

Turning Promises into Action: 'Legal Readiness for Climate Finance' and Implementing the Paris Agreement

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Abstract

A clear imperative in addressing the climate crisis is to turn finance promises into climate action. This article explores this challenge through the lens of the emerging concept of 'legal readiness for climate finance'. It is defined as the degree to which a country has coherent regulatory architecture in place, together with requisite domestic technical expertise and institutional capacity, to systematically attract and mobilise finance at scale to address climate change and its impacts. Legal readiness is relevant for all countries; yet it is especially pressing for developing countries that must mobilise finance for implementation of Nationally Determined Contributions pursuant to the Paris Agreement in the context of sustainable development. By drawing on empirical data and theories of regulation, this article presents pioneering research on the legal and regulatory dimensions of climate finance with particular attention to mobilising private finance. It addresses three core questions: what is legal readiness for climate finance; why should countries pursue it; and how can they retain it in light of political vicissitude? In addressing these questions, this article also explores three key learnings about legal readiness for climate finance for the benefit of decision makers in developing countries: strengthen national law and regulation for 'putting out' as well as 'calling in' climate finance; pursue an integrated regulatory framework to enhance institutional coherence; and seek support from multilateral financial institutions such as the Green Climate Fund for regulatory mapping as well as technical and institutional capacity building (not just project funding). At its heart, this article encourages decision makers to see the challenge of financial implementation of the Paris Agreement as an opportunity for endogenous empowerment.

[p41]

I. Introduction

The heartfelt plea of Ugandan climate justice activist, Vanessa Nakate, echoed throughout the hall where leaders across the real economy had been speaking only minutes earlier:

We are drowning in promises. Commitments will not reduce CO2. Promises will not stop the suffering of people. Pledges will not stop the planet from warming. Only immediate and drastic action will pull us back from the brink of the abyss. The truth is that the atmosphere doesn't care about commitments; only what we put into it or stop putting into it. Humanity will not be saved by promises...¹

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Ms Nakate delivered her message at the 26th Conference of the Parties to the United Nations Framework Convention on Climate Change in 2021, also known as COP26, [p42] without hand wringing or exclamations of grief. Just a clear message that preventing the end of days now requires all the promises and pledges to be made real.

Indeed, the 2021 climate conference in Glasgow produced a plethora of milestone pledges from both state and non-state actor groups on subjects ranging from methane and deforestation to electric vehicles and coal finance.² This article focuses on two promises in particular. First, at the time of COP26 in November 2021, many countries updated their Nationally Determined Contribution (NDC) pledges to become net zero by 2050 such that some experts estimated the post-COP global warming trajectory to be consistent with 2°C and Paris Agreement goals.³ Yet the neon caveat from those experts is that without sufficient financial support and domestic frameworks to help implement long-term and conditional NDC targets, we will be on track for 3°C warming by the end of the century⁴ which would render the planet unliveable.⁵ Hence the importance of the second pledge I wish to highlight. An international consortium of private finance actors under the banner of the Glasgow Finance Alliance for Net Zero (GFANZ), which together supervise US\$130trillion of assets under management, promised to help deliver the multi-trillion dollar funding required for a net zero transition.⁶ It is a world first. Yet the faithfulness of that pledge will be judged on whether those trillions become connected to the first pledge; that is, to what extent money is mobilised for the benefit of developing countries to support NDC implementation and address climate change in the tight timeframe available.

As such, these two public and private pledges are deeply interconnected. The COP26 summit was deemed the ‘Finance COP’ for its explicit focus on discussions about the public and private sector finance needed to implement the Paris Agreement. Indeed, the resulting Glasgow Climate Pact interweaves non-state actors and private finance into the delivery of Paris objectives in terms that

¹ ‘COP26: Racing to a better world’ (*High-Level Climate Champions*, 11 November 2021) <<https://www.youtube.com/watch?v=EISRo5A5d4E>> accessed 5 February 2022.

² Ehsan Masood and Jeff Tollefson, ‘COP26 climate pledges: What scientists think so far’ (*Nature*, 5 November 2021) <<https://www.nature.com/articles/d41586-021-03034-z>> accessed 5 February 2022.

³ See eg, Faith Birol, ‘COP26 climate pledges could help limit global warming to 1.8 °C, but implementing them will be the key’ (*International Energy Agency*, 4 November 2021) <<https://www.iea.org/commentaries/cop26-climate-pledges-could-help-limit-global-warming-to-1-8-c-but-implementing-them-will-be-the-key>> accessed 22 February 2022; also Malte Meinshausen and others, ‘COP26 Briefing paper: Updated warming projections for NDCs, long-term targets and the methane pledge. Making sense of 1.8°C, 1.9°C and 2.7°C’ (*Climate Resource*, 9 November 2021) <https://data.climateresource.com.au/ndc/20211109-ClimateResource-1-9C_to2-7C.pdf> accessed 22 February 2022, 1.

⁴ Meinshausen (n 3) 1 (emphasis added); See also pre-COP UNFCCC Synthesis Report: ‘Nationally Determined Contributions Under the Paris Agreement: revised synthesis report by the secretariat’ (UNFCCC, 25 October 2021) <https://unfccc.int/sites/default/files/resource/cma2021_08r01_E.pdf> accessed 24 February 2022.

⁵ ‘Summary for Policymakers’ (IPCC, 2021) <https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM_final.pdf> accessed 24 February 2022.

⁶ ‘Today’s Top of the COP: Finance goes green and resilient’ (*Climate Champions*, 3 November 2021) <<https://racetozero.unfccc.int/finance-goes-green-and-resilient/>> accessed 22 February 2022; c.f. Owen Walker and Camilla Hodgson ‘Does the maths on Mark Carney’s \$130tn net zero pledge stack up?’ (*Financial Times*, 4 November 2021) <<https://www.ft.com/content/036f6253-ea40-4cde-868a-db8c5f3b245a>> accessed 22 February 2022.

are explicit and unprecedented.⁷ Arguably this is guided by Article 2.1(c) of the Paris Agreement which exhorts parties to make ‘finance flows consistent with a pathway towards low GHG emissions and climate resilient development’.⁸ Whilst there is no internationally accepted definition of ‘climate finance’ as yet,⁹ the United Nations Framework Convention on Climate Change (UNFCCC) Secretariat acknowledges that the notion of ‘finance flows’ must now embrace not only public sources but also private investment and market finance¹⁰ given the scope and scale of the transition required.¹¹ [p43] More broadly, some argue that Article 2.1(c) is a clarion call for *all finance* to become sustainable in a radical move away from business as usual.¹²

A key priority is to ensure that finance for green and resilient investment is flowing at scale to the countries and sectors that most need it. Such investment can offer high returns combined with high impact; yet the risks (perceived and actual) tend to deter private capital.¹³ Thus, turning finance talk into climate action, as so poignantly framed by Ms Nakate, is both necessary and challenging. This is why climate action comprises more than just policy responses; it also includes law and regulation for climate finance. Whilst previous legal research has investigated international avenues of climate finance such as the Green Climate Fund (GCF),¹⁴ market mechanisms under Article 6 of the Paris Agreement,¹⁵ and financial obligations of developed countries under Article

⁷ UNFCCC Glasgow Climate Pact (signed 13 November 2021) Decision -/CP.26, para 14, 28, 40, 54, 55

⁸ UNFCCC Paris Agreement (adopted on 12 December 2015, entered into force 4 November 2016) FCCC/CP/2015/L.9/Rev.1, art 2.1(c). For legal commentary on Art 2.1c and UNFCCC process see: Ralph Bodle and Vicky Noens ‘Climate Finance: Too Much on Detail, Too Little on the Big Picture?’ [2018] CCLR 248; Megan Bowman and Thomas Talyer, ‘Outcome Report: Legal Roundtable on Article 2.1(c) of the Paris Agreement, Co-convened by King’s College London and Aviva Investors on 21 February 2020’ (King’s College London, 2020) <<https://www.kcl.ac.uk/climate-law/assets/kings-aviva-roundtable-outcome-report-300620.pdf>> accessed 22 February 2022; and Stephen Minas ‘The Paris Agreement Goal on Finance Flows’ (Legal Response International, 2021) <<https://legalresponse.org/wp-content/uploads/2021/10/LRI-brief-3-2021-Art.2.1.c.pdf>> accessed 22 February 2022.

⁹ A helpful account of the debate regarding the definition of ‘climate finance’ is in Charles Di Leva, ‘Financing Climate Mitigation and Adaptation’ [2017] CCLR 4, 315-317.

¹⁰ ‘Introduction to Climate Finance’ (UNFCCC) <<https://unfccc.int/topics/climate-finance/the-big-picture/introduction-to-climate-finance>> accessed 22 February 2022.

¹¹ Alina Averchenkova and others ‘Delivering on the \$100 billion climate finance commitment and transforming climate finance’ (UN, 2020) <https://www.un.org/sites/un2.un.org/files/100_billion_climate_finance_report.pdf> accessed 22 February 2022.

¹² Luis H Zamarioli and others, ‘The climate consistency goal and the transformation of global finance’ [2021] Nature Climate Change 578; Megan Bowman, ‘Law and Regulation for Climate Finance: Presenting a Legal Analytical Framework’ in R Smits (ed), *Climate Change and Sustainable Finance: Law and Regulation* (Edward Elgar, forthcoming 2022), available at <http://dx.doi.org/10.2139/ssrn.3952863>

¹³ Mark Carney, ‘Country Platforms Action Plan’ (Bloomberg Professional, 3 November 2021) <<https://assets.bbbhub.io/company/sites/63/2021/11/Country-Platforms-Action-Plan.pdf>> accessed 22 February 2022.

¹⁴ Eg. Joëlle de Sépibus, ‘Green Climate Fund: How Attractive Is It to Donor Countries?’ [2015] CCLR 298; Megan Bowman and Stephen Minas, ‘Resilience through interlinkage: the green climate fund and climate finance governance’ [2018] Climate Policy 342.

¹⁵ Eg. Michael A Mehling ‘Advancing International Cooperation under the Paris Agreement: Issues and Options for Article 6’ (MIT Center for Energy and Environmental Policy Research, November 2021) <<https://ceep.mit.edu/wp-content/uploads/2021/11/2021-016.pdf>> accessed 22 February 2022; David A Wirth and Lisa Benjamin, ‘From Marrakesh to Glasgow: Looking Backward to Move Forward on Emissions Trading’ [2021] Climate Law 245; Gillian Moon and Christoph Schwarte, ‘The Paris Agreement’s Article 6 Market Mechanisms and WTO Law’ [2021] Climate Law 279.

9 of the Paris Agreement,¹⁶ the legal and regulatory dimensions of climate finance at the national level have received much less attention to date. This is surprising given that mobilising climate finance at the necessary scale will require coherent domestic regulatory architecture and implementation. In addition to national policy responses, domestic legal and regulatory reform will be required to set out rights and responsibilities of regulated firms,¹⁷ to create and govern markets, and to steer economic actors and activities via regulatory incentives, penalties, and norm-setting.¹⁸ More specifically, within a very tight timeframe, climate change considerations will need to be fully incorporated into domestic legal and regulatory frameworks for effective NDC implementation.¹⁹

In short, global systemic change will be facilitated not only by macro policy and micro financial transactions, but also through a critical mass of national legal and regulatory frameworks. As such, there is a normative and instrumental need for that law and regulation to be fit for purpose to facilitate flows of climate finance and to help transmute the promises into action. Yet attracting financial investment directly from the private sector, rather than through Multilateral Financial Institutions (MFI)²⁰ channels, is still a work in progress. It is a critical issue which is being considered in various fora²¹ but must only gain traction as we turn talk into action. In particular, it presents challenges for law makers and regulators around the world regarding how best to bring Article 2.1(c) to life.

One thread in this complex and ambitious tapestry is the emerging concept of ‘legal readiness for climate finance’. The term was created in international policy circles and is being developed by practitioners such as the Legal Office of the Asian Development Bank (ADB)²² and [p44] research-impact partnerships such as that between King’s College London and the United Nations Environment Programme (UNEP).²³ It is defined in this article as the degree to which a country has coherent regulatory architecture in place, together with requisite domestic technical expertise

¹⁶ Eg. Alexander Zahar, *Climate Change Finance and International Law* (Routledge 2018); Hao Zhang, ‘Implementing Provisions on Climate Finance Under the Paris Agreement’ [2019] *Climate Law* 21.

¹⁷ Takako Morita and Christina Pak, ‘Legal Readiness to Attract Climate Finance: Towards a Low-Carbon Asia and the Pacific’ [2018] *CCLR* 6.

¹⁸ David Levi-Faur, ‘Regulatory Capitalism’ in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press 2017); Bowman, ‘Law and Regulation for Climate Finance’ (n 12).

¹⁹ Morita and Pak (n 17).

²⁰ This term will be used throughout this article as it encapsulates not only Multilateral Development Banks (MDBs) but also UNFCCC Financial Mechanism operating entities such as the GCF.

²¹ Noting relevant events at the COP26 UK Pavilion in Glasgow on 3 Nov 2021 included ‘Financial Sector Greening: Building Foundations for Sustainable Finance in Developing Countries’ (presented by Financial Sector Deepening Africa FSDA) and ‘Investing for Clean and Inclusive Growth in Emerging Markets’ (presented by CDC Group). Note also the UK PACT (Partnering for Accelerated Climate Transitions) ‘Country Programmes’ at ‘Country Programmes’ (*UK Partnering for Accelerated Climate Transitions*) <<https://www.ukpact.co.uk/country-programmes>> accessed 22 February 2022; and industry-led work in this space such as ‘Consistency case studies: actions supporting Article 2.1c of the Paris Agreement’ (*Climateworks Foundation*, 1 April 2021) <<https://www.climateworks.org/report/consistency-case-studies-actions-supporting-article-2-1c-of-the-paris-agreement/>> accessed 22 February 2022.

²² As detailed in Morita and Pak (n 17).

²³ As detailed in Megan Bowman and Katrien Steenmans, ‘Climate Finance Law: Legal Readiness for Climate Finance, Report and findings of workshop held at King’s College London 9-11 March 2018’ (*King’s College London*, July 2018) <<https://www.kcl.ac.uk/climate-law/assets/kingsunep-climate-finance-law-report-july2018.pdf>> accessed 22 February 2022; and Megan Bowman and Katrien Steenmans, ‘Legal Readiness for Climate Finance: Private Sector Opportunities, Report and Findings of Roundtable held at King’s College London, 25 January 2019’ (*UNEP*, April 2019) <https://wedocs.unep.org/bitstream/handle/20.500.11822/28219/2019law_clim_fin_rprt.pdf?sequence=1&isAllowed=y> accessed on 22 February 2022.

and institutional capacity, to systematically attract and mobilise finance at scale to address climate change and its impacts. Legal readiness is relevant for all nations; yet it is especially important for developing countries with conditional NDC pledges predicated upon receiving international financial support or whose legal systems may not yet sustain engagement with private sector investment.²⁴

This article seeks to explicate and expand current understandings of legal readiness for climate finance. It presents original findings about what it comprises, and the steps along the path to attaining it. The thrust of this article is to encourage developing countries to see the Paris process as an opportunity to drive a ‘homegrown agenda’ for climate finance²⁵ in the context of sustainable development. That is, it makes the novel argument for legal and regulatory design frameworks that not only ‘call in’ external (multilateral) climate-related funding but also ‘put out’ endogenous (domestic) investment opportunities especially for the private sector and thus strengthen country ownership in financial processes for sustainable development.

Specifically, this article shares and explores three key learnings for decision makers in developing countries about legal readiness for climate finance, namely: strengthening national law and regulation for endogenous empowerment; pursuing an integrated regulatory framework for enhanced institutional coherence; and seeking support from MFIs for regulatory mapping and technical capacity building (not just project funding). It then contemplates ways forward through ontological expansion of the legal readiness concept and protection against the loss of it. In so doing, this article makes the case for a pioneering approach to conceiving and communicating the crucial role of national law and regulation to the climate finance endeavour.

II. The Emerging Concept of Legal Readiness for Climate Finance

Legal readiness for climate finance is a relatively new concept and its meaning is evolving. Although the phenomenon of legal readiness has been investigated in other national legal contexts ranging from technological development²⁶ to security and defence capabilities,²⁷ its application and exploration in the context of climate finance is nascent.

It derives from the general concept of ‘readiness for climate finance’, which arose out of international policy discussions leading up to the Paris Agreement. The terms ‘readiness’ and ‘preparedness’ had been used in specific climate contexts, notably forestry and markets,²⁸ during

²⁴ Morita and Pak (n 17); also Bowman and Steenmans, ‘Climate Finance Law’ (n 23).

²⁵ ‘Q&A: A Message to the Green Climate Fund Board’ (IIED, 10 October 2016)

<<https://www.iied.org/qa-message-green-climate-fund-board>> accessed 4 November 2017.

²⁶ Eg. Sonny Zuhunda, Ida Madieha and Abdul Ghani Azmi, ‘Security Safeguards on e-Payment Systems in Malaysia: Analysis on the Payment Systems Act 2003’ [2011] *Journal of International Commercial Law and Technology* 187, 187, arguing that the electronic payment system ‘encompasses not only the issues of technical sophistication but also legal readiness’; also Jean-Paul Van Belle, ‘M-government for developing countries: A readiness framework’ in *Commonwealth Governance Handbook 2014/5* (Commonwealth Secretariat, Nexus Strategic Partnerships 2015), 30, which investigated legal readiness to ‘regulate the usage of technologies in government and society’; also Anna Maltseva and others, ‘Integral express analysis of institutional and legal readiness of the Russian Federation’ subjects to implement the priorities of scientific and technological development’ [2019] *Amazonia Investiga* 72.

²⁷ Hitoshi Nasu, ‘Japan’s Legal Readiness in the Event of Hostilities on the Korean Peninsula’ (*Columbia Law School*, 15 November 2020)

<https://ore.exeter.ac.uk/repository/bitstream/handle/10871/123749/Nasu_KoreanPeninsula_Nov2020.pdf?sequence=1&isAllowed=y> accessed 22 February 2022.

²⁸ André Aasrud, Richard Baron and Katia Karousakis, ‘Market Readiness: Building Blocks for Market Approaches, OECD/IEA Climate Change Expert Group Papers, No. 2010/03’ (*OECD Publishing*, 2010)

2010-2011; [p45] however, in 2012, the United Nations Development Programme (UNDP) proposed a ‘comprehensive definition’ to map out ‘the different elements of readiness with regard to climate finance’.²⁹ It defined readiness for climate finance as ‘the capacities of countries to plan for, access, deliver, and monitor and report on climate finance, both international and domestic, in ways that are catalytic and fully integrated with national development priorities and achievement of the [Millennium Development Goals] MDGs’.³⁰ Whilst this UNDP definition of general readiness was important for placing focus on building and strengthening national systems, it did not make explicit the legal and regulatory dimensions.

Thus, the more specific phrase *legal readiness* for climate finance clarifies the importance of law and regulation to the climate finance endeavour by, in the words of the ADB, making clear that a ‘robust and transparent legal system is key to attracting both public international and private funds’.³¹ Indeed, recent work by the ADB describes legal readiness for climate finance as ‘laws and regulations that have been carefully considered and enacted based on comprehensive assessment, analysis and consultations, [and that] can enable access to climate finance and investments and realize NDC targets’.³² Subsequent research has further expanded this conception to show that, by necessity, legal readiness must also include requisite technical expertise and capacity building to map, design, reform, and implement optimal regulatory architecture and financial activities, as explored below.

III. Research Impact and Key Learnings

This Part explores three key learnings from a research-impact partnership on the topic of legal readiness for climate finance between scholars in The Dickson Poon School of Law at King’s College London and UNEP. By way of background, a key output of that partnership was development of a novel Legal Analytical Framework for Climate Finance³³ arising from legal and policy data analysis and stakeholder workshops with relevant public and private sector

<<https://doi.org/10.1787/5k45165zm8f8-en>> accessed 22 February 2022; also ‘Legal Preparedness for REDD+ in Zambia’ (*International Development Law Organisation (IDLO)*, 2011)

<<https://www.files.ethz.ch/isn/139318/LegalPreparednessREDDZambia.pdf>> accessed 28 February 2022.

²⁹ Veerle Vandeweerd, Yannick Glemarec and Simon Billett, ‘Readiness for Climate Finance: A framework for understanding what it means to be ready to use climate finance’ (UNDP, 2012) <<https://www.unclearn.org/wp-content/uploads/library/undp122.pdf>> accessed 22 February 2022, 4, my emphasis added.

³⁰ *ibid* 4-5. Indeed, the general concept of ‘readiness’ was built into the governing instrument of the GCF to guide its allocation of financial resources: Article 40, *Governing Instrument of the Green Climate Fund* (approved by COP17 on 11 December 2011 in Durban, South Africa, and annexed to decision 3/CP.17 presented in ‘Report of the Conference of the Parties on its seventeenth session’ United Nations Framework Convention on Climate Change (UNFCCC) Conference of the Parties (Durban 28 November – 11 December 2011) 15 March 2012 UN Doc FCCC/CP/2011/9/Add.1): ‘The Fund will provide resources for readiness and preparatory activities and technical assistance, such as the preparation or strengthening of low-emission development strategies or plans, NAMAs, NAPs, NAPAs and for in-country institutional strengthening, including the strengthening of capacities for country coordination and to meet fiduciary principles and standards and environmental and social safeguards, in order to enable countries to directly access the Fund’, at ‘Governing Instrument for the Green Climate Fund’ (*Green Climate Fund*, 2011) <<https://www.greenclimate.fund/sites/default/files/document/governing-instrument.pdf>> accessed 24 February 2022.

³¹ Morita and Pak (n 17) 7.

³² *ibid* 11.

³³ For a detailed analysis of the Legal Analytical Framework see Bowman, ‘Law and Regulation for Climate Finance’ (n 12).

organisations from developed and developing countries.³⁴ The Framework embodies two central motifs. First, it conceptualises a *twofold typology of regulatory options* for climate finance termed as financial mechanisms (that directly mobilise and leverage capital) and facilitative modalities (that enable sustainable finance by improving technical capacity and knowledge exchange amongst key stakeholders). Second, it identifies the *plurality of legal forms* by which those financial mechanisms and facilitative modalities may be realised, including enshrinement in hard legislation and financial or market regulation as well as soft law standards and contractual arrangements.

The Legal Analytical Framework makes the invisible become visible. It seeks to help national decision makers engage in conscious and systematic choice-making that is relevant for their local context and that can bring long-term horizons into the present. It puts the legal and regulatory dimensions of climate finance front and centre; and expands the theory and practice of climate finance to include not just individual financial instruments but also enabling modalities that facilitate finance to flow at scale. Importantly, the workshops themselves enabled a constructive space in which participants could share institutional learnings. One workshop placed particular focus on South-South knowledge-exchange between two prominent cases in the study being Kenya and Mexico; [p46] and all discussions gave rise to rich learnings and implications about legal readiness. I wish to share and explore three learnings in particular that have only continued to percolate and gain relevance in light of the COP26 pledges outlined in the Introduction.

1. Strengthen national law and regulation for ‘putting out’ as well as ‘calling in’ climate finance

The Paris outcome reaffirmed an earlier promise by developed countries to jointly mobilise US\$100billion per year by 2020 to address the climate-related needs of developing countries.³⁵ Although that target has not yet been met,³⁶ it is both strategic and morally just for developing countries to continue to call on this promise and ‘call in’ this public funding. Access may occur through multilateral channels such as development banks and international financial institutions, but the formal channel is the Financial Mechanism of the Convention which has a specific mandate to support the Paris Agreement,³⁷ notably via the GCF as considered further below.

Nonetheless, public funding alone cannot acquit the multi-trillion dollar task of implementing the Paris Agreement. Market finance and private sector actors also have a critical role to play in facilitating a low-carbon transition and climate resilient world,³⁸ as reflected in the Glasgow Climate Pact.³⁹ In addition to policy, strong domestic regulatory frameworks attract private sector

³⁴ Empirical data were gathered via surveys, observations, and group discussions. Workshop design and findings are detailed in Bowman and Steenmans, ‘Climate Finance Law’ (n 23); Bowman and Steenmans, ‘Legal Readiness for Climate Finance’ (n 23).

³⁵ ‘Report of the Conference of the Parties on its sixteenth session’ United Nations Framework Convention on Climate Change (UNFCCC) Conference of the Parties (Cancun 29 November – 10 December 2010) (15 March 2011) UN Doc FCCC/CP/2010/7/Add.1.

³⁶ UNFCCC Glasgow Climate Pact (n 7) para 44.

³⁷ UN Framework Convention on Climate Change (adopted on 9 May 1992, entered into force on 21 March 1994) FCC/INFORMAL/84/Rev.1, art 11; UNFCCC Paris Agreement (n 8) art 9(8).

³⁸ Megan Bowman, *Banking on Climate Change: How Finance Actors and Regulatory Regimes are Responding* (Kluwer 2015); Justin Macinante, ‘Climate Impact Measurement in Climate Finance and Carbon Markets’ [2020] CCLR 199.

³⁹ UNFCCC Glasgow Climate Pact (n 7), para 14, 28, 40, 54, 55.

investment.⁴⁰ Climate Policy Initiative data show that the majority of climate finance is spent in the same country in which it is raised;⁴¹ yet research also shows a correlation between incentivising domestic regulation and green foreign direct investment.⁴² That is, national regulation to incentivise green investment can ‘put out’ opportunities for foreign and domestic companies and investors. This is important as all types of private capital will be required to animate Article 2.1(c).

As evidenced in stakeholder discussions, this need is increasingly recognised by decision makers in both public and private sectors. However, there are challenges for developing countries in ‘putting out’ investment opportunities and engaging with the private sector. For example:

- NDC Investment Plans for raising capital must include what the private sector needs to see when making financial decisions, such as risk profiles for available assets and types of vehicles that could fund them, as well as enhanced use of marketing tools such as prospectuses. Yet many NDCs fall short in this regard.
- Finance for adaptation requires scaling up by orders of magnitude.⁴³ Yet the vast majority of current NDC Investment Plans focus on mitigation not adaptation. In addition, private sector decisions apply business case logic whereby risk/return profiles are endemic to investment decisions. Adaptation measures often involve long-term investment timelines and provide social returns but not financial returns, which dampens private sector enthusiasm.
- Risk *perception* can be as determinative as actual risk. Indeed, previous research has shown that large corporations in the Asia Pacific were slow to apprehend strategic investment opportunities in adaptation (such as airports and coastal defence) for this reason.⁴⁴
- **[p47]** Encouraging local investors and financiers may require more attention to finance for Small-Medium Enterprises (SME) than asset investment. This ‘SME finance’ sits between retail finance for individuals and wholesale finance for large corporations to help SMEs gain access to both bank and bond finance. Yet SMEs pose a high risk for local bank lending while being too small to get access to international or foreign finance.

Overcoming these (and other) challenges is a work in progress for many countries. Workshop discussions focused on how regulatory architecture for green bonds and sukuk instruments could attract international investors as experienced in Nigeria and Malaysia, how deals might be aggregated to attract international and multilateral finance so that local banks can focus on financing bespoke projects, and how the right legal and financial structures can build investor confidence as illustrated by the impact investing movement.⁴⁵ Specifically, Kenya exemplifies a

⁴⁰ Morita and Pak (n 17); Barbara Buchner and others, ‘Global landscape of Climate Finance 2021’ (*Climate Policy Initiative*, 14 December 2021) <<https://www.climatepolicyinitiative.org/publication/global-landscape-of-climate-finance-2021/>> accessed 22 February 2022.

⁴¹ Buchner and others (n 40).

⁴² Bowman, *Banking on Climate Change* (n 38) 230-31; Lise Johnson, ‘Green Foreign Direct Investment in Developing Countries’ (*Columbia Center on Sustainable Investment*, October 2017) <https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/12> accessed 22 February 2022, Table 3; C.f. Noting the limits of FDI: Simon J Evenett and Johannes Fritz, ‘Declining foreign direct investment can’t contribute much to sustainable development’ (*Brookings Institution*, 3 June 2021) <<https://www.brookings.edu/blog/future-development/2021/06/03/declining-foreign-direct-investment-cant-contribute-much-to-sustainable-development/>> accessed 22 February 2022.

⁴³ Buchner and others (n 40).

⁴⁴ Ian Callaghan and Tessa Tennant, ‘Asia’s Green Mandate: A combo of nature, policy and cash’ (*CLSAU*, 15 September 2016) <<https://www.slideshare.net/IanCallaghan7/clsabluebook-asias-green-mandate>> accessed 22 February 2022.

⁴⁵ See eg. Maya Winkelstein, ‘How Impact Investors Can Prepare for the Next Crisis’ (*Harvard Business Review*, 17 December 2021) <<https://hbr.org/2021/12/how-impact-investors-can-prepare-for-the-next-crisis>> accessed 22 February 2022; and ‘A Legal Framework for Impact: Sustainability impact in investor

country that is endeavouring to strengthen policy, legal and regulatory frameworks for climate finance. Its business sector is comprised largely of SMEs, renewable energy investment has been successful but agriculture is key to the economy so finance for adaptation is now a high priority, and infrastructure development represents a multi-billion dollar investment opportunity.⁴⁶ Regulatory efforts acknowledge that risk-sharing between private sector and governments is key to addressing perceived and actual risks by creating financial mechanisms such as a Green Investment Bank and sovereign green bonds⁴⁷ and also increased use of facilitative modalities such as legal creation of strategic units like the Nairobi International Financial Centre⁴⁸ as well as collaborations with financial institutions that have experience doing business in emerging markets to leapfrog know-how gaps. All these initiatives are relatively new; they indicate valuable efforts on the journey to legal readiness, the efficacy and sufficiency of which will depend largely on resourcing and implementation, as discussed below.

2. Pursue an integrated regulatory framework and enhance institutional coherence

Research findings revealed that countries can pursue legal readiness in two main ways. Decision-makers can make *stand-alone* changes, such as amending an existing Taxation Act (to include tax credits for renewable energy investments) or Companies Act (to enhance climate-related corporate responsibility and disclosure) or enacting a new umbrella Climate Change Act. Alternatively, they can take an *integrated regulatory approach*, being a complementary mix of financial mechanisms and facilitative modalities across multiple legal domains that adjust or reform a country's legal and regulatory architecture to account for climate change and enable greater flows of climate finance. The choice will depend on country context. However, it became clear from workshop discussions that the integrated regulatory approach is preferable for improving institutional coherence and maximising engagement as it is more likely to create a stable investment environment so that the private sector knows where and how to invest.

Prior to the workshops, many participants had equated climate finance with specific financial mechanisms, namely a carbon price or blended finance. During the workshops, participants gained understanding of a much broader range of financial mechanisms such as green bonds, tax credits and related incentives, [p48] as well as introduction to the category of 'facilitative modalities', which created a new way of seeing climate finance regulation. Facilitative regulation regarding corporate conduct, prudential regulation, green/brown taxonomies, disclosure and knowledge

decision-making' (*Freshfields Bruckhaus Deringer LLP*, 2021) <<https://www.freshfields.com/en-gb/our-thinking/campaigns/a-legal-framework-for-impact/>> accessed 22 February 2022.

⁴⁶ Peter Odhengo and others, 'The Landscape of Climate Finance in Kenya: On the road to implementing Kenya's NDC' (*Climate Policy Initiative*, March 2021) <<https://www.climatepolicyinitiative.org/wp-content/uploads/2021/03/The-Landscape-of-Climate-Finance-in-Kenya.pdf>> accessed 22 February 2022. Note that local scholars have previously commented upon the strengths and weaknesses of the Kenyan Climate Change Act generally, see eg: Clarice Wambua, 'The Kenya Climate Change Act 2016: Emerging Lessons From a Pioneer Law' [2019] CCLR 257; Meissy Janet Naeku, 'Climate Change Governance: An analysis of the climate change legal regime in Kenya' [2020] *Environmental Law Review* 170.

⁴⁷ Odhengo and others (n 46) 46; 'EU Green Diplomacy Webinar on 11th May 2021: Notes for Hon. (Amb.) Ukur Yatani, EGH' (*Republic of Kenya: The National Treasury & Planning*) <<https://www.treasury.go.ke/wp-content/uploads/2021/05/CS-Treasury-Speech-11th-May-2021-EU-Green-Diplomacy-Webinar.pdf>> accessed 22 February 2022. Note also Eric Gwandega Magale, 'Developing a green bond market in Kenya: perspectives from practitioners and lessons from developing markets' [2021] *Journal of Sustainable Finance and Investment* 1, 5.

⁴⁸ For objectives, legislation and draft regulations of the Nairobi International Financial Centre, see 'Nairobi, Africa's Growth Capital' (*Nairobi International Finance Centre*) <<https://nifc.ke/>> accessed 28 February 2022.

sharing has been regarded traditionally as separate to the financial process and thus falling outside climate finance policy discussions. Yet this study showed that without such enabling regulation, the financial mechanisms alone cannot deliver systemic or transformational change in the tight timeframe available. Indeed, when sub-article 2.1(c) is read in the context of umbrella Paris objectives in Article 2.1 ‘to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty’, we are reminded that many countries are on a sustainable development *journey*, and that the flow of know-how as well as finance is a key priority to that journey.⁴⁹ Thus, while it may seem unorthodox to regard enabling or facilitative modalities as an integral component of climate finance, it is essential that decision makers start to do so.

What might an integrated regulatory approach look like? In short, there is no blueprint. One country might focus on financial mechanisms in various legal forms such as legislatively establishing an In-country Climate Fund (that has a mandate to blend finance) and tax credits and/or a sovereign green bond which can support facilitative modalities such as green taxonomy creation or Idea labs for financial knowledge sharing or adaptation research. For another country it may entail a legislative and policy overhaul that revamps and aligns the full range of legal domains to Paris objectives ranging from the Constitution to energy law, financial and prudential regulation, environment and planning law, procurement, employment law and just transition arrangements, and most everything in between. Indeed, given that initial NDC Synthesis evaluations showed that most countries are very far from the Paris Agreement temperature goal in Article 2.1(a), it is ideal to be ambitious.⁵⁰

Moreover, workshop discussions focused on the benefit of an integrated regulatory approach in providing a balanced package of reforms that can include rewards and trade-offs to help overcome cognitive biases to make bitter pills easier to swallow⁵¹ such as removing fossil fuel subsidies in agriculture-dominant countries. And, as recommended by scholars of new governance and nudge economics, an integrated regulatory approach will also need to include ex-post reviews to check the measures remain fit for purpose and are achieving their objectives.⁵² Indeed, Morita and Pak note that, at the back-end of the regulatory process, ‘the transparent implementation, monitoring and enforcement of... [climate finance] regulations and incentives is essential to boosting investor confidence’.⁵³

Regardless of the approach taken, a critical element of an integrated regulatory framework is enhanced inter-agency communication and collaboration between government branches and agencies. Rather than working in siloes, collaboration will be essential between Treasuries, Energy and Environment ministries, central banks, and parliamentarians even though climate finance may not be seen as their traditional field of expertise. In addition to policy that encourages this

⁴⁹ Generally, see: Chantal P Naidoo, ‘Relating financial systems to sustainability transitions: Challenges, demands and design features’ [2020] *Environmental innovation and societal transitions* 270.

⁵⁰ ‘NDC Synthesis Report’ (UNFCCC, 2021) <<https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs/nationally-determined-contributions-ndcs/ndc-synthesis-report>> accessed 22 February 2022.

⁵¹ Katherine L Milkman and others, ‘Policy bundling to overcome loss aversion: A method for improving legislative outcomes’ [2012] *Organizational Behaviour and Human Decision Processes* 158; Megan Bowman, ‘Nudging Effective Climate Policy Design’ [2011] *International Journal of Global Energy Issues* 242.

⁵² Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* (Yale University Press 2008); Cameron Holley, ‘Environmental regulation and governance’ in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press 2017).

⁵³ Morita and Pak (n 17) 13-14.

cooperation, institutional coherence can also be legislatively entrenched through financial or climate-related statutes. For example, the Lao PDR *Decree on Climate Change* has been described as calling 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’.⁵⁴ Similarly, as part of the objectives and powers of the Nairobi International Financial Centre Authority that is tasked with encouraging ‘sustainable economic growth of the country’,⁵⁵ [p49] the Kenyan *Nairobi International Financial Centre Act* explicitly includes collaboration with relevant agencies and authorities.⁵⁶

3. Seek MFI support for Regulatory Mapping and Capacity Building (not just Project Funding)

Taking an integrated regulatory approach to climate finance is more likely to enable systemic change to achieve NDC implementation and facilitate SDG goals. Yet that approach will also require comprehensive review, and likely reform, of existing architecture. Thus, the first step on the legal readiness path is regulatory mapping. That is, undertaking a comprehensive review and assessment of legal and institutional strengths, incentives, barriers and gaps for addressing climate change and enabling climate finance.⁵⁷ Mapping is critical for at least three reasons. First, it enables assessment of the extent to which extant laws and regulations are fit for purpose and aligned with Article 2.1(c). As noted by Morita and Pak: ‘if these laws and regulations are not climate change sensitive, they could also inadvertently become barriers to accessing climate finance.’⁵⁸ Second, it allows a country to develop a roadmap to get optimal law and institutional structures in place and to inform parliamentarians, government, public and private financiers, and civil society about the scale and types of support required to meet NDC objectives. Third, it enables identification and costing of the reforms required for roadmap implementation, which could be expensive, as well as the requisite institutional and technical capacity and expertise to make it happen.

Those issues of expense and also capacity building put the spotlight on the ways that MFIs can support in-country legal assessments, innovation and implementation for enhanced flows of climate finance. There is a clear need for this type of MFI support. For example, the Kenyan Climate Change Directorate, which was established pursuant to the *Kenyan Climate Change Act 2016*, has the role of coordinating climate knowledge, action and governance as well as providing climate-related analytical support to various sector ministries and county governments.⁵⁹ It is fulfilling its coordination role by, for example, promulgating the 2018-2022 National Climate Change Action Plan which is the main mechanism to ensure that Kenya achieves its NDC

⁵⁴ *ibid* 12; ‘Decree on Climate Change [Lao PDR, 2019]’ (*Open Development Laos*, 14 November 2019) <<https://data.laos.opendevlopmentmekong.net/dataset/decree-on-climate-change-lao-pdr-2019#:~:text=The%20decree%20determines%20the%20principles,properties%2C%20environment%2C%20biodiversity%2C%20and>> accessed 24 February 2022.

⁵⁵ ‘Summary’ (*Nairobi International Financial Centre*) <https://nifc.ke/NIFC_Summary.pdf> accessed 23 February 2022.

⁵⁶ *Nairobi International Financial Centre Act* (No 25 of 2017), Kenya Gazette Supplement No. 118 (Acts No. 25), Nairobi 3rd August 2017, ss6-7, at ‘Special Issue, Kenya Gazette Supplement No 118 (Acts No 25)’ (*Nairobi International Financial Centre*) <https://nifc.ke/NIFC_Act.pdf> accessed 23 February 2022.

⁵⁷ Morita and Pak (n 17).

⁵⁸ *ibid* 11.

⁵⁹ ‘Republic of Kenya, Kenya Gazette Supplement No. 68 (Acts No. 11), The Climate Change Act, 2016’ (*Republic of Kenya Ministry of Environment & Forestry*) <http://www.environment.go.ke/wp-content/uploads/2018/08/The_Kenya_Climate_Change_Act_2016.pdf> accessed 24 February 2022.

mitigation target.⁶⁰ However, without external funding, it does not have sufficient budget for analytical tasks or providing analytical support to sector ministries.⁶¹

As the main intermediaries for public international funds and increasingly as facilitators of private finance, MFIs can support developing countries not only with finance for projects but also with financial and technical support for catalytic efforts that include:

- mapping existing legal and regulatory architecture;
- integrating facilitative modalities; and
- building endogenous legal, technical, and educational capacity.

Indeed, some MFIs in the climate space are paving the way. For example, the ADB together with the International Finance Corporation (IFC) and Baker & McKenzie solicitors provided technical assistance to Fiji to critically assess the general investment environment and create a legal roadmap for climate finance.⁶² This included a review of extant investment policy and related legislation, enactment of new legislation such as the *International Arbitration Act 2017* and *Personal Properties Securities Act 2017* to improve market processes, and an evaluation of legal barriers to investment in the renewable energy and transportation sectors.⁶³ Similarly, the Inter-American Development Bank (IDB) Group created NDC Invest as [p50] a ‘one-stop-shop’ to provide technical and financial support for Latin American and Caribbean countries seeking to implement the Paris Agreement, including strengthening capacity of governments and academia.⁶⁴ Moreover, the World Bank Group Climate Change Action Plan for 2021–2025 broadens its efforts beyond green project investments to help countries ‘fully integrate their climate and development goals’ by using, for example, readiness diagnostic tools such as the Country Climate and Development Report for aligning climate action.⁶⁵

Moreover, legal and regulatory initiatives can be integrated into MFI project proposals or funded as a necessary precursor to them. For example, the GCF’s revised *GCF Readiness and Preparatory Support Programme* provides up to US\$1 million per year per developing country for proposals that ‘strengthen their institutional capacities, governance mechanisms, and planning and programming frameworks towards a transformational long-term climate action agenda’.⁶⁶ Thus, countries have

⁶⁰ ‘National Climate Change Action Plan 2018-2022’ (Republic of Kenya Ministry of Environment and Forestry, 2018) <http://www.environment.go.ke/wp-content/uploads/2020/03/NCCAP_2018-2022_ExecutiveSummary-Compressed-1.pdf> accessed 24 February 2022.

⁶¹ ‘Climate Governance, CAT Climate governance series, Kenya, December 2020’ (*Climate Action Tracker*, December 2020) <https://climateactiontracker.org/documents/836/2020_12_CAT_Governance_Report_Kenya_KvUz_QNR.pdf> accessed 24 February 2022, 1.

⁶² ‘Fiji Legal Roadmap for Climate Finance and Investments’ (COP23) <<https://cop23.com.fj/events/fiji-legal-roadmap%20-climate-finance-investments/>> accessed 23 February 2022.

⁶³ Morita and Pak (n 17) 13.

⁶⁴ Marcela Jaramillo and Valentina Saavedra, ‘NDC Invest: Supporting Transformational Climate Policy and Finance’ (*Inter-American Development Bank*, June 2021) <<http://dx.doi.org/10.18235/0003340>> accessed 23 February 2022.

⁶⁵ ‘Climate Change Action Plan 2021–2025 : Supporting Green, Resilient, and Inclusive Development’ (*The World Bank Group*, 22 June 2021) <<https://openknowledge.worldbank.org/handle/10986/35799>> accessed 15 March 2022.

⁶⁶ ‘Decisions of the Board – twenty-second meeting of the Board, 25 – 28 February 2019’ (*Green Climate Fund*, 20 March 2019) <<https://www.greenclimate.fund/sites/default/files/document/gcf-b22-24.pdf>> accessed 23 February 2022; ‘Country readiness’ (*Green Climate Fund*) <<https://www.greenclimate.fund/readiness>> accessed 21 August 2021; ‘Readiness and Preparatory Support Programme Guidebook’ (*Green Climate Fund*, March 2020)

the right to request funding to map their regulatory architecture, or to hire experts to work with their Attorney-General's department, Treasury, or the Energy Ministry to assess and strengthen enabling law and policy or legal expertise. Indeed, some examples of funding proposals supported by the GCF that have incorporated legal mapping and technical capacity building are Project FP019 'Priming Financial and Land Use Planning Instruments in Ecuador' (with UNDP) and Project FP030 'Catalysing Private Investment in Sustainable Energy in Argentina' (with the Inter-American Development Bank).⁶⁷

In addition to MFI channels, funding opportunities for mapping and capacity building in developing countries exist through innovative transnational initiatives such as the UK's *Climate Finance Accelerator* and also *Partnering for Accelerated Climate Transitions*,⁶⁸ the African Union's *Green Recovery Action Plan*,⁶⁹ and the multi-member *NDC Partnership*.⁷⁰ Such initiatives explicitly recognise that regulatory innovation and technical capacity building of local policy makers and financiers is often a precursor to ensuring the success of financial mechanisms such as green bonds and tax credits.

The examples in this Part show positive and constructive developments in MFI funding support for regulatory mapping and technical capacity building. Yet, given the urgency and complexity of climate imperatives, there is clearly more need for such funding to occur in a systematic way to help countries take an integrated regulatory approach to facilitate NDC implementation and SDG goals. Indeed, comprehensive reform of the international financial regulatory and supervisory architecture (including the mandates of MFIs) is now being discussed in policy circles with some experts advocating for the creation of a new International Platform for Climate Finance with explicit mandate to provide technical assistance and capacity building systematically.⁷¹

IV. Looking forward

1. *Ontological expansion of legal readiness*

Legal readiness is an emerging and dynamic concept. By taking an ontological view of how we might think [p51] about it going forward and what it might comprise, there is clear potential for the concept to expand as climate finance praxis evolves. Thus far, as noted in Part II above, legal readiness for climate finance has been conceptualised to denote the degree to which a country has coherent regulatory architecture in place to systematically attract and mobilise climate finance at

<<https://www.greenclimate.fund/sites/default/files/document/readiness-guidebook.pdf>> accessed 23 February 2022.

⁶⁷ 'Project Portfolio' (*Green Climate Fund*) <<https://www.greenclimate.fund/projects>> accessed 21 August 2021.

⁶⁸ 'Climate Finance Accelerator' (*UK Department for Business, Energy & Industrial Strategy*, 21 June 2021)

<<https://www.gov.uk/government/publications/climate-finance-accelerator/climate-finance-accelerator>> accessed 21 August 2021; 'About UK PACT' (*UK PACT*)

<<https://www.ukpact.co.uk/about>> accessed 21 August 2021.

⁶⁹ 'African Union Launches a Continental Green Recovery Action Plan' (*African Union*, 15 July 2021)

<<https://au.int/en/pressreleases/20210715/african-union-launches-continental-green-recovery-action-plan>> accessed 21 August 2021.

⁷⁰ 'NDC Partnership, Fact Sheet' (*NDC Partnership*, December 2020)

<<https://ndcpartnership.org/sites/default/files/NDCP-FS-Brochure-General.pdf>> accessed 28 February 2022.

⁷¹ Steve Waygood, 'Harnessing the international finance architecture to deliver a smooth and just transition, sustainable finance proposals for the G7 and G20' (*Aviva Investors*, 22 April 2021)

<<https://www.avivainvestors.com/en-gb/about/responsible-investment/climate-finance-challenge/sustainable-finance-proposals-g7-g20/>> accessed 23 February 2022. See also Carney (n 13) 1.

scale. This conception focuses on the regulatory outputs of government agencies and legislators. Yet around the world we are seeing interventions in the climate finance space by other State institutions such as courts and also financial regulators, as well as an increasing number of actors within and beyond the State, notably private sector financial institutions such as banks and pension funds, corporations, and civil society. Each of these actors has an important role to play in regulating and shaping the degree to which finance flows at scale to where and for what it is needed.

Of these actors and institutions, the most pertinent to elucidate regarding a more expansive conception of legal readiness are courts and the role of climate adjudication. Prominent cases in climate litigation have arisen as public law challenges to government indolence regarding Paris climate targets⁷² and also private law actions against intensive emitting companies for their contribution to global warming.⁷³ More specifically, however, it seems that there are two emerging categories of litigation being taken in national courts that are directly relevant to legal readiness for climate finance. First, actions being brought by shareholders and beneficiaries against their financial institutions for unacceptable disclosure of climate risks and/or lack of due diligence regarding business transitions to a carbon-constrained world.⁷⁴ Second, cases brought by citizens against their governments for inadequate climate-related disclosure of financial instruments such as sovereign bonds.⁷⁵ These categories are mutually reinforcing; the cases are novel in the finance space and have capacity to strengthen and extend existing jurisprudence on climate disclosure and accountability.

Peel and Markey-Towler opine that novel climate cases sit within ‘a broader ecosystem of innovative legal interventions on climate change’,⁷⁶ which is especially relevant in countries with recalcitrant governments or ambivalent corporate sectors.⁷⁷ Importantly, as stated by Bouwer and

⁷² Exemplified by the Urgenda climate case against the Dutch government in which the Dutch Supreme Court held that the Dutch government must reduce emissions immediately in line with its human rights obligations: “The Netherlands v. Stichting Urgenda” (2021) 193 International Law Reports 478.

⁷³ Bouwer provides a thoughtful analysis of the aims, impact and meaning of large-scale private law climate litigation: Kim Bouwer, ‘Lessons from a Distorted Metaphor: The Holy Grail of Climate Litigation’ [2020] Transnational Environmental Law 347. See also Richard A Epstein, ‘Beware of Prods and Pleas: A Defense of the Conventional Views on Tort and Administrative Law in the Context of Global Warming’ [2011] 121 Yale Law Journal Online <https://www.yalelawjournal.org/pdf/1037_or74bsym.pdf> accessed 15 March 2022; David Hunter and James Salzman, ‘Negligence in the Air: The Duty of Care in Climate Change Litigation’ [2007] University of Pennsylvania Law Review 1741.

⁷⁴ Exemplified by *McVeigh*, being the first case on disclosure and due diligence brought by a beneficiary against their public pension fund: *McVeigh v. Retail Employees Superannuation Pty Ltd* (2018) NSD1333/2018. For a thorough discussion of this category see Anita Foerster, ‘Climate Justice and Corporations’ [2019] King’s Law Journal 305.

⁷⁵ Exemplified by *O’Donnell* which is the first case to focus on sovereign bonds and government accountability: *O’Donnell v Commonwealth* (2020) VID482/2020. Concise statement: ‘O’Donnell v. Commonwealth’ (*Climate Case Chart*) <<http://climatecasechart.com/non-us-case/odonnell-v-commonwealth/>> accessed 24 February 2022. For a prescient exploration see Jacqueline Peel and Rebekkah Markey-Towler, ‘Climate Change Risk and Sovereign Bond Investments: The Case of *O’Donnell v Commonwealth of Australia*’ [2020] CCLR 177.

⁷⁶ Jacqueline Peel and Rebekkah Markey-Towler, ‘Climate Change Risk and Sovereign Bond Investments: The Case of *O’Donnell v Commonwealth of Australia*’ [2020] CCLR 177, 178.

⁷⁷ Hari M Osofsky and Jacqueline Peel, ‘Energy Partisanship’ [2016] Emory Law Journal 695, Parts III B and C. See generally Joana Setzer and Catherine Higham, ‘Global trends in climate change litigation: 2021 snapshot’ (*Grantham Research Institute on Climate Change and the Environment*, 2 July 2021)

Setzer, climate litigation is increasingly ‘taking a long view beyond the immediate success or failure of individual cases’ to influence ambitious climate action more broadly by leveraging improved policy outcomes and corporate and societal behaviour.⁷⁸ [p52] In so doing, it is not just litigants but also adjudicators such as Judges that are exhibiting a responsive regulatory role in the climate space.⁷⁹ This will likely impact upon a country’s legal readiness for climate finance in coming years.

Arguably therefore, the direction of travel for legal readiness for climate finance is that it will (and should) expand to comprise not just a qualitative evaluation of regulatory architecture created by government agencies and legislatures but also the degree of intervention and accountability by courts and tribunals. The impact of adjudicatory developments upon financial culture and finance flows to address climate change, as well as the regulatory architecture that steers and supports it, is ripe for further research.

2. *Protecting against the loss of legal readiness*

Contemplation of the case study research reveals a new question in this space: is it possible to get legal readiness and then lose it? The clear answer is ‘yes’ with the predominant reason being political vicissitude due to climate partisanship and/or a change in national government.

Importantly, despite the perception of developed countries as less risky investment jurisdictions than emerging economies, the following recount of the Australian case study evidences the contrary. In November 2011, under a Labor government, the Australian Senate passed the Clean Energy Legislative Package, which included a carbon price, renewable energy target, compulsory reporting of intensive corporate GHG emissions, and creation of the Clean Energy Finance Corporation.⁸⁰ The package was independently lauded and recommended to investor networks around the world as ‘investment grade’ and apt to provide ‘investors with real confidence when investing in areas such as renewable energy.’⁸¹ However, in less than three years, that progressive legal landscape was all but wiped clean following a change in government and political attitude. Pursuing an anti-climate and pro-coal agenda, the Coalition government disassembled key policy

<<https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-litigation-2021-snapshot/>> accessed 15 March 2022.

⁷⁸ Kim Bouwer and Joana Setzer, ‘Climate litigation as climate activism: what works?’ (*The British Academy*, 2020) <<https://www.thebritishacademy.ac.uk/publications/knowledge-frontiers-cop26-briefings-climate-litigation-climate-activism-what-works/>> accessed 23 February 2022. Peel et al describe this as ‘strategic climate change litigation’, which is ‘brought with the aim of producing policy or social change with respect to the issue’ rather than directly addressing greenhouse gas pollution as per the parties: Jacqueline Peel, Hari Osofsky and Anita Foerster, ‘A “Next Generation” of Climate Change Litigation?: an Australian Perspective’ [2018] *Oñati Socio-Legal Series* 275, 280. Ganguly et al further delineate strategic litigation as public or private: Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, ‘If at first you don’t succeed: Suing corporations for climate change’ [2018] *Oxford Journal of Legal Studies* 841, Section 2.

⁷⁹ Esmeralda Colombo, ‘From Bushfires to Misfires: Climate-related Financial Risk after *McVeigh v. Retail Employees Superannuation Trust*’ [2021] *Transnational Environmental Law* 1. See also Emily Barritt and Boitumelo Sediti, ‘The Symbolic Value of *Leghari v Federation of Pakistan: Climate Change Adjudication in the Global South*’ [2019] *King’s Law Journal* 203.

⁸⁰ The Clean Energy Legislative Package comprised: the *Clean Energy Act 2011* (Cth) (as amended by the *Clean Energy Legislation Amendment Act 2012* (Cth)), *Clean Energy Regulator Act 2011* (Cth), *Climate Change Authority Act 2011* (Cth), and the *Clean Energy (Consequential Amendments) Act 2011* (Cth), and later the *Clean Energy Finance Corporation Act 2012* (Cth).

⁸¹ Rory Sullivan, ‘Investment-grade climate change policy: financing the transition to the low-carbon economy’ (*United Nations Environment Programme Finance Initiative (UNEP FI)*, September 2011) <<https://www.unepfi.org/fileadmin/documents/Investment-GradeClimateChangePolicy.pdf>> accessed 25 February 2022, 15.

platforms and legal modalities by 2014. Notably, in an extraordinary move by a government that takes power with a tax *in situ*, the carbon tax was repealed.⁸² As a result of these changes and the accompanying regulatory uncertainty, investment shifted elsewhere despite Australia's natural abundance of renewable energy sources. The Australian political environment has remained recalcitrant to re-consideration of an effective clean energy package, and the notion of passing a carbon price in the immediate future has become anathema.⁸³

This example shows not only how regulation for legal readiness can be lost, but also that when it is lost it may be difficult to regain. So how might the impacts of political vicissitude or partisanship on legal readiness for climate finance be averted or at least mitigated in the first place? Again, the case studies yield some valuable insights, and the overarching lesson is one of forward-planning. In the space available I will outlay two approaches, noting that there are likely others. The first approach requires legal innovation and forethought; the second approach requires regulatory networking and pluralism.

The first approach is to enact legislation in such a way that cannot be repealed easily by subsequent governments even despite parliamentary sovereignty. The Australian Clean Energy Finance Corporation is a type of green investment bank that managed to survive the political ravages in this way. It was created by bespoke legislation (rather than company law)⁸⁴ [p53] and had dual form as a statutory authority and independent company, which protected it from outright abolition by mere executive order under a change of government.⁸⁵ Moreover, it garnered a degree of bipartisan support due to its commercial success such that multiple Bills to abolish it were voted down in the Senate.⁸⁶ Under Section 57 of the Australian Constitution, two rejections by the Senate give rise to a 'double dissolution' trigger whereby the government has discretion to dissolve both houses of parliament and call a federal election in order to overcome the deadlock. However, it is a drastic political move and then-Prime Minister Mr Tony Abbott declined to pull the trigger. Further attempts to abolish the Clean Energy Finance Corporation were abandoned; however, the government diminished both its remit and financial capacity.⁸⁷ So the bespoke legislative approach

⁸² Repealing legislation comprised: *Clean Energy Legislation (Carbon Tax Repeal) Act 2014* (Cth); *Customs Tariff Amendment (Carbon Tax Repeal) Act 2014* (Cth); *Excise Tariff Amendment (Carbon Tax Repeal) Act 2014* (Cth); *Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment (Carbon Tax Repeal) Act 2014* (Cth); *Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment (Carbon Tax Repeal) Act 2014* (Cth); *True-up Shortfall Levy (Excise) (Carbon Tax Repeal) Act 2014* (Cth); *True-up Shortfall Levy (General) (Carbon Tax Repeal) Act 2014* (Cth); *Ozone Protection and Synthetic Greenhouse Gas (Import Levy) (Transitional Provisions) Act 2014* (Cth).

⁸³ Neil Gunningham and Megan Bowman, 'Energy regulation for a low carbon economy: Obstacles and opportunities' [2016] *Environmental and Planning Law Journal* 118.

⁸⁴ It was created by the *Clean Energy Finance Corporation Act 2012* (Cth). The *Public Governance, Performance and Accountability Act 2013* (Cth), which relates to corporate Commonwealth entities, also applied to it regarding reporting and the use and management of public resources.

⁸⁵ Peter Hannam, 'Tony Abbott can't stop green loans, top lawyer says' (*The Sydney Morning Herald*, 19 September 2013) <<https://www.smh.com.au/environment/climate-change/tony-abbott-cant-stop-green-loans-top-lawyer-says-20130919-2u1ip.html>> accessed 4 November 2017; 'The Clean Energy Finance Corporation obliged to ignore unlawful direction of the Minister' (*Environmental Justice Australia*, 25 September 2013) <<https://envirojustice.org.au/the-clean-energy-finance-corporation-obliged-to-ignore-unlawful-direction-of-the-minister/>> accessed 4 November 2017.

⁸⁶ *Clean Energy Finance Corporation (Abolition) Bill 2014* (Cth); *Clean Energy Finance Corporation (Abolition) Bill 2013* (Cth).

⁸⁷ Latika Bourke, 'Government given double dissolution trigger as Clean Energy Finance Corporation abolition bill voted down' (*ABC News*, 18 June 2014) <<https://www.abc.net.au/news/2014-06-18/abbott-government-given-first-double-dissolution-trigger/5532358>> accessed 23 February 2022; Lenore Taylor, 'Coalition announces \$1bn clean energy fund to invest in emerging technologies' (*The*

can be a shield against outright abolition of legal readiness measures, but it may not protect against their diminishment by regressive executive action.

As such, a second approach to countering this issue is to disburse regulatory action in a pluralistic or ‘networked’ way amongst stakeholders thereby legitimating regulatory authority beyond just legislatures and government policy. Indeed, in addition to the growing role for courts and adjudicators in climate finance as outlined earlier, attention is increasingly turning to the role and readiness of financial regulators such as central banks and market/securities authorities to lead the transition to a low carbon and more resilient economy.⁸⁸ The logic is that climate change is a foreseeable systemic financial stability risk that needs to be addressed by the finance sector today to minimise the harshest impacts on markets and economies tomorrow, which thus puts it squarely on the plate of financial regulators.⁸⁹ Some early-moving financial regulators are heeding that call: for example, the Bank of England’s Prudential Regulatory Authority now supervises strategic plans on matters such as the responsibilities of Boards regarding climate risk management,⁹⁰ and Chinese state-owned banks have become quasi-regulators that enforce environmental law and policy pursuant to the *Green Credit Directive 2012*.⁹¹ Moreover, the Sustainable Banking Network was established in 2017 as a forum convened by the International Finance Corporation (IFC) for financial regulators in emerging economies to facilitate knowledge-sharing and capacity building about sustainable finance.⁹²

Responsive regulation theorists Braithwaite and Drahos note that, for regulators in developing countries [p54] without sufficient enforcement resources, regulatory objectives can be achieved by enrolling other actors.⁹³ These might be external actors in supply chains or competitor firms, civil

Guardian, 22 March 2016) <<https://www.theguardian.com/environment/2016/mar/23/australia-announces-1bn-clean-energy-fund-to-invest-in-emerging-technologies>> accessed 23 February 2022.

⁸⁸ Eg. Campiglio and others, ‘Climate change challenges for central banks and financial regulators’ [2018] *Nature Climate Change* 462; Bowman and Steenmans, ‘Legal Readiness for Climate Finance’ (n 23); Gunningham (n 97); Nick Robins, Simon Dikau and Ulrich Volz, ‘Net-zero central banking: A new phase in greening the financial system’ (*The Grantham Research Institute on Climate Change and the Environment*, March 2021) <<https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/03/Net-zero-central-banking.pdf>> accessed 28 February 2022.

⁸⁹ Megan Bowman and Daniel Wiseman, ‘Finance actors and climate-related disclosure regulation: Logic, limits, and emerging accountability’ in Cameron Holley, Liam Phelan and Clifford Shearing (eds), *Criminology and Climate, Insurance, Finance and the Regulation of Harmscapes* (Routledge 2020).

⁹⁰ ‘Supervisory Statement | SS3/19, Enhancing banks’ and insurers’ approaches to managing the financial risks from climate change’ (*Bank of England, Prudential Regulation Authority*, April 2019) <<https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/supervisory-statement/2019/ss319>> accessed 23 February 2022.

⁹¹ ‘Notice of the CBIRC on Issuing the Green Credit Guidelines’ (*China Banking and Insurance Regulatory Commission*, 24 February 2012) <<https://www.cbirc.gov.cn/en/view/pages/ItemDetail.html?docId=10270>> accessed 23 February 2022

⁹² Eg. ‘Creating Green Bond Markets : Insights, Innovations, and Tools from Emerging Markets’ (*Sustainable Banking Network*, 2018) <<http://hdl.handle.net/10986/30940>> accessed 23 February 2022; ‘Necessary Ambition: How Low-Income Countries Are Adopting Sustainable Finance to Address Poverty, Climate Change, and Other Urgent Challenges’ (*Sustainable Banking Network*, June 2020) <<https://documents1.worldbank.org/curated/en/631961596095193865/pdf/Necessary-Ambition-How-Low-Income-Countries-are-Adopting-Sustainable-Finance-to-Address-Poverty-Climate-Change-and-Other-Urgent-Challenges.pdf>> accessed 23 February 2022.

⁹³ Peter Drahos, ‘Intellectual Property and Pharmaceutical Markets: A nodal governance approach’ [2004] *Temple Law Review* 401; John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press 2000); John Braithwaite, ‘Types of Responsiveness’ in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press 2017), 123.

society groups, customers, shareholders, institutional investors⁹⁴ as well as individuals inside a firm who can institutionalise core social and environmental values.⁹⁵ The benefit of an enrolling regulatory approach is that a higher rate of business compliance with the law can be achieved when ‘a plurality of actors (public and private) utilise their plural resources and relationships with regulatees to activate the plurality of motivations for compliance than when regulatory agencies rely on official powers alone’.⁹⁶ Specific to climate finance, Gunningham argues that, in addition to direct regulation of corporate behaviour through innovative prudential and market regulation, financial regulators can indirectly harness the social licence (or social legitimacy) of finance actors by leveraging the interventions of civil society and market actors.⁹⁷ Haines and Parker go a step further by advocating that responsive regulation theory should now embrace ‘ecological regulation and compliance’ meaning that the full regulatory governance matrix should embed all aspects of human enterprise, including business activity, within ecological limits.⁹⁸

Certainly, as climate finance regulation continues to evolve, cultivating hybrid public and private interactions (or regulatory networks)⁹⁹ could be effective mitigation against loss of legal readiness. Importantly, utilising a broader range of regulatory actors alongside a complementary multi-instrumental mix reinforces an integrated regulatory approach (explored in Part III). In so doing, better regulatory outcomes might be produced while ameliorating the effects of political vicissitude and partisanship. There is no doubt that the issue of protecting legal readiness is a space to watch and likely there are several far-sighted strategies to employ. This area is amenable to further research to identify and theorize legal and practical ways of preventing or at least mitigating against such loss.

V. Conclusion

Climate-related financial efforts and decisions are shaped by law and regulation as much as policy. A critical challenge for countries is to enhance domestic capabilities that facilitate an enabling legal and regulatory environment to attract and leverage that finance. Having ‘legal readiness’ can

⁹⁴ See eg. Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992); Peter Grabosky, ‘Green Markets: Environmental Regulation by the Private Sector’ [1994] *Law & Policy* 419; Julia Black, ‘Enrolling Actors in Regulatory Processes: Examples from UK Financial Services Regulation’ [2003] *Public Law* 63; Neil Gunningham, Robert A Kagan and Dorothy Thornton, *Shades of Green: Business, Regulation, and Environment* (Stanford University Press 2003); Julia Black, ‘Constructing and contesting legitimacy and accountability in polycentric regulatory regimes’ [2008] *Regulation and Governance* 137; Peter Grabosky, ‘Beyond Responsive Regulation: The expanding role of non-state actors in the regulatory process’ [2013] *Regulations & Governance* 114.

⁹⁵ Christine Parker, *The Open Corporation: Effective self-regulation and democracy* (Cambridge 2002)

⁹⁶ Christine Parker, ‘Chapter 4: From Responsive Regulation to Ecological Compliance: Meta-regulation and the Existential Challenge of Corporate Compliance’ in Daniel Sokol & Benjamin van Rooij (eds), *The Cambridge Handbook of Compliance* (Cambridge University Press 2021) 41-42. See also Vibeke Lehmann Nielsen and Christine Parker, ‘To What Extent Do Third Parties Influence Business Compliance?’ [2008] *Journal of Law and Society*.

⁹⁷ Neil Gunningham, ‘A quiet revolution: Central banks, financial regulators and climate finance’ [2020] *Sustainability* 1.

⁹⁸ Christine Parker and Fiona Haines, ‘An Ecological Approach to Regulatory Studies?’ [2018] *Journal of Law and Society* 136; Parker, ‘Chapter 4’ (n 96).

⁹⁹ Burkard Eberlein and others, ‘Transnational Business Governance Interactions: Conceptualization and Framework for Analysis’ [2014] *Regulation & Governance* 1; Kenneth W Abbott and Duncan Snidal, ‘Strengthening international regulation through transnational new governance: Overcoming the orchestration deficit’ [2009] *Vanderbilt Journal of Transnational Law* 501. Note also Mutuma Ruteere, Alexander Makulilo and William John Walwa, ‘Editorial’ [2017] *The African Review* i, who draw on networked governance theory in Jennifer Wood and Clifford Shearing, *Imagining Security* (Willan 2006).

encourage investor confidence, especially in the private sector, by increasing the financial attractiveness of climate-related investments and minimising barriers to investment by reducing perceived and actual regulatory and sovereign risks. Thus, building robust national legal and regulatory frameworks for the receipt of climate finance (through, for example, an In-country Climate Fund) as well as to proactively incentivise investment from local and transnational private actors (through, for example, domestic financial regulation and corporate and taxation legislation) will be critical. The climate finance space is inherently dynamic [p55] so the notion of ‘legal readiness’ ought to steer and respond accordingly.

A key recommendation of this article is for countries on the legal readiness path to take an integrated regulatory approach that combines mutually supportive financial mechanisms and facilitative modalities, within local context, to address mitigation and adaptation in the urgent timeframe required. An integrated regulatory framework can help ensure a stable environment for sustained investor engagement. Yet a necessary precursor to this approach is regulatory mapping and reform, which is complex and requires legal and technical capacity as well as financial support. However, it is precisely for this type and scale of endogenous capacity building that MFI funding can (and ought to) be sought.

Looking forward, many challenges remain. Doing climate finance regulation is complex and doing it effectively will require breaking out of disciplinary bubbles to connect siloes and create collective action solutions. In addition to addressing risk perceptions and mobilising sufficient capital for and within developing countries, there is also a need to bridge the trust deficit between developing and developed countries and also public and private stakeholders. That will be a challenging process, requiring humility alongside innovation. Research findings in this study highlighted a potential bridge as the sharing of know-how and technical expertise across legal, regulatory, and financial domains, not only for instrumental results but also for intangible reasons of building trust and confidence between disparate stakeholders. Certainly, there are clear benefits of early collaboration between government agencies and private sector actors on matters such as formulating NDC Investment Plans and underlying methodologies.

Indeed, although this article has focused on public sector capacity building for optimal legal and regulatory design, the willingness of the private sector to engage in this process will be essential to its success. It is crucial that business sectors step up and make good on their pledges, especially market actors and GFANZ members based in developed countries.¹⁰⁰ Doing so will be integral to implementing the Paris Agreement and bridging the trust deficit, as expressed so profoundly in Vanessa Nakate’s own words:

We don’t believe that banks will suddenly put trillions of dollars on the table for climate action when rich countries have struggled since 2009 to raise 100 billion. I am here right now to ask finance and business leaders to show us your faithfulness. Show us your trustworthiness. Show us your honesty.
I am here to beg you to prove us wrong.
God help us if you fail to prove us wrong.¹⁰¹

¹⁰⁰ The concept of legal readiness for climate finance could be integrated into the concept of ‘country platforms’ on which GFANZ is working alongside Mark Carney who is the UN Special Envoy on Climate Action and Finance, and former Governor of the Bank of England: Carney (n 13) 2.

¹⁰¹ ‘COP26: Racing to a better world’ (n 1).