

A Legal Perspective of the Chiang-Chen Talks

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On December 21 the sixth round of cross-strait talks between Chiang Pin-kung, chairman of Taiwan's Straits Exchange Foundation (SEF), and Chen Yunlin, chairman of China's Association for Relations Across the Taiwan Straits (ARATS), were held at the Grand Hotel in Taipei. Since the Chinese Nationalist Party (KMT) returned to power in May 2008, it has already signed 12 agreements with the Chinese government including the Economic Cooperation Framework Agreement (ECFA). In this latest round of talks an investment protection agreement was not signed as originally planned. But SEF and ARATS still signed a Cross-strait Agreement on Medical and Health Cooperation. The legal implications of these agreements deserve some in-depth analysis.

Since the opposition Democratic Progressive Party (DPP), which used to radically oppose Chen's visits to Taiwan in the past, acknowledges them now as routine business, the Taiwanese have shifted their focus of attention to the outcome of the Chiang-Chen meetings and whether the content of the agreements signed there is harming Taiwan's national interests. Therefore the DPP did not plan any street protests during the sixth Chiang-Chen talks, but

instead closely monitored their actual content. DPP Chairwoman Tsai Ing-wen noted earlier that party headquarters has established a taskforce on the sixth Chiang-Chen talks that would constantly watch their progress and express the DPP's views and standpoints. The taskforce would also monitor the formation of a Cross-strait Economic Cooperation Committee under ECFA and deal with it from a legal perspective.

First, the term "the two sides" is used a lot in the text of the agreements. Yet exactly whom does "the two sides" refer to? That has not been clearly defined. The agreements' preambles frequently use the term "the judicial persons Straits Exchange Foundation and Association for Relations Across the Taiwan Straits," which does not imply that these are negotiations between the governments on both sides of the Taiwan Strait. Moreover, in the preambles it is not mentioned at all that SEF and ARATS have been empowered or commissioned by their respective governments to hold negotiations. On top of that the agreements carry the signatures of SEF Chairman Chiang and ARATS Chairman Chen, which shows that "the two sides" refers to SEF and ARATS. But if these two non-

governmental organizations are the principals of the negotiations, then the talks have been severely degovernmentalized.

Furthermore, in connection with the agreements' date of effect there is no mention that the said agreements require the approval of both governments before taking effect. In the first six agreements the date of signing is clearly determined followed by a clause that stipulates that the agreement will go into effect a certain number of days later. The latter six agreements stipulate that the agreement will "go into effect after each side has completed relevant preparations starting with the date of signing, but not later than a certain number of days thereafter." From such agreement wording the government's role is not visible as the principals of the negotiations have been severely degovernmentalized.

Then again, after the agreements have been signed and have taken effect, their implementation implies the assertion of public authority. But under the chapter or articles on "liaison mechanisms" or "liaison principals" the agreements distinguish between two categories, namely "matters negotiated in this agreement" and "amendments of the agreement and other relevant matters." In the case of the former the nongovernmental organizations that are involved with the implementation of the said matters liaise with each other. For instance, the Taiwan

Strait Tourism Association of Taiwan and the Cross-Strait Tourism Association of China are responsible for the Cross-Strait Agreement on Mainland Residents Visiting Taiwan for Tourism. In the case of the latter, SEF and ARATS are in charge. This shows that the agreement deliberately puts the agreement's implementation in the hands of nongovernmental principals. Furthermore, regarding who should explain the problem if disputes arise over the implementation of an agreement, presently most agreements adopt the following approach: "Should disputes arise over the implementation of the agreement, the two sides should negotiate a solution as soon as possible." But the term "the two sides" clearly refers to SEF and ARATS. If SEF and ARATS negotiate disputes over the implementation of an agreement, the principals who implement the agreement have clearly been turned into nongovernmental bodies.

It also deserves attention that the names of all these agreements start with the term "Cross-strait." And given that the government of President Ma Ying-jeou has accepted the 1992 Consensus and the definition that "the two sides of the Taiwan Strait belong to one China" these agreements have become domestic agreements under the "one China" framework. Let's take a look at the contents of the agreements. The

“air transport agreement,” for instance, clearly excludes carriers from third countries from operating cross-strait flights. The “sea transport agreement” even rules out that flag of convenience vessels operate cross-strait sea routes. Article 3 of the said agreement casts aside international navigation law, stipulating that “vessels registered on either side of the Taiwan Strait will fly their house flag, but do not fly any flag at the stern and on the mainmast from the time of entry into the other side’s harbor to the time of exit,” creating the impression that the vessel is sailing within national borders. The regulations mentioned above clearly treat Taiwan as part of China’s domestic territory.

On top of that, the “Agreement on Cross-Strait Joint Crime-Fighting and Judicial Mutual Assistance” particularly pertains to judicial sovereignty, because it involves the service of documents, the investigation of evidence, and the transfer of criminals. For the service of judicial documents China tries to adopt the “court to court” model used in Hong Kong and Macao, based on Article 95 of the Hong Kong Basic Law and Article 93 of the Macao Basic Law, which would mean that the signing courts commission each other with the service of judicial documents. This approach differs from the state-to-state service of judicial documents under the Hague Arbitration Convention and is a product

of the “one country, two systems” concept and the Basic Law framework. Moreover, the agreement stipulates that for the request procedure the two sides create a special “document format” that is exempt from “document authentication.” This arrangement completely circumvents the regulations of the Hague Arbitration Convention on the service of international documents, while coming close to the method of serving judicial documents that China currently uses with Hong Kong and Macao. The regulations mentioned above will turn Taiwan into an area of China.

As shown above, the Ma government will use even more political trumps including sovereignty to extract short-term economic and commercial advantages from China. As a result the situation will gradually change with China continuing to insist on “one China” and Taiwan avoiding to mention the sovereignty of the Republic of China toward the outside world. Under such a framework, which means that Taiwan refrains from creating the impression of “one China, one Taiwan” or “two Chinas,” Taiwan’s subjectivity will make an even greater step backward than under the KMT’s past “one China, two interpretations” policy and will eventually vanish completely. The Ma government’s pursuit of greater international space for Taiwan also builds on the acceptance of “one China, with different

interpretations at home and abroad,” and even China’s goodwill. We should pay attention that Taiwan’s participation in international affairs will be placed under the cross-strait framework, if we accept “one China” and if all matters require China’s prior consent. If we then also implement a policy that treats diplomatic issues as cross-strait issues, we will indirectly create the wrong impression that the People’s Republic of China holds sovereignty over Taiwan and has the final say over our participation in the international community. As a result Taiwan’s status in international law would be severely damaged. **B**