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

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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

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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).
3 See id. at 2–3.