

China Analysis

Les Nouvelles de Chine

This section, prepared by the Asia Centre (www.centreasia.org), draws mainly on the press in Chinese, aiming to reflect the point of view of the People's Republic of China on international questions and issues related to Greater China.

Abandoning the Two-State Theory

Analysis by Hubert Kilian based on:

- Wang Shan, "Ma Ying-jeou and the non-state theory: Taiwan or China's puppet," *Xin Taiwan Xinwen Zhoukan*, n° 651, 11 September 2008.
- Hsueh Hua-yuan, "Ridiculous non-state theory," *Xin Taiwan Xinwen Zhoukan*, n° 651, 11 September 2008.

In rhetorical terms, relations between the two sides of the Taiwan Strait have entered an uncharted phase with the reformulation by President Ma Ying-jeou of the nature of these relations. On 26 August 2008, in an interview with the daily *Sol de Mexico*, Ma said, "Relations between the two sides cannot be qualified as state-to-state relations. It is a special relationship between a free region and a mainland region but not between two countries." The president sought to justify his statement by citing the Constitution of the Republic of China, which as he interprets it does not allow the existence of another country on its territory.⁽¹⁾ This marks a major rupture with the two-state theory enunciated in July 1999 by then president Lee Teng-hui. By characterising the cross-strait exchange as "special state-to-state relations" (*teshu de guoyuguo de guanxi*), Lee had provoked major tensions, and China reacted by suspending the informal dialogue between the two sides. Now the government has broken unambiguously with the policy of Chen Shui-bian, who declared in August 2002 that there was a state on each side of the strait (*yibian, yiguo*). Ma's statement, which set off no ripples except among the opposition ranks, amounted to a return to the situation that prevailed until the late 1990s. The lead article in the pro-independence weekly *Xin Taiwan Xinwen Zhoukan* said that Ma's stand amounted to a vassalisation and "desovereignisation" (*qu Taiwan zhuquan*) of the island. The mention of two "regions" as well as the "special relations" that entailed meant the denial of the right to sovereignty of 23 million Taiwanese people, an asymmetric concession made with no reciprocal gesture by the Peo-

ple's Republic, the author said, citing a recent letter by Chinese ambassador to the United Nations, Wang Guangya, reminding member states of the one-China principle.⁽²⁾

Attacking the rhetorical dimension of this reformulation, the author dismisses the argument that the RoC constitution precludes another state on its territory. He says it is based on a political decision equivalent to the one taken by Chiang Kai-shek in 1971 when he rejected the principle of double representation for China in the United Nations. Today, only the Chinese threat helps feed the fiction that legal obstacles disallow mutual recognition.

In the interview, Ma stressed the need to set aside disputes over sovereignty. He recalled that the 1992 consensus was meant to serve as the basis for conducting cross-strait relations until the issue was finally resolved. But the author of the article says the 1992 formula (one China, but different interpretations of it, *yizhong gebiao*) has never existed outside Taiwan. It was invented by the Kuomintang member of Parliament Su Chi, who now heads Taiwan's National Security Council. Beijing swears by the One-China principle.⁽³⁾ Adhering to the 1992 consensus and describing Taiwan as a "region" (*diqu*) negates the island's sovereignty and is a manifestation, the author says, of a gradual slide to-

1. The Chinese government covers a mere 18% and insurance accounts for 30%. Study published in *The Lancet*, "Health System Reform in China," Vol. 372, Issue 9648, October 2008.
2. According to Ministry of Health figures published in the national media: see for example: Zhang Haizhou, "Feedback sought on reform of healthcare," *China Daily*, 15 October 2008.

wards unification with the mainland (*huadu jiantong*).

The author of the second article says the re-characterisation of cross-strait ties has to be anchored in a strictly Taiwanese historical perspective, to better position Taiwan with regard to the RoC constitution, and to definitively remove the threat of civil war. But given the absence of consensus on the issue of national identity, Ma has rendered this dimension murky. The president has limited himself to relations between the RoC and the PRC. The author says the problems goes back to the San Francisco Peace Treaty of 8 September 1951 between Japan and the United States,⁽⁴⁾ which failed to clearly set out Taiwan's status, following the precedent of the 1943 Cairo Declaration and the Potsdam Declaration of 1945,⁽⁵⁾ which failed to sufficiently clarify elements setting out that Taiwan belonged to the RoC in international law. Elaborating the classical pro-independence legal arguments, the author says it is wrong to redefine cross-strait ties in light of current tactical exigencies alone.

Facing attacks by Lee, who was furious at seeing his grand contribution to the construction of a purely Taiwanese nation

state thus denigrated,⁽⁶⁾ Ma said in a press statement⁽⁷⁾ that the concept of region had first been suggested by Lee himself in the *Guidelines for National Unification* in 1991, in which the two sides of the strait were deemed "political entities." Moreover, Ma stressed the need to overcome the sovereignty dispute.

Drawing up a balance sheet on the first 100 days of Ma's presidency, the two authors voiced disquiet over the indifference that greeted the re-characterisation, pointing to what they saw as three failures by Ma (*sanxiu*). The first was diplomatic, with the foreign policy strategy based on "diplomatic truce" (*waijiao xiubing*), the second was economic, with the desire to overhaul the insular economic policy by seeking closer links to the mainland (*jingji xiushi*), and the third was on sovereignty (*zhuquan xiuke*), as the re-characterisation showed. The authors say this tendency has already rattled Japan and the United States. •

• Translated by N. Jayaram

The Human Rights Clause in China-Europe Negotiations

Analysis by Mathieu Duchâtel based on:

- Zhang Hua, "The problem of the clause on human rights and the Sino-European agreement on cooperation," *Xiandai Guoji Guanxi*, No. 8, August 2008, pp. 40-47.

For the European Union, any conclusion of a Cooperation and Partnership Agreement (CPA) is conditional upon the inclusion of a human rights clause in the final draft. The commission has made it clear that every new foreign agreement with countries outside the EU must link the further development of economic and commercial relations to a respect for human rights. The relevant clause allows the EU to suspend the preferential treatment granted to its partners in the event of a blatant human rights violation.⁽⁸⁾ So far, the differences between the two sides on the matter of human rights have delayed the signing of a CPA. While

3. "Wen: China's Health Care Reform Focuses on Public Service," *Xinhua*, 15 April 2008.
4. "Shouzhi liang tiaoxian": Separating hospital accounting between revenue generated from treatments and drugs on the one hand and expenditures on the other, in order to prevent medical establishments from making money through the sale of drugs.
5. As opposed to "guanban heyi," meaning management and direction of health establishments belong to just one structure in which the person in charge of the health department is also the hospital director. The *guanban fenli* principle suggests that the two are separate.
6. "Lee Teng-hui pans Ma over belief in '1992 consensus,'" *Taipei Times*, 26 October 2008.
7. "Ma vows to listen to 'voice of the people,'" *Taipei Times*, 27 October 2008.
8. "This commitment to human rights and a legal framework are reflected in the Union's common foreign and security policy provisions and in its development cooperation programme. Every new agreement between the EU and a third country includes a human rights clause allowing for trade benefits and development cooperation to be suspended if abuses are established." European Commission, *Europe and the World, Europe on the Move*, Brussels 2001.

the negotiations on this new framework agreement to replace the 1985 agreement on economic and commercial cooperation began in early 2007⁽⁹⁾ and are still ongoing, it appears that China is prepared to relax its opposition to the human rights clause. This article by Zhang Hua⁽¹⁰⁾ calls on the Chinese government to accept the clause, but with reservations intended to limit its range and to restrict the EU's ability to force China to make major changes in civil rights legislation.

The human rights clause is a crucial point in the Sino-European negotiations. Zhang Hua sees in it a potential source of contention between China and the EU that overshadows the embargo on arms sales, the question of granting China the status of market economy, the European trade deficit, or the problem of illegal Chinese immigration. Zhang Hua goes back over the history of the emergence of this clause in European diplomacy, but there is no need to rehash it all here.⁽¹¹⁾ He emphasises that this clause is fundamental to the EU's foreign policy. It has been added to more than 50 agreements of every type signed with more than 120 partners. Moreover, although it is not currently applied to agreements covering particular sectors, such as textiles or agricultural products for example, in the future it may well become a condition for signing such agreements as well.

Yet the EU's human rights diplomacy cannot be compared to the brutal methods of the Americans (such as military interventions or embargoes). The inclusion of a human rights clause in bilateral agreements is far more acceptable to developing countries. Zhang Hua points out that the EU does not employ double standards in its dealings with developing and developed countries. In 1997, negotiations between Europe and Australia for signing a cooperation and partnership agreement were blocked by Canberra's refusal to sign a text including a human rights clause, and the two sides had to be satisfied with issuing a joint communiqué. The EU negotiations with New Zealand encountered the same roadblock in 1999. In the case of any failure to respect the terms of the human rights clause, the EU reserves the right to suspend the implementation of the agreements. For example, this was the case with Belarus in 2001, and Zimbabwe in 2002. The EU also employs a number of positive incentives to encourage respect for human rights among its partners. In Zhang Hua's view, they are more effective in promoting respect for human rights than sanctions.

Unlike unilateral sanctions, the human rights clause is consistent with the rules of international law. It respects

the principle of the freedom of treaties, and in this regard it constitutes an attempt to promote human rights through consensus. This means that it avoids all interference in the internal affairs of other States, since these third parties agree voluntarily to link the human rights situation in their country to a partnership with the EU. In this sense, Zhang Hua believes that the acceptance of the human rights clause by such third parties is a manifestation of the EU's soft power, which has enabled the European Union to forge its own identity within the international system.

Zhang Hua considers the dialogue between China and Europe on human rights to be well established. There are many exchanges between the two parties in this key policy area. In 1996, alongside the dialogue within the EU-China summit meetings, the various bilateral policy discussions, and ASEM and the Security Council, the two sides initiated exchanges specifically concerned with human rights. Through the European agencies for democracy and human rights, the EU supports NGOs and civil society, as well as individuals in China who uphold the cause of human rights. In his view, the EU is already having an influence on the development of human rights protection in China.

Yet Zhang Hua acknowledges that there is still frustration in Europe over the amount of real progress over human rights in China, despite increasingly diverse bilateral channels of communication. That explains why, at the 10th EU-China summit in November 2007, the EU called for more substantial cooperation between the two parties on this issue, to which China agreed.

When discussions on the CPA were initiated in early 2007, the two sides faced a clear obstacle to the progress of their bilateral relations. On the one hand, the increasing volume of their joint activities and shared projects, and the importance of their mutual trade, provided sufficient grounds for re-assessing and upgrading (*shengji*) their bilateral relations. On the other hand, Beijing tended to see the human rights clause as interference in China's internal affairs, while for the EU it was a *sine*

9. The decision to open negotiations on a partnership and cooperation agreement was taken at the Helsinki summit. See paragraph 4 of the Joint Statement of the Ninth EU-China Summit, 9 September 2006.
10. Zhang Hua is a high-ranking member of the Chinese administration who holds a doctorate in international law at the University of Wuhan and specialises in EU law.
11. Readers interested in this issue can consult the following expert report: *Vaughne Miller, The Human Rights Clause in the EU's External Agreements*, research paper 4/33, House of Commons Library, 16 April 2004, www.parliament.uk/commons/lib/research/rp2004/rp04-033.pdf.

qua non condition. There could be no question of abandoning it to enable the CPA to be signed. In view of this, Zhang Hua believes that any attempt to convince the EU by reasoning that it was futile to try to get China to agree to the human rights clause, and by pointing to Europe's own interests, was a lost cause right from the start. His argument suggests that China opted for concessions when it perceived the Europeans' determined stance on the issue.

But accepting the human rights clause carries obvious legal risks for China. A CPA is a global agreement. Whereas until now the two sides in the negotiations have separated political issues from economic and commercial ones, the CPA ties them together. So the European Parliament, or those member states that strongly support human rights, may seize upon this agreement to demand that the EU should extract more concessions on human rights from China.

Zhang Hua calls for the human rights clause to be accepted with reservations (*you xiandu di jieshou*). There are many potential benefits for China in a CPA with a human rights clause attached. To sign it only amounts to institutionalising an already existing dialogue surrounding the question of human rights. Firstly, therefore, it does not represent a new departure, and since China has to demonstrate its political willingness to the EU, a good means would be to take the existing dialogue further. Secondly, there are the many benefits arising from China's acceptance of the clause, for the EU gives greater weight to rewarding its signatories than to punishing those who fail to respect it.

In addition to this, the author shows that the Europeans will have very limited room for manoeuvre in seeking to impose sanctions on China in the event of non-compliance with the clause. Historically, the EU has only applied sanctions to ACP states (Africa, the Caribbean, and the Pacific). In most cases these sanctions were imposed in response to UN Security Council resolutions. Moreover, whenever differences arise over human rights, the EU regularly favours political dialogue. Its approach to the promotion of human rights and democracy in China consists of encouraging progress in that area. Experience shows that before undertaking a sanctions policy, the EU always takes a prudent and well thought-out position. Since this process of considering sanctions is taken through consultations with all the European institutions and member states, the risk of sanctions is very low. Although Zhang Hua acknowledges that the situa-

tion in Europe is changing, he concludes that in the short term China is immune from any sanctions.

He also underlines the point that the human rights clause is a bilateral legal instrument. So he believes that China could make use of it at any time to denounce the human rights situation in Europe, even though that would have no precedent in the history of relations between the EU and another signatory State. The clause is a legal weapon insofar as the situation concerning the protection of immigrant and minority rights remains a problem in Europe. This argument concerning reciprocity was used by the EU to persuade Mexico to sign a partnership and cooperation agreement in 1997. It seems highly likely that the EU will make use of the clause as the legal basis for a very flexible partnership with China, giving priority to incentives and rewards.

In exchange for its agreement to sign, China could demand concessions in other policy areas, such as the embargo on arms sales or being granted the status of a market economy. It could also exercise better control over the EU's pressures on it with regard to the imbalance in Sino-European trade. If it shows flexibility in its diplomacy and willingness to address human rights, China could strengthen its own soft power, and avoid arousing misunderstandings and doubts in the West about its choice of the path of peaceful development.

Admittedly, the human rights clause will intensify China's "legal burden" (*falü fudan*). But it could put a limit on such pressures, and that is how acceptance "with reservations" should be understood. China should focus on refusing the inclusion in the final draft of any reference to international agreements that it has not yet signed. That is particularly true in the case of the International Covenant on Civil and Political Rights, which China signed in 1998 but has not yet ratified. Any mention of that pact would commit China to major changes in its legal provisions. The same consideration applies to any mention of the Universal Declaration of Human Rights. Mentioning these two documents would give the Europeans a lever (*shouren yibing*) to put pressure on China. In Zhang Hua's view, Beijing should limit itself to the usual references to democracy, the rule of law, and human rights, mentioning only documents that it has already signed, the five principles of peaceful coexistence, and the broad principles of the United Nations Charter. At the procedural level, China must insist on the inclusion of a point similar to Article 96 of the Cotonou Agreement, which provides for lengthy bilateral consul-

tations if either party should fail to meet its obligations, and sets out the principle that sanctions should be proportionate to the infraction concerned. The Chinese negotiating team must also get the Europeans to agree to arbitration procedures. Finally, Zhang Hua argues that it is important for a public statement to be issued, setting out the precise points of agreement and difference between the two sides, emphasising that incentives are preferable to sanctions, and that cooperation on human rights must be gradually upgraded, starting from the present level. For China, the human rights clause could thus be transformed into a declaration of goodwill. •

• Translated by Jonathan Hall

Glossary

Shengji	升級
you xiandu di jieshou	有限度地接受
falu fudan	法律負擔
shouren yibing	授人一柄
teshu de guoyuguo de guanxi	特殊的國與國的關係
yibian, yiguo	一邊一國
qu Taiwan zhuquan	去台灣主權
yizhong gebiao	一中各表
diqu	地區
huadu jiantong	化獨漸統
sanxiu	三休
waijiao xiubing	外交休兵
jingji xiushi	經濟休市
zhuquan xiuke	主權休克