

# Legal Readiness to Attract Climate Finance: Towards a Low-Carbon Asia and the Pacific

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*The Parties to the Paris Agreement have made ambitious commitments to combat climate change - both in terms of greenhouse gas emissions and climate resilience targets as well as financial targets. In their Nationally Determined Contributions, most developing countries have made their commitments conditional on receiving international financial support. Developed countries and international organisations, in turn, have responded by offering various types of capacity development support. However, not enough attention has been paid to assessing the legal frameworks of the developing countries to identify legal barriers and opportunities for legal modernisation to optimise options for climate finance to fund their Nationally Determined Contributions. This article highlights some of these legal barriers and showcases examples from the Lao People's Democratic Republic<sup>1</sup> and the Republic of Fiji where the countries have embarked on legal modernisation.*

## I. Introduction

The urgency of legal reforms to support the low carbon transition is greatest in Asia and the Pacific where climate change has affected virtually every aspect of people's lives. Major shifts in economy, society and government are necessary for this transition and countries are decoding what should be the 'right' economic and societal models. In the Asia and Pacific region, 300 million people still live on less than USD 1.90 a day and are highly vulnerable to economic and environmental shocks, including natural disasters.<sup>2</sup> The poorest population is always disproportionately affected by such shocks and therefore, climate change and its impacts will also lead to less inclusive economic growth. It will be difficult to reduce

poverty and improve the living conditions and quality of life of people in the region without sustained efforts to mitigate and adapt to climate change impacts.<sup>3</sup>

At the 21st Conference of Parties (COP 21) to the United Nations Framework Convention on Climate Change (UNFCCC) convened in December 2015 in Paris, the parties adopted a bottom-up process of having each participating country set their own high-level policy plan to achieve emission reduction and adaptation measures through the Nationally Determined Contributions (NDCs). These NDCs offer some early indications of the countries' priorities and commitments towards low carbon development. However, it is already evident that without significant financial support from international public and private en-

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- 1 ADB recognises 'Laos' as the Lao People's Democratic Republic.
- 2 ADB, 'Key Indicators for Asia and the Pacific' (2016) <<https://www.adb.org/publications/key-indicators-asia-and-pacific-2016>> accessed 3 December 2017.
- 3 ADB, 'A Region at Risk: The Human Dimensions of Climate Change in Asia and the Pacific' (2017) <<https://www.adb.org/sites/default/files/publication/325251/region-risk-climate-change.pdf>> accessed 17 December 2017.

tities, most developing countries will not be able to achieve the conditional pledges included in their NDCs.

A robust and transparent legal system is key to attracting both public international and private funds. Nevertheless, the legal systems of many developing countries are not aligned with the needs and requirements of the providers of climate finance. As such, they do not facilitate financial flows in support of climate change activities. A timely legal modernisation is critical to ensuring that each developing country optimises its options and takes advantage of emerging products and funding sources to finance its NDC commitments. An analysis of different legal pathways may be helpful in determining possible trade-offs between different approaches and develop an optimal set of legal and regulatory reforms given the unique country context of each country. In light of this, the Office of the General Counsel of the Asian Development Bank (ADB) under its Law and Policy Reform Program<sup>4</sup> provides a technical assistance to its developing member countries to identify the legal barriers to accessing climate finance, find opportunities for legal reform to address those legal barriers, and identify and recommend ways to address interlinked regulatory, institutional and administrative impediments to climate finance.

4 ADB, 'Law and Policy Reform' (2017) <<https://www.adb.org/publications/law-and-policy-reform-program>> accessed 15 December 2017.

5 Unless the context provides otherwise, the term 'climate finance' as used in this article refers to the financial resources mobilised for climate change adaptation and mitigation activities, and may include both domestic and international funding sources from private and public funds.

6 Climate Policy Initiative, 'The Global Landscape of Climate Finance 2017' (2017) <<https://climatepolicyinitiative.org/wp-content/uploads/2017/10/2017-Global-Landscape-of-Climate-Finance.pdf>> accessed 10 December 2017.

7 *ibid.*

8 Decision 1/CP.21, FCCC/CP/2015/10/Add.1 para 53.

9 Green Climate Fund, 'Status of Pledges and Contributions made to the Green Climate Fund' (November 2017) <[https://www.greenclimate.fund/documents/20182/24868/Status\\_of\\_Pledges.pdf/eef538d3-2987-4659-8c7c-5566ed6afd19](https://www.greenclimate.fund/documents/20182/24868/Status_of_Pledges.pdf/eef538d3-2987-4659-8c7c-5566ed6afd19)> accessed 18 December 2017.

10 ADB, '2016 Joint Report on Multilateral Development Banks' Climate Finance' (2017) <<https://publications.iadb.org/handle/11319/8505>> accessed 1 December 2017.

11 *ibid.*

12 *ibid.*

13 *ibid.*

## II. Public and Private Sources of Climate Finance<sup>5</sup>

### 1. International Commitment on Climate Finance

The global landscape of climate finance is rapidly changing. According to Climate Policy Initiative's 2017 edition of the *Global Landscape of Climate Finance*, climate finance flows from private and public sectors reached its peak in 2015 with USD 437 billion, but has dropped to approximately USD 383 billion in 2016.<sup>6</sup> These numbers reflect the comprehensive global fund flow for climate change activities that include government budgets of both developing and developed countries, bilateral and multilateral aid agencies, and significant contribution from private actors such as commercial financial institutions and private project developers.<sup>7</sup> To ensure adequate funds flow from the developing countries to developed countries, at COP 21, the parties agreed that USD 100 billion per year would be the 'floor' for climate finance that developed countries will provide annually to developing countries post-2025.<sup>8</sup> In line with this goal, donor countries and the multilateral development banks (MDBs) have announced their ambitious commitments to expand their support for climate finance activities. For example, United Kingdom, Japan, Germany and France have each pledged more than USD one billion to the Green Climate Fund (GCF).<sup>9</sup> Collectively in 2016, the MDBs committed USD 27,441 million for climate finance, of which USD 21,217 million is dedicated to mitigation efforts and USD 6,224 million is earmarked for adaptation finance.<sup>10</sup> To avoid double counting, the mitigation finance and adaptation finance correspond to the financing of mitigation or adaptation projects or of those components, sub-components, or elements or proportions of projects that provide mitigation or adaptation benefits, respectively.<sup>11</sup> Of the total amount committed, MDB's own account constituted USD 25,482 million while the external resources channelled through the MDBs was USD 1,959 million. External resources include trust funded operations, such as those funded by bilateral agencies, climate-related funds under the Global Environment Facility (GEF) and those that MDBs manage.<sup>12</sup> 73% of these MDB commitments were made in the form of investment loans, followed by 9% in budgetary support to the developing countries, with some (4% or less each) grants, line of credit, guarantee and equity.<sup>13</sup>

There are a number of channels through which public international climate finance flows into a developing country, including multilateral climate funds and specialised bilateral climate finance initiatives set up by donor countries. The bilateral climate finance initiatives include, for example, International Climate Fund (UK), International Climate Initiative (Germany), NAMA Facility (UK and Germany) and Global Climate Partnership Fund (Germany, UK and Denmark). The GCF, GEF, and the GEF-administered Least Developed Countries Fund (LDCF) and Special Climate Change Fund (SCCF) are identified as the instruments to serve the Paris Agreement.<sup>14</sup> During the recent 23<sup>rd</sup> Conference of Parties in Bonn (COP23), the parties discussed whether the Adaptation Fund should serve the Paris Agreement exclusively. A decision will be taken by November 2019.<sup>15</sup>

In addition, non-state actors are making ambitious financial commitments. At COP 22 for example, the ‘Marrakech Investment Committee for Adaptation Fund’ was launched, the first ever private adaptation and resilience investment vehicle comprising of a USD 500 million fund launched in partnership with the GEF, the Lightsmith Group and BeyACapital. Through the ‘We Mean Business’ coalition, 646 companies have made USD 15.6 trillion in market capitalisation commitments as of 2017.<sup>16</sup>

## 2. Asian Development Bank’s Commitment to Tackling Climate Change

ADB’s corporate policy highlights the importance of supporting actions on climate change mitigation and adaptation and disaster risk management in its developing member countries (DMCs), include facilitating access to global and regional funds.<sup>17</sup> In line with this, ADB has mainstreamed climate change considerations and risks into its operations since 2010. In 2016, President Takehiko Nakao of ADB announced ADB’s commitment to doubling its annual climate financing from its own resources to USD 6 billion dollars by 2020, comprising USD 4 billion for climate change mitigation and USD 2 billion for adaptation activities.<sup>18</sup> ADB has developed the Climate Change Operational Framework 2017<sup>19</sup> to provide broad direction and guidance across all ADB sector and thematic groups to enhance resilience and strengthen climate actions in ADB’s operations and business

processes, and to operationalize ADB’s financial commitment. ADB is currently developing Strategy 2030, the next long-term corporate strategy for period up to 2030 which will position ADB to meet the emerging needs of its DMCs by supporting inclusive and resilient growth. ADB has provided more than 30 technical assistants on climate change actions to support policy and institutional development and knowledge and capacity strengthening to ensure the effectiveness and sustainability of climate investments.

## III. Legal Challenges to Accessing Climate Finance

### 1. Barriers that Developing Countries Face in Accessing Climate Finance

Many NDCs clearly acknowledge that adequate access to financing is key to achieving the emission targets and climate resilient development. Yet, many developing countries do not have concrete pathways to unlocking and tapping into international public and private climate finance. For successful NDC implementation, climate finance readiness, or ‘the capacities of countries to plan, access, deliver, monitor and report on climate finance, both international and domestic, in ways that are catalytic and fully integrated with national development priorities and the achievement of the [Sustainable Development Goals] must be high.’<sup>20</sup> Some of the capacity chal-

14 Decision 1/CP.21, FCCC/CP/2015/10/Add.1 para 58.

15 Decision -/CMP.13 (advanced unedited version), para 12 and 13 <[http://unfccc.int/files/meetings/bonn\\_nov\\_2017/application/pdf/cmp13\\_auv\\_afb.pdf](http://unfccc.int/files/meetings/bonn_nov_2017/application/pdf/cmp13_auv_afb.pdf)> accessed 18 December 2017.

16 ‘We Mean Business’ <<https://www.wemeanbusinesscoalition.org/>> accessed 5 December 2017.

17 ADB, ‘Strategy 2020: The Long-Term Strategic Framework of the Asian Development Bank 2008-2020’ (2008); ADB, ‘Midterm Review of Strategy 2020: Meeting the Challenges of a Transforming Asia and Pacific’ (2014).

18 ADB, ‘ADB to Double Annual Climate Financing to \$6 Billion for Asia-Pacific by 2020’ (25 September 2015) <<https://www.adb.org/news/adb-double-annual-climate-financing-6-billion-asia-pacific-2020>> accessed 19 December 2017. <<https://www.adb.org/news/adb-double-annual-climate-financing-6-billion-asia-pacific-2020>> accessed 19 December 2017.

19 ADB, ‘Climate Change Operational Framework 2017-2030: Enhanced Actions for Low Greenhouse Gas Emissions and Climate Resilient Development’ (2017)

20 UNDP, ‘Readiness for Climate Finance: A framework for understanding what it means to be ready to use climate finance’ (2012) <<https://www.uncclearn.org/sites/default/files/inventory/undp122.pdf>> accessed 18 December 2017.

allenges faced by the developing countries include: (i) inadequate legal and regulatory framework and limited enforcement capacity; (ii) weak organisational capacity, leadership and governance; (iii) weak research capacity and lack of access to systematic climate data; (iv) delays in budgetary prioritisation for climate actions; (v) limited capacity to identify, develop and process climate change projects and programs; (vi) a lack of access to expertise and international good practice for climate change mitigation and adaptation; and (vii) lengthy technical and administrative processes involved in issuing permits and licenses for climate change activities.

Understanding the legal readiness in the developing countries to access climate finance is critical because ability to attract public or private investments to implement NDCs is directly linked to the strength of enabling an environment based on predictable, transparent and enforceable legal and regulatory framework of the country. If the legal and regulatory systems of a country are unclear, overlapping, contradictory, show gaps or create unintended barriers, and/or provide limited enforcement ability or remedial actions, such country is less likely to attract the necessary climate finance to implement the NDCs.<sup>21</sup> In such cases, legal and regulatory reform can fundamentally shift the pathway for investment in the country towards low carbon development and climate resilience by creating a favourable environment to increase access to climate finance.

An example of a legal barrier is a reliance on existing fund channelling mechanisms that may not be well-aligned or suitable for receiving funding from emerging climate financing sources. This is particularly relevant in those Least Developed Countries

that do not yet have the capacity to access public international funds on their own and rely exclusively on the development partners to access funds on their behalf. Agencies such as the United Nations Development Programme (UNDP) and the German Institute for International Cooperation (*Deutsche Gesellschaft für Internationale Zusammenarbeit*) (GIZ) have capacity development programs to help developing countries set up an appropriate legal entity that satisfy legal, financial management and other criteria, to directly access public international funds. Indonesia is a good example of a country that saw the need to adjust the institutional set up based on the changing climate finance market. There, a national climate change trust fund was originally set up by the national government with UNDP acting as an interim trustee to channel funds from bilateral donors,<sup>22</sup> but with the intent to eventually channel funds for all climate change related activities in the country. In recent years, the trust fund has undergone institutional capacity development and legal fine tuning to enhance its readiness for full accreditation as a national implementing entity to directly access GCF.<sup>23</sup>

Another example of a legal barrier is a misalignment between the country's emission reduction commitments and the existing legal and regulatory scheme or its policies. For instance, a developing country may have indicated in its NDC that much of its emission reduction would come from the energy sector; however, its policy and legal framework may continue to give preferential treatment to grid-based energy or subsidies and incentives for fossil-fuel over decentralised energy and renewable energy or have insufficient carbon pricing or low incentives for low-carbon technologies. There could also be regulatory barriers to international investment in low-carbon technologies or projects such as limits on foreign ownership, restricted access to land, or local content requirements in procurement and trade barriers that restrict low-carbon goods and services from coming into the country.<sup>24</sup> Further, the current wholesale market structure supported by the legal and regulatory framework prevalent in many countries does not provide the right incentives for decarbonisation or investments in high capital costs of low-carbon technologies. A de-carbon supportive regulatory framework, for example, would be a framework that allows an efficient competition in investment on the basis of full generation costs, including the cost of

21 UNDP, 'The Role of Legal Instruments to Support Green Low-Emission and Climate-Resilient Development' (2013) <[http://www.undp.org/content/dam/undp/library/Environment%20and%20Energy/Climate%20Strategies/LECRDS\\_Legal\\_Guide.pdf](http://www.undp.org/content/dam/undp/library/Environment%20and%20Energy/Climate%20Strategies/LECRDS_Legal_Guide.pdf)> accessed 18 December 2017.

22 Original contribution to the Indonesia Climate Change Trust Fund came from United Nations Development Programme, United Kingdom, Australia, and Sweden. UNDP, 'Project Document Preparatory Arrangements for the Indonesia Climate Change Trust Fund' (2009) <[http://www.id.undp.org/content/indonesia/id/home/operations/projects/environment\\_and\\_energy/preparatory-arrangements-for-the-indonesia-climate-change-trust-1.html](http://www.id.undp.org/content/indonesia/id/home/operations/projects/environment_and_energy/preparatory-arrangements-for-the-indonesia-climate-change-trust-1.html)> accessed 17 December 2017.

23 Indonesia Climate Change Trust Fund Governance <<https://www.icctf.or.id/>> accessed 17 December 2017.

24 OECD, 'Aligning Policies for a Low-Carbon Economy' (2015) <<https://www.oecd.org/environment/Aligning-Policies-for-a-Low-carbon-Economy.pdf>> accessed 18 December 2017.

greenhouse gas emissions and other externalities.<sup>25</sup> Unless there is a conscious shift in thinking towards low carbon development among the law makers and enforcers, these existing legal and regulatory schemes will continue to widen the gap between the emission reduction commitments and the NDC achievements.

In the context of adaptation, legal barriers could be a result of competing public interest. For example, in many countries, there are constitutional or general legal rights to compensation for 'taking' or diminution in the productive uses or value of the property. These are fundamental rights that people have to their property. However, these types of compensable property rights can hinder or discourage governments from enacting new laws and regulations that restrict development or limit activities in ecologically sensitive areas or hazardous locations.<sup>26</sup> Without the explicit legal obligations to consider adaptation needs, such considerations would likely be overlooked by the governments and the developers and investors alike when they design or implement projects. Further, climate finance for adaptation does not typically cover compensatory payments, which means that to give due consideration to adaptation needs, project proponents would likely need to find additional sources of funds to cover such payments. Another example of legal barrier is privacy law that purports to protect personal data. Such privacy law could hinder the collection of personal information including demographics, which is critical in developing early warning systems.<sup>27</sup> Lack of early warning systems or difficulties in obtaining data for such systems, would in turn, hinder flow of climate finance for adaptation.

## 2. Legal Requirements for Accessing Public International Funds

Today, access to most public international climate funds, particularly those specified under the Paris Agreement, such as the GCF, GEF and Adaptation Fund, require the support of UN agencies or MDBs. This is because only the accredited entities (AEs) or accredited national implementing entities (NIEs) can access the funds under the legal framework of these funds. While most UN agencies and MDBs have been accredited under these funds, only a limited number of developing countries have their own accredited

national, regional and/or sub-national implementing entities to directly access these funds. This means that the developing countries, in part, need to rely on the capacity of their development partners to help prepare project proposals and access financing. Prior to receiving funds, legal arrangements between the funding sources and the AEs/NIEs also need to be formalized, and this requires additional time but potential delays due to such formality is beyond the control of receiving countries.

It is also noted that the nature and mandate of the AEs or NIEs may have significant impact on the type and scale of funded projects in the developing countries. For example, many MDBs are experienced in using credit-based instruments, such as loans, to invest in large scale hard infrastructures with low transaction costs, but may have focused less on investing in a large number of grant-based small decentralized projects.<sup>28</sup> Moreover, with the international communities focusing on large scale emission reductions, climate finance tends to favour the large scale projects with significant carbon emission savings and abatement instead of pro-poor small scale projects with soft components. The institutional preferences of AEs and NIEs could, in fact, serve as a legal barrier for certain developing countries to access climate finance for non-traditional projects such as coastal management or decentralised small-scale electrification projects or capacity development for climate change mitigation and adaptation. Developing countries could counter these institutional preferences by (i) strengthening the national and local enabling environment by legally mandating one entity with robust financial management to be responsible for climate finance, (ii) creating efficient and effective fund flow mechanism to those investments that are traditionally not prioritized by the UN agencies or MDBs including projects at localised level, and (iii) reducing the transaction costs associated with smaller or rural projects by reducing the time required or simplifying the permits and licensing schemes.

25 *ibid.*

26 J McDonald 'The Role of Law in Adapting to Climate Change' (2011) *Wiley Interdisciplinary Reviews: Climate Change* 2, 287.

27 *ibid.*

28 N Rai, S Best and M Soanes 'Unlocking Climate Finance for Decentralized Energy Access' (2016) <<http://pubs.iied.org/pdfs/16621IIED.pdf>> accessed 19 December 2017.

### 3. Developing Countries' Efforts to Mitigate Legal Barriers to Accessing Climate Finance

NDCs are preliminary indications of the countries' low carbon and climate resilient pathways and some NDCs have already identified the legal reforms needed to implement the NDCs. With the Paris Agreement and NDC commitments, it is likely that countries will need to either pass new laws or adjust their existing laws to ensure that climate change considerations are fully incorporated into the applicable legal and regulatory framework for effective NDC implementation. Laws and regulations set out the rights and the obligations of parties involved, and provides the architecture for effectively regulating behaviours and activities, but if these laws and regulations are not climate change sensitive, they could also inadvertently become barriers to accessing climate finance. Conversely, laws and regulations that have been carefully considered and enacted based on comprehensive assessment, analysis and consultations, can enable access to climate finance and investments to realize NDC targets. Given the uniqueness of each country, some developing countries have first worked on adjusting the overall legal framework for climate change; while others have focused on specific gaps in their legal system that hinder flow of climate finance into the country, or directing the received funds towards carbon intense sectors such as transport or energy or towards vulnerable sectors such as agriculture and coastal management.

ADB's Office of the General Counsel provides technical assistance to review the legal frameworks of selected DMCs to increase access to international public and private climate finance for the implementation of their NDCs. The following section provides case studies from the Lao People's Democratic Republic (Lao PDR) and the Republic of Fiji (Fiji)—the former is an example of a country that has begun the preparation of a climate change law, and the latter have taken multidisciplinary approaches to combat climate change and identified certain legal gaps in doing so.

#### a. Case Study - Lao People's Democratic Republic

The Lao PDR's 8<sup>th</sup> Five Year National Socio-economic Development Plan (2016-2020) and Vision to 2030<sup>29</sup> set out the country's target to transition from a Least Developed Country to a middle income country by 2030, supported by inclusive and sustainable economic growth while recognizing the need to mainstream environmental considerations including climate change actions into its development plans. Lao PDR ranks amongst the fastest growing economies in the world, with approximately 6.9% a year in Gross Domestic Product (GDP) growth.<sup>30</sup> However, the Lao PDR, being a landlocked country and highly dependent on natural resources for its development, is particularly vulnerable to changing climate patterns. Its biggest economic driver is the agriculture sector, but rain-fed rice cultivation and hydro-power generation are greatly affected by changes in weather patterns. The plains along the Mekong River may face more frequent and severe flooding, while the northern and north-western areas of Lao PDR may experience more droughts due to climate change.

The Lao PDR ratified the UNFCCC in 1995 and the Kyoto Protocol in 2003.<sup>31</sup> Lao PDR submitted its Intended Nationally Determined Contributions (INDC) in September 2015, and became the first ASEAN country to ratify the Paris Agreement in September 2016.<sup>32</sup> As indicated in its INDC, it is critical for the Lao PDR to be able to access, utilise, and account for climate finance to ensure successful implementation of its NDC.<sup>33</sup> In this regard, since 2014, the Lao PDR has been preparing a climate change law (CC Law) to accelerate its legal readiness. The CC Law will provide a framework for climate change adaptation and

29 Ministry of Planning and Investment Lao PDR, '8<sup>th</sup> Five-Year National Socio-Economic Development Plan (2016-2020)' (June 2016) <[http://www.la.one.un.org/images/publications/8th\\_NSEDP\\_2016-2020.pdf](http://www.la.one.un.org/images/publications/8th_NSEDP_2016-2020.pdf)> accessed 19 December 2017.

30 ADB, 'Asian Development Outlook 2017 Update: Sustaining Development Through Public- Private Partnership' (2017) <<https://www.adb.org/publications/asian-development-outlook-2017-update>> accessed 15 December 2017.

31 Ministry of Natural Resources and Environment, Lao PDR, 'The Second National Communication on Climate Change of Lao PDR' (2013) <[http://www.la.undp.org/content/laopdr/en/home/library/environment\\_energy/the-second-national-communication-on-climate-change-submitted-to.html](http://www.la.undp.org/content/laopdr/en/home/library/environment_energy/the-second-national-communication-on-climate-change-submitted-to.html)> accessed 19 December 2017.

32 Ministry of Foreign Affairs, Lao PDR, 'Laos Ratifies Paris Agreement Joining the World's Fight against Climate Change' (2015) <<http://www.mofa.gov.la/index.php/activities/state-leaders/1382-laos-ratifies-paris-agreement-joining-the-world%E2%80%99s-fight-against-climate-change>> accessed 19 December 2017.

33 Lao PDR, 'Intended Nationally Determined Contribution' (September 2015) <<http://www4.unfccc.int/submissions/INDC/Published%20Documents/Laos/1/Lao%20PDR%20INDC.pdf>> accessed 19 December 2017.

mitigation and defines principles and mandates required to combat climate change.

The draft CC Law identifies the Ministry of Natural Resources and Environment as the lead ministry for coordinating the climate change activities, and establishes the reporting line and mandates sharing of climate change data. Clear mandates and delegation of authority to specific entities are crucial especially for climate change coordination which is cross-sectoral in nature and involves many ministries and departments at the national, provincial, district and village levels. The draft CC Law also provides guidance on the roles and responsibilities of the different levels of government agencies, including reporting and monitoring of climate change mitigation and adaptation activities. This type of national law that allows for subnational entities to implement and carry out activities, tailoring to local circumstances will help gain greater participation and ownership from all levels of the government. The CC Law also calls for collaboration and participation by all ministries relevant to climate change mitigation and adaptation, as well as broad public participation by all citizens and businesses in climate change activities in the country.

Another key feature of the draft CC Law is the introduction of a climate change fund, which will channel funds from domestic and international sources for climate change related activities in the country. This is important for a country like the Lao PDR because it currently does not have any national implementing or accredited entity to directly access the Adaptation Fund or GCF, and can only access GEF through international intermediaries. In due course, a fund such as this may be strengthened to become an AE/NIE to permit direct access to public international funds. The draft CC Law has already undergone series of public consultations, and is scheduled to be submitted for consideration by the National Assembly in 2018, and implementing regulations will be promulgated thereafter. This draft CC Law is a major milestone for the Lao PDR, and will likely serve as a model for the Greater Mekong Sub-region and the other developing countries.

## b. Case Study - Republic of Fiji

Fiji's COP23 Presidency has shed light on the acute vulnerability of Fiji and the rest of the South Pacific region to climate change impacts and the rising and disproportionate financial costs faced by these small-

er economies that threaten their development.<sup>34</sup> For example, a recent World Bank vulnerability assessment reports that by 2050, Fiji's annual losses due to extreme weather events could reach 6.5% of GDP because of climate change impacts, with more than 32,000 people forced into hardship every year. It has also highlighted the significant challenges in attracting more climate finance to Fiji and the rest of the South Pacific region due to its small size, geographic remoteness, economic fragility<sup>35</sup> and the complexity of climate financing arrangements. Although this case study focuses on Fiji, the other South Pacific countries face similar issues.

Fiji's climate financing need far exceeds the availability of domestic funds and it must find ways to attract more international public and private climate finance. Under its current NDC, Fiji pledged to generate 100% of its electricity from renewable sources by 2030 and cut overall emissions from its energy sector by 30% by 2030 compared to business-as-usual, *conditional on* receiving external funding amounting to US\$500 million<sup>36</sup> and it is working with the World Resources Institute to review and update its NDC to enhance ambition and include other sectors which will require more international climate finance for its implementation. Moreover, an estimated FJD 9.3 billion or USD 4.5 billion over ten years (almost equivalent to 100% of the country's GDP for one year) is needed to build the resilience and capacity to adapt to climate change based on a recent report issued by the World Bank.<sup>37</sup>

Recognising the importance of clear and adequate legal and governance structure in attracting more international climate finance, the Government of Fiji has been undertaking a comprehensive assessment of its legal and regulatory framework and its institutional and administrative arrangements, to identify the legal and regulatory barriers, as well as opportu-

34 Government of the Republic of Fiji, 'Climate Vulnerability Assessment: Making Fiji Climate Resilient' (October 2017) <<http://documents.worldbank.org/curated/en/163081509454340771/pdf/120756-WP-PUBLIC-nov-9-12p-WB-Report-FA01-SP.pdf>> accessed 15 December 2017.

35 ADB, 'Building Resiliency in the Pacific: How ADB is Addressing Climate Change and Disaster Risks' (2017) <<https://www.adb.org/sites/default/files/publication/372696/building-resiliency-pacific.pdf>> accessed 15 December 2017.

36 Republic of Fiji, 'Intended Nationally Determined Contribution' (October 2015) <[http://www4.unfccc.int/ndcregistry/PublishedDocuments/Fiji%20First/FIJI\\_iNDC\\_Final\\_051115.pdf](http://www4.unfccc.int/ndcregistry/PublishedDocuments/Fiji%20First/FIJI_iNDC_Final_051115.pdf)> accessed 15 December 2017.

37 See (n 33).

nities for reforms.<sup>38</sup> Throughout 2017, stakeholder consultations were held with government ministries, public enterprises, industry groups, the private sector and development partners across a range of sectors of the economy which provided high level insights into the opportunities to create robust enabling environments for enhanced climate action. These consultations were supplemented with desktop review of policy and planning documents related to climate change, low carbon development and specific sectors which contribute to climate change mitigation and adaptation and legislative review and analysis of key acts, regulations, decrees and orders relevant to climate change mitigation and adaptation across key sectors of the economy. Thereafter, detailed assessments and analysis were conducted on the legal and regulatory regimes for the energy and transport sectors based on priorities identified by the Government of Fiji and stakeholders. Although the legal assessment is not yet complete, this case study provides a preview of the legal and regulatory reforms required for Fiji to transition to a low carbon economy.

At the fundamental level, it is critical to assess the general investment climate of Fiji to attract more climate finance. Fiji's 5- and 20-year National Development Plan highlights modernising the business regulatory environment as a strategic 'thrust' for the next five years, with plans to review the policy and regulatory framework.<sup>39</sup> The Government of Fiji is working with the International Finance Corporation on a review of the Investment Policy and related legislation, and has engaged Singapore Cooperation Enterprise to provide technical assistance to improve the ease of doing business. These reforms are intended to enhance the provision of services such as reg-

istration, land-use administration, development control, environmental protection, employment regulations and tax administration through e-government services. Land-use administration will be improved through digitization of the Titles Office and the development of the national land registrar, which will also include better access to accurate geospatial land-use information.<sup>40</sup> Furthermore, with the assistance of ADB, Fiji recently enacted the International Arbitration Act 2017<sup>41</sup> to establish a credible dispute resolution and enforcement regime to attract more foreign direct investment (including international private climate finance) and Personal Properties Securities Act 2017<sup>42</sup> to enable more secured transactions and enable borrowers to secure credit against personal property. Access to international climate finance will be hampered without these and other business reforms to support a better investment climate.

Key sectoral laws and regulations need to be reviewed to identify barriers and opportunities for reform. In the energy sector, the Government of Fiji has set out in its NDC a target approaching 100% of electricity being sourced from renewable energy, however, an assessment of the Electricity Act 2017<sup>43</sup> shows a need for further legislative reform to promote the uptake of renewable energy. Alternatively, a separate renewable energy legislation to facilitate the uptake of renewable energy and technologies can be enacted. There is abundance of renewable energy resources in Fiji and huge potential to increase the renewable energy share of the electricity generation. Yet, legal barriers to investment need to be first addressed to create the enabling environment for renewable energy uptake.

In the transportation sector on the other hand, the assessment revealed no direct legislative barriers, but a clear regulatory framework that recognises and effectively implements standards and incentives is necessary to bolster investment in the sector. Over the years, the Government of Fiji has introduced a number of new standards and tax incentives to encourage reduction of greenhouse gas emission. For example, within the 2017-18 budget, electric and hybrid vehicles incurred zero fiscal and import duties, duties for hybrid vehicle batteries were reduced from 32% to 5% and investment requirements were reduced for electric vehicle charging stations. The new standards and tax incentives require implementing regulations. Furthermore, the transparent implementation, monitoring and enforcement of these regula-

38 COP 23, 'Fiji Legal Roadmap for Climate Finance and Investments' (2017) <<https://cop23.com.fj/events/fiji-legal-roadmap-climate-finance-investments/>> accessed 15 December 2017.

39 Ministry of Economy, Republic of Fiji, '5-Year & 20-Year National Development Plan: Transforming Fiji' (2017) <<http://www.economy.gov.fj/images/NDP/5-Year--20-Year-NATIONAL-DEVELOPMENT-PLAN.pdf>> accessed 15 December 2017.

40 *ibid.*

41 International Arbitration Act 2017 (Act No 44 of 2017) <<http://www.parliament.gov.fj/wp-content/uploads/2017/03/Act-44-International-Arbitration.pdf>> accessed 15 December 2017.

42 Personal Property Securities Bill 2017 (Bill No 38 of 2017) <<http://www.parliament.gov.fj/wp-content/uploads/2017/03/Bill-No.-38-Personal-Property-Securities.pdf>> accessed 15 December 2017.

43 Electricity Act 2017 (Act No 13 of 2017) <<http://www.parliament.gov.fj/wp-content/uploads/2017/03/Act-13-Electricity.pdf>> accessed 15 December 2017.



tions and incentives is essential to boosting investor confidence within the transportation sector.

In early 2018, ADB and its international climate change law and policy experts will discuss the final draft of the legal assessment with the Government of Fiji and conduct stakeholder consultations and validation. The legal assessment can demonstrate how, on the one hand, existing legal and regulatory regimes can hinder climate finance and investments and, on the other hand, carefully crafted laws and the use of regulatory and policy tools, including fiscal incentives, can facilitate transformation to a low carbon economy. The assessment can also show how institutional and administrative barriers that hamper climate investments which, if addressed, could provide for better coordination and management of funds and investment for responding to climate change. In some cases, this may also involve updating institutional mandates and arrangements to ensure clear responsibility for achieving climate change goals and to address inter-agency coordination issues. In such a case, a national climate change law could serve to provide institutional coherence across government ministries and agencies.<sup>44</sup> The result of the legal assessment can be used to develop a legal roadmap to inform the government, policy makers, the private sector, and donor organisations as to the scope and type of assistance needed to realize Fiji's NDC.

#### IV. Conclusion

Legal readiness for climate finance will become increasingly critical as developing countries start to

translate their NDCs into specific actions on the ground. While general capacity development is needed for successful NDC implementation, legal modernisation must also be considered in parallel. Laws and regulations can bring about concrete changes by converting commitments to obligations and rights and can be effective tools to trigger behavioural changes in a systematic and predictable manner, but there needs to be an increased awareness of legal barriers and legal reforms essential to increasing the flow of climate finance into developing countries. The international community, in particular the MDBs as the main intermediaries for public international funds and facilitators for private international finance, can play a greater role in providing legal support to ensure that different combinations of legal tools are employed effectively to help adjust the requesting developing country's legal and regulatory framework to incorporate climate change into consideration. Lao PDR and Fiji are taking different approaches to modernise their legal systems and yet both of their efforts can serve as models for other developing countries. It is clear that an appropriate legal framework that encourages climate finance flow into a country is one key component to ensuring NDC implementation and a zero emission pathway.

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<sup>44</sup> Fiji's NDC Implementation Roadmap (2017-2030) launched at COP23 includes a proposal to develop and enact a Climate Change Act that will provide a legislative foundation to manage climate change risks, maximise the opportunities that arise from decisive action, and drive Fiji's transition to a low carbon, climate resilient community and economy.