sections 5.6 and 5.7 of the JET-IP).[1] It reiterates the principle of 'common but differentiated responsibilities and respective capabilities' (CBDR-RC) underpinning the multilateral climate regime and emphasises that financing arrangements under the JET-IP 'is located within the context of 'international climate agreements, commitments and institutional arrangements' (section 1 of the JET-IP).

It is important to note here that under Article 4.7 of the UNFCCC, as a developing country, South Africa's commitment under the UNFCCC and Paris Agreement to undertake climate change mitigation and adaptation measures is dependent on developed countries meeting their commitments to provide financial resources and technology transfer to developing countries.

This includes meeting the 'agreed full incremental costs' of mitigation and adaptation (Articles 4.3 and 4.4 of the UNFCCC). Financial resources have to be 'new and additional' (Article 4.3 of the UNFCCC) which means that the financial resources provided by South Africa from JETP partners to finance the JET-IP should be additional to official development assistance (ODA) and other financial flows for other sustainable development purposes. The Paris Agreement notes 'the significant role of public funds' and emphasises support for 'country-owned strategies' and the transparency and predictability of financial support from developed countries (Article 9(3) and 9(7) of the Paris Agreement).

Alongside the principles of the CBDR-RC, additionality, predictability and country ownership, the JET-IP states that financing arrangements should also be guided by considerations of debt sustainability, cost effectiveness, harmonisation of climate action with social and economic impacts of low-carbon transition and establishment of governance and safeguards to manage risks (section 5.6 JET-IP). The JET-IP therefore places emphasis on the alignment of financial packages from its International Partners Group (IPG) with these principles and the strategic priorities identified in the JET-IP.

Taking into account the objectives and principles within the context of the multilateral climate regime as well as in the context of broader international economic law, we outline below some key considerations the South African government should take into account in moving forward with the financing and implementation of the JET-IP. We believe that aspects of the financing approach and proposed financial instruments may generate legal and

[1] South Africa (2022), 'South Africa's just Energy Transition Investment Plan (JET IP) for the Initial period 2023- 2027', The Presidency of the Republic of South Africa, pp 120 – 121.

regulatory risks as well as social and economic risks and may have broader implications for governance and policymaking on climate action and sustainable development.

2. Legal and Regulatory Risks

The JETP-IP states that the financing arrangements emerging from discussions between South Africa and its investment partners 'will need to align with South Africa's fiscal realities and demands and uphold the development and climate finance in the context of the country's commitment to a just energy transition' (section 5.1). It also emphasises that the financing package 'must address the social costs associated with achieving the updated NDC targets and broader climate response' (section 5.3).

However, we have identified three concerns in the financing package that could undermine the aforementioned climate and sustainable development objectives and fiscal alignment, and that potentially give rise to legal, regulatory, policy and governance risks beyond the JET-IP:

1. reliance on debt instruments as a means of financing the JETP-IP;
2. reliance on private sector financing and the use of official sector finance to 'de-risk' financial investments, notably through blended finance instruments and public-private partnerships (PPPs);
3. limited financing and social safeguards to fully operationalise a 'just transition'.

In the following sections, we outline key areas of fiscal, legal and social risks posed by these features of the JET-IP.

2.1. Financial Regulatory and Policy Risks

The JET-IP is heavily reliant on debt instruments and market-based mechanisms to finance decarbonisation and economic transition plans. While the significant financing needs (estimated at ZAR1.5 trillion or USD 98.7 billion over the next five years) requires a broad range of financial instruments and investments, the reliance on debt instruments – official and commercial – and private investments generates significant financial, regulatory and legal risks for the country. The current IPG offer of USD 8.5 billion (funding only 12 percent of the total projected costs of the JET-IP) consists primarily of concessional loans and commercial loans and guarantees, with the bulk of financing geared towards catalysing other official and commercial sources of financing (section 6). Grant financing makes up only USD 29.7 million or less than four percent of the total financial package and is targeted primarily at technical assistance and advisory services (section 6 of the JET-IP).

This reliance on loans, even on concessional terms, to finance the JET-IP will have an impact on the fiscal position of South Africa given the pressures of financing other sustainable goals, including health, education, and increase the country's vulnerability to external financial dynamics and economic shocks. Beyond official sector financing in terms of direct project loans and programmatic support, a sizeable portion of committed IPG finance will be channelled through bilateral development finance institutions (DFIs), such as UK's British International Investment (BII) and US' Development Finance Corporation (DFC), and public-private platforms such as the Private Infrastructure Development Group (PIDG), to provide loans, guarantees and insurance to private investors. These commercial financing instruments increase the state's debt risks in a number of ways: (1) they form contingent liabilities on the state if backed by state guarantees or funded through blended finance instruments (see discussion below); (2) the contractual terms of these arrangements may stipulate high financial exit costs for state parties (see section 2.2 below); and (3) they heighten the state's exposure to volatility in international financial markets (see discussion below).

A significant part of the JET-IP and the financial package agreed with the IPG will be geared towards creating enabling environments, including regulatory reforms, to facilitate the development of financial markets and investment opportunities for private capital engagement in transition finance. It is unclear what these initiatives will be, but they could potentially include direct financial support through blended finance instruments and reforms to the domestic financial architecture and legal landscape to incentivise the development of 'sustainable finance' markets and the issuance of thematic sovereign and corporate bonds, such as green or sustainability bonds (see sections 5.7.4, 5.7.5 and 6.7 of the JET-IP).

This is certainly a trend emerging in the international development landscape where official sector finance is deployed towards the mobilisation of private finance through policy, regulatory and financial interventions to: (1) create pipelines for 'investable' projects attractive to private investors; and (2) engage in 'market building' through development of regulatory standards and institutional mechanisms for sustainable finance markets, such as disclosure and reporting standards and taxonomies.[2] Many of the latter regulatory initiatives and reforms in other jurisdictions have focused more on due diligence and protection for the investor rather than host states or communities. This focus on 'de-risking' private finance using official or state-backed resources can be a costly exercise and less financially sustainable than direct funding of transition projects.[3] PPP contracts can be complex and expensive to administer with high termination costs and questionable operational efficiencies compared to direct public procurement or public finance. Even developed countries with well-resourced technical and legal expertise in public administration have found it difficult to manage these complex, long-term contracts and identify savings from these arrangements.[4]

There have also been several high-profile collapses of PPP and outsourcing companies in developed countries (with more sophisticated regulatory and public administration oversight frameworks) over the years which have highlighted the precarity of reliance on private investors to deliver infrastructure development and essential services. When such contractors fail to deliver or governments are forced to terminate contracts (often at a cost of compensation to the private investors), it is the end user - hospital patients, schoolchildren, care home residents - who are impacted by the collapse in services and governments who will have to pick up the tab for re-contracting out services or, in some cases, renationalising projects to maintain viability of the infrastructure projects or continuity of service delivery.[5]

Reliance on debt instruments and on private capital markets will create greater exposure to shifts in global economic conditions and create new transmission nodes for financial instability. The rigour of the domestic legal and regulatory architecture outlined in section 5.4 of the JET-IP aside, existing systemic regulatory gaps in the global financial system mean that

[2] Tan, C (2022), 'Private Investments, Public Goods: Regulating Markets for Sustainable Development', *European Business Organization Law Review*, Vol 23, No 1 and Tan, C (2022), 'Regulating Financial Markets for
Sustainable Development Investments', 'Regulating Financial Markets for Sustainable Development Investments', NeF DeF Policy Brief Series No 3, September 2022.
[3] See IEJ (2022), 'Towards a Just Energy Transition: A Framework for Understanding the Just Energy Transition Partnership on South Africa's Just Transition', Climate Finance Policy Brief Series No 1, Institute for Economic Justice (IEJ), November 2022.
[4] See National Audit Office (NAO) (2018), 'PF1 and PF2', Report by the Comptroller and Auditor General, HM Treasury, HC 718 Session 2017–2019 18 JANUARY 2018.
[5] Tan, C and Cotula, L (2018), 'Regulating Development Partnerships: PPPs, Blended Finance and Responsible Investment Provisions', UNCTAD Investment Policy hub Blog, 23 March 2018; Jubilee Debt Campaign (2017), 'The UK's PPPs Disaster: Lessons on Private Finance for the Rest of the World', February 2017.

the turn to private debt instruments will increase South Africa's vulnerability to the speculative and pro-cyclical nature of financial markets. Without systemic reform of the current international financial architecture, including changes to the fragmented sovereign debt regime, reliance on private finance and bond finance in particular, creates significant legal and regulatory risks on top of financial risks which can risk the viability of projects and programmes financed by the JET-IP.

An increased dependence on external private investors governed by regulatory frameworks (including corporate governance or financial conduct rules) in external jurisdictions mean that failures of regulation in these external jurisdictions (such as banking supervisory failures in the investors' home state) may create contagion and spill-over impacts on investments located in host states, such as South Africa. Changes in the regulatory system in developed countries (such as pension fund, securities or capital requirements regulations) may also impact on investor behaviour and the value and security of investments abroad.

Although potentially more attractive to certain classes of investors focused on expanding their sustainable finance portfolio, thematic bonds carry similar financial and regulatory risks as 'plain vanilla' or traditional sovereign bonds and may not be a sustainable or predictable option for transition finance. The regulatory framework for thematic bonds[6] is not dissimilar to conventional securities regulation and is unlikely to insulate developing countries, such as South Africa, from these risks and can exacerbate some risks, including the risk of an 'ESG bubble' leading to the accumulation of unsustainable debt or the risk of large-scale divestiture in a financial crisis.[7] Regulation of thematic bonds is still nascent, fragmented and dependent on non-binding private standards-settings regimes, such as the International Capital Markets Association (ICMA) and the newly established International Sustainability Standards Board (ISSB), and focused primarily on disclosure and reporting regimes with little coordinated global regulatory oversight of investors or ratings agencies and methodologies. This lack of regulation creates significant vulnerabilities for countries seeking to rely on the so-called 'sustainable finance' market for resources to fund decarbonisation and climate action.

Moreover, in the absence of a formal sovereign insolvency process, the introduction of new creditors and new debt instruments into an already complex and challenging fiscal and financing landscape is likely to complicate efforts to restructure sovereign debt. Recent experience with developing country debt restructuring processes have demonstrated the reluctance and/or refusal of private creditors to engage in multilateral negotiations, prolonging access to financing and debt restructuring. Middle-income countries, such as Sri Lanka, and low-income countries, such as Zambia, have faced significant hurdles in receiving debt relief due to protracted negotiations since the start of the global COVID-19 pandemic, with private creditors holding out on debt relief to these countries[8] It is important that policymakers consider not only the financial impact of the contracting of further debt to fund the JET-IP (see section 7.3, Table 10) but also the legal risks associated with contracting debt with different classes of private creditors, the terms of the debt and the jurisdiction in which

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[6] Thematic bonds (sometimes known as 'labelled bonds') are fixed-income securities which target investments in specified thematic areas, such as climate action, biodiversity, marine conversation or sustainable development more generally. See for example, UN ESCAP (2021), 'An Introduction to Issuing Thematic Bonds', United Nations Economic and Social Commission for Asia and the Pacific (UN ESCAP).
[7] See note 2 above.
[8] See for example Elliot, L (2023), 'Hedge Funds Holding Up Vital Debt Relief for Crisis-Hit Sri Lanka, Warn Economists', *The Guardian*, 8 January 2023; and Inman, ,P (2022), 'Lenders Urged to Cancel Zambia Debt as Country Faces Economic Collapse', *The Guardian*, 16 September 2022.

the debt is governed. Debt governed by domestic law will be easier to restructure than debt governed by an external jurisdiction, but this may be subject to international and contractual obligations (see section 2.2 below).

There is also a risk that a financing agenda that is oriented to private investments for decarbonisation can subordinate countries' priorities, including those established under NDCs, to the interests and priorities of private investors. The United Nations Conference on Trade and Development (UNCTAD) has previously warned that efforts to create enabling environments for private investments in public goods, such as climate action, can accelerate the loss of policy and regulatory autonomy in developing countries, as legal and regulatory reforms, state guarantees and other blended finance instruments, and the development of new market-based instruments can outpace government capacity to direct credit creation in their own economies while disconnecting investment projects from country development plans.[9] It has also cautioned that the use of DFI financing can often bypass state agencies as DFIs contract directly with private actors within the host state.[10]

Therefore, in order to ensure that the JET-IP meets the quality of governance and management it establishes in section 7 and its objective to create a coordinated transition programme, focus should be on ensuring that projects and programmes under the JET-IP are prioritised according to domestic and local need and not primarily driven by investor or donor interests. It is important that the financial criteria for prioritisation of investment decisions under the JET-IP carry equal weight with the social and economic considerations for just transition outcomes outlined in section 2.3 below. Legal, regulatory and policy reforms linked to financing instruments, such as development policy loans from multilateral development banks (MDBs) or bilateral aid agencies, must be evaluated against the broader risks to the financial system and fiscal position of the South African government. Policymakers need to recognise that broadening the funding base to private actors and PPPs via DFIs and philanthropic funding does not necessarily mitigate the high financial risk the JET-IP identifies in section 7.3, Table 30 but can correspondingly generate the aforementioned additional risks.

2.2. Investment Law Risks

The focus on catalysing private capital for decarbonisation and climate action necessitates consideration of how this may impact South Africa's legal obligations elsewhere. There are potential areas of legal risks associated with transitions to a green economy, both in terms of transition away from existing investments in coal, oil and gas, and future deals with foreign investors in the renewable energy sector who hold the technology and know-how. The JET-IP commits South Africa to an ambitious investment plan to attract foreign investors in the renewable energy sector through private investments and PPPs whilst phasing out its domestic coal production.

When committing to this ambitious plan, policymakers should carefully consider potential risks and costs of future investment disputes that may arise between foreign investors and the South African government under South Africa's investment treaties, under investment contracts entered into when establishing PPPs, and under the terms of licensing agreements or permits issued to investors in the relevant sectors. The issuance of thematic bonds,

[9] UNCTAD (2019), *Trade and Development Report 2019: Financing a Global Green New Deal*, UN Conference on Trade and Development (UNCTAD): New York and Geneva; UNCTAD (2019) *The Least Developed Countries Report 2019. The Present and Future of External Development Finance: Old Dependence, New Challenges*. UNCTAD: New York and Geneva.
[10] Ibid.

notably sovereign bonds, to finance the JET-IP can also attract liability under investment law.[11]

International and domestic legal frameworks that promote and protect foreign investments run in parallel to JET-IP's implementation and may pose significant legal risks including regulatory chill. Regulatory chill describes situations where governments refrain from or postpone regulating due to potential or actual threats of investment disputes and exposure to significant financial burdens for breaches of investment protection standards.[12] Investment disputes span a whole litany of cases from a range of industries with a notable 42 per cent of recorded cases up to date filed by investors in mining and energy sectors.[13] Such risks can increase the cost of transition for South Africa and cause delays where regulators refrain from or postpone introducing necessary reforms, in order to avoid liability for excessive damages awards rendered by arbitration tribunals.

Investment treaties and contracts typically guarantee economic rights of foreign investors and safeguard against interference from regulatory changes that diminish value of investments, even where such regulatory reforms are in furtherance of public interest, such as environmental regulations or climate action. As such, these legal instruments create protection bubbles for a privileged few while undermining public policy reforms.[14] When governments amend the terms of or cancel projects in the energy sector for public policy reasons, this may give rise to investor-state disputes.

Typically, investor state disputes in the energy sector are settled by international arbitration tribunals under a largely opaque process. Most significantly, damages for breach are typically assessed using a method called 'discounted cash flow' (DCF). This method 'locates value in an asset's future profitability (rather than historic costs)' and 'works by adding up the expected cash flows, but subject to a discount factor in order to reflect associated risk'.[15] Use of this method has resulted in tribunals awarding excessive amounts of damages to cover the loss of investors, paid from the public purse. At its most excessive, in 2019 an international arbitration tribunal held Pakistan liable to pay a mining company USD5.84 billion in damages for a copper mine project in Pakistan that never went beyond the exploration phase.[16] Around the time this award was published, Pakistan entered into an agreement with the International Monetary Fund (IMF) for a lending programme of roughly the same amount to keep the country solvent.[17]

While it is crucial for South Africa to attract foreign investments to implement its plan for a just economic transition, the terms under which such investments are made and protected play a crucial role in giving South Africa the necessary flexibility to respond to evolving socio-economic conditions and scientific evidence during this transition. In its Sixth Assessment Report in 2022, the Intergovernmental Panel on Climate Change (IPCC) noted that

[11] *Abaclat and Others v Argentine Republic*, ICSID Case No. ARB/07/5.
[12] Tienhaara, K and Cotula, L (2020), 'Raising the Cost of Climate Action? Investor-State Dispute Settlement and Compensation for Stranded Fossil Fuel Assets', October 2020, Institute for Environment and Development (IIED) Land, Investment and Rights Series, London: IIED.
[13] ICSID (2023), 'The ICSID Caseload: Statistics', Issue 2023-12', Washington DC: International Centre for the Settlement of Investment Disputes (ICSID).
[14] Yilmaz Vastardis, A (2020), 'Investment Treaty Arbitration: A Justice b=Bubble for the Privileged' in T Schultz and F Ortino (eds) *The Oxford Handbook of International Arbitration*, Oxford: Oxford University Press.
[15] Marzal, A (2023), 'Polluter Doesn't Pay: The Rockhopper v Italy Award', *EJIL: Talk!* 19 January 2023
[16] *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1.
[17] IMF (2019), 'IMF Executive Board Approves US$6 billion 39-Month EFF Arrangement for Pakistan', Press Release No 19/264, 3 July 2019.

international investment protections may act as a hindrance to green transition policies.[18] The risks are most acute for fossil fuel asset stranding, but a recent wave of at least 80 investment treaty claims by renewable energy investors against Spain, Italy, the Czech Republic, Romania and Bulgaria act as a reminder that governments should carefully consider the impact of international investment treaty and contract commitments on just transition policies.[19] These European renewable energy disputes arose from respective governments taking the decision to reduce or eliminate the generous subsidies and incentives to existing renewable energy projects giving rise to a reduction in investor profits. The rollback of subsidies was triggered in various European countries as they became unaffordable for governments after the 2007 financial crisis.

South Africa has terminated some of its bilateral investment treaties (BITs) and currently it does not have active investment treaties with most of the JET-IP partners. However, it does still have investment treaties with some states within the EU (for example, Sweden) and it is possible for investors from JET-IP home states to incorporate investment vehicles in South Africa's existing BIT partner states (so called 'treaty shopping' practice) in order to benefit from investment treaty protections.[20] Additionally, existing coal investments due for phase-out, may benefit from the survival clauses of the terminated South African BITs, if they fall within the coverage of those BITs. Investment protections and international arbitration can also be embedded into contracts, permits or licences. South Africa has adopted a new Act on Protection of Investment in 2015 which curtails many excesses of the investment treaty and arbitration framework. Reliance on the domestic act for investment protection may provide a more suitable framework for just transition investments.

Two specific areas in the JET-IP require closer scrutiny for investment law impacts. First on coal phase-outs, the JET-IP refers to funding for decommissioning and repurposing of coal-fired power stations and coal mining land (see section 5.9 of the JET-IP). However, the plan does not consider the potential costs of compensation to investors for terminating coal projects before their end of life. Investment treaty claims from coal investors can climb up to significant amounts as demonstrated by the 2021 claim by the German energy company RWE against the Netherlands requesting EUR 1.4 billion compensation for the impact of the latter's coal phaseout plan on the company's investment.[21] A Dutch court decision relating to the same claim held that despite the plan infringing ownership rights, no compensation was due to the investors, as the interference was not unlawful and measures 'taken by the government to reduce CO_2 emissions have been proportionate, and the interests of the owners have been sufficiently taken into account'.[22] Judging by past arbitral awards, it is unlikely for the arbitral tribunal in RWE v the Netherlands to agree with the assessment of the Dutch court on whether the Netherlands owes compensation to RWE for the impact of its coal phase-out policy on RWE's business. Past arbitral awards dealing with the impact of environmental regulations and restrictions on expected or actual investment value have

[18] IPCC (2022), *Climate Change 2022: Impacts, Adaptation and Vulnerability*, chapter 14, pp.1505-1506.
[19] UNCTAD (2022), 'Treaty-based Investor-State Dispute Settlement Cases and Climate Action', IIA Issues Note, Issue 4, September 2022, pp.5- 6.
[20] Yilmaz Vastardis, A (2020), *The Nationality of Corporate Investors under International Investment Law*, London: Hart Publishing.
[21] *RWE AG v the Kingdom of the Netherlands RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, Request for Arbitration, 20 January 2021.
[22] Investment Treaty News (2022), *Dutch Court Denies Compensation to RWE and Uniper*, 26 December 2022.

found states liable without giving due consideration to the public purpose, necessity and proportionality of the measures taken.[23]

While it appears that the largest coal investments in South Africa are held by domestic investors, this alone is not a barrier to investment treaty or contract claims to recover future lost profits resulting from a coal phaseout under JET-IP. Domestic investors have previously successfully relied on 'round-tripping' to transfer holdings to an investment vehicle located in a state having a BIT with the host state, to benefit from investment treaty protections.[24] Exposure to international arbitration claims can also come from the terms of contracts, permits or licences for mining or electricity production and distribution. Risk of international arbitration claims by coal investors and the potential financial costs of such claims should be carefully considered as part of the JET-IP.

Secondly, on renewable energy investments, the JET-IP identifies (section 7.4) the need for a predictable regulatory environment and political risk mitigation to attract private green investments. While political and regulatory risk mitigation are important considerations for green energy investments, with high upfront costs, the South African government should carefully consider the uncertainties involved in implementing a just transition programme to tackle climate change. If South Africa commits itself to overly generous guarantees and commitments of profit for renewable energy investors in implementing the JET-IP, investment law protections can significantly increase the costs of future policy adjustments required for responding to changing conditions and science. For example, if funding arrangements or subsidy commitments later become untenable and unaffordable for the country, even if profits remain reasonable for the investors, reductions resulting from withdrawal or adjustments of state support can give rise to investment law claims.

A recent analysis reviewing the renewable energy investor claims arising from the rollback of renewable energy support schemes against Spain and Italy has found that a notable number of tribunals, relying on the DCF method to assess compensation, awarded overly generous compensations to investors for reduction in profits brought by the rollback of subsidies.[25] Approximately 80 investment treaty claims were filed in response to changes in renewable energy support schemes within the EU showing an emerging picture of the risks posed by investment law's inflexibility towards policy evolution in the context of transition into a just green economy. In light of these developments, South Africa would benefit from a careful evaluation of its promises to green economy investors and the extent of its investment law commitments as it develops its JET-IP further.

JET-IP aims to attract renewable energy investors from South Africa's partner countries, whilst committing to phase out South Africa's reliance on domestic coal production. In planning this transition, policy-makers in South Africa would benefit from carefully considering the potential legal and financial impacts of South Africa's investment law commitments on its ability to regulate in the public interest whilst navigating a just energy transition. For new investments in the renewable energy sector, contracts and/or terms of

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[23] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (Case No. ARB(AF)/00/2); *Clayton and Bilcon of Delaware Inc. v. Government of Canada* (PCA Case No. 2009-04); *Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic* (ICSID Case No. ARB/17/14); *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41).
[24] For example, *Yukos Universal Limited (Isle of Man) v The Russian Federation*, (PCA Case No AA 227); see note 16 above.
[25] Fermeglia, M (2022), 'Cashing-In on the Energy Transition? Assessing Damage Evaluation Practices in Renewable Energy Investment Disputes', *Journal of World Trade and Investment*, Vol 23, pp 982 – 1019.

licences should be designed carefully to ensure South Africa has adequate policy space for responding to the evolving energy transition landscape. South Africa could rely on its domestic Act on Protection of Investment as the governing framework of foreign investments, refrain from agreeing to international arbitration for settling disputes with investors and explicitly require disputes to be settled in domestic courts of South Africa.

2.3. Social and Economic Transition and Governance Risks

As discussed in section 2.1, the JET-IP relies on the debt instruments primarily to finance decarbonisation and transition projects and programmes and financing modalities aimed at mobilising private finance, such as blended finance instruments. The move towards blended and private financing in the provision of public goods, especially in large-scale transformative programmes such as the JET-IP, can generate significant social and economic transition and governance risks that can compromise the objectives of the JET-IP and key cornerstones of the plan laid down in section 7 as well as undermining South Africa's human rights and environmental obligations.

First, there is a danger that as the JETP itself remains a donor-dominated process which sits outside the official financial mechanism established under the auspices of the UNFCCC and supervised by the Conference of Parties (COP), it will remain premised on an aid framework rather than as part of the multilateral legal regime. This means that the strategic priorities of the JETP will continue to be driven by the interests of the developed countries as financiers and financial resources continue to be disbursed on the principle of conditionality, notably those linked to programmatic lending and budget support. These may include structural and policy conditionalities which may undermine rather than progress the objectives of decarbonisation and just transition outlined in the JET-IP.

The creation of further debt while attempting to embark on a just and inclusive transition can undermine South Africa's international human rights obligations. The UN Guiding Principles on Foreign Debt and Human Rights stress that 'economic reform programmes arising from foreign debt should maximize the policy space of developing countries in pursuing their national development efforts, taking into account the views of relevant stakeholders in a way that ensures balanced development conducive to the overall realisation of all human rights'.[26] There is a risk that the current form of the JET IP will create project-based debt obligations incumbent upon South Africa[27] without creating the policy and fiscal space for South Africa to move towards 'the overall realisation of all human rights' in the country, including through the progressive realisation of economic, social and cultural rights.[28]

This constraint on national policymaking is compounded by the risk posed by a financing agenda that prioritises the mobilisation of private finance. Aside from the concerns over the influence of private commercial investors over national policymaking outlined in sections 2.1 and 2.2 above, the involvement of philanthropic foundations proposed in the JET-IP, such as increasing the grant component of the package through partnerships with such actors, carries its own risk of policy capture by unaccountable actors. The dangers around the imposition of externally determined development or policy agendas on developing countries by powerful

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[26] UN (2011), 'UN Guiding Principles on Foreign Debt and Human Rights', A/HRC/20/23, 10 April 2011, para 20.
[27] Cotula, L (2008) 'Regulatory Takings, Stabilization Clauses and Sustainable Development', Paper prepared for the OECD Global Forum on International Investment VII 'Best Practices in Promoting Investment for Development', Paris, 27–28 March 2008.
[28] Erdem Türkelli, G (2021) 'Private Actors in Development Projects: Reflections on Human Rights between Power and Resistance', *International Journal of Law in Context*, Vol 17, No 1.

philanthropic actors and the subsequent shrinking of these countries' national policy space has been well documented in academic and policy literature.[29]

Another area of risk is social and economic risks associated with project financing. There will be significant social and economic dislocation accompanying the decarbonisation plans, both in terms of the shift away from coal but also the shift to green technologies. Without adequate safeguards, the financing and implementation of the JET-IP can compromise existing accountability and environmental, social and governance safeguards mechanisms for local communities. The JET-IP recognises that the plan carries a high social risk and proposes mitigation measures based on regular monitoring and coordination across government and implementing agencies alongside regular stakeholder consultation (section 7.3, Table 10 of the JET-IP). It also recognises a safeguards risk to the environment, vulnerable communities and excluded groups who may be impacted by project development associated with carrying out the JET-IP and proposes mitigation measures that will include adherence to national government and implementing agencies safeguards measures (section 7.3, Table 30).

Reliance on a risk-based accountability and governance framework for projects outlined in section 7.3 of the JET IP instead of a rights-based accountability and governance framework jeopardises compliance with national law as well as human rights obligations of South Africa under its Constitution, national laws and under international law.

The JET IP Risk Management Framework defines risk, particularly social risks, safeguards risks and public health risks, in a very narrow manner, which excludes many rights-holders, particularly those most prone to being marginalised. The Framework defines social risks, for instance, mainly as social risks to communities in the coal regions arising from the transition while much larger parts of the South African population may be adversely impacted by policies, programmes and projects under JET-IP if adequate social, labour and environmental standards are not effectively respected.

From a macroeconomic standpoint, decreasing public revenues from traditional energy production sources may curtail South Africa's public expenditure on public services such as education and healthcare. This would curtail the progressive realisation of human rights if the transition is not accompanied and offset by alternative funding sources, such as those made available through international assistance and cooperation (in line with Article 2.1 of the International Covenant on Economic, Social and Cultural Rights). In addition, when concessions such as tax or tariff exemptions are extended to investors, these may limit the economic benefits and contributions to public finances, instead creating value exclusively or primarily for investors. Investment projects focusing on renewables and green energy may also cause displacements of communities and loss of livelihoods through large-scale land acquisitions that disproportionately impact human rights along gender lines.[30] The long-term sustainability of

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[29] See McGoey, L, Thiel, D and West, R (2018). 'Le philanthrocapitalisme et les « crimes des dominants', *Politix*, 121, and Martens, J and Seitz,K (2015), 'Philanthropic Power and Development: Who Shapes the Agenda?', MISEREOR, Global Policy Forum and Brot für die Welt.

[30] A case in point is the Addax Bioenergy project in Sierra Leone (Addax Bioenergy Sierra Leone/ ABSL Ltd.) touted as a model sustainable bioenergy project for Africa and set up as a Public-Private Partnership financed by funding from a number of DFIs. It is an important example of a sustainable energy investment that has had negative human rights repercussions has been studied by civil society organisations for its land tenure and gender impacts. See: SILNoRF et al (2021), 'Large-scale Land Acquisition in Africa: Impacts, Conflicts and Human Rights Violations', Africa-EU Partnership 2021: Our Land Our Life Policy Brief,], December 2021, Sierra Leone Network on the Right to Food (SiLNoRF) and Abdullahm H J (2020), 'Women's Rights and Public-Private Partnerships in Sierra Leone's Agro-Energy Sector: A Case Study of Addax Bioenergy Sierra Leone Ltd (ABSL)', DAWN

'green' / 'renewable' energy projects, which are supposed to create benefits not only in lowering carbon emissions but also creating jobs and therefore livelihoods, also depends heavily on investor appetite. If investments do not generate the levels of profits desired by investors, investors may lose that appetite and exit projects even after displacement of communities. In such cases, when there are no additional social safety nets in place for project-affected persons and communities, they are left in limbo, often without any recourse and often no possibility to resume their previous economic activities.[31]

The narrow framing of risks also results in mitigation strategies being limited in scope and content, rendering them incomplete at best and ineffectual at worst.[32] The risk-based approach also fails to address questions of remedy and redress in cases where the possible risks materialise and negatively impact individuals and communities.

For instance, some of the suggested reforms and investment strategies proposed in the JET-IP may undermine existing safeguards mechanisms because of the shift in financing modalities proposed by the JET-IP. The reliance on private finance, mobilised primarily through DFIs and private capital markets, can exacerbate existing gaps in project finance safeguards and compromise limited recourse available to communities displaced or harmed by project operations. JET-IP (section 7.3, Table 30) states that safeguards and mitigation strategies centre mainly on 'regular monitoring and coordination across government and implementing institutions, along with regular stakeholder consultations' (p. 142). For individuals and communities that may be in a more vulnerable situation, JET-IP foresees implementation of 'national government and implementing institutions' safeguards measures' that are based on good practice. The focus on good practices and Monitoring & Evaluation (M&E) as safeguarding is demonstrative of the risk-based accountability and government that JET-IP espouses. Often, this model of risk-based management of accountability and governance falls short of delivering rights and entitlements to project-affected individuals and communities by relying on governance frameworks of implementing and financing institutions that do not match the substantive and procedural content of obligations owed to rights-holders under national and international law.

Accountability becomes more challenging in a financing landscape where multilateral and bilateral DFIs, commercial lenders and other private financiers are involved in a fragmented way There is greater opacity surrounding private sector projects in development projects compared to those undertaken by the public sector through an official sector grant or loan (for example, through an multilateral development bank as opposed to a DFI). DFIs and PPPs tend to have weaker transparency and information disclosure policies than their public counterparts on grounds of commercial sensitivity or client confidentiality .[33] Additionally, where projects are structured through a PPP between the state and a private investor, it becomes apparent that the fragmented legal structure of PPP projects presents unique challenges for community participation and access to information, both at the pre-project consent stage and at the later grievance/complaint stage.[34] Overall, the turn to new modes of

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Discussion Paper#29, September 2020, Development Alternatives with Women for a New Era (DAWN).

[31] This happened to communities in Sierra Leone impacted by the Addax Bioenergy project (see above).

[32] Erdem Türkelli, G (2020) *Children's Rights and Business: Governing Obligations and Responsibility*, Cambridge University Press.

[33] Vervynckt, M (2015), 'An Assessment of Transparency and Accountability Mechanisms at the European Investment Bank and the International Finance Corporation', Eurodad, 30 September 2015.

[34] Tan, C, Erdem Türkelli, G and Jebechii Sago, J (2023), 'Call for Input on 'Development Finance Institutions and Human Rights', Working Group on the Issue of Human Rights and Transnational

financing through DFIs, including blended finance mechanisms and PPPs, poses serious challenges to project-affected peoples' access to remedies. Many bilateral DFIs do not have centralised grievance or dispute resolution mechanisms but rely on fragmented project-level mechanisms which tend to have limited operational independence from their project sponsor and lack independent verification or scope for appeal.[35]

There is a risk that the JETP-IP may prioritise private investor interests over community rights. For example, it notes that a government review of the PPP policy framework 'will simplify approval and compliance requirements for the participation of private investors in the JET IP' (section 5.3). It should be recalled that renewable / green energy and transition projects are not exempt from creating negative outcomes for local populations such as involuntary resettlement or loss of livelihoods. While the simplification of bureaucratic procedures has often been hailed as a positive contributor to improving private sector investment outlook, there are clear environmental and social risks attached to inadequate safeguards and standards that may jeopardise the objectives of the JET, which seek to foster a just transition that protects livelihoods and the rights of people and communities.

Inadequate or diluted safeguards in turn end up most adversely impacting the parts of the society that are most prone to being marginalised and disadvantaged, such as children, women, persons with disabilities, older persons and indigenous communities.[36] In this respect, the simplification of PPP approval and compliance requirements should not result in the dilution of legal safeguards and standards around approval and compliance requirements, including but not limited to ex-ante, continuous and ex-post environmental and social impact assessments (ESIAs), and follow-up requirements such as monitoring, reporting and auditing. The importance of preparing and conducting 'human rights impact assessments with regard to development projects [and] loan agreements' was also highlighted by the UN Guiding Principles on Foreign Debt and Human Rights.[37] This approach is also in line with the United Nations Guiding Principles on Business and Human Rights, which are applicable in the context of the activities of business enterprises, including within development and green transition-related projects and in PPPs.

To prevent negative impacts on individuals, communities and the citizens of South Africa, JET-IP-financed projects should have robust impact assessment procedures that respect and cover all substantive and procedural regulatory, fiscal, environmental, human rights and labour standards obligations owed to individuals, communities and citizens that may potentially be affected by the JET-IP and projects financed under JET-IP, including those indirectly affected as well as directly affected. Ex-ante impact assessment should be complemented by follow-up assessments during the life cycle of the JET-IP in addition to ex-post impact assessments. Plan and project approval processes should ensure that where existing risks are identified, they should be mitigated prior to the start of the said plan or

Corporations and Other Business Enterprises, UN Human Rights Council: Submission by researchers on the New Frontiers in International Development Finance (NeF DeF) Project', 3 March 2023.

[35] See Erdem Türkelli, G (2022), 'Multistakeholder Partnerships for Development and the Financialization of Development Assistance', *Development and Change*, Vol 53, No 1; Tan, C (2021), 'Audit as Accountability: Technical Authority and Expertise in the Governance of Private Financing for Development', *Social and Legal Studies*, Vol 31, No 1; Tan, C (2019), 'Creative Cocktails or Toxic Brews? Blended Finance and the Regulatory Framework for Sustainable Development', in Gammage, C and Novitz, T (eds), *Sustainable Trade, Investment, and Finance: Toward Responsible and Coherent Regulatory Frameworks*, Edward Elgar.

[36] Erdem Türkelli, G (2021), 'Children's Rights when Financing Development through Multilateral Development Banks: Mapping the Field and Looking Forward, *The International Journal of Children's Rights*, Vol 29, No 1, pp 199-238.

[37] Note 21, para 23.

project. Impact assessment results should not only serve to identify and recognise potential risks but should bear on final approval decisions, including the option to require plans and projects to be redesigned to prevent the potential risks from materialising.

Foreign financiers, such as DFIs from the IPG, should ensure that adequate and effective environmental and social safeguards and standards are in place for all reasonably foreseeable adverse impacts from financed projects, including safeguards and standards on the protection of the environment, biodiversity, labour standards, health and safety, human rights including of most disadvantaged parts of the population such as women, children, persons with disabilities, older persons and indigenous populations, protections in cases of involuntary displacement and land acquisition as well as protections of cultural heritage.[38] In addition to self-regulatory standards used by DFIs as well as MDBs themselves, which often fall short of providing full protection for the environment and for labour and human rights, projects financed by the JET-IP must be designed and implemented in compliance with the Constitution, national law and international human rights, labour law and environmental law obligations of South Africa as well as of international law obligations of foreign financiers from IPG countries. Projects should ensure free, prior and informed consultations with and consent by local communities. In order to make these safeguards and standards effective, individuals and local communities that are adversely affected by the projects must have access to a variety of grievance and redress options, which may include non-judicial remedies such as those provided by project-level grievance mechanisms but should also extend to judicial remedies that can generate temporary injunctions and guarantees of non-repetition.[39]

3. Conclusion

The JET-IP has been presented as an opportunity for South Africa to establish long-term partnerships with developed countries, multilateral organisations and private investors to support the country's pathway to a low-carbon and climate-resilient economy and society (Preamble of the JET-IP). As noted in section 1 above, the plan should be guided by multilaterally agreed principles, including the CBDR-RC, additionality, predictability and country ownership, as well as by considerations of debt sustainability, cost effectiveness, harmonisation of climate action with social and economic impacts of low-carbon transition and establishment of governance and safeguards to manage risks of the transition programme.

The commitment of the South African government to these principles is to be commended but our review of the plan demonstrates that there is significant risk that the investment approach and the mix of financing instruments proposed and currently negotiated with the IPG may undermine these principles and generate additional legal, regulatory, policy, social and governance risks. Most notably, the financing and investment proposals may undermine South Africa's existing policy space by locking the country into external debt and investment contracts that can constrain future climate and sustainable development actions. Greater emphasis and focus should also be given to social and economic transition risks and to mitigate the community dislocations to ensure a just transition.

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[38] MDBs and DFIs have self-regulatory frameworks that address some of these issues. See for instance: The World Bank's Environmental and Social Framework and linked Environmental and Social Standards, the International Finance Corporation's Policy Standards and Association of European Development Finance Institutions (EDFI) Principles for Responsible Financing of Sustainable Development.

[39] The Accountability and Remedy project of the UN Office of the High Commissioner of Human Rights provides a detailed overview of various accountability and remedy options in cases of business involvement in human rights abuses.

Finally, we reiterate that the JET-IP must be seen as part of a comprehensive multilateral commitment towards achieving the objectives set out in the UNFCCC, Paris Agreement and other internationally agreed climate and environmental legal obligations. It is unclear whether resources committed to by the IPG constitutes additionality and whether it will affect existing ODA and other official development financial flows to South Africa for other purposes. For example, climate finance from the UK government is classed as ODA and it is not clear whether the resources pledged to the JET-IP would represent additional resources committed by the UK for other sustainable development purposes, whether to South Africa or to other developing countries. The diversion of ODA towards climate finance undermines the principle of 'additionality' under the multilateral climate regime and can have a material impact on countries' ability to mobilise resources to meet other sustainable development objectives and social and economic obligations, including those enshrined under national and international human rights law.

Ideally, climate finance should always be channelled through mechanism established by and under the supervision of the Conference of Parties so that progress on achieving commitments of state parties to the respective international climate agreements are appropriately monitored. Climate finance should not be fragmented across different platforms and entities nor should it be premised on strategic interests of developed countries and commercial interests of private investors over and above global collective interests on climate action and local community social, economic and other human rights.