

## Article

# The Paris Agreement and the Transformation of Global Climate Law: Taiwan's Perspective

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### ABSTRACT

*The Paris Agreement passed in the COP 21 of UNFCCC was highly praised as a success model for global effort on responding climate change, yet its importance to the global society and Taiwan has not been fully elaborated. Why the COP is able to reach a global agreement? What's the impact of the Paris Agreement on global and domestic climate change law? How should Taiwan prepare for the coming global legal order?*

*This article examines the process and result of the Paris Agreement with an attempt to explore its impact on the global climate change law. This article argues that, the Paris Agreement presents a new model for global climate change law. It transforms the top-down, mitigation focused, and state obligation centered climate change model of the Kyoto Protocol to a model of bottom-up, comprehensive and procedural rules. This article further argues, the Paris Agreement will trigger worldwide legislation on climate change law, revitalize global carbon market and reconstruct global governance and law. This article then examines recent development of climate change law in Taiwan, and argues that Taiwan should be better prepared for the coming global climate change legal order with three ways: deepening climate change policy, reconstructing organizational and procedural settings and seeking opportunities in the new legal order.*

**Keywords:** Climate Change, the Paris Agreement, UNFCCC, Global Administrative Law, NDC

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DOI : 10.3966/181263242018091302001

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## I. INTRODUCTION

In humans' history of wrestling with the nature, climate change presents as the most formidable challenge we humans have ever faced. Resulting from greenhouse gas (GHG) emissions, climate change is unprecedented in its cause and effect in a global scale, and uncertainties so derived. Expectedly climate change has transformed the face of environmental issues and the ways we deal with them. Meeting the challenges of climate change through both mitigation and adaptation requires a global solution, which has been sought by the global society in the last two or three decades.

As the world is struggling to reach consensus on solutions to climate change, it is imperative to point to "an inconvenient truth" in this process: the process remains state-centric. States, large or small, active or quiet, remain the primary actors in climate negotiation. The process rooted in international legal system deters a global solution for climate change law. The 2009 Copenhagen negotiation remains a vivid example. It was fraught and chaotic, with a last minute agreement emerging after frantic scenes on the conference floor. After the Copenhagen round, global GHG emissions nonetheless kept increasing and few states enacted laws to combat with climate change actively.

The Paris Agreement of COP 21, on the contrary, is highly praised as a successful model. The Paris Agreement is believed to be a legal framework for global and long-term climate action that will trigger a deep and worldwide legislation on climate change. After two years, despite of uncertainty, global society is still working hard to put Paris Agreement into force. How did the Paris Summit restore trust among the states with various and diverse interests and redirect climate change negotiation toward a more solid legal framework? Why is the Paris Agreement so important and transformative? What impact does the Paris Agreement have on the states, market and global governance? Most importantly, how will the Paris Agreement affect a country like Taiwan which is isolated from climate change negotiation and governance? How can Taiwan take advantage of the new development and response to the threat of climate change?

This paper sets out to sketch the progress and the achievement of the Paris Agreement, and explores the challenges and prospects ahead. Part 2 briefly summarizes the process and the result of the Paris Agreement. Part 3 inquires into the features and impacts of the Paris Agreement. The paper suggests that the Paris Agreement represents a new model of global climate change law as well as impacts states, market and the structure of global governance and law in a new pattern. In Part 4, Taiwan's situation, challenges and chances on climate change law are discussed. While democratic transition and international pressure are two major forces

triggered the development of environmental law in Taiwan, both fail to lead successful legislation on climate change and result in gesture policy. Nonetheless, the paper finds that the progress of the Paris Agreement could motivate the civil society in Taiwan and increase international pressure toward Taiwan, which brings both challenges and chances for Taiwan.

## II. THE PARIS AGREEMENT: AN INCLUSIVE AGREEMENT WITH UNIQUE PATH

The success of COP 21 is not an easy luck. Learning from the failure of COP 15, the UNFCCC and negotiating parties have gone through a long journey to Paris. The negotiation started since 2011 and adopted a more incremental, decentralized approach. The unique path aimed to restore trust between parties and finally result in the first universal and legally binding climate change agreement.

### A. *The Path to Restore International Trust*

As a part of the UN system, the negotiation of UNFCCC has been operated on a model based on state interests. Consensus among nations is necessary to reach a legally binding international agreement; state consent is the premise for a treaty to be enforced in a territory. The difference among states and the complexity of climate change both undermine the efficiency and function of international negotiation.

The principle of “common but differentiated responsibility (CBDR Principle),” which was created to reach a compromise among nations, found itself creating more problems than solution. Based on the CBDR Principle, the Kyoto Protocol distinguishes developed countries<sup>1</sup> from other countries, and only imposes them legal obligations to reduce GHG emissions on the basis of their historical GHG emissions. In recent years, however, some developing countries have emitted more GHG than developed countries. European countries, the U.S. and Japan find it is necessary to impose emissions reducing obligation on developing countries; yet developing countries refuse and claim such obligation imposed on developing is the strategy of developed countries to maintain their economic hegemony. Small islands, facing immediate climate change impact, have been requesting developed countries to realize their promise of financial support while at the same time departing from major developing countries to seek a full and effective mitigation law. Moreover, European countries, with their integrated market, prefer flexible mechanisms. With all these differences and conflicts presented in COP, politics overwhelms rationality, and undermines the

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1. Kyoto Protocol lists developed countries in the Annex one.

fundament of negotiation. Super-majority rule, state-centric position and interest-based thinking now dominate the climate forum, and the recent rounds of negotiation have borne limited if any fruit in arranging the post-Kyoto norms for the next stage. The failure of the Copenhagen COP is one vivid example.

The creation of the Paris Agreement represents an emerging terminology on UN negotiation.<sup>2</sup> Among others, a de-centralized and open negotiating process is the key.

The process to restore international negotiation on mitigation restarted in 2011, COP 17 in Durban. Considering the distrust among countries after the Copenhagen conference, the Durban COP established an “Ad Hoc Working Group on the Durban Platform for Enhanced Action” (hereinafter “ADP”) to prepare the framework and eliminate disagreements among conflicting parties. The aim was to conclude a new agreement by 2015 to cover the post-2020 period.

Meanwhile, the COP properly managed issues to avoid deadlock. By shifting to issues other than mitigation, COP successfully to make developed countries to provide developing countries more support on financial mechanism, technology transfer, adaptation as well as loss and damage, and capacity building.<sup>3</sup> These efforts with the obvious impact of climate change increased the motivation of developing countries to reduce GHG emissions. Developed countries are more possible to commit to the goal of reducing GHG emissions as a result.

In November 2014, China and the U.S. announced their intention to address climate change. This accord facilitated the Lima conference in December 2014 (COP 20) to conclude with the adoption of the ‘Lima Call for Climate Action’, a document that invited all Parties to communicate their plans for post-2020 climate action in the form of Intended Nationally Determined Contributions (INDCs). The Lima call contained an annex with elements of a draft negotiating text. Several UNFCCC negotiation sessions were held in 2015, but did not resolve key issues regarding fairness, responsibility and finance.

In order to avoid the failure of the Copenhagen round, many parties initiated a process of consensus to building their mitigation goal before the Paris conference. For example, the European Commission published its position for COP 21 in February 2015, European Council adopted a negotiating mandate in September 2015, and the European Parliament

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2. Jennifer Morgan et al., *Elements and Ideas for the 2015 Paris Agreement* 9 (World Resources Institute, ACT 2015 Working Paper) (Dec. 2014), [http://www.wri.org/sites/default/files/ACT\\_Elements\\_Ideas\\_FullPaper\\_FINAL.PDF](http://www.wri.org/sites/default/files/ACT_Elements_Ideas_FullPaper_FINAL.PDF).

3. The Cancun Adaptation Framework and the establishment of Green Climate Fund in COP 16 are both examples.

adopted its resolution in October 2015. Other countries, under the pressure of INDCs, also initiated discussions on climate change mitigation and adaptation; some of them even enacted laws. By the end of November 2015, 184 out of 196 Parties had submitted their INDCs.

Different from the Copenhagen conference, where the negotiation was centralized in the COP, leading to political deadlock, the negotiation process of the Paris conference was incremental and decentralized. The preparedness and negotiation platforms before the COP eliminated disagreement and hesitation of the Parties. Every Party came to Paris with certain degree of mutual understanding and domestic consensus, making the Paris Agreement possible. This terminology of negotiating process are followed and enhanced by later COPs.<sup>4</sup>

#### B. *The First Global and Legally Binding Climate Agreement*

The Paris Agreement adopted by 197 countries, and ratified by 173 countries. It is the first-ever legally binding global climate deal that will guide the process for global action on climate change. In contrast to the Kyoto Protocol, which commits only developed countries to specific reduction targets, the Paris Agreement requires all countries to prepare nationally determined contributions (NDCs), take measures to achieve their objectives, and report on progress. The Paris Agreement applies to all Parties of UNFCCC. 188 countries have put forward NDCs, covering 99% of global GHG emissions.<sup>5</sup> It is a truly “global” legal mechanism for climate change. The outcome of COP 21 consists of a COP decision and the Paris Agreement with 29 articles. Although some non-binding provisions make it a hybrid of legally binding and nonbinding provisions, the Paris Agreement is still regarded as the first global and legally binding agreement.<sup>6</sup>

The Paris Agreement sets out a global action plan to put the world on track to avoid dangerous climate change by limiting global warming to well below 2°C. By giving up a quantified emission target, the agreement aims to “reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter.”<sup>7</sup> More significantly, the Paris

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4. For example, COP 23 provided for Talanoa Dialogue that facilitates 2018 negotiation. The dialogue will be structured around three general topics: Where are we? Where do we want to go? and How do we get there?

5. *Paris tracker: Who Pledged What for 2015 UN Climate Pact?*, CLIMATE HOME NEWS (Oct. 13, 2015, 2:51PM), <http://www.climatechangenews.com/2015/03/10/paris-tracker-who-has-pledged-what-for-2015-un-climate-pact/>.

6. Some provisions of the Paris Agreement are legally binding, such as the implementation of NDCs and reporting.

7. Paris Agreement art. 4, Apr. 22, 2016. *See also*, Coral Davenport et al., *Inside the Paris*

Agreement pledges “to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century”.<sup>8</sup> Experts suggest that, when the Paris Agreement says it aims “to achieve a balance” between anthropogenic emissions and removals by sinks, it means getting to “net zero emissions” between 2050 and 2100.<sup>9</sup>

The Paris Agreement also marks a milestone crystallizing the efforts of past negotiations and decisions. The Paris Agreement includes articles regarding adaptation, technology transfer, capacity-building, as well as loss and damage. Most of them are conclusions of past COPs. For example, Article 7 restates the decisions of the Cancun Adaptation Framework; Article 8 confirms the Warsaw International Mechanism established from COP 13 to COP 19; the Transparent Mechanism provided in Article 13 is the extension of Measurable, Reportable, and Verifiable (MRV).

The U.S. President Obama praised the Paris Agreement as the “best chance we have to save the planet.”<sup>10</sup> He said, “The Paris Agreement establishes the enduring framework the world needs to solve the climate crisis . . . . It creates the mechanism, the architecture, for us to continually tackle this problem in an effective way.”<sup>11</sup>

### III. PARIS AGREEMENT: A NEW MODEL TRANSFORMING GLOBAL CLIMATE CHANGE LAW AND GOVERNANCE

The Paris Agreement is not only global, “it is also transformational”, Jennifer Morgan of the World Resources Institute said.<sup>12</sup> The Paris Agreement departs from the model of Kyoto Protocol and potentially leads to a structural transformation of global climate change law and governance.

#### A. *Transformational Features of the Paris Agreement*

From the 1992 Kyoto Protocol to the 2016 Paris Agreement, there are at least three breakthroughs worthy of discussion: the bottom-up approach, the

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*Climate Deal*, THE NEW YORK TIMES (Dec. 12, 2015), [http://www.nytimes.com/interactive/2015/12/12/world/paris-climate-change-deal-explainer.html?\\_r=0](http://www.nytimes.com/interactive/2015/12/12/world/paris-climate-change-deal-explainer.html?_r=0).

8. Paris Agreement art. 4, *supra* note 7.

9. “Net zero emission” should be interpreted as to reduce human-caused GHG emissions close to zero with removals of GHG emissions from the atmosphere by enhanced action to sequester it in carbon sinks.

10. Idrees Ali et al., *Obama Calls Paris Climate Pact ‘Best Chance’ to Save the Planet*, REUTERS (Dec. 13, 2015, 4:03 PM), <http://www.reuters.com/article/us-climatechange-summit-usa-obama-idUSKBN0TV0SQ20151213>.

11. THE WHITE HOUSE, STATEMENT BY THE PRESIDENT ON THE PARIS CLIMATE AGREEMENT (Dec. 12, 2015), <https://www.whitehouse.gov/the-press-office/2015/12/12/statement-president-paris-climate-agreement>.

12. Morgan et al., *supra* note 2.



comprehensive coverage and the procedure-oriented rules.

1. *From top-Down to Bottom-Up Approach*

The key for the success of Paris Agreement is it replaces a “top-down approach” with a “bottom-up” approach. A top-down mitigation approach was initially on the agenda of the post-Kyoto negotiation, but it encountered the barrier of Annex I/non-Annex I countries dichotomy. Moreover, because key developing and developed countries alike were reluctant to accept legally binding emissions commitments, a full-fledged scheme did not get enough support. A bottom-up approach became more fashionable after the Copenhagen Accord. The INDCs adopted by the ADP represent the turn to a bottom-up approach. INDCs require Parties to “outline national efforts towards low emissions and climate resilient development”,<sup>13</sup> and identify specific policies and practices that will enable the country to reach its intended targets.<sup>14</sup> The INDCs pose relatively little threat to the sovereignty of individual nations while provide flexibility to set emissions reduction targets on the basis of each state’s economic, political, and geographic conditions. Following the INDCs proposal, the Paris Agreement doesn’t mandate exactly how much each country must reduce its GHG emissions. It creates nationally determined contribution (NDC) in which each country sets its own goal and plans to reach that objective. The bottom-up approach is based on unilateral pledges of mitigation action, which also creates a space to introduce domestic mitigation policy instruments.

The bottom-up approach also gives the CBDR Principle new meanings. Because the quantity of GHG emissions of some developing countries exceed that of some Annex 1 countries, maintaining the CBDR Principle embodied in the Kyoto Protocol may undermine the effectiveness and fairness of global climate action. The Paris Agreement reshapes the CBDR Principle by two ways. First, it replaces the dichotomy of Annex 1/Non-annex 1 countries with developed/developing countries, and not clearly identifies the members of each catalogue. Second, it emphasizes the Paris Agreement will be implemented to reflect the CBDR Principle “in the light of different national circumstances.”<sup>15</sup> The CBDR Principle with new meanings creates room for reinterpreting how the nations should be grouped and what obligations they undertake. The CBDR Principle under the Paris

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13. U.N., SYNTHESIS REPORT ON THE AGGREGATE EFFECT OF INTENDED NATIONALLY DETERMINED CONTRIBUTIONS (INDCs) (2016), [http://unfccc.int/files/focus/indc\\_portal/application/pdf/synthesis\\_report\\_-\\_overview.pdf](http://unfccc.int/files/focus/indc_portal/application/pdf/synthesis_report_-_overview.pdf).

14. *Id.*

15. UNFCCC, Decision 1/CP.20, Lima Call for Climate Action, FCCC/CP/2014/10/Add.1 (Feb. 1, 2015).



Agreement no longer separates countries into two groups with assigned obligations; the principle rather directs to a spectrum where countries submit their contribution based on various considerations.

## 2. *From Mitigation to a Comprehensive Framework for Long-Term Action*

The Paris Agreement is inclusive not only in terms of its participating countries but in terms of its contents. It covers six issues, including mitigation, adaptation, finance, technology, capacity-building and transparency.

The Paris Agreement establishes “a global goal on adaptation: enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change”.<sup>16</sup> Governments are required to strengthen societies’ “ability to deal with the impacts of climate change”.<sup>17</sup> The international society also needs to provide continued and enhanced international support for adaptation to developing countries.

Relating to the need of adaptation, the issues of loss and damage are also written into an article in the Paris Agreement, which is an important political statement that it is now seen as an important issue needed to be addressed.<sup>18</sup> This article urges countries to cooperate and enhance the understanding, action and support in different areas such as early warning systems, emergency preparedness and risk insurance. The Paris Agreement recognizes “the importance of averting, minimizing and addressing loss and damage”,<sup>19</sup> and says that the Warsaw International Mechanism for Loss and Damage may be enhanced and strengthened. However, parties have different approaches to address loss and damages. Vulnerable countries framed the issue as liability and compensation, while most developing countries approached the issue as management and insurance. Therefore, liability and compensation are explicitly excluded in the article 8. Despite of that, the Paris Agreement establishes a framework within which cooperation can proceed in a less contentious manner.

Recognizing that developing countries may lack the capacities to fully implement the agreement, the COP 21 decision establishes the Paris Committee on Capacity Building to identify capacity gaps and foster international cooperation and opportunities to strengthen capacity. The Paris

16. Paris Agreement art. 7, para. 1, *supra* note 7.

17. *Historic Paris Agreement on Climate Change 195 Nations Set Path to Keep Temperature Rise Well Below 2 Degrees Celsius*, U.N. CLIMATE CHANGE (Dec. 12, 2015), <https://unfccc.int/news/finale-cop21>.

18. Inclusion of loss and damages in the agreement was a demand of countries that are particularly vulnerable to the impacts of climate change.

19. Paris Agreement art. 8, *supra* note 7.

Agreement also mentions that the existing UNFCCC Technology Mechanism will support collaborative research and development, as well as technology transfer to developing countries.

The Paris Agreement further incorporates the 2015 UN Sustainable Development Goals.<sup>20</sup> Climate change thus becomes a mega issue of sustainability and development, which interconnects with the issue of water resources, food safety, terrorism, human rights, democracy and population etc.

### 3. *From Substantive Obligations to Procedural Rules*

Recognizing that the NDCs submitted ahead of the COP 21 are not sufficient to achieve the ambition of keeping global temperature rise well below 2°C, the Paris Agreement includes mechanisms designed to raise countries' ambitions and monitor their implementation. These arrangements make the Paris Agreement a procedure-oriented legal framework.

Every party should submit its NDC, the contents of which include mitigation, adaptation, funds, technology transfer and capacity building. The COP is able to conduct a five-yearly review on the efforts of contracting parties from 2023 through a mechanism of "global stocktake". The "global stocktake" assess whether the net result of the climate actions being taken is consistent with the goal; its outcome will be provided for Parties to enhance their actions and support in a nationally determined manner.<sup>21</sup>

The Paris Agreement also demands Parties to ratchet up their ambition. States need to update their plan every five years and each successive update should be at least as strong as the current one.<sup>22</sup> When reviewing each country's actions, individual suggestions for improvement will also be provided.

The Paris Agreement holds Parties accountable for their NDCs through an enhanced transparency framework for actions and support. Although Parties could not reach an agreement on a strong compliance mechanism, they created a soft and possibly more effective mechanism of surveillance and compliance.<sup>23</sup> Each Party must regularly provide a national inventory report of anthropogenic emissions information about its effort in implementing NDC. The information submitted will be open to the public and undergo a technical expert review. A committee of experts will be

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20. On September 25th 2015, countries adopted a set of goals to end poverty, protect the planet, and ensure prosperity for all as part of a new sustainable development agenda. The Sustainable Development Goals includes 12 out of 17 articles that directly involve taking action on climate change.

21. Paris Agreement art. 14, *supra* note 7.

22. Paris Agreement art. 13, *supra* note 7.

23. Paris Agreement art. 15, *supra* note 7.

created to “facilitate implementation” and “promote compliance” with the Paris Agreement, but the committee is not able to punish states. The transition from the Kyoto model to the Paris model can be better understood through the following comparison showed in Table 1.

**Table 1: The Comparison between the Kyoto Protocol and the Paris Agreement**

	Kyoto Protocol	Paris Agreement
Scope	Mitigation	Comprehensive: mitigation, adaptation, finance, loss and damage, transparency, technology transfer
Duration & Coverage	A temporary and impartial regulatory scheme Phases: 2008-2012; 2013-2020 Developed countries, 14% of global emission	A universal and long-term framework Indefinite duration, with revision of NDCs every five years All parties, 99% of global emission
Decision of Obligation	Top-down quantified emission target for developed countries, market-based mechanism	Bottom-up Nationally determined contributions, voluntary cooperation
Compliance & Transparency	Differentiated reporting requirement for developed and developing countries.	Similar Reporting requirement Expert-based and facilitative mechanism that is transparent, non-adversarial and non-punitive

Through progressive NDCs, transparent mechanisms, global stocktake, and soft compliance mechanism, the Paris Agreement establishes a system of procedural rules aiming at to hold the increase in the global average temperature to well below 1.5°C or 2°C above pre-industrial levels. These rules and procedures are created to ensure the accountability of states and global administration through administrative structures, transparency, principles of reasoned decision-making, and mechanisms of review.<sup>24</sup> The main task of COP 22 and COP 23 is to work on a more detailed rulebook to operate Paris Agreement. In COP 23, for example, the Ad Hoc Working Group on the Paris Agreement (APA) worked on the rules of accounting guidance of countries’ nationally determined contributions (NDCs), transparency, and the Global Stocktake. The Subsidiary Body on Scientific

24. See Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 17-20 (2005).

and Technical Advice (SBSTA) deliberated on the establishment of Internationally transferred mitigation outcomes.<sup>25</sup>

B. *Structural Transformation of Climate Change Governance and Law*

Despite the UNFCCC has been signed over two decades, most states are reluctant to enact climate change law. Some worry the reduction of GHG may impair economic competitiveness, others are resentful at the unfair CBDR Principle, and still others just do not know how to do it. Only few climate change relevant law have been made so far.

Look back to the history, there are two generations of climate change legislation. The first generation was from 1997 when the Kyoto Protocol was signed to 2008, the start of the first commitment period of the Kyoto Protocol. The first generation climate change legislation, such as that of Japan and Switzerland, is a response to the Kyoto Protocol, most of which addresses only mitigation and lacks substantive obligation. The second generation started from 2008. Primarily triggered by IPCC Fourth Assessment Report and the Copenhagen Accord, some countries including U.K., Korea and Mexico came to be aware of the importance of GHG reduction and the potential of low carbon economy and legislated accordingly. Korea and Mexico, despite being Non-annex 1 countries and not obligated to reduce GHG, set up GHG reduction targets and promoted green growth. Yet until now, only few states have enacted climate change laws, most of which are thin both in terms of content and impact.

The Paris Agreement is expected to trigger the third generation of climate change legislation, which may lead to more comprehensive and substantive climate change legislation worldwide as well as to transform global governance.

1. *Triggering Worldwide Legislation*

The Paris Agreement releases several important and explicit signals to push states to enact laws responding to climate change.

(a) *Climate Change as a Prioritized Policy*

It has been over two decades since the creation of first climate change treaty (UNFCCC); however, most states hesitate to take sincere action. One reason is the limited coverage of mitigation obligations under the Kyoto Protocol and the CBDR Principle. Another reason is the direction of climate

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25. The work of APA in COP 23 are compiled as notes and annexed to a COP decision.

negotiation is not clear enough for states.

The first signal sent from the Paris Agreement is a turn toward low carbon society. The framework of the Paris Agreement is designed for long-term actions on GHG emission reduction. States are supposed to feel pressured to take climate change an immediate priority on their policy agenda. The process of preparing NDCs during the 12 months before the Paris conference had advanced national climate policy-making even before the Paris Agreement was adopted. According to recent research, 71% of the 52 surveyed developing countries indicate that the process has substantially increased their capacity for pre-2020 mitigation action. With the conclusion of the Paris Agreement, climate change mitigation is now a high political priority for the vast majority of consulted developing countries.

#### (b) States Being Accountable to Their Citizens and the Global Society

The NDCs shift the decision-making power from the COP to individual state. Whether the global society can successfully stabilize the global temperature relies on states' actions. The global stocktake, review, transparency and compliance mechanism are all designed to make sure states will do their part. The Paris Agreement thus enlarges the scope of state accountability. In terms of emissions reduction, states are responsible to both their citizens and the global society. If a state fails to set reasonable target or take sincere action, its citizens could hold it accountable, and the international society will watch, criticize and even adopt some forms of "sanction". The transparency mechanism bolsters the possibility of global accountability.

Even if states lack the political will or capacity to implement efficient mitigation policy, civil society may initiate litigation based on states' commitment after Paris Agreement. In U.S., the court in the ruling on *Juliana, et al v.s United States* asked other courts to take strong action on climate change, saying that "even when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government."<sup>26</sup> In the Netherlands, NGOs and citizens brought a suit against the government, claiming the state commits the tort of negligence against its citizens because it failed to regulate greenhouse gas emission adequately.<sup>27</sup> The district court of Hague ruled against the government. The court further required the government an obligation to reduce emissions by at least 25% by 2020, relative to 1990 levels. These actions are all demanding the states to take more aggressive policy on

26. *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016).

27. *See Urgenda Foundation v. The State of the Netherlands*, C/09/456689/HA ZA 13- 1396 (June 24, 2015) (Neth.).

climate change and will be empowered by the Paris Agreement.

(c) A Comprehensive and Multi-Sources Structure of Global Climate Change Law

The comprehensiveness of the Paris Agreement provides a more clear guidance for states to make climate change law. States should not only reduce GHG emissions, but take sustainable development and various issues such finance and adaptation into considerations. A wider understanding across sectors may also accelerate mainstreaming climate change and sustainability in sector planning.

It is fair to predict that states will initiate or continue their efforts of climate change legislation after the Paris conference. This third wave of climate change legislation is worldwide. Very likely, the scope of the legislation will be wider while the impact of such will be more comprehensive and significant. In addition to GHG emissions control, the third generation legislation may involve adaptation, loss and damage, technology, human rights, funds and even reconstructing the route of national development. More importantly, the experience of states will contribute to the international society and reinforce the Paris Agreement.

2. *Revitalizing Carbon Markets*

The Kyoto Protocol created carbon markets through the “flexible mechanism.” Yet carbon markets have seen a slump in the past years, because they are based on frameworks at risk of discontinuation and loss of capacity. Several potential options have been under discussion in recent negotiation; however, there has been no consensus on the choice of future international market mechanism. The Paris Agreement might come as a ray of hope for carbon markets.

(a) A New Market Mechanism for the Low Carbon Era

As mentioned above, the long-term target of the Paris Agreement is “to achieve a balance” between anthropogenic emissions and removals by sinks. The statement implies that the COP’s expectation to reach net zero emission, and also indicates that fossil fuel will no longer be the primary energy resource for human society. The clear message for investors is the future prosperity of renewable energy and green technology.

While the Paris Agreement doesn’t mention “carbon markets”, it allows Parties to use “international transferred mitigation outcomes” to meet their GHG reduction obligation. All parties can trade “Internationally Transferred



Mitigation Outcomes” (ITMOs) among themselves to meet their reduction target.<sup>28</sup> Parties will designate a body to operate the mechanism, and the technical group under the UNFCCC will develop its governing rules. Clear accounting rules that prevent double counting of emissions reduction will be adopted too. Furthermore, the mechanism mentioned above allows participants from both developed and developing countries as well as the public and private sectors.<sup>29</sup>

While much of the detail of the new mechanism is yet to be developed, the framework sends a signal to investors that a global carbon market in the long term is emerging. It is foreseeable that a range of inter-connected carbon market will emerge after 2020.

#### (b) An Emerging Legal Framework for Carbon Price

It is clear that states should prepare to transit away from reliance on fossil fuels. However, since public finance alone might not sufficient, the mobilization of private sector finance through carbon markets could play an indispensable role in scaling up low carbon development. Yet, without a clear and stable legal framework, such as accounting and monitoring, reporting, private sectors have no confidence to join the market.

Article 6 of the Paris Agreement provides the ability to create an international market if any Parties so desire. Over decades, corporate leaders and investors expressed the need of carbon pricing. Dirk Forrister, the president of the International Emissions Trading Association (IETA) said the Paris Agreement sends a very clear message to the business: “That price is coming.”<sup>30</sup> In addition, the Paris Agreement establishes a mechanism to assist Parties in achieving NDCs, raising ambition and supporting sustainable development. It contains a transparency framework to build mutual trust and confidence. It will serve as an important tool in mobilizing finance, technological support and capacity building for developing countries. These are all necessary legal framework to stabilize the market.

Although the Paris Agreement requires countries to propose national pledges that cover a timeframe beyond 2020, its implications for investments are immediate. It sends a powerful signal to markets that now is the time to invest in the low emissions economy. The Paris process catalyzed business

28. UNFCCC, *Adoption of the Paris Agreement*, FCCC/CP/2015/L.9/Rev.1, at 14 (Dec. 12, 2015).

29. Article 6 of the Paris Agreement establishes a new mechanism to “contribute to the mitigation of greenhouse gas emissions and support sustainable development”.

30. Steve Zwick, *The Road From Paris: Green Lights, Speed Bumps, And The Future Of Carbon Markets*, ECOSYSTEM MARKETPLACE (Feb. 1, 2016), <http://www.ecosystemmarketplace.com/articles/green-lights-and-speed-bumps-on-road-to-markets-under-paris-agreement/>.

and sub-national actors to formulate their ambitions and develop low carbon technologies.

### 3. *Reconstructing Global Governance and Law*

Without a strong compliance mechanism, Paris Agreement should be seen as a failure by the standard of traditional international law. Yet many observers praise it a model for effective global governance in the twenty-first century.<sup>31</sup>

#### (a) From Selective Coercion to Collective Supported Competition

The most important shift of the model, in Anne-Marie Slaughter's word, is "from selective coercion to collectively supported competition."<sup>32</sup> For a complex and far-reaching, large-scale problem such as climate change, a permanent treaty with legal binding force may not be a practical solution. Likewise, a united and top-down regulatory scheme is not a good idea either since the circumstances and capacity of states are so different. Relying on bottom-up NDCs that allow the civil society and government of each country to communicate the future development and restrictions they will reasonably choose is far more promising.<sup>33</sup> The bottom-up scheme creates a competition scenario, yet with some kind of cooperation and collective responsibility.<sup>34</sup> Climate change has proved that solving global problems requires strong governance at the national level. The various mechanisms of international support as well as the emphasis on capacity-building reflect a awareness that climate change will not be well addressed unless we invest in strengthening national governments.

#### (b) A Growing Administrative Space of Hybrid Public-Private

An international governance system that rests primarily upon state-centric and interests-based framework, as does the United Nations, will

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31. Chao Qingchen (巢清塵) et al., *Bali Xieding-Quanqiu Qihou Zhili De Xin Qidian* (巴黎協定—全球氣候治理的新起點) [*Paris Agreement: A New Start for Global Governance on Climate*], 12 *QIHOU BIANHUA YANJIU JINZHAN* (氣候變化研究進展) [ADVANCES IN CLIMATE CHANGE RESEARCH] 61, 61-67 (2016).

32. See Anne-Marie Slaughter, *The Paris Approach to Global Governance*, PROJECT SYNDICATE (Dec. 28, 2015), <https://www.project-syndicate.org/commentary/paris-agreement-model-for-global-governance-by-ann-e-marie-slaughter-2015-12>.

33. Same opinion, please see *id.*

34. Anne-Marie Slaughter suggests that, "by allowing journalists, activists, scientists, concerned citizens, and climate-friendly businesses to engage in debates, publicize successes and failures," the transparency system support the international society to share the responsibility. See *id.*

not be able on its own to meet the challenges we face today or in the future.

The bottom-up approach transforms the structure of global governance toward a more decentralized one. Presidents, premiers and central governments will have less day-to-day capacity to change the carbon footprints of their nations. Mayors, governors and CEOs may be in a better position to promote energy efficiency and deliver services in ways that reduce fossil fuel burning. The new Paris Agreement broadens ownership of the climate change challenge and provides mechanisms for drawing cities, states, companies and individual citizens into the global response. The decision of COP 21 also involves “non-party stakeholders”, including civil society, the private sector, financial institutions, cities and other sub-national authorities, local communities and indigenous peoples, in climate actions.<sup>35</sup> Moreover, the bottom-up approach could provide incentives for states and international organizations (such as OECD) to incorporate their declared mitigation engagement with trade-related policies.

The Paris Agreement created a global administrative space in which private sector and civil society members directly engaged. Local governments also outreach their national counterparts, establish vehicles like the C-40 to addressing climate change. In this space, “states, individuals, firms, NGOs, or representatives of domestic and global social and economic interests who are affected by, or otherwise have a stake in, global regulatory governance, interact in complex ways.”<sup>36</sup>

### (c) A Growing Global Normative System of Accountability

When the Paris Agreement incorporates some previous COP decisions, it also blurs the dichotomy of formally binding treaty and informally non-binding decisions. This regime complex, on the one hand implies that all informal rules, including decisions made by COPs or other governing entities, could be part of the legal system; on the other hand it indicates that all soft law may have substantial effects. States should refer to the Paris Agreement as well as decisions of COP.

Noticeably, the huge normative system consists of procedure-oriented Paris Agreement and various procedural rules of COP decisions aim to make states and governing entities accountable. With a clear framework and transparency mechanism, the current normative system not only requires states accountable to the international society, but also facilitates domestic citizens to make their government accountable. Similarly, the legitimacy committees and entities of the UNFCCC rely on transparent and reasoned

35. UNFCCC, *Adoption of the Paris Agreement*, FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015).

36. See Kingsbury et al., *supra* note 24, at 18.

decisions.<sup>37</sup> States have interests in policing the limits of any delegation to global administration. Domestic mechanisms can perform this policing function through review and other decisions based on the consideration of legality.

This development echoes the theory of “global administrative law.” Witnessing a development of hybrid public-private governance structure and the adoption of administrative law decision-making and rulemaking procedures, some scholars create the theory of global administrative law. According to Benedict Kingsbury, Nico Krisch, Richard B. Stewart and Jonathan B. Wiener, global administrative law should be defined as “comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.”<sup>38</sup> Emerging requirements of global administrative law include procedural participation and transparency, reasoned decisions, review and substantive standards such as proportionality.<sup>39</sup>

At the closing of COP 21, UN secretary-general Ban Ki-moon said: “We have an agreement. It is a good agreement. You should all be proud. Now we must stay united--and bring the same spirit to the crucial test of implementation. That work starts tomorrow.”<sup>40</sup> That “work” could lead to significant change for state legislation, for market development, and for global governance. It is inevitable to see a large-scale transformation of climate change law and governance.

#### IV. CHALLENGES AND CHANCE FOR TAIWAN

Taiwan has not taken adequate legal and political actions on climate change despite of the blooming actions among the international community. The progress is slow because two major forces that may push environmental legislation--democratic politics and international pressure, are too weak to promote climate change legislation.<sup>41</sup> Out of a strategy to show the world

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37. *Id.* at 26.

38. Global administrative bodies include formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies operating with reference to an international intergovernmental regime, hybrid public-private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of particular public significance. See Kingsbury et al., *supra* note 24.

39. *Id.* at 37-41.

40. Ban Ki-moon, *Remarks at Closing of COP 21: Innovation, Imagination, Faster Climate Action*, UNITED NATIONS SECRETARY-GENERAL (Dec. 12, 2015), <https://www.un.org/sg/en/content/sg/speeches/2015-12-12/remarks-closing-cop21>.

41. Jiunn-Rong Yeh, *Between International Pressure and Democratic Drive: Challenges and*

that Taiwan is a member of global society, the government has initiated some policies without genuine effort to reduce GHG emissions and to cope with the threat of climate change.

The Paris Agreement breaks through the state-centric international system, and creates a more open, hybrid and dynamic global administrative space where challenges and opportunities co-exist for Taiwan. The new framework empowers the civil society to request for more effective policies on climate change but meanwhile makes Taiwan an unpopular outsider subject to the criticism of international society. Taiwanese government, investors and the civil society should take the Agreement seriously and put effort into enacting a more substantial, comprehensive and accountable climate change law.

#### A. *The Difficulty of Climate Change Legislation*

Environmental legislation and the creation of regulatory institutions in Taiwan in the late 1980s were primarily driven by democratic reform.<sup>42</sup> International pressures only scaled up the concern over environmental degradation to a very limited extent.<sup>43</sup> On the one hand, environmental concerns and awareness in Taiwan emerged in correspondence with political reforms and economic development taking place at every stage on the road toward democratic transition. Political liberalization which followed the democratic transition coupled with economic prosperity helped bring a vibrant civil society and social institutions, rendering it possible for environmentalism to take root in Taiwan. On the other hand, concerns for international environmental issues rose in coincidence with the trend of globalization following the end of the Cold War. Pressures from the global community urged Taiwan, having been integrated as an indispensable de facto member in the network of global community, to take measures in countering environmental degradation.<sup>44</sup> Converged with and intensified by the vigor of democratic transition, forces coming from outside served as an effective catalyst activating the momentum of the dynamic society in the

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Prospects for Climate Change Approaches in Taiwan (Apr. 19-21, 2012) (A paper presented at a Conference on “Legal Possibilities to Strengthen Renewable Energies,” Konrad Adenauer Stiftung, Osaka, Japan) (on file with author).

42. *Id.*

43. See Jiunn-Rong Yeh, *Institutional Capacity-Building Toward Sustainable Development: Taiwan's Environmental Protection in the Climate of Economic Development and Political Liberalization*, 6 DUKE J. COMP. & INT'L L. 229, 229-72 (1996).

44. In the 1970s, after being repelled from the United Nations and losing formal diplomatic ties with alliance state one after another, Taiwan was kept from the global community and unable to take part in any formulation of international decision-making. Thus, Taiwan failed to catch up with the dynamics of international environmental issues; it had not taken any part, nor had it ever been affected in the course of domestic policy-making. The situation got changed in the early 1990s.

post-authoritarian era, and helped place environmental issues on the table. The very first international pressure exerted pressures upon Taiwan out of environmental concern was related the rhino horns controversy happening in early 1990s.<sup>45</sup> The government, in response to the international pressure, revised the relevant law to fulfill the obligation of international law. Moreover, the government learned the lesson and started to catch up with the development of environmental norms despite its limited access to the world forum.

Thanks to the momentum cultivated in democratic transition and pressure imposed by the international community, Taiwan has come to embrace the development in environmental issues. Yet, climate change presents tremendous challenges in both domestic and international aspects.

Democracy fails to promote effective climate change legal responses. Although democracy generally receives credit for environmental protection, climate change seems to present itself as an issue beyond the capacity of democracy. David Shearman and Joseph Smith argue the inefficiency of democracy facing climate change.<sup>46</sup> They present evidence regarding the fundamental problem resides in the operation of liberal democracy, and argue that its flaws and contradictions bestow upon government an inability to make decisions that could provide a sustainable society.<sup>47</sup> The reasons for democratic failure could be various. The asymmetric power of enterprise in policy lobbying and the ideology of economic development deter the progress of GHG reduction. Citizens may not be aware enough of the climate change threat and fail to mobilize. In addition, the complexity and uncertainty of climate change itself also incapacitate effective measure taken by the government. All the reasons for the failure of democratic response to climate change all exist in Taiwan and deter the government's active response.

International pressure could not activate climate change action in Taiwan either. A major problem is the collective action dilemma of climate issue in the international society. In light of climate change, the stagnation and stalemate of international negotiation is characterized by the problem of collective action, resulting partially from a defected institutional

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45. Taiwanese had a long tradition in practicing Chinese medicine, in which not only herbs but also animal parts, such as rhino horns, were used and even regarded as precious materials. In the early 1990s, local environmental groups announced opposition against the use of endangered animals in Chinese medicine, and soon the British Environmental Investigation Association (EIA) along with several international environmental groups came to Taiwan and conduct investigation. International environmental groups later announced that Taiwan was in violation of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES, also known as *Washington Convention*). In 1994, the US applied the *Pelly Amendment* and imposed trade sanction on Taiwan.

46. See generally, D. SHEARMAN & J. W. SMITH, *THE CLIMATE CHANGE CHALLENGE AND THE FAILURE OF DEMOCRACY* (2007).

47. *Id.*



arrangement. The unequal distribution of expected costs and benefits from climate change creates different incentives for different countries. Some countries may not share the view of the threat of climate change; some countries, despite understanding the threat, are aware of the disadvantage in being GHG reduction pioneer and prefer to benefit from others' efforts.<sup>48</sup> As George Rathjens suggests, "Because of the uncertainty, the very long lag-times involved, and the fact that effective mitigative action is likely to require something approaching a global consensus, the prospects for near-term action directed at reducing global warming must be seen to be poor."<sup>49</sup>

After the Copenhagen Conference, the prevailing distrust and negotiation deadlock further undermines motivation of some national governments that plan to respond climate change actively. Taiwan also waits and sees, did not take active actions.

#### B. *The Gesture Policy for Climate Change*

Democracy and international pressure lack enough energy to push the government to take painful action to reduce GHG effectively as it has been used to address other environmental derogations. Although climate change has been on the agenda because of the global awareness of climate change, the efforts of the government are unsatisfactory in light of institutional empowering and capacity building.

Notwithstanding being a stakeholder in climate change, Taiwan has not been present during the process of climate policy formulation in the international forum, and is thus under no international obligation, in regulatory, informational or financial terms, concerning both mitigation and adaptation.

Out of strategy to demonstrate its membership in global collective action, the Taiwanese government recently has started to formulate and adjust laws and policies to the international climate regime, but only reach limited achievements so far. Lack of foreign pressure led to a slack tendency of the government to ignore the problem. The agenda on climate policy has along been quite obscure, with fluctuating policy concerns and ambiguous goals of mitigation. The climate policy in Taiwan is a "gesture policy."<sup>50</sup>

48. Daniel Esty & Anthony Moffa, *Why Climate Change Collective Action has Failed and What Needs to be Done within and without the Trade Regime*, 15 J. INT'L ECO. L. 777, 777-91 (2012); Paul G. Harris, *Collective action on Climate Change: The Logic of Regime Failure: The Logic of Regime Failure*, 47 NAT. RESOURCES J. 195, 210-20 (2007).

49. George W. Rathjens, *Energy and Climate Change*, in PRESERVING THE GLOBAL ENVIRONMENT: THE CHALLENGE OF SHARED LEADERSHIP 183, 184 (Jessica Tuchman Mathews ed., 1991).

50. Jiunn-Rong Yeh, *An Overview of Climate Change Policy and Legislation in Taiwan* (May

The government's climate policy has done little to provide institutional framework, and failed catch up with the dynamics of global climate governance.

The early climate change policy in Taiwan was a response to the international agenda. Having learned the importance of international environmental issues, on the eve of the Rio Earth Summit in 1992, the Executive Yuan set up a cross-ministry panel charged with the duty of investigating and proposing global environmental policy. In 1997, in response to the adoption of the Kyoto Protocol, the cross-ministry panel was renamed as the National Council for Sustainable Development (hereinafter NCSD), and upgraded to the ministerial level. The NCSD, composed of cabinet members concerned and well-learned experts was designated to charge policy coordination in the cabinet. To fulfill its task, the NCSD consisted of six working groups, each of which focused on one climate-related issue. However, the climate change policy has been focused on energy issue.

The Ministry of Economic Affairs convened the 1<sup>st</sup> National Energy Conference in 1997, the 2<sup>nd</sup> in 2005, and the 3<sup>rd</sup> in 2009, to look into the climate facts and explore policy solutions. Discussed were the issues such as management of energy, development of new energy, energy efficiency, energy safety and sustainable development of industries. Interestingly, in the discussions of these relevant issues, the government promised to formulate an agenda on carbon mitigation in compliance with the Kyoto Protocol, despite the worries and concerns from the industry. According to the agenda, by the year of 2020, the emissions should be stabilized as in the year of 2000. To achieve this goal, the government started to plan for saving energy, promoting efficiency and encouraging the use of clear energy. Finally in 2008, the government published *Guidelines for Sustainable Energy Policy* as an effort to coordinate energy policy with the agenda. Notably, also in this period, renewable energy was proposed as one of the alternatives to replace fossil fuels. Despite all the achievements, neither the ambitious goal of mitigation nor the newly-formulated energy policy have ever been formally adopted into law or carried out in any practical way.

In 2005, with the coming into force of the Kyoto Protocol, how to transit to a "low carbon society" became the major concern of the Taiwanese government.<sup>51</sup> In response, the Task Force for Responding to the UNFCCC

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28-29, 2010) (A paper presented at International Workshop for Raising the Carbon Market-International Conference for the Establishment of the East Asian Environmental Law Network) (on file with author).

51. According to official reports, Taiwan's total carbon dioxide emission nationwide is more than 277 million tones one year, with an average growth of 124% every year. Energy conversion industry contributed to 7% of emissions; heavy industry contributed 52%; the transportation sector contributed 14%; the commercial sector 6 % and private households 12%.

and the Kyoto Protocol was founded, with similar offices established into relevant agencies in the central and local governments later, to deal with the issue of carbon reduction. The government again sets out to work on policies concerning mitigation, and has held three national conferences, including the *National Energy Conference of 2005*, the *National Sustainable Development Conference of 2006*, and the *Conference on Sustaining Taiwan's Economic Development of 2006*. The main focus of these discussions is on the policy for the post-Kyoto Protocol era and the strategies for the industrial sectors. In this wave of deliberation, however, the earlier proposed goal of mitigation was found difficult to implement, and the government thus proposed to adjust the agenda. Nevertheless, no consensus has been reached on this issue.

Concerning climate adaptation, the latest development is the National Guideline for Climate Change Adaptation Policy (hereinafter "Adaptation Guideline") proposed in 2010, the goal of which is to implement a comprehensive set of policy of adapting to the impact of climate change. Although the Adaptation Guideline gives detailed evaluations on climate change impacts in eight fields of impacts, it fails to provide frameworks and organizational reforms for later programs and actions. The problems remained in the National adaptation programmes of action (NAPAs).

### C. *The Greenhouse Gas Reduction and Management Act Passed before COP 21*

Interestingly enough, the Legislative Yuan of Taiwan passed the long-lingering Greenhouse Gas Reduction and Management Act (the Act) some months ahead the 2016 Paris COP. The enactment of the Act at the timing is not a coincident. Despite that from the civil society had been trying to promote GHG legislation since 2000, the government and the industry were reluctant to make effort. As mentioned above, the Durban Platform and the preparation of COP 21 initiated a global discussion on each state's INDC. Such a universal action and Taiwan's high emissions together highlight the uncomfortable outsider position of Taiwan. The international call on INDCs increased the pressure on and awareness of the government. The Legislative Yuan passed the Act in June 2015. The official announcement stated that:

"The Greenhouse Gas Emission Reduction and Management Act was passed ahead of UNFCCC COP 21 which is to take place in the end of this year in Paris . . . . The UNFCCC is designated to produce a legally binding international agreement which requires all signatories to shoulder the responsibility of emissions reduction.

By passing the Greenhouse Gas Emission Reduction and Management Act and being committed to protecting the planet, Taiwan . . . demonstrates its support of the UNFCCC. The Greenhouse Gas Emissions Reduction and Management Act will help Taiwan take a greater part in the international community and boost Taiwan's international ranking with regard to climate change policy, setting a milestone in terms of Taiwan's commitment to environmental protection and involvement in international affairs.”<sup>52</sup>

The Act sets up basic principles for climate change legal responses. The primary principle is to reduce dependence on fossil fuels, aiming at promoting low-carbon growth. The Act also announces the nuclear-free policy, the development of renewable energy and implementation of tax mechanism on imported fossil fuels.<sup>53</sup> These principles reflect past efforts of both UNFCCC COPs and the Taiwanese society.

At least four important progresses of the Act should be observed.

#### 1. *Reduction Goal and Periodically Renewed Regulatory Goal*

The Act requests the competent authority to promote GHG reduction and climate change adaptation. However, it addresses mostly GHG reduction. Referring to the emissions goal of other developing countries such as Mexico, the Act aims to reduce GHG emissions to no more than 50% of 2005 GHG emissions by 2050.<sup>54</sup>

A fixed and strict GHG reduction goal may be impractical due to the unpredictable change of international and domestic circumstances as well as industrial structure. Inspired by the “carbon budget” of the British Climate Change Act 2008, the Act requires the regulatory goal to be renewed on a five-year basis in order to achieve the long-term goal step by step. The Act delegates the EPA to develop the periodically renewed regulatory goal, which is the key for the sequent implementation of the Act.

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52. Xingzheng Yuan Huanjing Baohu Shu (行政院環境保護署) [Environmental Protection Administration, Executive Yuan], *Lifa Yuan Sandu Tongguo “Wenshi Qiti Jianliang Ji Guanli Banfa”* (立法院三讀通過「溫室氣體減量及管理法」) [*The Legislative Yuan passes the Greenhouse Gas Reduction and Management Act with Third Reading*], HUANBAO XINWEN ZHUANQU (環保新聞專區) [ENVIRONMENTAL PROTECTION NEWS] (May 15, 2015), [http://enews.epa.gov.tw/enews/fact\\_Newsdetail.asp?InputTime=1040615163027](http://enews.epa.gov.tw/enews/fact_Newsdetail.asp?InputTime=1040615163027).

53. *Wenshi Qiti Jianliang Ji Guanli Banfa* (溫室氣體減量及管理法) [Greenhouse Gas Reduction and Management Act] §§ 5-6 (promulgated and effective July 1, 2015) (Taiwan).

54. Greenhouse Gas Reduction and Management Act § 4, para. 1.

## 2. *The Implementation Organization and Structure*

In order to achieve the goal, the Act establishes a three-tier structure. First, the Executive Yuan, the highest executive organ of Taiwan, should develop a National Climate Change Action Guideline (“Action Guideline”) to instruct all climate change actions and measures. In addition, the central competent authority should also make a GHG Reduction Action Plan (“Action Plan”). Following the Action Plan is the GHG Emissions Control Action Program determined by central industry competent authorities charged with energy, manufacturing, transportation, residential and commercial, and agriculture sectors.<sup>55</sup> The competent authorities of local governments shall develop GHG control implementation plans in accordance with the Action Plan. Actually, the structure and responsibility allocation prescribed in the law is already part of existing policy. The inscription into statute increases little burden on the authorities. However, there is no legal consequence for government failure or violation.

## 3. *Public Participation and International Connection*

One feature of the Act is openness to public participation and international connection.

Considering the impact of regulatory goal, the Act provides some mechanism for public participation. The most important one is requiring the government to have consultation and public hearing when determining the regulatory goals. The competent authority shall invite scholars, experts and NGOs, in conjunction with the central industry competent authority to form an advisory committee to set regulatory goals and approaches. In addition, the periodically renewed regulatory goals shall be submitted to the Executive Yuan for approval after public hearings are held.<sup>56</sup>

The international pressure nudges the government to pass the law to prevent possible criticism and to show Taiwan’s determination to be “a member of the international society”. The first article of the Act explicitly claims that one purpose of the enactment is to “share the responsibility of environmental protection for the earth.” The Legislative Yuan is aware of the absence of Taiwan from the UNFCCC regime and its sequent impact such as Taiwan being excluded from climate change negotiations and indifferent to relevant information. Thus, many articles of the Act attempt to connect Taiwan to the international society. The determination of GHG reduction

55. Greenhouse Gas Reduction and Management Act § 4, para. 3.

56. Greenhouse Gas Reduction and Management Act § 11, paras. 1-2. Article 8 demands the Executive Yuan to invite NGOs, experts and scholars to determine and review the implementation of GHG reduction and adaptation.

goal shall take into consideration the UNFCCC and its agreements (Article 4); the GHG management programs and plans shall “seek to realize the common but differentiated responsibilities specified in the UNFCCC” (Article 6); the development of the Action Plan shall reflect “international situation” (Article 9); the implementation of the regulatory goals for each stage shall consider “the UNFCCC and its agreements, or relevant decisions made under international conventions” (Article 12); the implementation of the domestic cap-and-trade scheme shall consider “the UNFCCC and its agreements, or relevant convention decisions in response to the international GHG reduction requirements” (Article 18).

#### 4. *Emissions Trading as the Primary Policy Tool*

Different from some states that employ the command and control approach, the Act provides the emissions trading mechanism as the only tool to reduce GHG emissions. Direct regulatory measures, such as emissions standards or efficient standards, are absent from the Act. Two objects can be traded under the current emissions trade regime. One is the “allowance” distributed to participants under the cap-and-trade system; the other is the “credit” earned from the industry’s effort of reducing GHG emissions below the business as usual level. However, the emissions trade and cap-and-trade mechanism will not be enforced unless the competent authority establishes necessary legal mechanisms. In other words, the date when an efficient emissions reduction legal system will be in practice is far from clear. Moreover, because the chapter of emissions trading of the Act was passed in a hurry, the scheme established in the Act is not sound and comprehensive. For example, there is no price mechanism to stabilize the carbon price. In addition to emissions trading, the Act establishes the GHG Management Fund (Fund) for GHG emissions reduction and climate change adaptation. Yet the Fund fails to include private sources to enrich its financial basis.

#### D. *Strengthening Climate Change Law in Taiwan*

Taiwan is excluded from almost all the access to negotiations and international resources, and its barrier and cost to participate global carbon markets is much higher than others. Unsurprisingly, Taiwan is excluded from the progress following the Paris Agreement and thus suffers from many disadvantages. The supportive system and transparency mechanism created by the Paris Agreement do not benefit Taiwan, but only put Taiwan in a more disadvantageous competitive position. Yet, the Paris Agreement may contribute to strengthening Taiwan’s climate change legislation through increasing international pressure and facilitating the mobilization of the civil



society in Taiwan. Taiwan, ranking the third in Asia and in the world in terms of carbon emissions, becomes an outsider to the “universal” regulatory scheme. The newly enacted Act has embodied some spirits of the Paris Agreement; however, it is far from enough to facilitate Taiwan catching up the world. There are three important messages sent from the Paris Agreement that the Taiwanese government should neglect.

### 1. *Deepening Climate Change Policy*

The first and most important suggestion for Taiwan is to stop the gesture policy and thin legislation. The Act has set goal, policy tool and periodic review mechanism to reduce GHG emissions, yet necessary institutions and rules are not ready. It requires sincere efforts from the government, the industry, NGOs, and the civil society. Unfortunately, climate change has not become a mainstream government policy. During the past elections on the presidency and the legislators, for example, policy discussions were primarily focused on food safety, low income, social housing, and trade between Taiwan and China. Climate change and energy policy remained marginal. The end of fossil fuel era announced by the Paris Agreement signals states should incorporate climate change into national development policy, which could lead structural transformation of the society, business, energy and life style.

The need to strengthening climate change law and policy is more urgent for Taiwan than for other countries. Since Taiwan is unlikely to get support and resources from the UNFCCC regime, it is inevitably that Taiwan has to build the capacity of the society on its own. The Act is a gesture response to the international society and fails to address long-term capacity building. It addresses only on mitigation, it delegates much decision-making power to competent authorities and prescribes many issues without substantive content and concrete direction.

One lesson from the Paris Agreement is the inclusiveness of climate change governance. GHG reduction is only a part of it. Adaptation, financial mechanism, technology transfer, transparency, loss and damage are all equally important. Taiwan, because of its limited access to international resource and its high vulnerability to climate change, especially needs to invest on adaptation, territorial planning and long-term capacity-building. Several provisions of the Act are about these issues but without substances. Other issues, such as human rights as well as loss and damage, are absent.

Climate change has become an integral part to sustainable development in the light of the Paris Agreement. National development plans should include a multifaceted climate change law that is capable of leading to structural transformation of the society in the future.

## 2. *Reconstructing Organizational and Procedural Settings*

The second suggestion is about the procedural and organizational arrangement. Under current structure, the EPA is the competent authority on GHG reduction, National Development Council is in charge of adaptation, the Bureau of Energy under the Ministry of Economics is in charge of energy, while the Ministry of Finance takes care of energy tax. The governing structure is fragmented. When the new Act is enforced, the EPA will be the competent authority. However, many mechanisms necessary for GHG reduction, such as energy and national development, are beyond the jurisdiction of the EPA. This might seriously undermine the function of the Act. The Act notices the need for trans-sector coordination and requires the Executive Yuan to invite relevant central government agencies, non-governmental organizations, experts and scholars to determine the tasks of GHG reduction. However, the comprehensive Paris Agreement requires states to establish a cross-sector and sustainable organization to maintain and to continually develop policies.

The Paris Agreement also reflects a turn to procedural rationality and the emergence of global administrative law. Structural transformation of climate change could be painful and requires a process of deliberation and consensus building. In addition, transparent and legitimate process will be the key for global governance accountability.

The Act provides some access of public participation and transparency of decision-making, but the access provided is insufficient.

## 3. *Looking for Opportunities in Global Governance*

The Paris Agreement does not improve Taiwan's difficult situation in the international community. However, the emerging market and the global governance model may create opportunities for Taiwan. Formal international politics and law ideology may be easily dominated by political ideology. Yet the bottom-up approach, the market and informal governance focuses more on cost, benefit and effectiveness which creates opportunities for Taiwan.

The bottom-up system of NDCs and a clear legal framework re-empower the civil society to advocate climate action through the democratic mechanism. Due to the binding force of the Paris Agreement, Citizens and NGOs are able to participate in the implementation of NDCs through democratic processes and even judicial actions. Moreover, the transparency mechanism enacted in the global climate legal system, including reports, review and MRV, also enables the civil society to supervise the government and international organizations. The civil society will be a key player in future climate governance.

Since the Taiwanese government is unable to be present in any international climate forum, nor does it hold a active attitude toward climate change, Taiwan is in a more urgent need than any other state to recognize and make use of the trend of multi-level governance. As the cases of some states the governments of which take a passive attitude or sloppy strategy toward climate change have shown, non-state actors such as NGOs, local governments, and courts play an indispensable role in bridging the gap, or even leading the trend, of climate governance. In spite of the government's inertia, Taiwan can count on and benefit from its vibrant civil society and ever-robust judicial system for managing climate change. Domestic NGOs should put more effort in connecting NGOs in the world and create the chance of mutual fertilization.

The Paris Agreement declares the coming of carbon-pricing, which may create a market in which nationality weights less. Taiwan should encourage the private actors to participate developing low carbon economy and renewable energy. The Taiwanese government may also participate in global governance in informal forms. For example, it may participate in the market mechanism through public-private partnership or join the climate action network of cities and sub-national entities.

## V. CONCLUSION

The negotiation and the outcome of COP 21 constitute a turning point for both global climate governance and for Taiwan. The Paris Agreement marks a transition of international climate law, from the top-down, substantive obligation for Annex 1 countries approach taken by the Kyoto Protocol to the current bottom-up, procedure-oriented, comprehensive and universal legal framework. This article argues that, the new framework will trigger worldwide climate change legislation, revive the carbon market and reconstruct global climate change governance and law. It will result in a structural transformation of global governance and law in the field of climate change.

The transformation will bring Taiwan new challenges and opportunities. Taiwan, both a significant contributor to and high vulnerability of climate change, seems to have been responding to this global accord with limited promises and actions. Yet current Taiwan's legal response to climate change has been a gesture policy, providing only rhetoric statement on GHG reduction without genuine effort. The bottom-up approach and transparency of the future climate regime on the one hand empowers the civil society to ask for more substantive legislation and to supervise the implementation of NDCs; on the other hand it exposes the exception of Taiwan and will bring worldwide attention to the performance of this "outsider". The double forces

triggered by the Paris agreement will push the government to respond to climate change and catch up with the international agenda actively.

The article suggests the government to strengthen its climate change legislation and governance. The Taiwanese government should enact laws responding to various aspects of climate change, pay attention to organizational and procedural arrangement, and to seek possible opportunities in the emerging model of global governance.



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## 巴黎協議與全球氣候立法轉型： 臺灣觀點

葉俊榮、林春元

### 摘 要

聯合國氣候變化綱要公約第21次締約國大會達成巴黎協議，被高度讚揚為全球因應氣候變遷問題的成功模式，然而，其對於全球與臺灣的意義與影響尚未能被充分討論。何以本次締約國大會能成功達成全球性協議？其影響為何？臺灣又應該如何因應形成中的全球氣候法？

本文檢視巴黎協議的締約過程與結果，嘗試探究其對於全球氣候法律秩序的影響。本文主張，巴黎協議行程全球氣候變遷法的新模式。其將過去京都議定書那種由上而下、以減量為核心而有強制國家義務的模式，轉變成由下而上、全面性的方案，並且以程序為中心的模式。本文進一步認為，巴黎協議將帶動全球各國的氣候相關立法，重新復甦碳市場以及建構全球法律與治理。臺灣過去都消極、形式地回應氣候變遷問題，本文呼籲臺灣政府與社會應該深化氣候政策、重新建構組織與程序，並且在興起中的全球秩序尋找可能機會。

**關鍵詞：**氣候變遷、巴黎協議、聯合國氣候變化綱要公約、全球行政法、國家自訂預期貢獻