ADDRESSING LEGAL BARRIERS TO CLIMATE INVESTMENTS IN JORDAN, MOROCCO AND TUNISIA

On 4 November 2016, the Paris agreement on fighting climate change came into force, committing nearly 200 signatory countries to undertake ambitious efforts to combat global warming. In particular, signatories agreed to keep the average global temperature rise this century "well below 2C" compared with pre-industrial levels. They also agreed to endeavour to limit the increase to 1.5 degrees Celsius, since this would significantly reduce the impact of climate change and associated risks. How each country contributes to this enormous collective endeavour is set out in its nationally determined contributions (NDCs). These identify the climate actions that individual governments will take after 2020.[1]

In order to turn their NDCs into reality, however, many countries around the world will need to strengthen their legal, regulatory and institutional frameworks to encourage increased levels of climate investment. This is an area where the EBRD's Legal Transition Programme (LTP) has much to offer.

For more than 10 years the Bank has been at the forefront of efforts to tackle climate change. From 2006 to 2016, the EBRD invested €22 billion in projects that seek to increase the energy and resource efficiency of businesses and households, promote the use of renewable energy or help countries adapt to the effects of a changing climate. In 2015, the EBRD launched its Green Economy Transition (GET) approach,[2] which aims to further increase the volume of the Bank's sustainable financing to 40 per cent of Annual Bank Investment (ABI) by 2020 and broaden its scope.

EBRD EXPERTISE

In addition to investments, the EBRD engages in extensive policy dialogue to support climate change mitigation and adaptation measures. This includes policy and legal reform work on a wide range of climate-related topics, such as the development of a national energy efficiency action plan in Georgia; legislation on the energy performance of buildings in Moldova; or electricity sector reform in Bulgaria and Tajikistan.[3]

"Given the EBRD's long track record of helping our countries of operations put in place legal and regulatory frameworks that favour energy efficiency as well as broader climate investments, we are very well placed to provide guidance on targeted legal and institutional reforms that governments might need to carry out in order to meet their NDC commitments," says EBRD Principal Counsel Vesselina Haralampieva, who leads LTP work on climate issues.

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NDC ASSESSMENT

In July 2016, the LTP launched a pilot, donor-funded assessment of the national policy, legal and institutional measures required for the implementation of the NDCs in three EBRD countries of operations: Jordan, Morocco and Tunisia.

Under the Paris agreement, national governments are expected to identify and pursue key measures that would facilitate the development and implementation of mitigation adaptation and finance commitments set out in their NDCs. There is a legal obligation on all parties to report to each other and to the public on how well they are doing with regard to implementation. They are also required to update their NDCs every five years, anticipating an increase of ambition and resolve over time.

"Implementing the NDCs may require governments to revise current or develop new policies and legislation and strengthen their institutional and technical capacity," says Vesselina. "In particular, countries may use domestic law to create overarching obligations to reach climate mitigation or adaptation targets, as well as enacting a range of other measures. Examples include laws on emissions, energy efficiency, energy markets, land use, water management and transport, as well as legal frameworks related to climate finance.

"These reforms, if carried out promptly, could stimulate enough investment in climate projects to reach the Paris agreement's objectives. A global response also requires action from the private sector, donors and multilateral development banks, as well as from civil society organisations that can hold their governments responsible for meeting their climate commitments and, where necessary, advocate higher ambition levels."

The NDC study in Jordan, Morocco and Tunisia drew on the help of international and local experts and practitioners. It aimed to (i) identify the legal, institutional, regulatory and sectoral barriers to achieving countries' targets under their NDCs; and (ii) use the conclusions of the research to inform discussions with authorities on developing and implementing practical recommendations on how to address and overcome these barriers.

KEY FINDINGS AND RECOMMENDATIONS

The study provides specific recommendations for each country as well as for private investors, donors and civil society organisations. Overall, the study emphasised the need to coordinate legal, institutional and regulatory measures for climate mitigation and adaptation investments across all sectors and introduce transparent monitoring, reporting and verification requirements for carbon emissions. A lack of regulatory transparency – for example, in the renewable energy sector, with regard to the setting of tariffs in Tunisia or the licensing process in Jordan – is impeding the development of renewable energy or energy efficiency projects. This is compounded by low awareness among domestic and international investors of available incentives.

The assessment found, however, that significant legal reforms in recent years are paving the way to or have created a more favourable investment climate. Notably, the Tunisian constitution of 2014 provides for the right to a clean environment and highlights the importance of making a "contribution to climate security".[4] On 30 September 2016, legislators in Tunisia passed a new investment code that provides for specific premiums for investments "contributing to the fight against pollution and to environmental protection."[5] The implementation of the new legislation is yet to be seen, although some deficiencies have already been identified in the assessment. The government of Morocco has designed a legislative framework to encourage private investment in renewable energy and created two agencies to support solar energy projects.

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RENEWABLE ENERGY IN JORDAN

In Jordan, rising energy prices and recent regulatory changes have made investments in renewable energy generation and energy efficiency attractive for the private sector. To simplify the complex bidding process, the Renewable Energy and Energy Efficiency Law (REEL) of 2012 allows investors to develop renewable energy projects and propose them directly to the government, instead of having to wait for a government-initiated tender. In 2015, the Ministry of Energy switched to competitive tenders, prompting very attractive investment proposals for the development of new solar energy sites. A new regulation allows businesses to generate renewable energy in a location far from their place of operation and, by feeding it back to the grid, to offset their energy bill.

Through the introduction of these innovative regulations, Jordan has boosted investor interest and become a leader in the renewables energy market in the SEMED region. Last year, for example, the EBRD extended a syndicated loan to a subsidiary of ACWA Power, an electricity and desalination company based in Saudi Arabia, for the construction of a solar power plant at Mafraq in northern Jordan.[6] By showcasing these reforms and the lessons learned from them, the NDC study aims to act as a catalyst for similar legal and regulatory changes in neighbouring countries.

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A significant legal impediment to the further development of the renewable energy sector in Jordan, however, is the restriction on direct energy sales to domestic or foreign consumers by private renewable power companies. The assessment recommended allowing private-to-private energy sales, reducing the land purchase and investigation burden and improving the clarity and transparency of administrative processes in order to further stimulate renewable energy development in the country.

PRIVATE POWER GENERATION IN TUNISIA

In Tunisia, the state-owned power company STEG[7] enjoys a monopoly and is vertically integrated. These features, combined with a widely held perception that STEG's tariff-setting lacks transparency, inhibit the emergence of independent power producers (IPPs) and private-to-private power transmission. In order to help Tunisia meet its renewable energy targets, the assessment recommended the development of sound and transparent secondary legislation, including IPP regimes, the creation of an independent regulatory body for the Tunisian power sector and the simplification of land ownership arrangements. In particular, effective regulatory monitoring would ensure STEG does not have conflicts of interest regarding the connection of private renewable energy suppliers and consumers and would allow a competitive sector environment.

ENERGY EFFICIENCY

The report points out the limited monitoring and enforcement of energy efficiency (EE) regulations in Jordan and the unclear references to EE standards in Tunisian construction and infrastructure regulations. Moreover, there is a lack of knowledge of new construction and operational techniques, as well as of EE measures, among builders and property owners in Tunisia. In Jordan investors lack awareness of financial incentives for EE ventures.

The assessment recommends strengthening the capacity of regulators in Jordan to monitor and enforce EE regulations and the introduction of energy performance certificates for buildings. In Tunisia, the introduction of smart meters and more informative billing practices, coupled with the removal of inefficient energy subsidies, could incentivise more conservative energy use by consumers.

WATER SCARCITY

Jordan, Morocco and Tunisia all face water scarcity issues. An analysis of the three countries' legal frameworks reveals gaps in their water management policies. According to the study, in order for Morocco to achieve its NDC water targets, barriers to private sector participation in the operation of infrastructure and services related to wastewater and irrigation should be removed. Better water management plans are recommended, along with legal reforms aimed at encouraging water conservation. This would include the introduction of specific quotas and safe yield amounts for groundwater extraction.

The management of water resources is a politically sensitive issue in Tunisia due to the competing demands of farmers, industry and city dwellers. The study recommended strengthening regulatory safeguards in the water sector and reinforcing the involvement of users in water management planning in order to generate improved user buy-in.

MONITORING OF LOW-CARBON INVESTMENTS

"In addition to adaptation, mitigation and finance, the other key pillars of NDC implementation are monitoring, reporting and verification," says Vesselina. "This requires countries to have transparent climate governance systems that track the implementation and impact of climate change policies. Such policies would give the signals needed to attract financial flows."

The monitoring of compliance, enforcement and of other aspects of the implementation of international commitments is not very strong in any of the three pilot case study countries. Nevertheless, institutional arrangements envisaged under the Paris agreement that promote transparency and other monitoring and reporting obligations may help countries deliver on their commitments under the NDCs.

Private investors should take a leadership position when it comes to low-carbon and climate-resilient development by adopting a longer-term approach to investments and risk decisions, according to the assessment. By acting as first movers, investors will reap the benefits of government incentives and avoid being left behind when regulations are tightened on carbon-intensive investments.

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1 The NDCs submitted by the parties to date differ in their substance and format.

2 http://www.ebrd.com/what-we-do/get.html (last accessed 4 January 2017).

3 For more information go here: http://www.ebrd.com/what-we-do/sectors/legal-reform.html (last accessed 18 January 2017).

4 Paragraph 5 of the Preamble and Article 45 and 102 of the Tunisian Constitution of 2014, adopted on 26 January 2014. Such provision of state obligations to protect and respect environmental rights and contribute to climate security provide the strongest – albeit the most general – possible foundations in Tunisian law for the implementation of the country's NDC.

5 Law N° 2016-71 of 30 September 2016, Article 4 and 19.

6 http://www.ebrd.com/news/2016/ebrd-supports-solar-power-in-jordan.html (last accessed 4 January 2017).

7 https://www.steg.com.tn/en/institutionnel/mission.html (last accessed 4 January 2017).

8 http://www.ndcpartnership.org/ (last accessed 4 January 2017).

9 http://thecommonwealth.org/ (last accessed 4 January 2017).

10 http://newsroom.unfccc.int/ (last accessed 4 January 2017).

11 http://www.unep.org/ (last accessed 4 January 2017).

12 http://www.worldbank.org/en/events/2016/12/05/law-justice-and-development-week-2016 (last accessed 4 January 2017).

SUPPORT FOR NDC IMPLEMENTATION

The assessment notes that international coordination may be extremely important for improving political stability in the region, as well as for strengthening these countries' capacity for the regular monitoring, review and verification of their climate change commitments.

Furthermore, public engagement in the legal reform process is key to designing a successful legal and institutional framework. Civil society organisations are well-placed to provide capacity-building and training for citizens. Specialised training programmes on climate change and environmental matters should be organised (such as training judges on climate-related litigation) and information campaigns should raise awareness among businesses of low-carbon and climate-resilient investment opportunities.

THE EBRD IN MARRAKESH

The EBRD presented the preliminary findings of the assessment at the UN climate conference in Marrakesh in November 2016. EBRD General Counsel Marie-Anne Birken noted that "because of the new bottom-up approach upon which the [Paris] agreement is built, its implementation, enforcement and, ultimately, success will depend on the development and enforcement mechanisms envisaged in national legislation."

Multilateral development banks (MDBs) such as the EBRD and other international institutions also have an important role to play. The conference in Marrakesh saw the launch of the NDC Partnership,[8] which is a coalition of governments and international institutions aimed at helping countries achieve their climate goals. The EBRD is a founding member of the NDC Partnership.

BEYOND THE ASSESSMENT

In 2016, other LTP work that supported the fight against climate change included participation in a seminar organised by the Commonwealth,[9] in collaboration with the United Nations Framework Convention on Climate Change (UNFCCC)[10] and the United Nations Environment Programme (UNEP),[11] in London in December. This event focused on the need to develop a toolkit on law and climate change that would provide guidance to countries on the legal reforms and institutional transformations needed to meet their NDC commitments and attract financial flows. The EBRD presented the legal analysis it carried out on the legal instruments for NDC implementation in Jordan, Morocco and Tunisia.

At the World Bank's Law, Justice and Development Week[12] in Washington, DC, in December, the EBRD encouraged discussion of the various approaches states may choose when implementing the NDCs, such as developing an overarching climate act, strengthening their environmental legislation[13] and focusing on legislation that attracts financing for priority sectors.

"We will discuss our findings with government officials in Jordan, Morocco and Tunisia and seek to support their implementation of NDCs," says Vesselina. "Our assessment could be replicated in other EBRD countries of operations. This would provide a wide-ranging analysis of the legal and institutional barriers to climate finance, as well as of the opportunities to develop low-carbon economies through the adoption of clear and transparent regulations. This would pave the way for much higher levels of climate investment by the Bank and its finance partners."

13 In the Paris agreement, environmental integrity is key in relation to NDC implementation. For instance, Article 7.5 specifically provides that adaptation action should be integrated into the relevant socioeconomic and environmental policies and actions, where appropriate, and Article 6 provides that the parties shall promote sustainable development and ensure environmental integrity and transparency when implementing their NDCs.

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