CHINESE (TAIWAN) YEARBOOK OF INTERNATIONAL LAW AND AFFAIRS

Edited by Ying-jeou Ma

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The Chinese (Taiwan) Society of International Law -
The Chinese (Taiwan) Branch of the International Law Association

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All correspondences concerning the Yearbook should be sent to:

Professor Chun-i Chen
P.O. Box 1-171 Mucha, Taipei 116, Taiwan, ROC
Tel: 886-2-29388218
E-mail: yearbook@nccu.edu.tw

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Preface

We are delighted to present Volume 31 of the *Chinese (Taiwan) Yearbook of International Law and Affairs*, which includes articles and international law materials relating to the Asia-Pacific and, specifically, the Republic of China (ROC) on Taiwan in 2013.

This volume begins with six articles. In the first article, Professor Roda Mushkat of Johns Hopkins University analyzes the implementation of the Sino-British Joint Declaration on the Question of Hong Kong from legal and policy perspectives. Professor Erik Franckx and Mr. Marco Benatar of Vrije Universiteit Brussel authored the second article, in which they analyze the duty of cooperation under the United Nations Convention on the Law of the Sea (UNCLOS) for countries bordering (semi-)enclosed seas. Furthermore, by comparing regional anti-terrorism conventions in Asia, Professor Irena Ilieva of the Bulgarian Academy of Sciences stresses their implications for the protection of human rights.

In the fourth article, Professor Björn Ahl of the University of Cologne explores the delimitation of treaty-making powers between Mainland China and Hong Kong under their constitutional framework. Dr. Jure Vidmar of the University of Oxford, in the next article, surveys the modern practice of recognition of states and governments with a focus on case studies of Kosovo, Libya, and Taiwan. In the final article, Dr. Tomoko Yamashita of Kyoto University examines war compensation cases brought by Chinese and Korean victims in Japanese courts. The article focuses on whether *jus cogens* norms can invalidate procedural obstacles such as the waiver of claims under treaties and state immunity.

In the Special Report section, Professor Michael Sheng-ti Gau (高聖惕) of National Taiwan Ocean University provides an overview of the ongoing arbitration that the Philippines initiated against Mainland China, which has so far refused to respond, under the UNCLOS in 2013. The maps included in this report also demonstrate respective claims of Taipei, Beijing and Manila in the South China Sea.

The Contemporary Practice and Judicial Decisions section contains materials on the ROC's state practice in international law. These documents explain Taiwan's participation in the International Civil Aviation Organization (ICAO) after a departure of 42 years since the ROC lost its representation in the United Nations in 1971, its position on East and South China Seas, and responses to Mainland China's declaration of an Air Defense Identification Zone (ADIZ). Notably, the section collects statements on the development of the *Guang Da*

Xing No. 28 fishing boat incident. In May 2013, the Philippines Coast Guard shot dead a Taiwanese fisherman with automatic weapons in the overlapping exclusive economic zones of the two countries. The ROC's approach to dealing with this incident reinforced its commitments to the peaceful settlement of international disputes based on international law. The subsequent Treaties/Agreements section selects various instruments that the ROC concluded, including the Economic Cooperation Agreement with New Zealand and the Economic Partnership Agreement with Singapore.

Volume 31 represents a milestone of the *Yearbook* since its publication in 1981. The volume is published by Brill which, formerly known as Nijhoff, has a long and world-wide reputation for publishing leading law journals. I hope our cooperation will allow a wider range of readers to understand legal and political issues on the Asia-Pacific region and Taiwan. I also warmly welcome prominent international law scholars who recently joined our editorial board, including Judge Helmut Tuerk of Austria, Professors Seung Hwan Choi of Kyung Hee University, Władysław Czapliński of Polish Academy of Sciences, Jacques deLisle of University of Pennsylvania, Erik Franckx of Vrije Universiteit Brussel, Julian Ku of Hofstra University and Stefan Talmon of University of Bonn.

Finally, I would like to extend my gratitude to Professors Chun-i Chen (陳純一), Pasha Hsieh (謝笠天), Winnie Ma (馬若梅), Judges Chun-Liang Lai (賴淳良) and I-Hon Hsiao (蕭一弘), Ms. Chun-li Ouyang (歐陽純麗) and Dr. Pei-Lun Tsai (蔡沛倫) for their efforts in putting together this volume. The assistance of Lee & Li Attorneys-at-Law in translating Chinese documents into English is also gratefully acknowledged.

Ying-jeou Ma (馬英九), *S.J.D.*
Editor-in-Chief
April 2015

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The Intricacies of Implementing International Law: A Juxtaposition of Theories with the Actualities of the Sino-British Joint Declaration Regarding the Future of Hong Kong

Roda Mushkat

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I Introduction

International law is both theory rich and theory poor. The abundance is attributable to the proliferation of schools of thought—some normative, some positivist, some purely abstract, some policy oriented, some geared toward system maintenance, and some poignantly critical—their diversity, their multiple origins, and their range of concerns. The sense of insufficiency stems from the often less-than-satisfactory fit between theory and reality and severe

* Professor of International Law, Hopkins-Nanjing Center, Paul H. Nitze School of Advanced International Studies (SAIS), Johns Hopkins University and Honorary Professor, Faculty of Law, University of Hong Kong. I wish to thank Miron Mushkat for helping me navigate through social science territory, but I am solely responsible for the views expressed herein.

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fragmentation in the absence of constructive bridge-building or serious efforts to achieve at least a partial synthesis. There are thus gaps in the theoretical façade, whose development is impeded by excessive, zero-sum-style intellectual competition in areas where pursuing complementarity might prove potentially beneficial.

This duality, the wealth of ideas and the incompleteness and looseness of the conceptual architecture, manifests itself in the positivist segment of the theoretical space. That is the analytical domain where international legal researchers continue to systematically seek credible answers to the question "how nations behave," authoritatively and compellingly addressed, albeit inevitably without providing closure and a clear roadmap to follow, by a leading scholar in the field nearly half a century ago.[1] For the most part, they have employed the logic of expected consequences, assuming that actors in the global arena, when confronting choices, generate an array of alternatives, assess them in terms of their perceived net favorable effects, and select the one that best meets this criterion.[2]

In its pure and stylized, and a somewhat more elaborate and precise, form such an essentially rationalist framework thus consists of four components: alternatives (a set of feasible courses of action), expectations (the consequences associated with each alternative and the probabilities attached to them), preferences (the values ascribed by the decision maker to the expected consequences), and a decision rule (stipulating how the choice is to be made among the alternatives on the basis of the values accorded to their consequences; the notion of a cost-utility, or disutility-utility balance/equation most tellingly encapsulates this proposition).[3]

This is not an entirely homogeneous theoretical space. There are crucial differences between researchers who believe that players in an intensely competitive global milieu are primarily driven by power and its correlates (realists and their descendants)[4] and those who posit that international cooperation is

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1 *See generally* Louis Henkin, *How Nations Behave: Law and Foreign Policy* (1968).

2 *See* James G. March, *A Primer on Decision Making: How Decisions Happen* 2–3 (1994).

3 *See id.* at 2–3.

4 *See* Kal Raustiala, "Compliance and Effectiveness in International Regulatory Cooperation", 32 *Case W. Res. J. Int'l L.* 387, 400–05 (2000); Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?", 111 *Yale L.J.* 1935, 1944–47 (2002); Kal Raustiala & Anne-Marie Slaughter, "International Law, International Relations, and Compliance", *in Handbook of International Relations* 539–40, (Walter Carlsneas & Beth A. Simmons eds., 2002); Willam C. Bradford, "In the Minds of Men: A Theory of Compliance with the Laws of War", 36 *Arizona State L.J.* 1243, 1251–61, 1264–66 (2004).

a source of value and generally recognized as such (institutionalists).[5] A fundamental distinction may also be drawn between these two intellectual camps, largely united in their view that it is mostly reasonable to consider the State as a unitary actor, and those who disaggregate it and highlight the role played by domestic forces in shaping attitudes and policies toward international law (liberals).[6]

However, there is thought to be sufficient common ground to treat the three groups as a single (rationalist) category.[7] According to this perspective, the vital conceptual difference that needs to be emphasized is that between scholars who belong to this broad analytical cluster and those who are influenced by the logic of appropriateness.[8] This form of reasoning lays stress on the relevance of normative, as distinct from utilitarian, values that transcend the seemingly narrow ethical parameters associated with rationalism.[9] In the international legal context, it underscores the intrinsic value of collective ideas, common rules, cross-border cooperation, mutual obligations, productive worldwide discourse, and shared knowledge.[10]

Four cautionary observations are in order. First, strictly speaking, a focus on international rule-following should not be equated with a pronounced normative orientation, and vice versa. From a philosophical standpoint, rationalism is not devoid of normative underpinnings (nor do the so-called normative theories of international law lack a positivistic dimension). Indeed, utilitarianism is a normative school of thought par excellence. It does not merely qualify as such but (e.g., unlike egoism) in fact occupies a highly respectable place in the normative theory space by virtue of being agent neutral rather than agent centered:

> [T]here is a distinction between normative theories that are agent neutral, and those which are agent centered. A theory is agent neutral if it gives to everyone the same advice or aims. According to an agent neutral theory, your (theory-given) aims are better fulfilled exactly when mine are. By

5 *See* Raustiala, *supra* note 4, at 400–05; Hathaway, *supra* note 4, at 1947–52; Raustiala & Slaughter, *supra* note 4, at 540.

6 *See* Raustiala, *supra* note 4, at 409–11; Hathaway, *supra* note 4, at 1952–55; Raustiala & Slaughter, *supra* note 4, at 547–48; Bradford, *supra* note 4, at 1255–57.

7 *See* Raustiala, *supra* note 4, at 400–05, 409–11; Hathaway, *supra* note 4, at 1944–55; Raustiala & Slaughter, *supra* note 4, at 539–40, 547–48; Bradford, *supra* note 4, at 1251–61.

8 *See* March, *supra* note 2, at 57–102.

9 *See* Raustiala, *supra* note 4, at 405–09; Hathaway, *supra* note 4, at 1955–62; Raustiala & Slaughter, *supra* note 4, at 541–45; Bradford, *supra* note 4, at 1261–64, 1268–77.

10 *See* Raustiala, *supra* note 4, at 405–11; Hathaway, *supra* note 4, at 1955–62; Raustiala & Slaughter, *supra* note 4, at 541–45; Bradford, *id.*, at 1261–64, 1266–77.

> contrast, an agent centered theory gives to us at least some prescriptions or advice or aims which include indexicals. Sometimes the things an agent centered theory advises me to do will conflict with the things the same theory advises you to do. Your theory-given ends can be achieved only at the expense of mine. The classic and paradigmatic agent centered theory is egoism. Egoism tells me to pursue my good and you to pursue yours. The classic and paradigmatic agent neutral theory is utilitarianism. It tells us to promote the greatest happiness of the greatest number. Things are going better from your perspective exactly when they are going better from my perspective, according to utilitarianism.[11]

Second, the rationalist-normative dichotomy is restrictive because it leaves little room to accommodate schools of thought that do not squarely fall into one of the two categories. Constructivist,[12] eclectic/Grotian,[13] fairness/legitimacy-focused,[14] legal positivist,[15] managerial,[16] natural law-derived,[17]

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11 *See* James Dreier, "Structures of Normative Theories", 76 *The Monist* 22, 22 (1993).

12 *See* Bradford, *supra* note 4, at 1271–73. *See also* Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989); Benedict Kingsbury, "'Indigenous Peoples' in International Law: A Constructivist Approach to the Asia Controversy", 92 *Am. J. Int'l L.* 414 (1998); Anthony C. Arend, *Legal Rules and International Society* (1999); Jutta Brunnee & Stephen Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law", 39 *Colum. J. Transnat'l L.* 19 (2000); Phillip A. Karber, "'Constructivism' as a Method in International Law", 94 *Am. Soc'y Int'l L. Proc.* 189–92 (2000); Martin V. Totaro, "Legal Positivism, Constructivism, and International Human Rights Law: The Case of Participatory Development", 48 *Va J. Int'l L.* 719 (2008); Gerry Nagtzaami, *The Making of International Environmental Treaties: Neoliberal and Constructivist Analyses of Normative Evolution* (2009); Jutta Brunnee & Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactionist Approach* (2010); Adriana Sinclair, *International Relations Theory and International Law* (2010).

13 *See* A. Claire Cutler, "The 'Grotian Tradition' in International Relations", 17 *Rev. Int'l Stu.* 41 (1991); Christopher A. Stumpf, *The Grotian Theology of International Law* (2006).

14 *See* Raustiala, *supra* note 4, at 405–09; Hathaway, *supra* note 4, at 1958–60; Raustiala & Slaughter, *supra* note 4, at 541–42; Bradford, *supra* note 4, at 1269–71. *See also* Thomas M. Franck, *The Power of Legitimacy among Nations* (1990); Thomas M. Franck, *Fairness in International Law and Institutions* (1995).

15 *See* Stephen Hall, "The Persistent Specter: Natural Law, International Order, and the Limits of International Legal Positivism", 12 *Eur. J. Int'l L.* 269 (2001).

16 *See* Raustiala, *supra* note 4, at 405–09; Hathaway, *supra* note 4, at 1955–58; Raustiala & Slaughter, *supra* note 4, at 542–44; Bradford, *supra* note 4, at 1261–64. *See also* Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995).

17 *See* Hall, *supra* note 15.