

EFTA

ECONOMIC
COOPERATION
FRAMEWORK
AGREEMENT

東西向貿易 對台灣之衝擊

許忠信◎著



*ECFA*東西向貿易 對台灣之衝擊

許忠信 著

國家圖書館出版品預行編目資料

ECFA 東西向貿易對台灣之衝擊 / 許忠信著. -- 一
版. -- 臺北市：新學林， 2010. 08
面； 公分

ISBN 978 - 986 - 6225 - 19 - 2 (軟精裝)

1. 兩岸經貿 2. 經濟合作 3. 兩岸關係

558. 52

99013064

ECFA東西向貿易對台灣之衝擊

作 者：許忠信

出版者：新學林出版股份有限公司

地 址：台北市和平東路二段339號9樓

電 話：(02) 27001808

傳 真：(02) 27059080

網 址：<http://www.sharing.com.tw/>

總經理：毛基正 總編輯：田金益

主 編：江承勳 責任編輯：李啟琳

版權部：林靜妙 製程管理：浩瀚

出版日期：2010年8月 一版一刷

郵撥帳號：19889774 新學林出版股份有限公司

劃撥金額1000元以上免郵資，未滿1000元每本加收郵資50元

定 價：400 元

ISBN 978 - 986 - 6225 - 19 - 2 (軟精裝)

本書如有缺頁、破損、倒裝，請寄回更換

門市地址：台北市和平東路二段 339 號 9 樓

團購專線：(02) 27001808 分機 18

讀者服務：law@sharing.com.tw

電子商務：gotobuy@sharing.com.tw

自序

忠信所據以撰寫本書之觀察包括國際法律、國際政治與國際經貿之層面，而為 ECFA 議題所密切相關者。簽訂 ECFA 與否對台灣將來之影響受到此三環境之支配。忠信雖然是劍橋大學法律學院畢業，然而忠信個人的學歷是相當崎嶇坎坷。忠信在台灣大學政治學系國際關係組畢業並在民國七十九年剛退伍時去參加外交官特考，結果國文不及格不予錄取，隔年三月我在自修法律半年後通過法科高等檢定取得參加律師考試之資格並很僥倖地在五百多名法律系畢業的考生競爭之中考進政大法律研究所。由於忠信學國際關係（含國際經濟）又讀法律，因此，為找一個比較容易結合兩專長之法學領域，便選修 GATT 商品貿易總協定與 GATS 服務業貿易總協定等國際經濟法課程，並以智慧財產權法為碩士論文之撰寫領域。之後，在劍橋大學研習國際金融法回國後亦在輔大與成大教授國際經濟法、國際金融法與智慧財產權法。由於與中國簽訂 ECFA，不僅涉及國際政治，亦與國際經濟法、國際金融法及智慧財產權法息息相關，因此，忠信身為一接受政府公費留學贊助之學者，有責任將我國若簽訂 ECFA 所可能造成之後果，根據 WTO 法律規範向國民作一個中肯而客觀之分析報告。此一報告根據過去台灣之經貿史，觀察我國現在之國際法律、政治與經貿環境，並前瞻我國之經貿前景，認為我國現在不簽訂 ECFA 並不會被邊緣化，簽了 ECFA 反而可能在將來被中國「邊陲化」，而非兩岸關係正常化。而且，ECFA 將使中國的黑心劣質商品大量湧進台灣，降低生活品味（甚至品質）。跨國中資企業除將控制關鍵服務業外，亦將以專家名義大量引進中國服務業人員，加上眾多微型中資企業以及醫師與律師等專門職業到台北市以低價進行競爭

之結果，我國之薪資與就業將嚴重受到擠壓，進而貶抑我國之品牌價值與研發動力。此一嚴重後果之訊息傳輸，要感謝甚多人給忠信慷慨之協助與鼓勵，特別是要感謝新學林出版社毛基正總經理、江承勳經理、李啟琳編輯、盧起揚策劃等同仁之出版協助，亦感謝台灣人俱樂部、政治最前線、飛碟午餐、News 98 張大春泡新聞、夢中的國家、快樂 Morning Call、莓莓新聞爆米香、大秉包小餅、亞洲觀測站、寶島心聲等電台節目之長期專訪，亦感謝扶輪社、搶救台灣行動聯盟等數十團體邀請進行演講至今一百多場，也感謝筱峰、川信、俊達、惠蘭、慧玲、淑純等在反 ECFA 事務上之協助與連絡，並感謝我的助理怡安、正安、真好與銘邦之用心校稿。最後，感謝每天與我共用二十四小時之內人月琴、兒子維邦、女兒心瑜，對我回國後這十年之教學、研究、服務的鼓勵，對我讀書、寫書、教書的體恤，以及對我每天英語、德語、日語之充耳不聞！

許忠信 二〇一〇年六月二十九日於台北閣樓書房

〈作者學經歷〉

➤學歷：

新市國中畢業

台南一中畢業

國立臺灣大學政治學系國際關係組畢業

國立政治大學法律研究所碩士

國立政治大學法律研究所博士班修業六年（肄業）

英國劍橋大學法學博士

➤經歷：

民國 77 至 79 年考選陸軍經理少尉（預備軍官）

民國 80 年法科高等檢定及格

民國 81 年律師高考及格

民國 82 年萬國法律事務所實習律師

民國 83 年教育部公費留學考試及格

民國 89 到 93 年輔大財經法律系專任助理教授

民國 92 年兼任輔大法務室主任

經濟部貿易調查委員會義務法律顧問三年

行政院新聞局法規會委員

行政院新聞局無線電視台審議委員

德國海德堡大學經濟法暨國際私法研究所客座研究員（2006）

巴黎國際商會（ICC）主任仲裁人

台灣新世紀文教基金會「WTO 國際經貿法精英訓練團」團長

櫃檯買賣中心上櫃審查委員

➤ **現職：**

成大法律系所教授

成大兼任智慧財產權法律顧問

空總官兵權益保障委員會委員

➤ **著作：**

WTO 與貿易有關智慧財產權協定之研究（元照，2005，5月）

國際金融法之研究（元照，2006，8月）

➤ **專長：**

WTO 國際經濟法

國際智慧財產權法

國際金融法

〈英文摘要〉

ECFA's Impacts on Taiwan

Chung-Hsin Hsu *

1. Introduction

The Ma administration in Taiwan argues that Taiwan is in the imminent risk of marginalization in the world trading system because China and ASEAN formed a free trade area (hereinafter referred to as “ASEAN plus China”) in 2010, and also because Taiwan has failed to establish any free trade agreement (hereinafter referred to as “FTA”) with major trading nations like the United States and Japan. In order to prevent Taiwan from that alleged marginalization, the Ma administration proposes eagerly to sign Economic Cooperation Framework Agreement (hereinafter referred to as “ECFA”) with China. By this way, the Ma administration hopes that Taiwanese products can be transshipped into ASEAN countries via China.¹ In addition, the Ma administration further argues that signing ECFA with China not only can normalize the trade relations with China, but also can greatly increase the opportunity to sign FTA with the United States and Japan.

The above arguments are not persuasive. First, under the WTO regime, WTO trade is the rule, and FTA trade is an exception, i.e., an exception to the principle of most favored nation treatment (a bifurcation of the principle of non-discrimination).² So, in order to normalize trade relations with China, what we

* Professor of Law, National Cheng-Kung University, Taiwan ; Ph. D. in Law, Cambridge University; Gastwissenschaftler, Institut für Ausländisches und Internationales Privat- und Wirtschaftsrecht, Universität Heidelberg (2006).

1 Liberty Times, 2009/02/24, A 2.

2 Stoll/Schorkopf, WTO – Welthandelsordnung und Welthandelsrecht, Carl Heymanns Verlag KG, Köln, Berlin, Bonn, München, 2002, S. 50.

need to do is to implement WTO rules with China, not to sign ECFA with it. Second, Taiwan's failure to sign FTA with the United States has some causes. The main cause for that is China's objection. Most of the top 100 U.S. enterprises have invested in China, and China exercises pressure on these enterprises through tax measures or operation licenses, asking them to stop congressmen who have received their financial supports from supporting any FTA proposals with Taiwan.³ Third, Taiwan's trade history has provided us with empirical evidences that Taiwan will not be marginalized by the mere establishment of ASEAN plus China.

This book relies on relevant WTO rules (law) and Taiwan's trade history (historic facts), reviewing Taiwan's trade history in retrospect, observing Taiwan's present environments in the world, and foreseeing Taiwan's prospects in the future. It concludes that Taiwan will not be marginalized even without signing ECFA with China and that, to the contrary, Taiwan will become China's frontier if ECFA is really signed.

2. Taiwan's Trade History and Taiwan's Geography

Taiwan has a history of economic cycles of growth followed by stagnation. It depends on whether the trade pattern at that time is a north-south bound trade or west-east bound trade. Taiwan's trade history and Taiwan's geography show that north-south bound trade is far better for Taiwan than west-east bound trade. The effects of the doctrine of factor price equalization made Taiwan a rich country when Taiwan traded closely with Japan, and a poor country when Taiwan traded closely with China.

2.1. Taiwan's Trade History is an Empirical Evidence for the Doctrine of Factor Price Equalization

Just as President Obama has said, "the past is never dead or buried – it isn't even past"⁴ Where is past is prologue. In order to see Taiwan's economic prospect, it is advisable to review its economic past. This past can be divided into the

³ Interview with one of the former premiers of Taiwan.

⁴ Barack Obama, *Dreams from My Father*, Three Rivers Press, New York, 2004, p. X.

following six periods.

2.1.1. The Dutch Colonial Period (1624 - 1661)

In 1624, the Dutch went to war with China in the Pescadores (Penghu) Islands, an islands group in the Taiwan Strait and the easternmost point of the territory of Ming Dynasty of China. After the Dutch's occupation of the Pescadores, China signed a peace agreement with the Dutch. In that agreement, China asked the Dutch to leave the Pescadores and to stay in a non-Chinese territory, Taiwan(Formosa), if the Dutch would like to trade with China.⁵ The Dutch agreed and moved to Taiwan without any resistance from the aboriginals, Chinese pirates, and Japanese colonists and merchants there.⁶

After arriving in Taiwan, the Dutch invited male Chinese farmers to exploit Taiwan's rich plain areas for growing sugar cane, and hunted Formosan deer for their skin. Sugar and deer skins were exported to Japan and other areas in the world. The Dutch benefited so much from this trade and the transshipment operations among China, Japan and South-East Asia that it had a golden period in Dutch history. As a consequence, Taiwan had modern-form commerce and trade, cash economy, modern agriculture, and western religions.

2.1.2. The Tungnin Kingdom Period (1661 - 1683)

The Dutch colonial period was ended by Koxinga, who is half Chinese and half Japanese. Koxinga and his troop expelled the Dutch from Taiwan, declaring that Taiwan had been his father's territory. His father had been one of the pirate leaders in Taiwan before the Dutch came to Taiwan, and had worked as an interpreter for the Dutch during the Dutch colonial period. Unfortunately, Koxinga died soon after his arrival in Taiwan.

Koxinga's son, Cheng Ching, came to rule Taiwan with the help and cooperation of two capable men, Chen Yun Wha (a Fokien Taiwanese) and Liu Ko Shien (a Hakka Taiwanese). Cheng Ching chose Tungnin (now the city of Tainan)

⁵ James Davidson, *The Island of Formosa, Past and Present*, Macmillan & Co., London, New York, 1903, p. 12.

⁶ *Id.* at 12-13.

as the capital of his kingdom he established. “Tungnin” means peace in the east, and non-entanglement with China to the west. Chen Yun Wha was a general with an excellent administration capability. He established the political and educational systems, developed national economy, and encouraged international trade. After discovering that Taiwan is endowed with an excellent geographical location to trade with Japan in the north, South-East Asia in the south, Chen Yun Wha made the best use of the large amount of ships owned by Cheng Ching to engage in north-south bound trade because China refused to trade with Taiwan at that time. Importing Japanese goods to Taiwan and then transshipped to South-East Asia with Taiwanese products and exporting Taiwanese products to Japan with transshipped South-East Asian products were so lucrative that Tungnin Kingdom was a powerful enemy for China. Although China’s emperor deployed heavy troops on China’s south-east coast for attacking Taiwan, China could not defeat Taiwan during Cheng Ching and Chen Yun Wha’s life. This prosperity has made England to sign a first trade agreement with Taiwan in 1672, and to establish consul relations with Taiwan. Cheng Ching with his kingdom in a prosperous condition and having abandoned warlike expeditions against China, devoted his last days to teaching his successor, Cheng Ko-tsang (Teikokuzo).⁷ In 1682, Cheng Ching died at the age of 39 respected and honored by all his subjects, a powerful enemy of China for 19 years.⁸ Only after Chen Yun Wha and Cheng Ching both died, and the excellent successor chosen by Cheng Ching was replaced by a young man in a political turmoil that Taiwan surrendered to Manchu that ruled China at that time.

2.1.3. Manchu Colonial Period (1683 - 1895)

During this period, significant quantities of rice and sugar were shipped to China. The agricultural products of the two sides of Taiwan Strait were highly competitive because of the similarities of geographical conditions (like latitude, weather and rainfalls) and culture (like food and clothing). As a consequence, Taiwan’s products could not be sold at a good price. Because Chinese products (like timber, furniture, silk, porcelain) were relatively cheap in production costs, they

⁷ *Id.* at 60.

⁸ *Id.* at 60.

were popular in Taiwan. This made Taiwan rely on them, not to exploit its own potential. This situation made Taiwan a poor island, with rogues and homeless people everywhere.

2.1.4. Japanese Colonial Period (1896-1945)

After a Sino-Japanese war in the Northeast of China, China ceded Taiwan to Japan in 1895 by the Treaty of Shinmonoseki. Japan, being fresh from the Meiji Restoration, would like to show the western world that Japan had ability to be a colonial power, rather than to be colonized. So, Japan built modern roads, railroads, airports, seaports, dams and irrigation systems in Taiwan. Agriculture products, like rice and sugar, enjoyed relatively high price in Japan, and this trade surplus has made some Taiwanese light industries prosper. Agriculture and north-south bound trade led Taiwan's economic development and economic productivity overall outraced population growth by about three folds.

2.1.5. The Republic of China Period (1945 – 1949)

After World War II, Chinese government and troop, representing the western alliance, took over Taiwan. The east-west bound trade and economy delivered Taiwan a disastrous outcome - the 228 incident - in 1947. Taiwan's economy deteriorated after 1945 and this situation inflicted an island wide conflict between Taiwanese and Chinese in 1947. More than 20 thousand Taiwanese elites, who had been taught in Japanese education, were slaughtered in the incident because they were no use to the Chinese regime.⁹ And these Taiwanese elites' family lands were distributed to their tenants at a very low price in the subsequent land reform so that they lost their economic basis totally.¹⁰

2. 1. 6. The Republic of China on Taiwan Period (1949 - now)

In the 1950s, Taiwan was not viewed as having good economic development prospects. That was because Taiwan was lack of resources, capital and good political leadership. Indeed, in the 1950s, there was no trade at all, the island being

⁹ Helwig Schmidt-Glintzer, *Das Neue China*, Verlag C.H.Beck, 3. Aufl., 2004, S. 75.

¹⁰ Helwig Schmidt-Glintzer, a.a.O., S. 75.

a military base for recovering China.

In the mid-1960s Taiwan's economy took off, and its subsequent growth became the envy of the world. Many used the term "economic miracle" to describe Taiwan's economic success during the period from 1960s to 1990s. That was because the separation of Taiwan and China after 1949 made the west-east bound trade pattern to change into north-south bound trade with Japan, the U.S.A., and South-East Asia. This trade pattern has benefited Taiwan so much that even when Taiwan's biggest market (the U.S.) signed a Free Trade Agreement (NAFTA) with Taiwan's competitor (Mexico) in 1992, and this made Taiwan's textile export drop 12% in 1993,¹¹ Taiwan nevertheless was not marginalized, and to the contrary, Taiwan updated its textile technology and turned to synthetic fabrics and specialty products since natural fabric could be produced more cheaply in poorer countries.¹² In addition, Taiwan also transformed itself into a strong exporter of information technology products during that same period.

2.2. Induction

Three points can be induced from Taiwan's above-mentioned economic history. First, when Taiwan is a country and trades with the world (including Japan and South-East Asia), Taiwan prospers most. This is because Taiwan is situated at a pivotal position that can transship goods among Japan, Korea, China, South-East Asia, NAFTA and Australia-New Zealand. In other words, Taiwan's economy is inherently geared toward trade. The above-mentioned Tungnin Kingdom and R.O.C. on Taiwan's history shows that when Taiwan is a country and having international trade with the world, it is a strong country. When Taiwan was Dutch colony and Japanese colony and had north-south bound trade with Japan and South-East Asia, Taiwan's economic performance were the second best. When Taiwan was a part of Chinese Empire and had east-west bound trade with China, Taiwan's economy deteriorated most. That is because the same latitude of Taiwan and Southern China has made the products of these two areas severely compete with each other, and Taiwanese products are no match to Chinese competitive products because Taiwan

¹¹ J. Copper, *Taiwan*, 2nd ed., Westview Press, Colorado, 1996, p. 129.

¹² *Id.* at 128.

is relatively small when compared with China.

Second, Taiwan's trade history also shows that Taiwan will not be marginalized from the world trade system just because the establishment of ASEAN plus China and the absence of ECFA with China. The Ma administration in Taiwan argues that Taiwan will be marginalized in the world trading system if ECFA is not signed. Their memories are short. For they have forgotten what this country has already done.

Third, ECFA is an interim agreement leading to a free trade area with China in the same latitude. From the above, we can see that ECFA is an Emerging Crisis Formosa faces, because Taiwanese businesses have invested heavily in China from 1989, and have transferred quite a lot of technology to China. The production of industrial products on both sides of Taiwan Strait are competitive, rather than mutual supplementary.

2.3. That Taiwan Can Benefit from North-South Bound Trade Can Be Supported by the Pattern of Major Free Trade Areas in the World

Because latitude not only affects the production of agricultural products, but also influences industrial products (like clothing, home appliances), it is not suitable for a small but highly developed area to form a free trade area with a larger but less-developed area in the same latitude. Philippines are a good example for that. Philippines was ceded by Spain to the U.S. in 1898, and fast developed into a rich country after World War II. In 1992, however, Philippines signed a free trade area agreement with Malaysia, Thailand, Indonesia and Singapore, which are almost in the same latitude. The same latitude made the Philippines products compete with Thai products and Malaysian products, and finally made product prices and living standard into the same level. There is little trade among ASEAN countries now. Philippines are no more the second best country in Asia, and rely heavily on exporting labor and maids.

3. Taiwan's Present International Environments Cannot Be Improved by ECFA

The international environment surrounding Taiwan will not be improved by ECFA. Taiwan joined WTO in 2002 and Taiwan has to follow WTO rules. In addition to this legal environment, the international political environment and international economic environment are also relevant in the following discussion.

Free Trade is premised on national security,¹³ so the doctrine of comparative advantage is only acceptable when the trading partners are peacefully co-existing and respect each others' territorial integrity. In the example raised by Ricardo when he was illustrating the doctrine of comparative advantage, England majored in the production of textiles because of its early industrial revolution and Portugal majored in wine production because of its nice climate conditions. The world welfare will be increased if English textiles are exchanged for wine through trade. There is a precondition for this trade premium: the English cannot use its industrial technology to make weapons and to attack Portugal, otherwise drunken Portugese, who sleep in the grape yard because of drinking too much cheap but good wine, cannot defend themselves by throwing grapes.

3.1. The Legal Environments

3.1.1. ECFA is An Interim Agreement Leading to FTA

Although WTO recognizes that free trade can improve living standards of human being, it still understands that 100 percent free trade cannot be achieved at the present moment. So, freer trade is the purpose of WTO, and non-discrimination among WTO members is the norm. The principle of non-discrimination can be divided into the non-discrimination between foreign products (persons) and domestic products, and the non-discrimination between foreign products (persons) and foreign products. The former is called the principle of national treatment, the

¹³ Jackson, J., *The World Trading System – Law and Policy of International Economic Relations* (2nd ed. 1997, London: the MIT Press), p. 21.

latter the principle of MFN.

According to GATT §1, if a WTO member makes any concession to any WTO member, the treatment must be unconditionally enjoyed by other WTO members, unless the relevant members form up a Regional Trade Agreement (RTA) or FTA according to GATT §24.¹⁴

The RTA or FTA must make substantially all the trade (and service) between RTA or FTA members free trade, unless it is an interim agreement leading to full-grown RTA or FTA. According to a WTO 1994 understanding, the period allowed for that interim period is in principle no longer than 10 years.

ECFA, according to Taiwan government's statements, is an interim agreement leading to FTA, because ECFA will cover trade in services, intellectual property protection issues and the protection of investment. So, after ten years, the trade and service provision between Taiwan and China will be substantially (about or more than) 95% free. Free trade, according to Ricardo's principle of comparative advantage, can improve the living conditions of the world. In other words, if England focus on producing textiles (because of its early industrial revolution) and Portugal focus on producing wine (because its natural environments are suitable for growing grapes), and if English textiles are traded with Portuguese wine, then both countries' people will have cheaper clothing and wine. This theory, however, has some preconditions.¹⁵ One of them is that the English cannot transform its industrial technology into arm production. Otherwise, if the English attack Portugal when the Portuguese get drunk because drinking too much cheap wine and sleep in grape yards, then the Portuguese can only rely on grapes for bullets. The fate of Portuguese in this scenario is destined. Grape yards will become graveyards.

3.1.2. Rules of Origin Stop ECFA from Circumventing ASEAN plus China

It is argued by the Ma administration that ECFA can allow Taiwanese products to be transshipped from China and then be re-exported to ASEAN countries and to

¹⁴ Stoll/Schorkopf, a.a.O., S. 50.

¹⁵ Stoll/Schorkopf, a.a.O., S. 30.

enjoy the free trade concessions between ASEAN and China.¹⁶ This argument neglects the fact that the rules of origin in WTO and WTO members domestic regulations dictates that only the country that performs the last substantial transformation is the origin of the products.¹⁷ So, Taiwanese products even processed by Chinese factories are still Taiwanese unless they are last substantially transformed in China. If Taiwanese products rely on ECFA to transship to ASEAN countries through China, then ECFA will encourage Taiwanese businesses to reallocate the more advanced and high tech process in Chinese factories and leave Taiwanese factories to produce cheap and low-level products and materials. This situation will make Taiwan's technology standards deteriorate severely.

3.1.3. Trade Remedies in ECFA Is Not Enough to Protect Taiwanese Business.

The Ma administration tries to persuade our people to accept ECFA by saying that ECFA will be equipped with sufficient trade remedy mechanism.

Import relief can be divided into two main categories. The first category is that an exporting country's fair but large volume trade has caused the importing countries' competing industry serious injury. If this large volume import and the serious injury are unforeseeable when the concession is made, then the importing country can shut the door, but open another door (industry) to compensate the exporting country. This is the so-called escape clause. Can Taiwan argue that the flush of Chinese products into Taiwan is unforeseeable? The answer is no, and the escape clause cannot be triggered.

When an exporting country's trade is unfair and done by the exporting country's subsidy, then the importing country can resort to countervailing duty in order to set off the subsidy. Chinese products' low costs in their production save the Chinese government to subsidize its products. So, the countervailing duty remedy is not useful even it is installed in ECFA.

When an exporting country's unfair trade is done by the exporting business

¹⁶ Liberty Times, 2009/02/24, A 2.

¹⁷ Prieß/Berrisch, WTO Handbuch, Verlag C. H. Beck, München, 2003, S. 411.