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COP26: DID IT DELIVER?

– THOUGHT LEADERSHIP

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COP26, has been described as the 'last best hope" to avert climate disaster. In this extract from a recent Clifford Chance event, moderated by Partner and ESG Board member, Roger Leese, our experts assess the effectiveness of government actions and the important contribution made by businesses.

Energy transition

COP26 did not provide any concrete commitments on the transition from carbon fuels to more sustainable energy. "Whilst this was the first COP agreement to mention fossil fuels or coal, a last minute intervention by China and India meant that efforts to end the use of coal power and fossil fuels subsidies were thwarted, with 197 countries agreeing to 'phase down' rather than 'phase out' coal. This leaves us no specific ways of moving forward from where we were with the Paris Agreement," says Olamide Oladosu a London-based Partner in Clifford Chance's energy and infrastructure team. However, he adds that it wasn't all bad news. For instance, the US, UK, France and Germany are making US$8.5 billion available in grants and loans over the next five years to South Africa – through the Just Energy Transition Partnership – to help it reduce its reliance on coal. "I think this provides a template to deal with other countries which are also heavily dependent on coal," says Oladosu.

COP26 finance goals

In 2009, it was agreed that developed countries would provide US$100 billion a year by 2020 to help developing countries deal with climate change.

Angela McEwan, an Amsterdam-based partner in Clifford Chance's global financial markets group says: "There were a lot of statements at COP26 around the importance of this. The Glasgow Climate Pact urges developed countries to fully deliver on that US$100 billion goal urgently through to 2025. It also urges multilateral development banks and other financial institutions to further scale up investments in climate action and emphasises the need for an increase in climate finance from all sources globally in order to reach the levels of finance needed."

She adds that there was a particular focus in the Glasgow Climate Pact on adaptation finance. "This is a really important area for developing countries because it's almost impossible for them to prepare for extreme weather such as floods and wildfires without assistance from developed countries." The Pact urges developed countries to at least double their collective provision of climate finance for adaptation by no later than 2025. " That's an attempt to bring more of a balance between mitigation and adaptation in the provision of financial resources."

Multilateral development banks (MDBs) have a key role in the delivery and mobilisation of climate finance as the principal interface between the public and the private sector. They can also help countries set out long term strategies which are consistent with the Paris Agreement. "Development finance institutions (DFIs) can also assist in bringing in parties who may otherwise be reluctant to provide finance into developing countries by using a number of instruments and financial structures to de-risk transactions such as guarantees, blended finance and first loss structures," McEwan says.

Private finance

"Private finance will be crucial in tackling climate change," says Cheng Li Yow, a Partner in Clifford Chance's corporate financial institutions group. "Businesses and financial institutions made it clear at COP26 that they consider themselves as leaders in dealing with the issue and many of them have made commitments to supporting climate initiatives." The Glasgow Financial Alliance for Net-Zero (GFANZ), a consortium of over 450 financial firms from 45 nations which has combined assets of US$130 trillion and is chaired by UN Special Envoy Mark Carney, the former Governor of the Bank of England, committed to lending and investing with net zero goals. In addition, the Net-Zero Insurance Alliance, which brings together some of the world's biggest insurers and reinsurers, has committed to manage their assets in line with net-zero goals.

Nature based solutions and reforestation

COP26 made some mention of nature-based solutions such as the growing of trees to help reduce emissions. More than 100 countries signed a pledge promising to end deforestation by 2030 and earmarked US$12 billion of funds for the initiative. "There was nothing in there in terms of who is actually going to come up with that money, but at least there is a commitment to provide financing," says London-based Partner Roger Leese. He adds that there has been action by individual nations and regions on this already. "The EU has proposed legislation in relation to deforestation which will essentially see businesses having to do due diligence to ensure that their products and their supply chains are not leading to deforestation " he says.

Investment opportunities

COP26 may lead to a range of investment opportunities. "There is a growing pot of investible projects out there," says Oladosu. "There are opportunities in regards to carbon capture and around the use of clean hydrogen and in developing markets there is a growing focus on renewable energy such as wind and solar." He adds that are also opportunities for new technological solutions to climate change which will need scaling and financing.

Carbon trading

After six years of discussions, rules for a new global carbon market were finally agreed at COP26. "The Article 6 Rulebook Agreement, sets out how global carbon market mechanisms are going to actually work and how emissions reduction units are going to get traded," says New York-based Partner, Paul Koppel. "This framework could lead to the introduction of billions of dollars of carbon reduction projects all across the globe." It sets out how the approval process is supposed to work, how credits get issued and how to adjust the emission accounts of one host state where a project in question is located and how legacy projects and credits under the Kyoto Protocol's Clean Development Mechanism can be taken into account. in the new rule framework. "I hope that this could open up a market that private participants can really participate in. It may be one of the most lasting and meaningful things to come out of COP26," says Koppel.

How binding is the Glasgow Pact?

"Most of the outcomes are not legally binding," says Thomas Voland, a Partner in the firm's Dusseldorf office specialising in regulatory risks and compliance risk " But they are not, in the words of climate activist, Greta Thunberg, blah, blah, blah either." In general, COP26 cannot create new, enforceable obligations against particular parties. "However, both the Paris Agreement and the United Nations Framework Conventions on Climate Change (UNFCCC) are legally binding and they expressly state that they are to be implemented in accordance with the decisions of the Conferences of the Parties. So, to the extent that any decisions of the conference of the parties are made under one of the enabling provisions, these decisions then can be legally binding under public international law. This is the case for everything that happens under Article 6 of the Paris Agreement, because this Article stipulates that obligations need to be specified by a rulebook," he says.

The global carbon market mechanism described above, is the implementation of Article 6 and part of a rulebook and therefore can be considered to be legally binding. By contrast, the Glasgow Climate Pact is most likely not legally binding in terms of public international law. It's called a Pact and not an Agreement. However, Voland says that there have been several attempts to enforce those non-binding statements, agreements or provisions between countries or between governments before national courts. For example, the German constitutional court earlier this year forced the German legislator to amend its Climate Protection Act in order to protect future generations. In addition, activists are bringing lawsuits before courts against companies arguing that these companies are not meeting their targets to reduce their greenhouse gas emissions.

The US faces other issues, says Paul Koppel. "From a political perspective, it's far from clear how effective an administrative promise at COP26 might be in terms of getting the United States to really do whatever our government may have promised on our behalf. It's all likely to get challenged in courts in the United States under the argument that if it's not clearly within the scope of what Congress has said can be done." However, he adds that on a more positive note, private investors in the US are likely to get involved in new nuclear microreactors or small modular reactors and clean hydrogen. "There is some optimism around that even if we can't be robustly optimistic about how the legislative process is going to support all this," he says.

Commitments by businesses

As well as commitments by governments and regions, businesses also made a number of declarations at COP26. For example, various automotive manufacturers, investors, fleet operators and municipalities published a declaration on accelerating the transition to 100% zero emission cars and vans with a number of – but not all – automotive manufacturers committing to work towards reaching 100% zero emission new car and van sales in leading markets by 2035. However, this is not legally binding and there is a "softness around some of the wording," says Voland. For example "As business fleet owners and operators, or shared mobility platforms, we will work towards 100% of our car and van fleets being zero emission vehicles by 2030, or earlier where markets allow. What does 'where markets allow' actually mean?" He adds that activists, for example, might try to argue before courts that participating in such declarations or statements, but not complying with them amounts to greenwashing.

Did COP26 deliver?

Reactions to the success of COP26 are mixed. While there was some progress with the Article 6 Rulebook Agreement on global carbon market mechanisms, there was disappointment that governments are not moving fast enough to tackle climate change – for example, by watering down commitments on ending the use of fossil fuels. The general consensus is that businesses are driving some of the change that is needed. "I would say that COP26 was moderately successful, not least because businesses are increasingly aware of the challenges of climate change but are also willing to play their part and self-commit to transition and for me, that is very positive message," says Thomas Voland. And Paul Koppel adds: "I think we are going to see more and more private investment and engagement with these issues and that may turn the tide on emissions reduction rather than relying on commitments by nations.

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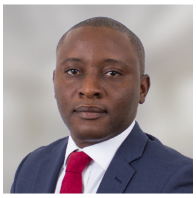

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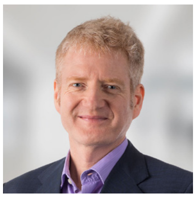

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