

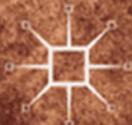
A stylized sun with a dark grey circular center and several triangular rays extending outwards. The sun is positioned on the left side of the cover, partially overlapping a light blue textured background. The rays are a pale yellow-green color. The background of the entire cover is split vertically: the left half is light blue with a subtle paper-like texture, and the right half is a darker, brownish-orange with a similar texture.

# **National Identity and Economic Interest**

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Taiwan's Competing Options and  
Their Implications for Regional Stability

Edited by  
**Peter C. Y. Chow**



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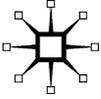


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Edited by  
*Peter C. Y. Chow*

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NATIONAL IDENTITY AND ECONOMIC INTEREST  
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## Preface

**I**n the economically dynamic East Asia region, the Korean Peninsula and Taiwan Strait are two of the most likely trouble spots for the peace and stability in East Asia. While the United States is linked to South Korea by both mutual defence treaty and a Free Trade Agreement, its relationship to Taiwan is far less specific.

The rise of China as an economic powerhouse has caused an unprecedented shift of the political hegemony in the region; never before has East Asia experienced the existence of two simultaneous powers in the region. Japan's status as the leader of industrial democracy in East Asia, however, has experienced sluggish economic growth since the Heisei recession, followed by the triple disaster of March 2011. And although the U.S. has stated its determination to remain a Pacific power, it has been diverted from changing dynamics in the Taiwan Strait by its economic stagnation since the global financial crisis, its difficulties in the Middle East, and its war in Afghanistan. The resulting partial power vacuum in East Asia has allowed China to greatly expand its influences in East and Southeast Asia. Without avoiding the issue of territorial disputes on those uninhabited islands, China signed the ASEAN-China Free Trade Agreement with ASEAN countries in 2002, a Close Economic Partnership Agreement (ECPA) with Hong Kong and Macao in 2003, and the Economic Cooperation Framework Agreement (ECFA) with Taiwan in 2010. Evidently, these actions lead one to believe not only that there is an emerging trade bloc across the Taiwan Strait, but also that a "Greater Chinese Economic Zone" will form in the near future.

Since May 2008, Taiwan under President Ma Yng-jeou has adopted a heretofore uncharted China-tilting stance, as exemplified by the signing of the ECFA with Beijing. Though this appeasement policy has resulted in a political détente with Beijing, the uncontrolled economic integration with two rival political regimes will push Taiwan into an irreversible China-centric economic bloc that will jeopardize the country's hard-won freedom and democracy. Therefore, Taiwan may join China's orbit economically in the short term and politically in the long term. Consequently, not only is the ability of the U.S. to support Taiwan defensively in question, but so is the sustainability of self-governance in

Taiwan under the current, reckless integration of its economy with China's and the unconditional normalization of cross-strait ties. The developments of economic integration and a possible peace agreement between China and Taiwan would significantly affect not only the economic and security interests of Japan and the United States, but also the peace and stability in the entire East Asian region.

The unique status of Taiwan's statehood has rendered its trade pact with China much more complicated than any of its other relationships. On the one hand, Taiwan is anxious to incorporate China's still growing economy as one of its major export markets. On the other hand, Beijing's preconditions for the ECFA imply severe concession on Taiwan's de facto autonomy predicating that any trade pact is necessarily based on the so-called One China principle. Although President Ma adopted a "One China, self-interpretation" principle based on the fictitious "1992 Consensus," a few eminent observers either domestically or abroad are convinced by this argument. Hence, the splitting paths of Taiwan's economic interests with her national identity has led to an unusually contested public debate and controversy over the ECFA.

We have herewith endeavored to garner the collective wisdom of several prominent scholars from diverse areas of Asia studies in general, as well as Taiwan studies in particular. Their chapters voice an unyielding challenge to our leaders and the general public: how can we resolute the legal and sociopolitical aspects of economic integration with confounding force of national identity? It is a timely publication on the political economy of economic integration and national identity, and calls attention to the urgent issue of regional peace and stability in East Asian.

I am indebted to all contributors for their strong supports on this book project and their dedication toward an in-depth analysis on various issues in each chapter. I would also like to thank Palgrave Macmillan for its strong interest in an early draft of the book project. Finally, all members of my family, my wife Alice, my daughter Isabella, and my son Philbert, have tolerated my negligence of my family obligation while I worked on this project. Needless to say, I am grateful for their support.

PETER C. Y. CHOW  
July 20, 2011

PART I

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*Economic Integration with a Rival  
Political Regime*

## CHAPTER 1

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# Introduction

*Peter C. Y. Chow*

The emerging trade blocs of East Asia were stimulated by the evolution of the single market of the European Union and by the North American Free Trade Agreement (FTA) forged between Canada, Mexico, and the United States in the 1990s. The Asian financial crisis in 1997–98 and the deadlock in the Doha Round of trade negotiations for freer global trade led to numerous bilateral and multilateral FTAs; there were more than 40 FTAs in East Asia by May 2011. These developments in the integration of emerging economies have an impact on all countries, whether or not they are participating in the new trade blocs of the Asia-Pacific region.

Within East Asia, there has been a significant shift in economic power throughout the past decade. The phenomenal growth of China as a powerhouse in the world economy and the sluggish growth of Japan's economy since the 1990s, a period known as the "Heisei Recession, had enabled China to push for regional economic integration more aggressively by signing numerous bilateral and multilateral FTAs with several Asian countries. Under its "Good Neighbourhood Policy" toward Southeast Asian countries, China undertook a policy-driven approach toward economic integration by offering ASEAN countries significant preferential trade treatments, thus encouraging them to join the ASEAN-China FTA, of which the United States is an outlier. On the other hand, China used its political leverage to establish a "Greater China Economic Zone" by signing the Closer Economic Partnership (CEPA) with Hong Kong and Macao in 2003.

In spite of Taiwan's deepening economic and trade interactions with Southeast Asian countries, Taiwan itself was barred from signing any bilateral and multilateral FTAs with ASEAN countries due to the "China factor." Hence, Taiwan has been suffering from a syndrome of being marginalized amid the emergence of regional integration in Asia. As a trade-dependent economy with exports accounting for more than 60% of its total GDP, Taiwan has aspired

toward integration with East Asian economies to complement its drive toward globalization (Chow and Ciuriak, 2012).<sup>1</sup> During the Democratic Progressive Party (DPP) administration of 2000–2008, Taiwan signed three FTAs with five tiny states in Latin America, which only accounted for less than 0.2% of its total trade with the rest of the world. Due to its proindependent attitude, the DPP administration was unable to negotiate with Beijing to further economic integration except for some functional issues on trade-investment operations,<sup>2</sup> which, of course, could not fulfill the aspirations of profit-oriented Taiwanese businessmen.

### **I. Taiwan's Domestic Pressure, Cumulated International Isolation, and China's Grand Strategy**

Taiwan's eagerness to dance to the music of FTAs closely matched Beijing's united front of unification policy and its intention to establish a "Greater China Economic Zone." After President Ma Ying-jeou took power as the president of Taiwan in May 2008, his party, the Nationalists or the Kuomintang, pursued rapprochement with Beijing by adopting a series of pro-China policies meant to enhance the relations across the Taiwan Strait. Direct flights were organized between China and Taiwan, investment ceilings were lifted to further liberalize Taiwan's trade with and investment in China, and fifteen trade pacts with China were signed. Among the latter, the Economic Cooperation Framework Agreement (ECFA) of June 2010 is the most significant in the drive toward economic integration between the two economies.

Though détente with a regime that had been denying Taiwan's sovereignty reduced tensions on the Taiwan Strait, many observers concerned the sustainability of a self-governing Taiwan recklessly integrating and normalizing relation with its neighbor across the strait had caused much apprehension among the Taiwanese people. Many people in Taiwan considered that further economic integration with China without mutual recognition of Taiwanese political sovereignty could force Taiwan into China's economic orbit and even into unification with its authoritarian regime. Internationally, the potential crisis questions not only the efficacy of U.S. policies supporting Taiwan's freedom and democracy but also the actual effects that Japan and the U.S. might experience. Despite being the leader of industrial democracy in East Asia, Japan has clocked its most sluggish growth in modern economic history growth since the Heisei recession, a plight that has been exacerbated by a natural disaster and a nuclear accident in March 2011. And despite being a Pacific power, the United States has not devoted its due attention to the changing dynamics on both sides of the Taiwan Strait due to its own concerns regarding economic recovery from the global financial crisis, foreign policy in the Middle East, and war in Afghanistan. Besides addressing some of the tensions on the Korean Peninsula and in the South China Sea, the U.S. has only paid lip service by welcoming the engagements between China and Taiwan under the Ma administration. Therefore, China was able to expand its economic influence and build up its military capabilities in the region.

## II. Taiwan's Democratization and Its Rising Taiwanese Identity

Democratization in Taiwan since the later 1980s led to the rise of a Taiwanese identity, with 70% or more people on the island identifying themselves as Taiwanese rather than Chinese (chapter 7). Public opinion polls also reveal that a great majority of people in Taiwan would prefer to maintain the “status quo” so as to enjoy their freedom and democracy rather than be annexed with China and its authoritarian regime.<sup>3</sup> Given the domestic demand for an export market and possible international exclusion from the emerging economic integration in East Asia, Taiwan would need to cope with China by maintaining its trade and investment flows across the Taiwan Strait. But never before have had any two economies operating under rival regimes attained economic integration to the extent that Taiwan and China might attempt. To what extent will economic interests of Taiwanese businessmen override the Taiwanese national identities? Or will Taiwanese national identity dictate the path of economic integration with China? What is the role of the rising national identity in Taiwan in the emerging economic integration between China and Taiwan? Will economic integration lead to political unification? And could the Taiwanese identity then become just another local Chinese identity such as Cantonese or Hunanese? What are the probable developments of those plausible scenarios and what does the evidence show so far? How would these developments affect the regional peace and stability in East Asia? These are but a few interesting questions that this book will try to answer for the reader in the subsequent chapters written by scholars in their respective specialities in these topics.

## III. Political Economy of Economic Engagements between Two Rival Regimes

Important beyond economic interests and domestic identity politics, the signing of the ECFA will have powerful repercussions in the emerging “Great China Economic Zone” and even in the China-centric hub in East Asia economic integration (Chow, 2011). Both developments would have substantial impacts on the regional peace, stability, and prosperity in East Asia, where the United States has high economic and strategic interest. The ultimate effects of the ECFA between China and Taiwan will be felt far beyond the two sides of the Taiwan Strait. They would cause a paradigm shift in the triangular relations among China, Taiwan, and the U.S., with strong repercussions also in Japan. If economic integration between China and Taiwan leads to an emerging Great China Economic Zone, what would be the consequences of removing Taiwan as an important strategic actor in East and Southeast Asia? Will the China-centric hub become Beijing’s “Monroe Doctrine” to remove U.S. influence from East and Southeast Asia? Can the U.S. maintain its leadership in the Pacific without participating in the emerging trade blocs in the regions? Taiwan’s choices on how to cope with the rise of China and U.S. policy actions regarding Taiwan will dominate U.S.-China-Taiwan relations in the coming decades. Hence, the developments in the emerging trade bloc across the Taiwan

Strait will affect not only the future of Taiwan, but also the peace, stability, and prosperity in East Asia.

#### **IV. The Legality of ECFA, Its Impacts on Taiwan's Economy and Beyond**

In [Chapter 2](#), Jau-Yuan Hwang analyzes the legal issues concerning democratic supervision of the ECFA and other cross-straits agreements. Hwang found that, in the formal sense, the ECFA was the first such agreement to be deliberated and approved by Taiwan's Legislative Yuan before entering into force. However, he argues, the current legal mechanism governing legislative supervision over the cross-straits agreements has been incomplete and ineffective. It is even more problematic for the use of referendums to supervise such agreements. Along this line, Hwang presents his analysis and arguments.

Hwang's chapter first discusses the legal nature of the ECFA under the WTO regime. He maintains that the ECFA is an interim agreement toward a fully fledged free-trade agreement which can be made in the long run. In this regard, the ECFA is undoubtedly an international agreement between two WTO members. Following this finding, Hwang discusses the status of the ECFA under Taiwanese laws. In spite of the constitutional controversies, the ECFA is to be approved by the Legislative Yuan before taking effect, in accordance with the specially enacted Statute Governing Relations between Peoples of the Taiwan Area and the Mainland Area. From here, Hwang further researches the laws and practices of the congressional supervision over the signing of Taiwan-China agreements.

Regarding the pre-ECFA agreements, Hwang finds that the vagueness of current statutory provisions often gives the executive branch too much leeway to escape from congressional supervision. In practice, Hwang argues, the Legislative Yuan often seems impotent when it comes to real checks and balances of external agreements. Moreover, the signing and approval of the ECFA once again illustrated the absence of effective congressional supervision, either legally or politically.

On this part, Hwang makes several suggestions on how to improve the supervision mechanisms, including referendums, of cross-straits and other external agreements. His main proposals include: (1) eliminating the "automatically take-effect clause" from future Taiwan-China agreements; (2) adopting a variety of prior control mechanisms, such as specific authorizations, restrictions, hearings, and consultations; (3) making reservations to an agreement upon approval; (4) statutorily overriding after the signing of an agreement; and (5) allowing and holding (mandatory) referendums on important cross-straits agreements.

Finally, Hwang discusses the supervision of the implementation of the ECFA. Considering its international nature, Hwang suggests that the dispute settlement mechanisms of the WTO should be a potential safeguard to protect Taiwan's interests and autonomy in the long run. In his conclusion,

Hwang stresses that it is essential to keep this international, multilateral procedure available and to deter the ECFA from evolving into an isolated, bilateral regime.

In [Chapter 3](#), Hong argues that, as a matter of fact, ECFA is a “Framework Agreement” as well as an “Early Harvest Program” with a list of limited products to liberalize. The implication is that the economic impacts of ECFA will depend on the outcomes of the subsequent negotiations, which will be tough on Taiwan’s banning of imports of more than 2,200 Chinese agricultural and industrial items (about 20% of Taiwan’s total imports).

Taiwan might find it difficult to comply fully with the WTO rules imposed on developed members engaging in regional trade agreements. Particularly problematic could be the criteria that “substantially all the trade” (SAT) in products must originate in the partner’s territory, since there is no “plan and schedule” in the legal text of ECFA.

The ECFA has been often compared with the CEPA between China and Hong Kong, mainly because the public’s suspicion that signing such an agreement could create the trap of “one country, two systems” has been confirmed in CEPA. However, both sides of ECFA have market access in a reciprocal way. In contrast, Hong Kong is a well known free port, a fact that suggests that it could be drawing unilateral national “grants” from China under the CEPA.

Most economists deal only with cost-benefit analysis of a trade pact. Because of the overlapping claims on Taiwan’s sovereignty between Beijing and Taipei, in [chapter 4](#) Chow takes a political economy approach to deal with the paradox of economic benefit and political cost of signing a trade pact with a politically rival regime. He analyzes the inherent contradiction that reducing political tensions across the Taiwan Strait could narrow the political choices available to Taiwan. Given that Beijing has never recognized Taiwan’s sovereignty, there is a trade-off between economic interests and political sovereignty if Taiwan were to sign any trade pact with China under the “one China” principle. Chow’s assessment was based on a computable general equilibrium (CGE) model simulation of fully fledged trade liberalization under an eventual FTA between China and Taiwan. In addition to the cost-benefit analysis of trade liberalization, he especially focuses on the sociopolitical consequences of economic integration between these two economies. He also analyzes the change of the “status quo” in the Taiwan Strait following enactment of the ECFA. Finally, he looks at the implications of such upheaval in East Asia for American interests in the region.

Since his inauguration as president of the Republic of China in May 2008, Ma Ying-jeou has pursued a rapid succession of agreements across the Taiwan Straits covering topics such as agriculture, charter flights, quarantine, quality control, and tariffs reduction. As the opposition has been afraid that this new China policy is causing integration to occur too quickly and too deeply, there has been an ongoing debate about the ability of Ma’s government to protect the sovereignty of the Republic. [Chapter 5](#) by Stéphane Corcuff analyzes these perceptions and the politicization and the reality of the risks and the responses.

Chapter 5 proposes a comparison of the present situation with the “discursive negotiation” of the Zheng in 1683 about their surrender to the Qing, providing concrete examples of the anxiety of the opposition parties and of the government’s responses in both eras. There are numerous and important differences between the two situations, however, that serve to characterize more precisely the current situation and answer the question of how the KMT reacts to a reluctant civil society.

## V. Taiwanese Identity and Apprehension of Rapprochement with China

In Chapter 6, Michael Danielson argues that the Taiwanese appear to be moving toward a common Taiwanese identity. In order to better understand identity issues, the chapter starts out with a short introduction to identity and a historical overview of the national identity policies in Taiwan during the current and the two previous presidencies. The Taiwanese identity thrives despite the rapid rapprochement between Taiwan and China through cross-strait trade agreements and the closer relationship between China’s communist party and Taiwan’s ruling party, the KMT. Since 1992, democracy has been acting as a melting pot and has facilitated the move toward a multifaceted and common Taiwanese identity, even for those with Chinese heritages.

Despite a stronger national identity, Taiwan continues to be a divided society, both across ethnic boundaries and political communities. In contrast to other developed countries, Taiwan does not have a clear definition of itself that can act as a solid foundation for the daily debates about the Taiwanese society. However, the push toward a common Taiwanese identity continues despite the KMT’s effort to construct a Chinese national identity policy since 2008. The KMT policy has failed to gather support because it runs against the opinions of the vast majority of the population. It is, consequently, unsustainable.

The history of Taiwan reveals that the Taiwanese will resist attempts to impose a specific culture or identity upon their island. During the authoritarian era, the KMT government followed a similar national identity policy as today and imposed a strong Chinese culture and identity upon the society. It did not survive in democratization.

In 2008, after the administration of President of Taiwan Chen Shui-bian (陳水扁) witnessed the most trade integration between its own nation and China and Ma Ying-jeou (馬英九) was elected as the new president, relations between the two states entered a phase of even closer economic and political integration. Cross-strait flights, tourism, cultural exchanges, and various trade and investment agreements have been the direct result of this deeper integration. The most significant achievement is the trade agreement, ECFA, between Taiwan and China. Although most Taiwanese support closer economic relations with China, they distinguish such policies from their Taiwanese identity.

Democracy appears to reinforce a common Taiwanese identity because the democratic debate in Taiwan is focused on concrete political issues in Taiwan that require Taiwanese solutions. The current cross-strait rapprochement has

ignited a debate about Taiwan's society, which could be affected by increased unemployment due to more imports from China, and it has given voice to concerns regarding the secrecy surrounding the negotiations of ECFA and Taiwan's sovereignty. It is concluded that Taiwan's democracy acts as a necessary vehicle for a future common Taiwanese identity.

In [Chapter 7](#), Frank Muyard analyzes the evolution of the Taiwanese identity and wish for independence in the past decade, especially since 2008. He looks at the increasing economic interaction between Taiwan and China as well as its potential impact on national identity. The parallel development of the Taiwanese identity and cross-strait economic exchanges has significantly changed Taiwan over the past 20 years. Many observers originally viewed divergence between national identity and economic activities as a paradox or even an inexplicable contradiction. The return of a pro-China administration in Taiwan after the election of Ma Ying-jeou in 2008 was thus expected to revert Taiwan's national identity to one amicable to China and the notion of unification of the two countries in the future. After three years of intensified cross-strait economic interaction and political contact, all the indicators show that, on the contrary, both the Taiwanese national identity and the rejection of unification have kept on growing. While attempting to assess the real and perceived impacts of the cross-strait economic integration on the Taiwanese people, the chapter questions the discourse about a future economy-driven unification and underlines the distinction between national identity and economic interests, or the political and economic spheres.

Taiwan's economy has been greatly influenced by the fast growth and tremendous scale of China's economy. Not only is Taiwan's economy deeply embedded in China's market and production, with a trade surplus of US\$77.17 billion in 2010, but the welfare of many people is also vested in the economic relationship with China. In a recent survey conducted in March 2011, 15.4% of respondents reported that the companies they own or work for have investments in China. The economic integration between the two sides of the strait raises an important issue: "Will the economic integration eventually lead to political assimilation?"

Naiteh Wu tries to answer this question in [Chapter 8](#) by focusing on the national identity of the general populace, which will largely decide the future relationship between the two countries. Comparing the findings from the aforementioned survey with those from surveys conducted over the past 20 years, Wu finds that the rising trend of Taiwanese identity has not been impeded by economic integration. People may not agree on the name the state in Taiwan should have, and they may have differing views on whether or not there is a new Taiwanese nation. But there is emerging consensus among the general public that Taiwan should remain an independent political community.

In addition to the opinions and identity inclinations of the electorate, political party competition has significant effect on the cross-strait relationship, both economically and politically. Wu analyzes how economic integration and the two major parties' positions on that integration influence their popular support. The KMT presses for active engagement with China while the DPP is reluctant and even resistant. The findings seem to suggest that economic integration has

framed party competition as an advantage of the ruling KMT. The current path of economic integration is, therefore, likely to continue, but may not pave the way for the political assimilation as some fear and others desire.

## VI. Geopolitics of Economic Integration across the Taiwan Strait

Taiwan's national security policy is also framed by the identity factors. In [chapter 9](#), York Chen argues that the Taiwanese identity is not as solid as might be expected. The history indicates that identities in Taiwan are easily subject to manipulation and constructed by difficult “negotiations” at different levels with various referents. Chen also identifies three different national security and defense paradigms under different government leaderships in Taiwan—Two-Chiang, Lee-Chen, and Ma—and their constitutive elements, values, beliefs, and methods. These elements are shaped by particular conceptualizations of the relationship between Taiwan and China. By this reasoning, Chen makes three main arguments. First, both the signature of the ECFA and the weakening of Taiwan's national defense were logical products of an idiosyncratic strategic paradigm. Second, the reconceptualization of China facilitated a redefinition of Taiwan's proper responses to China's rise and thus affected the core assumptions and practices of Taiwan's national defense policy. Finally, given that the military imbalance in the Taiwan Strait continues to shift against Taiwan's interests, the Ma administration created an irreversible strategic landscape, if not a straight-jacket, *vis-à-vis* China for succeeding administrations in Taiwan.

Lowell Dittmer reviews the nature of the relationship in the era of *détente* by focusing specifically on the all-important security dimension in [Chapter 10](#). Taiwan, a geopolitical flashpoint whose systemic volatility has unfortunately survived the Cold War, has the unusual distinction of deeming its main trade partners its number one national security threat. After more than a decade of escalating cross-strait polarization fed by growing nationalism on either side of the strait, there has been since 2008 an historic rapprochement between Taiwan and China that was not glimpsed for nearly two decades. It represents Taiwan's attempt to redefine security in political-economic rather than strictly military terms as China's growth surge heightened cross-strait power-political asymmetry. Yet the security issue has not been resolved, or even officially broached. To what extent can political-economic security, as symbolized by the ECFA, substitute for growing military-strategic asymmetry?

In [Chapter 11](#), John Tkacik argues that Beijing and Tokyo conceive of East Asian and Pacific geopolitics as a complex and multidimensional version of “Gō,” the millennia-old board game that has become a part of cultural landscapes, in which Taiwan occupies pivotal space. The looming transformation of Taiwan from an independent actor in East Asia and Pacific geopolitics into a Chinese satellite will have a far more profound impact in the region than mere economic and trade supply chains imply.

For the better part of the past 100 years, Taiwan's “Gō” stones have influenced much vaster geographic and demographic spaces than the island's size

suggests. Those spaces spread across the maps of the South and East China Seas and the populations of overseas Chinese in the Asia-Pacific region that arguably are the most dynamic, prosperous, and educated demographic cohorts in their adopted lands. China's gathering naval will ensure its control of Asia's vital sea lines of communication if Taiwan abandons its key island outposts in the Spratly Islands and Pratas Reef and cooperates with China in pressuring Japan to relinquish its claim on the Senkakus. And Taipei's waning influence in Asia-Pacific overseas Chinese communities—what one scholar has called the “Third China”—already is being assumed and enhanced by Beijing.

In the coming century, overseas Chinese populations in the region will insist on political power commensurate with their economic heft, and they will have Beijing's army and navy to back them. For decades, Beijing held overseas Chinese at arm's length fearing ethnic backlash. In 2006, however, after evacuating hundreds of Chinese from ethnic violence in the Solomon Islands, China declaimed a new doctrine that “the Chinese government has always attached great importance to protecting the legitimate rights and interests of overseas Chinese.” In 2011, for the first time, China used military aircraft and naval vessels to respond to the emergency evacuation of 30,000 Chinese from rebellion-torn Libya. As China's naval power grows, so too will China's readiness to deploy its forces abroad in “humanitarian interventions” and non-combatant evacuations. Already, overseas Chinese are playing more central roles in their national governance, but their new political influence will likely be more informed by Beijing's wishes than by domestic imperatives.

How will Taiwan's electorate reframe its political identity in the new century? Will it embrace the forces of Chinese nationalism or resume its exertions to carve out a new ethnic, cultural, and political identity for itself separate from China? The trend toward the former is clear, but the nationwide political dialogue in the 2012 presidential and legislative campaign will be a decision point from which there will be no reversal.

The removal of Taiwan's stones from this cosmic game of “Gō” and their replacement by China's stones promises to upend Asia-Pacific geopolitics in ways few now expect. It will strengthen Beijing's hold on the region and ensure its predominance for decades, if not centuries to come.

Developments in the Taiwan Strait would, as previously stated, reverberate around the world, but; Japan is the country that is monitoring the situation more closely than other countries. In [chapter 12](#), June Dreyer argues that Japan recognizes that Taiwan is important to its security and regards China as a growing threat. Although defense-related white papers since the mid-1990s have expressed concern with growing Chinese military power and lack of transparency, the country's defense budget actually decreased during the same period, largely due to two factors: financial constraints imposed by Japan's protracted economic slump and fear of being drawn into a ruinous military conflict. The nation's birth rate has been below replacement level for more than a decade, meaning a decrease in the cohort that would be available for military service should a confrontation become unavoidable. Moreover, much of the modest

economic progress Japan has made in recent years is attributable to trade with China. Even after a Chinese fishing boat rammed two Japanese coast guard vessels off the contested Diaoyu/Senkaku islands in September 2010, Tokyo simply acquiesced when Beijing announced that henceforth its maritime police would patrol the area. A series of weak prime ministers has been unable to resolve either foreign or domestic issues facing the country.

In summary, despite the acknowledged importance of Taiwan's security to that of Japan, Tokyo has neither the will nor the means to take a strong stand on its defense. This perception of being powerless to influence events was present before the triple disaster of March 11, 2011 and has been deepened by it. Meanwhile, the attitude of the Ma Ying-jeou administration has made Tokyo still more reluctant to assume an active role in Taiwan's defense. Japan will likely continue to seek cordial relations with Taiwan regardless of the political party in power there, but remain mindful of the need to avoid antagonizing the PRC while doing so.

## VII. Taiwan's Competing Options and Its Future

Economic interactions between Taiwan and China since the mid-1980s have led to the current status of economic engagements. Progress, if it could continue, from the ECFA to a FTA, and from a FTA to a common market or even an economic union, will be interesting to watch in the near future. Nevertheless, any democracy is subject to institutionalized uncertainty due to periodic elections in the due process of government turnover, and Taiwan is no exception. At the time of writing this book in June 2011, the campaigns of politicians vying for the presidency and the Legislative Yuan in the elections of January 2012 are underway. While the incumbent KMT government claims credit for reducing tensions across the Taiwan Strait and enhancing the economic benefits through trade, the procurement missions and tourist revenues from China, the opposition DPP argues that those benefits were only accrued by the small segments of large scale corporations at the expenses of eroding Taiwan's sovereignty and worsening income distribution. Instead, the DPP advocates developing indigenous industries by increasing domestic employment and improving the income distribution without adversely affect the ongoing trade with and investment in China. While President Ma will run for reelection on his record of China-leaning policies and diplomatic truce based on the "the 1992 Consensus and one China, self interpretation" principle, the DPP advocates a "Taiwan Consensus" to consolidate Taiwan's divided society so as to deal with China coherently and effectively. The DPP argues that globalization is not just Sinization. So, it supports working with the rest of the world to cope with a rising China and to maintain Taiwan's political autonomy and de facto independence to protect the freedom and democracy that has been enjoying by the Taiwanese people. The DPP presidential candidate, its chairwoman Tsai Ing-Wen, wants to register the ECFA at the WTO, and to operate Taiwan's trade and investment with China under the global trade framework of the WTO trade regime.

If China policy becomes a major issue in 2012 presidential and congressional elections, then the Taiwanese citizenry will have an opportunity to express its opinion on the matter on January 14, 2012. However, given the asymmetric resources between the two political parties,<sup>4</sup> and the predominantly distorted Taiwanese media, the election results may or may not totally reflect the real choice of Taiwanese people.<sup>5</sup> Hence, the election outcome may not be a “Pareto optimum” for the entire Taiwanese population.<sup>6</sup> But the outcomes of elections could determine the future of Taiwan’s democracy and its path of developments on the Taiwan Strait. Taiwanese identity and economic integration with China will enter a new phase in the aftermath of January 2012 elections. This book makes no predictions about the future of Taiwan. But the historic, theoretical, and empirical analyses contributed by each author can have important implications for the design of policies that will significantly influence not only the freedom and democracy of Taiwan as well as the peace and stability in the Taiwan Strait but also the development and prosperity of the Asia-Pacific region.

### Notes

1. Since the mid-1980s, Taiwan’s economy has been functionally integrated with those of many countries in Southeast Asia without formal institutionalized arrangement through trade and investment nexus as one of the most important trading partners and top investors in the region. But to avoid antagonizing Beijing, those countries were wary of signing any formal trade pact with Taiwan. See Peter Chow and Dan Ciuriak, “The FTA Music is Playing in Asia: After ECFA, Will Taiwan Join the Dance?” *International Trade Journal* (February, 2012).
2. During the DPP administration, Taipei and Beijing did work out some deals on the charter flights and other technical issues on trade and investment in Macao in 2004. This is the so-called Macao Model
3. Taiwanese identity emerged in the late 1980s after its democratization. For public opinion poll on Taiwanese identity, see [www.mac.gov.tw](http://www.mac.gov.tw).
4. The KMT is being alleged to be one of the richest political parties in the world. At the end of the World War II, the KMT came to Taiwan to take over the Japanese assets and Japanese-owned enterprises as party assets. Under the authoritarian regime, KMT party cadres and employees were considered as government civil service employees and were granted the same retirement benefits as those retired from government agencies.
5. During the first presidential election in March 1996, China fires missiles around Taiwan’s territorial sea and intimidated Taiwanese voters not to elect a proindependent candidate in 2000 president election. Reportedly, China also enticed Taiwanese businessmen in China to vote for a pronification presidential candidate by subsidized airfares. See “Hu Frets over Taiwanese Election” in the online edition of *Asian Times* at [www.atimes.com](http://www.atimes.com), October 4, 2011.
6. Public choice theory dictates that interest groups from trade liberalization are highly concentrated and easy to organize whereas those suffer from trade liberalization are widely scattered and ill-organized. In terms of Taiwan’s trade with and invest in China, the capitalist are the winner whereas the working class are the loser of trade liberalization. Hence, the electoral system is to the advantage of the KMT.

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## CHAPTER 2

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# Democratic Supervision of Taiwan-China Agreements: On the ECFA and Beyond

*Jau-Yuan Hwang*

### I. Introduction

Since Ma Ying-jeou took office on May 20, 2008, he has listed the China policy on top of his administration's priorities. As of May 10, 2011, the Ma administration has signed 15 agreements and three memorandums of understandings (MOU) with China.<sup>1</sup> These agreements opened direct postal links and air and sea transportation across the Taiwan Straits, allowed more Chinese tourists to visit Taiwan, and initiated a variety of cooperation agreements on judicial assistance, financial and banking businesses, agricultural products and food inspection, among others. Of them, the Economic Cooperation Framework Agreement (ECFA) is undoubtedly the most important and controversial one.

Roughly after six months of negotiations, the ECFA was signed on June 29, 2010. Along its negotiations, the ECFA has triggered polarized debates among all walks of Taiwanese on its political, economic, and social implications. Politically, the ECFA raises concerns over whether it would lead to formal political negotiations with China in the near future. Economically, many disagree on Taiwan's gains and losses from the ECFA on both short and long terms. Socially, many disagree on whether the ECFA will bring about further integration or worsen existing stratification of Taiwanese society. Along with these concerns, negotiations and signing of the ECFA also generate many legal controversies on both domestic and international planes.

Against this backdrop, this chapter will use the case of the ECFA to discuss constitutional and democratic control of Taiwan-China agreements. In sections II and III, this chapter will analyze the legal nature of the ECFA under the World Trade Organization (WTO) regime and Taiwan's constitution, respectively. Section IV will examine the mechanism and practice of congressional

supervision of the ECFA and other Taiwan-China agreements, focusing on the apparent deficiency of the current practice and legal framework. In section V, this chapter will propose suggestions for more democratic controls of future cross-straits agreements.

## II. The Legal Nature of the ECFA under the WTO Regime

Both Taiwan and China are members of the WTO. When concluding a bilateral trade agreement like the ECFA, both members have to comply with the WTO regulations. In the case of the ECFA, its terms must not violate the relevant regulations of the WTO.

The preamble of the ECFA expressly provides that both parties have agreed, “in line with the basic principles of the WTO and in consideration of the economic conditions of the two Parties, to gradually reduce or eliminate barriers to trade and investment for each other, create a fair trade and investment environment, further advance cross-straits trade and investment relations”<sup>2</sup> by signing the ECFA. In this regard, the ECFA should be characterized as an interim agreement signed between two WTO members in accordance with General Agreement on Tariffs and Trade (GATT) Article 24 and General Agreement on Trade in Services (GATS) Article 5.<sup>3</sup> The ultimate goal of the ECFA should be the formation of a more integrated free-trade area via a full-fledged Free Trade Agreement (FTA) in the near future. Under the WTO regime, an interim FTA like the ECFA should usually become a full-fledged FTA in approximately 10 years.<sup>4</sup> However, whether the ECFA would eventually lead to such a scenario remains to be watched.<sup>5</sup>

So defined, the ECFA is obviously a trade agreement signed by two WTO members as two international legal persons. Modern international law has long recognized that some nonstate entities, such as intergovernmental organizations (e.g., UN and EU), and territories are capable of concluding international agreements with states. Since Taiwan acceded to the WTO as a separate customs territory, instead of a state, the ECFA is clearly not an agreement between two states. Nevertheless, notwithstanding its designation used in the WTO, Taiwan, as customs territory, is an international legal person enjoying (almost) the same rights under the WTO as other members. It follows that the ECFA is and must be an international agreement under the WTO regime as well as under the international law in general.

## III. The Legal Status of Cross-Straits Agreements under Taiwan’s Constitution

Is the ECFA also regarded as an international agreement under Taiwan’s constitution? If it is, should it be ratified or approved by the Legislative Yuan (LY) before taking effect? Even if it is not, does the LY have any say on its negotiation, signing, or ratification?

Under Taiwan’s constitution, all treaties have to be ratified by the LY before becoming binding on Taiwan on the international plane.<sup>6</sup> However, the fact that

the ECFA is an international agreement under the WTO regime does not make it simultaneously a treaty or international agreement under Taiwan's constitution. In a deeper sense, this issue is closely related to the legal status of Taiwan vis-à-vis China (in the name of People's Republic of China [PRC]) in the view of Taiwan's constitution. Does Taiwan's constitution, after so many revisions since 1991, regard China as another state or part of its state territory?

### *III.1. The Issue of National Territory*

The current constitution of Taiwan was promulgated in China in 1947 and applied to Taiwan by the then National Government of the Republic of China (ROC), despite the fact that the international title of post-World War II Taiwan was unsettled pending a formal peace treaty with the defeated Japan. After 1949, this originally Chinese constitution found no territory of application other than Taiwan. Since then, the ROC constitution of 1947 became the written constitution enforced in Taiwan. Beginning from 1991, Taiwan's constitution has undergone many revisions along with democratization process. In its first revision, the 1991 amendments defined China as "Mainland Area" vis-à-vis Taiwan as "Taiwan Area." This amendment has remained so ever since.

On the statutory level, the LY passed the Statute Governing Relations between Peoples of the Taiwan Area and the Mainland Area (hereafter "Taiwan-China Relations Statute" or "TCR Statute") in July 1992. This TCR Statute was mandated and authorized by the above-mentioned 1991 amendments. Article 2 of the TCR Statute expressly provides that the Mainland Area is part of the ROC territory. However, the TCR Statute does not further define the legal nature and status of cross-straits agreements.

Against this legal background, some maintain that Mainland China is still regarded as territory under the Taiwan/ROC constitution, while some argue the constitutional amendments and the subsequent constitutional changes have, at least implicitly, abandoned the previous territorial claim of Mainland China and redefined the ROC territory to include Taiwan (and some small islands) only.<sup>7</sup> According to the former view, the ECFA and other Taiwan-China agreements should be defined as "intra-China," instead of international, agreements. However, this view fails to explain which law, the law of ROC or PRC, shall govern such agreements. According to the latter view, Taiwan-China agreements are definitely agreements of external or international nature, to which the international laws shall be applied.

In 1993, the Constitutional Court (Council of Grand Justices) of Taiwan was asked to answer the question regarding national territory. In fact, the Constitutional Court was petitioned by the legislators to rule whether Mongolia was still part of the ROC territory? Under the TCR Statute, Mongolia should be regarded as part of the Mainland Area and then part of the ROC territory. However, the Constitutional Court simply avoided saying anything on the merits by calling this territorial issue a "political question."<sup>8</sup> The interesting point is: if Mainland China and Mongolia indeed remain part of national

territory under the ROC constitution, in spite of so many amendments, why did the Constitutional Court still call it a political question?

### ***III.2. Constitutional Court on the Legal Nature of Cross-Straits Agreements***

Aside from the issue of national territory, the Constitutional Court had another case related to cross-straits agreements. In April 1992, the Koo-Wang Talks commenced in Singapore. Four agreements were signed at this meeting. Right after the meeting, many legislators once again petitioned to the Constitutional Court for its opinion on the status of these four agreements, while demanding their ratification by the LY before taking effect.

In December 1993, one month after the publication of the above Interpretation No. 328 on national territory, the Constitutional Court handed down Interpretation No. 329 to clarify the meaning and ratification requirements of international agreements. In this Interpretation, the Constitutional Court broadened the meaning and scope of treaties under Taiwan's constitution and mandated that all such treaties be submitted to the LY for ratification. Nevertheless, the Constitutional Court also said:

Agreements concluded between Taiwan and mainland China are not international agreements to which this interpretation relates. It should also be noted that whether or not these agreements should be sent to the Legislation Yuan for deliberation is not included in this interpretation.<sup>9</sup>

On the surface, the Constitutional Court held that the above four agreements were not "international agreements" as defined in Interpretation No. 329. However, it stopped short of saying what such agreements are, if not international, under Taiwan's constitution. Neither did this Interpretation rule out the possibility of congressional supervision of cross-straits agreements. Considering that this Interpretation was passed in 1993, long before Taiwan and China joined the WTO, we should not be surprised at its neglecting the governability of international trade and other laws on the cross-straits agreements. Besides, this Interpretation was passed in the early years of Taiwan's democratization and constitutional changes. It was obviously constrained by the political and constitutional environment then. Viewed today, its opinion shall be qualified or even overruled.

### ***III.3. Position of This Chapter***

This chapter would argue that Taiwan-China agreements are to be regarded as "external" or "international" agreements. First of all, neither the laws of Taiwan nor those of China are and shall be the applicable laws of such agreements. Given the transboundary and extraterritorial effects of such agreements, only international laws could serve to solve the possible legal issues thereof. Moreover, as long as the contents of cross-straits agreements involve matters

under the jurisdiction of the WTO, the WTO and related international norms shall apply. Legally speaking, the cross-strait agreements are treaty-like external agreements. In practice, they have been regarded as such, at least from the perspective of Taiwanese laws. As will be explained later, the LY eventually, in 2003, amended the TCR Statute to expressly provide a treaty-like approval procedure for such agreements.

#### IV. Congressional Supervision of Signing of the ECFA

##### *IV.1. The Statutory Framework for Congressional Supervision of Taiwan-China Agreements*

Initially, the TCR Statute of 1992 only mandated that any agreement signed between Taiwan and China, via their respective agents, be authorized in advance and approved thereafter, before taking effect, by the competent authorities. The original texts of the TCR Statute did not provide for any mechanism of congressional supervision over such agreement at all. Partly in response to the four agreements signed in 1992 and partly to the Constitutional Court's Interpretation No. 329 of 1993, the LY finally amended the TCR Statute, in May 1997, to create some sort of congressional supervision. The revised Article 5, Paragraph 2, of the TCR Statute of 1997, for the first time, provided that any cross-strait agreement, if involving any amendment to laws or any new legislation, be submitted to the LY for deliberation. Nevertheless, this new provision did not specify the level of congressional deliberation. Should they be presented to the LY merely for record or for its approval?

In October 2003, when the Democratic Progressive Party (DPP) was in power, the LY enacted a completely revised TCR Statute. Though this newly revised TCR Statute still failed to clearly define the legal nature of Taiwan-China agreements, its newly revised Article 5, Paragraph 2, provides for a more detailed framework of congressional supervision of such agreements.

Where the content of the agreement requires any amendment to laws or any new legislation, the administration authorities of the agreement shall submit the agreement through the Executive Yuan to the Legislative Yuan for consideration within 30 days after the execution of the agreement; where its content does not require any amendment to laws or any new legislation, the administration authorities of the agreement shall submit the agreement to the Executive Yuan for approval and to the Legislative Yuan for record, with a confidential procedure if necessary.

On the surface, this new provision gives the LY more leverage on the cross-strait agreements. It, however, remains very ambiguous as to "where the content of the agreement requires any amendment to laws or any new legislation." Unfortunately, this new provision gives no further guideline on how to determine this issue. In practice, since no cross-strait agreement was signed from 1995 to 2007, the latest revision of 2003 did not find its actual application until 2008.

#### ***IV.2. Congressional Supervision of Taiwan-China Agreements after 2008***

Since June 2008, a total of 15 agreements and 3 MOUs have been signed between Taiwan and China.<sup>10</sup> The ECFA is one of them. Under the above regulatory framework, all of these agreements caused controversies about the proper role and procedure of congressional supervision.

As illustrated in [table 2.1](#), all of the 16 agreements (including the three MOUs) signed from June 2008 to December 2009 (before the ECFA) contain a specific provision on their respective effective date, using a similar model. They all provide that the agreement itself shall become effective, as early as the seventh day and latest by the ninetieth day following the signing date. In other words, all of these 16 pre-ECFA agreements would become automatically effective in the lapse of 7–90 days following their signing, with or without congressional supervision. Even if the LY expressly rejects a specific agreement, this very agreement would still enter into effect and become binding on Taiwan on the cross-straits plane. If the contents of an agreement were inconsistent with the laws of Taiwan, it would bring about a further legal issue: which of these, the domestic laws of Taiwan or the cross-straits agreement, shall prevail?

In practice, of these 16 pre-ECFA agreements, only two (Agreement on Air Transportation and Agreement on Sea Transportation signed on November 4, 2008) were ever submitted by the Executive Yuan (EY) to the LY for approval before their taking effect. Such legislative approval is expressly required by Article 95 of the TCR Statute:

The competent authorities shall request the consent of the Legislative Yuan before permitting direct business transactions or direct sea or air transportation between the Taiwan Area and the Mainland Area, or permitting the people of the Mainland Area to enter into the Taiwan Area to work, and if the Legislative Yuan fails to adopt any resolution within one month after the request during its session, the consent is deemed granted.

As of December 4, 2008, the LY failed to pass any resolution on these two agreements, both of which were, therefore, deemed to be approved by the LY in accordance with the said provision of Article 95. However, the LY later adopted two resolutions on two tax exemption provisions of these two agreements, requiring further amendments to relevant laws for domestic implementation of these two tax exemption provisions.<sup>11</sup> Since the LY has not amended the relevant laws, such tax exemption provisions are yet to be implemented.

As to the rest of 14 pre-ECFA agreements, the EY simply sent them to the LY for record and not for approval, claiming that none of them requires any amendment to laws or any new legislation under Article 5, Paragraph 2, of the TCR Statute. The LY was not in full agreement with the EY. Among these 14 agreements, the LY agreed to acknowledge only 2 for the record. For the other 12 agreements, the LY referred them to its committees concerned for further review, largely due to the oppositions by the DPP caucus. However, referring to committee review proved to be a mere tactic of delaying and deception, as