

.....

# The Dynamics of International Legal Regime Formation: The Sino-British Joint Declaration on the Question of Hong Kong Revisited

Roda Mushkat\*

## Abstract

*The academic literature on the systems that govern relations between states is rich but not without gaps. The subject of international legal regime formation is one that may benefit from further exploration. The protracted and unnerving process leading to the signing of a path-breaking agreement between China and the United Kingdom regarding the future of Hong Kong, a topic which has fascinated historians but has not galvanized socio-legal researchers into action on a meaningful scale, may offer considerable insights pertaining to the development of governance systems that regulate complex interaction between states.*

## 1 Introduction

In the past two decades, the study of international law has assumed a more 'scientific' form. In the process, it has become relatively less concerned with prescription than description, as well as the often related activity of explaining observable behavioural patterns. This shift has been accompanied by corresponding methodological adjustments, albeit less pronounced in scope because the conceptual reorientation has been considerably deeper than that witnessed in the domain of empirical validation.

\* Professor of International Law, Hopkins-Nanjing Centre, Paul H. Nitze School of Advanced International Studies (SAIS), Johns Hopkins University; Honorary Professor, Faculty of Law, University of Hong Kong; Visiting Professor, Kadoorie Institute, University of Hong Kong; and Research Fellow, Institute of Advanced Legal Studies, University of London. I wish to thank Miron Mushkat for helping me navigate through social science territory and the Kadoorie Institute for its research support, but I am solely responsible for the views expressed herein. Email: [rmushka1@jhu.edu](mailto:rmushka1@jhu.edu).

An increasing openness to ideas and tools originating in neighbouring academic disciplines, notably the social sciences, has also been a salient characteristic of the reconfiguration that has taken place. It is not easy to identify a specific catalyst which may have induced the turnaround, or a precise turning point at which it may have occurred, but an article published in 1989 by a scholar straddling the previously detached fields on international law and international relations is generally credited with acting as an agent of change.<sup>1</sup>

Recourse to notions and instruments grounded in scientific logic and technique has not manifested itself across the entire issue spectrum. It has been most pronounced with respect to international legal compliance, but has not been seen on a broad scale and with great intensity elsewhere. The question of ‘how nations behave’, first addressed comprehensively by an international law expert 50 years ago,<sup>2</sup> has come to be perceived as inextricably linked with that of rule conformity in the global arena. A number of other subjects have attracted the attention of international legal researchers with an interdisciplinary bent, although not as consistently and strongly. Among the latter it is appropriate to single out the topic of the origins of international law, a sphere of academic inquiry where there has been a not insignificant input from students of international legal behaviour.<sup>3</sup>

It is this particular issue which, to all intents and purposes, even if selectively, constitutes the focus of this article. However, the term ‘international law’ recedes into the background and a somewhat more abstract one, ‘international legal regime’, moves into the foreground. A certain distance from prevailing theoretical discourse and professional realities should not be equated with novelty and marginal status. The idea of an international regime was floated as early as 1975,<sup>4</sup> recycled and refined subsequently, explored extensively, exposed to substantial criticism, retreated and re-emerged, and it continues to occupy the academic centre stage today. The definition is often adapted to the special circumstances examined, but there is a consensus among interested scholars that regimes may conveniently be viewed as:

sets of implicit or explicit principles, norms, rules and decision making procedures around which actors’ expectations converge in a given area of international relations. Principles are beliefs of fact, causation and rectitude. Norms are standards of behaviour. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice.<sup>5</sup>

This scarcely qualifies as a precise definition. Consequently, it has been argued that regimes may elastically be portrayed as ‘everything from a patterned set of interaction . . . to any form of multilateral coordination, cooperation, or collaboration . . . to formal

<sup>1</sup> See Abbott, ‘Modern International Relations Theory: A Prospectus for International Lawyers’, 14 *Yale J Int’l L* (1989) 335.

<sup>2</sup> See L. Henkin, *How Nations Behave: Law and Foreign Policy* (1968).

<sup>3</sup> See, e.g., Mushkat, ‘The Development of Environmental Governance Regimes: A Chinese-Inspired Reconstruction’, 2 *Washington and Lee School of Law J Energy, Climate and the Environment* (2010) 1.

<sup>4</sup> See Ruggie, ‘International Responses to Technology: Concepts and Trends’, 29 *Int’l Org* (1975) 557.

<sup>5</sup> Krasner, ‘Structural Causes and Regime Consequences: Regimes as Intervening Variables’, in S.D. Krasner (ed.), *International Regimes* (1983), at 2.

machinery'.<sup>6</sup> The corollary is that these analytical constructs inhabit an 'ontological space somewhere between the level of formal institutions . . . and systematic factors'.<sup>7</sup> Indeed, that may partly account for their intellectual appeal as the opaqueness is apparently 'a fertile source of discussion simply because people mean different things when they use [them]'.<sup>8</sup> Given such amorphousness and mistiness, producing an operational definition capable of guiding empirical research may prove to be an elusive goal.

Such reservations are not without foundation, but their significance should not be overstated. Similar objections may be levelled at many socio-legal concepts the boundaries of which cannot be delineated with surgical accuracy and which reside in disputed/unclaimed territory. With the benefit of hindsight, at least of some of the misgivings expressed during the early phases of the evolution of the literature on international regimes seem to be rather trivial. Neither a degree of vagueness nor a sense of feeble identity has prevented the academic work in this analytical domain from gaining momentum and displaying increasing rigour. There is certainly no compelling evidence to suggest that grappling with the operational side of the challenge has turned out to be an insurmountable undertaking.<sup>9</sup>

<sup>6</sup> R.M. Crawford, *Regime Theory in the Post-Cold War World: Rethinking Neoliberal Approaches to International Relations* (1996), at 55.

<sup>7</sup> Kratochwil and Ruggie, 'International Organization: A State of the Art on the Art of the State', 41 *Int'l Org* (1986) 753, at 760.

<sup>8</sup> Strange, 'Cave! Hic Dragones: A Critique of Regime Analysis', in Krasner (ed.), *supra* note 5, at 337, 342–343.

<sup>9</sup> See generally O.R. Young, *Resource Regimes: Natural Resources and Social Institutions* (1982); O.R. Young, *International Cooperation: Building Regimes for Natural Resources and the Environment* (1989); A. Hurrell and B. Kingsbury (eds), *The International Politics of the Environment* (1992); O.R. Young and G. Osherenko (eds), *Polar Politics: Creating International Environmental Regimes* (1993); B.I. Spector, G. Sjostedt, and I.W. Zartman (eds), *Negotiating International Regimes: Lessons Learned from the United Nations Conference on Environment and Development (UNCED)* (1994); O.R. Young, *International Governance: Protecting the Environment in a Stateless Society* (1994); V. Rittberger (ed.), *Regime Theory and International Relations* (1995); M. Rolen, H. Sjoberg, and U. Svedin (eds), *International Governance on Environmental Issues* (1997); O.R. Young (ed.), *Global Governance: Drawing Insights from the Environmental Experience* (1997); D.G. Victor, K. Raustiala, and E.B. Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (1998); O.R. Young, *Creating Regimes: Arctic Accords and International Governance* (1998); A. Underdal (ed.), *The Politics of International Environmental Management* (1998); A. Hasenclever, P. Mayer, and V. Rittberger, *Theories of International Regimes* (1999); J. Wettestad, *Designing Effective Environmental Regimes: The Key Conditions* (1999); O.R. Young, *Governance in World Affairs* (1999); O.R. Young (ed.), *The Effectiveness of International Environmental Regimes: Causal Connections and Behavioural Mechanisms* (1999); G. Kutting, *Environment, Society and International Relations: Towards More Effective International Environmental Agreements* (2000); J. Vogler, *The Global Commons: Environmental and Technological Governance* (2000); M. Franda, *Governing the Internet: The Emergence of an International Regime* (2001); Ho-Won Jeong (ed.), *Global Environmental Policies: Institutions and Procedures* (2001); E.L. Miles et al. (eds), *Environmental Regime Effectiveness: Confronting Theory with Evidence* (2002); O.R. Young, *The Institutional Dimension of Environmental Change: Fit, Interplay and Scale* (2002); A. Underdal and O.R. Young (eds), *Regime Consequences: Methodological Challenges and Research Strategies* (2004); D.K. DeGarmo, *International Environmental Treaties and State Behaviour: Factors Influencing Cooperation* (2005); M.M. Betsill, K. Hochstetler, and D. Stevis (eds), *Palgrave Advances in International Environmental Politics* (2006); H. Breitmeier, *The Legitimacy of International Regimes* (2008); O.R. Young,

Another common criticism is that the term ‘regime’ conveys an excessive measure of organization and stability.<sup>10</sup> By the same token, its use implies that the properties generally associated with a functioning regime, such as cooperation and maintenance of the status quo, possess intrinsic value. If this is the case, the seemingly neutral concept is in fact value-loaded.<sup>11</sup> Or, to express it differently, ‘[r]egime thinking may . . . be ideology masquerading as a necessary truth’.<sup>12</sup> To make matters worse, ‘regimes become a rationalization of current policies, and tend to enshrine and codify prevailing practices’.<sup>13</sup> In many circumstances, this typically means a ‘strong “value-bias” towards order (as opposed to justice for example)’.<sup>14</sup> The fundamental problem, according to some sceptics, is not whether regimes exist. Rather, ‘it is the tendency to define regimes as benign, genuinely voluntarist and legitimate entities . . . and to assume that everyone wants them . . . [which] is contestable’.<sup>15</sup>

In part, this assessment, possibly based on early impressions or misinformation, simply rests on a shaky foundation. In fact, regime theorists explore consistently and thoroughly phenomena such as system adaptation, atrophy, change, chaos, decay, disintegration (abrupt as well as gradual), friction, imbalances, mal-performance, misalignment, and transformation. Admittedly, these subjects receive closer attention outside the specific realm of international law/relations, but that is not entirely relevant as the dissection of regimes is not the sole preserve of researchers associated with this particular field. Social scientists of diverse backgrounds and even students of biological/physical systems have a deep and ongoing interest in regimes and their functioning.

The ideological side is more difficult to overlook. Regime theory is firmly embedded in neoliberal thought (neoliberal institutionalism) and shares its values. However, a degree of ideological ‘bias’ may be attributed to every analytical strand within international law/international relations: realism, neorealism, liberalism (not to be equated with its neo counterpart), and constructivism (and, needless to say, less widely embraced variants such as managerialism, fairness model, and the transnational legal

---

L.A. King, and H. Schroeder (eds), *Institutions and Environmental Change: Principal Findings, Applications and Research Frontiers* (2008); A. Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order* (2009); G. Nagtzaam, *The Making of International Treaties: Neoliberal and Constructivist Analyses of Normative Evolution* (2009); K. O’Neill, *The Environment and International Relations* (2009); A. Akhtarkhavari, *Global Governance and the Environment: Environmental Principles and Change in International Law and Politics* (2010); P.S. Chasek, D.L. Downie, and J. Welsh Brown, *Global Environmental Politics* (5th edn, 2010); R.B. Mitchell, *International Politics and the Environment* (2010); O.R. Young, *Institutional Dynamics: Emergent Patterns in International Environmental Governance* (2010); P. Nguitragool, *Environmental Cooperation in Southeast Asia: ASEAN’s Regime for Transboundary Haze Pollution* (2011).

<sup>10</sup> See Strange, *supra* note 8, at 345.

<sup>11</sup> See *ibid.*

<sup>12</sup> Crawford, *supra* note 6, at 84.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, at 85. See also Strange, *supra* note 8, at 345–346.

<sup>15</sup> Crawford, *supra* note 6. See also Strange, *supra* note 8, at 345; Keeley, ‘Towards a Foucauldian Analysis of Regimes’, 41 *Int’l Org* (1990) 83, at 84.

process school). The same observation may be offered with respect to major scientific/social science paradigms: positivism, critical rationalism, classical hermeneutics, and interpretivism (and, of course, offshoots like critical theory, ethnomethodology, social realism, contemporary hermeneutics, structuration theory, and feminism).<sup>16</sup>

Nor are biases confined to the ideological sphere. Distinct intellectual traditions display distinct conceptual orientations. One should be aware of underlying values and ingrained theoretical propensities.<sup>17</sup> It is legitimate to embrace them consciously or challenge them unreservedly. The notion of regime may comfortably be examined beyond its nurturing neoliberal ground. Indeed, there is ample scope for undertaking the task from a critical perspective. 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 (henceforth the Sino-British Declaration) is a bilateral accord. However, viewing it exclusively as such is arguably an exercise in legalistic reductionism. Regime is a more meaningful construct, and the aim of this article is to draw some lessons regarding the formation of such entities in light of the specific manoeuvres leading to the signing of that unique document.

## 2 Relevant Analytical Benchmarks

British-controlled Hong Kong was a product of the Opium Wars waged in the mid-19th century. Having inflicted an agonizing defeat on China, the British proceeded to establish a crown colony in Hong Island/Victoria City and Kowloon Peninsula and Stonecutters' Island under the terms of the Treaty of Nanking (1842) and the Convention of Peking (1860). Towards the end of the century, the Convention for the Extension of Hong Kong Territory (Convention of Peking 1898) provided a legal framework for the incorporation of Lantau Island and adjacent lands, which became known as the New Territories, into the expanding colonial umbrella.<sup>18</sup> This political configuration remained intact until 1997.

The Opium Wars experience, while broadly consistent with a long cyclical pattern featuring dynastic collapses during which the Mandate of Heaven enjoyed by the rulers of the Middle Kingdom was temporarily withdrawn, was a defining moment in the evolution of Chinese civilization. It proved to be the starting point in a lengthy period, stretching from 1842 to World War II, in the course of which China was economically, legally, militarily, and politically marginalized by outside powers. This turned out to be one of the most painful eras in Chinese history, perhaps the most painful from an international standpoint, involving *bainain guochi* (a Century of Humiliation) at

<sup>16</sup> See N. Blaikie, *Approaches to Social Inquiry: Advancing Knowledge* (2nd edn, 2007), at 109–205.

<sup>17</sup> See *ibid.*

<sup>18</sup> See generally P. Wesley-Smith, *Unequal Treaty 1898–1997: China, Great Britain and Hong Kong's New Territories* (revd edn, 1998); Y. Ghai, *Hong Kong New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (2nd edn, 1999); S.Y.S. Tsang, *A Modern History of Hong Kong, 1941–1997* (2003).

the hands of the West, with Japan becoming a source of additional aggravation after 1895.<sup>19</sup>

Given that this episode weighs heavily on Chinese people's psyche, it would possibly be logical to adopt a constructivist approach to the formation of the Sino-British Joint Declaration. That conceptual structure has demonstrated selectively its usefulness in other, less emotionally charged socio-cultural contexts where international law has been present in some direct or indirect form.<sup>20</sup> However, it does not appear to exhibit the properties that might furnish an effective basis for a fertile research agenda in this particular case. One ends up offering insights which add little theoretical value (e.g., that China was determined to put right a historical wrong and went through the motions of conducting a dialogue with Britain without yielding strategically and merely working out the procedural details of the transfer of sovereignty).

Such insights tend to have a metaphysical quality and are difficult to apply in concrete problem-solving situations, unless converted into 'harder' observations (e.g., the Chinese desire to be perceived as a post-revisionist and responsible power needs to be crystallized and solidified). Perhaps more importantly, China's foreign policy during the reform period extending from 1978 to the present has for the most part been devoid of the shrill undertones witnessed previously. In terms of content and style of execution, it would not be inappropriate to depict the pattern witnessed in the past three decades as 'conservative'. Scholars specializing in Chinese international relations have portrayed it as a manifestation of 'pragmatic nationalism'.<sup>21</sup>

At the opposite side of the analytical continuum, one may locate the domestic coalition/group-centred model of international law. This is a potentially sophisticated tool which ascribes outcomes observed in the global domain, including international legal regime formation, to the interplay of political forces within the state.<sup>22</sup> However, although solid empirical evidence is lacking, it would be legitimate to posit that domestic actors (British and Hong Kong business groups, liberal professions, the media, and so forth) exerted at best a modest influence on the United Kingdom stance during the Sino-British negotiations regarding the future of Hong Kong. In China,

<sup>19</sup> See generally L. Dittmer and S.S. Kim (eds), *China's Quest for National Identity* (1993); Weixing Hu, G. Chan, and Daojing Zha (eds), *China's International Relations in the 21st Century* (2000); Zhang, 'Self-Identity Construction in Present China', 23 *Comparative Strategy* (2004) 281; D. Scott, *China Stands Up: The PRC and the International System* (2007).

<sup>20</sup> See, e.g., Brunnee and Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law', 39 *Columbia J Transnat'l L* (2000) 19; Fehl, 'Explaining the International Criminal Court: A "Practice Test" for Rationalist and Constructivist Approaches', 10 *EJIL* (2004) 357; Totaro, 'Constructivism and International Human Rights: The Case of Participatory Development', 48 *Virginia J Int'l L* (2008) 719; A. Sinclair, *International Relations Theory and International Law: A Critical Approach* (2010).

<sup>21</sup> See, e.g., Suisheng Zhao, *Nation State by Construction: Dynamics of Modern Chinese Nationalism* (2004); Suisheng Zhao (ed.), *Chinese Foreign Policy: Pragmatism and Strategic Behaviour* (2004).

<sup>22</sup> See Zurn, 'Bringing the Second Image (Back) In: About the Domestic Sources of Regime Formation', in Rittberger (ed.), *supra*, note 9, at 282–311; J.P. Trachtman, *The Economic Structure of the Law* (2008), at 20–21; Trachtman, 'International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law', 11 *Chicago J Int'l L* (2010) 127.

where the fragmentation of the domestic political facade is a source of great academic fascination,<sup>23</sup> one may be able to resort to group-focused explanations, but in a distinctly tentative fashion. Attempts along these lines<sup>24</sup> have generally proved unproductive<sup>25</sup> and it is more fruitful to view the two-way bargaining as being largely limited to the respective foreign policy establishments, albeit in the broad sense of the term (i.e., not merely career diplomats).

This leaves realism/neorealism and neoliberalism/neoliberal institutionalism as the sole contenders for the position of the most appropriate vehicle(s) for accounting satisfactorily for the formation of the international regime embodied in the Sino-British Joint Declaration. Juxtaposing these supposedly divergent schools of thought with one another—or, to take it a step further, contrasting them—may be a questionable proposition as some critics regard the differences as not being sufficiently significant to merit a separate status. According to those who embrace this posture, neoliberalism may be viewed as a subset of neorealism which, in turn, scarcely amounts to a radical reconstruction of the realist agenda.<sup>26</sup> Whether that is the case should not be considered as a serious concern here because neoliberalism sheds additional light on the process of international regime formation.

Both proponents of neorealism and neoliberalism (and, of course, realism) deem state interests, which are exogenously given, as the principal driver of state action in the global arena and stipulate that states are rational players. The two camps also share the assumption that international society is inherently anarchic and that the stabilizing mechanisms which prevent disintegration into pandemonium are distinctly fragile. There are thus enough common key components to justify incorporating them, in their entirety, into the rational choice paradigm, broadly defined. Again, however, this need not detract from the fact that, on pragmatic grounds, the approaches may be treated as complementary rather than, to all intents and purposes, identical. Indeed, neorealists are not concerned with regimes as such, gravitating towards hierarchical configurations such as the balance of power instead.

Since neorealists do not address international regimes explicitly, one has no choice but to attempt to surmise how they might have explained the formation of the system reflected in the Sino-British Joint Declaration. Some kind of an accord was presumably inevitable because the alternative would have been unpalatable/anarchy. The interests of post-colonial Britain and reformist China may possibly have also overlapped to a sufficient degree to produce an agreement acceptable to both sides: resumption of Chinese sovereignty without meaningful departures from the institutional status

<sup>23</sup> See for an overview F. Christiansen and S.M. Rai, *Chinese Politics and Society: An Introduction* (1996); Jianrong Huang, *The Applicability of Policy Making Theories in Post-Mao China* (1999).

<sup>24</sup> See B. de Mesquita, D. Newman, and A. Rabushka, *Forecasting Political Events: The Future of Hong Kong* (1985); B. de Mesquita, D. Newman, and A. Rabushka, *Red Flag over Hong Kong* (1996).

<sup>25</sup> See for an evaluation Mushkat and Mushkat, 'The Political Economy of International Legal Compliance: Pre-1997 Predictions and Post-1997 Realities in Hong Kong', 10 *UC Davis J Int'l L & Policy* (2004) 229; Mushkat and Mushkat, 'International Law and Game Theory: A Marriage of Convenience or Strange Bedfellows?', 2 *NZ Yrbk Int'l L* (2005) 101.

<sup>26</sup> See Crawford, *supra* note 6, at 87–89.

quo. The convergence of interests may have been close enough to induce the protagonists to cooperate rather than merely settle for coordination or a lesser form of positive interaction whereby interests just coincide.<sup>27</sup>

This hypothetical account might give rise to a vexing question: why did not China simply announce unilaterally its blueprint for post-1997 Hong Kong and proceed to implement it with its allies in the territory, bypassing Britain altogether in the process or, if necessary, confining itself to minimum coordination? After all, this would have been the ultimate, constructivist-style, retribution for the deep psychological scars caused by the indignities wrought by the Opium Wars and century-and-a-half-long colonial rule. The neorealist response might be that such a strategy could have been prohibitively costly due to the uncertainty and unpredictability associated with it. In a global arena, where stable expectations facilitate transactions and fuzziness impedes them, that is not considered to be a sensible course of action.<sup>28</sup>

Regimes lie at the epicentre, rather than the periphery, of the neoliberal intellectual order. They are pervasive for '[n]o patterned behaviour can sustain itself for any length of time without generating a regime'.<sup>29</sup> They are also long-lasting, in that such structures transcend 'temporary arrangements that change with every shift in power or interests'.<sup>30</sup> By the same token, although state interests remain a salient feature of the post-World War II, and to a greater extent the post-Cold War, international system, they have a long-term dimension which partly defines the character of the entire edifice and its constituent elements: '[s]ince regimes encompass principles and norms, the utility function that is being maximized must embody some sense of general obligation. . . . When states accept reciprocity they will sacrifice short-term interests with the expectation that other actors will reciprocate in the future, even if they are not under a specific obligation to do so.'<sup>31</sup>

Regimes endure, but neither are they static nor do they exist in perpetuity. They undergo transformation when their rules and decision-making procedures evolve. They cease to function when their principles and norms change materially. Although not ultra-resilient and shock proof, regimes do matter, according to neoliberals. They may be thought of as intervening variables which are the product of a number of focal independent variables, notably state interests and power, but which also influence a range of dependent variables, or actor behaviour/system outcomes. The impact may be limited (consistent with the modified structural stance) or substantial (in line with the Grotian view).<sup>32</sup>

The two principal independent variables, which play a vital role in international regime formation, egoistic self-interest and political power, possess deep realist/neorealist roots. The former is an expression of a 'desire to maximize one's own utility

<sup>27</sup> See J.L. Goldsmith and E.A. Posner, *The Limits of International Law* (2005), at 10–12; A.T. Guzman, *How International Law Works* (2008), at 25–33.

<sup>28</sup> See *ibid.*, at 27.

<sup>29</sup> Krasner, *supra* note 5, at 1.

<sup>30</sup> *Ibid.*, at 2.

<sup>31</sup> *Ibid.*, at 3.

<sup>32</sup> See *ibid.*, at 5–10.



function where that function does not include the utility of another party'.<sup>33</sup> It is not necessarily incongruous with the notion of collaboration because stubborn self-reliance may lead to Pareto-suboptimal outcomes, particularly in situations where the choice of actor is contingent on the choice made by another (e.g., game of chicken and prisoner's dilemma), the costs of collaboration are low, and those of non-collaboration are high.<sup>34</sup> Such situations are more common in the neoliberal world than the realist/neorealist one due to the perception that states have grown very interdependent.<sup>35</sup>

Political power falls into two categories: cosmopolitan and instrumental. In its first form, it is employed to provide optimal outcomes for the system as a whole or, in technical parlance, to pursue joint maximization. In its second form, it is channelled towards particularistic and potentially consumption-related uses in order to benefit specific players who stand to gain from international collaboration.<sup>36</sup> In realist/neorealist writings, the 'productive' exercise of power is closely linked to the leadership furnished by a hegemonic actor. Although this vision is not universally shared,<sup>37</sup> neoliberals expect a configuration characterized by an increasing diffusion of power in the global arena and place somewhat less emphasis on that particular factor, especially with respect to international regime maintenance, as distinct from its formation.<sup>38</sup>

Three additional variables, not bearing a realist/neorealist imprint, are incorporated into the neoliberal explanatory scheme: norms and principles, usage and custom, and knowledge. The first set may be regarded as exogenous rather than merely endogenous (i.e., crucial defining feature of any given regime) and thus impinges on regime formation.<sup>39</sup> A prominent example is the post-World War II international economic system the design of which was inspired by the principle of embedded liberalism. Unlike its nationalist and orthodox counterparts, it seeks to fuse efficiency-promoting multilateralism with stability-enhancing domestic intervention.<sup>40</sup>

Usage and custom are a manifestation of patterned/routinized behaviour. While they are essentially endogenous, rather than exogenous, types of variables, custom and usage may reinforce the momentum generated by the catalysts for regime formation by facilitating the emergence of shared expectations, which may carry normative significance (e.g., customary international law).<sup>41</sup> Knowledge enjoys the same (endogenous) status and may exert a similar influence by providing a basis for collaboration which stems from its ability to illuminate 'complex interconnections that were

<sup>33</sup> *Ibid.*, at 11.

<sup>34</sup> See *ibid.*, at 11–12.

<sup>35</sup> See generally R.O. Keohane and J.S. Nye, *Power and Interdependence* (3rd edn, 2000).

<sup>36</sup> See Krasner, *supra* note 5, at 13–16.

<sup>37</sup> See, e.g., A. Bailin, *From Traditional to Group Hegemony: The G7, the Liberal Economic Order and the Core-Periphery Gap* (2005).

<sup>38</sup> See generally R.O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984).

<sup>39</sup> See Krasner, *supra* note 5, at 16–20.

<sup>40</sup> See Ruggie, 'International Regimes, Transactions and Change: Embedded Liberalism in the Post-war Economic Order', 36 *Int'l Org* (1982) 379.

<sup>41</sup> See Krasner, *supra* note 5, at 18–19.

not previously understood<sup>42</sup> (e.g., rules relating to health protection, such as quarantine regulations, were adjusted substantially following new scientific discoveries).<sup>43</sup>

Neoliberal analysis of self-interest and power is more multi-faceted and nuanced than that undertaken within the realist/neorealist framework. However, broadly speaking, it does not offer any significant new insights that may account for the dynamic path leading to the formation of the post-1997 international legal regime for Hong Kong. That historical experience may lend substance to key neoliberal propositions, particularly the more specific ones, in this respect, but not necessarily by visiting previously unexplored territory. It may also expose gaps in the neoliberal facade (e.g., egoistic tendencies may be tempered and regime formation may proceed without any meaningful input from a hegemonic power).

Norms and principles, as well as customs and usage, may be invoked too, yet knowledge appears to be peripheral in this context. China's seemingly uncompromising posture regarding sovereignty, its decisive reformist swing towards embedded liberalism, and the remarkable pragmatism displayed by its post-1978 leaders (epitomized by Deng Xiaoping's maxim that 'it does not matter whether a cat is black or white, as long as it catches mice'<sup>44</sup>) may have all been pivotal elements in that complex equation. By the same token, Chinese willingness to live with the uncomfortable realities emanating from 19th century unequal treaties, including at the height of the revolutionary era, may be indicative of the effectiveness of explanations highlighting the role played by path dependency (usage and custom) in the evolution of international regimes.

That said, these are very familiar themes. The challenge here lies in identifying less commonly examined ones. After all, that is a conceptual domain where ideas of exclusively Western origin abound and where empirical validation is restricted (selectively rather than comprehensively to boot) to Western evidence. If developments in the East, even those involving a Western joint-venture 'partner' (Britain), are to be incorporated into a somewhat one-dimensional picture (in the cultural sense of the term), they should preferably provide an adequate basis for broadening further the scope of theoretical inquiry and enhancing palpably the understanding of the processes of international regime formation.

### 3 Event Flow Reconstruction

For approximately two years in the early 1980s, British and Chinese representatives conducted secrecy-shrouded negotiations with the aim of devising a credible solution to the Hong Kong question. In September 1984, the two governments initialled the

<sup>42</sup> *Ibid.*, at 19.

<sup>43</sup> See Stein, 'Coordination and Collaboration: Regimes in an Anarchic World', in Krasner (ed.), *supra* note 5, at 115, 136–137.

<sup>44</sup> See McGeary *et al.*, 'Deng Xiaoping Set Off Seismic Changes in His Country', *Time Magazine*, 3 Mar 1997, available at: [www.time.com/time/magazine/article/0,9171,985990,00.html](http://www.time.com/time/magazine/article/0,9171,985990,00.html) (accessed on 15 July 2011).

Joint Declaration, under which the United Kingdom would hand over its last major colony, and its roughly six million inhabitants, to Communist China in 1997. For their part, the Chinese undertook to allow post-colonial Hong Kong to retain its capitalist economy, common law legal system, and way of life. China also pledged that the territory would be granted a high degree of autonomy, enjoying self-governance in all matters except defence and foreign affairs.<sup>45</sup>

The elaborate bilateral talks were not the first attempt to address the issue. They were preceded by informal British–Hong Kong initiatives to place it on the diplomatic agenda in a mostly indirect fashion. These initiatives revolved around subtle manoeuvres to secure Chinese acquiescence to the notion of permitting the Hong Kong government to extend commercial leases in the New Territories – which were leased to Britain for 100 years, rather than ceded in perpetuity – beyond 1997. Whether for strategic reasons or because of communication/execution problems, China did not prove receptive to such proposals and the subsequent marathon discussions were not destined to be entirely open-ended.<sup>46</sup>

Chinese signals, initially implicit and as time wore on explicit, portrayed the restoration of sovereignty over the whole of Hong Kong as an inviolable demand. Any other course of action would be equivalent to ratifying the unequal treaties and Deng Xiaoping did not wait long to reveal his determination ‘not to go down in history as another Li Hung-chang’,<sup>47</sup> the mandarin who signed the lease on the New Territories. China also envisaged no change in the Hong Kong social system, a high degree of local autonomy (‘Hong Kong people ruling Hong Kong’) and a stable politico-economic environment. This unilaterally formulated strategic blueprint later became known as the ‘sixteen character solution’.<sup>48</sup>

That vision was apparently not altogether consistent with British expectations. Previous Chinese statements might have suggested that the Hong Kong problem would be addressed in earnest after the Taiwanese challenge has been dealt with successfully. As this seemed to be a distant prospect, there may have been ample scope for preserving Hong Kong’s fundamental status quo, subject perhaps to modest adjustments, and thus for striking a grand bargain. The new Chinese stance inevitably implied that the policy range was limited and that the negotiations would have to progress within a narrow channel.<sup>49</sup>

<sup>45</sup> See generally de Mesquita, Newman, and Rabushka, *Forecasting Political Events*, *supra*, note 24; Ghai, *supra* note 18; Tsang, *supra*, note 18; Johnson, ‘The Mousetrapping of Hong Kong: A Game in which Nobody Wins’, 24 *Asian Survey* (1984) 887; D. Bonavia, *Hong Kong 1997: The Final Settlement* (1985); W. McGurn, *Perfidious Albion: The Abandonment of Hong Kong, 1997* (1992); R. Cottrell, *The End of Hong Kong: The Secret Diplomacy of Imperial China* (1993); M. Roberti, *The Fall of Hong Kong: China’s Triumph and Britain’s Betrayal* (revd edn, 1996); M.B. Yahuda, *Hong Kong: China’s Challenge* (1996); Ma, ‘The Sino-British Dispute over Hong Kong: A Game Theory Interpretation’, 37 *Asian Survey* (1997) 738; R. Mushkat, *One Country, Two International Legal Personalities: The Case of Hong Kong* (1997); Gao, ‘Negotiating with China in Power Asymmetry: The Case of the Sino-British Negotiations on the Handover of Hong Kong’, 14 *Int’l Neg* (2009) 475.

<sup>46</sup> See Cottrell, *supra* note 45, at 35–57; Roberti, *supra* note 45, at 3–24.

<sup>47</sup> *Ibid.*, at 42.

<sup>48</sup> See *ibid.*, at 41–42.

<sup>49</sup> See *ibid.*, at 42–43; Cottrell, *supra* note 45, at 66–68.

A mixture of ingenuity and pragmatism may stretch the boundaries of sovereignty. Some members of the British foreign policy establishment and prominent Hong Kong residents with close links to the local government conjured up a scenario whereby British rule could co-exist with Chinese possession. Under this not entirely unrealistic plan, the United Kingdom would concede sovereignty to China but would continue to administer the territory beyond 1997, if necessary on a rolling basis. This scheme, referred to as the ‘Macau solution’, also did not find favour with the Chinese, who deemed it symbolically and conceptually unacceptable, shrinking further the strategic choice set and leaving even less room for meaningful bargaining.<sup>50</sup>

China insisted that an unambiguous relinquishment of sovereignty by the United Kingdom be a precondition for the start of detailed negotiations, and that the exchanges be confined to the mechanics of the transfer of power. However, it is interesting to note that it relied almost exclusively on propaganda/psychological pressure, including signals that it would be willing to pay an economic price for its immovability (watch nonchalantly Hong Kong’s currency, equity, and property gyrations and, ultimately, recover the territory as a barren rock), and United Front tactics. There is no indication that disruption of essential supplies (e.g., food and water) and military muscle flexing was ever on the agenda.<sup>51</sup>

It is equally noteworthy that the British side did not accept China’s precondition and countered with a proposal that the two parties disregard in the initial stages the issue of sovereignty and proceed to discuss arrangements conducive to Hong Kong’s future prosperity and stability. Again, it is relevant in this context that the suggestion did not provoke an unambiguously hostile response and was, in fact, eventually embraced.<sup>52</sup> The corollary is that it would not be entirely correct to portray the process in stark realist terms and imply that it was characterized unequivocally by the application of an overwhelming force by one determined and resourceful side over another, displaying a complete lack of resolve and being deprived of the means to influence outcomes in any tangible way.

The decision not to concede sovereignty outright, and cling to the notion of maintaining an administrative foothold beyond 1997 was not universally acclaimed within and outside the British foreign policy establishment. While the ‘doves’ claimed that non-adversarial tactics, consistent with China’s avowed desire to reassert formally *de jure* possession, would elicit a favourable reaction regarding actual physical control, or at least the precise form of the local autonomy blueprint, the ‘hawks’ (interestingly, often originating from within the Hong Kong political ‘aristocracy’) contended that no agreement would be preferable to a flawed one and that, on cultural grounds, bargaining with the Chinese required a combination of resilience and toughness in order to obtain satisfactory results.<sup>53</sup>

<sup>50</sup> See *ibid.*, at 49–51; Roberti, *supra* note 45, at 43–44.

<sup>51</sup> See Cottrell, *supra* note 45, at 93–97; Roberti, *supra* note 45, at 54, 59, 63–64, 73–75.

<sup>52</sup> See Cottrell, *supra* note 45, at 98–107; Roberti, *supra* note 45, at 62.

<sup>53</sup> See Cottrell, *supra* note 45, at 98–99, 128–129; Roberti, *supra* note 45, at 59–62, 76–77.

Positioned between these two polar perspectives, the ‘pragmatists’ were inclined, if necessary, to accommodate the other side’s fundamental demands, but not forthwith and not at any price: ‘[w]hatever our private thoughts might have been about what was to happen at the end of the day, there was no prospect of our saying to China “We will give up.” Simply to have given in to their diktat would have been politically intolerable.’<sup>54</sup> This was not merely a product of post-Falklands euphoria. ‘It was also a recognition that to surrender sovereignty without a fight, and then to find China still intractable, would be a terrible political blunder. Better for Britain to fight and lose than not fight at all.’<sup>55</sup> Moreover, ‘[t]here was . . . the effect on Hong Kong to consider. Britain would not be able to argue that an eventual settlement was the “best possible” deal that could ever have been achieved with China unless a modicum of blood had been – metaphorically – spilt in the negotiating of it’.<sup>56</sup>

This apparent resolve notwithstanding, the Chinese seemed on the face of it unmoved by the manoeuvres it inspired and came close on a number of occasions to proceeding unilaterally, or contemplating seriously the possibility of a risk of a breakdown of the bargaining process.<sup>57</sup> Whether or not their brinkmanship was just a negotiating ploy or a reflection of an unshakeable strategic commitment would be difficult to establish at present, but the fact remains that, in the end, they were willing to continue the dialogue on the basis of a mere hint that the issue of sovereignty would not pose a problem if a solution conducive to prosperity and stability in Hong Kong could be agreed upon.<sup>58</sup> This again is worth highlighting because there may be a temptation to conclude that the Sino-British Declaration is the result of realist-style coercion/imposition by a totally dominant player rather than a bargain, albeit doubtless asymmetrical in nature.

A similar pattern was observed during the more concrete phases of the negotiations. For the most part, China continued to control the emotional temperature, define the dimensions of the negotiation set/zone of agreement,<sup>59</sup> dictate the pace of the interaction, and shape the rules of the game. Nevertheless, the British role was not peripheral – indeed, it was more significant than in previous stages, which focused less on the mechanics than the overall architecture. Once the United Kingdom expressed, however obliquely, its intention to relinquish sovereignty and not to pursue in earnest the post-1997 administration option, the Chinese became somewhat more inclined to engage in give-and-take, or distributive (i.e., claiming value, win-lose, zero-sum) bargaining,<sup>60</sup> and even enter into integrative (i.e., interest-based, win-win, positive-sum) negotiations.<sup>61</sup>

<sup>54</sup> Cottrell, *supra* note 45, at 98–99.

<sup>55</sup> *Ibid.*, at 99.

<sup>56</sup> *Ibid.*

<sup>57</sup> See *ibid.*, at 101–103; Roberti, *supra* note 45, at 76–77.

<sup>58</sup> See Cottrell, *supra* note 45, at 129–132; Roberti, *supra* note 45, at 76–78.

<sup>59</sup> See for an elaboration H. Raiffa, *The Art and Science of Negotiation* (1982), at 44–65.

<sup>60</sup> See for an elaboration M.R. Carrell and C. Heavrin, *Negotiating Essentials: Theory, Skills and Practice* (2008), at 54–82.

<sup>61</sup> See for an elaboration *ibid.*, at 83–107.

This two-way structure, even if uneven, manifested itself in a number of ways. The United Kingdom insisted, in the face of an obvious Chinese preference for general statements, that the post-1997 roadmap be as detailed as possible. It also maintained that any mutually acceptable plan should be presented as a joint undertaking rather than in a parallel fashion. Further, it pressed for according the understanding towards which it was striving formal legal (i.e., treaty) status and resisted attempts to relegate it to a less lofty (e.g., communiqué, expression of intent and so forth) level. These strategically vital goals were largely achieved, although a price inevitably had to be paid, no mean feat which involved considerable determination, effort, finesse, and perseverance.<sup>62</sup>

The price paid was not negligible. China effectively demanded a role as a co-manager, albeit not an active one, of the Hong Kong enterprise even before the transfer of sovereignty in 1997. This request had to be accommodated in order to secure progress on other fronts. The Sino-British Joint Liaison Group was thus established to facilitate contact, consultation, and exchange of information between the two sides.<sup>63</sup> This not altogether unreasonable arrangement was not inconsistent with the picture painted here. One party was clearly dominating the proceedings and exerting substantial influence over decision-making outcomes. Nevertheless, distributive and integrative bargaining did take place. Complex and asymmetrical negotiations were conducted, but it would be inaccurate to portray them as an exercise in coercive tactics culminating in a *diktat* (which would not qualify as bargaining).

The fine details of the negotiated agreement were hammered out in working groups which were less focused on distributive issues than integrative ones. Given the greater sense of purpose and mostly technical orientation, the weaker side was better able to have an impact on the steps taken.<sup>64</sup> The general reaction, in Hong Kong and elsewhere, to the Sino-British Joint Declaration was mixed but not unfavourable. The *Times* assessed it aptly as ‘the best of a bad job’.<sup>65</sup> To the extent that this verdict, which echoed vividly opinions expressed widely in perhaps less emphatic terms, captured the essence of what was achieved and what proved unattainable,<sup>66</sup> it lends credence to the argument that the two parties delivered a bargain, imperfect and uneven, but nevertheless a negotiated settlement.

#### 4 Notable Analytical Gaps

In many respects, the making of the Sino-British Joint Declaration was a unique process. The historical backdrop, cultural chasm, economic dissonance, ideological divergences, and legal mismatch were virtually without precedent. In light of the array of intricacies and unexplored angles confronted, one would expect this emotionally

<sup>62</sup> See Cottrell, *supra* note 45, at 134–135, 141–142, 147–149; Roberti, *supra* note 45, at 83–87.

<sup>63</sup> See Cottrell, *supra* note 45, at 143, 157–161; Roberti, *supra* note 45, at 107–109.

<sup>64</sup> See Cottrell, *supra* note 45, at 154–155, 166–171; Roberti, *supra* note 45, at 98–99, 109–112.

<sup>65</sup> Bonavia, *supra* note 45, at 138.

<sup>66</sup> For a more academic evaluation see Ghai, *supra* note 45; Mushkat, *supra* note 45.

and intellectually absorbing episode to spawn an impressive range of conceptually-oriented academic inquiries. For some reason, that has not been the case. There has been of course no dearth of factual accounts, some more detailed and illuminating than others, but genuinely theoretical efforts have been conspicuous by their absence.

The most obvious exception to the norm has been a set of elaborate studies endeavouring to illustrate the effectiveness and versatility of a parsimonious behavioural model grounded in group notions of politics and rationalist logic.<sup>67</sup> Unfortunately, they have provoked a fundamentally sceptical response<sup>68</sup> and, more importantly, have failed dismally to exhibit any predictive power, the appropriate yardstick for judging the merits of the underlying propositions. Given this inauspicious beginning, there has been no determination to follow in the path trodden by the three methodologically sophisticated authors and the momentum generated has not been sustained. Two much less ambitious research ventures have since been undertaken in a broadly similar vein, and despite their limited scope they may provide a basis for drawing useful inferences with respect to international legal regime formation.<sup>69</sup>

The first of the surveys in question has employed a very familiar game-theoretic framework to shed new light on the 1982–1984 Sino-British quest for a solution to the Hong Kong issue. The author has identified and tentatively quantified the preferences and interests of the two protagonists, although rather narrowly, in particular on the British side (where the benefits have been assumed to consist exclusively of material gains stemming from the colonial relationship with Hong Kong, omitting Sino-British investment and trade from the equation and overlooking politico-symbolic considerations such as the unmistakable need to stage an honourable and orderly retreat; China, on the other hand, has been thought to be driven by a diverse array of forces).<sup>70</sup>

The bargaining has been likened to a 'game of chicken', a non-cooperative variant of social interaction. The structure of the game has reflected the view that each player stood to maximize advantage by obtaining/retaining economic and political control over Hong Kong, provided the other party acquiesced in such an uneven outcome. The second-best configuration from an individual perspective would entail some form of power sharing (e.g., resumption of Chinese sovereignty but extension of British administration). This would also constitute a collectively palatable scenario. The worst possible situation, both individually and collectively, would feature a breakdown of the negotiations or, in technical parlance, simultaneous defection.<sup>71</sup>

The structure of the game is one of the two determinants of the final outcome. The strategies employed by each side also impinge on the evolution of the game. The chicken metaphor emanates from the fact that winning in such circumstances

<sup>67</sup> See de Mesquita, Newman, and Rabushka, *Forecasting Political Events and Red Flag over Hong Kong*, *supra* note 24.

<sup>68</sup> See Mushkat and Mushkat, 'The Political Economy' and 'International Law and Game Theory', *supra* note 25; Thompson, 'Forecasting the Future of Hong Kong', 9 *Asian J Public Admin* (1987) 184.

<sup>69</sup> See Ma, *supra* note 45; Gao, *supra* note 45.

<sup>70</sup> See Ma, *supra* note 45, at 739–744.

<sup>71</sup> See *ibid.*

requires nerves of steel and an ability to impress on the other actor that one would not flinch, whatever the consequences. ‘This is how China played the game in 1983.’<sup>72</sup> Specifically, it ‘managed to manipulate British perception, convincing them that sovereignty was China’s ultimate concern and it would go to any lengths to recover Hong Kong’.<sup>73</sup> The British apparently obliged by ‘chickening out’ of the confrontation.<sup>74</sup>

Such analysis suffers from serious limitations, which are worth restating. The structure of the game is largely arbitrary, characterized by backward induction (a mental procedure whereby the parties are supposed to choose their strategies from the beginning to the end of the process), mostly static (during two year-long negotiations!), rather mechanical, seemingly timeless, unburdened by uncertainty, and underpinned by a narrow definition of rationality. Some of these limitations are a by-product of the conceptual approach embraced (i.e., a classical game-theoretic model) and they are not necessarily absent in augmented/broader/enhanced versions of the genre, including those relied upon in neoliberal accounts of international legal regime formation.

This is not to imply that game theory, even in its classical form, cannot generate relevant insights or, more critically, that this rigorously constructed body of knowledge has not outgrown its classical roots. Evolutionary game theory, which focuses systematically on adaption and interaction, and accords greater attention to the dynamics of strategies than the properties of social equilibria, has the potential to mitigate certain limitations of the type highlighted above.<sup>75</sup> A similar observation may be extended to specific game-centred tools such as the theory of moves, which posits that players endeavour to anticipate not merely the immediate consequences of strategies/moves, but also the consequences of countermoves to these moves, counter-countermoves, and so forth.<sup>76</sup> However, such notions (which reach beyond neoliberal visions of iterated/repeated games) have not yet been widely explored in the context of international negotiations, and they are unlikely to provide answers to all the problems encountered in examining the development of international legal regimes.<sup>77</sup>

Post-classical game theorists leave modest room in their analytical space for agents other than *homo economicus*, whose egoistic self-interest features so prominently in the realist/neorealist/neoliberal literature. They thus acknowledge patterns consistent with categories such as *homo reciprocans* (who ‘comes to strategic interactions with a propensity to cooperate, responds to cooperative behaviour by maintaining or increasing his level of cooperation and responds to non-cooperative behaviour by retaliating against the “offenders,” even at a cost to himself, and even when he could

<sup>72</sup> See *ibid.*, at 743.

<sup>73</sup> *Ibid.*

<sup>74</sup> See *Ibid.*, at 743–744.

<sup>75</sup> See generally J.W. Weibull, *Evolutionary Game Theory* (1995).

<sup>76</sup> See generally S.J. Brams, *Negotiation Games: Applying Game Theory to Bargaining and Negotiation* (1990); S.J. Brams, *Theory of Moves* (1994).

<sup>77</sup> See, e.g., M.A. Young, *Rational Games: A Philosophy of Business Negotiation from Practical Reason* (2001); Schmidt, ‘The Epistemic Foundations of Social Organizations: A Game Theoretic Approach’, in S. Rizzello (ed.), *Cognitive Developments in Economics* (2003), at 243–267.



not reasonably expect future personal gains to flow from such retaliation<sup>78</sup>), *homo equalis* ('who cares not only about his own payoff, but also how it compares with the payoff of others'<sup>79</sup>), *homo parochius* (who 'divides his world into *insiders* and *outsiders* . . . values insiders' welfare more highly than that of outsiders, evaluates insiders' personal qualities more highly than those of outsiders and partially suppresses personal goals in favour of the goals of the group of insiders'<sup>80</sup>), and *homo communicans* ('who makes a claim to substantive rightness by presenting arguments in public, and seeks a dialogue with partners whose preferences he hopes to alter by offering better reasons'<sup>81</sup>).

Bargaining dynamics is not the sole preserve of economists/game theorists. Scholars in neighbouring disciplines bring their own distinct perspectives to bear on the subject (see Figure 1). Psychologists emphasize agent motivational goals such as self-enhancement (entailing the maintenance and preservation of identity rather than the single-minded pursuit of egoistic self-interest), desire for closure (whereby some circumstances elicit an epistemic state of wanting a quick resolution of an issue), need for cooperation (not to be equated with the interest-driven variant), and an expressed wish to act in an accountable fashion (*vis-à-vis* one's constituencies, whether or not the latter exert pressure on the agent). Close surveillance by constituents – again, whether or not pressure is involved – may reinforce the propensity to demonstrate accountability.<sup>82</sup>

While motivational insights have subjective origins, it is legitimate to argue that the need to produce a blueprint broadly consistent with the long-term interests of the Hong Kong people as a whole, and key segments of the local community (the principal constituencies in the territory), played an unquantifiable role in the British pursuit of a credible accord with China, and had some impact on the substance and form of the agreement that was eventually struck. Nor was it just a matter of purporting to act in a generally accountable manner, as well as aspiring to be seen as a party exercising duly its moral responsibilities. Constant vigilance and signalling by local constituencies, even if selective in nature (i.e., most visible at the political establishment level and fledgling pro-democracy movement) and perhaps falling short of influencing specific strategic decisions, may have been another not negligible factor in the evolving negotiations.

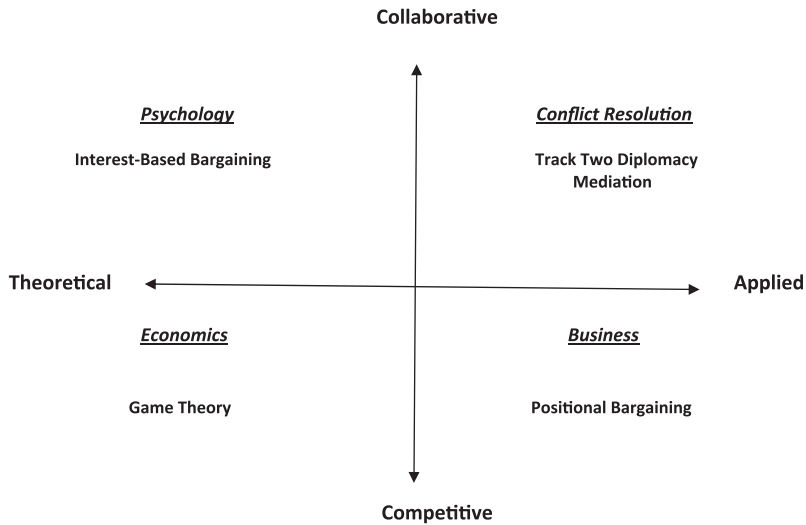
<sup>78</sup> H. Gintis, *Game Theory Evolving: A Problem-Centred Introduction to Modelling Strategic Interaction* (2000), at 251–252.

<sup>79</sup> *Ibid.*, at 252: '[h]omo equalis is also especially displeased when subjected to *relative deprivation*, by being placed on the losing end of an unequal relationship. Indeed, [h]omo equalis may be willing to reduce his own payoff if that reduces the payoff of relatively favoured players even more'.

<sup>80</sup> *Ibid.*

<sup>81</sup> A. Van Aaken, C. List, and C. Luege (eds), *Deliberation and Decision: Economics, Constitutional Theory and Deliberative Democracy* (2004), at 19.

<sup>82</sup> See D.G. Pruitt, *Negotiation Behaviour* (1981), at 42–44; Thompson, Neale, and Sinaceur, 'The Evolution of Cognition and Biases in Negotiation Research: A Examination of Cognition, Social Perception, Motivation and Emotion', in M. Gelfand and J.M. Brett (eds), *The Handbook of Negotiation and Culture* (2004), at 7, 22–27.

**Figure 1:** Perspectives on Negotiations

Adapted from B. Starkey, M. A. Boyer and J. Wilkenfeld, *Negotiating a Complex World: An Introduction to International Negotiation* (1999) at 2.

Trust, or lack thereof, has not been incorporated into the game theoretic analysis of the making of the Sino-British Declaration, despite obviously being a highly relevant variable.<sup>83</sup> This is not entirely surprising, as it does not necessarily feature prominently in that type of academic work.<sup>84</sup> The classical Prisoner's Dilemma game is essentially devoid of uncertainty, which is at the root of trust-related problems. In this kind of situation, all players have a strong reason (i.e., dominant strategy) to defect because of the absence of uncertainty about the motivations of those involved and their expected behaviour.<sup>85</sup> In augmented versions of the game that omission is rectified, but this step is taken without placing trust/uncertainty at the centre of the model.<sup>86</sup>

<sup>83</sup> See Yahuda, *supra* note 45, at 69–75.

<sup>84</sup> '[T]rust is a belief that the other side prefers mutual cooperation to exploiting one's own cooperation, while mistrust is a belief that the other side prefers exploiting one's cooperation to returning it. In other words, to be trustworthy, with respect to a certain person in a certain context, is to prefer to return their cooperation rather than exploit them. To be untrustworthy is to have the opposite preference ordering. Cooperation between two actors will be possible if the level of trust each has for the other exceeds some threshold specific to the situation and the actors': A.H. Kydd, *Trust and Mistrust in International Relations* (2005), at 6. See also J.S. Coleman, *Foundations of Social Theory* (1990); R. Hardin, *Trust and Trustworthiness* (2002); Hoffman, 'A Conceptualization of Trust in International Relations', 8 *Euro J Int'l Relations* (2002) 375; R. Hardin (ed.), *Distrust* (2004); Mushkat and Mushkat, 'The Political Economy of Constitutional Conflict in Hong Kong', 11 *Tilburg Foreign L Rev* (2004) 756; K.S. Cook, R. Hardin, and M. Levi, *Cooperation without Trust?* (2005); R. Hardin, *Trust* (2006); Mushkat and Mushkat, 'The Political Economy of Governance and Public Trust: The Promise of Autonomy and Post-1997 Inertia', 37 *Int'l Q for Asian Studies* (2006) 87.

<sup>85</sup> See Kydd, *supra* note 84, at 10.

<sup>86</sup> See *ibid.*

The gaps persist in iterated Prisoner's Dilemma interactions. In the indefinitely repeated format, cooperation may be sustained provided the players are sufficiently concerned about future payoffs because they fear that moves to exploit the other side will provoke retaliation.<sup>87</sup> However, this conceptualization gives rise to difficulties similar to those encountered in the one-shot game. There is no uncertainty in the game as to whether the other side wishes to sustain the relationship. 'Either future payoffs are valued highly enough to make sustained cooperation worthwhile, or they are not and the parties will rationally defect. Trust is therefore perfect or nonexistent.'<sup>88</sup>

In the Assurance Game, the players' preferences are assumed to be different. As in the Prisoner's Dilemma configuration, each side is inclined to defect if it believes that the other side will act similarly. Nevertheless, if one side has confidence that the other will cooperate, it prefers to behave likewise. This implies that players with Assurance Game dispositions are trustworthy. They prefer to reciprocate cooperation rather than take advantage of it. This notwithstanding, they may fail to cooperate if they are not certain that the other side has Assurance Game (as distinct from Prisoner's Dilemma) dispositions.<sup>89</sup>

Trust poses a serious challenge in relations between states. *Inter alia*, it may materially facilitate or impede the bargaining process. Offensive realists assert that mistrust is widespread among actors in the global arena and that it never subsides.<sup>90</sup> Defensive realists claim that it occasionally diminishes in its intensity and paves the way for collaboration.<sup>91</sup> Reassuring gestures on the part of states (i.e., signalling), such as a Graduated Reciprocation in Tension Reduction (GRIT), may foster a climate conducive to mutually beneficial action.<sup>92</sup> Bayesian realists contend that an inherent tendency towards mistrust is not an ever present characteristic of international relations. Indeed, '*convergence on correct beliefs is more likely than convergence on incorrect beliefs*. That is, although the learning process is noisy and prone to errors of all kinds, beliefs over time and on average are more likely to converge towards reality than to diverge from it.'<sup>93</sup>

It is again a matter of subjective judgement, but it may be virtually impossible to construct a picture of the events of 1982–1984 that would conform fully to that painted by exponents of offensive realism. It is apparent that the level of trust/mistrust, while fundamentally high, fluctuated significantly during the two-year period. On the other hand, to suggest that there was an underlying Bayesian propensity to learn, however awkwardly, and gravitate towards a widely acceptable compromise may be

<sup>87</sup> See generally R. Axelrod, *The Evolution of Cooperation* (1984); R. Axelrod, *The Complexity of Cooperation: Agent-Based Models of Competition and Collaboration* (1997).

<sup>88</sup> Kydd, *supra* note 84, at 10.

<sup>89</sup> See *ibid.*, at 7–9.

<sup>90</sup> See *ibid.*, at 14–15.

<sup>91</sup> See *ibid.*, at 16–18.

<sup>92</sup> See *ibid.*, at 17. See also C. Osgood, *An Alternative to War or Surrender* (1962); R. Jervis, *Perception and Misperception in International Politics* (1976); D. Welch Larson, *Anatomy of Mistrust: U.S.-Soviet Relations During the Cold War* (1997); I.W. Zartman and G.O. Faure (eds), *Escalation and Negotiation in International Conflicts* (2005).

<sup>93</sup> Kydd, *supra* note 84, at 18–19.

a case of stretching reality too far. The type of force highlighted by members of the defensive realism school, accommodating gestures at delicate junctures, although not resorted to on a comparable scale by the protagonists, seems to have exerted considerable influence on the final outcome and steps taken along the way. Some combination of Bayesian and defensive realist perspectives may explain the laborious yet uninterrupted journey towards the ultimate destination in the complex bargaining process regarding the future of Hong Kong.

A game-theoretic analysis of the formation of the Sino-British Declaration is not without intellectual merit. It serves as a useful reminder that, contrary to realist/neorealist/neoliberal conceptions, the ability to shape outcomes in international relations is a function not merely of tangible resources but also intangible ones. In the corporate strategy literature, a distinction is commonly drawn between resources, both tangible and intangible, and capabilities/competencies.<sup>94</sup> If China did indeed outmanoeuvre the United Kingdom, which is a moot point, it was due not just to its physical might (economic, military, and so forth), if any, but apparently superior negotiating skills as well. Rightly or wrongly, it has been suggested that the British learned from their 1982–1984 experience and adopted harder/more sophisticated tactics during subsequent rounds of bargaining with the Chinese, and were consequently in a better position to influence certain developments in Hong Kong.<sup>95</sup> Whether or not this assessment is entirely valid, the theoretical ramifications are worth noting.

Unfortunately, game-type situations are structured by mathematical economists and those who embrace their tools in such a parsimonious fashion that modest light is shed on players' skills. They are normally confronted with binary choices, cooperate or defect, and are hostage to the model's properties which are exogenously given (availability of channels of communication, payoffs, and so forth). The capabilities/competences they rely upon in seeking to prevail in the contest are not brought effectively into focus. The corollary is that the game is deprived of some crucial dimensions, which may partly explain its dynamics and outcome. The Sino-British negotiations regarding the future of Hong Kong and other similar episodes cannot, it seems, be adequately dissected within such a narrow conceptual framework.

Researchers in the field of corporate strategy (and, selectively, legal scholars exploring conflict resolution) have been able to inject more substance into the notion of bargaining style. They have identified patterns such as the 'hard nut' negotiator (who adopts a super-tough stance that he/she modifies only with great reluctance), 'nice guy' negotiator (who goes to great lengths to accommodate the other party), 'building-block' negotiator (who deals with the easy problems first in order to establish a foundation for a workable relationship), 'tough-issues-first' negotiator (who addresses the thorny questions at the outset with a view to determining whether an agreement is feasible and minimizing bargaining costs), 'best-offer-first' negotiator (who also aims to minimize bargaining costs by making early a seemingly attractive offer which is not

<sup>94</sup> See G. Johnson, K. Scholes, and R. Whittington, *Exploring Corporate Strategy: Text and Cases* (8th edn, 2008), at 93–130.

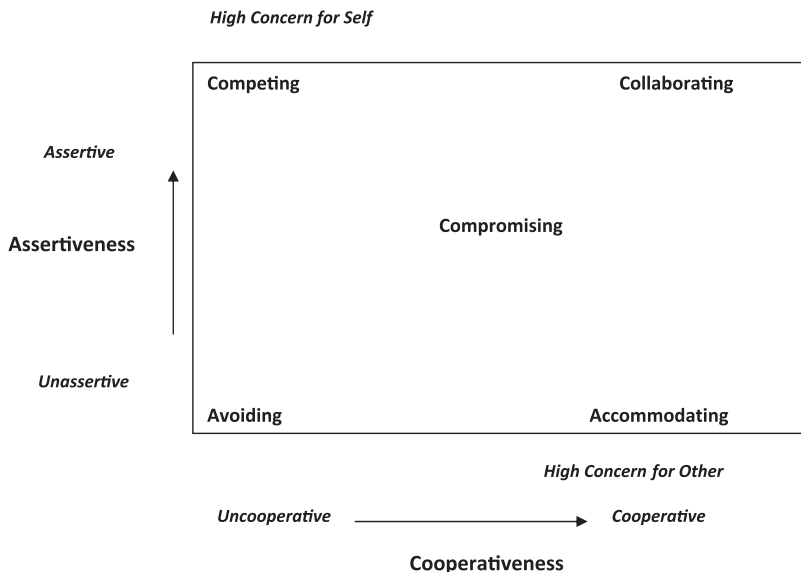
<sup>95</sup> See Ma, *supra* note 45, at 746–751.

subject to further adjustments), ‘give-and-take’ negotiator (who is willing to engage in distributive bargaining), ‘honey-and-vinegar’ negotiator (who emphasizes methodically the affirmative/benefits of a settlement and the negative/costs of failing to reach an agreement), and ‘brinkmanship-style’ negotiator (who employs an extreme type of the hard nut approach by pushing the other side to the edge of a precipice).<sup>96</sup>

A more focused and interconnected classification scheme is derived from the dual concern model, which encapsulates the propensity of parties involved in bargaining to satisfy themselves (concern for self) and to satisfy the other side (concern for others). A player may thus be assertive or unassertive (display high or low concern for self) and accommodating or avoiding (exhibiting high or low concern for others). Five negotiating styles ensue: accommodating, avoiding, collaborating, competing, and compromising (see Figure 2).<sup>97</sup> Again, such behavioural dispositions, or carefully orchestrated deliberate tactics could conceivably impinge on the evolution of bargaining, including in the international domain, and influence the final results.

Game-theoretic accounts of the making of the Sino-British Joint Declaration suggest that China’s superiority in terms of bargaining skill stemmed from its hard nut, brinkmanship-style, or competing approach. By contrast, the United Kingdom countered by adopting a compromising posture (rather than a nice guy-type or accommodating stance). In this clash of strategies (civilizations and cultures?), the

**Figure 2:** Dual Concern Model of Negotiations



Adapted from Carrell and Heavrin, *supra* note 60, at 9.

<sup>96</sup> See A. Goldman and J. Rojot, *Negotiation: Theory and Practice* (2003), at 111–129.

<sup>97</sup> See Pruitt, ‘Strategic Choice in Negotiation’, in J.W. Breslin and J.Z. Rubin (eds), *Negotiation Theory and Practice* (1991), at 27.

less flexible and more forceful party was bound to prevail, and this explains why the Sino-British Joint Declaration was portrayed as ‘the best of a bad job’. Had the United Kingdom capitulated unconditionally (i.e., opted for a nice-guy or accommodating style), the outcome in all likelihood would have been even less appealing.

The second analytical survey referred to earlier<sup>98</sup> eschews game theoretic constructs in favour of an approach akin to that of economists examining negotiation patterns under different market conditions or, broadly speaking, structural configurations.<sup>99</sup> The author acknowledges that this was not interaction between equals (symmetric bargaining).<sup>100</sup> In terms of resources that could productively be employed in this particular context, the Chinese possessed an unmistakable advantage. Nevertheless, the author questions the proposition that the physically weaker party was completely outmanoeuvred during the asymmetric negotiations. According to her, the United Kingdom obtained some vital concessions, displaying considerable capabilities/competencies/skills in the process.

Most of the key concessions secured by the British have been alluded to previously. The author provides a broader list. Among those that are explored in detail and merit further attention are China’s consent to the idea that the Sino-British Joint Commission be an ‘organ of liaison’ rather than an ‘organ of power’,<sup>101</sup> and its willingness to countenance the notion that members of the Hong Kong Legislative Council be elected (rather than appointed or elected) and that the territory’s chief executive be accountable to that institution.<sup>102</sup> Pursuant to the adoption of the latter principle, a framework was established for British democratic (or quasi-democratic) reforms during the period preceding the transfer of sovereignty.<sup>103</sup>

A possible interpretation of the United Kingdom’s ability to win a string of significant concessions might be that the weaker party’s negotiating style (compromising) was not ineffective after all in those circumstances. Another potentially credible reading would be that it was not a matter of style as such, but of specific bargaining skills (a mixture of contentious and problem-solving tactics such as presenting persuasive arguments, constructing win-win agreements, expanding the pie, exchanging concessions, solving underlying concerns, refocusing questions, acquiring information about the other party’s concerns, and making promises).<sup>104</sup>

The author does not discount the validity of such explanations. However, she accords greater weight to the asymmetric nature of the relationship (strong actor versus weak actor configuration). Such imbalances are a common feature of international regime (legal and other) formation: ‘[i]t seems reasonable to conclude on a priori grounds that perfectly symmetrical bargaining will seldom occur in the real

<sup>98</sup> See Gao, *supra* note 45.

<sup>99</sup> See P.H. Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective* (1979), at 36–51.

<sup>100</sup> See for further elaboration K. Winkler, *Negotiations with Asymmetrical Distribution of Power: Conclusions from Dispute Resolution in Network Industries* (2006).

<sup>101</sup> See Gao, *supra* note 45, at 483–485.

<sup>102</sup> See *ibid.*, at 485–486.

<sup>103</sup> See *ibid.*, at 486.

<sup>104</sup> See D.G. Pruitt and P.J. Carnevale, *Negotiation in Social Conflict* (1993), at 30–44.

world, if only because resources and personal attributes of the players are unlikely to be identical'.<sup>105</sup> This is consistent with realist/neorealist/neoliberal propositions, which are unfortunately seldom extended into international domains where hegemony is not the defining characteristic of the situation.

In the international political economy literature, there are conflicting views regarding the implications of power imbalances for negotiation dynamics. One strand emphasizes the inherent 'tendency for the "exploitation" of the small'.<sup>106</sup> It is thus posited that 'under conditions of unequal relative power among bargainers, the party with high power tends to behave exploitatively, while the powerful party tends to behave submissively, unless certain special conditions prevail'.<sup>107</sup> This stance, which again does not lack realist/neorealist/neoliberal underpinnings, is supported by elementary common sense as much as careful model building and empirical observation.

The contrary and less obvious argument is that the weak player often gains comparatively more than conventional wisdom would have predicted. This phenomenon is depicted as the 'structuralists' paradox'.<sup>108</sup> The puzzle stems from the apparent contradictions involved. After all, 'how can weaker parties negotiate with stronger parties and still get something?'<sup>109</sup> Or, alternatively, 'how do known (or perceived) weaklings negotiate with known (or perceived) heavies and emerged satisfied with the results?'<sup>110</sup> This seems to defy logic because, '[e]xpecting to lose, a weaker party would want to avoid negotiation with a stronger party at all costs; a stronger party would have no need to negotiate since it could simply take what it wants'.<sup>111</sup> Yet, somehow, 'weak parties not only take on stronger ones in negotiation, they often emerge with sizable – even better than expected – results'.<sup>112</sup>

The corollary presumably is that 'the aggregate power position of a state cannot be directly translated into relevant and available power in any particular situation',<sup>113</sup> a feature of international bargaining which deserves greater recognition in academic work than is currently the case.<sup>114</sup> The paradox stems partly from the fact that bargaining style and skill also determine the outcomes of negotiations between states.<sup>115</sup> However, the asymmetrical, or unequal, relationship is believed to account for the puzzle as well. The weak player enjoys certain fundamental advantages which, if reinforced by an appropriate bargaining style and pertinent skills, may stand him/

<sup>105</sup> Gao, *supra*, note 45, at 477.

<sup>106</sup> M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1965), at 35.

<sup>107</sup> J.Z. Rubin and B.R. Brown, *The Social Psychology of Bargaining and Negotiation* (1975), at 199.

<sup>108</sup> See Zartman and Rubin, 'The Study of Power and the Practice of Negotiation', in I.W. Zartman and J.Z. Rubin (eds), *Power and Negotiation* (2000), at 1, 3.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> I.W. Zartman, *The Politics of Trade Negotiations between Africa and the European Community* (1971), at 5.

<sup>114</sup> See Zartman, 'The Political Analysis of Negotiation: How Who Gets What and When', 26 *World Politics* (1974) 385.

<sup>115</sup> See Zartman and Rubin, *supra*, note 108, at 394; G.H. Snyder and P. Diesing, *Conflict among Nations: Bargaining, Decision Making and System Structure in International Crises* (1977), at 498.

her in good stead. The author of the study outlined here embraces this analytical perspective in seeking to explain the genesis of the Sino-British Declaration and its overall characteristics.<sup>116</sup>

Despite such conceptually rigorous and wide-ranging efforts to enhance the understanding of international legal regime formation, the picture that emerges remains incomplete in some respects. The absence of fairness from the theoretical equation is especially noteworthy. This is not just a matter of equality (à la *homo equalis*) and reciprocity (à la *homo reciprocans*). Fairness does not fully overlap with the former and the latter, both procedurally and substantively.<sup>117</sup> The issue is whether Sino-British negotiators were at least to some extent motivated by a desire to satisfy this criterion and whether, given the intricacies they were confronting, 'the best of a bad job' does not really qualify as such, even if merely in the loose sense of the term (without resorting to esoteric yardsticks such as Pareto efficiency and Nash equilibrium).<sup>118</sup>

Experimentally generated findings, originating in economics as well in social psychology, suggest that strategic interactions are not marked exclusively by an unrestrained pursuit of self-interest and that agents also display a concern for others (i.e., are other-regarding).<sup>119</sup> This implies that they invoke standards such as fairness (and equality and reciprocity) in evaluating outcomes. This manifests itself palpably in the Ultimatum Game, in which players (a Proposer/P and a Respondent/R) have an opportunity to divide a sum of money in a 'selfish' and 'selfless' manner. In a variety of cultural milieus, and under different conditions, agents appear to gravitate towards fair solutions, at variance with the postulates of the *homo economicus* model.<sup>120</sup>

Its imperfections notwithstanding, the Sino-British Joint Declaration may be thought of as a mutually prominent alternative<sup>121</sup> in terms of being collectively fair to all parties affected, in the sense of serving, up to a point, everyone's interest in some logical way. The scope for improving the architecture, as distinct from the engineering, was limited in this respect. While the outcome was by no means inevitable, the two protagonists muddled through towards this structure in a Bayesian fashion, although there were clearly other forces at work. To attribute the results to a single variable, no matter how relevant, like the asymmetry of the relationship, would constitute an oversimplification of complex realities.

<sup>116</sup> See Gao, *supra* note 45.

<sup>117</sup> For illuminating illustrations see S.J. Brams and A.D. Taylor, *The Win-Win Solution: Guaranteeing Fair Shares to Everybody* (1999). For a more comprehensive survey see E.B. Kapstein, *Economic Justice in an Uncertain World: Towards a Level Playing Field* (2006).

<sup>118</sup> See Young, *supra* note 77, at 33–38.

<sup>119</sup> See, e.g., *ibid.*, at 51–53; Frohlich, Oppenheimer, and Kurki, 'Modelling Other-Regarding Preferences and an Experimental Test', 119 *Public Choice* (2004) 91; Orbell, 'Science, Anti-Science and Rational Choice', 12 *Pol Economist* (2005) 1.

<sup>120</sup> See, e.g., J. Henrich *et al.*, *Foundations of Human Sociality: Economic Experiments and Ethnographic Evidence from Fifteen Small-Scale Societies* (2004).

<sup>121</sup> Such an option typically stands out in both parties' thinking, either because it embodies some standard of fairness or reasonableness or because it enjoys perceptual 'uniqueness, simplicity, precedent or some rationale that makes [it] qualitatively differentiable from the continuum of possible alternatives': see T.C. Schelling, *The Strategy of Conflict* (1960), at 70. See also Pruitt, *supra* note 82, at 57–70.



## 5 Conclusion

The notion of an international legal regime is challenging, yet not unworkable. Such systems neither are readily visible nor do they display uniform properties. To compound the problem, their essence lies in the eye of the beholder. The softness, fuzziness, and subjectivity notwithstanding, the concept yields valuable theoretical and practical insights. Exploring the formation, maintenance, adaptation, transformation, disintegration, and effectiveness of international legal regimes is arguably a worthy undertaking. Scholars identified with mainstream perspectives like realism, neorealism, and neoliberalism have channelled substantial intellectual resources in this direction.

An examination of the making of the Sino-British Joint Declaration suggests that there are tangible gaps in the knowledge regarding regime development. An assessment of the analytical studies focused on the intricate process leading to an agreement between China and the United Kingdom with respect to the future of Hong Kong helps to highlight these gaps and pinpoint ways to broaden the conceptual framework. Egoistic self-interest, political power (symmetrical or otherwise), norms and principles, usage and customs, and knowledge are vital components of the international legal regime formation equation, but this set is not exhaustive.

To the extent that states may be visualized as unitary actors, they are not motivated by self-interest and power alone. There is evidence that they are propelled by a sense of reciprocity, equality, fairness, identity (us versus them), trust/mistrust, social transparency (established via communication channels), and accountability. Quite naturally, an obligation to constituencies is more likely to be fulfilled in an environment where vigilance is high/surveillance is intense. Fairness is a distinct variable, not to be subsumed under reciprocity and/or equality.

Power relationships are not straightforward. Paradoxically, strength may translate into weakness and vice versa. Negotiating style and player capabilities/competences/skills may exert a palpable influence on bargaining outcomes. They may or may not be correlated with power. There is a certain randomness to the international negotiation process, but (if capabilities/competences/skills do make a difference) it can be controlled/manipulated. Defensive realists have concrete ideas in this regard and Bayesians posit optimistically that one may stumble upon them productively in the course of strategic interaction.

The limited success, rather than outright failure, of game-theoretic models to explain adequately the genesis of international legal regimes may have methodological implications. Such constructs, and their deductive brethren, occupy perhaps excessive space in inter-state bargaining territory, crowding out once equally favoured tools of social inquiry (e.g., cognitive, learning, and reaction process analytical vehicles).<sup>122</sup> By the same token, top-down, deductive approaches overshadow their bottom-up, inductive counterparts. The apparently serendipitous discovery that

<sup>122</sup> See Gulliver, *supra* note 99, at 36–50; Patchen, 'Models of Cooperation and Conflict: A Critical Review', 14 *J Conflict Res* (1970) 389.

the 1982–1984 Sino-British ‘game’ had an asymmetrical structure, which was not necessarily exploited ruthlessly by the ‘strong’ player, serves as a timely reminder that the theory-oriented (as distinct from theory-driven) and systematically executed case study should not be consigned to oblivion.