

# *A Quick Assessment of the ECFA Impact from the Legal Perspective*

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An observation from the legal perspective of the Economic Cooperation Framework Agreement (ECFA) that the Ma government started to negotiate with China in February 2009 will reveal that the agreement's legal nature and individual articles are fraught with controversy. This paper will only discuss a few major problems concerning this pact and will leave the other issues for further examinations in future analyses.

## **Impact 1: The Term “Cross-Strait” Has Gained a Beachhead in Law**

Under the current constitutional framework, Article 11 of the Additional Articles to the Constitution of the Republic of China employed “the free area” and “the Chinese mainland area” as the legal terms to distinguish Taiwan from China. Authorized by this additional constitutional article, the Regulations Governing the Relations between the People of the Taiwan Area and the Mainland China Area enacted in 1992 has become the most important law governing Taiwan's relations with China. However, the ECFA has moved beyond the established legal framework by replacing the legal terms regulating China-Taiwan relations with the term “Cross-Strait.” By coincidence or not, in

the Regulations Governing Tax Exemptions under the Cross-Strait Sea Transport Agreement and Supplementary Agreement on Cross-Strait Air Transport that the Ministry of Finance announced July 1, the ministry has also begun to use the term “Cross-Strait.” This is a subtle change that we need to keep a watchful eye on.

From China's perspective, Taiwan is “a renegade province” of China, so Beijing has never been pleased to see the terms “Taiwan” and “the mainland” placed side by side for these long years. In order to find a concept that will accommodate Taiwan to a status similar to that of a province, China has invented and established the so-called Western Taiwan Straits Economic Zone in Fujian Province. Hoping to start with economics and gradually build up the Western Taiwan Straits Economic Zone into a Cross-Strait Economic Zone, China ultimately wants to turn Taiwan into the Eastern Taiwan Straits Special Administrative Region. Positioning Taiwan on equal status with Fujian Province will further buttress and materialize Beijing's long-term propaganda in the international community: that Taiwan is part of China's territory. Therefore, the most worrying part of the subtle change from “the Taiwan Area and the Mainland China Area” to “Cross-Strait” is that it indicates the

beginning of the Ma administration's seeming inclination to accept the Chinese perspective on this matter and collaboration with Beijing to obscure the existence of "Taiwan."

### Impact 2: The Legitimacy of the Cross-Strait Economic Cooperation Commission is Highly Questionable.

After the exposure of the contents of the ECFA, Article 11 of the agreement that regulates the establishment of a cross-strait economic cooperation commission has raised many questions and concerns. As Professor Wang Szu-wei's criticism has pointed out, the Straits Exchange Foundation has overstepped the bounds of its power by creating the commission, because the law did not authorize the foundation to do so. Such a step has violated not only the principle of administration according to law but also the principle of transparency under democratic supervision. It is true that Article 16 of the Administrative Procedure Act stipulates that administrative agencies can entrust part of its powers to private organizations or individuals and authorize them to perform certain functions (Item 1). But the "assignment of administrative duties" means that government agencies can authorize private organizations to execute "specific administrative duties" by delegating relevant powers to them so as to enable them to exercise the power of the state.

Based on this, government agencies, when commissioning private organizations, should adhere to the principle of assigning "specific administrative duties" to these organizations only and stay within the limits. Government agencies can delegate part of their powers to private organizations as permitted in the Administrative Practices Act, but the power to establish institutions as granted in the Administrative Organization Act they do not have.

The cross-strait economic cooperation commission, however, was "organized by government representatives from both sides" and is an institution that can actually exercise the power of the state. Moreover, the commission is "responsible for handling ECFA-related matters," which means it will be involved in almost all areas of cross-strait economic and trade relations. The assignment of administrative duties, however, must be conducted within the boundaries set by the Administrative Practices Act and not touch the powers granted in the Administrative Organization Act. But the cross-strait economic cooperation commission, which will be in charge of each and every matter related to cross-strait trade, has completely departed from the principle that the assignment of administrative duties should be limited to "specific administrative duties" only. Surely what's most absurd about this commission is that the establishment of

such a powerful body and the determination of its responsibilities are both decided by an agreement signed by two “private organizations” authorized by both sides’ governments to execute the power of the state. This commission has far exceeded the farthest boundaries permitted by the concept of the assignment of administrative duties and has become like an “illegal building” constructed upon the law. The Ma administration has not only abused power by creating this body, but has also intended to neglect Legislative Yuan review and ECFA’s article-by-article supervision. The potential damage such behavior can do to the rule of law and the democratic mechanism is deeply worrying. What’s more, the most crucial regulations concerning this commission—those about how to design a mechanism to comprehensively and properly settle disputes and how to produce commission members—are nowhere to be seen in the ECFA. No wonder some questioned whether Article 11 of the ECFA should be called “the Article for the Almighty.”

Let’s take a big step back and assume that the Ma administration, all out of goodwill, signed this agreement with China that contains an article allowing government officials from both sides to organize a commission together. Even if this is the case, China remains the biggest threat to Taiwan’s security till this day and such an agreement

with Beijing is “necessarily” one of the most significant national matters for this country. In pursuance of the principle of legal reservation, the ECFA should be treated as law and be reviewed and passed by the Legislative Yuan article by article. It should also be voted on in a referendum to strengthen its democratic legitimacy. If the government evades mechanisms for public opinions to directly or indirectly approve and oversee the ECFA, the legitimacy of this agreement is bound to affect the binding power of any policies or measures made in accordance with the pact. Ma’s government should take this issue seriously so as not to cause endless political, economic and social controversies within Taiwan in days to come. **BT**