

Taiwan can only benefit from having its legislature review cross-strait pacts, write **Jerome A. Cohen** and **Yu-jie Chen**

# Smart politics

**T**aiwan's politics is in turmoil about the Economic Co-operation Framework Agreement (ECFA) signed last week with the mainland. Although the agreement promises to benefit Taiwan's economy, the island's politicians have been engaged in heated debate over how the legislature should consider whether to approve this 13th agreement between Taiwan's "semi-official" Straits Exchange Foundation (SEF) and the mainland's "semi-official" Association for Relations Across the Taiwan Strait (Arats). This useful debate, and the current inter-party negotiations it has spawned, offers a chance for Taiwan to improve its democratic institutions and transparency, and bridge the gap between bitterly divided political parties over the process of concluding future agreements with the mainland.

Amid the arguments about the appropriate legislative review process, it is easy to lose sight of the Ma Ying-jeou administration's real accomplishment in

From the outset of its cross-strait negotiations, the executive branch has sought to minimise the role of the legislature

dealing with Beijing. During the past two years, despite the mainland government's desire to avoid either acknowledging the legitimacy of the Republic of China on Taiwan or weakening Beijing's claim to sovereignty over the island, the SEF has concluded a series of important agreements with Arats without agreeing to Beijing's "one China" principle. And the latest agreement allows for institutional development in cross-strait relations by providing, for the first time, for establishing trade offices, monitoring agreement implementation, settling relevant disputes, terminating the agreement and organising a facilitating bilateral joint committee.

Yet the trade pact's importance has made it impossible for the Ma administration to further postpone the sensitive problem of the allocation of power between the executive and legislative branches in dealing with the mainland. From the outset of its cross-strait negotiations, the executive branch

has sought to minimise the legislature's role. The Ma administration did not submit any of its first dozen agreements with Beijing for substantive legislative review since it claimed no legislative amendments were needed to implement these agreements. Because the ECFA's implementation requires amendments of related legislation, the executive branch had to submit it for review. Yet it has been striving to limit the review's scope to prevent the legislature from modifying the agreement and to avoid delaying its start, scheduled for January 1.

Taiwan's constitution, laws and judicial interpretations offer little guidance about legislative review of cross-strait commitments. President Ma, his Kuomintang cabinet and the KMT caucus that dominates the legislature have invoked a range of domestic, foreign and international analogies to support their argument that the legislature should only engage in "wholesale review" that permits it to accept or reject the ECFA in its entirety but not to modify individual clauses.

The agreement, they claim, is the functional equivalent of a treaty, which in Taiwanese practice is generally accorded wholesale review. The opposition Democratic Progressive Party (DPP) has argued for a clause-by-clause review that would allow possible amendment of each clause.

The executive branch argues that this would be inconsistent with international practice in legislative review of trade agreements, render its negotiations meaningless and discourage others from concluding a free-trade agreement. The DPP, led by Dr Tsai Ing-wen, an expert on international trade law, says that, to the extent that such practice exists, it is usually part of a political process in which the legislature authorises negotiations in advance, monitors their progress and sometimes even takes part. This is clearly not what happened with the trade pact, even though Wang Jin-pyng, speaker of the legislature and former KMT vice-chairman, suggested such arrangements as early as 2008.

Moreover, as pointed out by several knowledgeable sources, including Wang, the legislature has already conducted clause-by-clause reviews of several free-trade agreements with Central American countries, without insisting on changes. It has even conducted a detailed review of a copyright agreement with the United States and demanded changes, but later withdrew its demands under executive



pressure. The legislature has also revised a domestic law to press for executive renegotiation of a beef import agreement with the US.

Important cross-strait agreements, which are more politically sensitive than any of those documents, deserve the same degree of legislative scrutiny, at least in the absence of early legislative supervision of the process. The legislature should be able to propose amendments to the ECFA if necessary, in accordance with its existing practice. The executive branch can then assess whether these demands warrant the SEF's renegotiation with Arats or another effort by the administration to persuade the legislature to relent.

Yet, in view of the current partisan political climate, the concern that a clause-by-clause review might substantially delay the trade pact's approval should not be overlooked. If the DPP acts reasonably and constructively in the review, rather than engage in the obstructionist tactics that the KMT fears, it will gain public support.

One hopes the executive branch has learned its lesson from this difficult chapter and will work with the legislature to set up

suitable arrangements for earlier and better executive-legislative collaboration in future negotiations with the mainland. Closer collaboration is likely to help Taiwan's political system function better, as well as increase the legitimacy of cross-strait agreements. It will also give the opposition party a role in monitoring the process and perhaps start to bridge differences between the KMT and the DPP over how to deal with the mainland.

Whatever review process is deemed appropriate for the especially delicate problems raised by cross-strait relations need not control the review process for Taiwan's free-trade agreements. The legislature is free to adapt its procedures to the needs of those negotiations, just as it is free to deal with the unique features of cross-strait relations.

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