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THE CHINA–TAIWAN ECFA, GEOPOLITICAL DIMENSIONS AND WTO LAW

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ABSTRACT

This article examines legal and geopolitical aspects of the China-Taiwan Economic Cooperation Framework Agreement (ECFA). It begins by analyzing areas in which the two governments' measures contravene rules of the World Trade Organization (WTO). In particular, it provides the first detailed examination of the significant implications emerging from the ECFA for cross-straits trade relations and East Asian regionalism. The article also explains how the ECFA was modeled on free trade agreements (FTAs) of the Association of Southeast Asian Nations and assesses the impact of the ECFA's early harvest program. Finally, the article discusses the ECFA's consistency with WTO requirements for an interim FTA agreement and potential legal issues arising from the dispute settlement mechanism. In this respect, the article presents a valuable case study of an FTA.

I. INTRODUCTION

On June 29, 2010, China and Taiwan signed a landmark trade pact, known as the Cross-Straits Economic Cooperation Framework Agreement (ECFA), in the Southwest Chinese city of Chongqing.¹ The ECFA marks the most important agreement between these two political rivals since the end of the

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¹ Lucy Hornby, *Taiwan and China Sign Trade Pact*, 29 June 2010, *Reuters*, available at <http://www.reuters.com/article/2010/06/29/us-china-taiwan-signing-idUSTRE65S17Z20100629> (visited 15 February 2011); Xie Yu and Ma Wei, *Cross-Straits Trade Deal to Cut Tariffs, Open Markets*, 30 June 2010, *China Daily*, available at http://tianjin.chinadaily.com.cn/china/2010-06/30/content_10037141.htm (visited 10 October 2010). The texts of the ECFA and Annexes are available at <http://tga.mofcom.gov.cn/zt/column/subject/ecfa/subjectii.html?97846377=3878450466> (simplified Chinese and English texts) and <http://www.ecfa.org.tw/RelatedDoc.aspx> (traditional Chinese and English texts) (both visited 10 November 2010).

Chinese Civil War in 1949 and intends to legally transform the cross-straits economic link. The ECFA is also significant from the viewpoint of the World Trade Organization (WTO) and in terms of international relations. It not only serves as the world's first bilateral free trade agreement (FTA) concluded between WTO members with long-lasting sovereign disputes, but also accelerates the 'domino effect' in East Asian economic integration.²

With a focus on the relevant geopolitical implications and WTO legal issues, this article examines the ECFA from a holistic perspective. The article argues that while East Asian regionalism and new cross-straits policies have provided a major impetus for the ECFA, this agreement will intensify trade relations across the Taiwan Strait and further ignite regional integration. Moreover, the ECFA constitutes an interim agreement to a full-fledged FTA between the signatories and is hence obliged to comply with both substantive and procedural requirements under WTO law. The article nonetheless cautions that due to limited jurisprudence and the lack of consensus on FTA requirements under WTO law, there remains possibilities for the two governments to depart from these requirements for their own policy considerations.

The article proceeds in five parts. Part II explores WTO-inconsistent measures that China and Taiwan have imposed on each other, as well as political and economic reasons contributing to such measures. Part III focuses on the strategic considerations that lie behind China's and Taiwan's FTAs and cross-straits trade policies. It explains how China aims at expanding its regional influence and 'rectifying' WTO-plus commitments included in its accession to WTO membership, while Taiwan seeks to avoid diplomatic and trade marginalization. Part IV analyzes the ECFA's key provisions and pertinent WTO legal issues. It addresses why China and Taiwan decided to follow the 'framework agreement' model that the Association of Southeast Asian Nations (ASEAN) developed for its external FTAs and examines whether the ECFA's 'cross-straits characteristics' are consistent with WTO rules. Other crucial elements for prospective cross-straits economic integration, including the ECFA's early harvest program (EHP) and dispute settlement mechanism (DSM), will also be discussed, along with legal and policy recommendations. Part V concludes by outlining the ECFA's significance for cross-straits relations and for the broader multilateral trading system.

² In the regionalism context, the domino effect refers to a fear of exclusion from major markets due to certain countries' signing of free trade agreements (FTAs) with such agreements tending to lead other countries to conclude FTAs of their own. Richard Baldwin, *A Domino Theory of Regionalism*, NBER Working Paper Series, Working Paper No. 4465, at 1–5 (1993); Peter Lloyd, 'New Bilateralism in the Asia-Pacific', in Peter Lloyd and Chris Milner (eds.), *The World Economy: Global Trade Policy 2002* (Malden, MA: Blackwell Publishing, 2003), at 88–9.

II. THE TAIWAN STRAIT AS A WTO-INCONSISTENT AREA

For nearly two decades following the Chinese Civil War, the political animosity between the People's Republic of China (PRC) in Mainland China and the Republic of China (ROC) in Taiwan prevented the two sides from developing normal trade relations. Nonetheless, trade volume across the Taiwan Strait has grown rapidly since the 1980s. The main change occurred as a result of China's attempt to attract Taiwanese investments, and Taiwan gradually liberalized restrictions on trade with China.³ Bilateral economic ties accelerated after China and Taiwan joined the WTO in 2001 and 2002, respectively.⁴ From 2002 to 2009, cross-straits trade soared from US\$395 billion to \$865.9 billion.⁵ Despite diametrically opposed sovereign claims, China and Taiwan have become important trading partners. In fact, China is now Taiwan's number one trade partner, and Taiwan is China's fifth largest trade partner.⁶ Not only does 70.5% of Taiwanese capital outflows to the Mainland make Taiwan China's second largest source of foreign direct investments (FDI), but Taiwan also runs the largest trade surplus with China.⁷ 'Chaiwan', a newly coined term that has emerged in Asian production networks, refers to products that are 'made by Taiwan, but made in China'.⁸ Notwithstanding their WTO membership and extensive economic interdependence, both governments have imposed WTO-inconsistent

³ For a historical background of cross-straits trade relations, see Pasha L. Hsieh, 'III.C.14 China-Taiwan Trade Relations: Implications of the WTO and Asian Regionalism', in Paul Davidson (ed), *Trading Arrangements in the Pacific Rim: ASEAN and APEC* (Oxford: Oxford University Press, 2008), at 2–3.

⁴ The Fourth Ministerial Conference of the WTO, which took place in Doha, approved both China's and Taiwan's WTO memberships in 2001. Taiwan's membership became effective in January 2002 following the deposit of its instrument of acceptance with the WTO Director-General.

⁵ Bureau of Foreign Trade of the Ministry of Economic Affairs, *Liang An Mao Yi Zong Zhi Nian Cheng Zhang* [Annual growth of the Total Cross-Straits Trade Volume], *Liang An Jing Ji He Zuo Xie Yi Xian Jie Duan Xie Shang Cheng Guo* [Results of Current ECFA Negotiations], *Jiao Liu* [Exchange], No. 111 (2010), at 13 (in Chinese).

⁶ Table 7: China's Top Trade Partners 2009 (\$ billion), US-China Trade Statistics and China's World Trade Statistics, available at <http://www.uschina.org/statistics/tradetable.html> (visited 26 August 2010); Cross-Straits Economic Cooperation Framework Agreement: Policy Explanation, Mainland Affairs Council, The Executive Yuan (2009), at 4.

⁷ Trade Policy Review Report by Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, WT/TPR/G/232 (31 May 2010) (Taiwan Trade Policy Review Report (2010)), at 38; China's Absorption of FDI in the First 7 Months of 2010, MOFCOM, 22 August 2010, available at <http://english.mofcom.gov.cn/article/statistic/foreigninvestment/201008/20100807095675.html> (visited 10 September 2010); 2009: *Zhong Hua Min Guo Dui Wai Mao Yi Fa Zhan Gai Kuang* [Summary of 2009 Republic of China (ROC) External Trade], available at <http://cweb.trade.gov.tw/kmi.asp?xdurl=kmif.asp&cat=CAT319> (in Chinese) (visited August 27, 2010), at 26–27.

⁸ Many technology products that are 'made in China' are produced by factories owned by Taiwanese companies. E.g., Rhee So-eui and Baker Li, 'Chaiwan' Set to Reshape Asia's Tech Landscape, 21 July 2009, *Reuters*, available at <http://www.reuters.com/article/idUSTRE56K1J820090721> (visited 20 July 2010). 'Chi Wan' is also used to refer to the same phenomenon.

measures in cross-straits trade relations. To understand the ECFA's significance on developments across the Taiwan Strait, it is necessary to examine the political and economic considerations behind these measures.

A. China's trade measures concerning Taiwan

Even after Taiwan acceded to the WTO, Beijing declined to consider Taiwan's status as a 'separate customs territory' on par with China's 'full' WTO membership as a sovereign state.⁹ The PRC's position is contrary to WTO law because Article XII of the WTO Agreement stipulates that WTO membership is open to both states and separate customs territories.¹⁰ Although no WTO provision distinguishes between WTO members' rights and obligations based on the two categories of membership, Beijing's political mindset led to various WTO-inconsistent policies concerning Taiwan. These policies include both discriminatory and preferential measures.

First, China denies Taiwanese nationals' 'right of priority' under the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement). In general, after a manufacturer files its patent or trademark application in one country, it may well file applications in other countries to extend legal protection in those countries as well. This right of priority, which was first introduced into the Paris Convention for the Protection of Industrial Property (Paris Convention), allows subsequent applications to be treated as if they were filed on the date of the first application.¹¹ This concept efficiently protects intellectual property (IP) holders' legal interests and has been incorporated into the domestic laws of parties to the Paris Convention. The PRC is no exception, as both Chinese Patent Law and Trademark Law recognize the right of priority.¹² However, Chinese IP

⁹ See Pasha L. Hsieh, 'Facing China: Taiwan's Status as a Separate Customs Territory in the World Trade Organization', 39 (6) *Journal of World Trade* 1195 (2005), at 1199–203 (explaining Taiwan's status in the WTO). For Taiwan's status in international law, see Pasha L. Hsieh, 'An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan', 28 *Michigan Journal of International Law* 765 (2007), at 770–73.

¹⁰ See Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), art. XII.1 ('Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement...') (emphasis added).

¹¹ Paris Convention for the Protection of Industrial Property (Paris Convention), Articles 4.A.1 and 4.B.

¹² See People's Republic of China (PRC) Patent Law, art. 29 ('Where, within twelve months from the date on which any applicant first filed in a foreign country an application for a patent for invention or utility model, ... he or it may, in accordance with ... any international treaty to which both countries are party, ... enjoy a right of priority'); PRC Trademark Law, Article 24 ('Any applicant for the registration of a trademark who files an application for registration of the same trademark for identical goods in China within six months from the date of filing the first application for the trademark registration overseas may enjoy the right of priority ... according to the international treaty to which both countries are parties ...') (emphases added).

government agencies have refused to accept Taiwanese nationals' right of priority applications because the Paris Convention is a United Nations Treaty that governs 'state-to-state' relations inapplicable to Taiwan.¹³ Taiwan's lack of member status in the Paris Convention, as well as the absence of bilateral arrangement with China, prevents Chinese IP authorities from handling Taiwanese applications. This practice contravenes WTO law because Article 2 of the TRIPS Agreement specifically requires WTO members to comply with Article 4 of the Paris Convention.¹⁴ In Taiwan's case, the lack of membership in the Paris Convention due to its political status should pose no obstacle for its nationals to enjoy the right of priority. Thus, China's denial of such right infringes the TRIPS Agreement.

Second, China's failure to enact implementing statutes for its WTO services commitments precludes Taiwanese professionals from benefiting from rights extended under the WTO General Agreement on Trade in Services (GATS). This issue arises from Taiwan's unique status in Chinese law, effectively placing Taiwan in legal limbo. More specifically, since Taiwan is not considered a 'foreign country', most statutes that implement China's services commitments for 'foreigners' do not directly apply to Taiwan. Legal services illustrate this problem. In its schedule of specific commitments under the GATS, China has opened the legal services market to foreign law firms by allowing them to establish representative offices in China.¹⁵ To put this commitment into effect, the PRC State Council promulgated the Regulations on Administration of Foreign Law Firms' Representative Offices in China.¹⁶ As of 2009, the government has granted 188 foreign law firms the right to operate representative offices.¹⁷ Yet, these statutes do not apply to law firms based in Taiwan, Hong Kong and Macau, all of whom are WTO members. As these three areas are considered Chinese

¹³ Hung-Ming Tsai, *Hou ECFA Shi Shai De Zin Tiao Zhan* [New Challenges in the Post-ECFA Era], 30 June 2010, *Zhong Guo Shi Bao* [China Times], at A16 (in Chinese); see also, Yu-Lan Kuo, *International Report - Special Notes on Taiwan Patent Prosecution*, 1 January 2007, *IAM*, available at <http://www.iam-magazine.com/reports/Detail.aspx?g=24d9d724-136b-4284-869d-1d4f6d0eb380> ('China and Taiwan do not admit priority right for each others' patent application.... [A]n applicant that files a patent application in Taiwan is unable to claim priority based on his Taiwan's patent application when he subsequently files the corresponding application in China, and vice versa') (visited 10 August 2010).

¹⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Article 2.1 ('... Members shall comply with Articles 1 through 12 and Article 19 of the Paris Convention (1967)').

¹⁵ Report of the Working Party on the Accession of China: Addendum, S Schedule CLII – The People's Republic of China, Part II – Schedule of Specific Commitments on Services List of Article II MFN Exemptions (Taiwan WTO Services Schedule), WT/ACC/CHN/49/Add.2, 1 October 2001, II.A.a: Legal Services.

¹⁶ The Regulations on Administration of Foreign Law Firms' Representative Offices in China became effective in 2002 [Foreign Law Firms Regulations]. The text is available at http://www.gov.cn/english/laws/2005-08/24/content_25816.htm (visited 10 October 2010).

¹⁷ PRC Ministry of Justice Notice, No. 91 (2009), available at http://www.legalinfo.gov.cn/index/content/2009-12/24/content_2010149.htm?node=7864 (visited 10 October 2010).

territories, statutes that govern 'foreign' law firms do not accord them the same rights. Under China's Closer Economic Partnership Arrangements (CEPAs) with Hong Kong and Macau, the PRC State Council subsequently enacted separate rules to allow Hong Kong and Macau-based firms to establish representative offices in China.¹⁸ Taiwanese law firms, however, lack a legal basis for setting up offices because China failed to promulgate such rules for them.¹⁹ For similar reasons, Taiwanese companies have not been able to expand professional services, such as accounting and auditing services, in the Chinese market. Consequently, China's practice not only impairs Taiwanese service providers' business interests, but also curtails Taiwan's rights under the GATS.

Third, Taiwanese exporters have encountered unique non-tariff barriers for products sold to China, mostly in the form of technical and standards requirements. For instance, local PRC customs authorities have postponed clearance or even returned imported goods marked with 'Republic of China' or 'Taiwan' labels.²⁰ This practice, which has no legal basis in Chinese law, compels Taiwanese exporters to incur additional expense by revising their products' 'Made in Taiwan' labels, which are accepted by all other WTO members. This labeling requirement arguably violates the WTO Agreement on Technical Barriers to Trade (TBT Agreement) since it creates 'unnecessary obstacles' to cross-strait trade and may not be justified under the narrowly construed 'national security' exception.²¹

¹⁸ Regulations on Administration of Hong Kong and Macau Special Administrative Regions Law Firms' Representative Offices in China. The text is available at <http://www.chinabaike.com/law/zy/bw/gw/sfb/1345916.html> (in Chinese) (visited 10 October 2010).

¹⁹ To bypass the law, some Taiwanese law firms, such as Lee and Li and Tsai Lee, Tsai and Partners, set-up 'consulting firms' in Beijing and Shanghai to deal with cross-strait legal issues, but their scope of business is restricted compared to that of representative offices. In 1994 and 2009, China allowed Taiwanese to sit for the bar exam. Chih-Chao Tseng, *You Dai Lu Kai Fang Lu Shi Kan Liang An Si Fa He Zuo* [Cross-Straits Judicial Cooperation and China's Opening of the Legal Market], 9 January 2009, *NPF Background*, No. 098-002, available at <http://www.npf.org.tw/post/3/5263> (in Chinese) (visited 12 October 2010). Although 40 Taiwanese passed the bar exam, they often find it difficult to qualify to become a practicing lawyer because only a few Chinese firms provide them with the required one-year internship. *Id.*; PRC Lawyers Law, art. 5.

²⁰ These customs authorities require that the labels be changed to 'China Taiwan' or 'China Taipei'. *Zhong Guo Yao Xie Tai Shang, Na Cheng Wei Zho Wen Zhang/Hao Pin Lai Zi 'Taiwan'*, *Zhong Guo Bu Zhun Bao Guan* [China Threatens Taiwanese Businessmen. Titles Matter: China Does Not Allow Products from 'Taiwan' to Clear Customs], 23 May 2010, *Zi You Shi Bao* [Liberty Times], available at <http://www.libertytimes.com.tw/2010/new/may/23/today-t3.htm> (in Chinese) (visited 20 June 2010); see also, *FEDEX Notice about Chinese Ban on Made in ROC Imports Stirs Internet*, 18 May 2010, *Examiner.Com*, available at <http://www.examiner.com/taiwan-policy-in-national/fedex-notice-about-chinese-ban-on-made-roc-imports-stirs-internet> ('FEDEX issued a notice on items banned from import into China. Along on the list with counterfeit money, narcotics, dangerous viruses, and toxic chemicals are trade goods from Taiwan that have a Made in ROC label') (visited 10 August 2010).

²¹ Agreement on Technical Barriers to Trade (TBT Agreement), Article 2.2.

Finally, in addition to the above-mentioned discriminatory measures, China's policies that accord Taiwan preferential treatment also contravene WTO law. During the economic reform era, China granted Taiwanese investors preferential treatment in order to attract capital. This treatment is dubbed a 'super national treatment' because it encompasses tax preferences to which Chinese enterprises are not entitled. China has gradually removed such preferential treatment during its transition period following WTO accession because it is inconsistent with the national treatment principle under the WTO Agreement on Trade-Related Investment Measures (TRIMs Agreement).²² However, to buttress its recent policy to 'buy the hearts of Taiwan compatriots', Beijing has adopted measures that are incompatible with WTO rules. The most renowned measure is its 'fruit diplomacy'. Immediately after passing the 2005 Anti-Secession Law that authorizes 'non-peaceful means' to prevent Taiwanese independence, Beijing granted zero-tariff status to 15 Taiwanese fruit items.²³ The political motivation behind this was conspicuous. Chinese leadership intended to ease Taiwan's fierce protests against the Law, particularly given that most fruit farmers in Southern Taiwan are faithful supporters of the pro-independence Democratic Progressive Party (DPP). In fact, the zero-tariff treatment's benefits were limited since it excluded bananas and mangos, Taiwan's top two export fruits, and because the profit margin was undermined by transportation costs and a 17% value-added tax.²⁴ Nevertheless, because this tariff treatment was not granted to other WTO members, this 'fruit diplomacy' violated the most-favored-nation (MFN) treatment under the General Agreement on Tariffs and Trade (GATT).²⁵

B. Taiwan's trade measures concerning China

Compared to their Chinese counterparts, Taiwan's WTO-inconsistent measures are far more egregious. Taiwan's measures primarily have caused imbalanced trade, having made China's trade deficit with the island grow rapidly from US\$204.5 billion in 2000 to \$652.1 billion in 2009.²⁶ The ECFA may

²² Agreement on Trade-Related Investment Measures (TRIMs Agreement), Article 2.

²³ PRC Anti-Secession Law, Article 8; Position Paper on Taiwan's Fruit Exports to China, 26 January 2010, available at <http://www.taiwan.gov.tw/ct.asp?xItem=13559&ctNode=1938&mp=1001> (visited 10 March 2010). For details on the Anti-Secession Law, see Pasha L. Hsieh, 'The Taiwan Question and the One-China Policy: Legal Challenges with Renewed Momentum', 84 (3) *Die Fridens-Warte: Journal of International Peace and Organization* 59 (2010), at 68–9.

²⁴ Hsiao-ching Chang, *Political Manipulation of Taiwan's Agricultural Trade*, 1 February 2007, available at http://www.strategycenter.net/research/pubID.144/pub_detail.asp (visited 10 October 2010).

²⁵ General Agreement on Tariffs and Trade (GATT), Article I.

²⁶ Department of Taiwan, Hong Kong and Macao Affairs, Ministry of Commerce of the People's Republic of China, *Liang An Mao Yi Tong Ji Biao (2000 Nian–2009 Nian)* [Statistics of Cross-Straits Trade (2000–2009)], 20 May 2010, available at

prompt Taipei to remove or reduce these measures and pave the way for future 'normal' trade relations with China. To understand the ECFA's impact on Taiwan's cross-straits policy, its discriminatory trade measures against China must be ascertained.

First, Taiwan maintains overall restrictions on Chinese exports to which no other WTO members are subject. Taiwan has only marginally liberalized these restrictions after China criticized them as being WTO-inconsistent during Taiwan's 2006 WTO Trade Policy Review.²⁷ As of March 2010, Taiwan still bans the importation of 865 agricultural products and 1,377 industrial products from China on security and commercial grounds.²⁸ The comprehensive import ban contravenes Articles I (MFN treatment) and XI (quantitative restrictions) of the GATT because Taiwan did not invoke the non-application clause concerning China in the WTO accession process. Neither can the ban be justified by exceptions under Article XX of the GATT.²⁹

Second, Taiwan currently declines to recognize academic degrees conferred by Chinese universities because the Ministry of Education seeks to prevent Taiwanese students from studying in China.³⁰ The underlying reason for this policy is that Taiwan's dwindling birthrate, which has made more than a third of 164 local universities face difficulties in recruiting students.³¹ This policy has had a discriminatory impact on Chinese professionals because they are ineligible for Taiwan's professional examinations that require a bachelor's degree in a relevant discipline.³² Some may argue that Taiwan's policy on Chinese degrees does not violate WTO law, given that Article VII

<http://tga.mofcom.gov.cn/aarticle/jingmaotongji/redht/201005/20100506924293.html?3917983081=3878450466> (in Chinese) (visited 20 August 2010).

²⁷ Allen Hsu, *Taiwan Delegates Clarify Positions at WTO Trade Policy Review in Geneva*, 30 June 2006, available at <http://taiwanauj.nat.gov.tw/fp.asp?xItem=21931&ctNode=122> (visited 1 July 2010). See generally, Chen-huan Hsiao, 'Taiwan's First Trade Policy Review in the World Trade Organization (June 20 and 22, 2006)', 24 *Chinese (Taiwan) Yearbook of International Law and Affairs* (2006), at 185–95.

²⁸ *Taiwan and China to Start Substantive Talk on ECFA this Month*, 1 March 2010, *Taiwan Economic News*, available at http://www.cens.com/cens/html/en/news/news_inner_31284.html (visited 10 October 2010).

²⁹ GATT, Article XXXV and WTO Agreement, Article XII; GATT, Article XX.

³⁰ Despite Taiwan's policy, the number of Taiwanese students who study in China is increasing. In 2009, 6,755 Taiwanese students were enrolled in Chinese colleges. *Tai Sheng Yong Yue Fu Dai Lu Nian Shu, Qia Wei Dai Zhong Hua* [Taiwanese Students are Enthusiastic about Studying in Mainland China, For Better Positions in Greater China], 24 June 2010, available at <http://www.177liuxue.cn/info/2010-7/133207.html> (in Chinese) (visited 10 October 2010).

³¹ *Taiwan Parliament Passes Bill to Admit Chinese Students*, 19 August 2010, *Channel News Asia*, available at http://www.channelnewsasia.com/stories/afp_asiapacific/view/1076016/1/.html (visited 20 October 2010).

³² For example, one requirement for taking Taiwan's bar exam is a bachelor's degree in law recognized by the Ministry of Education. ROC Regulations for the Senior Examination for Professional and Technical Personnel: Lawyer, Articles 5 and 20. A candidate with a law degree obtained in China is thus unable to meet this requirement.

of the GATS simply stipulates that 'a Member *may* recognize the education obtained' abroad.³³ Absent a bilateral 'agreement or arrangement' regarding this matter,³⁴ Taiwan is not obliged to accord recognition of Chinese educational credentials. This argument nonetheless cannot stand. Notably, Article VII of the GATS also emphasizes that such recognition cannot 'constitute a means of discrimination between countries' that apply comparable 'standards or criteria'.³⁵ As Taiwan recognizes degrees from Vietnam, India and Swaziland, it is difficult to contend that the standards or criteria of Chinese intuitions are inferior to or fundamentally distinguishable from their counterparts in these countries.³⁶ In addition, this policy will likely hurt Taiwan's competitiveness in the long run because it encourages elite Chinese graduates to go to Hong Kong and Singapore rather than Taiwan.

Finally, Taiwan imposes stringent restrictions on both outbound and inbound cross-strait investments. These restrictions aim to prevent Taiwan from being 'hollowed out' by Mainland Chinese investment and to maintain the country's economic competitiveness, particularly in the technology industry. Currently, the cap on Taiwanese companies' investments in China is 60% of their net worth and special approval is required if a project involves more than an accumulated US\$50 million.³⁷ Restrictions on outbound investments are not within the purview of WTO law because the TRIMs Agreement is concerned primarily with inbound investment. In Taiwan's trade regime, foreign investments are subject to the 'negative list' that excludes only industries with security or environmental concerns. Chinese investments are nonetheless confined to the 'positive list' of 192 items,³⁸ which explains why there is less than US\$1 billion Chinese investments in Taiwan in contrast to more than US\$50 billion Taiwanese investments in China.³⁹ Taiwan's restrictions in this respect are contrary to WTO law. These restrictions may survive legal challenges under the TRIMs Agreement because

³³ Emphasis added. General Agreement on Trade in Services (GATS), Article VII:1.

³⁴ Ibid.

³⁵ GATS, Article VII:3.

³⁶ The Reference List of Foreign Universities, Bureau of International Cultural and Educational Relations ROC, available at http://www.edu.tw/bicer/content.aspx?site_content_sn=8487 (visited 4 September 2010). Taiwan's Ministry of Education expects to recognize degrees conferred by 41 leading Chinese universities in 2011. Yojana Sharma, *Taiwan: Way Clear for Chinese Students Next Year*, 29 August 2010, *University World News*, available at <http://www.universityworldnews.com/article.php?story=20100828053320912> (visited 10 September 2010).

³⁷ Taiwan Trade Policy Review Report (2010), above note 7, at 31–32.

³⁸ *Kai Fang Lu Zi Xun Xu Jian Jin, Ma Zheng Fu Xian Fang Xing 192xiang* [Gradually Open Mainland Investments, Ma Government Permits 192 Items], 30 June 2009, *Zhong Guo Ping Lun Xin Wen Wang* [China Review News], available at <http://www.chinareviewnews.com/doc/1010/0/9/4/101009437.html?coluid=7&kindid=0&docid=101009437> (in Chinese) (visited 20 September 2010).

³⁹ *Lu Zi Lai Tai Yu Gui Yu Fan Xiang* [Mainland Investments Come to Taiwan and Salmon Return Home], 2 August 2010, *Huaxia*, available at <http://big5.huaxia.com/thpl/mtlj/2010/08/2016646.html> (in Chinese) (visited 1 October 2010).

Chinese investments, once allowed in Taiwan, are not subject to additional restrictions, such as local content requirements. Yet, in addition to the TRIMs Agreement that regulates goods-related investments, services-related investments are governed by the GATS. If a WTO member is committed to permitting the 'commercial presence' of foreign services providers (known as GATS Mode 3), the member is also obliged to 'allow such [associated] movement of capital' into its market.⁴⁰ Consequently, Taiwan's measures that allow Chinese investments in only 22% of the items of its services schedule⁴¹ infringe on Chinese investors' rights under the GATS if Chinese investors set-up commercial presence in Taiwan concerning other items.

The analysis above illustrates WTO-inconsistent measures that China and Taiwan have adopted for cross-straits trade. From a legal perspective, a breached party will mostly likely resort to the WTO dispute settlement mechanism that has compulsory jurisdiction over legal matters arising from WTO agreements. However, an anomaly in cross-straits relations is that neither side has filed a WTO complaint against the other. On the one hand, China intends to avoid 'internationalization' of cross-straits matters. In its view, the utilization of the WTO tribunals may create the image of 'state-to-state' relations with Taiwan, thus diminishing Beijing's sovereign assertion over the island. On the other hand, Taiwan also has been hesitant to bring WTO complaints against China due to the scale of its own WTO-inconsistent measures.⁴² Bringing actions against Beijing may also compel it to revoke preferential treatment for Taiwanese enterprises, which would in turn undercut financial support for Taiwan's ruling party.

III. REASONS FOR SIGNING THE ECFA IN THE CONTEXT OF EAST ASIAN REGIONALISM

The process that began with WTO-incompatible measures leading to WTO-plus treatment under the ECFA represents a significant advance not only in cross-straits economic ties, but also in East Asian regionalism. This fundamental change would not have been possible but for the new FTA and the respective cross-straits policies of China and Taiwan. The following

⁴⁰ GATS, Article XVI:1, footnote 8.

⁴¹ Gradually Open Mainland Investments, Ma Government Permits 192 Items, above note 38. For additional information on Taiwan's special commitments regarding 'commercial presence', see Taiwan WTO Services Schedule, above note 15.

⁴² For example, in 2002, China failed to notify the Taiwan government of China's anti-dumping and safeguard measures on Taiwanese steel products. Although such failure violated the notification requirements under Article 6 of the Anti-Dumping Agreement and Article 12 of the Safeguard Agreement, Taiwan did not file a complaint against China. Hsieh, above note 9, at 1219–20. For information on China in WTO dispute settlement, see Pasha L. Hsieh, 'China's Development of International Economic Law and WTO Legal Capacity Building', 13 *Journal of International Economic Law* 997 (2010), at 1028–36.

sections examine the two political rivalries' respective policy motivations for concluding the ECFA.

A. China's geopolitical and economic considerations for FTAs

The Doha Round impasse has prompted WTO members, including China, to shift their trade policies toward bilateral FTAs. The 'domino effect' caused the rapid proliferation of FTAs in East Asia, leading to the region's 'noodle bowl syndrome'.⁴³ Since China first signed CEPAs with Hong Kong and Macau in 2003, it has concluded two regional trade agreements [China–ASEAN FTA (CAFTA) and the Asia-Pacific Trade Agreement] and six bilateral FTAs.⁴⁴ The ECFA with Taiwan may lead to China's eleventh FTA.

There are salient, yet different, geopolitical and economic considerations behind Beijing's FTA strategy. First, China's CEPAs with Hong Kong and Macau were intended to implement the 'one country, two systems' scheme, originally 'designed' for Taiwan.⁴⁵ These CEPAs became the two first FTAs concluded between customs territories within the same country. To justify China's takeover of Hong Kong and Macau, the continuing economic success of these two Special Administrative Regions (SARs) was seen to be vital. Beijing's unilateral concessions under the CEPAs were deemed to be 'gifts' that would salvage Hong Kong's and Macau's economic downturn resulting from the SARS outbreak. Because Hong Kong and Macau are WTO members, the CEPAs (which are FTAs under Article XXIV of the GATT and Article V of the GATS) prevent other WTO members from claiming MFN treatment.

Second, China considers FTAs a mechanism to 'rectify' the discriminatory WTO-plus obligations to which it committed in exchange for WTO membership.⁴⁶ In particular, China is concerned about its trading partners'

⁴³ Richard Baldwin, *Managing the Noodle Bowl: The Fragility of East Asian Regionalism*, ADB Working Paper Series on Regional Economic Integration No. 7, at 5–6 (2007). For an analysis of intra-Asian FTAs, see generally Bryan Mercurio, 'Bilateral and Regional Trade Agreement in Asia: A Sceptic's View', in Ross Buckley et al. (eds), *East Asian Economic Integration: Law, Trade and Finance* (Cheltenham: Edward Elgar Publishing, 2011).

⁴⁴ China has concluded bilateral FTAs with Chile, Pakistan, Singapore, New Zealand, Peru and Costa Rica. Trade Policy Review: Report by the Secretariat, China, Revision, WT/TPR/S.230/Rev.1 (5 July 2010) (China Trade Policy Review Report (2010)), at 16–20; China–Costa Rica FTA, China FTA Network, available at <http://fta.mofcom.gov.cn/topic/encosta.shtml> (visited 2 September 2010).

⁴⁵ For additional information on the China–Hong Kong CEPA, see Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA): Press Releases and Speeches, available at http://www.tid.gov.hk/english/cepa/press/cepa_press.html (visited 2 September 2010).

⁴⁶ For example, Protocol on the Accession of the People's Republic of China, WT/L/432, 23 November 2001, Section 15 (Price Comparability in Determining Subsidies and Dumping) and Section 16 (Transitional Product-Specific Safeguard Mechanism); Report of the Working Party on the Accession of China, WT/MIN(01)/3, 10 November 2001, para. 242 (measures regarding textiles).

'abuse' of China's non-market economy status in trade remedies cases.⁴⁷ This status allows WTO members to select surrogate markets (e.g. India or Turkey) for calculating the normal value of Chinese exports, frequently making Chinese companies liable in foreign anti-dumping proceedings.⁴⁸ In 2009 alone, 38% of worldwide anti-dumping investigations were directed against China, making the country the number one target of such proceedings.⁴⁹ China intends to tackle this issue on a bilateral basis by asking its FTA partners to recognize its market economy status in their respective FTAs.⁵⁰

Finally, China's FTA strategy is an integral part of its 'peaceful rise' policy, which aims to escalate Chinese regional influence in both political and economic arenas. FTAs with neighboring countries will not only ease concerns over the 'China threat', but also safeguard foreign markets, as well as raw material imports. More importantly, China intends to counterbalance US influence in the region. While China acknowledges the United States' inherent role in Asia, it has been reluctant to incorporate the United States in East Asian regionalism. This attitude is reflected in Beijing's keen support of the East Asian Economic Community (EAEC) on the 'ASEAN Plus Three' basis and its lukewarm approach to the US-proposed Free Trade Area of the Asia Pacific (FTAAP) including 21 Asia-Pacific Economic Cooperation (APEC) economies.⁵¹ The key difference in membership between the EAEC and the FTAAP is that the former excludes both the United States and Taiwan. Although it is still premature to assert that China is implementing its own Monroe Doctrine in Asia, Beijing's FTA strategy illustrates its concerns about US 'intervention' in the region.

⁴⁷ See US-China Bilateral WTO Agreement, 15 November 1999, available at <http://clinton4.nara.gov/WH/New/WTO-Conf-1999/factsheets/fs-004.html> (explaining that under the US-China Bilateral WTO Agreement, 'the United States can continue to apply our current non-market economy methodology in antidumping cases involving imports from China for 15 years') (visited 1 October 2010).

⁴⁸ On China's Non Market Economy, G-IPR Global Research Center, 25 May 2009, available at <http://www.giprs.org/node/464> (visited 2 September 2010).

⁴⁹ *Exclusive-WTO Raps EU Anti-dumping in China Fasteners Case*, 10 August 2010, *Reuters*, available at <http://www.foxbusiness.com/markets/2010/08/10/exclusive-wto-raps-eu-anti-dumping-china-fasteners-case/> ('But for the entire history of the WTO since 1995, China has been by far the biggest target of anti-dumping investigations.... In 2009 China was the target of 77 anti-dumping investigations out of a total of 201....') (visited 10 September 2010).

⁵⁰ For example, Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between China and ASEAN (China-ASEAN Framework Agreement), Article 14 ('Each of the ten ASEAN Member States agrees to recognise China as a full market economy and shall not apply... Sections 15 and 16 of the Protocol of Accession of... China to the WTO and Paragraph 242 of the Report of the Working Party on the Accession of China...').

⁵¹ See Dick K. Nanto, *East Asian Regional Architecture: New Economic and Security Arrangements and US Policy*, CRS Report for Congress, 4 January 2008, at 17-20 (discussing Asian trade arrangements proposed by China, Japan and the United States). Taiwan joined the Asia-Pacific Economic Cooperation (APEC) under the name 'Chinese Taipei' in 1993.

When the anti-China Democratic Progressive Party was in office in Taiwan from 2000 to 2008, the PRC fiercely opposed Taiwan's FTA efforts.⁵² Beijing once declared that under its 'one-China principle', any countries that sign FTAs with Taiwan would 'bring political trouble to themselves'.⁵³ China was concerned that any official agreements with Taiwan would constitute implied recognition of the island. However, China faced a dilemma. Its isolation policy limited ties with Taipei and strengthened Taiwan's hostile attitude toward Beijing. This attitude, in turn, also worked to fortify the DPP's popularity in Taiwanese elections. The year 2005 became a turning point when Lien Chan visited China.⁵⁴ Lien was then the chairman of Taiwan's opposition party, the Chinese Nationalist Party (KMT or Kuomintang). His trip was symbolically important, given that he was the first KMT chairman to visit the Mainland since Chiang Kai-shek fled to Taiwan in 1949.

Lien's visit was motivated by the KMT's concern about worsening cross-straits relations and by the party's intention to establish contact with Chinese leadership. The Chinese Communist Party (CCP) also seized the opportunity presented by Lien's visit because the CCP anticipated that the KMT would adopt a more Beijing-friendly policy should it win Taiwan's 2008 presidential election. In the long term, Beijing also expected that cross-straits economic integration would promote political reunification. Lien's trip culminated in the KMT-CCP joint declaration, in which the two parties agreed to promote 'peace and development' by establishing a bilateral 'economic cooperation mechanism'.⁵⁵ This declaration was not legally binding because the DPP administration did not designate signing authority to the KMT. Nonetheless, it first provoked the idea of creating a cross-straits trade agreement and paved the way for subsequent ECFA negotiations.

B. Taiwan's goal to prevent diplomatic and trade isolation

Taipei's motivations for concluding the ECFA should be understood in tandem with its FTA strategy. Taiwan is one of the robust 'little dragons' in East Asia, now the world's most FTA-active region with 45 FTAs in place.⁵⁶ Taiwan and North Korea remain the only two Asian countries excluded from regional economic integration. In the early 21st century,

⁵² Chen Shui-bian of the Democratic Progress Party was the ROC president from 2000 to 2008.

⁵³ *FTA with Taiwan Means Political Trouble: Official*, 21 June 2002, *China Daily*, available at http://english.people.com.cn/200206/21/eng20020621_98285.shtml (citing the statement by then Chinese foreign trade minister, Shi Guangsheng) (visited 1 September 2010).

⁵⁴ *Backgrounder: ECFA, a Cross-Strait Economic Pact*, 28 June 2010, *Xinsha News Agency* (LexisNexis News Database). Lien was the ROC vice president from 1996 to 2000.

⁵⁵ *Ibid.*

⁵⁶ See Masahiro Kawai and Ganeshan Wignaraja, *Free Trade Agreements in East Asia: A Way toward Trade Liberalization?*, ADB Briefs, No. 1, June 2010 ('By May 2010, East Asia had

Taipei had failed to cement FTAs with any major trading partners, such as the United States, the European Union and ASEAN states. Instead, it signed FTAs with five of its Central American diplomatic allies: Panama, Guatemala, Nicaragua, El Salvador and Honduras.⁵⁷ Under the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), Taiwanese exporters may take advantage of the agreement's preferential treatment to increase their share of the US market. Yet, bilateral trade with these Central American nations constitutes merely 0.187% of Taiwan's total exports. This is a clear reflection of how political reality has affected Taiwan's foreign trade.⁵⁸

Taiwan's marginalization on the international trade stage can be attributed to the PRC's isolation policy.⁵⁹ In practice, China denied that Taiwan possessed the 'right' to conclude FTAs. This position however is unfounded under WTO law, as Article XXIV of the GATT and Article V of the GATS respectively provide that provisions of economic integration apply to all WTO 'customs territories' and 'Members'.⁶⁰ No WTO provision imposes restrictions on any WTO member's qualification or capability to conclude FTAs. However, Beijing's attitude created a 'political chilling effect' on Taiwan's potential FTA partners because they became concerned that concluding FTAs with Taiwan would jeopardize trade and diplomatic ties with China. This chilling effect can best be demonstrated by Mercosur's prohibition of its member states from signing FTAs with Taiwan.⁶¹ It was also evident in the hesitant attitudes of parties to the Trans-Pacific Strategic Economic Partnership Agreement (TPP) toward Taiwan's membership,

emerged at the forefront of global FTA activity, with 45 FTAs in effect and another 84 in various stages of preparation').

⁵⁷ *ECFA to Let Taiwan 'Resume Regional Hub Status': Economic Official*, 17 June 2010, *Focus Taiwan News Channel*, available at http://focustaiwan.tw/ShowNews/WebNews_Detail.aspx?ID=201006170031&Type=aECO (visited 1 September 2010).

⁵⁸ *Ibid.*

⁵⁹ See Nanto, above note 51, at 10–11 ('In some cases, the [trade] arrangements (or lack thereof) are politically driven, particularly in the case of Taiwan as Beijing attempts to isolate it diplomatically while Taipei tries to counter the diplomatic snubs that belie existing underlying trading relations').

⁶⁰ See GATT, Article XXIV:1 ('The provision of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories...'); GATS, Article V:1 ('This Agreement shall not prevent any of its Members from being a party or entering into an agreement liberalizing trade in services...'). See also, Michelle Lu, *US State Department affirms Taiwan's right to sign FTAs*, 9 June 2010, *Taiwan Today*, available at <http://www.taiwantoday.tw/ct.asp?xitem=110075&CtNode=414> ('... Taiwan has the right to negotiate free trade agreements, and affirmed improving cross-strait relations and Taiwan's role in international affairs') (visited 20 August 2010).

⁶¹ See Nanto, above note 51, at 16–17 ('Pressure from China, however, apparently has led...Mercosur to prohibit its members from signing unilateral trade agreements with other economies, particularly as Mercosur considers an FTA with China'). Mercosur is the Southern Common Market that includes Argentina, Brazil Paraguay and Uruguay.

despite the TPP's 'open accession' clause.⁶² These political factors cannot be legally resolved under the WTO framework.

Furthermore, the formation of 'ASEAN Plus One' FTAs⁶³ and the prospective 'ASEAN Plus Three' FTA has made the 'trade diversion' theory a reality for Taiwanese exporters. Korea's competitiveness in ASEAN and Chinese markets under these FTAs poses an imminent threat to Taiwan. Korea and Taiwan overlap in 80% of their exports, predominantly in information technology and machinery products.⁶⁴ This 'trade diversion' impact is substantiated by statistics. Two years before the Korea-ASEAN FTA took effect in June 2007, Taiwan's and Korea's annual growth rates in exports for ASEAN were 20.1% and 16.6%, respectively.⁶⁵ Only a year after June 2007, Taiwan's growth rate plunged to 11.8% while Korea's rose to 24%.⁶⁶

What worries Taiwanese enterprises more is the loss of the Chinese market to ASEAN and Korean competitors. After the China-ASEAN FTA took effect in 2010, tariffs on the majority of ASEAN exports to China decreased considerably, making them more competitive in China. For example, 43.34% of Taiwanese petrochemical products are exported to China where they are subject to a 6.49% tariff compared to only a 0.25% tariff for ASEAN products.⁶⁷ Taiwan's trade interests in China will further be eroded should the Korea-China FTA or the 'ASEAN Plus Three' framework be realized. Statistics show that the 'ASEAN Plus Three' FTA will decrease Taiwan's trade surplus by US\$694 million per year, and reduce its gross domestic

⁶² This Agreement is also known as the P4 FTA because the members of the FTA include Singapore, New Zealand, Chile and Brunei Darussalam. The 'open accession clause' of the Trans-Pacific Strategic Economic Partnership Agreement (TPP) is Article 20.6.1, which states that the agreement 'is open to accession on terms to be agreed among the Parties, by any APEC Economy or other State'. However, according to Taiwan's Bureau of Foreign Trade, P4 members do not support Taiwan's 'unilateral accession' to the TPP because they found it 'sensitive'. Chun-Fang Hsu, *APEC Jing Ji Zheng He Zhi Jin Zhan Ji Wo Guo Shen Yu Qing Xing* [Developments of APEC Economic Integration and Taiwan's Participation], *APEC Shi Shi Lun Tan* [APEC Forum], 30 October 2009, PowerPoint slides, at 11 (in Chinese) (on file with the author).

⁶³ For example, the China-ASEAN FTA, the Korea-ASEAN FTA, or the Japan-ASEAN FTA.

⁶⁴ Johnny Chi-Chen Chiang, *Wu Zhu 'Dong Xie Jia Yi' Lai Shi Xiong Xiong: Wei Lai Shi Nian Tai Wan Bi Xu Zheng Shi De Tiao Zhan* [Five 'ASEAN Plus One' Frameworks Are Forming Rapidly], *Jiao Liu* [Exchange], No. 109, February 2010, at 36 (in Chinese). A total of 41.1% and 15% of Taiwan's exports go to China (including Hong Kong) and ASEAN, respectively. Summary of 2009 ROC External Trade, above note 7.

⁶⁵ Taipei Representative Office in Singapore, *Liang An Jing Ji Xie Yi (ECFA) Zho Nei Han Ji Ke Neng Ying Xiang* [ECFA's Contents and Potential Impact], 26 February 2010, PowerPoint Slides, at 8 (in Chinese) (on file with the author).

⁶⁶ Ibid.; China Trade Policy Review Report (2010), above note 44, at 91–104.

⁶⁷ Top three Taiwanese products exported to China are petrochemical products (43.34%), machinery products (27.04%) and automobiles and auto-parts (5.4%). Chen-Te Huang, *Liang An Jing Ji He Zuo Jia Gou Xie Yi (ECFA) Zhi Yi Han* [ECFA's Meaning and Contents], The 11th International Conference on Cross-Straits Economy and Trade Management, 9 June 2010, PowerPoint Slides, at 21 (in Chinese) (on file with the author).

product (GDP) by 0.836%.⁶⁸ These declines would occur because competition from China, Korea, Japan and ASEAN is likely to replace Taiwanese exports.

To counter Taiwan's marginalization in FTA networks and expand the country's space in such networks, the newly elected Taiwan President Ying-jeou Ma of the KMT proposed the 'flexible diplomacy' with a two-fold goal in 2008.⁶⁹ First, Taiwan is to 'normalize' economic ties with China by concluding a bilateral FTA, which is expected to allow Taiwanese businesses to maintain their advantages in the Chinese market. Taiwan also hopes to circumvent the 'investment diversion effect', which has prompted foreign and domestic investors to relocate to China due to Taiwan's restrictions on Chinese investments. In addition, the Taiwanese government expects to attract FDI, as well as 'go home' investments by China-based Taiwanese enterprises. The ECFA is thus an indispensable building block for Taiwan to constitute a regional hub that attracts foreign enterprises to establish headquarters or research and development (R&D) centers on its territory. Additional inflow investments and the increase of employment will further boost Taiwan's economy. Second, Taiwan will be more pragmatic in its FTA efforts. It will no longer insist on the use of 'Taiwan' or the 'Republic of China' for its name in FTAs.⁷⁰ Moreover, the ECFA will ease the chilling effect on potential FTA partners for Taiwan because it is difficult for Beijing to assert that 'we can sign an FTA with Taiwan, but other countries cannot do the same'.

After Ma took office in 2008, the KMT immediately resumed economic negotiations with China, which had been suspended for 11 years.⁷¹ In just two years, both governments concluded 12 agreements that liberalize restrictions on financial services, postal services, sea and air transport, tourism and food safety.⁷² To echo Ma's conciliatory approach, Chinese President Hu Jintao stressed again that Beijing's Taiwan policy would focus on enhancing bilateral commercial ties by signing 'an economic cooperation agreement',

⁶⁸ Ying-Hua Ku, 'ECFA Dui Tai Wan De Zhong Yao Xing' ['The Importance of the ECFA to Taiwan'], in Cyrus C.Y. Chu (ed), *ECFA Kai Chuang Liang An Hu Li Shuang Ying Xin Ju Mian* [The ECFA Leads to Mutual Benefit and the New Win-Win Stage of Cross-Straits Relations] (Taipei: Cross-Strait Interflow Prospect Foundation, 2009) (in Chinese), at 45.

⁶⁹ For information on Ma's policy on China, see Taiwan's Renaissance: Inaugural Address (20 May 2008), available at <http://english.president.gov.tw/Portals/4/images/PresidentOffice/AboutPresident/pdf/section1.pdf> (visited 1 October 2010); The Concept and Strategy of 'Flexible Diplomacy' and the Republic of China's Foreign Relations: A Talk Delivered during an Inspection Tour of the Ministry of Foreign Affairs (4 August 2008), available at <http://english.president.gov.tw/Portals/4/images/PresidentOffice/AboutPresident/pdf/section2.pdf> (visited 1 September 2010).

⁷⁰ In other words, Taiwan would accept the use of its WTO title, 'Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu' or 'Chinese Taipei', in bilateral FTAs.

⁷¹ *China Focus: Mainland China, Taiwan Negotiators Make Last-Minute Preparations for New Round of Talks*, 28 June 2010, *Xinhua News Agency* (NexisLexis News Database).

⁷² Ibid.; Taiwan Trade Policy Review Report (2010), above note 7, at 91–104.

represented by today's ECFA.⁷³ Interestingly, while a domino effect of potential trade diversion was the main motivation for the ECFA, its conclusion has had the paradoxical effect of promoting the proliferation of regional FTAs in East Asia. A round of selective and competitive bilateral deals has followed. For instance, 60% of Korean exports to China worth US\$60 billion compete with Taiwan in the Chinese market.⁷⁴ The fact that the ECFA's early harvest program alone would impair Korea's trade interests in the amount of US\$12 billion gravely concerned Korean industries and caused the Korean government to feel pressured to accelerate FTA negotiations with China.⁷⁵ Similarly, after the ECFA, Singapore immediately announced its plan to negotiate an FTA with Taiwan.⁷⁶ A prospective Taiwan–Singapore FTA may prompt other ASEAN countries to negotiate FTAs with Taiwan. Moreover, Hong Kong's conclusion of an FTA with New Zealand after the CEPA also suggests Beijing's implied acquiescence toward 'delinking' sovereignty with trade agreements.⁷⁷ These new developments indicate that the ECFA would both integrate Taiwan in regional economic integration networks and accelerate East Asian regionalism.

IV. CONTENTS OF THE ECFA AND WTO LEGAL ISSUES

China and Taiwan conducted separate feasibility studies on the ECFA. The results of the studies were positive for both economies. The ECFA is expected to increase Taiwan's GDP by 1.65% and the balance of trade by US\$17.2 billion while augmenting China's GDP by 0.63% and its balance

⁷³ Russell Hsiao, *Hu Jintao's 'Six-Points' Proposition to Taiwan*, 12 January 2009, 9 (1) *China Brief* 1, available at [http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews\[tt_news\]=34333&tx_ttnews\[backPid\]=25&cHash=11701d2ca6](http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews[tt_news]=34333&tx_ttnews[backPid]=25&cHash=11701d2ca6) (visited 20 August 2010).

⁷⁴ *ECFA Will Hurt South Korean Export: Trade Group*, 30 June 2010, *China Post*, available at <http://www.chinapost.com.tw/taiwan/national/national-news/2010/06/30/262706/ECFA-will.htm> (visited 20 August 2010).

⁷⁵ *Ibid.*

⁷⁶ See Mary Swire, *Singapore Leader Favours Taiwan FTA*, 19 September 2010, http://www.tax-news.com/news/Singapore_Leader_Favours_Taiwan_FTA45265.html ('Singapore's Prime Minister, Lee Hsien Loong...believes that the signing of a free trade agreement (FTA) between Singapore and Taiwan would quickly lead to similar agreements between Taiwan and other countries within the Association of South-east Asian Nations (ASEAN)') (visited 20 September 2010). See also, *Taiwan-Singapore FTA Hinges on Cross-Strait Ties*, 9 May 2008, *China Post*, available at <http://www.chinapost.com.tw/taiwan/2008/05/09/155579/Taiwan-Singapore-FTA.htm> ('Singapore will only be able to sign a free trade agreement (FTA) with Taiwan if Taiwan improves its relations with China, Singaporean Minister Mentor Lee Kuan Yew said...') (visited 20 August 2010); Iana Dreyer et al., *Beyond Geopolitics – The Case for a Free Trade Accord between Europe and Taiwan*, ECIPE Occasional Paper, No. 3/2010 (2010), at 7 (arguing that after signing the ECFA, the EU should 'respond positively to an FTA request by Taiwan').

⁷⁷ Hong Kong – New Zealand Closer Economic Partnership Agreement was signed on 29 March 2010. Hong Kong – New Zealand Closer Economic Partnership Agreement, available at http://www.tid.gov.hk/english/trade_relations/hknzcep/index.html (visited 1 October 2010).

of trade by US\$58.97 billion.⁷⁸ Since the beginning of 2010, expert groups and negotiators from both sides have discussed the title and basic structure for the ECFA.⁷⁹ The negotiations were concluded with the signing of the ECFA, along with the Cross-Straits Agreement on Intellectual Property Rights Protection and Cooperation (Cross-Straits IPR Agreement).⁸⁰ Both agreements took effect in September 2010 following the completion of China's and Taiwan's domestic implementation procedures.⁸¹ Modeled on the China–ASEAN Framework Agreement, the ECFA provides a legal basis for negotiating subsequent agreements. Within six months, China and Taiwan will negotiate four agreements that govern trade in goods, trade in services, investments and dispute settlement.⁸² These agreements will become an integral part of the ECFA.⁸³ Like most FTAs, the ECFA also contains a termination clause, which is the agreement's ultimate safety valve,⁸⁴ although neither China nor Taiwan would likely annul the ECFA in light of current cross-straits developments.

A. ASEAN framework agreements as the ECFA's model

Notwithstanding the ECFA's economic nature, the signing of the agreement was a political decision. Searching for an appropriate FTA model was the prime task for negotiators, particularly given the wide range of FTAs that differ in title and scope. It is thus important to explain why China and Taiwan followed the 'ASEAN framework agreements' approach rather than 'one-step' FTAs or CEPAs. A normal one-step FTA was not acceptable to either Beijing or Taipei. In China's view, a cross-straits pact entitled 'FTA'

⁷⁸ Chung Hua Institution for Economic Research (Taiwan WTO Center), *Liang An Jing Ji He Zuo Jia Gou Xie Yi Zhi Ying Xiang Ping Gu: Zhai Yao Yue Ming* [Summary Information on the ECFA's Impact Evaluation], 29 July 2009, at 6 (in Chinese); Chinese Academy of International Trade and Economic Cooperation, *Liang An Jing Ji He Zuo Jia Gou Xie Yi Zhai Yao Yue Ming* [Summary Information on the ECFA], 13 October 2009, available at <http://tga.mofcom.gov.cn/aarticle/subject/ecfa/subjectjj/201007/20100707017974.html?1521721961=3878450466> (in Chinese) (visited 1 September 2010).

⁷⁹ *Backgrounder: ECFA, a Cross-Strait Economic Pact*, above note 54.

⁸⁰ The ECFA and the Cross-Straits Agreement on Intellectual Property Rights Protection and Cooperation (Cross-Straits IPR Agreement) were signed during the fifth round of the Chiang-Cheng Talks in Chongqing on 29 June 2010.

⁸¹ *Landmark Cross-Strait Pact to Take Effect on Sept. 12*, 11 September 2010, *Radio Taiwan International*, available at <http://english.rti.org.tw/Content/GetSingleNews.aspx?ContentID=109536> (visited 20 September 2010). Under Taiwanese law, cross-straits agreements are not treaties with foreign states. Judicial Yuan, Interpretation No. 329. Pursuant to the Statute Governing the Relations between the People of the Taiwan Area and the Mainland Area, Taiwan's Congress (Legislative Yuan) ratified the ECFA on 17 August 2010. China does not consider the ECFA as a treaty, meaning that the ECFA was not required to be ratified by the Standing Committee of the National People's Congress.

⁸² ECFA, Articles 3.1, 4.1, 5.1 and 10.1.

⁸³ *Ibid.*, Article 13.

⁸⁴ *Ibid.*, Article 16.

would suggest inter-state relations under international law.⁸⁵ Furthermore, an FTA that immediately liberalizes both sides' WTO-inconsistent measures would incur fierce opposition from domestic industries. In Taiwan, a referendum result opposing the ECFA could have even constitutionally blocked the administration from continuing negotiations under Taiwanese law.⁸⁶

Politically speaking, Beijing wished to adopt the CEPA model for a cross-straits trade pact because it would show the supremacy of the central government over its own separate customs territories. For example, China and Hong Kong signed the CEPA in 2003, and subsequently signed seven supplemental agreements to further liberalize bilateral trade in goods and services.⁸⁷ Nevertheless, this approach was unacceptable to Taipei for several reasons.

First and foremost, the CEPA approach would downgrade the status of Taiwan to that of Hong Kong by implying that Taiwan fell under the PRC's jurisdiction. China's careful choice of the word 'arrangement (*an pai*)', instead of 'agreement (*xie ding*)', in the CEPA's title avoids acknowledgment of the CEPA as an international instrument. Meanwhile, Article 2 of the CEPA specifically recognizes the PRC's 'one China, two systems' as a political precondition.⁸⁸ The fact that the China-Hong Kong CEPA was signed by the PRC's Vice Minister of Commerce and Hong Kong SAR's Financial Secretary indicates the internal nature of the CEPA. These political shadings made the CEPA approach unacceptable to the Taiwanese leadership. Second, the CEPA not only recognizes China's market economy status, but also makes anti-dumping and countervailing measures on products from either side inapplicable.⁸⁹ Giving up such measures to counter the

⁸⁵ Tan Wei, Head of the Department of Taiwan, Hong Kong and Macau Affairs, PRC Ministry of Commerce, stated that 'we would like to sign a free trade agreement with [Taiwan], but the agreement cannot be called an "FTA".' *Bu Qian ECFA, Ming Nian Tai Wan Shi Ye Dai Zeng; Dai Lu Shi Tai Jin Rong Ye Guo Ji Hua De Di Yi Bu* [Unemployment in Taiwan will Increase Next Year if the ECFA is Unable to Be Concluded; The Mainland is the First Step for Internationalization of Taiwan's Finance Industry], 21 January 2010, available at <http://www.adj.idv.tw/html/59/t-14959.html> (in Chinese) (visited 20 June 2010).

⁸⁶ See *ECFA Referendum Rejected Again*, 13 August 2010, Chinese Television System, available at <http://news.cts.com.tw/cts/english/201008/201008130538867.html> ('Following a previous failed attempt, the Taiwan Solidarity Union (TSU) made another proposal to settle the disputes over ECFA through a referendum, only to see it rejected again by the government's committee for not conforming to the law') (visited 1 October 2010).

⁸⁷ Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA), available at http://www.tid.gov.hk/english/cepa/further_liberal.html ('... Pursuant to Article 3 of CEPA, ... the two sides signed six Supplements to CEPA on 27 October 2004, 18 October 2005, 27 June 2006, 29 June 2007, 29 July 2008 and 9 May 2009 respectively ... [and] signed Supplement VII to CEPA on 27 May 2010 ...') (visited 1 October 2010).

⁸⁸ CEPA provides that it adheres to five principles, including 'one country, two systems' and WTO requirements. Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA), Articles 2.1 and 2.2.

⁸⁹ CEPA, Articles 4, 7 and 8.

potential rapid inflow of Chinese products would cause serious concern to Taiwanese businesses.

Finally, the CEPA's politically oriented dispute settlement mechanism provided limited guidance for resolving disputes. Article 19 of the CEPA merely stipulates that a Joint Steering Committee comprised of senior officials will deal with CEPA matters 'through consultation in the spirit of friendship and cooperation'.⁹⁰ The CEPA does not include procedures for resorting to this mechanism, nor does it envision further negotiations over a detailed dispute settlement agreement. This deficiency is compounded by the fact that the CEPA lacks investor-state arbitration, which would be of paramount importance to Taiwanese investors in China. These distinctive features of the CEPA incurred fierce opposition in Taiwan and made it undesirable for the ECFA to follow the CEPA model. Indeed, the KMT government had to change the name of the proposed agreement from the 'Comprehensive Economic Cooperation Agreement' (CECA) to 'ECFA' because the former suggests that it was a Taiwan version of the CEPA.⁹¹

Distinguishable from a one-step FTA and the CEPA, ASEAN's framework agreements provide a suitable model for both China and Taiwan. The ECFA's title as 'framework agreement', instead of 'FTA', would avoid sovereignty concerns. Under WTO law, a framework agreement, known as an 'interim agreement' under Article XXIV of the GATT, is the lowest level of economic integration leading to a full FTA.⁹² In practice, ASEAN collectively has concluded FTAs with China, Korea, Japan and India on the basis of bilateral framework agreements.⁹³ This building block approach suits politically sensitive trade ties across the Taiwan Strait. Among ASEAN's FTAs, negotiators from China and Taiwan pay particular attention to the China–ASEAN FTA that was finalized in 2010.⁹⁴ The CAFTA started with the China–ASEAN Framework Agreement on Comprehensive Economic Cooperation (China–ASEAN Framework Agreement) in 2002 and was supplemented by four enabling agreements on trade in goods (2004), dispute settlement (2004), trade in services (2007) and investments (2009).⁹⁵ The China–ASEAN Framework Agreement provided the legal basis for

⁹⁰ Ibid., Articles 19.1–19.4.

⁹¹ Zhao Hong and Sarah Y. Tong, *Taiwan–Mainland Economic Cooperation Framework Agreement (ECFA): Implications for Cross–Strait Relations*, EAI Background Brief, No. 452 (21 May 2009), at 5.

⁹² GATT, the chapeau to Article XXIV:5, XXIV:5(a) and (b) and XXIV:7(a). Trade arrangements by intensity are: (i) trade under WTO rules; (ii) framework agreement; (iii) Economic Partnership Agreement; (iv) Free Trade Area; and (v) Common market. Nanto, above note 51, at 10.

⁹³ In addition to ASEAN, India has concluded framework agreements that committed to liberalizing trade with Thailand, Chile, Mercosur and the Gulf Cooperation Council (GCC).

⁹⁴ China–ASEAN FTA, available at <http://fta.mofcom.gov.cn/topic/chinaasean.shtml> (visited 1 October 2010).

⁹⁵ Ibid.

negotiating these subsequent agreements leading to a final FTA within the 10-year timeframe.⁹⁶

In general, ASEAN's framework agreements contain certain features that make them cornerstones for ultimate WTO-plus FTAs. First, the framework agreement includes an 'early harvest program', which immediately liberalizes trade in goods.⁹⁷ The EHP's coverage is often seen as a political benchmark for parties' 'sincerity' regarding economic integration. Invariably, the EHP is the core of framework agreement negotiations. Second, the goods that the EHP does not cover will be placed on 'normal' and 'sensitive' tracks subject to different timeframes and rates of tariff reduction.⁹⁸ The lists of goods on these two tracks are negotiated as part of the subsequent agreement on trade in goods. The fact that 'sensitive' goods would be allowed a longer period for, or even be immune from, liberalization also allows vulnerable domestic industries to gradually transform and upgrade themselves to cope with competition. Finally, the framework agreement provides a timetable for other enabling agreements that lead to an FTA.⁹⁹ Thus, parties are legally bound to engage in subsequent negotiations. As a whole, the enabling agreements under the framework agreement result in an FTA that accords WTO-plus treatment to contracting parties.

B. The early harvest program and prospective liberalization

The various features and negotiation models of ASEAN framework agreements have influenced the ECFA's negotiations and structure. The final text of the ECFA includes 16 articles in five chapters, along with five annexes.¹⁰⁰ Because the EHP will directly impact industries' trade interests, the coverage under the EHP was at the center of ECFA negotiations. To understand the EHP and prospective liberalization in cross-straits trade, it is important to first discuss the evolution of the negotiating mechanism and Beijing's 'making concessions (*rang li*)' policy.

⁹⁶ China-ASEAN Framework Agreements, Article 2.

⁹⁷ China-ASEAN Framework Agreement, Article 6. Pakistan used the 'agreements on the early harvest program (EHP)' as the preliminary step for FTAs. The scope of these agreements, which solely stipulate the EHP, is narrower than that of ASEAN's framework agreements. For additional information, see Pakistan's Agreements on the Early Harvest Program for the Free Trade Agreement with Malaysia and China, both signed in 2005.

⁹⁸ China-ASEAN Framework Agreements, Article 2(4).

⁹⁹ For example, China-ASEAN Framework Agreements, Articles 8 and 11.

¹⁰⁰ After the Preamble, the five chapters include Chapter 1: General Provisions, Chapter 2: Trade and Investment Liberalization, Chapter 3: Economic Cooperation, Chapter 4: Early Harvest and Chapter 5: Miscellaneous Items. The five annexes include Annex 1: List of EHP Goods; Annex 2: Interim Rules of Origin Applied to EHP Goods; Annex 3: Safeguard Measures Applied to EHP Goods; Annex 4: List of EHP Services Sectors; and Annex 5: Definition of EHP Service Provider.

As the Preamble to the ECFA indicates, this landmark agreement was concluded based on ‘equality and reciprocity’.¹⁰¹ The ECFA was signed between two semi-official organizations, China’s Association for Relations Across the Taiwan Straits (ARATS) and Taiwan’s Straits Exchange Foundation (SEF). While the former is under the Taiwan Affairs Office of the PRC State Council, the latter falls under the Mainland Affairs Council of the ROC Executive Yuan. The creation of the ARATS and SEF allowed both sides’ policies to avoid ‘official’ contact. The ARATS-SEF formula distinguishes the ECFA from the CEPA, as the latter was concluded between the central government and its SAR. Unlike the CEPA, the ECFA contains neither the ‘one China, two systems’ precondition nor political discourse concerning reunification of both sides. This equal political status between Beijing and Taipei was a cornerstone of ECFA negotiations. In addition, the ECFA expects the current negotiating mechanism to evolve. The ECFA mandates that both governments establish a ‘Cross-Straits Economic Cooperation Committee’ (CSEC Committee) to deal with negotiations for the subsequent four agreements.¹⁰² This CSEC Committee, composed of senior officials from both sides, will be the first ‘joint’ organization in cross-straits relations. These officials will represent relevant ministries directly in charge of trade affairs. Hence, the CSEC Committee intends to be more efficient than the ARATS-SEF mechanism. By its nature, the ECFA is a trade agreement, but it will be interesting to see whether the operation of a joint committee will provide a precedent for cross-straits political affairs.

Moreover, it took less than a year from the initial negotiations of the ECFA to the final inking.¹⁰³ This accelerated process has primarily been attributed to PRC leadership’s political decision to ‘make concessions’ to Taiwan.¹⁰⁴ It was this decision that broke the negotiating impasse over liberalization of coverage under the EHP. Beijing applied a similar concession-making strategy to CEPA and CAFTA negotiations. From China’s perspective, the long-term political gains from these FTAs surmounted economic interests. This realization is particularly true in the

¹⁰¹ ECFA, Preamble.

¹⁰² *Ibid.*, Article 11.

¹⁰³ At the meeting in December 2008 in Taichung, Taiwan, representatives of the Association for Relations Across the Taiwan Straits (ARATS) and the Straits Exchange Foundation (SEF) first agreed to list the ECFA on the agenda of subsequent meetings, which were held three times from January to June 2010; the ARATS and SEF concluded the ECFA in Chongqing, China in June 2010. *Liang An Jing Ji He Zho Kuang Jia Xie Yi Jin Qi Sheng Xiao: Huo Ji Ji Ken Ding* [ECFA that Took Effect Today Received Positive Responses], *Zhong Guo Jing Ji Wang* [China Economic Network], 12 September 2010, available at http://big5.ce.cn/xwzx/gnsz/gdxw/201009/12/t20100912_21810879.shtml (in Chinese) (visited 15 September 2010).

¹⁰⁴ *MAC Minister Lauds Cross-Strait ‘Mutuality’*, 15 March 2010, *Taiwan Today*, available at <http://www.taiwantoday.tw/ct.asp?xItem=96049&CtNode=445> (‘Chinese Premier Wen Jiabao’s suggestions that Beijing will make concessions to Taipei in the early harvest and tariff reduction list...’) (visited 10 October 2010).

case of the ECFA because the KMT will face intense challenges from the DPP in Taiwan's 2012 presidential election. Beijing is reluctant to see negative results from the ECFA orient Taiwan's election results in favor of the DPP, which could reverse Taipei's China-friendly policy.

This background contributes to several unique features of the ECFA's early harvest program. As the EHP covers trade in goods and services, it is the world's first EHP that includes trade in services. Due to Beijing's concession-making policy, the ECFA is an interim agreement that includes the world's most imbalanced EHP with the largest scale of liberalization ever seen. On the subject of trade in goods, for example, Beijing will eliminate or lower tariffs on 539 Taiwanese items, accounting for 16.1% of China's imports from Taiwan and totaling US\$138.4 billion.¹⁰⁵ In contrast, Taipei will only do the same for 267 Chinese items, accounting for 10.5% of Taiwan's imports from China and totaling US\$28.6 billion.¹⁰⁶ Under the ECFA, the percentage of liberalization in cross-straits trade is significant, particularly in comparison with the early harvest program of the China-ASEAN Framework Agreement, which only accounts for 1.8% of bilateral trade.¹⁰⁷ The unilateral concession on the agricultural sector is particularly noteworthy. While China agreed to accord preferential tariffs to 18 Taiwanese agricultural products, Taiwan will continue its MFN-inconsistent ban on the importation of 830 Chinese agricultural products and will not lower tariffs on 1,415 such products.¹⁰⁸

Similar to its motivation for the 'fruit diplomacy', Beijing attempted to ease Taiwanese farmers' opposition to the ECFA. Consequently, the ratio of liberalization as to China's and Taiwan's commitments under the EHP is 2:1 in items and 5:1 in monetary value.¹⁰⁹ Both sides agreed to gradually eliminate tariffs on EHP items over two years, depending on existing tariffs.¹¹⁰

¹⁰⁵ Bureau of Foreign Trade, *Di Wu Ci 'Jiang-Chen Hui Tan' Shun Li Qian Shu 'Hai Xia Liang An Jing Ji He Zhe Jia Gou Xie Yi' Ji 'Hai Xia Liang An Zhi Hui Cai Chan Quan Bao Hu Xia Yi'*, *Jing Ji Bu Ji Ni Ying Jie Taiwan Wei Lai Jing Ji Fa Zhan De Huang Jin Shi Nian, Yu Dai Jie Zuo Huo Da Ping Ying Xian Ji* [Fifth 'Chiang-Chen Meeting' Successfully Concluded the 'ECFA' and the 'Cross-Straits IPR Agreement', Ministry of Economic Affairs Actively Embraces Taiwan's Golden 10 years for the Future Economic Development and Works with Everyone to Seize Opportunities] (Fifth Chiang-Chen Meeting), 29 June 2010, available at http://www.moea.gov.tw/Mns/populace/news/News.aspx?kind=1&menu_id=40&news_id=19039 (in Chinese) (10 October 2010); see generally, Annex I: Product List and Tariff Reduction Arrangements under the Early Harvest For Trade in Goods (ECFA Annex I).

¹⁰⁶ Fifth Chiang-Chen Meeting, above note 105; ECFA Annex I, above note 105.

¹⁰⁷ *Zhi Biao Xing Xiang Mu* [Index Items], 25 June 2010, *Lian He Bao* [United Daily News], at A2.

¹⁰⁸ Fifth Chiang-Chen Meeting, above note 105.

¹⁰⁹ *Ibid.*

¹¹⁰ For information on three tariff reduction categories, see ECFA Annex I, above note 105, at 12 and 32.

In this manner, they expect to reach their goal of zero tariffs for the EHP in January 2013. Compared to liberalization in trade in goods, the scope of the EHP's liberalization in services is limited. China will open 11 services sectors to Taiwan, whereas Taiwan will open 9 sectors to China.¹¹¹ Overall, China accords Taiwan WTO-plus treatment, whereas the scope of Taiwan's liberalization is mostly on a par with its WTO commitments.

The ECFA is undoubtedly important to industries. Indeed, business interests primarily account for the ECFA tug-of-war negotiations. In terms of goods liberalization, the ECFA largely alleviates the threat of 'trade diversion' for Taiwan because the EHP includes 20% of Taiwanese products that would be disadvantaged by the CAFTA and 17% of products that are in direct competition with products of Korean and Japanese origin.¹¹² The most significant beneficiaries are Taiwanese manufacturers of petrochemical products, machine tools and textiles.¹¹³ Although 88 petrochemical products are included in the EHP, these items account for only 10% of the items that Taiwan initially requested.¹¹⁴ Due to intense opposition from Chinese state-owned petrochemical enterprises, Beijing insisted on excluding most petrochemical products from the EHP, particularly Taiwan's competitive polyvinyl chloride (PVC).¹¹⁵ This fact demonstrates Chinese enterprises' growing influence in FTA negotiations and their ability to set boundaries on the government's concession-making policies.

With respect to trade in services, the banking industry benefits most. Chinese banks will be allowed to establish branches in Taiwan and engage in the New Taiwan dollar business.¹¹⁶ Similar to the China-Hong Kong CEPA, China will allow Taiwanese banks to set up branches and conduct Renminbi business after they operate for two years and earn profit for

¹¹¹ Fifth Chiang-Chen Meeting, above note 105.

¹¹² Ibid.

¹¹³ Table 1: Good Items in the 'Early Harvest' List, Economics: Taiwan-China: A Quick Look at the ECFA, 29 June 2010, DBS Group Research, available at [https://www.dbsvresearch.com/research/DBS/research.nsf/\(vwAllDocs\)/F678A45CFC276BA5482577510031F27F/\\$FILE/tw_2010Jun29.pdf](https://www.dbsvresearch.com/research/DBS/research.nsf/(vwAllDocs)/F678A45CFC276BA5482577510031F27F/$FILE/tw_2010Jun29.pdf) (visited 10 October 2010).

¹¹⁴ Ibid.; Chen You-Zhen, 9 *Cheng Shi Hua Chan Pin Wei Lie ECFA Zao Shou Qing Dan* [90% of Petrochemical Products Were Not Included in the ECFA's Early Harvest List], 26 May 2010, available at <http://times.hinet.net/times/article.do?newsid=3159066&option=mainland> (in Chinese) (visited 11 October 2010).

¹¹⁵ Judith Wang and Nurluqman Suratman, *China-Taiwan ECFA Excludes PVC from List of 88 Petchems*, 25 June 2010, *Icis.Com*, available at <http://www.icis.com/Articles/2010/06/25/9371075/china-taiwan-ecfa-deal-excludes-pvc-from-list-of-88-petchems.html> (visited 11 October 2010). Interestingly, China accords zero-tariff treatment to PVC from ASEAN, but declined to do so for Taiwan. The reason is that PVC factories in ASEAN (particularly Singapore) are primarily invested by Japanese and their high-end products with higher costs that are not likely to compete with Chinese products, as their Taiwanese counterparts may do.

¹¹⁶ Annex IV: Sectors and Liberalization Measures under the Early Harvest for Trade in Services (ECFA Annex IV), at 4.

a year.¹¹⁷ In addition, the ECFA accords more preferential terms than the CEPA for Taiwanese banks that engage in Renminbi business with Taiwanese enterprises in China.¹¹⁸ This 'CEPA-plus' treatment may prompt Hong Kong and Macau to request further liberalization from China in financial services. The ECFA will thus indirectly accelerate economic integration between China, Hong Kong and Macau as well.

The early harvest program of the ECFA is only an 'appetizer' for the prospective cross-straits free-trade area. It is expected that further liberalization of goods, services and investments will be covered in subsequent agreements along with IPR issues. For instance, the ECFA's 'economic cooperation' section includes reference to 'intellectual property rights protection and cooperation'.¹¹⁹ This section should be read in tandem with the Cross-Straits IPR Agreement, signed simultaneously with the ECFA. As discussed previously, China does not accept Taiwanese nationals' 'right of priority' applications because the Paris Convention does not apply to Taiwan. Under the Cross-Straits IPR Agreement, this TRIPS-inconsistent measure will be abolished since both sides are obliged to extend the right of priority to patent, trademark and plant variety applications.¹²⁰ The Cross-Straits IPR Agreement also offers protection for geographical indications and well-known trademarks.¹²¹ This protection is vital to Taiwanese exporters because it has been common for Chinese manufacturers to fabricate or maliciously register the names of Taiwanese products, such as Alishan high mountain tea, Chishan rice and Yonghe soybean milk.¹²² The Cross-Straits IPR Agreement provides a mechanism for the PRC and ROC IP authorities to discuss these matters and enforce IP rights. The ECFA, built on the basis

¹¹⁷ Ibid., at 9. See Table 1: Good Items in the 'Early Harvest' List, Economics: Taiwan-China: A Quick Look at the ECFA, above note 113 (stating that this 'is the same treatment China offered to Hong Kong banks under the CEPA, and superior to the WTO treatment (requiring 3 years of operation and 2 years of profits)').

¹¹⁸ ECFA Annex IV, above note 116, at 9; see Table 1: Good Items in the 'Early Harvest' List, Economics: Taiwan-China: A Quick Look at the ECFA, supra note 113 ('[T]he license requirement is lowered further to 1 year operation (earning profits for 1 year), which is even less restrictive than under the CEPA'); Li and Fung Research Centre, Analysis of the Economic Cooperation Framework Agreement (ECFA) between the Chinese Mainland and Taiwan, Issue 67, June 2010, available at <http://www.idsgroup.com/profile/pdf/distributing/issue67.pdf> ('One highlight is that Taiwanese banks are granted to do Renminbi (RMB) business to Taiwan companies after establishing branch [*sic*] and being profitable for one year vs two years under the [China-Hong Kong CEPA] and three years under the [WTO]') (visited 12 October 2010).

¹¹⁹ ECFA, ch. 3.

¹²⁰ Cross-Straits IPR Agreement, Article 2.

¹²¹ Ibid., Article 7.

¹²² *Liang An Zhi Hui Cai Chan Quan Bao Hu He Zho Xie Yi Xiang Guan Wen Da* [Cross-Straits IPR Agreement Relevant Q&A], 22 June 2010, available at <http://www.mac.gov.tw/ct.asp?xItem=85905&ctNode=5706&mp=2> (in Chinese) (visited 12 October 2010).

of the Cross-Straits IPR Agreement, obliges both sides to engage in negotiations with respect to the eventual scope and plan of IPR protection.¹²³ Hence, the ECFA and its enabling agreements will likely prompt both China and Taiwan to gradually reduce WTO-inconsistent measures and make the future cross-straits FTA a WTO-plus one.

C. The WTO consistency of the ECFA as an interim agreement

The ECFA's imbalanced liberalization and unique 'cross-straits characteristics' have stirred intense discussions about the consistency of FTA requirements under WTO law. Given that WTO members lack consensus on most substantive requirements, the ECFA cannot be labeled as WTO-inconsistent. However, as the ECFA's unique 'cross-straits characteristics' depart from traditional interim agreements, these features will likely be subject to the WTO's intense scrutiny.

During ECFA negotiations, Taiwan intended to include an 'international linkage' provision that 'requires' Beijing not to block Taiwan's FTAs with its trade partners.¹²⁴ China also proposed the inclusion of cross-straits trade 'normalization' in the ECFA's text with the intention of obliging Taiwan to remove all barriers to Chinese exporters and service-providers.¹²⁵ A mutual compromise was not to include these provisions, but to adopt relatively vague provisions that incorporate the 'concepts' on which both sides insisted. The ECFA aims to 'gradually reduce or eliminate barriers to trade and investment' in compliance with the WTO's 'basic principles'.¹²⁶ While recognizing these principles, they also agreed to take into account their respective 'economic conditions'.¹²⁷ This provision illustrates Taiwan's reluctant promise to entirely remove its trade barriers on China and raises controversies as to the ECFA's consistency with FTA procedural and substantive requirements.

1. Procedural requirements

On the procedural front, the 2006 WTO General Council Decision on the Transparency Mechanism for Regional Trade Agreements requires China

¹²³ ECFA, Article 6.1(1).

¹²⁴ He Ming-Guo & Chen Xiu-Lan, *ECFA Jie Mi, 6 Xiang Tuo Xie Bao Tai Kong Jian, Wen Ben Gong 16 Tiao Wen, Zi Zi Qian Zang Liang An Zheng Zhi Jiao Li* [Unveil the ECFA's Secrets, 6 Compromises that Keep Taiwan's Flexibility, The Text Includes 16 Provisions, Which Show Political Bargains between the Two Sides], 30 June 2010, *Zhong Shi Dian Zi Bao* [China Times], available at <http://forums.chinatimes.com/report/ECFA/news-2010063003.htm> (in Chinese) (visited 13 November 2010).

¹²⁵ *Ibid.*

¹²⁶ See ECFA, preamble ('Have Agreed, in line with the basic principles of the World Trade Organization (WTO) and in consideration of the economic conditions of the two sides, to gradually reduce or eliminate barriers to trade and investment...'). In Taiwan's view, the WTO 'basic principles' refer to China's acknowledgement of Taiwan's 'FTA rights' under the WTO.

¹²⁷ *Ibid.*

and Taiwan to notify the WTO ‘before the application of preferential treatment’ under the ECFA.¹²⁸ Like the China–ASEAN Framework Agreement, the ECFA is an ‘interim agreement *necessary* for’ or ‘*leading* to’ a cross-straits free-trade area.¹²⁹ Although the difference between an ‘interim agreement’ and a final regional trade agreement (RTA) exists for the purposes of the Transparency Mechanism, no distinction between the two has been drawn with respect to their WTO notification requirement.¹³⁰ In fact, none of the trade agreements concluded to date among WTO members have been notified as interim agreements. For example, despite its ‘interim’ nature indicated by a 10-year transitional period, the EC–Chile Interim Agreement was reported to the WTO as a full agreement.¹³¹ Given that the ECFA is based on Article XXIV of the GATT and Article IV of the GATS, China and Taiwan are required to notify the Council for Trade in Goods and the Council for Trade in Services as required by the Transparency Mechanism.¹³² As the ECFA took effect in September 2010 and its early harvest program will be implemented on 1 January 2011, the notification requirement should be completed prior to that date.¹³³

2. Substantive requirements

While the procedural WTO notification requirement does not pose problems for the ECFA, disputes arise when it comes to the ECFA’s consistency with

¹²⁸ General Council, Decision on a Transparency Mechanism for Regional Trade Agreements (Transparency Decision), WT/L/671, 18 December 2006, para. 3. For additional information on the Transparency Mechanism, see generally, Jo-Ann Crawford, ‘A New Transparency Mechanism for Regional Trade Agreements’, 11 *Singapore Yearbook of International Law* 133 (2007).

¹²⁹ Emphasis added. See GATT, Article XXIV:5 (‘...an interim agreement necessary for the formation of a... free-trade area...’); GATT, Article XXIV:7(a) (‘...an interim agreement leading to the formation of such a[n]... area...’); Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 (Article XXIV Understanding), paras 1 and 12 (‘...interim agreement leading to the formation of a... free trade area’).

¹³⁰ See Lorand Bartels, ‘“Interim Agreements” under Article XXIV GATT’, 8 (2) *World Trade Review* (2009) 339, at 342 (‘[T]he Decision makes no distinction between interim and “full” regional trade agreement with an implementation period’).

¹³¹ Committee on Regional Trade Agreements (CRTA), Examination of the Interim Agreement between the EC and Chile – Note on the Meeting of 28 July 2005, WT/REG/164/M/1, 6 October 2005, para. 10.

¹³² Committee on Regional Trade Agreements, Notification Format for Regional Trade Agreements, WT/REG/16, 23 November 2006. The ECFA cannot be based on the Enabling Clause because of the ECFA’s reciprocal, albeit asymmetrical, nature and because Taiwan’s is deemed to be a ‘developed rather than developing country member’ in the WTO. During its WTO accession process, Taiwan committed that it ‘would not claim any rights under the WTO agreements to developing country members...’. Working Party on the Accession of Chinese Taipei, WT/ACC.TPKM/18, 5 October 2001, para. 6.

¹³³ Notes in ECFA Annex I, Product List and Tariff Reduction Arrangements under the Early Harvest for Trade in Goods (Notes in ECFA Annex I) provide that ‘if the Agreement enters into force in the second half of the year, the Early Harvest Program shall be implemented on January 1st of the next year’.

substantive FTA requirements. These substantive requirements were also at the core of the ECFA debate between Taiwan President Ma and Tsai Ing-wen, the DPP Chairman, in April 2010.¹³⁴ Article XXIV:5(c) of the GATT mandates that an interim agreement contain ‘a *plan and schedule* for the formation of...a free trade area within a *reasonable length of time*.’¹³⁵ These requirements should be interpreted interdependently. First, neither WTO rules nor jurisprudence set out a degree of specificity concerning a ‘plan and schedule’. Nevertheless, a holistic interpretation of the Transparency Decision would reveal that the plan and schedule must contain enough information for the WTO Secretariat to prepare a factual presentation, including ‘when the agreement is to be implemented *by stages*’.¹³⁶ The term ‘by stages’ should refer to a requirement as to when the interim agreement will lead to a final FTA rather than when the EHP under such an agreement will be implemented. For instance, the China–ASEAN Framework Agreement not only provides that the CAFTA will be created ‘within 10 years’,¹³⁷ but also includes a specific timeframe that requires the subsequent Agreement on Trade in Goods to *commence* in 2003 and to be *concluded* in 2004.¹³⁸ Article 8(1) further sets 2010 and 2015 as deadlines for the implementation of the CAFTA for different groups of ASEAN states.¹³⁹

Unlike the China–ASEAN Framework Agreement, the ECFA neither mentions a 10-year transitional period nor sets a deadline for the completion of the cross-straits FTA. The ECFA only requires both sides to commence negotiations regarding trade in goods and services ‘within 6 months’ after the ECFA takes effect and to ‘expeditiously conclude’ these negotiations.¹⁴⁰ In other words, the ECFA arranges for open-ended negotiations for completing the cross-straits FTA. Remarkably, it was this ‘open-ended’ nature that galvanized the United States to heavily criticize the China–Pakistan FTA.¹⁴¹

¹³⁴ For details, see *Ma, Tsai Lock Horns in ECFA Debate*, 26 April 2010, *Taipei Times*, at A3.

¹³⁵ Emphasis added. GATT, Article XXIV:5(c).

¹³⁶ Emphasis added. Annex, Transparency Decision, para. 2(a)(ii); see also, Transparency Decision, para. 1(b) (‘Members parties...shall convey to the WTO...information on the RTA, including...any foreseen timetable for its...provisional application...’); Transparency Decision, para. 7 (‘To assist Members in their consideration of a notified FTA: (a) the parties shall make available to the WTO Secretariat data as specified in the Annex...and (b) the WTO Secretariat...shall prepare a factual presentation of the RTA’).

¹³⁷ See China–ASEAN Framework Agreement, Article 2 (‘The Parties agree to negotiate expeditiously in order to establish an ASEAN–China FTA within 10 years...’).

¹³⁸ Emphasis added. China–ASEAN Framework Agreement, Article 8.1.

¹³⁹ See *ibid.* (‘...2010 for Brunei, China, Indonesia, Malaysia, the Philippines, Singapore and Thailand, and by 2015 for the newer ASEAN Member States’).

¹⁴⁰ ECFA, Articles 3.1 and 4.1.

¹⁴¹ From the US perspective, ‘an agreement that provided for open-ended negotiations that “might” result in additional elimination of tariffs could not constitute an agreement establishing or leading to the formation of an FTA.’ CRTA, Consideration of the Free Trade Agreement between Pakistan and China, Goods, WT/REG237/M/1 (4 May 2009), at 4.

Although not a single interim agreement that lacks a specific plan and schedule has been found ‘invalid’ under WTO law, the Understanding on the Interpretation of Article XXIV of the GATT 1994 authorizes ‘the working party’ to impose a plan and schedule that parties are required to follow.¹⁴² The working party is now the Committee on Regional Trade Agreements (CRTA), which aims to examine FTAs/RTAs while considering systemic issues.¹⁴³ Thus, when reviewing the ECFA, the CRTA may find the ECFA’s plan and schedule insufficient and consider imposing a more specific one, although this is likely a hypothetical concern given continuing deadlock in the CRTA over the approval of RTAs generally.

With respect to the ‘reasonable length of time’ requirement for FTAs, the understanding stipulates that it ‘should exceed 10 years only in exceptional cases’.¹⁴⁴ To date, no WTO jurisprudence or report has defined what constitutes ‘exceptional cases’. Moreover, it is common practice for FTAs’ transition periods to be extended to 12 years.¹⁴⁵ For instance, under the Australia-US FTA, the United States committed to eliminating its tariffs on Australian beef after 18 years; and under the Korea–US FTA, Korea included a 20-year phase-out period for its tariffs on US-produced Fuji apples.¹⁴⁶ The WTO has found none of these FTAs WTO-inconsistent. In fact, neither Article XXIV of the GATT nor the Understanding would render a FTA invalid simply because its transitional period exceeds 10 years. Therefore, the ECFA’s validity is unlikely to be affected by the absence of a defined transition period or by the fact that it may take longer than 10 years to create the cross-straits FTA.

Also significant is the presence of certain ‘non-standard’ legal terminology within the ECFA to allow Taiwan the flexibility to liberalize the coverage of goods and services in subsequent negotiations. According to Article XXIV:8(b) of the GATT, an FTA has to meet the ‘substantially *all* the trade’ requirement with respect to trade in goods.¹⁴⁷ The ECFA,

¹⁴² Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 (Understanding), para. 10.

¹⁴³ CRTA, available at http://www.wto.org/english/tratop_e/region_e/regcom_e.htm (visited 20 October 2010).

¹⁴⁴ Understanding, para. 3.

¹⁴⁵ See Bartels, above note 130, at 346.

¹⁴⁶ CRTA, Free Trade Agreement between the United States and Australia – Questions and Replies, Revision, WT/REG184/5/Rev. 1 (1 September 2007), at 2–3; United States Department of Agriculture: Foreign Agricultural Service, Fact Sheet: US-Korea Free Trade Agreement – Benefits for Agriculture, September 2009, available at <http://www.fas.usda.gov/info/factsheets/korea.asp> (visited 22 October 2010). With respect to interim agreements between the European Union and African Caribbean and Pacific (ACP) countries, the EU believes that 15 year-liberalization should be ‘the benchmark for WTO compatibility’. European Commission: Trade, Fact Sheet on the Interim Economic Partnership Agreements: An Overview of the Interim Agreements, at 3.

¹⁴⁷ GATT, Article XXIV:8(b)

nonetheless, stipulates that tariffs and non-tariff barriers will be reduced or eliminated on 'a substantial *majority* of goods' in bilateral trade.¹⁴⁸ Furthermore, while an FTA that liberalizes trade in services has to satisfy the '*substantial* sectoral coverage' requirement under Article V:1(a) of the GATS,¹⁴⁹ the ECFA merely commits to reducing or eliminating discriminatory measures 'on a *large number* of sectors'.¹⁵⁰ The fact that these terms in the ECFA are different from those in the GATT and the GATS does not 'authorize' the cross-straits FTA to depart from WTO rules. The cross-straits FTA, which may 'exceed 10 years only in exceptional cases', is required to adhere to both 'substantially all the trade' and 'substantial sectoral coverage' requirements.

Regarding the 'substantially all the trade' requirement, the Appellate Body in *Turkey – Textiles* only found the requirement to be 'something considerably more than merely some of the trade,' but 'not the same as all the trade'.¹⁵¹ Presently, WTO members lack consensus on the definition of this requirement and have proposed either a *qualitative* approach or a *quantitative* approach.¹⁵² The former means that no major sector can be excluded from the FTA's coverage, whereas the latter sets a certain percentage of the intra-FTA parties trade as a statistical benchmark. Although this benchmark is 'often understood to mean liberalization of 90% of the trade in goods between the FTA parties',¹⁵³ WTO members have not agreed on a specific percentage. Nevertheless, WTO members have expressed 'disappointment' regarding the China–Pakistan FTA because its first phase 'would liberalize only about 35% of tariff lines for both Parties', which may not meet the 'substantially all the trade' requirement.¹⁵⁴ As the scale of liberalization under the EHP of the ECFA is far lower than that of the China–Pakistan FTA, WTO members may express similar concerns about the ECFA.

With regard to the 'substantial sectoral coverage' requirement under the GATS, the footnote to Article V:1(a) of the GATS provides that this requirement is to be 'understood in terms of number of sectors, volume of

¹⁴⁸ ECFA, Article 2.1.

¹⁴⁹ GATS, Article V:1(a).

¹⁵⁰ ECFA, Articles 2.2 and 4.2(1).

¹⁵¹ Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, 2345, para. 48.

¹⁵² For detailed information on these two approaches, see CRTA, Synopsis of 'Systemic' Issues Related to Regional Trade Agreements, WT/REG/W/37 (2 March 2007), at 21.

¹⁵³ European Commission–Trade, CARIFORUM-EC EPA: Trade in Goods, October 2008, at 2.

¹⁵⁴ See e.g., CRTA, Consideration of the Free Trade Agreement between Pakistan and China, Goods, above note 141, at 3. With respect to the China–Pakistan FTA, 'there was no plan and schedule available for the completion of the FTA and [China and Pakistan] would endeavor to reach consensus on a reasonable and relatively short period of time to form a complete FTA' and therefore the EU considered this agreement 'an "imaginary" FTA'. Ibid.

trade affected and modes of supply'.¹⁵⁵ Furthermore, an FTA 'should not provide for the *a priori* exclusion of any mode of supply'.¹⁵⁶ The above definitions reveal that although the GATS does not require liberalization of all services sectors, the exclusion of major sectors may render the FTA inconsistent with the 'substantial sectoral coverage' requirement. Therefore, prospective Cross-Straits Agreements on Trade in Goods and Trade in Services are required to comply with the GATT and GATS requirements.

Under the above-mentioned FTA requirements, Taipei is most concerned with the question of whether it may 'legally' prohibit Chinese labor from entering Taiwan's employment market and whether it can continue its import ban on Chinese agricultural products. Regarding Chinese labor, Taiwan's prohibition does not relate to its specific services commitments because the GATS does not 'apply to measures affecting natural persons seeking access to the employment market' or measures concerning 'employment on a permanent basis'.¹⁵⁷ Thus, Taiwan is not obliged to open the employment market under the ECFA. However, Taiwan's prohibition of the importation of 830 Chinese agricultural products after signing the ECFA may jeopardize this policy's adherence to the 'substantially all the trade' requirement of Article XXIV:8(b) of the GATT.¹⁵⁸ Arguably, Taiwan's policy does not violate this requirement. Qualitatively speaking, agricultural commodities are an insignificant percentage of cross-straits trade and thus the exclusion of a non-major sector is justified. From a quantitative view, 830 Chinese agricultural products that are currently banned constitute only 7.5% of cross-straits trade, and even with this exclusion, the future cross-straits FTA still meets the 90% benchmark.¹⁵⁹ Given WTO members' lack of consensus on FTA requirements and 'enforcement' procedures regarding WTO-inconsistent FTAs, the differences between a 'model' FTA and the ECFA do not render it invalid. Nonetheless, these differences constitute the ECFA's unique 'cross-straits characteristics' and are expected to be in the spotlight during the CRTA review sessions.

¹⁵⁵ For further discussion on the 'substantial sectoral coverage' requirement, see Won-Mog Choi, 'Regional Economic Integration in East Asia: Prospect and Jurisprudence', 6 *Journal of International Economic Law* 49 (2003), at 64–5.

¹⁵⁶ GATS, Article V:1(a), footnote.

¹⁵⁷ GATS, Annex on Movement of Natural Persons Supplying Services under the Agreement, para. 2.

¹⁵⁸ *Liang An Jing Ji Xie Yi (ECFA) Wen Da Ji/830 Xiagn Zhong Guo Dai Lu Nong Chan Pin Jin Kao Guan Zhi* [ECFA Q&A/Prohibition on the Importation of 830 Chinese Agricultural Products], available at <http://www.coa.gov.tw/view.php?catid=21312> (in Chinese) (visited 22 October 2010).

¹⁵⁹ *Ibid.*

D. The dispute settlement mechanism

Having discussed the ECFA's consistency with WTO rules, it is important to explore how the ECFA's dispute settlement mechanism can safeguard trade interests under the EHP and enable future agreements. The DSM under the ECFA forms the prelude to the legalization of cross-straits economic relations. This mechanism is of importance because both China and Taiwan have been hesitant to resort to the WTO for reasons identified previously. The ECFA ensures that both sides will establish 'appropriate dispute settlement procedures' and will conclude the Cross-Straits Agreement on Dispute Settlement Mechanism (Agreement on DSM) within six months after the ECFA takes effect.¹⁶⁰ Before the Agreement on DSM takes effect, disputes arising from the ECFA will be 'resolved through consultations' or by the CSEC Committee.¹⁶¹

From 1990 to 2010, China and Taiwan concluded 22 agreements, eight of which contain no dispute settlement provisions¹⁶² and 13 of which merely provide that any disputes 'shall be resolved by prompt negotiation' without enforcement procedures.¹⁶³ The ECFA is thus the preliminary step for placing the politically volatile cross-straits economic relations under a legal framework. Notwithstanding this significance, the ECFA's dispute settlement provisions fail to effectively safeguard trade interests for the EHP implementation. The ASEAN framework agreements provide three models for dispute settlement mechanisms. First, both the China-ASEAN and India-ASEAN Framework Agreements envision separate agreements on DSM within one year.¹⁶⁴ In the interim period, disputes arising from the agreements' 'interpretation, implementation or application' will be resolved by consultation.¹⁶⁵ Second, the Japan-ASEAN Framework Agreement resembles the former

¹⁶⁰ ECFA, Article 10.1.

¹⁶¹ *Ibid.*, Article 10.2.

¹⁶² The list of 22 cross-straits agreements and their texts are available at <http://www.sef.org.tw/lp.asp?ctNode=4384&CtUnit=2569&BaseDSD=7&mp=300> (visited 20 October 2010). The eight agreements that have no dispute settlement rules include: the 1990 Kinmen Accord, the 1993 Joint Agreement of the Koo-Wong Talks, the 1993 Agreement on the System for Contacts and Meeting between SEF and ARATS, the 1994 Facilitation Measures for the Entry and Exit of SEF and ARATS Personnel, the 1995 Consensus of the First Preparatory Meeting for the Second Koo-Wang Talks, the 1997 Summary Accord of the Taiwan and Hong Kong Shipping Negotiations, the 2008 SEF-ARATS Minutes of Talks on Cross-Straits Charter Flights, and the 2009 Cross-Straits Air Transport Supplementary Agreement.

¹⁶³ For example, Cross-Straits Agreement on Intellectual Property Rights Protection and Cooperation (Cross-Straits IPR Agreement), Article 15; Cross-Straits Joint Crime-Fighting and Judicial Mutual Assistance Agreement, Article 22.

¹⁶⁴ China-ASEAN Framework Agreement, Article 11.1; Framework Agreement on Comprehensive Economic Cooperation between the Republic of India and the Association of Southeast Asian Nations (India-ASEAN Framework Agreement), Article 11.1.

¹⁶⁵ See China-ASEAN Framework Agreement, Article 11.2 ('[A]ny disputes... shall be settled amicably by consultations and/or mediation'); India-ASEAN Framework Agreement, Article 11.2 ('[A]ny disputes... shall be settled amicably by mutual consultations').

approach, but differs in that the DSM is incorporated into the final Japan–ASEAN Agreement on Comprehensive Economic Partnership, rather than concluded in a separate agreement on DSM.¹⁶⁶ Finally, the Korea–ASEAN Framework Agreement was negotiated and took effect concurrently with the Korea–ASEAN Agreement on DSM, which accords jurisdiction over disputes arising from both the EHP under the Framework Agreement and subsequent subject-specific agreements.¹⁶⁷

The first two models bear substantial political risks and provide no legal recourse to either party in the interim period before finalizing the formal dispute settlement agreement. The ASEAN–Korea Framework Agreement model would best serve the interests of China and Taiwan, particularly given the EHP's scale and the possibility of legal disputes arising under the ECFA. However, the ECFA's DSM is modeled after that of the China–ASEAN and the India–ASEAN Framework Agreements primarily because concurrent negotiations for a dispute settlement agreement would postpone the implementation of the EHP, which is essential to Taiwanese industries. As the strong political will that expedited the negotiations also undermines the ECFA's legal stability, the governments should be cautious about the potential dispute settlement issues identified below.

1. Jurisdictional problems of forum shopping

The future Cross-Straits Agreement on DSM will focus on claims between parties, whereas the Cross-Straits Agreement on Investment (Agreement on Investment) will deal with investor-state claims. As for the former, two potential jurisdictional issues may surface. First, outside the ECFA structure, certain cross-straits agreements concerning trade issues have their own dispute settlement provisions.¹⁶⁸ A respondent in a dispute concerning trade in goods or services may assert that the Agreement on DSM lacks jurisdiction because a complainant is obliged to resolve the dispute only by 'consultation', as stipulated in other cross-straits agreements. The CAFTA would not result in a similar jurisdictional impasse because China and ASEAN do not have free-standing trade-related agreements that contain separate dispute settlement mechanisms outside the CAFTA framework. Therefore, negotiators should pay particular attention to addressing this loophole when

¹⁶⁶ Framework for Comprehensive Economic Partnership between the Association of Southeast Asian Nations and Japan, Article 9.

¹⁶⁷ See Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea, Article 5.1 ('[A]ny dispute concerning... this Framework Agreement shall be resolved through the procedures and mechanism as set out in the Agreement on Dispute Settlement Mechanism...'). For the structure of the Korea–ASEAN FTA, see Won-Mog Choi, 'Legal Analysis of Korea–ASEAN Regional Trade Integration', 41 (3) *Journal of World Trade* 581 (2007), at 585.

¹⁶⁸ Cross-Straits IPR Agreement, Article 15; Cross-Straits Arrangement on Cooperation of Agricultural Product Quarantine and Inspection, Article 11.

drafting the Agreement on DSM. An efficient way to tackle this issue is to accord jurisdiction to the Agreement on DSM over trade disputes that arise from all cross-straits agreements.

Second, the overlap of jurisdictions under the WTO and the Cross-Straits Agreement on DSM may complicate cross-straits trade disputes. With the exception of CEPAs, FTAs concluded by China and Taiwan have a similar design to deter ‘forum shopping’. Once a complainant files a suit, the forum it chooses ‘shall be used to the exclusion of’ the respondent.¹⁶⁹ For example, if Panama sued Taiwan under the Taiwan-Panama FTA, the FTA’s jurisdictional clause would prohibit Taiwan from resorting to the WTO dispute settlement system. The same rationale applies to a case initiated by ASEAN against China under the CAFTA. This issue arose from an FTA’s jurisdictional ‘exclusion clause’ that appeared in *Mexico – Soft Drinks*, in which the United States brought a complaint against Mexico’s tax measures.¹⁷⁰ Mexico requested that the panel and the Appellate Body decline jurisdiction. Mexico argued that because the case constituted part of ‘a broader dispute’ it had previously brought against the United States in North American Free Trade Agreement (NAFTA) proceedings, the ‘exclusion clause’ (i.e., Article 2005(6) of the NAFTA) mandated that the NAFTA be the only forum for the dispute.¹⁷¹ Both the panel and the Appellate Body disagreed with Mexico. In particular, the Appellate Body found that a WTO panel did not possess ‘the authority to decline to rule on the entirety of the claims’, and declining its own jurisdiction would ‘diminish’ a complaining party’s right under the Dispute Settlement Understanding (DSU).¹⁷² In addition, although there might be ‘legal impediments’ that exclude WTO panels from hearing a case, the Appellate Body found that no such impediments existed in that case.¹⁷³ As WTO jurisprudence provides limited guidance on what would constitute ‘legal impediments’, jurisdictional issues resulting from an FTA’s ‘exclusion clause’ can only be determined on a

¹⁶⁹ For example, Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People’s Republic of China, art. 2.6; Free Trade Agreement between the Republic of China (Taiwan) and the Republic of Nicaragua, Article 22.03.3. For detailed analyses of dispute settlement in China’s and Taiwan’s FTAs, see Francis Snyder, ‘China, Regional Trade Agreements and WTO Law’, 43 (1) *Journal of World Trade* (2009), at 39–47; Factual Presentation: Free Trade Agreement between Nicaragua and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Goods and Services), Report by the Secretariat, WT/REG267/1, 16 July 2010, at 58–60.

¹⁷⁰ Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, 3, para. 42. For discussions on the exclusion clause, see Henry Gao and CL. Lim, ‘Saving the WTO from the Risks of Irrelevance: The WTO Dispute Settlement Mechanism as a “Common Good” for RTA Disputes’, 11 *Journal of International Economic Law* 899 (2008), at 907–11.

¹⁷¹ *Ibid.*, paras 42 and 54.

¹⁷² *Ibid.*, paras 46 and 48–53.

¹⁷³ *Ibid.*, para. 54.

case-by-case basis.¹⁷⁴ Thus, it is advisable that unlike their FTAs, China and Taiwan should avoid the inclusion of such an exclusion clause in the Agreement on DSM in order to prevent a jurisdictional battle that may prolong the legal process.

2. *Claims by private parties*

In addition to above-mentioned inter-state arbitration, investor-state arbitration should be included in the Cross-Straits Agreement on Investment based on the CAFTA model. This agreement, which is comparable to a bilateral investment treaty (BIT), would provide an important investment protection mechanism for investors. China enacted the 1994 Law on the Protection of Investment of Taiwan Compatriots and the 1999 Rules for the Implementation of this law.¹⁷⁵ However, both statutes deem Taiwanese investments to be ‘domestic investments’ and thus international arbitration is inapplicable for relevant disputes. Furthermore, as Taiwan is not a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), Taiwanese investors cannot resort to the multilateral mechanism within the World Bank for their investment disputes with the Chinese government.¹⁷⁶ In practice, the absence of legal recourse on the Mainland often makes Taiwanese enterprises vulnerable to Chinese local governments’ land expropriation and frequent changes in labor and environmental regulations. The incorporation of investor-state arbitration into the ECFA framework will thus provide legal protection to Taiwanese investors in China. Given the increasing numbers of Chinese investors in Taiwan, this arbitration mechanism is also important in safeguarding their business interests.

V. CONCLUSION

The Taiwan Strait was once depicted as East Asia’s Balkan region. Sovereign disputes compounded by political animosity between China and Taiwan have

¹⁷⁴ See Gabrielle Marceau and Julian Wyatt, ‘Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO’, 1 (1) *Journal of International Dispute Settlement* 67 (2010), at 71 (‘There is little WTO jurisprudence even indirectly relevant to the question of the applicability of non-WTO choice of forum clauses before WTO adjudicatory bodies...’).

¹⁷⁵ The texts of the Law on the Protection of Investment of Taiwan Compatriots and the Rules for the Implementation of the Law on the Protection to Investment of Taiwan Compatriots are available at <http://news.sina.com.cn/c/2004-05-19/11513271540.shtml> and <http://news.sina.com.cn/c/2004-05-19/11523271554.shtml> (in Chinese) (visited 20 October 2010). For private investment disputes, Taiwanese investors often resort to Taiwan Affairs Offices at the local level, but the efficiency of this political mechanism varies largely between provinces.

¹⁷⁶ The PRC joined the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) in 1993. Under the Convention, the International Centre for Settlement of Investment Disputes under the World Bank deals with investor-state arbitration.

prevented both sides from developing normal trade relations for decades. This background signifies the ECFA's unique status as the most important cross-straits agreement to date. The agreement also represents the first FTA concluded between WTO members with long-standing territorial conflicts.

This article examined geopolitical and legal issues that arise from the ECFA with a focus on its relations vis-à-vis East Asian regionalism and WTO rules. It first analyzed why and how the Taiwan Strait became a conspicuous WTO-inconsistent area as a result of China's and Taiwan's cross-straits policies. While the domino effect of proliferating Asian FTAs and changing cross-strait politics led to the ECFA, the agreement now promises to transform bilateral trade ties and further escalate regional integration. The article further explored the ECFA's application of the model provided by ASEAN's framework agreements and its consistency with WTO requirements as an FTA interim agreement. The article found that given limited jurisprudence and WTO members' lack of consensus on such requirements, the ECFA's particular cross-strait characteristics may present obstacles to normal trade relations. Nonetheless, the ECFA represents a significant step toward the legalization of politically volatile bilateral trade and constitutes an indispensable building block for prospective cross-straits economic integration. Moving forward, the article cautioned that the prevention of forum shopping and the creation of an investor-state arbitration mechanism as important subjects for negotiation in the post-ECFA era.

The conclusion of the ECFA marks a milestone both in cross-Taiwan Strait relations and in WTO history. The ECFA may have been inconceivable absent strong political will, but the WTO legal framework was crucial in making this 'mission impossible' possible. While the ECFA's impact on cross-straits ties and East Asian regionalism remains to be seen, this agreement provides an important gateway to regional stability and presents a valuable example of bilateral trade liberalization with the broad framework of the multilateral trading system.