From Zero-Sum to Net-Zero Antitrust

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INTRODUCTION

Climate change is a global crisis. Efforts to address it are increasingly transnational,[1] as evidenced by more than 3,500 bilateral and multilateral environmental agreements.[2] Adherence to these agreements requires public and private actors to come together to facilitate standard setting, monitoring, certification, and reporting. This so-called "polycentric" approach to climate governance, as defined by Elinor Ostrom, is an innovation in hybrid transnational and private regulatory governance.[3] As Ostrom argued, the polycentric approach, though not without its limitations, offers many advantages for mitigating the climate crisis.[4] For instance, it provides non-state actors (such as firms or non-governmental organizations) the ability to transcend nonexistent or insufficient state efforts.[5] The Paris Agreement reflects this evolution and specifically sets forth a role for non-state actors in climate governance.[6]

Large, diversified investors (or "universal owners") are among the most capable non-state actors to address the climate crisis. Universal owners include public pension funds like California Public Employees' Retirement System ("CalPERS"), as well as the private "Titans of Wall

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[1] For an analysis of the rise of transnational environmental governance, see Thomas Hale, *Transnational Actors and Transnational Governance in Global Environmental Politics*, 23 ANN. REV. POL. SCI. 203, 206-07 (2020) ("Transnational actors have been a growing presence in multilateral fora across all issue areas, but environmental actors have composed one of the most numerous and influential constituencies, and environmental intergovernmental fora have been increasingly open to transnational actor influence.").

[2] *IEA Database Home*, INT' ENV'T AGREEMENTS (IEA) DATABASE PROJECT, http://iea.uoregon.edu/ (last visited Jan. 29, 2023) [https://perma.cc/H7T9-BAKB].

[3] *See generally* Tim Bartley, *Power and the Practice of Transnational Private Regulation*, 27 NEW POL. ECON. 188, 188 (2022) ("Transnational private regulation has exploded over the past three decades.").

[4] Andrew Jordan, David Huitema, Jonas Schoenefeld, Harro van Asselt & Johanna Forster, *Governing Climate Change Polycentrically: Setting the Scene*, *in* GOVERNING CLIMATE CHANGE: POLYCENTRICITY IN ACTION? 3, 3-26 (Andrew Jordan, Dave Huitema, Harro van Asselt & Johanna Forster eds., 2018).

[5] *See generally* Jordan K. Lofthouse & Roberta Q. Herzberg, *The Continuing Case for a Polycentric Approach for Coping with Climate Change*, 15 SUSTAINABILITY 1, 1-5 (2003), identifying six advantages of polycentric systems for coping with climate change.

[6] *See* Charlotte Streck, *Strengthening the Paris Agreement by Holding Non-State Actors Accountable: Establishing Normative Links Between Transnational Partnerships and Treaty Implementation*, 10 TRANSNAT'L ENV'T L. 493, 500 (2021) (discussing the ways that the Paris Agreement formalizes the participation of non-state actors).

Street."[7] While these public and private actors are far from homogeneous, their diversification has focused them on a common path towards reducing climate change, which poses a "systematic risk"[8] to their portfolio values. As suppliers of capital to the global economy, universal owners have powerful levers for mitigating climate risk and enforcing compliance with the Paris Agreement.[9] For instance, these universal owners can use shareholder power to advocate for directors to adopt climate transition planning, or condition future investment on climate mitigation strategies.[10]

The United Nations ("UN") has recognized the powerful role universal owners can play and has fostered a new type of polycentric governance — Investor Climate Alliances ("ICAs").[11] This Article argues that ICAs are consistent with Ostrom's theory that individual actors will voluntarily steward common pool resources to overcome the so-called "tragedy of the commons." Ostrom demonstrated that even profit-seeking actors (such as the for-profit members of ICAs) will voluntarily reduce environmental harms in a way that limits their individual profit, but only if they know

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[7] Jill Fisch, Assaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17, 17-18 (2019).

[8] While the terms systemic risk and systematic risk are sometimes used interchangeably, a systemic risk threatens the economy or society as a whole, whereas systematic risks threaten investor portfolio values. Climate change is both a systemic and a systematic risk. *See generally* JAMES P. HAWLEY & ANDREW T. WILLIAMS, THE RISE OF FIDUCIARY CAPITALISM: HOW INSTITUTIONAL INVESTORS CAN MAKE CORPORATE AMERICA MORE DEMOCRATIC 21 (2000) (discussing the risks a universal ownership faces in the economy); John C. Coffee, Jr., *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk*, 2021 COLUM. BUS. L. REV. 602, 614 (arguing "institutional investors are more concerned with 'systematic risk' than are individual investors").

[9] *See* UNEP FIN. INITIATIVE, UNIVERSAL OWNERSHIP: WHY ENVIRONMENTAL EXTERNALITIES MATTER TO INSTITUTIONAL INVESTORS 42 (2011), https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf [https://perma.cc/ZUH8-DWW6]; *see also* Ken Shimokawa, *Investor Activism Campaigns Hit Record High in 2022*, S&P GLOB.: MKT. INTEL. (Mar. 13, 2023), https://www.spglobal.com/marketintelligence/en/news-insights/blog/investor-activism-campaigns-hit-record-high-in-2022 [https://perma.cc/6RG2-2G4H].

[10] *See* UNEP FIN. INITIATIVE, *supra* note 9, at 43.

[11] For a description of how the UN fosters or "orchestrates" the roles of non-state actors in environmental governance, see Karin Bäckstrand & Jonathan W. Kuyper, *The Democratic Legitimacy of Orchestration: The UNFCCC, Non-State Actors, and Transnational Climate Governance*, 26 ENV'T POL. 764, 765 (2017) ("Orchestration is a strategy in which international organizations (IOs) and states mobilize intermediaries — private actors, civil society, transnational networks, and substate actors — to direct targets in the pursuit of key collective goals.").

that all other actors will behave in the same way.[12] While this leaves room for individual actors within the network to compete, collaboration is a necessary and foundational element of governing common pool resources. Therein lies the fundamental tension with antitrust law. Although antitrust allows competitors to collaborate, it imposes many guardrails. Competitor collaborations will typically violate antitrust if they: impose mandatory industry-wide restrictions; share commercially sensitive information; reduce supply or output; or increase cost.[13]

The proposal to allow ICAs to enact their own rules and monitor their own compliance conjures up fear of the monopolistic practices that prompted the enactment of the Sherman Act in the first place.[14] Indeed, ICAs pose unique legitimacy challenges — not least because their members include the largest and most powerful global financial asset owners and managers. The instinctual remedy of antitrust law is to break up such concentrated power. But this Article argues that ICAs' broad representation of the global financial market is precisely what makes them effective. There is no doubt that ICAs are powerful, but the question of how to address their power remains largely unexplored. This Article begins to fill that gap and hopes to spur more scholarly focus on the unique promise and limitations of ICAs. It argues that it is both impractical and undesirable to "break up" ICAs, but acknowledges that their unprecedented power warrants policy reforms.

Notably, antitrust faced a similar fork in the road when Adolf Berle and Louis Brandeis — advisors to President Roosevelt in the New Deal era — vigorously debated how to address corporate power. In the shadow of the Great Depression, neither trusted corporate concentration. But "there was a large gulf between how Berle and Brandeis viewed the best response to incorporated enterprises that had come to dominate the economy . . . ."[15]

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[12] *See* Elinor Ostrom, *A Polycentric Approach for Coping with Climate Change* 12 (The World Bank Pol'y Rsch., Working Paper No. 5095, 2009) [hereinafter *A Polycentric Approach*]; *see also* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 5-6 (1990).

[13] *See* Amelia Miazad, *Prosocial Antitrust*, 73 HASTINGS L.J. 1637, 1673 (2022).

[14] Edward H. Levi, *The Antitrust Laws and Monopoly*, 14 U. CHI. L. REV. 153, 153 (1947) ("The Sherman Antitrust Act embodies this tradition against monopoly."); Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 204 (2021) ("The legislative history of the Sherman Act, particularly when read in light of its common-law background and popular genesis, supports the conclusion that legislators acted on the economic vision of the antimonopoly movement.").

[15] Robert B. Thompson, *Adolf Berle During the New Deal: The Brain Truster as an Intellectual Jobber*, 42 SEATTLE U. L. REV. 663, 672 (2019).

William Bratton has shed light on this important juncture in antitrust policy:

> Brandeis was a prominent "New Freedom" progressive who advocated aggressive antitrust enforcement for the restoration of market competition, prohibition of unfair trade practices, and protection for small business. Berle, in contrast, thought market competition was part of the problem. Although corporate concentration had gone too far, he wrote, the antitrust platform did not provide a viable approach to the economic crisis of 1932. Better to accept the large economic units and mold them so as to make them useful to the people. State capitalist planning could address the economic crisis even as the individual was protected.[16]

Brandeis' view continues to play prominently in antitrust scholarship and policy debates.[17] On the other hand, Berle's views on antitrust and corporate concentration remain largely unexplored, even though his influence on other areas of corporate law eclipses most scholars.[18] However, Berle's views on antitrust, and his orientation towards government monitoring — rather than the dispersion of power — is a far better approach for addressing the climate crisis and deserves a closer look. Drawing inspiration from Berle's prescription to "mold" large economic units or "concentrates,"[19] this Article proposes that global antitrust enforcement agencies should actively encourage ICAs to cooperate in ways that address systemic risk, while ensuring that there is robust government oversight.

In the European Union ("EU") and across the world, global antitrust enforcement agencies are acknowledging the tension between antitrust and commitments under the Paris Agreement. This recognition is spurring

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[16] William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 110 (2008). Berle's view was also reflected in President Roosevelt's early speeches. President Theodore Roosevelt, *Confession of Faith Before the Progressive National Convention* (Aug. 6, 1912) ("Concentration and co-operation are conditions imperatively essential for industrial advance; but if we allow concentration and co-operation there must be control in order to protect the people, and adequate control is only possible through the administrative commission.").

[17] *See generally* Christopher S. Yoo, *The Post-Chicago Antitrust Revolution: A Retrospective*, 168 U. PA. L. REV. 2145 (2020).

[18] *But see* Bratton & Wachter, *supra* note 16, at 110 ("Berle, in contrast, thought market competition was part of the problem.").

[19] A.A. Berle, Jr., *The Developing Law of Corporate Concentration*, 19 U. CHI. L. REV. 639, 641 (1952).

innovation across antitrust regimes, from Austria's "Green Antitrust Exemption" to Japan's updated draft guidelines for enforcement against sustainability agreements.[20] In the United States, however, antitrust enforcement agencies continue to disregard that meeting climate goals often requires competitor collaboration.

This Article argues that ICAs provide a novel and necessary forum for collaborative governance of climate change, a systemic risk to the economy. Therefore, ICAs are different from traditional industry collaborations, and require a tailored antitrust approach. Part I contextualizes the rise in universal owners and explains why they are uniquely impacted by climate risk. Part II argues that ICAs provide a forum for universal owners to collaborate to mitigate the climate crisis. Part III describes how policymakers on both sides of the aisle are weakening ICAs by making threats of antitrust enforcement. Part IV makes a normative argument for strengthening the ability of ICAs to collaborate and offers a policy roadmap for aligning global antitrust policy with ICAs.

I. UNIVERSAL OWNERS AND CLIMATE CHANGE RISK

The rise of universal owners laid the foundation for ICAs. Section A will describe their evolution and why these investors are motivated to minimize the risk of climate change. Section B will discuss practical and normative criticisms of universal owners as private regulators.

A. The Rise of Universal Owners

Due to the massive growth of index investing, the "Big Three" (BlackRock, State Street, and Vanguard) collectively hold more than 20% of the shares of companies listed in the S&P 500 index and cast almost 25% of votes at their annual meetings.[21] Their influence stretches beyond U.S. markets; for instance, the "Big Three" are the largest asset managers

[20] *See* Tomoko Fuminaga & Kyoko Nagano, *Japan Introduces Mandatory ESG Disclosures for Public Companies*, MORGAN LEWIS (Dec. 22, 2022), https://www.morganlewis.com/pubs/2022/12/japan-introduces-mandatory-esg-disclosures-for-public-companies [https://perma.cc/27XL-4EC4]; Viktoria H.S.E. Robertson, *The World's First Green Antitrust Provision Shows that Climate Action Is the Newest Antitrust Frontier*, PROMARKET (Mar. 10, 2022), https://www.promarket.org/2022/03/10/the-worlds-first-green-antitrust-provision-shows-that-climate-action-is-the-newest-antitrust-frontier/ [https://perma.cc/X4WZ-F7MW].

[21] Lucian Bebchuk & Scott Hirst, *Big Three Power, and Why It Matters*, 102 B.U. L. REV. 1547, 1599 (2022).

in 40% of the 30 largest German public corporations, and are not far behind in other European and Asian countries.[22] Consequently, the "Big Three" are "increasingly occupying an influential position in global corporate governance."[23]

Crucially, some of the "Big Three's" largest clients are themselves diversified investors, such as pension funds and insurance companies.[24] A growing corporate law literature refers to these highly diversified investors as "universal owners."[25] According to modern portfolio theory, investors maintain diversified portfolios to avoid idiosyncratic risks caused by a particular company or industry.[26] The downside of the strategy is that

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22 *See* Jan Fichtner & Eelke M. Heemskerk, *The New Permanent Universal Owners: Index Funds, Patient Capital, and the Distinction Between Feeble and Forceful Stewardship*, 49 ECON. & SOC'Y 493, 505 (2020). In Japan, the "Big Three" are the largest or second-largest owner in 50% of TOPIX 100-listed firms, and 40% of firms listed on the Nikkei 225. *Id.*

23 *Id.* Commentators argue that this concentration bears the promise of overcoming the rational apathy of diversified investors, a problem that Berle and Means' foundational work, *The Modern Corporation and Private Property*, illuminated in 1932. *See* Fisch et al., *supra* note 7, at 31-37 (arguing that the Big Three have incentives to monitor management); *see also* Marcel Kahan & Edward B. Rock, *Index Funds and Corporate Governance: Let Shareholders Be Shareholders*, 100 B.U. L. REV. 1771, 1793 (2020) ("Because the advisers to the largest index funds, by virtue of their huge size, independently have incentives to cast informed votes — thereby reducing the classic problems of rational apathy and free riding — other shareholders benefit without bearing any of the cost"). But there are skeptics — the power of the "Big Three" has drawn growing criticism from academics and fueled an "ESG Backlash" by lawmakers. *See infra* Part III; *see also* Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSPS. 89, 90 (2017); Dorothy S. Lund, *Asset Managers as Regulators*, 171 U. PA. L. REV. 77, 80 (2023) [hereinafter *Asset Managers*] ("This dynamic — where shareholders have become regulators — is a modern one, made possible by the rise of institutional investing, the recent popularity in index funds, and the growth of shareholder power."). For a discussion on the emergence of the "Giant Three" and its implications on corporate governance, see generally Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 741 (2019).

24 BLACKROCK, BLACKROCK REPORTS FULL YEAR 2022 DILUTED EPS OF $33.97, at 1 (2023), https://s24.q4cdn.com/856567660/files/doc_financials/2022/Q4/BLK-4Q22-Earnings-Release.pdf [https://perma.cc/Y7F4-FLRL]; Rebecca Ungarino, *Here Are 9 Fascinating Facts to Know About BlackRock, the World's Largest Asset Manager*, INSIDER, https://www.businessinsider.com/what-to-know-about-blackrock-larry-fink-biden-cabinet-facts-2020-12 (last updated Mar. 10, 2022, 1:39 PM PST) [https://perma.cc/5KMV-M32V] ("Nearly 60% of its overall assets under management are for institutional investors . . . ."); *Our Clients*, BLACKROCK, https://www.blackrock.com/institutions/en-axj/our-client (last visited Apr. 30, 2023) [https://perma.cc/DHJ9-RJLT].

25 *See, e.g.*, Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 5-6 (2020) (using the term "universal owners" to refer to these types of investors).

26 *See* Miazad, *supra* note 13, at 1653.

highly diversified portfolios, by design, are exposed to systematic or "unhedgeable" risks.[27] Madison Condon was among the first to illuminate how the universal owner's relationship to risk is different from traditional investors, in ways that undermine corporate law's traditional single firm focus.[28] According to Condon, "[a] rational owner would use its power to internalize externalities so long as its share of the costs to the externality-creating firms are lower than the benefits that accrue to the entire portfolio from the elimination of the externality."[29] This reality unmoors corporate law from a paradigm in which investors seek to maximize the share price of each individual company in their portfolio. Rather, under this philosophy, shareholders should be motivated to reduce financial risk across their portfolios. Taken to its logical conclusion, then, a universal owner may even be willing to accept *lower* returns at a specific firm, if it means that the entire portfolio will benefit.

Relying on this intuition, some commentators have gone so far as to argue that universal owners' fiduciary duties are to maximize long-term, portfolio-wide returns, rather than a specific company's share price.[30] One of the few ways to do so — given their diversification and the challenges of "exiting" an index — is by decreasing exposure to systematic risks. A systematic risk, by definition, cannot be eliminated through diversification.[31] While the concept can be amorphous, "the clearest

[27] *See* John Armour & Jeffrey N. Gordon, *Systemic Harms and Shareholder Value*, 6 J. LEGAL ANALYSIS 35, 54-70 (2014) (arguing for a different fiduciary duty for directors to maximize portfolio values, as opposed to firm-specific shareholder value). *But see* Marcel Kahan & Edward Rock, *Systematic Stewardship with Tradeoffs* 37 (N.Y. Univ. L. & Econ. Rsch., Working Paper No. 22-01, 2021); Roberto Tallarita, *The Limits of Portfolio Primacy*, 76 VAND. L. REV. (forthcoming 2023) (manuscript at 50-51).

[28] *See* Condon, *supra* note 25, at 6.

[29] *Id.* at 6.

[30] For an overview of universal ownership, see generally *id.* at 5; Ellen Quigley, *Universal Ownership in the Age of COVID-19: Social Norms, Feedback Loops, and the Double Hermeneutic* (May 21, 2020) (unpublished manuscript). For a historical account, see Frederick H. Alexander, *The Benefit Stance: Responsible Ownership in the Twenty-First Century*, 36 OXFORD REV. ECON. POL'Y 341, 356 (2020); *Universal Ownership: Why Environmental Externalities Matter to Institutional Investors*, PRINCIPLES FOR RESPONSIBLE INV. (Oct. 1, 2010), https://www.unpri.org/environmental-issues/universal-ownership-why-environmental-externalities-matter-to-institutional-investors/4068.article/ [https://perma.cc/TW7X-Z3D].

[31] *See* Jeffrey N. Gordon, *Systemic Stewardship*, 47 J. CORP. L. 627, 629 (2022) ("Risk that pertains to a particular company, so-called 'idiosyncratic' risk, can be diversified away; risk that will affect returns throughout the portfolio, 'systematic risk,' remains."); Jim Hawley & Jon Lukomnik, *The Long and Short of It: Are We Asking the Right Questions?*, 41 SEATTLE U. L. REV. 449, 449 (2018) ("Beta, which is the systemic or non-

example of a major systematic risk is the risk of adverse climate change."[32] Since 2020, climate disasters have caused $760 billion in damages globally, according to Munich Re.[33] As I have argued elsewhere, investor focus on climate change reflects how these diversified investors experience systematic risks.[34] John Coffee has predicted an era in which "universal owners . . . align[] their strategy with minimizing portfolio-wide risks."[35] The Securities and Exchange Commission's ("SEC") recent proposed climate change disclosure requirements reflect this view: "[I]nvestors often employ diversified strategies, and therefore do not necessarily consider risk and return of a particular security in isolation but also in terms of the security's effect on the portfolio as a whole, which requires comparable data across registrants."[36]

diversifiable risk of a portfolio, is widely regarded — wrongly — as exogenous and rarely impacted by portfolio investment."). *See generally* HAWLEY & WILLIAMS, *supra* note 8, at 21 (explaining that systemic risk affects a wide range of economic, political, and social institutions whereas systematic risk impacts financial markets and portfolios).

[32] John C. Coffee, Jr., *The Coming Shift in Shareholder Activism: From "Firm-Specific" to "Systematic Risk" Proxy Campaigns (and How to Enable Them)*, 16 BROOK. J. CORP. FIN. & COM. L. 45, 46 (2021) [hereinafter *The Coming Shift in Shareholder Activism*].

[33] *Climate Change and La Niña Driving Losses: The Natural Disaster Figures for 2022*, MUNICH RE (Jan. 10, 2023), https://www.munichre.com/en/company/media-relations/media-information-and-corporate-news/media-information/2023/natural-disaster-figures-2022.html [https://perma.cc/X95H-DQQE]; *Hurricanes, Cold Waves, Tornadoes: Weather Disasters in USA Dominate Natural Disaster Losses in 2021*, MUNICH RE (Jan. 10, 2022), https://www.munichre.com/en/company/media-relations/media-information-and-corporate-news/media-information/2022/natural-disaster-losses-2021.html [https://perma.cc/D5ZG-Y476]; *Record Hurricane Season and Major Wildfires – the Natural Disaster Figures for 2020*, MUNICH RE (Jan. 7, 2021), https://www.munichre.com/en/company/media-relations/media-information-and-corporate-news/media-information/2021/2020-natural-disasters-balance.html [https://perma.cc/5QPJ-K6D5]; Damian Shepherd, *The World Paid a Huge Financial Price for Climate-Driven Extreme Weather in 2021*, TIME (Dec. 26, 2021, 9:34 PM EST), https://time.com/6131659/climate-disaster-extreme-weather-cost/ [https://perma.cc/C9NS-FLDN].

[34] *See* Miazad, *supra* note 13, at 1656.

[35] *See, e.g.*, Coffee, *The Coming Shift in Shareholder Activism*, *supra* note 32, at 46-47 ("This recognition that change at one firm can affect the value of other firms in the portfolio implies a new goal for activism: namely, to engineer a net gain for the portfolio, possibly by reducing 'negative externalities' that one firm is imposing on other firms in the investor's portfolio.").

[36] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,336 & n.9 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. §§ 210, 229, 232, 239, 249) (stating that broadly diversified investors evaluating any individual asset for addition to a portfolio need to consider its risk and return characteristics not in isolation, but in terms of the asset's effect on the portfolio as a whole,

While diversified investors share a desire to minimize climate change risk, the types of investors who fall under the "universal owner" umbrella are quite different. Broadly speaking, universal owners include both public and privately held for-profit asset managers and asset owners (institutional investors), public pension funds, and sovereign wealth funds. These disparate categories of investors have different strategies, incentives, clients, stakeholders, and goals. While universal owners are not homogenous, the "Big Three" private asset managers have captivated the academic and policy debate.[37] Public pension funds, such as CalPERS, are also universal owners.[38] Unlike private asset managers, who are diversified because of their business model of indexing, pension funds are sometimes legally required to diversify.[39] The incentives of universal owners can also vary widely. Private asset managers are compensated based on the amount of assets under management, while pension fund

and providing CalPERS as an example of an asset owner holding a diversified growth-oriented portfolio that has integrated climate risk assessment into its investment process); *see also* Carine Smith Ihenacho & Severine Neervoort, *The Proposed SEC Climate Disclosure Rule: A Comment from Norges Bank Investment Management*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (July 24, 2022), https://corpgov.law.harvard.edu/2022/07/24/the-proposed-sec-climate-disclosure-rule-a-comment-from-norges-bank-investment-management/ [https://perma.cc/LAS3-M3JG] ("We welcome the Commission's proposed rules, which we believe will lead to more consistent, comparable, and reliable climate-related reporting from companies, and thereby help investors get a better picture of companies' value. Better sustainability reporting can also contribute to well-functioning and efficient markets."); *Amalgamated Bank Statement on Proposed SEC Climate Disclosures*, AMALGAMATED BANK (Mar. 21, 2022), https://amalgamatedbank.com/news/amalgamated-bank-statement-proposed-sec-climate-disclosures [https://perma.cc/M3PK-JMPQ] (stating that the principal mitigant of investment risk is diversity of exposure and indicating that comprehensive climate disclosures help investors assess systemic risk).

37 *See* Jill Fisch, *The Uncertain Stewardship Potential of Index Funds*, *in* GLOBAL SHAREHOLDER STEWARDSHIP 454, 465 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022) (cautioning against expanding the stewardship obligations upon mutual funds and explaining that "[t]he challenge for the stewardship movement is that it treats institutional investors — primary large asset managers — as shareholders rather than intermediaries").

38 *See* James Hawley & Andrew Williams, *The Emergence of Universal Owners: Some Implications of Institutional Equity Ownership,* 43 CHALLENGE 43, 45 (2000) ("The quintessential universal owners are the largest of the public and private pension funds because they have amassed investment portfolios that naturally comprise a broad cross section of the financial assets available for investment, and their objective — to provide pensions — naturally gives them a long-term perspective toward wealth maximization.").

39 For instance, the California Constitution requires the board of CalPERS to "diversify the investments of the system so as to minimize the risk of loss and to maximize the rate of return . . . ." CAL. CONST. art. XVI, § 17(d).

managers are often appointed through a political process.[40] And unlike private asset managers, pension funds do not compete with one another. A pension fund beneficiary cannot move the assets in its pension fund from Oklahoma to New York, in the same way that individuals and corporations can move their business from BlackRock to Vanguard.[41] These differences help to explain why it is the large pension funds, such as CalPERS, who have been the driving force behind investor alliances.[42]

Despite these differences, pension funds and private asset managers' growth are inextricably linked. That is because asset managers' largest clients are often pension funds.[43] The parallel growth of pension funds and asset managers has strengthened their combined voice in corporate governance. As Benjamin Braun, who calls the phenomenon "asset manager capitalism," has explained, pension funds' desire for diversification helped asset managers to gain shareholder control, despite different motivations.[44]

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[40] RANDY MILLER & RICK FUNSTON, PUBLIC PENSION GOVERNANCE THAT WORKS 12 (2014), https://www.nasra.org/Files/Topical%20Reports/Governance%20and%20Legislation/FunstonGovernance1403.pdf [https://perma.cc/4VQD-4K4C].

[41] *See* David H. Webber, *Should Labor Abandon Its Capital? A Reply to Critics*, 12 HARV. BUS. L. REV. 215, 223 (2022) ("Public pensions do not compete against each other. An unhappy CalPERS member can't shift her retirement funds to CalSTRS without changing careers. Public pensions are therefore relatively indifferent to free riders.").

[42] *Climate Change*, CALPERS, https://www.calpers.ca.gov/page/investments/sustainable-investments-program/climate-change (last visited Jan. 22, 2023) [https://perma.cc/VVM3-YZPA] (CalPERS is the Co-Founder and/or Founding Signatory of several major investor alliances including Climate Action 100+, Ceres, The Principles of Responsible Investment, the Council of Institutional Investors, and the UN Net Zero Asset Owner Alliance, among others).

[43] *BlackRock Joins Climate Action 100+ to Ensure Largest Corporate Emitters Act on Climate Crisis*, CERES (Jan. 9, 2020), https://www.ceres.org/news-center/press-releases/blackrock-joins-climate-action-100-ensure-largest-corporate-emitters-act [https://perma.cc/L2M6-H3QG] ("In joining Climate Action 100+, BlackRock is responding to the demands of its asset owner clients and other groups globally that they take meaningful action to address climate change." (quoting Fiona Reynolds, Member, Climate Action 100+ Steering Comm.)).

[44] Benjamin Braun, *Exit, Control, and Politics: Structural Power and Corporate Governance Under Asset Manager Capitalism*, 50 POL. & SOC'Y 630, 640-41 (2022) ("Rather than the outcome of BlackRock and Vanguard seeking control over portfolio firms, the size of their shareholdings is a by-product of their success in the market for equity investment funds, both active and index-tracking.").

B. The Limitations of Universal Owners

Setting aside the debate over universal owners' incentives, commentators also point to the normative and practical limitations of tasking "private market actors" with reducing a public harm like climate change.[45] The normative arguments with universal owners are rooted in legitimacy concerns.[46] Universal owners, so the argument goes, are private market actors — not elected officials — and thus lack democratic legitimacy.[47] After all, why should the CEO of BlackRock make decisions that create tradeoffs for stakeholders to whom he is not accountable?[48] Moreover, the investor engagement process is opaque; it is often difficult to ascertain whose interests universal owners have in mind. Some argue that large asset managers' voting patterns are intended to curry political favor, rather than to increase either individual share price or even portfolio value.[49] Others argue that relying on "private regulators" harms the public and increases the risk of climate change by blunting the demand for public regulation.[50]

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[45] *See, e.g.*, John C. Coates, *The Future of Corporate Governance Part I: The Problem of Twelve*, 1, 5-6 (Harv. Pub. L., Working Paper No. 19-07, 2018); *see also* Lund, *Asset Managers*, *supra* note 23, at 82 ("From starting principles, the concentration of power in the hands of three private for-profit companies that lack democratic legitimacy and electoral accountability is seriously concerning.").

[46] These legitimacy challenges go beyond universal owners and are pervasive in private efforts to address ESG risks more broadly. *See, e.g.*, Stavros Gadinis & Chris Havasy, *The Quest for Legitimacy: A Public Law Blueprint for Corporate Governance*, 57 UC DAVIS L. REV. (forthcoming 2024) (noting that the "legitimacy challenges" against corporate managers are akin to the challenges faced by government officials and regulator agencies).

[47] As the preceding Part explained, many universal owners are public pension funds and sovereign wealth funds. While this heterogeneity raises its own vexing questions, the literature has tended to equate universal owners with large private asset managers.

[48] The legitimacy concerns have also led to a series of renewed proposals to strengthen "pass through voting" or the ability for individual beneficiaries to vote or communicate their priorities to large asset managers. *See, e.g.*, Jill E. Fisch, *Mutual Fund Stewardship and the Empty Voting Problem* 16 BROOK. J. CORP. FIN. & COM. L. 71 (2021) ("This broadened scope of institutional engagement and influence raises new questions about the legitimacy of institutional investor engagement. Specifically, the mutual funds and other institutions engaged in this stewardship are not principals but agents.").

[49] *See, e.g.*, Jeff Schwartz, *Stewardship Theater*, 100 WASH. U. L. REV. 2, 62 (2022) ("Politically driven voting is problematic: it is an illegitimate use of the voting power asset managers exercise on behalf of their investors; it makes public companies harder to run; and it provides politicians with too much say over industry.").

[50] *See* Tallarita, *supra* note 13, at 50-51. For a critique of the argument that private ordering stymies regulatory efforts, see Aneil Kovvali, *Stark Choices for Corporate Reform*, 123 COLUM. L. REV. (forthcoming 2023) (manuscript at 62) ("Internal and external

Critics have also pointed to universal owners' practical limitations, arguing that they do not make, and cannot monitor their portfolio companies' climate change risk.[51] Concededly, universal owners can never match the monitoring muscle of a hedge fund activist.[52] This limitation is embedded in the business model underlying universal ownership. As the preceding Section explained, universal owners are invested in passive index funds, which, by design, keep monitoring costs low.[53] Therefore, in contrast to hedge fund activists — who invest considerable time and money to gain, and then leverage, bespoke information about a specific company — it is infeasible for an individual universal owner to do so.[54]

Finally, index investing makes it difficult for universal owners to exit or "divest" from individual companies.[55] Under such circumstances, engagement "may be ineffective without a credible exit threat."[56] As I have argued elsewhere, however, the inability to exit is precisely what is increasing the incentives of universal owners to engage more robustly with companies.[57] And there is data to support that universal owners are investing more in engagement, particularly on climate change. Take

reforms have historically proceeded in parallel . . . . Internal corporate governance reforms can also support external reforms by leveraging corporate power over the political process and changing facts on the ground in a way that supports external regulation.").

[51] *See, e.g.*, Tallarita, *supra* note 27 (conducting an empirical assessment of large asset managers' climate change efforts and identifying limits that undermine their effectiveness).

[52] Dorothy S. Lund, *Corporate Finance for Social Good*, 121 COLUM. L. REV. 1617, 1657-58 (2021) [hereinafter *Corporate Finance*] ("Perhaps behind-the-scenes engagement would be more effective than voting, but meaningful engagement is even more time-consuming and expensive.").

[53] *See* Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 511 (2018) ("Because a passive fund seeks only to match the performance of a market index — not outperform it — the fund lacks a financial incentive to ensure that the companies in their portfolio are well run.").

[54] *See* Kahan & Rock, *supra* note 23, at 3 ("[W]e analyze the extent to which universal owners can and should be expected to induce a firm to sacrifice itself in order to increase a universal owner's overall portfolio value. We are quite pessimistic that universal owners have the ability and inclination to do so.").

[55] Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2034 (2019) ("Furthermore, because index funds have no 'exit' from their positions in portfolio companies while those companies remain in the index, they have a long-term perspective and are not tempted by short-term gains at the expense of long-term value.").

[56] Lund, *Corporate Finance*, *supra* note 52, at 1658.

[57] Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1405-06 (2020).

BlackRock for example: "In 2021, we broadened our climate focus universe from 440 to more than 1,000 companies. We had nearly 2,300 engagements on climate and natural capital and did not support management at 341 companies — including not supporting the election of 281 directors — due to climate-related concerns."[58] This increase in engagement is impressive, but BlackRock's entire investment stewardship team, the largest in the world, remains just 60 people.[59] Scholars are right to point out that it is relatively small compared to the size of its portfolio.[60] Vanguard's stewardship team, reported at 35 members in 2020, is even smaller.[61]

These practical limitations have prevented universal owners from advocating for tailored governance reforms.[62]

However, as the next Part explores, ICAs offer a solution to these normative and practical limitations, though they raise novel questions of their own.

II. INVESTOR CLIMATE ALLIANCES

Universal owners are focused on increasing portfolio values, which they do by minimizing systematic (portfolio-wide) risks. An emerging literature explores whether universal owners' fiduciary duties are aligned with corporate law's single firm focus, but scholars have paid scant attention to how the focus on systematic risk is impacting the relationships *between* universal owners.[63] This Article argues that such a portfolio-wide

[58] BLACKROCK, INVESTMENT STEWARDSHIP ANNUAL REPORT 11 (2022), https://www.blackrock.com/corporate/literature/publication/annual-stewardship-report-2021.pdf [https://perma.cc/QT5S-5G69].

[59] Schwartz, *supra* note 49, at 420 (citing Dawn Lim, *BlackRock Starts to Use Voting Power More Aggressively*, WALL ST. J. (Apr. 30, 2021, 5:30 AM ET), https://www.wsj.com/articles/blackrock-takes-aggressive-posture-on-esg-proxy-votes-11619775002 [https://perma.cc/QT5S-5G69]).

[60] *See id.* at 28 ("The size of the stewardship teams is also telling. For example, Vanguard's team is 35. BlackRock's is 60. This is far too few people for the vast number of votes these asset managers tally.") (internal citations omitted).

[61] *Id.* at 420 (citing Press Release, Vanguard, Vanguard Publishes 2020 Annual Investment Stewardship Report (Sept. 15, 2020), https://corporate.vanguard.com/content/corporatesite/us/en/corp/who-we-are/pressroom/Press-Release-VG-2020-Investment-Stewardship-Annual-Report-Appointment-091520.html [https://perma.cc/7LVQ-NBWC]).

[62] Lund, *Corporate Finance*, *supra* note 52, at 1657-58 ("Perhaps behind-the-scenes engagement would be more effective than voting, but meaningful engagement is even more time-consuming and expensive.").

[63] For a notable exception, see Tim Bowley & Jennifer Hill, *The Global ESG Stewardship Ecosystem* 2 (Eur. Corp. Governance Inst., Working Paper No. 660, 2022)

perspective provides new incentives for investors to collaborate. In other words, what Jeffrey Gordon refers to as "systematic stewardship"[64] is more effective, and sometimes can *only* be achieved, through collaborative engagement among universal owners.

The evolution towards collaborative engagement makes intuitive sense — since, by definition, systematic risks cannot be diversified away.[65] Thus, the more diversified an investor is, the more likely it is to seek out opportunities to work with other investors to reduce systematic risks. Moreover, systematic risks are better addressed at scale, or by changing the business practices of an entire industry or the market as a whole; individual interventions at specific companies are less effective. That is where universal owners are uniquely suited to addressing systematic risks — unlike hedge funds, universal owners "tend to focus on market-wide or industry-wide issues such as governance, sustainability, and risk management . . . ."[66]

(describing the rise in transnational corporate governance and investor stewardship as "a transnational network of different non-state actors, including globally-active institutional investors, international institutions and agencies, non-governmental organizations, investor networks and representative bodies, as well as the various service providers that support the governance activities of institutional investors").

Scholars have also explored the relationship between activist hedge funds and diversified investors. *See* Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 897-98 (2013); John Pound, *Raiders, Targets, and Politics: The History and Future of American Corporate Control*, 5 J. APPLIED CORP. FIN. 6, 16 (1992). For a more contemporary treatment, see Suren Gomtsian, *Different Visions of Stewardship: Understanding Interactions Between Large Investment Managers and Activist Shareholders*, 22 J. CORP. L. STUD. 151, 157 (2022) (describing how activists "assist large investment managers in identifying the firms where they need to concentrate limited stewardship resources and in deciding how to use their voting power"); see also Kahan & Rock, *supra* note 23, at 3.

[64] Gordon, *supra* note 31, at 628.

[65] This approach to collaborative governance by investor alliances is consistent with Elinor Ostrom's work, who argued that private solutions to common resource problems can be more effective than regulatory interventions. *See generally* OSTROM, *supra* note 12. Towards the end of her career, Ostrom advocated for a "polycentric" approach to addressing climate change. *See* Ostrom, *A Polycentric Approach*, *supra* note 12, at 32. For an application of the commons analysis to corporate law, see generally JESSICA F. GREEN, RETHINKING PRIVATE AUTHORITY: AGENTS AND ENTREPRENEURS IN GLOBAL ENVIRONMENTAL GOVERNANCE (2014); Simon Deakin, *The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise*, 37 QUEEN'S L.J. 339 (2012).

[66] Jill E. Fisch & Simone M. Sepe, *Shareholder Collaboration*, 98 TEX. L. REV. 863, 887 (2020); *see also* Matthew J. Mallow & Jasmin Sethi, *Engagement: The Missing Middle Approach in the Bebchuk-Strine Debate*, 12 N.Y.U. J.L. & BUS. 385, 392-94 (2016).

As this Part explores, the rise of ICAs reflects increased investor demand for collaboration. Section A briefly charts the history of ICAs. Section B describes their recent proliferation and explores how they are governed.

A. A Brief History of Investor Climate Alliances

As *The Economist* summed up in 2019, "investors concerned about climate change have never been better organized."[67] Such investors have joined forces in multiple ways, often with the backing of the UN.[68] But opponents have misconstrued these ICAs as purely private associations of firms that have assembled to consolidate power. [69] For instance, House Republicans recently referred to Climate Action 100+ as a "climate-obsessed corporate cartel."[70] But a closer look uncovers a different reality. ICAs consist of a complex web of public and private entities across jurisdictions and industries, not simply private partnerships that resemble trade associations. Further, the most prominent ICAs were either initiated or co-founded by various UN agencies.[71] The influence of the UN is another factor showing that ICAs are markedly different from trade

[67] *Oil Majors Face Shareholder Resolutions on Climate Change*, ECONOMIST (May 30, 2019), https://www.economist.com/business/2019/05/30/oil-majors-face-shareholder-resolutions-on-climate-change [https://perma.cc/26AF-BF59].

[68] Similar to the ESG movement more broadly, the United Nations has played a prominent role in facilitating these investor alliances. Elizabeth Pollman, *The Meaning and the Making of ESG* 7 (Eur. Corp. Governance Inst., Working Paper No. 659, 2022) ("Although the United Nations (UN) does not typically feature in contemporary discussions of ESG, it played a critical role in bringing about the term and mobilizing its spread.").

[69] Arizona AG's Mark Brnovich's description of Climate Action 100+ illustrates this misconception. *See* Mark Brnovich, Opinion, *ESG May Be an Antitrust Violation*, WALL ST. J. (Mar. 6, 2022, 4:40 PM ET), https://www.wsj.com/articles/esg-may-be-an-antitrust-violation-climate-activism-energy-prices-401k-retirement-investment-political-agenda-coordinated-influence-11646594807 [https://perma.cc/3TXW-FN5D] ("The biggest banks and money managers seek to implement a political agenda, such as compliance with the Paris Climate Accord. Then a group mobilizes: Climate Action 100+, for example, comprised of hundreds of big banks and money managers that together manage $60 trillion.").

[70] Dominic Webb, '*We Are Not a Cabal' — Anne Simpson on Climate Action 100+*, RESPONSIBLE INV. (Dec. 20, 2022), https://www.responsible-investor.com/we-are-not-a-cabal-anne-simpson-on-climate-action-100/ [https://perma.cc/K83C-3RX4].

[71] *See, e.g.*, *About Us*, GFANZ, https://www.gfanzero.com/about/ (last visited Mar. 13, 2023) [https://perma.cc/42G2-78ED] (GFANZ, a coalition of zero-committed financial institutions, was launched in April 2021 by UN Special Envoy on Climate Action, among others).

associations, or other strategic alliances that are created by — and for the exclusive benefit of — a private industry.

The corporate law literature has largely ignored the prominent role the UN and "soft international law" has played in corporate governance.[72] Yet, a dizzying number of UN initiatives shape corporate governance in ways that range from relatively passive, such as information dissemination, to prescriptive and active, such as partnerships and alliances. While the recent proliferation of ICAs is the most active intervention that the UN has had in corporate governance, it is consistent with the UN's long-standing collaboration with the private sector.[73]

The history of ICAs begins with the UN's Principles of Responsible Investment ("PRI").[74] Its formation in 2006 — by the UN Global Compact, the UN Environment Programme ("UNEP") Finance Initiative, and a group of large institutional investors — was a turning point in sustainable finance. It was the first time that large, diversified investors jointly recognized that oversight of environmental and social risks is essential to securing the long-term sustainability of their investment portfolios. PRI's growth has been impressive — today, PRI signatories represent more than $121.3 trillion of assets under management.[75]

[72] For a comprehensive review of how international organizations have shaped international corporate law ("ICL"), see Mariana Pargendler, *The Rise of International Corporate Law*, 98 WASH. U. L. REV. 1765, 1768 (2021) ("Unbeknownst to most observers, the various guidelines and initiatives by international organizations such as the International Monetary Fund (IMF), the World Bank, the Organisation for Economic Cooperation and Development (OECD), and the United Nations have amounted to a sizable body of ICL."); see also Elizabeth Pollman, *The Origins and Consequences of the ESG Moniker* 7 (Inst. for L. & Econ., Research Paper No. 22-23, 2022), https://gcgc.global/wp-content/uploads/2022/05/6.-Pollman_The-Origins-and-Consequences-of-the-ESG-Moniker.pdf [https://perma.cc/WSZ4-DNVG] ("Although the United Nations (UN) does not typically feature in contemporary discussions of ESG, it played a critical role in bringing about the term and mobilizing its spread.").

[73] UNITED NATIONS GLOB. COMPACT, THE UNITED NATIONS AND THE PRIVATE SECTOR: A FRAMEWORK FOR COLLABORATION 4 (2008), https://www.un.org/millenniumgoals/2008highlevel/pdf/background/UN_Business%20Framework.pdf [https://perma.cc/UEF4-A6FT] ("Virtually all [UN] Agencies, Funds, and Programmes have designated Private Sector Focal Points who work with the private sector in a variety of ways, from fundraising to strategic partnerships.").

[74] For a history of investor collaboration facilitated by PRI, see generally Bowley & Hill, *supra* note 63, at 12-17.

[75] *See* Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59, 87-90 (2010) (discussing the history of PRI); *New and Former Signatories*, PRINCIPLES FOR RESPONSIBLE INV., https://www.unpri.org/annual-report-2021/how-we-work/more/new-and-former-signatories (last visited Jan. 27, 2023) [https://perma.cc/U78U-H9E6] (listing information about assets

PRI provided a cornerstone for later investor-stewardship initiatives. In the early 2000s, with the support and participation of PRI, investors created several "climate networks," organized regionally or thematically.[76] These investor networks formalized collaborative stewardship by creating investor stewardship codes and creating a forum for investors to share information and engagement priorities and strategies. These forums also created ways for investors to communicate — for example, in 2011, UN's PRI and UNEP Finance Initiative commissioned a report that urged universal owners to "[j]oin other investors and engage collaboratively with companies through platforms such as the PRI Engagement Clearinghouse to address key issues."[77] The report goes on to highlight several "existing collaborative investor initiatives in the areas of climate change, water, forests and biodiversity."[78]

Continuing the focus on collaboration with private firms, in March 2019, the UNEP Finance Initiative updated its Strategy for Private Sector Engagement, emphasizing the need for continued engagement. The updated strategy sets forth a continuum of engagement activities, from passive, such as "information dissemination," to active, such as "partnerships, alliances, and transactions."[79] Recognizing that legal

under management by PRI signatories); PRINCIPLES FOR RESPONSIBLE INV., UNITED NATIONS GLOB. COMPACT, 2021-22 ANNUAL REPORT 35 (2022), https://www.unpri.org/annual-report-2022 [https://perma.cc/PA2N-BRLY].

76 Examples include the Institutional Investors Group on Climate Change ("IIGCC"), the Investor Group on Climate Change Australia/New Zealand ("IGCC"), the Investor Network on Climate Risk ("INCR"), and UNEPFI's Climate Change Working Group ("CCWG"). UNEP FINANCE INITIATIVE & PRINCIPLES FOR RESPONSIBLE INV., UNIVERSAL OWNERSHIP: WHY ENVIRONMENTAL EXTERNALITIES MATTER TO INSTITUTIONAL INVESTORS 12 (2011), https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf [https://perma.cc/ZUH8-DWW6].

77 *Id.* at 5.

78 *Id.* at 37.

79 UN ENV'T PROGRAMME, STRATEGY FOR PRIVATE SECTOR ENGAGEMENT 9-11 (2019), https://wedocs.unep.org/bitstream/handle/20.500.11822/31107/Strategy%20for%20Private%20Sector%20Engagement-2.pdf?sequence=1&isAllowed=y) [https://perma.cc/DH6N-FGSQ]; *see id.* (describing "five distinct levels of engagement" for private sector collaboration including: (1) information dissemination, (2) public events, training and campaigns; (3) open networks and policy discussion; (4) multi-stakeholder fora; and (5) partnerships, alliances, and transactions). PRI has also been focused on "collaborative stewardship" — its recent 2022 annual meeting included "workshop for asset owners to discuss their unique role in collaborative initiatives, how they can set ambition levels and influence their external managers' participation." *PRI in Person & Online: Breakout 1F — Asset Owner Workshop*, PRINCIPLES FOR RESPONSIBLE INV. (Jan. 30, 2023), https://www.unpri.org/pri-in-person-and-online-2022-highlights/pri-in-person-and-online-breakout-1f-asset-owner-workshop/11107.article [https://perma.cc/UM85-2LBZ].

advisors in certain jurisdictions may take a more conservative view of investor fiduciary duties, the UNEP and PRI also invested in legal analysis and reports advocating that investor fiduciary duties do not only permit, but require investors to work collaboratively to reduce systemic "ESG" risks.[80] With the increase of climate disasters, the push for collaborative engagement by investors has recently reached a fever pitch. Thus, setting the stage for ICAs.

B. Investor Climate Alliances

The Paris Agreement explicitly created a role for non-state actors, inviting their robust participation in addressing climate change.[81] Over 13,000 non-state actors — so far — have shared climate action commitments and information, according to the UN's database.[82] As scholars of private environmental governance have noted, this "promotion and mutual review of targets, policies and strategies has enabled nonstate actors to organize in new ways."[83] Such cooperation occurs at various levels: "from information collecting and sharing, to capacity building and implementation, to rule and standard setting."[84] Commentators have referred to these cross-border collaborations between public and private entities as "polycentric governance."[85] These observers have argued that cooperation is a necessary response to climate change, which "require[s] action at all levels of governance, in particular with regard to the involvement of 'lower-level' or contextually situated actors who have

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80 UNEP FINANCE INITIATIVE, FIDUCIARY DUTY IN THE 21ST CENTURY: FINAL REPORT 27-41 (2019), https://www.unepfi.org/wordpress/wp-content/uploads/2019/10/Fiduciary-duty-21st-century-final-report.pdf [https://perma.cc/LDE9-HY2H].

81 *See* Paris Agreement to the United Nations Framework Convention on Climate Change art. 6, Dec. 12, 2015, T.I.A.S. No. 16-1104; *see also* Theresa Sabonis-Helf, *The Paris Accord: An Experiment in Polylateralism*, AM. FOREIGN SERV. ASS'N (Oct. 2021), https://afsa.org/paris-accord-experiment-polylateralism [https://perma.cc/E29B-B8FW].

82 Sabonis-Helf, *supra* note 81.

83 *Id.*

84 *See* Charlotte Streck, *Strengthening the Paris Agreement by Holding Non-State Actors Accountable: Establishing Normative Links Between Transnational Partnerships and Treaty Implementation*, 10 TRANSNAT'L ENV'T L. 493, 495 (2021).

85 *See* Monica Di Gregorio, Leandra Fatorelli, Jouni Paavola, Bruno Locatelli, Emilia Pramova, Dodik Ridho Nurrochmat, Peter H. May, Maria Brockhaus, Intan Maya Sari & Sonya Dyah Kusumadewi, *Multi-Level Governance and Power in Climate Change Policy Networks*, 54 GLOB. ENV'T CHANGE 64, 73 (2019).

knowledge of local conditions and are best placed to implement action that leads to the achievement of defined goals."[86]

ICAs exemplify the burgeoning international collaboration between public and private entities. Climate Action 100+ and GFANZ, described below, are the two largest and most influential ICAs.

1. Climate Action 100+

Climate Action 100+ is the first and largest voluntary initiative of investors focused on climate change. The initiative was co-founded by five global investor networks: Asia Investor Group on Climate Change; Investor Group on Climate Change (Australia and New Zealand); Institutional Investor Group on Climate Change (Europe); Ceres Investor Network in Climate Risk and Sustainability (North America); and the Principles of Responsible Investment (global).[87] It was designed to address a complex, but specific, "commons" problem: reducing carbon emissions from highly diversified investor portfolios. Its genesis dates to 2017. Then-director Anne Simpson directed a carbon audit of CalPERS' $400 billion dollar portfolio, comprised of over 10,000 companies — one of the largest pools of money in the world.[88] The audit calculated each company's carbon emissions and revealed that approximately 100 companies were responsible for over 85% of the emissions in CalPERS' portfolio.

This finding led to two key takeaways. First, CalPERS could focus its limited engagement resources on a relatively small number of companies. Second, and more importantly, CalPERS could collaborate with other diversified investors, because the 100 companies in its portfolio were probably the *same* companies in the portfolios of diversified investors throughout the world. This realization prompted Simpson to encourage other asset owners such as pension funds, and asset managers to conduct the same portfolio-wide assessment. Not surprisingly, these audits mirrored the findings in CalPERS audit, identifying the same 100 or so companies as responsible for 85% of the emissions. In response, this informal group of about a dozen investors convened a series of meetings

[86] Streck, *supra* note 84, at 496; *see also* Ostrom, *A Polycentric Approach*, *supra* note 12, at 38-39; Elinor Ostrom, *A Multi-Scale Approach to Coping with Climate Change and Other Collective Action Problems*, 1 SOLS. J. 27, 32-33 (2010).

[87] *The Investor Networks*, CLIMATE ACTION 100+, https://www.climateaction100.org/whos-involved/investor-networks/ (last visited Apr. 9, 2023) [https://perma.cc/26PW-DWB2].

[88] Interview with Anne Simpson, Global Head of Sustainability, Franklin Templeton (on file with author).

at the United Nations, and ultimately created Climate Action 100+. The initiative started with about 24 investors and has grown to over 700 investors across 33 countries.[89]

Importantly, Climate Action 100+ is not a separate legal entity. Instead, it acts as a forum or hub for coordinating a myriad of public and private constituencies including non-governmental organizations, non-profits, international organizations, public pension funds, sovereign wealth funds, private investors, insurance companies, and hedge funds, among others. Despite the lack of a corporate form which would impose legal obligations on the alliance as an entity, Climate Action 100+ has voluntarily adopted a formal governance structure that disperses power throughout the global investor networks. Oversight is delegated to a global steering committee, which includes one investor network representative and one investor representative for each global network.[90] For instance, in North America, Mindy Lubber, CEO of the non-profit Ceres, is the investor network representative. The investor representative is Simiso Nzima, Managing Investment Director of the California Public Employees Retirement System. To ensure that one investor network does not have outsized power, the Steering Committee Chair and Vice Chair rotate every six months. Climate Action 100+ is far from a purely private initiative. It is a forum to coordinate the highly diverse investors with an equally varied set of public actors. The non-profit Ceres (a founding member) plays an influential role. Another active non-profit in Climate Action 100+ is As You Sow, a shareholder advocacy organization with the mission to "promote environmental and social corporate responsibility through shareholder advocacy, coalition building, and innovative legal strategies."[91] Climate-oriented non-profits are also a source of funding for Climate Action 100+.

2. GFANZ

In April 2021, the UN announced the Glasgow Financial Alliance for Net Zero ("GFANZ"), a coalition of seven separate net-zero initiatives that

[89] The original list of 100 focus companies was incomplete because it was not capturing the high emitters in emerging markets, thus failing to respond to the needs of investors in local markets. To address this deficiency, Climate Action 100+ "crowdsourced" an additional 60 companies from investors operating in local markets. *Id.*

[90] In addition to two representatives from each regional network, Anne Simpson serves as a founding member for a total of eleven steering committee members. *Id.*

[91] *About Us,* AS YOU SOW, https://www.asyousow.org/about-us (last visited Apr. 2, 2023) [https://perma.cc/L2NJ-GPL5].

span the financial industry.[92] Unlike an industry association, GFANZ includes a combination of representatives from the UN, industry, and civil society. Its co-chairs are billionaire businessman Michael Bloomberg — also the former mayor of New York City — and Mark Carney, former governor of the Bank of England. Its "Principals Group" includes CEOs from global financial institutions and stock exchanges including BlackRock, Avia, Citi, and the London Stock Exchange, among others.[93] The advisory board includes representatives from, for instance, Carbon Tracker Initiative, Center for Climate-Aligned Finance, and Climate Safe Lending Network.[94] GFANZ defines its three focus areas as follows:

(1) *Net-zero transition planning for financial institutions*. Supporting efforts to translate net-zero pledges into actionable, near-term, science-based transition plans. Driving consistency and accountability by presenting common methodologies and resources that align business activities with 1.5°C pathways and net zero for the real economy.

(2) *Mobilizing capital for Emerging Markets and Developing Economies ("EM&DEs")*. Accelerating the deployment of capital to enable EM&DEs to decarbonize and prosper in a global net-zero economy.

(3) *Net-zero public policy*. Leveraging GFANZ's global scale to drive ambitious and credible public policies and regulations that enable the net-zero transition.[95]

GFANZ now represents roughly 40% of global financial institutions.[96] To become a member, financial institutions join one of the sector-specific groups, and agree to the following five commitments:

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[92] GFANZ includes the Net-Zero Asset Owner Initiative ("NZAOA"), Net-Zero Asset Manager Initiative ("NZAM"), Paris Aligned Asset Owners ("PAAO"), Net-Zero Banking Alliance ("NZBA"), Net-Zero Insurance Alliance ("NZIA"), Net Zero Financial Services Providers Alliance ("NZFSPA"), and the Net Zero Investment Consultants Initiative ("NZICI"). *Our Members*, GFANZ, https://www.gfanzero.com/membership/ (last visited Jan. 27, 2023) [https://perma.cc/CJ69-6M7Z].

[93] *About Us*, *supra* note 71.

[94] *Id.*

[95] *Id.*

[96] *GFANZ Releases Guidance on Credible Net-Zero Transition Plans and Seeks Public Input to Accelerate Action*, GFANZ (June 15, 2022), https://www.gfanzero.com/press/gfanz-releases-guidance-on-credible-net-zero-transition-plans-and-seeks-public-input-to-accelerate-action/ [https://perma.cc/4Q6Q-V3QH]; *GFANZ Unveils Enhancements to Measuring Net-Zero Portfolio Alignment for Financial Institutions*, GFANZ (Aug. 9,

(1) Using science-based guidelines to reach net-zero emissions across all emissions scopes by 2050;

(2) Setting 2030 interim targets that represent a fair share of the 50% decarbonization required by the end of the decade;

(3) Setting and executing on a net-zero transition plan;

(4) Transparent reporting and accounting on progress against those targets; and

(5) Adhering to strict restrictions on the use of offsets.[97]

Despite its rapid progress, GFANZ has faced considerable headwinds. In September 2022, two major pension funds in Austria and Australia exited GFANZ, citing that the requirements were too strict.[98]

Adding another layer of monitoring or quasi-government monitoring, GFANZ reports to the Financial Stability Board ("FSB"), "an international body that monitors and makes recommendations about the global financial system."[99] Moreover, a number of academic and scientific institutions advise GFANZ through the Advisory Panel, which seeks to ensure "GFANZ's work is held to the highest standards of ambition while keeping climate science at the heart of everything GFANZ does."[100] The way that GFANZ develops its rules also has some notable parallels to public rulemaking. For example, GFANZ recently updated its methodology for measuring net-zero portfolio alignment, and its guidance included a public comment period.[101]

As these ICAs have gained momentum, so has the backlash against their existence, as the next Part explores.

2022), https://www.gfanzero.com/press/gfanz-unveils-enhancements-to-measuring-net-zero-portfolio-alignment-for-financial-institutions/ [https://perma.cc/6842-7LG8] [hereinafter *GFANZ Unveils Enhancements*].

97 *Our Members*, *supra* note 92.

98 Camilla Hodgson, *Two Pension Funds Quit Mark Carney's Green Alliance*, FIN. TIMES (Sept. 24, 2022), https://www.ft.com/content/df321358-c6d1-4dfc-8ab7-4526fab1305b [https://perma.cc/QB5W-NB76].

99 *About the FSB*, FSB, https://www.fsb.org/about/#mandate (last visited Jan. 27, 2023) [https://perma.cc/6M3Y-ND2F].

100 *About Us*, *supra* note 71.

101 *GFANZ Unveils Enhancements*, *supra* note 96.

III. Partisan Antitrust Threatens Investor Climate Alliances

The ESG backlash is gaining momentum. A growing chorus of Republicans vow to prevent investors and firms from addressing environmental and social harms. One high-profile example is Florida Governor Ron DeSantis, who removed Disney's special tax district when the company criticized the state's "Don't Say Gay" bill — stating that the company "crossed the line."[102] Since then, DeSantis has prohibited the state's pension fund from including ESG factors in investment decisions, and declared ESG policies "dead on arrival" in the state.[103] Former Vice President Mike Pence has also declared himself an adversary of ESG.[104] In a May 2022 speech, Pence accused the Biden administration of "weaponizing the financial system" through "capricious new ESG regulations that allow left-wing radicals to destroy American energy producers from within."[105] Both DeSantis and Pence are likely Republican frontrunners for the presidency in 2024, so the ESG backlash is not likely to fade away in the near future.

Meanwhile, in Congress, House Republicans are already planning investigations of financial firms that incorporate ESG issues into their investing decisions.[106] Kentucky Representative Andy Barr, a member of the House Financial Services Committee, stated that ESG "represents everything that is wrong with woke capitalism," calling it a "cancer to our

[102] Lucas Manfredi, *DeSantis Says Disney 'Crossed the Line' for Criticizing Parental Rights in Education Bill*, FOX BUS. (Mar. 30, 2022, 11:39 AM EDT), https://www.foxbusiness.com/politics/disney-desantis-parental-rights-education [https://perma.cc/EE7J-XFGN].

[103] Karin Rives, *Florida Adopts Anti-ESG Rule for State's $186B Pension Plan*, S&P GLOB. (Aug. 24, 2022), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/florida-adopts-anti-esg-rule-for-state-s-186b-pension-plan-71569179 [https://perma.cc/4F9A-3MSR].

[104] Mike Pence, Opinion, *Republicans Can Stop ESG Political Bias*, WALL ST. J. (May 26, 2022, 1:50 PM ET), https://www.wsj.com/articles/only-republicans-can-stop-the-esg-madness-woke-musk-consumer-demand-free-speech-corporate-america-11653574189 [https://perma.cc/497H-EWBZ]; *see also* Editorial, *Ron DeSantis's War on Woke Puts BlackRock on the Frontline*, FIN. TIMES (Dec. 7. 2022), https://www.ft.com/content/ce5bb64d-83dc-4aaa-bcf8-6506732b9b4e [https://perma.cc/E483-ETFG].

[105] Mark Niquette & Kevin Crowley, *Pence Rips ESG Investing as Injecting Left-Wing Politics into Business*, L.A. TIMES (May 10, 2022, 5:02 PM PT), https://www.latimes.com/business/story/2022-05-10/pence-rips-esg-investing [https://perma.cc/4GFC-WNMY].

[106] Saijel Kishan & Danielle Moran, *Republicans Prepare to Ramp Up Their Anti-ESG Campaign in 2023*, BLOOMBERG L. (Dec. 29, 2022, 3:00 AM), https://news.bloomberglaw.com/environment-and-energy/republicans-prepare-to-ramp-up-their-anti-esg-campaign-in-2023 [https://perma.cc/3PJT-7JKY].

capital markets" and promising "serious oversight scrutiny."[107] Accordingly, on December 6, 2022, Republican members of the House Judiciary Committee announced an investigation into whether corporations acting collectively to address ESG are violating antitrust laws.[108] Kicking off the investigation, Ranking Member Jim Jordan wrote to the steering committee of Climate Action 100+ and characterized ESG as "merely partisan politics masquerading as responsible corporate governance."[109] Quoting Trump-era Assistant Attorney General ("AG") Makan Delrahim, the letter stated that the "loftiest of purported motivations do not excuse anti-competitive collusion among rivals."[110]

State legislatures, too are joining the fray, drafting and enacting a dizzying array of anti-ESG laws. In Texas, the Comptroller announced that state pension funds and other entities must divest from 10 major financial firms that supposedly "boycott" energy companies.[111] West Virginia has declared certain banks ineligible for state banking contracts for allegedly boycotting fossil fuel industries, and Indiana AG Todd Rokita issued an advisory opinion in September 2022 stating that Indiana law prohibits its

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107 Rachel Frazin, *House Majority Gives Republicans a Chance to Take on ESG Investing*, HILL (Dec. 30, 2022, 6:00 AM ET), https://thehill.com/policy/energy-environment/3789903-house-majority-gives-republicans-a-chance-to-take-on-esg-investing/ [https://perma.cc/AVV6-YMBW].

108 Press Release, H.R. Comm. on Judiciary, Woke Companies Pursuing ESG Policies May Violate Antitrust Law (Dec. 6, 2022), https://judiciary.house.gov/media/press-releases/judiciary-republicans-woke-companies-pursuing-esg-policies-may-violate [https://perma.cc/9MGE-ZF68].

109 *See* Letter from Dan Bishop, Member of Cong., Jim Jordan, Ranking Member of the H.R. Comm. on Judiciary, Matt Gaetz, Member of Cong., Tom McClintock, Ranking Member of Subcomm. on Immigr. & Citizenship, Scott Fitzgerald, Member of Cong., & Cliff Bentz, Member of Cong., to Mindy S. Lubber, Chief Exec. Officer & President, Ceres, & Simiso Nzima, Managing Inv. Dir. Glob. Equity, CalPERS (Dec. 6, 2022), https://judiciary.house.gov/sites/evo-subsites/judiciary.house.gov/files/evo-media-document/2022-12-06-hjc-gop-to-lubber-nzima-re-esg.pdf [https://perma.cc/CG5J-AYRA].

110 *Id.*

111 Mitchell Ferman, *Texas Bans Local, State Government Entities from Doing Business with Firms that "Boycott" Fossil Fuels*, TEX. TRIB. (Aug. 24, 2022, 4:00 PM CT), https://www.texastribune.org/2022/08/24/texas-boycott-companies-fossil-fuels/ [https://perma.cc/NQC2-6KBT]. A study initiated by the Wharton School of Business found that such legislation, if passed in six other states that threatened similar action, could have cost taxpayers in those states more than $700 million on increased municipal bond interest payments alone. *New Research Shows Legislation to Boycott ESG May Cost State Taxpayers up to $700 Million in Excess Payments*, CERES (Jan. 12, 2023), https://www.ceres.org/news-center/press-releases/new-research-shows-legislation-boycott-esg-may-cost-state-taxpayers-700 [https://perma.cc/HF6A-J7VQ].

retirement system from choosing investment strategies that further ESG goals.[112]

Antitrust is a popular line of attack on ESG. The argument relies on Section 1 of the Sherman Act, which prohibits "[e]very . . . combination . . . , or conspiracy, in restraint of trade or commerce."[113] For example, the House Judiciary Committee's letter to Climate Action 100+ argued that "[a]dvancing the ESG agenda requires that the owners of capital collude to restrict the supply of certain goods and services," which the Committee called a "textbook antitrust violation."[114] And, in an unprecedented move, on November 3, 2022, five Republican U.S. Senators sent letters to 51 law firms with ESG practices, warning the firms that the senators will use their oversight powers "to scrutinize the institutionalized antitrust violations being committed in the name of ESG."[115] The letter cites to a Senate Judiciary Committee Hearing testimony by the Federal Trade Commission ("FTC") Chair Lina Khan and Assistant AG of the Antitrust Division Jonathan Kanter who emphasized that there is "no ESG exception" in antitrust.[116]

Republican state lawmakers and AGs are also claiming that ESG violates antitrust. In March 2022, Arizona attorney general Mark Brnovich launched an antitrust investigation into Climate Action 100+, arguing that it was anticompetitive and advanced a "political or woke agenda."[117] Then,

[112] Todd Rokita, Indiana Att'y Gen., Official Opinion Regarding the Indiana Public Retirement System and ESG Investments (Sept. 1, 2022), https://content.govdelivery.com/attachments/INAG/2022/09/01/file_attachments/2259125/Official%20 Opinion%202022-3.pdf [https://perma.cc/6SKC-FL3W]; Pete Schroeder, *West Virginia Bars Five Financial Firms for Deemed Fossil Fuel 'Boycotts'*, REUTERS (July 28, 2022, 10:44 AM PDT), https://www.reuters.com/business/sustainable-business/west-virginia-bars-five-financial-firms-deemed-fossil-fuel-boycotts-2022-07-28/ [https://perma.cc/SDX4-6SZS].

[113] Sherman Antitrust Act of 1890, 15 U.S.C. § 1 (2022).

[114] Letter from Dan Bishop, Jim Jordan, Matt Gaetz, Tom McClintock & Cliff Bentz, to Mindy S. Lubber & Simiso Nzima, *supra* note 109 (quoting Sean Fieler, *The ESG Movement Is a Ripe Target for Antitrust Action*, WALL ST. J. (June 2, 2022, 1:07 PM ET), https://www.wsj.com/articles/antitrust-enivornment-social-governance-oil-gas-equity-exxon-mobil-collusion-11654184723 [https://perma.cc/364V-88HB]).

[115] *See* Letters from Republican Senators to Law Firms (Nov. 3, 2022), https://www.dandodiary.com/wp-content/uploads/sites/893/2022/11/ESG-Letters-to-law-firms.pdf [https://perma.cc/2WBH-VV76].

[116] *Id.*

[117] Press Release, Mark Brnovich, Arizona Att'y Gen., Attorney General Brnovich Announces Action to Stop Coercive Investment Practices (Nov. 17, 2021), https://www.azag.gov/press-release/attorney-general-brnovich-announces-action-stop-coercive-investment-practices [https://perma.cc/WZ75-YX8K].

in August 2022, 19 state attorneys general sent a letter to BlackRock's CEO, asserting that the firm's "coordinated conduct" with other financial institutions to achieve carbon reduction targets was anticompetitive.[118]

Along similar lines, in October, the 19 state attorneys general sent Civil Investigation Demands ("CIDs") to several of the largest US banks.[119] That investigation was based on the banks' membership in the UN Net Zero Banking Alliance ("NZBA"), a UN-led initiative, comprised of over 120 banks from 41 countries that have committed to meeting net-zero emissions by 2050.[120] Missouri AG Eric Schmitt, who is leading the investigation, called the alliance "a massive worldwide agreement … to starve companies engaged in fossil fuel-related activities of credit on national and international markets."[121] Legal advisors warn that "the politicization of ESG efforts seems likely to continue, heightening the potential for entities to face state-level antitrust inquiries . . . ."[122] As the next Part explains, the increased risk of antitrust enforcement at the state level, coupled with the lack of engagement by the FTC and DOJ, threatens the ability of investors to address ESG risks, particularly climate change.

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[118] Letter from Nineteen Republican State Att'ys Gen. to Laurence D. Fink, Chief Exec. Officer, BlackRock Inc. (Aug. 4, 2022), https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/BlackRock%20Letter.pdf [https://perma.cc/3QKK-2S84].

[119] Bank of America, Citigroup, Goldman Sachs, JP Morgan, Chase, Morgan Stanley, and Wells Fargo received demands. Allegra Fradkin, *Nineteen State AGs Launch Investigation into Six Major Banks*, BLOOMBERG L. (Oct. 19, 2022, 10:29 AM), https://news.bloomberglaw.com/banking-law/nineteen-state-ags-launch-investigation-into-six-major-banks [https://perma.cc/6LXN-V8TF]; Tom Higgins, *Attorneys General Issue 'Anti-ESG' Demands to Big Six US Banks*, NET ZERO INV. (Oct. 26, 2022), https://www.netzeroinvestor.net/news-and-views/attorneys-general-issue-anti-esg-demands-to-big-six-us-banks [https://perma.cc/39EA-QBFZ].

[120] *See* Fradkin, *supra* note 119; Higgins, *supra* note 119. Though targeted at NZBA membership, the CIDs are broadly worded and seek information relating to the Bank's participation in *any* global initiative relating to addressing climate change or ESG more broadly. *See, e.g.*, Civil Investigative Demand from Taylor Hubbard, Assistant Texas Att'y Gen., to Bank of Am. Corp. (Oct. 19, 2022), https://www.texasattorneygeneral.gov/sites/default/files/images/press/10.19.2022%20-%20Bank%20of%20America%20CID_0.pdf [https://perma.cc/2R6N-EQC5] ("All Documents and Communications between Bank of America and any signatory or member of a Global Climate Initiative related to any ESG factors involving any Covered Company.").

[121] Higgins, *supra* note 119; *see also* Fradkin, *supra* note 119.

[122] *Antitrust Law and ESG Initiatives: A Rapidly Evolving Legal Landscape*, DAVIS POLK (Nov. 28, 2022), https://www.davispolk.com/insights/client-update/antitrust-law-and-esg-initiatives-rapidly-evolving-legal-landscape [https://perma.cc/R6J5-A7QZ].

IV. Policy Implications

This Article has illuminated the tension between antitrust and ICAs. This Part offers a few next steps that policy makers can take to resolve these tensions. Section A is a relatively modest proposal for the FTC and DOJ to issue updated guidance addressing ICAs. Section B is more ambitious, expands the focus to global antitrust authorities, and advocates for a global monitoring board to oversee ICAs.

A. Updated Guidance from US Antitrust Authorities on Investor Climate Alliances

On the first day of the Biden administration, the US rejoined the Paris Agreement.[123] Then, in August 2022, President Biden signed into law the US Inflation Reduction Act, which some have deemed "the single largest action ever taken by Congress and the US government to combat climate change."[124] The administration has also called for an "all agency" or "whole of government" approach to combating climate change.[125] In response, the SEC, FTC, and DOJ have focused their respective enforcement tools on a wide array of environmental issues. For instance, the DOJ made a commitment to "tackle the climate crisis" by "prioritizing enforcement actions that will reduce greenhouse emissions, achieve emission reductions and relief that mitigate the impact of past violations, and hold violators accountable for committing environmental crimes."[126] Likewise, the SEC is formulating a rule proposal that would require

[123] H.J. Mai, *U.S. Officially Rejoins Paris Agreement on Climate Change*, NPR (Feb. 19, 2021, 10:29 AM ET), https://www.npr.org/2021/02/19/969387323/u-s-officially-rejoins-paris-agreement-on-climate-change [https://perma.cc/2AEQ-4U8J].

[124] John Larsen, Ben King, Hannah Kolus, Naveen Dasari, Galen Hiltbrand & Whitney Herndon, *A Turning Point for US Climate Progress: Assessing the Climate and Clean Energy Provisions in the Inflation Reduction Act*, Rhodium Grp. (Aug. 12, 2022), https://rhg.com/research/climate-clean-energy-inflation-reduction-act/ [https://perma.cc/X6RP-LRHX]. The law provides for a record $369 billion of spending on climate and energy and has been widely regarded as a "milestone achievement." *Id.*

[125] *See* Executive Order No. 14008, 86 Fed. Reg. 7,619, 7,622 (Jan. 27, 2021). The order urges an "all agency" approach to addressing climate change but makes no mention of antitrust.

[126] *Id.*; *see also* Press Release, U.S. Dep't of Just. Off. of Pub. Affs., Justice Department Launches Comprehensive Environmental Justice Strategy (May 5, 2022), https://www.justice.gov/opa/pr/justice-department-launches-comprehensive-environmental-justice-strategy [https://perma.cc/TE3C-V9AY] (the DOJ has also partnered with the EPA to advance environmental justice, recognizing that climate-related harms are disproportionately borne by communities of color).

companies to significantly increase their disclosures relating to climate risk.[127] Meanwhile, the FTC has filed lawsuits to address "greenwashing," or false marketing claims related to the environment.[128]

Such efforts by the executive agencies are laudable. But, as I have argued elsewhere, a crucial missing piece is antitrust regulators' recognition of the environmental benefits of competitor collaboration.[129] Indeed, to the dismay of climate advocates, the FTC and DOJ have grown even more resistant to the private sector's collaboration on climate change mitigation efforts, such as the formation of investor alliances. FTC Commissioner Lina Khan has been particularly clear — even penning an Op-Ed entitled "ESG Won't Stop the FTC."[130] Commissioner Khan's stance towards industry collaboration is not new; Trump-appointed Assistant AG Makan Delrahim previously wrote that "[t]he loftiest of purported motivations do not excuse anti-competitive collusion among rivals" when he announced his investigation into four automakers for agreeing to adhere to fuel efficiency standards.[131] Delrahim characterized his position as "long-standing antitrust law."[132]

While it is true that anticompetitive behavior cannot be cleansed with prosocial intent, diversified investors' desire to collaborate on climate change is motivated by their desire to minimize material financial risk. By equating ESG with "lofty" goals, or efforts to "make the world a better place," both Commissioner Khan and former Assistant AG Delrahim misconstrue ESG collaboration as values-based — like greenwashing —

[127] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,335 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

[128] As of January 2023, the FTC is also seeking public comment on its "Green Guides," which seek to address false environmental marketing claims. The guides were last updated in 2012. Press Release, Fed. Trade Comm'n, FTC Seeks Public Comment on Potential Updates to Its 'Green Guides' for the Use of Environmental Marketing Claims (Dec. 14, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-public-comment-potential-updates-its-green-guides-use-environmental-marketing-claims [https://perma.cc/746G-X3YY].

[129] *See* Miazad, *supra* note 13, at 1643.

[130] Lina Khan, *ESG Won't Stop the FTC*, WALL ST. J. (Dec. 21, 2022, 5:10 PM ET), https://www.wsj.com/articles/esg-wont-stop-the-ftc-competition-merger-lina-khan-social-economic-promises-court-11671637135 [https://perma.cc/QW4R-PQ46] ("Companies can get creative when they want to fend off a government challenge to an illegal merger.").

[131] Makan Delrahim, *DOJ Antitrust Division: Popular Ends Should Not Justify Anti-Competitive Collusion*, USA TODAY (Sept. 12, 2019, 7:31 PM ET), https://www.usatoday.com/story/opinion/2019/09/12/doj-antitrust-division-popular-ends-dontjustify-collusion-editorials-debates/2306078001/ [https://perma.cc/MVE2-GX8S].

[132] *Id.*

rather than as an effort to reduce climate-related financial risk and benefit from resulting efficiencies. Indeed, as discussed above, addressing climate leads to procompetitive benefits, even under the current articulation of the consumer welfare standard.[133] But as discussed in Part III-IV, Commissioner Khan and Assistant AG Kanter's recent congressional testimony has had a chilling effect on procompetitive collaboration to address climate change risk. This Article argues that climate collaboration deserves special treatment.

Given the market realities of concentrated ownership, the FTC and DOJ should update their competitor collaboration guidelines, which are anchored to a bygone era; they have not been updated for over two decades. A lot has changed since 2000, most notably the financial materiality of climate change risk and the rise of universal owners. Beyond general guidance, the FTC and DOJ should issue guidance that is specifically tailored to ICAs. Failing to do so threatens to widen the gulf between the antitrust enforcement agencies and the SEC, leading to inconsistent and incoherent guidance for businesses. As the SEC's proposed rule has made clear, climate change is financially material.[134] As a starting point, the FTC, DOJ, and SEC should form a working group to address how ICAs can meet their fiduciary duties to monitor and disclose systematic climate risk, without running afoul of antitrust.

B. International Net-Zero Antitrust & A Global Monitoring Forum

The US has often resisted attempts to establish a global antitrust enforcement regime.[135] A rich literature has debated the normative and

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[133] *See* Miazad, *supra* note 13, at 1643.

[134] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,335 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

[135] In 1948, the US Congress refused to ratify the Havana Charter, which contemplated an International Trade Organization to enforce antitrust law. *See* US Dep't of State, Pub. No. 3206, Havana Charter for an International Trade Organization 114 (1948). For a history of the Havana Charter and a critical view of International Antitrust see Diane P. Wood, *The Internationalization of Antitrust Law: Options for the Future*, 44 DEPAUL L. REV. 1289, 1290-99 (1995) ("It is neither useful nor desirable to jump in feet first to a world antitrust code along the lines of the Havana Charter."). Throughout the 1950s, the US also rejected efforts to centralize antitrust enforcement in the Economic and Social Council of the United Nations. *See generally* Ioannis Lianos, *The Contribution of the United Nations to the Emergence of Global Antitrust Law*, 15 TUL. J. INT'L & COMP. L. 415 (2007) (noting that the US "withdrew its support").

practical value of the development of international antitrust standards.[136] Many scholars recognize, however, that the existing diffuse approach to antitrust is out of step with a globalized business world.[137] As Anu Bradford's work has illuminated, the lack of coherence among global enforcement authorities "increases transaction costs, causes delays, and raises the likelihood of conflicting decisions."[138] Despite these tensions, proposals for so-called "international antitrust" have failed to gain much traction.

In place of international antitrust there are many bilateral (or multilateral) agreements between antitrust authorities.[139] The EU and the US have forged numerous bilateral agreements, despite important differences between their respective domestic antitrust regimes. Most notably, the EU has always had an antitrust policy that considers social impacts.[140] On the other hand, the US traditionally does not consider social factors in antitrust enforcement; though in recent decades, commentators have observed a slow, but steady, convergence of EU and US antitrust law.[141] But while the EU is adjusting its antitrust enforcement to account for climate cooperation measures, the US is largely ignoring the tension between climate cooperation and competition law. As this Article argues,

[136] *See*, *e.g.*, COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 1 (Richard A. Epstein & Michael S. Greve eds., 2004) (highlighting several issues with antitrust enforcement in the "international arena"); MAHER M. DABBAH, THE INTERNATIONALISATION OF ANTITRUST POLICY 4 (2003) ("[A]ntitrust communities . . . have been seeking ways to 'internationalise' antitrust policy."); Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1548 (1998) (" International agreements on antitrust policy will continue to be difficult-and may be impossible-to reach because not all countries will benefit from such agreements."); Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478, 478 (2000) ("Over the last several years, a chorus of voices have called for international action in the area of competition policy.").

[137] *See, e.g.*, Anu Bradford, *Antitrust Law in Global Markets*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF ANTITRUST LAW 283, 295 (Einer Elhauge ed., 2012) ("Decentralized antitrust enforcement increases transaction costs, causes delays, and raises the likelihood of conflicting decisions." (internal citations omitted)).

[138] *Id.*

[139] *International Cooperation Agreements*, FED. TRADE COMM'N, https://www.ftc.gov/policy/international/international-cooperation-agreements [https://perma.cc/76X2-T49M] ("FTC has formal and informal bilateral and multilateral international arrangements, agreements, and MOUs with competition and consumer protection agencies around the world.").

[140] Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 4-5 (1997).

[141] *See* Bradford, *supra* note 137, at 291 ("[I]ncreasing convergence is taking place between the two key antitrust jurisdictions.").

the US approach is placing ICAs collaborative efforts to mitigate climate change under threat.

The EU and European Commission have historically taken certain environmental concerns, such as energy efficiency, into account in their antitrust analysis.[142] For example, in 1999, the Commission permitted manufacturers of washing machines to agree on mandatory energy standards, even though the agreement would lead to increased prices.[143] The Commission reasoned that the individual energy savings to consumers, or "individual economic benefits" offset the competitive harm.[144] Then, in late 2019, the Commission initiated a public debate to address how antitrust laws hampered efforts to meet the European Green Deal.[145] The Commission has updated its guidelines, effective in July 2023, to exempt certain sustainability-focused agreements if the agreements result in a "collective benefit" to society.[146]

Individual countries within the EU are moving in a similar direction. In 2021, Austria became the first country to enact a "green antitrust provision," exempting sustainability agreements from antitrust enforcement.[147] Likewise, on January 25, 2022, the United Kingdom's ("UK's") Competition and Markets Authority ("CMA") announced that certain collective efforts on climate change will fall under the UK's "fair share" antitrust exemption.[148] Crucially, the chief executive of the CMA

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142 *See e.g.*, Simon Holmes, *Climate Change, Sustainability, and Competition Law*, 8 J. ANTITRUST ENF'T 354, 355 (2020) ("The 'constitutional' provisions of the EU Treaties require sustainability and environmental protection to be taken into account when implementing 'all' of the EU's policies and activities.").

143 European Commission Press Release IP/00/148, Commission Approves an Agreement to Improve Energy Efficiency of Washing Machines (Feb. 11, 2000), https://ec.europa.eu/commission/presscorner/detail/en/IP_00_148 [https://perma.cc/LY7M-9MML].

144 Commission Decision 2000/475, 1999 O.J. (L 187) 47, 52 (EC).

145 *See* Miazad, *supra* note 13, at 1645.

146 2022 O.J. (C 164) 115. For an analysis of the European Commission's updated guidelines and the recognition of "collective benefit", see Ted Hassi, Erica Weisgerber, Timothy McIver, Michael Schaper & Ulysses Smith, *Debevoise & Plimpton Discusses ESG and Antitrust*, CLS BLUE SKY BLOG (Mar. 8, 2023), https://clsbluesky.law.columbia.edu/2023/03/08/debevoise-plimpton-discusses-esg-and-antitrust/ [https://perma.cc/5BUN-GYP7].

147 Viktoria H.S.E. Robertson, *Sustainability: A World-First Green Exemption in Austrian Competition Law*, 13 J. EUR. COMPETITION L. & PRAC. 426, 426 (2022).

148 *UK Competition Watchdog to Ease Rules on Climate Change*, COMPETITION POL'Y INT'L (Jan. 24, 2023), https://www.competitionpolicyinternational.com/uk-competition-watchdog-to-ease-rules-on-climate-change/ [https://perma.cc/72L9-QKGL]. Likewise, the Dutch Authority for Consumers and Markets ("ACM") recently clarified that, in the

emphasized the need for collaborative engagement among "insurers and asset managers … to work together on initiatives that would combat or mitigate climate change."[149] The Dutch Authority for Consumers and Markets ("ACM") has also been a leader in aligning sustainability with antitrust.[150]

The US, on the other hand, is a clear outlier. Perhaps this is unsurprising — the US has also lagged far behind Europe with respect to mandatory ESG legislation and disclosure regulation more broadly.[151] But the US's refusal to weigh in on antitrust and sustainability, as opposed to ESG matters more broadly, has potentially disastrous consequences. To understand why, it is important to appreciate that antitrust regulation is

antitrust analysis of certain "environmental-damage agreements," consideration of social benefits is warranted. Peter Citron, *Recent Guidance on Sustainability Cooperation from the Dutch Competition Authority*, WHITE & CASE (Nov. 1, 2022), https://www.whitecase.com/insight-alert/recent-guidance-sustainability-cooperation-dutch-competition-authority [https://perma.cc/473D-3GH5] (noting examples of allowed collaboration for Dutch companies, such as allowing garden stores to cooperate on pesticide standards). For instance, the ACM approved an agreement between grid operators to work together to reduce carbon emissions, even though the agreement included a higher fixed price on carbon. *ACM Favors Collaborations Between Businesses Promoting Sustainability in the Energy Sector*, AUTH. FOR CONSUMERS & MKTS. (Feb. 28, 2022), https://www.acm.nl/en/publications/acm-favors-collaborations-between-businesses-promoting-sustainability-energy-sector [https://perma.cc/T52X-9ERM]. Similarly, the German Competition Authority approved an agreement among milk producers to improve animal welfare conditions, irrespective of the agreement's effect on milk prices. Janith Aranze, *German Enforcer Approves Milk Price Increases on Sustainability Grounds*, GLOB. COMPETITION REV. (Mar. 29, 2022), https://globalcompetitionreview.com/article/german-enforcer-approves-milk-price-increases-sustainability-grounds [https://perma.cc/TU2E-E3JQ].

149 Kate Beioley & Camilla Hodgson, *UK Competition Watchdog to Ease Rules on Climate Change Action*, FIN. TIMES (Jan. 24, 2023), https://www.ft.com/content/6513ae6f-2347-409c-9be1-eee673d9447f [https://perma.cc/5RKM-V285].

150 Citron, *supra* note 148 ("The Dutch Authority for Consumers and Markets ("ACM") is currently one of the leading competition authorities in Europe taking a flexible approach to the application of competition law to sustainability initiatives."). In January of 2023, Japan's Fair Trade Commission published revised draft guidelines on sustainability commitments to provide assurance to competitor collaborations addressing climate change. Toko Sekiguchi, *Japan's New Antitrust Guidelines on Environmental Sustainability Address Collective Action, Vertical Collaborations and M&As*, MLEX (Jan. 13, 2023), https://mlexmarketinsight.com/news/insight/japan-s-new-antitrust-guidelines-on-environmental-sustainability-address-collective-action-vertical [https://perma.cc/MRE9-BBK5].

151 Addisu Lashitew, *The Risks of US-EU Divergence on Corporate Sustainability Disclosure*, BROOKINGS INST. (Sept. 28, 2021), https://www.brookings.edu/blog/future-development/2021/09/28/the-risks-of-us-eu-divergence-on-corporate-sustainability-disclosure/ [https://perma.cc/8MGW-WGXB].

applied extraterritorially — therefore, "antitrust differs from many other areas of law subject to jurisdictional competition in that the strictest regime governs firms' conduct in global markets."[152] This is reflected in the EU's antitrust efforts against the US technology companies for sharing data, for example. As Bradford has argued, "competition law offers one of the most prominent examples of the EU's global regulatory hegemony."[153] But if the US's enforcement of climate collaborations is stricter than the EU's, companies and investors could be inclined to collaborate less, adhering to the US's stricter standards. This will thwart multinational companies from entering climate collaborations in general, but it is magnified in the context of investor climate alliances.[154]

Given their size and market power, ICAs give rise to valid antitrust fears, as well as legitimacy and accountability concerns. How can we verify that, under the guise of systematic climate risk reduction, ICAs will not engage in conduct that benefits financial firms at the expense of consumers? The inquiry cannot end there. Given their ability to aid governments in meeting their obligations under the Paris Agreement, global antitrust authorities must consider how to facilitate the evolution of ICAs in a way that is consistent with competition policy.

As Part II explored, ICAs are more transparent and accountable than purely private industry alliances. Still, ICAs are new, and their governance attributes are rudimentary. They can, as designed, operate within the bounds of current antitrust law, both in the US and globally. However, antitrust law as it stands today curtails their impact on systematic climate change risk, which increasingly requires collaborations that may be, or in fact are, "out of bounds" for antitrust. Predicting when these situations arise is difficult to do *ex ante*, which means that fear of antitrust enforcement is likely to prevent ICAs from achieving their full potential.

Rather than ignoring this impasse, global antitrust authorities should jointly innovate ways to align ICAs with a coherent global antitrust policy. More specifically, this Article argues that ICAs require active monitoring by a forum of global antitrust enforcement authorities. This "Global Investor Climate Alliances Monitoring Forum" should be limited to

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[152] Bradford, *supra* note 137, at 310.

[153] Anu Bradford, The Brussels Effect: How the European Union Rules the World 99 (2020).

[154] *See* Bradford, *supra* note 137, at 311 ("The only possible race in antitrust enforcement is therefore the race to be the strictest jurisdiction among the states seeking to assert their norms globally, given that all other jurisdictions yield to the most aggressive regulator in case of a conflict.").

investor alliances, and not sustainability and competition concerns more broadly. By keeping the focus on ICAs, the global antitrust community can start to develop the tools for measuring when competitor collaboration can be procompetitive at a portfolio-wide level. Prescribing a precise structure for this monitoring forum is beyond the scope of this Article. As a starting point, though, the International Competition Network ("ICN") should convene a discussion.[155]

As discussed, the response to international antitrust has historically been tepid, but there are parallels to an external monitor in other transnational governance regimes. For example, World Trade Organization ("WTO") members routinely issue Trade Review Policies, which provide an assessment of how WTO members are implementing agreements. And the World Intellectual Property Organization ("WIPO") includes an Independent Advisory Oversight Committee that provides oversight and monitoring of WIPO's operations. In fact, antitrust enforcement authorities are rather unique in their reliance on private self-assessments as opposed to external monitors. The cost of robust monitoring is admittedly high, providing a constraint on state-enforced monitoring of private-sector initiatives. Thus, antitrust enforcement agencies opt for self-assessments, effectively shifting the monitoring costs onto the private sector. Reliance on private sector actors to monitor their own conduct comes at a cost: the risk of abuse causes authorities to limit the scope of competitor collaboration. To address this shortcoming, this Article proposes that, like WIPO's "self-funded" model, the individual members of the ICAs should provide the funding for the monitoring forum. However, unlike self-monitoring, this external monitoring forum would be conducted by external experts selected by the participating antitrust enforcement agencies.

This proposal draws obvious inspiration from Eleanor Fox's conception of a World Competition Forum.[156] While Fox conceded that a stand-alone global antitrust forum would be normatively desirable but practically infeasible, a monitoring body for the narrow purpose of monitoring ICAs is a more modest aim, and wholly within reach. Moreover, unlike Fox's

[155] The ICN is an informal network of antitrust agencies that "seeks to enhance policy convergence, reduce transaction costs, and catalyze domestic reforms on a voluntary basis." *Id.* at 316.

[156] *See, e.g.*, Eleanor M. Fox, *Competition Law and the Millennium Round*, 2 J. INT'L ECON. L. 665, 675 (1999) (providing details about the "free standing World Competition Forum"); Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911, 925-26 (2003) (discussing the practical challenges to a standalone global antitrust forum).

stand-alone proposal, the monitoring forum could be housed within another international agency, such as the OECD. Indeed, the OECD Competition Committee has been actively debating the tensions between sustainability and competition and could serve as venue for housing the monitoring forum.[157]

CONCLUSION

Investor Climate Alliances provide a necessary forum for public and private actors to address the climate crisis. Yet, growing threats of antitrust enforcement are thwarting the promise of ICAs when we need more urgent action than ever. The promise of ICAs requires antitrust scholars, policymakers, and enforcement agencies to sharpen their existing tools. This Article begins the task, and invites more policy and scholarly focus on antitrust and collaborative climate governance.

157 *See, e.g.*, *High-Level Symposium on Pro-Competitive Policies for a Sustainable Economy*, OECD (Jan. 23, 2023), https://www.oecd.org/daf/competition/high-level-symposium-on-procompetitive-policies-for-a-sustainable-economic-recovery.htm [https://perma.cc/2T9Z-LG93]. This is also consistent with a number of scholars who have argued that the OECD should play a more active role in international antitrust. *See, e.g.*, Tarullo, *supra* note 137 ("The European Commission proposes that the member states of the World Trade Organization (WTO) negotiate a binding competition code.").