THE EBRD'S CLIMATE AND SUSTAINABILITY AGENDA: THE ROLE OF LAW AND LAWYERS IN DELIVERING ON THE PARIS AGENDA

INTRODUCTION: THE INTERNATIONAL CLIMATE CHANGE REGIME

Climate change poses a grave and widespread threat to human health and well-being. The last decade witnessed the devastating impacts of a fast-changing climate. Yet matters are set to get much worse: infrastructure, economic development, food security, migration and trade flows are all further threatened under current projections. The scale and the scope of the crisis demand urgent and appropriate responses across a daunting array of fields and professions, from policymakers and the financial community to top scientists and civil society leaders. This article reviews the key aspects of the EBRD's green and sustainability agenda to address the crisis, then examines what lawyers can and must do to help achieve the Paris goals.

> "AVERTING THE WORST POSSIBLE CATASTROPHES CAUSED BY CLIMATE CHANGE WILL REQUIRE NO LESS THAN A LARGE-SCALE TRANSFORMATION OF BOTH ECONOMY AND SOCIETY."

The landmark 2015 Paris Agreement on climate change – joined by 193 Parties – sets a suitably ambitious goal of keeping the increase in global temperature to "well below 2°C" above preindustrial levels and pursuing efforts to limit the increase to 1.5°C. Six years on, the world is projected to warm by about 2.7C° on average based on national policies now in place.[2] Scientists have warned that crossing the 1.5°C threshold risks unleashing far more severe climate change effects on people, wildlife and ecosystems. The increased country ambition reflected in binding long-term targets, and especially the net-zero targets of large emitters (that is, the United States and China) signed in


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1
MICHAEL STRAUSS[1]
GENERAL COUNSEL, EBRD
StraussM@ebrd.com

2
HARRY BOYD-CARPENTER
MANAGING DIRECTOR,
GREEN ECONOMY & CLIMATE ACTION, EBRD
BoydCarH@ebrd.com

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2 See Climate Action Tracker Glasgow's 2030 Credibility Gap: Net Zero's Lip Service to Climate Action (9 November 2021) at https://climateactiontracker.org/publications/glasgows-2030-credibility-gap-net-zeros-lip-service-to-climate-action/

2021, have led to more optimistic projections (around 2.1°C global warming) that nonetheless still entail unpredictable and unprecedented disruption to societies across the globe.[3]

Insufficient progress on mitigation was at the core of negotiations at the meeting of the parties to the Paris Agreement (COP26) in Glasgow last year. COP26 concluded with countries' commitment to increase ambition and, in particular, to review annually their progress towards the interim 2030 targets. Nevertheless, the scale of the challenge and the multiple competing public policy demands, notably the unpredictable imperatives of responding to a war of aggression in Europe, heighten the risk that the Paris agenda will be stalled.

Averting the worst possible catastrophes caused by climate change will require no less than a large-scale transformation of both economy and society. Financial markets and institutional investors are increasingly shifting towards sustainable investments: over US$ 500 billion flowed into environmental, social and governance (ESG)-integrated funds last year.[4] With such a transformation under way, policy and regulatory responses are inevitable to prepare markets for better management of climate-related risks and ensure their stability. With this trend sweeping rapidly across every type of economy and every geography on the globe, it still remains to be seen if the climate transition envisaged by the Paris Agreement – and required for the health and safety of the planet – will remain orderly or spin into chaotic disorganisation.

As lawyers and policymakers at the heart of the EBRD's investment and policy engagement in sustainable finance, we take on two challenges in this paper. First, we look carefully at the Bank's green agenda and how it fits in the legal and regulatory landscape that would impose some degree of order and allocate formal responsibility on key parties. Next, we explore the essential and unique contribution of law and lawyers, as key professionals in an "all-hands-on-deck" effort, to achieve the Paris goals within the timeframe necessary to prevent the worst catastrophe.

3 Ibid.

4 See ESG Outlook 2022: The Future of ESG Investing (1 February 2022) at https://am.jpmorgan.com/gb/en/asset-management/liq/investment-themes/sustainable-investing/future-of-esg-investing/

THE GREEN AND SUSTAINABILITY AGENDA OF THE BANK

Sustainable development and environmentally sound investment are intrinsic to the EBRD's mandate and incorporated in its founding agreement of 1991. This commitment is restated in EBRD sector and country strategies and integrated in all projects that the Bank finances through the environmental and social requirements set out in our Environmental and Social Policy. Most importantly, it is embedded in our transition mandate. The Bank's mandate is to "foster the transition towards open market-oriented economies". Addressing climate change, famously described by a former Chief Economist of the Bank, Lord Nicholas Stern, as "the greatest market failure the world has seen", is fundamental to this agenda.

> "ADDRESSING CLIMATE CHANGE IS AT THE CORE OF THE BANK'S STRATEGIC AND CAPITAL FRAMEWORK FOR 2021-2025."

Emerging economies and developing countries are particularly vulnerable to climate change. We saw the devastating impacts of wildfires in Turkey, Greece and Bulgaria last summer, as well as flooding in Central Europe and droughts in Central Asia and North Africa. The costs of these events can be measured in lost lives and livelihoods, lost homes, lost businesses and billions of euros in emergency services and disaster relief. At the same time, the countries in the EBRD regions are among the most energy-intensive economies in the world and often lack capacity, technical knowledge, policy and legal frameworks to support the transition to net zero.

Addressing climate change is at the core of the Bank's Strategic and Capital Framework for 2021-2025. "Supporting the transition to a green, low carbon economy" is one of its three strategic

themes, alongside inclusion and digital. This orientation builds on a long tradition in the Bank that began with the adoption of the Sustainable Energy Initiative in 2006. The EBRD's efforts in this area have two pillars:

- A target of ensuring that green finance represents at least 50 per cent of the Bank's annual investments by 2025.
- A commitment, adopted formally by the Bank's shareholders in summer 2021, to align all EBRD operations with the goals of the Paris Agreement by 1 January 2023.

The Bank, in fact, reached the first target four years early, with green finance representing 51 per cent of commitments in 2021. This reflects the comprehensive mainstreaming of green thinking throughout the business cycle. However, the commitment to Paris alignment represents an even more fundamental reshaping of the Bank's operations to align every aspect with the long-term goal of fostering a low-carbon transition. This, of course, begins with a close assessment of every Bank investment. To this end the EBRD has developed and published detailed methodologies to underpin this assessment. But it extends to cover the Bank's own operations and its funding approach. Perhaps most importantly, Paris alignment includes broad-ranging support for the Bank's regions and clients in designing their own pathways to a net-zero endpoint.

The EBRD's green financing approach is anchored to its client-driven and private-sector business model and in line with its operating principles of transition impact, sound banking and additionality. Addressing market failures in this area, rooted most fundamentally in the lack of pricing greenhouse gas externalities, our policy work will have an important role alongside the Bank's financing activity.

SUPPORTING THE GREEN AGENDA THROUGH INVESTMENT AND POLICY DIALOGUE: IMPLICATIONS OF COP26 FOR THE EBRD

COP26 catalysed a significant increase in climate ambition across governments and businesses. Beyond the commitments made before and during COP26, the Glasgow Climate Pact codified the conclusions of the meeting, including a crucial commitment from countries to update the nationally determined contributions (NDCs) and prepare long-term strategies in 2022. These documents form the vital architecture of a low-carbon transition, setting the direction and speed of travel. They must be clear, detailed and credible enough that investors can respond, and they have to capture the level of ambition needed to meet the Paris Agreement temperature goals. Collectively, however, the updated NDCs and the new pledges leave a 15 per cent to 20 per cent gap between the current emissions trajectory and the trajectory required to meet the Paris goal of limiting the global temperature increase to 1.5°C.

Responding to this, the EBRD has sharpened its focus on policy instruments supporting the climate transition, including by enhancing cooperation on countries' updated NDCs, helping develop long-term strategies and other low-carbon and climate-resilient pathways at sector and subnational levels. For example, the Bank is supporting the development of a low-carbon pathway for the power sector in Uzbekistan, a low-carbon pathway for the steel sector in Turkey and the development of a green hydrogen strategy in Egypt. This work is not obviously connected to the investments and loans that are the "bread and butter" of a development bank's work, but in fact they are inextricably linked. The policy dialogue creates the enabling environment for green investments; the understanding of investor needs informs the policy dialogue.

This work to help countries recalibrate their economies to incentivise low-carbon investments is vital because it addresses the critical constraint holding back those investments. There is sufficient capital and financing available for the net-zero transition, especially for clean energy and carbon-reducing projects. One of the highlights of COP26 was the announcement by the Global Financial Alliance for Net Zero (GFANZ) of more than US$ 130 trillion of capital committed to adopting high-ambition, science-based targets, including achieving net-zero emissions by 2050.[5] A growing number of low-carbon technologies have reached the level of maturity where they are capable of being rapidly scaled, making them increasingly cost-competitive. However, there are insufficient commercially robust projects coming to market at the speed needed for those funds to be used and, importantly, at the speed required to reduce emissions. This challenge motivates the broad range of policy engagement that the EBRD carries out in this area.

> "THE EBRD AIMS TO SCALE UP INVESTMENT IN RENEWABLES AND FINANCE SMART, INTEGRATED AND RESILIENT NETWORKS AND REGIONALLY INTEGRATED MARKETS."

In addition to the United Nations Framework Convention on Climate Change (UNFCCC) negotiations and the outcomes captured in the Glasgow Climate Pact, COP26 also prompted the adoption of various initiatives that won wide support, but not the consensus required of a formal UNFCCC conclusion. These spanned a very wide range of issues, from protecting Congo Basin forests to phasing out internal combustion engine vehicles. One of the major commitments by the parties was a move away from coal and a redirection of funds to cleaner energy, also reflected in the carefully crafted wording in the Glasgow Climate Pact, committing to a "phase down" of coal consumption. This aligns well with the EBRD's longstanding work to accelerate the development of alternative energy solutions in its regions by supporting energy sector reform, investing in new technologies and mobilising private-sector capital. Decarbonisation and integration of energy systems are at the heart of the EBRD's 2019-2023 energy strategy. Back in 2018 the Bank decisively shifted away from the most polluting fuels by closing the door on thermal coal mining or coal-fired electricity generation. In 2021 the Bank also concluded that it would not invest in upstream oil and gas exploration or production. Instead, the EBRD aims to scale up investment in renewables and finance smart, integrated and resilient networks and regionally integrated markets. It is also increasingly

5 Its 450 members represent an astonishing 40 per cent of the world's financial assets under management. They will all now work to meet global net zero by 2050.

focused on the newer technologies that will be fundamental to deep energy decarbonisation, in particular energy storage, e-mobility and green hydrogen.

The energy transition is not only about investment in zero-carbon infrastructure; the world relies on hydrocarbons for 80 per cent of its energy needs. That is reflected in the existing infrastructure, and a critical challenge in the coming years is to engage with that infrastructure, to reduce its emissions and to transform it to a low-carbon mode. The EBRD accordingly remains engaged with the high-emitting sectors. It was the first multilateral development bank (MDB) at COP26 to sign the Global Methane Pledge, a commitment now made by more than 100 countries to reduce their collective methane emissions by 30 per cent by 2030.[6] Methane abatement is a key focus area for the coming years because it is typically low cost and can generate revenue by avoiding losses. Furthermore, methane emissions are high impact, with a global warming potential 27 to 80 times that of carbon dioxide, depending on the timeframe assessed.

> "THE EBRD ALSO ANNOUNCED AT COP26 A GOAL OF DOUBLING ITS PRIVATE-SECTOR CLIMATE MOBILISATION BY 2025."

COP26 also placed considerable scrutiny on climate finance as one of the main pillars of the international climate change regime. A central plank in that regime is the commitment made in the 2009 Copenhagen Accord to mobilise US$ 100 billion of climate finance by 2020 for developing nations. The Glasgow Climate Pact acknowledged "with deep regret" that developed countries had not met that goal and would be unlikely to do so before 2023. It reaffirmed the commitment of developed countries to this goal, however.

MDBs play an important role in delivering this goal, but clearly their own resources are insufficient. While MDBs' climate finance from their own resources exceeded US$ 63 billion in 2020,[7] little of that finance is provided in developing countries. Accordingly, to reach the investment needs required and to contribute to the US$ 100 billion goal, all MDBs strongly emphasise mobilising other sources of climate finance. These efforts focus especially on the private sector, which has, as the GFANZ declaration highlighted, huge volumes of capital available for this agenda, at least in principle. Beyond just the money, the private sector also brings innovation, diversity and operational resources; the dramatic fall in renewable costs over the last decade demonstrates vividly how effective those characteristics can be.

This mobilisation is a priority for the EBRD, given its primarily private sector-oriented mandate. In 2020 the Bank mobilised US$ 1.80 of private climate co-financing for every dollar of its own climate finance committed, compared to US$ 0.50 among MDBs as a whole.[8] Consistent with that priority, the EBRD also announced at COP26 a goal of doubling its private-sector climate mobilisation by 2025.

The importance of the private sector and the business community in transition towards a low-carbon, climate-resilient economy was highlighted repeatedly at COP26, making it by all accounts the conference of the parties with the strongest business participation ever. There is now broad recognition that climate change is a systemic source of both risks and opportunities for businesses, and that companies must strengthen their corporate climate governance to adjust to this shifting market context. Yet most companies in emerging markets have little visibility on what their climate risk exposure might be. We see this in the gulf between levels of governance and disclosure of climate-related risks and opportunities in developed and emerging markets.[9]

6. Global Methane Pledge at https://www.globalmethanepledge.org/
7. Joint Report on Multilateral Development Banks' Climate Finance 2020 at https://www.ebrd.com/2020-joint-report-on-mdbs-climate-finance
8. Ibid.
9. The gap is visible in a recent EBRD study of banks where only 43 per cent of chief risk officers of companies in the region consider the climate impacts of their portfolios as a potential source of risk compared to 91 per cent of respondents from leading global banks. See https://www.ebrd.com/news/2021/support-is-key-to-helping-ebrd-partner-financial-institutions-deal-with-climate-risk-survey-shows-.html

The EBRD has accordingly extended support to its clients to develop and enhance their corporate climate governance consistent with the recommendations of the Task Force for Climate-related Financial Disclosures. As a mainly private-sector bank, our strength is to engage with businesses and help them adopt better corporate practices by assessing, managing and disclosing information about climate-related risks and opportunities. As companies integrate these actions into their risk management and business strategies, they become part of the market shift towards low-carbon and resilient economies.

The final piece of the framework refocusing private capital on the climate challenge relates to standards. Institutional investors are increasingly looking to finance green and sustainable products.[10] Climate-related reporting of large financial institutions and companies is gradually being mandated in law and regulations at a national level,[11] with some jurisdictions requiring the integration of climate and ESG reporting and financial reporting.[12] Therefore, there is growing demand for a more quantifiable and comparable measure of emissions and environmental impact, especially for greater simplicity and credibility in the fast-growing plethora of green standards, initiatives, institutions and principles. The new standard-setting institution established by the International Financial Reporting Standards Foundation and announced at COP26 – the International Sustainability Standards Board – will contribute to the long-awaited harmonisation of standards with direct impact on companies and investors.

> “LAW IS FUNDAMENTAL FOR TACKLING CLIMATE CHANGE EFFECTIVELY.”

THE ROLE OF LAW IN DELIVERING ON THE CLIMATE AGENDA

Tackling climate change is in many ways a matter of justice. The impacts of climate change are pervasive and raise many scientific, political, economic and financial questions as well as questions about equity and responsibility; and, of course, each of these areas has a direct nexus with the law. Climate change threatens the effective enjoyment of a range of human rights, including those to life, water and sanitation, food, health, housing, self-determination, culture and development. As one of the largest investors in the EBRD regions, the Bank has committed to ensure that no one is left behind while we transition away from fossil fuels into a more sustainable and cleaner world. Such a “just transition” is one where the benefits of a green economy are shared, while support is also provided to those that stand to lose economically from the transition – be they countries, regions, industries, communities, workers or consumers. To unlock opportunities for climate finance and to ensure a “just transition”, we need enabling, sound and transparent legal frameworks and policy development.

Law is fundamental for tackling climate change effectively. Legal acts underpin policy commitments and targets, turning them into binding obligations and setting out the institutional framework to support the policy objectives. Climate laws also produce an enabling environment for private-sector investments, creating legal certainty and business opportunities. A national climate framework law, for example, mandates a country to cut its carbon emissions to net zero by a certain date (ideally no later than 2050) and ensures oversight and accountability. A strong and enforceable climate law also has interim targets to ensure this mark is reached and obliges the government to develop a roadmap to achieve the targets.

To drive action on the crisis, laws need to change at many levels, and they must be clear, participatory and inclusive. We need to strengthen and update laws relevant to all sectors (for instance, energy, land use and planning, transport) to take account of urgent climate objectives and obligations. Sectorial laws, in particular, set clear targets for specific industries, create a level playing field for investors and

10 See article “Beyond the hype: Delivering impact through sustainability reporting” in this journal.

11 For example, the United Kingdom will require all financial services firms to publish their net-zero plans by 2023.

12 The European Union sustainable finance package will likely require the integration of financial and non-financial reporting.

regulate new relationships in areas pushed forward by the pace of the energy and climate transition (for example, offshore wind laws). At the EBRD, we support national authorities and policymakers as they develop and implement innovative legal instruments and institutional capacities to attract and absorb financial flows while ensuring an equitable sharing of the benefits for the community.

For example, we have supported national authorities in Eastern Europe, the Caucasus, Central Asia and North Africa to introduce modern legal and regulatory practices in the energy sector. This includes reviewing and updating energy sector legislation, strengthening the institutional capacity of regulators, building market interconnections and opening up transparent and competitive markets for renewable energy. The new national legal and regulatory frameworks that the EBRD has supported have been instrumental to unlocking opportunities for major private-sector solar developments in North Africa, the Western Balkans and Central Asia, among other regions.

Finally, but importantly, countries need to invest in environmental rule of law to reduce and prevent pollution, establish dispute resolution mechanisms in case of violation and ensure the enforcement of sanctions. Many countries also recognise the mutually reinforcing relationship between human rights law and the environment,[13] which provides a more robust and enforceable legal protection regime for disadvantaged communities. And as this last point implies, the judiciary has an essential role in tackling climate change; the tidal wave of climate-related litigation is swelling.[14] The Bank has a long-standing tradition of supporting lawyers, the legal profession and the judiciary in the economies where we invest, so it is only natural for the EBRD to help lawyers navigate the increased complexities caused by the impacts of climate change.

13 Many countries have established the right to a healthy environment in their domestic legal frameworks. Internationally, the UN Human Rights Council recognised the human right to a clean, healthy and sustainable environment, see https://www.unep.org/news-and-stories/story/landmark-un-resolution-confirms-healthy-environment-human-right

14 Interest in climate litigation is increasing, reflecting a growing perception that courts can be a forum for progressing climate justice and can offer a focal point for bringing concerned citizens together. A growing body of constitutional law and human rights cases now seeks to achieve climate justice for all claimants.

HOW LAWYERS CAN PAVE THE WAY TO NET ZERO

It is tempting to feel helpless in the face of the immensity of the climate change challenge, but as lawyers, we have both the capacity – some even argue a duty – to act and contribute.

At the EBRD, our in-house lawyers ensure that sustainability is embedded within our strategic documents and integrated into our broader business operations and our policy dialogue. Our legal support ranges from advising on financing agreements with donors and climate funds to project structuring, institutional support and policy and regulatory advice. We prepare the legal structures and agreements supporting mitigation and adaptation investments and advise when the Bank subscribes to green bonds or sustainability-linked bonds issued by clients in the region.[15]

In addition, we advise our Treasury department on the issuance of new products aimed at supporting the low-carbon and resilient agenda of the Bank, such as the EBRD's Green Bonds,[16] which are aligned with the International Capital Market Association's Green Bond Principles. The Bank has issued sustainability bonds and the world's first dedicated climate resilience bond[17] as part of efforts to green our portfolio.

Lawyers also provide critical input to the Bank's policy framework on sustainability, which includes three key policies that ensure the EBRD meets the highest standards: the Environmental and Social Policy, the Access to Information Policy and the Project Accountability Policy. In addition, EBRD lawyers provide support and guidance to economies where we operate in implementing policy, law and governance reforms to build climate resilience and reduce carbon emissions.

The legal profession more broadly will play a leading role in maintaining and strengthening the rule of law and supporting transparency and responsible governance for delivering on the sustainability goals. As companies seek to attract new capital by publishing their ESG or climate reports, in particular, separating the wheat from the chaff can be complex. Understandable concerns about greenwashing[18] are growing and scrutiny of companies' green claims on a whole range of products is intensifying. And as climate liability is on the rise, lawyers must consider climate-related risks in advising their clients.[19] Finally, in company law, the changing nature of directors' duties pressures executives and their legal advisers to consider the impact of a firm's business on the community and the environment, in addition to the material climate and ESG risks the company faces.

As we engage with our clients, we have seen the expanding role of in-house lawyers as drivers of change in organisations by advising on innovative project structures and demanding climate-conscious provisions in legal agreements and standard contracts (for suppliers or service providers, for example). The general counsel in particular should be a trusted adviser to the board on matters related to good governance, reputation and integrity in the context of ESG and climate-related reporting. As climate and sustainability regulation become more stringent, lawyers will expect to play a more important role in aligning the sustainability strategy with the regulatory environment, highlighting potential current and future risks. Aligning and balancing business and sustainability strategies must become part of the in-house lawyers' repertoire to manage and enhance the ESG portfolio.

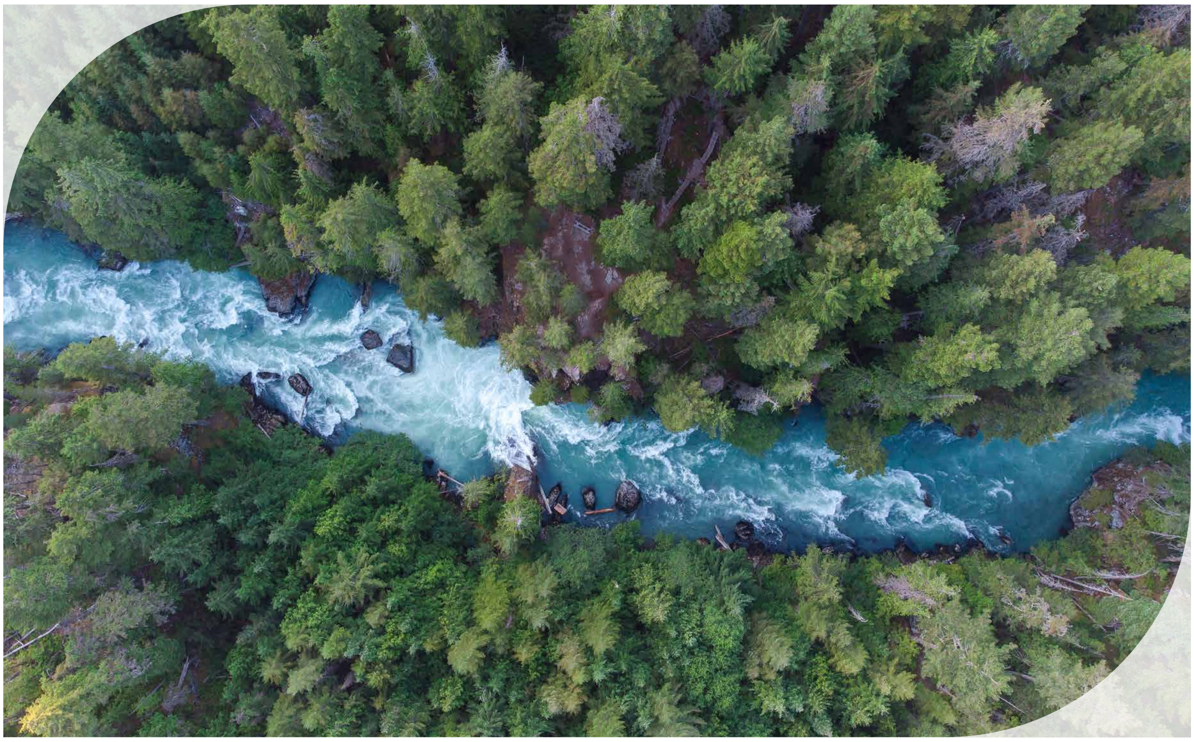
15 See https://www.ebrd.com/news/2021/ebrd-invests-in-ppcs-followup-sustainabilitylinked-bond-issue-in-greece.html

16 See https://www.ebrd.com/work-with-us/sri/green-bond-issuance.html

17 See https://www.ebrd.com/sites/Satellite?c=Content&cid=1395285042643&d=Touch&pagename=EBRD%2FContent%2FContentLayout

18 A new High-level Expert Group was established on 31 March 2022 to police the net-zero commitments of non-state entities and weed out so-called greenwashing; it will report directly to the UN Secretary-General. See https://www.un.org/en/climatechange/high-level-expert-group

19 Many professional bodies believe that consideration of climate-related risks is increasingly necessary as part of the legal due diligence process, especially in high-risk sectors (energy, mining, transport) and areas of law (conveyancing).



CONCLUSION

Responding to the climate crisis is one of, if not the, greatest geopolitical challenges of the coming decades. We already observe the impacts across all countries of a 1°C temperature increase. We have emitted enough greenhouse gases that a further increase, and thus further impact, is inevitable. A failure to hold that increase to the goals set out in the Paris Agreement risks impacts of ever-worsening scale and nature.

We know what needs to be done to reach the Paris Agreement goals, to avoid those impacts, to preserve the benefits of modern developed economies and to spread those benefits globally: a global economy that relies overwhelmingly on hydrocarbons must be rebuilt with infrastructure and systems that run on clean energy. More than ever before, we know not just what has to be done, but how it can be done. The pathways to reduce emissions to zero by 2050 are uncertain, but the pathway to halve emissions by 2030 is clear, feasible and affordable: reduce energy intensity, electrify road transport, progressively electrify heating and industry, shift electricity generation to wind, solar and other renewables, conveyed on a smart network with growing quantities of storage, and start the process of decarbonising aviation, shipping and heavy industry.

The climate crisis is at heart a human crisis. The impacts of climate change are not book entries, but lost opportunities, displaced communities, degraded biomes, drought, hunger, poverty and all the ills that flow from these. Addressing such a complex, pervasive challenge requires a set of rules and a belief in the value and credibility of a rules-based system. Lawyers believe in the rule of law as an essential prerequisite for a just and fair society delivering better outcomes for all. That same aspiration sits at the core of a development bank's mandate. In addressing a challenge that is multifaceted, global and multigenerational, lawyers from all paths of the profession have an essential role to play.