



## CLIMATE CHANGE LAW IN SOUTHEAST ASIA: RISK, REGULATION AND REGIONAL INNOVATION



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# I INTRODUCTION

## A. *From the Sidelines to Centre Stage*

In the last five years, Southeast Asia has been forced to confront its extreme vulnerability to climate change. From Thailand's floods to the ongoing human costs of Cyclone Nargis and Typhoon Bopha, recent disasters have sharpened public awareness and clarified the nature of the problem. Climate change can no longer be regarded as an occasional physical disruption. From Manila to the Mekong Delta, it is coming to be recognised as a fundamental challenge of law, society and governance.

This dawning sense of urgency stands in contrast to past inactivity. Historically, Southeast Asia has not played a leading role in global climate governance, either within or outside the United Nations Framework Convention on Climate Change (UNFCCC).<sup>1</sup> Domestic engagements with climate law and policy have tended to be equally modest or non-existent.<sup>2</sup> As recently as March 2009, leading agencies concluded that 'legislation in Asia has yet to catch up with the urgency of the issue being expressed globally'.<sup>3</sup>

In 2013, this blunt assessment may no longer be accurate. As international negotiations lurch from summit to summit, several Southeast Asian states have begun to take action unilaterally: in national legislatures, through ministerial decrees and under newly established climate commissions. This paradigm shift in regional lawmaking is arguably of global significance. In May 2012, a UN special envoy went so far as to describe the Philippines' *Climate Change Act 2009*<sup>4</sup> as being the 'best in the world'.<sup>5</sup> Whether or not this glowing assessment is justified, it is clear that some degree of change – and indeed

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<sup>1</sup> Joyeeta Gupta, 'A History of International Climate Change Policy' (2010) 1 *Wiley Interdisciplinary Reviews: Climate Change* 636.

<sup>2</sup> A R Subbiah and Xiaoli Wang, 'National-Level Institutional and Policy Landscape, Project Efforts and Good Practices in Southeast Asia' (Report, UNISDR and Asian Disaster Preparedness Centre, 2010) 6.

<sup>3</sup> Peter N King, 'Strengthening Legal and Policy Frameworks for Addressing Climate Change in Asia: Synthesis Report' in Asian Environmental Compliance and Enforcement Network (AECEN), USAID and United Nations Environment Program (UNEP), 'Strengthening Legal and Policy Frameworks for Addressing Climate Change in Asia: Identifying Opportunities for Sharing Best Practices' (Report, 2009) 22.

<sup>4</sup> *Climate Change Act 2009* (Philippines), Republic Act No. 9729, Congress of the Philippines.

<sup>5</sup> Margareta Wahlstrom, United Nations Special Representative of the Secretary General for Disaster Risk Reduction, as quoted by Michael Lim Ubac, 'UN lauds Philippines' climate change laws "world's best"', *Philippine Daily Inquirer* (Manila), 4 May 2012.

innovation – is occurring at multiple sites in Southeast Asia. As deadlines pass and core commitments are confounded by the ‘truly diabolical’<sup>6</sup> climate problem, these new sources of activity can no longer be ignored.

### B. *Research Questions and Rationale*

This thesis examines the evolution of climate change law at its frontiers. Rather than focusing on well-established regulatory spaces, such as the European Union, it sets its sights on emerging regimes in vulnerable places. By directing its enquiries toward these edge zones – where legal diversity is high and climate regimes are embryonic – this research seeks to assess the real-time processes and cross-scale interactions that are unfolding within global climate law.

Southeast Asia has been selected as an ideal site of analysis. Collectively, its ten states<sup>7</sup> are extremely vulnerable to climate change and also increasingly active in climate law and policy making. Beyond its basic geographical commonalities and regional grouping under the Association of South East Asian Nations (ASEAN), Southeast Asia offers sufficient intra-regional diversity to enable a fruitful comparative study. Furthermore, the field of climate law in Southeast Asia is yet to attract a sustained body of research.<sup>8</sup>

This thesis addresses three main research questions:

1. Where, and how, is climate law being produced in Southeast Asia?
2. To what extent are UNFCCC principles and other international legal norms being imported into Southeast Asia’s domestic climate laws?
3. Do these developments signify a steady integration, an innovative regionalisation, or a chaotic fragmentation of global climate law?

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<sup>6</sup> John S Dryzek, Richard B Norgaard and David Schlosberg, ‘Climate Change and Society: Approaches and Responses’ in John S Dryzek, Richard B Norgaard and David Schlosberg (eds), *The Oxford Handbook of Climate Change and Society* (Oxford University Press, 2011) 4.

<sup>7</sup> ‘Southeast Asia’ is defined to include the ten ASEAN states.

<sup>8</sup> Koh Kheng Lian, Lye Lin-Heng and Jolene Lin, *Crucial Issues in Climate Change and the Kyoto Protocol: Asia and the World* (World Scientific, 2010) vii.

This tripartite structure is designed to place Southeast Asian climate law in its wider context, while also capturing the creativities and contingencies of particular instruments. It responds to the emerging sense that Asian states can be ‘game changers’ in global climate governance.<sup>9</sup> Taking a critical step back, it examines how core principles of sustainability, risk and responsibility can be translated – and fundamentally transformed – between different geographical scales and political cultures.

### C. *Structure of this Thesis*

This thesis is divided into six chapters. Chapter II provides a critical overview of climate risks and the UNFCCC regime, introduces key theories, and explains the research methodology. Chapter III surveys the current extent of Southeast Asian climate law.

Chapters IV and V conduct case studies of states which are at the forefront of regional innovation, yet have received minimal scholarly attention. Chapter IV investigates the Philippines’ *Climate Change Act 2009* and related instruments. The Philippines is an ideal focal point – and an appropriate benchmark for comparative analysis – because it is the first state in Southeast Asia to enact a standalone primary law on climate change. Chapter V examines Vietnam’s rapidly growing ‘forest’ of climate change laws, which are rooted in a very different political and institutional context. Vietnamese climate law is notable for its ambitious central targets and its dense layering of Decisions, Strategies and Circulars.

Chapter VI returns to the three core research questions, and offers concluding remarks on patterns and significance of climate law in Southeast Asia.

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<sup>9</sup> Christine Loh, ‘The Road to Poznan and Copenhagen’ in Christine Loh, Andrew Stevenson and Simon Tay (eds), *Climate Change Negotiations: Can Asia Change the Game?* (Civic Exchange and the Singapore Institute for International Affairs, 2008) 35-36.

## II DYNAMIC SYSTEMS: CLIMATE, POLITICS AND LAW

### A. *Defining the Climate Risk*

The world's climate is changing due to human interference with the carbon cycle. The Intergovernmental Panel on Climate Change (IPCC) confirms that anthropogenic greenhouse gas emissions are leading to higher global temperatures and disrupting weather patterns and ecosystems.<sup>10</sup> These effects are highly asymmetrical. While developed states are cumulatively responsible for the majority of emissions, developing states will bear the immediate brunt of adverse climate changes.<sup>11</sup> Unless decisive action is taken, climate change will cause mass extinctions,<sup>12</sup> threaten long term economic growth<sup>13</sup> and expose hundreds of millions of people to disaster and displacement.<sup>14</sup>

The global climate risk is 'unbounded' on two axes.<sup>15</sup> First, it is spatially diffuse. Its impacts do not follow national borders or match up with existing legal jurisdictions. Second, it is temporally indeterminate. Unlike conventional environmental hazards, it is extremely difficult to predict the rate and direction of change, or to set a finite timeframe for management. Stated in terms of Beck's 'risk society', the climate risk cannot be contained within existing regulatory paradigms of public and private, or political and sub-political, or the modern industrial state.<sup>16</sup> Instead, regulators must abandon their 'assumptions of

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<sup>10</sup> Intergovernmental Panel on Climate Change (IPCC), 'Summary for Policymakers' in Susan Solomon, Dahe Qin, Martin Manning, Zhenlin Chen, Melinda Marquis, Kristen Averyt, Melinda Tignor and Henry LeRoy Miller (eds), *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007).

<sup>11</sup> UNFCCC Secretariat, 'Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries' (Report, United Nations, 2007) 5.

<sup>12</sup> Chris D Thomas et al, 'Extinction Risk from Climate Change' (2004) 427 *Nature* 145.

<sup>13</sup> Nicholas Stern and HM Treasury, *The Economics of Climate Change: The Stern Review* (Cambridge University Press, 2006).

<sup>14</sup> Oli Brown, 'Migration and Climate Change' (IOM Migration Research Series No. 31, International Organisation for Migration, 2008).

<sup>15</sup> Harriet Bulkeley, 'Governing Climate Change: The Politics of Risk Society?' (2001) 26 *Transactions of the Institute of British Geographers* 430, 434.

<sup>16</sup> Ulrich Beck, *World Risk Society* (Polity Press, 1999) 39, 93; Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage, 1992) 213.

ecological stationarity'<sup>17</sup> and deal with 'new conflicts which stretch social relations over space and time'.<sup>18</sup>

In Southeast Asia, these conflicts are amplified. The region's remarkable diversity and rapidly transitioning societies make it difficult to strike a lasting and equitable compromise between national interests and common goals; and between current needs and future generations. There is no perfect balance or 'silver bullet'.<sup>19</sup> As this thesis will demonstrate, regulatory responses are emerging from a variety of scales and sectors, in a manner that is neither completely coherent nor entirely fragmented.

### B. *International Coordination and Controversy*

The primary international response to the climate risk is the United Nations Framework Convention on Climate Change (UNFCCC).<sup>20</sup> The UNFCCC's overall objective is to stabilise greenhouse gas concentrations at a level that will prevent dangerous interference with the climate system.<sup>21</sup> Since 1992, the UNFCCC has facilitated a series of further agreements and declarations (Figure 1).

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<sup>17</sup> Robin Kundis Craig, "'Stationarity is Dead' – Long Live Transformation: Five Principles for Climate Change Adaptation Law" (2010) 34 *Harvard Environmental Law Review* 9.

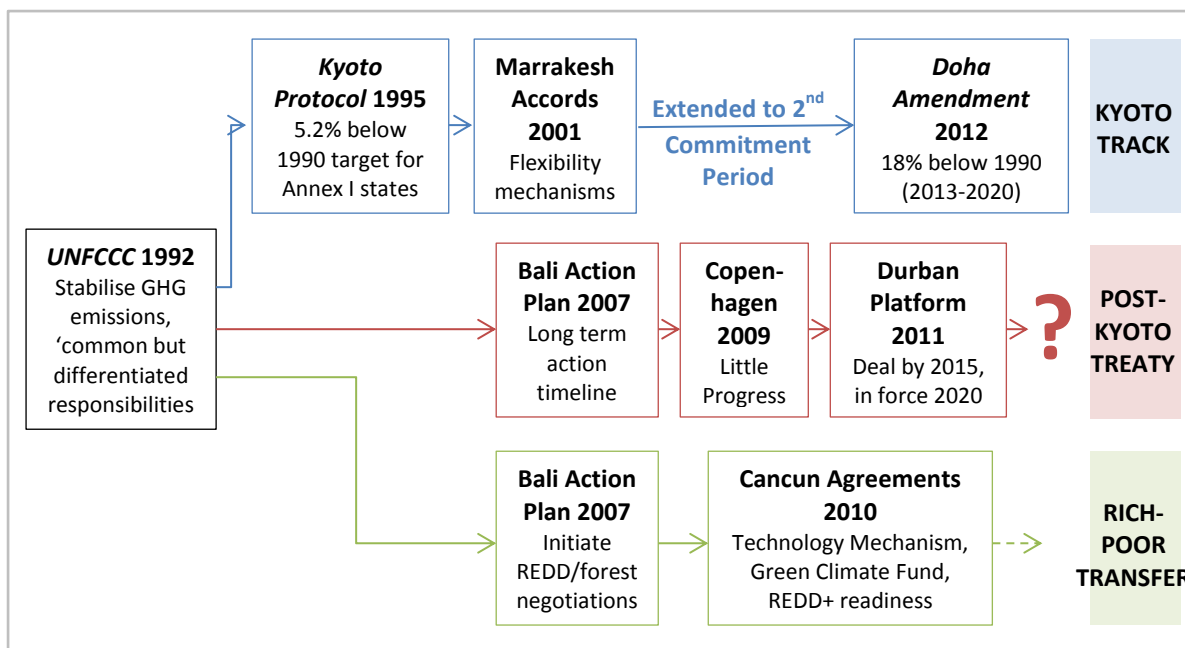
<sup>18</sup> Bulkeley, above n 15, 434.

<sup>19</sup> Grant Anderson and Fergus Green, 'One Hat Does Not Fit All: Climate Change Policies in the Asia Pacific Region' (Report, Allens Arthur Robinson, November 2009) 3.

<sup>20</sup> *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) art 2 ('UNFCCC'). Current ratification status: 194 parties.

<sup>21</sup> UNFCCC art 2.





**Figure 1: The UNFCCC Regime – Evolution of Key Themes**

The UNFCCC has inspired an extensive body of commentary, criticism and diplomatic controversy.<sup>22</sup> Three issues are particularly relevant to this thesis.

First, the UNFCCC establishes a clear dichotomy between developed and developing states, based on the principle of ‘common but differentiated responsibilities’.<sup>23</sup> This principle is operationalized in the Kyoto Protocol,<sup>24</sup> which sets binding emission targets for ‘Annex I’ developed states, while encouraging ‘non-Annex I’ developing states to pursue nationally-appropriate actions and make voluntary reductions.<sup>25</sup> As this thesis will demonstrate, Southeast Asian states have readily embedded ‘common but differentiated responsibilities’ into their own national climate laws. However, as emissions patterns change and the climate threat becomes more urgent, influential blocs have called for this longstanding

<sup>22</sup> For critical overviews, see: Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3<sup>rd</sup> ed, Cambridge University Press, 2012) 274-298; Daniel Bodansky, ‘The United Nations Framework Convention on Climate Change: A Commentary’ (1993) 18 *Yale Journal of International Law* 451; David G Victor, *The Collapse of the Kyoto Protocol and the Struggle to Slow Global Warming* (Princeton University Press, 2001); Daniel Bodansky, ‘A Tale of Two Architectures: The Once and Future U.N. Climate Change Regime’ (2011) 43 *Arizona State Law Journal* 697.

<sup>23</sup> UNFCCC art 3.1.

<sup>24</sup> *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, (1998) 37 ILM 22 (entered into force 16 February 2005) (‘Kyoto Protocol’); *Doha Amendment to the Kyoto Protocol*, opened for signature 8 December 2012 (not yet in force).

<sup>25</sup> *Kyoto Protocol* art 10(b).

paradigm to be abandoned. The emerging collision course between national interests and international principles is further examined in later chapters.

Second, in its main objective<sup>26</sup> and binding commitments,<sup>27</sup> the UNFCCC portrays mitigation as the top priority.<sup>28</sup> Although adaptation is originally mentioned<sup>29</sup> and has received increased attention at recent summits,<sup>30</sup> there is no binding international commitment to assist vulnerable parties. In contrast, most Southeast Asian climate laws present adaptation as the paramount national priority. Later chapters will explore this cross-scale friction and demonstrate how the Philippines and Vietnam are using law to reconstruct the climate discourse and lend visibility to specific national risks and local needs.

Third, the UNFCCC has slowly – but not steadily – created mechanisms for sharing resources with developing states. Since 2004, Southeast Asian states<sup>31</sup> have been amongst the most prolific project hosts under the Kyoto Protocol’s Clean Development Mechanism (CDM).<sup>32</sup> If the recently adopted Cancun Agreements are successfully implemented, developing states will gain access to a Technology Mechanism,<sup>33</sup> a substantial Green Climate Fund (US\$100 billion per annum by 2020),<sup>34</sup> and a controversial and as-yet-undefined mechanism for forest protection (‘REDD-plus’).<sup>35</sup> Southeast Asian states have already anticipated many of these international opportunities in their domestic climate laws. However, there is a

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<sup>26</sup> UNFCCC art 2.

<sup>27</sup> *Kyoto Protocol* art 4.

<sup>28</sup> Bodansky (2011), above n 22; E Lisa F Schipper, ‘Conceptual History of Adaptation in the UNFCCC Process’ (2006) 15 *Review of European Community and International Environmental Law* 82.

<sup>29</sup> UNFCCC arts 4.1(b), 4.1(f), 4.3, 4.4, 4.8.

<sup>30</sup> UNFCCC Conference of the Parties (COP), ‘Decision 5/CP.7’, UN Doc FCCC/CP/2001/13/Add.1 (21 January 2002); UNFCCC COP, ‘Decision 1/CP.16: Cancun Agreements’, UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011) 4-7. For full citations of UNFCCC materials, see Bibliography.

<sup>31</sup> UNFCCC Secretariat, ‘Distribution of Registered Projects by Host Party’ (Statistics Publication, UNFCCC, 30 April 2013) <cdm.unfccc.int/Statistics/Public/files/201304/proj\_reg\_byHost.pdf>. Regarding future viability of CDM, see Section V.D.3.

<sup>32</sup> Sands and Peel, above n 22, 288-291; *Kyoto Protocol* art 12; UNFCCC COP, ‘Decision 17/CP.7’, UN Doc FCCC/CP/2001/13/Add.2 (21 January 2002).

<sup>33</sup> UNFCCC COP, ‘Decision 1/CP.16: The Cancun Agreements’, UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011) 18-22.

<sup>34</sup> *Ibid* 16-18.

<sup>35</sup> *Ibid* 12-14. Rosemary Lyster, ‘International Legal Frameworks for REDD+: Ensuring Legitimacy’ in Rosemary Lyster, Catherine MacKenzie and Constance McDermott (eds), *Law, Tropical Forests and Carbon: The Case of REDD+* (Cambridge University Press, 2013).

significant risk that developed states will not commit enough resources to make these mechanisms work.<sup>36</sup>

### C. *Global Law for a Global Issue?*

#### 1. *Questioning the Conventional Discourse*

From Greenpeace<sup>37</sup> to the UN Secretary General,<sup>38</sup> it is often stated that climate change is a global problem requiring a global solution. Amid ‘glacial’<sup>39</sup> progress toward a long term agreement, the UNFCCC Conference of the Parties recently reiterated that:

The global nature of climate change calls for the widest possible cooperation by all countries [in an] international response, with a view to [reducing] global greenhouse gas emissions.<sup>40</sup>

Beyond this ubiquitous mantra, it is less frequently asked: what does a ‘global’ response to climate change really mean? What degree of integration is necessary? At what levels should decision-making power be situated? After 20 years of (unsuccessfully) attempting to reduce emissions under the UNFCCC, these fundamental questions are ripe to be asked. The contemporary environmental governance literature offers several anchor points for such discussion – including two concepts which are particularly relevant to Southeast Asian climate law.

#### 2. *Polycentric Governance*

Building on earlier works,<sup>41</sup> contemporary scholars are using ‘polycentric governance’ theories to question the desirability (and basic viability) of a fully-integrated global response to climate change. These scholars tend to be critical of the UNFCCC. To varying degrees,

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<sup>36</sup> Michael Grubb, ‘Doha’s Dawn?’ (2013) 13 *Climate Policy* 281.

<sup>37</sup> Gerd Leipold, ‘Introduction by Gerd Leipold’ [2009] (2) *Greenpeace Quarterly* 2, 2.

<sup>38</sup> Ban Ki-moon, ‘The UN System Delivering as One on Climate Change: Sustainable Solutions for Climate Action’ (Speech delivered to the UN System Chief Executives Board for Coordination, UNFCCC 18<sup>th</sup> Conference of the Parties, Doha, 4 December 2012).

<sup>39</sup> Jessica Boyle, ‘A Mirage in the Deserts of Doha? Assessing the Outcomes of COP 18’ (IISD Commentary, International Institute for Sustainable Development, December 2012).

<sup>40</sup> UNFCCC COP, ‘Decision 2/CP.18: Advancing the Durban Platform’, UN Doc FCCC/CP/2012/8/Add.1 (7 December 2012) 19.

<sup>41</sup> Vincent Ostrom, Charles Tiebout and Robert Warren, ‘The Organisation of Government in Metropolitan Areas: A Theoretical Inquiry’ (1961) 55 *American Political Science Review* 831.

they advocate a more functionally-diverse and geographically-differentiated array of mitigation and adaptation measures.

Keohane and Victor favour a diversified 'regime complex' over a monocentric hierarchy, due to its greater flexibility when faced with the inherent uncertainty of climate change.<sup>42</sup> Cole similarly argues that independent regional, national and sub-national schemes, such as the northeast United States' Regional Greenhouse Gas Initiative (RGGI), are a pragmatic alternative to global inaction and a valuable source of creativity and competition.<sup>43</sup> To the extent that a global framework is necessary, Cole suggests that it should be embedded within a diverse array of 'nested institutions' at various levels.<sup>44</sup> Elinor Ostrom takes a more human-centred path to a similar conclusion.<sup>45</sup> Questioning the ability of abstract global agreements to create 'trust' between actors, Ostrom recommends greater reliance on pre-existing (formal and informal) community-based governance mechanisms.<sup>46</sup>

These network-based approaches stand in contrast to orthodox top-down notions of global cooperation (Figure 2). By adopting a more pluralistic view of global governance 'architectures',<sup>47</sup> they challenge the assumption that international law is the dominant decision-making arena and the leading source of legal creativity. Although some degree of connectivity is necessary, a decentralised and moderately fragmented assemblage of climate laws may lead to 'greater experimentation, learning and cross-influence' between different sites and scales of government'.<sup>48</sup>

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<sup>42</sup> Robert Keohane and David Victor, 'The Regime Complex for Climate Change' (Discussion Paper 10-33, The Harvard Project on International Climate Agreements, January 2010).

<sup>43</sup> Daniel H Cole, 'From Global to Polycentric Climate Governance' (2011) 2 *Climate Law* 395, 407-411.

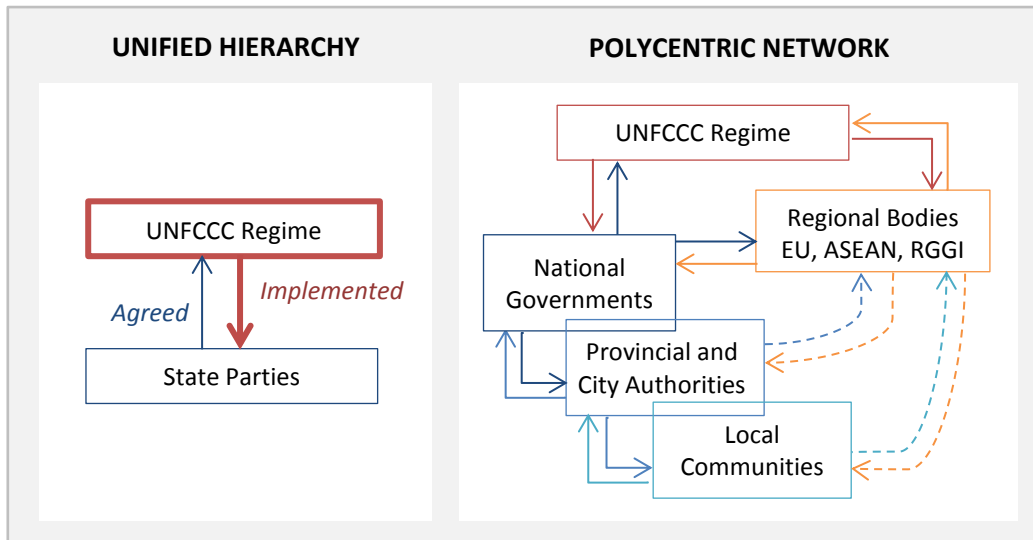
<sup>44</sup> *Ibid* 396.

<sup>45</sup> Elinor Ostrom, 'A Polycentric Approach for Coping with Climate Change' (Policy Research Working Paper 5095, The World Bank, October 2009).

<sup>46</sup> *Ibid* 36-38.

<sup>47</sup> Frank Biermann et al, 'The Fragmentation of Global Governance Architectures: A Framework for Analysis' (2009) 9(4) *Global Environmental Politics* 14.

<sup>48</sup> Cole, above n 43, 395.



**Figure 2: Contrasting Models of Climate Governance**

Southeast Asia is an ideal context to test these theories. As the UNFCCC Conference of the Parties belatedly begins to consider bottom-up approaches,<sup>49</sup> national laws in the Philippines, Vietnam and other non-Annex I innovators are becoming increasingly relevant. While far from perfect, these emerging frameworks can be source of diversity, creativity and momentum and – following Raustiala’s ‘refined’ rationalist approach to international law – may form part of:

The texture of international cooperation ... which [contains] complex but important feedback loops between international institutions and domestic politics, preferences and institutions.<sup>50</sup>

Later chapters critically assess this potential, and examine whether Southeast Asian states can be ‘change agents’<sup>51</sup> in climate regulation.

<sup>49</sup> Bodansky (2011), above n 22, 705-6; UNFCCC COP, ‘Decision 2/CP.15: Copenhagen Accord’, UN Doc FCCC/CP/2009/11/Add.1 (30 March 2010) 4-7.

<sup>50</sup> Kal Raustiala, ‘Refining The Limits of International Law’ (2006) 34 *Georgia Journal of International and Comparative Law* 423, 424.

<sup>51</sup> Christine Loh, Andrew Stevenson and Simon Tay (eds), *Climate Change Negotiations: Can Asia Change the Game?* (Civic Exchange and the Singapore Institute for International Affairs, 2008) 12.

### 3. *Climate Law and the 'Politics of Scale'*

Polycentric governance theory forms a natural confluence with legal geography and the 'politics of scale'<sup>52</sup> (Figure 3). Approaching this junction from a governance perspective, Cole recognises that:

The geographic scale of the threat does not, by itself, determine the scale of the regime needed to avert or minimise the threat.<sup>53</sup>

From a political ecology perspective, Adger reiterates that:

Climate change is a global phenomenon ... but this does not mean that the appropriate scale of governance is global for all related climate issues.<sup>54</sup>

Drawing on key legal geography texts,<sup>55</sup> Osofsky characterises climate change as a 'multiscalar' problem involving a 'web of place-based relationships'<sup>56</sup> – and thereby concludes that any legal solution must cut across multiple scales simultaneously.<sup>57</sup> These complementary statements suggest new ways of 'break[ing] out of our usual conceptual boxes'<sup>58</sup> and unpacking the relationships between law and geographical space. In this thesis, they offer a useful framework for examining how different levels of (local, national, regional and global) climate law interact with each other.

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<sup>52</sup> David W Cash et al, 'Scale and Cross-Scale Dynamics: Governance and Information in a Multilevel World' (2006) 11(2) *Ecology and Society* 8; Eric Swyngedouw, "'Glocalisation" and the Politics of Scale' in Kevin Cox (ed), *Spaces of Globalisation: Reasserting the Power of the Local* (Guilford Press, 1997).

<sup>53</sup> Cole, above n 43, 398.

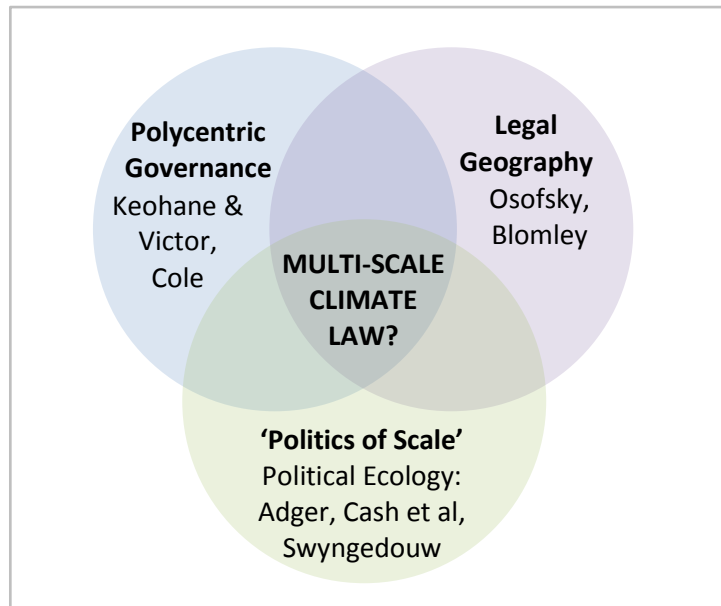
<sup>54</sup> W Neil Adger, 'Scale of Governance and Environmental Justice for Adaptation and Mitigation of Climate Change' (2001) 13 *Journal of International Development* 921, 921-922.

<sup>55</sup> Nicholas Blomley, *Law, Space and the Geographies of Power* (Guildford Press, 1994); Nicholas Blomley, David Delaney and Richard T Ford (eds), *The Legal Geographies Reader: Law, Power and Space* (Wiley-Blackwell, 2001); Jane Holder and Carolyn Harrison (eds), *Law and Geography* (Oxford University Press, 2002).

<sup>56</sup> Hari Osofsky, 'The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance' (2005) 83 *Washington University Law Quarterly* 1789, 1802.

<sup>57</sup> Hari Osofsky, 'Is Climate Change "International"? Litigation's Diagonal Regulatory Role' (2009) 49 *Virginia Journal of International Law* 585, 587.

<sup>58</sup> Hari Osofsky, 'The Geography of Climate Change Litigation Part II: Narratives of Massachusetts v EPA' (2008) 8 *Chicago Journal of International Law* 573, 579.



**Figure 3: Law, Scale and Climate - A Confluence of Theories**

An awareness of scale politics promotes sharper insight into the ‘winners and losers’<sup>59</sup> of global climate regulation. As convincingly demonstrated in other resource management contexts, a dominant scale of regulation can be consciously chosen and socially constructed, in order to render certain interests visible while marginalising others.<sup>60</sup> This dynamic is readily observable in international climate law. For example, the UNFCCC frames climate change as a ‘common concern of humankind’<sup>61</sup> which demands an ‘effective and appropriate international response’<sup>62</sup> in order to achieve the ‘stabilisation of greenhouse gas concentrations’.<sup>63</sup> By ‘scaling up’ the problem in this way, the UNFCCC serves to prioritise globally-oriented mitigation targets over the more immediate, locally-oriented adaptation needs of Least Developed Countries (LDCs) and small island states (Figure 4).<sup>64</sup> There is a distinct spatial logic to this regime. Since adaptation measures produce ‘primarily local’ benefits, wealthy states have little direct incentive to support an international legal instrument which focuses on the adaptation needs of poorer states.<sup>65</sup>

<sup>59</sup> W Neil Adger, Katrina Brown and Emma L Tompkins, ‘The Political Economy of Cross-Scale Networks in Resource Co-Management’ (2005) 10(2) *Ecology and Society* 9.

<sup>60</sup> Robert W Williams, ‘Environmental Injustice in America and its Politics of Scale’ (1999) 18 *Political Geography* 49); Chris Sneddon and Coleen Fox, ‘Rethinking Transboundary Waters: A Critical Hydropolitics of the Mekong Basin’ (2006) 25 *Political Geography* 181).

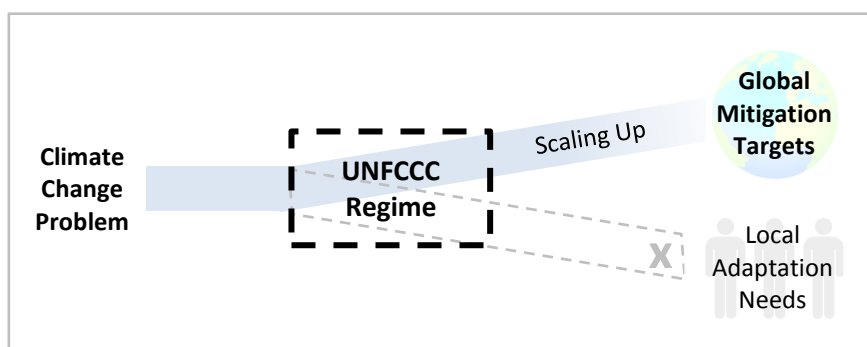
<sup>61</sup> UNFCCC Preamble.

<sup>62</sup> Ibid.

<sup>63</sup> UNFCCC art 2.

<sup>64</sup> Catrien Termeer et al, ‘The Regional Governance of Climate Adaptation: A Framework for Developing Legitimate, Effective, and Resilient Governance Arrangements’ (2011) 2 *Climate Law* 159, 161.

<sup>65</sup> Bodansky (1993), above n 22, 528.



**Figure 4: 'Scaling Up' the Climate Change Problem**

While undoubtedly challenging, the scalar politics of climate change are also a source of opportunity for Southeast Asian lawmakers. First, governments might use law as a means of *re-scaling* and *re-constructing* the regional climate discourse, in order to highlight alternative priorities that are neglected by the UNFCCC. Second, by establishing the necessary institutions and certifications, and by 'rebranding' national development initiatives as 'adaptation objectives',<sup>66</sup> domestic law can function as a cross-scale conduit between local needs and global climate funds and markets. Later chapters examine the current use and potential uptake of these opportunities.

#### D. Methodology

This thesis combines a region-wide 'content mapping' with detailed national 'content mining'.<sup>67</sup> Chapter III presents a broad survey of climate laws Southeast Asia's ten states. This exercise in 'thin description'<sup>68</sup> serves as a context for Chapters IV and V, which engage in a thicker<sup>69</sup> exploration of the specific content and innovations of Filipino and Vietnamese climate law.

<sup>66</sup> Elizabeth Wilson and Catrien Termeer, 'Governance of Climate Adaptation: Introduction to the Special Issue' (2011) 2 *Climate Law* 149, 154.

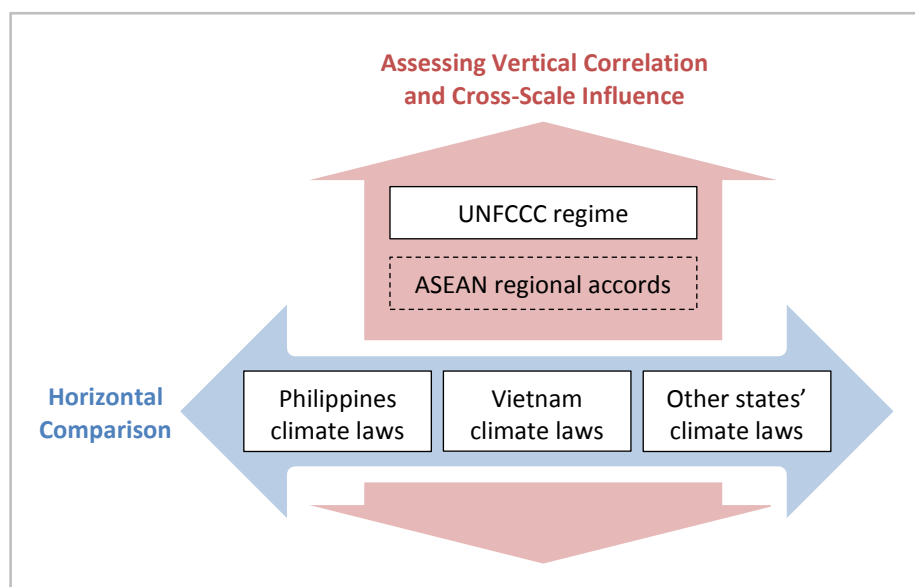
<sup>67</sup> Robin Legard, Jill Keegan and Kit Ward, 'In-depth Interviews' in Jane Ritchie and Jane Lewis (eds), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (SAGE, 2003) 168.

<sup>68</sup> John Gerring, *Social Science Methodology: A Critical Framework* (Cambridge University Press, 2001) 105; Clifford Geertz, 'Thick Description: Toward an Interpretive Theory of Culture' in *The Interpretation of Cultures: Selected Essays* (Basic Books, 1973).

<sup>69</sup> *Ibid* 105.



This study is ‘comparative’ on two axes (Figure 5). Working horizontally, it compares national laws in the Philippines, Vietnam and other Southeast Asian states. Working vertically, it assesses the correlation between national laws, regional accords and the UNFCCC. Together, these two dimensions are designed to provide a richer account of what is occurring and why it is significant.



**Figure 5: Dimensions of Comparative Analysis**

This thesis’ methodology is informed by recent writings on comparative law, which offer a principled basis for ‘looking at one mass of legal data in relationship to another’.<sup>70</sup> As identified by Eberle, ‘the act of comparison requires a careful consideration of the similarities and differences between multiple legal data points’.<sup>71</sup> For present purposes, relevant data points include emissions targets, adaptation initiatives and the structure of national climate agencies. These basic attributes are supplemented by higher order features such as cross-sector coordination, degree of decentralisation, and accountability mechanisms. By tracking how these data points correspond or differ across jurisdictions and between scales, this thesis aims to provide new insights into the integration, regionalisation or fragmentation of climate governance.

<sup>70</sup> Edward J Eberle, ‘The Method and Role of Comparative Law’ (2009) 8 *Washington University Global Studies Law Review* 451, 460.

<sup>71</sup> Ibid; John C Reitz, ‘How to Do Comparative Law’ (1998) 46 *American Journal of Comparative Law* 617, 620.

### III MAPPING THE FIELD: CLIMATE LAW IN SOUTHEAST ASIA

#### A. *Introduction*

Climate change is rapidly entering the lexicon of Southeast Asia's lawmakers. From Manila to the Mekong delta, wide-ranging scientific and policy concerns are solidifying into specific Laws, Regulations and Decrees.

Section III.B briefly outlines the regional climate risk. Section III.C charts recent supra-national developments. Section III.D surveys major national instruments. The intention of this legal mapping exercise is to illustrate the remarkable breadth of recent lawmaking, and its formal and functional diversity. These findings provide a solid basis for venturing deeper into the scholarly 'lacuna'<sup>72</sup> of Southeast Asian climate law.

#### B. *Regional Vulnerability*

Southeast Asia is highly vulnerable to climate change.<sup>73</sup> Its long and densely-populated coastlines will be acutely affected by rising sea levels and predicted increases in tropical storm frequency. Several states are also heavily reliant on climate-sensitive industries, such as agriculture and forestry, to drive growth and ensure food security. In low income states, these primary vulnerabilities are compounded by a lack of adaptive capacity.

The regional burden is unevenly distributed. The Philippines, Vietnam, Myanmar and Indonesia will bear greater costs than technologically-advanced Singapore and landlocked Laos. Further differentiation will occur sub-nationally, between geographical locations and according to class, gender and occupation. Residents of coastal mega-cities will be particularly affected. A 2013 survey of 50 global cities ranked Manila (2<sup>nd</sup>), Bangkok (3<sup>th</sup>),

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<sup>72</sup> Koh, Lye and Lin, above n 8, vii.

<sup>73</sup> Koh Kheng Lian and Lovleen Bhullar, 'Governance on Adaptation to Climate Change in the ASEAN Region' (2011) 1 *Carbon and Climate Law Review* 82, 83-84; Nicholas A Robinson, 'Climate Disruption: Remaking the Agenda of MEAs in Asia and the World', in Koh Kheng Lian, Lye Lin-Heng and Jolene Lin (eds), *Crucial Issues in Climate Change and the Kyoto Protocol: Asia and the World* (World Scientific, 2010) 7.

Yangon (4<sup>th</sup>), Jakarta (5<sup>th</sup>) and Ho Chi Minh City (6<sup>th</sup>) as being amongst the most vulnerable to climate change.<sup>74</sup>

Southeast Asia's differentiated and multiscalar<sup>75</sup> vulnerability to climate change does not, in itself, 'determine the scale of the regime needed'.<sup>76</sup> There is no single most 'appropriate' form of governance.<sup>77</sup> As outlined below, regulatory bodies are reacting – or failing to react – to the climate conundrum in a variety of ways.

### C. *Supra-national Laws*

The Association of South East Asian Nations (ASEAN) is the peak regional body for diplomacy, cooperation and treaty-making.<sup>78</sup> While traditionally perceived as a 'soft'<sup>79</sup> grouping with minimal influence on environmental regulation,<sup>80</sup> ASEAN has recently and rapidly sought a more active role on climate change (Figure 6). Under the Singapore Declaration of 2007<sup>81</sup> and subsequent resolutions<sup>82</sup> and initiatives,<sup>83</sup> ASEAN leaders have pledged to prioritise adaptation,<sup>84</sup> reach 15% renewable energy by 2015,<sup>85</sup> and add 15

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<sup>74</sup> Maplecroft, 'Climate Change and Environmental Risk Atlas 2013' (Report, Maplecroft, 2013). See also: Maplecroft, 'Cities of Dhaka, Manila, Bangkok, Yangon and Jakarta face highest climate change risks – Maplecroft Risk Atlas' (Press Release, 15 November 2012) <maplecroft.com/about/news/ccvi\_2013.html>.

<sup>75</sup> Osofsky, above n 57, 587.

<sup>76</sup> Cole, above n 43, 398.

<sup>77</sup> Adger, above n 54, 921-922.

<sup>78</sup> *ASEAN Declaration (Bangkok Declaration)* (Bangkok, 8 August 1967); *Charter of the Association of Southeast Asian Nations*, signed 20 November 2007 (entered into force 15 December 2008).

<sup>79</sup> Amitav Acharya, 'Ideas, identity and institution-building: from the "ASEAN Way" to the "Asia-Pacific Way"?' (1997) 10 *Pacific Review* 319.

<sup>80</sup> Koh Kheng Lian and Nicholas A Robinson, 'Strengthening Sustainable Development in Regional Intergovernmental Governance: Lessons from the "ASEAN Way"' (2002) 6 *Singapore Journal of International and Comparative Law* 640. Excepting: *ASEAN Agreement on Transboundary Haze Pollution*, signed 10 June 2002 (entered into force 25 November 2003).

<sup>81</sup> *Singapore Declaration on Climate Change, Energy and the Environment* (3<sup>rd</sup> East Asia Summit, Singapore, 21 November 2007) ('*Singapore Declaration*').

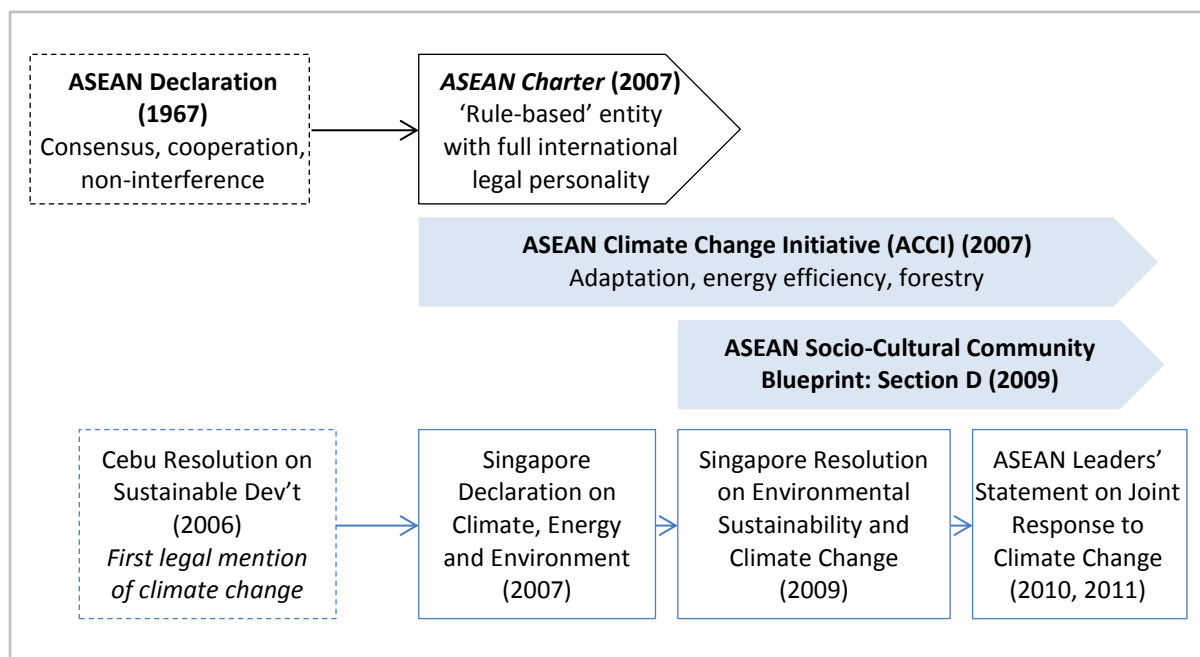
<sup>82</sup> *Singapore Resolution on Environmental Sustainability and Climate Change* (11<sup>th</sup> ASEAN Ministerial Meeting on Environment, Singapore, 29 October 2009); *Bangkok Resolution on ASEAN Environmental Cooperation* (12<sup>th</sup> ASEAN Ministerial Meeting on Environment, Bangkok, 16 September 2012).

<sup>83</sup> Jan Trevisan, Fondazione Eni Enrico Mattei (FEEM) and Centro Euro-Mediterraneo sui Cambiamenti Climatici (CMCC), 'The Common Framework for Climate Policy in South-East Asia' (ICCG Reflection No. 13/2013, International Centre for Climate Governance, 2013) 3-4. For the full text of the Socio-Cultural Community Blueprint, Part D, see: ASEAN Secretariat, 'Roadmap for an ASEAN Community 2009-2015: One Vision, One Identity, One Community' (Report, 2009), 80-86.

<sup>84</sup> *Singapore Declaration* art 4.

<sup>85</sup> *ASEAN Plan of Action for Energy Cooperation 2010-2015* (27<sup>th</sup> Meeting of the ASEAN Ministers for Energy, Mandalay, 29 July 2009) 2, 21-23.

million hectares of forest cover by 2020.<sup>86</sup> ASEAN has also begun issuing ‘Joint Statements’ on climate change to UNFCCC Conferences of the Parties.<sup>87</sup>



**Figure 6: ASEAN and Climate Change - A New Era?**

Compared to previous inactivity, some commentators have welcomed ASEAN’s recent proliferation of climate instruments as a first step toward more ambitious regional cooperation.<sup>88</sup> However, others have questioned the normative force of ASEAN declarations – observing that ‘the will to build a Green ASEAN’ is not manifested in ‘concrete, region-wide policy targets’.<sup>89</sup> This thesis offers a new perspective on this debate. Later chapters examine what (if any) correlation exists between ASEAN declarations and the domestic laws of the Philippines and Vietnam – in order to gauge the significance of ASEAN as an intermediate site of climate governance.

<sup>86</sup> Ibid art 9(b).

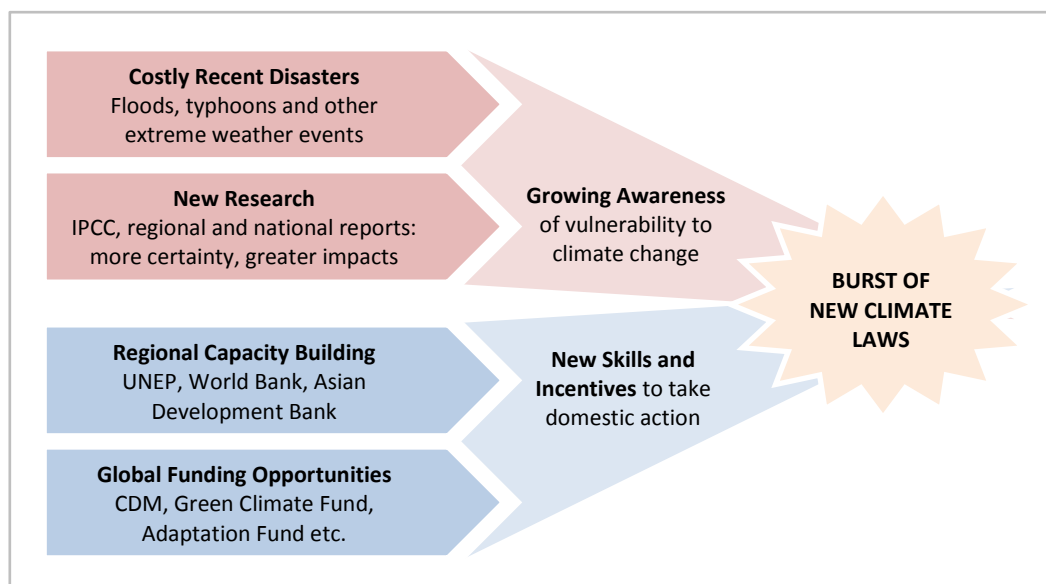
<sup>87</sup> ASEAN Secretariat, ‘ASEAN Leaders’ Statement on Climate Change to the 17th Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change’, Communication to the United Nations Framework Convention on Climate Change, 17th Conference of the Parties, 17 November 2011.

<sup>88</sup> Raman Letchumanan, ‘Is there an ASEAN Policy on Climate Change?’ in Nicholas Kitchen (ed), ‘Climate Change: Is Southeast Asia up to the Challenge?’ (LSE IDEAS Special Report No. 4, London School of Economics and Political Science, 2010).

<sup>89</sup> Trevisan, FEEM and CMCC, above n 83, 6-7.

#### D. National Laws

Since 2007, at least 40 climate-related laws, regulations and decrees have been enacted by Southeast Asian states. This rapid lawmaking is being driven by a combination of internal and external factors (Figure 7).<sup>90</sup>



**Figure 7: Why Now? Drivers of Climate Change Lawmaking in Southeast Asia**

Table 1 presents the most significant instruments in each state, ordered by overall scope and sophistication. General laws on environment, forestry and energy are only included if they directly refer to climate change. All ten states have also ratified the UNFCCC and the Kyoto Protocol. While no state has codified an overall emissions target in domestic law, Singapore has pledged to reduce emissions by 16%, and Indonesia by 26%, below ‘business-as-usual’ levels by 2020.<sup>91</sup>

<sup>90</sup> Steven Tay and Phir Paungmalit, ‘Politics, Positions and Policy-Making on Climate Change in Asia’ in Christine Loh, Andrew Stevenson and Simon Tay (eds), *Climate Change Negotiations: Can Asia Change the Game?* (Civic Exchange and the Singapore Institute for International Affairs, 2008) 49-57.

<sup>91</sup> UNFCCC Ad Hoc Working Group on Long-term Cooperative Action under the Convention, *Compilation of information on nationally appropriate mitigation actions to be implemented by the Parties not included in Annex I to the Convention – Note by the Secretariat*, UN Doc FCCC/AWGLCA/2011/INF.1 (18 March 2011).

**Table 1: Major National Laws on Climate Change**

	State	Leading Instrument	Related Instruments (selected)
<b>Highly Developed</b>	Philippines	<i>Climate Change Act 2009</i>	Administrative Order on Inter-Agency Committee on Climate Change (1991) Administrative Order on Presidential Task Force on Climate Change (2007) <i>Renewable Energy Act 2008</i> <i>Disaster Risk Reduction and Management Act 2010</i>
	Singapore	National Climate Change Strategy (2012)	<i>National Environment Agency Act 2003</i> Sustainable Singapore Blueprint (2009) <i>Energy Conservation Act 2012</i>
	Vietnam	Decision on National Strategy for Climate Change (2011)	Decision on Implementation of the Kyoto Protocol (2007) Decision on National Target Program on Response to Climate Change (2008) Decision on National REDD+ Action Program (2012)
	Indonesia	Decree on National Action Plan to Reduce Greenhouse Gas Emissions (2011)	Decree on National Commission for the Clean Development Mechanism (2005) Decree on National Energy Policy (2006) Decree on National Council on Climate Change (2008) <i>Law on Environmental Protection and Management 2009</i> Decree on REDD+ Task Force (2010)
	Malaysia	National Policy on Climate Change (2009)	<i>Renewable Energy Act 2011</i>
	Thailand	Resolution on National Strategies on Climate Change (2008)	Decree on Greenhouse Gas Management Organisation (2007) Bangkok Declaration on Mitigation and Climate Change (2007)
	Laos	Decree on National Strategy on Climate Change (2010)	Decree on National Steering Committee on Climate Change (2008)
<b>Poorly Developed</b>	Cambodia	-	Declaration on Cambodian Climate Change Office (2003) Sub-decree on National Climate Change Committee (2005)
	Brunei	-	Sultan's Consent to National Council on Climate Change (2010)
	Myanmar	-	-

Amid the vast literature on global climate change, there are few commentaries on the listed instruments. Existing multi-national and regional compilations are descriptive rather than critical,<sup>92</sup> or address general policy issues rather than law specifically,<sup>93</sup> or pre-date key instruments.<sup>94</sup> While there are a few excellent analyses of specific national laws,<sup>95</sup> these do not extrapolate to consider regional patterns or connectivity with the UNFCCC. This thesis responds to these gaps. Before proceeding to its case studies, the remainder of this section broadly examines four key ‘data points’<sup>96</sup> which are an appropriate basis for region-wide comparison. Together, these elements raise interesting questions about regional differentiation, and demonstrate how law is embedded in – and shaped by – particular physical, social and political ‘spaces’.<sup>97</sup>

First, as Table 1 indicates, the total number of laws varies considerably between states. While most have experienced a relative increase in regulation since 2007, there are major disparities in the objectives, scope and sophistication of individual regimes. As later chapters will confirm – this diversity suggests that lawmaking is motivated by state-specific risks, priorities and technical capacities, rather than by collective regional interests.

A second relevant data point is legal form. Since 2007, six out of ten states have enacted an overall ‘Strategy’ or ‘Action Plan’, and seven states have empowered a ‘Climate Change Committee’ or ‘Council’ or ‘Agency’. However, these instruments are presented very differently. For example, Vietnam’s energy intensity targets are enumerated in a legalistic

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<sup>92</sup> GLOBE International, ‘Climate Legislation Study: A Review of Climate Change Legislation in 33 Countries. Third Edition’ (Report, 2013); Subbiah and Wang, above n 2.

<sup>93</sup> Koh, Lye and Lin, above n 8; Loh, Stevenson and Tay, above n 51; Lorraine Elliott and Mely Caballero-Anthony (eds), *Human Security and Climate Change in Southeast Asia: Managing Risk and Resilience* (Routledge, 2013); Paul G Harris (ed.), *Global Warming and East Asia: The Domestic and International Politics of Climate Change* (Routledge, 2003).

<sup>94</sup> King, above n 3; Anderson and Green, above n 19.

<sup>95</sup> François Fortier, ‘Taking a Climate Chance: A Procedural Critique of Vietnam’s Climate Change Strategy’ (2010) 51 *Asia Pacific Viewpoint* 229; Rommel J Casis, ‘Constructing the Philippine Climate Change Legal Framework’ (2009) 83 *Philippine Law Journal* 1011; Lim Weida, ‘Climate Change Policies in Singapore: Whose ‘Environments’ Are We Talking About?’ (2009) 2(2) *Environmental Justice* 79.

<sup>96</sup> Eberle, above n 70, 460.

<sup>97</sup> Blomley, above n 55, 51; David Delaney, ‘Beyond the World: Law as a Thing of this World’, in Jane Holder and Carolyn Harrison (eds), *Law and Geography* (Oxford University Press, 2002) 68.

and densely-worded Prime Minister's Decision,<sup>98</sup> whereas Singapore declares similar targets in a much softer, publicity-oriented format.<sup>99</sup> The functional implications of these formal differences – for example, relating to enforceability and flexibility – are considered in Chapters IV-VI.

Third, while most Southeast Asian climate laws align closely with other sectoral priorities, such as energy security and disaster management, the nature and mechanism of these 'co-benefits'<sup>100</sup> differs between states. In some cases, horizontal connectivity is formally codified by inserting cross-referencing provisions into related laws.<sup>101</sup> In other cases, connectivity is implied by legislative timing or joint ministerial authorship,<sup>102</sup> or is informally explained in policy documents.<sup>103</sup>

Finally, each national framework establishes a different distribution of power between national, sub-national and local decision-makers (Figure 8). While the Philippines' and Indonesia's climate laws envisage significant decentralisation, decision-making authority is moderately or highly centralised in Cambodia, Laos, Vietnam, Singapore and Brunei. Subsequent chapters consider the implications of these different architectures for effective, innovative and flexible climate governance.

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<sup>98</sup> Prime Minister of Vietnam, *Decision Approving the National Strategy for Climate Change* (Vietnam), Decision No. 2139/2011/QĐ-TTg of 5 December 2011 [Vietnam Law and Legal Forum trans, Official Gazette: Issue No. 3-5/December 2011 (FAO Legal Office) <faolex.fao.org/docs/pdf/vie113168.pdf>] Annex arts IV.5(a), IV.5(b).

<sup>99</sup> National Climate Change Secretariat, Singapore, *National Climate Change Strategy 2012* (Policy Document, 2012) 41.

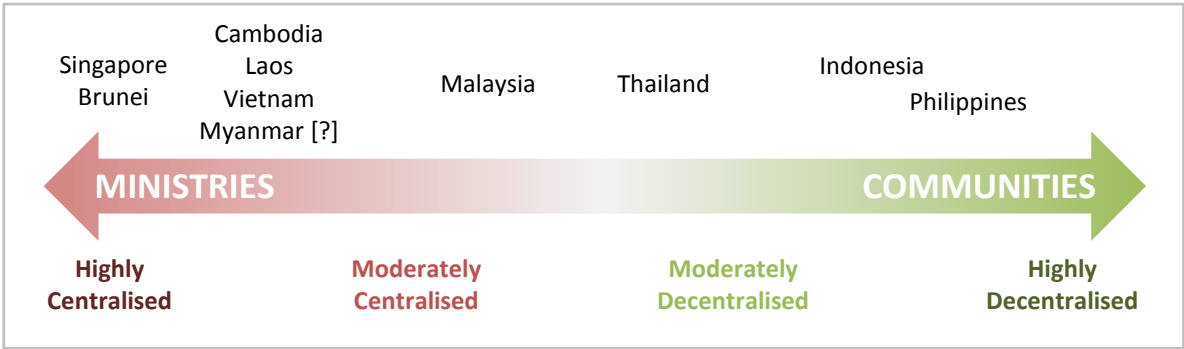
<sup>100</sup> Cornie Huizenga et al, 'The Co-Benefits Approach: An Integrated Policy Response to Climate Change and Development in Asia' in Christine Loh, Andrew Stevenson and Simon Tay (eds), *Climate Change Negotiations: Can Asia Change the Game?* (Civic Exchange and the Singapore Institute for International Affairs, 2008).

<sup>101</sup> *Climate Change Act 2009* (Philippines), Republic Act No. 9729, Congress of the Philippines; *Disaster Risk Reduction and Management Act 2010* (Philippines), Republic Act No. 10121, Congress of the Philippines.

<sup>102</sup> Ministry of Agriculture and Rural Development, Ministry of Planning and Investment and Ministry of Finance, *Joint Circular Guiding the Implementation of the Prime Ministers Decision on Target, Task, Policy and Organisation for the Implementation of the Five Million Hectares Afforestation Project in the 2007-2010 Period* (Vietnam), Joint Circular No. 58/2008/TTLT-BNN-BKHDT-BTC of 2 May 2008 [Vietnam Law and Legal Forum trans, Official Gazette: Issue No. 11-12/May 2008 (FAO Legal Office)].

<sup>103</sup> Ministry of Environment and Water Resources and Ministry of National Development, Singapore, *Singapore Sustainable Development Blueprint – A Lively and Liveable Singapore: Strategies for Sustainable Growth* (Policy Document, 2009); National Climate Change Secretariat, Singapore, *National Climate Change Strategy 2012* (Policy Document, 2012).





**Figure 8: Distribution of Legal Authority to Act on Climate Change**

## IV THE PHILIPPINES: A REGIONAL LEADER?

### A. Introduction

In July 2009, the Philippines became the first state in Southeast Asia to enact a standalone primary law on climate change. In four years of operation, the *Climate Change Act 2009*<sup>104</sup> has attracted a mixture of high praise and harsh criticism. In May 2012, a UN Special Envoy lauded it as the ‘best in the world’.<sup>105</sup> In contrast, a recent NGO report claims that the Act ‘adheres to a flawed development framework’ and ‘falls silent on who are responsible’ for climate change.<sup>106</sup>

This chapter critically assesses these claims. Section IV.B introduces the physical, political and institutional context of Filipino climate law. Section IV.C tracks the growth of the national climate framework from 1991 to the present. Section IV.D examines the content of the *Climate Change Act*, and finds considerable innovation in key areas. It also observes a selective and highly strategic engagement between Filipino climate law and the UNFCCC. Section IV.E concludes that – while Filipino climate law is a regional frontrunner – it cannot be regarded as global best practice until it passes stern tests of implementation.

### B. Law in Context

#### 1. Physical and Political Context

Due to its high poverty and archipelagic geography, the Philippines is consistently classified as ‘extreme risk’<sup>107</sup> and to be ‘most affected’<sup>108</sup> by climate change. Its long coastlines and low-lying cities are vulnerable to erosion, inundation and salinity associated with rising sea

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<sup>104</sup> *Climate Change Act 2009* (Philippines), Republic Act No. 9729, Congress of the Philippines (‘*Climate Change Act*’).

<sup>105</sup> Ubac, above n 5.

<sup>106</sup> Arnold Padilla, Cheamson Boongaling and Lisa Ito-Tapang, ‘On the Road to Disaster: Gaps in Republic Act 9729 and Philippines Climate Change Policies’ (Report, Centre for Environmental Concerns-Philippines, 2011) 47, 49.

<sup>107</sup> Maplecroft, ‘Big economies of the future – Bangladesh, India, Philippines, Vietnam and Pakistan – most at risk from climate change’ (Press Release, 21 October 2010) <maplecroft.com/about/news/ccvi.html>.

<sup>108</sup> Sven Harmeling and David Eckstein, ‘Global Climate Risk Index 2013: Who Suffers Most from Extreme Weather Events? Weather-Related Loss Events in 2011 and 1992 to 2011’ (Briefing Paper, Germanwatch, November 2012) 4.

levels.<sup>109</sup> These risks are accentuated by the degradation of mangroves and other barrier ecosystems; and by urban land subsidence.<sup>110</sup> The Philippines may also experience more extreme weather events.<sup>111</sup> Severe typhoons, storm surges and other disasters will disproportionately affect subsistence farmers and the urban poor, as Typhoons Ondoy<sup>112</sup> and Bopha<sup>113</sup> have recently demonstrated.

While undoubtedly a source of extreme risk, the Philippines' dynamic atmospheric and marine systems are ideal for generating solar, wind and hydroelectric power.<sup>114</sup> Additionally, due to its volcanic geology, the Philippines is already the world's second largest producer of low-emissions geothermal power.<sup>115</sup> By further developing these physical assets, the Philippines can position itself as a regional leader in 'green growth' and climate change mitigation – especially in relation to similarly-sized, resource-dependent states such as Vietnam, Thailand and Myanmar.

The Philippines can also draw on substantial human resources. Due to public education campaigns and frequent weather-related disasters, Filipinos are more concerned about climate change than any other population in Southeast Asia<sup>116</sup> and perhaps the world.<sup>117</sup> The Philippines' democratic political system offers considerable 'space' for environmental activism and civil society engagement,<sup>118</sup> and non-government actors such as the Philippine

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<sup>109</sup> Antonio A Oposa Jr., 'Strengthening Legal and Policy Frameworks for Addressing Climate Change in Asia: The Philippines' in Asian Environmental Compliance and Enforcement Network (AECEN), USAID and United Nations Environment Program (UNEP), 'Strengthening Legal and Policy Frameworks for Addressing Climate Change in Asia: Identifying Opportunities for Sharing Best Practices' (Report, 2009) 183.

<sup>110</sup> Jose Ramon T Villarin, Ma. Antonia Y Lozaga and Antonio G M La Vina, 'In the Eye of the Perfect Storm: What the Philippines Should Do About Climate Change' (Working Paper, Manila Observatory, 8 July 2008) 16.

<sup>111</sup> Ibid 17-18.

<sup>112</sup> Katherine Evangelista and Agence France-Presse, '73 Dead, More than 300,000 Displaced by Ondoy', *Philippine Daily Inquirer* (Manila), 27 September 2009.

<sup>113</sup> Amir Ahmed, 'Death Toll from Typhoon Bopha Tops 1,000 in the Philippines', *CNN International Edition* (online), 17 December 2012 <edition.cnn.com/2012/12/16/world/asia/philippines-typhoon>.

<sup>114</sup> Villarin, Lozaga and La Vina, above n 110, 43-51.

<sup>115</sup> International Geothermal Association, *Installed Generating Capacity* (17 February 2013), <[www.geothermal-energy.org/geothermal\\_energy/electricity\\_generation.html](http://www.geothermal-energy.org/geothermal_energy/electricity_generation.html)>.

<sup>116</sup> Louis Lebel, 'Synthesis Report of the Second Asia-Pacific Climate Change Forum – Mainstreaming Adaptation in Development: Adaptation in Action' (Conference Report, Regional Climate Change Adaptation Knowledge Platform for Asia (AKP) and Asia Pacific Adaptation Network (APAN), May 2012) 22.

<sup>117</sup> Nielsen, 'Sustainable Efforts and Environmental Concerns around the World' (Report, Nielsen Global Online Survey, August 2011) 5.

<sup>118</sup> Gloria Estenzo Ramos, 'Country Report: Philippines – Climate Change, Sustainability and Resilience' [2012] (1) *IUCN Academy of Environmental Law e-Journal* 180, 188.

Network on Climate Change have recently staged a number of high profile campaigns.<sup>119</sup> This widespread and participatory discourse has arisen alongside – and is actively supported by – an extensive formal sphere.

## 2. *Legal Context*

The Philippines’ legal system is a ‘unique’ blend of Roman civil law, Anglo-American common law, Islamic law and indigenous law.<sup>120</sup> Its fundamental instrument is the *1987 Constitution*, which establishes the Philippines as ‘a democratic and republican state’<sup>121</sup> and articulates three ‘co-equal’ branches of legislative, executive and judicial power.<sup>122</sup>

Two sources of law operate beneath the *1987 Constitution*.<sup>123</sup> Statute laws are promulgated by the legislature and the executive and operate in a fixed hierarchy (Table 2). Case law consists of binding Supreme Court judgments and non-binding decisions of lower courts and tribunals.<sup>124</sup> The Philippines’ primary legal language is English.

**Table 2: Hierarchy of Written Laws in the Philippines**

Instrument	Issuing Body
<i>1987 Constitution</i>	Ratified by popular plebiscite
<ul style="list-style-type: none"> <li>• Republic Acts and Codes</li> <li>• International Treaties</li> </ul>	<ul style="list-style-type: none"> <li>• Congress (Senate and House of Representatives)</li> <li>• Valid when concurred by two-thirds Senate majority<sup>125</sup></li> </ul>
Orders and Decrees	President
Administrative Rules and Regulations	Departments, Agencies and Commissions
Ordinances	Local Government Units

<sup>119</sup> Villarin, Loyzaga and La Vina, above n 110, 36-37.

<sup>120</sup> Milagros Santos-Ong, *Philippine Legal Research* (updated edition, March 2012) Globalex – New York University School of Law <[www.nyulawglobal.org/globalex/Philippines1.htm](http://www.nyulawglobal.org/globalex/Philippines1.htm)>; Pacifico Agabin, ‘The Philippines’ in Vernon V Palmer (ed), *Mixed Jurisdictions Worldwide: The Third Family* (Cambridge University Press, 2001) 425-431.

<sup>121</sup> *1987 Constitution of the Republic of the Philippines* (Philippines) (‘*1987 Constitution*’) art II.1. For a concise introductory commentary, see: Santos-Ong, above n 120.

<sup>122</sup> *Ibid* arts VI-VIII.

<sup>123</sup> Santos-Ong, above n 120.

<sup>124</sup> *Civil Code of the Philippines 1949* (Philippines), Republic Act No. 386, Congress of the Philippines, art 8; *Miranda v Imperial* [1947] 77 Phil 1066 (Supreme Court of the Philippines). For commentary, see: ASEAN Law Association, *Legal Systems in ASEAN – Philippines: Sources of Law* (2004) <[www.aseanlawassociation.org/papers/phil\\_chp2.pdf](http://www.aseanlawassociation.org/papers/phil_chp2.pdf)>. Supreme Court decisions cited in this thesis have been obtained from: Supreme Court of the Philippines, *Jurisprudence – Decisions* (online) <[sc.judiciary.gov.ph/decisions.php](http://sc.judiciary.gov.ph/decisions.php)>.

<sup>125</sup> *1987 Constitution* art VII.21.

At present, statutes are the dominant source of Filipino climate law. However, the Supreme Court has developed a rich and creative jurisprudence on general topics of environmental law<sup>126</sup> which may soon be extended to climate change disputes. This influence could arise in one of two ways.

First, the Court may use art II.16 of the *1987 Constitution* – which gives the people a right to ‘a balanced and healthful ecology’<sup>127</sup> – to enable citizen suits on climate change. This radical possibility has a clear precedent. In the landmark case of *Oposa v Factoran*, the Court held that art II.16 burdened the government with an ‘intergenerational responsibility’ to ‘refrain from impairing the environment’ – and on this basis, granted a group of children standing to challenge state-issued forestry permits.<sup>128</sup>

A second opportunity for citizen suits was created in 2010, when the Supreme Court issued a new set of *Rules of Procedure for Environmental Cases*.<sup>129</sup> This innovative document introduces an ‘extraordinary’<sup>130</sup> new writ of *kalikasan* (literally, ‘writ of nature’), which can be used to compel or prohibit government or private action when:

The environmental damage is of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces.<sup>131</sup>

Based on the successful outcomes of a recent test case – in which petitioners obtained an order compelling the government to install rainwater collectors in climate-vulnerable, flood-prone areas<sup>132</sup> – the writ of *kalikasan* is likely to have a very significant impact on the implementation and enforcement of the *Climate Change Act*. Indeed, a leading Filipino

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<sup>126</sup> *Ysmael v Deputy Executive Secretary* [1990] G.R. 79538; <sup>126</sup> *Oposa et al. v Fulgencio S. Factoran, Jr.* [1993] G.R. 101083; *Philippines Earth Justice Center, Inc., et al. v Department of Environment and Natural Resources* [2011] G.R. 197754.

<sup>127</sup> *1987 Constitution* art II.16.

<sup>128</sup> *Oposa et al. v Fulgencio S. Factoran, Jr.* [1993] G.R. 101083 (Supreme Court of the Philippines); Hilario G Davide, Jr., ‘The Environment as Life Sources and the Writ of Kalikasan in the Philippines’ (2012) 29 *Pace Environmental Law Review* 592, 594-595.

<sup>129</sup> Supreme Court of the Philippines, *Rules of Procedure for Environmental Cases* (Philippines), A.M. No. 09-6-8-SC, 29 April 2010 (‘*Rules of Procedure for Environmental Cases*’).

<sup>130</sup> Nicholas A Robinson, ‘Ensuring Access to Justice Through Environmental Courts’ (2012) 29 *Pace Environmental Law Review* 363, 382.

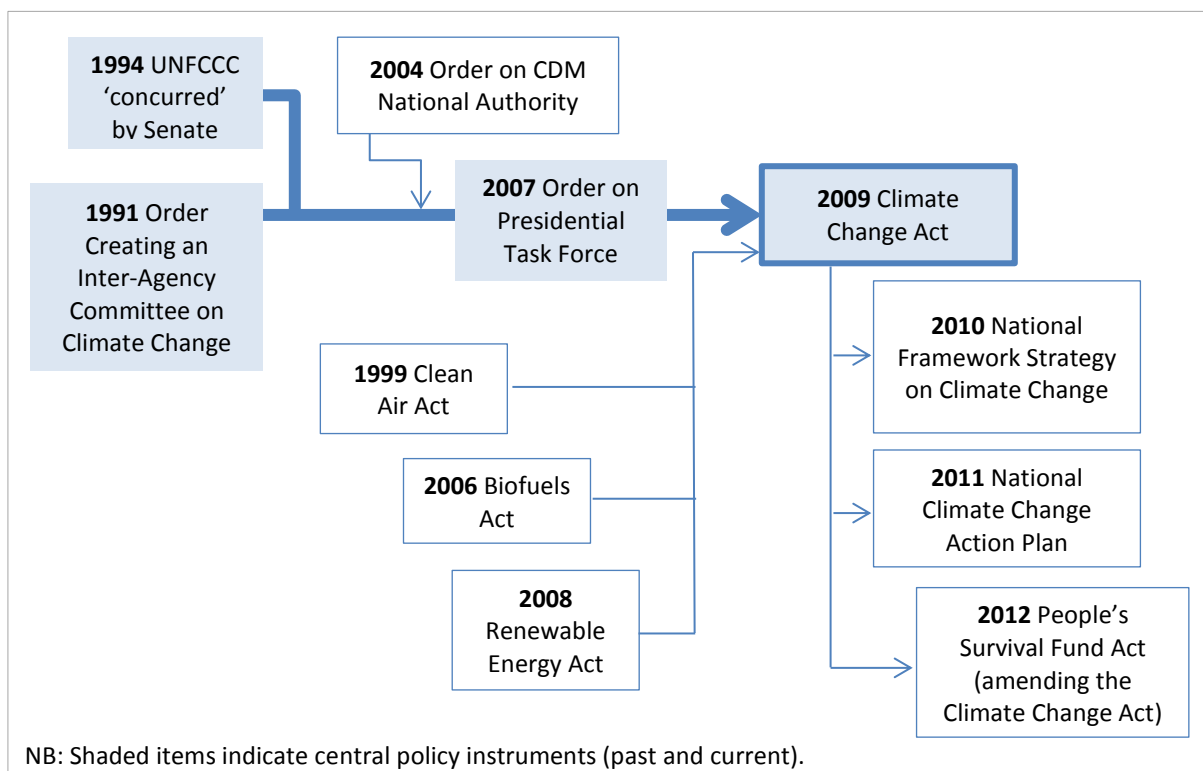
<sup>131</sup> *Rules of Procedure for Environmental Cases* r 7; Davide, above n 128, 596-598.

<sup>132</sup> *Global Legal Action Against Climate Change v Philippines* [2011] G.R. 191806 (Supreme Court of the Philippines).

climate change negotiator recently predicted that the writ of *kalikasan* ‘can be used against any major carbon dioxide producer’.<sup>133</sup>

### C. Evolution of National Climate Laws

The *Climate Change Act* is a culmination of two decades of lawmaking activity (Figure 9). This section charts the processes and principles by which Filipino climate law has evolved, from the early 1990s to the present. In addition to providing a basic timeline, it critically examines the interplay between domestic instruments and the UNFCCC.



**Figure 9: Evolution of Climate Law in the Philippines**

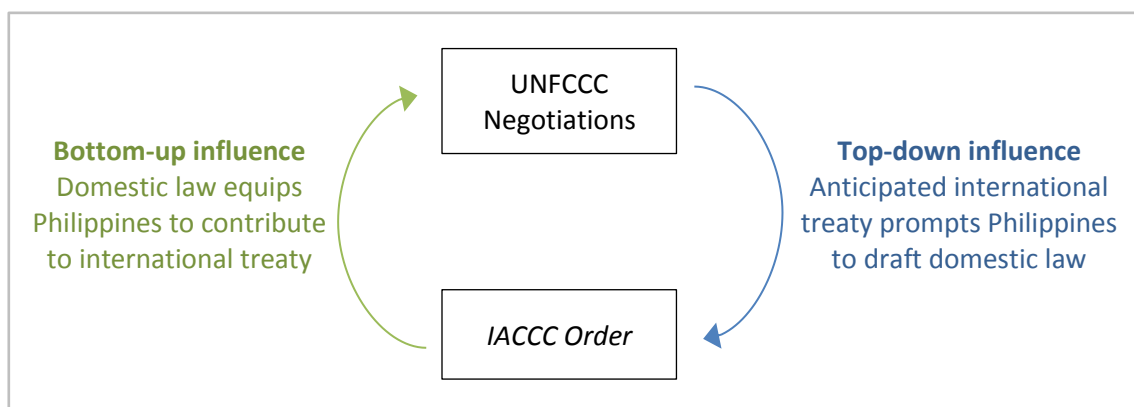
The Philippines’ first climate law was issued in 1991. Citing ‘extreme vulnerability’<sup>134</sup> and constitutional imperatives to act,<sup>135</sup> the *Administrative Order Creating an Inter-Agency Committee on Climate Change* established the interdisciplinary IACCC to ‘formulate policies

<sup>133</sup> Antonio La Vina, in: Purple S Romero, ‘Philippines: Landmark Challenge Could Force Action to Curb Climate-Related Flooding’, *AlertNet* (Manila) 24 May 2010 <reliefweb.int/report/philippines/philippines-landmark-court-challenge-could-force-action-curb-climate-related>.

<sup>134</sup> President of the Philippines, *Administrative Order Creating an Inter-Agency Committee on Climate Change* (Philippines), Administrative Order No. 220, 8 May 1991 (‘IACCC Order’) Preamble. For further background on the *IACCC Order*; Casis, above n 95, 1027-1028.

<sup>135</sup> *IACCC Order* Preamble, quoting *1987 Constitution* art II.16.

and response strategies to climate change'.<sup>136</sup> The *IACCC Order* suggests an interesting and polycentric legal 'feedback loop'.<sup>137</sup> From a top-down perspective, it appears to have been drafted in direct anticipation of – and with a view to implementing – an international climate agreement (Figure 10). For example, s 3 required the IACCC to monitor local climate change 'in coordination with international agencies'<sup>138</sup> and to 'serve as a link between the Philippines and the Secretariats'.<sup>139</sup> From a bottom-up perspective, the *IACCC Order* required the IACCC to use relevant national information to actively influence the international negotiating process.<sup>140</sup> As an early adopter domestically, the Philippines was well-placed to contribute to preparatory UNFCCC negotiations,<sup>141</sup> to speak for the G77 and China negotiating bloc,<sup>142</sup> and to convene subsequent leaders' summits.<sup>143</sup>



**Figure 10: Legal Feedback Loop? Cross-Scale Interaction between UNFCCC and *IACCC Order***

From the early 1990s to 2008, the Philippines enacted a 'piecemeal'<sup>144</sup> array of Acts, Regulations and Orders relating to climate change. In several instances, Congress annexed broadly-stated climate objectives and powers to more general regulatory architectures –

<sup>136</sup> Ibid s 3(a).

<sup>137</sup> Raustiala, above n 50, 424.

<sup>138</sup> *IACCC Order* s 3(c).

<sup>139</sup> Ibid s 3(d).

<sup>140</sup> Ibid s 3(b).

<sup>141</sup> *Kuala Lumpur Declaration on Environment and Development* (Second Ministerial Conference of Developing Countries on Environment and Development, Kuala Lumpur, 29 April 1992); Ma. Gerarda Asuncion Merilo, 'Philippine Initiatives on Climate Change' in Rommel J Casis (ed), *Experts Dialogue on Philippine Climate Change Policy: Mitigation and Adaptation* (Institute of International Legal Studies – University of the Philippines Law Centre, 2008)132-133.

<sup>142</sup> Villarín, Loyzaga and La Vina, above n 110, 39.

<sup>143</sup> *Manila Declaration* (First Asia Pacific Leaders' Conference on Climate Change (ASPAC-LCCC), Manila, 20 February 1995).

<sup>144</sup> Anderson and Green, above n 19, 35.

such as the *Clean Air Act 1999*,<sup>145</sup> the *Biofuels Act 2006*<sup>146</sup> and the *Renewable Energy Act 2008*.<sup>147</sup> This broad approach in primary legislation was supplemented by more detailed and issue-specific executive Orders and Regulations. For example, the *Executive Order Designating the DENR as the National Authority for CDM*<sup>148</sup> articulates a precise set of definitions, duties and project approval criteria,<sup>149</sup> which expressly align with the Marrakesh Accords adopted by the UNFCCC Conference of the Parties in 2001.<sup>150</sup>

In 2007, following the release of the IPCC Fourth Assessment Report, the Philippines took a critical intermediate step toward the present statutory framework. Citing new ‘certainty’ as to the causes and impacts of climate change, the *Administrative Order Creating the Presidential Task Force on Climate Change* set an extensive agenda for research, policy-making and international collaboration – with the aim of ‘mainstreaming’ climate risk management into all aspects of government.<sup>151</sup>

The *Climate Change Act* is the leading outcome of this agenda. Together with its implementing instruments, the Act arguably ‘caps the gigantic strides taken by the Philippines Government’ on climate change’.<sup>152</sup> The following section analyses its substantive content.

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<sup>145</sup> *Clean Air Act 1999* (Philippines), Republic Act No. 8749, Congress of the Philippines, s 31.

<sup>146</sup> *Biofuels Act 2006* (Philippines), Republic Act No. 9367, Congress of the Philippines s 2(b).

<sup>147</sup> *Renewable Energy Act 2008* (Philippines), Republic Act No. 9513, Congress of the Philippines, s 2(c).

<sup>148</sup> President of the Philippines, *Executive Order Designating the Department of Environment and Natural Resources as the National Authority for the Clean Development Mechanism* (Philippines), Executive Order No. 320, 25 June 2004 (‘*CDM Order*’). See also: Department of Environment and Natural Resources, *Rules and Regulations Governing the Implementation of EO 320* (Philippines), DENR Administrative Order No. 2005-17, 31 August 2005 (‘*CDM Rules*’).

<sup>149</sup> *CDM Rules* ss 5, 6, 8-11.

<sup>150</sup> *CDM Order* Preamble; UNFCCC COP, ‘Decision 17/CP.7’, UN Doc FCCC/CP/2001/13/Add.2 (21 January 2002).

<sup>151</sup> President of the Philippines, *Administrative Order Creating the Presidential Task Force on Climate Change* (Philippines), Administrative Order No. 171, 20 February 2007. As amended by: President of the Philippines, *Executive Order Reorganising the Presidential Task Force on Climate Change* (Philippines), Executive Order No. 774, 26 December 2008.

<sup>152</sup> Ramos, above n 118, 184.



## D. *Climate Change Act 2009*

### 1. *Origin and Structure*

The *Climate Change Act* is the Philippines ‘flagship’ law on climate change.<sup>153</sup> It was enacted by Congress in September 2009, following a long drafting period in which at least eight different Bills were considered by a wide range of stakeholders from national and local government, academia, business, international organisations and the NGO sector.<sup>154</sup>

As specified in its extended title, the *Climate Change Act* has three main objectives. First, it commits to ‘mainstreaming’ climate change into development planning and sectoral decision-making. Second, it commissions a National Framework Strategy on Climate Change. The Framework Strategy guides and coordinates substantive policies, including the National Climate Change Action Plan<sup>155</sup> and ‘frontline’ Local Climate Change Action Plans.<sup>156</sup> The Act’s third objective is to create a Climate Change Commission (CCC). As the ‘sole policy-making body’ on climate change,<sup>157</sup> the CCC is tasked with a long list of powers and functions – ranging from horizontal and vertical policy coordination,<sup>158</sup> to recommending ‘key development investments’,<sup>159</sup> to delivering the Framework Strategy.<sup>160</sup> Figure 11 illustrates the structure of the CCC and supporting bodies.<sup>161</sup>

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<sup>153</sup> GLOBE International, above n 92, 331.

<sup>154</sup> Rommel J Casis (ed), *Experts Dialogue on Philippine Climate Change Policy: Mitigation and Adaptation* (Dialogue Report, Institute of International Legal Studies – University of the Philippines Law Centre, 2008) Appendix.

<sup>155</sup> *Climate Change Act* s 13.

<sup>156</sup> *Ibid* s 14.

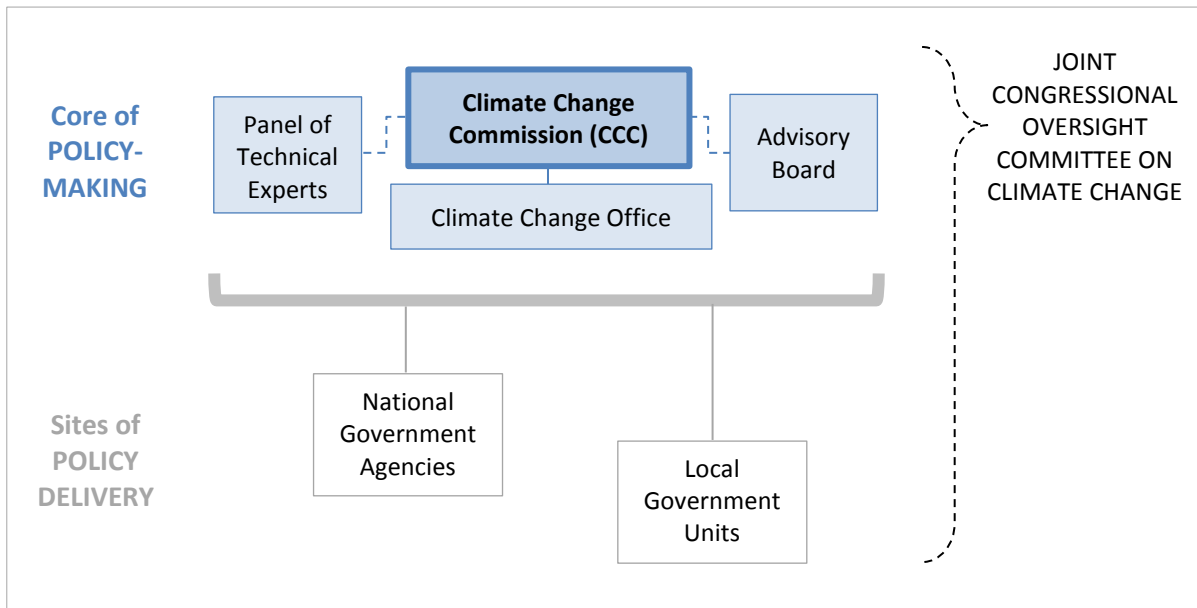
<sup>157</sup> *Ibid* s 4.

<sup>158</sup> *Ibid* ss 9(a), (b), (d), (j), (m).

<sup>159</sup> *Ibid* s 9(f).

<sup>160</sup> *Ibid* s 9(c).

<sup>161</sup> *Ibid* ss 5, 8, 10.



**Figure 11: Institutional Structure under the *Climate Change Act***

The primary text of the *Climate Change Act* creates a broad policy mandate and a powerful chain of authority on climate change. However, unlike Vietnam’s flagship law,<sup>162</sup> it does not establish substantive targets or practical programs. This elaborating step is left to the Framework Strategy,<sup>163</sup> the National Action Plan,<sup>164</sup> and Local Action Plans.<sup>165</sup> Further guidance on financing and institutional structure is provided by the Act’s revised *Implementing Rules and Regulations*<sup>166</sup> and by a recent amending Act, titled the *People’s Survival Fund Act 2012*.<sup>167</sup> This combined legal framework addresses three main themes, which are discussed below.

<sup>162</sup> Prime Minister of Vietnam, *Decision approving the National Strategy for Climate Change*, Decision No. 2139/QĐ-TTg of 5 December 2011 [Vietnam Law and Legal Forum trans, *Official Gazette: Issue No. 3-5/December 2011* (FAO Legal Office)].

<sup>163</sup> Climate Change Commission, *National Framework Strategy on Climate Change 2010-2022* (Philippines), approved by the President on 28 April 2010 <climate.gov.ph/index.php/documents/category/27-nfsc> (*‘Framework Strategy’*).

<sup>164</sup> Climate Change Commission, *Resolution Approving the National Climate Change Action Plan* (Philippines), approved by the President on 22 November 2011 <climate.gov.ph/index.php/documents/category/21-nccap-resolution> (*‘National Action Plan’*).

<sup>165</sup> *Climate Change Act* s 14.

<sup>166</sup> Climate Change Commission, *Implementing Rules and Regulations of the Climate Change Act of 2009* (Philippines), Administrative Order No. 2010-01, 20 January 2010.

<sup>167</sup> *People’s Survival Fund Act 2012* (Philippines), Republic Act No. 10174, Congress of the Philippines (*‘People’s Survival Fund Act’*).

## 2. Adaptation

The *Climate Change Act* elevates adaptation to national priority status. Of the CCC's sixteen 'powers and functions', eleven directly address adaptation,<sup>168</sup> whereas only four directly address mitigation.<sup>169</sup> This weighting – which is the inverse of the UNFCCC regime<sup>170</sup> – is confirmed by the National Framework, which states that:

The national priorities ... shall be adaptation and mitigation, *with an emphasis on adaptation as the anchor strategy*. Whenever applicable, mitigation actions shall also be pursued as a function of adaptation.<sup>171</sup>

The National Action Plan implements this 'anchor strategy' through a detailed set of outcomes relating to ecological stability, food, water and human security, and capacity development.<sup>172</sup> These outcomes do not contain numerical targets. Instead, they require the government to establish new bodies (including a Water Regulatory Commission<sup>173</sup> and Climate Change 'Centres of Excellence'<sup>174</sup>) and perform particular activities (such as agricultural risk assessment<sup>175</sup> and public health monitoring<sup>176</sup>) within specified timeframes from 2011 to 2028. While there is no direct accountability mechanism or specified standard to which these tasks must be performed, government agencies are supervised by a Joint Congressional Oversight Committee<sup>177</sup> and might be compelled to act by citizen petitions founded on constitutional rights or the writ of *kalikasan*.<sup>178</sup>

The *Climate Change Act* strongly links Climate Change Adaptation (CCA) to Disaster Risk Reduction (DRR). This connection is emphasised in several provisions, which are mirrored in

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<sup>168</sup> *Climate Change Act* ss 9(a), (e), (f)-(h), (j), (l)-(p).

<sup>169</sup> *Ibid* ss 9(e), (h), (i), (p).

<sup>170</sup> UNFCCC art 2; *Kyoto Protocol* art 2.

<sup>171</sup> *Framework Strategy* art 2.7 (emphasis added), as substantially reflects *Climate Change Act* s 11.

<sup>172</sup> *National Action Plan* 6.

<sup>173</sup> *Ibid* 69.

<sup>174</sup> *Ibid* 114.

<sup>175</sup> *Ibid* 63.

<sup>176</sup> *Ibid* 88.

<sup>177</sup> *Climate Change Act* s 19.

<sup>178</sup> Applying *Global Legal Action Against Climate Change v Philippines* [2011] G.R. 191806 (Supreme Court of the Philippines).

the *Disaster Risk Reduction and Management Act 2010*.<sup>179</sup> As its first listed responsibility, function, the CCC must:

Ensure the mainstreaming of climate change, in synergy with disaster risk reduction, into the national, sectoral and local development plans and programs.<sup>180</sup>

From a structural perspective, the *Climate Change Act* requires the CCC to ‘establish a close partnership’ with the National Disaster Risk Reduction and Management Council (NDRRMC)<sup>181</sup> and to include a representative ‘from the disaster risk reduction community’ on its Advisory Board.<sup>182</sup> A mirror provision in the *DRR Act* requires the Executive Director of the CCC’s Climate Change Office to be appointed as a member of the NDRRMC.<sup>183</sup> Turning to international law, the *Climate Change Act* affords almost equal significance<sup>184</sup> to the UNFCCC climate change regime and the Hyogo Framework for Action (which is the peak international resolution on DRR).<sup>185</sup> Although the Act does not refer to ASEAN or any other regional body, its joint approach to CCA and DRR substantially reflects art II.2.7 of the Work Programme<sup>186</sup> of the *ASEAN Agreement on Disaster Management and Emergency Response*<sup>187</sup> and other supra-national instruments.<sup>188</sup> This dense pattern of cross-scale and cross-sector connectivity is summarised in Figure 12.

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<sup>179</sup> *Disaster Risk Reduction and Management Act 2010* (Philippines), Republic Act No. 10121, Congress of the Philippines (‘*DRR Act*’).

<sup>180</sup> *Climate Change Act* s 9(a); mirrored by *DRR Act* s 2(g).

<sup>181</sup> *Climate Change Act* s 9(j). Mirrored by: *DRR Act* ss 6(j), 6(n).

<sup>182</sup> *Climate Change Act* s 5.

<sup>183</sup> *Climate Change Act* s 5; *DRR Act* s 5(y).

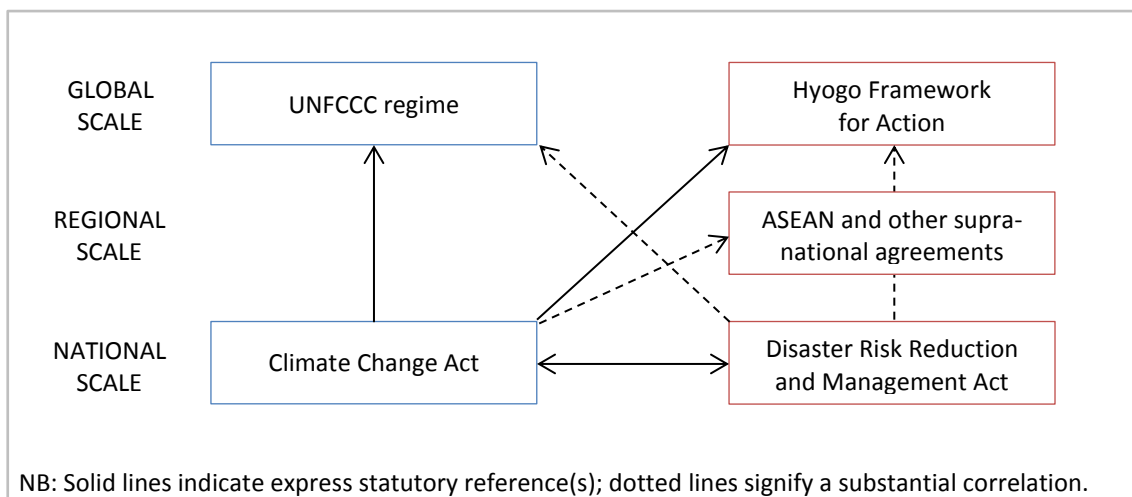
<sup>184</sup> *Climate Change Act* s 2.

<sup>185</sup> United Nations World Conference on Disaster Reduction, ‘Resolution 2: Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters’ in *Report of the World Conference on Disaster Reduction*, UN Doc A/CONF.206/6 (22 January 2005).

<sup>186</sup> ‘ASEAN Agreement on Disaster Management and Emergency Response – Work Programme 2010-2015’ (15<sup>th</sup> Meeting of the ASEAN Committee on Disaster Management, Singapore, 12 March 2010) 40-42, art II.2.7.

<sup>187</sup> *ASEAN Agreement on Disaster Management and Emergency Response*, signed 26 July 2005 (entered into force 24 December 2009).

<sup>188</sup> *Incheon Declaration on Disaster Risk Reduction in Asia and the Pacific 2010* (4<sup>th</sup> Asian Ministerial Conference on Disaster Risk Reduction, Incheon, 28 October 2010); *Incheon Regional Roadmap on DRR through CCA in Asia and the Pacific* (4<sup>th</sup> Asian Ministerial Conference on Disaster Risk Reduction, Incheon, 28 October 2010).



**Figure 12: Connectivity between CCA and DRR laws in the Philippines**

The conceptual marriage of CCA and DRR is a useful innovation in governance. For the already disaster-prone Philippines, it is an efficient means of integrating short and long term development objectives, and represents one possible way of coming to terms with the ‘unbounded’ risk and inherent uncertainty of climate change.<sup>189</sup> It is also a sound financial strategy. By legally ‘rebranding’ disaster resilience programs as ‘adaptation objectives’,<sup>190</sup> the Philippines can maximise its access to the UN Adaptation Fund, the Green Climate Fund, and other climate change-specific global resources.

### 3. Mitigation

The *Climate Change Act* expressly adopts the UNFCCC’s ultimate objective, which is to stabilise greenhouse gas concentrations at a safe level.<sup>191</sup> While it does not set an overall emissions reduction target (in accordance with the principle of ‘common but differentiated responsibilities’<sup>192</sup>), Filipino climate law provides for three key modes of mitigation.

First, the Framework Strategy and National Action Plan establish several measures on energy efficiency<sup>193</sup> and sustainable transport.<sup>194</sup> These strategies address the related challenges of greenhouse gas emissions, air pollution and rapid urbanisation. This

<sup>189</sup> Bulkeley, above n 15; Beck, above n 16.

<sup>190</sup> Wilson and Termeer, above n 66, 154.

<sup>191</sup> *Climate Change Act* s 2.

<sup>192</sup> UNFCCC art 3.1; *Framework Strategy* art 2.3.

<sup>193</sup> *Framework Strategy* art 8.1; *National Action Plan* 26.

<sup>194</sup> *Framework Strategy* art 8.3; *National Action Plan* 26.

complementary cross-sectoral approach is exemplified by Strategic Priority 8.3(b) of the Framework Strategy, which requires the government to expand urban mass transit systems and convert all public vehicles to natural gas or renewable power sources by 2022.<sup>195</sup>

Second, the Framework Strategy sets a target of doubling renewable energy capacity from 4500 MW to 9000 MW by 2030.<sup>196</sup> The National Action Plan revises this target upwards to 12,000 MW and particularly emphasises the role of hydropower, geothermal and wind power.<sup>197</sup> Interestingly, both figures are actually *less ambitious* than a pre-existing target of 15,300 MW by 2030 set by the National Renewable Energy Program (NREP) in June 2011. There is no apparent reason for this discrepancy. From a structural perspective, the setting of three different goals in such a short time period tends to suggest a lack of cross-sectoral coordination between the Department of Energy and the CCC. However, viewed in a more positive light, these changes might also be regarded as flexible, iterative policy responses to shifting demand forecasts and uncertain climate predictions.

In any event, the Philippines' linking of domestic energy policy to international climate change policy is strategically advantageous. By 'rebranding'<sup>198</sup> the NREP's economically-motivated<sup>199</sup> renewable energy target as a UNFCCC-inspired mitigation activity, it stands to gain access to a much larger pool of international development finance – ranging from established (but shaky) CDM markets to the recently established Green Climate Fund (Figure 13).<sup>200</sup> This strategic use of law has interesting theoretical implications. As with its CCA-DRR linkage, the Philippines' series of renewable energy targets suggests a self-interested choice to engage with the UNFCCC, rather than a forcible imposition of 'carbon colonialism' by wealthy emitters on to passive developing states.<sup>201</sup>

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<sup>195</sup> *Framework Strategy* art 8.3(b).

<sup>196</sup> *Ibid* art 8.2; GLOBE International, above n 92, 337.

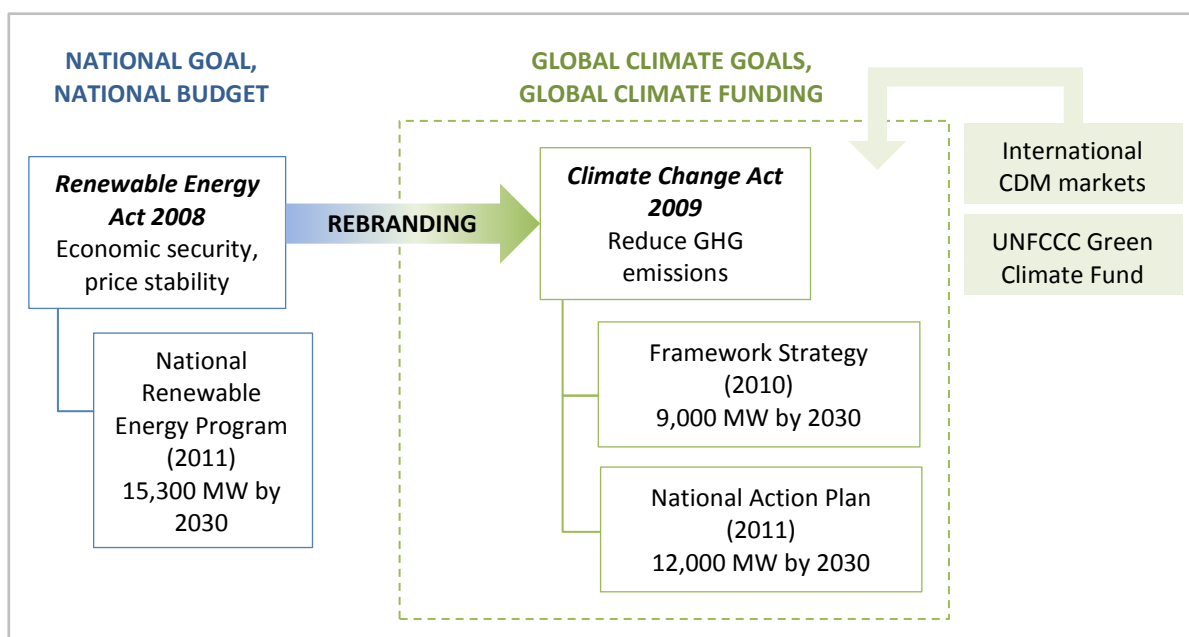
<sup>197</sup> *National Action Plan* 29.

<sup>198</sup> Wilson and Termeer, above n 66, 154.

<sup>199</sup> *Renewable Energy Act* s 2(a); Casis, above n 95, 1054.

<sup>200</sup> Interim Secretariat of the Green Climate Fund, 'Green Climate Fund accelerates preparations to support global climate action' (Press Release, 26 March 2013) 2; UNFCCC COP, 'Decision 3/CP.17: Launching the Green Climate Fund', UN Doc FCCC/CP/2011/9/Add.1 (15 March 2012).

<sup>201</sup> Heidi Bachram, 'Climate Fraud and Carbon Colonialism: The New Trade in Greenhouse Gases' (2004) 15(4) *Capitalism Nature Socialism* 5; A G Bumpus and D M Liverman, 'Carbon Colonialism? Offsets, Greenhouse Gas Reductions, and Sustainable Development' in Richard Peet, Paul Robbins and Michael J Watts, *Global Political Ecology* (Routledge, 2011).



**Figure 13: Strategic 'Rebranding' of Renewable Energy Targets**

The Philippines' third mode of mitigation relates to forestry and REDD+. Unlike other aspects of national climate law, the Philippine National REDD Plus Strategy (PNRPS)<sup>202</sup> did not originate from within the formal planning process (Figure 14). Indeed, a close reading of the *Climate Change Act* reveals no mention of REDD+ and only one incidental mention of 'forestry'<sup>203</sup> – as reflects the government's absolute lack policy coverage when the Act was drafted in 2008.<sup>204</sup> In early 2009, this gap was identified by a coalition of NGOs, who initiated a multi-stakeholder planning process involving academics, local and central officials, and communities from 23 provinces.<sup>205</sup> In April 2009, this ad-hoc process was formally recognised by an Executive Order and given government support.<sup>206</sup> After further drafting and consultation, the final PNRPS was legally incorporated into the Framework Strategy in 2010,<sup>207</sup> and further implemented by the National Action Plan in 2011.<sup>208</sup>

<sup>202</sup> The Philippine REDD-plus Strategy Team, 'The Philippine National REDD-plus Strategy' (National Strategy, DENR Forest Management Bureau and CoDe REDD-plus Philippines, October 2010).

<sup>203</sup> *Climate Change Act* s 9(f).

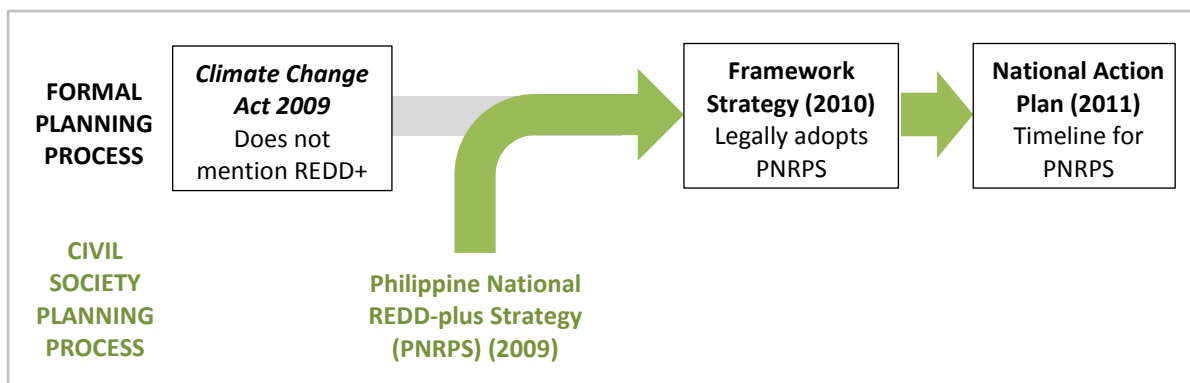
<sup>204</sup> The Philippine REDD+ Strategy Team, above n 202, 3.

<sup>205</sup> *Ibid* 3.

<sup>206</sup> President of the Philippines, *Executive Order on REDD-plus Planning and Development* (Philippines), Executive Order No. 881, 26 April 2009.

<sup>207</sup> *Framework Strategy* art 8.5.

<sup>208</sup> *National Action Plan* 79 (Outcome 3.1.1.3).



**Figure 14: Intersection of Formal and Informal Climate Lawmaking in the Philippines**

It remains to be seen whether the PNRPS – which focuses on institutional ‘readiness’ and specific priority sites<sup>209</sup> – will have any success in mediating the Philippines’ acute conflict between forest protection and lucrative mining projects. Nevertheless, from a procedural perspective, the PNRPS is a very promising example of ‘bottom up’ lawmaking. In demonstrating the specific value of stakeholder consultation and public-private partnerships, it supports Cole’s wider proposition that polycentric climate governance can lead to greater ‘experimentation, learning and cross-influence’.<sup>210</sup>

#### 4. Local Action

While recognising global causes and national impacts, the *Climate Change Act* nominates local authorities and communities as the primary sites of climate change response. This ‘scale choice’<sup>211</sup> is particularly expressed in s 14 of the Act, which describes Local Government Units (LGUs) as ‘frontline’ agencies and requires municipal governments to ‘consider climate change adaptation as one of their regular functions’ (Figure 15).<sup>212</sup> This mandate is elaborated in the Framework Strategy and National Action Plan, which affirm the principle of subsidiarity<sup>213</sup> and nominate local accompaniments to almost every national action.

<sup>209</sup> The Philippines REDD-plus Strategy Team, above n 202, v-ix.

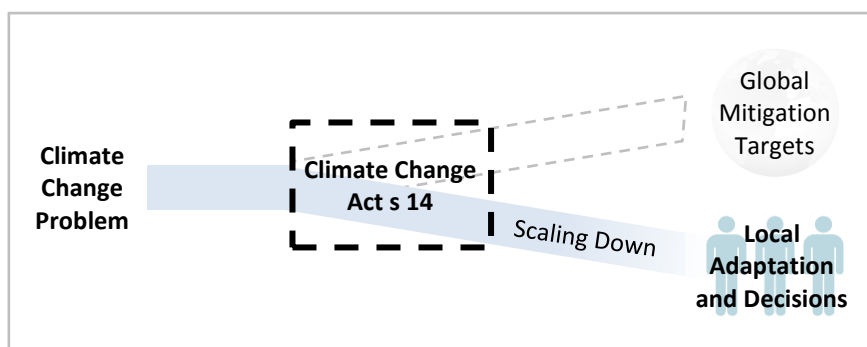
<sup>210</sup> Cole, above n 43, 395.

<sup>211</sup> Cash et al, above n 52.

<sup>212</sup> *Climate Change Act* s 14. Mirrored by: *DRR Act* ss 11, 12.

<sup>213</sup> *Framework Strategy* art 2.12; United Nations Conference on Sustainable Development Secretariat, ‘Regional, National and Local Level Governance for Sustainable Development’ (Rio 2012 Issues Brief No. 10, UNCSO, December 2011).





**Figure 15: 'Scaling Down' to Prioritise and Enable Local Action**

The *Climate Change Act's* strong local mandate is to be delivered with the 'technical and financial assistance' of the central government.<sup>214</sup> In a regionally-innovative step, local climate change projects are eligible for 'preferential finance packages' (discounted loans) from the Central Bank of the Philippines.<sup>215</sup> Local entities can also apply for funding from the government-administered People's Survival Fund (PSF). Under the PSF's terms of operation, an annual fund is designated solely for 'adaptation activities of local governments and communities'.<sup>216</sup> While the current amount is insufficient to cover all initiatives, the existence of a scale-specific trust fund is politically ground-breaking because it guarantees a direct flow of funding to local decision-makers.

The Philippines' locally-centred adaptation strategy is creating internationally-recognised 'islands of good governance and climate leadership' across the country.<sup>217</sup> For example, Albay province has established a 'first-in-the-world' Climate Change Academy for local officials, which aims to improve to improve decision-making capacity and 'provide information and technology' for climate-resilient planning.<sup>218</sup> Puerto Princesa has displayed similar leadership on mitigation.<sup>219</sup> In 2011, it became Southeast Asia's first 'carbon neutral' city,<sup>220</sup> after completing an independently certified Greenhouse Gas Inventory in accordance

<sup>214</sup> *Climate Change Act s 14*

<sup>215</sup> *Ibid s 15(f)*; C S Vincent Lim, 'Greener Central Banks: Exploring Possibilities' (Staff Paper No. 76, The South East Asian Central Banks (SEACEN) Research and Training Centre, August 2010).

<sup>216</sup> *People's Survival Fund Act s 13* (inserting new ss 19 and 20 into the *Climate Change Act*).

<sup>217</sup> Ramos, above n 118.

<sup>218</sup> *Ibid.*

<sup>219</sup> *Ibid.*

<sup>220</sup> Philippine Information Agency (PIA), *Puerto Princesa, First Carbon Neutral City in Southeast Asia* (15 August 2011) <[www.pia.gov.ph/?m=1&t=1&id=46442](http://www.pia.gov.ph/?m=1&t=1&id=46442)>.

with domestic best practice<sup>221</sup> and IPCC Guidelines.<sup>222</sup> These local strategies will be further supported by the National Action Plan's 'Eco-Town Framework', which is currently being piloted by the CCC.<sup>223</sup>

The Philippines' coordinated support for local action resonates with scholarly notions of polycentric governance.<sup>224</sup> In particular, the *Climate Change Act* manifests a key characteristic of effective environmental governance, as identified by Ostrom, which is to promote community-based action through trusted local institutions.<sup>225</sup> By empowering LGUs such as Albay, the *Climate Change Act* enables greater creativity and 'cross-influence' between different sites and scales of governance.<sup>226</sup>

However, a local focus brings its own 'politics of scale' and implementation challenges. Provincial and community-based adaptation strategies depend on the integrity and capacity of local personnel and require highest-level support. As explained by Ramos:

The President has to exhibit the political muscle that his predecessors failed to exercise, to make the LGUs a key player in this process – and embed a participatory, transparent and accountable mindset of governance under the rule of law.<sup>227</sup>

A further challenge lies in up-scaling successful local programs. In order to successfully transition from the pilot phase (2011-2016) to full implementation (2017-2028) of the National Action Plan, the Philippines will need to attract foreign grants and contributions. From a domestic perspective, this fundraising task is directly anticipated and legally authorised by statute.<sup>228</sup> From an international perspective, the evolution of promising national governance structures – such as the Philippines' Framework Strategy and National

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<sup>221</sup> USAID Philippines, 'Climate Change and Clean Energy Project – GHG Management in Local Governments: A Guide' (Report, USAID, August 2011) <[www.cenergy.ph/LGU\\_Guidebook\\_on\\_GHG\\_Accounting\\_and\\_Management.pdf](http://www.cenergy.ph/LGU_Guidebook_on_GHG_Accounting_and_Management.pdf)>.

<sup>222</sup> Simon Eggleston et al (eds), '2006 IPCC Guidelines for National Greenhouse Gas Inventories' (Report, Institute for Global Environmental Strategies (IGES) on behalf of the IPCC National Greenhouse Gas Inventories Programme, 2006) <[www.ipcc-nggip.iges.or.jp/public/2006gl/](http://www.ipcc-nggip.iges.or.jp/public/2006gl/)>.

<sup>223</sup> Mel Caspe, 'Climate Change Commission Launches Eco-Town Project', *The Philippine Star* (Manila), 3 August 2012 <[www.philstar.com/region/2012/08/03/834438/climate-change-commission-launches-eco-town-project](http://www.philstar.com/region/2012/08/03/834438/climate-change-commission-launches-eco-town-project)>.

<sup>224</sup> Cole, above n 43, 396.

<sup>225</sup> Ostrom, above n 45.

<sup>226</sup> Cole, above n 43, 395.

<sup>227</sup> Ramos, above n 118.

<sup>228</sup> *Climate Change Act* s 17; Casis, above n 95, 1061.

Action Plan – means that it is not only *morally incumbent* but an *increasingly rational and assured investment* for wealthy countries to deliver on their Green Climate Fund commitments.

#### E. Evaluation

The Philippines has long been regarded an ‘early actor’ on climate change – by regional standards, and even by world standards.<sup>229</sup> This reputation continues to have a strong substantive basis. The *Climate Change Act* and related instruments are detailed, ambitious and regionally innovative.

From a comparative perspective, three aspects are noteworthy. First, the Philippines has built an impressive CCA-DRR synergy which should be emulated by Vietnam, Thailand and other disaster-prone states. Second, the *Climate Change Act* makes a decisive ‘scale choice’ in favour of local impacts and decentralised decision-making.<sup>230</sup> Its nomination of LGUs as frontline responders challenges rigid assumptions of ‘global’ climate governance<sup>231</sup> and the ‘monolithic’ nation state.<sup>232</sup> This innovative approach – and its corresponding benefits of creativity, ‘principled flexibility’<sup>233</sup> and local ‘visibility’<sup>234</sup> – should be considered by other diverse, decentralised democracies such as Indonesia.

The Philippines’ third key innovation is yet to be fully realised. The Supreme Court’s radical constitutional interpretations and globally-unique writ of *kalikasan* are potentially very powerful tools for adjusting to uncertain climate impacts, and for adjudicating unforeseen conflicts which ‘stretch social relations over space and time’.<sup>235</sup> While such court--driven flexibility is probably inconceivable for authoritarian states, the Philippines’ progressive

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<sup>229</sup> Antonio A Oposa Jr., ‘Strengthening Legal and Policy Frameworks for Addressing Climate Change in Asia: The Philippines’ in Asian Environmental Compliance and Enforcement Network (AECEN), USAID and United Nations Environment Program (UNEP), ‘Strengthening Legal and Policy Frameworks for Addressing Climate Change in Asia: Identifying Opportunities for Sharing Best Practices’ (Report, 2009) 182.

<sup>230</sup> Cash et al, above n 52.

<sup>231</sup> Ban Ki-moon, above n 38.

<sup>232</sup> As criticised by Anne-Marie Slaughter, ‘Breaking Out: The Proliferation of Actors in the International System’ in Yves Dezalay and Bryant G Garth, *Global Prescriptions: The Production, Exportation and Importation of a New Legal Orthodoxy* (University of Michigan Press, 2002).

<sup>233</sup> Craig, above n 17, 17, 63-69.

<sup>234</sup> Cash et al, above n 51, 8.

<sup>235</sup> Bulkeley, above n 15, 434.

approach might be adopted by Indonesia's Constitutional Court (applying the analogous right to a 'good and healthy environment'<sup>236</sup>), Malaysia's Supreme Court (using a *kalikasan*-like writ to expand strict standing requirements<sup>237</sup>) and the 'Green Bench' of Thailand's Supreme Court.<sup>238</sup>

More fundamentally, this case study reveals a selective and highly strategic engagement between the Philippines' climate framework and the UNFCCC. Rather than uncritically implementing international principles, domestic lawmakers appear to have deliberately 'rebranded'<sup>239</sup> existing development goals as global climate objectives in order to maximise access to funding. These strategic practices demonstrate that Filipino climate law is not an involuntary product of 'carbon colonialism'.<sup>240</sup> Instead, it appears to be shaped by rational choice<sup>241</sup> and 'overlapping legal spaces' of polycentric governance.<sup>242</sup>

Finally, returning to initial stimuli – this chapter affirms the *Climate Change Act* as a 'gigantic stride'<sup>243</sup> in Southeast Asian climate law. However, despite steady improvements in general governance,<sup>244</sup> the Philippines' ability to deliver on its climate framework remains largely unproven. Necessary international funding is hoped-for rather than guaranteed, and it remains to be seen whether Congressional oversight and the prospect of judicial review will be sufficient to ensure government accountability. For these reasons, the *Climate Change*

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<sup>236</sup> *Undang-Undang Dasar Republik Indonesia 1945* [1945 Constitution of the Republic of Indonesia] [Embassy of the Republic of Indonesia (Washington DC) trans] art 28H(1) Mas Achmad Santosa, Josi Khatarina and Rifqi Sjarief Assegaf, 'Indonesia' in Richard Lord, Silke Goldberg, Lavanya Rajamani and Jutta Brunnée (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2012) 188-193.

<sup>237</sup> Maizatun Mustafa, *Environmental Law in Malaysia* (Kluwer Law International, 2011) 220-222; *Government of Malaysia v Lim Kit Siang; United Engineering (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12 (Supreme Court of Malaysia); *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & 2 Ors* [1997] 3 AMR 2521 (Court of Appeal, Malaysia).

<sup>238</sup> Winai Runagsri, 'Australia-Thailand: Promoting Improved Court Policies and Practices on the Environment' (Presentation at the 2010 AECEN Regional Forum, Kyoto, 10-12 November 2010) <[www.aecen.org/sites/default/files/forums/2010/Thailand\\_Australia-%20WINAI.pdf](http://www.aecen.org/sites/default/files/forums/2010/Thailand_Australia-%20WINAI.pdf)>.

<sup>239</sup> Wilson and Termeer, above n 66, 154.

<sup>240</sup> Bachram, above n 201.

<sup>241</sup> Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press, 2005).

<sup>242</sup> Osofsky, above n 56, 1801.

<sup>243</sup> Ramos, above n 118, 184.

<sup>244</sup> Department of Budget and Management, *Cabinet Cluster on Good Governance and Anti-Corruption: Action Plan 2012-2016* (Philippines), 9 March 2012 <[www.competitive.org.ph/files/downloads/Good\\_Governance\\_and\\_Anti-Corruption\\_Plan\\_2012-2016\\_2.pdf](http://www.competitive.org.ph/files/downloads/Good_Governance_and_Anti-Corruption_Plan_2012-2016_2.pdf)>.

*Act* cannot be regarded as the 'best in the world'<sup>245</sup> until it passes stern tests of implementation.

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<sup>245</sup> Ubac, above n 5.

## V VIETNAM: A FOREST OF LAWS?

### A. Introduction

This chapter assesses another Southeast Asian state that has engaged very proactively with climate governance. Since 2007, Vietnam has enacted a burgeoning array of Decisions, Decrees and Ministry Circulars on climate change. These instruments form a dynamic, densely woven and (as yet) largely untested legal framework. Preliminary assessments by commentators range from ‘an excellent national program’<sup>246</sup> to being ‘partial and problematic’<sup>247</sup> and ‘harder to implement than it appears on paper’.<sup>248</sup>

As Section V.B outlines, Vietnam’s emerging ‘forest’<sup>249</sup> of climate law is rooted in very particular physical, political and legal substrata. Section V.C identifies major trunks of law and charts their recent growth. Section V.D conducts a fine-grained analysis of the National Strategy on Climate Change – and finds extremely promising attempts to integrate Ministries, combine ‘hard’ and ‘soft’ strategies, and produce strategic co-benefits in mitigation. However, as Section V.E concludes, Vietnam faces major challenges regarding the effective implementation, flexible adjustment and local relevance of climate law within its rigid political system.

### B. Law in Context

#### 1. Physical and Political Context

Like the Philippines, Vietnam is extremely vulnerable to climate change. Due to its long coastlines and vast low-lying deltas, it is frequently classified as a ‘most affected’ state.<sup>250</sup> A sea level rise of even a few centimetres will cause significant erosion, inundation and saline

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<sup>246</sup> United Nations Viet Nam, ‘Viet Nam and Climate Change: A Discussion Paper on Policies for Sustainable Human Development’ (Discussion Paper, December 2009) 16.

<sup>247</sup> Fortier, above n 95, 229.

<sup>248</sup> Lebel, above n 116, 10.

<sup>249</sup> The ‘forest of laws’ metaphor appears haphazardly, eg, Robert Bolt, *A Man for All Seasons: A Play in Two Acts* (Heinemann, 1961); James Spigelman, ‘The Rule of Law and Enforcement’ (2003) 26 *University of New South Wales Law Journal* 200, 209; John F McCarthy and Carol Warren, ‘Communities, Environments and Local Governance in Reform Era Indonesia’ in Carol Warren and John F McCarthy (eds), *Community, Environment and Local Governance in Indonesia: Locating the Commonwealth* (Routledge, 2009) 20 n 13.

<sup>250</sup> Susmita Dasgupta et al, ‘The Impact of Sea Level Rise on Developing Countries: A Comparative Analysis’ (World Bank Policy Research Working Paper 4136, World Bank, 2007); Maplecroft, above n 107.

intrusion into major urban and agricultural areas.<sup>251</sup> Under a ‘worst case’ rise of one metre, approximately 20% of Vietnam’s land area would be permanently submerged<sup>252</sup> and up to 20 million people would be displaced.<sup>253</sup>

Vietnam’s uncertain climate scenario is conceptually challenging for lawmakers. Phenomena such as disappearing land and mass migration do not sit comfortably with ‘classical conceptions of regulation’<sup>254</sup> or with lawmakers’ assumptions of ‘ecological stationarity’.<sup>255</sup> These dynamic processes are especially at odds with the modernist ideal of using *certain rules* to promote *stable social relations* within a *fixed geographical area*.

While problematic for all states, the collision of physical reality with legal inertia may be especially severe in Vietnam, whose orthodox mode of governance is very rigid. Whereas the Philippines’ democracy is decentralised and pluralistic, Vietnam’s authoritarian regime has traditionally operated through fixed hierarchies and inflexible central planning processes.<sup>256</sup> Although recent reforms have brought some liberalisation (and fragmentation),<sup>257</sup> Vietnam’s environmental policy discourse remains highly ‘technocratic’ and is dominated by closed exchanges between party officials, bureaucrats and government-affiliated scientists.<sup>258</sup> The practical significance of this contrast – in terms of flexible and effective climate regulation – is explored throughout this chapter (Figure 16).

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<sup>251</sup> Socialist Republic of Viet Nam, ‘Viet Nam’s Second National Communication to the United Nations Framework Convention on Climate Change’, Communication to the United Nations Framework Convention on Climate Change, 5 November 2010.

<sup>252</sup> Ministry of Natural Resources and Environment (MONRE), *20 Million Vietnamese to Lose Homes if Sea Rises 1 Meter: Expert* (20 December 2012).

<sup>253</sup> Ibid.

<sup>254</sup> De Gier, Gupta and Rijswick, above n 42, 42.

<sup>255</sup> Craig, above n 17.

<sup>256</sup> Gareth Porter, *Vietnam: The Politics of Bureaucratic Socialism* (Cornell University Press, 1993).

<sup>257</sup> Martin Painter, ‘The Politics of State Sector Reforms in Vietnam: Contested Agendas and Uncertain Trajectories’ (2005) 41 *Journal of Development Studies* 261.

<sup>258</sup> Fortier, above n 95, 242.

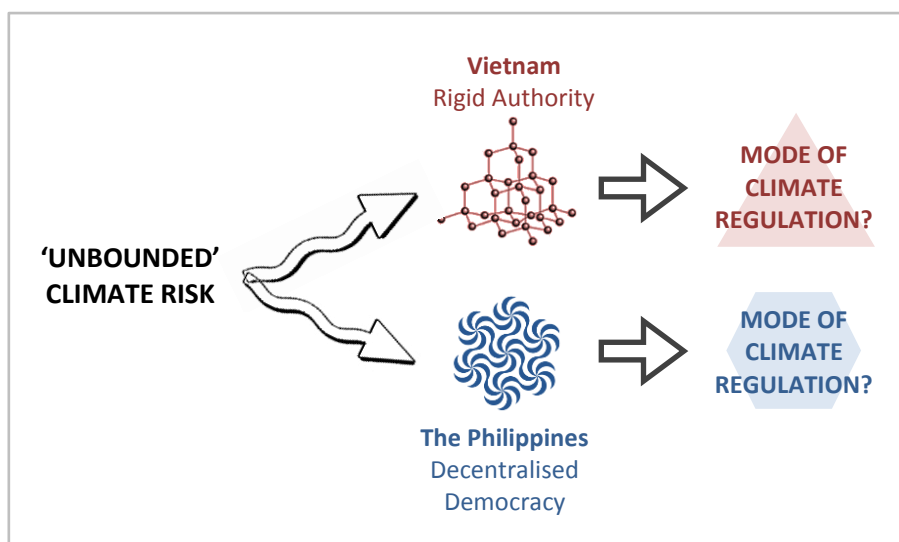


Figure 16: Legal Collisions - Climate Risk and Political Context

## 2. Legal Context

Vietnam is a civil law jurisdiction. Written statutes and international treaties<sup>259</sup> are the only formal source of law (Table 3).<sup>260</sup> Following *doi moi* reforms and its 1992 Constitution,<sup>261</sup> Vietnam has embraced the doctrine of ‘law based state’<sup>262</sup> and has promulgated countless new primary and subordinate laws – including over 200 laws on environmental issues.<sup>263</sup>

Table 3: Hierarchy of Domestic Laws in Vietnam

Instrument	Issuing Body
<ul style="list-style-type: none"> <li>1992 Constitution</li> <li>Laws and Resolutions</li> </ul>	National Assembly
Ordinances and Resolutions	Standing Committee of the National Assembly
Decrees	Government (Prime Minister and Cabinet)
Decisions	Prime Minister
Decisions and Circulars	Ministries

<sup>259</sup> Treaties which Vietnam is party to ‘shall prevail’ over inconsistent domestic laws: *Law on Conclusion, Accession to and Implementation of Treaties 2005* (Vietnam), Law No. 41/2005/QH11 [Ministry of Justice trans] art 6.

<sup>260</sup> *Law on Promulgation of Legal Documents 2008* (Vietnam), Law No. 17/2008/QH12 QH12 [Ministry of Justice trans] art 2; Allens Linklaters, ‘Legal Guide to Investment in Vietnam’ (Report, 2012) 10.

<sup>261</sup> *1992 Constitution of the Socialist Republic of Vietnam* (Vietnam) [Ministry of Justice trans] art 4; Pip Nicholson and Quan Nguyen, ‘Vietnamese Law: A Guide to Sources and Commentary’ (Legal Studies Research Paper No. 328, University of Melbourne, 2007) 2.

<sup>262</sup> Do Muoi, *Sua Doi Hien Phap Xay Dung Nha Phap Quyen Viet Nam Day Manh Su Nghiep Doi Moi* [trans, *Amending the Constitution, Establishing a ‘law based state’ and Promoting Doi Moi Achievements* (World Publishing House, 1992)]; John Gillespie, ‘Concepts of Law in Vietnam: Transforming Statist Socialism’ in Randall Peerenboom (ed), *Asian Discourses on Rule of Law* (Routledge, 2004) 146.

<sup>263</sup> Planning and Development Collaborative International (PADCO), ‘Environmental Compliance and Enforcement in Vietnam: Rapid Assessment’ (Country Assessment Report, USAID and Asian Environmental Compliance and Enforcement Network (AECEN), December 2005) 13.



Vietnam's formal legal hierarchy does not capture the complex, political way in which laws are actually drafted and implemented. Due to limited National Assembly capacity and extensive Ministerial power, subordinate instruments tend to assume greater importance than might be expected. As explained by Luu:

In practice, *the real legislators are the administrators*, particularly the Ministries... Laws are generally drafted in such general terms that they are not enforceable without the implementing decrees and circulars.<sup>264</sup>

This 'real' locus of lawmaking activity is particularly evident in the field of climate change, where almost all leading instruments are formally classified as subordinate legislation.

Vietnam's climate laws lack standalone enforcement and supervisory mechanisms. While the *Law on Organisation of Government*<sup>265</sup> provides a general channel of Ministerial accountability to the National Assembly, outside accountability to citizens is very limited. Unlike the Philippines, Vietnam has no culture of public interest litigation or judicial review of executive action.

### C. *Evolution of National Climate Laws*

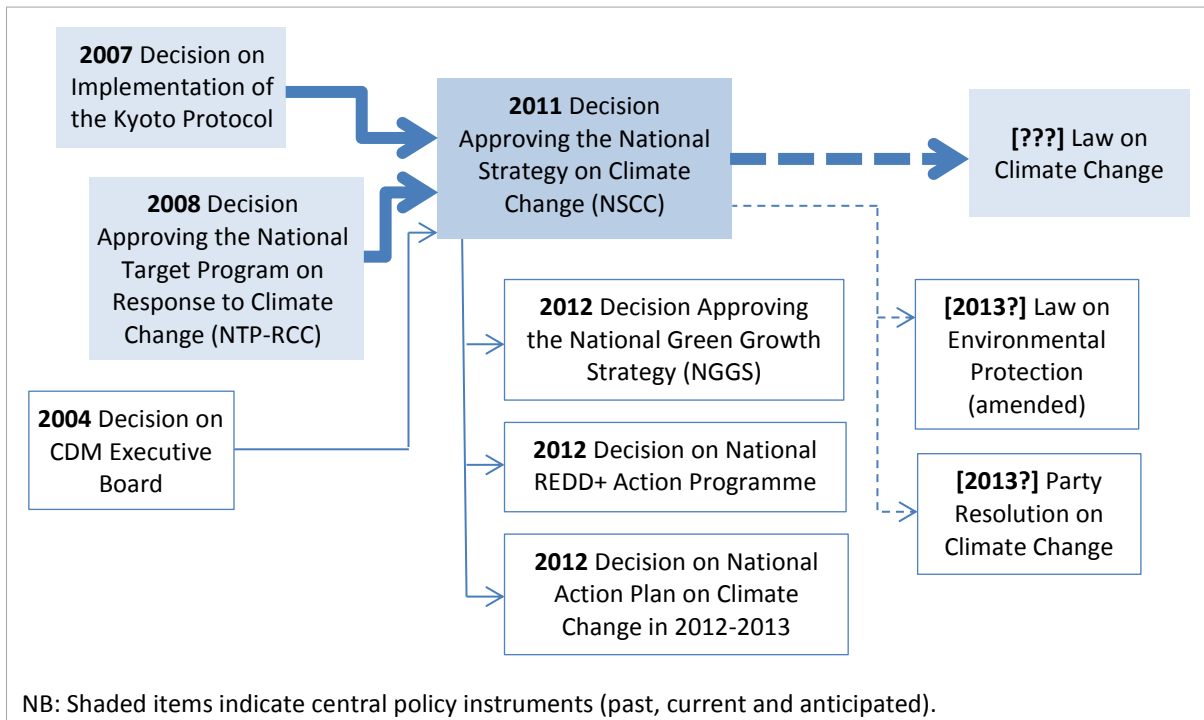
Vietnam's domestic climate regime has become substantially more sophisticated since 2007 (Figure 17). This turn to law is strongly motivated by science. Due to the close connections between Vietnam's core bureaucracies and its large scientific establishment, key party officials are acutely aware of the climate threat.<sup>266</sup>

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<sup>264</sup> Anh Luu, *Vietnam Legal Research* (updated edition, July 2010) Globalex – New York University School of Law <[www.nyulawglobal.org/globalex/Vietnam1.htm](http://www.nyulawglobal.org/globalex/Vietnam1.htm)>; Dang Xuan Hop, 'Vietnam: The Past 25 Years, the Present and the Future' in Ann Black and Gary Bell (eds), *Law and Legal Institutions of Asia: Traditions, Adaptations and Innovations* (Cambridge University Press, 2011) 195.

<sup>265</sup> *Law on Organisation of Government 2001* (Vietnam), Law No. 32/2001/QH10 [Ministry of Justice trans] arts 1, 22-31.

<sup>266</sup> Fortier, above n 95, 231-232.



**Figure 17: Evolution of Climate Law in Vietnam**

Prior to 2007, Vietnam’s only significant climate law was a 2003 Ministerial Decision, which created a CDM Executive Board and defined national processes for approving CDM projects and issuing Certificates of Emission Reductions.<sup>267</sup> This early development was likely prompted by Vietnam’s participation in the UNEP-coordinated ‘Capacity Development for CDM’ (CP4CDM) project from 2002 to 2005.<sup>268</sup>

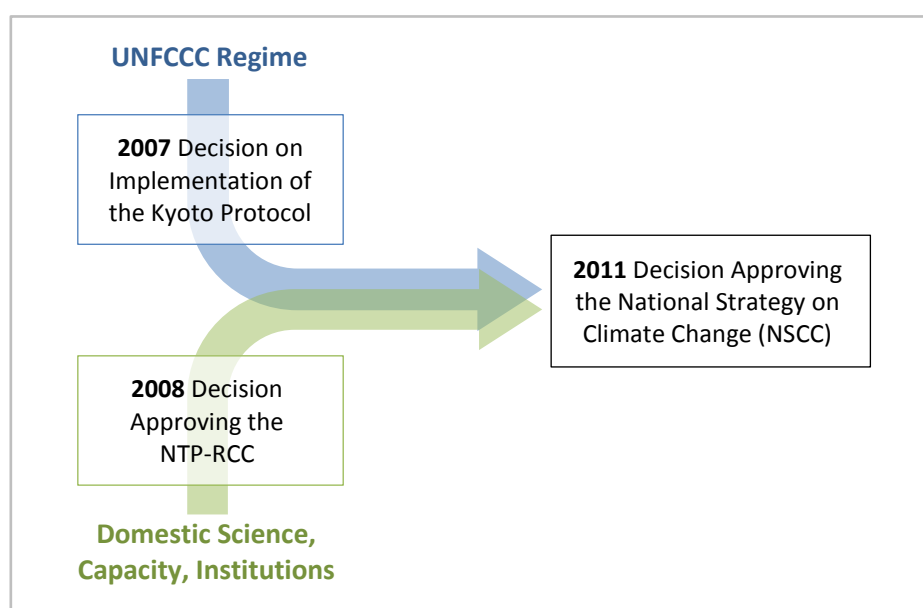
Vietnam’s present policy progression was initiated by two complementary Prime Minister’s Decisions. Taking a top-down approach, the 2007 *Decision on Implementation of the Kyoto Protocol* directed Ministries to make domestic plans compatible with international treaties and to ‘complete the legal framework’ on CDM.<sup>269</sup> This Decision’s express objective was to maximise Vietnam’s access to the ‘benefits which the Climate Convention and Kyoto

<sup>267</sup> MONRE, *Decision on CDM National Executive and Consultative Board* (Vietnam), Decision No. 553/2003/QĐ-BTNMT of 29 April 2003 [no full text translation available]; Nguyen Khac Hieu, Establishing and Developing Capacity for CDM National Authority (CNA): Preliminary Results and Work Plan to Implement Task 3 (Paper presented at 3<sup>rd</sup> National Workshop on Capacity Building for CDM in Vietnam, Ho Chi Minh City, 26 August 2004) <[www.cd4cdm.org/asia/vietnam/third%20national%20workshop/3%20BC%20Hieu%20TA.ppt](http://www.cd4cdm.org/asia/vietnam/third%20national%20workshop/3%20BC%20Hieu%20TA.ppt)>.

<sup>268</sup> United Nations Environment Program (UNEP), ‘Programme: National Workshop on Capacity Building for the Clean Development Mechanism’ (1<sup>st</sup> National Workshop on Capacity Building for CDM in Vietnam, Hanoi, 27-28 November 2002). <[cd4cdm.org/vietnam.htm](http://cd4cdm.org/vietnam.htm)>.

<sup>269</sup> *Decision on the Implementation of the Kyoto Protocol* art 1.II.1.

Protocol grant to developing countries'.<sup>270</sup> A year later, the 2008 *Decision Approving the National Target Program on Response to Climate Change* established a broader roadmap for mitigation and adaptation activities up to 2015.<sup>271</sup> Working from the bottom up, the National Target Program (NTP-RCC) required Ministries to assemble scientific evidence, build capacity and 'complete a system of legal documents' on climate change.<sup>272</sup> Together, these two Decisions laid the groundwork for Vietnam's preeminent climate law (Figure 18).<sup>273</sup>



**Figure 18: Complementary Forces – Top-Down and Bottom-Up Lawmaking**

The *Decision Approving the National Strategy for Climate Change*<sup>274</sup> is, at present, Vietnam's most important climate law.<sup>275</sup> It was drafted by the Ministry of Environment and Natural Resources (MONRE)<sup>276</sup> with limited external consultation,<sup>277</sup> and was formally issued by

<sup>270</sup> Ibid art 1.I.2.

<sup>271</sup> Prime Minister of Vietnam, *Decision Approving the National Target Program on Response to Climate Change* (Vietnam) Decision No. 158/QĐ-TTg of 2 December 2008 [Vietnam Law and Legal Forum trans, *Official Gazette: Issue No. 3-4/December 2008* (FAO Legal Office)] ('NTP-RCC Decision').

<sup>272</sup> NTP-RCC Decision art 1.III.4.

<sup>273</sup> Tuan Khanh, 'Sun Shines on Climate Change Initiatives', *Vietnam Investment Review* (Hanoi), 14 November 2011 <[www.vir.com.vn/news/features/sun-shines-on-climate-change-initiatives.html](http://www.vir.com.vn/news/features/sun-shines-on-climate-change-initiatives.html)>.

<sup>274</sup> Prime Minister of Vietnam, *Decision Approving the National Strategy for Climate Change* (Vietnam), Decision No. 2139/2011/QĐ-TTg of 5 December 2011 [Vietnam Law and Legal Forum trans, *Official Gazette: Issue No. 3-5/December 2011* (FAO Legal Office)] ('NSCC Decision').

<sup>275</sup> GLOBE International, above n 92, 439.

<sup>276</sup> Tuan Khanh, above n 273.

<sup>277</sup> Asian Management and Development Institute (AMDI) and The Pressure Group Consultancy, 'Climate Change and Disaster Management Policy in Vietnam' (Assessment Report, 30 June 2011) 8-9.

Prime Minister Nguyen Tan Dung in December 2011. The Decision codifies the National Strategy on Climate Change (NSCC), which refines institutional structures, sets sector-based emissions reduction targets, and allocates ten ‘Strategic Tasks’ to national and provincial government bodies. This content is closely examined in Section V.D.

The NSCC is intended as a ‘foundation for other strategies’.<sup>278</sup> As Figure 17 illustrates, it provided a platform for three new Prime Minister’s Decisions in 2012. The *Decision Approving the National Green Growth Strategy* elaborates the NSCC’s energy intensity plan.<sup>279</sup> The *Decision on the National REDD+ Action Programme* defines a framework for international investment pursuant to the NSCC’s forestry targets.<sup>280</sup> The most recent *Decision Approving the National Action Plan 2012-2013 Period* defines 65 immediate projects to implement NSCC objectives.<sup>281</sup> Although unconfirmed by official sources, it has been suggested that a standalone *Law on Climate Change* may also be ‘considered for development in the near future’.<sup>282</sup>

#### D. National Strategy for Climate Change 2011

##### 1. Origin and Structure

The *Decision Approving the National Strategy on Climate Change* is Vietnam’s ‘flagship’ climate law.<sup>283</sup> The ‘enclosed’<sup>284</sup> NSCC runs for thirteen pages and establishes ten core Strategic Tasks on adaptation and mitigation. Unlike the Philippines’ *Climate Change Act*, the NSCC supplements rather than reinvents Vietnam’s climate change bureaucracy (Figure 19). MONRE is confirmed as the national focal point on climate change and is given primary

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<sup>278</sup> NSCC Decision Annex art II.

<sup>279</sup> Prime Minister of Vietnam, *Decision Approving the National Green Growth Strategy* (Vietnam), Decision No. 1393/2012/QD-TTg of 25 September 2012 [FAO Legal Office trans].

<sup>280</sup> Prime Minister of Vietnam, *Decision on Approval of the National Action Program on Reducing Greenhouse Gas Emissions through Efforts to Mitigate Deforestation and Forest Degradation, Sustainable Management of Forest Resources, and Conservation and Enhancement of Forest Carbon Stocks during 2011-2020*, Decision No. 799/2012/QD-TTg of 27 June 2012, [Vietnam Law and Legal Forum trans, Official Gazette: Issue 8-10/June 2012 (FAO Legal Office)] (‘REDD+ Decision’).

<sup>281</sup> Prime Minister of Vietnam, *Decision Approving the National Action Plan on Climate Change in the 2012-2013 Period* (Vietnam), Decision No. 1474/2012/QD-TTg of 5 October 2012 (English translation is not yet available).

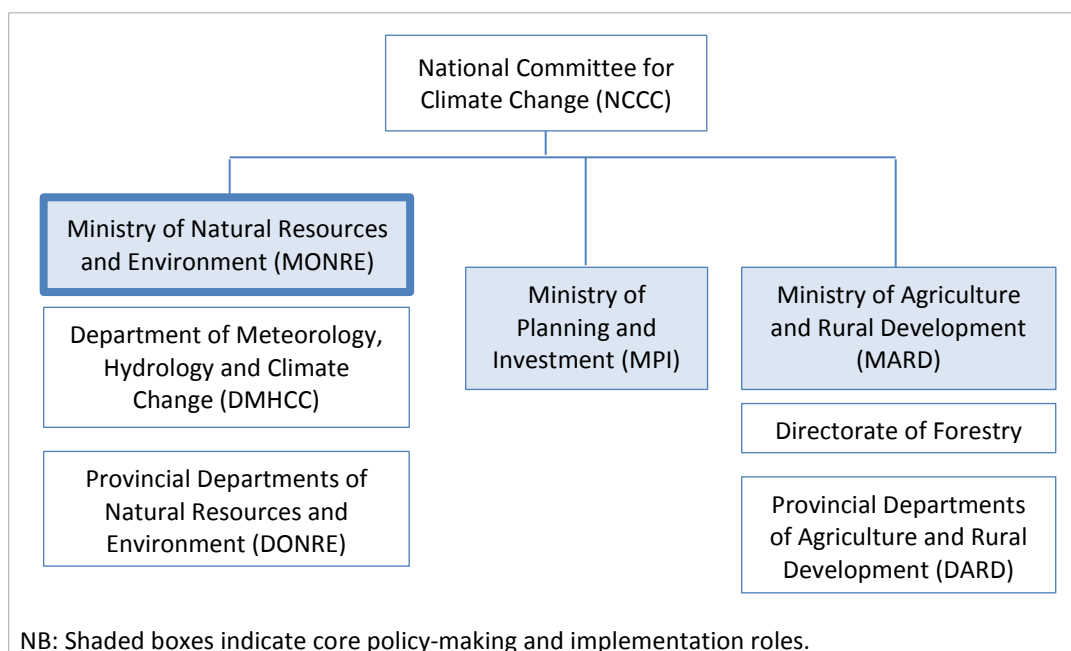
<sup>282</sup> AMDI and The Pressure Group Consultancy, above n 277, 8.

<sup>283</sup> GLOBE International, above n 92, 437.

<sup>284</sup> NSCC Decision art 1.

responsibility for implementing the NSCC.<sup>285</sup> The Ministry of Planning and Investment (MPI) is tasked with ‘mainstreaming’ climate change policies into development planning.<sup>286</sup> The Ministry of Agriculture and Rural Development (MARD) is responsible for agriculture and land use aspects of the NSCC, and for administering Reducing Emissions from Deforestation and Degradation (REDD) projects through its Directorate of Forestry.<sup>287</sup>

Since March 2012, the Ministries have been subject to ‘steering action’ by a National Committee for Climate Change (NCCC).<sup>288</sup> Although chaired by the Prime Minister, the NCCC’s practical role appears to be limited. Unlike the Philippines large and permanent Climate Change Commission, the NCCC is only required to meet once per year<sup>289</sup> – meaning that core policy-making activities are left to relevant Ministries and other sectoral agencies.



**Figure 19: Key Climate Change Bodies in Vietnam**

<sup>285</sup> Ibid Annex art V.3(a).

<sup>286</sup> Ibid Annex art V.3(b); United Nations Development Program and MPI, ‘Strengthening Sustainable Development and Climate Planning’ (Project Inception Report, UNDP Vietnam, November 2009) 5.

<sup>287</sup> Prime Minister of Vietnam, *Decision on Approval of the National Action Program on Reducing Greenhouse Gas Emissions through Efforts to Mitigate Deforestation and Forest Degradation, Sustainable Management of Forest Resources, and Conservation and Enhancement of Forest Carbon Stocks during 2011-2020*, Decision No. 799/2012/QĐ-TTg of 27 June 2012, [Vietnam Law and Legal Forum trans, *Official Gazette: Issue 8-10/June 2012* (FAO Legal Office)] (‘REDD+ Decision’) art 1.V.2(a).

<sup>288</sup> NSCC Decision Annex art IV.6(b); National Committee on Climate Change, *Working Regulation of National Committee on Climate Change* (Vietnam) Decision No. 25/2012/QĐ-UNQGBDKH of 20 March 2012 [Unknown trans, <kiengiangbiospherereserve.com.vn/project/uploads/doc/working\_regulation\_of\_national\_committee\_on\_climate\_change.pdf>].

<sup>289</sup> Ibid art 9.1.

## 2. Adaptation

Like the Philippines, Vietnam's first priority is adaptation. While requiring simultaneous action on 'climate change adaptation' and 'GHG emission reduction', the NSCC states that Vietnam will favour 'adaptation as a focus in the initial phase'.<sup>290</sup> This agenda is manifested in three Strategic Tasks.

Strategic Task 1 requires improved meteorological forecasting, disaster risk reduction and emergency response.<sup>291</sup> As reflects emerging regional<sup>292</sup> and international<sup>293</sup> practice, this task integrates CCA and DRR strategies. At the national level, there is a thematic crossover between the NSCC and the *Decision Approving the National Strategy for Natural Disaster Prevention, Fighting and Reduction to 2020*<sup>294</sup> (Figure 20). Both instruments require Vietnam to establish a world-standard meteorological forecasting network<sup>295</sup> and to incorporate CCA and DRR into mainstream socioeconomic plans.<sup>296</sup> However, in contrast to the Philippines, Vietnam's CCA-DRR framework is not expressly cross-referenced, and does not require cross-representation between the lead agencies on CCA (MONRE) and DRR (MARD Central Storm and Flood Committee). Moving up in scale, both instruments refer to the UNFCCC<sup>297</sup> and the *Decision on Natural Disaster Strategy* also mentions the Hyogo Framework.<sup>298</sup> However, these cross-sector connections are not substantially elaborated.

The relatively low connectivity in Figure 20 probably reflects the fact that Vietnam's CCA-DRR framework is still a work in progress. There is presently a proposal for a 'National

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<sup>290</sup> NSCC Decision Annex art II; GLOBE International, above n 92, 438.

<sup>291</sup> NSCC Decision Annex art IV.1.

<sup>292</sup> 'ASEAN Agreement on Disaster Management and Emergency Response – Work Programme 2010-2015' (15<sup>th</sup> Meeting of the ASEAN Committee on Disaster Management, Singapore, 12 March 2010) 40-42, art II.2.7.

<sup>293</sup> United Nations World Conference on Disaster Reduction, 'Resolution 2: Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters' in *Report of the World Conference on Disaster Reduction*, UN Doc A/CONF.206/6 (22 January 2005); United Nations International Strategy for Disaster Reduction (UNISDR), '6.3: Planning for Risk Reduction and Climate Change Adaptation' in *2011 Global Assessment Report on Disaster Risk Reduction: Revealing Risk, Redefining Development* (Report, 2011).

<sup>294</sup> Prime Minister of Vietnam, *Decision Approving the National Strategy for Natural Disaster Prevention, Fighting and Reduction to 2020* (Vietnam), Decision No. 172/2007/QĐ-TTg of 16 November 2007 [Vietnam Law and Legal Forum trans, *Official Gazette: Issue No. 4-5/November 2007* (FAO Legal Office)] ('*Decision on Natural Disaster Strategy*').

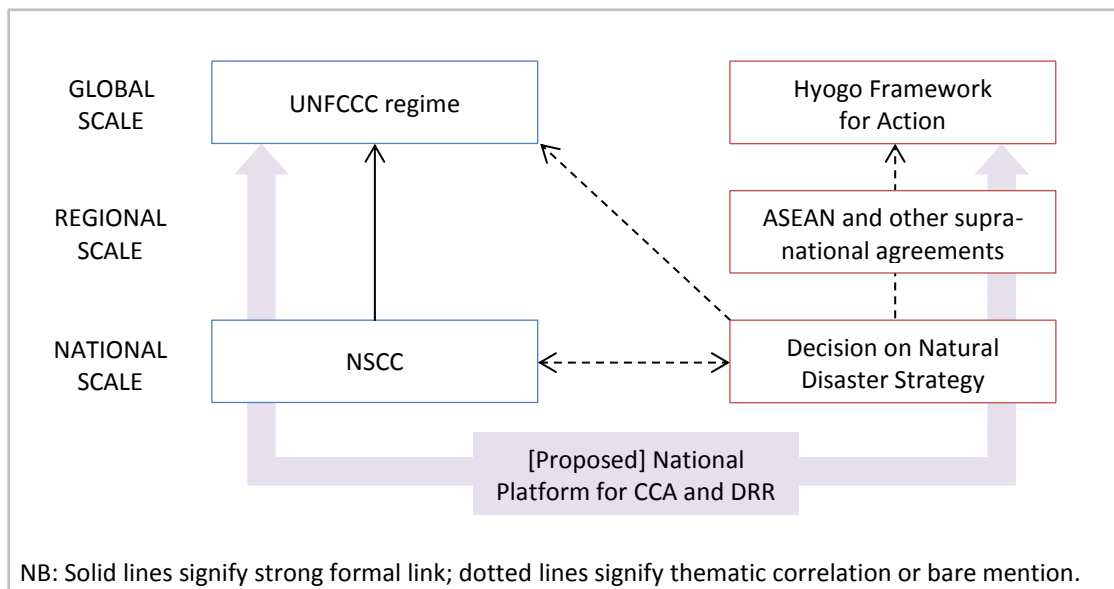
<sup>295</sup> NSCC Decision Annex art IV.1(a); *Decision on Natural Disaster Strategy* art 1.III.2(a).

<sup>296</sup> NSCC Decision Annex art IV.1(b); *Decision on Natural Disaster Strategy* arts 1.III.2(b), 1.III.2(d).

<sup>297</sup> NSCC Decision (several provisions); *Decision on Natural Disaster Strategy* art 1.IV.1(i).

<sup>298</sup> *Decision on Natural Disaster Strategy* art 1.IV.1(i).

Platform for Disaster Risk Reduction and Climate Change Adaptation’ to be developed by MARD, assisted by MONRE and the UNDP.<sup>299</sup> When drafting this Platform, Vietnamese policy-makers should seek express alignment with international principles and consider adopting key innovations of the Filipino framework, such as formal cross-representation on committees and boards.



**Figure 20: Connectivity between CCA and DRR laws in Vietnam**

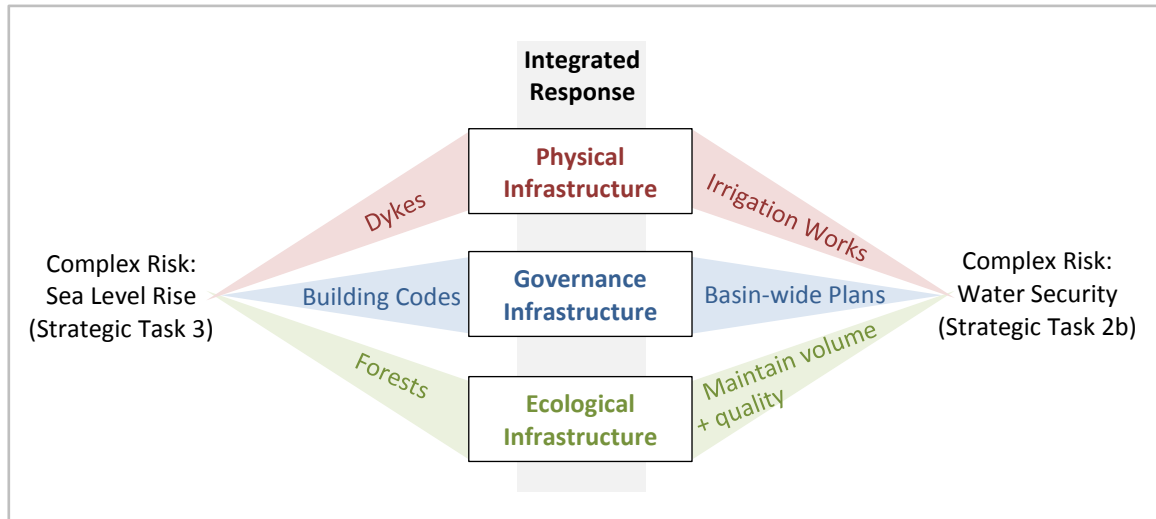
Strategic Tasks 2 and 3 of the NSCC address other aspects of adaptation. Task 2 promotes food and water security through agricultural research, irrigation infrastructure and ‘integrated’ resource management.<sup>300</sup> Task 3 requires national socio-economic ‘master plans’ to incorporate predicted climate impacts.<sup>301</sup> Rather than relying on ‘hard’ engineering solutions or treating climate change as a conventional ‘natural’ hazard, both of these tasks are notable for their multi-dimensional approach, which recognises the uncertainty and human complexity of Vietnam’s climate risk. For example, Strategic Task 3 addresses the risk of rising sea levels by requiring physical infrastructure (dykes) to be accompanied by governance infrastructure (regional ‘master plans’ and flood-safe building codes) and ecological infrastructure (afforestation to increase natural resilience). A similar

<sup>299</sup> United Nations Development Programme (UNDP) Viet Nam, ‘Fact Sheet: The Global Assessment Report for Disaster Risk Reduction 2011 – Vietnam’ (GAR Fact Sheet, 2011); AMDI and The Pressure Group Consultancy, above n 277, 8-12.

<sup>300</sup> NSCC Decision Annex art IV.2.

<sup>301</sup> Ibid Annex art IV.3.

paradigm is applied to the issue of water security (Figure 21).<sup>302</sup> This integrated, interdisciplinary approach is particularly progressive in Vietnam’s political context, which has traditionally favoured narrow ‘technocratic’ plans and sector-based decision-making.<sup>303</sup>



**Figure 21: Complex Risks, Integrated Responses**

While commendable and potentially innovative in some respects, the NSCC’s adaptation agenda is missing an important dimension. While each Strategic Task requires extensive horizontal coordination between different national agencies, there is a lack of vertical coordination between national objectives (‘top-down’ decisions’) and local implementation (‘bottom-up initiatives’).<sup>304</sup> As Figure 22 illustrates, the NSCC only delegates authority as far as Provincial People’s Committees.<sup>305</sup> District and commune authorities are not directly mentioned anywhere in the document. Applying a political ecology lens,<sup>306</sup> this ‘scale choice’ is problematic, because it separates national planning and resources from local decision-making and impacts. Rather than using national law to highlight interests that are not satisfactorily recognised in the UNFCCC regime (as the Philippines has done), the NSCC appears to reinforce the legal ‘invisibility’<sup>307</sup> of vulnerable Vietnamese communities.

<sup>302</sup> Ibid Annex art IV.2(b).

<sup>303</sup> Fortier, above n 95; Painter, above n 257.

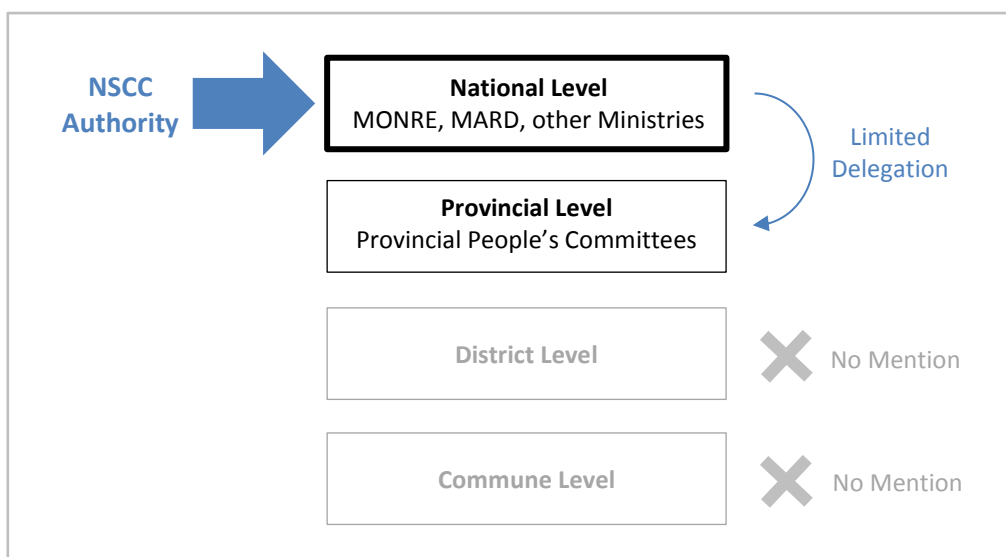
<sup>304</sup> Lebel, above n 116, 13.

<sup>305</sup> NSCC Decision Annex art V.3(d).

<sup>306</sup> Williams, above n 60; Adger, Brown and Tompkins, above n 59.

<sup>307</sup> Cash et al, above n 52, 8.





**Figure 22: NSCC Delegation of Authority**

This legal disengagement is compounded by a lack of practical awareness. In 2010, a UNEP-sponsored assessment found an ‘enormous gap’ in climate-related knowledge and skills in Vietnam’s sub-national agencies.<sup>308</sup> While the NSCC requires some ‘capacity building’,<sup>309</sup> it may be difficult for local authorities to accumulate meaningful expertise and experience within Vietnam’s ‘exclusionary’ and ‘technocratic’ policy environment.<sup>310</sup> In the meantime, opportunities for legal experimentation and polycentric policy-making<sup>311</sup> will be relatively restricted – at least in comparison to neighbouring states such as the Philippines.

### 3. *Mitigation*

Vietnam’s engagement with international climate law is highly selective. While requiring the state to ‘actively participate in international programs on GHG emission reduction’,<sup>312</sup> the NSCC admits that:

[To become an] industrial country by 2020, Vietnam will strongly increase energy production and consumption ... which will result in higher emissions of greenhouse gases. This will go against the global trend.<sup>313</sup>

<sup>308</sup> Bach Tan Sinh and Regional Climate Change Adaptation Knowledge Platform for Asia (AKP), ‘Scoping Assessment on Climate Change Adaptation in Vietnam – Summary’ (Scoping Assessment, AIT Regional Resource Centre for Asia and the Pacific (RRCAP) and UNEP, October 2010) 6.

<sup>309</sup> NSCC Decision Annex art IV.7.

<sup>310</sup> Fortier, above n 95.

<sup>311</sup> Ostrom, above n 45; Cole, above n 43.

<sup>312</sup> NSCC Decision Annex art IV.10.

In this instance, Vietnam uses law to ‘reconstruct’ the climate problem. By highlighting its domestic commitment to economic development,<sup>314</sup> it implicitly challenges the prevailing, expert-driven ‘politics of scale’ which construct climate change as a ‘common concern of humankind’.<sup>315</sup> Within this overall paradigm, the NSCC adopts a ‘no regret’ approach to emissions reduction.<sup>316</sup> Mitigation actions are framed as ‘green growth’ and are adopted only where they offer ‘win-win solutions’ to existing development challenges.

Strategic Task 4 requires Vietnam to establish 16.24 million hectares of forest, in order to increase total forest coverage to 45% by 2020.<sup>317</sup> As with aspects of Filipino climate law discussed earlier, this task is notable for its strategic ‘rebranding’ of pre-existing domestic development goals.<sup>318</sup> The NSCC’s 45% target is very similar to a longstanding, earlier target which was enacted for economic and land management purposes and does not even mention climate change.<sup>319</sup> This legal reinvention is politically and financially advantageous. By presenting its national forestry program as a global mitigation initiative – and also as a biodiversity booster<sup>320</sup> and a climate adaptation strategy<sup>321</sup> – Vietnam is enabling itself to access the widest possible range of international funding sources (Figure 23). This strategic direction is confirmed by the 2012 *Decision Approving the Forest Protection and Development Plan*, which declares that 71% of funds for achieving Vietnam’s forestry target must come from ‘non-State’ and ‘international’ sources.<sup>322</sup> The 2012 *Decision on the National REDD+ Action Programme* requires MARD and MONRE to set further technical

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<sup>313</sup> Ibid Annex art I.1.

<sup>314</sup> *1992 Constitution of the Socialist Republic of Vietnam* (Vietnam) [Ministry of Justice trans] art 3.

<sup>315</sup> *UNFCCC Preamble*; Termeer et al, above n 64, 161; Bodansky (2011), above n 22, 528; Adger, Brown and Tompkins, above n 59.

<sup>316</sup> GLOBE International, above n 92, 438.

<sup>317</sup> *NSCC Decision Annex art IV.4.*

<sup>318</sup> Wilson and Termeer, above n 66, 154.

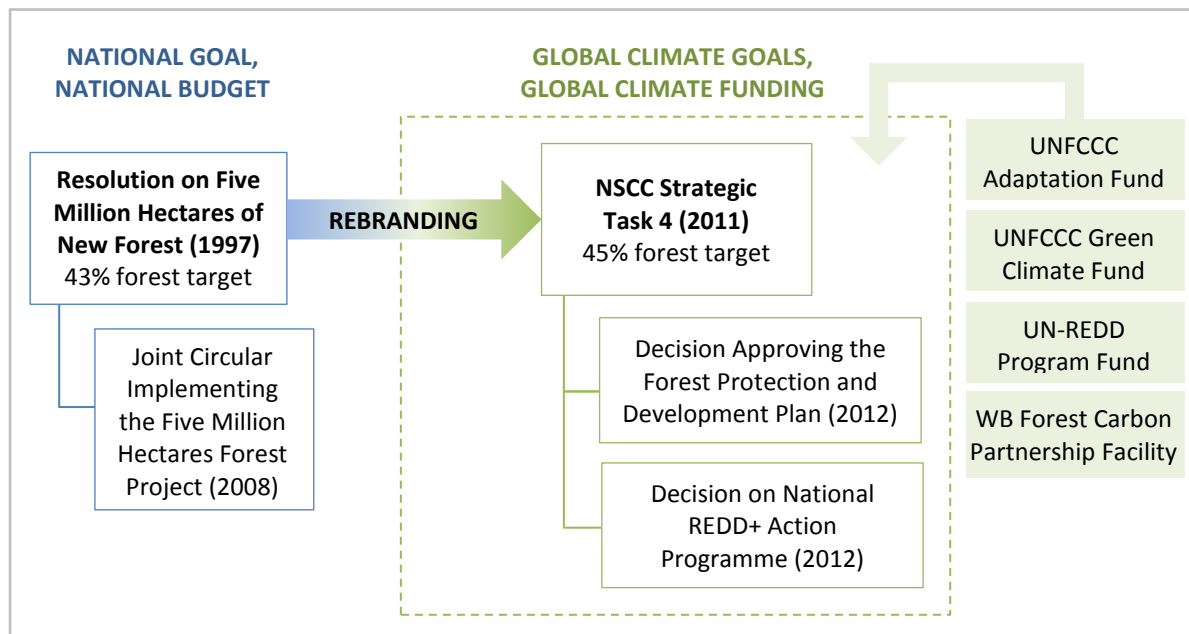
<sup>319</sup> National Assembly of Vietnam, *Resolution on the Establishment of Five Million Hectares of New Forest* (Vietnam), Resolution No. 08/1997/QH10 of 5 December 1997 [MARD International Support Group trans]. For a more recent implementing instrument, see: MARD, Ministry of Planning and Investment and Ministry of Finance, *Joint Circular Guiding the Implementation of the Prime Ministers Decision on Target, Task, Policy and Organisation for the Implementation of the Five Million Hectares Afforestation Project in the 2007-2010 Period* (Vietnam), Joint Circular No. 58/2008/TTLT-BNN-BKHDT-BTC of 2 May 2008 [Vietnam Law and Legal Forum trans, *Official Gazette: Issue No. 11-12/May 2008* (FAO Legal Office)].

<sup>320</sup> *NSCC Decision Annex art IV.4.*

<sup>321</sup> Ibid Annex art IV.1(b).

<sup>322</sup> Prime Minister of Vietnam, *Decision Approving the Forest Protection and Development Plan for the Period 2011-2020* (Vietnam), Decision No. 57/2012/QĐ-TTg of 9 January 2012 [MARD Forest Sector Support Partnership Coordination Office trans (2012)] art 1.II.9.

parameters, such as 'Forest Reference Levels',<sup>323</sup> 'Reference Emissions Levels'<sup>324</sup> and Measurement, Report and Verification (MRV) systems,<sup>325</sup> in order to maximise Vietnam's access to the UNFCCC's much anticipated (but still to be delivered) REDD+ mechanism.<sup>326</sup>



**Figure 23: Strategic 'Rebranding' of National Forestry Targets**

Strategic Task 5 establishes a multifaceted green growth agenda, which combines new initiatives<sup>327</sup> with expanded<sup>328</sup> and 'rebranded'<sup>329</sup> targets in other areas. This agenda has prompted a veritable flurry of implementing laws, which are loosely coordinated under the *National Green Growth Strategy* of September 2012.<sup>330</sup>

For example, the NSCC's ambitious target of 'reducing 20% of [agricultural] GHG emissions, while securing the sector's growth by 20%, and lowering the poverty rate by 20%'<sup>331</sup> is

<sup>323</sup> REDD+ Decision arts 1.II.1(b), 1.II.2(d), 1.V.2(a)-(b).

<sup>324</sup> Ibid.

<sup>325</sup> Ibid arts 1.II.1(c), 1.II.2(e), 1.V.2(a)-(b).

<sup>326</sup> Lyster, above n 35.

<sup>327</sup> NSCC Decision Annex art IV.5(c).

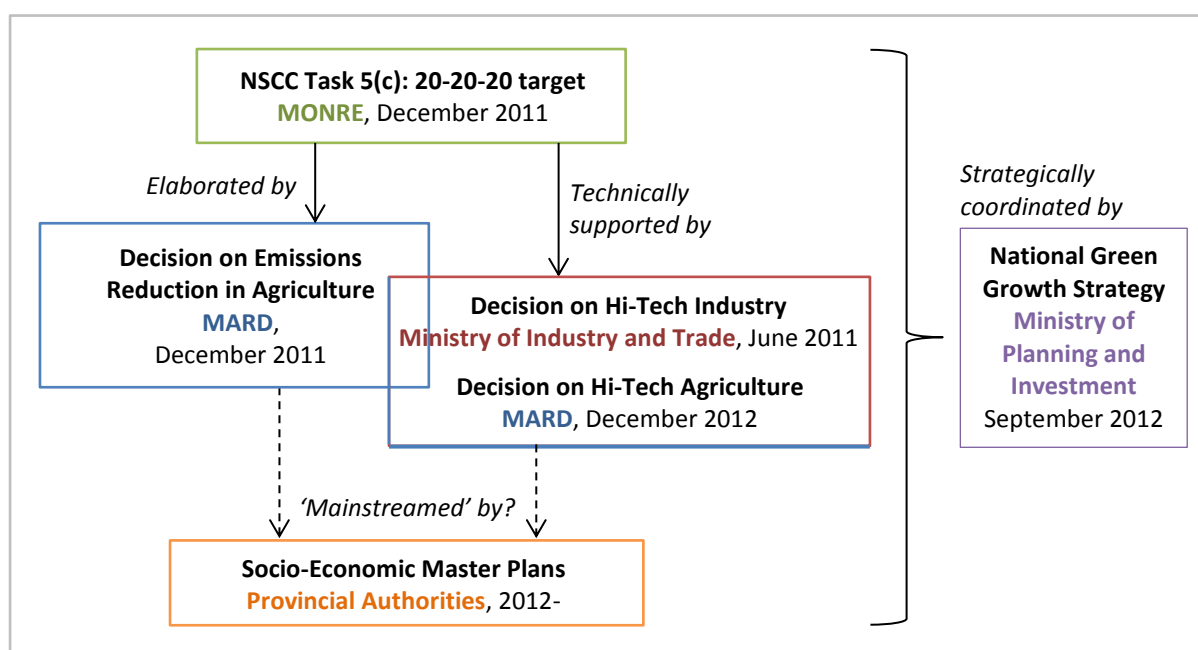
<sup>328</sup> Ibid Annex art IV.5(a).

<sup>329</sup> Ibid Annex art IV.5(b), cf *Law on Economical and Efficient Use of Energy 2010* (Vietnam), Law No. 50/2010/QH12 [Ministry of Justice trans].

<sup>330</sup> Prime Minister of Vietnam, *Decision Approving the National Green Growth Strategy* (Vietnam), Decision No. 1393/2012/QĐ-TTg of 25 September 2012 [FAO Legal Office trans].

<sup>331</sup> NSCC Decision Annex art IV.5(c).

elaborated by MARD's *Decision on Emissions Reduction in Agriculture*.<sup>332</sup> The MARD Decision allocates a VND 2470 billion budget,<sup>333</sup> and sets detailed geographical and sub-sectoral targets, such as the application of advanced rice cultivation techniques to 3.2 million hectares of delta and coastal cultivation zones.<sup>334</sup> These practical directions are additionally supported by cross-cutting technical laws,<sup>335</sup> and are 'mainstreamed' into provincial socio-economic development plans.<sup>336</sup> This 'forest' of related instruments has been drafted by numerous different agencies (Figure 24). Given Vietnam's tradition of rigid sector-based planning, this integrated approach is very progressive. However, if Painter's assessment of 'fragmented' state institutions proves correct, it may be very difficult to implement.<sup>337</sup>



**Figure 24: Laws on Low-Carbon Agriculture – Coordinated Network or Tangled Web?**

<sup>332</sup> MARD, *Decision on Approving Programme of Green House Gas (GHG) Emissions Reduction in the Agriculture and Rural Development Sector up to 2020* (Vietnam), Decision No. 3119/2011/QD-BNN-KHCN of 16 December 2011 [UN-REDD-Vietnam Programme trans (2012)] ('MARD Decision on Emissions Reduction').

<sup>333</sup> MARD Decision on Emissions Reduction art 1.5.2.

<sup>334</sup> Ibid art 1.3.1.1.1.

<sup>335</sup> Prime Minister of Vietnam, *Decision Approving the Program on Hi-Tech Agriculture Development under the National Program on High-Tech Development through 2020* (Vietnam), Decision No. 1895/2012/QD-TTg of 17 December 2012 [Vietnam Law and Legal Office trans, *Official Gazette: Issue No. 11-12/December 2012* (FAO Legal Office)]. As enacted under: Prime Minister of Vietnam, *Decision Approving the Plan on Development of a Number of Hi-Tech Industries Through 2020* (Vietnam), Decision No. 842/2011/QD-TT-g of 1 June 2011 [Vietnam Industry and Trade Information Centre trans].

<sup>336</sup> Prime Minister of Vietnam, *Decision Approving the Master Plan on Socio-Economic Development of An Giang Province through 2020* (Vietnam), Decision No. 801/2012/QD-TTg of 27 June 2012 [Vietnam Law and Legal Office trans, *Official Gazette: Issue No. 11-12/June 2012* (FAO Legal Office)].

<sup>337</sup> Painter, above n 257, 267.

Surprisingly, despite setting a target of increasing hydropower capacity from 5,500 MW<sup>338</sup> to 20,000-22,000 MW by 2020,<sup>339</sup> the NSCC does not expressly mention CDM. Although basic CDM rules are contained in a much earlier Decision,<sup>340</sup> the NSCC does not update or incorporate these rules. This legal disconnect is difficult to reconcile with actual regulatory practices. Since 2006, hydropower developers have registered approximately 170 CDM projects, which represent at least 70% of Vietnam's total number of CDM projects.<sup>341</sup> It is unclear how these activities fit into Vietnam's overall climate change strategy. In any event, the piecemeal engagement between Vietnamese hydropower and international carbon markets may be short-lived. From 1 January 2013, the globally-dominant European Union Emissions Trading Scheme (EU-ETS) will only accept CDM credits from new projects located in Least Developed Countries,<sup>342</sup> which excludes all Southeast Asian states except Cambodia, Laos and Myanmar. Although existing contracts will be honoured, the future legal and commercial status of CDM in Vietnam (and the Philippines) is very uncertain.

#### E. Evaluation

Vietnam's climate laws aim high. Since 2007, the national policy agenda has swelled in quantity and ambition. Following the enactment and elaboration of the NSCC, Vietnam now boasts a reasonably sophisticated – if not entirely coherent – theoretical framework for responding to multiple forms of climate risk. Although limited by political rigidity and sectoral divisions, lawmakers have made a good attempt to coordinate Ministries, combine 'hard' and soft' risk management strategies, and produce co-benefits in mitigation. These approaches are highly applicable to Vietnam's similarly bureaucratic (but less advanced) neighbours such as Laos, Cambodia and Myanmar.

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<sup>338</sup> US Energy Information Administration (EIA), *Vietnam* (9 May 2012) <[www.eia.gov/countries/country-data.cfm?fips=VM&trk=m](http://www.eia.gov/countries/country-data.cfm?fips=VM&trk=m)>.

<sup>339</sup> NSCC Decision Annex art IV.5(a).

<sup>340</sup> MONRE, *Decision on CDM National Executive and Consultative Board* (Vietnam), Decision No. 553/2003/QD-BTNMT of 29 April 2003 [no full text translation available].

<sup>341</sup> Mattijs Smits, 'The Parallel Universe of a CDM Consultancy: A View from Hanoi' on *Carbon Market Watch* (27 March 2013) <[carbonmarketwatch.org/the-parallel-universe-of-cdm-consultancy-a-view-from-hanoi/](http://carbonmarketwatch.org/the-parallel-universe-of-cdm-consultancy-a-view-from-hanoi/)>. Raw data available from: UNFCCC Secretariat, *CDM: Project Activities – Project Search* (30 May 2013) <[cdm.unfccc.int/Projects/projsearch.html](http://cdm.unfccc.int/Projects/projsearch.html)>.

<sup>342</sup> *Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 Establishing a Scheme for Greenhouse Gas Emission Allowance Trading within the Community and Amending Council Directive 96/61/EC* [2003] OJ L 275/32, art 11a(4).

Comparatively, the most distinctive feature of Vietnamese climate law is its remarkable density. This chapter cites approximately 25 of the most important instruments, which may represent only half of the total volume.<sup>343</sup> This rapidly growing legal ‘forest’ is quite extraordinary for a developing state with relatively few resources. Superficially, such dynamism compares favourably to the ‘glacial’ rate of lawmaking on the international stage and in many developed states.<sup>344</sup> Yet from a functional perspective, its significance is debatable. Viewed optimistically, the complexity and diversity of Vietnam’s ‘legal ecosystem’<sup>345</sup> may increase its adaptive capacity and resilience to changing conditions. Conversely, if policies and Ministries compete rather than coordinate – as is reasonably likely on past history<sup>346</sup> – such dense legal layering may cause confusion and hamper effective implementation.

As with the Philippines, Vietnam’s engagement with the UNFCCC regime is selective and highly strategic. Rather than simply duplicating international principles at the domestic level, the NSCC places adaptation above mitigation, and ‘rebrands’ existing development policies to match new international funding sources. Yet unlike the Philippines, Vietnam’s climate laws only empower high level bureaucracies and lend ‘visibility’<sup>347</sup> to aggregate national interests. Local communities are barely mentioned. This scalar bias is a predictable outcome of Vietnam’s closed politics and technocratic planning process.<sup>348</sup> However, such exclusionary frameworks are not inevitable, nor desirable. Due to Vietnam’s immensely diverse landscapes and livelihoods, and its promising consultation experiences in other fields,<sup>349</sup> lawmakers will almost certainly achieve a more flexible and resilient climate

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<sup>343</sup> Legal Office, Food and Agriculture Organisation of the United Nations (FAO), *FAOLEX Database* (online) <faolex.fao.org/>.

<sup>344</sup> Boyle, above n 39.

<sup>345</sup> J B Ruhl, ‘The Fitness of Law: Using Complexity to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy’ (1996) 49 *Vanderbilt Law Review* 1407.

<sup>346</sup> Painter, above n 257, 267; PADCO, above n 263, 23, 27, 32-34.

<sup>347</sup> Cash et al, above n 52, 8.

<sup>348</sup> Fortier, above n 95.

<sup>349</sup> Nopparat Nasuchon and Anthony Charles, ‘Community Involvement and Fisheries Management: Experiences in the Gulf of Thailand Countries’ (2010) 34 *Marine Policy* 163; Alison Clausen, Hoang Hoa Vu and Miguel Pedrono, ‘An Evaluation of the Environmental Impact Assessment System in Vietnam: The Gap between Theory and Practice’ (2011) 31 *Environmental Impact Assessment Review* 136.

framework by encouraging local initiatives to operate from the bottom up, alongside major national programs.

## VI CONCLUSION

### A. *Law on the Edge*

Southeast Asia is a frontier space in global climate governance, and in global climate scholarship. Its highly exposed states have long occupied the periphery – not the core – of negotiation, policy and analysis. Yet in 2013, several states are rapidly approaching the leading edge of climate lawmaking. As this thesis has demonstrated, these emerging hotspots are worthy of greater attention.

Focusing on the innovative yet infrequently studied legal terrains of the Philippines and Vietnam, this thesis has pursued three complementary lines of enquiry. Stated concisely – it has investigated what laws are being made; how these laws connect to international principles; and whether such developments accord with prevailing theories of climate governance. This chapter discusses and concludes each question in turn.

### B. *Sites and Modes of Lawmaking*

As its first research question, this thesis asked: *Where, and how, is climate law being produced in Southeast Asia?* Through a combination of broad ‘content mapping’ and deep ‘content mining’,<sup>350</sup> it has identified a diverse and detailed array of national laws. This regulatory turn has occurred very quickly. Since 2008, seven out of ten states have enacted flagship climate laws, and all except Myanmar and Cambodia have issued relevant supporting instruments. These laws differ in form, flexibility and focus – and are as deeply embedded in specific politics of national interest as they are referable to the ‘global’ problem of climate change.

The Philippines’ *Climate Change Act* and Vietnam’s NSCC are exemplars of this regional trend. While containing some common attributes, these flagship laws are strongly shaped by their particular physical, political and institutional contexts. In the Philippines, innovative measures on adaptation, local planning and the People’s Survival Fund are closely aligned

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<sup>350</sup> Legard, Keegan and Ward, above n 67, 168.



with existing modes of decentralised governance. The potential for climate change litigation is similarly connected to the Philippines' rich history of environmental jurisprudence. These contextual features will likely improve the Philippines' ability to adjust to unbounded risks and resolve unforeseen conflicts. In further study, it would be interesting to compare these features to other decentralised, judicially-active states such as Indonesia, Thailand, India and Mexico.

The embedded evolution of 'law in space'<sup>351</sup> is also occurring in Vietnam, whose growing forest of climate laws is rooted in very different institutional bedrock. Rather than empowering 'frontline' local authorities or creating a 'sole policy-making body' on climate change,<sup>352</sup> the NSCC reinforces the primacy of MONRE, MARD and other sectoral agencies. This rigid distribution of power is pragmatic and unsurprising, but may also create problems, given that the 'unbounded'<sup>353</sup> risk of climate change demands a multi-scale response that 'breaks out of usual conceptual boxes'.<sup>354</sup> Although the NSCC integrates 'hard' and 'soft' management strategies and calls for extensive cross-sector coordination, the government may not be institutionally and financially capable of implementing these ambitions. Ultimately, Vietnam's successful delivery of the NSCC may depend on its ability to build strategic linkages with international resources, as discussed below.

### C. *Strategic Interactions*

Secondly, this thesis asked: *To what extent are UNFCCC principles and other international legal norms being imported into Southeast Asia's domestic climate laws?* Through a close cross-scale comparison, it has found that international law is not being neatly imported or uniformly imposed on to Southeast Asia's diverse legal spaces. Rather, the relationship between the international and domestic climate law is reflexive, selective and highly strategic.

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<sup>351</sup> Delaney, above n 97, 68.

<sup>352</sup> *Climate Change Act* (Philippines) ss 4, 14.

<sup>353</sup> Bulkeley, above n 15; Beck, above n 16.

<sup>354</sup> Osofsky, above n 58, 579.

Classical theories of top-down lawmaking are refuted in two ways. First, neither the Philippines nor Vietnam adopt the UNFCCC's primary focus, which is to stabilise global emissions at a safe level.<sup>355</sup> Instead, citing extreme vulnerability and urgent development needs, lawmakers have chosen to prioritise national adaptation. This 'scale choice' is made explicit in Vietnam's NSCC, which admits that Vietnam will 'go against the global trend' and continue to increase its emissions in order to achieve industrialisation.<sup>356</sup> Filipino law diverges even further from the dominant emphasis on state parties and global solutions. By empowering local governments as frontline responders,<sup>357</sup> the *Climate Change Act* rejects conventional notions of the 'monolithic'<sup>358</sup> state actor and lends legal 'visibility'<sup>359</sup> to local interests that are marginalised by the UNFCCC. Collectively, these practices challenge the idea that climate governance is an objective and scientific management project. Instead, they tend to indicate that 'law is nothing more than congealed politics'.<sup>360</sup>

The Philippines and Vietnam also use climate law as a rational economic instrument. As envisaged by Wilson and Termeer,<sup>361</sup> both states have 'rebranded' a number of pre-existing domestic energy, forestry and disaster preparedness targets as 'mitigation' and 'adaptation' objectives – in order to maximise their access to economic opportunities such as the Green Climate Fund and the (future) REDD+ mechanism. The practice of strategic rebranding suggests that developing states possess some degree of independent agency. Rather than being morally obliged, or becoming the passive victims of 'carbon colonialism',<sup>362</sup> the Philippines and Vietnam appear to be making 'rational choices' to link existing national policies to international climate governance.<sup>363</sup> Ultimately, while the current UNFCCC regime may privilege existing power relations, this thesis demonstrates that climate law can

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<sup>355</sup> UNFCCC art 2.

<sup>356</sup> NSCC Decision Annex art I.1.

<sup>357</sup> *Climate Change Act* s 14. As supported by: *People's Survival Fund Act* s 13 (amending the *Climate Change Act*).

<sup>358</sup> Slaughter, above n 232.

<sup>359</sup> Cash et al, above n 52, 8.

<sup>360</sup> Kader Asmal, 'International Law and Practice: Dealing with the Past in the South African Experience' (Second Annual Grotius Lecture – delivered to the American Society of International Law, Washington DC, 5 April 2000).

<sup>361</sup> Wilson and Termeer, above n 66, 154.

<sup>362</sup> Bachram, above n 201.

<sup>363</sup> Goldsmith and Posner, above n 241.

also be a site of opportunity, replete with ‘possibilities of resistance’ for those at the periphery.<sup>364</sup>

The practical significance of these possibilities is still to be determined. As the following section will explain, the outcomes of current negotiations – on REDD+, Green Climate Fund contributions, and a post-Kyoto agreement – may either vindicate or jeopardise Southeast Asia’s promising engagements with international climate law.

#### D. *Integration, Regionalisation or Fragmentation?*

This thesis’ final research question asked: *Do recent developments in Southeast Asian climate law signify a steady integration, an innovative regionalisation or a chaotic fragmentation of global climate law?* These hypotheses are considered in turn.

The strategic selectivity and general diversity of laws studied in this thesis refute a simple ‘integration’ hypothesis. Contrary to classical notions of international law, Southeast Asian states do not appear to be uniformly implementing the UNFCCC regime as a matter of perceived obligation or top-down normative pull.<sup>365</sup>

The alternative theory of a regime complex based on innovative regionalisation<sup>366</sup> is doctrinally attractive, especially for proponents of ASEAN.<sup>367</sup> The similar timing of several national laws and their rapid evolution since the *Singapore Declaration*<sup>368</sup> of 2007 may indicate some degree of common motivation or cooperative action. However, this circumstantial theory is not supported by empirical evidence. In over 1,000 pages of text, the contrasting climate laws of the Philippines and Vietnam contain *only one* direct mention of ASEAN.<sup>369</sup> Although there is some thematic correlation on CCA-DRR policy, domestic

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<sup>364</sup> Lawrence Kritzman (ed), *Michel Foucault: Politics, Philosophy, Culture: Interviews and Other Writings, 1977-1984* (Taylor and Francis, 1988).

<sup>365</sup> Jack L Goldsmith and Eric A Posner, ‘The New International Law Scholarship’ (2006) 34 *Georgia Journal of International and Comparative Law* 463; Raustiala, above n 50.

<sup>366</sup> Keohane and Victor, above n 42.

<sup>367</sup> Letchumanan, above n 88.

<sup>368</sup> *Singapore Declaration on Climate Change, Energy and the Environment* (3<sup>rd</sup> East Asia Summit, Singapore, 21 November 2007).

<sup>369</sup> *National Action Plan* (Philippines) 93.

forestry<sup>370</sup> and energy<sup>371</sup> targets are inconsistent with their supra-national equivalents. While such formal comparisons may not capture ‘thicker’<sup>372</sup> normative influences (which might be discovered by interviewing key lawmakers), these findings suggest that ASEAN is not a significant site of climate governance.

The third hypothesis – of chaotic and ‘conflictive’<sup>373</sup> fragmentation – is equally unsuitable. Although diverse in form and substance, almost all of Southeast Asia’s climate laws expressly recognise the UNFCCC and make some attempt (however selective and strategic) to coordinate with international climate laws, funds and market opportunities.

Ultimately, the evolving complexity of Southeast Asian climate law cannot be confined to a single scalar paradigm. In accordance with confluent theories of governance,<sup>374</sup> legal geography<sup>375</sup> and political ecology,<sup>376</sup> the failure of all three hypotheses confirms that there is no ‘natural’ or ‘most appropriate’ scale of climate governance. Instead, the diversity of climate change impacts and interests – in the Philippines, Vietnam and beyond – means that the best legal responses will be multi-level responses which ‘connect policy domains’<sup>377</sup> and cut across multiple scales simultaneously.<sup>378</sup>

For individual Southeast Asian states, the evolution of domestic climate laws as part of a wider, polycentric governance regime is a *very promising* sign. From an economic perspective – the existence of overlapping governance regimes means that local adaptation burdens and national development goals can be achieved with assistance met using global climate funds. Early-acting states such as the Philippines and Vietnam have already begun to take advantage of this synergy. From a policy perspective – the cross-scale connectivity between local, national and global climate governance can facilitate knowledge-sharing and

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<sup>370</sup> NSCC Decision Annex art IV.4 (Vietnam); *Singapore Declaration* art 9 (ASEAN).

<sup>371</sup> *National Action Plan* 29 (Philippines); NSCC Decision Annex art IV.5(a) (Vietnam); *ASEAN Plan of Action for Energy Cooperation 2010-2015* (27<sup>th</sup> Meeting of the ASEAN Ministers for Energy, Mandalay, 29 July 2009) 2.

<sup>372</sup> Geertz, above n 68.

<sup>373</sup> Biermann et al, above n 47, 20-21.

<sup>374</sup> Cole, above n 43.

<sup>375</sup> Blomley, above n 55; Osofsky, above n 56, 1802.

<sup>376</sup> Adger, above n 55, 921-922.

<sup>377</sup> Termeer et al, above n 64, 161.

<sup>378</sup> Osofsky, above no 57.

kick-start innovation. These intangible diffusions are particularly important for highly vulnerable developing states with limited lawmaking expertise.

The evolution of Southeast Asian climate laws is also a *somewhat promising* sign in the global fight to prevent dangerous climate change. On one hand, while national laws may be a ‘crucial and underappreciated development’,<sup>379</sup> they will not, on their own, generate the required emissions reductions. The necessity of a robust and globally-subscribed post-Kyoto agreement is widely affirmed by classical, polycentric and radical ‘bottom up’ theorists alike.<sup>380</sup>

Nevertheless, the domestic lawmaking activities of vulnerable developing states may indirectly ‘change the game’<sup>381</sup> in two ways. First, national laws constitute a useful source of creativity which can be adapted and applied to build momentum elsewhere. Second, the establishment of sophisticated domestic plans, institutions and certification systems places states such as the Philippines and Vietnam in a stronger position to actively participate in global climate negotiations and – perhaps most importantly – to convince wealthy actors that promised contributions to carbon markets, REDD+ mechanisms and the Green Climate Fund are worthwhile investments that will be applied wisely.

Together, these ‘important feedback loops’<sup>382</sup> may propel states past the reductive limits of immediate self-interest,<sup>383</sup> and toward genuine global cooperation on climate change.

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<sup>379</sup> Nicholas Stern, ‘The Tide Could Finally be Turning on Climate Change’ in Financial Times, *The A-List* (25 January 2013) <[blogs.ft.com/the-a-list/2013/01/25/the-tide-could-be-finally-turning-on-climate-change-action/](http://blogs.ft.com/the-a-list/2013/01/25/the-tide-could-be-finally-turning-on-climate-change-action/)>.

<sup>380</sup> Cole, above n 43.

<sup>381</sup> Stern, above n 379; Loh, above n 9, 35-36.

<sup>382</sup> Raustiala, above n 50, 424.

<sup>383</sup> As seminally proposed by: Goldsmith and Posner, above n 241.

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## B. *International Legal Materials*

### 1. *United Nations*

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