



## Beijing's Legal Preemption by Jianwei Wang

The Bush administration is now infamous for its "preemption doctrine," which warns rogue states against providing safe havens for international terrorists or possessing weapons of mass destruction. The Chinese government is following in U.S. footsteps when it comes to Taiwan. There is one big difference, however: at least for now, the instrument for preemption is not force, but law.

On Dec. 29, the Standing Committee of China's National People's Congress voted unanimously to submit the draft anti-secession law to the full session of the NPC when it meets in March. The law is designed to prevent Taiwan from formally declaring political independence. For many cross-Strait observers, Beijing's decision to widely publicize this legislation at this time is puzzling. After all the pan-blue camp, which leans more toward recognizing the "one China" principle than does the government, won an unexpected triumph in the recent legislative election. It was anticipated that Beijing would feel relieved and would seize the opportunity to soften its policy and even offer an olive branch to Taiwan.

Beijing took little comfort from the election results and instead moved to make public the consideration of the long-speculated anti-secession law. Beijing's move represents a significant change in its strategic mindset in dealing with Taiwan. In the past, Beijing usually reacted to the ever-changing Taiwan political landscape, "striking only after the enemy has struck." After Taiwan's March presidential election in which the pan-blue ticket was defeated, Beijing was determined to reclaim the initiative in cross-Strait relations by preempting rather than merely reacting to anticipated policy changes in Taiwan.

The May 17 statement by the Taiwan Affairs Office of the State Council three days before Chen Shui-bian's inauguration speech was proof of this tactical shift. In this case, Beijing attempted to establish legal benchmarks – red lines – to forestall Chen's declared goal of passing a new constitution through a referendum in 2006 and put it into force in 2008, which will pave the way for Taiwan's *de jure* political independence. A narrow pan-blue victory in the legislative election is simply not enough for Beijing to let down its guard. Indeed some Chinese analysts predicted that Chen might further intensify his campaign of "de-sinicization." With the opposition unable to get its act together and moving ever closer to pan-green positions on cross-Strait relations, Beijing can no longer count on the KMT and PFP to block DPP moves toward political independence.

The proposed anti-secession law also indicates a subtle change in Beijing's priority in its Taiwan policy. For a long time, Beijing's slogan has been "anti-independence and the promotion of unification" (*fan du cu tong*) as if these two

aspects of the policy could be achieved simultaneously. Jiang Zemin attempted several times to set up a timetable for unification. Political reality in Taiwan, however, forced the new Chinese leadership to realize that the goal of unification with Taiwan was unattainable in the short term. Although the long-term objective of unification will never be forgotten, the more immediate and urgent challenge for the Chinese leadership is thwarting or at least slowing Chen Shui-bian's timetable for independence. In other words, opposition to independence does not necessarily mean visible progress toward unification. If Taiwan maintains its current status for the foreseeable future, so much the better. That is one of the reasons why the title of the proposed legislation was changed from the unification law to the anti-secession law.

When it comes to Taiwan's independence, Beijing perceives that it has some common interests with Washington. Although many Chinese are deeply skeptical that the United States would ever be willing to see China formally unified with Taiwan, they are convinced that Washington does not want to see Taiwan move toward *de jure* independence. This is not because Washington supports Beijing's long-term goal of unification, but because Taiwan's independence would drag the U.S. into a disastrous military confrontation with China.

In this regard, recent comments by senior State Department officials on the Taiwan issue certainly please Chinese leaders. Then-Secretary of State Colin Powell and Deputy Secretary of State Richard Armitage on various occasions more explicitly endorsed Taiwan as part of China, showed more understanding of unification as China's national aspiration, and laid out limits in the U.S. commitment to the defense of Taiwan, departing from the traditional strategic ambiguity on these issues. These remarks, to the extent they are a reflection of a consensus within the Bush administration rather than mere slips of the tongue, reassure the Chinese leadership that when it comes to independence, the U.S. and China share the goal of reining in Chen Shui-bian. Obviously encouraged by Washington's signals, Beijing concluded that the current U.S. preoccupation with Iraq and the Middle East and its conflict-averse mentality in the Taiwan Strait provide a window of opportunity for China to establish its legal threshold to stop Chen before his de-sinicization crusade reaches a point of no return.

Furthermore, Beijing's preemptive move demonstrates that the Taiwan issue is not just a political and military battle, but also a legal wrangle. Ironically this is a result of learning from Washington and Taipei. In its dealing with China, Washington often put Beijing on the defensive by invoking the Taiwan Relations Act (TRA), domestic legislation that obligates the U.S. to help Taiwan in case of a mainland military assault. Beijing witnessed with dismay America's decreasing adherence to the three communiqués. Most U.S.

policymakers consider the TRA to be more important and binding than the three communiqués.

The referendum laws passed by Taiwan last year also alarmed Beijing. Although they do not cover issues related to unification or independence, they could be revised for that purpose. In contrast, Beijing has only rhetoric and policy statements such as “Jiang’s eight points,” which pale in comparison to laws. Another purpose of the anti-secession law therefore is to level the playing field among the three sides as they wage this so-called “legal war” on Taiwan.

Some pundits in Washington and Taipei declared the anti-secession law a provocative action by China that changes the cross-strait status quo. In one sense, it is a fair assessment. It should not be forgotten, however, that this is the logical consequence of Chen’s attempt to make a new constitution through referendum. Indeed, crafted discreetly, the anti-secession law could preserve – rather than disrupt – the status quo by creating a new triangle of checks and balance with each side possessing a legal “lethal weapon” to punish another’s misbehavior. Washington could use the TRA to deter the mainland’s unprovoked use of force against Taiwan. Beijing could invoke the anti-secession law to prevent Taiwan from slipping out of hand. And Taipei could use the referendum law as a last resort to legalize separation from China if Beijing treats the Taiwanese people too harshly. Thus, a fragile but viable status quo might be sustained in the Taiwan Strait for sometime to come. While this is not ideal, it is in the interest of all three parties involved.

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**Editor’s Note:** It is with great sadness that we at the Pacific Forum CSIS acknowledge the passing of a close friend and long-time supporter of the Forum, Koo Chen-fu, who died of cancer last month in Taipei at the age of 88. “C.F.” was an internationally renowned businessman and statesman who played an instrumental role in cross-strait developments as head of the Straits Exchange Foundation (SEF) which conducted unofficial, but government-supported, talks with Beijing’s Association for Relations Across the Taiwan Straits (ARATS), in the early 1990’s, in what was more informally known as the Koo-Wang Talks, after C.F. and his Chinese counterpart, Wang Daohan. Dr. Koo received the Pacific Forum’s Habib Award (named after our former Board Chairman, Ambassador Philip Habib) in 1994 for his outstanding service to the cause of international peace. While Wang Daohan was not in good enough health to attend the funeral services for Dr. Koo, held on Feb 2, 2005 in Taipei, Beijing did send two senior ARATS representatives, raising hopes that the passing of this great leader might in some way help open the door for the future cross-strait dialogue he worked so hard to promote.