

**Singapore Management University**

---

**From the Selected Works of Pasha L. Hsieh**

---

Summer June 1, 2016

# Legitimacy of Taiwan's Trade Negotiations with China: Demystifying Political Challenges

Pasha L. HSIEH, *Singapore Management University*



Available at: [https://works.bepress.com/pasha\\_hsieh/67/](https://works.bepress.com/pasha_hsieh/67/)

# Legitimacy of Taiwan's trade negotiations with China: Demystifying political challenges

Political Science  
2016, Vol. 68(1) 3–21  
© The Author(s) 2016  
Reprints and permissions:  
[sagepub.co.uk/journalsPermissions.nav](http://sagepub.co.uk/journalsPermissions.nav)  
DOI: 10.1177/0032318715625401  
[pnz.sagepub.com](http://pnz.sagepub.com)



**Pasha L. Hsieh**

## Abstract

The article analyzes Taiwan's legitimacy debate over trade negotiations with China. The theoretical concept of legitimacy is used to assess Taiwan's cross-straits negotiation mechanism and trade agreements. This article argues that Taiwan's current legal framework governing congressional supervision of cross-straits agreements falls short of procedural legitimacy and performance legitimacy. By explaining the constitutional design for Taiwan's "white glove" mechanism, the article explores the initial procedural legitimacy deficit. As cross-straits negotiations involve increasingly substantive obligations, the legitimacy of bilateral agreements has changed fundamentally. The massive protest of the Sunflower Movement due to the Services Trade Agreement reinforced legitimacy concerns. Taiwan's ambiguous congressional review procedures and negative public perception undermine the performance legitimacy of cross-straits agreements. Notwithstanding the conclusion of free trade agreements with Singapore and New Zealand, Taiwan's domestic political impasse will jeopardize its efforts to integrate into regional free trade agreements. Hence, the legitimacy of Taiwan's law and politics regarding cross-straits negotiations will have a profound impact on its cross-straits and foreign trade policies.

## Keywords

Association of Southeast Asian Nations, China, Cross-Straits Economic Cooperation Framework Agreement, cross-straits relations, Services Trade Agreement, Straits Exchange Foundation, Sunflower Movement, Taiwan

---

## Corresponding author:

Pasha L. Hsieh, Singapore Management University, 50 Stamford Rd, Level 4, Singapore 178899, Singapore.  
Email: [pashahsieh@smu.edu.sg](mailto:pashahsieh@smu.edu.sg)

## Introduction

Improved relations between China and Taiwan have rapidly accelerated cross-straits economic integration since the inauguration of Taiwan's President Ma Ying-jeou. The Cross-Straits Economic Cooperation Framework Agreement (ECFA) marked a political milestone. The ECFA not only constructed a legal framework for a prospective cross-straits free trade agreement (FTA), but also changed the long-standing mode of "non-official" negotiations in light of sovereign disputes. Yet, the massive protest against the Cross-Straits Services Trade Agreement (CSSTA) in Taiwan intensified constitutional and political tensions over the legitimacy of the country's trade negotiations with China.<sup>1</sup> These developments are critical to Taiwan, China, and the Asia-Pacific.

The article examines Taiwan's legitimacy debate over cross-straits economic relations. The unique nature of bilateral negotiation mechanisms and agreements underlies Taiwan's legitimacy controversies, which are intertwined with cross-straits politics and FTA policy. This article argues that Taiwan's current legal framework that governs congressional supervision of cross-straits agreements lacks procedural legitimacy and performance legitimacy. The second section provides a theoretical framework for the multifaceted concept of legitimacy and identifies the research question in context. The third section discusses the "white glove" mechanism that made China–Taiwan negotiations feasible given their mutual non-recognition based on their respective interpretations of the one-China policy. The fourth section addresses the public demand for enhanced congressional supervision over cross-straits agreements amid the 2014 Sunflower Movement's unprecedented 24-day occupation of Taiwan's Legislative Yuan (LY or Congress).<sup>2</sup> The fifth section concludes by analyzing legal and political implications.

## Theoretical concepts

This article focuses on Taiwan's legitimacy tensions over two key aspects of cross-straits trade negotiations: the negotiation mechanisms and cross-straits agreements. It shows the challenges to legal validity and political legitimacy in Taiwan's democratization. To develop a theoretical framework, the article first explores the concept of legitimacy, which is traditionally prevalent in legal and political science discourse. The notion of legitimacy is paramount to examining Taiwan's mechanism to deal with cross-straits trade negotiations and agreements as democratized society has demanded further transparency and accountability. In particular, analyzing the distinction between procedural and performance aspects of legitimacy is of significance to understanding polarized cross-straits politics.

1. Fujuda Madoka, "Japan–China–Taiwan Relations after Taiwan's Sunflower Movement," *Asia Pacific Bulletin*, no. 264 (2014); David G. Brown and Kevin Scott, "China–Taiwan's Relations: A Breakthrough and a Deadlock, Comparative Connections," May 2014, available at: [http://csis.org/files/publication/1401qchina\\_taiwan.pdf](http://csis.org/files/publication/1401qchina_taiwan.pdf)
2. Michael J. Cole, "Sunflowers End Occupation of Taiwan's Legislature," *The Diplomat*, 11 April 2014, available at: <http://thediplomat.com/2014/04/sunflowers-end-occupation-of-taiwans-legislature/>

Legitimacy is a subjective and non-static norm because it evolves through the historical and emotional changes in civil society.<sup>3</sup> While legitimacy encompasses values such as morality, democracy, or justice, diverse definitions of legitimacy and approaches to assessing legitimate practices remain.<sup>4</sup> Legitimacy is distinguishable from legality, which is often based on the state's interpretation of positive law. While legality denotes conformity with the binding rules of a political entity, legitimacy refers to the normative perception of whether such rules should be observed.<sup>5</sup>

It is recognized that "legitimacy concerns first and foremost the right to govern."<sup>6</sup> Without resorting to normative criteria, Max Weber asserted that "the basis of every system of authority, and correspondingly of every kind of willingness to obey, is a belief, a belief by virtue of which persons exercising authority are lent prestige."<sup>7</sup> In other words, the fundamental elements that underpin political legitimacy include citizens' faith in governmental power to impose orders and their corresponding obligations to carry out such orders.<sup>8</sup> This command-obedience relationship implies consent or recognition of authority, which forms an indispensable condition for the right to govern.<sup>9</sup> Such consent, which reflects the generalized perception, is not limited to the will of rule-makers and rule-followers.<sup>10</sup> Rightful membership qualified to evaluate legitimacy

3. Vesselin Popovski, "Legality and Legitimacy of International Criminal Tribunals," in Richard Falk, Mark Juergensmeyer, and Vesselin Popovski (eds), *Legality and Legitimacy in Global Affairs* (New York, NY: Oxford University Press, 2012), pp. 388–389; Jean Marc Coicaud, *Legitimacy and Politics: A Contribution to the Study of Political Right and Political Responsibility* (Cambridge: Cambridge University Press, 2002), pp. 20–21.
4. Michael Barnett and Kathryn Sikkink, "From International Relations to Global Society," in Christian Reus-Smit and Duncan Snidal (eds), *The Oxford Handbook of International Relations* (New York, NY: Oxford University Press, 2008), p. 68; Lorraine Elliott, "Legality and Legitimacy: The Environmental Challenge," in Richard Falk, Mark Juergensmeyer, and Vesselin Popovski (eds), *Legality and Legitimacy in Global Affairs* (New York, NY: Oxford University Press, 2012), p. 368.
5. Christine Chinkin, "Rethinking Legality/Legitimacy after the Iraq War," in Richard Falk, Mark Juergensmeyer, and Vesselin Popovski (eds), *Legality and Legitimacy in Global Affairs* (New York, NY: Oxford University Press, 2012), pp. 220–221; Antonio Cassese, "The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice," *Leiden Journal of International Law*, Vol. 25, No. 491 (2012), pp. 491–492.
6. Jean Marc Coicaud, *Legitimacy and Politics: A Contribution to the Study of Political Right and Political Responsibility* (Cambridge: Cambridge University Press, 2002), p. 10.
7. Max Weber, *The Theory of Social and Economic Organization* (New York, NY: The Free Press, 1964), p. 382.
8. Zheng Yongnian and Lye Fook Liang, "Political Legitimacy in Reform China: Between Economic Performance and Democratization," in Lynn White (ed.) *Legitimacy: Ambiguities of Political Success or Failure in East and Southeast Asia* (Singapore: World Scientific, 2005).
9. Jean Marc Coicaud, *Legitimacy and Politics: A Contribution to the Study of Political Right and Political Responsibility* (Cambridge: Cambridge University Press, 2002), pp. 13–14.
10. Andrew Linklater, *The Transformation of Political Community* (Cambridge: Polity Press, 1998); Lorraine Elliott, "Legality and Legitimacy: The Environmental Challenge," in Richard Falk, Mark Juergensmeyer, and Vesselin Popovski (eds), *Legality and Legitimacy in Global Affairs* (New York, NY: Oxford University Press, 2012), pp. 368–369.

includes any stakeholders who are affected by rules. Legitimacy thus ensures voluntary compliance without utilizing external means of coercion, and, consequently, decreases the social and political costs of governance.

Irrespective of divergent views on legitimacy, it is undisputed that a government or rule gains legitimacy by demonstrating compliance with correct procedures along with appropriate objectives.<sup>11</sup> To provide for normative assessment, this article divides the legitimacy discussion into procedural and performance aspects of legitimacy. Procedural legitimacy or input legitimacy is embedded in Western democracies and gained prominence in Taiwan, which has undergone rapid democratization since the lifting of martial law in 1987.<sup>12</sup> The procedural justice concept centers on whether an outcome is derived from legitimate institutions and legal procedures.<sup>13</sup> Notably, procedural legitimacy is intertwined with legality, but it is not confined to legal rules that make policy decisions legitimate.<sup>14</sup> Procedural legitimacy thus lies at the heart of the transparency and accountability of the decision-making process that warrants democratic representation and effective participation.<sup>15</sup> Such legitimacy is vital to cross-straits negotiations, which inevitably concern issues of constitutionality and sovereignty.

While procedural legitimacy appraises whether collective decisions are reached in a politically correct way, performance legitimacy or output legitimacy assesses if such decisions are acceptable in the eyes of the stakeholders. Performance legitimacy is validated on the basis of prescribed societal goals and practical outcomes that reflect the public assessment of institutional functions.<sup>16</sup> The types of outcomes may include government effectiveness and responsiveness to increasing public welfare and economic

11. James G. March and Johan P. Olsen, "Elaborating the 'New Institutionalism,'" in Robert E. Goodin (ed.), *The Oxford Handbook of Political Science* (New York, NY: Oxford University Press, 2011), p. 166; Zheng Yongnian and Lye Fook Liang, "Political Legitimacy in Reform China: Between Economic Performance and Democratization," in Lynn White (ed.), *Legitimacy: Ambiguities of Political Success or Failure in East and Southeast Asia* (Singapore: World Scientific, 2005), p. 188.
12. Shelly Rigger, *Politics in Taiwan: Voting for Democracy* (New York, NY: Routledge, 1999), p. 128.
13. Martin E. Spencer, "Weber on Legitimate Norms and Authority," *British Journal of Sociology*, Vol. 21, No. 2 (1970), pp. 123, 127–128.
14. Valerie Dye, "Targeting Source and Addressing Plurality in European Union Legitimacy: Procedure versus Substance," *Political Perspective*, Vol. 2, No. 2 (2008), pp. 2–7.
15. Jenny de Fine Lichet, "Do We Really Want to Know: The Potentially Negative Effect of Transparency in Decision Making on Perceived Legitimacy," *Scandinavian Political Science*, Vol. 34, No. 3 (2011), pp. 183, 186–188; Lorraine Elliott, "Legality and Legitimacy: The Environmental Challenge," in Richard Falk, Mark Juergensmeyer, and Vesselin Popovski (eds), *Legality and Legitimacy in Global Affairs* (New York, NY: Oxford University Press, 2012), pp. 378–379.
16. Lorraine Elliott, "Legality and Legitimacy: The Environmental Challenge," in Richard Falk, Mark Juergensmeyer, and Vesselin Popovski (eds), *Legality and Legitimacy in Global Affairs* (New York, NY: Oxford University Press, 2012), pp. 380–381; Christopher A. Thomas, "The Uses and Abuses of Legitimacy in International Law," *Oxford Journal of Legal Studies*, Vol. 34, No. 4 (2014), pp. 729, 751–752.

development. The standards of performance legitimacy consistently evolve so that public demands can be met.

A government or rule short of legitimacy results in a democratic deficit. A question arises as to when procedural legitimacy converges and diverges with performance legitimacy. Weber asserted that “the most common form of legitimacy is the belief in legality, the compliance with enactments which are formally correct and which have been made in the accustomed manner.”<sup>17</sup> Weber’s legal-rational legitimacy suggests that political legitimacy is deemed to be established so long as a collective decision meets the requirement of laws or procedures. Carl Schmitt, among others, argued that exceptional political and economic circumstances render legality and legitimacy bifurcated.<sup>18</sup> In other words, a rule made in compliance with procedures per se may not justify its legitimacy. Evolving legitimacy, in turn, helps close the gap between general perception and rules, and contributes to progressive developments in positive law.<sup>19</sup>

The article examines why and whether the cross-straits negotiation mechanism and resultant trade agreements meet the requirements of procedural and performance legitimacy. By focusing on Taiwan’s law and politics, this article explores political challenges to Taipei’s trade negotiations with Beijing. The legitimacy debate on economic relations with China demonstrates the influence of shifting legitimacy on Taiwan’s institutional mechanism governing cross-straits affairs.

## Extraordinary cross-straits negotiations

The post-civil war division of “old” China between the Republic of China (ROC) on Taiwan and the People’s Republic of China (PRC) has created legal and political dilemmas. While it is constitutionally infeasible for them to “recognize” each other, the inevitable contact has enabled both sides to develop extraordinary mechanisms for bilateral negotiations since the 1990s. The legitimacy of the so-called “white glove” mechanism under Taiwan’s constitutional order became an important topic in democratic politics and cross-straits negotiations.

### *The evolution of the “white glove” mechanism*

The “Three No’s” policy of Taiwan’s ruling party, the Kuomintang (KMT), which maintained no contact, made no compromises, and held no negotiations with the Chinese Communist Party (CCP), had prevented cross-straits talks for decades. This policy encountered pragmatic challenges when dealing with Beijing on hijacking and illegal

17. Max Weber, *Economy and Society: An Outline of Interpretive Sociology Vol. 1*. (Berkeley, CA: University of California Press, 1978), p. 37.
18. Carl Schmitt, *Legality and Legitimacy* (Durham, NC: Duke University Press, 2004), pp. 4–29.
19. Vesselin Popovski and Nicholas Turner, “Conclusion: Legitimacy as Complement and Corrective to Legality,” in Richard Falk, Mark Juergensmeyer, and Vesselin Popovski. (eds), *Legality and Legitimacy in Global Affairs* (New York, NY: Oxford University Press, 2012), pp. 440–441.

immigration issues. In 1983, the crash of a Taiwan military transport aircraft near Fujian Province led to the first post-1949 contact when China transported the corpses of Taiwanese crew members to Kinmen Island.<sup>20</sup> The 1986 incident was more complex. Taiwan's China Airlines cargo plane was hijacked by its captain, who proceeded to land the plane in Guangzhou.<sup>21</sup> To avoid "official" contact, Taipei requested that China Airlines negotiate the transfer of the plane with PRC authorities.<sup>22</sup> In 1990, a rapidly increasing number of illegal Chinese immigrants to Taiwan prompted the two sides to conclude the first cross-straits agreement, the Kinmen Agreement.<sup>23</sup> In the absence of government agencies in charge of cross-straits negotiations on both sides, the agreement was concluded between their respective Red Cross associations. These pragmatic issues marked the prelude to cross-straits talks, albeit under the guise of their "private" nature.

After Lee Teng-hui assumed Taiwan's presidency in 1988, his administration decided to set up a specialized institution to deal with inevitable, wide-ranging cross-straits affairs. In 1991, the Mainland Affairs Council (MAC) was established as a ministry under the Executive Yuan.<sup>24</sup> Nonetheless, direct communications between the MAC and Beijing would violate Taipei's Three No's policy, which prohibited official contact. It became necessary to have a non-governmental organization (NGO) facilitate "non-official" cross-straits talks. The Taiwanese government set up the Straits Exchange Foundation (SEF) as a semi-official, intermediary institution.<sup>25</sup> The SEF thus became a government-funded NGO that conducts cross-straits negotiations under the MAC-mandated policy.

China was initially puzzled by Taiwan's double-layered mechanism. Under its one-China trajectory, Beijing's preferred negotiation approach would be CCP-KMT dialogues rather than intergovernmental talks. The PRC nonetheless altered its stance because it intended to seize the opportunity to negotiate with Taipei and to break through the Three No's policy.<sup>26</sup> In Beijing's view, promoting "three links" (i.e. direct postal, transportation and trade) would benefit its economic reform and ultimate reunification. Therefore, the Taiwan Affairs Office (TAO) under the PRC State Council established the semi-official Association for Relations Across the Taiwan Straits (ARATS) in 1991. The

20. Zheng Jian, *Chao Qi Chao Luo: Hai Xie Hui Hai Ji Hui Jiao Liu Jiao Wang Ji Shi* [Turn of the Tide: Records of Straits Exchange Foundation (SEF)–Association for Relations Across the Taiwan Straits (ARATS) Exchanges and Relations] (Beijing: Jiuzhou Press, 2013), pp. 19–20.
21. Ibid., p. 21.
22. Ibid., pp. 23–25.
23. "Red Cross Signatories Observe Kinmen Agreement Anniversary," *China Post*, 22 September 2010, available at: <http://www.chinapost.com.tw/taiwan/local/offshore-islands/2010/09/22/273507/Red-Cross.htm>
24. Su Chi, *Liang An Bo Tao: Er Shi Nian Ji Shi* [Cross-Straits Waves: Records of 20 Years] (Taipei: Commonwealth Publishing, 2014), p. 16.
25. Liu Chien-pin, "Conflict of Interest and Value: An Analysis of Negotiations between Taiwan and China, 1992–1998," *International Negotiations*, Vol. 16, No. 249 (2011), pp. 249–251.
26. Ou Yang Sheng En, *Zui Jian, Bai Shou Tao: Hai Ji Hui 2000 Ri* [Good Byes, White Gloves: 2000 Days at the SEF] (Taipei: Cite Publishing, 1997), pp. 209–210.

ARATS serves as the contact point for Taiwan's SEF. The SEF–ARATS mechanism enables substantive negotiations without direct contact, which may constitute implied recognition as a result of government-to-government talks. This structure, commonly referred to as the “white glove” mechanism, has since become the standard channel for cross-straits negotiations.

The fluctuation of cross-straits politics has inevitably influenced the effectiveness of the SEF–ARATS mechanism. A notable initial success was the 1993 Koo–Wang meeting, which took place in Singapore under the mediation of Singapore's former Prime Minister Lee Kuan Yew.<sup>27</sup> The summit between the heads of the SEF and the ARATS, Koo Chen-fu and Wang Daohan, concluded four agreements that institutionalized subsequent meetings.<sup>28</sup> Yet, the second Koo–Wang meeting never took place because of Beijing's protest against Lee's “two-state theory,” in which he characterized ROC–PRC ties as special state-to-state relations pursuant to Taiwan's constitutional amendments.<sup>29</sup>

The suspension of bilateral talks continued during the presidential tenure of Chen Shui-bian of the pro-independence Democratic Progressive Party (DPP). The SEF–ARATS mechanism was only revived after Ma Ying-jeou of the KMT was elected Taiwan's president. Of the 21 agreements that the Ma administration entered into with China between 2008 and 2014, the ECFA was the most significant one.<sup>30</sup> The ECFA not only constructed a legal framework for a prospective FTA, but also resulted in a political spillover effect. It has advanced direct negotiations by establishing the Cross-Straits Economic Cooperation Committee (EEC) to include government officials from both sides when negotiating post-ECFA agreements, such as the CSSTA.

### *The legal framework*

Procedural legitimacy, often conflated with legality, denotes compliance with existing procedures enacted by a political entity, whereas performance legitimacy may lie in various factors and changes constantly. The procedural legitimacy of the white glove mechanism is a fundamental aspect of cross-straits trade negotiations and symbolizes the shift of Taiwan's China policy.

Taiwan's constitution is based on the 1947 ROC Constitution that the National Assembly ratified in Nanjing. As congressional members represented the “whole” China, they could not envision the dilemma of a divided state. As it is constitutionally

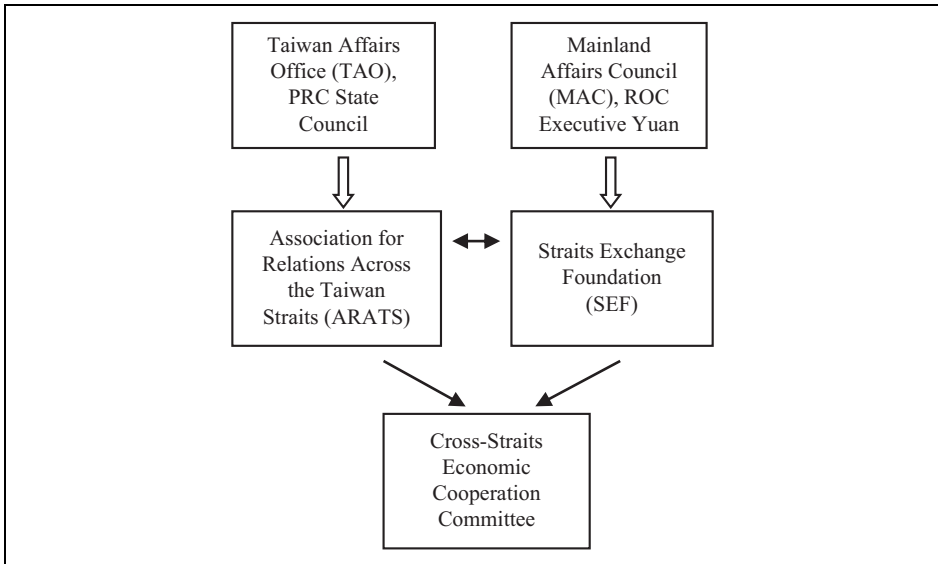
27. Fang Peng-Cheng, *Taiwan Hai Ji Hui De Gu Shi [The Story of Taiwan's SEF]* (Taipei: Commercial Press, 2005), pp. 174–175.

28. Ken Wang Qingxin, “Taiwanese NGOs and the Prospect of National Reunification in the Taiwan Strait,” *Australian Journal of International Affairs*, Vol. 54, No. 1 (2000), pp. 111–115.

29. Philip C. Sauters and Scott L. Kastner, “Bridge over Troubled Water? Envisioning a China–Taiwan Peace Agreement,” *International Security*, Vol. 33, No. 4 (2009), pp. 87, 92–93.

30. Lowell Dittmer, “Taiwan's Narrowing Strait: A Triangular Analysis of Taiwan's Security since 2008,” in Peter C.Y. Chow (ed.), *The US Strategic Pivot to Asia and Cross-Strait Relations: Economic and Security Dynamics* (New York, NY: Palgrave Macmillan, 2014), pp. 1520–1521.





**Figure 1.** The evolution of the cross-straits negotiation mechanism based on the organizational charters of the ARATS and the SEF and the ECFA.

infeasible for Taiwan to recognize the PRC as a foreign country, legal constraints prevented the creation of mechanisms for cross-straits negotiations. The MAC and the SEF only became possible after Taiwan passed *Additional Articles* to the original constitution to reflect political reality. The constitutional amendments define one China as the ROC's "free area" and the "Mainland area," and confine the application of constitutional rights to the former.<sup>31</sup> As *Additional Articles* delegate legislative power to regulate cross-straits matters, the LY enacted the Act Governing Relations between Peoples of the Taiwan Area and the Mainland Area (Cross-Straits Statute) in 1992.

Based on these constitutional amendments, the Cross-Straits Statute justifies the legality of the MAC and the SEF. The statute mandates that the MAC be Taiwan's sole government agency for cross-straits affairs. Furthermore, it authorizes the MAC to "entrust" NGOs to conclude agreements in order to avoid official contact under the Three No's policy.<sup>32</sup> Thus, the Executive Yuan donated US\$20.8 million to contribute to the birth of the SEF.<sup>33</sup> The SEF's operating expenses have also continued to depend on the government budget. According to the statute, the MAC possesses the authority to "instruct and supervise" the SEF as to its competence to execute agreements with China.<sup>34</sup>

31. Additional Articles, Constitution of the Republic of China ("ROC Constitution"), art. 11.

32. Act Governing Relations between Peoples of the Taiwan Area and the Mainland Area (Cross-Straits Statute), art. 4.

33. The initial fund of the SEF was NT\$670 million (US\$26.8 million). Ou Yang Sheng En, *Zai Jian, Bai Shou Tao: Hai Ji Hui 2000 Ri* [Good Byes, White Gloves: 2000 Days at the SEF] (Taipei: Cite Publishing, 1997), p. 20.

34. Cross-Straits Statute, art. 4-3.

In comparison, the legality of China's TAO and ARATS may be questionable due to the ambiguity of their legal basis. Under its 1982 Constitution, Taiwan remains part of the PRC's "sacred territory" pending reunification.<sup>35</sup> The 2005 Anti-Secession Law indicates that cross-straits consultations and negotiations should be conducted on an equal basis.<sup>36</sup> It thus implicitly recognizes the legality of governmental mechanisms that deal with the ROC, a regime that Beijing declines to recognize. Neither the Constitution nor the law details the status and the structure of the TAO and the ARATS. In practice, the highest decision-making power lies in the CCP Central Leading Group for Taiwan Affairs, where the CCP Secretary-General (also the President of the PRC) serves as the leader. The Taiwan Work Office of the CCP Central Committee and the TAO represent the Communist Party and the Chinese government, respectively. These two institutions are technically independent but share the same compositions and premises under the concept of the "same people under the two signboards."<sup>37</sup> Absent clear legal instruments, this structural design reflects CCP-led Taiwan policy and functions more "efficiently" than Taiwan's mechanism, which often encounters institutional tensions.

### *Legitimacy concerns*

In the pre-Sunflower Movement era, legitimacy issues of the MAC–SEF design that resulted in the white glove mechanism were limited. Legitimacy concerns about Taiwan's government structure centered on procedural legitimacy, which focuses on transparency, accountability, and democratic representation. The deficits of procedural legitimacy were arguably remedied by legal amendments that enlarged congressional supervision of the MAC and the SEF. Prior to the ECFA, performance legitimacy did not attract public attention because of the narrow scope of the "outcome" of cross-straits negotiations. As most initial agreements were technical in nature and did not influence most Taiwanese people, discussions about the right to govern based on public consent were rare. In contrast, legitimacy concerns escalated to new levels in the post-Sunflower Movement era. The lack of both procedural legitimacy and performance legitimacy surfaced as deficiencies in Taiwan's legal framework on the congressional role in cross-straits agreements.

The creation of the SEF was due to Taiwan's Three No's policy. Based on the Cross-Straits Statute, the MAC designated power to the SEF, a "private" NGO, to conduct negotiations with China. A dilemma soon emerged in the 1990s as to whether, and to what extent, the legislative and executive branches could legally supervise the SEF's operation. In this regard, procedural legitimacy begs the question of legality. Taiwan's LY realized that its direct supervision over the SEF would be constitutionally infeasible because the SEF structurally resides outside the government framework. Congressional power to review budgetary bills only applies to the MAC, rendering SEF budgets "free" from the LY's control, despite the fact that the SEF is based on government funding.<sup>38</sup>

35. Constitution of the People's Republic of China ("PRC Constitution"), preamble.

36. PRC Anti-Secession Law, art. 7.

37. Su Chi, *Liang An Bo Tao: Er Shi Nian Ji Shi* [Cross-Straits Waves: Records of 20 Years] (Taipei: Commonwealth Publishing, 2014), p. 19.

38. ROC Constitution, art. 63.

Although LY committees “may invite governmental officials and private persons” to address questions at congressional meetings, SEF officials rarely succumb to such requests.<sup>39</sup> Making laws that are specifically applicable to the SEF alone would even violate the doctrine of legal equality, which requires all private foundations, including the SEF, to be governed in the same way.

An intertwined challenge was the extent to which the LY could *indirectly* supervise the SEF through the MAC. This issue hinges upon the legal relations between the MAC and the SEF. In the PRC, no conflict between the TAO and the ARATS has arisen irrespective of the latter’s “independent” status. The two institutions strictly follow the CPC’s direction and can interchangeably act as government officials or private representatives depending on Taiwanese counterparts. Such flexibility is largely confined in Taiwan because law in the democratic system needs to ensure the autonomy of an NGO. Consequently, the SEF’s and the MAC’s division of work and different approaches to Beijing resulted in internal inefficiency in cross-straits negotiations in the early days. The SEF preferred the proactive top-down approach in favor of comprehensive talks on diverse topics.<sup>40</sup> The MAC instead adopted a conservative stance and focused on functional, low-politics matters in order to build mutual political trust.

In practice, the SEF’s negotiation leverage was often undermined by external pressure from the ARATS and the internal restrictions imposed by the MAC. The ARATS and TAO follow the same mandate from the CCP. While facing the Taiwanese delegates, the ARATS possesses great flexibility in the bargaining process. Nevertheless, the SEF is accountable to the MAC and the LY’s multiparty interest groups. The SEF is often confined by the MAC’s preset bottom lines and cannot effectively respond to its Beijing counterpart’s requests in key issues.

In order to address the legitimacy concerns about the SEF’s operation, the legislators introduced legal amendments to strengthen the MAC–SEF framework and to accord the LY more power in cross-straits policymaking. The MAC has a vertical supervisory and horizontal entrust-agency relationship with the SEF. Legislation mandates that as a regulatory authority, the MAC possesses overall responsibility to “direct and supervise” the SEF.<sup>41</sup> Furthermore, the MAC–SEF entrust contract obliges the SEF to carry out contractual terms with due diligence and to report to the MAC.<sup>42</sup> As China affairs are intra-ministerial in nature, other ministries governing national defense and foreign affairs also concluded entrust contracts with the SEF. These administrative and contractual obligations remedy the deficits of procedural legitimacy by making the SEF a *de facto* government agency and enhancing congressional supervision.

39. Ibid., art. 67.

40. Ou Yang Sheng En, *Zui Jian, Bai Shou Tao: Hai Ji Hui 2000 Ri [Good Byes, White Gloves: 2000 Days at the SEF]* (Taipei: Cite Publishing, 1997), pp. 118–121.

41. Cross-Straits Statute, arts 4–5; Civil Code, art. 32; Organization Act of the Mainland Affairs Council of the Executive Yuan, art. 3.

42. Mainland Affairs Council (MAC)–SEF Entrust Contract, art. 6.

## The CSSTA and the Sunflower Movement

As previous sections explain, legitimacy concerns before the ECFA centered on procedural legitimacy instead of performance legitimacy. Procedural legitimacy concerns about the white glove mechanism subsided due to the legal amendments that enhanced a congressional role in the MAC–SEF decision-making process. However, under Ma’s presidency, legitimacy in cross-straits negotiations has transformed fundamentally. The expanding scope of post-ECFA negotiations galvanized the demand from the LY and civic groups for transparency in the actual outcome of negotiations (i.e. trade agreements). Such demands finally provoked the large-scale protest that opposed the CSSTA. Due to the changing nature of cross-straits agreements, both procedural legitimacy and performance legitimacy have undermined the authority of Taiwan’s legislation governing congressional procedures for reviewing such agreements.

### Post-ECFA negotiations

The purpose of the ECFA is to construct a framework for a prospective cross-straits FTA. Categorized as an “interim agreement” under Article XXIV of the General Agreement on Tariffs and Trade (GATT), the ECFA was concluded between the ARATS and the SEF under the World Trade Organization (WTO) framework.<sup>43</sup> Notwithstanding the legal nature of the ECFA in the PRC’s and the ROC’s domestic constitutional orders, the ECFA is an international instrument from the WTO perspective. Although the China–Hong Kong Closer Economic Partnership Arrangement (CEPA) was also concluded in compliance with GATT requirements, notable differences exist between the ECFA and the CEPA. The CEPA explicitly recognized the “one country, two systems” mandate in the text, placing Hong Kong subordinate to Beijing in the constitutional hierarchy.<sup>44</sup> The ECFA avoided such language. The ECFA also refrained from following the CEPA model that made anti-dumping and subsidies measures inapplicable and adopted an ambiguous dispute settlement mechanism. The ECFA aimed to be more legally oriented and to build the foundation for negotiating subsequent agreements on specific sectors.

The 2013 CSSTA is a post-ECFA agreement that furthers services liberalization. Prior to the ECFA, Taipei only concluded FTAs with five diplomatic allies in Central America, including Panama, Guatemala, Nicaragua, El Salvador, and Honduras. These FTAs are of political significance but have limited economic effect on Taiwan’s external trade.<sup>45</sup> For Taipei, concluding a trade pact with Beijing will increase Taiwan’s export market. More importantly, improved cross-straits relations can help Taiwan’s FTA efforts with foreign countries that try to avoid tensions with China. Since post-ECFA negotiations are seen to have a direct impact on Taiwan’s investment and employment market, concerns of procedural legitimacy regarding insufficient congressional supervision over the agreements with China have escalated.

43. Pasha L. Hsieh, “The China–Taiwan ECFA, Geopolitical Dimensions and WTO Law,” *Journal of International Economic Law*, Vol. 14, No. 1 (2011), pp. 146–149.

44. *Ibid.*, pp. 139–141.

45. Bureau of Foreign Trade, “PTT Slides: Challenges v Opportunities—Tasks and Prospects in Signing ECFA,” 2010, p. 15.

To understand the political challenges provoked by the Sunflower Movement, understanding the CSSTA is essential. This agreement aims to further liberalize barriers to cross-straits trade in services. As the services sector amounts to 70% of Taiwan's gross domestic product (GDP), the CSSTA became indispensable to achieving the objective of the ECFA.<sup>46</sup> Under the CSSTA, Beijing and Taipei committed to liberalizing 80 and 64 services sectors, respectively.<sup>47</sup> All of China's commitments under the CSSTA exceed the WTO level. Half of such WTO-plus commitments are comparable to or higher than the preferential treatment that China accorded Hong Kong under the CEPA.<sup>48</sup> The level of Taiwan's commitments to opening its services market to China is relatively limited.<sup>49</sup> While Taiwan's China-based e-commerce, banking, and securities industries will benefit from liberalization, the CSSTA will oblige Taiwan to decrease China-targeted barriers by allowing Chinese enterprises to enter Taiwan's services sectors.

Notwithstanding the "favorable" treatment accorded to Taiwan, the CSSTA has encountered a polarized political stand-off. According to a 2014 poll, 42.5% and 40.1% of Taiwanese voters support and oppose the pact, respectively.<sup>50</sup> Arguably, certain contentions about the substance of the CSSTA are misleading. Contrary to popular belief, the scope of the CSSTA is restricted in comparison with Taiwan's other FTAs. The agreement allows the entry neither of Chinese laborers nor immigrant investors. It is true that liberalizing grassroots sectors, such as the laundry, beauty salon, and mortuary industries, may endanger Taiwan's small- and medium-sized enterprises (SMEs), hence undermining the performance legitimacy of the agreement. Nonetheless, this presumption may underestimate these SMEs' home advantages and overestimate their attraction to Chinese investors because of the limited market sizes of these sectors. The argument against the CSSTA's "permanent" nature is questionable. The "emergent consultations" provision of the agreement allows for requesting bilateral consultations should either party's services sectors encounter "substantive negative influence."<sup>51</sup> It also permits either side to revise or revoke the commitments after the CSSTA is implemented for three years.<sup>52</sup>

46. Council for Economic Planning and Development, "Cross-Strait Trade in Services Agreement Brings New Business Opportunities," 3 August 2013, available at [http://investintaiwan.nat.gov.tw/eng/news\\_display.jsp?newsid=2897](http://investintaiwan.nat.gov.tw/eng/news_display.jsp?newsid=2897)

47. Ministry of Commerce People's Republic of China, "Interpretation of the Cross-Straits Agreement in Services by Head of Department of Taiwan, Hong Kong and Macau Affairs of MOFCOM," 3 July 2013, available at: <http://english.mofcom.gov.cn/article/policyrelease/Cocoon/201308/20130800259783.shtml>

48. *Jing Ji Ri Bao* [Economic Daily News], "Liang An Fu Wu Mao Yi Xie Yi Kai Qi Tai Wan Xin Ji Hui" ["The Cross-Straits Services Trade Agreement (CSSTA) Provides New Opportunities for Taiwan"], 22 June 2013, p. 2.

49. Ibid.

50. MAC News Release No. 43, 2014.

51. CSSTA, art. 8.

52. Ibid., art. 17(1).

### *The procedural legitimacy deficits of cross-straits agreements*

The widespread outcry against the CSSTA revealed problems in Taiwan's legal framework governing the conclusion and review of cross-straits agreement and thus undermined the current system's procedural legitimacy and performance legitimacy. In fact, challenges to the CSSTA's contents were the pretext underlying the protest against the agreement. What initially provoked the Sunflower Movement was the procedural legitimacy deficit involving the alleged "black box" review procedures that govern cross-straits agreements. In turn, the public's worry about the negative impact of post-ECFA agreements rose rapidly.

The LY's constitutional mandate to review cross-straits agreements lies in the legal nature of such agreements. Existing legal frameworks provide for procedures governing the congressional ratification of treaties. However, it is controversial whether cross-straits agreements fall within the ambit of "treaties" under the ROC Constitution.<sup>53</sup> This question first arose following the 1993 Koo–Wang meeting as congressional members requested that the Constitutional Court clarify the definition of "treaties" and their review procedure in the LY. The Court explained that, notwithstanding titles, treaties denote international agreements concluded with foreign countries.<sup>54</sup> As cross-straits agreements are not construed as treaties, the Court declined to determine the congressional role in reviewing such agreements. The judicial declination to offer guidance on the applicable review procedures for cross-straits agreements led to legislative–executive conflicts.

The procedural challenges to the CSSTA centered on the interpretation of the Cross-Straits Statute, which includes bifurcated congressional review procedures for cross-straits agreements depending on their legal nature. Under Article 5 of the statute, if enforcing an agreement requires legal amendments or new legislation, such an agreement should be submitted to the LY for "consideration." Otherwise, an agreement needs only to be submitted to the LY for "record" following the Executive Yuan's approval. The consideration–record distinction is of great significance to the legal effect. "Consideration"-type agreements will not take effect until the LY has a substantive review and has ratified them. However, "record"-type agreements can become automatically effective if they are pending in the LY for 90 days.<sup>55</sup>

Reasons for the public perception over "black box" review procedures are twofold. First, there are different congressional review procedures, depending on the legal nature of cross-straits agreements. The legal loophole exists in the executive branch's sole power to determine whether an agreement needs legal amendments or new laws. In other

53. ROC Constitution, art. 63.

54. Interpretation No. 329, Council of Grand Justices, Judicial Yuan, 1993.

55. Dai Shi-Ying, "Liang An Tou Bao Xie Yi He She Sheng Xiao? Lun Liang An Xie Yi Qian Shu De Sheng Xiao Shi Dian" ["When Did the Cross-Straits Bilateral Investment Protection and Promotion Agreement (BIPPA) Take Place? Discussing the Effective Dates of Concluded Cross-Straits Agreements"], 30 January 2013, available at: [http://www.lawtw.com/article.php?template=article\\_content&area=free\\_browse&parent\\_path=,1,561,&job\\_id=192664&article\\_category\\_id=2056&article\\_id=112490](http://www.lawtw.com/article.php?template=article_content&area=free_browse&parent_path=,1,561,&job_id=192664&article_category_id=2056&article_id=112490)

words, the government can circumvent congressional scrutiny by categorizing a controversial agreement as one required only for the congressional “record.” The 2008 Cross-Straits Sea Transport Agreement and the 2009 Cross-Straits Air Transport Supplementary Agreement illustrate the problem of the government’s unilateral interpretations of their legal natures.<sup>56</sup> The Executive Yuan submitted both agreements to the LY for record, asserting that they did not require changes to current law. Yet, the tax authorities found that enforcing tax exemptions under the two agreements would require a legal basis.<sup>57</sup> The two agreements did not become effective until the LY passed amendments to the Cross-Straits Statute.

Second, the LY itself maintains no consistent approach to reviewing FTAs, including cross-straits agreements submitted for congressional “consideration.” The review procedure is usually determined by an ad hoc cross-party consensus. The Taiwan–El Salvador–Honduras FTA and the ECFA were reviewed clause by clause, but voted on as a package.<sup>58</sup> Yet, the Singapore–Taiwan FTA was reviewed and voted on as an entirety without addressing each provision.<sup>59</sup> The DPP requested that the CSSTA be voted on clause by clause. The KMT opposed this view and argued that the DPP approach would alter an FTA’s intertwined structure and essentially invalidate the agreement. As recent cross-straits agreements include more substantive obligations, these anomalies under legal procedures make procedural legitimacy a serious matter and intensify KMT–DPP conflicts over trade ties with Beijing.

In March 2014, the “Chin-Chiang Chang incident” incited the outbreak of the Sunflower Movement, including students’ 24-day occupation of the LY. Before reviewing the CSSTA, the LY reached a cross-party agreement under which the CSSTA would be reviewed and voted on article by article.<sup>60</sup> Emphasizing that the pact would not take effect before substantive review, the LY also decided to hold 16 public hearings to increase transparency.<sup>61</sup> Nevertheless, these hearings incurred heavy criticism for failing to address public concerns. In particular, the eight KMT-held hearings were “rushed through” in a week. Chin-Chiang Chang of the KMT served as the chair on the LY

56. Gao Xie Wen, “‘Liang An Xie Yi Guo Hui Jian Du Fa Zhi Hua’ Zuo Tan Hui Hui Hou Xin Wen Gao (Yi) Lai Chung-Chiang Ti Chu Fu Mao Xie Yi Gou Hui Shen Cha De Si Yuan Ze” [“The Legalization of Congressional Supervision over Cross-Straits Agreement’ Meeting News Release (1), Chung-Chiang Lai Proposed Four Principles of Congressional Review of the CSSTA”], News Release, 2 March 2014.

57. Ibid.

58. According to the *Legislative Yuan Gazette*, Vol. 96, No. 97 (2007), the Taiwan–El Salvador–Honduras FTA was subject to clause-to-clause review, but the only debate was whether “Taiwan” should be added to the title of the country. The clause-by-clause review of the ECFA was based on the DPP proposal.

59. *Legislative Yuan Gazette*, Vol. 103, No. 3 (2014).

60. X-strait.blogspot.tw, “Annex, Mei Guo Dui Fu Mao Xie Yi He Tai Yang Hua Xue Yun De Tai Du Ji Qi Yi Han” [The US Attitude toward the CSSTA and the Sunflower Student Movement and its Implications], 8 August 2014, available at: <http://x-strait.blogspot.tw/2014/08/blog-post.html>

61. Ibid.



committee in charge of reviewing the CSSTA. Presumably, Chang was under the executive branch's pressure to ratify the agreement. Without going through substantive deliberations, he unexpectedly announced that the CSSTA procedure was "completed" on 17 March 2014.<sup>62</sup> He asserted that since the CSSTA had been pending for congressional review for 90 days, the agreement should be deemed to have been reviewed under existing procedures. This incident immediately incurred public anger and prompted Taiwan's political crisis.

As neither the Constitutional Court decision nor the Cross-Straits Statute provides clear guidance on procedures for reviewing cross-straits agreements, Chang's announcement was highly controversial from the perspective of procedural legitimacy. The public demanded a high degree of scrutiny over the CSSTA, which is perceived to adversely affect Taiwan's economy. Arguably, the "black box" review process contravenes core components of procedural legitimacy, which mandates democratic representation that ensures transparency and accountability. President Ma's immediate response was to reject the protestors' request to withdraw the CSSTA and renegotiate with Beijing. Legally speaking, the LY's ratification of the ECFA in 2010 by no means denotes a "blank check" for subsequent agreements. Each of the post-ECFA agreements is a free-standing agreement that requires respective congressional approval.

### *The justification of performance legitimacy*

Taiwan's political debate on the procedure for reviewing and ratifying cross-straits agreements is distinguishable from that of other countries. FTA discussions usually center on economic and geopolitical strategies. Washington's promotion of the Trans-Pacific Partnership (TPP) and the Regional Comprehensive Economic Partnership (RCEP), advocated by the Association of Southeast Asian Nations (ASEAN), exemplify this point. Also, as Australia–China FTA negotiations illustrate, economic dependency is an essential topic in trade relations with Beijing.<sup>63</sup> The difference for Taiwan's discourse lies in whether intensifying cross-straits economic ties will be detrimental to the country's "survival." The lack of detailed procedures did not prevent political parties from reaching a consensus on securitizing and ratifying the FTA with Singapore as a package deal. Complex political ramifications associated with the unclear legal nature of cross-straits agreements viewed as "non-treaties" in Taiwan law propelled the congressional conflicts. This legal limbo has yet to be resolved as the draft law that enhances congressional supervision continues to be pending.

Ma's refusal to abrogate or redo the CSSTA was due to the multilayered political risks of renegotiations, which link to the broader performance legitimacy of cross-straits agreements. The KMT government's justification of performance legitimacy was founded on the impact of FTAs on Taiwan's economy. The government has promoted

62. Michael J. Cole, "Taiwanese Occupy Legislature over China Pact," *The Diplomat*, 20 March 2014, available at: <http://thediplomat.com/2014/03/taiwanese-occupy-legislature-over-china-pact/>

63. Greg Hoy, "Is Australia Too Dependent on Trade with China?" 10 November 2014, available at: <http://www.abc.net.au/7.30/content/2014/s4125539.htm>



trade agreements with China for advancing Taiwan's economic advantages. For instance, the outcome of the CSSTA will have a direct influence over subsequent negotiations of tariffs on goods. Due to tariff preferences under FTAs, a higher "FTA coverage rate" (the ratio of exports shipped to FTA partners) will increase exporting countries' competitiveness in foreign markets. Current FTA coverage rates of Singapore and Korea are 76.5% and 38.1%, respectively.<sup>64</sup> Taiwan's FTA coverage rate is only 10.38%, but a complete FTA with China will augment the rate to 23.5%.<sup>65</sup> Increasing the ratio of Taiwanese exports entitled to FTA preferences will be paramount to the country's economic growth. Also, it is vital to finalize post-ECFA negotiations because the expected completion of the Korea–China FTA will soon damage Taiwan's market share in China.

In the KMT's view, a noteworthy "peace dividend" effect of cross-straits negotiations is to accelerate Taiwan's integration in regional frameworks. Warmer cross-straits relations have galvanized China to hold a "no objection" view on Taiwan's FTAs under Beijing's one-China policy. After the conclusion of the CSSTA, Taiwan signed FTAs with New Zealand and Singapore in 2013.<sup>66</sup> The two FTAs have salient implications because neither country has diplomatic relations with the ROC. New Zealand and Singapore are Taiwan's 38th and 5th largest trade partners, respectively.<sup>67</sup> While New Zealand is Taiwan's first developed-country FTA partner, the Singapore FTA may lead to Taiwan's FTA with other ASEAN countries. These two FTAs built a model for Taiwan's prospective trade agreements. While downplaying the political significance of signing formalities, Taiwan will use its WTO nomenclature "Separate Customs Territory" to conclude FTAs under the WTO framework.<sup>68</sup> Unlike the ECFA's incremental approach, having a comprehensive single-undertaking FTA will be Taipei's preferred approach.

More profoundly, Taiwan desires to join the multilateral TPP and the RCEP. Both mega-FTAs will significantly impact global trade rules. The 12-member TPP and the 16-member RCEP cover 37.5% and 30% of global GDP, respectively.<sup>69</sup> FTAs with New Zealand and Singapore, both members of the TPP or the RCEP, would lay the initial foundation for Taiwan's participation. Nevertheless, it should be noted that the CSSTA impasse will lead to a US\$21.6 billion loss for Taiwan after the conclusion of the

64. Shih Hui-Tzu, "Qi Dong Qi Yu Zheng He Xiao Ying De Liang An Huo Huo Xie Yi" ["The TGA that Results in the Effect of Regional Economic Integration"], *Liang An Jing Mao* [*Straits Business Monthly*], Vol. 266, No. 6 (2014), p. 7.

65. Ibid.

66. Shih Hsiu-Chuan, "Taiwan, Singapore Sign Free-Trade Pact," *Taipei Times*, 8 November 2014, available at: <http://www.taipeitimes.com/News/front/archives/2013/11/08/2003576388>

67. Value of Exports & Imports by Country, no date, available at: <http://cus93.trade.gov.tw/ENGLISH/FSCE/>

68. Pasha L. Hsieh, "Facing China: Taiwan's Status as a Separate Customs Territory in the World Trade Organization," *Journal of World Trade*, Vol. 39, No. 6 (2005), pp. 1199–1203; Jason Young, "Space for Taiwan in Regional Economic Integration: Cooperation and Partnership with New Zealand and Singapore," *Political Science*, Vol. 66, No. 1 (2014), pp. 12–17.

69. Trans-Pacific Partnership Agreement Negotiations, no date, available at: <http://www.dfat.gov.au/fta/tpp/>

Korea–China FTA.<sup>70</sup> The political turmoil has also caused potential FTA partners, such as Australia and Indonesia, to suspend their plans to enter into substantive negotiations with Taiwan.<sup>71</sup>

The Sunflower Movement and the KMT's landslide defeat in local elections in 2014 undermined the government's economic justification. Performance legitimacy hinges on public perception. Undoubtedly, trade agreements with China have benefited Taiwan's enterprises, but they only constitute the minority of voters. For the majority of people, cross-straits agreements have limited effects on remedying Taiwan's declining GDP growth. Aggravated by the global economic slowdown, the long-lasting income stagnation drove the middle class' opposition to the CSSTA. University students were particularly frustrated by the fact that, notwithstanding increasing living costs, the average monthly salary of college graduates is only US\$855.<sup>72</sup> The FTAs seem to extend benefits only to a minority of people at the expense of the majority. The widespread pessimism about the economic outlook has buttressed the claim that the Ma administration "lied" about the effect of FTAs and strengthened the distrust about cross-straits policy.

A more salient argument against the CSSTA is the increase in economic dependency on China that may make Taiwan a second Hong Kong. Currently, China-bound trade accounts for 40% of Taiwan's exports, whereas US and European markets only constitute 11% and 9% of the island's exports, respectively.<sup>73</sup> Slightly behind Japan, China also became Taiwan's second largest source of imports as Chinese exports to Taiwan constitute 16.4% of the island's imports.<sup>74</sup> Taiwan's trade surplus with China is valued at US\$77 billion, and the country would run a deficit of US\$41 billion if cross-straits trade was excluded.<sup>75</sup> The intensifying cross-straits trade and potential political risks promoted public demand for congressional supervision over the CSSTA. The changing nature of cross-straits agreements constituted exceptional political and economic circumstances that provoked legality-legitimacy conflicts. In the context of the CSSTA, the existing parliamentary review framework can no longer meet the requirements of procedural and performance legitimacy.

Cross-straits negotiations have encountered the changing nature of political hurdles, which were further complicated by the Sunflower Movement. To solve the political

70. Amy Chyan, "China–S. Korea FTA to Hurt Taiwan," *China Post*, 11 November 2014, available at: <http://www.chinapost.com.tw/taiwan-business/2014/11/11/421528/China-S-Korea.htm>

71. Liu Jing-Yu, "Tai Ao FTA Tan Pan Kong Pao Tang" ["Taiwan–Australia FTA May Be Futile"], *China Times*, 29 May 2014, available at: <http://www.chinatimes.com/newspapers/20140529000054-260202>

72. Eva Dou and Lorraine Luk, "In Taiwan, Foxconn Sparks Debate over College Grad Salaries," 15 May 2014, available at: <http://blogs.wsj.com/chinarealtime/2014/05/15/in-taiwan-foxconn-sparks-debate-over-college-grad-salaries/>

73. William T. Wilson, "Market Solutions Should Be Central to U.S.'s Taiwan Policy," *Background*, No. 2930 (2014), p. 6.

74. *Ibid.*

75. *Ibid.*, p. 5.

stand-off and address the legitimate deficits of the congressional role in reviewing cross-straits agreements, the LY expects to enact a new law that will strengthen congressional supervision. The MAC-drafted supervisory bill was based on the Cross-Straits Statutes with features adopted in the Trade Promotion Authority under US trade law and the Trade Procedure Act of Korea.<sup>76</sup>

Through various stages of negotiations, the bill mandates compulsory public hearings in order to enhance public awareness.<sup>77</sup> The National Security Council of the Presidential Office is also charged with the national security review of cross-straits agreements. Distinguishable from US practice, the bill does not allow for congressional members' direct participation in negotiations.<sup>78</sup> The government explained that unlike the US Constitution, which bestows trade negotiation power on both legislative and executive branches, the LY's constitutional authority is confined to reviewing and ratifying agreements. Moreover, strengthened congressional supervision at the pre-signing stage was designed in exchange for obliging the LY to ratify the agreement as a package rather than vote by individual clauses.

The supervisory bill was submitted to the LY for review in April 2014 but has yet to be approved. It remains unclear how Taiwan's presidential election in 2016 will impact the DPP's position on the supervisory bill, which is tied to the potential passage or rejection of the CSSTA. Any drawback in post-ECFA negotiations may negatively impact FTA talks with Indonesia and Australia and create hurdles for other states to lend support for Taiwan's TPP and RCEP membership.

Dealing with democratic Taiwan is a key challenge for China. The Sunflower Movement galvanized Xi Jinping's administration to face Taiwan's civic groups that represented the emerging "third" power in the island's two-party system.<sup>79</sup> These civic groups could voice legitimacy concerns about congressional supervision over cross-straits agreements and could influence prospective Taiwan elections that determine cross-straits policy. Chinese leadership understood that it would be immature to conclude that the student movement indicates Taiwan's "anti-China" or "pro-independence" stance. Yet, it would be too simplistic to rely on the KMT to continue its China-friendly policy. Beijing will need to engage the population on Taiwan, including particularly DPP supporters and those who do not gain the direct economic benefits of cross-straits agreements. Importantly, the performance legitimacy of cross-straits negotiations would require Taiwan's FTAs to expand in tandem with post-ECFA agreements. To accelerate economic integration with Taiwan, China should be conscious of its position on Taiwan's external FTA efforts.

76. Mainland Affairs Council, "Information on the Cross-Straits Agreement Supervisory Bill," 3 April 2014, available at: <http://www.mac.gov.tw/lp.asp?ctNode=7596&CtUnit=5154&BaseDSD=7&mp=210>

77. Executive Yuan, "Executive Yuan Approves Draft Bill on Cross-Strait Agreement Supervision," 3 April 2014, available at: [http://www.ey.gov.tw/en/News\\_Content2.aspx?n=1C6028CA080A27B3&s=38451DE4C3084458](http://www.ey.gov.tw/en/News_Content2.aspx?n=1C6028CA080A27B3&s=38451DE4C3084458)

78. US Constitution, arts I:8, II:2; ROC Constitution, arts 38, 58, 63, 107.

79. Alan D. Romberg, "Sunshine Heats Up Taiwan Politics, Affects PRC Tactics," *China Leadership Monitor*, No. 2 (2014), pp. 2–5.

## Conclusion

Cross-straits economic ties have been closely intertwined with political challenges. After the conclusion of the landmark ECFA, the CSSTA provoked intensive constitutional and political clashes in Taiwan. This article examined Taiwan's cross-straits negotiation mechanism and agreements with China under the multifaceted concept of legitimacy. These legitimate controversies resulted in a significant impact on cross-straits politics and regional FTAs. To demystify political challenges, the article examined legal and structural issues from the perspectives of procedural legitimacy and performance legitimacy.

The white glove mechanism based on Taiwan's Three No's policy first gave rise to legitimacy concerns concerning congressional power over the cross-straits negotiation mechanism. The Cross-Straits Statute based on constitutional amendments remedied the procedural legitimacy deficits by enhancing the LY's authority through strengthening MAC–SEF supervisory relations. Nevertheless, the nature of legitimacy fundamentally transformed in post-ECFA negotiations because cross-straits agreements incorporate increasingly substantive obligations that are perceived to harm Taiwan's politics and economy. Unable to cope with changes in cross-straits politics, Taiwan's legal system that governs the congressional review of trade agreements with China lacks both procedural legitimacy and performance legitimacy.

The alleged "black box" congressional review procedures for cross-straits agreements led to the Sunflower Movement, which compelled the government to address the procedural legitimacy deficit. The KMT's performance legitimacy argument for expediting post-ECFA negotiations was perceived as unconvincing. Stagnant GDP growth and economic dependency have weakened voters' support for economic integration with Beijing. It remains to be seen whether the prospective ratification of the supervisory bill will converge with public consensus. These political challenges are, in turn, linked to Taiwan's bids to expand its FTA network through agreements such as the TPP and the RCEP. Hence, the legitimacy of law and politics concerning cross-straits agreements will have a long-lasting impact on Taiwan's cross-straits and FTA policy.

## Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

## Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

## Author biography

**Pasha L. Hsieh** is an Assistant Professor of Law at the Singapore Management University School of Law, Singapore. Prior to joining academia, he served as a Legal Affairs Officer at the Appellate Body Secretariat of the World Trade Organization and as an associate at Shearman & Sterling LLP. He wishes to thank Professors Bruno Coppieters, Clara Portela, and Scott Y. Lin for their thoughtful comments.