THE DICKSON POON SCHOOL OF LAW

AVIVA INVESTORS

Legal Roundtable Report:
Law and regulation as tools to accelerate implementation of Paris Agreement finance goals

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Context

The Paris Agreement, and subsequent cover decisions from the Conferences of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC) that inform its interpretation, provides the world with a set of common goals for tackling climate change. In the context of sustainable development and the eradication of poverty, Article 2 of the Paris Agreement speaks to strengthening the global response to the threat of climate change by holding the increase in global average temperature to well below 2°C and pursuing efforts for 1.5°C, increasing the ability to adapt to the adverse impacts of climate change, and making finance flows consistent with a pathway towards low GHG emissions and climate resilient development.

The first Global Stocktake of progress in 2023 affirmed that our current trajectory is not yet on track to meet these goals. Importantly, there is a 'rapidly narrowing window' to implement commitments and increase ambition.[1] COP28 in the UAE reiterated the need to transition away from fossil fuels in energy systems and phase out inefficient fossil fuel subsidies.[2] It also emphasised the importance of the private sector to reach the scale of investments needed to achieve global transition and therefore the need for governments to strengthen policy guidance, incentives, regulations and enabling conditions.[3] Implementing a full suite of measures can have a profound impact on the trajectory of global emissions and the feasibility of achieving the Paris goals.[4]

These are political choices and thus robust policy is required. However, policy is largely implemented by law and regulation. This reality is often over-looked and under-examined. Law and regulation that is fit for purpose will be critical to implementing the Paris Agreement (and related treaties), to leveraging public finance and mobilising private finance at scale, and to ensuring the credibility and effectiveness of national policy commitments.

Roundtable purpose and design

This report summarises key elements of the expert legal roundtable co-convened by King's College London and Aviva Investors on 29 October 2024. This roundtable forms part of a knowledge-exchange and impact partnership to explore legal and financial aspects of planetary crises. It complements and extends themes in earlier workshops on topics about operationalising Art 2.1(c) of the Paris Agreement (in 2020) and reforming the international financial architecture (in 2023).

The purpose of this roundtable was to discuss and debate legal and regulatory dimensions of finance-related implementation of the Paris Agreement to help inform key elements required at COP29 in Baku, in countries' Nationally Determined Contributions (NDCs), and in the lead up to COP30 in Belem. It was held under the Chatham House Rule of non-attribution and designed with these aims:

- **Consider the following matters:**
  - Hopes for COP29 and potential of the New Collective Quantified Goal (NCQG) as a narrow goal or source of broader signals
  - Potential for Nationally Determined Contributions to be investment-ready (NDCs 3.0) and National Transition Planning as a domestic tool for whole-of-economy acceleration?
  - Ways to create a frictionless enabling environment – law and regulation as a tool for efficient and equitable implementation
  - Effecting Systems Change: Law as a catalyst

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[1] https://unfccc.int/documents/631857
[2] UAE Consensus, paragraph 28
[3] Ibid. paragraph 70
[4] See, for example, IEA analysis https://iea.blob.core.windows.net/assets/f2f6dbe0-ee3d-4ffc-ac8b-b811a868b9b1/FromTakingStocktoTakingAction.pdf

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- **Publish a short outcome report** to reflect roundtable key findings and debate.
- **Inform the policy debate** on Paris implementation, NDCs, and the NCQG; and
- **Continue to curate and connect a global community of experts** with legal/regulatory, financial and sustainability expertise to facilitate collaboration and coordination.

To facilitate those aims, the roundtable was hybrid and comprised 23 international experts with legal, financial, and multilateral expertise in private firms, public institutions, third sector organisations, and academia who also represented diversity in gender, age groups, and cultural backgrounds. Participating organisations are listed in *Appendix A*.

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SESSION 1

Point of Departure: Hopes for COP29 and the NCQG? A narrow goal or source of broader signals?

For discussion

- What are the criteria for success in the NCQG? What is needed on public finance, and what wider signals might be sent by the goal?
- What role might law and regulation play in that goal and the broader mobilization of climate finance policies?

Co-authors' note: Background to COP29 & Looking Ahead to COP30

One of the core issues to be decided at COP29 in Baku was the New Collective Quantified Goal on Climate Finance (NCQG). The UNFCCC provides that developed countries "shall provide" financial resources to help developing countries tackle climate change. The quantum of that finance was agreed as US$100 billion per year by 2020 at COP15 in 2009 and formalised at COP16 in Cancun to run until 2025. At COP21 in 2015, it was decided that prior to 2025 a new and more ambitious collective goal would be agreed, taking into account the needs and priorities of developing countries. That same year, Article 9.3 of the Paris Agreement was drafted to provide that, "developed countries should continue to take the lead in mobilising climate finance from a wide variety of sources, instruments and channels, noting the significant role of public funds."

The promise of $100 billion per year by 2020 was not met. The OECD's assessment found that it was achieved in 2022. However, Oxfam estimates that, due to the proportion of market rate loans within the $100 billion, the "true value" of climate finance provided could be as little as $28 billion.

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Within the NCQG negotiation at COP29, several core issues were hotly disputed: the overall quantum of climate finance to be agreed; the distinction between "provision" of finance in the form of grants and grant-equivalent public finance versus the "mobilisation" of finance from all sources; the contributor base for the goal including the role of voluntary contributions; and the time period over which the NCQG should run. In the final hours of COP29, a decision was made to establish the NCQG.[5] It sets out that the new goal is at least $300 billion per year by 2035 for the benefit of developing countries to cover mitigation and adaptation costs, and to include all climate-related outflows from and climate finance mobilised by multilateral development banks. It also calls on all actors to work together to scale up financing to developing countries from all sources, public and private, to at least $1.3 trillion per year by 2035.[6]

Whilst our roundtable discussion preceded that COP29 decision, operationalising this new goal will continue to be spotlighted at future COPs and, given the importance of matters that were not concluded at COP29 such as the creation of the Baku to Belem Roadmap to $1.3 trillion that will report to COP30, the hopes and concerns raised by roundtable participants in Session 1 continue to have relevance as we head into 2025 and beyond.

Separate but Related: the NCQG, Paris Agreement Article 9, and Article 2.1c

Discussion revealed hope for an NCQG outcome at COP29 that is significantly better and more comprehensive than the inherited $100 billon target from COP15 in Copenhagen; and concomitant concern that a failure to agree such an outcome puts the 1.5°C guardrail at risk for all countries. That spirit of collective responsibility was emphasised in one plausible version of the NCQG not only as a monetary amount but also as a division of labour and accountability that includes not just the "what" of climate finance but the "how, who, and when" regarding which actors and channels need to be engaged. Mobilising these qualitative elements of climate finance was identified as a collective action problem that needs collaboration to address. In addition to developed and developing country parties, this would involve multilateral development banks, bilateral agencies, export credit agencies, international finance institutions and standard setters, private sector financial institutions, and could also reference innovative instruments and measures to cover mitigation, adaptation and loss and damage. Although governments will agree the Goal and have primary responsibility for meeting it, there is also a critical 'delivery' role for non-party stakeholders, including the private sector, finance, and civil society.

Overall, the hope for the NCQG was expressed in two ways: a "narrow hope" that a more ambitious target than the $100 billion is agreed; and a "deeper hope" that the Goal can be a catalyst for reinvigorating multilateralism.

Consideration was given to the relationship between Article 2.1c of the Paris Agreement – '*making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development*' – and the NCQG. Discussions emphasised that they should not be conflated. The importance of the NCQG to the legitimacy of the Paris Agreement was recognised, but it is one mechanism within a suite of mechanisms to fulfil the wider ambition represented by Article 2.1c. There was a feeling that a strong NCQG can open the door for a reinvigorated discussion on Article 2.1c within the Sharm el Shiekh dialogue that was launched at COP27 to promote an exchange of views on and to enhance understanding of Article 2.1.c and its complementarity with Article 9 and is due to conclude in 2025. Due to the importance of CMA texts (being texts of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement) in shaping the interpretation and application of the Paris Agreement, it was argued that, from a public international law perspective, the minimum goal must be to 'do no harm' to the potential meaning and breadth of Article 2.1c as embracing *all* financial flows: domestic and international, public and private. It was also recognised that aligning global stocks of assets and capital as well as the 'flows' of finance is essential to make the necessary shift beyond business-as-usual for the global economy. There was concern that if Article 2.1c is limited solely to grant and grant equivalent finance, its effectiveness as a supportive mechanism for delivery of the other

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[5] Decision CMA.6 https://unfccc.int/sites/default/files/resource/CMA%2011%28a%29_NCQG.pdf
[6] https://unfccc.int/sites/default/files/resource/CMA%2011%28a%29_NCQG.pdf

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goals of Article 2 – tackling climate change and limiting the degree of warming whilst increasing capacity to adapt to impacts, all in the context of sustainable development and the eradication of poverty – will be similarly limited.

Participants also noted that aligning financial flows per Article 2.1c is essential for all countries to do. Surmounting the trust divide between country parties was discussed in the context of translating that need for alignment from an equity perspective. Some developing countries regard Article 2.1c as a welcome chance to consider modalities for increasing financial *in-flows* into their economies for their benefit and a pivot away from having their resources extracted outwards for other countries' benefit. It was also recognised that the principle of common but differentiated responsibilities and respective capabilities is important here, and that making finance flows consistent ought not be expected on the same trajectory for all parties, with an emphasis on the importance of different pathways to achieve that consistency which reflect national circumstances: a universal destination but different routes to get there.

The relationship between Article 9 of the Paris Agreement and the NCQG was also discussed, with Article 9.3 outlined as a framing reference for the general obligation to mobilise climate finance from a wide variety of sources, but that Article 9.1 makes it clear that it is developed countries who must, and have agreed to, take the lead with Article 9.2 encouraging other countries to contribute voluntarily. But in the context of the NCQG, it was recognised that there is a rare opportunity to move beyond the Paris Agreement, particularly on transparency and reporting obligations. For example, although countries who have developed significantly in the years since UNFCCC Kyoto and Paris Annexes are resistant to being mandated to contribute to the Goal, if they make voluntary contributions, should that include reporting requirements to allow a more comprehensive and reliable picture of total flows? There is also the question of how private capital flows should be tagged and tracked to understand more clearly the extent to which they are reaching where needed and whether they are being mobilised or catalysed by public funds. More transparency on reporting and means of access were recognised as essential characteristics that the NCQG needs to tackle to meet the needs of developing countries not only in terms of finance quantum but also effectiveness.

Reporting and transparency were also identified as essential to confidence in the concessionality and additionality of climate finance under the NCQG. A far more detailed approach than under the $100 billion goal is needed to include responsibilities for stakeholders and shareholders in Multilateral Development Banks (MDBs) and International Financial Institutions (IFIs), with time-bound responsibilities attributed to actors rather than "calls to the ether" that lack accountability mechanisms.

The Rule of Law and the Role of Regulation in Mobilising Climate Finance

The NCQG is ultimately a political decision, a negotiated compromise between countries that will inevitably be imperfect. But that political decision has, or should have, legal and regulatory consequences. Like a stone cast into a glassy pond, the NCQG will send ripples that can become waves that wash up on many different shores. Some of those ripples ought to take the form of changing legal and regulatory rules and norms.

Other participants opined that legal questions are also critical in setting the goal with, for example, interpretation of the mandate for the NCQG being a heated point of debate in the NCQG process. However, this is another situation where political will has the potential to find a path towards a compromise even if the precise scope of the mandate is narrower than parties' ambitions. Indeed, one question is whether NCQG mandate exists to agree a new *investment* target as well as (or rather than) a *climate finance* target as worded in the Addendum to the Ad hoc work programme on the new collective quantified goal on climate finance.

Other participants opined that the process of agreement at COP29 will be political, but the subsequent implementation of the new Goal will require domestic law and regulation. Indeed, the *rule of law* and the *role of law* were identified as separate but essential elements. The $100 billion goal was seen as a country-level and public finance promise, with limited impacts on or involvement by private actors. It was agreed that the

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NCQG needs to go much further to be impactful and effective. At COP28, in the Global Stocktake outcome, countries highlighted the need to "*strengthen policy guidance, incentives, regulations and enabling conditions to reach the scale of investments required to achieve a global transition towards low greenhouse gas emissions and climate resilient development*". The NCQG needs to be implemented in this light and, as such, laws and regulations are crucial. Some participants noted that money is not mobilised on the basis of historic responsibilities and climate justice, important as those things are; rather it requires incentives that are created by legal and regulatory frameworks set out and implemented by governments. Public finance can play a critical role in crowding in private finance by being first-mover capital to create scalable and investable solutions and projects, by taking on parts of the risk profile of investments that are outside the tolerance of most private actors, and by lighting the path towards the Paris-aligned future we need. But those conditions need to be created.

To make that happen, the role of law and regulation in shaping the enabling environment for the private sector must be seen as a leading part of the toolkit available to parties to make the NCQG speak to the whole of their economies in a way that the $100 billion could not. A core element of this, discussed in detail in a previous roundtable, is the reform of the international financial architecture to align it with Article 2.1c as a matter of design and purpose.

Some participants had concerns that a "maximalist" position would only lead to disappointment. Others opined that an ambitious goal, whether realistic or not, has an important function to push countries to take action and seek solutions, which they would not do otherwise. The temperature goal (Article 2.1a) is an exemplar here. This signalling function is not legal *per se*; rather it has normative weight and that triggers legal and regulatory consequences at sub-national levels to support delivery of the Goal.

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SESSION 2

NDCs 3.0 and National Transition Planning – a domestic tool for whole-of-economy acceleration?

For discussion

- Countries must submit their latest NDCs, with goals for 2035 by the end of February 2025. How can implementation of commitments made, including in the UAE Consensus, be a framework for acceleration?
- What signals are needed to other countries and the private sector on action, policy, investment to make the next round of NDCs credible?
- What do we need to support a successful COP30 in Belem, including what is needed from COP29?

NDCs and National Transition Planning

The gap between the necessary greenhouse gas emissions cuts to remain on a science-based pathway towards net zero emissions by 2050 and therefore keeping the chance of limiting global warming to 2˚C above pre-industrial averages and pursuing efforts to limit that warming to 1.5˚C (as per Art 2.1a Paris Agreement) is starkly set out in the UNFCCC NDC synthesis report and the UNEP Emissions Gap Report. Current NDCs are assessed as likely to lead to a 5.9% emission reduction by 2030 versus 2019 levels, when the IPCC concluded that to give a 50% likelihood of limiting end-of century warming to 1.5˚C, the reduction needs to be 43%. This means that if countries fail to increase ambition with their new NDCs, and do not start delivering immediately, we are heading towards a catastrophic temperature rise of 2.6–3.1˚C this century.

The roundtable discussed the means to make NDCs 'investable' especially given that was not their original purpose. The need to communicate clearly what investors want was raised, with emphasis given to the need

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for investor and business feedback on NDCs as well as creating an aligned enabling environment of laws and regulation. The importance of the advice of the legal and regulatory community to governments preparing NDCs was therefore stressed.

Another question, linked to both the analysis of the current gaps in not only investment but also in government ambition, was how to assess whether or when NDCs "add up" to the change we need to see? National transition plans were identified as key to addressing this question, particularly noting that evidence of their implementation and commensurate shifts in ambition and activity at private sector level will be crucial.

Roundtable participants discussed the proposal for national transition planning as set out in the report [Taking the Lead on Climate Action and Sustainable Development](). This included the rationale for national transition planning as a strategic roadmap for whole of economy and society and a necessary complement to the growing momentum to regulate corporate transition plans. It also recognises that corporate transition planning has revealed key dependencies on government policy and incentives to steer and support businesses to transition, as well as increasing scrutiny of government climate policies, the growth of climate litigation against both states and businesses, and the need to create credible sectoral pathways that are underpinned by a system of law and regulatory governance. The framework set out in the paper builds upon countries' NDCs and Long-Term Low Emission Development Strategies (LT-LEDS) to enhance their detail and investability and to connect them – and the responsible ministries – together under the one canopy.

National transition plans were seen by participants as a positive means of building a "bridge" between government pledges and private sector involvement because they can provide certainty of implementation that has arguably been lacking with previous NDCs.

'Investability': Risk, Return, and Justice

Investment is a function of risk-return logic. Money will flow to where an investor deems the risk to be limited and/or returns are likely. However, in the context of implementation of NDCs and particularly in the context of developing country needs identified in the first session, there is a real question about which risks are real and which are merely perceived. There was discussion about the 'emotional' (non-rational) nature of markets, and the concern that private investors want to retain all returns while passing all the risks to governments. The need to find an equitable sharing of risk, with both public and private constituencies sharing burden and benefit is therefore critical. There was discussion as to whether the consideration of risk has been too narrow, particularly in the risk-based approach of regulators. In the prudential regulation context specifically, risk to individual institutions and contagion from too-big-to-fail firms has been the focus of supervisory stress testing, but there is too little consideration of systemic risk or shocks to the entire economy, leading to significantly negative outcomes across the financial system. In a world of growing physical risk events with price and financial stability consequences, the focus on system-wide risk as well as individual risk must be explicitly included in regulatory approaches.

The potential conflict between a myopic focus on return or shareholder value maximisation at all costs and the long-term interests of people and planet was also discussed. Currently, incentives between private self-interest and public benefit are not aligned. As such, present conceptions of investor duties within some jurisdictions are creating schisms between the desire to support transition and sustainability outcomes and the maximisation of profit. This raises the question of where 'justice' connects into the notion of investability, especially in a world where the shareholder primacy norm of capitalist companies is perpetuating unsustainable resource extraction in developing countries. There is a clear role for law and regulation – and reform - to rectify this misalignment.

Enabling Environments

Participants acknowledged that the conception of what is 'climate finance' has shifted and evolved beyond only public finance, as necessitated by sheer financial need (in the trillions) and exemplified by the connection of NDCs and national priorities to private sector ambitions and actions. The importance of a stable, predictable regulatory and legal environment that supports the alignment of economic incentives with implementation of ambitious NDCs and private capital was repeatedly stressed. The rule of law has an important role to play in

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creating a stable and predictable environment for the long-term deployment of capital, which is needed for the necessary infrastructure investment to support energy, transport, built environment and agriculture transitions. But it was recognised that mis-aligned enabling environments must not be used as an excuse for inaction by the private sector. Whilst there are undoubtedly misaligned incentives, there are also examples of investments being made, of the sharing of risk between public and private sectors for mutual benefit including through blended finance mechanisms, and of private financing of projects and infrastructure in developing countries that are proving successful with good returns. A transition is under way, but it is not fast, uniform, or fair enough under current policy conditions.

The phrase often used by private sector and governments alike that 'there is no shortage of money, just a shortage of investable projects' was deconstructed. Some participants noted that there is a need for investor education in this brave new world to help alter their risk perceptions and broaden their appetite for new approaches, especially in foreign jurisdictions. Exemplars already exist of where training and educating both investors and project proponents has crowded in private sector finance and created successful pipelines of EMDE projects (eg. Private Financing Advisory Network (PFAN)). Roundtable discussion also acknowledged that what is deemed to be 'investable' and 'implementable' will vary wildly depending on the type of investor: for example, an angel investor will have very different specifications to a hedge fund. NDC conversations need to account for these realities.

There was also recognition that, outside the sustainability bubble, there are many firms that continue to focus solely on profit at all costs, whatever impacts are being felt by planet or people. Examples were mentioned of private sectors actors seeking exemptions from legal and regulatory frameworks via additional subsidies, tax exemptions, or waivers of planning/environmental regulation. The importance of not only law and regulation of finance, but of real economy and trade policy, and the need for consistency and predictability was therefore re-emphasised to create level playing fields.

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SESSION 3

Creating a frictionless enabling environment – law and regulation as a tool for efficient and equitable implementation

For discussion

- If Parties were to take the difficult decisions needed to accelerate the transition, are legal and regulatory frameworks ready to support (egs robust carbon markets; national transition planning)?
- What barriers exist? What needs to change in the financial and regulatory architecture?
- How to bring about a frictionless legal and regulatory system to support rapid implementation and a just transition?

Legal Enablement of a Whole-of-Society Transition

Discussion began with the question of how to enhance legal enabling environments not just for a finance sector transition but for a whole-of-society transition for which finance is required.

A conception was presented of "the body of law" not as a single system, but as multiple overlapping systems, akin to a human body: the Rule of Law is the skeleton, which gives the body shape; Public International Law is the nervous system, sending signals throughout the body via various treaties that underpin finance, trade, human rights; National and Regional Laws are the muscles for implementation. In a whole-of-society climate transition, laws in all domains are therefore activated, not just in environment or finance, but also contract, commercial, tort, criminal, procurement, constitutional, trade. In the words of one participant: we must now "look at all law through a climate lens".

Specific focus was given to trade law as a key enabler of the transition, particularly for attracting and derisking Foreign Direct Investment (FDI) into EMDEs. FDI is the domain of foreign investment and trade departments, so those ministries need to be engaged in national transition planning alongside Treasuries and Ministers of Finance. International economic law instruments are increasingly being repackaged in a climate-

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aligned manner using a Paris Agreement lens. As such, "plurilateral" climate-related opportunities exist outside the UNFCCC context, an example being UNCITRAL on trade law.

Discussion then moved into closer analysis of the role of law and regulation to make finance flows happen and at scale:

- For all countries, utilising an architectural approach to enable greater flows of finance to where it is needed via a Legal Analytical Framework for Climate Finance or typology of 'financial mechanisms' and 'facilitative modalities'. *Financial mechanisms* directly mobilise or leverage finance, especially private capital, through incentives and disincentives that nudge action in a green and sustainable direction, such as a carbon price, tax credits, green bond arrangements, blended finance. By contrast, *facilitative modalities* are non-pecuniary complementary measures for indirectly mobilising greener private capital by building up knowledge, capacity and accountability in the medium-longer term, such as climate-related disclosure, prudential regulation of banks, anti-greenwashing measures, taxonomies, training, education. These are essential and complementary to financial mechanisms for mobilising climate-related finance at scale, especially private capital, to *actually* benefit people and planet. Both types of instrument can take a variety of legal forms ranging from legislation to regulation (financial, corporate, market, environmental) to contractual agreements. For full effect, an *integrated regulatory approach* is required, being a complementary mix of financial mechanisms and facilitative modalities across multiple legal domains to adjust or reform a country's legal and regulatory architecture to account for climate change and enable greater flows of finance to where it is actually needed.
- Turning finance promises into climate action, especially for and in EMDEs, via Legal readiness for Climate Finance which is '*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 an opportunity for endogenous empowerment and entails three key elements: 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 MDBs/IFIs for regulatory mapping as well as technical and institutional capacity building (not just project funding).

Participants discussed ways in which these approaches could evolve and be mobilised in-country for impact:

- Break down the categories of 'financial mechanisms' and 'facilitative modalities' into sectors, geography, market type.
- Evaluate the efficacy and equity of each type of instrument, eg, which instruments are shifting finance in greener directions; which are misdirecting finance or slowing down change; which ought to be jettisoned entirely.
- Investigate cross-border effects of law and regulation, acknowledging that what is good for one country may not be good for another.
- Investigate to what extent and with what success developing countries are implementing their Paris commitments via legal and regulatory instruments (aka financial mechanisms and facilitative modalities) in a way that leverages public finance and reduces sovereign debt to de-risk, unlock, leverage, and mobilise FDI and broader private sector finance
- Investigate whether and how developed (donor) countries are altering their policy and regulatory environments and incentives to change the cost of capital and scale up the effectiveness of public finance for the benefit of donee countries.
- Provide guidance for countries on implementing the typology and enhancing capacity building.

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- Develop principles for designing law and regulation that can facilitate a paradigm shift rather than tinkering with the status quo.

Legal limitations and barriers were also identified, including the slow nature of legal and parliamentary processes, the need for public support and majority consensus to produce legislative outcomes, and the potential for unintended consequences. It was also noted that whilst MDB/IFI funding can be accessed to map current architecture and create new laws, it is not available for public engagement to enhance the acceptability of proposed laws or to implement them once passed. Some participants highlighted the benefits of accepting a 'second best' or 'good enough' regulatory outcome in the face of such barriers to ensure that "perfect does not become the enemy of the good" by stultifying transition efforts.

"No Such Thing as a Frictionless Transition": Legal frameworks and accountability

Participants noted that friction is inevitable (and likely desirable) in areas of accountability and legal enforcement of standards to keep the transition on track. The roundtable discussed how legal support is required to map, design and implement NDCs, national transition strategy and corporate transition plans; and that implementation may give rise to legal implications. The Asian Development Bank has noted that 'the transparent implementation, monitoring and enforcement of... regulations and incentives is essential to boosting investor confidence' (Morita and Pak 2018 at 13-14); and it is also essential to ensuring private sector and public sector accountability. As such, institutional systems need to be regularly reviewed to locate misaligned incentives and regulatory barriers.

Participants noted that, to ensure that neither finance nor law exacerbate inequality, countries need legal frameworks that are designed by local experts and have accountability mechanisms built in. For example, the UK *Climate Change Act 2008* is internationally lauded for being the first statute in the world to enshrine legally binding carbon budgets that set limits on the UK's greenhouse gas emissions. That Act also establishes the Climate Change Committee as an independent statutory body that oversees implementation and holds the government to national targets over the long-term. The critical importance of these tools to achieving national net zero ambitions was highlighted by the UK High Court in *Friends of the Earth v SoS for Energy Security and Net Zero (*May 2024) which held that the UK government's climate action plan is in breach of the UK *Climate Change Act* and inadequate to meet legally required net zero targets by 2050. By way of background, in 2022 the High Court had originally ordered the government to revise its first Net Zero Strategy after which the government created its Carbon Budget Delivery Plan. That revised Plan, and the steps proposed to meet it, were then challenged as insufficient and unlawful by third sector organisations Friends of the Earth, ClientEarth, and the Good Law Project via judicial review in the High Court. The High Court found the minister's decision to be "irrational" due to the lack of evidence to support it. As a result, the UK government must revise targets, adopt sound policies, and establish credible implementation actions in line with legislative requirements of the *Climate Change Act* and internal scrutiny by the Climate Change Committee.

The key to this case is that targets and standards were enshrined in law and not just policy. It shows the importance of *framework climate laws* and *independent oversight* to hold governments to account. Such laws are instrumental in ensuring the operationalisation of NDCs and national transition plan commitments and emissions targets. These need to be embedded to withstand the whims of changing governments and galvanize coordinated action across domestic economies and societies. However, some participants noted that it can be difficult to pass such legislation for the very reason of political recalcitrance or industry lobbying.

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SESSION 4
Effecting Change: Law as a catalyst of change

For discussion

- The role of legal and regulatory frameworks in driving change – treaties, contracts, regulatory requirements. New provisions or reimagining of familiar concepts?
- Climate litigation as accountability – states and private sector in the crosshairs

Reimagining Current Law vs Starting Afresh with New Law

Discussion focused on the 'fitness for purpose' of law for indirectly increasing finance flows by regulating firms and financial institutions in a time of planetary crisis. Three discrete legal domains were identified: company law director duties; investor fiduciary duties; and investor state dispute settlement (ISDS).

- In 2024, Pollination and the Commonwealth Climate Law Initiative (CCLI) commissioned legal opinions regarding directors' duties and nature-related risks in the UK and Australia that build on previous work regarding climate-related risks. These reports clearly evidence that: directors may face legal liability under company law for failure to consider nature and climate risks in governance, disclosure, and decision-making; sectoral and jurisdictional hotspot analysis of impacts and dependencies is possible without asset level data; and these can inform risk mitigation strategies and business resilience, and uncover value-creation opportunities. These legal opinions are a comprehensive restatement of current law not a radical reinvention of it. Their intent is to educate rather than reform. Anecdotal evidence has revealed that they are moving the needle on how nature risks are viewed and discussed at board level. But participants noted that success will ultimately be judged by the extent to which company action on nature and climate risks helps to steer more sustainable finance flows.

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- Also in 2024, the Net Zero Lawyers Alliance commissioned a report on 'Sustainable Fiduciary Duties' regarding the role of fiduciaries in the context of the climate and nature loss crises. It concludes that 'preserving and maximizing financial returns on investment means actively pursuing climate mitigation, and ensuring that investee companies and public authorities do so, too' and that an '*investing policy designed to avoid and undo climate damage is in the best interest of their beneficiaries in the longer run – and therefore a duty for fiduciaries – because it lowers the potentially huge risks and costs of an unmitigated climate crisis, and thus helps preserve the value of their assets against steep losses'*.
- By contrast, ISDS is a domain that requires overhauling. Investment protection frameworks were originally established to attract FDI but a 2023 report by David R Boyd the Special Rapporteur on the issue of human rights obligations revealed that *ISDS 'has become a major obstacle to the urgent actions needed to address the planetary environmental and human rights crises'* with foreign investors (notably mining industries) misusing dispute settlement to 'seek exorbitant compensation' from States that seek to strengthen environmental protection in-country, which creates regulatory chill and deters governments from taking ambitious national action.

Some participants felt comfortable that existing fiduciary duties at company and investor levels could merely be re-interpreted to further develop in the right direction. Others were concerned about the disconnect between a duty to 'consider' risk versus actually managing and mitigating it to a level that civil society would approve; that is, translating legal duties into meaningful outcomes that keep us within 1.5 and on track for net zero. An example is the now-famous Client Earth v UK Shell derivative action in 2023, in which a single Supreme Court judge found that by Shell's directors having a company strategy in place, regardless of its ambition or authenticity, they were legally compliant with extant company law. By contrast, the French *Law on the Duty of Vigilance 2017* and the French Civil Code imposes a positive duty on boards to prevent violations of human rights and environmental damage that may occur in the course of their business. In 2023, a case was filed against BNP Paribas under this law, alleging that the bank is breaching those obligations by, amongst other things, failing to establish an adequate plan and not adequately disclosing or managing its climate risks from financing activities (scope 3). This litigation is pending, but the very fact of being sued under this law has forced the bank to pledge to step away from some fossil fuels ahead of annual meeting of shareholders.

Questions arose amongst participants. Do we need to re-design or re-interpret the subjective aspect of directors' duties and the prudent person principle in light of planetary boundaries? Are fiduciary duties (investor and director) poor levers to facilitate a paradigm shift? Should there be a new general duty to account for climate change, the details of which are left to shareholders and courts to decide? Is it sufficient to re-design current legislation in conjunction with compulsory board education? Or should drafters start afresh with new laws that are fit for purpose for a climate-constrained world from the get-go? By reimagining corporate purpose in context of planetary crisis, could the norm of shareholder primacy be relegated or removed entirely? Are the judges who interpret and apply these laws struggling with the science and/or limited by cultural conditioning and, if so, how best to *re-align the judiciary* for a net zero transition? Could similar analyses occur outside common law jurisdictions such as Islamic law traditions?

Climate-related Litigation as a Catalyst of Change

Participants noted that legislation and contracts are only as good as their enforcement or interpretation. Litigation was identified as catalytic when it:

- *Breaks new ground and sets new standards*, eg. *KlimaSeniorinnen v Switzerland* In this case the European Court of Human Rights (April 2024) held that the Swiss government's failure to rapidly cut greenhouse gas emissions is a violation of human rights, and confirmed the importance of carbon budgets at national level. It is the first of its kind to set out criteria for robust national transition planning by governments.

- *Forces accountability of existing standards*, eg *ACCR v Santos* In this pending case, the Australian oil and gas company Santos is being sued under Australian consumer protection and company laws for alleged

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greenwashing by claiming that natural gas is a clean fuel, and that it has a credible net zero transition plan even though it plans to expand gas exploitation.

- *Has a positive ripple out effect to other domains,* eg *Finch v Surrey County Council* In this case the UK Supreme Court (2024) held it unlawful for the Council '*not to require the environmental impact assessment for a project of crude oil extraction for commercial purposes to include an assessment of the impacts of downstream greenhouse gas emissions resulting from the eventual use of the refined products of the extracted oil*'. Some participants noted that this case has given rise to a new phrase "being Finched" to describe the translocation of the logic in this ruling into other areas of extractive development.

Some participants noted that, in contrast to the UK *ClientEarth v Shell* case, the Polish ENEA derivative action exemplifies how litigation has materialised financial risk in two phases: ClientEarth taking court action to stop the coal project back in 2019; and shareholders (including ClientEarth) bringing a claim against former management for breach of directors' due diligence obligations (claiming $160m in damages) in 2024.

Nonetheless, limitations of litigation were acknowledged. It is lengthy, expensive, uncertain, and requires judges to be not only climate-educated but also courageous. One participant noted that "contracts are often rigged in favour of incumbent interests, which is something that litigation tends to reinforce rather than rebalance". Court outcomes can also be influenced by the political environment, with participants noting that the successful UK *Finch* case on environmental impact assessment was able to be decided favourably due to a supportive policy environment arising from a change in government. Litigation may also have perverse consequences such as a chilling effect on boards that fear being sued for forward-looking transition plans or risky new green investment decisions. Participants responded that boards that substantiate their claims with credible data, metrics, and methodologies can actually mitigate the risk of litigation.

Overall, participants agreed that litigation is an important tool through which to catalyse the transition, but it is one tool amongst others identified in earlier sessions regarding legal and regulatory enabling environments.

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Appendix A

Roundtable Participants (by Organisation)

- CETEX London School of Economics and Political Science (LSE)
- Children's Investment Fund Foundation (CIFF)
- Centre for Climate Law & Governance, King's College London
- Columbia Center on Sustainable Investment, Columbia University
- Cornerstone Barristers
- Ecologic Institute
- Generation Foundation
- International Institute for Environment and Development (IIED)
- International Fund for Agricultural Development (IFAD)
- Qatar Centre for Global Banking and Finance, King's College London
- Quadrature Climate Foundation
- NDC Partnership
- Net Zero Lawyers Association (NZLA)
- ODI
- Peking University School of Transnational Law
- Pollination
- Sustainable Finance Centre for Excellence, Aviva Investors
- Systemiq
- Twenty Essex
- UNFCCC Technology Executive Committee
- University of Edinburgh Business School
- World Bank

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Appendix B:
References and Further Information

Session 1:

NCQG framework text and "investment"

IEA (2024) From Taking Stock to Taking Action

ODI, The New Collective Quantified Goal

Naidoo CP, P Lehmann-Grube, A Sheehama, J Beaumont, C Watson, L Pettinotti (2023) Exploring the intersection between equity and Article 2.1c of the Paris Agreement (Rabia Transitions Initiative and Overseas Development Institute)

Session 2:

COP29 Declaration on Green Digital Action:
https://unfccc.int/sites/default/files/resource/Declarations_and_Pledges_Letters.pdf

M Manning, R Bowhay, M Bowman, P Knaack, L Sachs, A Smolenska, F Stewart, T Tayler, P Toledano and H Walkate (2024) Taking the lead on climate action and sustainable development (CETEx)

T Tayler (2022) The tipping point for climate finance - Aviva Investors

Session 3:

M Bowman (2023) 'Polaris and Pluralism: Presenting a Legal Analytical Framework for Climate Finance', *Carbon & Climate Law Review* 17(1): 3-26

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Session 4:

S.A. Shivji KC et al (2024) *Nature-related risks and directors' duties under the law of England and Wales: Opinion 11 March 2024* (Pollination and CCLI), https://commonwealthclimatelaw.org/wp-content/uploads/2024/03/Nature-related-risks-and-directors-duties-under-the-law-of-England-and-Wales.pdf

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'Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights' (13 July 2023) UN Doc A/78/168:
https://www.ohchr.org/en/documents/thematic-reports/a78168-paying-polluters-catastrophic-consequences-investor-state-dispute

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We would like to thank all participants for their valuable and lively contributions during the roundtable and acknowledge helpful input from experts who were unable to attend on the day. More broadly, our co-convened legal-themed events form part of an ongoing partnership between King's College London and Aviva Investors to stimulate collaboration and knowledge exchange between public and private sectors in developed and emerging economies for transformational change in the face of planetary crisis.

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https://www.kcl.ac.uk/climate-law

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