

**DISSECTING INTERNATIONAL LEGAL COMPLIANCE:  
AN UNFINISHED ODYSSEY**

RODA MUSHKAT\*

*Rule conformity in the global arena, a non-traditional subject with distinct behavioral underpinnings, has evolved into one of the most extensively and intensively researched subjects in the field of contemporary international law. What started as a strictly American enterprise is now a broader undertaking spanning both sides of the Atlantic. A selective examination of an array of competing theories in light of the features and experience of the Sino-British Joint Declaration regarding the future of Hong Kong suggests that a further widening beyond the Western core of the world system may yield valuable substantive and methodological insights.*

I. INTRODUCTION

The academic discipline of international law has traditionally been concerned with the emergence, via custom-based and treaty-based channels, of international rules. In parallel to this predominantly descriptive endeavor, systematic efforts have been carried out to interpret and evaluate the end-products of the norm-creation process. Analytical schemes of an explanatory nature, particularly ones of the elaborate variety, have not featured prominently on the research agenda, which has displayed modest theoretical orientation. Historical accounts, factual assessment, rule determination, philosophical exploration and value judgment have largely shaped the evolution of this field of inquiry. Theory-building, as commonly conceived,<sup>1</sup> has mostly been relegated to the periphery, albeit not marginalized to a point of being overlooked altogether.

International legal scholars following the traditional path have tended to blur the distinction between “what is” and “what ought to be.” This has not manifested itself in a symmetrical fashion in that these two concepts have not been subject to equally critical examination. Prevailing realities have routinely been scrutinized in light of established prescriptive yardsticks—indeed, at times even novel ones—but

---

\* Professor and Director of the Centre for International and Public Law, Brunel Law School, Brunel University; Honorary Professor, Faculty of Law, University of Hong Kong; and Visiting Professor, Kadoorie Institute, University of Hong Kong. I wish to thank Miron Mushkat for helping me navigate through social science territory. The usual disclaimers apply.

1. See W. LAWRENCE NEUMAN, SOCIAL RESEARCH METHODS: QUALITATIVE AND QUANTITATIVE APPROACHES 37 (6th ed. 2005).

the standards assumed to govern State action have seldom been juxtaposed with patterns of behavior witnessed in concrete international settings. It has often been posited, whether explicitly or implicitly, that general rule acceptance is tantamount to faithful rule observance, or that “what ought to be” (in the broadly empirical, if not strictly normative, sense of the term) effectively translates into “what is” in typical circumstances.<sup>2</sup>

This analytical disposition cannot be said to be flagrantly at variance with global policy trends and well-ingrained, discipline-specific fundamental postulates. After all, legalization, productive or otherwise, of international exchanges appears to be underway. The corollary is that “[a]cross many issue-areas, the use of law to structure world politics seems to be increasing.”<sup>3</sup> By the same token, rightly or wrongly, law and prescribed behavior are inevitably intertwined at the conceptual level, at least in legal contexts, even if the empirical basis of the relationship may prove tenuous in practice. Law and prescribed behavior may be viewed as interchangeable by legal researchers, but not social scientists, because their work is heavily geared towards producing adherence to rules. That is not the case elsewhere in the academic domain.<sup>4</sup>

Prevailing realities may be adjusted or, alternatively, held constant for analytical purposes, in order to accomplish legitimate discipline-specific objectives. This is not however an inherently open-ended process in that, at some stage, they need to be incorporated into the conceptual framework for, otherwise, the mismatch between “what is” and “what ought to be” may materially impede scholarly progress. The fact is that prescribed State behavior commonly diverges from international law and that this phenomenon must be both duly acknowledged and methodically explained. Indeed, the empirical dichotomy between rules and adherence/non-adherence persistently witnessed in the global arena has provoked a strong response on the part of researchers in the field of international law (and, naturally, international relations). Substantial intellectual resources have thus been channelled in recent years into the study of State compliance, a move akin to a paradigm shift in terms of the deep theoretical re-orientation observed.<sup>5</sup>

In the rapidly expanding literature on the subject, compliance is broadly defined as “a state of conformity or identity between an actor’s behavior and a specified rule.”<sup>6</sup> Some authors include motives in their analytical schemes,

---

2. See Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in THE HANDBOOK OF INTERNATIONAL RELATIONS 538, 538 (Walter Carlsnaes et al. eds., 2002).

3. *Id.*

4. *See id.*

5. *See id.* at 544, 548, 552; William C. Bradford, *International Legal Compliance: An Annotated Bibliography*, 30 N.C.J. INT'L L. & COM. REG. 379, 379-83 (2004) [hereinafter Bradford, *Bibliography*]; William C. Bradford, *International Legal Compliance: Surveying the Field*, 36 GEO. J. INT'L L. 495, 495-98 (2005) [hereinafter Bradford, *Surveying*].

6. Raustiala & Slaughter, *supra* note 2, at 539. *See also* Roger Fisher, *Improving Compliance with International Law* 105 (1981); Ronald B. Mitchell, *International Oil Pollution at Sea: Environmental Policy and Treaty Compliance* 31 (1994).

7. *See* Raustiala & Slaughter, *supra* note 2, at 539. *See also* Friedrich V. Kratchowil, *Rules,*

drawing a distinction between compliance induced by negative-style tactics (e.g., fear of punishment) and more positive/subtle attitudinal techniques (e.g., inculcation of norms via formal or informal educational socialization).<sup>7</sup> Yet, this is not the dominant practice and, for the most part, the issue of causality is addressed separately. Compliance is also generally not equated with implementation, where implementation is defined as the process of converting commitments into action and legal system effectiveness. This is because rule effectiveness may persist in the face of low compliance and high compliance may coincide with ineffective standards.<sup>8</sup>

The scholarly work undertaken in this field is wide in scope and conceptually intricate. At the same time, it is still evolving and branching out in different directions. This may be viewed as a healthy development at this early juncture, and taking stock of divergent theoretical trends in an organized fashion may be more appropriate than attempting a thorough synthesis.<sup>9</sup> The purpose of this paper is even more modest. It accepts analytical fluidity and diversity as inevitable features of an extended learning process and the socio-political complexity towards which the endeavor is directed. It nevertheless critically examines some of the crucial assumptions underlying the principal conceptual schemes that have emerged and selectively pinpoints tangible gaps in the academic writings on international legal compliance (the two objectives converge, partially or fully, in concrete settings).

The Sino-British Joint Declaration (officially known as the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong<sup>10</sup>) will serve as a source of empirical illustrations in this context, albeit eclectically so. The choice of this particular case reflects the fact that it does not fall into the over-represented but not-comprehensive American and European categories. It is a way of stretching the boundaries of the population from which students of international law and international relations typically choose their samples when seeking to buttress theoretical assertions. The Sino-British Joint Declaration also possesses somewhat different attributes from those displayed by legal regimes commonly explored in compliance-oriented research, without constituting a distant outlier. It has also been adequately researched by both

---

Norms, and Decisions on the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs 96 (1989); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L. J. 2599, 2632-34 (1997).

8. See Raustiala & Slaughter, *supra* note 2, at 539. See also The Implementation and Effectiveness of International Legal Commitments: Theory and Practice 661 (David G. Victor et al. eds., 1998).

9. See, e.g., Raustiala & Slaughter, *supra* note 2, at 545; Bradford, *Bibliography*, *supra* note 5; Bradford, *Surveying*, *supra* note 5.

10. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, U.K. – P.R.C., Dec. 19, 1984, H.K.L.I.I. 2301 available at <http://www.hklii.org/hk/legis/en/ord/2301/>.

lawyers and social scientists. This paper, however, does not focus on the Sino-British Joint Declaration as such.

Before proceeding to survey briefly the relevant theoretical literature, it should be emphasized that the Sino-British Joint Declaration is not a statement of policy intent but a genuine international treaty. The status of such a mechanism is not affected by its title (Declaration) or the (declaratory) method embraced by the parties (the two governments in question) entering into an accord. By the same token, the Sino-British Joint Declaration readily meets the definitional criteria necessary to qualify as an international treaty.<sup>11</sup> Last but not least, the two signatories went to considerable lengths to signal that they consider the agreement (including its Annexes) as an instrument giving rise to binding rights and obligations (e.g., by registering it with the United Nations in accordance with article 102 of the UN Charter).<sup>12</sup>

The issue of effectiveness doubtless poses an analytical and practical challenge. No sanctions may be invoked in the event the provisions of the accord are violated. To make matters worse, no means of dispute settlement are available and access to the International Court of Justice is realistically precluded (due to the non-acceptance by the PRC of the compulsory jurisdiction of the institution). This is a potentially problematic configuration, hinging on the goodwill exhibited by the parties (or, to be exact, one of them) in changing circumstances over a long period of time.<sup>13</sup> As indicated earlier, however, compliance and effectiveness need not be highly correlated. Strong adherence to poorly-structured legal regimes, and the opposite pattern, is not rare socio-political phenomena.

## II. SEARCH FOR THEORETICAL ENLIGHTENMENT

Cross-fertilization between international law and sister disciplines has varied over time and from one specific area of academic inquiry to another. A certain degree of openness to external influences has nevertheless prevailed throughout its intellectual evolution and this has manifested itself in the handling of the topics dissected. Compliance has consistently been at the high end of the ever-widening historical range. From inception (to the extent that it may be identified with any precision), the study of the subject has borne traces of a coherent interdisciplinary/multidisciplinary orientation. The impact of major schools of thought shaping the development of the social sciences (particularly, but not exclusively, international relations) has been apparent, whether or not explicitly acknowledged. This includes realism, liberalism, structuralism, public/rational choice and constructivism.

The frequent crossing of established scholarly boundaries may account for the methodological consciousness displayed, another salient characteristic of the work

---

11. Vienna Convention on the Law of Treaties art. 2, ¶ 1(a), May 23, 1969, 1155 U.N.T.S. 331 (defining a treaty as "an international agreement concluded between States in written form and governed by international law").

12. See RODA MUSHKAT, ONE COUNTRY, TWO INTERNATIONAL LEGAL PERSONALITIES: THE CASE OF HONG KONG 140-41 (1997).

13. See *id.*

on international legal compliance. There is a definite awareness of the formal side of concept utilization that may need to be brought into play when seeking to impose an intellectual structure on complex socio-political reality. Relevant concepts (compliance and others) are generally delineated with considerable care, effectively combined into clusters, clearly linked and allowed to vary. This effort extends beyond generating ad hoc explanations into the realm of theory building (unusually for lawyers, it is a largely deductive, as distinct from an inductive, undertaking).<sup>14</sup>

Certain features of this methodological thrust should be highlighted at the outset. Concepts are multilevel in nature. At the basic level, their fundamental essence is captured. At the secondary level, their principal dimensions are identified. At the data/indicator level, they are measured and operationalized.<sup>15</sup> Students of international legal compliance function predominantly at the first two levels. For the most part, they are engaged in qualitative rather than quantitative research. The corollary is (although it does not automatically follow) that they belong not to the operationalizing tradition of methodological inquiry, but to its ontological counterpart (the latter aims at producing clusters of concepts that portray the key facets of the social world and aspires to enhance the understanding of social phenomena).<sup>16</sup>

Nor are the attempts at theory building/testing uniformly geared towards determining causality. This is often the case, yet there are ample exceptions to the rule. The ontological perspective tends to exhibit a functionalist bias. Within this framework, greater emphasis thus tends to be placed on functions that must be performed for conditions (such as compliance) to be satisfied than on causes (e.g., democracies cannot operate effectively unless competitive elections are held, without causality being implied).<sup>17</sup> Consequently, the theories may pertain to the interrelationships of the secondary-level dimensions, employ functionalist terminology and eschew causal attribution. Perhaps more importantly, this is not a purely theoretical exercise. The ultimate goal is to bolster compliance with acceptable or desirable norms rather than merely provide better behavioral insight.

While there had been some notable previous contributions, the foundations for the systematic analysis of international legal compliance were arguably laid by Henkin in his seminal treatise on the interplay between law and politics in the global arena, which was originally published in 1969 and appeared in an expanded form in 1979.<sup>18</sup> He posed a number of theoretically pivotal questions which have subsequently loomed large on the scholarly and policy agendas, particularly the former: "Do nations comply with international law? When do they comply? Why do they observe law? Why do they violate it? Compliance apart, has international law any other significance in shaping their conduct? And is it 'law,' or is it

---

14. See DAVID DE VAUS, *RESEARCH DESIGN IN SOCIAL RESEARCH* 5-7 (2001).

15. See GARY GOERTZ, *SOCIAL SCIENCE CONCEPTS: A USER'S GUIDE* 6 (2006).

16. See NORMAN BLAIKIE, *DESIGNING SOCIAL RESEARCH: THE LOGIC OF ANTICIPATION* 130-36 (2000).

17. See GOERTZ, *supra* note 15, at 13-16.

18. See LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 88-99 (2d ed. 1979).

'politics'?"<sup>19</sup> He also expressed a preference for widespread (and peaceful) adherence to prevailing international legal norms and tentatively suggested strategies via which this state of affairs could be pursued.<sup>20</sup>

Henkin offered a distinctly sanguine assessment of State attitudes towards international law claiming that, appearances to the contrary, compliance was surprisingly common, albeit not universal.<sup>21</sup> He opted to explain this pattern in both typically self-interest-centered (accorded close attention by proponents of the realist and public choice paradigms) and seemingly broader sociological terms (featuring prominently in liberal and constructivist writings).<sup>22</sup> States are assumed to employ a cost-benefit calculus when confronting compliance issues, but it is not a simple balancing act. The scale is weighted heavily towards the benefit side of the equation and the likely costs of adhering to the legal status quo—or, alternatively, the potential gains from flouting it—must be very substantial to prompt rule-defying behavior.<sup>23</sup>

Moreover, self-interest is not the sole relevant factor on the positive (or, for that matter, negative) side of the ledger. States seek to maximize reputation abroad and minimize external censure. They also realize the advantages of international cooperation as an antidote to the anarchical Hobbesian state of nature and appreciate friendship with other States. Such accounts are seldom embraced by realists, who are inclined to focus on concrete economic and military benefits, but these accounts are not necessarily incompatible with public choice-style theoretical propositions. Sociological explanations, whether rooted in international or domestic dynamics, often bear the imprint of constructivist thinking (e.g., "[a]ttitudes toward international law reflect a nation's constitution, its laws and institutions, its history and traditions, its values and 'style'").<sup>24</sup>

With the possible exception of realism, virtually all the analytical approaches referred to above incorporate institutional elements into their conceptual structures. Constructivism does not stand out in this respect. It is thus interesting to note that Henkin ventured relatively far in implicitly embracing what would amount today to full-fledged institutionalism. At several junctures in his book, he attributed compliance, or lack thereof, to institutional influences, and in an elaborate fashion. According to him, for example, "[i]n more complicated ways, accepted international arrangements . . . launch their own bureaucracy with vested interests in compliance, their own resistances to violation and to interference and

---

19. *Id.* at 5.

20. *See id.* at 313-39.

21. *See id.* at 46-48.

22. *See id.* at 49-87.

23. *See id.* at 49-50, 54.

24. *Id.* at 61. *See also* James Fearon & Alexander Wendt, *Rationalism v. Constructivism: A Skeptical View*, in *HANDBOOK OF INTERNATIONAL RELATIONS* 52, 57-58 (Walter Carlsnaes et al. eds., 2002); Duncan Snidal, *Rational Choice and International Relations*, in *HANDBOOK OF INTERNATIONAL RELATIONS* 73; Emanuel Adler, *Constructivism and International Relations*, in *HANDBOOK OF INTERNATIONAL RELATIONS* 96 (Walter Carlsnaes et al. eds., 2002).

frustration.”<sup>25</sup> The European community agreements are a case in point “because they have been accepted in member countries and enmeshed in national institutions; there are national bureaucrats whose job it is to assure that the agreements are carried out; powerful domestic groups have strong interests in maintaining these agreements.”<sup>26</sup>

Such wide-ranging factors should also be taken into account in designing mechanisms to enhance international legal compliance. Gains accruing and costs incurred in the process ought to be maximized and minimized, respectively (e.g., via positive and negative reinforcement). The means employed to this end may have to be radical in nature (e.g., “[t]hat will require a willingness by older and wealthier nations to give serious consideration to the aspirations of the ‘New Economic Order,’ to help satisfy the legitimate aspirations of newer and poorer countries for quicker development and favorable trade”).<sup>27</sup> International law and the institutions underpinning it need to be solidified, and substantial resources must be channelled through both global and domestic channels towards improving the psychological climate impinging on compliance. Again, unconventional strategies may have to be resorted to for this purpose (e.g., “[n]ations with special interest in and avowed dedication to order have special responsibility: it is time that such nations take an affirmative lead in demonstrating the importance of law to international stability”).<sup>28</sup>

Henkin’s sweeping descriptive, explanatory and normative survey of State practice vis-à-vis legal benchmarks was sufficiently comprehensive and diversified to capture the principal dimensions of international legal compliance and to provide a sound theoretical foundation for exploring the subject within a nuanced but coherent framework. It has proved challenging, however, to maintain a degree of analytical cohesion in the face of intense centrifugal pressures and loose integration has given way to marked fragmentation. Some researchers have decided to shift the emphasis back to the cost-benefit calculus whose significance Henkin sought to reduce (echoing arguments found in the realist and public choice literature, particularly the latter). Others have chosen to follow his liberal and (tentatively) constructivist path, yet in an exclusive fashion.

Among the latter, Franck was the first to paint, in an elaborately methodical fashion, a decidedly positive picture of State behavior in the norm-constrained global arena. While acknowledging exceptions to the overall pattern, he noted, like Henkin, that the propensity to conform is a salient characteristic of an essentially autonomous adaptation in that decentralized setting. Thus: “In the international system, rules usually are not enforced yet they are mostly obeyed. Lacking support from a coercive power comparable to that which provides backing for the laws of a nation, the rules of the international community nevertheless elicit

---

25. HENKIN, *supra* note 18, at 61.

26. *Id.*

27. *Id.* at 316.

28. *Id.* at 318.

much compliance on the part of sovereign states.”<sup>29</sup> This observation, it should be emphasized, applies to “both the weak and, more remarkably, the strong [players].”<sup>30</sup>

The seemingly compelling proposition that “nations obey rules of the community of states because they thereby manifest their membership in that community, which, in turn, validates their statehood”<sup>31</sup> is discarded as overly narrow to be embraced as a versatile explanatory tool. Contractarian formulations, grounded in the assumption that State adherence to international norms is the product of the equivalent of a social compact whose purpose is to forge a non-anarchic collective order even if it entails some dilution of sovereign power, are also deemed to be limited in scope.<sup>32</sup> Instead, analogies are sought with domestic scenarios where compliance manifests itself even in the absence of supporting coercive mechanisms (which are either lacking altogether or weak in the global arena).

Such configurations are explored by legal philosophers who typically ascribe habitual obedience to governance which is underpinned by factors other than dominant power (e.g., fairness, justice and integrity for Dworkin and discursive validation in the case of Habermas).<sup>33</sup> Their work, which often revolves around process-focused/procedural and outcome-oriented/substantive values, may arguably serve as a basis for arriving at an understanding of the determinants of rule conformity at the international level, consistently and without resorting to utilitarian constructs. Franck invoked the notion of legitimacy—and its variant, legitimation—to this end. He effectively defined it as “a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively.”<sup>34</sup>

Legitimacy does not crystallize in a social vacuum.

Legitimacy can only be accorded to rules and institutions, or to claims of right and obligation, in the circumstance of an existing community. It is only by reference to a community’s evolving standards of what constitutes right process that it is possible to assert meaningfully that a law, or an executive order, or a court’s judgment, or a citizen’s claim on a compatriot, or a government’s claim on a citizen, is *legitimate*.<sup>35</sup>

The corollary is that, when it is contended that a rule or its application is legitimate, the implications are twofold: “[T]hat it is a rule made or applied in accordance with right process, and *therefore* that it ought to promote voluntary compliance by those to whom it is addressed. It is deserving of validation.”<sup>36</sup> The

---

29. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 3 (1990).

30. *Id.*

31. *Id.* at 8.

32. *See id.*

33. *See id.* at 15.

34. *Id.* at 16.

35. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 26 (1995).

36. *Id.*

next logical step is to suggest that “[i]nternational law, even more than any individual state’s legal system, needs this element of voluntary compliance because of relative paucity of modes of compulsion.”<sup>37</sup>

The notion of the right process was articulated in concrete terms, rather than just introduced abstractly, by Franck. Four meta rules, or rules about rules, provide the normative foundation in this respect: “(1) [T]hat states are sovereign and equal; (2) that their sovereignty can only be restricted by consent; (3) that consent binds; and (4) that states, in joining the international community, are bound by the ground rules of community.”<sup>38</sup> The granting of consent is not necessarily an ongoing and wide-ranging undertaking, which inevitably would render the entire façade unworkable: “Once a state joins the community of states (today an inescapable incidence of statehood) the basic rules of the community and of its legitimate exercise of community authority apply to the individual state regardless of whether consent has been specifically expressed.”<sup>39</sup>

In a rather innovative manner, by the analytical standards of the day, Franck additionally offered a set of well-delineated indicators of legitimacy (albeit without operationalizing them). They include determinacy (“the ability of a text to convey a clear message”),<sup>40</sup> symbolic validation (which communicates authority, as distinct from meaning; “[a] rule is symbolically validated when it has attributes, often in the form of cues, which signal its significant part in the overall system of social order”),<sup>41</sup> coherence (“[a] rule is coherent when its application treats like cases alike and when the rule relates in a principled fashion to other rules of the same system”),<sup>42</sup> and adherence (“the vertical nexus between a single primary rule of obligation . . . and a pyramid of secondary rules governing the creation, interpretation, and application of such rules by the community”).<sup>43</sup>

Perceptions (the constructivist element) of legitimacy are the principal independent variable impinging on international legal compliance (the dependent variable) in Franck’s explanatory scheme. The distinction between the analytical and normative dimensions occasionally becomes blurred, however. They interact, typically in a synergistic fashion, with perceptions of equity/justice, combining to form a broader/composite variable subsumed under the term fairness (or, ultimately, perceptions of fairness).<sup>44</sup> It could thus be said that perceived fairness is the source of the compliance pull which accounts for the reassuring empirical patterns of State behavior that Franck highlighted. Somehow, his seminal contribution to international legal theory building in this particular domain has been almost exclusively associated with the narrower, yet still powerful, concept of (perceived) legitimacy and the normative framework in which it is embedded.

---

37. *Id.*

38. *Id.* at 29.

39. *Id.*

40. *Id.* at 30.

41. *Id.* at 34.

42. *Id.* at 38.

43. *Id.* at 41.

44. *See id.* at 47.

The moral underpinnings, both procedural and substantive, of international legal rules cannot be assumed to be self-evident. They presumably need to be recognized as such by players in the global arena and incorporated into their decision apparatus. Otherwise, the practical ramifications of the entire explanatory edifice would be distinctly limited. This issue has not been addressed explicitly by Franck, but it features prominently in the complementary writings of transnational legal process theorists, most notably Koh.<sup>45</sup> In a quintessentially constructivist manner, they argue that compliance with international norms is the product of interactive learning which culminates in the internalization of prescribed standards of external behavior.

Participation in the transnational legal process helps constitute the identity of a state as one that obeys the law, but what is critical is the *interaction*, not the label that purports to identify a state as liberal or not. In part, actors obey international law as a result of repeated interaction with other governmental and nongovernmental actors in the international system.<sup>46</sup>

To elaborate further:

As transnational actors interact, they create patterns of behavior and generate norms of external conduct which they in turn internalize. Law-abiding states *internalize* international law by incorporating it into their domestic legal and political structures, through executive action, legislation, and judicial decisions which take account of and incorporate international norms . . . Moreover, domestic decision-making becomes "enmeshed" with international legal norms, as institutional arrangements for the making and maintenance of an international commitment become entrenched in domestic legal and political processes. It is through this repeated process of interaction and internalization that international law acquires its "stickiness," that nation-states acquire their identity, and that nations define promoting the rule of international law as part of their national self-interest.<sup>47</sup>

Transnational legal processes have attracted considerable scholarly attention and have been extensively explored in recent years. An interesting feature of the endeavor has been the emphasis placed on the role played by transnational epistemic communities in propagating and sustaining international legal norms. Such entities consist of strategically positioned individuals and groups that are firmly committed to upholding prescribed external standards of behavior within and across key issue areas. They vary in their international orientation and cohesion (members often have a domestic base and obligations as well), but transnational legal process theorists view them as generally effective over time in

---

45. See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183-86 (1994); Koh, *supra* note 7, at 2604, 2609, 2659.

46. Koh, *supra* note 45, at 203.

47. *Id.* at 204. See also Alexander Wendt, *Constructing International Politics*, 20 INT'L SEC. 71, 71-81 (1995).

diffusing ideas across national boundaries through a combination of formal and informal strategies.<sup>48</sup>

State propensity to adhere scrupulously to external commitments in most circumstances is an equally salient characteristic of the managerial model, put forth by Chayes.<sup>49</sup> This empirical pattern is believed to be underpinned by three crucial factors: efficiency, interests and norms. Decisions should not be regarded as free goods as they consume substantial organizational resources whose supply is severely constrained. To minimize transaction costs incurred in repeatedly confronting complex choices (such as whether to comply or not to comply), or to maximize efficiency, it is generally sensible to follow the established path and conform to authoritative rules, other things being equal (“standard economic analysis argues against the continuous recalculation of costs and benefits in the absence of convincing evidence that circumstances have changed since the original decision”).<sup>50</sup>

Interests exert a similar influence. After all, an international accord is an essentially consensual device. It has no solid foundation without prior consent of the relevant parties. The corollary is that it is reasonable to posit that their interests were served by assuming the obligation in the first place (“the process by which international agreements are formulated and concluded is designed to ensure that the final result will represent, to some degree, an accommodation of the interests of the negotiating states”).<sup>51</sup> The slow progression towards the final destination, the multiplicity of inputs from a wide range of institutional sources (both domestic and international) and the proliferation of checks and balances (particularly in democratic/pluralistic settings) tends to bring about a high degree of convergence between individual interests and the collective outcome.<sup>52</sup>

The impact attributed to norms does not diverge materially from that portrayed by transnational legal process theorists. Constructivist-style social learning predisposes people at all levels (including group, state and the like) to obey the law. The existence of a binding legal commitment, “for most actors in most situations, translates into a presumption of compliance, in the absence of strong countervailing circumstances.”<sup>53</sup> Illustrations are offered from a variety of milieus, formal and informal, macro and micro. Pertinently, in this context, a fundamental norm of international law, *pacta sunt servanda*, treaties are to be

---

48. See MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORK IN INTERNATIONAL POLITICS* 1-4 (1998); James G. March & Johan P. Olsen, *The Institutional Dynamics of International Political Orders*, 52 *INT'L ORG.* 943, 946-47 (1998); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 *VA. J. INT'L L.* 1, 80-81 (2002); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 41-45 (2004); Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 *YALE J. INT'L L.* 301, 303-10 (2007).

49. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 22 (1995).

50. *Id.* at 4.

51. *Id.*

52. See *id.* at 4-7.

53. *Id.* at 8.

obeyed, is invoked for that purpose.<sup>54</sup> It is also asserted, in a familiar fashion, that in many countries such moral imperatives “become part of the law of the land. Thus a provision contained in an agreement to which a state has formally assented entails a legal obligation to obey and is presumptively a guide to action.”<sup>55</sup> For example:

Even in the stark, high politics of the Cuban missile crisis, State Department officials argued that the United States could not lawfully react unilaterally, since the Soviet emplacement of missiles in Cuba did not amount to an “armed attack” sufficient to trigger the right of self-defense under Article 51 of the UN Charter. It followed that use of force in response to the missiles would be lawful only if approved by the Organization of American States (OAS). Though it would be foolish to contend that this legal position determined President Kennedy’s decision, there is little doubt that the asserted need for advance OAS authorization for any use of force contributed to the mosaic of argumentation that led to the decision to respond initially by means of the quarantine rather than with an air strike.<sup>56</sup>

Non-adherence to external standards of behavior by players in the global arena (primarily States, but no longer exclusively so, following the refinements introduced by transnational legal process theorists) is duly acknowledged by the proponents of the managerial model. It is nevertheless not viewed as the dominant empirical pattern and, perhaps more importantly, is not ascribed to realist-type premeditated designs rooted in cold utilitarian logic. Rather, the failure to comply, at times on a worrisome scale, stems from the ambiguity of the law/norms (as Franck previously noted, “[l]anguage is unable to capture meaning with precision”; even formal statements of legal rules, such as treaties, thus “frequently do not provide determinate answers to specific disputed questions”)<sup>57</sup> and inadequate (principally State) capacity to conform to normative international precepts/to implement external legal obligations. This is thought to be a universal phenomenon, but one closely correlated with the level of economic development.<sup>58</sup>

The policy corollary is that managerial strategies to ensure compliance with international law are generally superior to those geared towards enforcement through the deployment of hard power in one form or another (i.e., economic or military resources, or a combination of the two). The former include a host of soft variants such as measures to enhance transparency, promote dispute settlement in a flexible fashion (via institutional mechanisms extending beyond formal international adjudication), determined capacity building, and the judicious use of persuasion. The latter is supposed to underpin the entire behavior modification architecture and convert it into “a broader process of ‘jawboning’ – the effort to

---

54. *See id.*

55. *Id.*

56. *Id.* at 9.

57. *Id.* at 10.

58. *See id.* at 13-15.

*persuade* the miscreant to change its ways – [this being] the characteristic method by which international regimes seek to induce compliance.”<sup>59</sup>

Not all scholars favorably disposed towards the liberal and constructivist analytical perspectives depict an equally favorable picture of actor/State adaptation to external norms. Those who harbor doubts, or discern significant divergences between the reality and the ideal, often endeavor to shrink the space to which their generalizations apply. Rather than aim to produce observations which are to all intents and purposes universally valid, they draw distinctions between segments of the global arena where a high degree of international legal compliance is apparently common and others where the record is more ambiguous. The most widely embraced dichotomy is that between the affluent liberal democracies, with a long tradition of the rule of law and an elaborate institutional façade to support it, and the economically poorer countries whose socio-political structures rest on less solid foundations.<sup>60</sup>

The intellectual optimism often displayed by legal researchers, including those with substantial practical experience, does not seem to be contagious in that it is seldom reflected in views held by scholars in related fields of academic inquiry (“[i]f states’ respect for international law is surprising or puzzling to eminent professors of the subject, it is probably more so to many political scientists”).<sup>61</sup> The latter, particularly students of international relations, tend to style themselves as hard-nosed realists rather than starry-eyed idealists. Within their utilitarian framework, States “seek to maintain position, wealth, and power in an uncertain world by acquiring, retaining, and wielding power-resources that enable them to achieve multiple purposes.”<sup>62</sup> They do not adapt to external norms in a constrained fashion but, instead, employ them opportunistically as instruments to attain their interests. International law/legal compliance may be viewed through such an instrumentalist (as distinct from normative) optic.<sup>63</sup>

Realist leanings are not the preserve of political scientists. Instrumentalist skepticism has crept into law schools, notably in the United States, where it is posing a challenge to the notions of genuine cooperation, pluralism and rule conformity espoused by researchers inspired by a liberal/constructivist vision of the world order. It has found a solid base in Chicago (perhaps a more appropriate habitat for methodological individualism of the public choice variety) and has spread to other large academic centers such as Berkeley and Harvard. Legal realism restores the State to a position of prominence in the conceptual structure<sup>64</sup>

---

59. *Id.* at 25.

60. See Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503, 503-08 (1995); Peter M. Haas, *Why Comply, or Some Hypotheses in Search of an Analyst*, in INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS 21, 23-24, 37-39 (Edith Brown Weiss ed., American Society of International Law 1997).

61. Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INTL L.J. 487, 487 (1997).

62. *Id.* at 487-88.

63. See *id.* at 487-502.

64. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 4-5 (2005).

(having been dethroned by transnational legal process theorists) and it may thus be portrayed as a nationalist perspective.<sup>65</sup> In an instrumentalist vein, the State is also believed to be strongly driven by its interests, or preferences about outcomes.<sup>66</sup> Similarly, it follows this path in accordance with rationalist precepts.<sup>67</sup> The implications for rule conformity are scarcely favorable:

Even on the assumption that citizens and leaders have a preference for international law compliance, preferences for this good must be compared to preferences for other goods. State preferences for compliance with international law will thus depend on what citizens and leaders are willing to pay in terms of the other things that they care about, such as security or economic growth. We think that citizens and leaders care about these latter goods more intensely than they do about international law compliance; that preferences for international law compliance tend to depend on whether such compliance will bring security, economic growth, and related goods; and that citizens and leaders are willing to forgo international law compliance when such compliance comes at the cost of these other goods.<sup>68</sup>

Approaches bearing the hallmarks of public choice reasoning veer in the same overall direction. Indeed, the sole material difference manifests itself in less emphasis on the State as the principal unit of analysis. The rule conformity observed by (among others) managerial theorists is attributed to a selection bias stemming from an excessive focus on international legal instruments which require relevant parties to make merely negligible adjustments in the course of action that they would have followed in the absence of the external constraints. This, in turn, has its roots in the endogeneity problem which is the product of deliberate choices by the players in question that are geared towards realizing such a comfortable outcome:

Just as orchestras will usually avoid music that they cannot play fairly well, states will rarely spend a great deal of time and effort negotiating agreements that will continually be violated. This inevitably places limitations on the inferences we can make from compliance data alone. As in the case of the orchestra's mistakes, we do not know what a high compliance rate really implies.<sup>69</sup>

The depth of cooperation is the analytical device employed to express formally the idea that rule conformity is a function of the shift potentially induced by an international legal instrument from a behavioral pattern favored by actors in the global arena ("it is most useful to think of [such a vehicle's] depth of

---

65. See Janet Koven Levit, *Bottom-Up International Law Making: Reflections on the New Haven School of International Law*, 32 YALE J. INT'L L. 393, 394, 396 (2007).

66. See GOLDSMITH & POSNER, *supra* note 64, at 6-7.

67. See *id.* at 7-10.

68. *Id.* at 9.

69. George W. Downs et al., *Is the Good News about Compliance Good News about Cooperation?*, 50 INT'L. ORG. 379, 383 (1996).

cooperation as the extent to which it requires states to depart from what they would have done in its absence").<sup>70</sup> Lack of depth may be conducive to compliance, but this in itself does not possess significant policy ramifications. In situations where rule conformity necessitates substantial adjustment on the part of the players involved, or ones characterized by depth of cooperation, enforcement is a more effective tool than the kind of soft remedies typically prescribed by managerial theorists (whose generalizations do not exhibit the breadth and realism of their enforcement counterparts).<sup>71</sup>

Rationalist conceptual frameworks at times assume a higher degree of rule conformity than suggested above and are not always rigidly wedded to the notion of hard enforcement. Where this is the case, liberal and constructivist visions of world order are still deemed to be analytically inadequate and not fully representative in the behavioral sense of the term, but the relevance of international law in its different shapes is not discarded lightly and is not attributed exclusively to traditional-style sanctions. Actor reputation, or its loss due to non-adherence to external standards, is a salient feature of such frameworks since, "[i]n the absence of other enforcement mechanisms, . . . a state's commitment is only as strong as its reputation."<sup>72</sup> Indeed, "[w]hen entering into an international commitment, a country offers its reputation for living up to its commitments as a form of collateral."<sup>73</sup> In accounting for this phenomenon, it is thus essential to recognize that:

[A] decision to violate international law will increase today's payoff but reduce tomorrow's. This explains not only why nations comply with international law despite the weakness of existing enforcement mechanisms, but also why they sometimes choose to violate the law. The existence of a reputational effect impacts country incentives, but in some instances that impact will be insufficient to alter country behavior. So, unlike some existing theories of international law, this model reconciles the claim that international law affects behavior with the fact that the law is not always followed.<sup>74</sup>

---

70. *Id.*

71. *See id.* at 383-98. *See also* George W. Downs et al., *The Transformational Model of International Regime Design: Triumph of Hope or Experience?*, 38 COLUM. J. TRANSNAT'L L. 465, 482-87 (2000).

72. Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1849 (2002).

73. *Id.*

74. *Id.* *See also* Jutta Brunnée, *A Fine Balance: Facilitation and Enforcement in the Design of a Compliance Regime for the Kyoto Protocol*, 13 TUL. ENVTL. L.J. 223, 235 (2000); Peter H. Huang, *International Environmental Law and Emotional Rational Choice*, 31 J. LEGAL STUD. 237, 256-57 (2002); Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 582, 589, 606 (2005); MARKUS BURGSTALLER, *THEORIES OF COMPLIANCE WITH INTERNATIONAL LAW* 89, 110, 162 (2005); Markus Burgstaller, *Amenities and Pitfalls of a Reputational Theory of Compliance with International Law*, 76 NORDIC. J. INT'L L. 39, 61 (2007).

### III. LESSONS FROM THE ORIENT

The academic literature on rule conformity in the global arena has expanded substantially in the past fifty years or so and its post-1980s growth has been rather spectacular. This has been a dynamically dialectical process characterized by the emergence (ultimately proliferation) of different theoretical strands and their critically constructive interaction with each other. No great coherence, let alone effective synthesis, has been achieved, but a truly rich tapestry of loosely-woven insights has been produced and may be readily accessed for either scholarly or practical purposes. This entire conceptual façade however rests on distinctly narrow cultural/geographical foundations, both analytically and empirically, in that its construction has been an almost exclusively American/European affair. Ideas from other sources and patterns observed elsewhere have been largely overlooked.

There is arguably a need to incorporate modes of thinking (perhaps in a constructivist fashion) and experiences (again, not invariably imbued with seemingly objective meanings) originating in socio-political settings other than the Northern/Western core of the world system. An examination of the Sino-British Joint Declaration, in its implementation phase, even if undertaken selectively and tentatively, may constitute a modest, yet useful, step in that challenging direction. A much larger sample of cases will have to be explored in order to turn this into a viable research exercise extending over various cultural/geographical domains and time periods, but as a starting point that particular configuration possesses certain interesting features. This applies to the nature of the international legal instrument at issue, *modus operandi* of the parties involved and the intricate relationships among them.

China, the pivot underpinning that delicate equation, has displayed remarkable economic vibrancy since embarking on economic liberalization in 1978. It nevertheless does not qualify as an affluent country by any common technical standard (including per-capita income estimates relying on purchasing-power-parity criteria). More importantly, it definitely cannot be portrayed as a liberal democracy. In recent years, tangible progress has been witnessed in the socio-political realm. The organs of the State have been functioning in an increasingly less arbitrary manner and a climate of relative tolerance has gradually developed (albeit more in the broadly social than strictly political sphere). An institutional structure based on the rule of man has given way to one reflecting a rule *by* law (but not necessarily a rule *of* law) and cautious efforts have been made to promote grassroots participation (village elections being a notable example).<sup>75</sup>

Political reform remains a small-scale enterprise however and the cumulative effects thus far have been rather modest. Indeed, it has been controversially argued that the balance between authoritarian and liberal-democratic practices has not shifted unambiguously in favor of the latter. Dahl's notion of polyarchy has been invoked for this purpose. According to him, a polity evolves along two

---

75. See Miron Mushkat & Roda Mushkat, *Economic Growth, Democracy, the Rule of Law and China's Future*, 29 *FORDHAM INT'L L. J.* 229, 240-45 (2005); RANDALL PEERENBOOM, *CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST?* 20, 239 (2007).

principal dimensions: participation and contestation.<sup>76</sup> While the former relates to the issue of who is included among the political classes, contestation determines what constitutes the essence of politics: the nature and limits of political competition.<sup>77</sup> A country may move towards polyarchy along either axis, sometimes by choice and sometimes because of factors (external, internal or a combination of the two) beyond its control.<sup>78</sup>

Yet, in a country where the ruling elite maintains a firm grip on the polity, no palpable movement may take place. It has been asserted (although, again, controversially so) that this may be the case in China, given that participation has apparently been frozen at the level of village elections for more than a decade and contestation, which was tentatively in evidence during the early reform period, seems to have been nipped in the bud.<sup>79</sup> The corollary possibly is that, the measure of benevolence and self-restraint exhibited by the power-holders notwithstanding, in some crucial respects China today resembles to a greater extent Dahl's closed hegemony than an evolving polyarchy and that it is not inappropriate to equate the absence of elite contestation with the end-of-politics syndrome.<sup>80</sup>

This may be an excessively one-sided verdict and a more nuanced picture is often painted by Sinologists.<sup>81</sup> Be that as it may, prevailing Chinese socio-political realities are seldom portrayed in liberal-democratic terms. Rather, expressions such as market-preserving authoritarianism, soft authoritarianism (as distinct from the hard variant practiced under Mao Zedong) and authoritarian pluralism are typically employed to capture the essence of the current mode of governance.<sup>82</sup> Such depictions are indicative of regime performance that does not correspond in any meaningful way to Dahl-style two-dimensional polyarchy or a full-fledged liberal democracy. The question thus inevitably arises whether this constitutes fertile ground for examining issues relating to rule conformity, in the international as well as domestic context.

Interestingly, and perhaps surprisingly, the answer to this question is by no means in the negative. A substantial body of detailed case studies, firmly anchored in relevant facets of the law, does not exist at the present juncture. A broad survey of Chinese international legal compliance in diverse fields such as arms control, environmental protection, human rights and trade has nevertheless been produced recently and it does not at all suggest that China consistently plays by its own rules. The record is scarcely perfect and it may vary from one issue-area to another, as well as over time. Yet, it possibly qualifies as adequate, even respectable, at least insofar as this particular study is concerned.<sup>83</sup> On that basis,

---

76. See ROBERT A. DAHL, POLYARCHY PARTICIPATION AND OPPOSITION 33-40 (1971).

77. See *id.*

78. See *id.* See also Michael McFaul, *The Fourth Wave of Democracy and Dictatorship: Noncooperative Transitions in the Postcommunist World*, 54 *WORLD POL.* 212, 238-39 (2002).

79. See Bruce Gilley, *The "End of Politics" in Beijing*, 51 *CHINA. J.* 115, 116 (2004).

80. See *id.*

81. See generally PEERENBOOM, *supra* note 75.

82. Mushkat & Mushkat, *supra* note 75, at 242-45.

83. See GERALD CHAN, CHINA'S COMPLIANCE IN GLOBAL AFFAIRS: TRADE, ARMS CONTROL,

there may be no compelling reason to confine research focused on international legal compliance to liberal democracies alone, although it may well be desirable to treat the nature of the political system as a factor in the equation (i.e., as an intervening variable).<sup>84</sup>

The literature on the subject also highlights the impact of attributes of the instrument (predominantly treaties, but not to the exclusion of customary norms) on rule conformity. One distinction commonly emphasized is that between hard law and its soft counterpart (i.e., commitments made by actors in the global arena which, strictly speaking, are not legally binding). The latter is generally assumed to be a real phenomenon and an inherently positive one (as soft law is preferable to alternatives other than a hard legal architecture).<sup>85</sup> This sophisticated notion poses conceptual and empirical difficulties yet, to the extent that it is an integral part of the international law agenda, there are ramifications for rule conformity. They need not however be addressed here since, as pointed out earlier, the Sino-British Joint Declaration falls into the hard category.

A more pertinent analytical distinction is that between high and low politics. Some international legal commitments may have potentially greater repercussions on the pursuit of national interests than others (high versus low). Compliance is believed to be less likely in such circumstances because more is at stake for the players involved (the costs of rule conformity may be prohibitively lofty).<sup>86</sup> Yet, as the strategic context in this case vividly illustrates, the idea is easier to handle at the conceptual than operational level. In practice, one confronts a situation characterized by a proliferation of shades of grey and the proposition may not be

---

ENVIRONMENTAL PROTECTION, HUMAN RIGHTS (Series on Contemporary China Vol. 3, World Scientific 2005). See also ANN KENT, CHINA, THE UNITED NATIONS AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE (1999) [hereinafter KENT, LIMITS OF COMPLIANCE]; IMPLEMENTING INTERNATIONAL ENVIRONMENTAL LAW IN GERMANY AND CHINA (Zhengua Tao & Rudiger Wolfrum eds., Kluwer Law International 2001); ANN KENT, BEYOND COMPLIANCE: CHINA, INTERNATIONAL ORGANIZATIONS, AND GLOBAL SECURITY 221-28 (2007) [hereinafter KENT, BEYOND COMPLIANCE].

84. See generally Daniel E. Ho, *Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?*, 5 J. INT'L ECON. L. 647 (2002) (examining the economic and institutional determinants of why countries comply with international soft law).

85. See generally Haas, *supra* note 60. See also Guzman, *supra* note 72, at 1879-81; Guzman, *supra* note 74, 591-94, 610; Mary Ellen O'Connell, *The Role of Soft Law in a Global Order*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 100, 100-114 (Dinah Shelton ed., 2000); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 423, 434-50 (2000); ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 211-29 (2007).

86. See Downs et al., *supra* note 69; Harold K. Jacobson, *Conceptual, Methodological and Substantive Issues Entwined in Studying Compliance*, 19 MICH. J. INT'L L. 569, 570-71 (1998); John Norton Moore, *Enhancing Compliance with International Law: A Neglected Remedy*, 39 VA. J. INT'L L. 881, 887, 916-17 (1999); Beth A. Simmons, *Capacity, Commitment, and Compliance: International Institutions and Territorial Disputes*, 46 J. OF CONFLICT RESOL. 829, 842-45 (2002); Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1784-85 (2003); Steven R. Ratner, *Overcoming Temptations to Violate Human Dignity in Times of Crisis: On the Possibilities for Meaningful Self-Restraint*, 5 THEORETICAL INQUIRIES IN L. 82, 82-109 (2004); Claire R. Kelly, *Enmeshment as a Theory of Compliance*, 37 N.Y.U. J. INT'L L. & POL. 303, 347, 354-55 (2005).

readily testable. The examples found in the literature are typically too clear-cut (e.g., national security versus environmental protection) to be entirely illuminating.

It is debatable whether the Sino-British Joint Declaration belongs to the domain of high politics. There is a possibility here of positive and negative spillovers having far-reaching implications for China's domestic political stability (as seen during the 1976 Tiananmen Incident and on several occasions subsequently), unification prospects with Taiwan, territorial integrity in general, smooth functioning of the Chinese economy and politico-economic relations with the Western world. Many other facets of this international legal instrument are strategically less significant. This is a complex balancing act, and not necessarily one representing an unusual constellation of forces. Because of its intricate nature, one would probably not choose it for purely theoretical illustration purposes, but that does not detract from its empirical relevance.

The preoccupation with the high-low politics dichotomy (it may be an uneven continuum) is understandable, but perhaps not entirely productive. The Sino-British Joint Declaration possesses attributes which receive little attention in the academic literature, possibly due to their technical (as distinct from strategic) character yet merit systematic consideration. It is a bilateral instrument with no effective mechanisms for monitoring, verification, adjudication and enforcement. More importantly, and this qualifies as a strategic factor, the power relationship between the two signatories is distinctly unequal in this specific context (paradoxically so, in light of the historical backdrop) and the incentive structures on both sides diverge markedly. That is by no means an unusual phenomenon in a global environment traditionally featuring substantial imbalances of power (at times of the hegemonic/stabilizing variety) and widespread conflicts of interest (which need not preclude close inter-party cooperation).

The Sino-British Joint Declaration is also an instrument intended to provide a broad governance framework for a long period of time (half a century) in a highly dynamic politico-economic setting. The combination of breadth (in terms of scope) and length (with reference to time) may have impinged on its evolution during the design and implementation phases. International accords may extend over a short period of time, constitute a long-term commitment, or be open-ended in nature. By the same token, they may be one-dimensional, moderately diverse, or genuinely multi-dimensional. Any combination of these two variables (scope and duration), in turn, may influence materially the propensity to adhere to the provisions of the agreement, other things being equal. The position on the high-low politics continuum may not always be the decisive factor.

The issue of breadth/diversity does not loom sufficiently large in academic writings on rule conformity. The Sino-British Joint Declaration is a multi-dimensional instrument par excellence. It pertains to virtually all sub-systems of the Hong Kong institutional infrastructure: cultural, economic, legal, political and social.<sup>87</sup> It is fundamentally different from the significantly less complex (in this

---

87. See MUSHKAT, *supra* note 12, at 195-214.

respect) agreements typically dissected by students of international legal compliance. This does not necessarily render it a distant outlier and thus unrepresentative of the genre. Such instruments do not just vary widely across issue areas (e.g., national security versus environmental protection) but often also within them.

If that is the case, the phenomenon reinforces the argument that international legal compliance must be considered as a scalar rather than binary variable. Moreover, given the potential for behavioral differences along the multi-dimensional prescriptive spectrum covered by the instrument, it should be treated as a weighted variable, regardless of whether it is approached from a quantitative or qualitative angle. An equally germane inference in this context is that breadth/diversity has implications for the choice of the explanatory mode relied upon for purposes of elucidation. A number of permutations are possible here, but ultimately the analyst is likely to opt either for a causal framework or a functional one (both of which could be loosely—as distinct from rigorously—delineated).

While dissection of the law is a predominantly qualitative enterprise, students of rule conformity tend to embrace causal explanations. There is no dearth of functional assertions, yet they are often conveyed implicitly rather than explicitly, and seldom in an elaborate and organized fashion. Functional conceptual structures may enhance understanding in circumstances where multi-dimensionality manifests itself on a meaningful scale. In such a setting, it is desirable to decompose the instrument/problem into its constituent parts, examine methodically the interconnections and draw the appropriate conclusions. Even natural scientists (at least in fields such as biology) do not shun functional forms of reasoning and frequently employ simple qualitative/soft techniques (e.g., morphological analysis)<sup>88</sup> to this end.

In the case of the Sino-British Joint Declaration, it is commonly contended that China has been far more inclined to fulfill its obligations vis-à-vis post-1997 Hong Kong in the economic than political domain. Quintessentially capitalist institutions and practices have been left entirely intact.<sup>89</sup> Indeed, close and productive ties have been forged between Hong Kong's business elite and the ruling class on the mainland (whose power base is in the upper echelons of the Communist Party, State organs and large public enterprises).<sup>90</sup> By contrast, China may have been less willing to grant the ultra-capitalist enclave a high degree of political autonomy and support local efforts to lay a solid foundation for a

---

88. *See generally* KENNETH D. BAILEY, *TYPOLOGIES AND TAXONOMIES: AN INTRODUCTION TO CLASSIFICATION TECHNIQUES* (1994) (discussing various classification techniques, their advantages and disadvantages, and how these techniques can improve research).

89. *See* TONY LATTER, *HANDS ON OR HANDS OFF? THE NATURE AND PROCESS OF ECONOMIC POLICY IN HONG KONG 10* (2007).

90. *See* LEO F. GOODSTADT, *UNEASY PARTNERS: THE CONFLICT BETWEEN PUBLIC INTEREST AND PRIVATE PROFIT IN HONG KONG 97-117* (Hong Kong University Press 2005) (examining how the Colonial British relied on a special relationship with the Hong Kong business elite to rule Hong Kong, and how this relationship survived the transition from British to Chinese rule).

genuinely representative form of government.<sup>91</sup> Be that as it may, it has not been possible in practice to decouple wholly the political dimension from the economic one, and impulses emanating from the business sector have impinged on developments elsewhere, resulting in *de facto* patterns of compliance that cannot be explained fully in strictly causal (as distinct from functional) terms.<sup>92</sup>

In some instances, ascertaining the degree of international legal compliance does not pose an insurmountable challenge because of the availability of effective qualitative adjudication mechanisms or relevant quantitative yardsticks (the latter have been relied upon in inferential processes even in research areas seemingly not amenable to scientific exploration such as human rights).<sup>93</sup> The Sino-British Joint Declaration is not alone in not falling into this category. Neither of those two paths can be comfortably followed in seeking to determine whether (from a binary perspective), or to what extent (from a scalar viewpoint), China has acted in accordance with broad, diverse, and elastic provisions of that complex document. Inevitably, opinions differ, particularly if the assessment exercise is geared towards producing a categorical (i.e., binary type) statement, and generating an implicitly or explicitly weighted scalar configuration may be just marginally less demanding.

This gives rise to thorny methodological problems such as reliability and validity. Unlike in the experimental sciences (with partial exception of medicine), the empirical accumulation of theoretical knowledge in law is based principally on single (as distinct from multiple) case studies. Scholars often approach rule conformity from fundamentally different analytical angles and arrive at conclusions that bear the imprint of the conceptual paradigm from which they draw inspiration. Allegations of selection bias and subjective construction are common.

---

91. See generally YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 493-500 (Hong Kong University Press 1997); Ian Holliday, Ma Ngok & Ray Yep, *A High Degree of Autonomy? Hong Kong Special Administrative Region, 1997-2002*, 73 POL. Q. 455, 455-464 (2002); LO SHIU-HING, GOVERNING HONG KONG: LEGITIMACY, COMMUNICATION AND POLITICAL DECAY (2001) [hereinafter LO SHIU-HING, GOVERNING HONG KONG]; Phil C. W. Chan, *Hong Kong's Political Autonomy and Its Continuing Struggle for Universal Suffrage*, SING. J. OF LEGAL STUD. 285, 285-311 (2006); Yash Ghai, *The Legal Foundations of Hong Kong's Autonomy: Building on Sand*, 29 ASIA PAC. J. OF PUB. ADMIN. 3, 3-28 (2007); CARINE LAI & CHRISTINE LOH, FROM NOWHERE TO NOWHERE: A REVIEW OF CONSTITUTIONAL DEVELOPMENT, HONG KONG 1997-2007 (2007); Sonny Lo, *The Political Cultures of Hong Kong and Mainland China: Democratisation, Patrimonialism and Pluralism in the 2007 Chief Executive Election*, 29 ASIA PAC. J. OF PUB. ADMIN. 101, 101-28 (2007) [hereinafter Sonny Lo, *Political Culture*]; Sonny S. H. Lo, *The Mainlandization of Hong Kong: A Triumph of Convergence over Divergence with Mainland China*, in THE HONG KONG SPECIAL ADMINISTRATIVE REGION IN THE FIRST DECADE 179-231 (Joseph Y.S. Cheng ed., City University of Hong Kong Press 2008) [hereinafter Sonny Lo, *Mainlandization*]; SONNY SHIU -HING LO, THE DYNAMICS OF BEIJING—HONG KONG RELATIONS: A MODEL FOR TAIWAN? (2008) [hereinafter SONNY SHIU-HING LO, DYNAMICS].

92. See generally Sonny Lo, *Mainlandization*, *supra* note 91; MING SING, HONG KONG'S TORTUOUS DEMOCRATIZATION: A COMPARATIVE ANALYSIS (2004); HONG KONG POLITICAL SCIENCE ASSOCIATION, CONTEMPORARY HONG KONG POLITICS: GOVERNANCE IN THE POST-1997 ERA (Lam Wai-man et al. eds., Hong Kong University Press 2007); MA NGOK, POLITICAL DEVELOPMENT IN HONG KONG: STATE, POLITICAL SOCIETY, AND CIVIL SOCIETY (2007).

93. See Gauthier de Beco, *Human Rights Indicators for Assessing State Compliance with International Human Rights*, 77 NORDIC J. OF INT'L L. 23-49 (2008).

The adversarial nature of the argument-making process cannot in itself induce convergence in the absence of authoritative adjudication/conflict resolution. There is no magic wand to narrow significantly the gap separating those positioned at the polar ends of the opinion spectrum regarding China and Hong Kong.

Reliability and validity are pivotal issues in empirical research. The former refers to consistency or dependency. It implies that projects repeated under identical or closely similar conditions must yield equivalent or roughly the same results. Validity relates to truthfulness or how well an idea about reality corresponds to actual reality. Where measurement is a realistic objective (i.e., in quantitative research), it concerns the match between a construct, or the way an analyst captures an idea in a conceptual definition, and a measure.<sup>94</sup> There is no reason why scholars dissecting compliance in contexts such as the Sino-British Joint Declaration should not be held systematically accountable for the reliability and validity of their (at times idiosyncratic) fact-finding endeavours.

Reliability and validity are positivist notions, but they are not inconsistent with constructivist postulates. Nor are they the exclusive preserve of quantitatively-oriented researchers. Various tools have been proposed to render them feasible goals in qualitative settings. They include triangulation in its various shapes, participant feedback (where appropriate), peer review or debriefing, negative case sampling, reflexivity or neutrality, pattern matching and audit trail.<sup>95</sup> A simple procedure such as negative case sampling (which involves the examination – and, if necessary, presentation – of cases contrary to one's expectations) or reflexivity/neutrality (which assumes the form of a transparent review of hypotheses, methods and findings that is deliberately structured in a critical fashion) may lend considerable credibility to the project.<sup>96</sup>

Beyond such technical quibbles, the implementation of the Sino-British Joint Declaration exposes inherent limitations of the entire range of theoretical perspectives on rule conformity in the global arena. The world political architecture, as seen from Beijing, must be a different construct from the liberal international order underpinned by a Franck-type sense of legitimacy derived from perceptions of procedural and substantive justice. It may have more in common with the patterns of uneven development portrayed by modern world system theorists (who highlight inequalities between an economic core, semi-periphery,

---

94. See generally EDWARD G. CARMINES & RICHARD A. ZELLER, *RELIABILITY AND VALIDITY ASSESSMENT* (1979) (explaining how social scientists determine the reliability and validity of empirical research measurements).

95. See generally R. Burke Johnson, *Examining the Validity Structure of Qualitative Research*, 118 *EDUC.* 282, 282-90 (1997); ISADORE NEWMAN & CAROLYN R. BENZ, *QUALITATIVE-QUANTITATIVE RESEARCH METHODOLOGY: EXPLORING THE INTERACTIVE CONTINUUM* 18-19 (1999); Jeasik Cho & Allen Trent, *Validity in Qualitative Research Revisited*, 6 *QUALITATIVE RES.* 319, 319-40 (2006).

96. See generally Johnson, *supra* note 94; NEWMAN & BENZ, *supra* note 94; Cho & Trent, *supra* note 94.

and periphery)<sup>97</sup> and their dependency counterparts<sup>98</sup> but perhaps no longer those depicted by exponents of Marxist-Leninist thought.<sup>99</sup>

Hong Kong is a product of British imperial practices illustrating that liberal and illiberal policies may be pursued simultaneously. During the so-called free trade era of the mid-nineteenth century, European States were subject to reciprocity treaties freely negotiated between contracting parties. This contrasted starkly with the open-door treaties imposed on the East. Moreover, while European countries were given sufficient leeway to industrialize through a modicum of tariff protection (designed to shield infant industries), Eastern economies were compelled to move in an unimpeded fashion to free trade or equivalent.<sup>100</sup> This coincided with a passive military posture on the part of Britain vis-à-vis its European neighbors, yet frequent recourse to violence in the East.<sup>101</sup>

The imposition of unequal treaties was not merely a manifestation of a one-sided (and thus illiberal) strategy of economic containment but also a concerted effort to bring about cultural conversion. The psychological damage which this inflicted is believed to be greater than the material harm.<sup>102</sup> It assumed the form of a widespread affront to Eastern sovereignty and cultural autonomy. The Opium Wars, with Hong Kong at the epicenter, created a wedge for Britain to engineer a dilution of China's sense of identity.<sup>103</sup> The treaties which facilitated the undertaking were labelled unequal for three reasons. First, they were imposed unilaterally and reinforced by military power.<sup>104</sup> Second, they were dictated solely on Western terms.<sup>105</sup> Third, they symbolized the humiliation and injustice suffered by the vanquished party.<sup>106</sup>

Two imperial practices proved particularly unsettling from a cultural perspective. Notably, Chinese sovereignty was severely undermined by the application at gunpoint of the principle of extraterritoriality – the notion that all foreign residents, rather than just foreign diplomats, living in China should be subject to their own Western laws.<sup>107</sup> A number of concessions were established

---

97. See DAVID N. BALAM & MICHAEL VESETH, INTRODUCTION TO INTERNATIONAL POLITICAL ECONOMY 72 (1996).

98. See *id.* at 73-74.

99. See generally *id.* at 67-69. See also Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 816-17 (1990); Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L. J. 81, 127 (1991); William J. Aceves, *Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution*, 39 COLUM. J. TRANSNAT'L L. 299, 299-300, 340 (2001); CHINA MIÉVILLE, BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW 245-47, 263-64 (2004); John A.C. Conybeare, *Efficiency, Entitlements, and Diservingness: Perspectives on International Distributive Justice*, 14 REV. OF INT'L POL. ECON 389, 389-411 (2007).

100. JOHN M. HOBSON, THE EASTERN ORIGINS OF WESTERN CIVILIZATION 260 (2004).

101. *Id.*

102. *Id.*

103. *Id.* at 260-61.

104. *Id.* at 261.

105. *Id.* At 261-62.

106. *Id.*

107. *Id.*

for that purpose. Underlying this problematic policy was the perception that China was not a civilized society and consequently was not deemed to be sovereign (and equal). In addition, the Chinese were pressured into accepting foreign administrators as heads of key bureaucratic agencies (e.g., postal services).<sup>108</sup>

It is a moot point whether such distant historical experiences, however traumatic, are necessarily an integral part of the collective psyche of a nation, particularly an economically and politically resurgent one, and impinge in a concrete fashion on foreign policymaking and implementation. Interestingly, leading constructivists emphasize discontinuity and epochs, rather than path-dependence and persistence, in the study of macro history.<sup>109</sup> On the other hand, prominent ethno-symbolists highlight the importance of the reinvention and representation of long-established cultural relationships, group ties, myths, symbols, as well as memories, in the intricate (yet meaningful) process of collective identity formation and (hence) action.<sup>110</sup>

A wide ranging survey of the contemporary China scene lends broad support to ethno-symbolic postulates. While the role of other factors (which may propel the country towards cooperation with the core of the world system and thus rule conformity) is not overlooked by the author, he concludes that the Chinese experience with unequal treaties continues (far more so than elsewhere; e.g., Japan and Turkey) to exert a marked influence on grassroots and policy perceptions of the global politico-economic order and the role played by international law in sustaining it (e.g., China was the first nation to challenge the validity of its treaties with foreign countries).<sup>111</sup> This ambivalence reflects itself in the attitude towards the Sino-British Joint Declaration, a treaty which restores sovereign authority but dilutes it at the same time.<sup>112</sup>

It is equally difficult to reconcile Chinese realities with visions of transnational legal process. Rapid post-1978 economic expansion has not paved the way for a corresponding increase in external activism. China may be inching in that direction, by virtue of its growing affluence and size (as well as moderation), but this is a deliberately protracted process. There is no solid evidence to indicate that it is firmly engaged in interactive learning in the global

---

108. *Id.* See generally EILEEN H. TAMURA ET AL., CHINA: UNDERSTANDING ITS PAST 109-22 (1997); PETER WESLEY-SMITH, UNEQUAL TREATY 1898-1997: CHINA, GREAT BRITAIN AND HONG KONG'S NEW TERRITORIES (1998) (discussing the British law and administrative system in Hong Kong's New Territories); Matthew Craven, *What Happened to Unequal Treaties? The Continuities of Informal Empire*, in INTERROGATING THE TREATY: ESSAYS IN THE CONTEMPORARY LAW OF TREATIES 43, 43-80 (Matthew Craven & Malgosia Fitzmaurice eds., Wolf Legal Publishers, 2005); DONG WANG, CHINA'S UNEQUAL TREATIES: NARRATING NATIONAL HISTORY (2005) (studying the linguistic development and uses of the expression 'unequal treaties,' and arguing that the Chinese nationalists use the phrase to strengthen party authority as well as preserve national independence, unity, and development).

109. DONG WANG, *supra* note 108, at 2.

110. *Id.*

111. Dong Wang, *The Discourse of Unequal Treaties in Modern China*, 76 PAC. AFF. 399, 399-401 (2003).

112. See MUSHKAT, *supra* note 12, at 10.

arena and that it is thus being decisively socialized to comply with international rules. There is also no reason to infer that involvement in transnational epistemic communities and enmeshment at home are having a material impact on foreign policy making and implementation.<sup>113</sup> If they do, the handling of the Sino-British Joint Declaration, an almost exclusively domestic affair (Hong Kong being an element, even if a semi-autonomous one, in the domestic equation) since 1997, is a notable exception to the norm.

The assumption, explicit or implicit, that rule-focused learning in the global arena is an orderly phenomenon also needs to be critically examined. Change-inducing catalysts may originate from different sources and assume a variety of forms. By the same token, responses to them are not uniform in nature. A distinction may thus be drawn between changes which are slow or fast (speed of change) and those which are incremental or fundamental (mode of change). A typology based on these distinctions yields four categories of change: gradual typical, gradual atypical, rapid normal and rapid atypical.<sup>114</sup> Fast movement along an unfamiliar path (e.g., in the form crisis-engendered systematic perturbations) may prove disruptive and produce undesirable effects.<sup>115</sup>

Post-1997 semi-autonomous Hong Kong provides ample illustrations. Perhaps the most telling is the rather brief but highly intense episode that revolved around (indirect) Chinese efforts to implement national security legislation (intended to be passed under Article 23 of the Basic Law) in the territory. The aim was to introduce the crimes of subversion and secession, and to grant the local government extensive powers to ban non-mainstream groups.<sup>116</sup> As such, the initiative was widely perceived by the community as an act fundamentally at variance with the Sino-British Joint Declaration (the spirit, if not the letter, possibly both).<sup>117</sup> The blueprint triggered a decidedly adverse reaction at the grassroots level and was withdrawn unceremoniously.<sup>118</sup> The experience, while involving interactive learning (albeit largely confined to the domestic arena), can scarcely be portrayed as being meaningfully constructive.

The gap between premises underlying the managerial model and the workings of the international legal architecture designed to ensure the re-absorption of Hong

---

113. See JUDITH F. KORNBERG, JOHN R. FAUST, *CHINA IN WORLD POLITICS: POLICIES, PROCESSES, PROSPECTS* (2d ed. 2005) (explaining that China seeks a foreign policy with minimum international obligations but considerable internal independence).

114. See Robert F. Durant & Paul F. Diehl, *Agendas, Alternatives and Public Policy: Lessons from the U.S. Foreign Policy Arena*, 9 J. PUB. POL'Y 179, 196-205 (1989).

115. See Paul A. Sabatier, *An Advocacy Coalition Framework of Policy Change and the Role of Policy-Oriented Learning Therein*, 21 POL'Y SCI. 129, 148-49 (1988).

116. XIANGGANG JI BEN FA Art. 23.

117. See Press Release, Amnesty International, Hong Kong: Article 23 Legislation – the Potential for Abuse (Dec. 9, 2002) available at <http://www.amnesty.org/en/library/info/ASA19/004/2002/en>.

118. Miron Mushkat & Roda Mushkat, *The Political Economy of the Constitutional Conflict in Hong Kong*, 11 TILBURG FOREIGN L. REV. 756, 769 (2004); Carole J. Petersen, *Hong Kong's Spring of Discontent: The Rise and Fall of the National Security Bill in 2003*, in NATIONAL SECURITY AND FUNDAMENTAL FREEDOMS: HONG KONG'S ARTICLE 23 UNDER SCRUTINY 13, 49 (Fu Hualing et al., 2005).

Kong into nominally socialist China without disturbing the politico-economic status quo in the territory is equally large. The notion of ambiguity as outlined by proponents of the model is of course fraught with considerable analytical difficulties, most of which are of limited relevance here. Suffice it to say, in this context that there are mechanisms for reducing ambiguity and that both norm-driven and rational-type players may respond to the challenge in a manner that minimizes divergences from a compliance-consistent trajectory, if they so desire. There is nothing to prevent the Chinese side in this particular instance from taking steps to enhance transparency either through the established legislative/policy/quasi-judicial or alternative institutional channels (at least with respect to the Basic Law, the constitutional vehicle embodying concretely the broad ideas built into the Sino-British Joint Declaration).<sup>119</sup>

It is apparent that the international legal instrument singled out here falls squarely into the ambiguous category.<sup>120</sup> This need not however be attributed to an overly loose conception of the appropriate ends-means configuration in the circumstances (although substantial differences between the parties involved in the design process and the adversarial climate prevailing at the time may have been a contributing factor), leaving ample scope for conflicting interpretations and departures from the envisaged blueprint. Rather, ambiguity may have been deliberately rendered a feature of the Sino-British Joint Declaration in order to enable the relevant parties to adapt effectively to structural shifts in the internal and external politico-economic environment over an extended period of time. Even from a narrow Hong Kong perspective, a balance had presumably to be struck between the imperatives of coherence and flexibility.

Perhaps more importantly, from a theoretical viewpoint, this case again exposes the cultural limitations of Western perceptions of the ideal attributes of a legal instrument. A high degree of clarity is regarded favorably and pervasive ambiguity is deemed to be inherently problematic. Lawmakers in China tend to adopt a fundamentally different stance. A modicum of ambiguity may thus be considered as a factor enhancing the quality of the governance structure rather than detracting from it.<sup>121</sup> This is a constructivist-style interpretation of a culturally-ingrained action mode, not an endorsement of one response to ambiguity or another.<sup>122</sup>

Another conceptual pillar underpinning the managerial model—capacity constraints—also sheds little light on rule conformity in the present context. It is evident that any divergences between international legal commitments and corresponding practices here, whether on the Chinese or Hong Kong side (with the United Kingdom effectively relegated to the position of a passive observer), are not the result of a technical skill shortfall, which could be addressed by third

---

119. See YASH GHAI, CONSTITUTIONAL, *supra* note 91, at 212-15.

120. See MUSHKAT, *supra* note 12, at 145.

121. XIAOYING MA & LEONARD ORTOLANO, ENVIRONMENTAL REGULATION IN CHINA: INSTITUTIONS, ENFORCEMENT AND COMPLIANCE 91-92 (2000).

122. See *id.* at 153-71.

parties possessing higher-level expertise. This may well be an issue meriting selective attention in China, but not in respect to the Sino-British Joint Declaration and not necessarily in the form envisaged by proponents of the managerial model. The model may need to be broadened to encompass adequately institutional (as distinct from technical) capacity.

Sinologists have addressed the capacity question in considerable detail. They have focused predominantly on institutional fragmentation (often the product of administrative decentralization, or poorly conceived devolution of power from the central government to the provinces) as the root cause of policy disarray/paralysis. At certain critical junctures in some strategic domains (e.g., population control), the political center in Beijing has been able to mobilize resources decisively, neutralize pockets of resistance and follow a coherent course. This has by no means been invariably the pattern observed, however.<sup>123</sup> Be that as it may, the lack of institutional cohesion, rather than technical deficiencies, has typically posed the principal challenge in such circumstances. As pointed out, there is no compelling reason to believe that capacity constraints in any shape materially hamper Chinese movement on the Sino-British Joint Declaration front. Interestingly, that may not be the case on the Hong Kong side, despite the territory's lofty status as a global metropolis.<sup>124</sup> Again, technical impediments are not the relevant issue. Nor do the difficulties lie in instrument-specific restrictions that circumscribe the room for maneuver of the local authorities.<sup>125</sup> Rather, post-1997 Hong Kong has experienced institutional fragmentation of its own and subtle changes in its political culture. It has been argued that this has impinged adversely on its potential as a partner, albeit a junior one, in the implementation of the Sino-British Joint Declaration.<sup>126</sup>

A closer fit may be identified between realist propositions and the behavioral trends observed in this context. An examination, within a game-theoretical framework, of Sino-British negotiations which culminated in a bilateral accord regarding the future of Hong Kong lends support to that assertion. The author

---

123. See generally, WANG SHAOGUANG & HU ANGANG, *THE CHINESE ECONOMY IN CRISIS: STATE CAPACITY AND TAX REFORM* (2001); Jonathan Schwartz, *The Impact of State Capacity on Enforcement of Environmental Policies: The Case of China*, 12 J. ENV'T & DEV. 50 (2003); Shaoguang Wang, *The Problem of State Weakness*, 14 J. DEMOCRACY 36 (2003); Dali L. Yang, *Population Control and State Coercion in China*, 14 J. DEMOCRACY 43 (2003); HOLDING CHINA TOGETHER: DIVERSITY AND NATIONAL INTEGRATION IN THE POST-DENG ERA (Barry J. Naughton & Dali L. Yang eds., 2004); Shaoguang Wang, *Regulating Death at Coalmines: Changing Modes of Governance in China*, 15 J. CONTEMP. P. R. C. 1 (2006); Tim Wright, *State Capacity in Contemporary China: Closing the Pits and Reducing Coal Production*, 16 J. CONTEMP. CHINA 173 (2007); Jonathan Schwartz & R. Gregory Evans, *Causes of Effective Policy Implementation: China's Public Response to SARS*, 16 J. CONTEMP. P. R. C. 195 (2007).

124. DAVID R. MEYER, *HONG KONG AS A GLOBAL METROPOLIS passim* (2000).

125. See Zeng Huaqun, *Hong Kong's Autonomy: Concept, Developments and Characteristics*, 1 CHINA INT'L J. 313, 318 (2003); Zeng Huaqun, *Unprecedented International Status: Theoretical and Practical Aspects of the HKSAR's External Autonomy*, 9 J. WORLD INVESTMENT & TRADE 275, 292-97 (2008).

126. Roda Mushkat, *Hong Kong's Exercise of External Autonomy: A Multi-Faceted Appraisal*, 55 INT'L & COMP. L. Q. 945, 960-61 (2006).

demonstrated that China may have devised and executed a well-defined and tightly-structured multi-step strategy that allowed it to achieve its goals in an efficient fashion (and outmaneuver the United Kingdom in the process).<sup>127</sup> No research of this type has been undertaken subsequently but, if it were possible to extrapolate beyond that particular phase in Hong Kong's evolution from a British colony into a special administrative region of the PRC, realist perspectives would receive further reinforcement.

Unfortunately, extrapolation cannot be the sole tool relied upon for this purpose and the paucity of germane empirical inquiries militates against easy generalizations. By the same token, the stylized (i.e., abstract) nature of realist models implies that there may be a risk of oversimplifying a complex picture, leading to a loss of potentially valuable information. Two specific questions may thus have to be addressed. First, is it legitimate to embrace the nationalist assumption that the State is always the critical variable in the compliance equation or should one reach across the analytical divide and incorporate elements of the pluralist vision espoused by transnational legal process theorists, at least selectively by accepting the notion of domestic inter-group competition in the policy process? Second, is it appropriate to posit that strategic decision-makers are driven exclusively by cost-benefit calculations, even if the aim is merely to generate illuminating insights?

Public choice versions of the rationalist model discard the assumption of State centrality and homogeneity. In writings on rule conformity in the global arena however other actors somehow recede into the background and the State re-emerges as the principal unit of analysis, blurring a key distinction between the realist and public choice schools. A notable exception to the norm is a study illustrating incisively that international legal agreements have distinct domestic distributional consequences and that domestic constituencies take active steps to magnify or lessen them. The upshot is a flow of autonomous influences from multiple sources and in a variety of directions. The State is not necessarily able to regulate effectively this flow, a phenomenon which inevitably has ramifications for national compliance.<sup>128</sup>

In the period leading up to the resumption of Chinese sovereignty, there were two scholarly attempts to predict the fate of the Sino-British Joint Declaration employing a public choice-type conceptual framework. A number of salient domestic groups were identified in China (centralizers, decentralizers, bureaucratic conservatives, entrepreneurial reformers, the military, etc) and their interests vis-à-vis Hong Kong were determined. The relative power of the groups to shape policy outcomes was then assessed and conclusions were drawn regarding likely Chinese fulfillment of obligations towards the territory.<sup>129</sup> The subject was not revisited by

---

127. See Ma Ngok, *The Sino-British Dispute over Hong Kong: A Game Theory Interpretation*, 7 *ASIAN SURV.* 738, 742-44 (1997).

128. See, e.g., Xinyuan Dai, *Why Comply? The Domestic Constituency Mechanism*, 59 *INT'L ORG.* 363, 372-74 (2005).

129. See, e.g., BRUCE BUENO DE MESQUITA, DAVID NEWMAN & ALVIN RABUSHKA, *FORECASTING POLITICAL EVENTS: THE FUTURE OF HONG KONG* 105-33 (1985) (predicting the political ramifications

the authors after 1997, but to the extent that such an approach possesses sound empirical underpinnings,<sup>130</sup> the studies serve as a useful reminder that the heavy realist emphasis on the State is not entirely productive.

When it comes to the question whether policymakers in China seek coherently and consistently to maximize benefits and minimize costs (as they perceive them, presumably for the nation), one confronts a genuine embarrassment of (analytical) riches. Even for the years when the country seemingly experienced a hard form of one-person rule, and was to all intents and purposes closed to the outside world, several alternative explanatory constructs were developed by Sinologists (e.g., the Yan'an round-table model, the two-policy-lines struggle model, the structural functional model, the Maoist-revolutionary model, and the generational model).<sup>131</sup> The reform era has naturally witnessed a greater proliferation of competing theoretical accounts (e.g., the structural model, the normative model, the Mao-in-command/paramount leader model, the factional model, the bureaucratic model, the tendency model, the new generational model and the interest group model).<sup>132</sup>

A team of prominent students of Chinese politics has managed to reduce the cognitive diversity significantly by consolidating the divergent constructs into merely two key categories: (1) those focusing on reasoned debates over substantive issues by policymakers (which bear the hallmarks of the rationalist model), and (2) those highlighting the individual/factional struggle for power among contending members of the ruling elite (the power model).<sup>133</sup> However, to complicate matters slightly, it has introduced its own version of the bureaucratic model (which links policy outcomes to bureaucratic structures)<sup>134</sup> and, at a later juncture, yet another (fragmented authoritarianism) model. The latter posits that political authority in China is fragmented and disjointed. Strategic decisions are thus characterized by complex bargaining and multi-directional maneuvering.<sup>135</sup>

---

of Chinese administration of Hong Kong); BRUCE BUENO DE MESQUITA, DAVID NEWMAN & ALVIN RABUSHKA, *RED FLAG OVER HONG KONG* (1996) (updating the predictions set out in the authors' 1985 book).

130. For a partial evaluation of this approach, see Miron Mushkat & Roda Mushkat, *The Political Economy of International Legal Compliance: Pre-1997 Predictions and Post-1997 Realities in Hong Kong* 10 U. C. DAVIS J. INT'L L. & POL'Y 229, 231-35 (2004); Miron Mushkat & Roda Mushkat, *International Law and Game Theory: A Marriage of Convenience or Strange Bedfellows*, 2 N. Z. Y. B. INT'L L. 101, 109-13 (2005).

131. LUCIAN PYE, *THE DYNAMICS OF CHINESE POLITICS* 41-46 (1981); HUANG JIANRONG, *THE APPLICABILITY OF POLICY-MAKING THEORIES IN POST-MAO CHINA* 59-62 (1999).

132. See Harry Harding, *Competing Models of the Chinese Communist Policy Process: Toward a Sorting and Evaluation*, 20 ISSUES & STUDIES 13, 13-18 (1984). See also HUANG JIANRONG, *supra* note 131.

133. KENNETH LIEBERTHAL & MICHEL OKSENBURG, *POLICY MAKING IN CHINA: LEADERS, STRUCTURES AND PROCESSES* 58-60 (1988); HUANG JIANRONG, *supra* note 131, at 61. See also Avery Goldstein, *Explaining Politics in the People's Republic of China: The Structural Alternative*, 22 COMP. POL. 301, 315-17 (1990).

134. See LIEBERTHAL & OKSENBURG, *supra* note 133, at 402-03.

135. See Kenneth G. Lieberthal, *Introduction: The "Fragmented Authoritarianism" Model and Its Limitations*, in BUREAUCRACY, POLITICS AND DECISION MAKING IN POST-MAO CHINA 1, 6-7, 12

Individual/factional fragmentation has diminished in recent years as a result of growing bureaucratization/institutionalization. It nevertheless remains a salient feature of Chinese policy making.<sup>136</sup> While empirical evidence is sparse, it is reasonable to assume that post-1997 Hong Kong is not insulated from such pressures.<sup>137</sup> Unlike its realist counterpart, the public choice version of rationalism may accommodate fragmentation and disjointedness, provided the participants in the game endeavor to maximize utility in a determined and systematic fashion. That said, individual rationality may not always prevail in these circumstances and, even when it does, collective rationality may be impaired. This, in turn, may impinge on national compliance.

It is not certain whether, or to what extent, reputational costs are part of the equation. As Simmons has noted, countries vary in their sensitivity in that respect.<sup>138</sup> Interestingly, China may not be oblivious to the reputational implications of rule conformity.<sup>139</sup> On the other hand, its record suggests that the sensitivity displayed may be issue dependent.<sup>140</sup> Post-1997 Hong Kong is expected to be managed within the international legal framework provided by the Sino-British Joint Declaration, but this is an anomalous situation from a Chinese perspective, because the territory's status is deemed to be a domestic question, in the final analysis. That may lead to a greater willingness to sacrifice reputation than in other policy domains. Theory-building efforts should arguably reflect such variations.

A related observation may be appropriate in this context. Proponents of the public choice model contend that policymakers in the political marketplace are myopic.<sup>141</sup> If this is the case, there may be discontinuities in the decision-making process detrimental to the orderly acquisition of State reputation over time. Individual/factional fragmentation, coupled with disjointedness, which apparently persists to one degree or another in China, may certainly be viewed as a characteristic of the institutional environment not conducive to a concerted and methodical pursuit of reputation-oriented strategies in the political arena. There may be countervailing forces at work and differences across the issue spectrum, yet this is another matter which possibly merits further analytical attention.

---

(Kenneth G. Lieberthal & David M. Lampton eds., 1992).

136. SUSAN L. SHIRK, CHINA: FRAGILE SUPERPOWER 51-52 (2007).

137. See generally LO SHIU-HING, GOVERNING HONG KONG, *supra* note 91; Sonny Lo, *Political Culture*, *supra* note 91; Sonny Lo, *Mainlandization*, *supra* note 91; SONNY SHIU-HING LO, *Dynamics*, *supra* note 91; "ONE COUNTRY, TWO SYSTEMS" IN CRISIS: HONG KONG'S TRANSFORMATION SINCE THE HANDOVER (Wong Yiu-chung ed., 2004).

138. Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819, 819 (2000); Beth A. Simmons, *Money and the Law: Why Comply with the Public International Law of Money?*, 25 YALE J. INT'L L. 323, 324-25 (2000).

139. KENT, LIMITS OF COMPLIANCE, *supra* note 83, at 132; CHAN, *supra* note 83, at 69-75; KENT, BEYOND COMPLIANCE, *supra* note 83, at 2.

140. KENT, BEYOND COMPLIANCE, *supra* note 83, at 4-5.

141. DAVID L. WEIMER & AIDAN R. VINING, POLICY ANALYSIS: CONCEPTS AND PRACTICE 159-95 (3d ed. 1999).

## V. CONCLUSION

The study of compliance has emerged as one of the most dynamic and vibrant sub-fields in international law. The conceptual and empirically-based exchanges between legalization theorists, who discern patterns of rule conformity in the global arena, and their sceptical critics, who employ an instrumentalist optic, have been illuminating and productive. Useful attempts have also been made to narrow the gap between the two perspectives.<sup>142</sup> The systematic exploration of the subject was initially an exclusively American affair, but it is now dissected carefully on the other side of the Atlantic. Indeed, some of the most comprehensive and rigorous work in this area is presently being carried out in Europe.<sup>143</sup>

Thus far, no experiences and insights from other parts of the world have been incorporated into the analytical façade.<sup>144</sup> A degree of exclusivity prevails in that virtually the entire theoretical structure rests on narrow Western foundations. A cultural/geographical broadening of the scope of inquiry might prove to be beneficial, even if impeded by a lack of relevant data and limited access to crucial sources of information. A tentative juxtaposition of American/European conceptual formulations and Chinese/Eastern realities suggests that this may be a worthwhile undertaking. The latter do not necessarily call the former into question, but they suggest that certain substantive and methodological issues may need to be addressed from additional, perhaps even fundamentally different, angles.

---

142. See Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559, 592-93 (2002); David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 NW. U. L. REV. 879, 881-83 (2003); Teall Crossen, *Multilateral Environmental Agreements and the Compliance Continuum*, 16 GEO. INT'L ENVTL. L. REV. 473, 494-98 (2004); Claire R. Kelly, *Realist Theory and Real Constraints* 44 VA. J. INT'L L. 545, 556-64 (2004); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 492 (2005).

143. See LAW AND GOVERNANCE IN POSTNATIONAL EUROPE: COMPLIANCE BEYOND THE NATION-STATE (Michael Zürn and Christian Joerges eds., 2005).

144. For notable exceptions to the norm see KENT, LIMITS OF COMPLIANCE, *supra* note 83; CHAN, *supra* note 83; KENT, BEYOND COMPLIANCE, *supra* note 83.