

China-Taiwan ECFA Investment Agreement and its Implications for the Korea-China FTA Negotiations

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1. Process of the China-Taiwan ECFA Negotiations

“Cross-Strait Investment Protection and Promotion Agreement” (i.e., ECFA Investment Agreement) was concluded on August 9, 2012, after eight rounds of negotiations. The two countries reached the Economic Cooperation and Framework Agreement (ECFA) earlier in 2010 which has six sub-negotiation areas of trade in goods, trade in services, investments, dispute settlement, industrial cooperation, and maritime customs. The investment deal was struck for the first time among six areas.

The reason the investment agreement was able to be settled earlier than the other negotiations is that the negotiations for investment agreement had begun even earlier than those for the ECFA. The deals for trade in goods and services as well as for dispute settlement will need more time to be concluded.

Before the ECFA investment agreement, there were several policies to loosen regulations and promote investment between the two as the volume of cross-strait investment has been steadily increasing in recent years. After signing the ECFA, in November 2010 the government of mainland China released the “Announcement Regarding Chinese Corporations’ Investment in Taiwan,” jointly drafted by the National Development and Reform Committee (NDRC), the Ministry of Commerce, and the Taiwan Relations Office of the State Council. The said announcement sums up the issues that were identified by the 2008 and 2009 announcements made by inter-agency coordination regarding assessment of Chinese firms investment into Taiwan. The 2010 announcement also clarifies the support that the Chinese government intends to provide for companies investing in Taiwan. Taiwan, for its part, began in 2002 to open up some of its industries to Chinese investors within the framework provided by the WTO concessions. Having released the “List of Taiwanese Businesses and Industries Opening to Investment from the People of China” and updated it three times in 2009, 2011, and 2012 respectively, the Taiwanese government has been expediting the opening of its market to Chinese companies. In addition, Taiwan also passed the “Regulation for Chinese Capital Invested in Taiwanese Securities and Futures” as well as the “Regulation for the Establishment of Branches and Representative Offices of Chinese Companies in Taiwan.”

2. Main Features of the ECFA Investment Agreement and Analysis on the Agreement

A. Main Features of the ECFA Investment Agreement

The ECFA Investment Agreement contains most of the factors that have already been included by the earlier investment agreements in other FTAs. Furthermore, it also takes new provisions for some of the issues rarely addressed in other bilateral investment treaties (BITs), such as the protection of investors’ personal freedom

and safety, the mechanism for settling disputes between invested region and investor, and the provisions for investment involving commercial disputes dealing with civil law suits of investors (Table 1). Protection of personal freedom and safety has never come up as an issue in other BITs, but was included as part of the ECFA Investment Agreement upon the strong request by the Taiwanese side. Accordingly, the two countries have agreed to open up an expeditious communication channel concerning the safety of investors; to provide convenience for visits of the investors' families and lawyers; and to inform investor's family members within 24 hours of discovering any issue affecting investors' safety. The provisions for disputes settlement between invested region and investor more specifically address the disputes that may arise between investors and the local administrations of the region receiving the investment. The provisions for investment involving commercial disputes dealing with civil law suits of investors were also scarcely seen in other BITs or FTAs to which mainland China is a party.

Table 1. Comparing the Provisions of the ECFA Investment Agreement and Other FTAs Involving China

	Provisions	China-Taiwan ECFA	China-ASEAN (2009)	China-Peru (2008)	China-New Zealand (2008)	Korea-China BIT (2007)
1	Definitions	○	○	○	○	○
2	Objectives	×	○	×	○	×
3	Scope of application	○	○	○	○	×
4	National treatment (NT)	○	○	○	○	○
5	Most favored nations (MFNs)	○	○	○	○	○
6	Non-conforming measures	○	○	○	○	○
7	Performance requirements	×	×	×	○	×
8	Investment treatment	○	○	○	○	○
9	Expropriation	○	○	○	○	○
10	Compensation for losses	○	○	○	○	○
11	Transfer	○	○	○	○	○
12	Measures to Safeguard Balance of Payment	×	○	×	○	×
13	Subrogation	○	○	○	○	○
14	Disputes between contracting parties	○	○	○	○	○
15	Disputes between invested regions and investors	○	×	×	×	×
16	Disputes over investment in commercial affairs	○	×	×	×	×
17	Denial of benefits	○	○	○	○	×
18	Exceptions	○	○	○	△	×
19	Transparency	○	○	×	○	×
20	Promotion of investment	○	○	×	○	○
21	Personal freedom and safety	○	×	×	×	×

B. Comparing the China-Taiwan ECFA Investment Agreement to other China's FTAs

Table 2 summarizes the details of comparison among the China-Taiwan ECFA Investment Agreement, China's already concluded FTAs and the South Korea-China BIT. It shows differences in the definitions of "investment" and "investor", national treatment (NT), most-favored nations (MFN) and the provisions of dispute settlement. The comparison reveals that the China-Taiwan ECFA Investment Agreement includes some more advanced provisions than those seen in other agreements, especially the BIT between Korea and China. Therefore, the Korean government may consider whether to adopt some of these advanced provisions found in China's agreement with Taiwan and address them during the course of the FTA negotiations with China.

Table 2. More Advanced Provisions of the ECFA Investment Agreement and Other Chinese Concluded FTAs than those of the Korea-China BIT

Section	FTA Agreement	Description
Definition of "investment"	ECFA	"The right to form contracts over package ordering, construction, management, production, income distribution, and other such areas of concern" is first shown as the definition of "investment in the China's already concluded FTAs.
	China-New Zealand	"Government-issued bonds" are included in the definition of investment regarding bonds and the rights associated with bonds.
	China-ASEAN	"Utility models, service marks, geographic indications, and integrated circuit designs" are added to the definition of the investment regarding intellectual property.
Definition of "investor"	ECFA / China-New Zealand	"Legal persons of a third country which are owned or controlled by investors of one Party and which have been made in the territory of the other Party" are included in the definition of investors.
	China-Peru	"Legal entities not established under the law of the People's Republic of China but effectively controlled, by natural persons or by economic entities that have made an investment in the territory of the other Party" is included in the definition of investors.
	China-New Zealand	"A Subsidiary" is included in the definition of enterprise as investor.
National Treatment	China-Peru	"NT exception" is allowed for "the measures that accords differential treatment to socially or economically disadvantaged minorities and ethnic groups."
Most Favored Nations	All agreements	Investment and corporate activities that are conferred the MFN treatment are specified as admission, establishment, expansion, acquisition, management, conduct, operation, maintenance, use, liquidation, sale and other form of disposition.
	China-Peru FTA	"MFN exceptions" are allowed for "the measures that accord differential treatment to socially or economically disadvantaged minorities and ethnic groups, or involving cultural industries related to the production of books, magazines, periodical publications, or printed or electronic newspapers and music scores."
	China-New Zealand	MFN exceptions are allowed for fisheries and maritime matters.
Dispute Settlement	ECFA	Diverse procedures and mechanisms of settling disputes between local government and investors are included such as arbitration by the administration of the invested region or a higher authority, resolution by the investment arbitration mechanism established under the FTA agreement, and resolution by the Cross-straight Investment Dispute Settlement Organization, etc.
	China-ASEAN	- Including temporary measures for protecting investor before filing dispute settlement trials - Providing consultation mechanism to decide whether a certain tax measure which is alleged to violate the expropriation provisions by its adaption or implementation can be considered to have the same effects with the expropriation or nationalization.
	China-New Zealand	- Allowing a non-binding, third-party procedure under the mutual consensus of disputants - Allowing to file a preliminary objection that a claim is manifestly without merit or is otherwise outside the jurisdiction or competence of the tribunal.

Source: Compiled and summarized from various trade agreements by the author.

3. Assessing the ECFA Investment Agreement

The significance of ECFA Investment agreement lies in the fact that it is the first systematic mechanism of investment protection for cross-strait investments between mainland China and Taiwan. Such WTO-led mechanisms as the Agreement on the Trade-Related Investment Measures (TRIMs), the General Agreement on Trade in Services (GATS), and the Dispute Settlement Understanding (DSU), are only applied to the governmental relations between mainland China and Taiwan, and therefore were not applicable to the disputes related to the private investors. The WTO system, moreover, lacks any mechanism to settle disputes between investors and invested regions. Since Taiwan is not yet a member-state of the International Center for Settlement of Investment Disputes (ICSID), any disputes between mainland China and Taiwan could not be solved by means of third-party international arbitration. Even if Taiwan were to resort to assistance from the ICSID, China would not accept the ICSID's decision on the case related to Taiwanese investors because China stands the ground that it only accepts the decision of ICSID when the case is within the ICSID's jurisdiction (which China assumes that Taiwan is not included). Therefore, it was necessary to enact a legal and institutional framework to afford required protection for Taiwanese investors in Chinese territory.¹⁾ The ECFA Investment Agreement is now expected to solve numerous issues that have been raised in investor protection between mainland China and Taiwan.

The ECFA Investment Agreement realizes the partial reciprocity in bilateral investment treatment and protection. In other words, the Taiwanese laws on the treatment of Chinese investors prior to the ECFA Investment Agreement were blatantly discriminatory, i.e., excluding Chinese investors from the NT or MFN privileges that were provided for foreign investors from other countries under the "Taiwanese Regulation for Foreign Investors and Chinese-National Investors from Overseas. As the ECFA Investment Agreement now includes NT and MFN treatment to be provided for each other's nationals, Chinese investors will be able to enjoy the same benefits and favors from Taiwanese authorities as investors from other countries. Taiwan, on the other hand, will have to revise and amend its domestic law in order to bring it up to date with the ECFA Investment Agreement.

Overall, however, the ECFA Investment Agreement is not the most open and free investment agreement you could find. Compared to the considerable concessions that China made to Taiwan — greater than the concessions that China made to any other countries in other FTAs — for the Early Harvest Program (EHP) as part of the ECFA reached in June 2010, China seems to have made lower-level concessions in the ECFA Investment Agreement. Although clauses for the protection of investors' personal freedom and safety, and the settlement of disputes between local government and investors were included upon the request made by Taiwan, Taiwan had also to make significant concessions, especially by providing the NT and MFN for Chinese investors. The ECFA Investment Agreement is more equal negotiation results compared to the ECFA EHP concessions.

1) Jie Huang (2012), "Implement the ECFA: Prospects of a Bilateral Investment Agreement between Mainland China and Taiwan," *Journal of Chinese Economic and Foreign Trade Studies*, Vol. 5, Iss. 2, pp. 127-156.

4. Implications on the Korea-China FTA Negotiations

The China-Taiwan ECFA Investment Agreement provides several implications for Korea-China FTA investment negotiations. First, the dispute settlement mechanism of the ECFA Investment Agreement includes the provision on disputes between investors and the local government of regions receiving investments. It is worth considering that similar clause may be adopted in Korea-China FTA. The dispute settlement mechanism in the ECFA Investment Agreement provides five ways in which a dispute can be resolved, namely, (1) a mutually favorable settlement based on consultation between the disputing parties themselves; (2) arbitration by the authority of the invested region or a higher authority; (3) resolution with assistance from the dispute settlement mechanism established pursuant to the ECFA Investment Agreement; (4) arbitration by the Cross-strait Investment Dispute Settlement Organization; or (5) administrative or judicial remedies from the competent local authorities. The “higher authority” mentioned in the second method of arbitration is generally interpreted to refer to the central government.²⁾ The inclusion of a clause like this is clearly meant to emphasize the local government authority that is a party of receiving the benefits from the foreign investment and is simultaneously a competent authority to make disadvantageous decisions on the foreign investor related cases. Negotiators of the Korea-China FTA had better consider and devise more specific mechanisms for settling disputes that may arise between Korean investors and Chinese local authorities.

The Korea-China BIT reached in 2007 stipulates in Article 10 (“Other Obligations”), that “[i]n fulfilling the obligations under this Agreement, each Contracting Party shall take such reasonable measures as may be available to it to ensure the observance of this Agreement by provincial governments in its territory.” as mentioning the provincial government in the treaty. It is uncertain, however, which provisions of the BIT this particular article will be applicable to. Nor has either government specified as to what would constitute “such reasonable measures as may be available.” It seems to be better for negotiators of the Korea-China FTA to consider expressly manifesting “local government” as a party of the agreement just as the ECFA included the local authority as potential disputants in foreign investment relations.

Another component of ECFA investment agreement applicable to the Korea-China FTA is to establish the Investment Settlement Consultation Committee and attaching annex regarding the procedures and details of dispute settlement. The Korea-China BIT, as it stands now, provides only two options for settling disputes involving governments and investors, namely, by resorting to either a court of law in either country, or an international arbitration body. No dispute subject to the BIT, however, has ever been settled or resolved by international arbitration yet. Filing such investor state dispute (ISD) settlement cases would be tantamount

2) The “Application of the Dispute Settlement Provisions of the ECFA Investment Agreement,” published by the Taiwanese Ministry of Economy, explains that the resolutions by the higher governmental body of the regional government receiving the investment and Taiwan Affairs Office of the State Council PRC were included in the dispute settlement resorts in order to prevent Chinese local administrations from exercising their power unfairly in disputes with Taiwanese investors.

to expressing to stop all business operations in China any longer. It is thus worthwhile to consider developing a more effective and realistic dispute settlement mechanism in the Korea-China FTA framework so that Korean companies investing in China may have more chances to deal with the investment related disputes with Chinese local administrations in the real terms.

Now that Korean companies invest in an expanding range of countries and regions worldwide, it could be advantageous for Korean investors if "Legal persons of a third country which are owned or controlled by investors of one Party and which have been made in the territory of the other Party" is included in the definition of investors in Korea-China FTA as is in China-Taiwan ECFA Investment Agreement. Taiwanese companies that have established subsidiaries or companies in a third country to make indirect investment in China are now protected as well under the ECFA investment Agreement. The Korea-China BIT as amended in 2007 defines an "investor" only as "any natural person or legal entity of one Contracting Party who invests in the territory of the other Contracting Party." Should the future Korea-China FTA include Korean nationals in third countries into its definition of "investors," it will be capable of providing protection for a wider range of Korean capital, including investments made by Korean companies from their offices or subsidiaries in third countries.

As Table 2 shows, the China-Taiwan ECFA Investment Agreement contains more progressive and advanced provisions than the Korea-China BIT. Therefore, negotiators of the Korea-China may as well review the applicability of some of these provisions to their negotiation. By doing so can they result in a more open investment agreement capable of providing greater protection for the flows of investment between the two countries.