



Selective Adaptation In Comparative Perspective: Approaches to Understanding Reception of International Law Under Conditions of Globalization

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Legal behavior is strongly influenced by norms of legal and political culture¹ and by the institutional context within which these norms are operationalized.² Cultural norms are reflected in rules, including formal laws and regulations and informal procedures and practices. The distinction between rules and the cultural norms they represent becomes especially important when rules particular to one cultural group are used by another, without a corresponding assimilation of underlying norms. Local implementation of non-local rules is also affected by the institutional context. Under current conditions of globalization normative tensions are present as liberal rules of governance generally associated with the Europe and North America are disseminated to other areas characterized by local norms that are often in conflict with norms of liberalism. International trade and human rights are matters of special importance, where concerns over compliance with international standards often reflect misplaced expectations about the enforceability of rules without agreement on underlying norms. In the context of globalization, economic and political

1 Amitai Etzioni, "Social Norms: Internalization, Persuasion, and History," *Law & Society Review* vol. 34 no. 1 (2000), pp. 157-178; Hans Kelsen, *General Theory of Norms*, (M. Hartney tr. (Oxford: Clarendon Press, 1991).

2 Douglass North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990).





power has allowed trade and human rights standards associated with liberal democratic capitalism to be imposed on societies outside the European tradition, but has had less effect in displacing local cultural norms. Understanding treaty compliance can be furthered through appreciation of the normative contexts for legal performance. This paper introduces an approach to understanding treaty compliance in light of normative factors of selective adaptation, making reference to the example of China and international legal standards for security cooperation.

I. Selective Adaptation and Reception of International Law Standards

Treaty compliance is an important example of the reception of international law. Treaty compliance involves dynamics of interpretation and implementation of international legal standards. In cases where treaties involve rules grounded in non-local norms, interpretation involves a dynamic of selective adaptation by which non-local rules are interpreted according to local norms borne of legal and political culture.

A. Selective Adaptation

Selective adaptation involves a dynamic by which international rule regimes are mediated by local cultural norms.³ Proceeding from typologies linking international rules regimes with associated sets of normative principles, and informed by concepts linking rule compliance with the existence of normative consensus, the paradigm of selective adaptation suggests that international human rights compliance may require accommodation with local cultural norms. This is not an exercise in justifying non-compliance with international obligations by reference to Party or state assertions about national and social interests. Rather, selective adaptation posits a model for understanding the reality that non-local rule regimes are interpreted and applied according to the extent of commonality between the norms underlying these rule regimes and local cultural norms. Thus, universal human rights standards on the right to adequate health care, for example, will in practice be interpreted according to local norms concerning such matters as the relationship between individual and collective claims, expectations about health and the delivery of health care.

³ Pitman B. Potter, "Legal Reform in China – Institutions, Culture, and Selective Adaptation," *Law & Social Inquiry* vol. 28 no. 4 (Spring 2004), pp. 465-495 and Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices. *Washington University Global Studies Law Review*, vol. 2 no 1 (2003), pp. 119-150.





Compliance with treaty rules involves a myriad range of interpretation and application, which in turn involve the intervention of interpretive communities comprised of political, legal and socio-economic elites.⁴ In the trade area, for example, the international rule regime is grounded in liberal norms of popular sovereignty and limits on state agency.⁵ In the health area, the international rule regime is grounded in norms about the links between health and social wellbeing, the importance of health in realizing values of human dignity, and shared social interests in prevention, monitoring, and treatment of infectious disease.⁶ Selective adaptation analysis would examine the extent to which these norms are shared by interpretive communities in treaty member states.

The paradigm of selective adaptation may also be seen to operate by reference to factors of perception, complementarity, and legitimacy. *Perception* influences understanding about foreign rules and local norms and practices. In the area of human rights to health care, this may involve perception about what the international rule regime requires in terms of health care priorities, outcomes and processes, and perception about local conditions and expectations. *Complementarity* describes a circumstance by which apparently contradictory phenomena can be combined in ways that preserve essential characteristics of each component and yet allow for them to operate together in a mutually reinforcing and effective manner. In the health care area, for example, complementarity may help explain how international standards for assessment of health needs and delivery of health care can accommodate local social practices. *Legitimacy* concerns the extent to which members of local communities support the purposes and consequences of international standards. Thus, in the health care sector, popular reactions to state-controlled reporting on infectious diseases such as HIV, SARS and Avian Flu may signal varying levels of legitimacy for the process of localizing international standards.

While selective adaptation offers potential to understand dynamics of localization of international human rights standards, it also works to limit efforts to insulate or excuse government behavior

4 Stanley Fish, *Is There a Text in This Class: The Authority of Interpretive Communities*. (Cambridge MA: Harvard University Press, 1980).

5 Biukovic, Ljiljana, "Compliance with International Treaties – Selective Adaptation Analysis" in *Canadian Yearbook on International Law* (2006).

6 Biddulph, Sarah, "Relevant International Norms for Cross Cultural Resolution of Human Rights Issues". Asia Pacific Program on Cross Cultural Dispute Resolution Research Occasional Paper Series, # MCRI-MPI 08, (The Institute of Asian Research, UBC), August 2003.





from human rights criticism. For the key determinant in selective adaptation is the relationship between the norms underlying international human rights standards and local cultural norms – not necessarily as articulated by the state or by local elites, but rather as discerned empirically in society. In the health area, we have found that the international rule regime is grounded in norms about the links between health and social well being, the importance of health in realizing values of human dignity, and shared social interests in prevention, monitoring, and treatment of infectious disease. While much of the academic and policy work on the international health rights regime focuses on rule compliance, understanding such compliance requires more than simply comparing local performance against international requirements. Rather, compliance can be understood more clearly by examining the extent to which norms underlying the international regime are consonant with local norms. This can help explain compliance outcomes, by differentiating between those situations where non-compliance is the result of normative conflict and those cases where local norms are consistent with the norms of the international regime but local practices fail to satisfy international standards. Such a norms-based approach invites expansive empirical research on the structure and content of local cultural norms, and the link with acceptance of international rule regimes. The focus then shifts from state-centered discourses of compliance to socially grounded analysis of normative consensus.

As a result, remedies for non-compliance with international human rights standards may vary depending on the normative relationship between international rule regimes and local society. Demonstrated lack of normative consensus on the goals, processes, and outcomes on human rights may invite efforts to explore the potential for accommodation of normative difference and may support movement toward accepting normative diversity in the recognition and enforcement of human rights. On the other hand, non-compliance in the absence of normative conflict may invite performance remedies and possibly institutional incentives to induce stronger compliance. In sum, the focus on normative dynamics of compliance allows the paradigm of selective adaptation to limit the scope of claims to cultural relativism as an explanation for non-compliance with international human rights standards. Where demonstrable conflicts exist between international rule regimes and local popular norms, accommodation to cultural differences might be useful. But non-compliance unrelated to factors of normative consensus cannot be excused by reference to cultural relativism.





II. The China Example: Issues of National Security Cooperation

Applied to China, Selective Adaptation analysis permits understanding of local responses to international legal obligations. This is evident in a range of areas. This paper will focus on security issues.

A. China and International Law Generally.

China's interpretation and implementation of international agreements in trade and human rights, for example, will depend on normative perspectives of interpretive communities comprised of government officials, socio-economic and professional elites, and other privileged groups exercising authority borne of political and/or professional position, specialized knowledge, and/or socio-economic status.⁷ Thus, local implementation of international trade agreements will depend in part on the extent to which local interpretative communities assimilate the norms of trade liberalization that underlie the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), while implementation of international human rights agreements will depend similarly on the extent of assimilation by local interpretive communities of underlying human rights norms.

Factors of perception, complementarity, and legitimacy also play a role. Influenced by their training and education, members of China's interpretive communities bring their *perceptions* about international law and relations to bear in responding to the requirements of international rule regimes.⁸ Perceptions contrasting China's colonial past and resulting weakness in foreign relations with its current strengths tend to encourage both a sense of grievance and of opportunities

for correction and redress that influence attitudes toward the international system.⁹ Perception dynamics are also evident in academic and policy assessments of the international legal system that

7 On interpretive communities in China, see H. Lyman Miller and Liu Xiaohong, "The Foreign Policy Outlook of China's 'Third Generation' Elite," and Joseph Fewsmith and Stanley Rosen, "The Domestic Context of Chinese Foreign Policy: Does 'Public Opinion' Matter?," both in David M. Lampton, ed., *The Making of Chinese Foreign and Security Policy* (Stanford: Stanford University Press, 2001), pp. 123-150 and 151-187.

8 See e.g., Zeng Lingliang, "21 shijie falu fuwu maoyi de fazhan qushi yu Zhongguo faxue rencai peiyang de yong you gaige" (Development trends in 21 century trade in legal services and needed reforms in training of China's legal talents), *Faxue pinglun* (Law Review) 2001 no. 1, pp. 3-8; Xiao Yongping, "Falu de jiao yu xue zhi geming" (Revolution in teaching and studying law), *Faxue pinglun* (Law Review) 2003 no. 3, pp. 153-160.

9 See e.g., Li Baojun, *Dangdai Zhongguo waijiao gailun* (Treatise on contemporary Chinese foreign policy) (Beijing: People's University Press, 1999); Wang Yinzhou, *Quanguo zhengzhi he Zhongguo waijiao* (Global politics and China's foreign policy) (Beijing: World Knowledge Press, 2003).





acknowledge the challenges posed by globalization for sovereignty imperatives of the nation-state generally,¹⁰ and focus on the intrusive nature of international regimes whose underlying norms are seen as a challenge to China.¹¹ Such perceptions affect the reception of international legal standards by local interpretative communities, and ultimately on China's responses of implementation.

Factors of *complementarity* are also important – particularly around questions of compliance with international standards. Local analyses of China's participation in the international system tend to emphasize the need for compatibility with China's systemic and substantive requirements.¹² As well, the status of international law as a binding standard for Chinese domestic law remains the subject of intense debate, suggesting once again the link between complementarity and acceptance of international standards.¹³ Dynamics of *legitimacy* are also evident. Although China's academic and policy discourses as well as its behaviour in international law are in some respects aimed at building legitimacy with local audiences, the pursuit of legitimacy in the international community explains much about China's engagement with international legal regimes.¹⁴ Thus, understanding China's increased participation in the international legal system invites appreciation of issues of normative engagement, as international standards are selectively adapted by interpretive communities influenced by factors of perception, complementarity, and legitimacy.

B. Security: Cooperation and Sovereignty.

China's engagement with the international legal regime is evident in the area of security, where China has become increasingly engaged in international diplomatic and security institutions and discourses.¹⁵ Yet, diplomatic irritants over China's interpretation of international and bilateral

10 Rao Geping and Huang Yao, "Lun quanqiu hua jincheng yu guoji zuzhi de hudong guanxi" (On mutual impacts of globalization processes and international organizations), *Faxue pinglun* (Law Review) 2002 no. 2, pp. 3-13.

11 See e.g., Liu Shuguang, *Quanqiu hua yu fan quanqiu hua* (Globalization and anti-globalization) (Changsha, Hunan People's Press, 2003), esp. pp. 103-166. For response to such resistance, see He Qinghua, "Fa de yizhi yu fa de bentuhua," (Legal transplanting and localization of law"), *Zhongguo faxue* (Chinese Legal Studies) 2002 no. 3, pp. 3-15.

12 See e.g., Li Dexi, Qian Zhen, and Lin Zhe, *Quanqiu beijing xia de Zhongguo minzhu jianshe* (Development of democracy in China under the global background) (Chongqing: Chongqing Press, 2005), based on a policy conference at the authoritative Central Party School. Also see Gao Gangjun, "Zhongguo de heping fazhan yu guoji fa de jiazhi tixi" (China's peaceful development and the value system of international law," in *Faxue pinglun* (Law Review) 2006 no. 3, pp. 104-110.

13 See e.g., Zhang Shaodong, "Ye lun guoji tiaoyue zai woguo de shiyong," (Again examining the application of international treaties in China), *Faxue pinglun* (Law Review) 2001 no. 6, pp. 73-79.

14 See e.g., Jiang Xiuyan, "An Analysis on Changing International System and Its Acceptance of China," *International Review* vol. 39 (Summer 2005), pp. 19-36.

15 Joshua Cooper Ramo, *The Beijing Consensus: Notes on the New Physics of Chinese Power* (London: The Foreign Policy Centre, 2004), pp. 52-53; Evan S Medeiros and M. Taylor Fravel, "China's New Diplomacy," *Foreign Affairs* vol. 82 no. 5 (Nov.- Dec. 2003), pp. 22-35; Avery Goldstein, "The Diplomatic Face of China's Grand Strategy: A Rising Power's Emerging Choice," *The China Quarterly* (2001), pp. 835-864.





treaties on consular relations in such areas as dual citizenship and consular access, and ongoing reluctance to submit to binding international judicial or arbitral decision on key sovereignty and security issues¹⁶ raise questions China's commitment to the international legal regime. As with the areas of trade and human rights, Selective Adaptation offers a useful approach to understanding China's positions and behaviour.

1. Regional Security: Korea and Central Asia.

Acknowledging the opportunities presented by UN Security Council efforts to permit more fulsome engagement by regional organizations in carrying out UN Charter provisions on peace and security,¹⁷ China has supported a broader role for multilateral regional security efforts in Northeast and Central Asia.¹⁸ Through these processes, China has sought to assert leadership in building international legal standards on security that support its particular foreign policy goals.¹⁹

a. *Six-Party Talks.*

The "Six Party Talks" on North Korea exemplify China's approach to UN and international law provisions for local arrangements on collective security. Prompted by withdrawal by North Korea (DPRK) from the Nuclear Non-Proliferation Treaty in 2003, the Six-Party Talks, involving China, Japan, Russia, South Korea, and the United States along with North Korea, were aimed ostensibly to build a peaceful resolution to the problem of nuclear weapons in the DPRK. Yet the forum also reflected other policy concerns of the participants regarding security in Northeast Asia. While Japan and the United States have pushed for North Korea's 'verifiable and irreversible' nuclear disarmament, China, Russia and South Korea have suggested a more incremental approach involving incentives in response to gradual disarmament by North

Korea. These differences reflected conflicting policy goals of the participants, and impeded rapid resolution of the issue of DPRK nuclearization.

16 Liang Yong, "Cong guojifa shijiaok kan Zong Ri Donghai dalu jiahua jie zhengduan" (Assessing Sino-Japan disputes over the continental shelf in the East China Sea from the standpoint of international law), *Faxue* (Legal Science) 2006 no. 8, pp. 122-128.

17 UN Charter Chapter VIII. Also see e.g., "Security Council Highlights Need to Further Strengthen Cooperation Between UN, Regional Organizations in Maintenance of International Peace, Security" (Security Council Resolution 1631/2005).

18 Avery Goldstein, *Rising to the Challenge: China's Grand Strategy and International Security* (Stanford: Stanford University Press, 2005) pp. 119-122.

19 Woodrow Wilson Center for Scholars, "China's 'Good Neighbor' Diplomacy: A Wolf in Sheep's Clothing?," *Asia Program Special Report* no. 126 (Jan. 2005).





China's role in hosting the talks reflected its appreciation that leadership in multilateral organizations presents opportunities to influence the normative and institutional standards of the international legal regime. China's concerns regarding North Korea have tended to centre on the immediate impacts on China from regime collapse and resulting refugee and humanitarian crises, although China also has longer-term interests in ensuring regional stability and denying the United States opportunities for broader regional linkages and limiting the potential for direct intervention.²⁰ China has used its leadership of the talks to assert its interests with regard to relations not only with North Korea but also with the other involved parties, particularly Russia.²¹ The Joint Declaration resulting from Hu Jintao's state visit to Russia in May 2003, emphasized a joint approach to political and diplomatic methods for resolving the problems of the Korean Peninsula, a commitment to cooperation in the interests of peace, stability and development on the Korean Peninsula, and an agreement that the security of the DPRK must be guaranteed and favourable conditions established for its socio-economic development.²² Speaking in connection with the Third Round of talks, Vice Foreign Ministry Wang Yi contrasted a joint China-Russia proposal on the "promotion of the peace-talk process and the resolution of difficult questions" with the unilateral proposals of the United States which were couched in terms of bilateral discussions with the DPRK.²³

The distinction between China's emphasis on process and participation and the US focus on substantive results was acknowledged by Foreign Ministry spokesperson Zhang Qiyue,²⁴ while Vice Minister Wang Yi also alluded to the general lack of consensus on the purpose of the talks, "As the host, we are delighted to see the progress achieved. . . The basis of the talks is not solid enough and there are still a number of differences."²⁵ Wang's remarks at the conclusion of the Third Round reflected the focus on preserving this role by keeping the talks ongoing, rather than achieving particular results:

20 John S. Park, "Inside Multilateralism: The Six-Party Talks," *Washington Quarterly* vol. 28 no. 4 (Autumn 2005), pp. 75-91; Scott Snyder, Ralph Cossa, and Brad Glosserman, "Whither the Six-Party Talks," *U.S. Institute for Peace* (May, 2006); Avery Goldstein, "Across the Yalu: China's Interests and the Korean Peninsula in a Changing World," in Alastair Iain Johnston and Robert S. Ross, ed., *New Directions in the Study of China's Foreign Policy* (Stanford: Stanford University Press, 2006), pp. 131-161

21 For background on China-Russia cooperation on Korea, see Harry Gelman, "The Changing Asian Arena," in Sherman W. Garnett, ed., *Rapprochement or Rivalry: Russia-China Relations in a Changing Asia* (Washington D.C.: Carnegie Endowment for International Peace, 2000) pp. 403-431.

22 Russian Ministry of Foreign Affairs, "Text of Putin – Hu Jintao Joint Declaration" (FBIS May 28, 2003).

23 "Vice Foreign Minister Wang Yi Hosts a Press Conference in the Media Centre on the Six Party Talks," (June 26, 2004).

24 "Foreign Ministry Spokesperson Zhang Qiyue Holds a Press Conference at the Press Center for the Six Party Talks" (June 25, 2004).

25 "Vice Foreign Minister Wang Yi Hosts a Press Conference in the Media Centre on the Six Party Talks," (June 26, 2004).





“The posture of the Chinese delegation at this round of talks can be summarized as to keep firm objectives, consolidate the achievements, perform active good offices and seek steady progress. By to keep firm objectives, I mean that in no circumstances shall the objective of a denuclearized Korean Peninsula or the confidence and resolve to maintain peace and stability of the Peninsula waver. By to consolidate the achievements, I mean that we will carefully preserve the hard-won consensus accumulated by all parties through peace talks and consolidate the foundation for the talks. By to perform active good offices, I mean that China will continue to take an objective and just stance to actively make peace and promote talks. We will help all parties increase contacts, foster trust and seek and expand common ground while putting aside differences. By to seek steady progress, I mean that China will have full estimations of the difficulties and complicates factors facing the peaceful talks, remain cool-headed and patient and gradually move the process of the talks ahead in a correct direction in a down-to-earth manner.”²⁶

These points reflect China’s particular interests in hosting the talks. Denuclearization reflects China’s direct interest in reducing US military power on its borders is evident in the comment on denuclearization of the entire Korean Peninsula.²⁷ Consolidation involves not simply the content of the negotiations, but also China’s role as Chair, which enables China to influence the agenda and to control the potential for overlap into other bilateral issues of interest to China. The emphasis on good offices and steady progress also reflect China’s main focus on preserving its own leadership of the process. At the end of the Third Round, Wang Yi focused on the ‘good offices’ element of China’s role: “The role of China is to promote the peace talk process through good offices.”²⁸ Beijing’s preferred role as mediator at the Six-Party talks is emblematic of traditional approaches to dispute resolution in the PRC where Party-sanctioned mediators are not ‘disinterested,’ but rather guide the parties toward a outcome consistent with government policy priorities while entrenching the mediator’s authority and legitimacy.²⁹

26 “To Keep Firm Objectives, Consolidate the Achievements, Perform Active Good Offices and Seek Steady Progress: China’s Basic Attitude at the third Round of the Six-Party Talks Expounded by Vice Foreign Ministry Wang Yi, Head of Chinese Delegation,” (June 23, 2004).

27 Robert S. Ross, “Comparative Deterrence: The Taiwan Strait and the Korean Peninsula,” in Alastair Iain Johnston and Robert S. Ross, ed., *New Directions in the Study of China’s Foreign Policy* (Stanford: Stanford University Press, 2006), pp. 13-49

28 “New Consensus and New Steps: Remarks on the Third Round of the Beijing Six Party Talks by Wang Yi,” (June 26, 2004).

29 Stanley B. Lubman, “Mao and Mediation: Politics and Dispute Resolution in Communist China,” *California Law Review* vol 55 (1967), pp. 1284-1359.





With little resolution after the Third Round of talks in June 2004, a Fourth Round began in July 2005, after many months of increased tension between North Korea and the United States.³⁰ China had exercised its influence over the DPRK to bring North Korea to the negotiations in 2003 and seemed prepared to do so again. In contrast to the lack of agreement at the Third Round and even at the first session of the Fourth Round (July 26 – Aug. 7, 2005), the final session of Fourth Round (Sept. 13-19, 2005) resulted in a consensus of sorts, although the joint statement at the conclusion of the round reflected a range of contradictory outcomes.³¹ The DPRK agreed to abandon all nuclear weapons and existing nuclear weapons programs and returning, at an early date, to the Nuclear Non-Proliferation Treaty and to International Atomic Energy Agency (IAEA) safeguards. The US affirmed that it has no nuclear weapons on the Korean peninsula and has no intention to attack or invade the DPRK with nuclear or conventional weapons – an agreement made possible because American nuclear assets are concentrated offshore and because the intent not to invade is limited in scope and time. The talks also resulted in nominal agreements on fealty to the UN Charter and “recognized norms of international relations,” economic cooperation, and lasting peace and stability in Northeast Asia.

Yet the agreement reflected continued disagreement on the question of North Korea’s right to development nuclear energy for peaceful purposes (opposed by the US and Japan). The Joint Statement reflected China’s interest in keeping the talks going by its affirmation of an agreement to take joint steps to implement the Fourth Round agreement in a phased manner in line with the principle of ‘commitment for commitment’ and ‘action for action’ (a modification of the principle of ‘words for words, actions for actions’ articulated at the end of the Third Round). A Fifth Round was held November 9-12, 2005, but resulted in little more than affirmation of the Fourth Round Joint Statement. The DPRK declined to commit to continue the Fifth Round, expressing objections to U.S. “economic sanctions” against Macao’s Banco Delta Asia (BDA), a Macao-based bank, in response to alleged counterfeiting and money laundering involving North Korean accounts.³² A DPRK proposal in April 2006 to resume the talks conditional on the lifting of U.S. economic sanctions was not accepted. Having been carried out for many years without apparent resolution,

30 Todd M. Walters, “The Fourth Round of the Six-Party Talks,” *Power and Interest News Report* (Sept. 5, 20005).

31 “Joint Statement of the Fourth Round of the Six-Party Talks Beijing, September 19, 2005,” (Sept. 19, 2005).

32 Scott Snyder, Ralph Cossa, Brad Glosserman, “Whither the Six-Party Talks?,” US Institute for Peace Briefing (May 17, 2006).





the Six-Party Talks appeared generally ineffective in moderating DPRK security behaviour. Instead, North Korea's testing of ballistic missiles in July 2006 and its completion of a nuclear weapons test in October brought tensions to new heights. Under pressure from the United States, China managed to persuade the DPRK to return to the SPT toward the end of 2006.³³ While the achievement of a bilateral agreement between the DPRK and the United States in March 2007 suggested an important easing of tensions, China's official response reflected a continued interest in ensuring China's continued involvement in managing regional security matters. PRC State Councillor and former Foreign Minister Tang Jiaxuan Implied significant credit for China's role as chair of the session held in Beijing, describing it as a "major breakthrough . . . [t]he Six-Party Talks mechanism itself has entered a substantive period. . . . The Chinese government firmly supports the document and will spare no efforts to take on its responsibilities."³⁴

China's role in the Six-Party Talks has revealed the extent to which Beijing's commitment to international law processes on collective security remains conditioned on pursuit of China's regional security interests. China's positions regarding the SPT suggest an effort to leverage apparent influence over the DPRK as a way to modify regional security behaviour by the US and Japan and to solidify links with Russia. China's purported influence over the outcome of the talks appears as a bargaining chip to influence debates in Japan over constitutional change and rearmament, and to diminish US support for Taiwan. Similarly, China can be seen to use its good offices at the SPT to build cooperation with Russia on energy security and border trade issues. While this is to be expected in the dynamics of international law and relations, the dubious effectiveness of the Six-Party Talks on DPRK behaviour will likely further test China's ability to balance its agreed role as regional coordinator, its potential to influence DPRK behaviour, and its pursuit of its own individual interests. In the wake of China's apparent inability to restrain the DPRK from missile and nuclear weapons testing in July and October 2006, possible changes in regional security architecture (including potential re-armament of Japan, increased US military presence in S. Korea, and expanded arms expenditures by Taiwan) may in the end challenge China's interests. The possible implications for China's engagement with the international legal system are important, as Beijing's regional cooperation efforts are driven by national security

33 "Six-party talks on the Korean peninsula to be held soon," *Xinhua* Nov. 1, 2006; Jeremy Palteil, "How China got North Korea Back to the Table," *Globe and Mail* Nov. 1, 2006, p. A25.

34 Qin Yize, "Six-Party Nuclear Talks Yield Breakthrough," *China Daily* Feb. 14, 2007, p. 1.





concerns which may run contrary to collective security interests. China's apparent successes in assisting a resolution to the Korea nuclear crisis will certainly reinforce the value of Beijing's selective adaptation of international legal standards.

b. The Shanghai Cooperation Organization.

Another example of China's response to provisions of the international legal regime on regional security is the Shanghai Cooperation Organization (SCO), China's first foray into multilateral organizations not exclusively economic in scope.³⁵ Comprised of China, Russia, Kazakhstan, Kyrgyzstan, Tajikistan (the original "Shanghai Five") and Uzbekistan (added in 2001 to complete the SCO), the organization is centred around security concerns in Central Asia. While issues of "terrorism, separatism and extremism" are given public primacy, other issues of economic cooperation (especially in oil and gas exploration and extraction) and counterbalancing the geo-strategic reach of the United States following 9/11 and the Afghan war. As well, the wealth of natural resources in the region offers opportunities for international collaboration on resource exploration and extraction.

The conditions of economic cooperation and security in central Asia are matters of particular concern to China in light of the complexities of its governance of Xinjiang Autonomous Region. China's policies in Xinjiang reflect the importance of the region to Beijing's conception of national interest.³⁶ Xinjiang has multiple riches of natural resources including oil and natural gas, which are essential to China's economic development. Xinjiang's strategic location in central Asia has leant particular importance to China's policies,³⁷ most recently the Chinese government's attempt to use the US-led anti-terrorism campaign as justification for suppression of Islamic separatists.³⁸

China's support for the SCO also furthers policy goals on relations with the central Asian states

35 Chien-peng Chung, "The Shanghai Co-Operation Organization: China's Changing Influence in Central Asia," *The China Quarterly* (2004), pp. 989-1009.

36 Dru Gladney, "Chinese Program of Development and Control, 1978-2002," in S. Frederick Starr, ed., *Xinjiang: China's Muslim Borderland* (Armonk NY and London: M.E. Sharpe, 2004), pp. 101-119; Ma Dazheng, *Guojia liyi gaoyu yiqie* (The national interest is paramount) (Urumqi: Xinjiang People's Press, 2003).

37 Nicolas Becquelin, "Xinjiang in the Nineties," *The China Journal* no. 44 (July 2000), pp. 65-90; Yitzhak Schichor, "The Great Wall of Steel: Military and Strategy in Xinjiang," in S. Frederick Starr, ed., *Xinjiang: China's Muslim Borderland* (Armonk NY and London: M.E. Sharpe, 2004), pp. 120-160.

38 Chien-peng Chung, "China's 'War on Terror': September 11 and Uighur Separatism," *Foreign Affairs* vol. 81 no. 4 (July/August 2002), pp. 8-12; Vivien Pik-Kwan Chan, "War on terrorism: Local foes in mainland's sights," *South China Morning Post* September 19, 2001.





in a range of security and economic issues, including suppression of terrorism and drug trade, cross-border economic relations, and resisting U.S. influence.³⁹ Economic issues, while given less attention initially, have come to prominence with the SCO agreement on a long term program of multilateral trade and economic cooperation, including a establishment of development fund and business council.⁴⁰ While linked with anti-terrorism efforts (much as China's domestic 'Western Development Strategy' is predicated on the idea that economic development will reduce opportunities for separatism), the SCO's inclusion of economic dimensions to regional cooperation reflects China's priorities in building multifaceted regional organizations through which it can pursue its interests. China's support included a US\$90 million development fund to support SCO efforts at regional cooperation.⁴¹ While some outside observers have dismissed the influence of the SCO as marginal, the potential inclusion of Iran has given pause to US policy makers.⁴²

As with the Six-Party Talks, China's relations with Russia are a key issue.⁴³ The SCO was formed in conjunction with the conclusion of a Sino-Russian treaty on "Good Neighbourliness and Friendly Cooperation." Subsequently, the relationship was depicted as one of 'partnership and strategic interaction' that will encompass elements of security, territory, and economic, technical, and trade cooperation.⁴⁴ The Sino-Russia relationship reflects China's effort to build support for its initiatives taken within the context of international legal institutions and regional security efforts. The Joint Declaration resulting from Hu Jintao's 2003 visit to Moscow emphasized the role of regional organizations:

"Russia and China attach much significance to the strengthening of security and cooperation in the Asian-Pacific Region for the purposes of securing a stable development and wellbeing of all the states situated there. The parties reaffirm the readiness to continue

39 Mark Lanteigne, *China and International Institutions: Alternate Paths to Global Power* (New York and London: Routledge, 2005), pp. 133-135; Ross Munro, "China's Relations With Its Neighbors: Some Observations Regarding Its Strategy and Tactics," *International Journal* Spring 2006, pp. 320-328.

40 "Tashkent Declaration of Heads of Member States of Shanghai Cooperation Organization," (June 17, 2004).

41 "Council of Heads of SCO Member States Meets in Shanghai," SCO Website (www.sectsc.org) (2006).

42 Lionel Beehner, "The Rise of the Shanghai Cooperation Organization," *Council on Foreign Relations* (June 12, 2006).

43 See generally, Rian Jensen and Erich Marquardt, "The Sino-russian romance," *Asia Times On-Line* Mar. 21, 2006, http://www.atimes.com/atimes/Central_Asia/HC21Ag02.html; Martha Brill Olcott, "Russian-Chinese Relations and Central Asia," in Sherman W. Garnett, ed., *Rapprochement or Rivalry: Russia-China Relations in a Changing Asia* (Washington D.C.: Carnegie Endowment for International Peace, 2000), pp. pp. 371-402.

44 Russian Ministry of Foreign Affairs, "Text of Putin – Hu Jintao Joint Declaration" (FBIS May 28, 2003). A border treaty was concluded in 2004, ending 40 years of negotiations. "Sino-Russian Border Treaty" (Xinhuanet, Oct. 14, 2004).





efforts to establish in the APR a mechanism – according with the regional specificities – of cooperation aiming at securing regional stability and security as well as the enlargement of interaction with other states and regional organizations.

Russia and China invariably proceed from the assumption that the emergence of different bilateral and multilateral mechanisms ought to contribute to enhancing cooperation and agreement within the APR. such mechanisms must complement each other in accordance with the purposes and principles of the UN Charter, be based on accommodating the reciprocal interests and the commonality of approaches to solving the regional and global problems. . . . The parties believe that the purposes and principles of the Shanghai Cooperation Organization correspond to the modern tendencies of development and realities of the given region, its stability contributes to strengthening of regional security and stability.”⁴⁵

As well, the 2003 Joint Statement’s repeated references to the centrality of the United Nations system seemed pointedly juxtaposed to patterns of US rejection of UN processes. A Joint Statement following Hu’s 2005 visit to Moscow emphasized the need to build regional organizations to resist efforts by any powers (*read*, ‘the United States’) to achieve a monopoly in world affairs and to impose models of social development.⁴⁶ This language was subsequently included in statements issuing from the SCO’s Fifth Annual Summit held in Shanghai in June 2006.⁴⁷

Thus, similarly with the Six-Party Talks, China’s support for the Shanghai Cooperation Organization reflects an effort to build regional cooperation arrangements that will further perceived PRC security interests. Whereas the Six-Party Talks were an ad-hoc response to an immediate crisis, the SCO is potentially a long-term institutional initiative. Yet China’s use of the SCO is similar – emphasizing China’s leadership over cooperation processes and referencing international law norms to further Chinese state interests in economic and security matters. However, whereas China’s apparent ineffectiveness in the SPT may diminish the potential for PRC engagement with international

⁴⁵ Russian Ministry of Foreign Affairs, “Text of Putin – Hu Jintao Joint Declaration” (FBIS May 28, 2003).

⁴⁶ Michael A. Weinstein, “Intelligence Brief: Shanghai Cooperation Organization,” *Power and Interest News Report* (www.pinr.com) (July 12, 2005).

⁴⁷ Stephen Blank, “The Shanghai Cooperation Organization: Cracks Behind the Façade,” *Eurasia Insight* June 21, 2006.





legal processes on regional cooperation with the US and its allies, China's performance in the SCO suggests increased willingness of Beijing to use regional arrangements to facilitate strategic relationships with states largely outside the sphere of US influence.

2. International Law and China's Claims to Taiwan.

China's participation in the international legal regime in regional security matters is also evident in relation to Taiwan, where China has come to rely increasingly on international law discourses to support its sovereignty claims. China's perspectives on Taiwan question can be understood in light of intra-cultural tensions and the contradiction between sovereignty and local identity.⁴⁸ As a "question not subject to debate," China's claim to sovereignty over Taiwan has been grounded in international law principles on statehood.⁴⁹ Sovereignty claims are also at the heart of China's efforts to deny Taiwan international personality or treaty rights.⁵⁰ Yet China's behaviour regarding Taiwan illustrates the ways in which PRC's reception of international law remains contingent on assertions of national self interest. Conflict between China and Taiwan has been a salient feature of economic, political, social and security relations in Asia at least since 1949. China's 2000 White Paper on Taiwan policy expressed a paradoxical commitment to international legal standards of sovereignty while also asserting China's rights to use force against Taiwan.⁵¹ Departing from the principles set forth in the previous 1993 White Paper, the 2000 document added a third condition for China's exercise of its alleged right to the use of force: namely if the Taiwan authorities fail to negotiate a reunification agreement with China promptly and in good faith. The White Paper rejected the 'two German states' model associated with German reunification as a basis for cross-strait reconciliation, since this might be taken to support separate sovereignty for Taiwan and the Mainland. Instead, the White Paper reiterated the commitment to 'one country-two systems' as a basis for reunification, while allowing for a different application than that of Hong Kong. Whether under China's nominally unified legal regime such an approach will permit the emergence of autonomous regional legal systems remains uncertain.⁵²

48 Allen Carlson, *Unifying China, Integrating with the World: Securing Chinese Sovereignty in the Reform Era* (Stanford: Stanford University Press, 2005), pp. 124-145; William A. Callahan, *Contingent States: Greater China and Transnational Relations* (Minneapolis and London: University of Minnesota Press, 2004).

49 Jiang Guoqing, "Luetan zhuquan yu liang an guanxi" (Sketch on sovereignty and cross-strait relations), *Faxue pinglun* (Law Review) 2001 no. 3, pp. 39-43, 79.

50 Yuan Gujie, "Tiaoyue zai Zhongguo neidi yu Kang, Ao, Tai shiyong zhi bijiao" (Comparison of the applications of treaties in China's interior and in Hong Kong, Macao, and Taiwan), *Faxue pinglun* (Law Review) 2002 no. 5, pp. 129-137 at pp. 134-135.

51 State Council Taiwan Affairs Office and Information Office, "The One-China Principle and the Taiwan Issue" (Feb. 21, 2000).

52 See Du Huanfang, "Zhongguo quji falu wenti yanjiu de zuixin jinzhan: Ping <<Zhongguo de quji falu wenti yanjiu>>" (Latest developments in the study of the issue of regional law in China: Reviewing *Study of Questions of Regional Law in China*), *Faxue pinglun* (Law Review) 2004 no. 5, pp. 159-160.





The 2000 White Paper attempted an international legal argument using theories of state succession to justify claims that China-Taiwan issues are wholly domestic and therefore beyond the reach of international law's general prohibition against the use of force between states. While there is much to disagree with in the content of the argument, the fact that China elected to state its claims in these terms suggests the extent to which China recognizes the need to accommodate the international legal regime in pursuing its sovereignty goals concerning Taiwan.

China's perspectives on the application of international law to Taiwan were also evident in the text of a discussion of a draft law (the so-called "Wuhan Draft") on managing re-unification with Taiwan.⁵³ While officials familiar with the drafting process in the National People's Congress indicated that the Draft was not under formal legislative consideration, the text nonetheless suggested possible approaches to resolving the cross-strait problem. While the draft did not renounce the use of force to achieve reunification, it did suggest several options for peaceful reunification, through establishment of a Taiwan Special Administrative Region of the PRC, or the establishment of a "Federated Republic of China" (*Zhongguo lianbang gongheguo*). While the first option seemed to draw heavily on the "one country-two systems" approach being applied in Hong Kong (which has been strongly and consistently criticized in Taiwan), the latter offered the possibility of a federation in accordance with the constitutions of both the PRC and the Republic of China. However, the draft stated that if the Taiwan authorities were to delay indefinitely or obstruct peaceful reunification, or in the event of a declaration or substantive steps toward independence (or outside armed intervention or occupation), "non-peaceful reunification" would be imposed.

Despite its non-formal status as an 'academic draft,' many of the sentiments expressed in the Wuhan Draft appeared in the "Anti-Secession Law" enacted in March 2005.⁵⁴ Echoing themes from the 'one-country, two systems paradigm,' the Anti-Secession Law promises, "After the country is reunited peacefully, Taiwan may (*keyi*) practice a system different from that on the Mainland, and enjoy a high degree of autonomy." By requiring agreement to reunification negotiations first, China retains the negotiating advantage to determine what will be the "political status of

53 Yu Yuanzhou, "Scholar's Proposal: National Unification Promotion Law of the People's Republic of China" (Nov. 1, 2002). Thanks to Professor Richard Baum (UCLA) and ChinaPol for this draft.

54 "Full Text of Anti-Secession Law," Third Session of the 10th National People's Congress and National Political Consultative Congress (<http://www.china.org.cn/english/2005lh/122724.htm>).





the Taiwan authorities.” The Law reiterated that the China-Taiwan relationship will be based in the PRC Constitution (Art. 1), thus extolling principles of national unity and territorial integrity. The ASL suggests that reunification with Taiwan may proceed on the basis of political equality between authorities on both sides of the Taiwan Strait (Art. 7). The political status of the Taiwan government may be a subject for reunification discussions (Art. 7.4). The ASL also allows for discussion of Taiwan’s ‘room for international operations,’ thus holding out the promise of some sort of international status. In the wake of China’s campaign to oppose Taiwan’s participation in UN organizations such as the WHO, a grant of authority to participate independently in the international community may be a significant improvement for Taiwan. However, as these are simply issues for discussion, the outcome remains uncertain. When viewed in conjunction with the PRC’s 2000 White Paper, the Constitutional reference underscores the discretionary grant of authority under which local autonomy for Taiwan might be granted by the central government, and asserts rights to forceful unification under principles of national sovereignty. President Hu Jintao’s “Four Point Guidelines on Cross-Strait Relations,” issued in concert with the Anti-Secession Law, underscored China’s reliance on international law principles of state sovereignty.⁵⁵

China’s reliance on international law standards to support its claims on Taiwan purport to convey confidence in China’s position. This was underscored by China’s muted response to Taiwan President Chen Shuibian’s provocative independence speech in March 2007, as official comments were made in the context of the Chinese People’s Political Consultative Congress (CPPCC) a united front body at some remove from the centre of Party and state power. CPPCC Chair Jia Qinglin noted that “the Chinese people have the confidence and capability to maintain national sovereignty and territorial integrity, and will never allow any person to split Taiwan from China in any form,”⁵⁶ while Foreign Minister Li Zhaoxing, was dismissive: “Don’t listen to local leaders.”⁵⁷

Thus, China’s policies on Taiwan reflect the extent to which national security issues have been asserted by reference to international law, but also at times in spite of apparent international

⁵⁵ “Four Point guidelines on cross-strait relations set forth by President Hu (full text)” (Mar. 4, 2005) Xinhuanet

⁵⁶ “Top advisor reiterates resolute opposition to ‘Taiwan independence,’” Xinhuanet March 9, 2007, http://www.gwytb.gov.cn:8088/detail.asp?table=headlines&title=Headlines&m_id=678.

⁵⁷ “War of words after call for independence,” *The Times* March 7, 2007, http://www.gwytb.gov.cn:8088/detail.asp?table=headlines&title=Headlines&m_id=678





law obligations. China's White Paper on Taiwan, as well as the Anti-Secession Law, reflect the influence of international law institutions and norms and may well represent efforts to limit calls for a military solution to the Taiwan issue. On issues such as state succession, conceptions of sovereignty and protection of territorial integrity, China's reliance on international law discourses on the Taiwan question suggest an effort to harmonize Chinese policy with international standards. At the same time, however, China's resistance to participation by Taiwan in international agencies such as the World Health Organization has been seen as counterproductive and inconsistent with international law standards regarding cooperation and security. Thus, in contrast to regional security arrangements where little direct sovereignty interests are at stake, China's approach to Taiwan explicitly links substantive international legal standards to sovereignty concerns, subordinating international law to national interest.

3. Selective Adaptation in China's Security Regimes.

China's engagement with the international legal system in the area of security reflects not unexpectedly the influence of national interests. The Six-Party Talks suggest an effort to rectify a pressing security problem on China's border while also solidifying relations with Russia as a regional counterpoint to US and Japan and also building legitimacy as a good offices broker of international security arrangements. Similarly, the Shanghai Cooperation Organization reflects efforts to exert a measure of control over political and security relations in China's far west, combining agendas of resisting US encroachment, building political ties (particularly with Russia) to support resource and energy security, and building influence and legitimacy through international organizations where China can exert a modicum of control. In each of these efforts, China's engagement with the international system is coloured mainly by regimes supporting regional cooperation and security. On the Taiwan question, China's engagement with the international system consists primarily of drawing on international law discourses to support sovereignty claims.

While national interest is clearly an important component informing China's positions on security matters, Selective Adaptation also plays a role. In this case, however, the norms underlying the international regime are quite consonant with China's normative positions. International law norms on equality of states as legal actors have allowed China the opportunity to broker peace





talks on Korea and to assert a role of parity with the US. Despite uneasiness with the potential for regional organizations to be dominated by powerful state participants,⁵⁸ China's support for the Shanghai Cooperation Organization suggests acceptance of international law norms on regional organizations – likely because China's own influence is not likely to be diminished by other partners in the SCO. China's embrace of international law norms on sovereignty is particularly evident in matters related to Taiwan. Factors of perception, complementarity and legitimacy are also present. In all three examples of security relations discussed here, perceptions of the ways that international legal standards and institutions support China's pursuit of national interest can be seen to outweigh perceptions about exclusion that had tended to dominate previously. The complementarity of international regime norms on state actors, regional cooperation, and sovereignty with China's own normative and policy preferences helps explain the ways that China's official positions and practices on Korea, Central Asia, and Taiwan are justified by reference to international law. The role of legitimacy remains central as China's policies and practices on the Six-Party Talks, the SCO, and Taiwan reflect not only the need to build legitimacy for China's positions but also the quest to build legitimacy through China's behaviour.

III. Summary

Factors of globalization have intensified participation of local communities in international legal regimes. The paradigm of 'Selective Adaptation' can be helpful to explain dynamics of local compliance with international law standards. The example of China reveals the ways that suggests that 'Selective Adaptation' can explain the relationship between increased participation in international legal regimes and particularistic interpretation of international law standards. China's interpretation of international standards on security suggest that local interests as well as conditions of legal and political culture affect the interpretation and application of international law rules. While the dynamics of globalization may drive increased participation in the international legal system, possible conflict may also arise as expectations about uniformity in treaty compliance face the prospect of disappointment. Understanding the substantive dynamics of local participation in the international legal system through the paradigms of selective adaptation may help reduce the potential for disappointment, as the contours of normative assimilation are better understood.

⁵⁸ Sun Huanwei, "Quji zuzi dui Lianheguo Anlihui de taozhan" (The challenge of regional organizations for the UN Security Council), *Faxue pinglun* (Law Review) 2001 no. 1, pp. 80-87.





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