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Taiwan's Participation in Global Climate Regime: A Non-Party Perspective

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Thesis submitted for the degree of MPhil

2016

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Abstract

This thesis aims to explore Taiwan's participation in the global climate regime from the perspective of a non-party state. It argues that given the fact that climate change is the common concern of humankind and that the operation of the UNFCCC regime will *de facto* or even *de jure* affect non-party states, the regime should refer to how a non-party state should be treated when the non-party state is rejected rather than reluctant to join the regime.

In an effort to promote this argument, this thesis starts from the analysis that why Taiwan's case is unique in international law and worth studying in chapter 2. Based on the analysis in chapter 2, the thesis turns to explore the evolution and development of the global climate regime to show a whole picture and some important features of the regime in chapter 3.

Chapter 4 moves to address the non-party state issue in the global climate regime. It first examines non-party issues based on public international law, and then analyses the influences of overlap of climate issues in different regimes, including the potential conflict of norms on climate issues inside and outside the UNFCCC system, and the difficulties that a non-party state will confront when integrating itself into the regime. Chapter 5 provides an empirical study on the making of Taiwan's laws and policies regarding to climate change. It elucidates how a non-party state struggles to interact and reconcile its domestic laws and policies with global climate regime.

Based on the above studies, chapter 6 turns to rethink the possible approaches to encourage the widest participation of all countries and prevent the problem of free riders. Chapter 7 concludes that the UNFCCC should make itself more flexible to construct a more harmonised and target-oriented global climate regime.

Table of Contents

Chapter 1 Introduction.....	1
1.1 Setting the scene	1
1.2 The objectives of the thesis.....	3
1.3 Theoretical research	4
1.4 Case study: Taiwan	6
1.5 Structure of the thesis.....	8
 Chapter 2 The Causes and Influence of Taiwan’s Non-party Status in the United Nations System	 10
2.1 Historical background.....	11
2.2 The legal status of Taiwan.....	13
2.2.1 Instruments relating to the legal status of Taiwan.....	13
2.2.2 Viewpoints on the sovereignty of Taiwan.....	17
2.3 The influence of the unclear sovereign status to Taiwan	22
2.3.1 Taiwan's attitude toward the international community	22
2.3.2 Taiwan's attitude toward the international environmental affairs	24
2.3.3 Taiwan's strategy on the making of environmental laws and policies	29
2.3.4 Taiwan's participation in inter-governmental organisations and agreements	35

2.4 Taiwan's special concern on the application of international environmental law.....	45
2.5 Summary of the chapter	51
Chapter 3 Development of International Climate Change Regime	52
3.1 Scientific discovery of Climate Change	52
3.2 Development of the UNFCCC regime.....	57
3.3 Key provisions of the UNFCCC and Kyoto Protocol.....	66
3.4 The Paris Agreement.....	75
3.5 Conclusion of the chapter	76
Chapter 4 Problems of a Non-Party State's Participation in Global Climate Regime.....	78
4.1 Causes to become a non-party state in the UNFCCC regime	79
4.1.1 Fairness	79
4.1.2 Regime design.....	81
4.1.3 Political intervention.....	81
4.2 The relationship and legal effect of a third party to a treaty	82
4.2.1 Consent of the third party	82
4.2.2 " <i>Erga omnes</i> " obligations	83
4.2.3 Co-existence of a rule in a treaty and in customary principle of international law.....	84

4.3 The legal problems of the overlap of climate issues in global climate regime to a non-party state in the UNFCCC system	85
4.3.1 Conflict of norms	85
4.3.2 The UNFCCC	86
4.3.3 The WTO	86
4.4 Concluding remark.....	87
Chapter 5 Shaping the National Climate Policies and Laws in Taiwan.....	88
5.1 Science of climate change in Taiwan	88
5.1.1 Change of natural environment due to global warming.....	88
5.1.2 Carbon emissions of Taiwan	90
5.2 Historic background of policy making	94
5.3 Climate legislation in Taiwan	103
5.3.1 Domestic laws relating to climate change	103
5.4 Conclusion	111
Chapter 6 Moving to Wider Participation to the UNFCCC Regime	112
6.1 Multilateralism vs. Minilateralism.....	112
6.2 The regime design.....	112
6.3 Harmonisation of different climate regimes	113
6.4 Incentives	113

6.4 More flexibility of the UNFCCC Regime	113
Chapter 7 Conclusion	115
Bibliography	119

List of Tables

Table 2-1 International Organisations in which Taiwan is a full member	37
Table2-2 International Organisations in which Taiwan is an observer	38
Table 2-3 International Organisations in which Taiwan is a Cooperating Non-Member	39
Table 2-4 International Organisations in which Taiwan is a Corresponding Member	39
Table 2-5 International Organisations in which Taiwan is an Associate Member	39
Table2-6 FTAs between Taiwan and States having diplomatic relations with Taiwan	41
Table 2-7 FTAs between Taiwan and China	43
Table 2-8 Economic cooperation agreements between Taiwan and other countries which do not have diplomatic relations with Taiwan	45
Table 5-1 Statistics of Taiwan's GDP and CO₂ emissions by year	92
Table 5-2 Comparison of Taiwan's CO₂ emissions with major countries and the world*	93

Chapter 1 Introduction

1.1 Setting the scene

Global warming or climate change¹ is one of the most challenging environmental risks at our time. Even though some sceptics remain, its impact to the ecosystem, energy, human economic activities, development of technology, all livings of the Earth and so on has gradually been shown by scientific research. Due to its global nature and political sensibility, climate change has transformed from a scientific issue into a worldwide political issue. Basically, a global climate change regime is erected on the ground that problems of climate change cannot be resolved by any single country; instead, they should be coped with by the cooperation of all states in the world.

International community has made more than two decades of efforts to establish a global climate regime which is feasible and acceptable by all countries. While the initial achievements was reached by the enactment of the United Nations Framework Convention on Climate Change (hereinafter the UNFCCC or the Convention) in 1994 and the Kyoto Protocol in 2005, many problems remains debatable and unresolved during the subsequent process of negotiations, such as the fair distribution of burden to reduce the carbon emissions, the effect of implementation of the developed countries between 2008 and 2012, and the financial mechanism to support states on the work of mitigation and adaptation, especially for developing countries. After years of negotiations, the Conference of Parties (COP) of the UNFCCC finally adopted the

¹ Despite that the two terms could be distinguished by following a very strict definition, 'climate change' and 'global warming' are interchangeable in this thesis.

Paris Agreement in December 2015 to replace the Kyoto Protocol as a new international climate agreement after 2020.

Wide participation of all countries to fight against climate change together is a key element to make the global climate regime work well. The Paris Agreement shall enter into force on the 30th day after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55 % of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession with the Depositary.² It remains to be seen whether the double thresholds will be met.

To date, states still play the main role in the rule making and implementation of international norms, even though the participation of non-state actors are also important in many aspects. The process to adopt a treaty or any legal instrument, whatever bilateral, regional or international, is a process of compromise of national interests between countries with different concerns. If states are not satisfied with the contents of the proposed instrument, they can choose not to sign or ratify it. The refusal of the United States to ratify the Kyoto Protocol and the withdrawal of Japan, Canada and Russia from the second period of commitment in the Kyoto Protocol are the just examples. In such cases, those countries are non-party states to the Kyoto Protocol. In addition, there is another type of non-party state, i.e. Taiwan. Taiwan is a non-party state in the UNFCCC regime, but its case is quite different from the countries mentioned above. Due to its non-member status in the United Nations, Taiwan is rejected rather than reluctant to join the UNFCCC regime.

In both types of cases mentioned above, some problems arise. For example, the first

² Article 21 of the Paris Agreement.

one is why a state becomes a non-party in the UNFCCC regime. In theory, a multilateral treaty should encourage as many as states to join it. They must be some key points which extinguish the willingness of some states to join a treaty. How can these obstacles be removed?

Second, global nature, interconnectedness and multi-facet feature of climate issues make it nearly impossible for any country to be self-isolated from the global climate actions. When some countries become non-party states in the UNFCCC regime, they still need to govern the climate issues on other platforms. Therefore, climate issues are now governed by the UNFCCC regime and other bilateral, regional or international arrangements. The overlap and fragmentation of global climate governance becomes an emerging issue. The application of laws and harmonisation of regimes on climate issues between different treaties becomes a critical problem that is worth being re-examined at the time that the UNFCCC regime has stepped onto a new stage by the adoption of the Paris Agreement.

1.2 The objectives of the thesis

This thesis aims to explore Taiwan's participation in the global climate regime from a non-party perspective. It consists of theoretical research on non-party issue in public international law and empirical study on Taiwan's peculiar case with a view to discussing the following research questions:

- Why did the UNFCCC negotiations stalled? Why do some countries become non-party states in a multilateral treaty?
- What is the relationship between a non-party state and the UNFCCC legal regime?
- What is the influence of the fragmentation of global climate governance to non-party states in the UNFCCC regime and to global climate governance per se, and how can this problem be resolved?

- What is the influence of the governance of the UNFCCC regime to the making of domestic climate law and policy of a non-party state? What is the implication of Taiwan's case to the non-party issues in the UNFCCC regime?
- What can be learned from the latest outcome of negotiations of the UNFCCC with a view to encouraging the widest participation of all states into the global climate regime?

1.3 Theoretical research

Theoretical research of this thesis starts from the question that why the climate negotiations were stalled and why some countries become non-party states in a multilateral treaty. A simple answer is that they are not satisfied with the contents of the treaty or they are not allowed to join it. From the academic view, this question could be analysed from different perspectives, such as self-interest of states, fairness, or the design of the regime. For example, Gupta attributes the deadlock of the climate negotiation and its implementation to self-interest and fairness between countries because firstly, the costs of measures will have to be borne locally or nationally and especially by certain domestic sectors while the benefits will be global, there is lack of domestic support in developing countries. Secondly, the industrial countries are reluctant to take measures on the ground that if only they take measures, developing countries will become free riders and their actions will make little sense because the emissions in developing countries are still increasing. Thirdly, in contrast, developing countries argues that industrial countries should take the action first due to their historic responsibility.³

Guzman refers the failure to adopt an agreement to the 'design of international

³ Joyeeta Gupta, *The Climate Change Convention and Developing Countries: from Conflicts to Consensus?* 17 (Dordrecht: Kluwer, 1997).

agreements' generally from the perspective of economics of law. He argues that there is tension between two objectives pursued by states when they enter into an agreement. The first is the desire to make the agreement credible and binding. The design elements of hard law, dispute resolution, and monitoring all promote this goal. The second part of the explanation is related to the sanctions triggered by the violation of an international agreement. He argues that when agreements between states are violated, however, the associated sanctions do not have this zero-sum character.⁴ Daniel Bodansky and Elliot Diringer also argue that when a multilateral treaty is on the way to become deeper, broader or more integrated, the loop should not be too ambitious because it needs time for trust to develop.⁵ The institutional development, the choice of legal form, precision of the contexts and so on should be taken into account and deserve to be examined further. The process of the UNFCCC negotiations provides plenty of materials on the study. More interestingly, the Paris Agreement takes a different approach to make the UNFCCC regime more workable, which is relatively new from the existing literature. Therefore, this thesis will explore the theoretical research based on the existing literature and bring a new insight by analysing the new outcome of the UNFCCC negotiations.

The second focus of the theoretical research falls into the overlap of different regimes to climate issues. Climate issues now are governed by not only the UNFCCC; they are also addressed and need to be coped with by other arrangements, such as the WTO. In this regard, the term 'global climate regime' is used to illustrate a broader

⁴ Andrew T. Guzman, 'The Design of International Agreements', 16 E. J. I. L. 581-582 (2005).

⁵ Daniel Bodansky and Elliot Diringer, 'The Evolution of Multilateral Regimes: Implication for Climate Change', Prepared for Pew Center on Global Climate Change, December 2010, at 15-16, available at: <http://www.c2es.org/publications/evolution-multilateral-regimes-implications-climate-change> (last visited 4 March 2016).

scope than the UNFCCC climate regime in this thesis. The issue of overlap has been discussed in a large number of literatures, especially in the fields of international trade and environment in general or climate change in specific,⁶ but since the Paris Agreement adopts the hybrid of soft law and hard law as the legal character,⁷ it seems that to some extent the line between a party and a non-party in the UNFCCC regime has been blurred more than the Kyoto period. In such a case, what is the impact of the fragmentation of global climate regime to non-party states of the UNFCCC and to the regime itself? The Paris Agreement is the important new material which needs to be further examined to see what has been changed so far.

1.4 Case study: Taiwan

As noted, Taiwan's case is quite different from other non-party states. The way that international community is doing to persuade these states returning to the UNFCCC regime is to constantly negotiate among different countries and groups, making the proposed instrument acceptable to all countries. The negotiation in each and every Conference of the Parties (COP) of the UNFCCC shows how the global climate regime is reshaped to encourage the widest participation of all countries. In fact, they are entitled to join the regime and can do it as long as they agree with the contents of the proposed instrument.

As to Taiwan, Taiwan's natural environment is vulnerable when facing more and

⁶ See for example, Harro van Asselt, *The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions* (Cheltenham: Edward Elgar 2014); Rafael Leal-Arcas, *Climate Change and International Trade* (Cheltenham: Edward Elgar 2013); Tracey Epps and Andrew Green, *Reconciling Trade and Climate: How the WTO Can Help Address Climate Change* (Cheltenham: Edward Elgar 2010); Erich Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law and Legal Theory* (Oxford, Oxford University Press: 2009).

⁷ See generally Daniel Bodansky, 'The Legal Character of the Paris Agreement', *Review of European, Comparative, and International Environmental Law*, Forthcoming. It could be downloaded at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2735252 (last visited 10 May 2016).

more frequent risks caused by global warming; Taiwan definitely has the need to cooperate with all states to fight against climate risks. On the other hand, however, due to its non-member status in the United Nation system, Taiwan is rejected rather than reluctant to join the UNFCCC regime, by which Taiwanese government is restrained to take part in many international affairs.

The need of participation of all countries to combat climate change has been affirmed in the preamble of the UNFCCC, stating that ‘Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic condition’. However, this common consensus is challengeable in the case of Taiwan’s participation.

The UNFCCC regime has ignored its linkage to Taiwan for a long time.⁸⁸ The issues of Taiwan at international level, including climate change, are usually discussed from the political dimension. In contrast, this thesis dedicates to Taiwan’s right of access to international climate regime by rethinking the global climate regime from the non-party perspective which has not yet been comprehensively discussed in the previous literature. It is expected that this thesis can draw the attention of international community to realizing and taking consideration to Taiwan’s struggle and efforts to the mitigation of global warming as a common concern of humankind. Further, by so doing, a broader thinking to the global climate regime which takes into account the elements of economy, morality, law, sustainable development and human rights in

⁸⁸ Michelle Winglee, ‘No Seat at the Table: Taiwan and the Global Fight Against Climate Change’, *The Diplomat*, 2 Dec. 2015, available at: <http://thediplomat.com/2015/12/no-seat-at-the-table-taiwan-and-the-global-fight-against-climate-change/> (last visited 10 May 2016).

order to reach a balance among common concern of humankind, equity of sovereignty and self-interest of states would be given in this thesis.

1.5 Structure of the thesis

This thesis consists of seven chapters. It provides a brief introduction of the thesis, including the research background, objectives, the originality and innovation, selection of case study and structure in this chapter. Since this thesis chooses Taiwan's case as the object for the study of non-party issues in the UNFCCC regime, it first explores the causes and influence of Taiwan's non-party status in the United Nations system in chapter 2, in order to show why Taiwan's case is unique and different from other countries and worth studying. Based on the analysis in chapter 2, the thesis turns to explore the evolution and development of the global climate regime in chapter 3 to provide a whole picture and some important features of the regime.

Chapter 4 of the thesis moves to address the non-party state issue in the global climate regime. It firstly examines the relationship and legal status of a non-party state to a treaty based on the rules in law of treaties, and then analyses the influences of not being able to become a party in a treaty, including the problem of free riders, potential conflicts of norms on climate issues inside and outside the UNFCCC system, and the difficulties that a non-party state will confront to integrate itself into the regime. Chapter 5 of the thesis provides an empirical study on the making of Taiwan's laws and policies regarding to climate change. It elucidates how a non-party interacts and reconciles its domestic laws and policies with global climate regime.

Based on the above studies, chapter 6 turns to discuss what can be learned from the latest outcome of the UNFCCC negotiation and rethinks the possible approaches to encourage the widest participation of all countries and make the global climate regime

work better. Chapter 7 concludes that the UNFCCC has moved onto a right way and should make itself more flexible to construct a more harmonised and target-oriented global climate regime.

Chapter 2 The Causes and Influence of Taiwan's Non-party Status in the United Nations System

Taiwan is a unique case in international law and politics. As introduced in Chapter I, because Taiwan has not been a member of the UN and since 1971, it has been rejected to participate in many international organisations for a long time, especially those under the UN. The causes that lead to this result can be traced back to the end of the Second World War and mainly attribute to the unclear legal status of Taiwan, the Republic of China in international law.

The outbreak of the Chinese Civil War has caused two main issues relating to the national position of Taiwan since World War II. The first one is who owns the sovereignty of Taiwan, and the second one is what the legal status of the ROC is in international law. Because they were not solved in the past, these two issues has further induced more political arguments, controversy and development, such as the long-lasting "One China Policy" by the PRC, "the 1992 Consensus" between the PRC and ROC, the call for independence of Taiwan and even the recent ice-breaking "Ma-Xi meeting", the first meeting of the political leaders since 1949 held on 7 November 2015. The discussion on the legal status of Taiwan refers to not only the interpretation of several treaties and documents from the perspective of international law but also complicated international relations, in particular the Far-East policy of the United States during the Cold War. The controversy over the legal status of Taiwan is the starting point for Taiwan's inability to become a member state in the UN, which has affected the making of laws and policies of Taiwanese government responding to international environmental affairs for several decades.

Whatever the debate of Taiwanese legal status is evaluated, the non-member position in the UN has very deep influence to Taiwan when Taiwanese government deals with international affairs, including those in the field of international environmental issues. In international law, what we learn from Article 34 of the Vienna Convention of the Law of Treaty is that "A treaty does not create either obligations or rights for a third State without its consent". Nonetheless, due to the global nature of many issues and the trend of global governance in the era of globalisation, Taiwan has no choice but to follow the norms made by international organisations in many respects. In other words, there is a gap between rights and obligations on Taiwan's participation in international affairs. Taiwanese government always seeks ways to break through the hardship in international law and politics. This situation is also applicable to environmental issues. In order to catch up with international law, Taiwan's policy responses on climate change affairs become unique.

This chapter firstly elucidates the debate of Taiwan's legal status in international law. Then, it analyses the attitude of Taiwan toward international environmental issues and how Taiwan responses to the international environmental norms in generally.

2.1 Historical background

The Republic of China (ROC) has been established by Dr. Sun, Yet-sen and his Nationalist Party (also known as *Kuomintang* in Chinese, KMT) since 1911. At that time, Taiwan was still a colony of Japan because the Chinese Ching government lost the war against Japan and ceded Taiwan to Japan as war compensation in 1895. After Japan surrendered on 15 August 1945, The KMT-led Chinese government sent troops

to occupy Taiwan under the order of the commander of Allied⁹. However, Chinese civil war between KMT and Chinese Communist Party (CCP) exploded in 1947. KMT was defeated and retreated to Taiwan in 1949 and CCP established the People's Republic of China (PRC) at the same year. From then on, P.R.C controls most of the previous territory of the ROC, while KMT controls only four main islands, namely Taiwan, Penghu, Kinmen and Matsu, and several smaller islands on the Pacific Ocean. Both of the two governments claimed the unity of all China. In the period from 1949 to 1971, though the question on the recognition of the opposing governments and the representatives of China in the United Nations went on in the international community, the ROC, under the bolster of the United States, was still regarded as the legitimate representative of China in the United Nations. Nevertheless, while more and more countries recognised the PRC as the representatives of China, Resolution 2758 adopted by the UN General Assembly in 1971 turned to recognise the PRC as the sole legitimate representative of China in the UN.¹⁰ Though neither the PRC nor the ROC can *de facto* control the two sides of Taiwan Strait, nowadays PRC still claims that Taiwan is a province of the PRC while the ROC also claims that it has the sovereignty to the whole territory of Chinese Mainland under the Constitution of ROC on the other hand.¹¹ Meanwhile, the *status quo* of the two sides of Taiwan Strait remains unchanged but the fact is that most of the countries recognise PRC as the representative of China, while only 22 States in the world establish diplomatic

⁹ General Order No. 1 for the surrender of Japan. It was prepared by the Joint Chiefs of Staff of U.S. military forces and approved by President Harry Truman on 17 August 1945.

¹⁰ The General Assembly of the United Nations, Resolution of the lawful rights of the People's Republic of China in the United Nations, 26th session, 25 Oct. 1971.

¹¹ See also James Crawford, *The Creation of States in International Law* 198-200 (Oxford: Clarendon Press, 2nd ed., 2006).

relations with ROC on Taiwan in 2016.¹²

2.2 The legal status of Taiwan

2.2.1 Instruments relating to the legal status of Taiwan

Several instruments relating to the sovereign status of Taiwan should be mentioned in the first place.

A. Treaty of Shimonoseki, 1895

Treaty of Shimonoseki is the outcome of the war between Chinese Ching government (Imperial China) and Japan ended in 1895. Chinese Ching government was defeated and agreed to cede Taiwan and Penghu to Japan as war compensation. Article 2 of the Treaty stated that:

China cedes to Japan in perpetuity and full sovereignty the following territories, together with all fortifications, arsenals, and public property thereon:...(b) The island of Formosa, together with all islands appertaining or belonging to the said island of Formosa; (c) The Pescadores Group, that is to say, all islands lying between the 119th and 120th degrees of longitude east of Greenwich and the 23rd and 24th degrees of north latitude.¹³

From then on, Japan had the legal jurisdiction to the island of Formosa (Taiwan Island) and the Pescadores Group (Penghu Group).

B. Cairo Declaration, 1943

Cairo Declaration is a statement made by U.S. President Franklin D. Roosevelt, British Prime Minister Winston Churchill and Chinese President Chiang Kai-shek in

¹² Diplomatic Allies, Ministry of Foreign Affairs of the ROC, available at: <http://www.mofa.gov.tw/en/AlliesIndex.aspx?n=DF6F8F246049F8D6&sms=A76B7230ADF29736>. (Last visited on 3 March 2016)

¹³ 'Treaty of Shimonoseki, Shimonoseki, 17 April 1895', available at: <http://www.taiwandocuments.org/shimonoseki01.htm> (last visited 1 March 2016).

Cairo Conference held in Cairo, Egypt in November and December of 1943 when they met to discuss the progress of the war against Japan and the future of Asia.

Regarding to the sovereignty of Taiwan and Penghu, they agreed that:

It is their purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and The Pescadores, shall be restored to the Republic of China....¹⁴

C. Potsdam Proclamation, 1945

The Potsdam Proclamation is a statement that called for the surrender of all Japanese armed forces in order to end World War II, and decided how the terms of the surrender of Japan should be defined. On July 26, 1945, United States President Harry S. Truman, United Kingdom Prime Minister Winston Churchill, and Chinese President Chiang Kai-shek signed and released the document. The most important thing for the Potsdam Proclamation relating to Taiwan is that the Article 8 of the Potsdam Proclamation cited the content of the Cairo Declaration, stating that:

The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine.¹⁵

D. Japanese Instrument of Surrender, 1945

The Japanese Instrument of Surrender is an agreement that formalized the surrender of the Empire of Japan, by which the World War II was formally ended. It was signed

¹⁴ "Cairo Declaration, Cairo, released December 1, 1943", available at: http://www.ndl.go.jp/constitution/e/shiryo/01/002_46/002_46tx.html (last visited 3 March 2016).

¹⁵ "Potsdam Proclamation, Potsdam, 1 August 1945", available at: <http://www.ndl.go.jp/constitution/e/etc/c06.html> (last visited 3 March 2016).

by representatives from Japan, the United States of America, the Republic of China, the United Kingdom, the Union of Soviet Socialist Republics, Australia, Canada, the Provisional Government of the French Republic, Netherlands, and the Dominion of New Zealand on September 2, 1945. Regarding to the sovereignty of Taiwan and Penghu, the Japanese Instrument of Surrender stated that:

We, acting by command of and in behalf of the Emperor of Japan, the Japanese Government and the Japanese Imperial General Headquarters, hereby accept the provisions set forth in the declaration issued by the heads of the Governments of the United States, China, and Great Britain on 26 July 1945 at Potsdam, and subsequently adhered to by the Union of Soviet Socialist Republics, which four powers are hereafter referred to as the Allied Powers, and

We hereby undertake for the Emperor, the Japanese Government, and their successors to carry out the provisions of the Potsdam Proclamation in good faith, and to issue whatever orders and take whatever action may be required by the Supreme Commander for the Allied Powers or by any other designated representative of the Allied Powers for the purpose of giving effect to that declaration.¹⁶

Because this document accepted the outcome of the Potsdam Proclamation, and the Potsdam Proclamation also accepted the outcome of the Cairo Declaration as noted earlier, it seems logistic from the context of these two documents to say that Japan accepted the statement in the Cairo Declaration that "all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and The Pescadores, shall be restored to the Republic of China."

E. Treaty of San Francisco, 1951

The Treaty of San Francisco, also known as the Treaty of Peace with Japan, was signed by 48 nations on September 8, 1951. It is the legal document to end the Allied

¹⁶ "The Japanese Instrument of Surrender, Tokyo Bay, 2 September 1945", available at: <http://www.ndl.go.jp/constitution/e/etc/c05.html> (last visited 3 March 2016).

post-war occupation of Japan and return sovereignty to that nation; to clarify the compensation of Japan and other issues. In addition to this, the treaty also stirred up the problem of the legal status of Taiwan. According to Article 2(b) of the Treaty, "Japan renounces all right, title and claim to Formosa and the Pescadores."¹⁷

However, it did not specify what country Taiwan was to be surrendered. It was because of the Chinese Civil War which led to the controversy over which government was the legitimate representative of China. The play of international relations had a significant role during the process of negotiation. Therefore, neither the ROC nor the PRC were invited to attend the meeting and signed the treaty. The ROC recognised the Treaty of San Francisco later in the Treaty of Taipei in 1952 while the PRC has not recognised it since then.

F. Treaty of Taipei, 1952

Because "China" did not sign the Treaty of San Francisco, an agreement was needed to formalise the end of war and deal with the accompanying affairs between China and Japan. Under the pressure and far-east policy of the United States, it was ROC rather than PRC to sign Sino-Japanese Peace Treaty with Japan in April 28, 1952, also known as the Treaty of Taipei. Article 2 of the Treaty of Taipei recognised Article 2 of the Treaty of San Francisco in which "Japan has renounced all right, title, and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratley Islands and the Paracel Islands." Also, Article 4 of the Treaty stated that:

It is recognized that all treaties, conventions and agreements concluded before December 9, 1941, between China and Japan have become null and void as a

¹⁷ "Treaty of Peace with Japan, San Francisco, 8 September 1951", available at: <http://www.taiwandocuments.org/sanfrancisco01.htm> (last visited 3 March 2016).

consequence of the war.¹⁸

However, like the Treaty of San Francisco, the Treaty of Taipei did not specify what country Taiwan was to be surrendered either. It left room for commentators to elaborate the legal status of Taiwan in a way different from those based on the contexts of the Cairo Declaration, Potsdam Proclamation and the Japanese Instrument of Surrender.

2.2.2 Viewpoints on the sovereignty of Taiwan

Most of the debates on the sovereignty of Taiwan come from the interpretation of the above treaties and documents. Different views have been discussed since 1950s.¹⁹ This thesis does not intend to give an answer to the debate itself but only to points out the influence of the controversy relating to the Taiwanese response of policy to international environmental affairs.

Firstly, it is argued that by combining the contexts of the Cairo Declaration, the Potsdam Proclamation and the Japanese Instrument of Surrender regarding to Taiwan and Penghu, Japan was obliged to carry out its commitments and gave Taiwan and Penghu back to China. Since the Chinese KMT government unilaterally abolished the Treaty of Shimonoseki in 1941 and has occupied Taiwan and Penghu under the order of the Allied since 1945, China has legally owned the sovereignty of Taiwan an

¹⁸ "Treaty of Peace between the Republic of China and Japan", available at: <http://www.taiwandocuments.org/taipei01.htm>. (last visited 3 March 2016)

¹⁹ See for example, Daniel P. O'Connell, The Status of Formosa and the Chinese Recognition Problem, 50(2) A.S.I.L. 405, 405-416 (1956); Christopher J. Carot, The "Republic of Taiwan": A Legal -Historical Justification for a Taiwanese Declaration of Independence, 75 NYU Law Review 429, 429-468 (2010); Crawford, *supra* note 11, at 198-221; Ching-hsiung Hsu and Ming-Juinn Li, Modern International Law 387-407 (in Chinese) (Taipei: Angle, 2001); Huang-chih Chiang, International Law and Taiwan-Historic Retrospect and Legal Reappraisal (in Chinese) (Taipei: Sharing, 2000) ; Yi-shen Chen et. al., The History and Theory of the National Position of Taiwan (in Chinese) (Taipei: Tipi, 2004); Chi Sui and An-gou Cheng ed., "One China with Respective Interpretations" - A Historic Account of the Consensus of 1992 (in Chinese) (Taipei: National Policy Foundation, 2002); Yun Cheng, Territorial Status and Formosa: A Global Perspective (in Chinese) (Taipei: Jing Yi, 2007).

Penghu.²⁰ Both the KMT-led ROC government and the CCP-led PRC government claim that Taiwan has become Chinese territory since 1945. If this precondition is accepted, the next question is which Chinese government owns it, the PRC or the ROC?

On the side of the PRC, as shown in the official White Paper "The Taiwan Question and Reunification of China" in 1993 and the other White Paper "The One-China Principle and the Taiwan Issue" in 2000, the PRC government clearly argued that "On October 25, 1945, the Chinese government recovered Taiwan and the Penghu Archipelago, resuming the exercise of sovereignty over Taiwan."²¹ It also argued that because the PRC government has replaced the ROC government as the sole legitimate representative of China since 1971, the PRC owns the sovereignty of Taiwan thereby.²²

On the side of Taiwan, although the KMT-led ROC government was defeated in Chinese Civil War, it still claimed its sovereignty and jurisdiction toward "all China". To some extent, therefore, it could be argued that the Chinese Civil War is not actually over even though the ROC government *de jure* finished the military stand-off by the abolishment of the Temporary Provisions Effective During the Period of Communist Rebellion in 1991. The KMT-led ROC government has not really admitted its failure against PRC when "the National Unification Guidelines" in 1991(abolished in 2006 under the reign of the Democratic Progress Party, DPP), The Additional Articles of the Constitution of the Republic of China in 1991 and the 1992 Consensus--One China

²⁰See O'Connell, *supra* note 19, at 406; Crawford, *supra* note 11, at 207.

²¹ See "The White Paper on The Taiwan Question and Reunification of China", available at: <http://www.china.org.cn/english/taiwan/7953.htm>; and "The White Paper on The One-China Principle and the Taiwan Issue", available at:

<http://www.china-embassy.org/eng/zt/twwt/White%20Papers/t36705.htm>. (last visited 3 March 2016)

²² Id.

Principle with Respective Interpretation are considered. According to these instruments, "a divided China" is the most appropriate description for the stance of the KMT-led ROC government toward the Cross-Strait relations.²³ For example, in the preamble of "The Additional Articles of the Constitution of the Republic of China", it states that:

To meet the requisites of the nation **prior to national unification**, the following articles of the ROC Constitution are added or amended to the ROC Constitution in accordance with Article 27, Paragraph 1, Item 3; and Article 174, Item 1: (emphasis added)

However, because the majority of states in the world have recognised PRC government as the sole legitimate representative of China after 1971, the insistence of the KMT-led ROC government to claim the sovereignty of all China has probably made the Cross-Strait matters essentially within the domestic territory. As commentators argue, in such a circumstance, the ROC in Taiwan is seen as just a "government-in-exile of China".²⁴ This is disadvantageous to the ROC.

The above view is criticised by the second view that the legal status of Taiwan was undetermined in accordance with the contexts of the Treaty of San Francisco and the Treaty of Taipei. Supporters of this view argue that the Cairo Declaration and the Potsdam Proclamation were just policy statements between several national leaders during the time of war. They were not made in legal forms, not treaties and not ratified by the congress of the United Kingdom and the United States.²⁵ Also, Japan is not legally bound by the two treaties because Japan did not sign them. As to the legal effect of the Japanese Instrument of Surrender, supporters of this opinion argue

²³ See generally Su and Cheng ed., *supra* note 19

²⁴ See Crawford, *supra* note 11, at 208.

²⁵ See O'Connell, *supra* note 19, at 407-408.

that the Instrument was not signed in light of the procedure of a treaty. It is just an agreement during the time of war in order to end the war. A peace treaty is needed to deal with the affairs after the war.²⁶ Crawford further argues that Taiwan remained formally Japanese territory until the Peace Treaty because "the cession of territory at the end of a war must await the peace treaty". However, the Peace Treaty in 1951 left it undetermined because there was no agreement on which government represented China.²⁷ The second view was also supported via some diplomatic documents from the United Kingdom, the United States and Japan.²⁸ Based on the rhetoric of the second view, it is also argued that the Peace Treaty and Treaty of Taipei left Taiwan *terra nullius* or territory subject to a *condominium* of the United Nations.²⁹

Therefore, some supporters of Taiwanese independence fear that the Cross-Strait matters would fall essentially within the domestic territory of China. They take the view that the legal status of Taiwan was undetermined. Following this argument, at least two different approaches are employed to interpret the sovereign status of Taiwan. The first one is that since the ROC government has occupied Taiwan for more than 60 years, ROC owns the sovereignty of Taiwan under the principle of "occupation" or "prescription".³⁰ The second one is that the Peace Treaty and the treaty of Taipei left room for Taiwanese people to determine themselves the future of Taiwan.³¹ The right of self-determination becomes a prevalent viewpoint in Taiwan, both the KMT and DPP argue that "the future of Taiwan should be determined by 23 million Taiwanese people".

²⁶ See Chen et.al., *supra* note 19, at 55.

²⁷ See Crawford, *supra* note 11, at 207-208.

²⁸ See Crawford, *supra* note 11, at 207-208; O'Connell, *supra* note 19, at 408-410.

²⁹ See O'Connell, *supra* note 19, at 409-413; Crawford, *supra* note 11, at 209.

³⁰ See O'Connell, *supra* note 19, at 414; Crawford, *supra* note 11, at 209; Chen et. al., *supra* note 19, at 79.

³¹ Chiang, *supra* note 19, at 186-213; Chen et. al., *supra* note 19, at 81-85.

In my view, the second view seems more convincing subject to contexts of the treaties as what we learn from Article 34.1 of the VCLT. However, it should be borne in mind that the Peace Treaty and the Treaty of Taipei were signed in a time both China and the world were facing a new and big change. In addition to Chinese Civil War, the outbreak of the Korean War in 1950 led to the military stand-off between the United States and the Union of Soviet Socialist Republics (USSR) and then the Cold War had continued for decades of years. The United States needed partners to fight against the USSR together in the Far East. Therefore, even though KMT-led ROC government was clearly defeated by the CCP in 1949, unlike the rapid recognition of the PRC government by the United Kingdom in 1950, the United States still recognised KMT-led ROC government to be legal representative of China until 1979.³² Otherwise, in light of the contexts of the Cairo Declaration, the Potsdam Proclamation and the Japanese Instrument of Surrender, it was clear to see that the Allied intended to pass the sovereignty of Taiwan to the then Chinese government, even though those documents were regarded as policy statements. In other words, if the outcome of the Chinese Civil War had been different in 1949 or the PRC had stood on the side of the United States at that time, the contexts of the Peace Treaty might have been written differently from what it is now. Therefore, it could be argued that the contexts of the Peace Treaty and the Treaty of Taipei that left the status of Taiwan undetermined were the outcome of the play of the international relations, by which the United States could justifiably intervene the matters between the PRC and the ROC while prevent from the violation of Article 2.7 the Charter of the United Nations which forbids the intervention of matters essentially within the domestic jurisdiction of any state. From

³² See Crawford, *supra* note 11, at 199-200; Huang-chih Chiang, *Fiftieth Anniversary of the Treaty of San Francisco* (in Chinese), 15 *New Century Think Tank Forum* 98, 102 (2001).

this perspective, it can be argued that to some degree, the legal status of Taiwan has been "distorted" by the play of international relations and cannot be resolved any more merely by the interpretation of treaties.

2.3 The influence of the unclear sovereign status to Taiwan

It is no doubt that the unclear sovereign status of Taiwan has very deep influence in many aspects. For example, the ROC in Taiwan has swamped into an extremely hardship on the future of Taiwan, namely the pursuit of reunification or independence, and the so-called "national identity" in Taiwanese society. It also has to fight against the military threat from the PRC, maintain diplomatic and trade relations with other States, and promote its participation in the regional and international organisations.

2.3.1 Taiwan's attitude toward the international community

Amongst all of them, the long-standing status of Taiwan's non-membership in the United Nations leads to Taiwan's peculiar attitude toward the United Nations and even the international community as a whole. More precisely speaking, Taiwanese people, including the academic researchers and political parties, thought the ROC (or Taiwan) is not treated fairly by the international community.³³ Of course, this attitude cannot be quantified but can be seen via some events. A good example was the spread of Severe Acute Respiratory Syndrome (SARs) from the PRC to Taiwan in 2003. Because Taiwan was not a member state in the World Health Organisation (WHO) and the PRC insisted that any measure taken by the WHO should be done through the

³³ See generally Cheng-Yi Lin and Wen-cheng Lin, *Why and How does Taiwan Participate in the United Nations?* (in Chinese), 14 *New Century Think Tank Forum* 30, 30-42 (2001), available at: <http://www.taiwanncf.org.tw/tforum/14/14-05.pdf> ; "Burkina-Taiwan: une amitié de cœur", Chinese translation by the President Office of the ROC, available at: http://www.president.gov.tw/Portals/0/FeaturesSection/Foreign-visits/President-Ma/2012p01/chinese/international_news03.html (last visited 5 March 2016).

PRC, Taiwanese government could not directly obtain necessary information from the WHO, which increased the difficulty for Taiwan to fight against the SARs promptly.³⁴

Another good example to prove this attitude is that when the former President of the ROC, Chen, Shui-bian, attempted to apply for the Taiwan's accession to the United Nations in 2007, his letter of application to the Secretary-General, Ban, Ki-moon, stated that:

The international community of today chooses to disregard the efforts of Taiwan's 23 million people in their pursuit of dignity and peace. It would rather ask a country that advocates the universal values of freedom, democracy, human rights, and peace to submissively remain silent when its identity is denied and security threatened. Whereas globalization draws nations and peoples around the world closer under shared interests and concerns, the United Nations has long excluded Taiwan from participation, erecting a wall against it and placing it in political apartheid. Such **unfair treatment towards Taiwan** is incomprehensible and unbearable.³⁵(emphasis added)

From a legal perspective, one of the core problems for the non-membership of the ROC in the United Nations is that the ROC has not explicitly claimed the statehood distinct from the PRC. O'Connell's view is often cited here: "a government is only recognised for what it claims to be."³⁶ Accordingly, even we put aside the intervention from the PRC, it is not surprising for the United Nations to reject the application of the ROC to renew its membership in the United Nations. That is also why advocates of Taiwanese independence ask for so-called "*de jure* independence"

³⁴ See Shiing-er, Twu, In Memory of 10th Anniversary of SARS event and the Way of Taiwan to Join the WHO (in Chinese), 62 New Century Think Tank Forum 9, 9-18 (2013).

³⁵ "President Chen Shui-bian's Letters to UN Secretary-General Ban Ki-moon and UN Security Council President Wang Guangya on July 31, New Release, Ministry of Foreign Affairs of the ROC, available at: "<http://english.president.gov.tw/Default.aspx?tabid=491&itemid=18997>" (last visited 3 March 2016).

³⁶ See O'Connell, *supra* note 19, at 415; Crawford, *supra* note 11, at 211; Chen et. al., *supra* note 19, at 86.

because they argue that is the only way to make Taiwan a normal country.³⁷

2.3.2 Taiwan's attitude toward the international environmental affairs

Besides, Taiwan's attitude toward international environment affairs is also affected by Taiwan's non-membership in the United Nations system. As mentioned above, due to the ambiguous status under international law and the international political reality, Taiwan has had less interaction with international community at the inter-governmental level since its retreat from the United Nations. Compared to the progress in the application for the accession to the GATT/WTO from 1990, Taiwan's first contact with international environmental treaties is like a nightmare.³⁸

The "rhinoceros horn" case in 1992 was the starting point. Wen-chen Shih described that:

In November 1992, a London-based NGO launched a campaign in the United Kingdom to boycott any product imported from Taiwan. This was because the alleged use of rhinoceros horn as a traditional Chinese medicine in Taiwan was in breach of Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The Taiwanese Government initiated various measures to crack down on the illicit trade and outlawed the import of rhinoceros horn. In the meantime, several conservationist NGOs contemplated lobbying CITES to impose trade sanctions against Taiwan. Subsequently, a series of interactions between Taiwan and the CITES Secretariat began.³⁹

Further in September 1993, a strange but deeply-influenced decision was adopted at the 30th Standing Committee meeting of the CITES, providing that: "reports concern

³⁷ Chen et. al., *supra* note 19, at 86.

³⁸ Wen-Chen Shih, *The Greening of the WTO?-Trade, Environment and Taiwan* 281 (in Chinese) (Taipei: Angle, 2008). See also, Chun-hung Lin, *Historical Review of Taiwan's Environmental Legislative Adjustment and Its Implications under International Agreements*, 6 US-China Law Review 13, 20 (2009).

³⁹ Wen-Chen Shih, Multilateralism and the Case of Taiwan in the Trade Environmental Nexus: The Potential Conflict between CITES and GATT/WTO, 30 Journal of World Trade 109, 121 (1996).

that the measures taken by **the People's Republic of China and the competent authorities in Taipei** are not adequate to sufficiently control illegal trade in rhinoceros horn and tiger specimens and failed to comply with measures outlined in Resolution Conf. 6.10. **Parties should consider implementing stricter domestic measures up to and including prohibition of trade in wildlife species now.**⁴⁰(Emphasis added) The decision is obviously interesting because it seems to admit the jurisdiction of the PRC does not reach Taiwan at all, which is inconsistent with the "One China Policy" in the United Nations. In any case, no decision of trade sanction was made at the Ninth Conference of the Parties (COP9) of the CITES in November 1994.

However, Taiwan was unilaterally sanctioned by the imposition of the Pelly Amendment of the US in 1994. The *Pelly Amendment* aimed to restrict on importation of fishery or wildlife products from countries which violate international fishery or endangered or threatened species programs. Pei-Ying Lee concludes from a historic review that the reasons for the United States to do so are: 1) in the late 1980s the conservation efforts for the elephant and the rhinoceros reached their height, and Taiwan was one of the key circulation routes and trade regions; 2) Taiwan's responses to the international community then, especially to the CITES, were weak and ineffective; 3) as the host country of the Assembly of States Parties of CITES, the United States was under pressure both at home and abroad to enforce the Pelly Amendment; 4) the Republic of China was not a member of the United Nations, thus

⁴⁰ Paragraph 6 of Decisions of the Standing Committee on Trade in Rhinoceros Horn and Tiger Specimens Brussels (Belgium), 6-8 September 1993.

unable to fight for its own rights in the international arena.⁴¹ Taiwan's parliament was forced to adopt the amendment of the Wildlife Conservation Act on 29 October 1994 in order to avoid being sanctioned. As a matter of fact, the measures taken by the *Pelly Amendment* were not authorized by the CITES. However, even if they were authorized by the CITES, Taiwan had no legal standing to claim its right because Taiwan was not a contracting party in the CITES. That is also one of the reasons why Taiwanese people think Taiwan is not treated fairly by the international community.

The event of rhinoceros horn deeply influenced the attitude of Taiwan's society to international treaties and affected the mode of policy making at the central governmental level. Firstly, according to Shih's observation, it led to a thought from government and people in Taiwan that international environmental treaties are not friendly to Taiwan. Secondly, due to the improvements and success in economic development and international trade, it is ironically to say to some extent that Taiwan government always focuses on the trade advantages or disadvantages which the international environmental agreements will bring about to Taiwan when dealing with international environmental issues.⁴² Environmental problems as such are not the main concerns.

In the same vein, it is fair to say that concerning the issue of global warming, the fear to be trade sanctioned by the international community also exists in Taiwanese society today. After the signature of Kyoto Protocol in 1997, an article from a popular and reputable magazine in Taiwan argued that "Accompanied by **trade sanction**,

⁴¹ See Pei-Ying Lee, *The Influence of the Pelly Amendment to Taiwan's Conservation Policies*, dissertation of master in School of Forestry and Resource Conservation, National Taiwan University (2008).

⁴² See Shih, *supra* note 38.

green storm will brood over Taiwan."⁴³ In addition, one governmental official in Environmental Protection Administration (EPA) of Taiwan said in an interview that "the most serious sanction in the future is that the contracting parties are **prohibited to trade** with those who do not follow (the Protocol)...There are more than 180 countries in the world, and 169 of them are the contracting parties, how could we do if Taiwan could not trade with them?" (Emphases added).⁴⁴ Further, a senator in the Parliament said that "the policies, which categorize from the private fossil-based power plant to significant development plans, should be reviewed again. Taiwan should be conscious of the risk of *Green 301*." (Emphasis added)⁴⁵

Moreover, even after Taiwan has become a WTO member since 2002, this kind of dread still exists. Chi-Yuan Liang, a then economic researcher in Academia Sinica, which is the most authoritative academic research institute in Taiwan, argued in 2005 that "though the Kyoto Protocol just entered into force this year, if Taiwan is not able to respond actively, some industries and products will probably be under the risk of being **sanctioned** by the EU and other advanced countries by 2012."⁴⁶ Furthermore, president Ying-Jiou Ma vowed to levy energy tax in 2008, stating that "...though Taiwan is not a contracting party of the Kyoto Protocol, Taiwan will **be denied to trade** by the international community if we do not control the volume of GHG emissions."⁴⁷ (Emphasis added)

Taiwan's fear of trade sanction by other countries even exists nowadays. In June

⁴³ I-Chin Cheng, *An Earthquake of Taiwan's Industry: Green Storm Broods over Taiwan* (in Chinese), 203 Common Wealth: Taiwan's Leading Magazine 154, 154 (1998).

⁴⁴ Id., at 157-158.

⁴⁵ Id., at 164.

⁴⁶ Chi-Yuan Liang, *Establishing Taiwan's Green Tax Regime* (in Chinese), 22 Journal of Sustainable Development for Industry 10, 15 (2005).

⁴⁷ "Ma Ying-Jiou Reiterates to Levy Energy Tax", *Chinatimes*, 22 April 2008.

2015, Taiwanese parliament passed the Greenhouse Gas Reduction and Management Act, the most important legislation for combating climate change. The Ministry of the EPA of Taiwan reiterated in a number of interviews by the media that "The Act is a pressure to push all (Taiwanese) people reducing the emissions of greenhouse gases, and by so doing the industries will not need to worry the trade sanctions...."⁴⁸

From the legal perspective, in my view, Taiwan's fear of trade sanction by other countries is unnecessary in the meantime, especially when Taiwan is already a member of the WTO now. Of course the fear was understandable in the past because other countries could take unilateral measures against Taiwan without considering their obligations in the MEAs. However, since the WTO regime has covered more than 90% of the international trade on goods and services, once Taiwan is unilaterally imposed trade-restricted measures by other countries, it can claim its own right in the WTO.

Moreover, the term "trade sanction" is not appropriate because trade sanction is different from trade-restricted measures. Many trade-restricted environmental measures, for example the EU proposal to incorporate foreign aircraft operators into the EU-ETS, are employed for compliance of their obligations under the MEAs, or for the rebalance of competitiveness and avoidance of carbon leakage to other countries, rather than being a form of "punishment", even though they could cause similar economic effects in reality. However, the attitude toward international environmental affairs has been deeply embedded into Taiwanese society; even lawyers misuse it as

⁴⁸ See for example, "Taiwan is making effort to 50% of carbon reduction by 2030", *Chinatimes*, 18 September 2015.

well.⁴⁹

To sum up, Taiwan's first contact with multilateral environmental agreements (MEAs) was not so comfortable to its government and people. The event of rhinoceros horn and its subsequent development deeply affected Taiwan's attitude against the other MEAs, including the UNFCCC, the Kyoto Protocol and the Paris Agreement. As Shih argues, this interaction makes government and people in Taiwan hard to exceed the appearance of 'trade sanction' to the MEAs.⁵⁰ Government and some people in Taiwan ignore the environmental objective of the MEAs *per se*.

2.3.3 Taiwan's strategy on the making of environmental laws and policies

Due to the fact that on one hand Taiwan has difficulty in participating international affairs since its withdrawal from the United Nations and Taiwan needs to cooperate with other countries in order to survive itself, Taiwanese government has used several approaches to incorporate itself into international community.

A. Meaningful participation approach

The basic idea of the meaningful participation in Taiwan's diplomatic policy is that the ROC in Taiwan has the real need to participate in international affairs. Due to the current situation of Taiwan's unclear legal status, Taiwan would like to reduce the controversy on the problem of ideology and does not insist its official title "ROC" or "Taiwan" in regional or international organisations as long as Taiwan can

⁴⁹ For example, see C. V. Chen, "This year is the key year to join the new climate convention" (in Chinese), *UDN*, 4 June 2015, available at: <http://udn.com/news/story/7339/944701-%E5%8A%A0%E5%85%A5%E6%96%B0%E6%B0%A3%E5%80%99%E5%85%AC%E7%B4%84-%E9%97%9C%E9%8D%B5%E5%9C%A8%E4%BB%8A%E5%B9%B4> (last visited 8 March 2016).

⁵⁰ Shih, *supra* note 38 at 285.

"substantially" or "meaningfully" participate in them.⁵¹

The origin of the Meaningful Participation approach could be traced back to the late 1980s when the then President Lee, Teng-hui adopted the so-called "Practical Diplomacy" policy. In brief, the "Practical Diplomacy" policy aimed to show the international community the results of Taiwanese democratic improvement; to achieve diplomatic purpose by using all diplomatic resources under the principle of democracy; to fight against the invasion of the PRC by strengthening cooperation with other countries; and to assist the development of States who are friendly to Taiwan for the aim of world peace.⁵² Since then, Taiwanese government had made efforts to strengthen its bilateral relations with other countries, whatever with or without diplomatic relations with Taiwan, and attempted to participate in more international organisations, such as the United Nations, WHO and the WTO, and the regional fora such as the Asia-Pacific Economic Cooperation (APEC)⁵³ or the recent effort to join the Trans-Pacific Partnership (TPP).

Taiwan has experienced two shift of political power between KMT and DPP from 2000 to 2015. During this period, Chen, Shui-bian's government took the so-called "human rights diplomacy" approach from 2000 to 2007. Chen was more aggressive

⁵¹ See "Taiwan's quest for meaningful participation in the International Civil Aviation Organization (ICAO)", available at: http://www.mofa.gov.tw/igo/News_Content.aspx?n=CD0EC8D01432D27B&sms=B6999C1011992A87&s=C79319BBC3D16D35; "Taiwan's Bid for Meaningful Participation in the UNFCCC", 2014 version, available at: <http://www.mofa.gov.tw/igo/NewsNoHeadOnlyTitle.aspx?n=731990F806254F77&sms=F34923ABE419ADE0> (last visited 8 March 2016).

⁵² See the Ministry of Foreign Affairs of the ROC, *The Foreign Relations Yearbook 1997 Republic of China* (in Chinese), available at the official website of the MOFA: http://multilingual.mofa.gov.tw/web/web_UTF-8/almanac/almanac1997/2.html#s21b (last visited 8 March 2016).

⁵³ MOFA, Id. See also, Sigrid Winkler, 'Taiwan's UN Dilemma: To Be or Not To Be', 9 *Taiwan-U.S. Quarterly Analysis* (2012), available at: http://www.brookings.edu/research/opinions/2012/06/20-taiwan-un-winkler#_ftnref5 (last visited 8 March 2016)..

on Taiwan's UN campaign by the call for fundamental human rights and democracy.⁵⁴ Ma, Ying-jeou's government takes the so-called "viable diplomacy" from 2008 to present. He dedicates to mitigate the political tension and improve the cooperation of economy and trade between the PRC and Taiwan. Even though the KMT and DPP take different attitude and position toward the PRC and take different approach on the UN campaign, the basic idea of meaningful participation in international affairs is very similar to Lee, Teng-hui's practical diplomacy approach, . As Ma government argues:

The point of viable diplomacy policy is to take a pragmatic approach to break through the impasses that have dogged Taiwan's foreign relations, and to replace confrontation with dialogue in a manner that respects the principles of dignity, autonomy, pragmatism, and flexibility.⁵⁵

Following the meaningful participation strategy and accompanying the trend of climate change issue, the UNFCCC and International Civil Aviation Organisation (ICAO) have been targeted by Ma Government as the priority of meaningful participation since September 2009.⁵⁶

B. Voluntary compliance approach

From the perspective of legal research, "voluntary compliance" approach may be more important. Although the term is not officially defined in any instrument, the basic idea of it is that even though Taiwan cannot participate in the United Nations

⁵⁴ See the Ministry of Foreign Affairs of the ROC, *The Foreign Relations Yearbook 2000 Republic of China*, available at the official website of the MOFA: http://multilingual.mofa.gov.tw/web/web_UTF-8/almanac/almanac2000/mofa_3.htm (last visited 1 March 2016).

⁵⁵ Office of the President of the ROC, *Policy Standpoint on Visible Diplomacy*, available at: <http://english.president.gov.tw/Default.aspx?tabid=1145> (last visited 2 March 2016).

⁵⁶ See the Ministry of Foreign Affairs of the ROC, *Government decides to promote the meaningful participation in the UNFCCC and ICAO; the MOFA calls for the support by all States*, Press release, http://www.mofa.gov.tw/igo/News_Content.aspx?n=3E9C6A131C420E9D&sms=B5877621755C11D4&s=504AB58CAE8A1C62 (last visited 8 March 2016).

and its subordinate agencies, Taiwan is willing to voluntarily comply with the related international norms.

There are several reasons for Taiwan to take this approach. Firstly, in the era of globalisation and proliferation of international organisations, Taiwan has the need to catch up the trend of international norms. Even though the non-membership in the United Nations system is disappointed, to a large degree Taiwan has no choice but to follow the international norms. In particular, because Taiwan's economy is highly dependent on the international trade, being consistent to the international norms become very important for Taiwanese companies for their international markets. Secondly, Voluntary compliance is one of the approaches for Taiwan to enforce the strategy of meaningful participation. by so doing, Taiwan attempts to show the international community that Taiwan is a responsible country and would like to bear the burden together with other countries to cope with global issues, such as climate change.⁵⁷

Voluntary compliance approach can be obviously proved by the incorporation of international laws in Taiwan. To date, at least 5 legal instruments which Taiwan is not a contracting party have been directly transformed into Taiwanese domestic laws, namely the Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights announced in 2009; the Enforcement Act of Convention on the Elimination of All Forms of Discrimination against Women announced in 2011; the Implementation Act of the Convention on the Rights of the Child and the Act to Implement the Convention on the Rights of Persons with Disabilities both announced in 2014. All of them take the

⁵⁷ See "Taiwan's Bid for Meaningful Participation in the UNFCCC", 2014 version, *supra* note 51.

same legislation model. For example, Article 1 of the Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights states that:

This Act is made to implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (hereafter the two Covenants), which were both adopted by the United Nations in 1966, and to strengthen our country's human rights protection system.

Article 2 of the Act further states that: 'Human rights protection provisions in the two Covenants have domestic legal status.'

Also to this end, the Executive Yuan of the ROC promulgated the Direction Governing the Incorporation of Multilateral and International Treaties and Agreements by the Subordinate Agencies of the Executive Yuan in 2014, by which the subordinate agencies of the Executive Yuan can follow to go through the process.

In addition to the direct incorporation of international laws, Taiwan has also passed many domestic laws which are substantially consistent with the international norms concerned, especially in the field of environmental laws, even though Taiwan is not a contracting party in all of them. For example, Taiwan amended the Management Regulations for the Import and Export of Industrial Waste in 5 September 2008 in order to catch up the norms of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.

The most obvious evidence of Taiwan's voluntary compliance approach is shown on the issue of climate change. Unlike the United States which explicitly refuses to ratify the Kyoto Protocol, Taiwan has employed the so-called 'voluntary compliance' approach on the issue of climate change since the then President Den-Huei Lee claimed in written congratulations to the World Summit in 1992. It stated that:

...Although the ROC (Taiwan) is not a party of the Montreal Protocol or the UNFCCC, **we are willing to voluntarily comply with their norms.**⁵⁸
(Emphasis added).

Shih argues that due to the background at that time, the genuine intention of Taiwan's statements is to prevent from trade retaliation or restriction rather than the implementation of UNFCCC and Kyoto Protocol.⁵⁹

Also, in the written statement sent by Stephen Shen, the then Minister of the Environmental Protection Administration to the UNFCCC Secretariat in June 2010, Shen vowed that Taiwan would voluntarily commit to implement its timetable and target of CO₂ reduction.⁶⁰

Further, the legislation of the Greenhouse Gas Reduction and Management Act is the best example. It was the first time submitted by the Executive Yuan of the ROC to the congress for consideration in 2006. The explanatory note of the draft states that:

...Due to the special international status, R.O.C. (Taiwan) cannot sign the UNFCCC and Kyoto Protocol; however, being a member of the global village, **we are willing to bear the common but differential responsibility in light of the Convention**, in order to prevent the climate change by using cost-effective and lowest-cost approaches, and pursuit sustainable development. (Emphasis added)

Due to the lack of support from the industrial groups, the Act had been postponed for consideration for almost 10 years and was finally passed on 15 June 2015 and entered into force on 1 July 2015. The above explanatory note is not changed in the

⁵⁸ Wen-Chen Shih, *supra* note 38, at 181

⁵⁹ Shih, *supra* note 38, at 251.

⁶⁰ Ministry of Foreign Affairs of ROC (Taiwan), *The Case for Taiwan's Meaningful Participation in the UNFCCC 1* (in Chinese) (19 November 2010).

final version.⁶¹ Also, the Act is highly linked with the UNFCCC, which will be discussed in Chapter 4. Therefore, it is fairly to say that Taiwan has taken the voluntary compliance approach to catch up international norms.

Scholars in different academic fields have different views on the voluntary compliance approach. Yi Yuan analyses the role that international norms play in the cross-strait relations from the perspective of international relations and argues that fairness, peace means and universal values are the core elements of the international norms. When Taiwan voluntarily meets the expectation of international norms, Taiwan establishes a good communication model with the international community, by which the international community can trust and understand more about Taiwan and constantly interact with Taiwan. In other words, by so doing, Taiwan has adequately behaved as a "norm entity" even though Taiwan is not seen as a normal country. In such a case, international norms are used as a safe valve to restrict the imposition of sovereign will of the PRC to Taiwan.⁶²

However, some Taiwanese scholars in the field of international environmental law worries that Taiwan may be legally bound or commit certain obligations by its unilateral declaration and legislation that voluntarily comply with international norms, despite of its non-party status in the related international organisations or MEAs.⁶³ It probably does not meet the best interests of Taiwan. It will more be discussed later in section 2.4 of this chapter.

2.3.4 Taiwan's participation in inter-governmental organisations and agreements

⁶¹ See EPA, "The General Explanation of the Greenhouse Gas Reduction and Management Act"(in Chinese), available at: <http://www.epa.gov.tw/public/Data/511181643871.pdf>.

⁶² Yi Yuan, "Norm Constructivism and Cross-Strait Relations: Theory and Practice", in Tzong-ho Bau and Yu-Shan Wu ed., *Revisiting Theories on Cross-Strait Relations* 365-366 (in Chinese) (Taipei: Wunan, 2nd ed., 2012).

⁶³ See generally, Shih, *supra* note 58, at 181-264.

The influence of Taiwan's vague sovereign status and non-membership in the United Nations are reflected in its participation of inter-governmental organisations. As indicated above, under the 'meaningful participation' approach, Taiwan shows its flexibility on the issues of title or the membership when attempting to incorporate into the international community. This could be analysed from several aspects as follows.

A. Forms of Taiwan's membership in inter-governmental organisations

The forms of Taiwan's membership in inter-governmental organisations or international treaties are divided according to the nature of the international treaty or organisation *per se*. Firstly, if they are affiliated under the UN system, Taiwan cannot join as a full member, but at most attends as an observer', such as the World Health Assembly of the WHO. Secondly, if they are built up outside the UN system, Taiwan can become a full member (e.g. WTO), an observer (e.g. OECD), a cooperating non-member (e.g. ICCAT), a corresponding member (e.g. OMIL), a 'Fishing Entity' (e.g. Convention for the Conservation of Southern Bluefin Tuna), or an associate member (e.g. GBIF) respectively. (See Table 2-1 to Table 2-5) Except the status of a full membership, Taiwan's rights in these organisations, treaties or agreements are very limited.

Table 2-1 International Organisations in which Taiwan is a full member

Title	Abbreviation	Year of Taiwan's accession
South Pacific Regional Fisheries Management Organisation	SPRFMO	2012
International Council for Information Technology in Government Administration	ICA	2010
Inter-American Tropical Tuna Commission	IATTC	2010
Standards and Trade Development Facility	STDF	2010
Advisory Centre on WTO Law	ACWL	2004
Western and Central Pacific Fisheries Commission	WCPFC	2004
Extended Commission for the Conservation of Southern Bluefin Tuna	CCSBT	2002
The International Scientific Committee for Tuna and Tuna-like Species in the North Pacific Ocean	ISC	2002
World Customs Organization (Technical Committee on Customs Valuation)	WCO	2002
World Customs Organization (Technical committee on Rules of Origin)	WCO	2002
World Trade Organization	WTO	2002
The International Competition Network	ICN	2002
Asia-Pacific Association of Agricultural Research Institutions	APAARI	1999
Egmont Group	EG	1999
Association of Asian Election Authorities	AAEA	1998
Asia/Pacific Group on Money Laundering	APG	1997
Study Group on Asian Tax Administration and Research	SGATAR	1996
Asia-Pacific Legal Metrology Forum	APLMF	1994
Association for Science Cooperation in Asia	ASCA	1994
International Association of Insurance Supervisors	IAIS	1994
Central American Bank for Economic Integration	CABEI	1992
International Satellite System for Search and Rescue	Cospas-Sarsat	1992
Conference of Governors of South East Asian Central Banks	SEACEN	1992
Asia-Pacific Economic Cooperation	APEC	1991
International Organization of Securities Commissions	IOSCO	1987
AVRDC-The World Vegetable Centre	AVRDC	1971
Food and Fertilizer Technology Centre for the Asian and Pacific Region	FFTC/ASPAC	1970
Afro-Asian Rural Development Organization	AARDO	1968
Asian Development Bank	ADB	1966
International Cotton Advisory Committee	ICAC	1963

Title	Abbreviation	Year of Taiwan's accession
International Seed Testing Association	ISTA	1962
Asian Productivity Organization	APO	1961
World Organisation for Animal Health	OIE	1954

Sources: Ministry of Foreign Affairs, R.O.C (Taiwan), available at:

<http://www.mofa.gov.tw/EnOfficial/NationalOrg/OrgList/?opno=3400817f-1a5b-443c-8969-174b5c7819b2>

Table2-2 International Organisations in which Taiwan is an observer

Title	Abbreviation	Year of Taiwan's Accession
International Renewable Energy Agency	IRENA	2011
World Health Assembly of the World Health Organization	WHA	2009
Organization for Economic Cooperation and Development (Fisheries Committee)	OECD	2006
World Customs Organization (Revised Kyoto Convention Management Committee)	WCO	2006
Conferencia de las Fuerzas Armadas Centroamericanas	CFAC	2005
Organization for Economic Cooperation and Development (Steel Committee)	OECD	2005
Kimberley Process	KP	2003
Organization for Economic Cooperation and Development (Competition Committee)	OECD	2002
Sistema de la Integración Centroamericana	SICA	2000
Parlamento Centroamericano	PARLACEN	1999
Food Aid Committee	FAC	1995
International Grains Council	IGC	1995
Commission for the Conservation of Southern Bluefin Tuna	CCSBT	1994
European Bank for Reconstruction and Development	EBRD	1991
Foro de Presidentes de Poderes Legislativos de Centroamerica y la Cuenca del Caribe	FOPREL	1991
Inter-American Development Bank	IDB	1991

Sources: Ministry of Foreign Affairs, R.O.C (Taiwan), available at:

<http://www.mofa.gov.tw/EnOfficial/NationalOrg/OrgList/?opno=6453f36a-1a1d-44ad-b912-40729a8d53c5#>

Table 2-3 International Organisations in which Taiwan is a Cooperating**Non-Member**

Title	Abbreviation	Year of Taiwan's Accession
International Commission for the Conservation of Atlantic Tunas	ICCAT	1972

Sources: Ministry of Foreign Affairs, R.O.C (Taiwan), available at:

<http://www.mofa.gov.tw/EnOfficial/NationalOrg/OrgList/?opno=7b50c92a-bc2f-45e3-8060-75e7e3741656>

Table 2-4 International Organisations in which Taiwan is a Corresponding**Member**

Title	Abbreviation	Year of Taiwan's Accession
International Organization of Legal Metrology	OMIL	1997

Sources: Ministry of Foreign Affairs, R.O.C (Taiwan), available at:

<http://www.mofa.gov.tw/EnOfficial/NationalOrg/OrgList/?opno=fb11e6ab-e95b-476e-9b3c-685a2d353983>

Table 2-5 International Organisations in which Taiwan is an Associate Member

Title	Abbreviation	Year of Taiwan's Accession
Global Biodiversity Information Facility	GBIF	2001
Conférence Générale des Poids et Mesures	CGPM	2002

Sources: Ministry of Foreign Affairs, R.O.C (Taiwan), available at:

<http://www.mofa.gov.tw/Organizations/Organizations/Participation/?opno=4b1095c6-3e33-4c54-a42b-17c22c2b82c3>

B. Taiwan's title in inter-governmental organisations and agreements

Even though Taiwan can become a full member in a few inter-governmental organisations, Taiwan's title is always controversial under the "One China Policy" of the PRC. Taiwan is not allowed to use its formal name Republic of China or its well-known name "Taiwan" in all of them. Rather, "Chinese Taipei" is the title which can be accepted by the PRC government in most of cases. The only exception is the WTO. Due to its unique nature, the membership of the WTO is not limited to nations in the UN; rather, WTO is more flexible than the UN on the issue of accession. Article XII of the WTO agreement provides that:

Any State **or separate customs territory** possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto. (Emphasis added)

Taiwan, therefore, uses the title "Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu" to join the WTO in 2002, although it is still called "Chinese Taipei" as the short title.⁶⁴ This is called WTO model in Taiwan. To date, Taiwan uses the WTO model to sign any treaty with other countries which do not have diplomatic relation with Taiwan.

Another example relating to Taiwan's title in inter-governmental organisation is the change of Taiwan's title in the OIE in 2007. The international committee of the OIE adopted Resolution No. XX by majority vote in a bid to get China involved into the

⁶⁴ In an informal conversation between the author and one Taiwanese senior governmental official who took part in the process of Taiwan's WTO accession, the official said that when Taiwan submitted its application for accession to GATT by the name of 'The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu', Professor John H. Jackson told the official that this is a very 'skilful' legal action to break the political stalemate and restriction between Taiwan and China.

OIE in 2007.⁶⁵ The resolution restored the exercise of the legal rights and obligations of the People's Republic of China within the OIE as a sovereign state member of the OIE, while Taiwan was compelled to change its title from ROC to Chinese Taipei and continued to participate in the activities of the OIE as a "non-sovereign regional member of the OIE".⁶⁶

C. Taiwan's title in bilateral treaties⁶⁷

Apart from the inter-governmental organisations and regional or multilateral treaties, Taiwan's title in bilateral treaties is very important to show how the controversy on the Taiwan's sovereignty affects Taiwan itself and how Taiwan breaks through the diplomatic hardship with other countries which do not have official ties with Taiwan. It could be analysed as follows.

Firstly, Taiwan government has signed four free trade agreements with four States which have diplomatic relations with Taiwan. In these cases, Taiwan undoubtedly uses ROC as the title of the signatory state. (See Table 2-6)

**Table2-6 FTAs between Taiwan and States having diplomatic relations with
Taiwan**

Title	Year of entry into force
Free Trade Agreement between the Republic of China and the Republic of Panama	2004
Free Trade Agreement between the Republic of China and the Republic of Guatemala	2006

⁶⁵ OIE, Resolution No. XX: Restoration of the Exercise of the Legal Rights and Obligations of the People's Republic of China to the OIE, adopted by the International Committee during its 75th General Session, 75 GS/FR-Paris, 25 May 2007.

⁶⁶ See Id.

⁶⁷ Nowadays, treaties between two countries could be designed as different titles due to different concerns, such as FTA, BIT or partnership agreement. However, these treaties are bilateral in nature whatever the titles and contents are. Therefore, the thesis uses 'bilateral treaties' as a general term here.

Title	Year of entry into force
Free Trade Agreement between the Republic of China and the Republic of Nicaragua	2007
Free Trade Agreement between the Republic of China and the Republic of El Salvador and Republic of Honduras	2008

Sources: Ministry of Foreign Affairs, R.O.C (Taiwan), available at:
<http://www.trade.gov.tw/english/Pages/List.aspx?nodeID=672>

Secondly, the relationship between Taiwan and China is changing in recently years. On the side of the PRC, the PRC still sees Taiwan as a province of the PRC and never gives up the use of military action if Taiwan declares independence. However, the PRC government realises that it cannot get to unification just by military threats or diplomatic oppression, so it has turns to use peaceful approach, i.e. conferring economic preferential treatment to Taiwan. On the side of Taiwan, although Taiwan still sees Chinese government as a hostile government, Taiwan also realises the influence and importance of China as a world factory and market. Therefore, the current Taiwan government started to ease the political tension with China in order to get benefits in economic and diplomatic areas in 2008. The so-called Cross-Straits Economic Cooperation Framework Agreement (ECFA) was signed on 29 June 2010 based on the background (Table 2-7). What interesting here is that both Taiwan and Chinese entrusted two non-governmental bodies, i.e. the Straits Exchange Foundation and the Association for Relations across the Taiwan Straits, to sign a legally binding agreement for two governments. Further, no title referring to sovereignty is shown in the text.⁶⁸ This case shows the peculiarity of the relationship across Taiwan Strait: intertwining the need of cooperation, the reality of competition, and the long-lasting sovereign debate and identity of nations. That is why the relationship across Taiwan Strait cannot be interpreted only by either international law or domestic law.

⁶⁸ The English text of the ECFA is available online at:
<http://www.ecfa.org.tw/RelatedDoc.aspx?pid=3&cid=5>

Table 2-7 FTAs between Taiwan and China

Title	Abbreviation	Year of entry into force
Cross-Straits Economic Cooperation Framework Agreement	ECFA	2011

Sources: Bureau of Foreign Trade, Ministry of Economic Affairs, R.O.C.(Taiwan), available at: <http://www.ecfa.org.tw/RelatedDoc.aspx?pid=3&cid=5>

Thirdly, the signature of the ECFA between Taiwan and China is regarded as a green light for other countries which do not have diplomatic relations with Taiwan to sign FTAs or other bilateral treaties with Taiwan. It is because that once China has signed the agreement with Taiwan, it seems to have no reason for the PRC to block other countries which do not have diplomatic relations with Taiwan doing the same thing. Due to this consideration, the signature of 'the Arrangement between the Association of East Asian Relations and the Interchange Association for the Mutual Cooperation on the Liberalization, Promotion and Protection of Investment' on 22 September 2011 is an example. Also in this Agreement, it is hard to know who the signatory States are just by the title. Actually, it is an arrangement between Taiwan and Japan. Like ECFA, two non-governmental bodies were entrusted by their own governments to sign the arrangement, and no sovereign title and terms are shown in this context.⁶⁹

Moreover, The Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation (ANZTEC) and another similar agreement between Taiwan and Singapore, the Agreement between Singapore and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu on Economic Partnership, was also signed after the signature of

⁶⁹ The text of the Arrangement is available at: http://www.moea.gov.tw/TJI/main/content/ContentLink.aspx?menu_id=3613

the ECFA. (See Table 2-8) In these two cases, however, Taiwan followed its WTO model and used the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu as the full title, and Chinese Taipei as the short name.⁷⁰ Taiwan's WTO model also helps avoid Taiwan's sovereign debate, since the both countries of the agreement are the WTO members so they can "build on their rights and obligations under the World Trade Organisation"⁷¹, by which it is hard for China to oppose under its One China Policy.

⁷⁰ In the case of New Zealand, the text could be seen on Taiwan's official website : http://www.moea.gov.tw/TNE/main/content/ContentLink.aspx?menu_id=3629

⁷¹ See the Preamble of the ANZTEC.

**Table 2-8 Economic cooperation agreements between Taiwan and other countries
which do not have diplomatic relations with Taiwan**

Title	Abbreviation	Year of enactment
Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation*	ANZTEC	2013
Agreement between Singapore and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu on Economic Partnership**	ASTEP	2014
Arrangement between the Association of East Asian Relations and the Interchange Association for the Mutual Cooperation on the Liberalization, Promotion and Protection of Investment***		2011

*Sources: Ministry of Economic Affairs, R.O.C. (Taiwan), available at:

<http://www.moea.gov.tw/TNE/main/home/Home.aspx>

**Sources: Ministry of Economic Affairs, R.O.C. (Taiwan), available at:

http://www.moea.gov.tw/Tse/main/news/News.aspx?kind=1&menu_id=40&news_id=14

***Sources: Ministry of Economic Affairs, R.O.C. (Taiwan), available at:

http://www.moea.gov.tw/TJI/main/content/ContentLink.aspx?menu_id=3613

To sum up, these cases are definitely a significant breakthrough to Taiwan's diplomatic hardship, and also show the difficulty for Taiwan to establish the inter-governmental cooperation with other countries. Interestingly, "Taiwan ends up having many different personas", as Crawford argues, "it is surprising Taiwan does not suffer from schizophrenia".⁷²

2.4 Taiwan's special concern on the application of international environmental law

Taiwan is not a contracting party in many of the international organisations and agreements. Therefore, in the field of international environmental law, there is no wonder that Taiwan has special concern to consider the legal effect of the MEAs

⁷² Crawford, *supra* note 11, at 220.

toward a non-party State. The question is: in what circumstance Taiwan will be legally bound by a treaty in which Taiwan is not a contracting party?

A. treaty law

It is the principle that a treaty does not create either obligations or rights for a third State without its consent. Article 1(h) of the VCLT defines "third State" as a State not a party to the treaty. An example could be shown in the WTO jurisdiction. When dealing with the relationship between WTO laws and other international treaties, WTO Panel in *EC - Measures Affecting the Approval and Marketing of Biotech Products* case (known as *EC - GMO* case) thought that since the United States is not a party of the Convention on the Biological Diversity (CBD), the CBD is not an applicable rule between all WTO members when Article 31.3(c) of the VCLT is considered.⁷³

However, the consent of a State becomes a controversial issue in the case of Taiwan. As indicated earlier, Taiwan employs voluntary compliance approach to catch up many international environmental norms of the MEAs. Does the unilateral declaration mean that Taiwan has agreed to be bound by the MEAs?

Shih cited the Nuclear Test case in the International court of Justice (ICJ) as her arguments. In this case, France had operated several nuclear tests near New Zealand since 1966. New Zealand filed the suit to the ICJ in 1973 and 1974 respectively, asking to terminate French acts by the order of the ICJ. From July to October 1974, French government unilaterally announced for six times that it will terminate the test in 1975 by the minister of National Defense, president and minister of Foreign Affairs

⁷³ See Panel Report on *EC - Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, 292, 293/R, paras. 7.71-72 (29 September 2006).

respectively. The case was finally settled under the ground that France terminated the nuclear test in 1975.⁷⁴ As to the legal effect of declarations made by unilateral acts of a State, the ICJ held that:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo*, nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made."⁷⁵

According to this paragraph, the "publicity of the declaration" and the "intent to be bound" becomes two key elements in judging the legal status of unilateral acts of a State.

Moreover, International Law Commission (ILC) has also discussed the matter since 1996 and submitted a report (Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations) to the General Assembly of the United Nations in 2006.⁷⁶ Ten guiding principles were made in the report. Basically ILC also agree that "Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the

⁷⁴ *Nuclear Tests (New Zealand v. France)*, 1974 I.C.J. Rep. 457, at paras. 55-59.

⁷⁵ *Nuclear Tests (New Zealand v. France)*, id., at para. 46.

⁷⁶ Report of the International Law Commission on the work of its fifty-eight session, 1 May - 9 June and 3 July-11 August 2006, UN A/61/10, at paras. 160-176.

binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected."⁷⁷ However, the condition should be strict. The ILC also states that "to determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise."⁷⁸

The ICJ judgment and the opinions of the ILC are important reference on this matter, even though the ICJ did not clearly elucidate the legal effect of unilateral acts and the opinions of the ILC cannot undoubtedly be seen as a source of international law. In such a circumstance, the unilateral declaration and wordings in certain Taiwanese laws vowing to voluntarily comply with international norms may create certain legal obligations to Taiwan because the elements of it have been met.⁷⁹ If this is the case, the cost of voluntary observance could be very high because Taiwan has to fulfil its treaty obligations without simultaneously having the opportunity of participating in the negotiation and rule-making process and enjoys the rights bestowed by the treaty.⁸⁰

B. The possibility of co-existence of a treaty and a customary law

A treaty is different from a customary international law. However, in some special circumstance, a rule set forth in a treaty may be binding to a third State as a customary rule of international law. Article 38 of the VCLT states that:

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming

⁷⁷ Guiding principle 1.

⁷⁸ Guiding principle 3.

⁷⁹ See Shih, *supra* note 38, at 260.

⁸⁰ Kuei-jung Ni, *The Status of Taiwan in International Environmental Law*, 31(2) National Taiwan University Law Journal 97, 107-107 (2002). See also, Shih, *supra* note 39, at 125.

binding upon a third State as a customary rule of international law, recognized as such.

The relationship between treaty and customs is close, as Philippe Sands argues, "a treaty might codify or further develop a rule of customary law" or alternatively "the conclusion and implementation of a treaty may reflect the existence of a rule of customary law."⁸¹ Moreover, as the International Court of Justice recognised in the *Military and Paramilitary Activities Case*, customary rules may emerge which are identical to those of treaty law, and which exist simultaneously with treaty obligations.⁸² In addition, Article 102(3) of Restatement of the Law (third), Foreign Relations Law of the United States, also provides that: "International agreements create law for States parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and in fact widely accepted." In the Jurisdiction of the ICJ, Principle 21 of the Stockholm Declaration is one of the examples to be regarded as a customary law.⁸³

In the case of climate change, although it is too early to conclude, the principle of common but differentiated responsibilities articulated in Article 4 of the UNFCCC seems to have the potential to become a customary law in the future. Therefore, in such a case, even though Taiwan is not a contracting party in a certain MEA, if a rule in the MEA meets the elements so that it is regarded also as a rule of customary law, Taiwan will likely be bound by the rule. This is not the outcome that Taiwan wants.

The same logic can be applied to the issue of "*erga omnes*" obligations. It refers to

⁸¹ Philippe Sands et al., *Principles of International Environmental Law* 113 (Cambridge: Cambridge University Press, 3rd ed., 2012).

⁸² *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, at 97.

⁸³ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I. C.J. Reports 1996, at 241.

legal obligations which is owed to the whole international community of states and can be enforced by or on behalf of that community.⁸⁴ Some people attempted to usher the *erga omnes* obligations from human rights into the field of international environmental law. For example, the Draft to the Convent on Environment and Development (1995) which was made by the International Union for the Conservation of Nature and Natural Resources (IUCN) states that:

The concept of 'common concern' is not new and has been applied in other fields. It forms the basis for international laws relating to human rights, humanitarian relief and international labour relations. Those obligations are now recognised as obligations *erga omnes*, owed by all States to the entire international community.⁸⁵

The dissenting judgement of Judge Weeramantry in the *Gabčíkovo – Nagymaros Case* also regards sustainable development as an *erga omnes* obligation.⁸⁶ However, as Birnie et al. argues, if this kind of arguments is correct, the real characteristic is "not that all states have standing before the ICJ in the event of breach, but that the international community can hold individual states accountable for compliance with their obligations through institutions such as the Conference of the Parties to the Climate Change Convention or other comparable bodies endowed, whether by treaty or General Assembly resolution, with supervisory power."⁸⁷ In such a case, Taiwan will again has no opportunity to participate in the process of rule making or negotiation.

⁸⁴Patricia Birnie et al., *International law and the environment* 131 (Oxford: Oxford University Press, 2008).

⁸⁵Jimena Murillo, *Common Concern of Humankind and its Implications in International Environmental Law*, 5 Macquarie J. Int'l & Comp. Env'tl. L. 144 (2008).

⁸⁶ *GabCikovo-Nagymaros Project* (Hungary/Slovakia), Judgment, I. C. J. Reports 1997, at 7.

⁸⁷*Id.* at 131-132.

2.5 Summary of the chapter

Taiwan is a unique case in international law and politics. Taiwan's unclear sovereign status in international law intertwined with controversial self-position of the ROC and complicated operation of international politics lead to Taiwan's non-membership in the United Nations and its subordinate agencies. Due to the non-membership, Taiwan has very limited access to participate in the negotiation or rule-making process of international affairs. However, Taiwan cannot survive alone without the connection with international community in the era of globalisation, especially in the field of international trade. Accordingly, Taiwan develops a peculiar model to incorporate into international community.

In the field of international environmental law, Taiwan's first contact with the MEAs in the early 1990s was a nightmare. Nowadays, Taiwan has made efforts to voluntarily comply with international environmental norms. *Inter alia*, Taiwanese government has paid much attention to the development of international climate change regime for two decades. Conference of the Parties (COP) in the UNFCCC has adopted the Paris Agreement to replace the Kyoto Protocol after 2020. On the other hand, Taiwan has also renewed its national legislation on climate change in recently years. The following chapters will focus on how Taiwan interacts with international climate change regime from the perspective of a non-party State.

Chapter 3 Development of International Climate Change

Regime

The international climate change regime is constructed through the process of normalisation. Briefly speaking, it starts from the scientific discovery and research on the climate change phenomenon. When more and more people recognise the existence, impacts and influence of the problem to human beings or ecosystem from the scientific discovery, climate change gradually becomes an issue at the national, bilateral, regional or international level. At the international level, the problem is discussed through the negotiation of States in order to see if any consensus can be reached. Once the consensus is reached, negotiators set up a framework convention as the fundamental legal basis and then craft protocols to implement the subsequent work. In other words, scientific research, political negotiation and rule making constitute the integral parts of the international climate change regime.⁸⁸

Accordingly, this chapter firstly explores the scientific discovery to show the background information of the climate change issue. It then analyses the development of international climate change regime by scrutinizing the process of negotiations. Some critical issues will be discussed in the last part of this chapter.

3.1 Scientific discovery of Climate Change

The scientific research on climate change could be traced back to 1896.⁸⁹ However, it

⁸⁸ See Jun-rong Ye, *Climate Change: Governance and Law* 13-14 (in Chinese) (Taipei: NTU Press, 2015).

⁸⁹ See Svante Arrhenius, On the Influence of Carbonic Acid in the Air upon the Temperature of the Ground, 41 *Phil. Mag. & J. Sci.* 237 (1896)

was not until 1988 that the Intergovernmental Panel on Climate Change (IPCC) was established by the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO), with a view to providing scientific views on the current state of knowledge in climate change and its potential environmental and socio-economic impacts.⁹⁰

A. Change of climate system

Although the scientific debate on the existence of global warming and its casual linkage with artificial GHG emissions still continues in the mean time,⁹¹ the IPCC has published five assessment reports since 1990 and has taken more and more positive position on it. Firstly, the Working Group I of the IPCC published its assessment report of the physical science basis of climate change as a part of the Fifth Assessment Report (AR5) in 2013. According to the report, the IPCC observed that warming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over decades to millennia. The atmosphere and ocean have warmed, the amounts of snow and ice have diminished, sea level has risen,

⁹⁰ The IPCC consists of three Working Groups and a Task Force. Working Group I deals with "The Physical Science Basis of Climate Change", Working Group II with "Climate Change Impacts, Adaptation and Vulnerability" and Working Group III with "Mitigation of Climate Change". See IPCC, organisation of the IPCC, available at: <http://www.ipcc.ch/organization/organization.shtml> (last visited 1 April 2014).

⁹¹ For example, a report written by Paul Hudson of the BBC news implies that natural causes play more important role on global warming than human activities. He cited the research of Professor Lockwood in Reading University, arguing that 'the late 20th century was a period when the sun was unusually active and a so called "grand maximum" occurred around 1985. Since then the sun has been getting quieter...[W]e are already beginning to see a change in our climate - witness the colder winters and poor summers of recent years.' See Paul Hudson, 'Real risk of a Maunder minimum "Little Ice Age" says leading scientist', the BBC Weather website: <http://www.bbc.co.uk/blogs/paulhudson/posts/Real-risk-of-a-Maunder-minimum-Little-Ice-Age-says-leading-scientist> (last visited on 25 April 2014). Being characterised as a legal research, it goes beyond the ability and purpose of the thesis to deepen the debate from the scientific perspective. To some extent, this issue matters more about risk management than the science as such due to its uncertainty, which implies a basic attitude that how we human beings should do when facing a non-fully-proven risk. A brief compilation and analysis of the debates could be seen in Anthony Giddens, *The Politics of Climate Change* 18-21 (Cambridge: Polity, 2011).

and the concentrations of greenhouse gases have increased.⁹²

More specifically speaking, as to atmosphere, the globally averaged combined land and ocean surface temperature data as calculated by a linear trend, show a warming of 0.85 [0.65 to 1.06] °C, over the period 1880 to 2012, when multiple independently produced datasets exist.⁹³

As to ocean, on a global scale, the ocean warming is largest near the surface, and the upper 75 m warmed by 0.11 [0.09 to 0.13] °C per decade over the period 1971 to 2010.⁹⁴

As to sea level, the rate of sea level rise since the mid-19th century has been larger than the mean rate during the previous two millennia (high confidence). Over the period 1901 to 2010, global mean sea level rose by 0.19 [0.17 to 0.21] m.⁹⁵

As to the emissions of carbon dioxide, carbon dioxide concentrations have increased by 40% since pre-industrial times, primarily from fossil fuel emissions and secondarily from net land use change emissions.⁹⁶

Secondly, the AR5 analyses the drivers of climate change. It attributes the drivers to "natural and anthropogenic substances and processes that alter the Earth's energy budget, i.e. radiative forcing (RF)." The AR5 further concludes that "total radiative forcing is positive, and has led to an uptake of energy by the climate system. The largest contribution to total radiative forcing is caused by the increase in the

⁹² IPCC, 'Summary for Policymakers', in T.F. Stocker et al. eds., *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change 4* (Cambridge University Press: Cambridge and New York, 2013). More results of data analysis are shown respectively from pages 4 to 12.

⁹³ Id., at 5.

⁹⁴ Id., at 8.

⁹⁵ Id., at 11.

⁹⁶ Id., at 11.

atmospheric concentration of CO₂ since 1750."⁹⁷

Thirdly, AR5 attributes the climate change of the earth to human influence with more evidences found since AR4 in 2007. AR5 argues that "it is extremely likely that more than half of the observed increase in global average surface temperature from 1951 to 2010 was caused by the anthropogenic increase in greenhouse gas concentrations and other anthropogenic forcings together."⁹⁸

Finally, the Working Group I made a pessimistic prediction on the future global and regional climate change, arguing that if the emissions of greenhouse gases continue, it will lead to further warming and changes in all components of the climate system⁹⁹, including atmosphere, water cycle, air quality, ocean, cryosphere, sea level, and carbon and other biogeochemical cycles.¹⁰⁰ The effect of emissions of greenhouse gases is cumulative and will persist for many centuries. Therefore, part I of the AR5 concludes that "limiting climate change will require substantial and sustained reductions of greenhouse gases emissions."¹⁰¹

B. Impacts, vulnerability and adaptation of climate change

The Working Group II of the IPCC published its assessment report as the second part of the AR5 in March 2014.¹⁰² As shown in the contents of the Summary for Policymakers, It considers the observed impacts, vulnerability, and adaptation of climate change. Notably, the Group II adds a new focus on risk which did not exist in the AR4. It supports people and societies to know or rank the risks and opportunities

⁹⁷ Id., at 13.

⁹⁸ Id., at 17.

⁹⁹⁹⁹ See id., at 19.

¹⁰⁰ See id., at 20.

¹⁰¹ Id., at 19.

¹⁰² The full text can be obtained on the IPCC website: <http://www.ipcc.ch/index.htm>.

for adaptation and how to manage future risks.¹⁰³

The global climate has largely changed, and changes of climate system have great impacts on natural and human environment, assessed by the AR5. The impacts on natural system are strongest and most comprehensive, while impacts on human systems have also been attributed to climate change, with a major or minor contribution of climate change distinguishable from other influences.¹⁰⁴ Impacts from recent extreme weather events, such as heat waves, droughts, floods, cyclones, and wildfires, also show vulnerability and exposure of some ecosystems and many human systems to current climate variability.¹⁰⁵ Key risks are elaborated, spanning sectors and regions, such as freshwater resources, terrestrial and freshwater ecosystems, coastal systems and low-lying areas, marine systems, food security and food production systems, urban and rural areas, human health, human security, economics, livelihoods and poverty. They are all affected at different levels by climate change.¹⁰⁶

C. Sub-conclusion

As noted earlier, the sceptics toward the existence of changes of climate system and causation with human greenhouse gases emissions still exist so far, and the levels of uncertainty of climate risks vary from different sectors and countries. However, when the extreme weather events appear more and more often in recent years, even though the uncertainty of risk is the characteristics of climate problem, it would be better to manage the risk earlier under the concept of precautionary principle. In any case, the

¹⁰³ See generally, IPCC, 'Summary for Policymakers', in Field et al., eds., *Climate Change 2014: Impacts, Adaptation, and Vulnerability--Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press: Cambridge and New York, March 2014).

¹⁰⁴ Id., at 6.

¹⁰⁵ Id., at 7.

¹⁰⁶ Id., at 14-22.

AR5 of the IPCC provides a scientific basis for negotiators to consider how to manage the risks of natural and human systems relating to climate change.

3.2 Development of the UNFCCC regime

The international political response to the scientific concern of climate change did not exist until the signature of the UNFCCC in 1992. The publication of the First Assessment Report of the IPCC in 1990 provided a scientific support for the making of political decisions. In response to it, the UN General Assembly 'decides to establish a single intergovernmental negotiating process...for the preparation by an Intergovernmental Negotiating Committee of an effective framework convention on climate change, containing appropriate commitments...'¹⁰⁷ However, the conflicts of interests between developed and developing countries played a major part during the negotiation process.¹⁰⁸ It is a prolonged process to establish the regime. Some moments and events of the negotiations are particularly important.

(1)The UNFCCC

After the AP1 of the IPCC was released in 1990, the Intergovernmental Negotiating Committee (INC) was set up by the UN General Assembly in February 1991 to negotiate a new global climate treaty. The UNFCCC was opened for signature along with the United Nations Convention on Biological Diversity (UNCBD) and the United Nations Convention to Combat Desertification (UNCCD) in 1992. It entered into force on 21 March 1994 and has 196 Parties now.¹⁰⁹ The UNFCCC is a

¹⁰⁷ Protection of global climate for present and future generations of mankind, U.N. Doc. A/RES/45/212, para. 1, 21 December 1990.

¹⁰⁸ See generally, Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 Yale J. Int'l L. 451, 454-558 (1993).

¹⁰⁹ See UNFCCC, *Background on the UNFCCC: The international response to climate change*, http://unfccc.int/essential_background/items/6031.php (last visited 18 March 2016).

milestone for the crafting of a global climate regime. Firstly, it employs the framework convention/protocol model, by which the UNFCCC allows work to proceed in an incremental manner; and it can produce positive feedback loops, making the adoption of specific substantial commitments more likely.¹¹⁰ Secondly, though the Convention failed to determine concrete target and timetable of the reduction of GHG emissions, Article 2 of the Convention stipulates the ultimate objective of this Convention is "to achieve stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system", and the Annex I Parties commit to return individually or jointly to their 1990 levels of GHG emissions.¹¹¹ To this end, four principles were incorporated into the Convention, namely the CBDR principle; full consideration to the specific needs and special circumstances of developing country Parties; precautionary principle and sustainable development.¹¹² They are important materials to interpret and shape the international climate change regime. Thirdly, the action for mitigation, adaptation, compliance mechanism and support mechanism are seen as the four pillars of the UNFCCC.¹¹³

(2) The Berlin Madate

As a framework, however, as Bodansky argued quite early in 1993, the UNFCCC was a disappointment to many.¹¹⁴ It contains no concrete commitments on the reduction of greenhouse gases; it fails to include establish the financial and technology clearinghouse or insurance fund; it lacks of market mechanism; and it confers

¹¹⁰ Bodansky, *supra* note 108, at 494-495.

¹¹¹ Article 4.2(b) of the UNFCCC.

¹¹² Article 3 of the UNFCCC.

¹¹³ Ye, *supra* note 88, at 44.

¹¹⁴ Bodansky, *supra* note 108, at 454.

over-loose requirements to developing states and fossil-fuel producing countries.¹¹⁵ In any case, the UNFCCC needs to be polished, supplemented and implemented by subsequent work of the Conference of the Parties (COP). Therefore, the Berlin Mandate was adopted on COP1 of the Convention in 1995 for ‘the strengthening of the commitments of the Parties included in Annex I to the Convention...through the adoption of a protocol or another legal instrument’¹¹⁶

(3) The Kyoto Protocol

The release of the Second Assessment Report (AR2) of the IPCC in 1995 helped to strengthen the political wills of negotiators on further international climate change negotiations. In December 1997, the Kyoto Protocol was adopted at COP3. The Kyoto Protocol responded many of the previous critics toward the UNFCCC. For example, the Parties agree to cut their overall emissions of greenhouse gases by at least 5% below 1990 levels in the commitment period 2008 to 2012;¹¹⁷ three flexible mechanisms, joint implementation (JI)¹¹⁸, the Clean Development Mechanism (CDM)¹¹⁹ and emissions trading system (ET) are entrenched to assist Annex I states meeting their national targets in a cost-effective way;¹²⁰ and the CBDR principle is maintained in the Kyoto Protocol.¹²¹ The Kyoto Protocol entered into force on 16 February 2005 after the accession of Russia, and has 192 Parties to date.¹²² However, The United States still refuses to join the Kyoto Protocol so far.

¹¹⁵ Id.

¹¹⁶ The UNFCCC, The Berlin Mandate: Review of the adequacy of Article 4, paragraph 2 (a) and (b), of the Convention, including proposals related to a protocol and decisions on follow-up, Decision 1/CP.1, in Report of the Conference of the Parties, FCCC/CP/1995/7/Add.1, at 4, 6 June 1995.

¹¹⁷ Art. 3.1 of the Kyoto Protocol.

¹¹⁸ Art. 6 of the Kyoto Protocol.

¹¹⁹ Art. 12 of the Kyoto Protocol.

¹²⁰ Art. 17 of the Kyoto Protocol.

¹²¹ Art. 10 of the Kyoto Protocol.

¹²² UNFCCC, *supra* note 109.

(4) The Marrakesh Accords

In 2001, the IPCC's Third Assessment Report was released and the Marrakesh Accords was also adopted at COP7 in the same year. The Marrakesh Accords establishes many rules for implementation of the Kyoto Protocol such as capacity building and transfer of technology. It also establishes three new funds, namely the Least Developed Countries (LDC) Fund and Special Climate Change Fund (SCCF) under the Convention,¹²³ and the Adaptation Fund under the Kyoto Protocol.¹²⁴

(5) The Montreal Conference

In 2005, following the enter into force of the Kyoto Protocol, the COP11 of the Convention and the first Conference of the Parties serving as the meeting of the Parties to the Protocol (COP/MOP1) took place in Montreal, Canada. Among all the important achievements made in COP/MOP1, the establishment of the *Ad Hoc* Working Group on Further Commitments for Annex I parties under the Kyoto Protocol (AWG-KP) and the discussion on possible post-2012 commitments are probably the most crucial for the future of this regime. COP11 initiated a 'dialogue' to exchange the experience and analyse the strategies for the long-term cooperation action to address climate change.¹²⁵

(6) The Bali Roadmap

The work of AWG-KP and the Dialogue under the Convention between 2006 and

¹²³ UNFCCC, Funding under the Convention, Decision 7/CP.7, in Report of the Conference of the Parties on its seventh session, FCCC/CP/2001/13/Add.1, at 43, 21 January 2002.

¹²⁴ UNFCCC, 'Funding under the Kyoto Protocol', Decision 10/CP.7, in *Report of the Conference of the Parties on its tenth session*, FCCC/CP/2001/13/Add.1, at 52, 21 January 2002.

¹²⁵ UNFCCC, Dialogue on long-term cooperative action to address climate change by enhancing implementation of the Convention, Decision 1/CP.11, in Report of the Conference of the Parties on its eleventh session, FCCC/CP/2005/5/Add.1, at 3-4, 30 March 2006.

2007 made a series of decisions which comprised the Bali Roadmap in COP13 in 2007. Notably, the discussion was deeply influenced by the release of the IPCC's fourth Assessment Report (AR4) in 2007. The AWG-KP recognised that 'the contribution of Working Group III to the AR4 indicates that global emissions of greenhouse gases need to peak in the next 10 to 15 years and be reduced to very low levels, well below half of levels in 2000 by the middle of the twenty-first century in order to stabilize their concentrations in the atmosphere at the lowest levels assessed by the IPCC to date in its scenarios.'¹²⁶ The so-called lowest level scenario of the IPCC here is that if we want the atmosphere to be stabilised at 450 ppm CO₂-eqb, the targets of emissions allowances for various GHG concentrations for Annex I countries should be 25 to 40 per cents below the level in 1990 by 2020, and 80 to 95 per cents below the level in 1990 by 2050.¹²⁷ This decision of the AWG-KP played the vital role on the conclusion of the Doha Amendment in 2012. Moreover, in Bali Action Plan, the Parties determined to "launch a comprehensive process to enable the full, effective and sustained implementation of the Convention through outcome and adopt it at COP15."¹²⁸ The Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA) was established under the Convention with a view to conducting the negotiation.

(7) The Copenhagen Accords

Since COP15 was expected to reach an agreement on the post-Kyoto commitments of

¹²⁶ UNFCCC, Report of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol on the first part of its fourth session, FCCC/KP/AWG/2007/4, para. 18, 17 September 2007.

¹²⁷ B. Metz et al. eds., *Climate Change 2007: Mitigation of Climate Change - Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* 776 (Cambridge University Press: Cambridge and New York, 2007).

¹²⁸ UNFCCC, Bali Action Plan, Decision 1/CP.13, para.1, in Report of the Conference of the Parties on its thirteenth session, FCCC/CP/2007/6/Add.1, 14 March 2008.

GHG reductions, it drew worldwide attentions during the conference in Copenhagen in December 2009, ranging from media to the public. However, as the UNFCCC itself admitted afterwards, the Bali Action Plan was too ambitious and optimistic, and "underestimated the complexity both of climate change as a problem and of crafting a global response to it."¹²⁹ The high expectation ended up with deep frustration due to the disagreement of positions from different groups of states on the burden sharing of addressing climate change. The non-binding Copenhagen Accord was made in COP15, containing no concrete reduction commitments except that Annex 1 Parties committed to implement individually or jointly the quantified economy-wide emissions targets for 2020 and submit it to the Secretariat by 31 January 2010, while Non-Annex 1 Parties agreed to submit their mitigation actions by the same day.¹³⁰ Despite of this, there was achievement in the COP15. Developed countries pledged to provide the so-called "fast-start finance". It is new and additional resources, including forestry and investments, and approaches USD 30 billion for the period 2010 – 2012.

(8) The Cancun Conference

COP16, held in Cancun in 2010, seemed to revive the negotiation from the frustration of the Copenhagen Conference. Although the Parties of the Convention did not reach an agreement on the GHG reduction commitment after 2012, the Cancun Agreements was adopted in which the Parties shared a vision for long-term cooperative action and agreed a comprehensive package of future work, including mitigation, adaptation, finance, technology transfer, and capacity building to developing countries. In particular, the Parties decided to establish a "Green Climate Fund", which is to be

¹²⁹ UNFCCC, *Now, up to and beyond 2012: The Bali Road Map*, http://unfccc.int/key_steps/bali_road_map/items/6072.php

¹³⁰ UNFCCC, Copenhagen Accord, Decision 2/CP.15, paras. 4-5, in Report of the Conference of the Parties on its fifteenth session, FCCC/CP/2009/11/Add.1, 30 March 2010.

designated as an operating entity of the financial mechanism of the Convention, to 'support projects, programmes, policies and other activities in developing country Parties using thematic funding window'.¹³¹

(9) The Durban Conference

Given the fact that the negotiation on the mitigation commitment has been deadlocked for several years, COP17 held in Durban in 2011 seemed to become a turning point to it. The Parties determined to launch a new platform of negotiations, i.e. the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) to take on the subsequent work of the AWG-LCA of the Convention from the first half of 2012. The ADP was required to "complete its work as early as possible but no later than 2015 in order to adopt this protocol, another legal instrument or an agreed outcome with legal force at the twenty-first session of the Conference of the Parties and for it to come into effect and be implemented from 2020."¹³² In addition, as to the long-term finance, developed Parties provided the fast-start finance as a new and additional resources approaching USD 30 billion for the period 2010–2012. They also committed to a goal of mobilizing jointly USD 100 billion per year by 2020 to address the needs of developing countries.¹³³

(10) The Doha Conference

Recognising the coming expiry of the Kyoto Protocol in the end of 2012, the Parties of the Kyoto Protocol in COP/MOP8 agreed to set up a second commitment period of

¹³¹ UNFCCC, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, Decision 1/CP.16, para. 102, in Report of the Conference of the Parties on its sixteenth session, FCCC/CP/2010/7/Add.1, 15 March 2011.

¹³² UNFCCC, Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, Decision 1/CP.17, para.4, in Report of the Conference of the Parties on its seventeenth Session, FCCC/CP/2011/9/Add.1, 15 March 2012.

¹³³ Id., at 23.

the Kyoto Protocol, namely 2013 to 2020, to continue the ultimate goal of the Convention.¹³⁴ In addition, while most Annex 1 countries have made their new reduction commitments for the second commitment period, Canada decided to withdraw from the Kyoto Protocol; Japan, Russia and New Zealand declared that they do not have the intention to be bound in the second commitment period by different reasons.¹³⁵ Further, since the Doha Amendment is an amendment to the Kyoto Protocol, a total of 144 instruments of acceptance are required for the entry into force of the amendment, subject to Article 20.4 of the Kyoto Protocol.¹³⁶

(11) The Warsaw Conference

Under the expectation to reach a new agreement with legal force by 2015, the meeting of COP19 held in Warsaw in 2013 was seen as a middle point to COP20. The AR5 of the IPCC released in September 2013 further confirmed the risk and impact of global climate change but the negotiation was still deadlocked. At that time, given the current fact that the United States still refused to join the Kyoto Protocol and some big emitting countries, whatever developing or developed ones, were reluctant to make commitments on the second period of the Kyoto Protocol, the destiny of COP20 and the future of the Kyoto Protocol were regarded optimistic. However, the existing Durban Platform and the Green Climate Fund were still running; the Warsaw Framework for REDD Plus and the Warsaw International Mechanism for Loss and

¹³⁴ UNFCCC, Amendment to the Kyoto Protocol pursuant to its Article 3, paragraph 9, Decision 1/CMP.8, para. 4, in Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its eighth session, FCCC/KP/CMP/2012/13/Add.1, 28 February 2013.

¹³⁵ *Id.*, at 8.

¹³⁶ Art. 20.4 of the Kyoto Protocol states that: 'Instruments of acceptance in respect of an amendment shall be deposited with the Depositary. An amendment adopted in accordance with paragraph 3 above shall enter into force for those Parties having accepted it on the ninetieth day after the date of receipt by the Depositary of an instrument of acceptance by at least three fourth of the Parties to this Protocol.'

Damage and other decisions were adopted therein.¹³⁷ It seemed not in the worst situation.

(12) The Lima Conference

The Lima Conference was held on 1-12 December 2014. It began with a sense of momentum, following nearly \$10 billion in pledges to the new Green Climate Fund and the joint announcement by the United States and China of their post-2020 emission targets. What the more important contribution of the conference to the adoption of the Paris Agreement later in 2015 was the initiative of the Intended Nationally Determined Contributions (INDCs). However, the meeting quickly bogged down, and parties put aside the "elements" document to haggle over the more immediate issues of how their intended contributions to the Paris agreement are to be submitted to and weighed by the UNFCCC.¹³⁸

(13) The Paris Conference

At COP 21 in Paris, Parties to the UNFCCC reached a historic agreement to combat climate change and to accelerate and intensify the actions and investments needed for a sustainable low carbon future.¹³⁹ Article 2.1(a) of the Paris Agreement set up its ultimate goal to keep a global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius. Additionally, the agreement requires all Parties to make their best efforts through “nationally determined contributions”

¹³⁷ See generally the UNFCCC, *Report of the Conference of the Parties on its nineteenth Session*, FCCC/CP/2013/10/Add.1, 31 January 2014.

¹³⁸ Center for Climate and Energy Solutions: *Outcome of the U.N. Climate Change Conference in Lima*, available at: <http://www.c2es.org/international/negotiations/cop-20-lima/summary>.

¹³⁹ UNFCCC, The Paris Agreement, available at: http://unfccc.int/paris_agreement/items/9485.php (last visited 1 March 2016).

(NDCs) and present a progress over time.¹⁴⁰ As noted in chapter 1, the Paris Agreement will enter into force once the double threshold is met and the deposition procedure is completed.

3.3 Key provisions of the UNFCCC and Kyoto Protocol

The UNFCCC regime adopted the ‘framework-protocol’ model to make it flexible to the future development of the regime. They commonly set up a number of rules, including the decisions made by the COP/MOP and the subordinate bodies. Provisions can be roughly categorized into several parts: a preamble for introduction; a set of principles which constitute theoretical basis and main approaches to the objectives; objectives and commitments; secretariat and subsidiary bodies which operate the regime; financial mechanisms with the commitment by some developed country parties, capacity building and transfer of technology; implementation, compliance and dispute mechanism; and the final provisions relating to entry into force, amendments, depository etc. The thesis will discuss some main provisions in this section.

Objectives

The UNFCCC is set up by country parties to avoid the risks of human-made climate change. The ultimate objective is stipulated in Article 2: ‘...stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.’ The level ‘should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable

¹⁴⁰ See Article 3 of the Paris Agreement.

economic development to proceed in a sustainable manner.’ However, this article has been controversial since it was made. First, due to its declarative language used in the final context, it is hard to be seen as a concrete commitment or obligation.¹⁴¹ Further, the unclear definition of ‘dangerous’ is also mentioned by scholar.¹⁴² However, following the release of the AR4 of the IPCC in 2007, the Parties have accepted the research of the report and agreed to hold the increase in global average temperature below 2 degrees Celsius above preindustrial levels.¹⁴³ The debate is solved in a large extent. As Sands argues, the following task of adaptation, especially for vulnerable countries, has been more prioritized.¹⁴⁴

The Kyoto Protocol shares the objective of the Convention but goes further. The Kyoto Protocol requires rich countries to reduce their GHG emissions below levels which are based on the emission volume in 1990. Article 3.1 of the Kyoto Protocol provides that: ‘The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.’ The major distinction between the two is that the Convention just urges developed countries to stabilize GHG emissions, while the concrete emission reduction targets which developed countries bear are legally

¹⁴¹ See Bodansky, *supra* note 114, at 500; Sebastian Oberthur and Hermann E. Ott, *The Kyoto Protocol: International Climate Policy for the 21st Century* 34 (Berlin: Springer, 1999); Soltau, *Fairness in International Climate Change Law and Policy* 55-56 (Cambridge: Cambridge University Press, 2009).

¹⁴² *Id.*

¹⁴³ See the UNFCCC, *supra* note 131, para. 4.

¹⁴⁴ Sands et al., *supra* note 81, at 278.

binding commitments in the Kyoto Protocol.

Principles

Article 3 of the Convention set out some ‘Principles’ in order to guide the Parties achieve the objectives. However, it raises debates as well in the first place. The U.S. questioned the unclear legal status of these principles. From the perspective of application of law, if the contexts of the provision are not tangible or specific enough, such as principles, it is problematic for judges to apply them to the judicial cases. However, as Bodansky argues, principles embody certain standards even though these standards are more general than commitments.¹⁴⁵ Since the principles are set to achieve the objective of the Convention, they should be taken into account by parties in good faith. Several principles are discussed as follows.

1. Fairness

Article 3.1 of the UNFCCC states that:

The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.

Article 3.1 of the UNFCCC shows two concepts, i.e. inter-generational justice and the CBDR principle. Both of them are the expression of fairness. The CBDR principle constitutes the foundation of the international climate change regime. It establishes a clear structure that treats the unlike unlikely. Developed countries have definitely emitted most of the GHGs contributing to global warming. Following the CBDR principle, the developed countries should take the lead to combat climate change and the adverse effects. Article 10 of the Kyoto Protocol reiterates to take into account the

¹⁴⁵See Bodansky, *supra* note 114, at 501.

CBDR principle when all Parties implement their commitments. Interestingly, as Bodansky argues, in the process of negotiation of the Convention, although the developed and developing countries both agreed that developed countries should take the lead, the reasons varied. Developed countries argued that it is because they have more financial and technological capacities to do so, not because they bear the main responsibilities for the climate problems.¹⁴⁶ The negotiating history shows again the rooted conflict of interests between the North and South. However, by setting up differentiated responsibilities to different countries, the incorporation of the CBDR principle is the key element which integrates the developing countries into the international climate change regime. More detail will be discussed in the next section.

2. Special needs of developing countries

Article 3.2 of the UNFCCC stipulates that:

The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.

This is definitely the expression of differential treatment. As the AR4 of the IPCC have shown, developing countries are more vulnerable to the impacts of climate change and have less capacity to respond. However, the GHG emissions from developing countries have increased dramatically due to the rapid increase of economic growth in recent decade. Data from International Energy Agency (IEA) shows that the gap of CO₂ emissions between OECD and non-OECD countries has reduced gradually from 1990 to 2011.¹⁴⁷ Therefore, the special needs of developing

¹⁴⁶ Id., 503.

¹⁴⁷ IEA, CO₂ Emissions from Fuel Combustion Highlights 101 (2013 Edition).

countries are changing and need to be reviewed over time.

3. Precautionary principle

Article 3.3 of the UNFCCC states that ‘...Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures....’ This principle aims to solve the burden of proof because many environmental problems tend to have irreversible damage to environment but is hard to prove. However, when the precautionary principle is applied, it takes reference to cost-effectiveness, stating that the parties should ‘take into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost.’

In the Kyoto Protocol, the precautionary principle is not literally mentioned, while the cost-effectiveness is stated in Article 10.1(a), saying that:

All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances,...shall formulate, where relevant and to the extent possible, cost-effective national and, where appropriate, regional programmes to improve the quality of local emission factors, activity data and/or models....’

The idea of cost-effectiveness seems to be released from precautionary principle and becomes an independent, cost-benefits guidance to the implementation of the Protocol. The flexibility mechanism embodied in the Protocol and the new proposals in recent negotiations, such as the ‘new market-based mechanism’,¹⁴⁸ can be an example. In any case, even though the parties just need to ‘take into account’ the

¹⁴⁸ See UNFCCC, ‘Agreed outcome pursuant to the Bali Action Plan’, 1/CP.18, in *Report of the Conference of the Parties on its eighteenth session 9*, FCCC/CP/2012/8/Add.1 (2013).

cost-effective approach rather than bear a legal obligation, the approach implies the cooperation between countries because it is usually more cost-effective in a multilateral or global level.¹⁴⁹ By so doing, it helps to solid the international community in an era of interdependence.

4. Sustainable development

Article 3.4 of the UNFCCC clearly states that ‘The Parties have a right to, and should, promote sustainable development....’ The principles of sustainable development pursue the balance between economic development, social development and environmental protection. As this article goes on, climate policies and measures should ‘be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.’ Article 2.1 of the Kyoto Protocol also resonate this principle. It requires the Annex I countries to take measures for implementation ‘in order to promote sustainable development’. Further, economic development and environmental protection are in conflicts with each other in some cases. The *Tuna/Shrimp* case of the GATT is the example. Article 3.5 of the Convention states that ‘Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.’ Article 2.3 of the Kyoto Protocol follows and states that: the Parties included in Annex I shall strive to implement policies and measures under this Article in such a way as to minimize adverse effects, including the adverse effects of climate change, effects on international trade, and social, environmental and economic impacts on other

¹⁴⁹ Christina Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Laws* 64 (Leiden: Nijhoff, 2009).

Parties...’ In international economic law, Article XX of the GATT has similar statement. They both aim to harmonize and prevent the potential conflicts between international trade system and the MEAs. In addition, as noted in previous chapter, Brundtland Report has defined sustainable development in a temporal dimension. Therefore, the inter-generational equity stipulated in Article 3.1 of the Convention should also be categorized in here as well.

Flexibility mechanism

Flexibility mechanism is an innovative experiment in the international climate change regime. It is the expression of cost-effectiveness or market-oriented approach. It includes Joint Implementation, Emissions Trading and the Clean Development Mechanism (CDM). They are analysed as follows:

Joint Implementation (JI)

The basic principles are defined in Article 6 of the Kyoto Protocol. It says that ‘For the purpose of meeting its commitments ..., any Party included in Annex I may transfer to, or acquire from, any other such Party emission reduction units resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any sector of the economy’, provided that requirements from (a) to (d) are fulfilled. This is the international cooperation made by two or more Annex I countries, and both public and private legal entities could be involved in JI projects according to the subparagraph 3 of this Article. Notably, the use of JI should be a supplementary rather than a main approach to achieve the goal of GHG emission.

CDM

The CDM is defined in Article 12 of the Kyoto Protocol. It provides for Annex I Parties to implement project activities that reduce emissions in non-Annex I Parties, in return for certified emission reductions (CERs). The CERs generated by such project activities can be used by Annex I Parties to help meet their emissions targets under the Kyoto Protocol. Article 12.2 stresses that such project activities are to assist the developing host Parties in achieving sustainable development and in contributing to the ultimate objective of the Convention. In other words, this is a win-win approach for both developed and developing countries. Notably, reductions in emissions should be ‘additional’ to any that would occur in the absence of the certified project activity, in accordance with Article 12.5(c).

Emissions Trading (ET)

Emissions Trading provides for Annex I Parties to acquire units from other Annex I Parties and use them towards meeting their emissions targets the Kyoto Protocol. This enables Parties to make use of lower-cost opportunities to reduce emissions. According to Article 17, of only Annex I Parties to the Convention with emission limitation and reduction commitments inscribed in Annex B to the Protocol may participate in such trading.

Flexibility mechanism is supplemented by the Marrakesh Accords in 2002. In general, it states that ‘the use of the mechanisms shall be supplemental to domestic action and that domestic action shall thus constitute a significant element of the effort made by each Party included in Annex I to meet its quantified emission limitation and reduction commitments under Article 3, paragraph 1.’¹⁵⁰ The eligibility to participate

¹⁵⁰ Decision 15/CP.7, ‘Principles, nature and scope of the mechanisms pursuant to Articles 6, 12 and 17 of the Kyoto Protocol’, in *Report of the Conference of the Parties on its seventh session*, para. 1, FCCC/CP/2001/13/Add.2 (2002).

in the mechanisms by a Party included in Annex I shall be ‘dependent on its compliance with methodological and reporting requirements under Article 5, paragraphs 1 and 2, and Article 7, paragraphs 1 and 4, of the Kyoto Protocol.’¹⁵¹ Also, certified emission reductions (CERs), emission reduction units (ERUs) and assigned amount units (AAUs) as well as removal units resulting from activities under Article 3, paragraphs 3 and 4, ‘may be used to meet commitments under Article 3.1, paragraph 1.’¹⁵²

Further, the market-oriented characteristics of the flexibility mechanism make it significant and popular, since it tackles environmental problems with economic development more closely and directly. However, the Parties are still seeking more approaches to achieve their mitigation task. For example, a so-called ‘new market-based mechanism’ (NMM) is proposed in COP17. COP17 urges the Parties to ‘define a new market-based mechanism, operating under the guidance and authority of the Conference of the Parties, to enhance the cost-effectiveness of, and to promote, mitigation actions, bearing in mind different circumstances of developed and developing countries...’¹⁵³ The future of NMM remains to be seen.

Compliance Mechanism

Compliance Mechanism of the Kyoto Protocol is one of the most controversial issues during the negotiation process. It is designed to strengthen the Protocol’s environmental integrity, support the carbon market’s credibility and ensure transparency of accounting by Parties. Its objective is to facilitate, promote and

¹⁵¹ Id., para. 5.

¹⁵² Id., para. 6.

¹⁵³ Decision 2/CP.17, ‘Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention’, in *Report of the Conference of the Parties on its seventeenth session*, para. 83, FCCC/CP/2011/9/Add.1 (2012).

enforce compliance with the commitments under the Protocol.¹⁵⁴ Art. 18 of the Kyoto Protocol prescribes that:

The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance....

However, it is just guidance for the compliance. Due to its sensitive nature, the content of compliance mechanism has been under much debate and finally the Parties of UNFCCC adopted 'Marrakesh Accords' for further regulation in July 2002. Actually, unlike the WTO, it is difficult for the UNFCCC or the Kyoto Protocol to develop a strong legally-binding dispute settlement system for non-compliance mainly on the ground that they are under a nature of collective obligations, rather than reciprocal ones.¹⁵⁵ Facilitative approach which Kyoto Protocol has adopted may be the best way to achieve its goal, not dispute settlement procedure.

3.4 The Paris Agreement

The Paris Agreement and the accompanying COP decision:

- Reaffirm the goal of limiting global temperature increase well below 2 degrees Celsius, while urging efforts to limit the increase to 1.5 degrees;
- Establish binding commitments by all parties to make “nationally determined contributions” (NDCs), and to pursue domestic measures aimed at achieving them;

¹⁵⁴ UNFCCC, available at: http://unfccc.int/kyoto_protocol/compliance/items/2875.php

¹⁵⁵ For more discussion, see Joost Pauwelyn, *Conflicts of Norms in Public International Law-How WTO Relates to Other Rules of International Law* 52-88 (Cambridge: Cambridge University Press, 2003).

- Commit all countries to report regularly on their emissions and “progress made in implementing and achieving” their NDCs, and to undergo international review;
- Commit all countries to submit new NDCs every five years, with the clear expectation that they will “represent a progression” beyond previous ones;
- Reaffirm the binding obligations of developed countries under the UNFCCC to support the efforts of developing countries, while for the first time encouraging voluntary contributions by developing countries too;
- Extend the current goal of mobilizing \$100 billion a year in support by 2020 through 2025, with a new, higher goal to be set for the period after 2025;
- Extend a mechanism to address “loss and damage” resulting from climate change, which explicitly will not “involve or provide a basis for any liability or compensation;”
- Require parties engaging in international emissions trading to avoid “double counting;” and
- Call for a new mechanism, similar to the Clean Development Mechanism under the Kyoto Protocol, enabling emission reductions in one country to be counted toward another country’s NDC.¹⁵⁶

3.5 Conclusion of the chapter

The Paris Agreement is the response of contracting parties to the failure of previous negotiations. The evolution of the UNFCCC regime seems to go through a paradigm shift from the Kyoto Protocol to the Paris Agreement. It turns to take softer approaches to make the system work, mainly the employment of NDCs and the hybrid of binding and non-binding provisions in it. However, the incorporation of loss and damage is probably not very appropriate because it enlarges the scope of the climate issue in the UNFCCC which still needs time to be trusted by all states. In any case, as

¹⁵⁶ C2ES, Outcomes of the U.N. Climate Change Conference in Paris, available at: <http://www.c2es.org/international/negotiations/cop21-paris/summary> (last visited 7 April 2016).

noted, the Paris Agreement is open for ratification right now. The new approach of the Paris Agreement will be examined in political practice soon.

Chapter 4 Problems of a Non-Party State's Participation in Global Climate Regime

In this thesis, I distinguish the UNFCCC system with the global climate regime. The so-called global climate regime here is larger in scope than the UNFCCC and its protocols. As Asselt points out, due to the complexity and uncertainty, this wicked problem cannot be governed through a single international regime.¹⁵⁷ The UNFCCC is no doubt the central one among all of them, but other organisations concerning climate issues are also important to make the global climate regime complete, such as the WTO and other regional or bilateral arrangements.

States have either moral pressure or legal obligations to make efforts on the GHG reduction and adaption. They also have the discretion to choose the way to do it. Joining into the UNFCCC regime is not the only and mandatory option in theory. We have also seen some countries withdrawing from the second commitment period of the Kyoto Protocol in practice. The absence of some countries in the UNFCCC regime has caused some legal and political problems at both international climate governance and national climate policy. At the international level, combined with the fragmentation of global climate governance, the application of laws between different regimes and the management of the interaction of different regimes becomes more complicated. At the national level, on the other hand, even a non-party state of the UNFCCC regime still has to build up its own national climate system which will definitely be affected by and need to interact with the UNFCCC regime.

¹⁵⁷ See Harro van Asselt, *The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions* 244 (Cheltenham: Edward Elgar 2014).

Thus, it is interesting to discuss why a state becomes a non-party state in the UNFCCC regime. In addition, in the circumstance that the overlap of different climate regimes and the fragmentation of global climate change become inevitable, what is the influence of the non-party status to a country in the global climate regime?

4.1 Causes to become a non-party state in the UNFCCC regime

4.1.1 Fairness

As noted above, climate change is a global problem which has affected all human beings, whatever the rich or the poor, current or future generations. We definitely need global action to deal with it as the global temperature cannot be cooled down by the efforts of any single country. Therefore, the next task is how to allocate the burden of GHG reduction. The CBDR principle is employed to argue that all countries have common responsibilities to combat climate change but every state should bear different share of burden by which it is substantially fair to all countries. The general meaning is clear while the contents need to be discussed further.

Fairness or equity is a perennial issue in the history of human society. Human beings tend to pursue justice, fairness or equity in their communities. The general idea is that things alike should be treated likely. It is also true in international law, as Ian Brownlie argues, ‘the sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality.’¹⁵⁸ Traditionally, a sovereign state has the exclusive jurisdiction to its own territory and people, and should not be bound to the obligations of any treaty without its consent. Formal equality is easy to

¹⁵⁸ Ian Brownlie, *Principles of Public International Law* 287 (Oxford: Oxford University Press, 6th eds, 2003).

be understood and accepted in this regard which posits that ‘all subjects of the law should be treated in a similar fashion. Rules are usually deemed to be just if they apply to all without discrimination.’¹⁵⁹ Formal equality is applied to international law as a very fundamental principle. For example, Art. 2.1 of Charter of the United Nations provides that ‘The Organization is based on the principle of the sovereign equality of all its Members.’ Also, Art. 18.1 of the Charter of the UN stipulates that ‘Each member of the General Assembly shall have one vote.’ Every vote is equal in principle except the veto right offered to the five countries in the Security Council.

Different Treatment however, as Rajamani argues, might be a derogation of the doctrine of sovereign equality of states.¹⁶⁰ The so-called equality of states here is surely rooted in formal equality. It argues that formal equality should be adjusted so that it can achieve the equal outcomes. Differential treatment could be used to both developed and developing countries, but the thesis focuses mainly on those in favour of developing countries. There must be some reasons and rationales that justify the different treatment from one country to another. It could theoretically stem from logics, natural justice, morality, and much more. As Cullet argues, different treatment is already a common feature in international environmental law,¹⁶¹ and the issue of fairness or differential treatment has been discussed in a number of publications in international law, international environmental law and climate change law.¹⁶² Despite

¹⁵⁹ Philippe Cullet, *Different Treatment in International Environmental Law* 22 (Hants: Ashgate, 2003).

¹⁶⁰ Lavanya Rajamani, *Different Treatment in International Environmental Law* 2 (Oxford: Oxford University Press, 2006).

¹⁶¹ Cullet, *supra* note 159, at 21.

¹⁶² For example, see Cullet, *supra* note 159; Rajamani, *supra* note 160; Thomas M. Franck, *Fairness in international law and institutions* (Oxford: Clarendon Press 1995); Luiz Pinguelli-Rosa and Mohan Munasinghe, *Ethics, Equity and International Negotiations on Climate Change* (Cheltenham: Edward Elgar, 2002); Friedrich Soltau, *Fairness in International Climate Change Law and Policy* (Cambridge: Cambridge University Press, 2009); Aaditya Mattoo and Arvind Subramanian, ‘Equity in Climate Change: An Analytical Review’, 40(6) *World Development* 1083-1097 (2012); Christopher

of this, referring to the legal regime of international climate change, the stagnation of current international negotiations makes it worthy to rethink the theory and practice of differential treatment. Countries standing on opposite positions both use the CBDR principle to justify their own arguments that the other side of countries should bear more burden than they are willing to commit. It would be ironic instead if the CBDR principle becomes a tool to block the negotiation. On the other hand, equity or fairness should be a dynamic concept which will be re-interpreted or supplemented when the basis of theory and practice is continually changing in our era, especially the challenge to the traditional classification of countries on the level of development.

4.1.2 Regime design

There is tension between two objectives pursued by states when they enter into an agreement. The first is the desire to make the agreement credible and binding. The design elements of hard law, dispute resolution, and monitoring all promote this goal. The second part of the explanation is related to the sanctions triggered by the violation of an international agreement. A multilateral treaty is often at stuck on the balance of the two concerns. In the field of climate change, the evolution of the UNFCCC and its protocols clearly illustrates the struggle of choice between them. More interestingly, the Paris Agreement now takes a different approach to make the UNFCCC regime more workable, which is relatively new from the existing literature.

4.1.3 Political intervention

Taiwan's case is the example that a country cannot become a member in the United

Stone, 'Common but differentiated responsibilities in international law', 98 *American Journal of International Law* 276-301 (2004); Anita M. Halvorssen, 'Common, but Differentiated Commitments in the Future Climate Change Regime - Amending the Kyoto Protocol to include Annex C and the Annex C Mitigation Fund', 18 *Colo. J. Int'l Env'tl. L. & Pol'y* 247-266 (2007).

Nations system by political intervention. It has been discussed in chapter 2.

4.2 The relationship and legal effect of a third party to a treaty

The relationship and legal effect of a third party to a treaty is basically clear in law of treaties. It is defined by a general formula, *pacta tertiis nec nocent nec prosunt* (i.e. a treaty binds the parties and only the parties). This principle, as Malgosia Fitzmaurice points out, has been confirmed in a large number of cases before the World Court, and 'has been recognised in state's practice as fundamental, and its existence had never been questioned.'¹⁶³ Articles 34 to 38 of the Vienna Convention on the Law of Treaties (VCLT) have also stipulated the rules. Article 34 of the VCLT set up the basic rule, providing that: 'A treaty does not create either obligations or rights for a third state without its consent.' Although the fundamental rule is clear, what the more significant is the exceptions to the Articles 34 of the VCLT in which non-party states are likely to be legally bound by some rules in the treaty, such as the co-existence of a rule in a treaty and in customary principle of international law, and the to the issue of "erga omnes" obligations.

4.2.1 Consent of the third party

It is the principle that a treaty does not create either obligations or rights for a third State without its consent. The existing literatures have numerous studies on the theory and judicial practices of it in international law; however, a unique case occurs regarding to the UNFCCC regime is not yet well discussed. Taiwanese government has claimed to voluntarily comply with the norms of the UNFCCC regime since

¹⁶³ Malgosia Fitzmaurice, 'Third Parties and the Law of Treaties', in J.A Frowein and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law* 38 (Hague: Kluwer Law International, Vol. 6, 2002).

1992.¹⁶⁴ What can be discussed is that: does the unilateral declaration of Taiwanese government constitute 'consent of a third party'? This question is not much discussed in English literature and even very rarely in Chinese literature in Taiwan. Professor Wen-chen Shih is among the few people to discuss it. She analyses the statement of 'voluntary compliance' from the perspective of legal effect of unilateral declaration in international law. She invoked the decision of *Nuclear Test* (Australia v. France) of the International Court of Justice (ICJ) in 1974 and the discussion in the meeting of International Law Commission (ILC) and concludes that under certain conditions, the unilateral declaration of states to voluntarily comply with international treaties is likely to bring about an obligation to the declaring state.¹⁶⁵ This case deserves to be examined further.

4.2.2 "Erga omnes" obligations

"Erga omnes" obligations refers to legal obligations which is owed to the whole international community of states and can be enforced by or on behalf of that community. An interesting question regarding to the UNFCCC is that: does the common concern of humankind on climate change can be seen as an "erga omnes" obligation?

It is already mentioned in chapter 2 that the Draft to the Convention on Environment and Development (1995) states that "The concept of 'common concern' is not new and has been applied in other fields. It forms the basis for international laws relating to human rights, humanitarian relief and international labour relations. Those

¹⁶⁴ See chapter 2 for more detail.

¹⁶⁵ Wen-Chen Shih, 'The Application of the Legal Effect of Unilateral Act of States and Estoppels in WTO Dispute Settlement Cases and Its Implications for Taiwan's Policy of Voluntary Compliance with Multilateral Environmental Agreements', in *The Greening of the WTO: Trade, Environment and Taiwan* 205 (Taipei: Angle, 2008). (Chinese)

obligations are now recognised as obligations *erga omnes*, owed by all States to the entire international community.¹⁶⁶

The dissenting judgement of Judge Weeramantry in the *Gabčíkovo – Nagymaros Case* also regards sustainable development as an *erga omnes* obligation.¹⁶⁷ However, as Birnie et al. argues, if this kind of arguments is correct, the real characteristic is "not that all states have standing before the ICJ in the event of breach, but that the international community can hold individual states accountable for compliance with their obligations through institutions such as the Conference of the Parties to the Climate Change Convention or other comparable bodies endowed, whether by treaty or General Assembly resolution, with supervisory power."¹⁶⁸

What is interesting to further explore is that is there any rule set forth in the UNFCCC constituting an *erga omnes* obligation? The CBDR principle is the possible one which needs to be examined.

4.2.3 Co-existence of a rule in a treaty and in customary principle of international law

A treaty is different from a customary international law. However, in some special circumstance, a rule set forth in a treaty may be binding to a third State as a customary rule of international law. Article 38 of the VCLT states that:

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

¹⁶⁶Jimena Murillo, *Common Concern of Humankind and its Implications in International Environmental Law*, 5 Macquarie J. Int'l & Comp. Env'tl. L. 144 (2008).

¹⁶⁷ Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I. C. J. Reports 1997, at 7.

¹⁶⁸*Id.* at 131-132.

The relationship between treaty and customs is close. As Philippe Sands points out, "a treaty might codify or further develop a rule of customary law" or alternatively "the conclusion and implementation of a treaty may reflect the existence of a rule of customary law."¹⁶⁹

In the case of climate change, the principle of common but differentiated responsibilities articulated in Article 4 of the UNFCCC seems to have the potential to become a customary law in the future. Therefore, rationally speaking, a non-party in the UNFCCC does not want this to happen. It needs to be further discussed.

4.3 The legal problems of the overlap of climate issues in global climate regime to a non-party state in the UNFCCC system

4.3.1 Conflict of norms

Conflict of norms is not new in the field of international law, especially between trade and environment. What intriguing is how the issue will be dealt with between the UNFCCC and the WTO.

In the UNFCCC system, developed countries have to take domestic measures to fulfil their obligations under the Convention and its protocols. Some of the domestic measures are likely to constitute trade-restricted measures. For instance, the European Union amended its Emission Trading System (EU-ETS) therein all flights falling within the aviation activities which depart from an aerodrome situated in the territory of a Member State and those which arrive in such an aerodrome from a third country will be required to own emission allowances since 2012.¹⁷⁰ According to the EU-ETS on Aviation, airway companies could get some free allowances from EU; get

¹⁶⁹ Philippe Sands et al., *Principles of International Environmental Law* 113 (Cambridge: Cambridge University Press, 3rd ed., 2012).

¹⁷⁰ See generally, 'Directive 2008/101/EC of the EU of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community', *Official Journal of the European Union L008*, 13 January 2009.

allowances qualified by EU from their own countries; or buy qualified emission credits from international carbon market. The excess emissions penalty shall be EUR 100 for each tonne of carbon dioxide equivalent emitted for which the operator or aircraft operator has not surrendered allowances at a certain date.¹⁷¹ Moreover, in the event that an aircraft operator fails to comply with the requirements of this Directive and where other enforcement measures have failed to ensure compliance, its administering Member State may request the Commission to decide on the imposition of an operating ban on the aircraft operator concerned.¹⁷²

Although the policy of EU-ETS on Aviation was cancelled later, it is a good case to the legal study of conflict of norms. For example, does the UNFCCC system create a specific trade obligation to its member states? Does the measure of the EU constitute extraterritorial jurisdiction? How to avoid the use of unilateral trade measures?

4.3.2 The UNFCCC

Article 3.5 of the UNFCCC asks *the Parties should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade* when the measures are taken to combat climate change, including unilateral ones. Article 2.3 of the Kyoto Protocol asks the Parties included in Annex I shall strive to implement policies and measures under this Article in such a way as to minimize adverse effects, including the adverse effects of climate change, effects on *international trade*, and social, environmental and economic impacts on other Parties (emphasis added). However, it is very interesting to note that the term ‘trade’ is not mentioned at all in the Paris Agreement. Is it a new idea to avoid the possible conflict of norms between the UNFCCC and the WTO?

4.3.3 The WTO

¹⁷¹ See Article 14.3 of the Directive 2008/101/EC.

¹⁷² Article 14.5 of the Directive 2008/101/EC.

There are plenty of cases about the conflict of norms between international trade and environment in the WTO. However, no climate issue is decided under the Article XX of the GATT 1994 so far. Given the fact that many countries are introducing more and more market-oriented and trade-related domestic measures to fight against climate change, the issue should also be discussed on the side of the WTO.

4.4 Concluding remark

Conflict of norms is inevitable when climate issues are addressed by different treaties. From the perspective of a non-party state, when a trade-restricted measure is imposed by a member of the UNFCCC, the non-party state has no choice but to bring it to any other platform in which the issue can be addressed, mainly the WTO now. In such a case, the disputes are supposed to increase. Harmonisation of different regime is needed. It could be done through dialogue between two organisations or self-restriction of states' behaviour. Silence of the contexts of the Paris Agreement on trade seems to be a way of harmonisation.

Chapter 5 Shaping the National Climate Policies and Laws in Taiwan

5.1 Science of climate change in Taiwan

Climate change is an environmental problem. Taiwan, like other countries on Earth, is also facing the challenge and threat of global warming. Taiwanese government has done research on the science of climate change in Taiwan for many years.¹⁷³ The purpose of environmental policy and law is to resolve environmental problem. Therefore, before Taiwanese climate change policy and law are analysed, some scientific findings of climate change in Taiwan should be introduced in the first place.

5.1.1 Change of natural environment due to global warming

A. Taiwan's warming rate is higher than the global one

Taiwan's warming rate was determined using results from the Taiwan Climate Change Projection and Information Platform (TCCIP) project. Data collected for over a century from Taipei, Taichung, Tainan, Hengchun, Taitung, and Hualien meteorological stations show that the annual mean temperature in Taiwan increased by 1.4°C between 1911 and 2009. This is equal to an increase of 0.14°C per decade, which is higher than the global warming rate of 0.07°C per decade. In the last 30 years (1980 to 2009), the warming rate in Taiwan has accelerated significantly at a rate of 0.29°C per decade. This is almost twice the rate of the last century.¹⁷⁴

¹⁷³ See Huang-Hsiung Hsu et. al., *Climate Change in Taiwan: Scientific Report 2011 (Summary)* (Taipei: National Science Council, 2011.)

¹⁷⁴ Id., at 47.

B. The rise of sea level is higher than global trend

An analysis of tidal gauge observations of Taiwan's coastal regions shows that, from 1993 to 2003, the sea level in basins close to Taiwan rose at a rate of 5.7 mm yr⁻¹. This is twice the rate in the last 50 years and is slightly higher than the 5.3 mm yr⁻¹ calculated using satellite observations. This rate is substantially higher than the global average of 3.1 mm yr⁻¹ calculated by IPCC AR4.¹⁷⁵

C. Extreme weather has increased in Taiwan

Taiwan has been under the threat of natural disasters, such as typhoons, heavy rainfall, drought, heat waves, and cold surges. As shown in the report of the National Science Council, the proportion of typhoons reaching strong typhoon intensity increased significantly after 1980.¹⁷⁶

Also, the report of the National Science Council shows an analysis of the average number of annual rain days with different precipitation intensities. The data shows that the number of torrential rain days (daily rainfall \geq 200 mm) in Taiwan has increased significantly in the last 50 years and the last 30 years, respectively, with 50-60-year multidecadal variability. The number of light rain days (daily rainfall < 1 mm) in Taiwan has decreased substantially, with a decreasing trend of 2 days per decade in the last 100 years and 4 days per decade in the last 30 years.¹⁷⁷

As to hot wave and cold streams, the report of the National Science Council points out that the number of days with high temperatures has shown an increasing trend at all six stations in the last 100 years. Compared to the 1911-1920 decade, the annual

¹⁷⁵ Id., at 48.

¹⁷⁶ Id., at 51.

¹⁷⁷ Id., 52-53.

number of days with high temperatures increased by more than 10 days on average between 2000 and 2009. Extremely cold events at all six stations have decreased in the last 100 years. Both the frequency and intensity of cold surges have decreased from the effects of warming.¹⁷⁸

According the report of global risk analysis of the World Bank in 2005, Taiwan was regarded as one of the most vulnerable country in the world for its high exposure to multiple hazards, relatively high mortality risk from multiple hazards, risk from earthquakes, landslides, relatively high economic risk from multiple hazards, and risk from flood.¹⁷⁹ The outcome generally shows the similar trend as Taiwanese scientific research shows.

To sum up, it is fair to say Taiwan is vulnerable to the effects of climate change. From the perspective of protection of nationals' lives and sustainable development, Taiwan has the same incentive to fight against climate change.

5.1.2 Carbon emissions of Taiwan

The carbon emissions of Taiwan have very high positive co-relation with its economic development. As shown in Table 5-1, the GDP per capita of Taiwan has increased rapidly from 1970s to 1980s and gradually reached 20,386 US dollars in 2012. At the same time, carbon emissions in Taiwan have also surged very sharply in the 1970s and 1980s, and continued to rise rapidly in the last two decades along with the rise of GDP. According to the data released by the International Energy Agency (see Table 5-2), the CO₂ emissions per capita in Taiwan reached 11.66 kg in 2012, which was

¹⁷⁸ Id., 53-54.

¹⁷⁹ See Maxx Dilley et.al., *Natural Disaster Hotspots: A Global Risk Analysis* 4, 8, 48, 68, 90 and 112 (Washington D.C.: World Bank, 2005). For more details, see also generally, Council for Economic Planning and Development, *Adaptation Strategy to Climate Change in Taiwan* (Taipei: Council for Economic Planning and Development, 2012).

even higher than Japan, South Korea and the average of amount in OECD countries. It constitutes of around 1% of CO₂ emissions in the world. Admitted to say, the current CO₂ emissions in Taiwan is really high on both the aggregate volume and average per person. The energy intensity is also high.

Therefore, Taiwan is environmentally vulnerable on one hand and has high CO₂ emissions and energy intensity on the other hand. In such a case, Taiwan has the each and every motivation and demand to reduce its emissions of greenhouse gas for the sakes of national security, sustainable development, international reputation, and trade and commercial interests in international markets.

Table 5-1 Statistics of Taiwan's GDP and CO₂ emissions by year

Year	GDP per capita (USD)*	CO ₂ emission, sectoral approach (thousand tonnes)**	CO ₂ emission per capita (tonnes / CO ₂ /P)	CO ₂ emission intensity (kg CO ₂ /USD)
1951	158	N/A	N/A	N/A
1960	164	N/A	N/A	N/A
1970	393	N/A	N/A	N/A
1971	447	31,000***	N/A	N/A
1980	2,385	72,900***	N/A	N/A
1985	3,290	71,400***	N/A	N/A
1990	8,124	109,491	5.4	0.0206
1991	9,016	118,414	5.8	0.0206
1992	10,625	126,056	6.1	0.0204
1993	11,079	135,212	6.5	0.0205
1994	11,982	142,982	6.8	0.0202
1995	12,918	150,437	7.1	0.0200
1996	13,428	158,104	7.4	0.0199
1997	13,810	170,958	7.9	0.0203
1998	12,598	181,294	8.3	0.0209
1999	13,585	190,260	8.7	0.0207
2000	14,704	209,364	9.5	0.0215
2001	13,147	213,039	9.6	0.0223
2002	13,404	221,104	9.9	0.0219
2003	13,773	230,706	10.3	0.0221
2004	15,012	238,540	10.6	0.0215
2005	16,051	245,233	10.8	0.0211
2006	16,491	252,097	11.1	0.0206
2007	17,154	252,927	11.2	0.0197
2008	17,399	244,688	10.7	0.0187
2009	16,359	232,244	10.1	0.0181
2010	18,503	248,331	10.8	0.0175
2011	20,006	253,510	11.0	0.0171
2012	20,386	248,702	10.7	0.0166
Average rate of growth 1990-2012		3.80	3.17	-0.98
Average rate of growth 2000-2012		1.45	1.06	-2.14

Note: * quoted and translated by the author from National Statistics, R.O.C.(Taiwan), *Summary of National Income Statistics*, available at:

<http://www.stat.gov.tw/ct.asp?xItem=28862&ctNode=3565>

** quoted and translated by the author from Bureau of Energy, Ministry of Economic Affairs, R.O.C. (Taiwan), *Statistics of CO₂ Emissions from Fuel Combustion of Taiwan* 8 (July 2013). The data calculates CO₂ emissions only, other GHG are not included.

*** International Energy Agency, *CO₂ Emissions from Fuel Combustion 2012 – Highlights*, available at:

<http://www.iea.org/publications/freepublications/publication/name,4010,en.html>

Table 5-2 Comparison of Taiwan's CO₂ emissions with major countries and the world*

	Taiwan	Ranking	World	OECD	Japan	Korea	USA	China
Aggregate emissions ^a (million tonne CO ₂)	270.22	20	30,326	12,440	1,143.07	563.08	5,368.63	7,269.85
Population (million)	23.18	49	6,825	1,232	127.38	48.88	310.11	1,338.30
CO ₂ emission per capita (million tonne)	11.66	19	4.44	10.10	8.97	11.52	17.31	5.43
Emission Intensity ^b (kg CO ₂ /USD)	0.36	54	0.44	0.34	0.29	0.43	0.41	0.80

Notes: *This table is translated by the author from EPA, *GHG emission statistics*, available at: <http://www.epa.gov.tw/ch/artshow.aspx?busin=12379&art=2009011715443552&path=12437> (last visited on 1 September 2013)

a. CO₂ emissions from international navigation are NOT included.

b. Calculated by purchase power parity and USD in 2005.

Sources: International Energy Agency, Key World Energy Statistics, 2012 edition.

5.2 Historic background of policy making

Although Taiwan is not a member of the UNFCCC, Taiwan has paid attention on the climate change issue since early 1990s. Basically, it could be argued that to a large extent the climate change policy of Taiwan followed mainly the development of international climate change negotiations.

A. 1992-2000

The work of policy making on climate change officially started in 1992. The year 1992 was a significant year in the history of international environmental law, since many environmental issues were turned from scientific research into political commitment when the Rio Conference was held and several important MEAs was signed in the conference, including the UNFCCC. During the time of the Rio Conference, as mentioned in chapter 2, the then President of the ROC, Lee, Teng-hui, announced to the world that Taiwan, as a member in the global village, is willing to voluntarily comply with the norms of the UNFCCC though Taiwan is not a contracting party of it. In May 1992, the cross-cutting Working Panel on Global Environmental Change was established under the Executive Yuan to generally cope with international environmental affairs. After the Rio Conference, the Working Panel was upgraded to the title of Guiding Panel on Global Environmental Change, with a sub-working panel on the work of UNFCCC.

In 1997, following the signature of the Kyoto Protocol and the widely-accepted concern of sustainable development, Taiwan established the Committee on National Sustainable Development of the Executive Yuan to replace the old working panel. At that time, environmental issues, including the climate change issue, had gradually been incorporated into the field of sustainable development. However, it was not a

official governmental agency until the promulgation of the Basic Environmental Act in 2002, by which the legal status of the National Sustainable Development was formally confirmed.¹⁸⁰

Climate change issue is highly linked with national energy supply and security. In 1998, the first National Energy Conference was held in order to respond to the global trend of carbon emissions mitigation after the signature of the Kyoto Protocol.¹⁸¹ It was held by the Ministry of Economic Affairs attended by varied interests groups and civil society. It concluded that Taiwan should insist "no regret" policy and reduce its CO₂ emission to the level of 2000 by 2020, or 10 tonnes per capita per year. It was the first time the timetable and target of carbon reduction was proposed to the public. Also, Taiwan should seek to the support of other countries to define Taiwan as a newly industrialized country and make its own National Communication under the UNFCCC. In addition, many suggestions on energy policies and the adjustment of energy structure were made, including the nuclear energy.¹⁸²

Actually, the conclusions of the National Energy Conference do not legally bind the Taiwanese government. The suggested target and timetable of the reduction of CO₂ emissions were also controversial between industrial groups and environmental groups. For example, industrial groups argued that Taiwan is not a contracting of the Kyoto Protocol, there is no reason for Taiwan to strictly abide the norms of the Kyoto

¹⁸⁰ See National Sustainable Development Network, available at: http://nsdn.epa.gov.tw/Nsdn_Article_Page.aspx?midnb1=BB&midnb2=B1&midnb3=0&midnb4=0 (last visited on 6 March 2016).

¹⁸¹ Chi-Yuan Liang, "Review and Outlook of the National Energy Conference"(in Chinese), *Commercial Times*, 12 May 2014.

¹⁸² See Ministry of Economic Affairs, Executive Effects and Review of 1998 National Energy Conference 10-30 (2009).

Protocol; rather, voluntary carbon reduction by industries is the right way to go.¹⁸³ There was no clear and unequivocal conclusion on it in the conference. However, it is very clear from the conclusions that Taiwan has adopted the so-called voluntary compliance approach to cope with international climate affairs, as mentioned in chapter 2. Two National Communication reports were made in 2002 and 2012 respectively.

B. 2000-2008

In 2000, the DPP won the presidential election, stepping up to replace the KMT. DPP proposed nuclear-free homeland policy and attempted to stop establishing the fourth nuclear power station in Taiwan. It was challenged by the KMT, the leading party in the parliament.¹⁸⁴ It was a political and constitutional crisis in Taiwan. As a compromise, the proposal to stop establishing the fourth nuclear power station was cancelled while the Basic Environmental Act was passed in 2002. The nuclear-free homeland policy was incorporated in the Article 23 of the Act, stating that:

The government shall establish plans to gradually achieve the goal of becoming a nuclear-free country. The government shall also strengthen nuclear safety management and control, protections against radiation, and the management of radioactive materials and monitoring of environmental radiation to safeguard the public from the dangers of radiation exposure.

In such political atmosphere and the enter into force of the Kyoto Protocol, the Addressing Climate Change and Kyoto Protocol Working Group was established and the second National Energy Conference was also held in 2005. The second National

¹⁸³ See Zi-Lun Lin, "Climate Change Policy in Taiwan: A Discourse Approach"(in Chinese), 28 *Public Administration and Policy Review* 153, 166 (2008).

¹⁸⁴ For more details about the event, see Simona A. Grano, *Environmental governance in Taiwan: A New Generation of Activists and Stakeholders* 60-91 (London: Routledge, 2015).

Energy Conference focused more on the nuclear issue than carbon reduction.¹⁸⁵ The target of carbon reduction was suggested to be lower than that in the first National Energy Conference because of its low feasibility.¹⁸⁶ Sectors of energy, industry, transportation and residence were suggested to cut their carbon emissions. In addition, many measures were also proposed to implement the reduction of carbon emissions, such as improvement of energy efficiency and conservation, the use of renewable energy, acceleration of the development of low-carbon technology, and the adjustment of electricity price.¹⁸⁷ In particular, companies in industrial sector were encouraged to sign "voluntary carbon reduction arrangements" with government.¹⁸⁸ Companies which sign the arrangement and actually reduce their carbon emissions can get the off-set credits in return. The credits have been involved in the emission trading system by the Greenhouse Gas Reduction and Management Act since July 2015. However, to sum up, there was no consensus reached between industrial and environmental groups in the second National Energy Conference.¹⁸⁹ Some controversial issues were left to the conferences thereafter, such as the National Sustainable Development and the Conference on Sustainable Development of Taiwan's Economy in 2006.

The discussion in the National Energy Conference showed an important and clear signal to the linkage of Taiwan's national climate policy with the Kyoto Protocol. The Conference was divided into six discussion groups, and four of the them directly referred to the issue that how Taiwan should make its complete climate policy and the strategies on the reduction of CO₂ emissions in industrial, transportation and

¹⁸⁵ Liang, *supra* note 181; Lin, *supra* note 183, at 167.

¹⁸⁶ See Bureau of Energy, Ministry of Economic Affairs, *White Paper on Energy Policy* 7-8 (2005).

¹⁸⁷ *Id.*, at 11-14.

¹⁸⁸ *Id.*, at 13.

¹⁸⁹ "2005 Review: No Consensus Reached in Addressing the Kyoto Protocol in National Energy Conference ", Taiwan Environmental Information Center, available at: <http://e-info.org.tw/node/1365> (Last visited on 5 March 2016).

residential and commercial sectors, with a view to responding to the enter into force of the Kyoto Protocol.¹⁹⁰ For example, the conclusion suggested Taiwan follow the model of the Kyoto Protocol to set up its target and timetable of carbon reduction and. Cost-effective approach and the CBDR principle were also incorporated in the conclusion.¹⁹¹ Again, though the conclusion of the Conference did not legally bind the government, it showed the position clearly that Taiwan determined to voluntarily harmonise its national climate policy to international climate norms.

C. 2008 to present

In 2008, the KMT won the presidential election. Also, it was the first year for the Annex 1 countries to implement the reduction of CO₂ emissions under the Kyoto Protocol. In Taiwan, a new Working Group on Climate Change, Energy Conservation and Carbon Reduction was established under the Committee of National Sustainable Development and the Sustainable Energy Policy Framework was announced by the KMT government in June 2008. The Framework aims to achieve the "win-win-win" outcome among energy, environmental protection and economy.¹⁹² It prescribes that the target of this policy is to raise energy efficiency, develop clean energy and ensure the stable supply of energy. *Inter alia*, energy efficiency should be raised at least 2% per year in the coming eight years; energy intensity should be reduced at least 20% of the level of 2005 by 2015, and 50% by 2050 by technological innovation and integrated measures. CO₂ emissions should be reduced to the level of 2008 by 2016 to

¹⁹⁰ See generally, *Conclusions of the 2005 National Energy Conference* (in Chinese), available at: https://web3.moeaboe.gov.tw/ECW/meeting98/content/ContentLink.aspx?menu_id=1322 (last visited 6 March 2016); Lin, *supra* note 183, at 168.

¹⁹¹ See *Conclusions of the 2005 National Energy Conference* (in Chinese). (last visited 6 March 2016).

¹⁹² "The Sustainable Energy Policy Framework" (in Chinese), available at: http://verity.eri.itri.org.tw/EIGIC/index.php?option=com_content&view=article&id=1&Itemid=9 (last visited on 6 March 2016).

2020, and to the level of 2000 by 2025. The rate of use of low-carbon energy should be increased from 40% to 55% in the power generation system by 2025. Finally, it also aims to establish a safe energy supply system which can meet the need of 6% of economic growth and 30000 USD of national income per capita per year in the coming four years.¹⁹³

Further, among all the contents in the Framework, the proposal to construct a complete legal system on climate change may be the most important issue for this thesis. The system includes the legislation of the Greenhouse Gas Reduction Act, the Renewable Energy Development Act, Energy Tax Act and the amendment of Energy Management Act. The "four energy acts" reveal the different policy instruments employed by Taiwanese government to combat climate change, including command and control, subsidy, and internalization of external cost (tax), and cap and trade regime.¹⁹⁴ To date, three of them are already passed and enacted except that the Energy Tax Act is still under review in the Parliament.

In 2009, as noted earlier in chapter 2, the KMT government formally promote Taiwan's bid to "meaningfully participate in the UNFCCC". Also, the third National Energy Conference was held in April 2009 to continue the discussion of the controversial energy policy of Taiwan. Briefly speaking, the conclusion of the 2009 National Energy Conference reaffirmed the Taiwanese society has the strong will to make Taiwan a low-carbon society. The target and timetable of the reduction of GHG were again fiercely debated by different groups in the meeting. Also, it was suggested that the four energy acts and the Basic Energy Development Act should be passed as soon as possible to construct a legal system for the work of mitigation and adaptation.

¹⁹³ Id.

¹⁹⁴ Id.

In addition, it was also suggested that Taiwan should seek to cooperate with other countries and participate more in the international energy organisations.¹⁹⁵

In 2012, the 2012 National Climate Change Summit was held by the EPA of Taiwan in Taipei. Interestingly, no conclusion was made in the meeting. Instead, the participation of civil society and the right to be heard was the main melody of the meeting. The Summit focused on the communication among government, industries, varied groups of the civil society and the public. Different views, ranging from the perspective of climate science, agriculture and biodiversity, water pricing, economy, energy, climate diplomacy, environmental education and so on were presented.¹⁹⁶ Maybe it is because that Taiwanese people realised that Taiwan had been struck in the middle on the making of national development policy in the last twenty years, even though government had convened many national conferences in the past. The lack of mutual understanding among different interest groups needs to be resolved before the legislation. The bottom-up approach was used in the meeting and seemed to be successful.¹⁹⁷

2015 was an important year for the development of Taiwan's climate policy. Firstly, the fourth National Energy Conference was held in January 2015. Nuclear energy issue was still the main focus of debate in the meeting, which seriously affected the

¹⁹⁵ See generally, "Core Issues: Sustainable Development and Energy Security", *Conclusions of the 2009 National Energy Conference* (in Chinese), available at: https://web3.moeaboe.gov.tw/ECW/meeting98/content/ContentLink.aspx?menu_id=1320 (last visited on 6 March 2016).

¹⁹⁶ See generally, Great Vision Magazine ed., *The 2012 National Climate Change Summit* (Taipei: EPA, 2013).

¹⁹⁷ See Ma-li Yang, "From Understanding to participation; from Consensus to Action", in Great Vision Magazine ed., *The 2012 National Climate Change Summit 5* (Taipei: EPA, 2013).

making of conclusion of the Conference.¹⁹⁸

Secondly, the Greenhouse Gas Reduction and Management Act was passed in 15 June 2015. The Act is seen as the most important law for climate change in Taiwan. One of the key points that the Act could be passed is because the Chinese National Federation of Industries, the leader of the industrial sector in Taiwan, changed its position and turned to support the Act. In the past, the Chinese National Federation of Industries was seen as the key person to block the Act because it will increase the economic cost of industries. Also, Taiwan is not a member of the UNFCCC, Taiwan does not need to be a front runner. The core problem is the target and timetable. However, the industrial sector has gradually realised that carbon reduction is the international trend. If Taiwan does not follow the international norms, the export of Taiwanese products will be adversely affected.¹⁹⁹ The Act set up a clear target and timetable. It is that long-term national GHG emission reduction goal shall be to reduce GHG emissions to no more than 50% of 2005 GHG emission by 2050.²⁰⁰ More details of the Act will be discussed later.

Thirdly, Taiwanese government proclaimed voluntarily its own INDCs on 17 September 2015. As shown in the document, "In response to the *Lima Call for Climate Action*, Taiwan is committed to communicating its Intended Nationally Determined Contribution (INDC)...."²⁰¹ In the statement, Taiwan committed to

¹⁹⁸ See "Conclusions of National Energy Conference is criticized to be ridiculous and miserable by DPP Senators"(in Chinese), newtalk, 27 Jan. 2015, available at: <http://newtalk.tw/news/view/2015-01-27/56311> (last visited on 9 March 2016).

¹⁹⁹ You-ru Lee, "How to Breathe Fresh Air without Losing Your Job?"(in Chinese), the Journalist, 2 July 2015, available at: <http://www.new7.com.tw/NewsView.aspx?t=&i=TXT201506241752499FI> (last visited on 9 March 2016).

²⁰⁰ See Article 4.

²⁰¹ "Submission by Republic of China (Taiwan) Intended Nationally Determined Contribution", at 1, available at:

implement an economy-wide target, through domestic abatement effort to reduce its greenhouse gas emissions (214 Mt CO₂.eq) by 50% from the business-as-usual level (428 Mt CO₂.eq) by 2030.²⁰² This shows again Taiwan's ambitious commitment in combating climate change. Further, because the emission target is incorporated in the Greenhouse Gas Reduction and Management Act, it is not just a policy announcement but also a legal obligation in national law.

D. Sub-conclusion

More than twenty years has passed since former President Lee's announcement to voluntarily comply with the norms of the UNFCCC in 1992. Taiwanese government has made great efforts to construct its climate policy. Several things could be observed through the development of the climate policy. Firstly, it has been constantly proved by the announcement of policy or legislation that Taiwan commits itself to voluntarily comply with the norms in the international climate change regime. Taiwan treats itself as if it is a member of the UNFCCC. Secondly, the dilemma between economic development and environmental protection has existed in Taiwan since the end of the World War II.²⁰³ As Lin argues, "environmental pragmatist discourse coalition" and "climate action discourse coalition" in Taiwan have different positions on the environmental issues, such as the ideology of growth, the value of environment, and approaches to protect ecosystem.²⁰⁴ The long-standing deadlock of the national negotiation proves the phenomenon. In Taiwan, climate policy is highly intertwined

[http://enews.epa.gov.tw/enews/enews_frp/104/1117/174044/Submission%20by%20Republic%20of%20China%20\(Taiwan\)Intended%20Nationally%20Determined%20Contribution.pdf](http://enews.epa.gov.tw/enews/enews_frp/104/1117/174044/Submission%20by%20Republic%20of%20China%20(Taiwan)Intended%20Nationally%20Determined%20Contribution.pdf) (last visited on 4 March 2016).

²⁰² Id.

²⁰³ For more details about the dilemma between developmentalism and environmental protection, see Hua-pi Tseng, *The Environmental History of Taiwan after War: From Toxic Oil to National Park* (Taipei: Wunan, 2011); Grano, *supra* note 184, at 39-59.

²⁰⁴ Lin, *supra* note 183, at 161.

with national energy policy, in particular the target of the reduction of CO₂ emission. It becomes more controversial when the issue of the fourth nuclear power station is considered together. The aim of climate policy seems to be lean to supporting the stable and diverse energy supply in order to maintain the economic growth of Taiwan more than responding to the concern of environment as such. Economic concerns draw more attention than environmental concerns.

5.3 Climate legislation in Taiwan

5.3.1 Domestic laws relating to climate change

As noted earlier, Taiwan is producing more and more greenhouse gases. Therefore, Taiwanese government accelerates to establish the legal structures for the mitigation of climate change in recent years. Taiwan's response to the GHG reduction at national level could be seen from many aspects. This part of discussion emphasizes on its current domestic legal constructions.

A. Constitution

The notion of 'environmental protection' was not incorporated into the Constitution of ROC, which was adopted on 25 December 1947. Following the international tendency, however, environmental protection has become the fundamental policy at Constitutional level since the Amendment of the Constitution in 1991. Article 10.2 of the Additional Articles of the Constitution of the R.O.C. (Taiwan) provides that: 'Environmental and ecological protection shall be given equal consideration with economic and technological development.'

The issue of climate change, of course, should be involved at Constitutional level as well.

B. Basic Environmental Act

Basic Environmental Act was promulgated by presidential order on December 11, 2002. The Act aims to 'raise the quality of the environment, advance the health and well-being of the public, preserve environmental resources, and pursue sustainable development by promoting environmental protection.'²⁰⁵

The provisions which relate to GHG reduction are as follows:

Article 3 stipulates that:

Economic, technological and social development shall equally emphasize environmental protection based on long-term national interests. However, in the event that economic, technological or social development has a seriously negative impact on the environment or there is concern of endangering the environment, the protection of the environment shall prevail.

Article 21 stipulates that: 'Government entities at all levels shall actively adopt measures to control carbon dioxide emissions and establish related plans to mitigate the greenhouse effect.'

Article 37 stipulates that:

With the aim of rationally and effectively using resources and meeting environmental protection needs, government entities at all levels shall adopt appropriate preferential treatment, incentive, guidance and reparation measures for the following activities:

- Protection of the natural, social and human environment;
- Research and development of clean production technologies, equipment or products for production cleaning;
- Research and development of resource recycling and reuse technologies

²⁰⁵ Article 1 of the Act.

- Promotion and application of renewable energy;
- Research and development of energy conservation technology and installation of products that conserve energy;
- Manufacture or installation of pollution control equipment;
- Moving for the purpose of protecting the environment;
- Provision of land or other resources to be used to protect the environment;
- Environmental reforestation and greenification;
- Other activities related to environmental protection.

C. Greenhouse Gas Reduction and Management Act

The Greenhouse Gas Reduction and Management Act is seen as the most important legislation for Taiwan to cope with climate change in the future. As mentioned, the Act was passed in 15 June 2015. Key provisions of this Act relating the linkage to the UNFCCC are as follows:

1. Long-term target of GHG reduction

As noted above, the Act set up a long-term national GHG emission reduction goal , by which Taiwan commits to reduce GHG emissions to no more than 50% of 2005 GHG emission by 2050.²⁰⁶ The goal shall be timely adjusted by the central competent authority, in consultation with the central industry competent authorities, by taking into consideration the United Nations Framework Convention on Climate Change (UNFCCC), its agreements and or related international conventions decisions, together with domestic circumstances, subject to the Executive Yuan's approval; and in line with the required periodical review.

²⁰⁶ Article 4.1 of the Act.

2. Main principles

The Act set up some principles in Article 6. First, the National reduction targets and schedule shall seek **to realize the common but differentiated responsibilities specified in UNFCCC**, while also furthering the sustainable development of the nation's environment, economy, and society;²⁰⁷ second, the determination of sector-based periodic regulatory goals shall take **cost effectiveness** into consideration, and strive to achieve GHG reductions at the lowest possible cost;²⁰⁸ third, the government shall actively adopt **preventive measures**, seek to forecast, avoid, or reduce the causes of climate change, and mitigate the adverse effects of climate change;²⁰⁹ fourth, the government shall actively **strengthen international cooperation**, and strive to maintain the international competitiveness of domestic industries.²¹⁰(emphasis added)

It could be seen from the emphasized words that the Act aims to connect seamlessly with the UNFCCC by internalizing the principles of the UNFCCC.

3. Public participation

Public participation is stipulated in Article 8 of the Act which asks the Executive Yuan 'to invite relevant central government agencies, non-governmental organizations, experts and scholars to determine and review the division, integration, implementation and compilation of the work of GHG reduction and climate change adaptation.'

4. Fossil fuel tax

Fossil fuel will be taxed in the future. Article 5.3(3) asks the government to

²⁰⁷ Article 6(1) of the Act.

²⁰⁸ Article 6(2) of the Act.

²⁰⁹ Article 6(3) of the Act.

²¹⁰ Article 6(4) of the Act.

implement tax mechanisms on imported fossil fuels based on carbon dioxide equivalent, in order to respond to the impact of climate change, under the principle of equality and social welfare promotion.

5. Cap and trade mechanism

A cap-and-trade mechanism is committed to be established in the future according to Article 8.2(12) of the Act. In order to make it work, Taiwan needs to create a national system for measurement, registry and verification (MRV). The problem is that when emission credits or allowances are made by the system, can it be accepted by other countries? This is the biggest question for Taiwan to overcome in the future.

D. Statute for Upgrading Industries

Statute for Upgrading Industries is the law which mainly relates to industrial development. Article 6.1(4) of this Statute provides that: ‘To meet the requirement for industrial upgrading, a company may credit five to twenty percent of the amount of funds disbursed for any of the following purposes against the amount of profit-seeking enterprise income tax payable in each year within a period of five years from the then current year: ...The funds invested in equipment or technology used for the **reduction of greenhouse gas emissions** or the enhancement of energy efficiency;’ (emphasis added) This approach echoes Article 2.1(a)(v) of Kyoto Protocol, which suggests parties impose progressive reduction or phasing out of market imperfections, fiscal incentives, tax and duty exemptions and subsidies in all greenhouse gas emitting sectors that run counter to the objective of the Convention and application of market instruments. By the same token, it is basically good to impose this kind of measures, but the potential conflict with WTO norms should also be considered as

well.

E. Draft on Energy Tax Act

This Draft was submitted to the congress in 2006, but it was revoked by Democratic Progressive Party in November 2007. As noted before, it is expected that this Energy Tax Act could encourage nationals to save energy, to raise the efficiency of the use of energy, to push the development of energy industry as well, and then to enhance the growth of economy. The polluter-pays principle in international environmental law could be the good ground to this Draft. However, this Draft suffers too much opposition from the industry groups, so it is not clear how it will develop in the future.

F. Renewable Energy Development Act

This Statute was sent to the congress for consideration on 14 June 2005, chiefly due to the entering into force of the Kyoto Protocol on 16 February 2005. It has been postponed for several years and finally it was adopted and then promulgated on 8 July 2009. Taiwan relies deeply on the import of energy to develop its economy and meet the basic need of lives. However, when No-Nuke policy becomes prominent in Taiwan after 2000 and fossil fuels are not a good choice, the substitute energy becomes more and more important.

As for the purpose of this Statute, Article 1 of the Statute shows that '[T]he main goals of this Statute are to promote the use of renewable energy, enhance the diversity of energy, improve the quality of environment and boost the development of related industries.' Notably, the main way to achieve these goals in the Statute is through the governmental subsidy to the industries. According to Article 6 of the Statute, a power

plant should be collected a certain percent of money as a fund when electric power, which is not produced by renewable energy, is generated; the purpose of this fund is used for the development of renewable energy and for the subsidy of the equipments and electric price of renewable energy, and so on. Actually, economic incentives are the common way to push the environmental protection and sustainable development in Taiwan. As noted above, though this approach may be justified by Article 2.1(a)(v) of the Kyoto Protocol, the requirement of National Treatment and other WTO norms ought to be concerned.

G. Air Pollution Control Act

Air Pollution Control Act has entered into force for many years in Taiwan. Article 2.(6) of the Air Pollution Control Act Enforcement Rules gives the competent authority, i.e. Environmental Protection Administration(EPA), discretion to decide what can be regarded as an air pollutant. However, it was not until 2012 that the six greenhouse gases were declared to be ‘air pollutants’ by the EPA of Taiwan.²¹¹ It is a temporary stage because on the one hand Taiwan wanted to regulate the emissions of greenhouse gas; however, on the other hand due to the fact that the legislation of the Greenhouse Gas Reduction and Management Act had been postponed for consideration in the congress for several years, Taiwan government had to find a ‘plan B’ to get to its goal. In the declaration, the EPA stated the decision on the ground that ‘CO₂, CH₄, N₂O, HFCs, PFCs and SF₆, the so-called greenhouse gases which result in the effect of global warming and climate change, and indirectly impact, change and hinder the living environment.’ To some extent, Taiwan follows the pace of the EPA of the US

²¹¹ Environmental Protection Administration Order Huan-Shu-Kong-Tzu No. 1010038277 on May 9, 2012.

which declared the greenhouse gas as air pollutants in 2009. It is notably to say that because the Greenhouse Gas Reduction and Management Act is already promulgated, the regulation of the GHG is opted out from this Act.

5.4 Conclusion

This chapter analyses how Taiwan interacts and reconciles its national climate policies and laws with the UNFCCC. First, Taiwan continues to claim that the UNFCCC should allow Taiwan to take ‘meaningful participation’ in the meetings of the UNFCCC in a more flexible way, such as an ‘observer’ status. Second, Taiwanese government has constantly announced its ‘voluntary compliance’ approach to tackle the climate issues with the UNFCCC since 1992. Third, Taiwan explicitly incorporates the main principles of the UNFCCC into the domestic laws. Fourth, Taiwan provides its financial and technological support to assist the use of renewable energy to some African countries which have diplomatic relations with Taiwan, such as the ‘One child, one light’ programme in Burkina Faso.

On the other hand, Taiwan pays much attention to the imposition of climate-related trade measures in other organisations or countries. The discussion of CO₂ reduction in the ICAO and the debate on the imposition of carbon allowance to foreign aircrafts in the EU-ETS on aviation are the just examples. In such a circumstance, Taiwan depends highly on the operation of the WTO to claim its rights on trade.

In conclusion, Taiwan is the best case to show that the UNFCCC should take special consideration to the involvement of an unusual non-party state.

Chapter 6 Moving to Wider Participation to the UNFCCC

Regime

Based on the above studies, chapter 6 turns to discuss what can be learned from the latest outcome of the UNFCCC negotiation and rethinks the possible approaches to encourage the widest participation of all countries and make the global climate regime work better.

6.1 Multilateralism vs. Minilateralism

In the period that the negotiations of the UNFCCC were stalled, some scholars argued that due to the inherent limitation to make a multilateral climate treaty, it is probably not the best choice to insist make a new international legally binding agreement. Instead, states can turn to build up bilateral or regional cooperation mechanism which makes it easier to put the work forward.²¹² On the other hand, many people still believe that an international legal agreement is the best choice. As Bodansky and Diringier argue, for a long-term objective, it would be helpful for parties to pursue an ultimate, binding framework.²¹³ The debate for the future development of the UNFCCC to induce wider participation deserves to be discussed.

6.2 The regime design

The Kyoto Protocol was criticised to reflect the CBDR principle in the wrong way,

²¹² See for example, Robert Falkner et. al., 'International Climate Policy after Copenhagen: Toward a "Building Blocks" Approach', in David Held et. al., eds., *The Governance of Climate Change: Science, Economics, Politics & Ethics* 202-222 (Cambridge: Polity 2011)

²¹³ Bodansky and Diringier, *supra* note 5, at 23-24.

which caused the deadlock of the negotiations for a decade. Instead, the Paris Agreement takes different approach to tackle the issue. To the large extent, it can be called a paradigm shift that the UNFCCC regime is reshaped into a new face.

6.3 Harmonisation of different climate regimes

When fragmentation of global climate governance becomes inevitable, the harmonisation of different climate regimes is need. How can it be addressed from the perspective of international law?

6.4 Incentives

As Cullet concludes in the analysis of differential treatment in international environmental law, self-interest rather than solidarity is probably the main motives for successfully implementing differentiation in practice.²¹⁴ The analysis of this thesis also resonate Cullet's argument. In other words, in the case that self-interest is the main concern for states, what incentives can be provided to join the regime?

6.4 More flexibility of the UNFCCC Regime

As noted, to the large extent, the adoption of the Paris Agreement can be called a paradigm shift that the UNFCCC regime is reshaped into a new face. The key point to this is that it makes the regime more flexible for party states to build up their emission target and timetable on a voluntary basis combined with some mandatory obligations on the reporting and stocktaking. Based on the observation of the development of the latest UNFCCC regime, this thesis argues that making the regime move forward is the goal at the stage. The widest participation is the necessary means to get to the goal. In such a case, the problem of Taiwan's membership in the UNFCCC could also be

²¹⁴ Cullet, *supra* note 159, at 182.

considered in this way. The idea of a qualified ‘carbon entity’ may be feasible.

Chapter 7 Conclusion

This thesis examines Taiwan's participation in the global climate regime from the perspective of a non-party state. It consists of theoretical research on non-party issues and an empirical study on the case that how Taiwan is affected by its non-party status and how it interacts with and integrates itself into the global climate regime. In this chapter, I conclude as follows with a general suggestion that the UNFCCC regime should be more flexible on membership and continue the hybrid of soft-hard law approach to make the regime more effective.

Climate change is a wicked problem which needs to be governed by multi-level actors and also by multi-facet regimes at different fields due to its complexity and uncertainty. The UNFCCC system plays the central role in global climate regime while it is supplemented by other climate arrangements. In addition, climate change is an issue about self-interest of states and solidarity of the international community. In such a circumstance, participation of states in global climate regime is actually an issue about how the needs of all states are fulfilled and how the regime can really move forward to work more effectively.

Although to encourage the widest participation of all states is the goal of the UNFCCC, the preceding history of the negotiations in the UNFCCC shows some inherent and fundamental limitation to make a multilateral treaty. Fairness is one of the main problems. It is a perennial issue in human society. A multilateral treaty is always made under the consensus and compromise of all participating parties when each and every state thought it is treated fairly. The preceding analysis of the CBDR principle shows that the way that the Kyoto Protocol reflects the CBDR principle does

not function very well. Because there are no concrete or quantitative criteria forever to measure how the equitable distribution of burden should be. The top-down approach of the Kyoto Protocol to ask Annex I countries make concrete commitments while keep silent on the obligations of developing countries undervalues the importance of self-interest and fairness to states, especially developed countries. The use of NDCs in the Paris Agreement is a good way to eliminate the dissatisfaction that states are forced by other countries to make commitments.

The second problem to make a multilateral treaty is the design of the treaty. It is also about the self-interest of states. On the one hand, states create the treaty and expect it work well; on the other hand, states understand they are bound by it and tend to make it not too strict at the same time. The dilemma is fully reflected in the Paris Agreement. Although the call ‘to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties’ in Durban 2011 was fulfilled, Contracting Parties adopted the hybrid of binding and non-binding contents in the Paris Agreement. Making the regime work well is more important than making a treaty legally binding. As Bodansky and Diringer argue, an evolving regime must take careful steps when it is deepening, broadening and integrating. It takes time for trust by all participants.²¹⁵ The preceding analysis of the thesis observes the failure of ambitious Bali Action and Copenhagen conference and also sees that the Paris Agreement is on the right track to make itself softer.

Life will find a way. When the negotiation of the UNFCCC is stalled, states turn to find solutions in other platforms. For example, the United States rejected to join the Kyoto Protocol while made bilateral joint climate statements with China and India

²¹⁵ See Bodansky and Diringer, *supra* note 5.

respectively in 2014 and 2015. It also establishes a carbon market of its own. Fragmentation of global climate governance becomes inevitable. The analysis of chapter 4 shows that even a non-party state of the UNFCCC will be likely *de jure* and definitely be *de facto* affected by the UNFCCC. The problems of conflicts of norms and forum shopping need to be addressed. Self-restriction of legislation seems to be a way to avoid the conflict. For instance, unlike the CITES, the Paris Agreement keeps silent to the issue of trade. However, it remains to be seen.

Taiwan's case in the participation of a non-party state in the UNFCCC is unique. Unlike some countries which determine to withdraw from the Kyoto Protocol, Taiwan is rejected to join the United Nations' regime by the sovereign problem. The influence of the non-party status in the United Nations to Taiwan is undoubtedly enormous. First, the previous experience of Taiwan to be imposed trade sanctions by the CITES and the United States unilaterally affected deeply the response strategy of Taiwanese government for foreign affairs and people's attitude to international environmental norms. People thought Taiwan is not treated fairly by the international community because the rights and obligations are not balanced.

Second, it is very clear to Taiwan that it cannot be isolated outside the international community. Therefore, Taiwanese government employs all the possible strategies to participate in the international affairs, such as the 'meaningful participation' and 'voluntary compliance' approaches, or to participate in the international agreements or organisations as a 'fishing entity' or an 'observer'. In the field of climate change, Taiwan is using the same strategy and approach.

Third, since the action to fight against climate change connect highly to the development of green technology and Taiwan became a full member of the WTO in

2002, Taiwan used to address climate issues in the platforms of economy and trade, rather than environment.

In addition, the empirical case of Taiwan shows that when rejected to join the UNFCCC system, it is very difficult for Taiwan to establish a national carbon market in a cost-effective way because its carbon market is not able to link with other markets in the world. To some extent, Taiwan becomes a loop hole in the global climate governance.

It can be learned from the current development of the UNFCCC that offering more flexibility on the issue of access is the way to address the problem of Taiwan's participation in the global climate regime. By softening the legal effect of the Paris Agreement and encouraging more participation of non-state actors, contracting parties of the Paris Conference seem to have realised that widest participation to make the regime work is more important than making a perfect, binding agreement. If this observation is correct, then Taiwan can be treated similarly. It does not mean that Taiwan must become a member of the UNFCCC, but that Taiwan can be seen as a qualified 'carbon entity' to link its market to the world. Given the common concern of humankind and Taiwan's nearly 1% of global share in CO₂ emission, Taiwan has no ground to be forgotten in the global climate regime.

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