

DEFINITION OF INVESTORS AND RELATED ISSUES IN INVESTMENT TREATY ARBITRATION UNDER THE PROPOSED TAIWAN-CHINA BILATERAL INVESTMENT AGREEMENT

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ABSTRACT

In light of the massive volume of Taiwanese investment in China, and the recently opened access of Chinese investment in Taiwan, Article 5 of the recently concluded Economic Corporation Framework Agreement (ECFA) between Taiwan and China specifically points out the necessity of a bilateral investment agreement (BIA) between the two parties, which is currently under negotiation. The definition of investors in the proposed cross-strait BIA is an important issue as it is a precondition for a private party to invoke the dispute resolution mechanism under the BIA. The commonly recognized criteria for the determination of covered investors are nationality or permanent residency for individual investors, and incorporation, effective seat, and/or economic link for legal entities. These established standards might require modification if applied in the proposed Taiwan-China BIA (TCBIA), due to the infamous “One China” policy. This article examines respective Taiwanese and Chinese legislations, regulations and existing cross-strait agreements in an attempt to find consensus for

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alternative standards, possibly a household registration or ID certificate standard for individual investors, and a combination of “incorporation” and “effective seat” plus control criteria for corporate investors. Under such approach, related issues, such as dual nationality, control over legal entities, and treaty shopping could be properly dealt with and the TCBI could thus serve Taiwan’s best interest in the cross-strait context.

KEYWORDS: *ECFA, BIA, ICSID, eligibility, investment treaty arbitration*