

March 5, 1979

TAIWAN LEGISLATION S. 245-H.R. 2479

STATUS

On January 26, 1979, President Carter sent legislation to Congress to create an American Institute in order to "maintain commercial, cultural, and other relations with the people on Taiwan without official government representation and without diplomatic relations." On March 1, 1979, the U.S. Embassy in Taipei closed. No formal contact between the United States and Taiwan will resume until a new legal framework replaces diplomatic relations, which President Carter ended in favor of normalization of relations with the People's Republic of China.

Both the Senate Foreign Relations Committee and the House Foreign Affairs Committee held hearings on the legislation in February that led to substantial changes in the President's proposal. On February 22 the Senate concluded its mark-up of S. 245 and on March 1 reported the bill out of committee accompanied by Report No. 96-7. The House concluded its mark-up on February 27 and reported its bill, H.R. 2479, out of committee the following day. The Senate is scheduled to begin debate on the bill on March 6 and the House on March 8. With the absence of relations with Taiwan since March 1, prompt consideration and passage of legislation dealing with Taiwan is expected.

During consideration of the Administration bill in committee numerous problems arose causing much of the legislation to be rewritten and many new sections added either to clarify or expand coverage of the original bill. In particular, both the House and Senate committees added sections dealing with the security of Taiwan. After initially threatening to veto any legislation containing such a section, the Administration backed down following the Chinese attack on Vietnam on February 17.

Similar controversies concerning the Taiwan Enabling Act, as the Senate has called the legislation, arose in both Committees in Congress and many of them are expected to arise again in floor consideration of the bill. The following analysis examines the legislation section by section with a focus on issues likely to arise in the Congress. In references to the bill the Senate sections are used with the corresponding House sections of the same legislation appearing in parenthesis.

TITLE

While the Senate has referred to the legislation as the Taiwan Enabling Act, the House refers to it as the United States-Taiwan Relations Act. But beyond the differences in the short titles is a significant difference in the formal purposes of the two bills. The Senate bill specifically states that the general purpose of the bill is to authorize "the maintenance of commercial, cultural, and other relations with the people on Taiwan on an unofficial basis, and for other purposes." The House bill makes no reference to "unofficial basis" and in committee it was decided that such did not need to be stated in the title. Moreover, the committee felt that in the bill itself many kinds of official relations are established through the "designated entity" (or American Institute in the Senate version).

TITLE I

The thirteen separate sections under Title I of the Senate bill cover almost all aspects of the legislation that involve substantial controversies. The same sections in the House bill appear mostly under Title II. Descriptive section titles have been added.

SECTION 101. (a) PARTICIPATION IN U.S. PROGRAMS

This broadly grants to Taiwan all rights it formerly had as a country under American law. Thus Taiwan can continue to participate in both ongoing and future American programs open to any other countries.

SECTION 101. (b) DEFINITION OF "PEOPLE OF TAIWAN"

This defines the term "people on Taiwan" to "include the governing authority on Taiwan recognized by the United States prior to January 1, 1979 as the Republic of China; its agencies, instrumentalities, and political subdivisions; and the people governed by it in the islands of Taiwan and the Pescadores on December 31, 1978."

The House definition (Sec. 205) similarly includes "the islands of Taiwan and the Pescadores...and the authorities exercising governmental control on those islands."

Omitted in both definitions is any allusion to the islands of Kinmen (Quemoy) and Matsu, the two islands of 76,000 people controlled by Taiwan just off the mainland coast. In discussions, particularly by State Department representatives before the House committee, it was asserted that the people on those islands would be included under the definition of "people on Taiwan" for purposes of visas, emigration, trade, etc. Nonetheless, some uncertainty exists about the status of those two islands under the law, particularly concerning the use and placement of American military equipment purchased by Taiwan. As island fortresses the two islands represent the first line of defense for Taiwan against any PRC attack.

An effort in the House committee to include the islands by name under the definition was defeated. Supporters of including the islands contended that by excluding them the U.S. may encourage the PRC to take action against them, particularly if under the legislation the U.S., in effect, maintains that they are not part of Taiwan. Opponents of inclusion argued that the Mutual Defense Treaty did not include them and they should not be "extended the degree of protection this bill contemplates," according to Cong. Bingham.

However, the definition of Taiwan and the legislation only peripherally deals with defense. The Mutual Defense Treaty terminates at the end of the year and no security commitment exists in either the Senate or House bills. An attack on Taiwan, as defined in the bill, is viewed with "grave concern" by the United States. Thus the inclusion of Kinmen and Matsu under the definition would only mean an attack on them would also be viewed with "grave concern" by the United States.

SECTIONS 102-106 (SECTION 201) LEGAL STANDING OF TAIWAN MAINTAINED

The Senate bill in some detail and the House bill very briefly provide for the continued legal standing of Taiwan under various programs and in any court actions. Section 104 (201c) provides that all existing agreements with Taiwan as of December 31, 1978 remain in force unless terminated. The termination mechanism presumably resides with the American Institute at the direction of the President. At the hearings some suggestions were made, particularly by the representative of the American Chamber of Commerce in Taipei, that no existing agreements should be terminated without the consent of either Taiwan or the U.S. Congress in order to prevent other agreements from ending through unilateral action by the President, as with the Mutual Defense Treaty.

SECTION 107 EXPANDED TIES AND HUMAN RIGHTS FOR TAIWAN

This section resulted from a Senate committee compromise amendment added after Senator Pell attempted to allude in the legislation to the division between the Taiwanese and others in the Republic of China. The language adopted merely refers to the Institute trying "to strengthen and expand the ties between the people of the United States and all the people on Taiwan and to promote full human rights for all the people on Taiwan. The Senate committee report (p. 26) stated that "this section was not to be construed as authority for Institute officials to intervene in Taiwan's domestic affairs by favoring one group of people on Taiwan...." Senator Pell, in a dissenting note in the Committee report, argued for a broader interpretation of the language.

The House committee defeated a similar amendment to the bill with the view prevailing that (1) such a role should not be performed by the Institute, (2) the proposal however phrased represented interference in the internal affairs of Taiwan and could encourage a Taiwanese independence movement, and (3) the provision represented an unnecessary insult to Taiwan, particularly given the human rights record of the PRC.

SECTION 108-110 (202) DEALING WITH TAIWAN THROUGH THE AMERICAN INSTITUTE

These sections establish the framework dealings between the United States and Taiwan through the American Institute ("designated entity" in the House bill). Throughout these sections the authority of the President in carrying out contact with Taiwan through the Institute is constantly asserted even though the legislation allegedly cuts off government contact with Taiwan.

SECTION 111 (201b) PROPERTY AND OTHER RIGHTS OF TAIWAN

This section mandates protection for Taiwan "in all courts in the United States"; that recognition of the PRC "shall not affect the ownership of, or other rights or interest in, properties, tangible and intangible, and other things of value, owned or held...by the people on Taiwan." Similar, but broader language exists in the House bill. The Senate bill specifically exempts from protection "diplomatic real properties situated in the United States which were acquired prior to October 1, 1949," the date the PRC came to power on the mainland.

Under this provision neither the Embassy of the Republic of China nor the Ambassador's residence at Twin Oaks would be protected by congressional action. The State Department argued before both committees that the PRC had a better claim to the diplomatic properties because the U.S. recognizes them as China

In the House committee an amendment approved by a 13-7 vote removed this exclusion of protection so that Taiwan's rights to these buildings "shall not be affected in any way by United States recognition of the People's Republic of China." (201b3) Technically this means that the the Republic of China had a right to transfer ownership of the properties to the Friends of Free China, which they did in late December. The ROC purchased the properties in 1947 and, her supporters argue, still exists whether recognized by the United States or not.

SECTION 112: EXPANSION OF OPIC INSURANCE ON TAIWAN

This amendment by Senator Percy, not appearing in the House bill, allows the Overseas Private Investment Corporation to provide insurance and other guarantees to businesses investing in Taiwan, notwithstanding its usual \$ 1000 per capita income restriction. Only in the past year did Taiwan surpass this income level, but the Senate committee believed that new business uncertainties arising with the U.S. break in diplomatic relations justified this action to boost investment confidence.

SECTION 113 (202c) PRIVILEGES AND IMMUNITIES FOR TAIWAN

The Senate bill authorizes and requests the President "to extend...privileges and immunities comparable to those provided to missions of foreign countries" to representatives of the people of Taiwan. In a more limited provision the House simply authorizes the President to extend "such privileges and immunities...as may be necessary for the effective performance of their functions."

Senator Stone, who proposed this section, presented a check-list to the State Department of what rights members of the delegation from Taiwan to the United States would have under this formulation. They would have all the rights of diplomats except for losing immunity from prosecution at all times, Al visa status and diplomatic license plates. In the committee report (p. 30) it was noted that the Senate "intends under this section that the (Taiwan representatives) will be exempt from foreign agents registration requirements, and the State Department confirms that this will be the case."

The State Department argued that any expansion of privileges beyond those granted in Section 113 would constitute encroachment on official diplomatic status which the PRC would not accept. However, others argued after having granted full liaison status to Peking while maintaining diplomatic relations with Taiwan sets a precedent for granting full diplomatic privileges to Taiwan.

Not considered in this section was the number of offices which the ROC would be able to maintain in the United States. Although the prerogative resides with the President, the Congress can request and

authorize levels they deem necessary. Technically the American Institute will decide this issue, although the President reportedly has asked the ROC to close six of its present fourteen consulates under the new relationship. In the hearings Senator Stone indicated that only by maintaining the existing number of offices can the U.S. maintain the status quo of commercial, cultural and other relations with Taiwan. Much of the work of Taiwan with the Chinese communities in the United States could be affected by a cutback and cultural relations would not be maintained at their present level.

SECTION 114 (2 and 101) THE SECURITY OF TAIWAN

This section generated the most controversial issues and committee debate. Initially the Administration opposed any such provision in the bill, but following the Chinese attack on Viet Nam on February 17 some statement on security seemed particularly appropriate. The Administration reluctantly agreed to the compromise Church-Javits language and the similar proposal of Congressman Zablocki in the House. These sections of the bill consist of policy statements by Congress can be divided into three separate areas: security language, arms sales and boycotts.

SECTION 114a (2:5) "GRAVE CONCERN" OR SECURITY THREAT

Both Senate and House versions contain the same key phrase although they appear in slightly differing contexts. The Senate states that the U.S. would "consider any effort to resolve the Taiwan issue by other than peaceful means a threat to the peace and security of the Western Pacific area and of grave concern to the United States,"

Senator Percy attempted to strengthen this key provision by replacing "of grave concern" with the words "to the security interests of." He argued that with the break in the Mutual Defense Treaty the United States needed stronger language than "of grave concern" to indicate that the U.S. would continue to support Taiwan. Ironically Percy largely adopted language which Sen. Javits had proposed two weeks earlier which stated that the U.S. would regard an attack on Taiwan as "a common danger to the peace and security of Taiwan and the United States." But once Javits agreed to a compromise proposal he would no longer support his original language. Opponents in committee contended that Percy's language was too strong and might be unacceptable to Peking. Percy argued that even his proposal did not mandate the use of force. The committee rejected his amendment 10-5, but Percy is expected to propose it again on the floor.

A similar amendment in the House committee by Cong. Quayle was defeated by a 16-9 vote. He argued that "grave concern" was "so ambiguous" that it "doesn't mean anything." Rather than simply dealing

with an armed attack, the corresponding House provision stated that "Any armed attack against Taiwan, or the use of force, boycott, or embargo to prevent Taiwan from engaging in trade with other nations, would be a threat to the peace and stability of the Western Pacific area and of grave concern to the United States." By including problems of trade in this section it made the Percy phrase much broader in its area of coverage and some House members dissented for this reason.

SECTION 114b (2:5) BOYCOTT OR EMBARGO AND TAIWAN

As noted above, the same section of the House bill dealing with attacks on Taiwan included threats to Taiwan's trade. The House committee adopted an amendment by Cong. Broomfield to add the words "boycott, or embargo" to the original committee bill to deal with indirect threats to the continued economic viability of Taiwan.

A separate section of the Senate bill (114b) indicated that the U.S. would "maintain its capacity to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people on Taiwan." The phrase "other forms of coercion," according to Javits, meant "any ingenious devices the Chinese could come up with" to threaten Taiwan and thus seemed even broader than the House language.

State Department witnesses at the House mark-up session indicated that under the legislation the provisions of the Export Administration Act dealing with boycotts would apply to actions by the PRC against Taiwan. The committee decided to explicitly state that in its report rather than add such a provision to the bill. However, under that act American companies participating in the boycott suffer but not the nation initiating the boycott. The State Department contended that the law already applied earlier to the PRC but no action had ever been taken.

SECTION 114b2 (101a) SALE OF DEFENSIVE ARMS TO TAIWAN

In order for Taiwan to defend herself against armed attack both the Senate and House committees added provisions to the Administration bill explicitly dealing with the continued sale of arms to Taiwan. Under Sec. 101(a) the House stated that the U.S. "will make available to Taiwan defense articles and defense services for its defense against armed attack." Meanwhile the Senate version promised "to provide the people on Taiwan with arms of a defensive character."

In neither piece of legislation was an attempt made to elaborate upon the precise kinds of arms that should be included. Moreover, under the new relationship active duty military personnel apparently will be prohibited from going to Taiwan to consult with military leaders there and Taiwan will no longer be able to send its military personnel to the United States for training.

An amendment by Sen. Helms, not formally proposed in committee, attempted to specify the meaning of defensive arms to include an all-weather capable fighter, anti-ship weaponry including anti-submarine warfare weapons and anti-ship missiles. (Report p. 59) The formal committee report did not mention any weapons and in the past the U.S. Government has refused to sell modern weapons, such as the F4, F14 or ship missiles. However, with the prospective sale of weapons to the PRC by Western nations, particularly Britain and France, and the withdrawal of U.S. forces and treaty commitments to Taiwan, present military capabilities of Taiwan will not be able to contend with the potential PRC threat in several years.

TITLES II AND III (SECTIONS 203 and 204) THE AMERICAN INSTITUTE

These parts of the legislation deal extensively with the structure of the American Institute and the rights of U.S. Government employees to leave government service to work at the Institute without losing any employment benefits. These sections provide for protection of the Institute from local laws interfering with its operation.

TITLES IV AND V CONGRESSIONAL OVERSIGHT

These titles of the Senate bill, with no comparable House language, require that agreements reached with Taiwan through the Institute be transmitted to Congress for review and approval if necessary. Under Section 402 the Secretary of State must report to Congress each six months for next two years "describing and reviewing economic relations between the United States and the people on Taiwan, noting any interference with normal commercial relations."

Sen. Hollings has proposed a much more extensive congressional review process in the form of a new commission on security and cooperation which would monitor China policy just as the Helsinki Commission monitors the Treaty on Security and Cooperation in Europe.

CONCLUSION

The legislation reported out by the House and Senate committees drastically altered the Administration's proposal, which dealt very superficially with potential problems Taiwan could encounter. The emerging legislation particularly protects the crucial economic interests of Taiwan. However, the commercial success of Taiwan also resides in her security and confidence in the future and the legislation may still not cope adequately with the uncertainty engendered in Taiwan by the new China policy. The failure of the U.S. to formally recognize the reality of Taiwan will constantly erode the effectiveness of this legislation.

Jeffrey B. Gayner
Director of Foreign Policy Studies